Cosmopolitan Subjects:
An Anthropological Critique of Cosmopolitan Criminal Law and Political Modernity

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ABSTRACT

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This dissertation addresses the question of how we should understand the cosmopolitan power to punish the criminal embodied in the new global criminal courts, and whether cosmopolitan law can serve as the basis for what an earlier generation of anthropologists would have called a culturally-neutral global order? The present project, based on ethnographic fieldwork at the Yugoslavia Tribunal in The Hague, uses the case of Duško Tadić, the first subject of a properly cosmopolitan law, as a lens to raise the questions of how we should understand the new cosmopolitan subjectivities being produced by the immanent institutionalization of a global criminal law and whether our historically-specific modern conceptualization of law is compatible with the maintenance of meaningful local political diversity and the rights of communities to live in a manner in keeping with their own history and traditions. It argues that, to get at the full implications of this process, we will need to take up the now largely neglected concepts of tradition and authority as a way to make sense of the legacies various pre-modern forms of authority continue to exercise in what is called modern law. The alternative genealogies here elaborated suggest that scholars would do best to try to understand law through the traditions of legal thought, disputation, and practice that preceded legal modernity, especially the classical republican and Roman law traditions in which virtually every aspect of modern legality (except the state and sovereignty) has a basis. It is argued that, with the first trial at the International Criminal Court, these historically-specific and local forms of authority are now the basis for the global legal system—pre-modern forms of authority which remain vital, even ascendant, in the age of cosmopolitan criminal law

Contents

Acknowledgments ii

Preface v

Introduction: The Yugoslavia Tribunal: Cosmopolitan Law as Tradition, Empire, & Exception

Part I: Crisis in Political Thought

1. Anthropology, Political Modernity, and Our Contemporary Cognitive-Political Crisis 33

Part II: The ICTY and the Case of Prosecutor v. Duško Tadić: Cosmopolitan Law as Exception

2. Legality or Exception? The Security Council, Emergency Powers, and the Tribunal 124

3. Duško Tadić, Cosmopolitan Subject: The Tadić Appeal Decision as Cosmopolitan Precedent 169

Part III: Mere Law: Legal Modernity and Global Order

4. The Project of Legal Modernity: Law as Subjection and Legal Monism 186

5. Legal Imperialism: On the Imperial Quality of Law and the Political in the Roman Tradition 205

Part IV: Towards a Non-Modernist Political and Legal Anthropology

6. The Political as Tradition: A Critique of Political Modernity 243

Conclusion: Cosmopolitan Law and the Return of Roman Political Tradition 340

International Legal Sources 363

Bibliography 369

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The research itself took place during three periods at the Yugoslavia Tribunal, in The Hague, and consisted of observations of numerous trials, as well as both extended interviews and informal conversations with judges, prosecutors, court administrators, defense lawyers, international scholars, representatives of relevant NGOs, and members of the international and Balkan press. At an institutional level, the ICTY has at times been marked by a suspicion of possible sources of outside criticism, so I am especially grateful to all of those who did agree to talk to me, and for their truly important commitment to supporting scholarly research on the Tribunal and its development, and, though formal channels were sometimes closed or not forthcoming, alternative informal connections were often remarkably generous. In addition, those not formally working for the Tribunal, especially in the Balkan press, defense lawyers, and representatives of international legal NGOs, were never anything less than welcoming and giving with their time and resources, and this project could not have been possible without their assistance. Finally, a substantial amount of time was spent on careful documentary analysis of

the emergent web-based global public sphere that the tribunal has produced—an important archive for future anthropological research on cosmopolitanism which includes thousands of pages of constitutional documents, case decisions, and transcripts, as well as a fully-comprehensive collection of trial video—to legitimate, publicize, defend and record the tribunal's mission and work. This archive is a remarkable resource, and we are all indebted to those in those at the Tribunal who have advocated for keeping it open to the public and up to date.

The anthropology department at Columbia University is without question one of the truly outstanding intellectual environments of which I am aware, in any field, and I am truly humbled to have had the opportunity to work with the wonderful group of scholars I have encountered there. It took me years to find a place that I believed could accommodate my work in this form, and, in the final analysis, I do not believe that a project such as this could have been completed anywhere else. During the period of this research project, my work has benefitted immeasurably from the inputs of a remarkably large number of scholars I have worked with there who have been my teachers, helped me to shape my ideas, and read and commented on parts of this thesis. My greatest debt, of course, is to Nick Dirks who served as my advisor through his process. From the beginning of my time at Columbia he has been an unqualified supporter of me and my work, and I am more deeply indebted to him than I can possibly express for his formidable breadth of knowledge, keen insights, intellectual generosity, and eternal patience, but, most especially, I am grateful for the remarkable support I was given to follow my intellectual inclinations, wherever those have taken me. In that same spirit, I also want to express my deepest and most abiding debts and thanks to Mahmood Mamdani, Neni Panourgia and David Scott, each of whom I admire them more than I can say, and each of whom has given

immeasurably of their time and patience to in assisting my work. The depth of the intellectual debts I owe to each of them will be obvious on every page of this thesis. This project has also gained immeasurably from the input, time, kindness and support of Partha Chatterjee, Brinkley Messick, Martha Mundy, Claudio Lomnitz, Jean Cohen, Dusan Boric, Ron Casson, Val Daniels, Jonathan Friedman, Nick De Genova, Dilip Gaonkar, Stathis Gourgouris, Thomas Blom Hansen, Lynn Meskell, Sherry Ortner, Beth Povinelli, Nan Rothchilds and Richard Saumarez Smith. Finally, portions of this thesis have been presented in as public lectures at the Centre for Globalization and Development at University of Gothenburg in Sweden, as a Scheps Lecture, sponsored by the Department of Anthropology at Columbia University, and at the London School of Economics, as part of the lecture series "Global Tribunals Today," co-sponsored by Department of Anthropology and Global Civil Society Programme. I am very grateful for invaluable and generous comments I received from Gil Anidjar, Susan Marks, Anupama Rao, Bruce Robbins and Hakan Seckinelgin at those events.

Finally, I have also been incredibly lucky to have a patient and wise group of family and friends who have supported me and strongly influenced my work, especially grateful to Judith Edelstein, Diane McGrath and Christina Jennings, as well as Dave Kaufman and Jack Murnighan. However, I owe my greatest debts, both intellectuality and personally, to Lindsay Weiss.

Preface

My work is a response to an anxiety I have long felt about the relative silence of contemporary anthropological scholarship on the question of how we should understand the globalization of criminal law and the new cosmopolitan right to punish that it enacts, and, in particular, whether our culturally- and historically-specific contemporary conceptualization of law and the political can serve as neutral basis for a global order? In light of the virtual abandonment of questions tradition, culture and even history in contemporary political and legal studies, I have long been convinced that the discipline of anthropology remains one of the few places of possibility in the contemporary academy from which real difference—including, and perhaps at this moment especially, political difference—can be taken seriously, both subjectively and objectively.

To try to make sense of this, I conducted more than a year of ethnographic research—during three periods in 2002, 2003-4, 2007—in the world's first formally cosmopolitan jurisdictional space, the International Criminal Tribunal for the former Yugoslavia, located in a former insurance company building in a quiet neighborhood in The Hague. This research, funded by a dissertation support grant from the Social Science Research Council's Global Security and Cooperation program and by funds from Columbia University, included hundreds of hours of courtroom attendance in more than 50 trials involving major and minor defendants representing every political division in the Balkan wars, as well as interviews and conversations with judges, prosecutors, court administrators, defense lawyers, representatives of relevant NGOs, and members of the international and Balkan press. In addition, a substantial amount of time was spent on careful documentary analysis of the emergent web-based global public sphere that the tribunal has produced—an important archive for future anthropological research on

cosmopolitanism which includes thousands of pages of constitutional documents, case decisions, and transcripts, as well as a fully-comprehensive collection of trial video—to legitimate, publicize, defend and archive the tribunal's mission and work.

Finally, it should be said that the present academic research project builds upon my earlier professional work in the areas of international, human rights, criminal and asylum law in the South Africa, Cambodia, the US, and, in particular, my work, in 1995-96, as a Foreign Legal Advisor with the International Human Rights Law Group's Cambodia Court Training Project, a program with a mandate was to promote the development of legal institutions and the rule-of-law through a dual role as NGO advisors to the Cambodian Ministry of Justice, and through the training and observation of judges, prosecutors and court personnel in the Cambodian provincial courts. In addition, I also worked on a number of projects in South Africa. The first period, in the first post-election summer of 1994, involved working for two South Africa lawyers representing ANC members, and included conducting prison interviews with and assisting in the preparation of criminal defense cases of Apartheid era victims of police torture in the Vaal triangle region, as well as assisting in the representation of the shack residents of Finetown, Soweto in meetings with the government, in their petition to receive municipal services. During the second period, 1999-2000, my work also included writing a internationally distributed report on HIV/AIDS labor law and corporate best practice—based on the organization's precedent setting Constitutional Court victory against South African Airways—for the AIDS Law Project, South Africa's largest HIV/AIDS legal advocacy organization. Finally, I had worked, in the US, on a number of projects related to refugee rights and asylum, including working with Haitian refugees in Miami in 1994, at the University of Minnesota Law School Human Rights Clinic, and as Goldberg Legal Fellow at the Northwest Immigrant Rights Project in Seattle in 1996.

For Lindsay

INTRODUCTION:
On the Yugoslavia Tribunal: Cosmopolitan Law as Tradition, Empire, and Exception

> Can we not see the embryonic, albeit fragile form of the state apparatus reappearing even now…Are you certain that this is..a 'neutral institution'?
>
> (Foucault 1980: 3).[1]

Mere Law?

How should we understand the new cosmopolitan law? Early "globalization" scholarship in anthropology (Appadurai 2000, 2003; Ong 2006; Ong and Collier 2005; Hinton 2002; Inda 2002; Lewellen 2002), sociology (Robertson 1992; Albrow 1995; Bauman 1998; Sassen 1998, 2006; Beck 2000; Giddens 2000), law (Held 1995, 1999, 2003; Tuebner 1997; Maurer 1998; Cutler 2001; Jayasuriya 2001; Weiner 2001; Leader 2001), political science (Scheuerman 2001a, 2001b; Brown 2010), political economy (Holloway 1994; Harvey 2007), and economics (Sachs 2001; Soros 2002; Stiglitz 2002) viewed various economic or cultural forces as inevitably and permanently superseding the political in an increasingly anarchic post-sovereign and post-state world. Yet, the new global order has not been marked by an absence of political power, order, or even legitimacy. Indeed, looked at from the perspective of the proliferation of global criminal courts (*ad hoc* tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, Lebanon,

[1] This text is a transcription of a debate between Foucault and the members of a Maoists group on their project to set up people's courts to judge the police in Paris in 1971

and now the permanent International Criminal Court), law and criminal justice legality are in a moment of world-historical expansion in global terms.

This thesis focuses on the case of Duško Tadić—a former café owner, martial arts instructor and local level member of the ultra-nationalist Serbian Democratic Party of Bosnia and Herzegovina from the village of Kozarac in the former Yugoslavia—who became, on May 7, 1996, the first person to be put on trial by a cosmopolitan criminal court, the International Criminal Tribunal for the former Yugoslavia (Yugoslavia Tribunal or ICTY)—which is also to say, the first subject of a properly global and cosmopolitan law. This project is an attempt to make sense of the much underappreciated profundity of what the globalization of law, in general, and *global individual criminal jurisdiction*, in particular, have meant for both the legal and political rights and subjectivities of Tadić and the other defendants, but also what have been—and are likely to be—the implications of this for the global order, more generally. The argument presented here is that, unremarkable as it may at first sound, from the moment Tadić was named as the subject of a properly cosmopolitan law (which is to say both properly global and properly law) a world-historical realignment had already occurred in the global material constitution, though an understanding of the full importance of this seems to have been limited to a tiny number of international law professors, who happen to be both the most active partisans of global law and the key dramatis personae in the ICTY.

Cosmopolitan Law

To appreciate the full material constitutional implications of *cosmopolitan law* for both Tadić and the new global order, one must begin from the understanding that the *international*

law system (which had defined the global order for 300 years) recognized states, and *only states*, as the subject of what was, properly speaking, neither international, nor law. Note too that even those apparent exceptions that occurred in which states recognized non-state actors (e.g. the Red Cross) or accepted limitations on their sovereignty (e.g. international human rights law or international humanitarian law) were, constitutionally speaking, themselves the product of states exercising their authority to make treaties (and thus bind themselves in an essentially contractual manner). This remained, as well, unquestionably the dominant understanding of international law in early 1992 at the time that Tadić and the other future ICTY defendants committed the acts for which they would be charged.

Though inevitably mis-cited even by scholars as precedent for the ICTY (e.g. Morris & Scharf 1994a: 2; Morris & Scharf 1994b: 673; Bassiouni 1996: 199, 260; Jorda 1999: 202), even the judges of the International Military Tribunal at Nuremberg (IMT), had acknowledged clearly, in the famous *Nuremberg* Judgment, that their tribunal had been created by states and that it had prosecuted the trials based on the "exercise of the sovereign legislative power" and power to punish of the victorious allied powers doing "together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law" (1946: 48).[2] This fact is represented by the Nuremberg Indictment sheet which reads:

[2] With regard to the basis for its right to punish the criminal, the Nuremberg judgment reads as follows:

"The making of the Charter was the exercise of the *sovereign* legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The charter is not an arbitrary exercise of power on the part of the victorious nations, but in view of the Tribunal…it is an expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

> The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics –*against*- Goering, *et al*.

The decision also makes clear that the tribunal recognized individuals solely through their relations to state-defined laws of war, and then only for actions committed as state actors acting in furtherance of governments.[3] What is more, the judges made much of the oft neglected fact that Germany had unconditionally surrendered, and so was subject to well-established powers that went to the occupying power in war, through their ultimate control of the domestic state apparatus, including the right to punish the criminal.[4] Put simply, while some of the crimes with which the Nuremberg defendants were charged may have been novel, expansive and *ex post facto* (i.e. "crimes against humanity"), the much more significant fact was that the basis for the jurisdiction and authority to punishing the criminal remained state sovereignty, applicable there solely because the prosecuting powers had been victorious in a war.

Nor, as we shall see in some detail, can one dismiss the terms of the older international law system—through which Tadić and the other defendants understood their legal subjectivities—as merely accidental or incidental to the established state order. These terms

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The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In so doing, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law" [italics added]. Judgment of the International Military Tribunal (1946: 48).

[3] Article 6 of the Nuremberg Charter states that the Tribunal "shall have the power to try and punish persons, who, *acting in the interests of the European Axis countries*, whether as individuals or members of organizations" (Charter of the International Military Tribunal, 1945).

[4] Judgment of the International Military Tribunal, 1946.

were, in fact, its' very essence, and had been consciously understood as so by those who had juridically defined the terms of the new system in the 16th and 17th centuries (esp. Jean Bodin and Thomas Hobbes). What then, to follow David Scott's invaluable formulation, was the question to which the modern sovereign order was an answer (1999)? The answer is that before these writers, in what we might best think of as the post-Roman world, the earlier Roman law and classical traditions of inter-communal relations, had for more than a millennium already been following Roman tradition in viewing rulers as deriving their powers from the people and always and inescapably subject to law (esp. Livy and the *Corpus Juris*). The self-styled modern writers were the great legal advocates for the emergent monarchy, and, as jurists, they understood that if they were to foreclose the possibility of this older system subjecting the new kings to law (in both relations with other rulers and in the emerging domestic sphere), they would need to create a radically new juridical system, constructed—root and branch—as what we must understand as an elaborate mechanism to foreclose the possibility of a global law, properly so-called.

This new system was necessary because, as the modern writers well understood, the classical or pre-modern Roman tradition of law conceptualized law as an inherently insidious institution, with no necessary natural or legal limitation to the application of Roman law (especially in relations between rulers, institutions or communities), and that jurists would begin to apply it to any sphere which had not legally foreclosed that possibility (e.g. Bellomo 1995: 30-31; Stein 2002: 1-2; Maine 2003 [1861]: 12-13).[5] To accomplish this foreclosure they created a radically new and explicitly unconstitutional concept which had no place in the political tradition—*sovereignty*—which Bodin consciously defined as that which is "not subject to the

[5] Maine is particularly important: He views the Roman law tradition as the direct conceptual mold and model from which modern notions of not just law, but international law and morality are forged (Maine 2003).

law," and, in so doing, left to regulate inter-sovereign relations only the space for what came to be called international law (properly speaking only law-like, because, by definition, it could never subject sovereigns) (Bodin 2001 [1576]:11). Sovereignty then is not an amount of power that one can tally up or measure, as in much modern thought; rather, as Bodin writes: "No matter how much power they have, if they are bound to the laws, jurisdiction, and command of another, they are not sovereign" (49). Comprehended in this way, sovereignty is a juristic definition for the absolute independence of a regime from external forms of legality.

This *project*—the term is used explicitly and exactly in Alasdair Macintyre's sense—was enormously successful, in large part because it provided the legal machinery for jurists to de-legitimate (if it was in any way subject or recognized an outside law) every potentially conflicting internal power (2002). In so doing, they turned republics, cities, bishoprics, monasteries, lords, and other overlapping classical, ancient, ecclesiastical, and feudal institutions into mere non-sovereigns—namable only by the term *subject*.[6] For more than three centuries, this system successfully resisted the imposition of a global law, through, in particular, two defining presuppositions: The first that sovereigns, and only sovereigns, had the legal right to make law (both domestically through legislation and internationally through treaty), and, the second (much less discussed by scholars), that sovereigns were the sole subject of international law, with the monopoly over the representation of their citizens in international relations. It is

[6] The modern domestic political tradition is defined by the juridical redefinition of the rights of the citizens of a republican as subjects, a term entirely alien to the public political and legal traditions in Roman and classical thought. Subjection (*dominium*) was purely a relation in property law, which applied to human being primarily in the institutions of slavery and the ancient patriarchy. See Maine for the brilliant argument that legal modernity, especially sovereignty and international law, is defined by the extrapolation of Roman private law—and specifically property law—to the public sphere (2003[1861]:102). On the role of *dominium* as the basis for sovereignty, see also Gierke (1988[1900]: 88) "in their concept of *dominium*, Rulership and Ownership were blent." With relation to English history and the "proprietary theory of kingship," see Pollock and Maitland (1899: 526), and, regarding early modern France, see Herbert Rowen on the transition from "office theory" to "property theory" (1980).

these presuppositions which still defined the legal world in which Tadić and the other ICTY defendants committed the "crimes" for which they were charged.

As we will see in detail, at the core of this system (and the core of the second provision, in particular) was a conception of law (shared across time and by even the most antagonistic modern schools of legal and political thought), which, accepted sovereignty as the basic category through which law was comprehended and defined (e.g. Locke 1994[1689], Bentham 2001[1776], Kant 1983[1785], Austin 2000[1832], Sorel 2004[1908], Weber 1948[1919], Benjamin 1986[1921], Schmitt 1996[1927], Kelsen1967[1934], and Hart 1997). As a result, though this seems to have been forgotten by most observers of the Yugoslavia tribunal and the ICC, law is understood *subjecting*—and as subjecting as any political power. If sovereignty means, by definition, not being subject to law, the result is that sovereignty and law, properly so-called, are here understood as inherently and categorically opposed to each other. Understood this way, to make sovereign states subject to a true global law would be to destroy sovereignty. As Bodin writes: "No matter how much power they have, if they are bound to the laws, jurisdiction, and command of another, they are not sovereign" (2001 [1576]: 49).

Contrast this view with the dominant opinion today that—between a state-based system and a proper cosmopolitan law—it is possible to have a hybrid system of some kind in which sovereignty is weakened but remains the basis of the system of cosmopolitan law. This is the so-called dualist position, but it is widely shared by those, especially global law pluralists, who see global criminal law as simply adding another legal subjectivity on top of the old international system (e.g. Cohen 2006). According to the pluralist account, Tadić's political subjectivity as a citizen of Bosnia and Herzegovina was not fundamentally altered but rather supplemented by new obligations. The confusion here should not be surprising (especially from non-lawyers) in a

context in which even the most prominent international law textbooks on the ICTY (e.g. Morris & Scharf, Bassiouni) do not recognize what is at stake in the distinction between the term law, as it is used to describe the classical inter-state system, and law, "properly so-called" (to borrow Austin's invaluable phrase), examples of which include what we call moderns call domestic law, and now the new global law of international criminal jurisdiction (Austin 2000 [1832]). It will be argued here, however, that the dualist position is logically insupportable, and that, while practice may for some time make it appear that there is a dual system, the *telos* of only those ICTY precedents and opinions necessary to prosecute and punish Tadić inevitably (if not counteracted) point towards the end of sovereignty and the sovereignty-based system. Put simply, sovereignty—as it was intended by the jurists who defined it—cannot survive being subject to law, and, as a result, as Antonio Cassese has argued in support of this position, "[a]t present…the dualist conception is not longer valid in its entirety" (2005: 216).

As we shall see in detail later, however initially counterintuitive or controversial this argument that law is the solvent of sovereignty may seem, it turns out to have been—if one re-reads the literature carefully and in this light—the dominant opinion in every school of modern legal theory (as much for the liberal and other so-called critics of sovereignty (Locke, Austin, Bentham, Kant, Weber and Kelsen), as for Bodin and Hobbes), and all for precisely the reason they all were part of the tradition of political modernity which understood sovereignty as the basic form of political power and shared the theory of law as subjection just described.[7] Yet no

[7] Before moving on, one brief note of explanation may be necessary. It will have surprised many readers to see the modern inter-state order and international law viewed as a project of writers associated primarily with domestic political and legal thought, as well as the fact that no careful distinction has been made between law and the sovereign/state, or between the formal and the material order. These concerns

observer of the Yugoslavia Tribunal process—with apparently only two partisan exceptions—seems to have understood the full implications of global law for sovereignty, or for the legal subjectivities (starting with Tadić) based on it. Those exceptions are the two famous international lawyers, jurists and life-long advocates for global law and the end of the sovereign order who served as two of the first three Presidents of the Yugoslavia Tribunal and as the heads of its appeals chamber: the Italian Antonio Cassese and the American Theodor Meron. Importantly, though, the fullest and most overt recognition of this has thus far been limited to their general and introductory texts (i.e. in neither their professional capacities, judicial opinions, nor their tribunal specific scholarship)—most importantly in the newest editions of Cassese's canonical introductory international law textbook (Cassese 2005, see also Meron 1996, 1998).

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speak, as much as anything could, to the continued success of this modern political project, which has relied for its success on the defense of these bright line distinctions so crucial to a new account of the political in which the sovereign/state could emerges as pre-eminent precisely through the reduction of law to a mere expression of the sovereign or state (see gen. the late Schmitt of the *Nomos*(2003[1950]), in which the real of the new domestic sphere is defined and defended by the radical separation and reduction of the international sphere (see gen. Tuck 2001 and Maine 2003[1888]), and in which every unwritten or other material form of authority is radically de-legitimated in the new formal constitutionalism (see gen. Tully 1995). It is the argument of this thesis, that all of this was accomplished through nothing beyond or outside the new concept of domestic sovereignty, defined as not subject to law, and, if this is so, is it any wonder that the historicizations of political modernity has lagged so far behind that of other spheres, given the continued hegemony these basic concepts (esp. sovereignty) and conceptual divisions (esp. domestic and international, law and political, formal and material) continue to hold for contemporary academic disciplines?

Both as a question of logic and of history, however, the juristic concept of sovereignty as not subject to law was the necessary pre-requisite to, and completely defines, both the modern inter-state order and international law. This logical and juridical argument for the priority of domestic sovereignty to international law is buttressed by the history of the development of international law. As the very important work of Richard Tuck has shown, international law, which in its apologetics presented itself as a response to and limit on sovereignty, has in fact served (just as for liberal domestic political thought) as one of the great historical naturalizations of sovereignty and law as subjection through the shared adoption, on both sides of the celebrated Grotius-Pufendorf divide, of the sovereign subject as the basic conceptual and juridical entity (Tuck 2001). In short, both juridical logic and practice suggest that the concept of sovereignty proffered by the domestic jurists (Bodin and Hobbes) was the necessary pre-requisites for, and full determinant of, the modern global order (including international law).

Formally and institutionally, the clearest example of the fact that law is the solvent of sovereignty are the terms of the UN system itself, which treat (and appear to limit) the possibility of a judicial power to the International Court of Justice (aka the World Court). To ensure this, the UN Charter (1945) foreclosed the possibility of global law, properly so called, through three provisions: (i) It explicitly limits World Court jurisdiction to states ("Only states may be parties in cases" (ICJ Statute Art. 34)), and (ii) the absence of any kind of mandatory jurisdiction, so all parties must agree have their cases heard and decisions are purely advisory (i.e. no punishments are provided for). Less frequently mentioned, however, is the provision which (iii) precludes ICJ judgments from having a precedent value for future developments in international law. According to the Charter, "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case" (Art. 59).

These three initially curious limitations will turn out, it is argued here, to be the very essence the UN system in relation to law, and their inclusion was what was necessary to getting the support of many states for even such a drastically limited international judicial power.[8] The reason for this, and this was clearly understood by the international lawyers who drafted the UN Charter, was that real law without such a limit would—based on nothing more than a single precedent of a state being made subject to law—open itself up to juristic extrapolation of a proper global law. What the lawyers drafting the UN Charter and the ICJ statute understood, if perhaps only sometimes intuitively, is that the kernel of a proper *cosmopolis* is inherent in our

[8] See, for example, the thoughtful comments of Payam Akhavan, Legal Advisor, Office of the Prosecutor, ICTY: "…As we all know, this area of international law developed in a very haphazard way…in part, because states wanted to create ambiguities…Correspondingly, it is the area in which the greatest opportunities for progressive clarification and development exist…By expanding the ambit of hum protection, do we risk creating a law that…does not remotely reflect what states are actually willing to concede?...Will a surreptitious legislative process arise…Or, will such judicial activism undermine the Tribunal's credibility in the eyes of States?" (Akhavan 1998: 1515).

concept of law, if one removes the jurisdictional limitations imposed by the concept of sovereignty.

One note of clarification will be useful here. Legal pluralists of various stripes will reply that not all law is law in this sovereign and subjecting form (e.g. De Sousa Santos 1987; De Sousa Santos and Rodriguez-Garavito 2005; Griffiths 1986, 2009; Keck and Sikkink 1998; Lutz and Sikkink 2001; Marks 2000, 2008; Merry 1988, 2006; Merry and Levitt 2009; Merry, Levitt, Rosen, Yoon 2010 and Teitel 2000) and this is certainly true. Indeed, this project shares with this brand of legal pluralism a commitment to the possibilities of non-subjecting legal futures, which, according to this account, are best sought through a rejection of the terms of political modernity and a recommitment to properly republican traditions of law (e.g. Thompson 1975, Mamdani 1996, Cohen 2006). Where this account differs is that it believes the legal pluralists' emphasis on diversity of forms of law has, in failing to take seriously enough both the distinction between sovereign law and other forms of law (and especially the implications of that distinction), disabled political thought and served as one of the main engines for the naturalization of the International Criminal Court and cosmopolitan law (Roberts 1998, 2005). As the work of both Foucault and Agamben has done so much to show, it is not so easy to escape from sovereignty in a context where it has defined law itself for three centuries, and where every widely taught conceptually legal and political vocabulary already naturalizes sovereignty (Foucault 2000, Agamben 1998). As a result, legal pluralist scholarship (both domestic and global) has generally failed to account for either the fact of legal modernity, much less for the implications of the globalization of modern sovereignty through the triple legacies of the

hegemonic language of political modernity, colonialism and the embrace of the state form and international law by the anti-colonial movements in the new states.

How then should we ultimately understand what is at stake in this transition—constitutionally—for the global order? Whatever reservations one certainly ought to have about the general processes of the legalization and criminalization of the global order (or the dramatic new legislative powers being exercised the Security Council), the single most important material constitutional implication of cosmopolitan law is the result of a factor that was never debated by the Security Council and has, so far as I am aware, been entirely ignored in scholarship, except by Cassese and Meron.[9] What changed with the so-called ICTY statute (1993) that the Council drafted (and this is true for the ICC under the Rome Statute, as well) is that, *individuals* are now the *sole* recognized subject of the new cosmopolitan criminal law (as well as for the Rwanda, Sierra Leone, Cambodia, and Lebanon tribunals, as well as for all future ICC jurisdiction established on the basis of Council power (e.g. Bashir, Gaddafi)). As Article 6 of the ICTY statute reads, the tribunal exercises solely personal jurisdiction, which it defines as "over natural persons," a legal phase of art that means individual human beings. This idea of individual subjects seemed so inherently necessary to the idea of criminal law that it hardly raised any eyebrows for most participants and observers at a moment when so much else was changing so quickly with law.

Instead, as Michael Scharf, a member of the US legal advisory team, describes the process, attention (esp. for the US delegation headed by UN Ambassador Madeline Albright)

[9] One exception is Danilo Zolo, who has called international criminal jurisdiction the "great institutional invention of the twentieth century," but this is not the primary basis of his arguments (Zolo 2002: x).

seems to have been focused on issues of formal internal legality, as opposed to sovereign, political or global constitutional questions. Their priorities at the moment were, first, remedying what was viewed as one of the great historical scandals for global law advocates, the inclusion (primarily under US influence) of the Anglo-American collective crime of conspiracy in the Nuremberg statute (and, of course, ever after as possible precedent), and second, challenging the growing public claims by Serb politicians that they were being painted with the brush of collective guilt (Scharf 1997: 7-9, 12, 54, 58). As Albright famously announced before the Security Council; "Truth is the cornerstone of the rule of law, and it will point towards individuals not peoples, as the perpetrators of war crimes" (S/PV. 3217, 25 May 1993).

Whatever the reasons were, both Secretary-General Boutros Boutros-Ghali, and the team working under his Legal Council Carl-August Fleischhauer (who played the most significant role in drafting the ICTY statute which established cosmopolitan law) seem legitimately to have missed what was at stake in the difference between a sovereign state exercising the right to punish criminals in non-traditional fora (as at Nuremberg and with international humanitarian law under the Geneva Conventions) and a global criminal law which rejected, without debate or discussion, three hundred years of precedent establishing the state's monopoly on the right to represent its citizens in international law. What they missed is that, *for the first time in world history*, a proper trans-state *law* came into being, operating on a set of radically new principles (individual criminal jurisdiction and global criminal jurisdiction) which were no longer based in the logic of the state system because they broke, for the first time, the States' monopoly on the right to represent their citizens in the global sphere. As Cassese wrote, in the *Tadić* Interlocutory Appeal Decision which formally established this jurisdiction as a matter of law: "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented

approach" (1995: para. 97), and Meron, appropriately, has named this process the "humanization" of international law (2006).

The Globalization of the Political and the New *Nomos* of the Earth

As a result, global individual criminal jurisdiction, without more, has already profoundly reorganized the global material constitution. However, as Cassese perhaps alone seems to have understood, this is only the beginning of the unfolding of a number of *teloi* inherent in this tradition of law, once sovereignty is stripped away. The essence of these *teloi* is highlighted by a number of world-historical tendencies internal to law which have received far too little discussion in political and legal scholarship, but, as we have already seen in some detail Roman law presumes the comprehensive legal system of a republican form of community in which power and right are as radically inseparable in it as they are radically opposed in modern thought. As a result, what is at stake here is that, in the absence of formal impediments, law—in both the Roman and modern traditions—*tends toward an ordered system*. To comprehend this, we need to clear away the confusions of the various binary oppositions which define law in modern thought (e.g. natural law vs. positive law, or power vs. right) and instead re-imagine law—historically and structurally—in way that takes into account the fact that, in both the Roman and modern traditions, the legitimacy of law is determined by its relationship to comprehensive systems—historically this has meant the republic and then the state—which are its historical prerequisites. Law in both these traditions can only understand itself in a system, and so it will, absent formal obstructions, seek towards a comprehensive and self-legitimizing order.

The great recent example of this was the spontaneous creation of the Yugoslavia Tribunal itself from the smallest kernel of Security Council statutory enactment. Specifically, in a move much celebrated by legalists for its apparent restraint and deference to judges, the Statute of the tribunal calls for the judges (properly speaking the Presidency) to "adopt rules of procedure and evidence" (1993: Art. 15), and says nothing more of legal import about the particular source or form of these provisions other than that there be "fair" trials "with full respect for the rights of the accused" (Art. 20). Cassese, who was president of the tribunal at the time and who oversaw the rule making, has been quite explicit about what was at stake. In his *Presidential Statement* accompanying the promulgation of the new rules, he writes of the rule making process that "we ha[d] little in the way of precedent to guide us" (1994). The Nuremberg rules were "very rudimentary" (there were only three and a half pages of rules) because procedure was left to the tribunals, and so the judges constructed a complete system of rules, about which Cassese says "we hope, reflecting concepts which are today recognized as being fair and just in the international arena." In short, the entire judicial apparatus of global law was extrapolated legally as inherent in the words "fair trial," and all this without any need for reason or explanation beyond the fact that (under these presumed systems) all this is required of a fair trial. Remarkably, the importance of the *ICTY Rules of Procedure and Evidence* has been nowhere fully appreciated in scholarship. However, they mark, properly speaking, the first global law created without reference to sovereignty as the ultimate constitutional basis, and the terms and categories they define will serves as the precedent and basis for all subsequent cosmopolitan law practice.[10]

[10] Michael Karnavas [who was interviewed for this project], a ICTY-appointed defense lawyer (for Vidoje Blagojević) has complained about the potential prejudice for defense cases of the adoption of rules

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If we are to make sense of this inherently expansive quality of law, it will require that we abandon the modern vocabulary of law which has been nothing short of debilitating for political though and practice. By contrast, in the historical, structural and political account of *law as tradition* proposed here, our modern understandings of law is predominantly determined, even in its new global context, by both the historically-specific structural form that law took in the classical *polis* and *res publica*, in which law was understood as an systematic expression and representation of a public sphere defined by equality of citizenship, and also the Roman law tradition, which consciously took the classical Athenian form of law as the basis for all of its own republican legal and political institutions and traditions.[11] According to this account, the essential question of law in the Roman and neo-Roman traditions—lost to moderns in the false and polemical legal modernist oppositions (e.g. between natural and positive law)—is the politico-structural relationship between what Aristotle, in the *Nicomachean Ethics*, calls *dike* and *epieikeia*, generally interpreted by modern scholars the opposition between law (or properly legal justice) and equity (1976: 198-9).[12] Of course, equity here must be understood to have none of

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based on "enormous discretion" given to the judges to "create an entire international criminal justice system" (Karnavas 1996: 13).

[11] Unlike modern sociological and material constitutional theories which incorporate every aspect of "social" life, this account emphasizes law as a *political* concept, and unlike modern material constitutional theories it recognizes the importance of the political in its both formal and material sense. Finally, unlike modern thought, it recognizes no third space of civil society, and modern private law can make no sense understood in this manner.

[12] It is absurd that modern political science courses foreground Aristotle's *Politics* (1998), which had a much reduced place in the political and legal traditions, and not the *Nicomachean Ethics*, which is, for its place at the head of the tradition (but also objectively), the most single important political text (1976). As a result, the *Ethics*, which should be the beginning of legal pedagogy, has been read as much less a political manual than it in fact is. The problem with assigning it even now to the place it deserves is that most translations gloss over the distinction and treat justice in a much more substantive manner rather

the substantive modern implications of deep social or economic equality, but rather implies generality and inclusion, though in limited terms. In the Aristotelian account, the relationship between *dike* and *epieikeia* embodies the basic structural elements of political life in the polis, which modern legal thought has inevitably turned into a series of unbridgeable polemical oppositions—and especially those between right and power, law and equity, natural law and positive law, formal and material, equality and freedom, and the general and the particular (or case). *Dike* and *epieikeia*, by contrast, are neither absolutely identical nor opposed to each other, but are rather both ("like two species of the same genus") internally related and necessary structural facts of life in a *polis* or *res publica* (198 (fn. 6)). These dual goods help us to understand why all modern attempts to define the political in terms of a single ultimate good or term are doomed to failure in precisely the same way that modern philosophy could never capture in a single essence the multiple goods represented by the virtues in the Aristotelian tradition in MacIntyre's account (2002).

At the common conceptual core of all of these relationships is a fundamental politico-structural relationship encompassing the ultimate centrality to political life, in the *polis*, of the relationships between closure and openness, formal and material, continuity and progress, and ultimately tradition and modernity. At its heart was a classical pedagogical distinction drawn between the extremely conservative unwritten Spartan constitution of Lycurgus, which had sought to permanently close itself off to the inclusion of new peoples (both internally and externally) as citizens, and the Athenian constitutions, which could, because it was structurally more flexible—if only relatively—include previously excluded persons as citizens, and so could use inclusion as both a safety valve and in order to incorporate and benefit from the energies of

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than as a political concept between Aristotle's account of the law in the polis and his account of ultimate justice as the mean.

those excluded from citizenship internally. Within the Roman political traditions (esp. Polybius 2010), the Roman city comes to be viewed as the greatest city, precisely because of its structural ability to include new peoples beyond anything Sparta or Athens ever could (Bk. 6).

In contrast to scholars working within the main currents of legal modernity (whichever side of the natural law vs. positive law binary they side with), for whom it is the norm to be always for closure or always for openness, the political question *par excellence* for the classical traditions was the question of the continual need for judgments about where to draw the line between closure and openness, formal and material, and tradition and modernity. The fact is that every legal system (viewed historically or materially) has necessarily included both elements through some means or another—some formally and institutionally (e.g. courts of law and equity in England), some structural (statutes and interpretation by courts, or codification movements), and some through the ebb and flow (whether politically or in academia) between various natural law and positivist theories.

None of this, as we shall see, meant that law in the Roman and post-Roman traditions could fully escape its traditions or achieve a modernity in the totalizing sense in which today's scholars understand it, but, for purely historical reasons, law developed in this tradition in a manner that pointed towards the possibility of openness. For this reason, Roman law at the material level points in the direction of generality, expansion, inclusion and openness (in its own historically enumerated terms, not as a universal category), where formal constraints do not specifically preclude that. As with all the Roman law based traditions of jurisprudential disputation and modern court systems, law's *telos* through precedent is always to be extended to new terrain, new cases, and new concerns. Against this, a whole slew of traditional institutions and conceptual ideals have been activated in order to attempt to formalize, constrain and limit

law. In ancient Greece, this was embodied in the two traditions laid down by the Spartan lawgiver Lycurgus, to leave the laws unwritten, and by Draco the Athenian's decision to put the laws in writing (Polybius 2010: Bk. 6). Both shared, as their common and avowed purpose, the goal of constraining law's inherent *telos*. For modernity, however, the greatest and most definitive of these has been sovereignty, and, if this is true, then certainly the much debated possibility of the decline of state sovereignty opens up possibilities in law about which we understand very little.

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In particular, four of laws *teloi* have already come into being with the Yugoslavia Tribunal, both marking and enacting this decline in state sovereignty. In the most obvious instance, as soon as global law begins recognizing individual (criminal) jurisdiction, basic requirements of legality, justice and fairness for defendants (extrapolated from domestic understandings of law) will require that global law also begins to offer—and thus potentially become *the source and guarantee of*—the full corpus of *criminal defendants' rights* and protections that modern state-based legality views as the necessary cognates to criminal responsibility. No ultimate basis or source is yet given for these rights, but the ICTY Statute already guarantees the "Rights of the Accused," under Article 21. Indeed, a second stage has already been reached, with the Cassese's *Tadić* Interlocutory Appeal Decision (which is to say the case law precedent on which global law is built), which has now effectively brought in the entire corpus of international humanitarian and human rights standards (esp. the International Covenant on Civil and Political Rights) to enumerate these Art. 21 rights (1995: para. 4, 41-46). However, to make this legally enforceable (i.e. as law) all this has been radically redefined—primarily through the never debated naturalization of the concept of statute (esp. Nuremberg and

ICTY statute), a term technically impossible in the previous system—so that what were treaties (signed and agreed to by states) have come to be broadly interpreted as a proper global law subjecting states. On this basis, Meron has argued that the ICTY statute "incorporates" the full catalog of due process protections in the ICCPR (1996: 219), and, as a result of that precedent, one can now fairly say that the Convention now operates as effectively both a global proto-criminal code, as well as a cosmopolitan Bill of Rights.[13]

A second, closely related *telos* has to do with the extrapolation of all the legal mechanisms necessary to the *trial process*. As we have just seen, for the ICTY this already includes the drafting by the Presidency of an elaborate and comprehensive system of rules of procedure (pre-trial and trial procedures, as well as judicial review) and evidence which are now fully determinative for future tribunals and the ICC. Much attention has been paid to the tribunal's creation of a new hybrid system incorporating aspects from adversarial and continental systems, but much more important are the necessary and implicit judicial rights and powers, including the power to issue orders, enact penalties (including incarceration and fines), and enforce sentences (Art. 22-24, 27-28).

A third *telos* includes everything necessary to the constitution and operation of *a court* itself. For the ICTY, this already involves the creation of the various branches of the tribunal, including the Registry (Art. 17), Trial Chamber (Art. 12), Office of the Prosecutor (OTP) (Art. 16), and Appeals Chamber (Art. 25). More importantly, it also includes the enumeration of full investigatory, arrest and general police powers (Art. 18) (including the power to detain suspects

[13] For examples, spurred by ICTY precedent, of the interpretation of the ICCPR as both a global proto-criminal code and a cosmopolitan Bill of Rights, see Robert K. Goldman (1999) on the Inter-American Commission on Human Rights and Steven R. Ratner (1999) on war crimes law.

in the United Nations Detention Unit located in The Hague), all presumed to be necessary to established modern understandings of prosecutorial and judicial power.

Finally, a fourth *telos* has followed the necessary requirements of a modern *criminal justice system.* For the ICTY, this has included enumerated powers of Penalties, including imprisonment (and other forms of punishment including restitution) (Art. 24), and even commutation of sentence and pardon (Art. 28). In part because the Dutch did not want the Netherlands to become the de facto global prison, those convicted by the tribunal are sent to serve their sentences in states which agree to take them, so Tadić, who became the first defendant to be punished with imprisonment by a global court, served his sentence in Germany. It is the Tribunal, however, which maintains full jurisdiction throughout even the incarceration in a foreign prison.

To conclude, then, if the greatest part of the corpus of the legal traditions of the West (everything that dealt with men and women as either citizens or private individuals) remained inapplicable to an order defined by states, when the five judges in Tadić's appellate interlocutory appeals decision (1995) formalized and confirmed the new global individual criminal jurisdiction of the ICTY statute, at that moment precedent—and with it the full domestic tradition of law—became applicable to the global arena. From then on (and both Meron and Cassese agree that this was not legally possible before 1994), for law, that greatest of analogical institutions, the analogy at the global criminal courts was now domestic law, not international law. While this is admittedly still quite limited in its formal and institutional scope, absent formal constraints we have no idea how far this may ultimately go.

Put simply, piggy-backing on an ethically powerful set of claims about the need to punish Balkan war criminals and individual responsibility for one's actions are a set of institutions which legitimate themselves—globally—in terms of the logic of our historically specific and contingent conceptualization of the political. Put another way, we might perhaps say that the (internal political) *nomos* of the West is, through these new institutions, making a claim to become the *nomos* of the earth (Schmitt 2003[1950]). This, I argue, must be understood as *the globalization of the political*, and, if this is so, it raises for us all the necessity of considering the question of whether these forms can serve as the basis for a global order compatible with either deep and meaningful political diversity or republican values.

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Before moving on, two final objections to the claims made here that global law is a recent and new phenomenon logically opposed to sovereignty will need to be addressed. First, isn't global law simply the most recent small step—among innumerable other small steps—in a long slow historical development towards cosmopolitan law? The second question is didn't the Council address these concerns about sovereignty when it established the tribunal on the basis of the idea of "complementarily," as well as on limited temporal and subject matter jurisdiction?

In the first instance, it will be worth looking closely at how Cassese deals with this question, given that as a scholar he has certainly been the single most important, systematic, and consistent advocate of global law. Furthermore, as a jurist, he has been not only the key figure in the creation of the ICTY and the author of the key global law case law precedent, but even today he continues to serve a as the chief judge of the common appeals chamber which hears cases from other tribunals. In a brilliant discussion, which appears, as far as I know, only in newer

editions of his widely used introductory international law textbook, he addresses what he sees as one of the great weaknesses of contemporary thought and practice on global law, its tendency to accept an easy naturalization international law (and anything else law-like) as law (Cassese 2005). Whatever form this takes, this is possible, he argues, only through a fundamental mis-characterization of the ontological form of the concept of sovereignty. Specifically, this has occurred through the success of Kelsen's project to re-describe the system (international law) as prior to its sovereign parts, and this, in turn, has allowed sovereignty to be misunderstood as a part of *a system of collective and correlative rights* between states (i.e. *parts of* some preexisting whole called international law)(16).

This reading has made it possible for most observers of global law to view international law as an extant global proto-legal system. They can therefore quite logically insist that, legal niceties aside, something enough like global law has already existed for three centuries, and we ought to see global law as nothing more than the next small step, if perhaps not perfectly legalistic (e.g. the *ex post facto* nature of crimes against humanity for the Nuremberg tribunal and the legal fiction of customary law for the ICTY), in a natural and perhaps inevitable evolution. The process is thus understood as nothing more than the development from either one system of collective and correlative rights (international law) to a slightly more sophisticated one (global law), or from material to formal legality. As we have already seen, the dominant emerging response to the global law of the Yugoslavia tribunal for both progressive-liberal cosmopolitan scholars and activists (shared by scholars in international law and the social sciences, including many in anthropology) has been the attempt to reject the priority the modern definition of law and in favor of a picture of a plurality of competing definitions or cultural

traditions attempting to define what law is. In this account, international law always was real enough law, if we just slightly expand our definition in retrospect.

According to Cassese, this is both logically and historically inaccurate. Sovereignty, he says (contra Kelsen), is prior to the system (international law), and must be understood, juridically speaking, is *a series of reciprocal relationships* between two individual states (creating mutual obligations, like contracts, based on the presumption of the priority of the sovereigns to their agreements). He neatly summarizes his argument as follows:

> International rules [i.e. the classical system of "international law"], even though they address themselves to all States (in the case of customs) or group [sic] of States (in the case of multilateral treaties), confer rights or impose obligations on *pairs of States* only. As a result, each State has right or obligation in relation to one other State only (14).

What the naturalization and evolution theories miss, says Cassese, is how much is at stake, logically and juridically, in the difference between international law and global law. The fact is this process could not been slowly evolving for 300 years. The two systems are ontologically distinct and irresolvable, and there can be, whether juridically or logically, no halfway house or common ground between reciprocal and correlative rights and obligations. For this reason, he insists that the sovereignty-based modern state order and international law remained largely definitive of the global order from its inception up until 1994 (this includes the UN system), and what has changed towards global law (esp. the genocide convention) has been almost entirely limited to the post-War II period (17, Meron agrees 1998: 14). If these can perhaps exist side by side for a while as two competing systems, ultimately (if left unregulated) the latter will win out because sovereignty must be defended from law if it is to survive.

Where most scholars have tended to view this in binary or dual terms (national law vs. global law), Cassese views the current global order as defined by the coexistence of three ontologically distinct and irresolvable forms of legal relationships. As we have seen, (i) in the first (which is coterminous with what we call international law based on treaties between sovereign states) relations are based *reciprocal obligations* between preexisting pairs of sovereigns, which take the exact form of private contractual agreements (14). In this context, the violation of one state's sovereignty by another invokes a claim by one state only against the other, and this claim is not legal, properly speaking, since there is no compulsory element or precedent established. Fully distinct from this are two other types of relationships, which contemporary scholars and public debate tend not to differentiate as the process of what is called globalization. The (ii) second of these involves the development of new obligations on states—and Cassese cautions that this is much more limited than most observers realize—which he calls *community rights* in which obligations are towards all the member states of the international community (*erga omnes*) and which take the form of correlative or public rights which can be exercised by states, even when uninjured, in the name of the international community (16, 64). The sole subjects of this system remain states, however. The problem, says Cassese, is that the institutions representing this logic have been much more limited in both frequency and importance than most observers believe, either because like common Article1 of the Geneva Conventions of 1949 they stipulate obligations for states to all other states but provide no non-sovereign mechanism for enacting that, or because like the UN Charter they contain contradictory provisions.

Finally (iii), only with 1994 and the creation of the proper cosmopolitan law of the Yugoslavia tribunal was the third type of relationship possible, based on the principle of a

relationship between every individual and the collective world community. The natural end of this *telos*—and this is what Cassese himself is ultimately arguing for normatively—is a human commonwealth or *civitas maxima*, based on the notion of the common good for the whole world as shared by the whole of mankind (16, 217). Viewed as a kind of post-sovereign ancient constitution, these three forms of relationship may coexist for a time, Cassese argues, and indeed this overlapping complexity of the present moment is the ideal of the cosmopolitan legal pluralists. What that view misses, as Cassese shows, is that cosmopolitan law, properly so called (as represented by both the *ad hoc* tribunals and the ICC), is a unitary, top down and subjecting institution. As a result, and because the internal relations of the three are inherently in conflict, all "development" towards "global" legal ideals cannot be viewed as steps along a single path.

The final objection that must be addressed is wasn't the Security Council's inclusion, in the so-called ICTY statute, of the legal mechanism of "complementarity" (Art. 8) supposed to protect sovereignty, at least with regard to the *ad hoc* and hybrid tribunals, by allowing the courts of each state a kind of joint jurisdiction? The fact is it cannot. Indeed, in constitutional terms, complementarity can, paradoxically, only make sense in reference to states that agree to the jurisdiction of the global courts. The moment they seek to assert a jurisdiction that in some ways runs counter to the global law, complementarity shifts from a doctrine apparently protecting states to a compulsory global jurisdiction requiring states to follow the legal jurisdiction of the global court. What is more, as the ICTY statute shows, complementarity is compatible with the invocation of Chapter VII powers, and was perfectly compatible with *ultimate* (which, of course, does not mean total) global legal jurisdiction over the law of the Yugoslav successor states, and the same will be true as well for every present and future *ad hoc* and special tribunal.

To understand why this is so, it will be helpful to remember that the coalition of support for the Tribunal, particularly among the most vocal advocates on the Council, seems to been crucially based on the widely held but inaccurate belief that the limited and strictly enumerated jurisdiction of the ICTY (i.e. territorial, temporal, and also subject matter jurisdiction limiting its jurisdiction to enumerated crimes committed in the former Yugoslavia during the war) meant that the Tribunal would be a limited endeavor. "[C]ircumscribed in scope and purpose," to use the words of the Report by the Secretary-General's legal team (1993), discussed by the Council in debating *Resolution 827* (which created the Tribunal), and not, as the skeptics (esp. Venezuela, Brazil, China and Russia) feared, the ill-considered first step in a chain of precedents that would produce—in the Tribunal itself—a proper global law which would necessarily subject (and create precedents for the future subjection of) sovereign states (para. 12). To address these fears, the report goes on to state—in what its advocates seem to have sincerely believed was simultaneously a statement of fact and sufficient formal legal reservation—that the creation of the Tribunal "does not relate to the establishment of an international criminal jurisdiction in general nor to the creation of an international criminal court of a permanent nature" (ibid). Many of the Tribunal's advocates in the international community seem to have viewed it as nothing more than a kind of trial run to see how things worked, with no permanent implications for the global order and a definite end date to allow the Council the opportunity to reconsider the matter in the future. This, as we shall see, was to dramatically misunderstand what is at stake in the judicial power of courts, global or otherwise.

However, pushed by the tribunal advocates who were determined to a get a symbolic unanimous vote in the Council in the context of what was believed to be a genocide in progress, the skeptics engaged in frankly wishful thinking in believing that mere formal reservations could

limit the inherent *telos* of law, as they themselves had initially argued. In the long run, these states, the global order, and even the development of cosmopolitan law would have been better off had they abstained on the basis of the concerns they themselves made before the Security Council on May 25, 1993, the day the Tribunal was create. There, the Brazilian representative Ronaldo Mota Sardenberg objected to the fact that the matter had involved critical legal issues "many of which were not resolved to our satisfaction," and he insisted that an initiative bearing such far-reaching political and legal implications ought to have included "a much deeper examination in the context that allowed a broader participation by all States Members of the UN" (Brazil rep: S/PV. 3217, 25 May 1993). Similarly, Li Zhaoxing of China complained to the Council that "[t]his political position [to vote for the tribunal]…should not be construed as our endorsement of the legal approach involved," and he further argued, and quite accurately, that the creation of the tribunal was "not in compliance with the principle of State judicial sovereignty…[and] [t]his will bring many problems and difficulties in both theory and practice" (China rep: S/PV. 3217, 25 May 1993).

What the skeptics (esp. China and Russia) understood was that a Chapter VII intervention in the sovereignty of any state, if it takes the form of a general law exercised by a court, cannot be fully limited in the way that the advocates insisted it could. What the tribunal advocate's account missed was the fact that judicial power, as embodied in the right to issue binding orders, compel attendance of parties, or enforce judgments of even the most minimal kinds, requires the full apparatus of what lawyers call *mandatory jurisdiction*—or, as Cassese elaborates it in the *Tadić* Decision, "mandatory universal jurisdiction" (1995: para. 80). The limited territorial, temporal, and subject matter jurisdiction of the Tribunal can limit which cases the court will allow itself to hear, but mandatory jurisdiction (here an expression of the Security Council's

Chapter VII power) can make no sense in a limited form, and must be fully present for any court to exercise even the most minimal procedural matters. Importantly, this is no less true for the new self-consciously dual jurisdiction international-state special tribunals, such as those for Cambodia, Sierra Leone and Lebanon, to which the international community has increasingly turned as an apparently more sensitive alternative, since all are either based on Council Chapter VII power or recognize the ultimate jurisdictional priority of global law.[14]

Put simply, you cannot have law, properly so called, much less a court, without full mandatory jurisdiction. As representative Li of China pointed out to the Council, this was not simply a matter of legal semantics. This is because, in choosing to adopt Chapter VII as the basis for the Tribunal's mandatory jurisdiction, the Council created (by the logic of what is called judicial review) a body whose own enumerated legal powers would necessarily follow the same logic as the Council powers from which it was derived, the requirement that all "UN Member States must implement [Council decisions under Chapter VII] to fulfill their obligations" (China rep: 1993). As Li suggested, the decision to give the Tribunal Chapter VII power means, therefore, that *every* state must (under its UN treaty obligations) recognize the jurisdictional claims of even an *ad hoc* tribunal in precisely the same way in which it would recognize a Security Council resolution. The gravity of these same concerns led the Russian representative to insist on reservations against automatic deferrals by state courts to the tribunals and to even to feel the need to state that "we believe this body will not abolish or replace national justice organs" (Russia rep: 1993 S/PV. 3217, 25 May 1993), however, have turned out to be as ineffective as the skeptics themselves initially believed they ultimately would. The so-called

[14] The Lebanon tribunal, although originally technically a dual body with a local legal role, was transformed after the failure of the parliament to pass the law empowering the Tribunal, and this led the UN Security Council to pass a resolution invoking Chapter VII, which now serves as the ultimate jurisdictional basis.

Statute of the Tribunal, passed by the Council on that very day, though it formally appears to exercise strictly limited territorial, temporal and subject-matter jurisdictions with regard to crimes in the former Yugoslavia, exercises (as an expression of Chapter VII powers) a mandatory jurisdiction over not just the Yugoslav successor states, but *all* states with regard its primacy over national courts. Specifically, Article 9, with the Orwellian title "Concurrent Jurisdiction," establishes what it calls concurrent jurisdiction between the Tribunal and national courts (Sec. 1), only to then assert the "primacy" within that system of the Tribunal "over national courts" and require them to defer regardless of the procedural stage (Sec. 2).

What this all means is that the Yugoslavia Tribunal can, with regard to those indicted for crimes committed in the former Yugoslavia after 1991, claim primacy over any national court (i.e. not just in the states of the former Yugoslavia) into whose hands the indictee falls. This is precisely what happened to Tadić after his arrest in Germany. Though on the surface little appears to have changed with the old system of sovereign state extraditions based on equal (*vis-a-vis* other states) and ultimate (internal) jurisdiction, with Tadić the Tribunal asserted its jurisdictional supremacy over the German courts, and, on this quite different basis (mandatory jurisdiction), he was extradited to The Hague for trial. This issue was never contested with regard to Tadić because, as a Bosnian Serb with no citizenship rights there, the German government had no legal or sovereignty-based reason not to turn him over to the Tribunal, and so complied with the Tribunals claim of priority. Had Germany (or any country, no matter how unrelated to the Balkan conflicts) contested that claim, it is clear that its basis in Chapter VII would give the Tribunal, according to international law, primacy over its national courts.

A further provision in the ICTY Statute (Article 29 on "Co-operation and Judicial Assistance"), again because it is based on Chapter VII powers, further gives to the Tribunal the

power to compel *any* state—"States shall" is the wording—to "co-operate" with investigations and prosecutions and to "comply without undue delay with any request for assistance or an order issued by a Trial Chamber." Incorporating, as this article does, the investigative and police powers inherent in the Tribunal's prosecutorial power, the Tribunal is, as the skeptics warned, a substantial infringement on the sovereignty and legal independence of *every* state, not just the states of the former Yugoslavia. Indeed, as critics of the dual jurisdiction Lebanon tribunal have suggested, the investigatory process requires full criminal jurisdiction, without which it cannot operate, and criminal investigation and criminal trials without compulsion are meaningless.

The ultimate implication of Chinese and Russian concerns were that the Tribunal, as an expression of Chapter VII, now introduces into international law (through the apparently innocuous terms complementarity and cooperation) a generalized and mandatory compulsory element—analogous to the sovereign power of domestic governmental power in the modern state—which is both absolutely novel and foreign to the terms of the old state sovereignty system. In that system, a state might make requests for extradition of a person indicted by its courts, but there is no legal (as opposed to political, military or economic) means to compel the other state to comply. By basing the Tribunal's jurisdiction on Chapter VII, the kernel of *compulsory relations* (i.e. domestic sovereignty) has entered into international law.

Part I: Crisis in Political Thought

CHAPTER 1:
Anthropology, Political Modernity, and Our Contemporary Cognitive-Political Crisis

Chapter Abstract:

This essay is an examination of the implications of the largely uncritical taking up of the ascendant Agambenian paradigm in recent scholarship. Following Hannah Arendt, it is argued the most important reason for the success of the polemical redefinition of political community as subjecthood by those who elaborated the project of political modernity (Bodin and Hobbes) has been its success at getting its opponents (whether Locke, Bentham, Austin, Rousseau, Weber, Benjamin, Foucault, Derrida, or now Agamben) to accept this definition of sovereignty as an both an empirical reality and as the critical object against and through which future politics must be defined. As a result, the project of naming the sovereign—however rhetorically satisfying—has never failed to be deeply disabling for both scholarship and politics, as scholars accept it's radical modern naturalization, rationalization, and unification of power as the basic concept of political organization and as the possibilities of political life come to be defined by the impossible task of deriving freedom from the concept of sovereignty. The great recent example of this is Agamben's work which, because it is based on Benjamin's early writings in which this modern imbrications of sovereignty and political life is viewed as complete and irreversible, requires—if we are to get out of sovereignty—nothing less than that we reject every possibility of future political community and make a complete ontological break from political forms. This, it is argued here, is much too much to ask of either scholarship or of our political present.

Introduction: The New Dominant Paradigm in Critical Scholarship

A remarkably under-theorized paradigm shift has taken place in critical thought in recent years, and *sovereignty*, it seems, has emerged as the concept of our moment.[15] Indeed, just in the course of the past decade and a half, the question of sovereignty has moved, in critical scholarship, from an especially provocative curiosity question—one thinks of Jacques Derrida's initial forays into the subject in his 1989 lecture, 'Force of Law' (1992)—to its very conceptual center. In just that time, Giorgio Agamben, Walter Benjamin, and Carl Schmitt have emerged as

[15] A version of this chapter has been published in the journal *Anthropological Theory* as "Sovereignty and Political Modernity: A Genealogy of Agamben's Critique of Sovereignty" (Jennings 2011).

the thinkers of the moment—as much as anything it now seems clear—because of the seeming salience to our moment of their critiques of sovereignty. Today, the conceptual terms through which they have sought to name sovereignty—'friend-enemy' (Schmitt), 'state of exception' (Schmitt, Benjamin, and Agamben), and the sovereign 'ban' and 'bare life' (Benjamin and Agamben)—suddenly seem all but omnipresent in critical scholarship across a remarkably broad range of theoretical and disciplinary commitments (and with little discussed, implications for the less rhetorically available Derridean and Foucauldian theories that predominated just a short while ago).[16] Yet, it has already become easy, today, to forget how fundamentally politically provocative Derrida's choice to address the question of sovereignty at first seemed to many critically-oriented scholars.

This same transition—the ascendance of what we might variously call the early-Benjaminian, or *Agambenian critique of sovereignty*—has occurred within critical anthropological scholarship, as well. Though it remains both under-theorized and unnamed, it is time to come to terms with the implications of the fact that it now sits as effectively the dominant critical paradigm for anthropologists thinking the question of sovereignty, specifically, and the political, generally. In its wake, and in just the past half decade, a truly remarkable number of anthropological (and disciplinarily influential) scholars have substantively engaged the question of sovereignty in their work (e.g. Artexaga 2006, Asad 2003, Berlant 2007, Biehl 2007, Borneman 2004, Caton 2006, Cattelino 2006, Chatterjee 2005, Clarke 2004, 2007, Jean Comaroff 2007, John and

[16] *Friend-enemy* is Schmitt's definition in *Concept of the Political* (1996: 26). S*tate of exception* is now most famous for its use by Agamben, especially in his eponymously named book (2005: 52-55), but the use is preceded by Schmitt's discussion of *Ausnahmezustand*, in *Political Theology* (1985: 13), and by Benjamin's Thesis VIII in 'Theses on the Philosophy of History' (1969). Likewise, Agamben's notion of the *sovereign ban* and *bare life* from *Homo Sacer* (1998) follows almost exactly the terms of Benjamin's much less discussed treatment of 'mere life' in 'Critique of Violence' (1986: 297), about which he writes: 'Man cannot, at any price, be said to coincide with the mere life in him,' (299) understood as the effect of being subject to law.

Jean Comaroff 2005, 2006, Das and Poole 2004, DeGenova 2005, Gaonkar 2007, Farquhar and Zhang 2005, Fassin 2007, 2008, Hansen and Stepputat 2001, 2005, 2006, Inda 2005, Kapferer 2004, 2004, Mbembe 2000, 2003, Nugent and Vincent 2004, Ong 2006, Povinelli 2006, Panourgiá 2008a, 2008b, Raffles 2007, Sarat 2001, 2007, Sharma and Gupta 2006, Stoler 2006, and Wilson and Mitchell 2003), and, without exception, all have approached this fundamentally and explicitly through consideration of Agamben's work and ideas.

As important as the breadth of its success has been the remarkable breadth of the enthusiasm for these new ideas. Indeed, within the discipline, only the work of Panourgiá (2008a, 2008b) and Weiss (2010) has, as yet, engaged substantively with the potentially negative, problematic, or inadequate aspects of adopting Agamben's conceptual framework. Indeed, even the two authors, Thomas Blom Hansen and Finn Stepputat, whose invaluable work has done the most to recognize and encourage both the anthropological 'return to sovereignty' and '[t]he current reevaluation of the meanings of sovereignty—critically informed by the work of Giorgio Agamben,' have largely engaged Agamben's work as a theoretical source on sovereignty, rather than its own object of inquiry, and so have themselves been influential figures in the success of the new paradigm (Hansen and Stepputat 2005:18, 2006:296). In response to this lack of critical engagement with this new paradigm, this essay is an attempt to understand this new conceptual orientation, and especially what is at stake in taking up this framework—this '*Agamben-effect*' (Ross 2008)—through a genealogical investigation of the key historical moments in which the crucial terms and logics that have come down to us were being worked out, up to and including its recent florescence.

What then, to adopt David Scott's invaluable methodology of question and answer, was the question to which sovereignty has been the answer (1999)? It seems clear, if only perhaps in

hindsight, that the initial impetus for this recent florescence of sovereignty-talk was that it has seemed like an especially productive conceptual tool in the effort to name and critique the great post-Cold War unitary power global power, the United States, and its new liberal triumphalism (as well as the emerging global counter-power represented by the power to punish represented by the global criminal courts) (Hardt and Negri, 2000, Jennings, 2008).[17] For this reason, it would seem to be the ideal moment to be engaging, and attempting to expand upon, the fast proliferating literature naming the imperial sovereign exception, and yet, on a closer look, it is not clear that the terms of this particular critical intervention—for all its recent rhetorical importance—are necessarily ones we want to be working with. Though a good deal of the recent successes of the critique of sovereignty must be attributed to the sense (quite explicit in Agamben) that this marks a novel, critically cutting-edge, and politically radical project, on closer look the terms and assumptions that underpin this critique are remarkable for nothing so much as for their acceptance the polemical and reactionary modern account of political history and power in which the logico-rationalist and totalizing concept of sovereignty—conceptually and practically impossible within any tradition that preceded political modernity—is accepted as the sole, basic and universal term for describing political power and community. Rather than calling into question sovereignty or political modernity, the end result has, not surprisingly, been an explosion within anthropology of scholarship naming and naturalizing sovereignty in other spheres—from the individual to the global—and a fascinating renewal of positive political claims—that 'sovereignty matters' (Barker 2005)—which had been explicitly rejected by important figures in the postcolonial project (e.g. Scott (1996, 1999), and Mbembe (2000)).

[17] Though this fact, to my knowledge, has not been emphasized by Derrida scholars, it was surely no coincidence that it was in 1989—in the moment of the last gasp of the left defense of socialist sovereignty and the reorientation of the world order around a single, unitary sovereignty—that Derrida brought sovereignty back in, with his important resuscitation of Benjamin's now all but canonical essay.

To add credence to these doubts expressed here about taking up the contemporary critique of sovereignty, special effort will be made to show that, read carefully, both Benjamin (1969 [1940]) and Derrida (1992[1989]), who are today read as its key early exponents, came to understand—and especially in their later work—this critique as theoretically, politically and ethically disabling. Both, faced with the real political question of fascism, expressed grave and definitive doubts about the implications of the critique of sovereignty, in particular, and to the possibility of founding a politics on critique, more generally—though both, without an alternative political anthropology, quickly reached conceptual dead ends. Indeed, something like this is true even of Schmitt himself, whose late work radically departs from and fully undermines his early understanding of sovereignty (2003[1950]). The exception to these doubts is the contemporary work of Giorgio Agamben, which builds explicitly from the early Benjamin's account, and yet it is—troublingly—Agamben's work (esp. *Homo sacer* (1998) and *State of Exception* (2005)) that has emerged as definitive for our moment.

Part I. The Sorelian Roots of Contemporary Critical Political Thought

If Agamben, Derrida, Benjamin, and perhaps Schmitt are most commonly understood as the crucial figures in the re-emergence of the contemporary critique of sovereignty, the startling magic key to understanding the form and conceptual terms of their arguments is without question the work of Georges Sorel. Though neither it, nor its implications, have anywhere been dealt with in contemporary critical or anthropological scholarship, it is, as we shall see in a moment, Sorel's theorization of the political as sovereignty that serves as the provocation for and conceptual basis of *both* Benjamin's and Schmitt's understandings of sovereignty, and which in turn has been taken up by Agamben.

In fact, clear origins for every one of Schmitt's and Benjamin's most famous political ideas are to be found in Sorel's *Reflections on Violence* (2004 [1908]). For Schmitt, this includes Sorel's accounts of the political (80, 115), including the 'friend-enemy' distinction (78), the exception (149), and his critiques of liberal internationalism (115) and the 'cowardice' the middle class and its governments and of the classes which 'discuss' (71, 77-79)—perhaps even the mocking tone. Schmitt himself acknowledged as much when her wrote, in 1926, that he agreed that 'Georges Sorel is the key to all contemporary political thought' (Schmitt, 2001[1923]: 66, fn. 5), but the extent of the debt is still surprising, especially given how few scholars have remarked upon it. It is Sorel who writes:

> Every man or every power whose action consists solely in surrender can only finish by self-annihilation. Everything that lives resists; that which does not resist allows itself to be cut up piecemeal (Quoting Clemenceau (2004 [1908]: 78)).

Even Schmitt's infamous decisionism, which literally defines his concept of sovereignty in his most famous book, *The Concept of the Political* (1996 [1927]), clearly has its roots in Sorel's belief in the necessity of a 'decision', which the proletarian strike represents (122): 'We on the other hand must act' (149). All of this Sorel mustered against the cowardice of the middle class 'who always surrender before the threat of violence' (78) and so are 'condemned to death' (ibid), because of its existentially suicidal ideology of 'social peace' (68) based on the idea that 'violence is a relic of barbarism which is bound to disappear' (80). Finally, even Schmitt's justly famous critique of Anglo-American liberal internationalism with its criminalization warfare clearly has direct links to Sorel's arguments:

> Everything in war is carried on without hatred and without the spirit of revenge…force is then displayed according to its own nature, without

> professing to borrow anything from judicial proceedings which society sets up against criminals (115).

Surely no close reader of Schmitt cannot help but be struck by this.

Similarly, Benjamin also followed Sorel quite directly, addressing his most famous essay on political questions—the 'Critique of Violence'—explicitly to the problem of violence as Sorel had defined it, and a number of Benjamin's key political concepts—including his definitions of the political and his famous notion of 'divine violence' are fundamentally shaped by Sorel's thought. As we shall see in a moment, the latter is the explicit basis for Sorel's distinction between 'the political [or general] strike' and 'the proletarian strike', which is defined as anti-state violence. While it is important to keep in mind that Benjamin refers to these in slightly different terms (as 'the political strike' and 'the proletarian general strike'), his end in adopting the language of divine violence and of the exception to the exception is conceptually identical to Sorel's in that it is in effect the project of creating what one might call an anti-state (1986 [1921]): 171). As we shall see in a moment, even Benjamin's theory of the work of art rests heavily on Sorel's Bergsonianism, in which he is explicit in equating his myth of the proletarian strike with the 'inner depths of the mind and what happens during a creative moment' (Jennings, 2004: xiii).[18] Finally, Arendt, as we shall see later, was deeply indebted to Sorel, and even Foucault seems to have been presaged by Sorel's arguments that:

[18] Compare, as well, Benjamin's account (1977 [1928]) of the work of art from *The Origin of German Tragic Drama* (and Agamben's that follows from it) with Sorel's adoption of Bergson's notion of 'intuition' which, as metaphorical model for the general strike, ruptures out of 'ordinary language' (2004 [1908]): 122). Sorel is explicit about his equation between his myth of the proletarian strike and the work of art, equating the former to the 'inner depths of the mind and what happens during a creative moment' (Jennings 2004: xiii). Thus, Agamben's own theory of art is traceable to Sorel, though he appears to be wholly unaware of it.

> [K]ings employed, for this purpose, men taken from their courts of law; thus they came to confuse acts of disciplinary surveillance with the repression of crimes…The Revolution piously gathered up this tradition (108)

Ultimately, however, nothing is so striking as how closely both Schmitt's and Benjamin's conceptualizations of sovereignty follow Sorel's understanding, with implications as we shall see in a moment for every aspect of their political thought, as well as for political thought which relies on their work.

Remarkably, however, Sorel's rightful place at the head of this tradition has been almost wholly unremarked upon by scholars of either Benjamin or Agamben, and, indeed, Agamben, its most important contemporary exponent, makes no mention of Sorel at all in either his treatment of Benjamin or sovereignty more generally. How should we understand this absence? It is clear that, for Agamben at least, something fundamental is at stake in his efforts to place Benjamin, instead, at the head of the tradition. The site of this polemical erasure, therefore, must be the starting place for this inquiry.

Anarchism, and the Left Critique of Sovereignty

For all its contemporary omnipresence, the importance of the critique of sovereignty within left and critical thought had waned significantly by the mid-19th c. with the success of Marx's thought, the first great modern project to take seriously the possibility that the question of sovereignty could be bracketed in history, both as end and means. For Marx, the essence of the concept of the proletariat was the project of creating a class that could finally organize itself collectively without sovereignty, though this could be accomplish only by ultimately abandoning two and a half millennia of the prioritization of the political (Marx and Engels, 1978 [1848]:

481-3). If it might be necessary to perhaps, as Marx suggested in some writings, consider a possible interim period in which it would be necessary for history to move through the taking up of state power, then it was the proletariat alone that could legitimately exercise this sovereignty (Marx, 1978 [1975]: 538). Given this context, it should not surprise us then that raising the critique of state sovereign power was largely viewed by mid-19th c. Marxists as essentially a counter-revolutionary question—the obsession of only liberals (and later, and especially irritatingly, anarchists).

This is the background against which we need to understand the emergence of a distinctively *left critique of sovereignty* amongst the group of thinkers—Sorel, and then Benjamin—whose work forms the direct genealogical basis for its' contemporary re-florescence. In the late 19th and early the 20th centuries, anxieties about the nature of the left's accommodation with political power produced a tradition of left-inspired political theories that re-oriented themselves and once again took as their central anxiety the sovereign violence of the state.

If we follow Sorel's account, the origins of this theoretical turn must be located in the responses of worker's movements—and the more radical thinkers associated with them—to the first instances of socialist parties in coalition with liberal governments in mid-century Europe, and especially France. The issue came to a head when, in the wake of the Dreyfus Affair, the so-called *Bloc des Gauches*, capitalized on the moment to win an electoral victory in 1902 (Jennings, 1999: ix). When one reads Sorel, one is startled to see that the question of what to make of the increasing assumption of political power by what they considered to be putatively left parties was, much more than any concern with the theoretical arguments of the right or liberals, the driving anxiety behind their work. Their thought must be understood against a

backdrop framed, first, by the decision by major socialist political figures to abandon the revolutionary project (and with it to accept the idea of the state as the basic system of political life), and, second, by the participation of left leaders in governments that increasingly used police powers against workers' movements. Read this way, the new left critique of sovereignty was an internal critique over whether the left could exercise sovereign power without being corrupted.

Against this, Sorel's project is to legitimate what is in effect an anti-state, and, indeed, this is precisely what is at stake in his famous distinction between a 'political general strike' and a 'proletarian strike.' The former is the familiar project of labor and the socialist left which retains as its ultimate goal the acquisition of state power by the left, while Sorel's general strike is defined by the fact that it is anti-state violence that desires to destroy the state once and for all. Though there were of course innumerable close linkages between the left and these movements, they must be clearly distinguished as conceptually as antithetical, as they were by both by their advocates and by the advocates of the main currents of the Marxist left. Not surprisingly, then, Sorel was overtly scornful of welfarist state socialism, preferring the vision of a future built from the (neither sovereign, nor political) building blocks of local workers' syndicates.

It is clear, then, that to place Sorel's uncompromising and explicit anarchism at the head of the tradition of the left critique of sovereignty (as it was, explicitly, for Benjamin, and, implicitly, for Agamben) is to risk bringing to the conceptual foreground of one's political thought and practice a number of politically disabling implications. As Sorel certainly understood, by defining the political itself as sovereign violence he was intending to undermine the possibility of any kind of legitimate political community, as such. It is clear, then, that to take up Sorel's rhetorically powerful descriptive vocabulary is to take up a set of tools with an

inherent and direct relationship to the kind of loss of faith in political possibility which so defines our contemporary moment. Nor could the current state of the disenchanted left be an accident in a historical moment in which Sorel's underlying concepts have become—through Benjamin, Schmitt, and Agamben—the dominant modes of political thought of our age.

Part III: Towards a Genealogy of Sovereignty

> [N]o jurist or philosopher has defined it.
>
> (Bodin 1992 [1576]: 1).
>
> How different is this Doctrine from the Practice of the Greatest part of the world, especially of these Western part, that have received their Morall Learning from Rome and Athens.
>
> (Hobbes 2001 [1651]: 254)

The Project of Political Modernity

By taking up Sorel as the basis for their political thought, Schmitt, Benjamin, and those who follow them, have committed themselves to a conceptual framework with its origins in a much earlier period, and, despite its claims of radicalism, in the hegemonic tradition of modern political thought. Indeed, nothing is better testimony to the success of political modernity than how widely the language of sovereignty has been—and remains—accepted as a natural and universal concept, and yet for the founders of that school of political thought that would take for itself the name 'modern'—and this quite explicit initially in Jean Bodin, although Hobbes generally tries to disguise the fact—sovereignty was neither an ancient or timeless idea, nor a description of

something actually then existing in the world. It was, rather, the keystone of an explicitly polemical *project*—the gesture of course is to Alasdair MacIntyre (2002)—for which Bodin, in his famous *Six Books of the Commonwealth*, wished to be receive credit (1992 [1576]: 1), intended to enable a degree of unification and centralization of power in the emerging monarchies beyond anything which then existed, or could have existed in the juridical terms of the day.

The purpose of these first applications of the emerging notion of science and rationalization to political ideas (e.g. Hobbes, 2001 [1651]: 35-37) was very explicitly to *rupture* and displace all the extant traditions of political and legal thought—and especially the classical republican tradition, the ancient tradition of the Roman law, the scholastic Aristotelian tradition of political thought, and the tradition of the ancient constitution—precisely because none of them countenanced the possibility of anything like the incredible unity of sovereign power as we moderns understand it (on Bodin see Skinner, 2000: 207-8 and Franklin (1992: xv-xvii, xxv); on Hobbes see Arendt 2004: 193). Indeed, read carefully and in this light, both Bodin and Hobbes clearly acknowledge that this was their object and intention (see Bodin 1992[1576[: 1; Hobbes 2001[1651]: 254).

To fully appreciate what was at stake in the project, it is necessary to drastically reconfigure our conceptualization of the context against which Hobbes, in particular, wrote, and, in doing so, the three great political traditions which occupy the privileged place in attacks of the modern writers tell us a great deal about sovereignty's pre-history. In this light, far from the common schoolbook sense we have of Hobbes as the first great political intellect, a spark of light challenging the fallacies of *Ur*-practices or of the Dark Ages, *Leviathan*, in 1651, was in fact written in reaction to the rise of the English Commonwealth, a moment that (despite Cromwell's

ultimate failings and the subsequent inadequacy of the Glorious Revolution) must be remembered as a great historical high point of republican ideas. As Quentin Skinner has shown in his remarkable book, *Liberty Before Liberalism* (2001), classical republican ideas—through the reading of the Roman historians and of Machiavelli's *Discourses,* in particular—were the dominant political ideas in the era, and what held together writers like John Milton, Henry Neville, Algernon Sidney, Marchamont Nedham, James Harrington and Francis Osborne as a group was, as he shows, precisely their refusal—both politically and conceptually—of what Bodin and Hobbes would call sovereignty. The second great tradition which these thinkers explicitly sought to destroy was the ancient tradition of the Roman law—rooted in the reading and citation of Justinian's *Corpus Juris Civilis*—which had done nothing less than determine legal thought and practice for more than a thousand years, and in which—crucially—the dominant tradition had always understood rulers as subject to the laws.[19] Finally, the third great tradition against which the modern theorists of sovereignty were working was what has come to be called the ancient constitution, the complex of overlapping and non-exclusive memberships, established by custom and habit, in such diverse institutions as towns, churches and guilds, and which preceded the unification and centralization of political life through the ideas of the modern theorists (see gen. Tully, 1995). Emblematic of the ancient constitution was the fact the England long had three legal system—law, equity and cannon law—each fully independent of the power of the crown and of each other.

As the modern writers understood, to undermine these long established traditions it would be logically necessary to construct an entirely new political vocabulary—self-described as

[19] For Bodin's self-described relationship to the Roman tradition see Bodin (1992 [1576]: 36-38, 132, fn. 58) and Skinner (2000: 208). On the tradition generally, see Stein (2002), Tierney (1988), and Bellomo (1995).

modern, scientific and comparative (Hobbes, 2001 [1651]: 110)—which could avoid all possible claims made in the language of existing forms of authority. To this end, Bodin (and later Hobbes) turns to a new idea—sovereignty—which they describe, in a self-congratulatory manner, as an abstraction, a concept that can name what is common (i.e. comparable) to all political communities at all times and all places. This fact goes a long way to helping us to understand the necessity of the idea of the 'state of nature'. What else could obliterate history? How else to push the constituent power of the people back entirely into an unrepeatable pre-history and make of it a relation among contracting individuals (i.e. not political citizens of a republic, residents of a town with historic rights, members of a feudal aristocracy with established and historically-specific rights, or members of the Church) precisely so that the new constituted political power—the sovereign—could be outside any obligation to any constituent power (esp. to the people, tradition, or the laws)? In its stead, the concept of sovereignty replaced millennia of development of complex political and legal forms of authority (and established modes for interpreting them) with one single modern and rational concept for all power—sovereignty. And, of course, what this brought to the fore—what could play this role of universal signifier conceptually—was only that most minimal aspect of communal life: force (and force alone).

Finally, when he turned to the task of elaborating what he refers to as the 'marks' of these new sovereigns, Bodin, astoundingly, did this by strict logical derivations from two concepts—absolute supremacy and perpetuity—necessary to the logico-juridical perfection of his system, but which had no previous place in the tradition or the history of political ideas (1992 [1576]:1). Nor was this, as some scholars have suggested, a reflection of some extant constitutional reality

(i.e. the relatively advance centralization of the French monarchy), which Bodin was supposed to be merely describing. As the invaluable Bodin scholar Julian Franklin writes:

> Bodin's account of sovereignty…was…the source of confusion that helped prepare the way for the theory of royal absolutism, for he was primarily responsible for introducing the seductive but erroneous notion that sovereignty is indivisible (1992: xvii).

Though this absolute and irreducible nature of has come to be our common sense understanding of what sovereignty is, such a statement would have been impossible within any of the important traditions of political thought in the post-Roman world before this moment.

To the contrary, far from our sense of it as an *Ur*-concept, sovereignty is solely a modern idea—and one which brings to bear on political life the full weight of post-Cartesian rationalism. Sovereignty, in a manner that foretold its application to the European colonies (see gen. Mamdani, 1996), expresses a kind of unity and absolutism that would have been impossible in a pre-modern world defined in terms of a complex interplay of overlapping and relative relationships.

Though it was by no means the only traditional impediment, the comprehensive unitary power of modern sovereignty—embodied in Hobbes' infamous frontispiece Leviathan straddling images of secular power on the left and Church power on the right—would have been impossible, at least until the Protestant Revolution had already broken down the ancient dualist tradition of co-equal political and church power that defined the boundary between secular power and the Church in the lands of the Western Church from Augustine and Gelasius until the new rationalized political 'science' of the moderns provided a language for the newly empowered kings to assert their claims to power in a language fully outside any traditional form

of authority. Harold Laski has summed this case up nicely in his argument that Gelasian dualism broke down only after "Luther was driven to assert the divinity of states" as a basis for the radical new claims of the emergent sovereign against the traditional jurisdictions of the Holy Roman emperors and the Popes (1950: 45). So, in spite of the arguments made as part of the recent florescence of political-theological ideas, it was only Reformation thought which seriously and systematically asserted the divinity of the state. Before that time, the dualist system, which determined Church doctrine for more than a millennium, had been based on the thought of the great theologian and Ciceronian Augustine, whose thought—to follow Tierney's reading (1988)—gave man a clear choice between two societies competing for his allegiance, though neither could ever prevail in the world—the City of the World (which implied civil government, but effectively meant the universal city of Rome), in which man must in fact live as a result of sin, and the divine City of God (not the organized Church, but the ideals of the Christian community). Until the authority of the universal Church was broken in parts of northern Europe, Church doctrine (and secular practice) remained based on the distinction, to adopt the language of Gelasius' famous 494 letter (*Duo sunt*) to emperor Anastasius I, between two historically enumerated forms of authority, which he called the 'the sacred authority of the priesthood' (*auctoritas*) and the 'royal power' (*potestas*), each with its own sphere influence. No concept or term existed for a universal power, and, within a single locality, members of the Church hierarchy and its property (including churches, monasteries, and vast Church lands) were subject to Church authority and canon law (even with regard to apparently secular matters), while secular authority was always divided by allegiance to the Holy Roman Empire and amongst numerous overlapping potentates whose authority rested on traditional forms of authority which

never rested on simple top down derivations of power. It was this complex system that the Leviathan bestrides.

There was no way that sovereignty could be created within the terms and logics of these traditional forms, and, because the traditional constitution was based on historically enumerated forms of authority which individuals held as offices, not as raw exercises of power (see gen. 1958, Gierke), it could not have been possible to impose modern power top down by force. Only after the Reformation kings broke the dual power of the universal Church in their lands (e.g. Henry VIII as head of the Church of England and the great seizure of Church land and monasteries) was it possible for a single, unified, and centralized form of power to emerge in the world which could claim to speak in a modern political vocabulary that no longer recognized any residual authority in historical forms of authority—whether aristocracy, Church, town, or any other institution or tradition through which communities and individuals had owed fully independent allegiance before this time. As James Tully's work has so importantly shown, the modern political vocabulary was the world-historical prerequisite for the unification of the language of power necessary to the centralization and rationalization processes we associate with the modern state (1995). As his work also shows, the contemporary invocation of that same vocabulary continues to have every bit as grave consequences for political thought and practice even today.

Accepting Political Modernity's Autobiography

To appreciate how much is at stake the contemporary decision to adopt the language of sovereignty—even for description or critique—it is important to understand how truly polemical

the mere invocation of the concept of sovereignty has been in the history of political thought. Obviously, a significant part of what is theoretically and rhetorically most powerful about the contemporary invocation of the critique of sovereignty is the sense that it expresses a new and particularly hard-headed recognition on the part of the person doing the naming—one exposing and cutting against liberal squeamishness about acknowledging power. This was as true of its earliest exponents, Sorel (2004) and Schmitt (1996, 2001), as it is today. To even say it feels as if one is saying *J'accuse*.

Its history, however, suggests that, to the contrary, nothing has contributed so consistently to the success and proliferation of our political modernity as its ability to get its critics—as much as its advocates—to accept and take up its political vocabulary. Indeed, both Schmitt (1996) and Arendt (2004) make the point that, understood in this way, it is not so much Hobbes' overtly polemical writings which mark the triumph of political modernity as it is early liberal thought (esp. Locke, Bentham and Austin) which unhesitatingly accepts the modern theory of sovereignty, though it does posit rights against it. This is because, before these early liberal thinkers could posit rights against a sovereign, they had to accept the language of sovereignty itself.[20] As a result, liberal political theory has always been conceptually about unconsciously legitimating Hobbesian sovereignty through rights-talk.

Nor is this a fleeting fact. Indeed every important voice in the modern liberal tradition—from Bentham (2001 [1776]) and Austin (2000 [1832]) to Weber (famously quoting Trotsky at Brest-Litovsk, of course) (1991 [1919]: 78) and H. L. A. Hart (1997 [1961]: 50-1)—has insisted that it is precisely his or her personal bravery in invoking the language of sovereignty that

[20] Tuck (2001) makes this identical argument about Puffendorf place, with regard to the theory of the relations between sovereign states.

distinguished them from the soft-headed idealists their critics accused them of being. Nor, was this any less true of those Arendt called the revolutionary tradition. From Rousseau (1978 [1762]) through the Jacobins to Sorel (2004 [1908]), Benjamin (1986 [1921]) and Agamben (1998), our political modernity's dominant intellectual and political counter-tradition has been no less shaped by its acceptance of sovereignty.

It should, then, not surprise us to find that the dominant contemporary critical Agambenian school has formed itself—and indeed defined its radicalism—through no fact so much as its willingness to invoke the language of sovereignty. There have, however, been important thinkers with doubts about accepting these polemical terms.

Two Traditions of Political Power in Political Modernity

In taking up the critique of sovereignty in Agambenian terms, contemporary scholars also committing themselves to two sets of modernist political assumption relating to how political power is defined: (i) The first, just discussed, involving Hobbes' classical modern theory of power as sovereignty, and (ii) the second, taking up the great theory of political power and the constituent powers of a citizenry that has its origin initially in the what amounts to the single great internal critique of the classical modern theory of power—by what Arendt has called the revolutionary tradition (1990 [1963]).

To understand these two modern traditions of thinking about power—and especially their conceptualizations of the relationship between the political and sovereignty—it will be helpful here to use an analytical distinction formalized by Abbé Sieyès in his famous pamphlet, *What is the Third Estate?* (1964 [1789]), but which is by now almost a commonplace in political theory.

Indeed, as we shall see in a moment, it, or some very similar distinction, appears in the writings discussed in this essay to by Benjamin (1986 [1921]), Arendt (1990 [1963]), and Agamben (1998). This is the distinction between *constitutive power* and *constituted power*— Sieyès' *pouvoir constituent* and *pouvoir constitue*. In modern political thought, this has come to mean the difference between (a) the inherent source of power that alone can authorize the creation of a political order (variously, the citizenry, the sovereign, the people, the nation), and (b) the sovereign constituted political body that represents that power. To further elaborate on this distinction, it will, perhaps, be useful to trace its meaning through the two great successive forms which sovereignty took in modern political thought.

The Classical Modern Tradition

As has been said, for the founders of classical *modern* political thought, Bodin and Hobbes, sovereignty was the great modern scientific concept that could displace and bracket every extant form of political authority through the invocation of a single, abstract, and scientific vocabulary for all political power, based on the lowest common denominator of force. Yet in addition to these top down aspects, sovereignty was also intended to undermine and bypass the legitimacy of every account of the inherent—*bottom up*—political power of already existing citizens or political communities. This too is what the social contract accomplishes, conceptually, for the modern writers, creating a moment after which all existing political communities and all preexisting claims especially those based on the tradition of the inherent political powers of citizens, can be bracketed. Put in terms of the logic of constituent and constituted power, the concept of sovereign power was about a one-time moment of agreement

through contract, after which it could be presumed that all legitimate political power would be properly constituted in the sovereign power, with none residual in its citizens (except fully collectively) or anything that came before it.

The target of this intervention by the modern thinkers was not 'superstition' or ignorance, as Hobbes (2001 [1651]: 35) and our contemporary popular readings of this moment would have it, but rather the classical republican theory of the inherent political power of the citizen (Skinner, 2000: 19). To make sense of this, it is necessary, as has been said already, to radically reshape our everyday picture of the moment of this intervention. In point of fact, this was a great historical high point for classical republican thought throughout Europe, based in, and renewed through, a canon—both pedagogical and political (and much reinvigorated since the Renaissance)—in which the great histories of the Roman writers served as keystones and backbones, and which culminated with the creation of republics in the Netherlands and then England.

The alternative political anthropology which the modern writers targeted was based on the much older and more established normative priority of the inherent, ineradicable and non-deferrable political power of the citizenry of a republic (see esp. Arendt (1998 [1958], 1990 [1963])). To make sense of this it is useful to distinguish three crucial differences between the earlier and the modern views. First, just as sovereignty replaced top down power with one term, here it insists that one term stand for both good and bad power. Where the crucial distinction for the classical republican tradition is whether a law is created by a republican citizenry (as opposed, for example, to that by a king or tyrant), the modern tradition insists that no distinction in terms be made between the most democratically legitimate law imaginable and the most illegitimate, between the sovereignty of a republican community of equals and the sovereign

power of Louis XIV or Hitler. As Skinner neatly summarizes the modern view: '[W]hat matters for civic liberty is not who makes the laws, but simply how many laws are made' (2001: 81). Second, now all political relationships between citizens are to be understood using the same term as that which describes top-down power. Finally, and perhaps even more importantly, the classical republican theory differs from its challenger in that it citizens were understood to possess real, inherent, and ineradicable *political* power, in their very persons and at all times.

It is helpful, in explicating this argument to distinguish how radically different this is from our more common understanding of the rights citizens possess against a sovereign in liberal thought. Technically and legally speaking, rights—within normal constitution conditions—require the recognition of the sovereign for actualization and are thus properly thought of as *limits* inherent in the sovereign's political power, not positive political powers in the individual. If the sovereign were to disappear, they would mean nothing and have no value, and here, again, one sees the ways in which classical liberal political thought remains trapped in the language of political modernity. To fully understand what is at stake here, it will be helpful to emphasize that, properly understood, the power of a sovereign is not political, at all, and neither is the limited power that subjects retain to resist against the sovereign after contracting in the state of nature. By contrast, traditional classical power was inherent in the citizenry, and the power of a republic is literally the expression of that power in conjunction with the other citizens. Unlike modern sovereign power, power is never given away or represented for one, and the end power of a republic is a fluid and historically specific thing—not an amalgamation of power, nor even a universal quality common to every community, but rather the expression of the actual human citizens it embodies at the moment. Most importantly, the residual power of subjects must be understood to be expressly extra-political in that it plays the role of a kind of state of exception to

the sovereign order, and, because it is both ontologically and constitutionally distinct from the power of the sovereign, it can play no role in the normal state of day-to-day sovereign affairs.

To appreciate this, it is necessary to recognize that political power and rights are absolutely distinct and of an entirely different constitutional and ontological essence, and, in modern constitutional legality, what is inaccurately called political power is vested in and exercised exclusively by the sovereign—Locke's '*one Supream Power'* (1988 [1690]: Sec. 149) with the all rest 'must need be…subordinate' (150). Sovereign subjects here do 'retain' (149) a limited and residual kind of powers, which is not political power (see also Hobbes, 2001 [1651]: Ch. 14). This power is the strictly extra-political and extra-constitutional right of 'saving themselves…and *Self-Preservation*' (Locke: 149) by replacing tyrannical sovereigns, but this is only, in effect, what we might call an emergency or exceptional power and has no constitutional meaning in normal legality. '[W]hilst the Government subsists,' says Locke, the sovereign must needs be the supreme 'and *all other Powers* in any Members of parts of the Society, [must be] derived from it and *subordinate* to it' (150) (italics added).

One sees the specters of political modernity also in the way that, having accepted the modern writers' bracketing of every form of constituent power ,authority, and all history, all properly modern thought is necessarily entirely *presentist* and *rationalist* (from the question of what to do in the state of nature, to analytic philosophy and now rational choice and game theory). Through this framing, the contemporary power of the French king was naturalized, and arguments were to be made, without reference to any historical authority, as to what should be the relationship between this power and individuals (understood in the language of nature). By contrast, the earlier tradition recognized political power, properly so called, through tradition, authority and practice. What the tradition could not explain (and indeed has never been able to)

was the rational choice game of how a person stripped of all these traditional forms of power could get them back from the new sovereign power solely through the language of rationality and nature.[21]

Remarkably, and for all the importance of Skinner's historicization, the most important source in the defense of this account is Hobbes himself, who writes of his own project: 'How different is this Doctrine from the Practice of the Greatest part of the world, especially of these Western part, that have received their Morall Learning from Rome and Athens' (Hobbes 2001 [1651]: 254). Indeed, it is clear, in *Leviathan*, that Hobbes himself accepts the classical republican theory of political power as not just the object of his intervention but also the status quo opinion ('the Practice of the Greatest part of the world'), at least among at his educated contemporaries. How else are we to understand the importance he places on the fact that the social compact to create a Commonwealth (138) cannot be merely what lawyers call an implied contract, but must be an actual contract, *in fact*, corresponding in every manner to the requirements of a legal contract, including that it is 'voluntary' and shown by 'sufficient signe' (93). Implicit in this fact is the recognition that these individuals—even in a state of nature—retain real political power, and that this power is sufficiently important that no sovereign may assume it or merely take it by force but that it must be—in fact—given, and not simply as a product of coercion or threat (see gen. 94-100). If sovereignty were the natural pre-existing state of affairs, none of this would be necessary because the sovereign could simply act to create the Commonwealth in precisely the same manner in which it legislates for the domestic sovereign order. The grim fact is that Hobbes understood something that most of the great theorists of

[21] It will be clear immediately that in this paragraph I am following, and extrapolating on in political terms, MacIntyre's arguments and genealogies in *After Virtue* (2002).

power in political modernity (including Locke, Austin, and Weber) still do not—that the 'state of nature' was a key to a polemical project, and never a claim about nature, human or otherwise.

To sum up in the language of constituent and constituted power, the 'state of nature' pushed constituent power back entirely into an unrepeatable pre-history and made of it a relation among contracting individuals (i.e. not political citizens) precisely so that constituted political power—the sovereign—could be outside any obligation to any constituent power (esp. the preexisting power of the citizens of a republic, the aristocracy, or the laws). In so doing, however, it also served to strip away all traditional forms authority in which there was understood to be an inherent constituent power in citizens themselves. What the social contract accomplished, as much for liberals as for Hobbes, is to create a one-time consensus that could form the basis for a rationalist defense for a sovereignty that, in fact, violated the very source of its constituent power, as even Hobbes understood it (see esp. Arendt, 1990 [1963])

The Revolutionary Tradition

Comprehending these inadequacies of classical modern and liberal theory is necessary if we are to understand the ideas of the *revolutionary* tradition which sought to supersede it. The goal of the founding theorists of the revolutionary tradition (which ultimately includes the democratic, national and left revolutionary sub-traditions) was to find a popular-basis for political power, with which to contest absolutist monarchy. To genius of Rousseau (1978 [1762) and Sieyès (1964 [1789]) was to accomplish this was by turning on its head, so to speak, the logic of the classical modern relationship between constituent and constituted power, in a way that strongly emphasized the former at the expense of the latter. In this new formulation, the

new political question *par excellence* becomes, what pure ideal of constituent power—variously, the people, the popular will or the proletariat—can make a claim to representative legitimacy that trumps that of the sovereign constituted order of the Ancien Régime. The problem is that to accomplish this redefinition its founders had accepted—especially through their introduction of the new concept of *popular sovereignty*—the conceptual framework of the classical modern writers, including their account of (popular) political power as sovereign and their logic of constituent and constituted power. The popular expression that 'the people are sovereign' expresses this continued commitment by the revolutionary tradition to the crucial category that defines political modernity, and, as a result, while its advocates believe theirs to be a revolutionary project, it is more properly understood an internal critique or reform within the modern tradition.

What is more, two systemic problems flow from this theory, both of which Arendt treats in *On Revolution* (Arendt 1990: 161) First, the revolutionary tradition used the notion of popular sovereignty—of the constituent power of the people or the citizenry (and subsequently the nation)—to de-legitimate all previously constituted political power. In this view, the only legitimate sovereignty was that produced by the full constituent power of the people. However, as a result, *every* form of constituted power quickly came to seem suspect to the extent that any political order (or even any law), having been previously created, could never hope to truly represent the will of the constituent power of the moment. As a result, as Arendt nicely summarizes, 'a structure built on it as its foundation is built on quicksand' (163). Second, the modern revolutionary largely continues to accept the high modern concept of sovereignty as its definition of constituted power (e.g. popular sovereignty), and this, as well as the conceptual opposition they drew between constituted power and constituent power, stunted the growth of

theories of better political communities. As Arendt points out, the form (and degree) that political power takes remains that of the sovereign will of an absolute monarch, and, therefore, the men of the French Revolution 'put the people into the seat of the king' (156).

It is, as we shall see, the revolutionary tradition's conception of the political which Benjamin took up in the 20th century and passed down to the contemporary critique of sovereignty. It is defined by the question of how we can represent true popular, democratic or national power—read constituent power—in a political order that does not violate that power (161). What we will see is that this tends to produce a vision of politics in which a largely idealized revolutionary tradition of constituent power—still very close to the tradition which passed from Sieyes, to Rousseau, to Robespierre, to St. Just, and to Marx—is largely concerned with the question of how to undo sovereign power. Political thought then come to be largely about an attempt to define what kinds of constituent power (the nation, the proletariat) can create a legitimate kind of violence (revolution) that can permanently remove the violence of constituted sovereign power. In short, these theorists remain confined within a logic of positive constituent power and negative sovereign constituted power.

What is missing from this binary account of political power is precisely the possibility of a positive, constructive non-sovereign political power (which had traditionally been located to the republican notion of the inherent political power of the citizen of a republic (see Arendt, 1998 [1958] and Skinner, 2001))—the kinds of theories that, as we have seen, predominated before the great intervention of modern writers. The point of this is that even today we still largely remain locked within a political logic that is really meant for breaking down old systems and not for imagining new futures, and the reason for this rests largely in terms of this binary of power in which so much of our thought takes place. Unfortunately, the contemporary theories of

sovereignty merely repeat this earlier conceptual vocabulary, and accept the modernist self-description of political life.

Walter Benjamin and the Weimar Critique of Sovereignty

The more immediate roots of our contemporary theory of sovereignty grow out of the quite explicit resonances that these earlier 19th c. writings seem to have had—for thinkers on both the right and left—in the constitutional debates of the Weimar Republic, and especially on the question of the use of its police powers. In this moment, Walter Benjamin's work represents a kind of hinge connecting the overtly political work of the Sorel and Schmitt to the main currents of critical thought and—through Derrida and Agamben—to the present. The reading of Benjamin's work presented here argues that we ought to view his work as much more directly political than most scholars have, and, specifically, that the two keys to understanding the terms his work was to take are his greatly under-appreciated conceptual engagements with Sorel's anarchism and with Schmitt's sovereignty, which together frame the terms of the critique of sovereignty which Benjamin has bequeathed to the present.

The Critique of Violence

With regard to the first of these engagements—with anarchism and the terms of the anarchist critique of sovereignty—Benjamin's famous "Critique of Violence" (1986[1921]) seems notable in the first instance for nothing so much as how closely it initially follows the text of Sorel's *Reflections on Violence*. This is interesting because Sorel is quite explicit that his

project is the expression of the limit possibility of the dual trajectory being traced out here: the complete triumph of an idealized constituent power and a complete and total dismissal of constituted sovereign order.[22] What is more, Sorel's anarchism, in a sense, finally gets around the anxiety (inherent in Marxism as much as in liberalism) that the constituent power of the people needed either constituted legal limits placed upon it or else some kind of education or consciousness-raising. In this sense then Sorel expresses a certain logical consistency in his idealization of constituent power, but at the same time anarchism opens up a set of doubts about the very possibilities of a non-violent political order of any kind. As a result, as Benjamin writes, following Sorel, the 'meaning of the distinction between legitimate and illegitimate [state] violence [which includes any kind of law] is not immediately obvious' (279).

Sorel's project had countered the Marxist necessity of a vanguard party with a more broadly idealized notion of constituent labor power which, he argued, could get away from the necessity of constituting itself—as party or as the state—by replacing the traditional revolutionary logic of Marxism with a general revolutionary strike. Because its target was not the state apparatus as such, the worker councils were then never subject to the corruptions of state sovereign power that Leninist projects were at that time envisioning as a necessary stage. For these reasons, it is important that Benjamin at least initially seems to follow so closely to Sorel in his explication. On a certain level, and for a thinker who always defined central aspects of his own project in relation to the Marxist community, this would be an important move, and one that helps us to understand the full significance of the fact that 'violence' (not capital) has become the object of his critique (277).

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[22] Benjamin had read Sorel's book while in Switzerland in 1920, and, when he returned to Berlin later in the year, he wrote his essay 'Critique of Violence', which was finished in January of 1921. It originally appeared in *Archiv fur Socialwissenchaft und Sozialpolitik*, 1921 (Benjamin 1996: 252, 504).

In the last instance, however, Benjamin moves—for reasons that he never fully articulates—away from anarchism. Instead, he suggest the notoriously opaque and problematic notion of *divine violence* (297)—a kind of messianic violence—that suggests itself as a kind of 'pure' revolutionary constituent violence against the constituted sovereign violence of the state (300). This is a notoriously difficult concept to grasp, and indeed Benjamin himself is not clear about what it will be. We are told specifically that we will not know what it looks like and will not realize what it is until afterwards. It is said to be 'lethal without spilling blood', but what could this possibly mean (297)?

To understand the specter that is haunting Benjamin, one would do better to move away from his term 'divine violence' in order to think about what it is—to follow David Scott's invaluable formulation (1999)—that this divine violence is working against and what it is supposed to accomplish. Keeping in mind that Benjamin does not use the terms constitutive and constituted but rather uses the terms *law-making violence* and *law-preserving violence* (1986[1921]): 287), what Sorel's anarchist project seems to have touched off for Benjamin is ultimately a set of doubts about the possibility of creating any—even proletarian—kind of law-conserving (i.e. constituted) violence that would not ultimately undo the revolutionary law-making-constitutive violence. As Benjamin says admiringly of Sorel, he 'rejects every kind of program, of utopia—in a word, of lawmaking—for the revolutionary movement' (292). Read in this light, I want to think about Benjamin's messianic *divine violence* as ultimately the expression of a certain exhaustion of the possibilities of the tools of the state and of law to revolutionary possibility.

It is, therefore, an interesting fact how few of the theoretically responses to Benjamin's concept of divine violence—concerned as they have been especially with the messianic elements

in Benjamin's thought—have recognized the very immediate *political* concern at the heart of this idea. Indeed, what is remarkable is how directly—and exactly—Benjamin's divine violence, in both form and implication, embodies the logic of Sorel's proletarian general strike, 'which sets itself the sole task of destroying state power' (291). As Benjamin himself writes, in explicitly elaborating on Sorel's terms, the key distinction is here is with the familiar 'political strike' (i.e. of labor unions and moderate socialist politics), and, to describe its essence Benjamin quote directly and extensively from Sorel in a manner which expresses the most practical of political concerns:

> The strengthening of the state power is the basis of their conceptions; in their present organizations the politicians (viz. the moderate socialists) are already preparing the ground for a strong centralized and disciplined power that will be impervious to criticism from the opposition, capable of imposing silence, and of issuing its mendacious decrees (291).

Benjamin's careful engagement with Sorel also tells us a number of crucial things about how we should understand this idea of a pure violence that can annihilate without bloodshed. The answer, as Benjamin describes it, is that, just as the proletarian general strike, it is 'as a pure means…nonviolent' (291), a 'pure immediate violence' (300), and 'messianic' (294-297)—also called 'revolutionary' (300) and 'law destroying' (297), and, as such, it is the very 'antithesis' (297) of traditional state violence—which he refers to, variously, as political (291), mythical[23] (importantly Greek) (294-297) and law-making violence (287).

[23] Thus, Benjamin's use of the term "divine" violence must be understood, within the term of his conceptual vocabulary, as 'messianic', a concept defined explicitly in contradistinction to the 'mythical' (which is to say Greek and political) (294-297, 299).

Yet one must be careful not to take this too far, because we also have to ask ourselves why it is that Benjamin doesn't follow Sorel all the way (as Agamben perhaps does). In other words, if this was simply a critique of state violence and law, then why didn't it fully embrace anarchism? That Benjamin resisted this last step is clear from his own explicit dismissal, within that same text, of what he calls 'childish anarchism' (284).[24] This point will be crucial to distinguishing Benjamin's thought from Agamben's, in that the latter builds his theoretical edifice almost exclusively from the anarchic elements in Benjamin's writings, while making almost nothing of this more practical and political tendency.

Why then did Benjamin turn away from Sorel's anarchism? The answer is not clear from this text, but, looking at the span of Benjamin's work, and especially its *telos*, there seem to have been two, frankly contradictory, reasons. First, it seems as if raising the question of violence has provoked in Benjamin's thought a set of doubts about violence that, in the end, run deeper than Sorel's, such that, while the latter celebrated the specific violence of the Syndicalist strikes as necessary to destroying the state, the former, while keeping the term violence at the center of his program, insists that it is a 'nonviolence' without spilling blood. Second, at the same time, in resisting anarchism outright, Benjamin seems to have retained a certain anxiety about giving up the project of the political, in general, and socialism, specifically.

What is clear is that haunted by his anxieties about violence and political possibility, Benjamin's divine violence (which had initially taken the Sorelian form of the limit possibility of the revolutionary tradition's celebration of constituent power without constituted power) ultimately emerges, in the 'Critique' (despite its initial anti-utopian sympathies) as something

[24] The full quotation is as follows: "Nor, of course—unless one is prepared to proclaim a quite childish anarchism—is it achieved by refusing to acknowledge any constraint toward persons and declaring 'What pleases is permitted'" (284).

like the quality of a pure revolution purged of its fallen human violence. In this fallen and melancholy revolutionism, the idea of divine violence serves simultaneously as a kind of final exasperation at the very possibility of a new ideal political order, which can only make sense in the context of a residual idealization of the political (i.e. something like the Platonic ideal of the political, or the politics of a pre-fall Eden). It is, finally, an expression both of political exhaustion and of a still retained hope of what politics could be like—if human beings, perhaps, did not have to make it?

Schmitt / Agreement Hate Suspicion

The second of Benjamin's defining theoretical engagements was with Schmitt's conceptualization of sovereignty. A clear understanding of the full meaning and purpose of Benjamin's engagement with the concept must recognize that sovereignty was for the left at that moment, as has been said, a category viewed with suspicion. However much this might have been true in an abstract theoretical sense, it was certainly all the more true in Weimar Germany, where the politics of the right had come to be expressed explicitly and fundamentally in the concept of sovereignty. The intellectual spokesman for the German right on the question of sovereignty was Carl Schmitt, and, of course, this made him the great enemy of the left. Today, the brilliance of Schmitt's critique of liberalism has earned his work enormous readership across political boundaries, but, in the context of the constitutional crises of the Weimar Republic, he stood for the principle that the German exercise in liberal democracy had been a failure. It had shown its inherent weakness in its inability to stand up to the anti-constitutional extremists (on both left and right), and Schmitt, in this early period, believed that the only way to save the

German state was for a sovereign leader—as *diktatur* (Schmitt, 1928)—from the right to declare a state of emergency, suspend the constitution, and rule with dictatorial powers until such time as the anti-state forces of both left and right had been neutralized. After this, he believed that normal politics could, and should, be renewed (see gen. Schwab, 1996).

The theoretical apparatus that justified this politics had been worked out in Schmitt's earlier writings, but it is best known through his most famous text, *The Concept of the Political*, published in 1927. Those ideas must be understood, as least in this regard, as the form of Schmitt's response to the thought of the great liberal legal theorist Hans Kelsen, who had been at the center of the Weimar constitutional debates. Kelsen, famously, had sought to overcome the legal *aporia*, between constitution and law, at the heart of every constitutional order. At the heart of this gap is the question of how, in terms of the logic of the rule of law, a constitution can be legal if it precedes the very mechanisms that can make an enactment legal. If, in other words, the concept of legality requires that something must be made according to law, how can something be legal in the first instance? Kelsen's answer was the *grund norm* (basic norm)—a higher, unwritten norm of general legality—which could simultaneously legitimate the constitution and the laws in legal terms (2000 [1945]: 110).[25] Politically, the implications of Kelsen's work, as drawn by liberal constitutional scholars in response to the calls for a state of emergency, was that the Weimar constitutional order (technically its *grund norm*) was a comprehensive and hermetic legal order in which everything, including sovereignty, is defined by law. In this framework, the concept of the state of emergency—the suspension of the law and the constitution (which Schmitt advocated)—was both logically impossible and strictly illegal.

[25] Kelsen laid out these arguments in earlier writings, but they are, in English, most readily available especially in *Pure Theory of Law* (1967 [1934]) and *General Theory of Law and State* (2000 [1945]).

Schmitt's now well-known response was to reject the claim of a hermetic legal system as a fiction. Instead, he argued that political life was, in its essence, not defined laws, but rather by the categorical fact that the possibility of violence can never be removed from life. For Schmitt, every community must, at some point, be challenged by some force—external or internal—which seeks to destroy it. At that time, most people and communities will respond inadequately, but someone, or some group, will stand up and—in naming the Other as the enemy—defend the community. In *The Concept of the Political* (1996 [1927]), sovereignty is the name that Schmitt gives to the necessity of the distinction of friend-enemy in the face of the ever present possibility of violence. What must be emphasized is that, because this argument was a response to his debate with Kelsen (see gen. Schwab, 1996), [26] it was necessary for Schmitt that sovereignty be something absolutely ontologically distinct and prior to the constitutional order. That is to say, as Schmitt argued in his most explicit treatment of the exception (*Political Theology: Four Chapters on the Concept of Sovereignty*), it must be categorically of the quality of an exception to that order (1985 [1922]: 12-15).

This is the context in which Benjamin was working, and it, as much us anything could, gives us a sense of how much he obviously felt was at stake intellectually in this taking up of the concept of the exception, which was so deeply implicated in the politics of the German right. An important account of Benjamin's intellectual engagement with Schmitt comes from an interesting recent essay by Horst Bredekamp, in which the author emphasizes how seriously Schmitt's work was taken in that period. It is quite clear that Schmitt's theory of the exception was very much the concept of the moment, and it was taken up even by scholars of the left, such

[26] This reading, and Kelsen's place, is consonant with George Schwab's arguments in his introduction to Schmitt's *Concept of the Political* (1996).

as Benjamin, as simultaneously a metaphysical revelation and a great scandal, just as it was to be again a few years ago (see Strong, 1996).[27]

It was in this context that, as a young scholar, Benjamin most directly engaged Schmitt's work, particularly in the context of writing his early book on *The Origins of German Tragic Drama* (1977 [1928]). What Benjamin found in Schmitt's exception was a concept that could make sense of his understanding of the true nature of the work of art, which explodes against the continuity of ordinary life. Art, here, literally is the exception, and the motif of the abrupt departure from the time of normalcy corresponds exactly to the concepts of shock, the now, and suddenness in the vocabulary of contemporaneous avant-garde thinking. Nor should this relationship to art theory be surprising, given that Schmitt's own ideas on the exception were themselves deeply indebted to Sorel's explicit Bergsonianism.

Of course, the existence of this debt to Schmitt has not gone unnoticed by scholars, but what is truly fascinating is how close and direct it appears to have been. Bredekamp shows in considerable detail the terms of Benjamin's explicit esteem for Schmitt, which he charmingly calls 'one of the most irritating incidents in the intellectual history of the Weimar Republic' (1999: 247). Though his references to Schmitt in his writings are not numerous, Benjamin clearly acknowledged his intellectual debts in some largely unread writings and sent him several generous letters and some of his writings. Given that Agamben has argued extensively that the terms of this debt are the reverse and that Schmitt owed his ideas on the exception to Benjamin, it will be worthwhile to treat this debt in some small detail.

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[27] Regarding Schmitt's influence, Tracy Strong writes that his work has been 'taken seriously on all parts of the political spectrum' (x), and her references include Schmitt's influence on Carl Friedrich, Franz Neumann, Otto Kirchheimer, Jurgen Habermas, Julien Freund, Reinhart Koselleck, Karl Grunder, Alexandre Kojève, 'the Italian and French Left', 'those associated with the radical journal *Telos',* and Chantal Mouffe, as well as the Nazi party, the 'European Right', Leo Strauss and 'American conservatives of a Straussian persuasion', and especially Hans Morgenthau and Henry Kissinger.

To begin, the four volumes of the Benjamin's *Selected Writings* contain two instances in which Benjamin acknowledges his debts to Schmitt. The first is from a précis written to intellectually situate his scholarship in applications for early academic posts (entitled 'Curriculum Vitae (III)' and written in 1928), and it reads, in relevant part:

> This task, one that I had already undertaken on a larger scale in *Ursprung des deutschen Trauerspiels* was linked on the one hand to the methodological ideas of Alois Riegl, especially his doctrine of *Kunstwollen*, and on the other hand to the contemporary work done by Carl Schmitt, who in his analysis of political phenomena has made a similar attempt to integrate phenomena whose apparent territorial distinctness is an illusion (Benjamin, 2005: 78).

In addition, in December 1930, Benjamin wrote a brief letter accompanying the delivery of his *Trauerspiel* book to Schmitt himself, whose treatise *Political Theology* he acknowledged as a principle source. It includes the following acknowledgment:

> You will quickly notice how much this book, in its exposition of the doctrine of sovereignty in the seventeenth century, owes to you ('Chronology, 1927-1935', in Benjamin, 2005: 839).

In the same letter, Benjamin also referred to Schmitt's recent work in political philosophy as a confirmation of his own in the philosophy of art.[28] Nor was the relationship one sided, as Schmitt acknowledged openly.[29]

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[28] Bredekamp provides the following translation (and additions) for the same note: 'Esteemed Professor Schmitt,…Perhaps I may also say, in addition, that I have also derived from your later works, especially the 'Diktatur', a confirmation of my modes of research in the philosophy of art from you in the philosophy of the state…With my expression of special admiration, Your very humble, Walter Benjamin.'

[29] Schmitt was very generous in spirit in his notes to Benjamin, and, later in life, even claimed his book written immediately subsequent to Benjamin's—his *Hamlet or Hecuba*, published in 1950—was 'a response to Benjamin' (Benjamin, 2005: 839).

This certainly does not mean, however, that Benjamin ever viewed Schmitt entirely without reservations. Indeed, in Bredekamp's most provocative revelation, he shows that, after discussing Schmitt with Brecht in 1929, Benjamin had written the following to himself in his notes: 'Schmitt / Agreement Hate Suspicion.' It will be in the light of these inchoate doubts, especially, that we will want to read the development of Benjamin's thinking on the question of sovereignty.

The sovereign exception thus comes to the center of much of Benjamin's subsequent thought, and his project—theoretically and politically—comes to be defined by the question of how we might escape the exception.[30] This reading helps us to make sense of Benjamin's most famous treatment of the concept, from Thesis VIII of his 'Theses on the Philosophy of History,' in which he writes that 'the 'state of emergency' in which we live is not the exception but the rule' (257). How, specifically, Benjamin had worked out his own thinking on the sovereign exception becomes clear if we compare the full text of Thesis VIII, to Schmitt's conception, or to the common contemporary formulation influenced by Agamben, in which the idea of the exception has come to be applied to late modern political life, *tout court*. To appreciate this fully, it is worth citing the entire eighth thesis, written in 1940:

> The tradition of the oppressed teaches us that the 'state of emergency' in which we live is not the exception but the rule. We must attain to a conception of history that is in keeping with this insight. Then we shall clearly realize that it is our task to bring about a real state of emergency, and this will improve our position against Fascism.[31]

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[30] To his credit (and this, regrettably, distinguishes him from some of his contemporary readers), Benjamin took seriously the full political implications of these ideas for his political thought (Benjamin, 1969 [1940]).

[31] Thesis VIII continues:

In sharp contrast to Schmitt or Agamben, in Benjamin's late essay—written in the shadow of the Nazis—fascism now represents the exception which ordinary life can make no sense of in its conception of history, and only the radical concept of the exception, he argues, can make clear what is truly at stake in it. This, it is argued here, is the definitive moment in Benjamin's political thought, and, to understand how, it is useful to understand how this late framing has differentiated itself from Schmitt's account. Benjamin, at least momentarily, rejects Schmitt's thesis that the exception is the categorical determinant of all political life and instead names and locates the exception as fascism. Instead, he introduces at least the mere possibility of an *exception to the exception*—the 'real state of emergency' (which here is essentially a developed sense of his divine violence).

The question then arises of how, finally, one should understand both Benjamin's movement away from Schmitt and his emergent concept of the real state of emergency as the exception to the exception? The interpretation proposed here is that what we are seeing is Benjamin pulling back from his more radical early positions. Faced with the reality of the Nazis, he commits himself in Thesis VIII to a firm distinction between fascism and (even) the liberal legal order that preceded it, and, although still within the terms of the logic of the exception, he recognizes that some kind of power—the real state of emergency—must be brought to bear in response. Unfortunately, this doesn't leave him with very much room to work. Theoretically, the real state of emergency, like the divine violence, is still nothing but a pure, unnamable

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One reason why Fascism has a chance is that in the name of progress its opponents treat it as a historical norm. The current amazement that the things we are experiencing are 'still' possible in the twentieth century is *not* philosophical. This amazement is not the beginning of knowledge—unless it is the knowledge that the view of history which gives rise to it is untenable (Benjamin, 1969 [1940]: 257).

constituent power, and as an exception to an exception, it can have no constituted form. Yet, one must leave Benjamin understanding that, politically and practically, he could not quite leave matters where his own early theory of the exception was leading him.

Doubts

This all we might dismiss as merely history, so to speak, were it not for the fact that it is on precisely this edifice—and especially the his anarchic reading of the early Benjamin of the 'Critique of Violence'—that Agamben has sought to build his own emergent tradition. This too, then, is also what Agamben has handed down to those of us whose critiques of sovereignty have been influenced by this work, and, as in effect the new dominant critical paradigm, this is now the intellectual context in which we all work. It seems, then, to be of special relevance to understanding the potential yield and legacy of so much recent scholarship that, in the reading proposed here, Benjamin himself (if not fully successfully) clearly sought to differentiate his own later work from the tendencies which (as we shall see in a moment) Agamben has stressed. It is, therefore, a matter with very direct and immediate implications for contemporary thought that Benjamin—both within his early work (his rejection of anarchism) and over time (his later work naming the exception)—expressed clear and grave doubts about the conceptual and political inadequacy of a the critique of sovereignty. The specific implications of these doubts—especially its close relationship to both an anarchism of political exhaustion and an acceptance of the account of the political favored by both rightist and realist—are something that every scholar working in this tradition has an obligation to interrogate.

Part IV: Bringing Sovereignty Back In

Of course, it was Derrida who brought the question of sovereign power and violence—and especially Benjamin's text—back to the center of contemporary critical thought. In his now famous 1989 lecture, 'Force of Law: The "Mystical Foundation of Authority,' Derrida turned directly to Benjamin's critique of violence (1992). The choice of Benjamin's essay was in no way peculiar. As Derrida well knew, to address the question of sovereignty in the Critical Theory tradition (as well as the broader European critical tradition) clearly meant to read Benjamin (and Schmitt). The decision was, however, frankly puzzling to many of his readers both because this marked the first time Derrida's work had dealt with such overtly political matters, and because the critique of sovereignty raised the question (for both left and liberals) of what could to be gained from an critique of sovereign power which appeared to ultimately call into question modern democracy and welfare state socialism.

For Derrida, however, it is clear that this moment—defined by the end of Soviet Union and the apparent triumph of neo-imperial U.S. liberalism—had provoked an anxiety about the lack of political purchase in his earlier deconstructive scholarship (Mitchell and Davidson, 2007). In this reading, then, the taking up of the critique of sovereignty appears as both the definitive act of the transition to 'the late Derrida', and as the fundamental kernel that would haunt all of his more political subsequent work (Leitch, 2007). Sovereignty had emerged in his thought as perhaps the great thesis against which all his subsequent projects array as a series of antitheses. To what extent this was shaped by the reading of Benjamin (or preceded it) is not clear from his published works, but what is clear is that his late, politically-inflected projects represent nothing if not the three logical possibilities open to a critical political theory that bases itself on the presumption of sovereignty-as-violence and the critique of sovereignty. First, one

could investigate ever more closely the violence of the sovereign power of life and death, as Derrida does in his numerous seminars and lectures on the death penalty, in his reading of Benjamin, and in his work on 'rogues' (Derrida, 2005). Second, one could try to bypass the question of sovereignty altogether by essentially abandoning the field of the political, in favor of communities built around affective relationships, as he does in his 'politics of friendship' mode (itself obviously his response to Schmitt's friend-enemy thesis) (Derrida, 1997). Or, third, one could turn to a Levinasian universal super-ethicality in order to trump and transcend the political, as in his work on cosmopolitanism (2002 [1997]).

Yet even as he was the major figure in the project of bringing (the critique of) sovereignty back in, Derrida's own work suggests that he was never fully satisfied with the political implication of this vein of thinking. To get a clearer sense of this, as well as precisely what the terms of his dissatisfaction were, it will be helpful to look more carefully at the 'Force of Law' essay itself. The text, of course, is vintage Derridean deconstruction. There is no explanation of why, invited to investigate the possibility of deconstruction in law, he should have chosen Benjamin's text as his starting point. Instead, there is an almost super-human close reading of Benjamin, with a great deal of arcana and very little in the way of argument or opinion, and this is how the essay ends, as well, after more than fifty-pages of discussion. Except that Derrida, for all of his strict deconstructive impulses, could not quite leave it at that. Almost in spite of himself, he attached what he called a 'Post-scriptum' in which for the first time one feels like one is reading the writings of a flesh and blood human being, who could not prevent himself from having an opinion, and who intrudes back into the text to express a doubt about Benjamin's work that he apparently was not able to put aside. What he says is, in effect, that he is right with Benjamin in his doubts about what sovereign violence does, and yet he could

not help wonder whether what he has provided us with—his divine violence—is enough to ensure against the possibility of what Derrida called 'the worst' (Derrida, 1992: 60)—and here, of course, he means the final solution. Don't we need, he wonders, more than just an anti-violence or an anti-state? Don't we risk that our divine anti-sovereign annihilating violence may not come in time?

This is a very interesting moment, and it is, it is argued here, the most important thing Derrida wrote politically, both for its frank anxieties and for its pragmatism. It is also fascinating for how much it reminds one of nothing so much the movement of Benjamin's own thinking, though Derrida, who is reading only the 'Force of Law,' does not see this. Like Benjamin before him, he proceeds with a careful unmasking of sovereignty's inner secrets only to find that critical doubts about sovereign violence can ultimately only create a deep ambivalence about the possibilities of unchecked violence it opens in the process. So we find in common, in the later work of both these writers, these dramatic and ambiguous conclusions expressing a deeply felt—if, frankly, still inadequately theorized—exasperation with the political present.

What distinguishes Derrida's work is that—coming in the wake of the Holocaust—his critical move against constituted sovereign power begins to double back on itself, and actually begins to implicate the critique of sovereignty itself, as something that comes to weaken our ability to limit the possibilities of the worst that humanity does. Unfortunately, Derrida remains trapped in the modern binary logic of sovereign power or the absence-of-sovereign power. In other words, without the possibility of a pure counter-power that the revolutionary tradition offered, he remains trapped between too much sovereign power and its absence, and, if this is so, his work may be said to stand for the ultimate inadequacy, without more, of even the most sensitive and ethically engaged criticism.

Part V: 20th c. Theorizations of Local and Non-Sovereign Political Futures.

Critical thought has moved dramatically in recent years in its theoretical orientation and commitments. Provoked, in particular, by the desire to critique American imperialism, we have witnessed the near eclipse of Derridean and Foucaudian theory by the Benjaminian, Schmittian, and Agambenian critiques of sovereignty. Yet perhaps we would be better off considering the shared trajectories of thought this essay has described in the later works of Benjamin, Derrida, and Foucault. Confronted, as we have seen, with the real threat of fascism, both Benjamin and Derrida came to express grave—and, it is argued here, fatal—doubts about the *political* adequacy of the critique of sovereignty. In the same vein, Foucault's final publications, on the project of the ethic of the care for the self as a practice of freedom, is profoundly ethical and political (1994 [1987]). Yet contemporary scholarship which bases itself on the work of Agamben, Benjaminians, and Schmitt remains consistently committed to a framework whose own greatest exponents abandoned those ideas.

Remarkably, even Carl Schmitt, the great *eminence gris* of sovereignty, did so. His late work, *The Nomos of the Earth* (2003 [1950]), must be read as his own abandonment of the concept of the exception. There, against modern positivism's account of law as mere rules and decrees, he commits himself to a rehabilitation of the classical Greek ideal of *nomos*, as the historically-specific expression of a political community's most basic organizing principles. The modern state may have succumbed to a world where whoever has the momentary majority can change any law through decree (in effect sovereignty) and through a view of law as simply a tool for molding people, but, in the *Nomos*, Schmitt clearly delineates an alternative vision of a

political community held together by commitment to a small set of basic principles—territoriality and division are crucial to Schmitt—structurally embodied down through history in its laws, and basic to every aspect of that community's institutions and beliefs through the structurating role they play in every aspect of existence. He is in effect saying that, first and foremost, we are the people who divide and order things *in this way*, and everything else runs from that as superstructure. Even Schmitt, then, just as the late Benjamin and Derrida did, names the exception—in this case the modern sovereign state (as it was for Arendt), and sovereignty is now no longer as something necessary to human life, as it was in his early writings. Not unike Arendt, too, his response to modernity's great political rupture is not to argue for the necessity of one more break (another exception to the exception) but rather to attempt to reinvigorate a historic tradition.

This is explicit in the *Nomos* because, whatever we think of his obvious celebration of (and attempt to naturalize) territoriality and property, Schmitt acknowledges in *Nomos* something that its advocates had not acknowledged since Bodin, that sovereignty was a project. If he believed that the period of the Westphalian peace based on state sovereignty and non-intervention—and frankly on colonialism—was the best solution the world had yet found to the how it ought to be ordered, he nonetheless recognized it was a culturally and historically specific institution with invidious implications for many people outside Europe.

Given this widespread abandonment of the critique of sovereignty by its own greatest advocates (with the exception of Agamben), it will be worth taking a moment to trace out a number of crucial 20th c. theoretical projects—notably all before 2001—which had sought to

create frameworks for the possibility of non-sovereign political futures. Regrettably most have been completely eclipsed in the rush to critique U.S. neo-imperialism, and, not incidentally, in critical political debates at present, our future choices are too often understood as limited, as it was famously in Hardt and Negri's formulation, to a choice merely of the location sovereignty (i.e. in the U.S., empire, or states) (2000).

It will be worthwhile, then, to begin to think about some alternatives that have been proffered—some efforts to speak outside of sovereignty. Once this becomes the task, one is struck immediately by both the degree and extent to which the greatest critical political work of the era between the WWII and 2001 was predominantly defined by the project of how to bracket sovereignty and an create the possibility of non-sovereign political futures, in general, and of how to get out of the conundrum inherent in the critique of sovereignty, in particular.

The greatest of these—and, not incidentally, the one that has emerged as most important in the moment of the triumph of the Agambenian model—was certainly, as we shall see in a moment, Arendt's work, but there were certainly others, within this and related traditions. The most enigmatic of these, given both the direction of his own work and its near complete absence in contemporary scholarship, was certainly Michel Foucault's genealogy of the 'state judicial apparatus' (1980) [1972]: 4). Whether this was his intention or not, this project—which even in his own work overlaps with, and is often occluded by the project of the injunction to cut off the king's head—traces out the 14th c. European transition from a system of justice based on courts of arbitration which because they were based on the right of the parties required their mutual consent of the parties and were never a permanent repository of power to a set of stable and well defined institutions which had the authority to intervene and which recognized right in those in power (4-5). In so doing, it suggests that Foucault wished to bring to the foreground of political

thought the possibility of de-linking the possibilities of the political (as *polis/res publica*) from the accretions of the state judicial apparatus, that 'complex system of courts-police-prison' (14) whose secret to success (and burden for subsequent ages) he recognizes was that it too 'had the appearance of public power' (6). Regrettably, Foucault never seems to have done much with this intention, clear as it appears to be here.

Influenced by Foucault's historicism, the work of Quentin Skinner has been without peer in pushing forward the possibilities of non-sovereign political futures. Skinner's magisterial work on the foundation of modern political thought both historicized the modern project of sovereignty and in so doing reasserted the central place of the (non-sovereign) classical republican tradition age immediately preceding political modernity (2000 [1978]). More recently, in his invaluable lecture *Liberty Before Liberalism*, Skinner has developed the programmatic implications of this earlier work more fully in what amounts to a full-scale proposal for a return to a republican politics based on the dominant pre-Hobbesian notion of political power (2001). This tradition, which Skinner calls neo-roman (11), he distinguishes from the modern by saying that, in the latter, 'what matters for civic liberty is not who makes, but simply how many laws are made' (81). In this reading, Hobbes had intentionally sought, through the invocation of this radically new term sovereignty, a single term that would lump together as indistinguishable the power of the tyrant and republican law (i.e. legitimate and illegitimate power). This newer definition of power, which Skinner insists is no older than Hobbes (4), was a conscious effort to break the then dominant republican tradition of the liberty of the citizens of a republic (10), which saw the political question *par excellence* in the distinction between the rule of a tyrant or king and legitimate republican laws. As such, the chief

question—for a contemporary revitalization of this tradition—would then be whether a law, its creation and its content, are in keeping with the best principles of republican liberty.

A number of Skinner's colleagues and students have made important contributions to this project, but James Tully's work deserves special recognition. Just as with Skinner, Tully's *Strange Multiplicity: Constitutionalism in an Age of Diversity* is an attempt to resuscitate a largely forgotten non-sovereign political vocabulary (1995). This, too, takes him back to the pre-modern (and pre-sovereign) tradition of the ancient constitution (58), and, in particular, to the language and practices of constitutional accommodation through which European peoples (in their best practices) negotiated with non-European peoples and among themselves (see gen. Ch. 4-5). This long-lasting tradition provided a vocabulary for compacts between communities which were based not on sovereign power, but on a mutual presumption that political power lay on both sides and would require mutual consent (61).

Finally, though not given anything like the attention it deserves in the present, the work of the philosopher Cornelius Castoriadis is second only to Arendt's in its theoretical sophistication and the breadth of its imaginary. What is interesting is that Castoriadis, who was himself an important figure in the Paris of 1968, mounts what is nothing less than an unashamed defense of democracy, a tradition which he defines through practices—dating to ancient Athens—of communal 'autonomy' (i.e. self-reflexivity and self-creation) (1991 [1979]: 88). Democracy, he stresses, was from its very inception about the possibility that people could make their own world together. Quite literally, the creation of democracy was a collective decision that the community (i.e. its laws) would be the product of conscious critical assessment and then self-correction (191[1979]: 101 and 1991 [1988]: 164). Though less concerned with the question of sovereignty than these other writers, for Castoriadis, the *polis*, itself defined fundamentally as

the equality of citizenship, was creation of a form of equality in which every citizen could (potentially) be equal, precisely because none could exercise what we moderns call sovereignty.

Arendt and the Possibility of Non-Sovereign, Non-Anarchistic Political Order

However, to fully understand what is inadequate in the contemporary Agambenian account of sovereignty and political power, one cannot do better than to turn to one of this traditions most perceptive readers and critics, Hannah Arendt. It will be useful to think of her work, for a moment, as a counter theory of sorts, which comes quite directly out of the same debates and theoretical milieu, but which makes something quite different of its doubts about sovereignty. Arendt, it must be remembered, was one of the most perceptive and careful readers and critics of Sorel, Schmitt, and Benjamin (Arendt, 1969). All of her political thought was produced not merely in a context in which these thinkers' ideas predominated, but a surprising number of her most well known ideas are quite direct elaborations on, or responses to, the ideas of those thinkers. With regard to Sorel and Schmitt, in particular, Arendt's resuscitation and celebration of the political-as-public-sphere and non-sovereign account of the Athenian *polis,* in *The Human Condition* (see Ch. 2, 1998 [1958]), is not just an inversion of Heidegger but also clearly an explicit rejection of Sorel's and Schmitt's attempts to define the concept of the political as sovereignty (see gen. Sorel, 2004 [1908]; Schmitt1996 [1927]). However, it is also clear that she had substantial debts and points of agreement with these writer including her critique of the revolutionary tradition, in *On Revolution* (1990 [1963]), as never more than a critique of sovereignty (and never a proper politics itself), which rests heavily on Sorel's critiques of the Jacobin tradition and the Middle-class' 'theory of social peace' and discussing

classes (2004 [1908]), as well as Schmitt's critique of liberalism in *The Crisis of Parliamentary Democracy* (2001[1923]). Her critiques of the social—in both in *The Human Condition* (see Sec. 6) and in *On Revolution* (Ch. 2)—and of totalitarianism (in *The Origins of Totalitarianism* (2004 [1951]), are both deeply indebted to Sorel's critiques of 'social politics' (75), 'Parliamentary Socialists' (67), and Jacobin statism, as well as to Schmitt's notion of the total state in *The Concept of the Political* (1996 [1927]: 22). Indeed, in *On Violence*, which addresses Sorel directly, her critique of modern politics based on interests echoes ideas laid out in Sorel's attack on politics based on the idea of 'interests' (Arendt, 1970 [1969]: 65, 75),[32] while her famous categorization addresses Sorel's distinction between force and violence (171). Understood in this way, Arendt's work forms the basis for both an internal-critique of the critique of sovereignty, but what it does with this makes it a possible basis for an alternative tradition of thinking about political power.

To see this most clearly, it will be helpful to supplement the familiar picture of Arendt from *The Human Condition* (from 1958) with her every bit as important, but less read, *On Revolution* (from 1963). From that latter text it is clear that although Arendt is known, in a short-hand sense, as a theorist of the public sphere, it makes a good deal more sense to think of her as first and foremost a theorist of sovereignty and political power (168). In fact, the argument presented here is that one cannot understand Arendt's work unless one first realizes that her entire project rests on its attempt to elucidate a non-sovereign, non-anarchistic political order. It is, it seems clear, in responding to this initial problem space that Arendt came to realize

[32] Sorel writes that the 'Socialist party founds its electoral successes on the clashing of interests" (2004 [1908]: 65); and also that '[g]overnment professes…that it will take into consideration the interests of the employers…and…the workers' (75).

her well known conclusion that political life—her famous public sphere—remains the best practically available form of human community (1990 [1963]: 124).

No less than Benjamin, Arendt's project was about the construction of a constituted political order that does not destroy the constituent power that created it. What distinguishes Arendt is her understanding of constituent power, constituted power and sovereignty, and the relationship she draws between. The terms of this relationship are nowhere clearer than in Arendt's distinct and crucially important account of political power and sovereignty in her genealogical essay on the revolutionary tradition. Where that tradition goes wrong, for Arendt, is that that its critique of sovereign power becomes a critique of political power more generally (147-8). Arendt, on the other hand, makes a clear distinction between political power and sovereign power. To do this, she accepts the basic revolutionary critique of the modern state as a constituted sovereign entity, but in contrast she insists that what is wrong with this system is not political power as such, but rather the more limited fact of sovereign appropriation of constituent power. For Arendt then, sovereignty is what happens when the state strips away the constituent power of the people who make it up and claims it for itself. Put another way, sovereignty is constituted power to which constituent power can no longer make any claim.

Yet hers is not a critique of power, either. What Arendt does by this distinction is to separate out the possibility of non-sovereign political power. The problem, says Arendt, with the European revolutionary tradition is that its logical bases in theories of revolutionary change led it inevitably into a conceptual *cul-de-sac*. As a result, it never really amounted to an alternative positive account of political power that could challenge the modern sovereign: It was always primarily a critical account of sovereign power (148). In this sense, it was always an impossible attempt to construct a permanent metaphysical revolution out of a mis-utilized destructive tool

bag. The ultimate failing of the revolutionary tradition, says Arendt, was its failure to put as much emphasis on creatively constituting and founding new bodies politic, as it put on critiquing sovereign power (148).

It is worth re-emphasizing this last point. Arendt argues that the same conclusion can be applied to the liberal political thought, too—that it is really a set of doubts about sovereign power not an alternative account of power. If this is so, Arendt's point is nothing less than that the entire project of European political modernity has, since Hobbes, been how to solve the problem of sovereignty with sovereign power—or no power at all. Arendt's contribution—and it is frankly stunning to realize how rarely this argument has been made in the modern era—is to suggest that there are more than these two possibilities. What both the revolutionary and liberal traditions missed, she argues, is a positive account of power:

> Hobbes's deep distrust of the whole Western tradition of political thought will not surprise us if we remember that he wanted nothing more nor less than the justification of Tyranny which, though it had occurred many times in Western history, has never been honored with a philosophical foundation. That the Leviathan actually amounts to a permanent government of tyranny, Hobbes is proud to admit: 'the name of Tyranny signifieth nothing more nor lesse than the name of Soveraignty..; I think the toleration of a professed hatred of Tyranny, is a Toleration of a hatred to Commonwealth in general' (Arendt, 2004 [1951]: 193).

Put in terms of constituted and constituent powers, the problem for Arendt is that the revolutionary tradition fails to see that these two categories must be understood as completely imbricating each other. Constituent power for Arendt is never completely outside of some kind of constituted form—people and communities come already constituted (165). Spontaneous bodies politic and past traditions mean that we will never know what it would mean to begin

from a pure constituent place. Political communities must always simultaneously be constituted and capable of re-constitution. Contrast this with the political anthropology implicit in political modernity (including the revolutionary tradition up to Benjamin and Agamben) in which the very notion of distinction between constituent and constituent power in constitutional theory still to this day necessarily implies pre-constituted people (i.e. the state of nature) choosing to form a political community outside of any pre-existing association.

A look at Arendt's political proposals in *On Revolution* will help to elucidate exactly what is at stake practically in her understanding of constituent and constituted power. What it suggests, in the first instance, is that she is ultimately a good deal more comfortable with the constituent power of the people than Benjamin or Agamben (264). Her exact relationship to this constituent power is actually quite complex, but it is important to recognize that while Benjamin (and behind him the entire canon of modern political thought) begins from a suspicion of the pre-constituted people as such, Arendt begins with the presumption not of liberal individual subjects pursuing their own interests, but of historically constituted communities and people desiring, for historically contingent reasons, the things we have come to call freedom, an equal share in public life, recognition and, importantly, a certain kind of order (248, 262).

Arendt's famous example of this is Thomas Jefferson's plan for a federated system of 'elementary republics' (248). By this he meant not the states (or even counties), which were much too big to allow participatory government, but rather the townships (and, better still, the wards), founded through the earliest charters of the settlers. Each of these was a 'political society' on the form of a republic, which 'enjoyed power and was entitled to claim rights *without possessing or claiming sovereignty*' (168) [italics added]. This 'new American concept of power…from below' (166) was to be based only on 'mutual promise and common deliberation',

never any sovereign power of subjection or mutual intervention (214): 'their title rested on nothing but the confidence of [political] equals…the equality of those who had committed themselves to, and now were engaged in, a joint enterprise' (278). For both Jefferson and Arendt, these elementary republics would then—without conceding sovereignty or their inherent power—coordinate (in their own terms) in ever higher councils, based on the federal principle of league and alliance among separate groups (267).

As more contemporary examples of the fact that this ideal represents a practical reality, at least in Europe and North America, Arendt cites numerous instances from the French, Russian and Hungarian revolutions in which, in the very first moments of revolutionary upheaval, an explosion of spontaneous (i.e. not based on shared ideological commitments) local political councils had occurred (267). What distinguished these councils in every instance (French *societies revolutionaire*, Russian soviets and Hungarian workers councils), before they were co-opted back into their respective sovereign revolutionary states, is their deep commitment to non-sovereign internal political relations among the participants (168). They were all committed—and this is what connects them to Arendt's famous defense of the New England town halls—to political relations in which no individual exercises rule over anyone else, and in which all members of the community must be allowed to participate in any community decision (254) . That is to say, power is never given up to a sovereign actor, but rather is retained by the people themselves.

What Arendt is up to in her discussion of these various 'political societies' is nothing less than an attempt to create an alternative conceptual starting point for political thought—against the radical individualisms of both liberal and anarchist thought. What is at stake in this new 'state of nature' is to show that as a matter of actual historical fact modern people, when their

states collapse, not only do not regress to a state of all against all (or recede into some kind of 'natural' collective allegiances), but rather tend (quite apart from any particular ideological commitments) towards the creation of *political communities* (265-6), though communities importantly quite different from our modern states (278).

Three absolutely fundamental political facts about Arendt's conceptualization of constituent power of a citizenry are expressed in this new starting state. First, Arendt wants to insist that we take both individuals and communities as they come—and as the product of their own contingent histories. Posed against the modern tradition's individualism—which frankly only ever made sense when included in a state of nature (165)—she insists that we begin our theorizations from examples of how real people in New England, France, Russia and Hungary dealt with these issues. Yet, and perhaps most controversially, she insists that the people of these communities did not need any sort of leader, vanguard party or any sort of educative consciousness-raising to direct their actions—they were, so to speak, self-constituting, and not just capable of self-constituting, but actually did so (267).

Second, against classical liberal individualism, Arendt's model is intended to elucidate the necessarily communal and collective nature of these councils—and thus of constituent power itself. What is at stake for Arendt in these moments is that our theorizations of our possible political futures must begin, not from theorizations of individual liberty, but rather from a shared and deeply held, but historically contingent, desire for community. This is a very particular kind of community, however, quite distinct from both the nationalist and Marxist assumptions of a thick unity. It is, instead, the product of real people coming together, for historically specific reasons, to create the kind of community which might best ensure and protect their historically contingent conception of democratic political liberty (278). This specific kind of community

Arendt calls ordered community (and ordered liberty), and the idea must be understood as a response to both anarchism and liberalism. The point for Arendt is that these spontaneous bodies politic are organs of a certain kind of ordered action (263). It is a claim that suggests two important elements: First, that people can be trusted to order themselves without sovereign leaders, and second that there is, at least in late modern people, also some kind of spontaneously recognized necessity of some kind of political order, a claim about which the Benjamin tradition becomes anxious.

Finally, and ultimately, these communities must be understood as properly *political* bodies (168), though this initially innocuous claim, however, implies for Arendt the question of subjection itself. This is because she understood that it is only in a political community that there exists the *possibility* for people to live outside of subjecthood, whether under private power, tyranny or sovereignty (153). Of course this mean that such a community must, by definition, be non-sovereign, in contradistinction to which she opposed to the sovereign political communities—which Arendt understood as tyrannical—in which we late moderns live. Nor was this an easy idealization of political life, since she certainly understood, as much as Foucault or Agamben, that a sovereign political community (e.g. the modern state) will likely have the potential to be much more terrible (because of its possibilities for comprehensive and rationalized subjection) than many traditional forms of human organization (e.g. the Ottoman millet system). Still, Arendt understood that only political life—in its non-sovereign form (as in her elementary republics)—offers the possibility of a life genuinely and consistently free from both subjection, and, as importantly, from subjecting others. Here her example is Herodotus' description of the *polis*, as the 'form of political organization in which the citizens live together under conditions of no-rule, without a division between rulers and ruled' (30). Viewed from this

perspective, celebrated contemporary trans-national communities based on relationships or principles determined by market forces (including the internet), single-issue advocacy, affect, neo-communitarian logics (including long-distance nationalisms), and anarchism (including World Social Forum movements) are not close cousins to, but are rather, as both private and social, near opposites to political community proper (70, 90). This is because in each of these I come to be the subject of power exercised by other individuals and groups based on innumerable private factors of status, wealth and community, while at the same time it cannot help, for the same reasons, to make decisions that subject others.

Of course, for Arendt there is more to this claim about a political community than just this. At a thick level, it means that the citizens who constituted these councils continue to insist (in contradistinction to what liberal, anarchist and syndicalist theory tells us) on the idea that, within the limits of the possible forms of social organization realistically open to us, human potentiality, both individual and collective, can best be reached in a kind of community defined by all the members of the local territory in which one lives (254). Against both our modern inclinations and liberal, anarchist, and now postmodern celebrations of the fracturing of the world into communities of affect, Arendt insists that it is in the political community alone—understood as a universal community within a locality—that any true shared sense of equality and recognition is possible (31).

This conceptual and practical priority of political life ultimately rests, in Arendt's account, on a shared desire for a certain quality of '*public* freedom' (124) and 'public happiness' (127), which can be acquired nowhere else (119). Thus, if her thinking has something like a historically contingent first principle, it is that modern alienation is the product of the frustration of our most basic human desire—to be acknowledged and to interact with (to become 'visible

and of significance' (124)) to *all* of one's peers in a community—which is impossible in modern communities of affect or market communities. Arendt calls this that 'passion for distinction' possible, in its fullest sense, only in the 'the light of the public realm where excellence can shine' (69). This, she says, is possible only in a community which includes all the local residents and in which all are recognized as equal, and only within a political community can this desire find an outlet in a shared participation in public affairs. This, she insist, is necessary to achieving the potential of both the community and the individual. For the individual, it is the presumption that she or he has, and must continue to have, a 'share in public business' and an actual place in every decision of the community (119). It is an expression, in the final analysis, of the inherent, and continual, significance of the constituent power of every citizen within constituted political life.

The Foucauldian Theory of Power

The second post-War critical project that explicitly sought to break the stranglehold of the discourse of sovereignty was Michel Foucault's work of the early 1970s, and, in particular, his theory of *power*—an attempt to create an alternative language for making sense of relations of power outside the priority given to the concepts of sovereignty and legality. This is what is at stake in the famous injunction that we must 'cut off the head of the king' (Foucault 1990: 89, 1980b: 121). We remain, Foucault argued in *History of Sexuality, Vol 1*, caught up in a language of sovereignty and law that developed and took its meaning during the Middle Ages as a language to simultaneously express, enable, and mask the power of the emerging monarchies. The problem, he argues, is that 'political theory has never ceased to be obsessed with the person of the sovereign,' with the result that those who work within this paradigm 'still continue today

to busy themselves with the problem of sovereignty' (1980b: 121). Nor is this merely true of reactionary political projects, and, indeed, the real targets of his intervention, as Foucault shows us, are the democratic and radical projects which continue to seek to critique sovereign power through terms—especially juristic term and law—which he believed could not be untangled from sovereign power. Thus, of what he calls the 18th c. criticism of monarchy, Foucault writes that it was not really a critique of sovereignty, per se, but rather made in the name of a better sovereignty—represented by 'a pure and rigorous juridical system to which all mechanisms of power could conform, with no excesses or irregularities.' In the same way, even what he calls the radical 19th c. critique of sovereignty which argued that the 'legal system itself was merely a way of exerting violence, of appropriating that violence for the benefit of a few… still carried out on the assumption that, ideally and by nature, power must be exercised in accordance with a fundamental lawfulness' (Foucault 1990: 88). In other words, he insists, even today the two great apparent alternatives to sovereignty, the revolutionary-democratic and left projects, continue to frame their critiques in terms of representations of power which remain caught in this old sovereign system and 'under the spell of monarchy' (1990: 88).

To get at exactly what is at stake for Foucault in this argument about power, it is helpful to supplement the more familiar writings on sovereignty with a surprisingly forthright statement from the recently published lectures of 1975-76, called *Society Must be Defended* (2003). There we find Foucault elaborating further on this argument in response to a remarkably frank and overtly political question he has posed to himself on how to move forward in the wake of the implications of his work on discipline and bio power. The moment presents the danger, he suggests with evident sympathy, that in a desire to undermine disciplinary institutions critical thinkers will turn to a renewal of older discourses that remain fundamentally bound up in

sovereignty. Specifically, his concern is that, faced with excesses in disciplinary institutions, critical scholars will turn to the most natural and available language, the language of classical juridical right.[33] 'What do we do?,' he asks rhetorically, 'We obviously invoke right, the famous old formal, bourgeois right. And in reality it is the right of sovereignty' (2003: 39). Nor, he concludes unequivocally, will this kind of recourse to sovereignty against discipline, as it were, enable us to limit the effects of disciplinary power. Finally, and somewhat uncharacteristically, in one of the more valuable contributions made by the 1975-76 lectures to our understanding of his work, Foucault elaborates on this still further: In this, perhaps his clearest statement of how he understood the project framing his work on power, he argues that, instead, 'we should be looking for a new right that is both antidisciplinary and emancipated from the principle of sovereignty' (40).

Given this picture of Foucault's work in this period, one cannot help but be struck by how fundamentally this particular problem space reminds us of Arendt's. Though so far as I am aware he only explicitly discusses her work very briefly in questions asked of him in one interview, no one can doubt that there is a relationship between her work on the origins of race thinking and state racism and his, but, in the absence of documentary evidence and given Foucault's notorious violations of standards of citation, it has not been possible to say with certainty either the depth or breadth of the debt, as he understood it. In light of this, perhaps the single most remarkable contribution of the 1975-76 lectures has been to show how directly and

[33] In his introduction to the *Power* collection, Colin Gordon gives two excellent examples of what it might mean, concretely, to mobilize what Foucault understood as sovereign juridical rights against the great disciplinary projects: (i) Regarding the 18th c. emergence of institutions of psychiatric internment, one can read this as 'the history of a hidden defeat of law by order: the displacement…of forensic scruple over legal competence and responsibility of legal subjects by the more summary criteria of the orderly and disorderly conduct of social subjects.' (ii) Similarly, the birth of the prison can be read as the story of 'modern penal practice as a defeat of law, the exercise of uncontrolled, parajudicial power within the closed space of the penitentiary' (Gordon 2000: xxx)

broadly Foucault's early 1970s work links to Arendt's. Throughout the lectures, for instance, one finds Foucault very directly framing his discussions—not just on the history of state racism, but also colonialism, revolution, and constitutionalism—in terms which suggest that Arendt's texts (at least *On Totalitarianism* and, perhaps more provocatively, *On Revolution*) were both recently read and foremost in his mind. [34] It is clear, therefore, that if we are to fully understand Foucault's work on power, we must place it in the lineage of texts this essay traces and as a direct response to Arendt's great provocation and challenge, in *On Revolution*, to create a political thought outside sovereignty and sovereign power.[35] Read in this way, it also becomes immediately clear that the terms of the debt go both much wider and deeper than this, including clear links to Arendt, Schmitt and Benjamin that have not been central to our understanding of Foucault. Most profoundly, the 1975-76 lectures show a direct and immediate intellectual debt owed by Foucault's conceptualizations of governmentality (Arendt's critique of government,

[34] The difficulties of establishing direct genealogies for Foucault's work are, of course, well know. As Fontana and Bertani summarize nicely in their conclusory note to volume of the 1976 lectures, one can only speculate on what books he had read, his way of reading books and the manner in which he used secondary source material. What we all know is that he is notorious for the inadequacy of his citation, and so, it should not surprise us that there does not appear to be any direct citation to Arendt in any of his work that I am aware of. That said, however, a provocative reference is made by Fontana and Bertani to the fact that works by Arendt were among those translated and published since 1970 and so were fundamental to the intellectual conjuncture in which the theory of power was being worked out (Fontana and Bertani 2001: 287).

It is obvious, even to a fairly casual observer, that the same questions inform key aspects of the work of both Foucault and Arendt. Both, for instance, took up the problematic of the how to get around the language of sovereign power, and both seek genealogical answers to the question for the origins of 20th c. state-racism and Nazi. The debt goes much deeper than that, however, and, it will be argued here, Arendt's work—or at least *On Totalitarianism*— was something that he had obviously read closely, and which clearly serves as a basic organization starting point through the lectures known as *Society Must be Defended.* The single most direct reference is Foucault's discussion of the 'boomerang effect' of colonialism as 'a whole series of colonial models were brought back to the West' (2001:103), which Arendt, of course discusses in *On Totalitarianism.* It is also takes up the question of '[t]he idea of revolution' (78), adopting the Arendtian political historical typology from *On Revolution,* and which leads directly to his treatment of racism (80-2). He also discusses the constituent and constituted power in a manner that emphasizes distinctly Arentian emphases (192-3).

[35] Jurgen Habermas has argued that Foucault's omission of these debts is theoretically necessary for because he cannot deal genealogically with the question of his own genealogical historiography (Habermas 1992: 269).

Schmitt's critiques of parliamentary democracy and ultimately Sorel's critique of Jacobin statism (Sorel 2004)), disciplinarity (Sorel's disciplinary surveillance (108)) and biopower (Arendt's theories of the social and colonial race history, Benjamin's mere life, Schmitt's total state, and Sorel's 'social politics' (24)). In so doing they help us to better place and assess what was at stake for Foucault in the working out of the theory of power, and thus they allow us to shine a new and illuminating light on key elements of Foucault's work in this area.

Foucault's response to Arendt's provocation takes the form of two deeply inter-related commitments—the first to a radical historicization of political forms and discourses and the second to the elaboration of a radically new theory of power, and especially the practice of power. Understood in this way, the remarkable breadth of Foucault's interventions in the early 1970s in fact suggest a surprising unity—as a comprehensive de-naturalization of the modern political vocabulary and in particular its continued commitment to the normative and descriptive timelessness of its theory of power and sovereignty. The great genius of Foucault's project was to historicize the dominant theory of power in order to locate the origins of the language of sovereignty and sovereign legality in a historically contingent series of contests over power and political discourse in the Middle Ages. To still further undermine this, he takes the important additional step of showing us that the discourse of sovereign power has never, not even in the great centralized states of the West, succeeded in being the only discourse or register in which power has operated. This is the role that his great partially overlapping conceptualizations of disciplinarity, governmentality, and biopower play in the overall logic of his political thought of this period.

To accomplish this historicization and to answer Arendt's challenge to imagine a political discourse outside of sovereignty, Foucault works out both a new language for, and ultimately a

general theory of, power. This is one of the more distinctive aspects of his political project, but, it turns out to be one fraught with problematic implications. Despite his many protestations that this was not a proper general theory of power, it clearly amounts to one at least as elaborated in his "Method" chapter in the first volume of *History of Sexuality*, and, frankly, even many of his most sympathetic readers will concede as much. Fontana and Bertani, his former students, write that, while Foucault 'always denied having tried to formulate a 'general theory' of power,' they conclude that he had done so 'on a number of occasions' (Fontana and Bertani 2001: 274-275).

The question then arises as to what are ultimately the implications of this attempt to create a new master term—power—that can both link up the various historically contingent discursive forms of power he himself has enumerated and extend his critique of power to include the non-governmental and non-political forms of power highlighted by his work on asylums and sexuality? Politically, this move makes sense: Doing double duty by calling into question both triumphant liberalism's claim to have transcended sovereign power through law and rights, and, as in his response to the young Maoists, the generation of '68's goals of achieving (sovereign) power, as well as the sense that accomplishing that would be enough, in itself, to radically change history (Foucault 1980a).

The problem is that, to accomplish this wider historicization, Foucault felt it necessary (in contradistinction to the concepts of disciplinarity, governmentality and biopower, which remain essentially historical) to elaborate his general theory of power through a single, generalized, and ahistorical term applicable to every instance of power—and no longer just politically, but socially and individually, as well. Habermas calls this a 'transcendental-historicist concept of power' Habermas (1992: 269), but, sadly, this ought really to remind us of nothing so much as Hobbes' great classical modern theorization of power.

To make sense of this claim, it is necessary to begin from the fact that *Leviathan* (and Part I in particular) is, first and foremost, an explication of a comprehensive metaphysics, which scientifically categorizes, through logical derivations from a single basis in man's elemental nature, all forms of both natural and human behavior (Hobbes 2001: 13-4).[36] The project is explicitly an attempt to apply both the categories and causal logics ("Consequences from") that animate the new science to the field of political life, and the result is that *Leviathan* envisions the world as first and foremost a universal physics, in which social life is understood through the same physical laws as the natural world.[37] The purpose behind this, as Hobbes shows us in his scientific table organizing the subjects of knowledge, is to locate a universal and natural core element of human behavior within the dominant contemporaneous understanding of political life as 'accidents' and mere history (61). This essential element he relocates in the sphere of 'Natural Philosophy,' where it is ultimately placed in his categorizations as a form of 'Physiques,' and thus naturally and inevitably subject to physical laws. The goal here, obviously, is to pull political life outside of history in order that it will thereafter be subject to universal natural laws, so described so as to make his polemical picture of the war of all against all and of the need for a sovereign seem inevitable. While, at the same time, this serves to

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[36] In *Leviathan*, with regard to 'Man', 'The Originall of them all, is that which we call SENSE…', and the rest are derived from that original' (Hobbes 2001: 13). Note that for Hobbes' 'Science' is defined, especially in Chapter V (*Of* Reason, and Science), as the process of logically deriving ('[f]or Reason, in this sense, is nothing but '*Reckoning* (that is, Adding and Subtracting) '), from 'Universals' in nature (26), the series of proceeding 'Consequences.' For more on Hobbes' use of derivations, see also pp. 31-33, 121.

[37] Hobbes' target here is the Aristotelian and Scholastic tradition *tout court* (i.e. the tradition of grounding metaphysical and physical thought on 'certain Textes of *Aristotle*,' associated with what he calls the Philosophy-Schooles and the Universities), but it is instructive here that Hobbes engages this attack first (Chapters I and II) at the level of metaphysics—and especially around the question of physical causality (14). His first assault on Aristotle, then, is not political, per se, but rather a challenge to their claim that 'Heavy bodies fall…out of an appetite to rest and to conserve their nature.' Against which Hobbes marshals, explicitly in the name of Science, the new physics: 'When a Body is once in motion, it moveth (unless something else hinders it) eternally' (15).

denigrate every existing political community not based on the new science—'Politique Bodies' and especially 'Common-wealths' (including all their historical rights and duties)—as mere '[a]ccidents' of history (60).[38] Hobbes accomplishes this primarily through his radically new application of the same physical laws to certain realms of the 'Consequences from the Qualities of Men' that he applies to 'Consequences from the Accidents common to all Bodies Natural; which are Quantity, and Motion' (ibid). The new political science is, therefore, properly thought of as a kind of physics.

As Quentin Skinner has argued, adopting Hobbes' new physical theory of power has always meant that the primary question of political life was no longer who exercises this power and how, as it had been for the advocates of what he calls the neo-Roman (or republican) theory of power in which a tradition existed of recognizing historically-specific and value-laden forms of authority (associated with political community, the form of the republic or commonwealth, citizenship, legality, and opposition to tyranny). Now the question was only how much power is one subject to. In other words, 'what matters for civic liberty is not who makes the laws, but simply how many laws are made, and thus how many of your actions are in fact constrained' (Skinner 200: 81). In sum, a political theory is replaced with a physical theory of power, and laws are now just so many weights piled on top of us (Hobbes 2001: 53).

Next, in order to simultaneously undermine established forms of authority and accomplish the naturalization of this physical theory, Hobbes re-describes human relations through a single term—power—which he applies 'universally' (62). In other words, although it

[38] Hobbes makes history subservient to nature by co-opting the term history (just as he did with the concept of the Commonwealth itself), rather than rejecting it outright. Thus the great tradition of the Roman historians is now—in Hobbes' comprehensive typology—merely one of 'two sorts' of history: "*Natural History*…the History of such facts, or Effects of Nature, as have no Dependance on Mans *Will*" [sic] and "*Civill History*...the History of the Voluntary Actions of men in Common-weaths" (italics in original) (60).

is a fact remarkably rarely commented upon in modern scholarship, before it is an explication of sovereignty, *Leviathan* is an explication of a comprehensive theory of power. Where historically there had been innumerable historically particular names for what was virtuous (or not) in political life, Hobbes now introduced a single master term. To understand what he is up to in this move, one need only recognize his polemical lumping together conceptually of what were formerly high and low categories, intended to diminish the authority of values central to ones opponents: 'Power,…Riches, Knowledge and Honour,' he writes, 'are but serverall sorts of Power' (53). This is extrapolated still further, in Chapter 10, into a comprehensive theory of power, explicitly extended, just as we saw with Foucault, to include non-political instances of power within the single term—including the value of one's worth, dignity, fitness, riches, reputation, good successes, affability, prudence, nobility, eloquence, whatever quality makes a man loved or feared, even to have friends or servants. All these are merely different forms of power (62-69).

Only after this—only after power has been conceptually separated from the political community which it had, and should, serve—can Hobbes introduce his famous account of the 'nature of Power' (which he explicitly analogizes to 'the motion of heavy bodies') which is the 'general inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth onely in Death' (70).[39] Full acceptance of this polemical theory of a unceasing drive for power, as Hobbes knew well and Arendt has so perceptively recognized, could mean nothing less than the final de-legitimation of all forms of political organization—and ultimately for all political life, properly so called. Once that was accepted, no existing political institution,

[39] In his explication of Power, in general, Hobbes says: 'For the nature of power, is…like to Fame, increasing as it proceeds; or like the motion of heavy bodies, which the further they go, make still the more hast' (62).

structure, or community—new or old—could hope to be anything but an accidental historical impediment standing in the way of the constant transformation and expansion of power—a 'permanent process which has no end or aim but itself' (Arendt 2004: 184). Like the fantasy of the unending accumulation of money that begets money (Weiss 2011), for which it would become the model, all political bodies appear to be merely temporary obstacles when they are seen as part of an eternal stream of growing power.

We should not be surprised then that Foucault's theory of power—similarly organized around a single term in order, again quite explicitly, to delegitimize any distinction or priority (either analytically or normatively) for any extant institution or tradition of political organization, no matter how old or well established (including political equality, republican government, and democracy)—reminds us of the account in *Leviathan*. Like Hobbes before him too, Foucault insists he is simply describing reality, and yet, as much as he wished to be careful, the invocation of the word power in the 20th c. could not but imply (and he himself acknowledges this)—at least in lesser hands than his—the modern theory of power.[40] To understand precisely where Foucault goes astray, it is crucial here not to lose sight of the fact that Hobbes' generalization of power (and its attendant renaming) is a necessarily prior and logically distinct process from the positive account of how power behaves which he subsequently applies to all these various kinds of power. Unless this priority is recognized, one can expect to see repeated—as it was here by Foucault—a series of critiques, whether of sovereignty or the Hobbesian theory of human nature, which themselves operate within and reinforce the naturalization of the modern theory of power

[40] 'But the word power is apt to lead to a number of misunderstandings,' Foucault acknowledges in (1990: 92), but this itself raises the question of what is at stake in taking up a terms which suggests these other things.

that proceeded it. As we have said already, the greatest source of the success of the modernist vocabulary has been its ability to seem available as a resource to those who believe themselves to be challenging sovereignty or, as here, the Hobbsian account of human nature.

If the argument made here about the logical priority of power to sovereignty in *Leviathan* is correct, then, Foucault has clearly failed in his self-stated goal to abandon the language of political modernity, instead, he has, if anything, merely taken up the language of power against the language sovereignty. In so doing, it is true, he has certainly further flushed out the Hobbesian theory in truly important new ways, emphasizing the importance of positive power, non-top-down power, and non-political kinds of power, but it has done so at the cost of still further naturalizing the modern theory of power. In the final analysis, just as Foucault himself doubted that sovereignty could save us from discipline, one wonders whether power can save us from sovereignty, or, whether this is Hobbes' great conceptual trap.

Nor can there be any doubt that Foucault understood clearly that this was what his work on power represented and that these were its implications. This is apparent from the remarkable interview conducted with him in Berkeley in 1983 by Paul Rabinow, Charles Taylor, Martin Jay, Richard Rorty, and Leo Lowenthal (Foucault 1984). As he has written elsewhere, Taylor asked Foucault explicitly about his relationship to Arendt's theory of power (Taylor 1989: 278). In his question, Taylor opposed two 'possible sides of power,' (i) one based on power as a relation of domination, and (ii) the other which understands power as potentially productive of positive freedom, when it is organized politically through equal citizenship and citizen self-rule. Taylor, explicitly putting himself with Arendt in the later camp, said of his position: 'This did not interest Foucault…[He] would have none of it. We were left in no doubt that he saw this kind of

project as based on an illusion, and moreover on a dangerous illusion' (ibid).[41] In fact, Foucault's response, surprising for its clarity and forthrightness (if not for what it says), even accepted Taylor's description of his work as on the side of the domination theories (though he at first tries to distinguish it as 'the problem of the power relation'). What is inadequate, says Foucault (in the published interview) is that 'in many of the analyses that have been made by Arendt, or in any case from her perspective, the relation of domination has been constantly dissociated from the relation of power' (Foucault 1984: 378). In other words, Foucault believes Arendt's work does not sufficiently emphasize the role of domination, while he believed his own account of power comprehended both sides of power. Yet, despite this rhetorical claim to take the possibility of positive power seriously, when pushed on details of his relation to Arendt's theory, Foucault's description of his project leaves astonishingly little room for that possibility. If this fact is certainly no surprise to his critics, the Taylor interview is remarkable, within the Foucault opus, for its honesty and clarity. Pushed by Taylor about whether he really is taking the side of domination against 'the consensual side,' Foucault makes clear how small a place he leaves for the possibility of positive power: 'The farthest I would go is to say that perhaps one must not be for consensuality, but one must be against nonconsensuality' (ibid). There has been a lot of truly important Foucauldian scholarship that has tried to build on the positive possibilities embodied in his late work, especially that on the ethic of the care for the self as a practice of freedom, and yet, as late as 1983, this was Foucault's position on the limits—analytically, politically, and normatively—of the role of a theory of positive political freedom.

[41] Taylor continues: '…in the sense that the hopes placed in such a 'free' regime could easily lead one to ignore or gloss over and hence to exacerbate its effects of power/domination. The example of gulag, erected in the land of really existing socialism, was always uppermost in his mind' (Taylor 1989: 278).

What is perhaps most remarkable—and ultimately most provocative—about this exchange is to see the way in which Foucault continually seeks to evade Taylor's positive-negative power binary primarily through a claim he makes and remakes about the '*empirical*' and 'analytical' nature of his project, and, in assessing Arendt's positive theory he insists that we must be 'extremely empirical' (378). His theorization of power, he insists, is not negative, even if it appears that way; rather, this is just description.[42] Yet this, as we have seen, was precisely the way in which power is treated by Hobbes. What is so surprising here is to see how actively and programmatically Foucault exploits this particular claim about empiricism to undermine Arendt, in a way that clearly echoes the terms of Hobbes' engagement with the neo-roman thinkers (or Austin's with Blackstone). So, while all the time insisting that his theory recognizes both sides (as he said with power (i) and (ii)), he continues to invoke a series of binaries to undermine the former—politics and ethics, theory and practice, idea and ethos, thinking and acting (374-377)—at the expense of the later. The ultimate result is in every case he can claim his theory is open to both sides of the binary, while concluding that—in *practice*—the later term turns out to be all but decisive. As he concludes his critique of Arendt, he believes his theory is more open to comprehending both positive power and relations of domination than Arendt's, even as he insisted on the clear priority, in practice, of domination—because all 'power relations' are so tied up in relations of domination that they 'hardly allows for a decisive distinction' between positive power and domination (ibid).

What is wrong with empirical observation, analysis and practice? Nothing, so long as one understands the work that they do conceptually for those who marshal these modes of

[42] As he says of Arendt: 'in many of the analyses that have been made by Arendt…we can recognize that certain power relations function in such as way as to constitute, globally, an effect of domination," he then immediately poses his empirical perspective in contradistinction (378).

authority. Here, following what they did for Hobbes provides a valuable window into a much broader set of definitively modern practices—practices which even Foucault replicated. Again and again, we find that modern thought is defined by binaries like these—positive power or negative power, positive law or natural law, law or morals, sovereignty or rights—in which the primary critical traditions have accepted classical modern thought's terms and language, and have instead have thought it sufficient to turn the dominant theory on its head, so to speak. For critics of the Hobbesian position, then, the alternative comes to about replacing a negative position on power with a positive account of the possibilities of power—understood in no less abstract, ahistorical, and presentist terms. Unfortunately, because the positive theorists continue to accept the idea that the goal and end of their work must include being able to better describe and analyze political life, its patent inadequacy to that task continually undermines its ability to emerge as the basis for an alternative—whether politically or analytically. Most problematically, it also produces, like dialectical clockwork, a spectrum of theories—Taylor's just discussed account and Foucault's are both examples—that try to bring in both sides, positive and negative, under a single rubric. This sounds both promising and sensible, but these theories turn out to be, in the end, every bit as inadequate.

The reason is to be found in the inadequacy of Taylor's account of Arendt. There, though he prefaces his intervention with a recognition that Arendt 'reserved the word power for just one of the two sides,' Taylor quickly elides that distinction in his own framing in which he goes on to say: '[B]ut let us use the term more broadly, let us say that she saw the two possible sides of power' (378). This re-framing, however, completely misses the point, because absolutely everything is at stake in this reservation of the word power, which is for Arendt the absolute distinction and priority of the judgment of a community to organize politically, rather than live

according to relations based on mere force. At stake here are four claims: First, none of the aforementioned accounts are adequate because their modern privileging of empirical and analytical categories leaves no place—this was its role for Hobbes, but also for Foucault—for a recognition of what it means to live in historically and traditionally constituted communities in which certain historically-contingent institutions and forms of authority count (sometimes implicitly, sometimes not) for more than others. Second, in a manner directly analogous to MacIntrye's insistence on the plurality of the good (in the Aristotelan virtue ethics tradition), there can be no master term or good that can do justice to all of political life. Third, practices and empirical observations cannot ever adequately describe what it means to live in history and belief (e.g. anthropological emic perspectives, or Peircean living in belief). Finally, people who are committed to the political form of life have no obligation to translate the language of it into abstract terms, or to evaluate it solely in terms of a universal ethical position.

Given this account of Foucault's work, it is perhaps not surprising that it has been especially the power-centric elements of the Foucauldian project that have, in recent years, seemed increasingly inadequate—both analytically and rhetorically—for the growing number of critical anthropologists and other scholars whose work seeks to name and critique state and US neo-imperial power. It is this lack—of a basis for emphasizing critiques of centralized power, or for preferring one sovereignty over another—that seems to stand at the root of both the attendant decline in the centrality of Foucault's political work in the contemporary academy (biopower excepted), and the fact that it has been Schmitt, Benjamin, and Agamben, in particular, whose critiques of sovereignty have filled this void.

The most important exception to this tendency to move away from Foucault in moving back to sovereignty, in fact, has been Agamben's work. In *Homo sacer,* for example, he brings

back in the question of sovereignty precisely because he concludes that the most profound implications of Foucault's own work on biopower (as well as his work on racism and Arendt's thinking on political exclusion) come to the fore only when one asks what happens when it becomes possible to drive biopolitical agendas through sovereign power. This Foucauldian correction of Foucault, abandoning the atomic/atomistic theory of power in order to emphasize what is essentially a new, genealogically specific late-modern form of what we might call *bio-sovereignty,* has been one of Agamben's most important contributions, and it suggests a whole slew of provocative Foucauldian interventions into Foucault's own work.

Yet, even this does not go anywhere near far enough to rehabilitate the historicist element of the Foucauldian political project of the mid-1970s, because even if one attempts to bracket the atomic/atomistic theory of power, a set of micro-structural assumptions about power remain very much at the core of even his apparently historically-specific institutions (including sovereignty, discipline, government, and biopower), often with little understood implications. So, while the Foucauldian theory of power is not often discussed in terms of the language of structure, it is crucial to recall that Foucault does, in fact, lay out a properly structural account of it in his "Method" chapter in *History of Sexuality, Vol 1*. On a first reading, however, this account appears to be something quite other—almost an anti-structure. As the product of ceaseless struggle, power is, he insists, *always* moving, unstable, local, omnipresent, particular, peripheral, relational, and from below (1990: 92-95). Viewed at a micro-structural level, however, two key, but deeply programmatic, structural—perhaps even metaphysical— assumptions determine the behavior of *all* power, as Foucault describes it. The first is the conceptual priority of the elements to the structures that they make up, of the part to the whole, and of the small to the large. The great structures (e.g. sovereignty, law, domination) are merely 'the terminal forms

that power takes' and 'must be understood in the first instance' at the level of concept of power (92), with the result that we often see a slippage in his more polemical moments towards language that suggests that micro-power plays the role of the real, against which institutions and structures are essentially superstructural. The second assumption is the conceptual denial (today understood variously as Nietzschean or post-modern, but again familiar to us from Hobbes and the modern writers) of any authority to anything that *is*, thus always giving priority to what will come over what is, possibility over actuality, becoming over being, and the constituent over the constituted—a system whose logical consequence, as Arendt reminds us, is 'the destruction of all living communities' (Arendt 2004: 184).[43]

How should we understand this unsettling picture of Foucault's thought? The problem is that in taking up the modern theory of power his work had effectively morphed from a historicization of sovereignty into an attempt to theorize, through the concept of power, what is in effect (once again) a proper *anti-sovereignty*. To make sense of what is ultimately at stake for Foucault in this specific theorization, one must recognize once again how overtly political the power project clearly is for him. At the heart of this, at least as it is explicated in *History of Sexuality,* is a clear, but not quite explicit, desire to push beyond his earlier historicist doubts about a return to sovereign-right in order to head off and disable even the possibility of seeing our collective resistance to sovereignty through any kind of language of structure or unity. Through his language wavers, in one instance recognizing the importance of structures ('it is doubtless the strategic codification of these points of resistance that make revolution possible')(1990: 95), in some instances contradictory and opaque ('Are there no great radical

[43] With regard to Hobbes' account of power, Arendt's goes on to say: 'For every political structure, new or old, left to itself develops stabilizing forces which stand in the way of constant transformation and expansion. Therefore all political bodies appear to be temporary obstacles when they are seen as part of an eternal stream of growing power' (2004: 184).

ruptures, massive binary divisions, then? Occasionally, yes. But more often [not]') (ibid), but most often there is a list of claims about what power 'is not' (94), claims that sometimes run close to (e.g, can we really never say power is top down or binary?) and other times leave us with almost nothing on how we should then talk about institutions, structures, or historically or traditionally established relationships of power. Ultimately, then, in seeking to undermine the easy ontological there-ness at the base of sovereign-power, Foucault seems to have taken an analytically and politically disabling turn when he took up this alternative ontology of the power. What is more, we cannot fail to recognize that these micro-structural assumptions—so apparently overtly post-modern in form—continue to lie at the conceptual heart of all of all Foucault's theorizations of larger structures and institutions (including of sovereignty), so that it is not possible to easily extract them.

Yet neither, finally, would it be enough to work out a purely and radically historicist response to Arendt's provocation, and this is because, whatever the very real value of Foucault's thinking on biopower, discipline and government, they are all elaborated in clear conceptual contradistinction to his understanding of sovereignty, an understanding which is notable in the first instance for nothing so much as how radically a-historical it is. To see this, it will be useful to look carefully at the terms of Foucault's own genealogy of the juridical discourse of sovereignty in his 1973 essay 'Truth and Juridical Forms' (2000). First, and most perhaps most surprisingly, what startles us when we consider it is the a-historical account of what sovereignty is at the heart of Foucault's account of its early origins. More than anything, this seems to owe its place to his taking up in this essay, as his starting point, the work of his intellectual mentor and very close friend, Georges Dumézil, whose influence (particularly 'his idea of structure') Foucault publicly acknowledged when, asked his intellectual influences by *Le Monde* in 1961, he

replied by naming Blanchot, Roussel, Lacan, '[b]ut also, and principally Dumézil' (Eribon 1991: 75).

Dumézil's well-known works *Flamen-Brahman* and *Mitra-Varuna* are, of course, effectively a universalist theory of sovereignty in which the modern term sovereignty is the name he gives to a cross-cultural and pan-historical form of originary authority. This is then connected to a rather standard account of the origins of power in which sovereign power is both *Ur*-power and kingly power, with the arrow of history and progress corresponding to the long decomposition of this sovereign power by the fifth century Greeks (Foucault 2000: 31). Interestingly, the implications, for scholars, of taking up Dumézil's thought has recently been debated within the academy in the wake of interventions by Bruce Lincoln, Carlo Ginzburg and Arnaldo Momigliagno. Lincoln, in particular, has been critical of what he (quite correctly) views as the authoritarian, hierarchical and Eurocentric implications of Dumézil's work (which have been frequently cited by scholars and politicians on the extreme right), and he has gone further in elucidating links between his work and fascist ideas and even overt support for both French and Italian fascism in the 1930s (Lincoln 1998; see gen. Arvidsson 2006, Junginger 2008). Dumézil's has denied these political linkages (2003), but, long before this specific criticism, however, it was well understood that his work was an attempt to legitimate authority and hierarchy as the key universal principles and to naturalize modern authoritarian sovereignty (as well being implicitly Eurocentric in that it celebrates the European achievement of having progressed the furthest in freeing themselves from the primordial condition). Foucault's work, of course, directly challenges that modern celebration of authority, but it also seems to largely accept Dumézil's account of primordial power, in which the explicitly modern, rational, and systematic idea of sovereignty proffered by the legal advocates for the emergent absolute

monarchies is applied to the whole world—through the term kingship—as the basic primordial form of community.

It is this same naturalization of sovereignty and this directionality that inform Foucault's thought own arguments in 'Truth and Juridical Forms,' in which sovereignty is the basic pre-modern form of political life, and so becomes the easy starting place for his account of political development as 'the dismantling of that great unity of a political power' by the fifth century the Greeks (Foucault 2000: 31). Note too that Foucault, the great genealogist, uses interchangeably the terms king, sovereign, royalty (25), *basileus* (26), and tyrant (27) (the last of these, as we have seen, technically speaking an institution with a historically specific origin which only became possible in the space provided by the breakdown of traditional forms of authority with the early *polis*). Nor does he make a distinction between the form of power—across both time and geography—exercised by the *basileus*, Solon the lawgiver, the Athenian tyrants, or 'the famous Assyrian king.' As e have already seen, the fact is that, as archeological work has shown and as the important work of Foucault's contemporaries in Paris (esp. Vernant, Leveque, Vidal-Naquet, and Castoriadis) clearly shows, perhaps no fact contributed so much to the specific historically contingent form the *polis* took as the complete destruction of Mycenean kingship—and all forms of and language for kingship—during the period of the so called Greek Dark Ages in the 11th to 9th centuries BC. Indeed, as Jean-Pierre Vernant had long before argued in his well-known 1963 book, *The Origins of Greek Thought*, the *polis* is now widely recognized as not the product of the whittling away of sovereign power at all, but rather (as the Athenian tradition of Theseus had always said) the synoecism of a number of so-called village communities populated by self-governing *oikos* which themselves operated on something akin to our modern notion of *genos* (see gen. Vernant 1982).

Second, influenced perhaps by his reading of the early French historians who had done precisely this, Foucault frames his question of sovereignty around the transition from feudalism to monarchy, and thus both in a surprisingly early moment in the Middle Ages and not in consonance with theories of modernity. His account in 'Truth and Juridical Forms,' for example, is less about sovereignty, per se, than the emergence of the French monarchy—and, in particular, the triumph of the monarchy over the feudal power structures through the use of new mode of exercising power, which Foucault calls 'inquiry' (2000: 44). So one needs to remind oneself that his subject here was different than ours, and this must have implications for trying to adopt his mode for talking about modern sovereignty.

The third problem is that, working without either anything invested in resuscitating any part of the political past or a strong sense of the pre-modern political—and especially legal—traditions and institutions (e.g. Maine, late Schmitt, Stein, Bellomo, Tierney, Tuck) which striate this period, Foucault links together, ineradicably, sovereignty and the entire language of legality—and thus, ultimately, the entire political, itself. Viewed from the point of view of the present and his efforts to critique the late modern liberal legal state, this forms the basis for an important intervention, but it is inadequate as a genealogical account of the high modern moment, much less anything that came before. First, his argument reads as if everything of legal and political importance to his discussion is the product of a single originary moment (an understanding surprisingly similar to liberal modernity's belief that the rule of law, legality, liberty, and democracy were more or less invented by Locke). A profusion of interesting historical work not available to Foucault suggests rather that the language of legality, law and the political project (specifically the form of the republic), all historically and conceptually precede both the concept of sovereignty and the modern theory of power. Most importantly, it suggests

that all three were central to what had already at that time been two millennium of political and legal thought and practice which was neither formally, nor materially, sovereign (including Greek *poleis*, the Roman *res publica*, Roman 'municipes,' 'free towns,' Italian city-states, and medieval and early modern juristic relations between kings, emperors and Church). Where Foucault's genealogy goes wrong is to tie all of these elements together in one single discursive strata called sovereignty, so that no part of this calculus of law, political and sovereignty can be pried out from the remainder. With regard to the possibility of rehabilitating or reformulating law, for example, Foucault will not even engage the question directly in *History of Sexuality*, leaving it to the *telos* of history to sweep it away:

> Our historical gradient carries us further and further away from a reign of law that had already begun to recede into the past at a time when the French revolution and the accompanying age of constitutions and codes seemed to destine it for a future that was at hand (Foucault 1990: 89)

Sadly, as Taylor remarked, it is clear that Foucault was simply not interested in any possible responses to the historical tendency to view power as 'juridical and negative,' except the possibility of 'technical and positive' (1980b [1977]: 121).

The provocation for this amendment of Foucault's political genealogies is a question that animates this essay: How should we understand the ability of the concept of sovereignty to come back, again, in the wake of Foucault's intervention, such that it ultimately seems to have begun to eclipse it? The answer is that precisely as the concept of the state was coming to be called into question by globalization scholars and advocates of what Hardt & Negri call empire, the concepts of law and legality were not just not being similarly eclipsed, but were in fact

undertaking—in the wake of their through their relationships to colonial projects, anti-colonial movements, and global justice—a great world-historical advancement, at the global criminal courts. And in its wake concept of sovereignty came back. Without a genealogical disambiguation of sovereignty from law (and from the political) and an account of the forms of traditions scholars and jurists have turn to, and return to, at crucial junctures in their history, we can make no sense of the great structural continuities and renewals.

Giorgio Agamben and the Critique of Sovereignty

Agamben's most important and provocative contribution to contemporary political thought is surely his recognition of the profundity of the relationship between sovereignty and modernity. Regrettably, though in a manner quite in keeping with the *teloi* of his theory in general, the implications of this relationship are inevitably taken to their logical extreme, so that modernity and sovereignty are ultimately understood as not just deeply mutually implicated, but essentially coterminous. The classic example of this is Agamben's reposing of Arendt's earlier notion of the camp, in *Homo sacer*, in such a way that what for her had stood for the limit possibility of modernity is now understood as omnipresent and inescapable under the conditions of our political modernity (1998: 4, 9). In this view, modernity, sovereignty and the exception are essentially synonymous, and, perhaps most importantly, inseparably so. One can see this same totalizing movement, as well, through the terms of Agamben's very particular invocation of Foucault. Here Agamben has established what has quickly emerged as the dominant contemporary re-reading of Foucault through his insistence that, against the famous injunction to cut off the king's head, the "Foucauldian thesis will then have to be corrected or, at least, completed," in a way that emphasizes the modern imbrication of the biopolitical with sovereignty (9).[44]

[44] Compare Foucault, *History of Sexuality, Vol. I*, (89), and compare Arendt on the camp (2004).

To understand what is at stake in this tendency towards totalization, it will be useful to consider one of the most opaque aspects of Agamben's argument, the implicit theory of history that underpins his theoretical arguments, represented perhaps most clearly in his assertions that we must understand that it is no longer possible to go back to the earlier forms of political subjectivity enumerated in Foucault's work. Specifically, he writes that we live in a historical epoch defined by the imbrication of sovereign power with the logic of biopower, and, with this, a transformation has occurred which makes it impossible for us to wish ourselves happily back to earlier forms of subjectivity which we may prefer.[45] Though his writings were somewhat contradictory (e.g. he insisted the forms were not chronologically distinct), Foucault had indeed argued something similar (esp. with regard to the contemporary political availability of the high modern language of juridical rights) (2000 [1973]), but there are very provocative echoes here too of Constant's political modernity defining arguments about the existence of a irreparable rupture between ancient and modern subjectivities (2002[1820]). One searches in vain, however, for a clear statement from Agamben as to why this must be, and yet everything in his argument ultimately rests on this initial assertion.

Read carefully, however, what is ultimately at stake in Agamben's asumptions of totalization and rupture is that they reproduces a metaphysical distinction central to his earlier and explicitly postmodern work on art and aesthetics (45), which require that our thought make a radical and absolute break with every aspect of modernity. As Agamben writes:

> The problem of constituting power…requires nothing less than a rethinking of the ontological categories of modality *in their totality*…Only an *entirely new* conjunction of possibility and reality…will make it possible to cut the knot that binds sovereignty to constituting power (44) [italics added].

[45] If Arendt's concept of the social can be mocked as the blob, this is nothing compared to the reach of Agamben's conceptualization of biopower.

Nor should we have any doubts about the practical political implications of this theoretical position: '[P]olitics is a biopolitics from the very beginning, and…[therefore] *every* attempt to found political liberties in the rights of the *citizen* is, therefore, in vain' (181 [italics added]). In this light, it becomes clear that the key to comprehending the terms Agamben's political thought has taken is to understand that it is ultimately both radically postmodern and radically anarchist.

Central to this argument is a claim about the priority of ontology to politics, and of philosophy to political thought, so that to accomplish this break with modernity, Agamben says, we will need to recognize that the problem must be moved from one of political philosophy to one of 'first philosophy' (44), and politics, then, must be returned to its 'ontological position' (4). Practically speaking, this means that Agamben's positive project (properly speaking, his anti-politics), which he has been notoriously reticent to elaborate, would—if it is to overcome what he calls the sovereign ban, which includes by exclusion—have to take the form of a universal set of no longer political identifications, which can know no exclusions.

Nor perhaps should we be surprised that, though his use of the term ontology is clearly intended to make this all more palatable for us late moderns, Agamben's next move is to insist that this will require a reframing of post-political thought, to be accomplished through, as we shall see, an invocation of the central categories of Aristotle's *Metaphysics* itself (44-47). In this framework, all political thought and practice should exist as essentially a set of logical derivations from a single set of first concepts (potentiality and actuality, *dynamis* and *energeia*). All this is apparently what is necessary to ensure that we do not lapse into modern political categories.

Where Agamben's thought goes wrong, in his treatment of the exception, is in his chapter on his understand of constituent and constituted power ('Potentiality and Law'). There, he discusses Arendt framework briefly (41), and insists that it is his intention to follow her provocation on the necessity of a

better account of the classic constituent and constituted binary. Ultimately, however, he turns away from Arendt's framework, adopting, instead, the initially appealing Aristotelian distinction between potentiality and actuality (*dynamis* and *energeia*) to work the argument out (44). What is especially interesting is that there is no argument presented in this text as to why he chooses to utilize this conceptual distinction (45). Neither does he discuss other models, nor say clearly what is lost and gained in the choice between the Arendtian framework and his own.

Yet, the application of Aristotle's categories in this manner completely fails to address what is really at stake for Arendt. For example, a close reading of Agamben's discussion of potentiality-actuality (Section 3.3) shows that what he is primarily interested in is finding a way to locate potentiality in actuality and actuality in potentiality, and this is certainly an improvement on both the traditional modern account of constituent-constituted and Benjamin's account of law making and law preserving violence. In this sense, then, we can perhaps initially say of Agamben that, because both constituent and constituted power are indeed understood to mutually imbricate each other, his is a better account. Yet the Aristotelian notion of potentiality is really something essentially and importantly different from what Arendt meant by constituent and constituted power at the level of historically-contingent political practice (165), and, in the end, Agamben's new model simply replaces one timeless, metaphysical political ideal with a slightly more sophisticated and enabling one.

Ultimately, and despite the invocation of Aristotle, what Agamben has done here is to propose a startlingly Platonic metaphysical framework, in which potentiality and actuality stand in for the ideal and the real in the theory of Forms. The result is that Agambenian potentiality opens itself toward radically new kinds of ideal political possibility. The problem is that it is not unique or novel in this regard, and this, after all, is exactly the conceptual role played by both the Platonic ideal and the revolutionary traditions pure constituent power. As a result, and in exactly the same way, Agamben's potentiality points in the teleological direction of the radical de-legitimation of every actually constituted actuality, including every historically or culturally defined community or tradition. This Platonic position is an

especially interesting choice of Agamben given that, as we saw with Benjamin, his early idea of divine violence moved in the direction of a kind of impossible Platonic idealization of political life, as the sole means to imagine a politics entirely outside of all violence and the limit possibility of a critique of violence. For both, the possibility of political critique (e.g. law is violence) is based on a radical prior idealization of political life. If for Benjamin this idealization always remained properly political, for Agamben it has abandoned the political for a higher notion of universal potentiality.

Here a set of questions and anxieties must emerge for the reader, familiar to us from the late work of Benjamin and Derrida. What, then, are we to do '[u]ntil a new and coherent ontology of potentiality…has replaced the ontology founded on the primacy of actuality' (44)? Must we wait for the coming philosopher? What is more, could even the richest understanding of potentiality really gain favor among every member of a community (much less universally), and, if not, what is the mechanism for creating unity on the form of potentiality (e.g. consciousness raising, history)? Who will act as guardian to make sure no one lapses into the old ontology?

To appreciate what Agamben is up to in his re-invocation of metaphysics, it is worth reflecting here, for a moment, on the specific terms of his use of Benjamin. As we have seen already, Agamben's theory of sovereignty and the exception are essentially Benjamin's early theory, but one curious aspect of his account of this relationship sheds a good deal of light on what is at stake for him in this choice. This is his strong conviction that Benjamin, not Schmitt, is the originator of the idea of the exception-to-the-exception, rather than the reverse as is more commonly assumed (2005: 32). His argument largely rests on the chronology of the most well-known texts (esp. 'Critique of Violence' (1921), *Die Diktatur* (1921) and *Political Theology* (1922)), yet, as we have seen, Benjamin clearly acknowledged his own debt was to Schmitt and that it preceded 'Critique of Violence.'

To make sense of what is ultimately at stake for Agamben in this argument, it will be useful to consider the particular role that Benjamin plays in his treatment of the question of authority—a way of reading Benjamin shared by a significant group of contemporary scholars. In this understanding, we late-moderns turn to Benjamin as a kind of figure of pure authenticity, almost a source out of time and out of history. The reason for this is simple, once it is put against the background of, for example, Agamben's theory of history and modernity. How else, conceptually, could we imagine a source for the kind of emancipation necessary to fully transcend political modernity? In this context, then, Benjamin's very person emerges as the embodiment of this possibility, and the source, only apparently the product of this modernity, of a pure theory of potentiality—the living exception to the exception. It is through this lens that we must understand Agamben's arguments about Schmitt's debt to Benjamin.

Yet the strong claim about the novelty of Benjamin's thought, which sits at the root of Agamben's arguments about origins, has a problem—and for a reason that Agamben has never discussed anywhere in his work. This is Benjamin's acknowledged debt to Sorel, who had, himself (as Schmitt also acknowledged) fully laid out the conceptual basis for both the critique of sovereignty-as-exception and for the exception-to-the-exception. This desire to place Benjamin out of modernity—and especially with regard to his theory of sovereignty—runs up against the fact of his deep and explicit debts to Sorel, and yet it still comes as a surprise to see that Agamben makes no reference to Sorel in either of his texts that elaborate upon the question of sovereignty and Benjamin political ideas most directly (1998, 2005). Lost in this silence are Benjamin's debts and genealogical linkages to the main currents of political thought, and especially Sorel's relationship to the high modern and revolutionary traditions of political thought. It is in the light of these absent lineages that Agamben's account of Benjamin, modernity and sovereignty must be read.

Coda: The Exception to the Exception

Yet even if the invocation of Benjamin could accomplish this erasure of modernity for Agamben, the very project of the *exception-to-the-exception* (as enumerated in Benjamin's early work and in Agamben's) is doomed to failure from its inception. Far from serving as a radical break with (political) history, as its advocates hope, the exception-to-the-exception (in the same way as political revolution did for an earlier tradition) merely replicates Hobbes' great project—embodied in his notion of the 'state of nature'—of a *rupture* that can simultaneously break history and entirely remake it in new terms. Ultimately, then, it is not so much the grand narratives themselves, but rather the necessary prerequisite of a historical rupture which breaks history and creates the possibility of a year-zero and a radically new history in its wake, that most elementally defines political modernity. Read in this way, Agamben's project—and all self-described post-modern politics (no less than the sovereign, liberal and Jacobin projects which preceded them)—is not so much a break, as a further triumph of the modern theory of political history.

Schmitt's Doubts

Remarkably, even Carl Schmitt, the great *eminence gris* of sovereignty, eventually came to have doubts about his early theory. His late work, *The Nomos of the Earth* (1950), must be read as his own abandonment of the concept of the sovereignty-as-exception. There, against modern positivism's account of law as mere rules and decrees, he commits himself to a rehabilitation of the classical Greek ideal of *nomos*, as the historically-specific expression of a political community's most basic organizing principles. The modern state may have succumbed to a world where whoever has the momentary majority can change any law through decree (in effect sovereignty) and through a view of law as simply a tool for molding people, but, in the *Nomos,* Schmitt clearly delineates an alternative vision of a political community held together by commitment to a small set of basic principles—territoriality and division are crucial to Schmitt—structurally embodied down through history in its laws, and basic to every aspect of

that community's institutions and beliefs through the structuring role they play in every aspect of existence. He is in effect saying that, first and foremost, we are the people who divide and order things *in this way*, and everything else runs from that as superstructure. Even Schmitt, then, just as the late Benjamin and Derrida did, names the exception—in this case the modern sovereign state (as it was for Arendt), and sovereignty is now no longer something necessary to human life, as it was in his early writings. Not unlike Arendt, too, his response to modernity's great political rupture is not to argue for the necessity of one more break (another exception to the exception) but rather to attempt to reinvigorate a non-sovereignty political tradition.

This is explicit in the *Nomos* because, whatever we think of his obvious celebration of (and attempt to naturalize) territoriality and property, Schmitt acknowledges in *Nomos* something that its advocates had not acknowledged since Bodin, that sovereignty was a project. If he believed that the period of the Westphalian peace based on state sovereignty and non-intervention—and frankly on colonialism—was the best solution the world had yet found to the how it ought to be ordered, he nonetheless recognized it was a culturally and historically specific institution with invidious implications for many people outside Europe.

Conclusion: Object and Fetish or Sovereignty-Effect

Unaware of the genealogical linkages that connect the specific terms and assumptions of the contemporary critique of sovereignty to the main currents of political modernity, many contemporary scholars have unfortunately entangled themselves in theoretical commitments to a series of categories based on retrograde and reactionary modernist accounts of power and of political history. Emblematic of this is the now already startling fact of how little this explosion of sovereignty scholarship has done in the way of creating a florescence of ways of thinking outside sovereignty and the terms of political

modernity.[46] What begins as critique may often end up as a kind of fetish, and sovereignty remains the irresolvable Gordion object in contemporary anthropological scholarship.[47]

At the global level, this can be seen in the fact that there has very quickly emerged (in both academic work and political practice) a tendency for critics of American sovereignty to begin to naturalize any conflicting form of sovereignty. The most important example of this is the huge success of Hardt and Negri's now canonical argument, in *Empire* (2000), that our political choice today is limited to competing US and global sovereignties.[48] The choices then are, by definition, limited to locations of sovereignty, and this has produced two types of responses. The first (i) is historically unprecedented levels of support globally for an alternative, but nonetheless quite proper, sovereignty (Hardt and Negri's 'Empire')—especially the new global power to punish criminals (that *sine qua non* of modern sovereignty) as embodied in the International Criminal Court and the new global prosecutor; or (ii) critics of US neo-imperialism (e.g. Zolo, 2002: 3) who condemn the 'New World Order' from a position of acceptance of the UN Security Council's mandate to declare the global state of exception—to itself act, in other words, as global sovereign (Jennings, 2008).

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[46] Analytically, careful genealogical work on sovereignty—like that of Talal Asad whose 1972 essay 'Market Model, Class Structure and Consent: A Reconsideration of Swat Political Organization', though not much read today, is a powerful critique of Hobbesian assumptions in anthropological writing (2002 [1972], 2003)—remains very much the exception. Politically, nothing in anthropological scholarship has approached the importance of Arendt's work in *On Revolution* (1990 [1963]) and *The Human Condition* (1998 [1958]) (or Castoriadis (1991) [1983], Skinner (2000 and 2001), Tully (1995), or the late Schmitt (2003)).

[47] Elsewhere, Slavoj Zizek has nicely summed up this effect through his evocation of Max Horkheimer's acknowledgment that Critical Theory 'knows there is no God, and it nevertheless believes in him' (2003: 79).

[48] To appreciate exactly what is at stake here, it will be useful to distinguish the standard political theory account, which distinguishes the American republic from sovereign European states. In this vein, Arendt, for example, believes that 'the greatest American innovation in politics as such was the consistent abolition of sovereignty within the body politic of the republic', at least until it succumbed to subsequent statist projects (1990: 153). By contrast, Hardt and Negri's deep Schmittian presuppositions about sovereignty lead them to surreptitiously, but quite intentionally, apply the word 'sovereignty' to what is, in effect, the (non-sovereign) classical republican theory of political power, which they call network sovereignty (166).

Nor has this *sovereignty effect* been any less important at the state level, where one of the most fascinating trends in recent postcolonial scholarship has been the turn to an advocacy of state sovereignty (e.g. Bruyneel's project for a third space of sovereignty (2007)), against the twin concerns of U.S. neo-imperialism and Eurocentric global institutions. David Scott (1996, 1999) and Achille Mbembe (2000), in particular, have raised important questions about the anti-colonial project whose goal was the achievement of sovereignty, a criticism which raises concerns, very much resonant today, about the slippage when claims to freedom, pluralism and independence are framed in the language of sovereignty. By contrast, conceptual frameworks such as Appadurai's sovereignty without territoriality (2003), Zolo's neo-realist pluralism (2002), and Mouffe's Schmittian multipolar global order (2005) push this extremely fine line and become, effectively, celebrations of sovereignty.

The same can be said of recent scholarship based on the claim that 'sovereignty matters', which has been especially powerful in identitarian scholarship (esp. with regard to indigenous rights and critical race theory) (e.g. Barker, 2005; Blackburn, 2009; Davies and Clow, 2009; Harvey, 2007).[49] Here, too, sovereignty begins to sprout up everywhere one looks (e.g. Clarke's sovereignty of victims (2007), or the recent sovereign citizens movement in the US). This return to sovereignty is a fact of real importance if, with Scott, we see a critique of the aspiration for sovereignty (understood as the essential kernel for the nationalist project) as one of the central animating principles motivating and driving the emergence of the critical postcolonial movement that emerged in the late 1970s (1996). If this is so, this renewal of the aspiration for sovereignty may perhaps mark the end of an interregnum period, with more than a few implications for the future of the postcolonial project.

The present is a moment of great importance for political possibility defined, as it has come to be in public and academic discussions, by a false but world historical choice between American sovereign

[49] Contrast this with James Tully's *Strange Multiplicity* (1995) seeks to protect the same interests, but which explicitly seeks to create a non-sovereign language, based on the pre-sovereignty idea of the 'ancient constitution', precisely in order to bracket sovereignty.

neo-imperialism, the emerging global counter-sovereign power of Empire, and a revitalization of state sovereignties (Jennings, 2008). What we need instead—and with real urgency—is an anthropologically sensitive and positive framework for political thought, which refuses to accept the definition of political life defined by sovereignty, even as the basis for critique. What we cannot afford is to have our most thoughtful and creative thinkers of our moment distracted by a theory that takes them away from the hard political work that is at hand—learning to think outside of sovereignty, so that we can begin imagining the full possibility of a diversity of local and non-sovereign political futures.

Part II: The ICTY and the Case of *Prosecutor v. Duško Tadić:* Cosmopolitan Law as Exception

CHAPTER 2:
Legality or Exception? The Security Council, Emergency Powers and the Yugoslavia Tribunal

1. Creating the Yugoslavia Tribunal

This project is a response to a set of world-historical events about which the theoretical responses of scholars have been entirely inadequate. The importance of the Tadić case for the development of global law has been greatly underappreciated, and, put simply, it marks nothing less than the great moment of crisis for—and ultimately the global triumph of—a quite particular tradition of understanding of the rule of law and legality. It is the appreciation of the crisis element, in particular, which has been glossed by both specialist scholarship on the tribunal, and in public discussion. To appreciate its full importance, however, it must be remembered that—as a matter of law—there existed no legal precedent for the United Nations (including the Security Council, or indeed any international body other than a state acting internally or collectively through a treaty) to legislate (i.e. to make law in the manner necessary to create a criminal tribunal where none had existed before), to claim the right to punish the criminal, or for the application of criminal law to the international sphere. As a result, a trial for Tadić would inevitably violate virtually every key principle inherent the hegemonic school of legal modernity's commitments to the rule of law, legalism and justice. Specifically, the law creating the tribunal (adopted by the Council as part of *Resolution 827* on May 25 1993 and known as the Statute of the International Criminal Tribunal for the Former Yugoslavia) was clearly *ex post facto* (it had been created after the alleged crimes committed by Tadić in May and June 1992), and the defendant could have had no notice that what he was doing was a crime in this jurisdiction (in violation of the principle *nullum crimen sine lege*). Legally speaking, then, Tadić

was to be tried by a body that itself would have violated the international law at the time he had committed his acts—as indeed it would have for the preceding three and a half centuries during which the Westphalian and UN systems of international law held sway.

As has already been discussed, the judges of the Nuremberg tribunal were quite clear that they were neither creating—nor creating precedent for—cosmopolitan criminal law. Nor has an appreciation of the absence of a precedent been an understanding foreign to international jurists, even among the most formidable advocates of cosmopolitan law. Hans Kelsen, for example, whose vision had done more than any jurist to shape the UN system, did not believe that individual criminal jurisdiction could be located in the UN Charter, and thus could not be enacted by the Security Council. Writing in 1950, he argued that it was impossible to interpret the Council as having powers beyond those enumerated in the Charter, and the Charter referred solely to "the collective responsibility of states" and was thus applicable "against states as such, not against individuals" (Kelsen 1950: 738). For this reason, Kelsen did not believe that one could locate individual criminal responsibility in the Charter (though, as a strong advocate of the idea, he believed it could be found in customary law, or created by a treaty). Similarly, as we shall see later, Antonio Cassese, the central figure in the creation of the new global criminal courts of the present era, makes it patently clear, in his well-known *International Law* textbook, that neither Nuremberg nor the UN Charter can provide a proper precedent (Cassese 2005: 454). For this reason, when it came time to write his case law judgments (as the chief judge of the appellate division for the Yugoslavia tribunal), he cited as the sole available precedent not Nuremberg, but rather the creation of administrative tribunals by the General Assembly as part of the UN Emergency Force in the Middle East (UNEF) in 1956. Those tribunals, however, as

he was well aware, did not possess criminal jurisdiction, and they limited their jurisdiction, in the traditional manner, to state actors (*Tadić* Interlocutory Appeal Decision,1995: para 38, citing ICJ advisory opinion, *Effect of the Awards*, at 61). Prior to the creation of the Yugoslavia Tribunal, then, the belief that sufficient and proper precedents already existed for the Council to create individual international criminal jurisdiction would have been limited, among international legal scholars, to a tiny number of experts in a sub-field that even most advocates for global law believed was more aspiration than reality, international criminal law (especially, as we shall see, M. Cherif Bassiouni).

Indeed, even the Security Council itself (in its May 25, 1993 session) had, in debating the creation of what is invariably inaccurately called the enabling "statute" for the Yugoslavia tribunal, always clearly recognized that the UN Charter could not provide the basis for legislative power, understood in its most precise legal and constitutional sense as the power the make or even change law (see gen. *Provisional Verbatim Record* S/PV. 3175). The Council also clearly saw that Nuremberg was an inadequate precedent for the global courts and did not emphasize it as precedent in either the debates or in the statute. The actual public debate at the time of the adoption of *Resolution 827* was fairly formal, but we can say this with some authority because we actually know quite a bit about the debates that preceded and shaped the form the statute took, in particular, from the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* written by the Secretary-General's legal team and presented on May 3, 1993. That document was drawn up at the request of the then Secretary-General, Boutros Boutros-Ghali, in order to deal substantively with the legal issues raised by the tribunal and to create in effect a draft enacting statute that could be passed quickly and without too much debate.

The *Report*, which is publicly available, is, therefore, of unequalled importance to comprehending the future of global law, and, fortunately, a surprising amount of inside detail is known about its creation because members of that team (esp. Virginia Morris), as well as of the US legal team advising Ambassador Albright (esp. Michael P. Scharf), have written extensively on the behind the scenes process (see Morris and Scharf 1994, Scharf 1997).

The process that led to the creation of the *Report* is fascinating, and it provides crucial insights about the choices and omissions that determined the ultimate shaped of the tribunal. In particular, much of what occurred seems to have been driven by the Office of the Secretary-General and his Legal Council, Carl-August Fleischhauer, much more so than backroom debates between permanent Council members as one might expect. Indeed, it becomes clear quite quickly that this decision to turn the creation of the statute over to legal experts manifests strong and acknowledged prioritization of unanimity, speed, and effectiveness, at the expense of existing international law, sovereignty and debate. Interestingly, although these constitutional issues have been entirely lacking in Council debates regarding all subsequent tribunals, the Secretary-General's legal team dealt with these issues directly, (relatively) openly, and immediately in the *Report*. There, in response to the question of what could be the basis for the establishment of an international criminal tribunal, the *Report* lays out two clear alternatives that faced the Council. First, the "normal" approach would be "the conclusion of a treaty by which [all, or at least all the affected] states parties would establish a tribunal and approve its statute" (e.g. like the Rome Statute creating the ICC) (para. 19). Or, second, the Council could create a criminal tribunal through a resolution based on its Chapter VII powers. It is a fact of real importance that no more legal or precedent basis for this is provided than the statements that such a decision would "constitute a measure to maintain or restore international peace and

security" (Para. 22) and that "the Secretary-General believes…would be legally justified…[on the basis of Ch. VII] and of past Security Council practice" (Para. 24).

What is fascinating is how clear and forthright the *Report* is in showing us how poorly these issues seem to have been understood and how inadequately questions of sovereignty and attendant global material constitutional transformation were vetted. The two alternatives are opposed as simple choices. The "disadvantage" of the "treaty approach" is that it would take "considerable time…to achieve the number of ratifications" as well as the fact that "there could be no guarantee that ratifications will be received from those States which should be parties" (Para. 20). Its "advantage" would be that it "would allow for detailed examination and elaboration of all the issues" and allow States to "exercise their sovereign will" (Para. 19). All of this is presented in the form of policy proposals, as if the requirement of ratifications by states or the rights of states not to ratify treaties was constitutionally meaningless. The *Report* thus concludes with the prescription that, "[i]n light of the disadvantages of the treaty approach in this particular case…the Secretary-General believes" the Chapter VII approach should be used (Para. 22). Without more discussion, the document then proceeds to lay out what would turn out to be, virtually verbatim, the prosaic articles of enacting statute. By no more than this were three and a half centuries of established international law precedent on treaties and sovereignty overcome.

What is particularly fascinating is the manner in which the "Chapter VII approach" is presented here. The idea for apparently had its origins in a letter the French representative submitted to the Secretary-General (1993). This letter was based on a report by the Committee of French Jurists set up by Roland Dumas, then Minister of State and Minister of Foreign Affairs. Remarkably, that document—in fact the only true expert participation in the creation of the ICTY Statute—makes clear from the beginning that it does not believe Nuremberg was

sufficient precedent (para. 32) and that the UN (including the Council) clearly would not have the "competence" to create a permanent international criminal court. The argument is an excellent summation of the actually existing then international law, and is worth citing here in full:

> 33. If it was a matter of establishing a jurisdiction with universal competence, however, the Committee would be very reluctant to consider the United Nations as being competent to establish an international criminal court with binding force. There are no provisions in the Charter that could be invoked as giving the Security Council or General Assembly such powers.

The sole remaining avenue that the French jurists thought might remain—and they were quite forthcoming that they were interpreting the Charter "dynamically and teleologically" (Para. 34)—would be that the Council, since it clearly had to take measures necessary to maintain or restore international peace and security under its Chapter VII powers (Para. 35), could make the decision that a tribunal was necessary to those specific and enumerated ends. The tribunal would, however, have to be strictly limited and "ad hoc," jurisdiction (not universal), while that jurisdiction would need to be "designed specifically" and targeted to that conflict only (Para. 34).

Three key points were clearly understood by the jurists who drafted this. First, this was a radical new interpretation of the UN Charter, and, even so, it came nowhere near to being a claim to make law (legislate) or to create a universal criminal jurisdiction with binding force. Second, though they never use the term, it was clearly understood that what this mechanism was an expression of emergency powers (since that is what Chapter VII is) and that this could not create a proper legality. Here, the term of art employed is "if necessary" (Para. 34). Indeed, and third, it is clear that the jurists understood that one could not—properly speaking—think of an ad hoc

tribunal of this sort as a legal institution at all, since, after all, the Charter did not provide the power to create law and since it was created under emergency powers. In this view, the "Chapter VII approach" was obviously something quite other than—and indeed quite less than—law. In fact, the jurists were sufficiently concerned about the clear illegality of what they deemed to be a politically and morally necessary choice that they suggested that a General Assembly resolution in support of the *ad hoc* tribunal might be valuable public relations addition, even though nobody believed it had any actual power to do anything of relevance or value (Para. 41).

Absolutely none of this found its way into the Secretary-General's *Report*, and the Chapter VII approach is presented as the obvious and easy choice on the basis of both legality and justice. How should we understand the gross inadequacy of this discussion in this document, especially with regard to the lack of precedent and its implications for the future of the global material constitution of naturalizing an illegal, emergency and political mechanism as legal? What is clear is that the so-called legal experts were really not experts on these issues at all, but rather the regular lawyers of the UN's Office of Legal Affairs working under the direction of the Secretary-General's existing Legal Counsel Fleischhauer. Given that every international jurist would have jumped at the chance (as clearly the French jurists did), the fact that none of the big names was chosen (e.g. Cassese, Meron, or even Bassiouni) was a fascinating choice. First of all, it is important to stress that the position of legal counsel is not an independent position, but is rather subservient to, and serves at the will of, the Secretary-General. It is tasked with carrying out the work delegated it on behalf of the S-G, and this indeed is exactly the form the *Report* takes. Read carefully in this light, it is clearly prescriptive, partisan and even overtly defensive, and it makes no attempt to fully elaborate the counter position.

All this would be fine if the document had been presented as such and challenged by another, but that did not happen. More troubling still, the report's lengthy explicit and elaboration of the enacting statue was then accepted as the almost verbatim basis for the final draft. This, in turn, ought to raise two sets of concerns about how a partisan document morphed into the actual statute, and as well as what might be the consequences of the various omissions and glosses that one might expect to find in any partisan document written in such a contested and fraught context. This must then at least raise the question of whether the ultimate Tribunal statute enacted in Resolution 827 might turn out to be a much more radically unconstitutional document that even its strongest advocates hoped, and that indeed many of them may never have sully understood its implications for the global material constitution. All the debate seems to have take place over the question of what should be the legal basis for the tribunal (treaty or Ch. VII), and, in the end, this seems to have pushed partisans to be on one side or another, and not air the dirty laundry of the details. Finally, it cannot be stated often enough that by far the greatest number of the people involved never understood the implications of precedent and honestly believed the tribunal was a short-term trial run with a definite end date.

Here one must point out the complete lack of expertise and experience among the legal experts chosen for the task of drafting the draft statute. Fleischhauer and Deputy Legal Counsel, Ralph Zacklin created what was called the UN Office of Legal Affairs Working Group (consisting of Larry Johnson, Winston Tubman, Daphna Shraga, and Virginia Morris) (Morris and Scharf 1994: 56). All of them were lawyers in the diplomatic bureaucracy of the UN, and none of them had special expertise of training in constitutional issues. It seems quite likely that there was no malice intended by Boutros-Ghali, Fleischhauer, or any of the team, but it must at least be mentioned that it is a classic move for those more interested in ends than means to turn

crucial legal decisions over to young or inexperience lawyers without the training or institutional experience necessary to understand what is radically novel (i.e. unconstitutional) about what they are about to do.[50] Whether this is for the Machiavellian reason that inexperienced lawyers do not know the difference, or whether it is a more or less honest misunderstanding by inexperienced parties at every level is often quite difficult to tell?

Nor was this practice limited to the UN. Eighteen governments and international organizations submitted suggestions to the S-G in advance of the *Report*, but most appear to have dealt with prosaic and specific questions of specific law. For example, the draft statute proposal submitted by U.S. Ambassador to the UN Madeline Albright was drafted by a team made up of three rank and file Department of State lawyers: Michael Scharf, Attorney-Adviser for United Nations Relations, James O'Brien, Attorney-Adviser for Political-Military Affairs, and Robert Kushen, Attorney-Adviser for Law Enforcement and Intelligence. Scharf says this was "particularly influential" on the final, but describes this influence as related to quite prosaic issues like "the general organization of the Tribunal, the rights of the accused, the double jeopardy principle, and the standards for appeal," as well as the inclusion of rape in IHL (Morris and Scharf 1994: 32, fn 120; and Scharf 1997: 55).

Having dealt with the problem of the legal basis for the creation of the tribunal, the problem remaining for the Secretary-General's lawyers was how to establish the legal legitimacy of a cosmopolitan criminal tribunal, given the fact that there was nothing in existence approaching (nor any precedent of any kind for) global criminal jurisdiction without being

[50] This was the *modus operandi* of the George W. Bush administration both domestically and in the Green Zone.

clearly *ex post facto*, much less anything like a global criminal code, which could meet the standards of notice (*nullum crimen sine lege*) presumed by contemporary criminal legality. The two most commonly mis-cited precedents for global law have been Nuremberg and the human rights machinery, however, both were so obviously insufficient that the *Report* does not even mention either as possible legal precedent. For Nuremberg, this was for the reasons already mentioned, while the human rights mechanisms were well understood to be inadequate because they were created by states, addressed to state agents (not individuals), had no compulsory element akin to mandatory jurisdiction, and lacked both specific enumerations of crimes and enforcement mechanisms.

In the end the S-G's lawyers, and ultimately the Council, had to turn to international humanitarian law (IHL) (i.e. war crimes law, particularly the Hague and Geneva conventions) as its basis and analogy, since at least its enumeration of war crimes looked more like a criminal regulation. Though the *Report* did not reference it as such, this was the basis on which Bassiouni had based his minority opinion that IHL could serve as effectively an existing international criminal code (see gen. 1996). As a matter of legality, it could thus serve as a clear and longstanding precedent for every nut and bolt of law necessary to criminal prosecution. Two problems remained, however. The first, as we shall see later, was the question of whether international humanitarian law—a system of state treaties recognizing only states and state actors—could form an adequate precedential basis for individual criminal jurisdiction, and, what would that transformation mean for the future of state sovereignty to treat treaties signed by states as generalizable and subjecting laws? These were the issues behind the concerns of the French jurists, but, remarkably, as we shall see in a moment, this question was never dealt with substantively by any of the tribunal's advocates, whether at the Council or by the legal team.

Of course there were still the legal question (i.e. the legislative, notice and *ex post facto* law problems), as the S-G's lawyers well understood, if it appeared that the law had not existed before the crimes (as it patently had not). In fact, these issues were sufficiently controversial that the Council felt the need to have a surprisingly frank and open debate on these issues, but in the end adopted an awkward multi-step process, over the objections of the CSCE, Brazil, Russia, Slovenia and the ICRC, every piece of which was determined by the requirement of making it appear that the law with which Tadić and others would be charged had preceded existed before the alleged crimes had been committed. Their task was to find a way for the Security Council—which the *Report* clearly recognized was an executive power without the power to legislate or create law (Art 29)—to create a retrospective legal precedent for global criminal law, where it was patently clear that none existed (or indeed could have existed under existing international law) and where legality strictly forbid this being *ex post facto*. What is more, this source of precedent needed to appear to be sufficiently comprehensive to overcome concerns about lack *nullum crimen sine lege*. Put simply, it was hoping to overcome a legalistically insurmountable gap, by addressing it in the most legalistically precise terms possible, and then hoping that moral, political, and practical factors would allow the thing to hold for at least long enough to establish new precedents on the other side.

To appreciate the full importance of the *Report,* here, it is useful to think of its statements and proscriptions in a manner equivalent to statements of legislative intent or presidential signing statements in the US system, issued, in this case, by the Council at the time of the statutory enactment in order to determine subsequent legal interpretation. The key move here—and in many ways the key legal fiction behind the creation of the whole criminal tribunal precedent—was the *Report's* redefinition of a significant body of international humanitarian law (the so-

called “four sources”) as “customary law,” as opposed to “conventional” (i.e. treaty) (Para. 33). The legal argument being that the well-established nature of certain elements of IHL made it fair to apply it to everyone, though this was to completely ignore the material constitutional implications.

Conceptually, the *Report’s* process took five steps. To begin, it was recognized that the Security Council could not appear to be legislating or creating the law that made up the charges, since that would clearly violate well-established *nullum crimen sine lege* and *ex post facto* requirements (Report of S-G Para. 27). (i) So to avoid this, the *Report*’s drafters were careful to initially declare, in advance of any statutory enactment, that “the Council would not be creating or purporting to ‘legislate’ that law,” but rather “*applying* existing” international humanitarian law (Para. 29). (ii) Next, the drafters—here typically receding into formalism as the basis for their proscriptions—declare that “the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of [IHL] which are…customary law,” as if saying it were enough to make it so (Para. 34). (iii) Tactically, the legality of this point is then be emphasizing by underscoring the only apparently parsimonious decision to include as customary law only those provisions which were “beyond doubt” customary (Para 35). (iv) Next, because the persistence of any future debates over what was customary and what not (whether in the Security Council or the tribunal case law) would raise questions of legal legitimacy, the customary law itself was formally defined, in advance of the statute, as the “four sources” necessarily to the appearance of legality (specifically, the Grave Breaches of the 1949 Geneva Conventions for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the

Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945 (Nuremberg)).

Finally (v), and absolutely most crucially, the ultimate statute had to be drafted without textual reference to these legislative notices (especially the word "customary"). Indeed that is precisely what was done in *Report's* draft statute, and ultimately in the ICTY statute based on it. Every scholar who discusses the tribunal is fully aware that the new definition of customary international humanitarian law is its legal basis, but the statute nowhere includes the words customary or the claim that that is its basis. Had it been otherwise, it would have appeared that the statute the Security Council had written was the source of the new customary interpretation of IHL, and, as we have already seen, the *Report* itself was absolutely clear that the Council did not have that power and that the tribunal could not be legally legitimate if it had been created by the Council legislating.

Still, the problem had persisted for the S-G's lawyers of how to address the lack of either prior or formal notice of the existence of these crimes. The problem, as above, was that there was still no legal precedent for treating treaty-based IHL rules as a proper law transcending sovereignty, especially one recognizing individuals as direct subjects (as opposed to as state actors, or through their legal relationship to states). To get around this, the *Report*, and ultimately the Council, engaged in one of the few instances where they simply seemed to bluntly misunderstand and misread international law precedent in order to retain the appearance of legality, though we cannot know for certain since there was no debate on this particular question. What accomplished this was the inclusion in the definition of customary law (again through the

pre-statutory determination of "existing" and "beyond a doubt" IHL) of the Charter of the International Military Tribunal of 8 August 1945, which had established the Nuremberg tribunal (as well as the Nuremberg judgments and case law), and which did include (particularly through the inclusion of its case law as precedent) much more of the specific language necessary for legality. This included, in particular, the specifically enumerated crimes with the so-called general part establishing the standards for criminal liability, as well as a copious and carefully elaborated case law capable of filling in all the necessary "gaps" in a new law.

The problem—constitutionally—is that the Nuremberg Charter was not a statute at all, much less a global one, but rather, if one is legally precise about it, an agreement between the victorious Allied powers to exercise criminal jurisdiction on the basis of their individual sovereignties and well established international norms for the treatment of surrendering states. By mindlessly thinking of this as a statute, and specifically by dint of its determination that this too was part of customary IHL, the public relations language of Nuremberg (i.e. in the name of humanity) trumped the actual legal and material constitutional realities of those trials, and a set of rules which victorious states had applied to surrendering states henceforth would be applied to all sovereign states as a proper universal law. In so doing, Nuremberg was made—magically and retroactively—into a half-century old proper legal precedent, enumerated in explicit detail, well in advance of the Yugoslavia violence, but, again, it could do this only because the actual ICTY statute, when it appeared, made no reference to either the Charter or its precedents—which is to say its actual legal basis.

In concluding, three facts are worth underscoring, if one is to understand the full implications of the lack of proper legal precedent for global criminal law and of the Council's choice to seek to overcome this through the legal fiction of customary law. First, as has been argued here, the great material constitutional moment that could make global individual criminal jurisdiction appear to meet requirements of legality was a great anti-legalist preceding decision of the Security Council—which explicitly recognized that it acted as an executive power and without legislative power (e.g. Para 29)—made a decision to radically rupture established tradition on international humanitarian law and replace it with a system of legality based on a permanent non-enactment and elision of its actual ultimate legal and constitutional basis. Second, it is indisputable that international law, in the moment before this decision, did not (and indeed could not) recognize the existence of a set of criminal laws of sufficient specificity to pass legalist muster. The most obvious example of this are the so-called four sources, which had all existed for a considerable amount of time without anyone suggesting that they formed—as an extant legal fact—a global criminal code. Indeed, the *Report's* authors had clearly understood this, as exemplified by their recognition that the declaration of IHL as customary was necessary "so that no problem of adherence of some but not all States to the specific conventions does not arise" (Para. 34). So it is clear, to them at least, that the four sources were clearly not customary (or customary enough), either *de jure* or *de facto*, and, in fact, no state or international body had previously understood them as customary in precisely these terms.

Finally, it is clear that the driving force behind the particular form that this new order took was, once again, primarily concerns of domestic legalism. In fact, the customary law provision could have been avoided entirely—and existing international law reinforced—without undermining the possibility of convictions (or even convictions before a global court), but the

end result would have been unsuitable to the ideal of (domestic) legality. As the anti-customary law faction in the Security Council understood (though perhaps more instinctively than legally), existing international law recognized no global or UN-system criminal jurisdiction or right to sanction of any kind, but the international community had a number of options that were less constitutionally drastic than the customary law declaration, even if one were determined to have a global tribunal (Morris and Scharf 1994: 368-371). First, they could still have chosen to base the trials on some state's domestic law. This meant, according to the CSCE, Brazil and Slovenian positions, the law of the former Yugoslavia (which, it noted, recognized and was consistent with international law) (see gen. CSCE proposal 1993, Slovenia letter 1993). Second, according to the opinion of the ICRC (which holds observer status and participated), it could followed the real Nuremberg precedent (i.e. victor's justice) which establishes that the internal law of the detaining power is the applicable law in penal matters (e.g. the law of the Detaining Power for prisoners of war under Article 82 (1) of the Geneva Conventions III) (ICRC letter 1993). Third, they could have followed the US proposal that precedent be based on a Security Council stipulation of different legal fiction to the effect that all of the events in the former Yugoslavia were international conflict, and, thus, IHL, in its traditional form, would have been applicable (Scharf 1997: 55). Finally, as the French letter originally proposing the Ch. VII option had partially recognized, one could reverse the priority and insist that there was something specific and distinct, called international crimes, but that no enforcement mechanism yet existed, so they would be carried out in the name of SC Chapter VII emergency powers (not proper legalism), in a manner not dissimilar to Nuremberg (French letter 1993).

What is fascinating, in retrospect, how constitutionally constrained these proposals were (Morris and Scharf 1994: 368-71). The problem for the real believers in global law was that

none of these means was capable of appearing fully and entirely legalist. This is Scharf's conclusion, too, as to why the US proposal to base the tribunal's legality on a preliminary declaration by the Council that the conflict was subject to International humanitarian law was rejected: "The Secretary General evidently thought…[the US proposal] would be an encroachment on the independence of the Tribunal's judicial function and omitted it (Scharf 1997: 55). What this all underscores, once again, is that the driving concern behind the form the statute of the Tribunal took appears to have had at least as much to do with meeting the appearance of domestic legality (however grossly this was to misapprehend the issues and what was at stake), as it did questions of constitutional implications, justice, accountability, or even power politics, but this embarrassing naiveté about cosmopolitan law makes its full implications all the more troubling.

2. The New Global Material Constitution

The argument presented here is that, through nothing more than the simple invocation of basic principles of law and criminal justice necessarily associated with criminal court proceeding, the new global tribunals are enacting a dramatic re-alignment in the global balance of powers, a re-alignment about which we ought to have serious concerns. In considering the question of how we ought to think about the implications of *cosmopolitan law* for both the new political order and our new cosmopolitan political subjectivities, it would be useful, as a starting point, to ask what the *material constitutional* implications of the Yugoslavia Tribunal have been for the global order, as well as what they seem likely to be for the future? If this seems a strange question, it is only because we still continue to operate in terms of the formalized and positivized

concepts that have dominated that political and legal thought which has called itself "modern" (as Quentin Skinner (2000) and James Tully (1995) have so importantly shown). Here it is important that we not make the mistake, so common to formalist or positivist modern political and legal thought, of forgetting that the absence of a formal global constitution—the absence of a single document or agreement—does not mean that there are no organizing rules, nor that those organizing rules are not sufficient to produce a proper global order (here one might think of the work of Hans Kelsen (1967, 2000), the late Carl Schmitt (2003 [1950)], and Hardt and Negri (2000)).[51] So too, while Hardt and Negri have very provocatively and importantly suggested that the new power of "empire" is a diffuse and de-centered form of sovereignty, the reality has always been that political power was (materially) much more diffuse than the language sovereignty or the state could comprehend. What is at stake with cosmopolitan law, then, may be less a statement about the emergence of a new form of sovereignty, than about our lack of a conceptual term (and legal fiction) to name it. We may simply, as it were, be awaiting our Hobbes.

The fact is that, in the absence of a formal written constitution, what we might call the global material constitution now operates according to general principles of law and legality which have their origin in the traditions of Roman and post-Roman law—and first among these is the authority given to the dual logic that what we moderns call *precedent* and *stare decisis*.

[51] The dominant traditions of modern political (and legal) thought have tended to view this as a choice between material or formal accounts, either one or the other. However, that this can be viewed as a conceptual division has the possible only since the hegemonic success of the vocabulary of political modernity which polemically used this and other binaries to conceptually disable every alternative account which does partake of both sides of these oppositions. Any potential to understand tendencies and *teloi* within particular institutions will have to take place in material terms, however, political life (and law) cannot survive radical objectification of its underlying constitutional concepts. By contrast, here one might think of the work of Hans Kelsen (1967, 2000), the late Carl Schmitt (2003 [1950]), and Hardt and Negri (2000), which all treat together both formal and material aspects and objectification and subjective elements in defining their political terms.

Unlike merely following custom (which limits one to what has, in fact, been done in the past, and which recognizes only established usage), precedent operates on the internal logic that those past and present practices which can successfully claim to be a continuation of the law's founding principles become determinative for future constitutional practice. In contradistinction to the hegemonic conceptualization of law as rule following, central to both Anglo-American philosophy of law and analytical philosophy more generally, in which law is understood as a set of rules enumerated in advance, precedent is analogical and one of the great expansive institutions in world history, requiring for its authority neither past practice nor even a single past instance, and working (though obviously in practice much is done to try to constrain it) through a constant search for new legal and geographical terrain to include in its jurisdictional purview. Indeed, law in the classical (or pre-modern) Roman sense operates on the presumption of its applicability everywhere that has not formally foreclosed that possibility.

What this account brings to the fore is the fact that—against our legal modernist common sense that law is an essentially constrained and constraining institution—the terms of the emergent global constitution, in which we will all live in the future, are already being determined by the particular form which global legal practice is taking today. Put simply, for a system based on law (absent formal restraints), precedents *are* the constitutional order, and what this means in practice is that—through nothing more than the simple invocation of law and basic principles of legality—it is possible to fundamentally re-organize the global material constitution, without any kind of clear understanding of what is at stake, or any clearly established mechanisms for constitutional amendments—much less any means to try to link to any kind of meaningful republican or democratic legitimacy or oversight.

Indeed, so quickly and effectively do these matters become normalized by precedent that there has been little in the way of either Security Council or academic discussion about the constitutional implications of subsequent *ad hoc* tribunals (e.g. Rwanda, Sierra Leone, Cambodia, Lebanon) or the ICC indictments for Sudan. However, at that time of the creation of the ICTY, even the Secretary General's lawyers, who drew up the report that would be the direct textual basis for Resolution 827 (which established the tribunal) and ultimately for the ICTY statute, explicitly acknowledged that the creation of a judicial organ by the Council was unprecedented and that using a treaty—not Security Council, Chapter VII powers—was the "normal" method to create an ad hoc tribunal (Secretary-General's Report 1993: para. 19). In addition, as we have seen already in the previous section, the Council openly debated—if very briefly—the question of whether in fact it had the power to create a judicial body at all. Then, as now, the question arose as to what were the constitutional implications of the fact that the basis for the power to punish wrong-doers was being taken from what amounts to the UN system's state of exception provision (properly speaking, the exception to the system of sovereign states created by the UN system)—the *emergency power* of the Security Council to exercise force in the internal workings of a state (the same constitutional basis, it need hardly be said, on which the 2003 invasion of Iraq was based), as opposed to the collective representative power of the states through the signing of a treaty (e.g. the ICC)?

What is at stake here, though it has been too often neglected by both scholars of international law and international relations who have tended to naturalize juridical power and law, is the well-established legal-constitutional fact that—in its own internal terms—juridical power must have a recognized constitutional basis and source in law, and that this must recognize established institutional limitations. Thus it is self evident to any modern domestic

lawyer (though their justifications for this may differ widely, or there may be none at all) that one cannot simply presume that power—including, or perhaps especially, juridical power—may take any form the body creating it chooses. Power, under what is innocuously termed simply legal review, is not generic, but both specific and historically enumerated.

For this reason, we must begin our inquiry from the well-established presumption in international law that the two other bodies the UN Charter created, the General Assembly and the International Court of Justice (World Court) are legally and constitutionally precluded from legislating, or making law (formally or informally) of any kind. As a result, it could never have been an option to have the General Assembly create the mandate for the ICTY, because there is universal agreement among jurists that it does not possess the power to create a court of any kind, to use force, or to compel states to action. Still, at the time of the creation of the so-called ICTY statute, several proposals in the Security Council (by the representatives of Brazil and of Sweden (on behalf of the CSCE)) were made which sought ways to get the Assembly to officially sign off on what the Council was doing, if only for symbolic reasons. However, those arguments (and other objections by Brazil, China, the Russian Federation, and Venezuela, representing the non-aligned countries) were overcome under intense pressure from the Secretary-General, France, the US, and human rights groups, based on the presumption that a genocide was underway in the former Yugoslavia.

This legal review question of whether the Council is constitutionally empowered to create law is complicated further by the fact that the so-called ICTY statute, itself a legal expression of Chapter VII powers, claims to exercise jurisdiction only over individuals, without reference to states (i.e. personal jurisdiction under Art. 6), while the UN Charter does not explicitly authorize the Security Council to take measures with respect to particular individuals. As Virginia Morris

and Michael Scharf, authors of the most comprehensive and authoritative text on the law of the ICTY, point out weakly, "[s]ome commentators take the position that it is not authorized to do so" (Morris and Scharf 1994: 44). Before the ICTY debates, however, this would have been a serious understatement, and it is clear that the skeptical view would have been the nearly universally held opinion. Indeed, this turns out to have been the position of even Hans Kelsen, the great legal scholar whose academic ideas, more than anyone, were at the heart of creating the conceptual apparatus that has enabled global law. Yet, for Kelsen, writing in 1950, it was impossible to interpret the Council as having powers beyond those enumerated in the Charter, and the Charter referred solely to "the collective responsibility of states" and was thus applicable "against states as such, not against individuals" (Kelsen 1950: 738). For this reason, he did not believe that one could locate individual criminal responsibility in the Charter, though, as a strong advocate of the idea, he believed it could be found in the Nuremberg Charter, in customary law, or in a treaty.

Indeed, so inadequate was the precedent, that—in what is the single weakest section of the *Decision*—Cassese could do little more than sidestep well established legal review question of whether the Council can establish a subsidiary organ with judicial powers with criminal jurisdiction over individuals by denying the applicability of this classical legal question of delegation of power, and, instead, redefining it as a legally vague question "the exercise of its own principle function of maintenance of peace and security" (*Tadić* Appeals Decision 1995: para. 38). What is more, the only precedent for Council lawmaking the *Decision* could offer was the creation of Administrative Tribunals in Egypt in 1956 by the General Assembly at the time of the Suez Crisis, as part the first UN Emergency Force, and those tribunals clearly did not exercise criminal or individual jurisdiction (ibid.).

The clearest statement of this counter position that ultimately carried the day for both the Council and for Tribunal case law (and precedent), as summarized by the third President of the Tribunal, Judge Theodor Meron, is the argument that because under the UN Charter the Council "has broad discretion to take enforcement measures involving even sanctions and the use of force; thus *a fortiori* it may take such lesser measures as the establishment of a tribunal" (Meron 1996: 213). Legally this was what was necessary, but it is a troubling precedent. Indeed, it is hard to see how there could be any legal limit to the extent, form or content of Council power "to use force," except its definitional requirement under Chapter VII that it be for the maintenance of international peace and security. The problem is that the right to use *force* thus becomes, for the cosmopolitan legalists, a sufficient *sine qua non* for the right to exercise judicial power (in precisely the same manner as it does in Hobbes' and Schmitt's theories), and it was thus only a matter of time before this would extended to include legislative power as well.

It is generally, if mistakenly, assumed that these global constitutional issues are no longer relevant for the International Criminal Court (ICC), given that it was created from a treaty (the Rome Statute of 1998), and applies only to signatories. Unfortunately, this is not the whole story. The crucial case in this regard is the decision of the new ICC prosecutor, Luis Moreno-Ocampo, to indict Sudan's President, Omar al-Bashir, but precisely the same issues have now been raised again with indictment of Muammar Gaddafi. To fully appreciate what is at stake here, recall that the ICC and its prosecutor have jurisdiction only over states which have signed and ratified the Rome Statute. Since Sudan (and Libya) has not done so, the only available means was for the Security Council to invoke its powers under Chapter VII of the UN Charter

which allow it to use "force" (Art. 42) to "maintain or restore international peace and security" (Art. 39) in order to create what will be, in effect, a new ad hoc Tribunal, this time for Darfur.

The problem for the future of international law is that both the ICC Statute (Art. 13(b)) and Security Council practice now establish that all such future *ad hoc* tribunals shall be held at the ICC, though it would technically not be within the legal and institutional structures of the ICC. The ICC, in other words, now serves a dual jurisdictional role as, on the one hand, a judicial body proclaiming itself to be independent, while simultaneously (same law, same precedents value, same judges, same prosecutor) an arm of Security Council power. Nor does it seem likely, given Roman law's generalizing *teloi*, that these two jurisdictions can remain separate for very long. Regrettably, these issues no longer appear to be part of the Security Council's debates invoking ad hoc jurisdiction, whether with regard to Sudan, or any other more recent cases such as Libya.

Ultimately, then, we need to recognize, as a number of the international lawyers involved certainly did at the time the ICTY was created, that the constitutional precedent established by an ICC indictment of Bashir would have the effect of dramatically enhancing the power of the Security Council on at least three distinct levels:

(1) First, within the terms of the UN system, it must be remembered that before the ICTY and ICTR the Security Council had never claimed to have the power to create a proper judicial power. Both of those tribunals were temporary, so, should the Security Council invoke this same Chapter VII power in order to create ICC jurisdiction for Sudan (or any other country), it would have to be understood—constitutionally—as the first time the Security Council was claiming the

power to create judicial power for a permanent tribunal. In sum, this must be understood as both a claim to have the power to create at a global level a kind of power (judicial power) that the UN system never explicitly envisioned (in its statute), and which (if the statutory limits on the ICJ are to make any sense at all) appears to have been specifically precluded. To understand this, the UN system must be viewed as having dual, and conflicting, constitutional mandates (one (embodied in the preamble, the Assembly and the ICJ) based on state sovereignty and the other (embodied in the Security Council) representing the rupture of that system through Art. VII), but, however dramatically Council power gestures towards the potential end of this system, the balance has always ultimately swung in favor of states power because of the fact that the UN system generally (and the ICJ, specifically, in its limitations on mandatory jurisdiction and precedent) was formally precluded from making law (whether by legislation or legal precedent), as well as by the fact that Chapter VII applied only to states. As such, the (legislative) creation of juridical power by the SC (and the creation of global legal precedents by the global courts) serve as a dramatic re-alignment in the balance of power accorded by the UN Charter to the various UN bodies (especially the General Assembly and the International Court of Justice).

Second (2), beyond the UN system proper, the ICC's prosecution of cases on behalf of the Security Council will serve as a strong future precedent towards increasing Security Council (and UN) supremacy over the state treaty-based ICC (and other non-UN bodies). Finally (3), at the level of constitutional principle, the Security Council's invocation of this new power will stand as a powerful precedent, throughout the global sphere (and inevitably for domestic politics as well), that judicial power may be understood as nothing but a derivative of executive power (the Security Council), a power that the constituent and legislative power cannot exercise (e.g. of states, or the General Assembly). This was, in fact, one of the bases of Tadić's initial appeal

against the legality of the ICTY, that international law (esp. the International Covenant on Civil and Political Rights) was understood to clearly establish that (criminal) law must be the product of the legislative branch (*Tadić* Appeals Decision 1995: para. 42). In contrast, as we have seen, both Presidents Cassese and Meron, have argued that one of the great legal advances brought about by the ICTY is that it has served to undermine this normative lack of legitimacy for executive lawmaking. As good jurists, they simply had no other choice, since, without a universal treaty signed by every state, the Security Council is the only possible source of a global (criminal) law.

In sum, what is ultimately at stake in Ocampo's indictment of Bashir is that—through the invocation of the apparently neutral language of law and of courts, and through the apparent moral necessity posed by the very real crises to which these institutions are directed—a fundamental global constitutional re-organization is taking place, and taking place without much explicit discussion of what is really at stake. Beyond the perhaps initially appealing arguments for the priority of law to sovereignty and of universal ethics to local, we are witnessing at this very moment in world history the extrapolation of the (domestic) idea of law to the global sphere, and, yet, this is law with a difference—law shorn of every relationship (conceptual, constitutional or institutional) to any of the primary modern grounds (sovereign, republican, or democratic) which for over 350 years have served as the dominant and hegemonic intellectual bases for the legitimacy of lawmaking power. This is law, that is to say, shorn of every historical connection to sovereign/republican/democratic communities, with the end result being that the new global constitution will be based on the priority of global law to every democracy. Nor is this the first time we have seen this problem: This has been the greatest reason for the failure of

the European Union project, even as that body is substantially more democratic that anything that global law can offer.

3. Neither Legal, Nor Necessary

What then would have been the preferred means for the Security Council to have dealt with this situation in the Balkans? Contrary to the dominant opinion both then and now, which has framed this within some version of the doctrine of necessity or emergency, this certainly does not mean nothing could be done. Diplomacy, sanctions, blockade and even military intervention were accomplished within either the existing UN, NATO and European constitutional architectures without requiring a global criminal law, and, as we will see, even the cries for an end to impunity (i.e. individual criminal liability) could have been accomplished by basing the right to punish on either the law of the former Yugoslavia (some variant of which was advocated at the Council by the CSCE/Sweden, Brazil, Russia, Slovenia, and the ICRC) or the sovereignty of a collective group of occupying or guaranteeing powers (as with Nuremberg).

Critics of the international intervention in the Balkans (e.g. Chomsky 1999; Herman 2005; Zolo 2002, 2004; Mandel 2001; Ali 2000, Gowan 1999, Beck (Zolo, de Benoist (Zolo 2002: 42), Champetier (Zolo 2002: 42-44, Johnstone 2002, Fromkin 2002, and Orford 2003) as a new military humanitarianism, have tended to argue that this project was an overtly imperial attempt to create a new world order of one source or another (see gen. Zolo 2002), and so have tended to dismiss the legal aspects as a disingenuous smokescreen. This project to create a new world order may certainly have been true for some of the most important political actors (though where, for example, Clinton, Blair, Albright, Eagleburger, Cohen, Boutros-Ghali, or Anan fit is

beyond the brief of this paper), and it certainly was true many of its public apologists (e.g. Huntington 1999, Brzezinski 1997, and Haass 1997). It simply was not the case, however, for the true cosmopolitan legalists and legal pacifists—both at the tribunal (e.g. Cassese, Meron, Jorda 199, Bassiouni, Goldstone 2000, Arbour 1999, and Del Ponte 2009) and outside (Held 1995, Falk 2005, Bobbio 2002, Habermas1999, Walzer 2004, Simma 1999, Ignatieff 2001, Glennon 1999, Henkin 1999, Power 2003, Rieff 1995, Armatta 2010, Shattuck 1999, Scharf 1997, Roth 1998, Ratner 1999, Neuffer 2001, Neier 1998, Minow 1998, Moore, Douglas 2001, Cigar and Williams 2002, Beigbeder 1999, Bass 2002, Ball 1999)—for whom the creation of a global tribunal and the promotion of a general cosmopolitan rule of law was both the end and purpose of an ideological system. This fact makes it all the more surprising that, while many writers have discussed issues of internal legality or guilt and innocence at the tribunals, a remarkably small number of scholars have really taken seriously the broad constitutional and legal issues raised by cosmopolitan law and the new cosmopolitan legal pacifist ideology that drives its success (Alvarez 1998, Mandel 2001, Zolo 2002, Osiel 2000, Mattei and Nader 2008). For this reason, though there is certainly much that is correct in the imperial critique, this investigation has focused on the question of an internal critique, within the language of law and democracy, as a means to raise what, it is argued here, are the inherent internal contradictions and *aporia* in the cosmopolitan world-view.

At the center of this internal critique is the apparent irony is that, in recent decades, cosmopolitan legalist liberalism has come to be committed to a peculiar interpretation of this ideology (and this is also true of the avowedly anti-legalist domestic right with regard to executive and commander in chief powers) in which law can and should comprehend—and

integrate internally—every element of global and state practice, as law. In other words, if practice requires either intervention (or emergency or war, domestically) these acts must be legal—and legal retrospectively at the time that they were committed. Payam Akhavan, for example, a former Legal Advisor in the ICTY Office of the Prosecutor, has used Theodor Meron's pre-Tribunal academic writings to elucidate this position:

> [H]e wrote of the tendency of courts applying humanitarian law to blur the distinction between…*lex feranda* and *lex lata*…law as it is, and law as it ought to be…may emerge in the future, or…as we would like it (Akhavan 1998: 5, citing Meron 1987).

However, this apparent commitment to legality is actually logically opposed to legality, and its implications, constitutionally, are that the formal constitution becomes merely an ex post facto reflection of who can justify a claim of necessity—strictly speaking an a-legal exercise of force. It is therefore not the breaking of international law, but rather the project to redefine law itself it in strictly il-legal terms that Zolo had in mind when he called this "a war against law" (2002: 66).

In a neglected but truly important conclusion, Akhavan reminds us that international humanitarian law developed in a very haphazard way "in part, because states wanted to create ambiguities" and limits, precisely to protect their sovereignty (1998: 5). That then makes it the area in which the greatest opportunities for "progressive clarification and development exist," whether on the basis of legal rationalization or moral necessity, but, in doing so, Akhavan warns us, we "risk creating a law that…does not remotely reflect what states are actually willing to concede" (ibid.)? Two implications, in particular, trouble Akhavan: First, as has already happened with the Security Council, a surreptitious legislative process arise, the precedent

established by which will dramatically reorient the global material constitution around Chapter VII power? Or, second, will judicial activism undermine the Tribunal's credibility in the eyes of States?

By contrast, the preferred, and today entirely neglected, way to deal with such matters in the republican and classical traditions has always been—following the Socratic and Aristotelian models—to insist that the state or collection of states (or leading citizen, domestically) must acknowledge the law as it is, and in so doing one show ones fidelity to the laws that have made us. As Aristotle tells us in the *Nicomachean Ethics*, without question the single most important text in both the political and legal traditions, both for its place at the head of the traditions and for the excellence of its explication:

> the law takes account of the majority of cases, although not unaware that in this way errors are made. And the law is none the less right; because *the error lies not in the law* nor in the legislator; for the raw material of human behavior is essentially of this kind (1976: 199 (Book V, Ch 10)) [ital added].

At this point the law can be changed prospectively by legislation (or interpretive consensus), or, only then, if indeed it is properly speaking a time of necessity or emergency, does one have the responsibility of making the judgment of whether it is necessary to break the law and accept the consequences. Ideally, on the model of Socrates' deep commitment to the *nomos* of Athens, one then ought to stand by one's commitments to law by sacrificing one's self-interest to the international community (or polis/republic) by foregoing petty legalistic claims (including

innocence and necessity) which undermine the status of the law, and instead be resolute enough in ones beliefs to be willing to trust one's case to public opinion and to history, as arbiters.

In the case of the events in the former Yugoslavia, this means that the single most important conclusion is that the trials of Tadić, Milošević, and other defendants should have been conducted in domestic courts under domestic law as it existed at the time the alleged crimes. This was the position put forward in various forms before the Council by state representatives from Sweden (as representative of the CSCE), Brazil, Russia, and Slovenia. It was also the opinion of the Red Cross, one of the few consistent sources of knowledgeable legal reasoning and institutional knowledge about international law, which argued, the "internal law" of the state where crime was committee is the applicable law in criminal matters, and everyday criminal statutes or military law could easily be used as the basis for successful prosecutions of all of the defendants (ICRC Rep. Remarks 1993) . Indeed, the 1990 Penal Code of Yugoslavia, which was fully consistent with the relevant international law standards, was then the recognized law in all the successor states, and so rendered moot legalist concerns about either a lack of jurisdiction or legal uniformity. What is more, because Yugoslavia had acceded to all of the relevant international humanitarian law treaties, there was already a strong legal basis for applying to its domestic law every single humanitarian law crime eventually enumerated in the ICTY statute. In fact, the Council's decision to base the law of the Tribunal on the legal fiction that there already existed a "customary" international criminal law was based on the presumption that these were already and in fact considered legally customary in Yugoslavia. If anything, the customary argument very significantly limited the international humanitarian provisions applicable to those specific provisions which the Secretary-General's lawyers felt met the standard of customary

(while Yugoslavia had consistently recognized much broader applicability of international humanitarian law internally) (see gen. ICTY Statute 1993: Arts 4, 5 and 6).

In addition, besides the issue of the hidden global material constitutional implications, this fact the preference for domestic law is underscored by the inadequacy of what turned out in to be the most widely held argument for the Tribunal, the desire to reveal the truth about the violence in the former Yugoslavia. Practically, however, it has proven to be much too much to ask foreign investigators and lawyers often radically unfamiliar with language, history, and culture to find and properly interpret every detail of a defendant's conduct in an often hostile environment, especially when police and prosecutors routinely fail to find absolutely determinative evidence even in their home countries.

As was the case for Rwanda as well (Gourevitch 1998), this is magnified still further when standard academic and news accounts (e.g. Rebecca West's infamous *Black Lamb and Grey Falcon: A Journey Through Yugoslavia* (1994 [1941]), Robert D. Kaplan' *Balkan Ghosts: A Journey through History* (2005 [1993]), and Samantha Power's *"A Problem from Hell": America in the Age of Genocide*. (2003)), by which investigators and lawyers interpret events and evidence, so often grossly misinterpret the context through the lens of timeless communal hatred in "the Age of Genocide" (and this has been the case with every place international tribunals have been involved, including Cambodia, Rwanda, Sierra Leone, Lebanon, Sudan, and central Africa, as well as the former Yugoslavia). West's account has long been the "classic" account read by every visitor, and its' unfortunate and polemical account has always appealed to those who fancied themselves hardheaded and realist about human nature, and, of course this tendency has always been magnified still further for the Balkans (Todorova 1997). However, as Kaplan reports, it was his book (which he acknowledges follows West quite closely in its

account of timeless communal hatreds) which emerged as the text of the moment in the Yugoslavia crisis when it was famously seen under Bill Clinton's arm, and Clinton insiders have apparently acknowledged that the president saw it as his primary source on the Balkans (2005)!

For these reasons, as well as for the appearance of legality, Tribunal judges, faced with literally dozens of charges for every defendant and often very uneven evidence, have, as they did with Tadić, largely been happy to acquit on those charges which are less well documented, though many of these he may very well may have committed. For Tadić, this meant he was ultimately sentenced to 20 years in prison, even though he was—and this was the norm—convicted of less than half of the charges against him. The result both holds individuals accountable and is important as a matter of law, but it makes poor history—and in at least a large minority of cases it often fails at the Tribunal's much discussed brief of as redress for the specific injuries of specific victims (cf. Wilson 2003).

Tribunal advocates worried, as well, about governments shielding defendants, but even this has turned out to be much less of an issue than it might seem. Long established rules of jurisdiction would have allowed the courts of any of the successor states to indict and try defendants for acts related to its territory or citizens, and those states would then make formal claims for extradition. Any defendants shielded by successor governments would then be subject to international arrest warrants and no longer able to travel freely. Most importantly, however, it must not be forgotten that, even for the ICTY, the court was only able to get its hands on indictees when sovereign states extradited them. The major figures on all sides of the Bosnia war (e.g. Slobodan Milošević, Radovan Karadžić, Rasim Delić, and Ante Gotovina) were turned over to the tribunal by their own governments. This is the time honored system which has defined state legality for more than three centuries. If, to cosmopolitan legalists, the old system

lacks efficiency and uniformity, they do not see that this messy legality was carefully constructed as a means—indeed as the only means—to protect the legal independence of (democratic) communities. As we shall see in some detail, without these protections, the law of each successor state is now, as a matter of law, *subject* to—not fully, but *ultimately*—the higher legality of the Tribunal. The failure to see this distinction, and how much is at stake in it, is one of the great weaknesses of much contemporary cosmopolitan legal thought,

Finally, had some state or collection of states (UN, NATO, or EU) come to the conclusion that this proper legality was insufficient for dealing with the accused in the former Yugoslavia, then the most desirable alternative would have been for that state or group of states to claim the right to punish the criminal on the basis of its own sovereignty and the laws of the former Yugoslavia. This might also have been based on the right of a victor in war (as with Nuremberg), or of an international tribunal applying domestic law. This, it might be argued under emergency circumstances, might be the better practice for justice, peace, history, or even for law, but it must be viewed as illegal.

Given the reservations just discussed about basing the crimes in global, not domestic, law, the strongest argument against the manner in which the *ad hoc* global Tribunals were created is that the Security Council did not adequately comprehend, much less debate, the full constitutional implications of global law. Given the dramatic reorganization of the global material constitution this has produced, it is troubling to see that the enabling vote of the Security Council creating the ICTY must be understood to have been a momentary and surprising—and perhaps unrepeatable—coalition of support, and this raises serious questions about whether such

a dramatic realignment could have been legitimate under these terms. Specifically, it raises the question of whether there was sufficient debate for a change of this magnitude, did Council members have an adequate understanding of what was really at stake in the ad hoc tribunals, and were the legal-constitutional means used to create the Tribunal the most appropriate?

The first prong of this was the truly surprising support of two consecutive US governments for global criminal jurisdiction. Attention is usually paid to the Clinton administration, and especially to the role of then UN Ambassador Madeline Albright, but, given the infamous anxiety of Clinton administration foreign policy makers about being labeled idealist, especially after Somalia and Rwanda, the more important factor was certainly the remarkable—and even bizarre—support of the lame duck George H.W. Bush administration under Secretary of State Lawrence Eagleburger. Under the direction of realists like James Baker and Bret Scowcroft, foreign policy under Bush, had resolutely refused to label what was happening in Balkans a genocide (the term used was "ethnic cleansing") precisely because that would have required intervention under the terms of the genocide convention, and most US officials, according to Michael Scharf (at the time Attorney-Advisor for UN Affairs at the State Department) favored domestic trials in the former Yugoslavia (Scharf 1997: 42). However, after Bush's defeat in the 1992 election, when Baker was appointed White House Chief of Staff, Eagleburger was named as his replacement for the final six weeks of the Bush presidency.[52] It was in this truly tiny window that Eagleburger (whose positions fit more closely with dissenters within the State Department) had his famous conversion after talking with Elie Wiesel, and became, in Samantha Power's words, an "unlikely midwife to the justice movement" with his

[52] Eagleburger was Secretary of State from December 8, 1992 – January 20, 1993. Before that he had served as Acting Secretary of State from August 23, 1992 - December 8 1992.

famous December 1992 speech at the peace conference in Geneva in which he named the names of ten alleged Serb war criminals and their crimes and warning that "a second Nuremberg awaits the practitioners of ethnic cleansing" (Power 2003: 291). This was the first public diplomatic mention of the possibility of an international tribunal by the international community, and what is truly startling is that the announcement appears to have been made without White House authorization or knowledge (Morris and Scharf 1 1994: 30, fn. 111)!

Second, the widely held belief that a second European holocaust was at that moment already well underway created tremendous pressure on Council states to speed up the decision process and support the tribunal, whatever their initial reservations. This was especially true following the publication in July 1992 of accounts and images of skeletal prisoners after Roy Gutman of *Newsday,* Ed Vuillamy of the *Guardian* and an ITN film crew were allowed to visit the Serb-run camp of Manjača in Bosnia with the ICRC, a camp both similar and nearby to the camps in which some of Tadić's alleged crimes took place. "Like Auschwitz," as Gutman famously wrote at the beginning of the reportage for which he (and also John Burns) would win a Pulitzer Prize, Muslim civilians were being deported in "sealed boxcars", and he quoted a Muslim student who said that "We all felt like Jews in the Third Reich."[53] One particularly horrifying photograph of a skeletal man behind a barbed wire fence became an icon of the moment and appeared on the cover of *Time* magazine for August 17, 1992. At just this same moment, a CIA report predicted 150,000 deaths, and the UNHCR 200,000, over the winter of 1992-93, and the Bosnian government claimed that, in Bosnia alone, 130,000-200,000 had already died as of late 1992 and early 1993 (Kenney 1995, 2005).

[53] Roy Gutman, *Newsday*, July 21, 1992 (cited in Power: 271-2).

In this context, as the Venezuela representative, Diego Arria, publicly complained, the non-aligned countries "felt the resolution 'was rammed down our throats'…They said to us: 'if you object, you'll be responsible for damaging war crimes" (1993). Similarly, the Brazilian and Chinese representatives both expressed strong reservations about the process and made clear that their support was predicated on the "unique and exceptionally serious circumstances" and the "urgency" of what was at stake (1993, 1993).

Yet, as we shall see, it has become fairly clear to most non-partisan observers that only by the broadest and most legalistic possible definition can what happened in the former Yugoslavia be called a genocide, and the number of dead in the war in the western region (i.e. in what is now Bosnia and Herzegovina (BiH), Croatia, Serbia and Slovenia between 1991-95, and excluding the later events involving Kosovo in 1998-99) is now, according to recent numbers, generally estimated to have been approximately 120,000 on all sides and including soldiers. By comparison, current estimates are that 1 million died in Yugoslavia during WWII. With specific regard to the lands of the former Socialist Republic of Bosnia and Herzegovina, Tadić's home, relatively reliable recent estimates have questioned the longstanding consensus of 200,000-300,000 dead as politically based. By contrast, the Red Cross, which has confirmed 20,000 dead, estimates 20-30,000 total deaths, and most careful recent estimates suggest between 25,000-97,207 deaths, with roughly a 60%-40% breakdown between soldiers and civilians.[54]

[54] George Kenney estimates 25-60,000 died in Bosnia. That estimate is based on CIA, State Department and European experts, as well as on the Red Cross, which has confirmed 20,000 dead and estimates up to 20-30,000 total (Kenney 2005). Also, a carefully constructed database, the *Bosnian Book of the Dead*, created to "count every body" by the Sarajevo-based Research and Documentation Center, and funded by the Norwegian government, claims that early estimates were inflated, and concludes that 97,207 were killed, of whom 60% were soldiers and 40% civilians (2007, see also "Research shows estimates of Bosnian war death toll were inflated". *International Herald Tribune*. June 21, 2007).

Perhaps the most important fact is that, though the Prosecutor's office (OTP) at the Yugoslavia Tribunal continues to this day to pursue its prosecutions based on the legally and historically problematic presumption that the government of the Bosnian Serb Republika Srpska conducted a genocide in Bosnia in a manner directly analogous to that conducted by the Nazi state, the Tribunal has succeeded in convicting only two persons for the crime of genocide in its first decade and a half, and the first and most famous of these—the conviction of General Radislav Krstić of the Bosnian Serb Army (VRS)—was later reduced on appeal to aiding and abetting genocide on the grounds that Krstić's crimes we all of omission and failure to prevent others formally under his chain of command.[55] Both genocide convictions relate to the massacre of 8,000 Muslim Bosniak men and boys in 1995, in the vicinity of the UN Safe Area of Srebrenica, and both depend on a highly legalistic finding by the Tribunal that the definition of genocide could be satisfied by an attempt to "destroy, in whole or in part" the protected national group defined as the "the Bosnian Muslims of Srebrenica."[56] One cannot but recoil at the destruction of that community and the massacre of the majority of its men, but one must also recognize the legalistic inclusion of ever smaller sub-communities by activist prosecutors points in the direction of the international criminalization of every killing, even in wartime, conducted in the name of nationalism. This slippage from criminalization of genocide to nationalism has been at the heart of the ICTY Prosecutor's vision of events (and most of the defendants have

[55] *Prosecutor v. Radislav Krstic* Appeals Judgment (April 19, 2004). It seems likely that Karadzic will be convicted on genocide, and this is even more likely for Mladic, if he should ever be captured. The most interesting and important question though is whether Milosevic would have been on that charge.

[56] *Prosecutor v. Radislav Krstic* Judgment (August 2. 2001: para. 560). The Chamber concluded that the protected group, within the meaning of Article 4 of the Statute, must be defined, in the present case, as the Bosnian Muslims. The Bosnian Muslims of Srebrenica or the Bosnian Muslims of Eastern Bosnia constitute a part of the protected group under Article 4. The question of whether an intent to destroy a part of the protected group falls under the definition of genocide is a separate issue that will be discussed below.

been charged with genocide), nevertheless, the judges have only accepted this definition with regard to Srebrenica. In the end, neither Tadić, nor any of the others defendants convicted by the Tribunal for the events of 1992 in BiH, has yet been convicted of the crime of genocide (including both the then President of Republika Srpska, Biljana Plavšić, and the then speaker of the National Assembly, Momčilo Krajišnik, who were both part of the inner circle with Radovan Karadžić).

None of this is intended to deny the brutality of the violence, or to gloss over it with easy equivalencies. Without question, the cruelty of the treatment members of minority (and especially Muslim) communities faced, especially in smaller villages and at the hands of various informal local militias or paramilitary groups, is as terrible as anything that can be imagined, and it is unquestionably true that a disproportionate number of the earliest victims and civilian victims were Muslim. As purely a global constitutional question, however, if, as George Kenney has suggested, the proper analogy is that "Bosnia isn't the Holocaust or Rwanda; it's Lebanon," it is by no means clear that this emergency was of sufficient basis to justify the global constitutional realignment it produced in the face of clear opposition within the Security Council (2005).

Third, also important in determining Council support was the specific context of the violence, in which the victims appeared initially to be primarily Muslim and where the events were taking place in Europe. Within Europe, North America and their traditional allies, the perception that the international community would be seen as having done nothing to protect Muslim communities in their midst did much to soften any legalist, liberal or left opposition there might have otherwise been (e.g. in France, Hungary, Spain, the UK, the US, and also Japan and New Zealand). While the same issues seem to have helped to overcome any opposition that

might have otherwise come from the states of the Islamic world, and this ultimately lead to the full support of the Organization of the Islamic Conference (represented at the Council by the representatives of observer states of Egypt, Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey). Meanwhile, globally, the fact that the victims were Muslim and that the invasion of sovereignty would be European sovereignty (especially given that the faces of both the UN and the UN's investigating Commission of Experts were Egyptian, Boutros Boutros-Ghali and Cherif Bassiouni) may well have made easier the support of the Council representative states from the Islamic world (Pakistan, Morocco and Djibouti), the non-aligned states (Venezuela), and Africa states (Cape Verde). The same is likely to have been true of the fact that it was France, not the US or UK, that most actively pushed the ad hoc tribunal idea, and indeed the UK was the most skeptical of the European states, as the most invested in the Vance-Owen peace talks.

The fourth perhaps irreproducible prong of the ICTY coalition was that 1994 was a low ebb for both Chinese and Russian power. In particular, the Russian Federation, under Yeltsin—though it was then serving as President of the Security Council and though it saw itself as a traditional protector of Serbian interests—was momentarily in a uniquely pro-Western posture, at the lowest ebb of its international power before or since, and under intense international pressure to create a non-adversarial role for itself in the post-Cold War era. Ultimately, Russia allowed itself to be largely bracketed from being a major player in the creation of the Tribunal on the basis of the argument that its traditional interests risked undermining the strict neutrality that it was felt the Council must show in creating a judicial body (Scharf 1997: 32-33, 64-65, 78).

Finally, there is the problem of what it means that the tribunal was primarily created by interested or partisan parties, often with quite atypical understandings about global law. For example, prior to the creation of the Yugoslavia Tribunal, the belief that proper precedents existed for the Councilor example, prior to create individual international criminal jurisdiction would have been limited, among international legal scholars, to a tiny number of experts in a sub-field that even most advocates for global law believed was more aspiration than reality, international criminal law. It was, however, the foremost figure in this camp, Egyptian-born M. Cherif Bassiouni of DePaul University Law School in Chicago and author of one of the two best known textbooks, *Introduction to International Criminal Law* (1996), who would play a major role in the creation of the Tribunal. Strictly speaking, Bassiouni's role was investigatory, as head of the five-member 780 Commission, created under *Resolution 780* on October 6, 1992, as an impartial commission to collect information (and frankly to clarify how to assess blame) on what was happening in the former Yugoslavia. The data in its final report would ultimately become the factual basis for the ICTY Prosecutor's cases, but Bassiouni's direct role was limited when his candidacy to be the first ICTY Prosecutor was defeated in the Council, based on opposition from France, Britain, Russia, and China (Scharf 1997: 76-77). However, the importance of having the imprimatur of one of the few commonly know international jurists cannot be overstated—particularly with regard to less legally savvy members of the Security Council and public.

Several elements are worth especially highlighting. First, although it is largely beyond the scope of this project, the makeup, work and legacy of the 780 Commission is of the first importance to understanding the limitations of criminal law and truth-telling functions of global tribunals in general. Four issues in particular seem to reoccur in these contexts: Lack of

knowledge of the region and relevant experience for the key players; lack of consistent mandate, funding and support from the UN for long-term projects; choice of strong partisans or persons with minority opinions for formally impartial positions; and lack of fit between the requirements of the UN as a diplomatic community and the kinds of clean hands necessary to legal justice. Resolution 780 specified no more than that the Secretary-General must appoint persons based on "expertise and integrity," and so Boutros-Ghali chose, as chair, Frits Kalshoven, a seventy-year old Emeritus Professor of International Humanitarian Law at Leiden, while the remaining members were William Fenrick, Keba M'Baye, Torkel Opsahl, and Bassiouni.[57] All were respected senior academics or judges, but none had any experience related to prosecutions or criminal investigations, much less the kind of experience, language training and expertise necessary to comprehending—and setting the global terms of the debate for—a complicated war in the Balkans. The new chair of the 780 Commission was widely viewed as clearly out of his depth, and, as Michael Scharf relates, the journalist Roy Gutman claims that Kalshoven "tells visitors he does not know why he got the job" (1997: 43). This turns out to be an extremely important fact. Though it may seem like a decidedly academic critique, all prosecutions require a theory of history—of what constitutes a proper authority and what a crime against it, and, indeed, even the ICTY Office of the Prosecutor immediately began its internal work by bringing in its own expert historian, James Gow, who was then called as the very first witness to be called before the Tribunal, in order to provide "context." Gow, as we have already seen, was widely regarded as an inadequate choice, but at least he faced cross examination of his testimony. None of the members of the Commission had the expertise to make these kinds of historical judgments,

[57] Commander William Fenrick (Canada) was Director of Law for Operations and Training at the Canadian Department of Defense. Justice Keba M'Baye (Senegal) was the former President of the Supreme Court of Senegal and former President of the ICJ. Torkel Opsahl (Norway) was Professor of Human Rights Law at Oslo and a former member of the European Commission on Human Rights (Scharf 1997: 42).

and none was ever vetted on that basis. As a result, though this was not determined until later, when the collected background data, evidence and analysis that made up the eighty-four page final report and accompanying twenty-two annexes (3,300 pages of documents), when that material (facts and interpretations) became the basis for both the Tribunal Prosecutor's own theory of history and prosecutions (and by far the greatest part of this in turn became the Tribunal judges theory of history, since judges are not supposed to have other sources of information), it became the basis on which the Tribunal's dual mandate—judgments of guilt and truth-telling—were ultimately assessed (Scharf 49).

The creation and early work of the Commission (in late 1992 and early 1993) took place against the backdrop of the Vance-Owen peace talks, and the moment was marked by a serious internal cleavage within the Security Council between the US (under Eagleburger) and France and Britain, who supported a political settlement and viewed naming individuals at precisely that moment as counterproductive. It was at this moment that Eagleburger had chosen to publicly name ten names of the key figures in the Balkan crisis at a session of the peace talks in Geneva, without White House notice or approval (though it appears to have been vetted in the State Department) (Morris and Scharf 1 1994: 30 fn. 111). Eagleburger said that Lord Owen, who was present, had "made it clear that he considered my remarks unhelpful" (ibid.). Also at issue was the Commission's brief. The UK, France and Russia were willing to accept its existence, but they believed it should have no authority to conduct investigations (Morris and Scharf 1 1994: 26). Finally, it is Bassiouni's belief that the heads of the UN office of Legal Affairs, UN Legal Counsel Fleischhauer and his deputy Ralph Zacklin, which oversaw the 780 Commission, sided with its opponents and sought to undermine the Commission (Guest 1995: 94). Whatever the reason, Bassiouni says that the Commission was given an inadequate mandate of only ten

months, only two staff persons, and no funds were ever provided by the UN for investigations or operating expenses (Bassiouni 1996: 8). To remedy this, the commissioners, on their own, sought to set up a trust fund to allow countries to make voluntary contributions, though this was not provided for by the resolution and not a practice allowed elsewhere in the UN. Ultimately thirteen countries, not including Britain and France, contributed $1,320, 631.

One final note: Though it may already seem hackneyed by now, here one can see, once again, the continued importance of Arendt's claim that:

> [A]ll societies formed for the protection of the Rights of Man, all attempts to arrive at a new bill of human rights were sponsored by marginal figures—by a few international jurists without political experience or professional philanthropists supported by the uncertain sentiments of professional idealists (2004 [1951]: 371).

To this list, we can now surely add advocates of cosmopolitan law, in general, and Eagleburger, Bassiouni, Cassese and Meron, in particular. To this list we must also now add the former journalist and Obama advisor, Samantha Power (now at the Kennedy School of Government at Harvard) whose work serves as nothing less than the antithesis of Arendt's. Her enormously popular book, *A Problem from Hell: America and Age of Genocide*, makes a fetish of the "stories of the courageous Americans who risked their careers and lives in an effort get the US to act" (2003).[58] The hero (and model) of Power's famous and award winning book is Raphael Lemkin, who—more or less alone—seems to have conceived of, drafted, and publicized the Genocide

[58] In what is surely one of the saddest ironies in the history of American letters, Power was asked to edit and write an introduction for the new Schoken edition of *On Totalitarianism* (2004 [1951]).

Convention, though neither he, nor the various political figures who shepherded its enactment in particular countries (e.g. US Senator William Proxmire), seem to have any idea that they were creating a new state of emergency provision for the global order. This is because the Genocide Convention reverses the terms of the global order, through its requirement that states intervene in genocide, and this is the unstated reason why contemporary global politics now boils down to debates over the invocation of that term.

CHAPTER 3:
Duško Tadić, Cosmopolitan Subject: The *Tadić* Appeal Decision as Cosmopolitan Precedent

Prosecutor v. Duško Tadić

It was in this context that Tadić had chosen as his *pro bono* lawyer (from a list provided by the Tribunal) the well-regarded Michail Wladimiroff, a Russian-born Dutch law professor and practitioner, whose specialization was defending corporate clients in criminal cases. Wladimiroff began to prepare an alibi and mistaken identity defense, but he also, with his associate Alfons Orie, began preparing a series of pre-trial motions that he hoped would preclude the possibility of a trial by calling into question the very legality of the Tribunal, and it was, of course, legally necessary that these matters be dealt with before the trial itself could commence. These motions variously challenged the legality of the establishment of the tribunal, its primacy over national courts, and its subject matter jurisdiction, but at the essential core of all of the claims was the question of whether such a radically new (and frankly unconstitutional) body—and body of law—could have been *established by law*, understood as being within the terms of the legal regime in place at the time it had been created. For law and for lawyers, this then was the question of the Tribunal, and it was on this basis that Tadić immediately appealed his case. Since the Tribunal had been created by the Security Council, the gist of these motions, in legal terms, was the claim by Tadić's lawyers that the Tribunal had not been "established by law," a claim which took the form of four specific reservations about Council power under international law, and the UN Charter in particular —and each of which, if one is legalistically heard-headed, was a fair statement of international law at the time of Tadić's alleged crimes.

Duško Tadić, Cosmopolitan Subject

As we have already seen, the name Duško Tadić entered history, as the first person to fall into the custody of a cosmopolitan tribunal. Though Dragan Nikolic, the Bosnian Serb commander of the Susica camp was the first person to be indicted (in November 1994) by the Yugoslavia Tribunal, Tadić's name had been among an early group indicted in February 1995, charged as an admitted small fry, but with especially brutal acts in association with a the events—particularly in April, May and June 1992—at the Omarska, Trnopolje and Keraterm detention camps, which had particularly shocked the world after the first news report emerged in August 1992 (Tadić case transcript, Tuesday, 7th May 1996). However, his place in history was the product not of the seriousness of his acts (indeed there had been debate within the ICTY Prosecutor's Office about whether to indict him at all), but rather of a series of accidents and poor legal choices, though events with very real and important legal consequences for the foundation of global law. Indeed, they form, as we shall see, a very specific legal chain which could circumvent, and ultimately undermine as precedent, every protection of sovereignty in international law.

With the wartime collapse of the Serbian economy, Tadić and his wife and family had moved to Munich, where his brother lived, in the fall of 1993. A number of commentators have pointed out that this was a strange (and dangerous) choice, given Germany's historical association with Croatia, as a result of which more than three hundred and fifty thousand refugees had fled there, since 1992, from Bosnia and Croatia (Scharf 1997: 97 fn.). Indeed, it was perhaps not surprising that, a few weeks after his arrival, he was recognized in a line at a government registration office. Word quickly spread in the Bosnian community, and, soon thereafter, a television crew caught video of him. Very quickly, pressure from human rights

organizations built up to investigate a number of claims, and soon the chief federal prosecutor's office opened an investigation into Tadić and thirty other suspected war criminals (of whom thirteen were ultimately arrested) from the former Yugoslavia. On February 12, 1994, the German police confronted Tadić near his brother's flat. He pulled a pistol, though he did not fire it, and he was quickly apprehended, becoming, in the process, the first person outside the former Yugoslavia to be arrested for crimes committed there during the Balkan wars.

It is important to emphasize here the legal and constitutional importance of the fact that these events took place in Germany, one of a very small number of countries in which Tadić could have been charged with crimes that occurred outside the legal jurisdiction of the state in which one resides. This special jurisdiction is the result of the a German law, passed in the wake of World War II, which allows the German government to try people for war crimes or genocide, regardless of citizenship or where the crimes took place—forming, in effect, a *universal jurisdiction* with regards to the enumerated crimes (i.e. with limited subject-matter jurisdiction) (ibid.) Without this law, the product of frankly emergency conditions and post-surrender occupation, the German state could have had *no* jurisdiction over Tadić for acts committed before he entered that country, and Tadić would have been subject only to formal extradition claims made by the states of the former Yugoslavia to other sovereign states. Nor is this question of jurisdiction a mere formality, and indeed, as we shall see, it is the very essence of the independence of a legal system (and of sovereignty), as both the international and US federal systems show.

Comprehending how this works tells us a great deal about the expansive potentiality inherent in "mere law." It is easy from a realist perspective to mock this presumption of a single state legislating a universal jurisdiction, and, especially the naked idealism of a single sovereign making this claim in a context where the disapproval of almost every other state makes a collective universal jurisdiction incomprehensible. Surely the rest of the states were not all going to join in any time soon. However, law is something quite other than this. In this case, an apparently strictly enumerated legal provision passed by the German legislature and of relevance and applicability only to residents of that state is capable of emerging, decades later, as the basis for a global legal precedent. What is more, though based on only one single state's law and only in the instance of this one initial case (re: Tadić), the precedent now serves as the great pregnant signifier awaiting exposition to the global sphere in other cases.

What is most interesting is that because its form of authority is based on the Roman theory of history as founding and renewals—and here we see how different law is from custom or past practice—no matter how many states take the contrary opinion and no matter how many cases go against it, this potentiality remains implicit in law until such time as some case can again successfully make the claim. Thus, a single German law expressing a limited universal jurisdiction can lay dormant for a half century only emerge as the domestic law basis and precedent for a global legal jurisdiction which is less limited (i.e. more general) than that on which it is based. The same will certainly hold true the precedent this case set, and indeed the entire *telos* towards global law can take place over generations if need be. Politics and public opinion may ebb and flow, but law—in this tradition—mostly just flows (though the speed may vary tremendously).

Three additional other factors, one chance, one political, and one legal and of his own choosing, were also instrumental to bringing Tadić to the attention of world history. First, and as a matter purely of an accident of timing, because of his presence in Germany (not the former Yugoslavia), Tadić became the first person bodily available to the newly created ICTY Office of the Prosecution (OTP) precisely at the moment that Graham Blewitt of Australia was appointed deputy prosecutor and Richard Goldstone was about to appointed as Prosecutor, and just after the so-called investigative *780 Commission* had presented its final report (which was to become the evidentiary basis for the prosecution's case) to the UN. Second, in this context and given its domestic laws, the German government had no obvious reason to have reservations with regard to its own legal autonomy or political sovereignty in regard to this case or any precedent (or general political theoretical claims) that it might set, and so, when the OTP made a formal request for the case to be transferred to the ICTY, the German Federal Ministry of Justice accepted the formal legal *primacy* of the Tribunal with regard to Tadić's indictment. Yet even this would not have been enough to get Tadić before the ICTY, in that the government lawyers insisted that transfer would require the passage of specific enabling legislation by Bundestag. All this was predicated on the assumption that Tadić would have a strong legal case for resisting transfer on the basis of well-established international and domestic law jurisdictional practice (which had been designed to protect legal autonomy and sovereignty). Finally, however, this pointed was mooted when, at the Deferral Hearing, Tadić's German lawyer made no legal objection to the transfer to the Tribunal. Tadić himself has never spoken publicly of his reasons for this decision. Legally, it was likely to make little difference for his fate. In virtually any other state (i.e. without special jurisdiction), this prosecution would have been impossible, but,

given that he would almost certainly have been tried in Germany on the same charges, it was evidently just as well to be tried by history.

Yet, in spite of all this, when the case came before the Tribunal (in the Deferral Hearing of November 8, 1994), even the judges expressed both political and legal doubts about Tadić's place as potentially the first subject of global law. Their concern was that Tadić was clearly a minor figure, without any clear authority over anyone else, and they were concerned that there was no strong legal basis for extending jurisdiction to him, given that he would certainly have been tried and punished in Germany, and so was not likely to avoid culpability. Goldstone, however, was ultimately able to convince the judges to grant the deferral on the grounds that the case was integral to a broader investigation of events in the Prijedor district.

Still, it was not until March 31, 1995 that Germany finally enacted the necessary legal machinery for extradition, and so, finally, on April 24, Tadić was turned over to the Tribunal. He was brought to the new, formally global jurisdiction in The Hague, where he became the first defendant held in the small ICTY detention center, a former Dutch jail, now constituting a legally global space in a suburb of The Hague.

In the meantime, the OTP had completed its investigation, and, several months later (on February 13, 1995), it issued a formal indictment for a number of men associated with events at the Omarska prison camp, including the camp commander, guards, as well as what would come to be called "freelance torturer/murderers," such as Tadić, who were not formally part of the camp hierarchy but who participated in the violence committed there (Scharf 1997: 100). According to his Indictment, Tadić himself was charged with thirty-four counts, including

Breaches of the Geneva Conventions (international humanitarian law), Violations of the Law and Customs of War (war crimes), and Crimes Against Humanity, including the murder, rape, and torture of Muslim men and women (Tadić Indictment 1994). Specifically, the indictment enumerated three incidents. The first alleged that on May 27, 1992, during the surrender and evacuation of the village of Kozarac to Serb forces, Tadić had pulled four named Muslim men out of a column, beat, and then shot them. The second group of charges related to allegation that on June 24, 1992, during the siege of the villages of Jaskici and Sivci, Tadić beat evacuees and shot five men in front of their homes. Finally, the third group of charges was based on allegations about violence that had occurred in Omarska camp in late June 1992, including brutal beatings, castration and rape. Tadić, however, was not charged with genocide, as most of the higher ups (both political and military) were. To all of these charges, he pleaded not guilty on April 26, 1995.

The *Tadić* Interlocutory Appeal

As we have seen already, Tadić had chosen as his *pro bono* lawyer Michail Wladimiroff, apparently because his name was the only name of Slavic origin on the list. Wladimiroff was a Russian-born Dutch law professor and lawyer, whose specialization was defending corporate clients in criminal cases, and he, with his colleague Alfons Orie, set out to prepare a case an alibi and mistaken identity defense. Before even that, however, , Tadić lawyers began to prepare a number of pre-trial motions that they hoped would preclude the possibility of a trial by calling into question the ultimate legality of the Tribunal, itself, and, as a matter of law, it was necessary that these matters be dealt with before the trial itself could commence. These motions variously

challenged the legality of the establishment of the tribunal, its primacy over national courts, and its subject matter jurisdiction, but at the essential core of all of the claims was the question of whether such a radically new (and frankly unconstitutional) body—and body of law—could have been created *by law*, understood as being within the terms of the legal regime in place at the time it had been created.

Since the Tribunal was created by the SC, the gist of these motions, in legal terms, was the claim by Tadić's lawyers that the Tribunal had not been "established by law," a claim which took the form of four specific reservations about SC power under international law, and the UN Charter in particular—and each of which, if one is legalistically heard-headed, was a fair statement of international law at the time of Tadić's alleged crimes (*Tadić* Interlocutory Appeal Decision: para. 2). The first was claim that the ICTY could not lawfully order Germany to defer prosecution, because among the recognized sovereign powers maintained by states under the UN Charter was the right to prosecute in its own courts. Second, they argued that it was well recognized according to international law that a tribunal "should have been created by treaty…not by a resolution of the Security Council," a fact which indeed had played a central role in SC debates at the time of the Tribunal's creation (if not since). Third, it was argued that neither the UN Charter nor international law contained any specific language or precedent which could suggest that the SC was understood to have the legal authority to establish a subsidiary organ with specifically judicial powers. Finally, it was argued that the interpretations of the phrase establishing the right of a defendant to a "competent, independent and impartial tribunal established by law" in Article 14(1) of the International Covenant on Civil and Political Rights and in the European Convention on Human Rights had been specifically interpreted to preclude a tribunal dependant on the executive, and, therefore, to require that they must be the product of a

legislative body—a claim which ultimately called into question whether a criminal tribunal could be legally created within the UN system at all, since it lacked a legislature.

These arguments were well laid out and thoughtful challenges to the tribunal—and, as we have seen, all issues originally debated by the Security Council itself—but this brings to light one of the great legal inadequacies of the foundation of the Tribunal and the development of its case law, specifically with regard to the terms in which the early defense teams formulated their cases. As we shall see, one of the great, but least understood, aspects of the Tribunal's development was the remarkable near uniformity that the Serbian right, through its funding and support for Serb and Serb diaspora lawyers (as opposed to Bosnian Serbs) and former Yugoslavia based researchers, was able to exercise on defense strategy. It is a remarkable, but overlooked, fact that virtually none of the Serb defendants defended themselves primarily on the basis of the international law or global constitutional issues involved. They chose, rather, to emphasize the historical aspect, which centered on claims that what had occurred in the Balkans was a series of fairly traditional small wars (or civil wars), in which all parties had committed violations of international norms. So one might listen to Slobodan Milosevic, for example, go on for days questioning the causes of the internal injuries found on several young women found in a well in a small village late in the war, though this could have no legal value and he could not possibly have been expected to have had any actual knowledge of the events (Weiss 2010). The two important exceptions to this were Tadić's team's alibi and mistaken identity defense and Drazen Erdemovic's June 1996 guilty plea, but, even as early as the former, the position of the Serb lawyers was already taking form, with Tadić ultimately rejecting (in the appellate process) both his Dutch lawyers and their defense grounds. Indeed, throughout the full history of the

Tribunal, stories remained common of Serb defendants (e.g. Blagojevic) who were not speaking to their court appointed lawyers (Karnavas pers. com.).

Interestingly, what both of these groups of lawyers shared was that they were domestic defense lawyers (i.e. not constitutional law or international law experts), and, whether for political, legal, or professional reasons, they were not particularly interested in constitutional questions (e.g. what was the source of the power to punish the criminal or questions of sovereignty). Wladimiroff and Orie (who was interviewed for this project) were Dutch domestic defense lawyers who had no objections to global law as such, and who, in fact, based their case on seeking relief from the new tribunal—a strategy which, of course, meant initially recognizing its jurisdiction.[59] The rest of the defense team was made up of Steven Kay, a British barrister brought in as an expert in cross-examination (since the continental lawyers were unfamiliar with the practice), and two other defense lawyers, a Bosnian Serb named Milan Vujin and a Serb-American named Nikola Kostich, both of whom were dismissed by Tadić at the urging of Wladimiroff precisely because they advocated the less legalistic, historical defense.

What is important is that these Serb lawyers were, for their own reasons, no more interested in constitutional or international law questions of sovereignty. If they clearly rejected legalistic defenses as essentially effeminate, their concern—as Serb nationalists (of one stripe or another)—was with the historical questions, in a climate in which Serbian sovereignty (as opposed to Bosnian) appeared to remain (in legal terms) largely intact and their professional training as domestic lawyers made them less inclined to see the international legal or global material constitutional implications. As a result, the apparently obvious question of non-

[59] Orie would later be nominated by the Dutch government and chosen by the UN as a judge for the Tribunal. He was interviewed for this project in his judicial capacity.

recognition of the Tribunal—which the cosmopolitan legalists feared above all else—was not a priority for them, and even Milosevic's infamous theatrics were, properly speaking, engaged obstructionism, not legalistic non-recognition.

From a strictly legalist perspective, then, this then must be counted as one the single most important fact about the Tribunal (though I am aware of no one who has addressed it in scholarship): That no defendant's legal case ever really attempted to challenge its' legitimacy at the level of ultimate (rather than internal) legality. No case was ever made for how radically unconstitutional and without precedent a properly global law was (in legal terms), much less one which viewed—literally, for the first time in human history—a direct political and legal relationship between global right and individuals, without reference to their political communities or sovereignty. Nor was a case made for what a radical repudiation such a law must necessarily be to more than three centuries of international law precedents and custom on the legal rights of sovereign states, as well as to their codification in the UN Charter. Lastly, no case was ever made which ultimately and completely refused to ask for or acknowledge any kind of legal recognition for one's claims or the possibility of accepting any relief from the Tribunal, on the basis that a global tribunal could not exist within the extant legality of the moment of its creation.

The *Tadić* Interlocutory Appeals Decision, and the Question of Precedent

The fact was that Tadić's lawyers had already effectively settled the question of legality—for themselves, for the tribunal, and for the first precedent determining the future of

global law—when they had made the decision to file their *Motion for Interlocutory Appeal*, and, in so doing, recognized the tribunal as the appropriate power from which to seek recognition of their claim. Though their initial address to the court could have taken another form (e.g. a letter), they effectively recognized, through the specific legal form of the motion, the Tribunal as a proper judicial body—rather than, for example, a perhaps morally and politically (but certainly not legally) well-founded exercise in international executive power. The closest any defendant seems to have come to this was Vojislav Šešelj, who was up until the day of his extradition by the Serb government the head of the ultra-nationalist Serbian Radical Party, its regular candidate for the presidency, and a sitting member of parliament in Serbia, who has refused to present any witnesses in his own defense and who has been overtly obstructionist in court. However, even Šešelj, who has a PhD in law, has—in addressing his claims to the Tribunal, and in participating in the cross-examination of witness—recognized the essential legality of the Tribunal, and his objects appear to be self-consciously political and historical, not legal. What is more that trial did not begin until 2006 (after the precedent of recognition had held for hundreds of defendants and for more than a decade), and even this has not become a precedent for subsequent trials (e.g. Radovan Karadžić).

Emblematic of this was the acceptance by Wladimiroff and Orie of the Security Council's artificially limited (and only internally legalist) basis for the tribunal and its laws, thus both bypassing and legitimated the radical new terms adopted in the ICTY statute in order to get around the problems of sovereignty and of the clearly *ex post facto* nature of the Tribunal. For example, the second element of Tadić's motion challenged the lawfulness of his indictment for crimes laid out under Articles 2 (grave breaches of the Geneva Conventions) and 3 (violations of

the laws and customs of war) of the Tribunal's statute, as enacted by the Council. The grounds for their objection was that their claim that the context relevant to Tadić' charges there did not qualify as an international armed conflict, as required by the letter of international humanitarian law. Yet, if, with regard to mundane questions of guilt and innocence, this last challenge certainly made sense as a means undermine specific charges in the indictment, Tadić's lawyers seem to have missed both what, and how much, was ultimately at stake for the question of the legality of the Tribunal in the Council's drafting these specific provisions.

What they did not emphasize was how radically unconstitutional it was in terms of established legal precedent, and, in particular, to those carefully crafted and long defended provisions created for the specific purpose of protecting state sovereignty (e.g.in the provisions of The Hague and Geneva Conventions in which signatory states, *qua* states, agreed to be bound by specifically and textually elaborated standards in the conduct of warfare—in what were to be understood as the strictly limited and effectively emergency conditions of international combat between signatories, and excluding civil wars and strictly internal conflicts). Even the International Committee of the Red Cross (ICRC), recognized as a conservative and definitive source for interpretations of IHL (and cited for other purposes in their brief by Tadić's lawyers), saw no ambiguity in the precedent at all, and acknowledged that "according to International Humanitarian Law *as it stands today*, the notion of war crimes is limited to situations of international armed conflict" (Scharf 1997: 106). In failing to make this challenge, Tadić's lawyers must bear responsibility for having failed to legally head off the radical and expansive re-interpretation of this long established precedent ultimately proffered by the appeals chamber in its *Decision* on the interlocutory appeal.

That interlocutory decision (the *Tadić* Decision) effectively dispenses with the recognition of sovereignty in interpreting IHL relevant to global law, through a judicial rejection of the two basic requirements: That a conflict must be *international* in character, and that the conflict meet the meet the established definition of a *war* (as opposed to other forms of conflict). Civil wars and the use of one's military against internal insurgencies, among other things, were specifically not covered. This dramatic interpretive expansion in the applicability of IHL was necessary, as I discuss at length elsewhere, if these provisions were to be made applicable to events that took place in contexts in which the concept of sovereignty constrained the application of the tribunal's jurisdiction, as with conflict inside the Yugoslav successor states that might appear to be civil war (or otherwise not meet the definition of armed conflict), or with the difficulty of establishing where and when armed conflict (and global emergency provisions) started and ended in a particular location.

What bears underlining, however, is that both the Council statutory negotiations and these new judicial interpretations were clearly driven primarily by the requirements of legality, more than by any kind of desire to expand naked power. So too, the particular forms that they took were not accidental, but rather driven by the specific (legally inadequate) terms of the extant order and what would be necessary to stretch these extant rules to look like laws and meet the appearance of legality. For example, rejecting the requirements of an international conflict was necessary if these provisions (now effectively the global criminal code as enacted in Articles 2 and 3 of the ICTY statute) were to have the kind of generality necessary to serving as proper laws. Similarly, as a matter of interpreting, for diplomatic purposes, treaty provisions limiting applicability to non-international armed conflicts in a context where international law is defined by sovereignty, the question of logical coherence could have only limited applicability.

However, viewed against the norm of generalizeable laws, the analogy of domestic legality can see the exclusion of civil wars (from IHL) as only as illogical, unjust and inequitable—in a manner that threatens their ability to meet legalist standards. Of course, it also doesn't see (again from within the norm of domestic legality), as Tadić's lawyers also didn't see, the enormous difference between being subject to a treaty (risking at most exclusion from the treaty's benefits) and what it means to be subject to law in the modern world, much less subject to the mandatory jurisdiction of criminal law and the power to punish the body.

Nor, finally, unconcerned with sovereignty, did the Tadić team even mention, much less challenge, what was in effect the great unspoken constitutional leap of the process of establishing the legality of the ICTY (recognized as such by the fact that it could not be enshrined in the text of the statute): The statements and prescriptions (the equivalent to statements of legislative intent or presidential signing statements in the US system) which the SC had issued at the time of the ICTY statutory enactment, to the effect that certain provisions of IHL were to be *henceforth* understood as customary under international law.

The Cosmopolitan *Marbury v. Madison*

Quite aside from it specific legal basis, as a result of this recognition, the judgment by the Appellate Chamber in the *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* stands as, quite exactly, the great *Marbury v. Madison* for global law, and, as such, it expresses what is perhaps the single defining double logic fact for comprehending the expansiveness of case law. That famous case established the jurisdiction of the US Supreme Court over the other branches of the federal government where there was no precedent for that,

and though nothing in the constitution expressed or implied that the Court would have that power.[60] While journalists, the public, and even most lawyers focus exclusively on the question of who won or guilt and innocence, the real issue is the *establishment of the new jurisdiction (and future precedent).* As a result, we must understand that (for both constitutional issues and case law) the initial establishing of jurisdiction is always retrospective, not rule-following, and involves a claim about expansive claim about the applicability of the law in a new manner or to a new sphere. The classic move of the judiciary—both there and for Tadić—is then to for judges to split the difference on the question of guilt and innocence (some charge or element is always overturned or denied), in order to get the defendant to accept what really matters, which is the jurisdiction (not the verdict). There is a necessary and apparently contradictory second element This expansions are then immediately consolidated, through the institutions of precedent and the prohibition on raising decided questions or rehearing decided cases—*ultra vires*, as it indeed was by the beginning of the second ICTY trial, *Prosecutor v. Mucić et al,. in March 1997,* to even ask this question of global law's legal legitimacy. Once a decision has been made, one may only approach the court seeking justice for new claims (new cases, new circumstances), which means that one must—in effect—accept all past judgments and jurisdictional claims (i.e. the full history of the law) before one can ask for a prospective judgment. This double movement—in which law both expands and conserves—is the ultimate essence of law in the Roman tradition.

[60] This was the analogy for the US lawyers, including prosecution lawyers and presiding judge, Gabrielle Kirk McDonald.

Part III: Mere Law: Legal Modernity and Global Order

CHAPTER 4:
The Project of Legal Modernity: Law as Subjection and Legal Monism

Legal Modernity

The provocation for this section is the much discussed debate over what ought to be the terms of super-state law. In response to the excesses of the *humanization* of law, which I have called *cosmopolitan law*, already discussed in the last two chapters, there has been a substantial movement towards theorizations that seek to protect sovereignty, within the terms of a more properly *international law* (see gen Cohen 2004, 2006). At the level of institutionalization, this movement has already expressed itself in several overt differentiations which the formalizers of the final Rome Statute agreement initiated to limit, for the ICC, some of the precedent value of what the ICTY had done. This is an extremely important intervention, but the argument presented here is that neither this, nor even a shift to once again make sovereign states the sole subjects of international law, will enough to protect sovereignty, for the simple reason that—according to the very definition of *law* (in our hegemonic modern understanding)—any kind of trans-state law is, by definition, fundamentally irreconcilable with sovereignty. If this seems, on first reading, to be old news, this is because by far the greatest number of scholars working in this area has largely taken for granted the meaning of the word *law*, and have instead focused their investigations around the question of sovereignty. Taking law seriously, however, proves to have much more profound and direct implications for sovereignty than is generally realized, and this may, it is hoped, provoke scholars working at the level of cosmopolitan order to take law more seriously.

A Genealogical Background to the "Modern" Theory of Law

This investigation will proceed through a reading of John Austin's modernity defining definition of the relationship between law and sovereignty. Austin, of course, was profoundly influenced by Hobbes theory (both in itself [check this], and especially through Bentham's own sovereign theory), and his definition of sovereignty in his *Province of Jurisprudence Determined* (2000 [1832]) serves as the tradition defining statement for the idea that "every law simply and strictly so called, is set by a sovereign" (person or body of persons), with its necessary ontological and constitutional implications that sovereignty is superior to law (para. 219). The great importance of Bentham was the taking up by the sovereign superiority thesis by the Reformist tendency, with the implication that, by the time Austin wrote his great tract, every trace of its origins in Hobbes' polemical monarchism had been lost, and Austin (whose own commitments were no less reformist), in turn, was able to present his theory as properly positivist. There the sovereign superiority thesis has stayed—the very kernel of legal modernity, and there, for Anglo-American legal thought in particular, it remains to this day, the dominant theory and the conceptual starting point for legal pedagogy and scholarship.[61]

[61] This argument that the sovereign theory remains *the* dominant theory within law today will undoubtedly raise some eyebrows—especially among those who will struggle to find an important contemporary thinker who accepts this position, *tout court*. The fact is, however, that if almost no one today in legal thought considers themselves Austinians, Austin's theory remains the common engagement and target of an unbelievable breadth of scholarship, even today, and this role is only underscored by each additional text which, like H.L.A. Hart's work—which now the holds the place of second text in modern jurisprudence and legal theory pedagogy—continue (despite, or perhaps because of the vastness of the welter of late modern theories of law) to treat the Austinian view as *the* standard. Yet the claim here is that it is precisely this truly remarkable longevity and consistency which the Austinian theory of law has retained in domestic Anglo-American legal thought, from Hobbes to today, which has served as simultaneously the great defining kernel of political modernity. As such, the easy naturalness of this view for generations lawyers whose legal training all began with this viewpoint repeatedly served as a the great trans-historical source pool to which generations of anthropologists, international lawyers, international relations scholars, and political theorists have turned. To follow loosely from Tuck (2001b, Koskiemi (2005) and Skinner (2005), it is domestic legal thought which—in its remarkable Austin constancy—has

Before discussing the Austinian theory in detail, however, it will be useful to think briefly about the prehistory of idea that sovereignty is superior to law—to investigate, in David Scott's important formulation, the question to which sovereignty was an answer. Elsewhere I have discussed this moment and what was at stake in great detail, so it will perhaps be enough here to make several broad statements about how political life was understood before the *modern* writers—Bodin and Hobbes first among them—successfully re-described political life in the language of sovereignty. For present purposes, three elements of this "pre-modern" world-view are particularly relevant: first, that there was no understanding that various historically derived institutions of power (parliaments, kings, lords, cities, and monasteries) should all be resolvable into a single rationalized hierarchy with a single location of power alone at the top; second, that there could be simultaneously more than one law (e.g. common law, king's law, chancery, canon law, Roman law) and thus multiple sources of law, within a political community; and finally, the language of law served as the default constitutional language for by far the greatest part of these relations.

It was in this context, generally, in which Bodin and Hobbes wrote as polemicists on the side of the new and expansive monarchist claims. However, to fully appreciate understand what is at stake for thinking about law, it is possible to flush out the immediate target of their intervention. Again, this is something I have treated elsewhere in much more detail, but for present purposes it will be enough state categorically—and on the authority of [medievalists]—that the dominant traditions of political thought dating back to the Roman law and to emperors in antiquity clearly established that *a king was subject to the law*, of his realm and of Roman law. Indeed the entire system of legal disputation which surrounded the great law schools assumed

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served as the great naturalization of sovereignty in other spheres of thought which appear to be less consistent.

that the *Corpus Juris* served as a fully operative system of law for cases involving the constitutional relations between kings (and including emperors, lords and others) and even, internally, with a king's relationships with independent institutions of power recognized by tradition (see Stein 2002, Bellomo 1995, Tierney 1988). Coupled with the view of law just discussed, which recognized more than one law and more than one source of law, the tradition that kings were subject to law served as an insurmountable obstacle to the unification and centralization of kingly power, so much the more so if it was constitutionally necessary that political claims be made in the language of law. Unable to appeal to law against the shared claims of their adversaries that a king was subject to law, the monarchical parties throughout Europe faced a common and for a long time insurmountable theoretical conundrum.

The concept of sovereignty, in the Bodinian formulation, was constructed explicitly to meet this need to find a language capable of transcending law, since law claimed it transcended sovereignty. Sovereignty was construed to be something higher than law precisely so that it could be appealed to against law, but, of course, this could be so only if sovereignty was, by definition, something not subject to—and not subjectable to— law. This, in turn, made it necessary that sovereignty be defined without any reference law. This conceptual necessity, without more, tells us a more than anything else about the form that sovereignty was to take for Bodin and those who followed him, and yet the implications of this have been very little appreciated in either political or legal scholarship. What is at stake in kingly sovereignty, by this reading, is not reducible to its being a new site of power (from pre-modern institutions to the crown), a new degree of power or centralization, or even a radically new language for power, but rather that sovereignty be ontologically something that could be defined entirely outside of law. It is thus, conceptually, the radical negation of legality. However, because this notion of legality

was itself of a historically specific form, modern sovereignty's relationship to law must be understood less as a comprehensive and rational statement of kingly prerogative than as an institution construed as the dialectically-determined negation of a historically contingent form.

This conceptual imperative will turn out to be the key to understanding the theory of the superiority of sovereignty to law, as we shall see in a moment in addressing Austin's work—and, in particular, of the wider relationship between the various well-known parts. It will also go a long way to helping us to understand exactly what is at stake for its advocates, which in turn will tell us much about the remarkable cohesiveness and longevity of this viewpoint.

The Austinian Conception of Law

The remarkable continuity of the sovereign supriorty thesis is testified to by no fact so resolutely as by the absolute crystalline clarity it could still take more than a century and a half after Hobbes, and again, one can still follow, in a writer with such different motivations, every element of the work it does to disable the claim that law was superior to kingship.

The relevance of the presupposition stated above that the target of the sovereign theory was the idea that there could be multiple laws and multiple sources of law, within a political community, comes to the fore immediately when one considers Austin's classic definition of sovereignty in paragraph 220. Sovereignty, he says, implies the following marks (the term utilized by Bodin):

> "1. The *bulk* of a given society are in the *habit* of obedience or submission to a *determinate* and *common* superior…[and] 2. That certain individual or that

> certain body of individuals, is *not* in the habit of obedience to a determinate human superior." (Austin 200 [1832]: para. 220)

It is the second part of this which receives the much the greatest amount of discussion at the hands of scholars, and, yet, it is the first section which all the work and brings to the fore the spectre of sovereignty's prehistory. If the advocates of the naturalization of sovereignty, kingly and otherwise, are correct and "premodern" kings were already the sole sources law, then why would it even be necessary to make the claims in the first part. Here the key terms are "*determinate* and *common*," which posed against the background of sovereignty's prehistory, suddenly leap to the forefront as clear claims—against a reality determined by a multiplicity of laws (ibid.). The *unitary* element of modern sovereign thus appears as a claim made in response to an existing constitutional presumption that kingship is subject to law. If this were not so, kingship could have made the claim be the ultimate source of multiple laws, but, given the extant constitutional realities, to have done so would have been to accept laws place above kingship, and in so doing having risked that their opponents could have sought to make claims against them in the esteemed language of law.

To accomplish this unification of sovereignty, Austin's formulation adopts, in the second part, a definition of sovereignty as a relationship of *subjection*: "To that determinate superior," he writes, "the other members of the society are *subject*" (para. 222). The real key to this will become apparent below, but conceptually Austin extrapolates this into a general theory of subjection in which sovereignty is the name given to those bodies which can resist subjection—i.e. "*not* in the habit of obedience" to a sovereign. Once again, this wider theory of power shows itself most clearly as a response to the need to ensure that sovereignty itself would not come to be ensnared in claims made in any of the available traditions of authority that preceded it. The

theory of subjection recognizes only one form (and degree) of power that matters, everything else is elided, and thus, logically, you can only have one sovereign.

It is, however, the subsequent move Austin makes which, more than anything, brings sovereignty's prehistory to the forefront. A theory of a single unitary sovereign defined by relations of subjection would be enough, in itself, to provide a sovereign king with everything necessary to modern sovereignty, unless, that is, there are already existing sources of law which must themselves be undermined. To accomplish this, the sovereign theories insist on a distinction *within* what has heretofore called itself law, between what Austin calls "positive law"—"law simply and strictly so called" and what he calls laws "improperly so called." (para. 219-220). Austin's term positive thus differs slightly—but crucially—from the contemporary meaning of the term positive, in that for him it is, by definition, only law made by the sovereign.[62] Austin's move here thus makes the classic and crucial distinction between *real law*, "every" law is by definition "set by a sovereign," and that which is not law at all, again defined by the fact that it is not made by a sovereign (para. 219). Everything else—every tradition and every rule, no matter how longstanding or great its importance up to this time, is simply not law, at all.

The logical necessity of this division is to be found precisely in the need to completely and totally bracket the concept of sovereignty from in any way depending on the concept of law, and, in so doing, too, the old relationship is now reversed so that *law is, by definition, subservient to sovereignty*. This is the great implicit genius of this theory, and precisely what has made it so

[62] Legal positivism thus appears initially as a project specifically to redescribe—and ultimately a re-constitutionalize—all law as subject to sovereignty, and here one sees both why it had such importance to Bentham and French Revolution, as well how truly outrageous the claims by its late modern advocates that it is operating merely as a descriptive science quickly become.

internally consistent over such a long span of time. The crucial implication of this definition, then, is thus that law is permanently and definitionally subservient to sovereignty such that no subsequent claim to authority through law can ever claim even equality with sovereignty. Merely to make a claim in the language of law is thus to acknowledge subservience to sovereignty.

Once this is clear, far and away the most intriguing aspect of Austin's text is the light that it shows on the theory of inter-state relations implicit in this theory of sovereignty. The most familiar implication, obviously, is the fact that any rule or custom at the cosmopolitan level is now, by definition, not law at all. More provocative, however, is the specific language Austin uses to describe the purpose of his lecture, which is to define real law through an analysis of "the expression *sovereignty*, the correlative expression subjection, and the inseparable connected expression *independent political society*" (para. 219). It is the last of these that is most provocative, why does Austin trouble to include the word independent? I am aware of no reading of Austin in legal scholarship that sees in this the essence of his project, and perhaps this is inevitable to readers long enurred to such implications by the success of Weber's decadent definition of the state through force alone (1948[1919]). Yet one cannot help but be startled by where this leads a reading of Austin.

For what we find, upon fully extrapolating Austin's theory to cosmopolitan relations, is rather a remarkably fully-drawn and positive account of the liberty of independent political communities. The legal logic is simple, but it implications are much less so. As has already been said, any cosmopolitan order which seeks to proclaim itself law over truly sovereign communities is, by definition, not law, properly so called. The full implications come forward, however, if one goes further to ask what it would mean, by Austin's definition, if such a

cosmopolitan law really was established, as law. The answer is that, by definition, any constituted body or community which came to be subject to this law would be subject to a higher sovereign, and thus not itself sovereign. So far this reminds one of IR realist accounts or 19th German *machstat* and reason of state readings of Machivelli, but it is rather in Austin's term independent political society that one begins to see a genealogical link to that other, and much greater, Machiavelli, he of the theory of free republics. We ought to therefore return to Austin to trace the final link in the chain. For here—and in stark opposition to the simple physics of power proclaimed by contemporary IR realism and positivism—if one is subject to a higher (perhaps cosmopolitan) law, this is the very definition of subjection. What is at stake in the concept of the independent political society turns out, therefore, to be nothing less than a full elaborated theory of communal liberty in which—most remarkably—it is the subjection to law which, in the first instance, defines subjection (see Skinner 2001).

This conclusion tells us a good deal about the depth of the reactions that one typically finds among advocates of the sovereign theory when a cosmopolitan order is proposed. Here we find—even in Austin of all places—a a deep and longstanding commitment to an ontological account of life in which to be under law means that one no longer lives in an independent political community and that one lives, rather, in "*a state of subjection*" (2000[1832]): para 222). Here even the possibility of multiple sites of sovereignty or multiple forms of overlapping law strike one as categorically in opposition to the liberty of one's community.

To appreciate the fuller picture here, one cannot help but be struck by how startlingly reminiscent this picture is of the classical republican theory of free republics (see Machiavelli and Livy), which saw Roman history as a narrative about how to avoid the subjection of one's

community to another—and viewed this (since they presumed republican government internally) as the definitive form of liberty.

Kant's League of Peace "in accord with the idea of the right of nations"

Our answer to those working out of the Austinian tradition—and this has been the direction of my work elsewhere—might be: Just get over it, law is not, in fact just subjection. The problem arises, however, when one attempts, perhaps, to look for the beginnings of a counter tradition in Kant's great 1785 essay "Perpetual Peace," and yet there, one is likely to be startled to find, that Kant himself fully and completely shares the Austinian tradition's commitment to the idea that a true cosmopolitan law would be logically irreconcilable with state sovereignty—as well as that traditions commitment to the ethical priority of what he calls "the right of nations" (Kant 1983 [175]: para. 354), which is in effect state sovereignty.[63] This reading will be startling for some readers not familiar. with Kant who see his work through the place he has taken at the very head of the tradition of global cosmopolitanism, and yet, at least in this text, Kant is categorically opposed the idea of global law in a way that exactly coincides with Austin's positivist account of law as subjection.[64]

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[63] Kant refers to "independent nation[s]" in First Section, Preliminary Article 2 (108).

[64] Interestingly, this is Habermas' interpretation of "Perpetual Peace," as when he states, "Kant carefully distinguishes between a "federation of nations" and a "state of all peoples." (1997: 116) In fact, Habermas' reading of what Kant is proposing is sharp and comprehensive. The new cosmopolitan order established would, in the first instance, be one "distinguished from the legal order within states" in that it would not be based on "subjection" to supreme coercive laws (116). Rather it would be a federation of free states, based on the principle of sovereignty and "sovereign acts" and which the sovereignty of each member would remain "inviolable," meaning that they "do not establish any claims to enforceable rights by the parties over and against each other" (117). He attempt to distinguish Kant from himself, so to speak, by differentiating the Kant of "Perpetual Peace" in 1795 from an earlier Kant who seems to have

What is interesting here is to see the great master of ethical universalism explicitly framing the terms of that ethicality in terms of what he calls *the right of nations*—with nations defined, as we shall see in a moment, in exactly the same terms that Austin uses to define his sovereign

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been willing to see the cosmopolitanism order as real law, and even as a proper civil law. This is certainly true of Kant from as early as "Idea for a Universal History with Cosmopolitan Intent", and it may have extended to perhaps as late as two years before in "On the Proverb: That May be True in Theory, but It Is of No Practical use" (as Habermas makes clear cite). Habermas also seeks to differentiate the Kant of "Perpetual Peace" from the Kant who serves as a father to all cosmopolitan and universalist projects, and this specific proposal. The specific basis of Habermas' critique of Kant is based on two points, that it is "contradictory" (117) and that it "no longer appropriate to our historical experiences" (114). The first claim is dubious at best, based as it is on a quotation from *Metaphysics of Morals* (fn 8) to the effect that the league of peace would be an "enduring and voluntary association" which Habermas says he compares to a "permanent congress of states" (117)—against which his objection is that this would not be permanent. In seeing this as contradictory, as opposed to inadequate, Habermas shows that it is precisely his own difficulty with imagining a non-permanent (meaning voluntary) institution—defined importantly by the absence of legal obligation and coercive authority, and thus "likely to degenerate and fall apart"—that is really at stake here (117-118). The true kernel of Habermas' project to "reformulate" "Perpetual Peace" seems to be based on the implied claim that, as a result of the Nazi's project of unlimited war "the breakdown of civilization was so complete," with the result that now, with total wars, the concept of peace must expand "correspondingly" too (115 and 126). The solution Habermas, proposes (vaguely described as "halfway" (from Kant's Alliance (or the state of nature?) to world state) is then a cosmopolitan law based on the rights of the world citizen (120). Here cosmopolitan law would be law, properly so called, "that goes over the heads of [states]…to the individual subjects…unmediated" by states (128). While the rights of world citizenship would clearly have priority over state sovereignty (it "must be institutionalized in such a way that it actually binds individual governments") (127). Interestingly, Habermas is extremely vague on the question of what he thinks the residual power of state sovereignty would be, much less on the specific question being addressed here of whether sovereignty and real cosmopolitan law can coexist. It is clear that this "halfway" point would be something formidable—clearly real law, "binding individual governments," providing "sanctions," and taking over "state functions" (it is unclear how much) (127). The one explicit treatment of the question is an opaque and (in this one instance only) apparently favorable citation of Schmitt:

> "Carl Schmitt grasped this point and saw that this conception implies that "each individual is at the same time a world citizen (in the full juridical sense of the word) and a citizen of a state." The higher-level legal power to define authority itself [*Kompetenz-Kompetenz*] now falls to the unified world state, giving individuals a legally unmediated relation to this international community; this transforms the individual state into "a mere agency [*Kompetenz*] for specific human beings who take on double roles in their international and national functions." " (129)

Unfortunately, Habermas says almost nothing directly about this quote except that this is a "form of law that is able to puncture the sovereignty of states," but it certainly seems clear that he reads favorably the fact that cosmopolitan law and traditional state sovereignty are incompatible and that no properly dualist system could make any sense in this system (129). What he does leave open, and not discussed, is the question of whether any kind of sovereign dualism could be built from the role of the state in the international function.

independent political societies. Read in this way, Kant's famous proposal to found world peace on a global "federation of nations" (para. 354, in the "Second Definitive Article") is, in fact, a proposal for the universal recognition and protection of the right of nations through the institutionalization of a "league of peace" (para. 356), which itself must be based on and "in accord with the idea of the right of nations."

It is when one investigates more carefully the terms that such a league would need to take, for Kant, if it is to protect those rights, that one see most clearly the direct relationship to the Austinian treatment. In this discussion, which takes places in the "Second Definitive Article" (paras. 354-357), Kant proposes that "[f]or the sake of its own security, each nation can and should demand that the others enter into a contract resembling the civil one," though this must be one, he stipulates, "guaranteeing the rights of each" (para. 354). He calls the product of this contract a league of peace, based on the idea of a federalism of nations, but it is, as one looks more closely, a federalism of an extremely specific kind. Kant is especially clear to insist that he does not mean this to be—and is categorically opposed to—a proposal for "a single nation" encompassing all nations or a "world republic," because, as he insists, the universal principle on which his theory is built is the idea that the various nations "do not will to do this" (para. 357). The content of Kant ethical intervention is to resolutely insist that this right be recognized through an institution based on a communal right of autonomy, against those who would locate it in "a right to go to war."

It is when one turns to investigate precisely what he means by this contract that one sees the link to the Austinian reading, as well as what is really at stake here for Kant. The very essence of this universal right of nations is that each nation "sees its majesty…in not being subject," but it is what exactly this subjection means, in the first and paradigmatic instance for

Kant, that is surprising, because, as he concludes, "to any external legal constraint" (para. 354). It must be, that is to say, *exactly* what Austin called an independent political society—that is to say, not subject to law, in an account of law as subjection. This league, he writes, "does not seek any power of the sort possessed by nations." Lest there be any question about the full implications of this, Kant continues on to make explicit that he understands this fact of subjection to apply especially to any attempt to portray international law as real law. Where Austin made a conceptual distinction between law and not law, however, Kant turns to the example of the international law, about which he says:

> Grotius, Pufendorf, Vattel, and the others whose philosophically and diplomatically formulated codes do not and cannot have the slightest legal force (since nations do not stand under any common external constraints)… (para. 355).

In other words, international law, properly so called, would be subjection, in Kant's view.

This reading—clarified by Austin's clear conceptualization of the independent political society—tells us a great deal about how much is at stake in, and how to make sense of, Kant's *contract* and the league, or federation, it founds. Though they may seen related, it is clear that the whole impetus behind the idea of the contract, here, is to find a set of terms that do not, and cannot, add up to the imposition of cosmopolitan law. If, as has been suggested already, the federation must guarantee the rights of each nation, the requirements of the contract are intended to recognize and ensure that this right precedes the league, and that the league can only be understood in terms of its relationship to protecting that right.[65] Perhaps most fascinating of all, Kant clearly understands the super-state sphere through the lens of the state of nature, but, where

[65] This Kantian contract bares more than a passing similarity, though it is much more formalized, to James Tully's important proposal for a return to constitutionalism of mutual recognition (Tully 1995).

the contemporary tendency of cosmopolitans would be to emphasize global law itself as the source of peace, Kant believes that league is necessary to protect the freedom of nations, precisely against the encroachment of a global civil law. He clearly views the federation as a sort of half-way house, a contractual agreement created precisely to forstall the impulses towards the imposition a global law. This transforms the super-state sphere from a state of nature, though without establishing a full social contract, into a third kind of space, distinct from ontologically distinct from both. As he says:

> This league does not seek any power of the sort possessed by nations, but only the maintenance and security of each nation's own freedom, as well as that of every other nation leagued with it, without their having thereby to subject themselves to civil laws and their constraints (para 356).

In the final analysis, then, Kant's program for a federation to protect world peace is, just as Austin's, built upon and necessitated by a political ontology based in a comprehensive and positive account of the each nation's right to *freedom*—a kind of freedom paradigmatically linked to the absence of subjection through the imposition of a higher law. In so doing, Kant fully and completely shares the Austinian tradition's commitment to the idea that law is subjection and that a true cosmopolitan law would be logically irresolvable with state sovereignty.

Kelsen's Monism

It is remarkable to think that (and we must begin by asking precisely how and why this was so?)—within the terms of positive law—a proper theoretical repudiation of the

presupposition of the supremacy of sovereignty over law had to wait as late as the work of Hans Kelsen, writing from the 1920s. Kelsen, of course, is famous as the great advocate of legality (and therefore opponent on Carl Schmitt) in Weimar constitutional thought, as a self-described Kantian committed to a universal ethics, as an advocate (in the expressed serves of an ideology of pacifism) for the creation of "world legal organization" (properly so called) with effective supremacy over states, as the legal father of the United Nations Charter, and as the single most prominent public advocate of the project of global law throughout a long career as a scholar, much of it in the US. It may, therefore, be surprising, to some readers more familiar with his clear statements that international law is real law, that Kelsen's work grew directly from his acceptance of the positivist understanding that international law and sovereignty could not coexist.

This is a point which Kelsen himself made abundantly clear throughout his work, as we shall see in a moment, and yet, it is a point of real contemporary importance that the greatest number of the advocates of global and international law—very many seeing themselves to be working largely and explicitly in the space opened by Kelsen—seem to have very few questions a proper international law is fully compatible with dualism. Kelsen, however, understood real international law as "diametrically opposed" and in "contradiction" the classical understanding of state sovereignty (Kelsen 1960: 629).[66] Nor did he believe that this conflict could long remain temporary or partial: A proper international law he understood made states "subject" —while "to speak of a 'relative' sovereignty of the states…[is] a contradiction in terms," he said. Dualism might make sense, logically, for contemporary practitioners who see nothing more than

[66] Note that though this text is, properly speaking anachronistic because it was written in 1960, but it is especially clear and it is well known that Kelsen's writing is remarkable for nothing so much as its precise consistency over time and in different publications.

two systems of legitimating norms—one domestic, one international—apparently coexisting, but this coexistence is necessarily momentary and illusory, he thought, in that it masked a fundamental "teleological conflict" inherent in modern law's presumption of supremacy (363). While this reading of Kelsen may be surprising, this conceptual conflict between international law and sovereignty shows itself to be necessary to his theorization of international law, in a way that must raise very serious concerns about the implications of the project of international law—and, in particular, the possibility of a dualist legal order.

It is worth looking carefully the terms of Kelsen's argument which is still in many ways the most coherent and persuasive account argument for the supremacy of international law over sovereignty. Here he makes absolutely no bones about the fact that his intention is to find a definitional framework for international law and state sovereignty capable to primacy of the former, as law properly so called. The crucial first step to this then, as it presented itself to Kelsen, would be to prove that international law is law in the same way as domestic law. To accomplish this Kelsen understands that he must break the conceptual presumption, at the heart of the dominant theory, that there is some essential quality to the law of a sovereign political community which differentiates it, constitutionally and ontologically, from any kind of cosmopolitan system of agreements, treaties, and customs that might be improperly called law.

To do this, sets out to relativize the concept of sovereignty on which it is based. Sovereignty, he argues, has a variety of meanings and this has been the source of theoretical confusion. Certainly, in current parlance, it has come to mean a "special quality of the state," that is "a supreme power" that believes itself to be "incompatible with being subject to a

normative order" (627). This, says Kelsen, is merely a matter of perspective (630). Viewed from below from the perspective of state sovereignty, this is how international law appears, but this is purely a matter of definition, which expresses no ontological reality (631). Every bit as valid, he insists, would be a perspective beginning from the presumption of an existing international law, and deriving states' "legal obligations and rights" from there. This position can be defended against the perspectivism of the national legal system (though no victory is possible, he acknowledges), because as a matter of both logic and efficacy it is international law which determines the legal validity and recognition of a national legal order [state] (as well as its relation to other states), not the other way around (631). In so doing, Kelsen has effectively reoriented the basic binary at the heart of positivist legality, and, from this perspective, (international) *law is now superior to sovereignty*, for the first time since Bodin.

The implications of this theory for the relationship between national and international law are, for Kelsen, both straightforward and direct. The basic dynamic remains one of law as subjection. Thus, the primacy of international law means that it now emerges re-described as a "universal legal order, superior to and compromising, as partial legal orders," and the various national legal orders [the states] are now the "subjects" of this international law (632). Here it is the implications for state sovereignty that are most drastic, though again they remain fundamentally organized by traditional logic of sovereignty. Thus, once one accepts this view, Kelsen emphasizes, "one cannot speak of sovereignty of the state in the original and proper sense of the term" (632). Under international law, on cannot, properly speak of state sovereignty, but if one does it must necessarily acquire an utterly different meaning, in that it now refers to a "national legal order [that] is subject" to international law. In such a situation of "direct dependency," sovereignty can no longer mean a "supreme order." Rather, the "so called

'sovereignty of the state'" now means precisely that status of being subject to international law only, as opposed to another national legal order. Being sovereign itself is now, by definition, subjection.

The implications of this, for think about the possibility of dualism, are of course quite profound. Kelsen has reversed the key polarity, such that law is now superior to sovereignty, but law remains for him a form of subjection, no less than it was for Austin or Kant, and so he cannot escape the logic of sovereign subjection. It just presents itself at a new cosmopolitan level. While he cautions that the term sovereignty is problematic and prefers instead the term legal order, Kelsen fully understands this and what it means. In the new system, "[t]he 'sovereign,' *i.e.*, the supreme order, is the international...legal order" (632). Kelsen is not without grounds for this preference for a global sovereignty of law—it expresses an "objectivistic world view" against "state subjectivism" (638).

For Kelsen, then, international law is, by definition, "a legal order obligating and authorizing" states. It must, however, be emphasized immediately what this conclusion means, and what it doesn't mean. Kelsen is not describing a set of institutions in the world; rather, he is working out two possible approaches to international law in purely logical terms. In this treatment, Kelsen takes the position that we must ultimately choose between one of two monistic viewpoints (in which international law and national law form a unity): either of the *primacy* of international, or national, law. Any attempt to maintain a dualistic construction, he says, necessarily "collapses" (for logical reasons), because it is not possible to have two systems of norms (laws) "if these systems are valid independently from each other and therefore may

conflict with each other" (629). This is necessarily so because, as soon as there is a conflict, one must take precedence (or recourse will be made to norms within one of normative system to resolve the conflict), and this, in effect, will be sovereign.

The implications of this "teleological conflict" for thinking about the possibility of dualism are extremely sobering, but it must be remembered that Austin was a partisan of monism who wanted to present sovereignty as an untenable position. As in most cases, it is extremely difficult to find fault with Kelsen's logic, and his claim that international law and state sovereignty are contradictory seems sound. What must be remembered, however, is that this contradiction is the presumption Kelsen makes that whenever he speaks of international law he means real law, with all the implications implicit since before Austin (629). He is, in fact quite clear about this presupposition, but it means that Kelsen, in fact, never addresses Kant's question of whether any kind of non-legal cosmopolitan order could coexist with sovereignty. This is why dualism is impossible: Its only subjects (international law, properly so called) appears to be too closely linked, both conceptually and historically, to avoid the implications of this tradition of law as subjection.

CHAPTER 5:
Legal Imperialism: On the Imperial Quality of Law and the Political in the Roman Tradition

Two Traditions of Empire

Empire has become one of the key concepts of the moment. Following Hardt and Negri in particular, a great many scholars have taken up the concept to help them describe our contemporary global order—our global constitution (2000). The question arises, however, with regard to this project, whether the concept of empire can provide us any help in making sense of how we should better understand the emergence of the new universal individual criminal jurisdiction of the International Criminal Court and its role in this global constitution?[67] The answer given here is that the concept of empire is absolutely critical to a full understanding of the emergence of cosmopolitan law, but, before this can be so, it will first require a serious revitalization of the concept of empire. That is because, as we have seen in other contexts, our contemporary understanding of the concept of empire has been transformed in modern thought—indeed this may be what is definitive of that transition—into a theory of the relationship between sovereign states. Inherent in this account are two fundamental presumptions which determine our political present: First, empire is seen as a relationship between *states*, and, second, the terms of those relations are understood through the concept of *sovereignty*. States are understood as the natural and basic form for communal relations, and there is understood to be no system of inter-state or trans-state political relations which can claim to determine the relations between states, except those which are an expression of the various sovereign state powers.

[67] The jurisdiction is, of course, supplementary.

If this account of the relationship between states seems somewhat passé in an age of increasingly global theories, it certainly is, and yet, if one looks carefully at the contemporary theories that organize themselves around the concept of empire, they remain very much fundamentally organized around these same conceptual terms of state and sovereignty. In this account, the power inherent in the new cosmopolitan courts is understood to represent the extension of American state power (sometimes European states are included, and sometimes the U.N. is included as effectively representing the dominant sovereign states of the Security Council) into the sovereign power of other states. This is an argument held, in various terms, by a great many writers, including realist thinkers (both left and right), leftist thinkers and postcolonial thinkers. In the Yugoslav context, so this reading goes, the U.S. exerted its power to intervene in the rump part of the sovereign Yugoslavian state which is now the state of Serbia in a manner more akin to the exercise of internal domestic police powers within a state than to the relations of power between sovereign states. For these writers the International Criminal Tribunal for the former Yugoslavia (ICTY) then is either simply a further expression of that American state power (masked, and this is very important, as justice), or it is a mere apologetics for that power. In the first case the Americans create a global empire of sorts through the expression of their normative commitments (justice, the rule of law) as much as they do through their expressions of naked power or state violence (this is the common Schmittian from concept of the political), while in the later this is all just an effort to distract from what is really going on in state interventions (e.g. Lenin, Zolo). That, or these new global courts have to be mere irrelevancies.

I have serious doubts that this is all these new institutions mean. What, after all, does it mean that the definitive aspect of the classical modern definition sovereignty—the right to

punish the criminal—is being given to a global body? What does it mean that, for the first time, individuals, not just states, have become the subjects of international law? What does it mean that the global courts now make global laws that are not the product of any state's sovereignty? Specifically, I have doubts that the statist concept of empire helps us very much to get at one of the fundamental paradoxes of the new global courts—and indeed the new global order. That question is, how is it that, in spite of the dominance of the statist theory of empire, such a large number of critical writers (writers critical of both sovereignty and American neo-imperialism) have supported the ICC? Understood in terms of the state concept of empire that position is perverse: The ICC can be at best irrelevant, at worst it is the expression of sovereign power of the US. This essay is written as a response to my concern that many of the brightest and most well-meaning people I know support, without reservation, the emergence of the global courts without considering what I consider to be some of the central concerns they raise.

The theorization of empire that is presented here is a an effort to respond to both these concerns of the statist theory: Its inadequacy for describing what is happening with global law, and its inadequacy for describing the broad support that exists for the creation of global law. How shall we understand the fact that this looks, in certain aspects, so much like a state, when it is not, and how shall we understand the fact that these crucial elements of the state—individual criminal liability (and thus law (and thus sovereignty))—can be so popular, especially among people who would never countenance a global state?

The theory presented here is an attempt to resuscitate key aspects of a once dominant theoretical tradition of understanding empire (a way of understanding that has remained vital for

two and a half millennia) which, because it is not organized through the concepts of state and of sovereignty, can shed some important light on what is at stake on the global questions we are investigating. In particular, this tradition—which is most closely associated with the writings of Polybius (1923) and the Machiavelli (1981, 1998), though, as we shall see, it was much more broadly held than that—was not formed (and thus shaped), as the statist theory was, around the question of the assertion of first absolute monarchy and subsequently the modern total state, with all the attendant problems that have come along with them. Put simply, the statist theory of empire will always be, at its heart, a theory of the relation of sovereigns, a theory formulated at the moment of the single greatest claim to power by any political form in Western history. Never before in the history of the West had a political community claimed this kind of power; nor was this a description of a natural or historical state of affairs in the world. Rather, it was a project—a project that created a very new and artificial order: Never before in the history of the West had a political community claimed this kind of external inviolability (MacIntyre 2002).

By contrast, in classical and medieval thought determined by what we might call the Roman or republican theory of empire (some have used the term classical or Machiavellian), empire was understood radically differently. There were two fundamental kinds: (1) First there was empire not including the exercise of (sovereign) power—which Romans and Greeks saw as everywhere and always the normal state of relations between communities: A normative order which Thucydides in *The Peloponnesian War* saw as the normal state of inter-communal relations between *poleis* (1978). This allowed the Greeks to see power short of *arche* clearly (instead of trying to force it all into the empire vs. not-empire binary). (2) Second, there was an understanding of empire including (sovereign) power—which the Greeks called tyranny and *arche* and which was morally negatively charged (see gen. Ostwald 1982).

As perhaps the late Carl Schmitt alone among its advocates has been honest in recognizing, by contrast, the statist tradition and practice of international order based on the concept of sovereignty, which was inaugurated by the Treaty of Westphalia, was an effort to create a peace through a new and artificial legally fiction (Schmitt 2003 [1950]). Whatever the merits of that particular solution (and Schmitt makes a better case than anyone), he acknowledges that it must be understood as historically specific arrangement. There are few more remarkable facts—and few more indicative of what modern political thought has become—than the fact that this arrangement has come to be understood as the natural state of affairs, and even the state of nature itself. How this happened will be part of the questions that this essay addresses, but it will be enough to say now that it could only take place in a world in which meaningful political thought could be thought to begin with Hobbes, and indeed, for a period and in several schools of thought, history before the modern period is essentially pre-political.

At the heart of this development was the project by the newly emergent monarchs and their apologists to break the ancient traditional limitations on political power established by classical republican thought, the Roman law, the concept of the Holy Roman Empire as inheritor of Roman *imperium*, and the Roman Church. All of these were understood to put limits on the power that the newly emerging monarchies could assert, both internally and externally. In response, the apologists for modern monarchy sought to assert a new kind of rationalized and totalizing power of a kind that could never have been possible as long as political power had to coexist with the single Church. With the Reformation, however, it became possible in the north (as, in response, it subsequently became possible during the Counter-Reformation in the south), to assert a claim to the absolute (as opposed to relative) priority of the political to the church. Furthermore, the apologists for monarchy had for some time been attempting to extend their

power by claiming, for each and every monarch, the legal rights long established in the Holy Roman Empire, though the tradition had always viewed kings as manifestly subjects of the emperor. As a result, however weak the power of the emperor in practice vis-à-vis a particular king, the king could never have claimed absolute power, as such. Put simply, the terms of power and the relations between monarchies of Europe had been, since their inclusion in the Roman Empire, controlled by Roman legal and political forms and institutions, and this did not end even with the end of the Empire. The so-called Barbarian codes were fundamentally—especially in regards to these matters—Roman law, and the emergence of the European Roman Law system became the determinative forum and form for debating the relations between rulers. Nor had rulers ever exercised the two strands of what we understand as sovereign power in Greek or Roman antiquity—power had always been relative (at least to law) and what we now call inter-state relations had always recognized both the inevitability of interference and the innumerable norms, agreements, traditions and practices which shaped relations between communities.

It must be understood, therefore, that the notion of sovereign states which emerges in the modern period was far from a recognition of the reality of inter-communal political life. To make sense of it, we need to ask ourselves not just what the new order looked like and which interests it served, but we must also ask how it was that this project—understood as such by both its exponents and opponents—succeeded in undermining bases of inter-communal relations that had already existed for two millennia. The necessary key was to break the very notion of a tradition. In general terms, this meant breaking the very sense that long established past practices be understood as a form of what we would now call political legitimacy, while, specifically, it meant destroying the historically-particular institutions created by Rome and still adhered to. This is what the state of nature was for—as it always had been since it was first

introduced as a rhetorical idea by the Greeks: A clearing away of history so that nothing which proceeds that moment can have any meaning. In its place, the apologists for monarchy—Hobbes (2001), but also Bodin (2001[1576]—naturalize the sovereign power of the king (now absent all the limiting institutions and concepts which had historical kept kingly power relative, not absolute) and the existence of states (now understood as inviolable, where they never had been before).

What is remarkable to watch here is the transition, from Bodin's explicit acknowledgments of what he is up to, to Hobbes amazing silent opacity, and finally to the re-emergence of most of what is useful in the old Roman law tradition, now formulated as rational or natural. Perhaps most remarkable about this is the speed with which the concept of sovereignty came to dominate political and legal thought. The greatest result of this transformation—from the empire of tradition to the empire of traditional ideas stripped of their understanding as tradition—is the incredible emergence of the new conceptualization of the monarchies and of inter-state relations through adoption of the (Roman) legal terminology of property rights (e.g. Maine 2003 [1861], Anderson 1974). Thus the relationship between sovereigns comes to be comprehended legally in the terms through which Roman proprietors viewed one another—precisely because property was a concept that had an exclusivity that that political power never could (limited as it necessarily was by its basis in the will of the citizenry, limited by law, and constrained by practices and traditions). Nor, having destroyed their own history, did this apparently seem absurd, though property, thus understood, could only make sense within the kind of legal order which the kings most strenuously denied.

Against this generalization and naturalization of sovereignty and the state in modern political thought, the goal of this project is to try to resuscitate the classical Roman theory of empire. Put very briefly, the classical theory of empire was a theory of the external aspects of power in a republic. At the heart of this theory—as it is elaborated and passed along in the tradition of political thinking which includes Polybius, Livy and Machiavelli (though it begins much earlier and is even, in spite of the common assertion to the contrary, central to Thucydides writings) and as it was extended into modernity in Anglo-American republican thought (Pocock 2003)—is a description and elaboration of the inherent structural logics that inform political life in a republic. In marked contradistinction to modern comparativism's glossing over of differences to enable positivistic categories, the classical theorists insisted on the historical specificity of the political institutions they described. Concretely, the question that animated their work was what was it that had allowed Rome to achieve such greatness? The answers that they gave stressed the inherent dynamism of the republican form of political community that Rome developed. The points of emphasis may have varied from writer to writer (for Polybius it was the possibility a political constitution which empowered each of the traditional political classes in a system of counter-powers that could satisfy everyone's claims to power internally so that the whole dynamism of the community could expand outward (1923); for Machiavelli it was more that the republican constitutional forms of equal citizenship and laws opened the Roman state for the two inclusion of the kinds of large populations necessary to drive expansion—the democratic principle internally (i.e. everyone is included) and the possibility of the external inclusion of outside peoples as citizens (an example which was always seen classically in contradistinction to Athenian history)(1981, 1998)), but all of these writers shared the idea that it was in the terms of the historically particular constitutional form of the Roman political

community that that community's life must be understood. One hardly needs mention how different that is from the modern sense of the state as the basic category for a certain kind of political thought—a concept of the state resolutely and deliberately stripped of all of its historically particular content.

The chapter is an attempt to supplement that vision of world by re-introducing into political thinking concepts which have been significantly less important in modern political thought. The point is ultimately to call into question the place of state and sovereignty as the basic (and in most cases sole) terms in both analytical and normative political thinking, and yet it has become as important, in the present, to also begin to respond to the critics of statist theories. Indeed, a significant number of globalist scholars have felt the necessity of rejecting political life, as such (e.g. Appadurai 2000); or have called into question the continued vitality of political life itself because of their misgivings about state and sovereignty (e.g. Benjamin 1986 [1921], Agamben 1998); and, finally, there have been attempts to create avowedly post-modern political forms that might supersede the state (e.g. Agamben 1998, Hardt and Negri 2000). Part of the point of engaging the classical republican theories of empire is to explicitly cut against all of those projects. The point is that, if these traditional concepts can help us make sense of our contemporary political predicament, it might suggest that it is not the political (or law, or the republican form) that is coming apart, but rather just the concepts of sovereignty and state, and this might help us to understand—in response to modern political thought—that the modern political paradigm (state and sovereignty) may have been less of a step forward than even some of our most sophisticated thinkers—especially liberal thinkers—see to realize. As such, the republican theory of empire, through what it shows us about the once and future relevance of the concept of the republic (and the political)—a concept which precedes and succeeds the state—

radically undermines not just end-of-the-political and post-modern theories but modernist theories, as well.

What is especially relevant about the classical theory of empire, for present purposes, is that it does not operate on a theory of a strict and absolute distinction between inside and outside. Modern statist theorizations of empire are accounts of the political dominion of one state over another. They do treat of degrees short of political dominion, but these must be analogized to full dominion to make sense in statist terms. Thus, the focus is resolutely on whether a particular kind of interference by one state in another rises to the level of dominion, and the variations in the process get short shrift, as the debates focus always on that ultimate question of whether this rises to the level of empire. What kind of state this is internally doesn't really matter for most of these theorists.

By contrast, in the classical theory, empire was understood radically differently: Empire was the name given to the expansive principle which was central to any description of what made the Roman republican form unique and historically important. This kind of interference in the other political communities—which is to say empire not including the exercise of (what we now call) sovereign power over another state—both the Romans and Greeks saw as everywhere and always the normal state of relations between communities, but they also viewed it as the norm for this sphere of relations to be organized through a mix of traditions, practices, and agreements. As Martin Ostwald has shown, it was, therefore, not out of keeping with the Athenian concept of the freedom of states—*autonomia*—for these same states to pay tributes (1982), and yet there was never a sense (indeed this is what clearly motivated Thucydides condemnation of Athenian imperialism, if one reads him carefully as Moses Finley does) that the poleis were outside a normative order (Finley 1985). Ultimately this allowed the Greeks to see

the full spectrum power short of sovereign, subjecting power—that is power short of *arche*—in its full complexity and variety, instead of trying to force it all into the empire vs. not-empire binary of the modern theory. Yet it did this is in terms which always maintained a bright line distinction between, and clear political and moral condemnation of, the imposition of the full, subjecting power (sovereignty) over another political community. For the classical theory, then, *empire* was the name for the dynamic internal capacity of the polis to expand, a capacity in all poleis such that it was from the clashes between these dynamisms that history itself was made (see gen. Thucydides 1978 and pseudo Xenophon 1986 (also see Moore 1975). Empire was not the name for when one polis fully dominated another: That was always known disparagingly, by analogy, as *arche* (power, but pure, naked power, outside of terms of proper legitimacy) or tyranny (the naked, pure leadership principle). Both of these insights—*the inherently imperial character of republics* and *the relativity of power*—will be crucial to us today, if we desire to be able to make sense of the full meaning of the relative "sovereignty" of both states and the emergent global legal institutions.

The great genius of the classical theory of empire, however, was its understanding that the greatest capacity for the greatness of a political community—a polis, a republic—was in its ability to expand to the point that it could resist the threat of subjection by larger neighbors. At the basis of this thesis, however, was not an empty theory of a race for growth between states, but rather a complex understanding that communities were, as Livy emphasizes in his Book I ("Chapters from the Foundation of the City") (1988), importantly structured and limited by their beginnings, and they were always, as Polybius (1962) especially made manifest, the product of particular political developments and the terms through which crises were negotiated. The greatest distinction for the ancient writers (one determined more by their class position than

accuracy, but nonetheless the one that informed the tradition throughout) was between Rome and Athens. Athens, from antiquity, represented the republic which could not, because of its internal citizenship principle (understood as the product of its historical development), made the possibility of imperial expansion through full inclusion as citizens (of either immigrants or neighboring communities) too slow and fitful to succeed. The greatness of Rome, as Machiavelli, Polybius and Livy understood, was the product of the terms of its origins and of its earliest historical development which had structured the Roman political principle—and especially the principles of citizenship and of law—in such a way as to allow for the inclusion of immigrants and neighbors. Two aspects must be highlighted to make full sense of this. Of course this meant the general republican form of citizenship which permitted the inclusion of non-citizens. Yet this principle was itself predicated on an earlier basic republican political equality of citizenship and law which, the classical theorists understood, made possible a form of political life in which, at least potentially, the political claims of all the political classes could be met—at least to such a degree as to allow intra-class conflict to be weakened to the point where it would not frustrate expansion.

To fully understand what is at stake here, one must understand that at the heart of the classical theory was a conceptual model of the world relations into which communities were expanding, or not. In this model, Athens was again the focal point of contrast. The fate of that polis, it was understood, provided the twin lessons of the future. First, as we have said, she could not expand, but no less important was the lesson of the so-called Athenian empire that no republic based on a limited population and limited citizenship principle could ever control the world through force. Athens had failed, as Thucydides said, because its growing power had ultimately united its enemies against it, and this, the classical theorists of empire understood, was

the central logic which would always determine—at some point—the limits of the potential expansion and greatness of any city. Certainly early Rome did conquer other cities outright, but this could never be the norm, or at least not the end of the story. The great genius of the early Roman city and of the republic was the product of having had the good fortune to have emerged with a form of political life which allowed Rome to take full advantage, through their inclusion as citizens, both of all the people who came there as immigrants and the peoples of neighboring communities who came to be included through myriad means from conquest to agreements (Livy 1988; also see gen. Scullard 1976). Expansion, understood as modern theorists of empire have come to see it—that is, the dominion of one state over all, or part, of another—the classical writers recognized as much too difficult as task. Communities which undertook such direct conquests were always at the potential mercy of the unity of their neighbors, brought together precisely by their own growth and power (and, if not now, someday). This observation—that external dominion through force can only ever be a limited (and then preliminary) feature of state relation—is one with continued relevance for understanding the support and opposition for cosmopolitan law versus American empire today, as well as for raising questions about the limits of the modern theory of empire as rule through force.

Ultimately, then, the classical theory of empire is a theory of the unique possibility, in the Roman form of the republic, for expansion through the equality principle. To make sense of this, we need to recall the classical theory of *political classes*, so often miscast, in modern discussions and translations, as economic classes. Polybius stands at the start of the tradition for his clear-eyed understanding of this (though the idea is much older and indeed predates both Plato and Aristotle's attempts to undermine it). In this account, the three traditional political constitutions—monarchy, aristocracy and democracy—which, since at least Herodotus (1965;

Bk. III paras. 77-83), structure classical thought, correspond to the three potential bases for political organization. What the republican theorists saw in Rome's example was city that was able to emerge as a republic—which is to say it came to be organized around the inclusion of the popular element (the demos) in the form of a limited, public equality of citizenship and law. In so doing, Rome was able to simultaneous avoid the worst of civil strife which characterized life in communities where the popular element was not so recognized, while simultaneously hitching the engine of the republic to the great motor that the full populace alone—by its sheer numbers—could provide.

The writers in classical tradition understood that both the creation and the expansion of a political community are possible only through the unification of extant communities—communities with their own rules, forms of life and perhaps laws. This may seem, the first time one sees it, like a small point, but it is not. In fact, it is one of the deepest and most emblematic elements which define the traditional theory. Modern writers have come to see law as something easy and natural, and typically they begin with the question of what the law is. By contrast, the Roman tradition always began with the question of how and from what material a uniting and unitary law—which is to say a political community—could be for the first time constructed in order to create a republic. This was not the easy question it has become today, however. These writers, whose account of law was not as dreadfully positivistically empty as our own, understood that, in the founding of a republic, a new set of generalized laws or rules of citizenship, which could include all the members of the various communities, could not easily be accomplished simply by the extension of one group's laws to the totality. This was in part because, as we have seen in external relations, this kind of exercise of power would produce a unified opposition from all the other potential community members, but it was also because there

was a recognition that the existing frameworks of laws and traditions in each community framed privileges and rights—and especially communal privileges and rights—that could not be ignored. Thus, even the strongest of the groups or communities in any potential union could not impose its laws *tout court*, because its own elites' status depended on its definition by the old communal forms—forms and rules which were, by definition, exclusive. Viewed, as these writers did, from the position of a theory of political classes, this meant that the elites of the extant communities would inevitably oppose even the extension of their laws to others, much less the extension of someone else's law to them.

What this meant, as the foundation of the Greek poleis make clear is that the creation of a new common, shared law and citizenship that could unite a community as a republic was always understood classically to have been, not the product of a simple, rational creation of law from whole cloth, but rather was could only be produced by the radical and violent (no matter what its subsequent legitimacy) reorganization of a the most fundamental aspects of a community. As many modern scholars have, one might, in a blasé manner, say that this is the replacement of the communal principle of organization with the individual, and there is certainly some truth to that. More fundamentally, it means that all pre-existing communal forms—descent groups, families, or religions—are now relegated to the private sphere. Machiavelli, for example, writes of the deprivation of all other corporations…that its own corporate body may increase" (1998).

We must note, of course, is just how radically different this is from the view of our own day, when the republican form—and individual citizenship—are applied to new peoples as if communal traditions were mere bad manners. Preoccupied by theories of war and revolution, modern thinkers have forgotten the violence in origins of republican and liberal institutions. By contrast, both the Roman and Greek accounts of history foreground the early origins of a

political community. Theirs is, we must understand, essentially a theory of the origins of what can create a republic—out of these local systems of communal rules and identities. Contrast this account with that of Max Weber social scientific and objective ideal types (1948 [1919], 1949, 1967), or with the inherent progressivism and rationalism of so much contemporary democratic theory.

What, then, is at stake, internally for the citizens of the republic, in its foundation in this form? What the classical writers understood, by their focus on origins, was that both the equality principle and the possibility of greatness through expansion through which it operated depended upon a fundamental reorganization of the community itself. Which is to say that they understood that the possibilities inherent in the republican form had to be understood to have come at the cost of the radical re-imaging and re-organization of many of those elements of life which were heretofore most important to these people, and so the foundation of republican political life must, therefore, be understood to always incur a cost significant cost for the entire community. At its most dire, then, the republican form must always be understood to be born from the bones of those whose ways of life perished to make possible the modernity of their laws, and life in a republic must always be understood to be, itself, a form of modernity. Nor, simply because we have moved so far beyond this phase in the history of our own republic, can we assume that this cost can ever be avoided in the creation of a new one. It is only possible—as modern political theory mistakenly believes—to view the choice of a republican political form of life as a choice without costs, if one already lives in a (more or less) republican political community in which a single, common public political life has already taken precedence over all pre-existing forms of communal organization. Nor are these costs ever trivial—though we may come to feel they are ultimately still desirable.

It is from this republican arrangement that the expansive principle of empire as equality emerges, almost as a side effect or outgrowth. Once formed, a republic is then capable of the extension of its now (relatively) generalized laws and citizenship, to outsiders. Viewed from the worldview of political classes, once the popular element of a city like Athens or Rome comes to be included within its own political community according to a single and common notion of citizenship based on the territorial principle, it becomes conceivable, in a way in which it never could in a community based on multiple, cross-cutting communal, status and descent-based forms of life, to include the people of a neighboring community in the new general republican citizenship. This seems self-evident to us from our modern comprehension through statist theories of empire which presuppose modern (which really means more or less republican) states as the basic category for their model—states expand and can impose their laws in the conquered state if they so choose. Yet this world view itself only becomes possible from the position of theorist *within* a republican political community. The classical writers well understood that, by contrast, nothing was more remarkable and noteworthy than the possibility of extending one's own law to new people. Only a republic could even countenance this, and this is precisely what made Rome—and Athens too—so worthy of study. Most of the communities of the world were understood to live in complex systems of organization in which there was no single common citizenship or law to extend in the first place and in which numerous forms of life were based on status, communal affiliations or descent. What defined these forms of life was precisely their exclusivity—in general they could not even be extended to even all the members of their own community, much less to outsiders. The greatness of the republican writers is that they always wrote from the assumption that what needed to be explained was the peculiarity of their form of life. The norm, and they understood this very clearly, was that for one community to exercise

power over another is extremely difficult, and the possibility of extending one's own internal laws and statuses to outsiders was so rare and exceptional as to have emerged, for them, as almost *the* question of political history.

Nor did they simplemindedly view these republics as superior or happier, only more powerful and thus pragmatically more likely to survive where other cities would be come to be dominated by more powerful states. In fact, in general, the writers who have come down to us (from their relatively elite positions) tended to view Athens and Rome as deeply corrupted by all this expansion. They tended rather to favor Sparta to Athens (Thucydides, Plato, Aristotle, but also the Roman writers), to see the cause of Athens' destruction in her imperial excesses (as for Thucydides), to view Rome's history as a story of the corruption of her early republican traditions (Livy, Tacitus, most of the Romans, Machiavelli), or to see Rome's origins in a fratricide as the mark of a destiny to be lived out under the unending sign of violence (Livy).

Modern critics of empire who operate within the statist paradigm may read the world in a related way, but the classical writers were greater in that they explicitly linked the republican form of political community as kernel and cause of both that which is greatest in life (political life, order and growth) and that which is most potentially destructive (tyranny, unmediated rule by masses, and the naked assertion of external power). Nor did they view this linkage between republic and empire as accidental or, as in the modern theory, something that one might be able to learn enough from history to potentially do right this time. Thus, modern theorists of empire (both pro and con), share the view that the imperial sentiment—understood as the desire to dominate other men—is the natural and pre-political state of all men, and the state (or the republic) is the necessary means (as for Hobbes) which men must choose if the desire peace and security. By contrast, the classical theorists understood pre-political life as ordered according to

traditional ways of living, and the choice of political life in a republic was understood as a means to supersede those divisions so that the people of the new and growing populations of cities, people not subject to any single communal, descent or status rules, could resolve disputes between groups—which is to say, to live together. Understood from this perspective, political life in a republic is viewed not as a form of necessity but as a decision and a form of artiface—as a historically specific project for attempting to supersede early inter-communal and inter-class conflict, given very particular historical circumstances.

Indeed, the classical writers most certainly did not believe that all cities had been formed in this way, much less that they should be, and they certainly understood that both Athens and Rome were exceptional in innumerable ways, not the least of which the common facts that both were founded relatively late in the history of their regions (and so clearly could not operate on principles based on the fiction of time immemorial usage) and that both had, if they had ever had anything approaching real kings, done away with them very early. From this viewpoint, political life, in this specific form in which we understand it as such, must be understood as something very specific—something with a very particular single origin in Mediterranean history. Its success and expansion (especially at Athens) lay, for these writers, in the engine driven by its potential to include the popular element, the mass, in its terms of citizenship (as well as its ability to, relatively, diffuse internal class conflict). In this, republics created the possibility for internal peace that modern writers foreground, but, as we have already discussed, the classical writers always understood that this was, the product of an institution, the republic, which made political life, in its essence**,** *inherently imperial*.

What it means to live in a republic internally I will discuss elsewhere, but externally it means to live in a constitutional order which simultaneously must balance, on the exact same institutional base, the potential both of its highest ideal (the great privilege of equal citizenship and equality before the law) and of its greatest source of corruption—the potential to expand by including others within the law. What the classical writers understood is that *this principle of equality is inseparable from the expansive principle*—empire. Thus, to live in under a republican political constitution must be always to live under the sign of empire. Indeed, as I will discuss below, almost nothing could be further from the classical theory than the modern theory that democracies are somehow more peaceful. I will take up this question with specific regard to democracy below, but for now I will address this with regard to whether republican forms of government are less inclined to empire (since, after all, most of what the theorists of these arguments highlight as the defining characteristics of democracies—rule of law, etc.—are really more appropriately understood as republican institutions). The classical theorists understood that a republic is not just in a potential institution for empire. It is, in both its history and in it essence, empire. Just as Livy could not avoid beginning his history of Rome with Romulus' killing of his brother, the classical writers always understood that republic is born under the sign of violence and expansion.

The exact form that expansion and equality take in republican empire becomes apparent when we view the expansion of republics through the interpretive lens of the classical theory of political classes. To begin with, if one views the terrain conceptually as being one of numerous republics as neighbors as was the case in the relations between the Greek poleis, the concept of the republic opens up the possibilities of inter-class solidarity that was impossible in pre-

republican forms of order. Indeed, those pre-republican forms of community were organized around identities which were deeply historically particular and exclusivist, and they generally could not either be extended to other peoples or even aspired to by outsiders. However, in republican circumstances, the mass of citizens of a more oligarchic republic may choose to support the expansion of power by another republic into what we would call today their "sovereign" state because the imperial republic is more democratic and representative in its form of citizenship. Indeed this was very much the norm in the case of what was is called the Athenian empire: As GEM de Ste. Croix has described, the expansion of Athenian power (which after its origins never went so far as full unity with another republic) was viewed favorably by the democratic elements in oligarchic Greek republics (1954, 1961). In such cases, Athenian imperial expansion generally took on the form of (and the presumed moral imperative of) answering of direct calls for assistance from the popular party in more oligarchic republics—which in turn helped to enable an internal revolution in the neighbor such that that republic was now democratic itself. We can then understand, as for the Greeks, that the form of the republic always produces the possibility, in the realm of relations between republics, of creating inter-class solidarity between citizens of different republics.

A closely related aspect of republican empire, in this case as employed by Rome, has been so central to the writings of the exponents of the classical theory—and especially of Machiavelli's reading of that tradition—that it has become synonymous with it. Thus, in the so-called Roman form of empire, as Machiavelli stressed, the Romans rarely sought direct conquest of their neighbors, but rather found weak cities which chafed against the domination of a greater neighbor or some element within the other city which was predisposed to support Rome against another elements. As Machiavelli wrote in *The Prince*, "in every country they invaded, the

Romans were brought in by the inhabitants" (1981: 38), and Hardt and Negri describe this, very elegantly and within the context of the theory of political classes, by saying that empire is always "called in to being" either by weak cities seeking protection or the popular element in a neighboring republic seeking aid against its own oligarchies (2000: 15). This is actually very close to the Athenian example just given except that in this instance there is a complete inclusion of one republic into the Roman republic. What both cases clearly evince is a common critique of the modern statist theory of empire's presupposition that empire is primarily about force, power and invidious treatment, with its assumptions that everything else must therefore not be empire. What the classical theory suggests, through both these examples, is that republican empire—republican expansion—has always been, structurally, precisely about *aid, class-solidarity, fraternity and equality.*

Some scholars have described this as the beginnings of a true ideological politics, but that is much too abstract. To accept the expansion of an external city's republican principle is not interchangeable with the expansion of one's own local republican principle because the terms of citizenship and law are never exactly the same in different republics. Of course, it is a fact of the first importance that it becomes possible for each republic's citizenship, at least theoretically, to ultimately include every person in the world. Some have described this as the inherently universal potential of every republic, but it is important to be clear that this is not the same thing as an abstract democratic universal citizenship or mass solidarity, and the reason is because the link that connects these classes remains the republican form itself—which is to say it is only through the institutions of one of the republics that the inclusion is possible. Each may contain this potentiality, but this is only possible at the expense of every other republic—and thus would

require a further generalization rights no less than the inclusion of a non-republican community would.

To fully understand, as we have been trying to do here, the exact form that expansion and equality take, structurally, in republican empire requires that one look, at an even more elemental level, at the conceptual terrain of republican expansion. Up to this point, we have looked at cases involving relations between republics, but what if the neighboring city or community is not a republic? It may not make much difference in terms of how empire might get called in by the inhabitants, nor does it necessarily change the possible dynamic of solidarity towards the imperial republic from members of dispossessed classes. What is does change, however, is that the decision to include the new population within the republic necessarily must include the full spectrum of internal political reorganization which was discussed above, including the attendant violence and structural reordering of the most basic elements of life. This is not an aspect that receives much thought in the Roman tradition of writing on republics, though it ultimately involves only a fairly small extrapolation from those ideas, but it is essential to the Greek debates.

What it means is quite profound: Republics not only tend to expand in this manner, *they find it difficult to expand any other way*. Which is to say that, against the kind of claims in modern political thought that see political forms as little more than suits of clothes which can be changed and republican political forms as something that can be adopted easily and painlessly, a study of republican empire in the spirit of the classical tradition shows us that political forms are deeply structured—and in ways that are fundamentally determinative of what can be made of them. Nor is this any less true of more modern political forms like the republic. Thus, because at their origin and base republics are structured around a single general citizenship and law, it is

counter to the very essence of republican political life to extend multiple forms of citizenship or other laws, and, because it is in the structural essence of republican forms to recognize all people potential citizens, outsiders, whether in a republic of their own or in a different form of government, will always be recognized by the imperial republic first as individual citizens and subjects of law, not groups (though this is not the same as saying they are recognized as modern individuals because these identities are both common to all and determined by the political community, rather than each person). True republics thus will always try to expand in this way first, and the history of the expansion of the modern European republics could thus fruitfully be studied as a series of attempts to circumvent exactly this republican necessity.

What then is at stake, structurally, in the inclusion of a non-republic within a republic? It means, at a minimum, the following things: First, it means the preliminary definition of what is at stake and comprehension of the other community will always take place, for the republican community, through the lens of a republican understanding, and, in so far as the republican community is the more powerful, this means that republican life is taken as the natural state. Second, to be included, a transition must take place in the external community from a non-republican and often non-political form of community organization to a republican political constitution, with all of the attendant aspects described above including reorganization around the principles of political priority, equality and individual citizenship. Finally, it means this expansion takes place, not for reasons of internal political history, but for external reasons which may, or may not, be closely associated with a strong commitment from the breadth of the membership of full community for that kind of fundamental change, and this means that it is therefore extremely unlikely that it can be universally accepted by membership of that community, except in situations of crisis, either between internal parties or with regard to

external aggressors. Put simply, republican expansion will usually take place where internal crisis overcomes local resistance (though the republican community will likely see the crisis as having been the product of the outside community's failure to organize on republican principles in the first place).

It is worth, perhaps, reiterating here that whatever the effect on the external community, republican empire must always be understood as a reorganization of two communities. Citizens of republics must remain vigilant of the fact that the desire to extend externally the benefits of citizenship and law beyond the limits of the constitutional order of the moment, for whatever reason (be it justice, business or conquest), creates the necessity of reorganizing the interior political space of the republic in such a fashion as to make possible the new, *relatively* more cosmopolitan form of citizenship and law which can include both orders together. Thus imperial expansion must always be understood to have profound costs for its own citizens as well, because their very political identities, the basic and prioritized element in any republic, must be renegotiated. Nor does this end at some point in a purely abstracted and rationalized citizenship or law: No matter how many times it rationalizes itself in this way, as long as there are people still left to bring in, it must accommodate them through re-rationalization. If we have trouble seeing exactly what is at stake here, that is because we moderns have lost our sense of just how central our citizenship and political constitution are for the members of a political community. The writers of the classical tradition well understood how much struggle and thought was involved in the creation of this political form of life, and they understood how definitively and distinctly it structured every element of their world and their persons. Indeed these writers understood the difference between the republican political life and other forms as the single greatest distinction of the age, and the form of constitution one lived under—in its full historical

variety—was seen as the element that most closely described the character of the citizens, even individually.

Nor can this world view be dismissed as the product of some kind of romanticized political idealism associated with some simple classical ideas, as many modern writers try to dismiss the political: It was, rather, a hardheaded recognition of great historical labor—the violence, the struggles, the fundamental reorganization of life—that went into the production of particular artifice known as political life. Thus, this, combined with the increasing democratic deficit as the population of a republic grows, must serve as a warning to those of us inhabiting republics in a world shaped by modern statist notions of empire that, no matter how modernized or rationalized, law (at least so far as it describes political forms in a republic) can never be the kind positivist abstraction that modern theory wishes to make it. No matter how high minded the reason and no matter how equal the expression, the law, as it relates to the terms of citizenship and to the form of the political constitution, has content—law is always somebody's law

The point here is not the moderns' idea of a mere choice between good motives and bad motives for expansion, whether it's good or bad, and then whether its motives are good or bad? The point, finally, is that the origin of republics, and the moment in which they become structurally organized in the form we understand them, was a response to historically specific circumstances in which it was felt to be necessary to commit to a communal ordering through two central concepts: The first is the concept of the political (the public sphere), as the single, common and determinative logic for the community, and the second is through the idea of a limited equality principle of equal citizenship and one law for all. The first aspect, the political form, has made the republican form determinative within any community that remains political, and the second aspect puts, at the very core of political life—enshrined in constitutional forms,

the terms of citizenship, the institution of law, the great writings of the age, and in our greatest conceptual ideals—the concept of equality. This very particular equality which we understand as equality of citizenship and of laws was the compromise that resolved a historically specific set of conflicts very close to the origin of Athenian city. In so doing, it made what we have come to call republics through a set of structural commitments which forever prioritize that particular type of equality. In the meantime, we have learned that this same exact institutional form and ideals which underlie it are also the perfect instruments for expansion. In a republic, then, there is, and nothing says so much about its essence, no distinguishing between good and bad institutional forms and ideals—both what is best about political life and what is most problematic are the product of the same source. From the vantage point of life in a republic, therefore, there is no way to equality from expansion. All we can do is to distinguish better expansive-quality from less good expansive-equality: This is what the classical study of empire has been, and this is what it perhaps should be again.

The Form of the Republic

This investigation originated in a desire to try to understand how we might best understand the new global criminal law. The provocation for this question was a sense that most of the available theoretical paradigms in contemporary political and legal thought—and especially the modern theories of states, sovereignty and law—were not equipped to make full sense of what was happening. This was primarily because the dominant modern understanding of the concepts on which these theories came to be based—again, states, sovereignty and law—were precisely what the emergence of global criminal law was calling into question. Indeed,

most of what was happening with the development of the new tribunal simply doesn't make very much sense in terms of theories of state sovereignty or legal theories based on the sovereignty of law. How, after all, can one explain global criminal law through a theory of state sovereignty? How can one understand criminal law outside any relationship to a state, and, specifically, how can one understand a global order which contains a global criminal law but which does not have most of the other elements considered necessary to a modern state? Finally, how does one make sense of the incredible breadth of the contemporary support for global courts which seems, based on state-based critiques of empire, to be nothing more than the power of dominant states, or the apologetics for that power? This inquiry is an attempt to find alternative theoretical tools that might help us make better sense of both the new global constitution these new courts are simultaneously being enacted by and themselves enacting, and how global criminal law could have emerged so quickly even in an era in which most scholars did not believe it was possible.

Elsewhere I will treat more directly the inadequacies in the modern theories of the internal aspects of sovereignty, law and the political, but for present purposes, if our goal is to try to comprehend global criminal law beyond the terms of the modern account, the concept of republican empire we have been discussing offers itself as an obvious possibility. Pragmatically, we might want to reduce this choice to a simple recognition that this republican tradition offers itself as one of the great, and most carefully investigated, alternatives to state-based political theories, or we might begin from the fact that most of the world's countries are currently republics and that most of the contemporary great powers are republics. Neither of these facts is without importance, and yet, as the discussion above has just elaborated, the great genius of the

classical tradition is its recognition that all our basic political forms[68] (the republic, the political, law) are deeply structured and structuring—and structured in a way that, through disabling some possibilities and enabling others, makes certain patterns of outcomes likely. The role of the classical theory has been to begin to describe and interpret those patterns, within, of course, as Machiavelli so elegantly understood, the omnipresent limit of *fortuna*. The question, then, is, now that we have discussed the internal structuring of republics, can the patterns of lives lived in a republic tell us anything about global law?

It will be worth reiterating two facts that are taken much too lightly in contemporary scholarship—that most of the world's countries are currently republics and that most of the contemporary great powers are republics. (1) How the republican form of political community, from its specific local origins, came to be the dominant form in the modern world should perhaps be *the* question for contemporary/late-modern political thought. How the republican form emerged as the dominant form of life in the ancient Mediterranean world and then in the Europe is a question we will deal with in some depth elsewhere,[69] but for present purposes it will have to be sufficient to skip ahead to the history and process of the expansion of the republican political form from its European to its contemporary near universality.

To understand this one needs to understand two related but distinct elements. Just as Bodin and Hobbes represented, as we discussed above, the project of breaking the republican political tradition through sovereignty, Grotius represents the same process in the relations

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[68] In other words, the forms of the republic or of law are deeply structured, in contrast to modern thought's emphasis strictly on the subsequent internal arrangements of that form (Is it a democracy? Is this the rule-of-law?), which are always viewed primarily as ideological preferences.

[69] Of course, to do the subject justice, one would need to begin with a discussion of the particular conditions of the emergence of the Greek polis, as well as the expansion of the republican form through the practices of republican empire at Athens. It would be necessary, as well, to treat the taking up, by the early Roman city, of the Greek political ideas and forms—ideas and forms which became, in their integration into Roman concepts, the foundation of the Roman political and historical traditions.

between political communities. Here, again, the fiction of the state of nature operates precisely to radically expel from political analysis any discussions of past practices and traditions, and, by so doing, states can be reordered in order to explicitly deny the limits that the various traditions of Roman, neo-roman and post-roman thought and institutions placed on leaders acting abroad. Though Carl Schmitt sought to defend and reinvigorate precisely this state order in his great work, *The Nomos of the Earth*, he was a hardheaded enough analyst of political life that he understood, and acknowledge that he understood, that this was not a description of a political or natural reality, but rather an explicit project. Understood this way, an important strand—perhaps even the central strand—of the history of modern political thought and practice, is a project to create an outer limit, where none had been before, to the legal restrictions the Roman law placed on rulers and states. To understand this we must understand that, while early colonial states of Europe were to varying degrees themselves republics in terms of the internal political relations of their own people, the so-called Roman law—a law that was the product of a republican world and remained, always, based on republican concepts and assumptions—always remained the law that determined the relations of the new "sovereigns" to each other (as well as to the Church and in important aspects of their relations to their people). This Roman law was itself built from the materiel of the cosmopolitan law the Romans had created as the very vanguard of their republican expansion—a law whose role was precisely to enable the inclusion of new peoples. It therefore could not, according to republican principles, recognize any limit to its potential expansion. Confronted by the political and economic limits imposed by this law, modern international thinkers sought to create an outside limit to their civilization, a place beyond which the Roman laws did not extend. Their concept of the state of nature was not just a clever alternative origins myth, it was also a description they sought to project onto the world outside

their own irreversibly political and republican world. Lest one misapprehend the republican institutions of Roman law as simple ideological assumptions not deeply structured in laws, concepts and institutions, one needs only note that the republican law was so fundamental to their political world that the only concept the state theorists could oppose it with was emptiness.

This was initially successful, but ultimately every time the Europeans sought to extend government itself the Roman concepts once again would rise up. Obviously, the Spanish and Portuguese states were not republics and their empires were not republican in form, though the Roman law tradition and Roman law concepts remained relevant to, if not definitive of, the terms of external expansion. In Machiavellian terms, however, it could not be by accident that the greatest of the subsequent imperial powers—the Dutch, the British and later the French—were republics at home, and, at least initially, republican in their form of imperial expansion. It is worth noting that his is precisely the trajectory of history (though including the U.S. as the ultimate step) that Carl Schmitt, in his *Nomos*, sought to derogate as the Johnny-come-lately sea powers, who had no respect for his beloved European state system and its territorial principle. The concept of sea power is ultimately, however, a cover for the concept of the republic. In Machiavellian terms, however, it could be no accident that those political communities—the Netherlands, Great Britain and later France—grew so great and expanded so widely. Only republican political organization, as we have already seen, could simultaneously accomplish the unleashing of the great engine of growth and prosperity which only the popular class, by its dynamism and numbers, could provide, while, at the same time, allowing for a kind of Polybian counter-structures of government which could appease the calls from the people for recognition. So too the expansion of these republics took place, at least initially, in the classical republican manner—which is to say though the Roman concept of equality. The Netherlands, of course,

becomes the most cosmopolitan and broadly accepting political community in Europe, and Britain and later France both initially expand politically through the logic of the Roman equality principle and the possibility of extensions of both citizenship right and even territories. Strictly speaking we might call this a hybrid system, because it retains its place within the Westphalian state-based system of states and within that systems great fiction of the boundaries of the political. This extra-European system is what made it possible for the great trading companies to exert such broad freedom abroad, even as true political expansion remained bound by laws, and the European state system, as we have seen, essentially bracketed the older Roman concept of law by denying its traditional character, even as it created a new order from the same Roman law material. The new system denied its Roman inheritance and now made states, not individuals, the subjects of "international law," but it was in its other essential features, nonetheless, the Roman concept of law, now understood as the product of natural law, not tradition (see Tuck).

The history of high modern political thought and practice may therefore be very fruitfully approached through the dynamic established between this republican tradition and the sovereign and state concepts with which it ultimately could not be reconciled. This was, of course because, based as it was on a general citizenship principle, republican and Roman concepts always imply both the priority of the communal political life and the recognition of a very specific kind of individualistic citizenship the ultimate basis for all political organization. Thus, any time concepts or institutions of citizenship or law appear in European thought and practice, they inevitably bring with them the republican concepts. It might be easy to dismiss this as a mere ideological claim, entitled to be debated against sovereign and liberal theories, but the point is not that the ideas were in the air but rather that they were in the law and in political life—they were structural elements which reproduced themselves even by the anti-republican elements to

extent that law and citizenship played a role in their political lives. Two great modern distinctions were drawn to try to defend against this republican structural reality. The first was the great modern bourgeois invention of civil society as part of the private sphere. Note that even here, in high modernity, the republican concepts of public and private are—through law and citizenship—still so fundamental to political thought that they cannot be ignored, only misapprehended. Never before in any political community defined by Roman or republican law had there ever been a belief that civil society was private. The classical writers, writing from an era which still recalled the history of its own origins, understood that the life of relations between individuals defined by law was precisely the product of that law—and thus of republican political life. The moderns, through the fiction[70] of the state of nature, obliterated that history, and replaced it with a so-called private contract as the basis for political life. The ancients, by contrast, had understood that a generalized law as we understand it today—and even the law of relations between individuals—was the project of the republics. They understood that in early Athens and Rome, before there was republican government, there were many systems of law-like rules and these rules defined and recognized groups or statuses—not citizens, and certainly not individuals as we conceive of them. The modern writers on civil society try to rationalize out the republican legal inheritance (and especially its concept of citizenship) which threatened to quickly undermine the concept of sovereignty and state by insisting that this domain of legal relations between proprietors is a mere private contrivance—and thus a different sort of substance from the republican idea. The second major contrivance used by modern thinkers to weaken and obfuscate the power of the republican content within law was the supposed great division between Roman and English common law, or between Roman and German law. Initially, the distinction was made by those who sought to undermine the impact of

[70] Note, this term is used in its formal legal sense.

the republican content in Roman law on the sovereign states: Roman law was thus viewed as a foreign, hostile and explicitly imperial, and the common law and German law appear always as more organic.

Once the break with republican tradition had been accomplished and its history was no longer taught to new generations as political or legal history (it was now ancient history, a humanity), the very systematicity of the deeply ingrained concepts and terms of Roman law which continued to underlie legal form and practice, created the possibility of the theorization of a new system. This was first based on a notion of natural law, then it was the product of rational thought (extrapolated from a history of republican-oriented thought and practice), and, finally, it emerged as a full-fledged positivism in which the better part of the local and ancient system and parts of Roman law become either a natural social grammar or the vanguard of modern progress.

It would not be totally inappropriate here to speak of this as the end of a certain element of the republican tradition in law, as, indeed, Hannah Arendt suggested Marx was end of the political tradition of the West, and yet, the republican elements of law and of citizenship, because of their place at the center of law, legal practice and legal theory, remain deeply structural for even much anti-republican modern and late modern thought. It is therefore still true that every time law and citizenship are called upon or enacted, they are fundamentally still republican in important ways—including both their form and content, if not their ascribed sources of authority or justification.

There are two absolute high points of the sovereign state project. In the first, the British Empire, by far the great empire of the age, abandoned republican empire after 1856. In the colonies this was conceived of as so-called indirect rule through local leaders, but, despite the

fact that no name existed for it, it was much more significant even than that in terms of the metropolitan political constitutions—it was no less than the attempt to destroy the principle of republican expansion. The second high moment for the sovereign state project was the great carving up of the world. Yet somehow the great crises that these moments produced in terms of European relations produced a tremendous backlash—a backlash defined, in very important ways in republican terms.

Thus it was that the task of both the American and French revolutions was explicitly to create republics, and, just as Machaivelli and the Romans would have perfectly understood, the concept of republican equality became the great engine for the reorganization of Europe, and ultimately the world. In the first instance, Napoleon's imperial project—and its huge initial support throughout Europe—are, and were understood to be, classical examples of republican empire: Driven by the great engine of her citizen army, France conquered European countries not to occupy them and make them French, but to make them republics. It is perhaps especially worth noting the remarkable support that republican empire enjoyed at this moment. This republican expansion was welcomed, and indeed invited, by the popular classes and republican movements in these other countries, and it was honestly broadly perceived that the spread of republican institutions was neither an imposition of foreign government, nor foreign values.

Conclusion

As we have discussed, the modern state-based theory of empire can only explain the UN Security Council intervention in terms of US sovereignty or apologetics for that sovereignty, and the situation is worth discussing because it is both analogous to the question of global sovereign

empire and, perhaps, a critical hinge moment in a transition. In this account, the intervention is either an expression of American imperial power, or it is an effort by the US to present a humanitarian image in order to counteract its imperial advances elsewhere. There are important aspects to this account, but it is not adequate, by itself, to make sense of the specific terms in which American power—and, very much in and through this process, European power as well—operated in this case. In particular, given the broad diffusion of support for the project from other states and the fact that there is no effort by the any power to American imperialism theory only makes sense as a kind of this does not mean that an account of global capitalism

Perhaps the weakest aspect of the statist theory is its normative element. The value of any analytical framing and description of the world must also run up against the reality that the terms of critique of the old order will become inevitably the terms with which to construct its successor. This is where the statist theory is most obviously and self-evidently weakest, because it brings every account of empire back, in the end, to the statist order. This is, ultimately, a way of seeing the world with an impressive recent pedigree. In the wake of both WWI and WWII, Carl Schmitt sought to defend German interests in terms of precisely this kind of reassertion of the state order, just as sovereignty is currently re-emerging, against globalization and the "War on Terror" as a dominant trope among post-colonial scholars. These theoretical moves are understandable, but they are ultimately problematic. They are all made possible by critical political scholars who, in their efforts to be hardheaded have taken up precisely the abstracted and positivized concepts, especially sovereignty and power, on which the great modern critique of the political was based. Generally, then, their concepts have no histories. Ironically, even when contemporary historicist critical scholarship attacks sovereignty and the state, it does so

from within genealogies which continue to begin with Bodin and Hobbes. In other words, it condemns political life, *tout court*, on the basis of a critique of sovereignty and states.

In the final analysis, then, what we must re-learn is that citizens of republics find it very difficult to recognize the desire for expansion and generalization of law inherent in the republican form. Reserving the term empire for the full incorporation of another state and the extension over another community of one's law was understood, classically, to be much too high a barrier to overcome in practice, and thus unnecessary. Much easier, would be to follow the classical model of empire (as exemplified by the Athenian "juridical empire" in which the disputes of the Delian League were decided in the Athenian courts), and in which, to follow Machiavelli, empire was called into being by the oppressed among other peoples (see also Hardt & Negri). The republican form has been, in part, so successful because it bypasses the greatest potential source of resistance to expansion—resistance, from abroad and home both, to the extension of the old law—in favor of a new law for all and an insistence on common constitutional structure. Put simply, it is an account of the inherently imperial character of republics, and, at least conceptually, the republic is, as it was then, far and away the most broadly legitimate form of political life today. Global law (like Roman law) thus understands that even a new, generalized putatively universal law can serve this same function.

Part IV: Towards a Non-Modernist Political and Legal Anthropology

CHAPTER 6:
The Political as Tradition: A Critique of Political Modernity

Chapter Abstract: The argument presented in this chapter is that our understanding of the concept of law and the political needs to be radically reformulated in order to incorporate the insights of the Cambridge School of political history (esp. Skinner, Pocock, Tully, and Tuck) and recent postcolonial scholarship, which together have done so much to call into question the great project of naturalization at the heart of our political modernity. The alternative genealogies I have worked out suggest that we ought, rather, view political modernity as a *project*, in Alasdair MacIntyre's sense, and, re-read in this light, it is clear that its founders, Bodin and Hobbes, both explicitly sought to create a new political vocabulary precisely in order to break the dominant political and legal traditions of their day. Indeed, both acknowledged as much, with specific reference made to traditions of reading and pedagogy invoking, as authority, the classical republican writers (esp. Cicero), Justinian's *Corpus Juris* (Roman law), the Roman historians (esp. Polybius and Livy), and the writings of the Aristotelian corpus. To fully accomplish this rupture, it was logically necessary—and this is what the concept of the state of nature accomplishes—to create an entirely new set of terms for both establishing authority and understanding political life in terms which had no basis in, or reference to, the extant traditions. Both the new forms of authority which define political modernity—(human) nature—and the new master term (power), which would now be used to describe every political community across time and space, are non-traditional concepts, which had played no role in two millennia of political history in the classical or post-Roman world. They have been remarkably successful in accomplishing this goal, but, nonetheless, their own theorizations, especially of law, largely brought back in the common sense of political and legal practice of their day, though it was now re-rationalized in modern terms. As a result, in a manner analogous to MacIntyre's account of the history of ethics, pre-modern forms continue to exist as relatively ordered system through various political, legal and pedagogical traditions, even though no sense can be made of it in the modern vocabulary.

> [N]o jurist or philosopher has defined it.
>
> (Bodin 2001: 1)

> How different is this Doctrine from the Practice of the Greatest part of the world, especially of these Western part, that have received their Morall Learning from Rome and Athens,
>
> (Hobbes 2001: 254)

The Project of Political Modernity

No better testimony exists to how deeply the language of *political and legal modernity* has been naturalized for us moderns—even in the wake of the tremendous success of the critiques of Enlightenment and liberalism in regard to so many other elements of modern thought—as the near impossibility even today of thinking politically without sovereignty, a concept all but synonymous with modernity.[71] Yet for the *founders*[72] of that school of political thought that would take for itself the name modern[73]—and this is quite explicit initially in Jean Bodin, though Hobbes is much less forthcoming and systematic in his admissions—sovereignty was neither an ancient idea ("no jurist or philosopher has defined it"(Bodin 2001: 1)), nor something natural ("not by what is done…but by what should be done"(68)), nor even a

[71] As we saw in Chapter 1, in recent years, no writer has done as much as Giorgio Agamben to bring this claim about the imbrication of sovereignty and modernity to the forefront of scholarship. Agamben sees Foucault's work as definitive, if contradictory, in this regard (Agamben 1998: 6), and, as I have already argued, his project ought to be understood, in this regard, as an attempt to re-link Foucault's own thinking on sovereignty and biopolitics, the first of which Foucault had sought (against the classical juridical tradition) to background in his injunctions to "cut off the head of the king" (Foucault 1990: 89).

[72] See Julian Franklin, for example, for the argument that Bodin was "primarily responsible for introducing the seductive but erroneous notion that sovereignty is indivisible" and "[t]hus put the question was completely new" (Franklin 1992: xvii). Arendt (2004), Skinner (2001), and Maine (2003) share the view that sovereignty is a modern idea conceptually impossible before these writers.

[73] Constant, of course, makes the canonical distinction between ancient and modern government (Constant 2002: 309), but its full terms had already been laid out by Bodin and Hobbes, though they does not use the term modern in precisely this sense. The idea, for example, that representative government is one of the defining aspects of modern government (famous from Constant) was the creation of Bodin and Hobbes. Before that it was not possible until the modern writers redefined political life around the Roman legal concept of dominion—a term of property law which had never previously defined political authority—and at the same time opened political life up to redescription in terms of all the whole corpus of other private law concepts, including Roman contract law in which the concept of representative had its origin. Hobbes makes both these moves (dominion and representation) in Chs. 16 and 26 where he writes: "And as the right of possession, is called Dominion; so the Right of doing any Action is called AUTHORITY and sometimes warrant. So that by Authority, is always understood a Right of doing any act; and *done by Authority*, done by Commission, or License from him whose right it is" (Hobbes 112).

description of a state of affairs actually then existing in the world ("How different is this Doctrine from the Practice of the Greatest part of the world, especially of these Western part, that have received their Morall Learning from Rome and Athens" (Hobbes 2001: 254)). It was, rather, the keystone of an explicitly polemical *project* (the gesture, of course, is to the work of Alasdair MacIntyre), for which Bodin wished to receive credit (Bodin 1),[74] intended—in the service of anti-republican monarchist reaction—to enable a unity, degree and a centralization of power in the emerging statist monarchies beyond anything which then existed, or, indeed, anything that could have existed in traditional political terms.

The purpose behind these first applications of the emerging notions of philosophy and science (Hobbes 28) to political life was very explicitly to *rupture* and displace every extant form of *authority* that could possibly serve to legitimate pre-sovereign—and specifically classical—political forms against the emerging sovereign monarchy, and this meant, specifically, the four greatest extant *traditions* of political and legal thought—those based, variously, on the authority of the classical republican writers (esp. Cicero), of Justinian's *Corpus Juris* (Roman law), of the Roman historians (esp. Polybius and Livy), and of the writings of the Aristotelian corpus (on the question of the relationship of sovereignty to project to rupture tradition in Bodin,

[74] With regard to the specific terms of their relationship to the concept of sovereignty, both Bodin and Hobbes—in keeping with the terms of the new philosophy and new science—viewed their work in a way most closely analogous to the what it means to discover a new law of nature, as something that has always been there, though no one has ever described it. With regard to the terminology, Bodin uses "modern" ("*les derniers*") to refer to medieval jurists commentators on Roman civil law (fn 3, p. 133), while Hobbes himself actually uses "modern" only to distinguish between "modern tongues" and ancient (473), which appears to be the older usage in English according to the *Oxford English Dictionary*.

see Skinner (2000: 207-208) and Franklin (1992: xv-xvii, xxv), in Hobbes, see Arendt (2004: 193).[75]

This rupture was necessary because, as Bodin and Hobbes were fully aware, neither contemporary practice nor any of these traditions—which had, in one instantiation or another, served as the bases for political thought and practice in the Greek, Roman and post-Roman world for more than two millennia—countenanced, or ever had countenanced, the possibility of anything like the incredible unity of or monopoly on power implied in the concept of sovereignty as we moderns understand it. Indeed, Bodin's own earlier work, *Methodus ad facile historiarum cognitionem* (1566), had rested on a concept of limited (not absolute) supremacy, as part of a general juridical scheme in which a king's authority was not understood to be absolute or unbound by law and well-established custom, and in which a king could not change the law without proper consent (Franklin xiii)). Yet even in his famous *Les six livres de la republique* (1576) (hereafter *Republique*), Bodin says, of the monarchist juridical theory and practice of his own day, they followed the terms of the classical traditions and so have "given preference to the [republic] over private individuals, and to private individuals over kings," because they continue to work in classical—and thus inherently republican—terms (Bodin 42). For this reason, the cause of the new absolute monarchies would never be successful, he argues, until its advocates

[75] On Hobbes and the project of breaking tradition, Skinner argues that "[a]s Hobbes himself always emphasised, one of his aims in putting forward this analysis was to discredit and supersede a strongly contrasting tradition…the classical ideal of the *civitas libera* or free state" (Skinner 2001: 10). Similarly, Arendt believes that "Hobbes' deep distrust of the whole Western tradition of political thought will not surprise us if we remember that he wanted nothing more or less than the justification of Tyranny which, though it had occurred many times in Western history, has never been honored with a philosophical foundation. That the Leviathan actually amounts to a permanent government of tyranny, Hobbes is proud to admit: "the name of Tyranny signifieth nothing more nor lesse than the name of Soveraignty" (Arendt 2004: 193). With regard to Bodin and tradition, Julian Franklin concludes that "[t]his systematic elimination of binding restraints was a distortion of constitutional practice…in the French tradition" (Franklin 1992: xxv), and Skinner emphasizes that "the guiding ambition behind Jean Bodin's [book]…[was to] dethron[e] the immediate authority of Roman law…[in favor of] a new set of theoretical foundations for the conduct of legal and political debate" (Skinner 2000: 207-8).

discovered a new juridical language which no longer legally "confus[es] the [legal] cause (*causa*) of the prince and the [republic]" (Bodin 42, fn. (L 104, D1-2)). Put simply, sovereignty was juridically impossible so long as jurists continued to work within the terms of classical (Roman) legal traditions which presumed that power came from the people and that the republic and citizenship were the basic categories of political life, and which based their tradition on the comparative study of historical republics throughout the Mediterranean world.

Similarly, Hobbes was acutely aware of "How different is this Doctrine from the Practice of the Greatest part of the world, especially of these Western part, that have received their Morall Learning from Rome and Athens" (Hobbes 254)). Remarkably, it is also clear that, in *Leviathan*, Hobbes himself accepts that the classical republican theory of the inherent political power of each person (not the state of nature) is the conceptual starting point for arguments about political power. How else are we to understand the importance he places on the fact that the social compact to create a Commonwealth (138) cannot be merely what lawyers call an implied contract, but must be an actual contract, in fact, corresponding in every manner to the requirements of a legal contract, including that it is "voluntary" and shown by "sufficient signe" (93). Implicit in this fact is the recognition, by Hobbes himself, that these individuals—even in a state of nature—retain real political power, and that this power is sufficiently important that no sovereign may assume it or merely take it by force, but that it must be—in fact—given, and not simply as a product of coercion or threat (94-100). Read this way, the "state of nature" pushed constituent power back entirely into an unrepeatable pre-history and made of it a relation among contracting individuals (stripping them of their political power as citizens) precisely so that constituted political power—the sovereign—could be outside any obligation to any constituent power (esp. that of the citizens of a republic). In so doing, however, it also served to strip away

all traditional forms of authority in which there was understood to be an inherent constituent power in citizens themselves. Put simply, what the social contract ultimately accomplished was to create a one-time consensus that could form the basis for a rationalist defense for a sovereignty that, in fact, violated the very source of its own implied republican theory of constituent power, as even Hobbes himself understood it (see esp. Arendt 1990 [1963]). The grim fact is that Hobbes understood something that most of the great theorists of power in political modernity (including Locke, Austin, Weber, and up to today) still do not—that the "state of nature" was a key to a polemical project, and never a claim about nature, human or otherwise.

Bodin is actually quite explicit and open about both his project and his relationship to tradition. As he writes in the *Republique,* he believed that, before his treatment: "there is not one who has written anything on this subject except for Aristotle, Polybius, and Dionysius of Halicarnassus. But they have been so brief that one can see at a glance that they offer no clear resolution to this question" (47). Of Aristotle, he believes his account to be so inadequate that we might have to "admit that he never spoke of sovereignty," and yet, even in discussing Dionysius, who Bodin calls "best" of these and who was the great apologist of the moment of Rome's transition from republic to empire, he concedes that Augustus was never, in law or in fact, sovereign (25). Of the entire tradition of "modern jurists" of the Roman law up to his own day, Bodin insists that "[a]ll of them have made this error" and have "confused [sovereignty] with the duties of magistrates" and thus interpreted sovereign powers as those "shared by dukes, counts, barons, bishops, officers, and other subjects of sovereign princes" (48).

Similarly, with regard to the practical existence of sovereignty, Bodin is primarily at pains to explicate innumerable examples of what is not sovereignty: This list includes the

archon in the Athenian polis, the collective institutions of the Roman republic (52-53) (even under the dictators (2)), Augustus and the early emperors (25, 53, 107), the Holy Roman emperors (108), the Venetian Doge (108), the dukes of Milan, Savoy, Ferrara, Florence and Mantua (48), the kings of "the northern peoples" (e.g. Denmark) (26), and many, many others. Yet, even for his few unambiguous sovereign exceptions (e.g. the contemporaneous French and Spanish monarchies (10) (and to a lesser extent English (20-3)) and the late Roman emperors), Bodin's intervention takes place at the level of juridical and conceptual inconsistency, and he clearly recognizes that the balance of both practice and opinion, even in these so-called sovereign contexts, is—and has always been—that the modern kings receive their power from the Estates (see 15-23, gen.), and the emperors, even as late as Trajan and Theodoric, received theirs from the Roman people (26).[76] One among many possible examples is when Bodin writes that "sovereign princes who are well informed never take an oath to keep the laws of their predecessors, or else they are not sovereign" (15). The implication is clearly that many—and perhaps most—princes are not well informed about this and therefore do take these oaths, and this is reinforced by the list he proceeds to enumerate of princes who do so, including, the Holy Roman emperor (15), the ancient Epirote kings (16), the modern kings of France and Poland (16-17). His point is rather that this practice is logically inconsistent with any system that can properly be called monarchy, and, as such, he advocates that the monarchy must reject all such claims in the future. What is at stake for Bodin is that: "if it were otherwise, and the decision

[76] Bodin rests his argument on this point almost exclusively on a citation to Oldrado to the extent that "all true monarchies have absolute power, as Oldrado said, speaking of the kings of France and Spain" (10). However, in an extremely important footnote, Franklin points out that "Oldrado's holding in *Consilia 69*, which Bodin cites here, does not bear on the power of the king of France vis-à-vis his own subjects, but affirms only that the king of France does not recognize the German emperor as a superior either de jure or de facto. In other words, Bodin is extrapolating his theory of sovereign power within a realm from the well established tradition of mutual recognition of kings in inter-state affairs.

were in the hands of the many, the marks of sovereignty would disappear, and the monarchy would be no more than an aristocracy or a democracy exposed" (fn. 19).

This is why sovereignty cannot ever be reducible to an amount of power, but must rather be the radically new juridical quality of being subject to no one and nothing. As Bodin writes: "No matter how much power they have, if they are bound to the laws, jurisdiction, and command of another, they are not sovereign" (49). To accomplish this Bodin introduces a set of juridical identities which understand the power of the sovereign as something categorically distinct from every other identity (i.e. which "apply only to a sovereign prince…and [nothing] can be shared with subjects"), and he finds this in the non-traditional and non-constitutional category of subjecthood (ibid). Yet even this juridical category needed be modernized before it could do the work Bodin wanted it to do, since—even in traditional relationships of lord and subject, master and servant, or command and obedience—the lord, master or commander had himself always been simultaneously subject to some still higher law, jurisdiction, or command (e.g. a higher lord, the empire, the law, or the pope), and so Bodin must juridically define his new sovereign power as categorically and absolutely *not subject*.

Read in this way, it is remarkable how much this insight regarding the context in which Bodin and Hobbes worked helps us to see clearly the real targets of their interventions. Put simply, the emergence of the great modern school of political thought—and the specific terms that it took— need to be understood, primarily, as a response to a political context defined almost exclusively in classical terms. Though Hobbes is less willing to openly acknowledge that his work is a project, his sharp tongue frequently gets the best of him, and, if one traces out the

objects of his invective, it becomes clear that, in *Leviathan*, his scorn, both in degree and in tone, is reserved for the four traditions "that have received their Morall Learning from Rome and Athens" (Hobbes 254), not for the expected bogeymen—the ignorance and superstition of the "Dark Ages" or feudalism.[77]

Hobbes himself clearly understood exactly what—and how high—the stakes were, both politically and conceptually, in his intervention, and he has, in fact, a quite an elegantly accurate understanding of how these traditions he attacks continued to operate in an increasingly post-traditional world, though these are not the sections that modern's tend to read. In his account, because "the Athenians were taught…that they were Free-men, and that all who lived under Monarchy were slaves…and that *no man is* Free i*n any other government*" than "democracy" (citing Aristotle) and because "the Romans…were taught to hate Monarchy" (citing Cicero), "by reading these Greek, and Latine Authors, men from their childhood have gotten a habit…of favoring tumults, and of licentious controlling the actions of their Sovereigns" (150). Three important points can be drawn from this discussion. First, it is clear from this that Hobbes' intervention is not simply about the classical political traditions in general but is directed explicitly at republican ideas—the "Libertie…in the Histories, and Philosophy of the Ancient Greeks and Romans"—which he actually summarizes, in the above passage, as beautifully and pithily as any of its advocates has (149). Second, with regard to the political stakes, Hobbes understands that both contemporary practice and the established tradition mean that the dominant

[77] Skinner argues, the very invention of the idea of a "middle ages" (as a "dark" ages) was itself the product of humanist thinkers—understood precisely as a "dark" ages "lying between the achievements of classical antiquity and the restoration of its grandeur in their own time" (2000: 116). Note however that the modernist thinkers (especially Hobbes) depart from these earlier humanists in that, where the latter view contemporary history as a re-constitution of the classical tradition (simultaneously retaining and reenacting), the moderns insist that there is a proper historical rupture—thereby creating, by generalizing the "dark" era as an account of the entirety of the prehistory of modernity (including the classical era), a historical binary opposition between ignorance and knowledge.

political ideas of the moment emphatically reject the form of sovereign monarchy he advocates (or indeed any other form of sovereignty), with the result that, as long as these traditions prevail, so too will the resistance in the name these republican ideas which he views as categorically opposed to sovereignty. Finally, with regard to the question of these specific classical political traditions, though he elsewhere famously (and perhaps more characteristically) mocks those who take everything from "Authority" ("If Livy says the Gods made a cow speak…"), it is clear that here that this is to straw man tradition (49). Here he clearly understands that the tradition he is attacking is not about those who follow every jot of Aristotle's authority on every issue, but rather about forms of pedagogy and their resultant habits of mind that have more to do with how we start an inquiry than where we come out in the end (i.e. Hobbes too starts with Aristotle), including which questions we ask and who we think through in answering those questions.

Authority and Rupture

> It takes a lot of culture to get to the state of nature.
>
> (Sahlins 2004)

> Thus it took to establish… [sovereignty].
>
> (Livy 1988)

As Bodin and Hobbes both understood, to undermine these long established traditions, it would be necessary to construct a radically new political vocabulary—self-described as "scientific" (Bodin 89; Hobbes 28)—which could avoid all possible claims made in the language of existing forms of authority. To this end, they turn to a radically redefined account of a

constitutionally insignificant concept[78]—*sovereignty* (Bodin 1, Hobbes 121)—described, in a self-congratulatory manner, as an abstraction ("I speak not of men but (in the Abstract)" (Hobbes 3)) and a "universal" (26), a concept that can name what is common (i.e. comparable) to all political communities, at all times and all places (Bodin 89, Hobbes 26). However, this kind of totalizing redescription, which has become so familiar to modern ears, was the product not of an inherent love of order and system, but of, rather, the fact that this was what was logically necessary—the minimum required—to re-describe political life in a way that could deny the authority existing traditions drew, as we have just seen, simply from the continued description of the world in their classical traditional terms.

In Bodin's work, the terms of this new language emphasize definitional formalism and logical derivation, two elements which have been absolutely definitive of political modernity ever since. Bodin insists on the former through his arguments that to find "true definitions…one

[78] Note that this utilization of "sovereignty" by Bodin and Hobbes operates entirely in keeping with Henry Maine's invaluable, but rarely understood, insights on European legal history in *Ancient Law* (Maine 2003). Maine, though he is read as a kind of proto-sociologist now, was a lawyer and a legal Romanist (strongly influenced by Gibbon and Savigny), and the guiding purpose of his work was to call into question the presumptions of the newly hegemonic legal modernists (Hobbes, Bentham and Austin). As such, if we can bracket for a moment his comparativist writings on India, Maine's famous theory of status to contract was *not* intended to be read as a triumphal account of contract. His intervention was, rather, a closely laid out account of how contract (and other so-called modern institutions like wills and criminal law which have been understood as fully abstract) were never the product of rationalism, modern style reformism (through legislation), straight line evolution, or created out of whole cloth, but were always, because of preexisting (and deeply socially embedded) laws and social norms, the product the slow accretion of importance in less important pre-existing legal forms (e.g. *mancipium* or mancipation) which usually initially had little to do the purpose to which they were ultimately put. Put simply, the genius of Maine's argument is the opposite of how it has been understood: Modernity (here modern law) is understood to be neither a rational or universal quality, but is seen as a historically specific relationship of the (relative) opening up of specific traditions for the purpose of superseding other specific local traditions. Three important implications follow from this: First, the means to these relative modernizations occur will more often be piecemeal, non-rational and non-programmatic (e.g. fiction and equity) than direct, rational and reformist (e.g. legislation). Second, to speak of the modernity of an institution (like modern law) does not mean that it is a necessarily fully ruptured from tradition or has escaped its pre-modern origins, and, third, to the extent that it is not, we may they wish to speak of the form and content (e.g. traditional or cultural, etc…) to modernity, rather than viewing it as entirely an abstract quality.

must fix not on accidents, which are innumerable, but on essential differences of form," which he describes as "scientific knowledge" (Bodin 89). Even more radical, however, were the means by which he then went on to elaborate what he famously referred to as the "marks"(1) of these new sovereigns, by logical derivations from two concepts—*absolute* and *perpetual* power.[79] Hobbes, too, famously "derived all the Rights, and Facultyes" of his whole system, from the constitutive act of (self-constituted) *subjection*. Neither of these concepts—absolute power and subjection—had *any* previous place in the history of political ideas (Franklin xvii). Nor was the idea that political authority could be determined by logical derivation (which Hobbes adopts too (13, 121)) any less radically unconstitutional.

This *project to bracket tradition* also goes a long way to helping us to understand the form that Hobbes intervention took, and, in particular, the necessity of the idea of the "state of nature" (see gen. Hobbes Ch. XIII). What else could obliterate the history of two millennia of political practice? How else to push the ancient presumption of the constituent power of the people back entirely into an unrepeatable pre-history and make of it a relation among contracting individuals (not political citizens) precisely so that constituted political power—the sovereign—could be outside any obligation (i.e. authority) to any constituent power (esp. the people, and the laws)? In its stead, the concept of sovereignty replaced millennia of development of complex political and legal forms of authority with one single modern and rational concept for all power—sovereignty (see Ch. XVIII), and, of course, in Hobbes' account, what this brought to the fore—what could play this role conceptually—was only that most minimal aspect of communal life—*force*, and force alone (see esp. Ch. II).

[79] A subsequent edition (L78, D6) substitutes "supreme and absolute power" (Bodin 1, fn.).

The kernel of the argument presented here is that, though this modern account has come to be our common sense understanding of sovereignty (and political life, *tout court*), such statements would have been impossible in the history of political thought before this moment—impossible, that is to say, in a pre-modern world defined in terms of a complex interplay of overlapping and relative political and non-political relationships (see gen. Dirks 2001, Mamdani 1996, Messick 1996). Far from our sense of it as an *Ur*-concept, sovereignty is entirely modern idea, and one which brings to bear on political life the full weight of post-Cartesian rationalism. Nor was this a reflection of some extant, but as yet undescribed, constitutional reality. As Julian Franklin has argued persuasively, in discussing the context in which Bodin wrote: "[t]his thesis was controversial even as applied to the modern consolidated kingships of France, Spain, and England, and it was hopelessly at odds with the constitution of the German Empire and other monarchies of central Europe and Scandinavia" (xiii). In support of this argument, the remainder of this essay will take the form of an elaboration of pre-modern or traditional institutions and concepts (including the traditions of the mixed constitution, *merum imperium*, etc…) which conceptually precluded the possibility of the pre-modern existence in either theory or constitutional practice of the modern conception of sovereignty. None of these, however, was more fundamental than the doctrine of Gelasian dualism (the "two swords"), the ancient tradition of dual and co-equal political and Church power (shared by the Roman Church and the secular traditions) that defined political life in the lands of the Western Roman Empire from Augustine until the Protestant Revolution effectively dispensed with the dual claim of the universal Church (see gen. Tierney 1988).

Where Bodin's and Hobbes' projects differ most profoundly is in the scope of the break with traditional forms of authority that each envisions. Bodin's intervention is confined to the level of law and limited in practice by several ex post facto provisos he applies to the theoretical apparatus. As a matter of juridical clarity as much as anything, he sought to enable the systematic elimination of all enforceable limits on the king's authority, and so, if the extant limitations on the power of the princes was based in classical traditions and binding customary law, it would be necessary to create a radically new (i.e. unconstitutional) system which could enable this new power. Remarkably, however, while his commitment to juridical clarity made it logically necessary to reject the possibility of any legal limitation, Bodin sincerely believed that in his account, more than those of previous jurists, king's were in practice "more strictly bound by divine and natural law" (Franklin xxvi), specifically to respect the liberty and property of free subjects and to acknowledge contractual obligations entered into with private citizens (Bodin 34-35). These limitations now no longer had legal force, but for Bodin, the enlightened royalist, he sincerely expected princes to continue to be bound no less than in the past. Bodin, in other words, didn't set out to rupture the juridical tradition any more than was absolutely necessary for his intervention, and he quickly sought to rebuild, as moral imperative, as much as possible of the traditional legal edifice (Franklin xxiv).

The result is nothing less than emblematic of legal modernity: *Nomos*—the full unitary classical world-view embodied in the classical notion of citizenship is bifurcated into two radically distinct realms—positive law and morality—even as the pre-modern unity continues to implicitly determine crucial aspects of both spheres. The choice, for modernity, thus *appears* to be limited to positivism (e.g. Hart 1997) or normativism (e.g. Dworkin 1978, 1986) (see esp. Shklar 1986). Sadly, it has become next to impossible for modern readers to appreciate the

profundity of the importance of this pre-modern legacy, as Carl Schmitt reminds us in his very important late work, given that even the finest specialist scholarship on law and classical institutions, already operates through multiple generations of naturalizations by predecessors who "have no sense of how totally the word *law* was functionalized by late 19th century jurists…" (Schmitt 2003: 341, 78).[80] It is important to note too that all of this, the full apparatus legal positivism, is already present in Bodin's first "marque" of sovereignty, well before Hobbes—including that "law is the command of the sovereign" (Bodin 51), that the sovereign is the only source of law (56), and that "custom has no force but by sufferance, and only in so far as it pleases the sovereign prince who can make it a law by giving it his ratification" (57-58).

Yet even given the remarkable the scope of Bodin's intervention, Hobbes' ultra-modernization program is a much broader and more insidious attempt to bracket *every* form of pre-modern authority—in every sphere—through a comprehensive metaphysical reorganization of thought (especially around the question of causality). In fact, if we are to appreciate what Hobbes is doing here, it is important to emphasize that the question of *authority* is the primary and defining question of *Leviathan.* The intervention takes two parts. First, in an already classic move for critics of Scholasticism, Hobbes (in Part I, "On Man," in particular) uses—in what is the first substantive argument of the book—what would soon after come to be known as Newton's first law of motion, with its familiar physics ("When a Body is once in motion, it moveth (unless something else hinder it) eternally" (Hobbes 15)), the goal being to call into question Aristotelian authority by calling into its traditional account of specific physical

[80] Schmitt continues, in his inimitable manner: "…into the positivistic legal system of the modern state apparatus, until legality had become merely a weapon used at any given time by those legislating against the party excluded from legislation" (2003: 78).

phenomena (14).[81] What is less remarked upon is what replaces traditional forms of authority for Hobbes, and this—the hidden movement of Part I—is the slow, comprehensive metaphysical redescription of the concept of authority, culminating in its final chapter (Ch. XVI: "*Of* PERSONS, AUTHORS, *and things Personated*), through the application of Roman private law concepts—and, in particular, *dominion* (private property) and the rights of possession (112)—as metaphysics, the end result of which is surely the most drastic legalization of thought and culture in history.[82] We, of course, continue to see the implications of this move in modern philosophy's epistemological emphasis on classical Roman private law questions such as intentionality, which do not precede this intervention (189).

Hobbes next turns to the whole corpus of traditional forms of authority, each with its specific own internal logic of what can connote authority, which then exercised influence in political and public life. In each of these cases, Hobbes once again repeats his larger project of rationalizing each and then preceding to re-describing each in the same formalist, private law terms. The goal here is twofold. First he wants to rationalize away (through both his redescription and through the formalism of his new terms) every source of authority except one, the sovereign commonwealth, so that he can henceforth attribute all social obligations to the original contract. Second, this sole remaining political authority is now radically re-described internally, so that the central questions of political life in the Hobbesian universe are now—for the first time in more than two millennia—the classical questions of Roman private law, specifically those related to how we understand the "intent" (189) of property owner in regard to

[81] Hobbes gives no citation for his source for this law, but, though Newton's *Philosophiæ Naturalis Principia Mathematica* was not published until (1687), it does appear to have been a familiar idea at the time Hobbes wrote, both through Galileo (who Newton credits) and Descartes.

[82] One important exception is Maine (2003).

his property (or a contract). The Hobbesian theory of authority thus displaces the whole tradition of defining political life through the republican values and replaces it with the question of how we should understand the intent of the sovereign, now defined through private law as purely legal questions of knowledge ("sufficient signs (189)), a set of questions which are (not incidentally) purely top down. Authority, once multiple is now unitary, and once normative—reflecting republican values—is now top down.[83] If this is so, then sovereignty must be understood as the content that the reaction to republican ideas took, and, of course, it need hardly be necessary to mention that the period of the Counter Reformation (beginning with the Council of Trent (1545-1563) and ending at the close of the Thirty Years' War, 1648) exactly corresponds to the period from Bodin to Hobbes.

The extent of the success of this rupture and re-description, so definitive of political modernity, is surely one of the central facts of world history. However, there is a further, largely overlooked element every bit as important to comprehending the terms of our political modernity—and in particular its claims to be modern and scientific. Bodin and Hobbes certainly felt they needed to rupture and reorganize the sources and terms that political authority took, but neither, obviously, had any interest in a radical reorganization of society itself, aside from its public legal relations to monarchy. As a result, their own positive theorizations, especially of law, largely brought back in the common sense, and largely Roman, legal terms and practices of

[83] This argument shares aspects with Walter Ullmann's provocative and important theory of Western history in terms of competing traditions defined by commitment to ascending vs. descending theories of power (e.g. Ullmann 1966: 20-21). As in the present argument, top down power is viewed as becoming important in Western political and legal thought later (especially during the medieval period) and in response to the bottom up theory. As such, this argument is in agreement with the essence of Ullmann's ideas. Where his account goes wrong, it is argued here, is in his anachronistic association between descending power and sovereignty, which is something fully other and which is associated with modernity and not before. However, even here, a distinction must be drawn between Ullmann's descending tradition and Hobbes' top down power, which already captures all of the aspects of centralization, singularity and unity which James Tully's work has done so much to highlight (see gen. Tully 1993).

their day, though now re-rationalized in modern terms.[84] As a result, in a manner precisely analogous to MacIntyre's account of the history of ethics, pre-modern forms continue to exist as relatively ordered system through various political, legal and pedagogical traditions, even though no sense can be made of it in the modern vocabulary (see MacIntyre 2002).

Understanding this stage of legal modernity as, in essence, the sovereignization of the Roman law goes a long way to helping us the specific terms that what we moderns know as legal positivism took. In general, as we have already seen with Hobbes, the Roman private law concept of dominion, in virtually every nut and bolt, was applied to the sovereign and to public law, but the terms of the private law system could remain almost entirely in the older terms, except as to the ultimate question of the source of their authority in a sovereign act (Hobbes 187). The new question, *par excellence*, for legal and political thought would be can we attribute this act to the sovereign, but this was a question primarily of theory, not practice, which allowed private law to continue largely as before.

However, once again, a clear divergence emerges between Bodin and Hobbes, related here to the accounts of modern law proffered by each, and related, as before to the overall question of the extent to which each wishes to reorganize political authority, and the key to this, interestingly, is a question that haunts every reader of *Leviathan*, the question of why Hobbes never acknowledges either his major interlocutors (esp. Machiavelli, whose ideas Hobbes engages throughout, as in his opposition to "tumults" (Hobbes 150, 221) and to the idea that the form of government determines the flourishing of the city (225)) or the sources for his own ideas

[84] By Roman law is meant not the specific terms of any individual law, but the Roman system which underlay the English law, based on the essential relation of public-private, as well as on a long tradition of specific earlier Roman law sources, passages and terms which defined what it meant for an idea to be treated legally, even when the ultimate law or legal interpretation might vary or even be at cross purposes (see gen. Savigny's *System of Modern Roman Law* (1840-1849).

(e.g. Bodin, but also Galileo, Descartes and even his friend Bacon). Contrast this with Bodin, who seeks to create a language for sovereign power through what he calls a proper legal science, but whose relationship to the dominant political and legal traditions of his day is explicit and straight forward. He is happy, as we have seen, to acknowledge the novelty of his own ideas, and he deals fairly and straightforwardly with contrary opinions held by, in particular, other jurists. Thus, in explicating his arguments on sovereignty, Bodin feels himself obligated to treat it first in Roman terms (even if somewhat loosely and unconstitutionally), to specifically engage canonical writings (e.g. Herodotus, Thucydides, Xenophon, Plato, Aristotle, Polybius, Cicero, Dionysius of Halicarnassus, Livy, and Plutarch) and important contemporary writers (e.g. Machiavelli, Contarini and More), as well to provide examples from the history of historical republics, ancient and modern (e.g. Athens, Sparta, Rome, Florence, Venice).[85]

Hobbes, on the other hand, seems to feel that his more systematic and comprehensive reorganization of authority cannot allow him to risk the perception that he is creating merely an alternative tradition, but the effect, as readers of Hobbes are well aware, is to underscore the radicalness of this break. Consider, to use only the most obvious example, the debt Hobbes owes to Bodin, an obligation clearly both direct and specific, as when Hobbes himself invokes the term "markes" (127) in his first elaboration of the "Rights of Soveraignes" (121), or, in Chapter XXIX, in which Hobbes closely follows Bodin's explication of the marques—declaring that sovereignty is "[a]bsolute power" (222), "[n]ot subject to Civill Lawes (224), and "May not be divided" (225)—yet without any acknowledgment. More troubling still, Hobbes again and again rejects the tradition without even acknowledging it as such (221), as when he dismisses the

[85] In explicating his first "marke" of sovereignty, for example, Bodin treats it first in Roman and canonical terms through the writings of: Aristotle, Dionysius of Halicarnassus, Festus Pompeius, Varro, Cicero, the *leges Iulia*e, Demosthenes, the jurist Julian, Hadrian, Justinian, Papinian, Suetonius, Dio Chrysostom, Solon, Lycurgus, as well as examples from Venetian history (Bodin 50-59).

great tradition of Mixed Government (discussed below) in two paragraphs (228), or when he bypasses a millennium of debates on the tradition of the Two Swords and Ecclesiastical authority, without, in either case, a single reference to a canonical text (226-7). There are many other instances like this, including Ch. XXIV and Ch. XIX, which practically follows Bodin idea for idea on the kinds of commonwealth.

Three key aspects of Hobbes' alternative framework deserve special emphasis, however. First, while Hobbes ignores the traditions, as such, the fact that he engages and follows the key debates within the terms Bodin had laid out, means that Hobbesian modernity largely continues to be terms and debates which appear—superficially—familiar from the preceding juristic tradition. Second, in addition to their textual sources, where the earlier traditions initially emphasized examples from the history of republics, Hobbes now turns first to English history (222), while the Roman experience is now understood as mere history, not tradition (222). Finally, an especially telling instance is Hobbes' treatment of the question of counsel (Ch. XXV). There he follows Bodin's careful elaboration of the question of counsel. Bodin had taken absolutely seriously the already ancient juristic tradition of the obligation of princes and other public and traditional figures to hear the council of senior figures who represent established traditional interests, classes and communities, and he had taken seriously the established juridical debates on the question (Bodin 50). Hobbes follows Bodin's terms quite directly, but again he does so without ever acknowledging Bodin or the fact that these terms have any history before the moment he described them (Hobbes 176-182). He also badly straw mans these traditional arguments, which Bodin certainly took seriously, and dismisses them ("How fallacious is it…" (176)), without ever exercising much in the way of logical vigor. The end result is nothing less than emblematic of post-Hobbesian political modernity: Where Bodin's project is to seek to

insist that this ancient debate about counsel can be still be located in his new theory of sovereignty (as a moral burden of counsel on sovereignty), Hobbes turns the question of counsel from a right into an obligation that the traditional figures now owe to the sovereign, a duty which he elaborates in novel private law terms (179). This case, of counsel, is a classic example of the relationship between tradition and political modernity—fractured from tradition and every other acknowledged relationship except to sovereignty, and pressed into the service of the sovereign, but nonetheless largely retaining their names, terms and structural relationships.[86]

It was, then, only with on the basis of this radical and total denial of tradition that it was it possible to claim single, unified, and centralized form of political authority to be let loose in the world a so-called scientific political vocabulary that no longer recognized any residual authority in historical forms of authority—whether aristocracy, Church, city/town, or any other institution or tradition through which communities and individuals had owed fully independent allegiance before this time.[87] As James Tully's work has so importantly shown the modern political vocabulary was the world-historical prerequisite for the unification of the language of power necessary to the centralization and rationalization processes we associate with the modern state. More than just promoting a vision of modern, one must understand that what was really at stake, and to fully appreciate what is at stake in this argument will require a close and non-traditional reading of Bodin and Hobbes that recognizes that the ultimate intention behind their work is nothing less than to destroy the dominant political traditions of their day, by reframing political

[86] If this reading is correct, what then have been the implications for modern constitutional thought and practice that generations of students have begun their study of political life here at the moment of rupture with a largely unreferenced tradition?

[87] Nor was this limited to institutions proper, as Judith Shklar, for example, has shown in arguing that Hobbes sought to bracket the political not just from religion, but from morality as well (1986).

life around a set of terms and definitions that would no longer recognize the traditional bases and forms of the authority. To do this, however, will require a radically sharpened account of authority.

The Prehistory of Political Modernity: Four Pre-Modern Traditions

To fully appreciate that this is what was at stake in this project, it is necessary to significantly reorient our understanding of the contexts in which Bodin and Hobbes wrote. Thus, far from the common schoolbook sense we have of modern political thought emerging primarily in contra poise to timeless Dark Ages or feudal political ideas, Bodin wrote in, and personified, the context of the great flowering of humanist ideas in France.[88] These ideas, as Quentin Skinner showed so persuasively in *Foundations of Modern Political Theory*, were themselves the direct product of the diffusion across Europe of modes of understanding based on a project to renew and restore the true authority of *classical* sources (Skinner 2000: 200-208), and they carried with them a deep and longstanding tradition of *republican* political commitments and ideas which had

[88] Bodin (1529/30-1596) had received a "truly formidable humanist education" and strongly associated himself with humanism (Franklin 1992: ix). He was the product of a middle class family and had joined the Carmelite order as a young man. In Paris, he managed also to pursue a humanist education, the results of which were influential in determining the two main directions in which his work would take him, first through his academic writings as "one of the foremost polyhistors of his period," and, second, "through a private search for religious truth," and indeed he left the order, appears to have been charged with heresy, and was rumored to have converted to Calvinism (ibid). He then studied law at Toulouse, though he failed both to obtain a professorship and in his efforts to new humanist college. Politically, his life coincides with the period of the French religious wars (1562-1598 with interruptions), during which time he served as a barrister, became associated with the enlightened royalist politics, came to be associated with Charles IX and Henry III, counselor to the latter's heir Francis, duke of Alencon, chosen as a deputy for the Third Estate to the Estates-General of Blois, until the death of the duke in1584 and the assassination of Henry III in 1589. His fame, however, came from his academic writings, which included a guide to the study of universal history (1566), the first elaboration of the quantity theory of money (1568), the acclaimed exposition of French and universal public law (1576), a "distressing and all too influential" (xi) book on demonology and how to detect and punish witches (1580), a massive system of natural philosophy (1596), and a tome in which all religions are viewed as derivations from an original natural religion knowable by speculative reason (completed in 1593, but published posthumously).

formed the dominant political culture of the Renaissance era Italian City Republics.[89] In fact, these republican cities—as much as the particular tradition of reading and citing particular Roman texts, especially Cicero—provide one of the great structurating spines along which post-Roman history has retained its continuities: Linking the heyday of the Renaissance republics (including the 13th c. Florence of Dante), in which city-republics were the predominant form in northern Italy, simultaneously backwards, and including the Middle Ages (Skinner cites Paul Oscar Kristeller to the effect that the Renaissance in Italy must be regarded, to a large extent, as "a direct continuation of the Middle Ages" of the "continuity of thought which connects the Middle Ages with the Renaissance" (102, citing Kristeller 1956, 359), to Rome (e.g. Lucca claimed an uninterrupted republican government since Rome) and forward, first, to the early modern period in which (though only Florence, Lucca and Venice remained republics) it received its greatest statement in Machiavelli's *Discourses* (1531-1532), and, ultimately, onward into modernity, through the continuation of the Venetian republic (for over a millennium, 697-1797), and through the taking up of the Roman republican model in The Netherlands (a republic from 1581-1795), England (1649-53), and America (after 1776).[90]

The same is true in England as well, where, far from our common understanding of Hobbes as the first great political intellect, a spark of light challenging the superstitions and

[89] Skinner, to his credit, has rejected the simple binary between backwards and reactionary Scholasticism and progressive Humanism. He insists, instead, that the Aristotelian tradition had strong republican elements and that there were Aristotelian's who held positive republican politics, and he and Franklin both make clear Humanism, in its radical reformulation of the authority of the classical sources, was at the common root of both advocates republican politics and of Bodin's liberal absolutism (Franklin xxiv), while Scholasticism, at this moment in history, could never have been used to justify sovereignty (see gen. Skinner 2000 and Franklin 1992).

[90] The debate over the question of continuity vs. break between the classical world and the Middle Ages and Renaissance is beyond the scope of this essay to engage, but it will be enough to say here that this project is in sympathy with various projects which take the continuity position, including 18th and 19th c. Romanism, including legal Romanism (Gibbon 1960, Savigny 1829, and Maine 2003 [1861]) and republican thought (Machiavelli 1998, Pocock 2003, Skinner 2001, Wood 1969, 1993, Bailyn 1992).

fallacies of *Ur*-practices, *Leviathan*, in 1651, must be understood primarily as having been written in reaction to, and in the wake of, the rise of the English Commonwealth (1649-53). This is a moment, despite the subsequent Protectorate's ultimate failings, that must be understood as a great historical high point of both republican ideas and institutions in England. As Skinner shows, in his remarkable *Liberty Before Liberalism*, classical republican ideas— through the reading of Machiavelli's *Discourses*, in particular, but also through the canonical role played in the contemporary pedagogy by the reading of the Roman texts——were the dominant and more widely held political ideas in the era in England.

First among these ideas, which took the form of the invocation of key concepts or of specific citations (which were united because of their mutual imbrications through traditions over time, not a unitary ideology), was the classical ideal of the *civitas libera* or free state, a feature of Roman legal and moral argument revised and adapted by the defenders of republican *liberta* during the Italian Renaissance, and, finding fertile soil in "quasi-republican modes of political reflection and action" already present in Elizabethan society, it entered the mainstream of English political thought of the age (Skinner 2001: 11). The dominant source and conduit for this was the reading of Machiavelli's *Discourses*, the intellectual touchstone of the moment, and indeed Machiavelli's ideas on, for example, the *vivere libero* served as a source, in the late 16th century, for the works of "politic" humanist, such as Richard Beacon and Francis Bacon, as well as later poetry and plays by Sir Philip Sidney and Ben Jonson's Roman plays, in the late 16th and early 17th century (11-12). These ideas were to become particularly important and broadly held in the wake of the regicide in 1649 and the proclamation of England as "a Common-wealth and Free State," and there one finds "the neo-roman theory at the heart of the propaganda commissioned by the new government in its own defence," especially in official editorials by

Marchamont Nedham (1651 and 1652) and by Milton himself, who published defenses of the commonwealth, between 1649 and 1651 (13-14). Hobbes published *Leviathan* in 1651, and, in response to all these events, the next five years saw one of the great historical flourishing of republican thought, the best of which was that by Nedham, Milton, James Harrington, Henry Neville, and Algernon Sidney.

Nor should one mistakenly believe that these Roman ideas were some momentary fad or recent phenomenon. In addition to the influence of Machiavelli, their way had been paved by the re-formations and re-emphases of classical forms of authority that spread across Europe with Renaissance, and especially humanist, ideas. Thus, in England, traditionally viewed as considerably less Roman than the continent, the "commonwealth-men" of mid-16th c. England (esp. the Duke of Somerset, Hugh Latimer, and John Hales)—northern Renaissance humanists (like Sir Thomas More, though he himself was not one of them) teaching in the universities or serving in Tudor courts from the reign of Henry VIII—advocated civic virtue and wrote comments on political life framed around their readings of Roman sources more than a century before Hobbes. The influence of these ideas was sufficiently great that the period from 1529-1559 (the period of the Henrician Reformation and the reign of Edward VI) has even been called the "Tudor Commonwealth" (see esp. Jones 1970, cf. Elton), and commonwealth ideas became government policy during the period in which Somerset was Lord Protector under Edward VI. The humanist ideas which drove these politics had spread throughout northern Europe through, in particular, the dominant place that they played in the law schools of the new universities of the north, and so closely interlinked were these ideas to the teaching and practice of law (as legal advisors to princes), that Skinner speaks of neo-Roman *legal humanist* tradition (2000: 201). Nor, finally, should we assume that, because they were eclipsed by modern theories in law and

political thought, that these Roman ideas were of only passing importance, for they retained, from the period of the humanist intervention up until late modernity, the dominant role in English and American pedagogy, where to be educated meant to have been trained through the reading of the Roman canon.

Read in this way, it is remarkable how much this picture of the context in which Bodin and Hobbes worked helps us to see clearly that the most direct and urgent target of their interventions was the republican tradition. In this regard, this account finds fully convincing Skinner's arguments, in *Liberty Before Liberalism*, that what holds together what he calls the neo-Roman writers is their commitment to a theory of positive political power—and a positive vision of political community—against which Hobbes took himself, quite specifically, to be working—and in opposition to which his infamous theory of power took the form that it did (2001: 10, see also Pocock 2003). This older political anthropology was based on the long established priority of the inherent, ineradicable and non-deferrable political power of the citizenry of a republic, inherent in which was the recognition that the form of the republic was the normative locus of the possibility of liberty (see esp. Arendt (1998 [1958], 1990 [1963])). As a result, the crucial distinction in judging the authority of a law, for the classical republican tradition, was whether a law is created by a republican citizenry, as opposed to that by a king or tyrant. What matters for civic liberty is not whether there are laws, but, rather, who makes the laws, and how—as well as their relationship to the traditional ends of a republican community (2001: 81).

Read in this way, it easy to locate passages throughout *Leviathan* in which it is clear that these neo-roman republican ideas were the specific object of Hobbes intervention, that his infamous theory of power was created specifically in contra poise to these neo-roman ideas, and

how seriously he believed the political stakes of this debate were, but this relationship, and its specific terms, is nowhere made clearer than in his discussion in Chapter XXI, "*Of the* Liberty *of Subjects*" (Hobbes: 145), in which he traces out the place of his theory of power within his larger metaphysics. In the process of his elaboration of his arguments, it also becomes clear that Hobbes had an especially clear and accurate understanding of his opponents' ideas (in precisely the terms described above), as well as what it means to understand that these republican ideas took the form of a tradition.

The political problem confronting Hobbes, he acknowledges, is that republican ideas, in fact, dominated the practice of his day, and, because these ideas are radically antithetical, politically and conceptually, to sovereign monarchy, the continued authority of the republican terms effectively forecloses the possibility of his political program. The source of this, as he describes it, is that "the Athenians were taught…that they were Free-men, and that all who lived under Monarchy were slaves" (citing Aristotle), and the Romans "were taught to hate Monarchy," with the result that, speaking of his own day, "by reading these Greek, and Latine Authors, men from their childhood have gotten a habit…of favoring tumults, and of licentious controlling of the actions of their Sovereigns" (Hobbes:150). This is a crucially important passage. In it, Hobbes clearly acknowledges that not only are these republican ideas—and here, though of course he is famously never cited in *Leviathan,* especially the Machiavellian celebration of tumults—the dominant political ideas of the context in which he wrote and the specific target of his intervention, but also that he recognized that the established political practice of his own day was that of men "controlling of the actions of their Sovereigns."

If the breadth of Hobbes' metaphysical redescription of the world has frequently been commented upon, that fact merely buttresses the argument that this is what would have been

necessary to bracket a broadly established set of practices and beliefs. Hobbes certainly understood that, as a matter of logical necessity, it would be necessary to create an alternative source of political authority and a radically new political vocabulary, if he was to bracket the existing tradition. At its core would need to be an alternative theory of political power and liberty which left no room, in particular, for the normative priority of the tradition of life in a republic.

The obvious answer as to what could accomplish this was a new political vocabulary in which every act—political or not—would be understood in terms of a single universal and elementary category, with no place in the traditions of the day, and this, indeed, is what the concept of *power* accomplishes. At its heart is a broader Baconian physics of political power through which Hobbes sought to bracket every form of political authority, through a redefinition of political community and liberty in which:

> Liberty, or Freedome, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion;) and may be applied no less to Irrationall, and Inanimate creatures, than to Rationall (145).

But what that metaphysical redescription accomplishes is to atomize and naturalize the theory of power in a manner that allows one to begin to speak of political life purely in terms of its basic power or force relations.

Skinner argues, very convincingly, that this idea is no older than Hobbes (cite), and it seems clear that such a methodology could only make sense within a project to break tradition. In this case, the implications, as Hobbes draws them, are that the neo-roman ideals of positive republican liberty are now reducible to mere relations of power, and the positive and normative

account of republican liberty is reduced, as with the absence of "externall Impediments" in physics, to an account of *liberty as "the Silence of the Law." (*Hobbes: 152 [ital. added]). Hobbes himself explicates his counter position and its relationship to the republican tradition quite clearly:

> There are written on the turrets of the city of *Luca* in great characters to this day, the word *LIBERTAS*; yet no man can thence inferre, that a particular man has more Libertie, or Immunitie from the service of the Commonwealth there, than in *Constantinople*. Whether a Common-wealth be Monarchicall, or popular, the Freedome is still the same (149)

Our modern common sense that, without recourse to natural law, no distinction can be made between the most democratically legitimate law possible and the most illegitimate, between the sovereignty of a republican community of equals and the sovereign power of Louis XIV, has its basis in Hobbes response to the neo-roman writers.

Nor, finally, were republican ideas in England the sole object of Hobbes' intervention. Thus, the model of the Dutch—"imitating the "Low Countries" form of government," as he called it—was one of Hobbes' famous "[t]hings that weaken a Common-wealth" (225). Though the Italian City-Republics (besides Venice) were in eclipse at this particular moment, they remained the model for republican thought throughout Europe. This real center of gravity had shifted north to the Dutch, who had been, at the time of *Leviathan*, for more than a hundred years the great voice for republican government, in their revolt against Hapsburg monarchy. The Dutch Republic (1581-1795) was of immediate and direct concern to Hobbes, having been officially recognized in the Peace of Westphalia (1648), over the opposition of monarchists and statists.

One final thought must be made on citation and the success of Hobbes' *Leviathan* as an emblem of modernity. Machiavelli having been already mentioned, it remains to be mentioned that Hobbes never cited Bodin's work either, though it was clearly the influence for his political intervention and though both wrote in Paris. Yet, among the many instances in which Hobbes clearly follows the organization and logic of Bodin's arguments, one of the clearest is Bodin's formalist response to the Aristotelian tradition of the normative priority of republican values, implicit in the idea that the three forms of a republic (monarchy, aristocracy, democracy) must be divided into six depending on whether the leadership principle is exercised in a manner in keeping with its normative role in republican thought (Bodin 89). Bodin, as we saw Hobbes do with positive liberty, dismisses this distinction between "good or bad rulers" as the source of "confusion and obscurity," because to make virtue or vice the standard "there would be a world of them [i.e. kinds of states]" (ibid). What we need instead, Bodin argues, is a "scientific" definition based "on essential differences of form" (ibid). Despite the absence of citation, this is certainly the basis of for Hobbes formalism, and for modern legal formalism in general, but it also raises questions about what role his unwillingness to cite his contemporaries has played in both the modern commonplace of Hobbes' genius and of the success of his project among subsequent writers with opposed political values.

The Pre-Modern Impossibility of Sovereignty

At the heart of this chapter, of course, is a claim about the inherent modernity of our concept of sovereignty. This, of course, is not a unusual claim, by any means, but it goes deeper

this to a claim that modern sovereignty was categorically not possible—either theoretically or in practice—before Bodin and Hobbes had finished their demolitions of the traditional forms of authority. Or , more properly, until even those who disagreed with them had taken up their terms and modes of authority, even as the bases for making claims about their much older and more widely held traditions. This process, then, by which this historically-contingent concept came to be one of the great concepts of world-history will be the central to this story, but, before this, it is necessary to the show the way in which sovereignty gets elaborated by Bodin and Hobbes, in order to show that this concept could not have happened before this moment.

The effect of Bodin's radical derivation of the rights of a sovereign—which Hobbes would directly employ and which would be the basis for the subsequent western tradition—is an absolutist definition of sovereignty that includes at least five elements which could not have been made sense of in terms of the theory or practice of any place in the Europe (and especially the post-Roman Mediterranean regions) before this time. At the heart of this, as has been suggested briefly above, is a transition from a relative notion of power—as embodied in the idea of being "paramount"—to an "absolute" notion of power (Maine 2003 [1861]: 102). The best evidence for this comes from the history of the evolution of the meaning of the term sovereignty itself. In the English language, for example, in every 14th and 15th c. referenced in the *Oxford English Dictionary*, sovereignty is a resolutely relative concept—it is merely "a superior," of any kind (supremacy, rank or authority—concept—referring to any of a number of kinds of non-absolute and non-exclusive kinds of overlapping power, including a ruler, governor, lord or local master. It can mean king (though that term must be read relatively now, as well), but it can as well mean someone in the church hierarchy or city government—and it is frequently used in the plural. This fact fits well with arguments made by both Charles Howard McIwain (1975), J.G.A. Pocock

(1987: 52-55), and James Tully (1995) that pre-sovereign political power was always a question of the relative balance of power between institutions. A half century before *Leviathan*, Edward Coke, the greatest jurist of his day—whose writings served as the primary basis for legal pedagogy for the next 150 years and which served as favorite source for the American founders—understood the common law as radically distinct from the subsequent modern summations (e.g. Blackstone) not in the sophistication of the elaboration, but rather in the claim that common law was to be *the* understanding of history. Before this, for Coke, the common law was always a relative institution, one among many, overlapping and without any clear hierarchy—just as in Tully's description of the ancient constitution (McIwain 1975: 78-79).

(I) It thus could make no sense whatsoever, within either the dominant strains of contemporary constitutional thought or as a description of actual practice, to try to understand Bodin's logically derived definition that a sovereign is in the first instance defined by the fact of **not acknowledging any superior or equal**. The great historical constitutional counterfactual to this statement was the doctrine of dualism and the separation of "Ecclesiasticall and Civil" spheres. Dualism will be treated in some detail in the Appendix to this chapter, but for here it will be enough to say that for over 1500 years—from Christ's injunction to "[r]ender therefore to Caesar the things that are Caesar's; and to God the things that are Gods" (Luke 20:25), to Augustine's classical formulation, to its later understanding as the Gelasian Doctrine (named for the Church father Pope Gelasius), to Aquinas—dualism remained (as both doctrine and the basis of pedagogy) the theoretical and practical determinant in lands of the Catholic Church (see gen. Tierney 1988). It would be a serious mistake to minimize the constitutional importance of this duality. As Tierney shows, perhaps the great political question—within the domains of the

Catholic Church—for more than a millennium was the question of the exact distribution of power between secular (in all its forms, kings, Holy Roman Emperors, but also other holders of secular power) and ecclesiastical powers (not unitary either, because of divisions within the Church (both within the hierarchy and between center and strong bishops on the periphery)). Representatives of both sides claimed supremacy for *potestas* or *sacerdotum*, but no important figure ever sought to destroy the distinction.

This history has often been read—inadequately—as a history of unending conflict between timeless historical forces, but it can also be read in such a way as to emphasize the frankly stunning continuity of what turns out to be one of the great institutions in history. Given this understanding, two things can be said of this history. First, at the level of theory—in their writings—by far the greatest part of the texts, from the Roman Empire to the Middle Ages that make up the canonical debates accept the Gelasian Doctrine, and, of the few that appear to call it into question—the great voices who are read from a modern sovereign vantage as calling for the absolute priority of either Church or secular (whether kingly or imperial power (Holy Roman Empire)) and who make up the schoolbook accounts of this period (Emperor Frederick Barbarosa, Popes Innocent III (Tierney 1988: 130), etc…), this challenging is, in every instance, at best ambivalent. Much more profound, however, is the fact that—at the level of practice—no voice in these conflicts ever instituted anything even remotely approaching an absolute priority to the representatives of one power or another.

What is more, as Tierney has importantly argued, the competition between these two realms produced a historical dialectic in which the accumulation of power was always limited by the inevitable opposition of the other. Put simply then, nothing like Bodin's sovereignty would have been possible before the Protestant Reformation broke the co-equal power of the Church

and enabled the triumph of the new monarchies. Before that power, however it ebbed and flowed (and the history of the conflict is the precisely the history of the documents and texts which each great compromise produced and which became the precedential basis for future thought and practice), was always, in at least one fundamental respect, dual—and relative.

So resilient was this division that, even its greatest modern enemy, Hobbes—whose recurrent intellectual move is always to take the tradition and radically re-describe it in terms which conceptually antithetical to its traditional terms—could not deny its existence, and, indeed, it is featured as the symbolic division on the notorious frontispiece of *Leviathan* as the two great powers—"*Ecclesiasticall* and *Civil*"—that must be superseded by the new Sovereign. Indeed, he saves special scorn for the tradition of independent ecclesiastical authority represented by the Gelasian Doctrine, rejecting the division between "*Temporall*" and "*Ghostly*" authority associated with "Doctors" who "set up a *Supremacy* against the *Sovereignty*; *Canons* against *Lawes*; and a *Ghostly Authority* against the *Civill*" and so believe a Commonwealth can have more than one "Soule" (226-7). Note too that the frontispiece also helps us to see something else about Hobbes' project, because, though this is rarely understood, what the sovereign represents there is not the triumph of the secular authority over the church. It is, rather, the creation of an entirely new higher sphere defined by the capability of transcending the division between these two spheres—a unity that is a logically necessary prerequisite to the idea of absolute rulership.

To understand precisely what is at stake in this division, it is important not to make the mistake of believing that this history was somehow a conflict over who would exercise *sovereign* power (cf. Ullmann 1962 [1955], Elshtain 2008)-. In fact, neither side can be said to be

exercising anything akin to modern sovereignty. The great textual source over which this question has been historically debated is Pope Gelasius I's letter to emperor Anastasius of 494, in which he elaborated the doctrine (the historically specific name for one kind of papal authority) that would be associated with his name: "Two there are, august emperor, by which this world is chiefly ruled, the sacred authority [*auctoritas*] of the priesthood and the royal power [*potestas*]" (Tierney 1988: 13). The classic modernist interpretation of this is exemplified in Erich Caspar's reading that *potestas* implies a real sovereign power, while *auctoritas* is mere moral authority—an interpretation that simultaneously accepts and further naturalizes the modern political naturalization of kingship-as-sovereignty and of the priority of the secular. Yet, as other scholars such as Walter Ullmann have argued, in the language of Roman law, which was basic to Gelasius's era, *auctoritas*—the basis for our authority—was actually the higher power, while *potestas* was the legal term of art used for a power delegated from that higher power, a power which was expressly limited to the terms of the delegation (see Ullmann 1962 [1955]).

The problem with even Ullmann's reading, however, is that it partakes of the equally classic modern tendency to view all forms of power and authority as inherently sovereign, rather than historically specific. So here, Ullmann's intervention is directed at reading Gelasius as making a claim for a proper papal theocracy, in contradistinction to which, as Tierney shows, *auctoritas* means "the inherent right to rule," and *potestas* a "delegated executive power"—without any necessity of even showing that this authority was either a form of rule, properly so called, or executive power, in the modern sense. Three things, however, must be in the foreground, if we are to understand what Gelasius wrote. First, neither of these terms describes modern sovereignty. Second, both refer to historically-specific forms authority in which not just the names, but the underlying logic and form that each authority takes (e.g. the idea of delegation

and all the inherent assumptions about what that could mean), are distinct—in other words, these are not simply two words that represent the same kind of power in two different individuals or positions, but rather a question of boundaries between fully distinct, and yet not mutually exclusive (cf. Ullmann), forms of authority. Finally, third, it provides a very important argument against the political-theological thesis to the extent that its shows that the historically specific language in which authority—even that of the Church—was described and debated (for more than a millennium after Gelasius) was through the concepts and terms of the Roman law.[91]

To return to the larger argument, all this is has been to show that when the radically new understanding of modern sovereign power did finally enable the triumph of state power—through the pedagogical dominance it obtained soon after its introduction—it should not be understood as the product of the secular authority finally getting the upper hand in a long and ongoing struggle, but rather must be seen as something that could only become possible once the unity of the Catholic Church had been broken—thus freeing the lawyers for the emergent kings not merely to triumph, but to radically re-describe political life without reference to any of the forms of authority (esp. doctrine (from the Pope), canon, Augustine, Scholasticism) on which the authority of the Church had rested. It is, in other words, the Protestant Reformation that serves as the necessary prerequisite before which modern sovereignty would have been impossible.

Thus, immediately in the wake of Luther's posting of the 95 Theses in 1517 (even before Bodin's proper re-description of political life), Henry VIII was able to successfully promulgate—against all previous tradition (lay and Church), as his foe, the humanist and Catholic Thomas More well knew—the "Act of Supremacy" of 1534, which established the

[91] Thus a non-modernist political history must always assume that the most important political question will always have been decided by the translator, long before the scholar arrives to interpret. It suggests also the necessity that those wishing to do political theory study the Roman law.

independent Church of England and required (for the first time) that his "subjects" swear an oath that he was "the only supreme heed un erthe of the Churche of England" (OED 1970: 274). Even in political history, the greatest emphasis on this moment is always the creation of an independent national church, as the basis for the nation-state, but every bit as profound—and for present purposes much more so—the great political implication of the Act is in the word "only." If this, from our modern and sovereign perspective, seems redundant, this was not the case for either the dominant constitutional theory or practice of the day, both of which viewed the supremacy as traditionally dual (ibid.). Indeed, even here, with Henry's Act serving as a sort of half-way point, the traditional meaning of power is retained in the continued use of the term "supreme." However ambiguous it may be in modern terms, even in this drastic expansion of kingly power, "supreme" always retains the older sense (as with sovereignty) of relative power. This transition—and its evolution, even in Bodin's thought—is clarified for us by his usage in different editions. There were find Bodin still beginning an earlier Latin edition of the *Republique* (1578) with words that show the residue of the older usage along with the new: "Sovereignty is supreme and absolute power," thus retaining a reference to the traditional term for relative power in the word absolute, and yet, in the definitive Latin edition of 1586, Bodin had removed the word supreme altogether (and with it any remnant of relative power) so that henceforth "Sovereignty is absolute power" (Bodin 2001 [1576]).

(ii) The second aspect of Bodin's definition of sovereignty which could not have been made in terms of earlier forms of constitutionalism is his claim that sovereign must mean **the power of the sovereign to legislate**—to create (universal) law—without the approval of any other body: As Bodin writes, "to give law to all in general and each in particular…without the

consent of any other" (56). To the contrary, however, as Franklin has persuasively show, "the main tradition" of contemporaneous French and continental constitutional opinion—as exemplified by the then canonical writings Claude de Seyssel (1519) clearly held that pre-sovereign limited monarchs were not to change law without the advice and consent of, in the French case, the Parlement of Paris (Franklin xxi). Lest there be any doubt about the novelty of Bodin's position, the greatest import of Franklin's intervention has been the care with which he shows that the doctrine of advice and consent was sufficiently standard at that moment that Bodin himself had accepted it unquestioningly in his earlier work, *Methodus ad facilem historiarum cognitionem, of 1566. In that work, a decade earlier, he had argued that kings could not make laws w*ithout the consent of the provincial or general Estates, and that decrees in conflict could be refused enforcement in Parlement. This was certainly true of England as well (e.g. MacIlwain 1975: 78; Pocock 1987: see gen. Ch. II; Stein 2002: 61).

If this description of pre-sovereign state of affairs seems somewhat counterintuitive to us today, it is only because of the complete triumph of political modernity's naturalization and generalization of the idea of legislative power. However, against the idea that kings everywhere had always legislated and that modern history is the history of the citizenry slowly wrestling it away from monarchs, the legislative power of kings—in the established modern sense—was, before the triumph of political modernity, one of the rarest institutions in history. By contrast, the most that can be claimed is that the existence of a properly legislative power existed in a limited sense in classical Athens, in an extremely limited sense in Republican Rome, in a surprisingly limited sense in under the Roman emperors, and, in all of these cases except the late emperors, it was located firmly in the collective citizenry, not any sort of magistrate or official,

much less a ruler. This was true, as well, of Germanic communities, as Bodin himself acknowledged (25).

If in contemporary terms this seems a surprising claim, the argument here is that Bodin himself, educated on classical history, trained in law and poised at the precipice between classical forms and modernity, clearly understood this to be the case. This interpretation is also what is beside the claim made here that we see Bodin's concept of sovereignty as a *project*—not a claim about anything that existed, but an *aspiration* for the new kings. This becomes clear only after close reading and rereading of Bodin when one attempts to make sense of the odd fact in that the author is almost at pains to differentiate as non-sovereign many forms of historical power, both classical and contemporary, which to the modern eyes would certainly seem sovereign enough—especially his claims that neither Augustus, nor key contemporary northern European kings were sovereign.

(iii) The third aspect of Bodin's sovereign that radically broke with contemporaneous thought and practice was his claim that sovereignty is necessarily ***unitary***. Indeed, both the constitutional practice and theory of Bodin's own day are strongly in accord with James Tully's important intervention that it was only with the appearance of the totalizing theorists of *modern constitutionalism*—in particular Paine and Constant that the idea of a unitary constitution and state became possible (1995). So powerful has this idea been, that is difficult today to comprehend a non-unitary constitution, and yet, before this there had never been an idea in political or legal thought that even all sources of law (see also Pocock 1987 and McIlwain 1975). Before this time, in what Tully calls the ancient constitution the complex of overlapping and

non-exclusive memberships, established by custom and habit, in such diverse institutions as towns, churches and guilds, that pre-existed the unification and centralization of political life through the ideas of the modern theorists. Emblematic of the multiplicity of these sources, however is the fact the England long had three legal system—law, equity [Chancery] and cannon law—each fully independent of each other and of the crown.

What is more, even within the formal structures of one of these institutions, there was no single formal principle for derivation and delegation of power. In fact, the question of multiple sources of power was at the heart of a debate among jurists over the question of *merum imperium* in which Bodin himself was ultimately a key player. In contrast to the modern constitutional vision in which all political power is to be understood as derived and delegated from a single, central, and unitary source (whether the king or popular sovereignty), the majority of medieval constitutional jurists believed that even magistrates with the lands held by the crown did so by what was termed the "right of office," which recognized a real right, in the magistrates themselves, to exercise the law within discretion (Franklin 1992: xiv).

(iv) The fourth aspect of Bodin's sovereign that was radically out of keeping with the history of both constitutional thought and practice was his claim that sovereignty was ***indivisible*.** Today, so successful have been the modernist categories of sovereignty and state, even experts find it difficult to give a proper contemporary counter example and ultimately only end of muddling issues with half-hearted discussions of modern federalism. Yet, as Bodin and Hobbes both knew and acknowledged, this claim flew directly in the face of what was perhaps the single most important tradition of pre-sovereign constitutional thought, the theory of the *mixed*

constitution. This distinctly republican tradition claimed origins in Plato, Aristotle, and his student Dicaearchus, had its classical expressions in the Republic era 2nd century BC historian Polybius and in Cicero, and became the dominant constitutional understanding of the Renaissance city republics in Italy, especially in the Venetian and Florentine writings (and most definitively in Machiavelli's reading of Livy). For more than 1500 year, to write seriously about constitutional history in the Roman and post-Roman world was to engage this tradition—through these texts by these authorities. Nor had this become any less true of the milieu in which Bodin and Hobbes wrote. In fact, both recognized that the mixed constitution was their ultimate opponent, politically, and, if one reads carefully, it is clear that destroying the viability of that tradition was their specific intention in making the claim about sovereign indivisibility in particular.

In its origins, the theory of the mixed constitution must be understood as the great Roman Republican account of its own constitution. Its first comprehensive statement comes in the work of the 2nd c. BC historian Polybius, an educated man from an important Greek family who had been brought as hostage to Rome, but who quickly became associated with the great families of the heyday of the Republic, and ultimately tutor to the Scipio Aemilianus (the adopted grandson of Scipio Africanus), who would later capture and destroy Carthage in 146 BC. We can then say that Polybius' great *Histories*—which would henceforth be canonical for the pedagogical, political, and historical traditions—represents and expresses the ascendant Republican world-view, setting out to understand "in what manner, and under what kind of constitution, it came about that nearly the whole world fell under the power of Rome" (Polybius 2010: Bk 6, Preface: Political Constitutions (Thatcher translation).

Though basing his claims—in the traditional Roman manner—on the authority of Plato and Aristotle,[92] Polybius' claims are distinctly Roman. The great genius of the Roman republican constitution, he argues, is that—in contradistinction to the classical division into what we moderns translate as "royal, aristocratic, and democratic" (e.g. Bodin 2001 [1576]: 92)—the Roman constitution is "the best constitution…[because] it partakes of all these three elements" (Polybius 2010: Bk 6).[93] Implicit here is a claim that while other cities are disfigured or destroyed by internal conflicts between the political forces represented by these three elements, this historically-specific Republican constitution has found the ideal relationship in a form that is the simultaneous presence and balancing of all three, each embodied in one of the three great republican institutions—Consuls, Senate and people (through, especially, their Tribunes). Implicit in this, in every single canonical statement of the mixed constitution from Polybius on (though for moderns it is associated with Machiavelli), is a twinned pair of commitments—Polybius calls it "equality and equilibrium [stability]"—that emerge from the shared belief that, more than anything else, it inequality (and, in particular, the established political class' recalcitrance against meeting the claims of the politically disenfranchised with true political equality) that destroys cities (ibid.). This destruction is understood to take one of two forms—obviously as elite entrenchment (tyranny or oligarchy, which can lead only to both unending conflict, the turning the great potential energy of the people against their own city, and the loss of flexibility to respond to future crises), but equally, if not more so, it can degenerate into a

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[92] For good explications, see, for example, Book Four of Plato's *Laws* (1970: 168) and Aristotle's *Politics* (1998: 1270b20).

[93] Compare this translation (Thatcher) with the Loeb edition (Paton) of Polybius (1923):
The three kinds of government that I spoke of above all shared in the control of the Roman state. And such fairness and propriety in all respects was shown in the use of these three elements for drawing up the constitution and in its subsequent administration that it was impossible even for a native to pronounce with certainty whether the whole system was aristocratic, democratic, or monarchical.

pure, will of the people democracy (mob-rule, based on tribunal demagoguery). Equality and equilibrium, then, express the two prongs of their response: The first a commitment to political equality through universal republican citizenship, and the second a commitment to a certain stability, necessary both to weathering crises and to convincing the political elites (and the old order) to commit themselves to the new dispensation. Ultimately, there is in all of these accounts a recognition that constitutions express a unique and specific history of the elaboration of these forces, and so a constitution must be understood as a historically-specific thing—viewed as the responses of a community, throughout its history, to the real state of political affairs in a community and as something which must be potentially adaptable to whatever circumstances the future might hold (e.g. Crick 1998: 29).[94] They are talking about the specificity of the Roman constitution, not even about republics in general ("the Roman type…not that of any other republic," says Machiavelli (1998: 123)),[95] and constitutions are treated through historical traditions which compare other constitutions in order to differentiate what is distinct and celebratory about one's own.

If we are to make any sense of this Roman constitutional history, however, it will be necessary, as a first step, to bracket our modern and post-sovereign interpretations of these constitutional forms (with the special proviso that usually by the time one is faced with a translation the battle has already been lost). Two particular kinds of modernizations present themselves here. In the first, the claims Polybius made about the Roman republican constitution (which he viewed, even in comparison with other *republican* constitutions, as both historically specific and normatively preferable) become generalizations about unitary sovereign states—

[94] Bernard Crick's reading of Machiavelli's *Discourses* emphasizes this question of adaptability (29).

[95] Crick says "a republic of the Roman kind" (25).

which, worse still, they insist on calling—for clearly polemical reasons—Republics (Bodin) and Commonwealths (Hobbes). Contrast this with Machiavelli who began his *Discourse*s by drawing an absolute and categorical distinction between free and dependent men and cities and insisting that his comments on the Roman republic could only apply to the former, and would make no sense applied to the latter (1998: 101-2). A modern writer, on the other hand, will likely translate Polybius' most famous statement of his argument this way (from Greek):

> As for the Roman constitution, it had three elements, each of them possessing *sovereign* powers: and their respective share of power in the whole *state* had been regulated with such a scrupulous regard to equality and equilibrium, that no one could say for certain, not even a native, whether the constitution as a whole were an aristocracy or democracy or despotism [italics added] (Polybius 1962 (Shuckburgh translation)).[96]

It is precisely the taking up of this viewpoint—especially of an *a priori* assumption of sovereignty—that allows both Bodin and Hobbes the purchase to call into question the mixed constitution tradition, now interpreted as a claim about the simultaneous co-existence of three modern sovereigns within one community. This allows Bodin to insist, quite correctly that, if we accept his definition of sovereignty, the "mixed constitution" (95)—the dominant republican

[96] Compare, for example, the Greek with the highly modernizing Evelyn S. Shuckburgh English translation of Polybius' discussion of the triple element in the Roman Constitution (1962):
"As for the Roman constitution, it had three elements, each of them possessing sovereign powers: and their respective share of power in the whole state had been regulated with such a scrupulous regard to equality and equilibrium, that no one could say for certain, not even a native, whether the constitution as a whole were an aristocracy or democracy or despotism. And no wonder: for if we confine our observation to the power of the Consuls we should be inclined to regard it as despotic; if on that of the Senate, as aristocratic; and if finally one looks at the power possessed by the people it would seem a clear case of a democracy." (6.11)
[11] Ên men dê tria merê ta kratounta tês politeias, haper eipa proteron hapanta: houtôs de panta kata meros isôs kai prepontôs sunetetakto kai diôikeito dia toutôn hôste mêdena pot' an eipein dunasthai bebaiôs mêde tôn enchôriôn poter' aristokratikon to politeuma sumpan ê dêmokratikon ê monarchikon. [12] kai tout' eikos ên paschein. hote men gar eis tên tôn hupatôn atenisaimen exousian, teleiôs monarchikon ephainet' einai kai basilikon, hote d' eis tên tês sunklêtou, palin aristokratikon: kai mên ei tên tôn pollôn exousian theôroiê tis, edokei saphôs einai dêmokratikon. [13] hôn d' hekaston eidos merôn tês politeias epekratei, kai tote kai nun eti plên oligôn tinôn taut' estin.

constitutional tradition—is "impossible and contradictory, and cannot even be imagined" (92). Hobbes then is free, in his inimitable manner, to belittle "Mixt Government" as "three Soveraigns," not one, and thus (to use a favorite invective) "three Factions," a status he analogizes it to a "Disease": "I have seen a man, that had another man growing out of his side, with an head, armes, breast, and stomach, of his own" (228).

Worse still, Bodin insists—and here we begin to see the political import of this indivisibility claim—even if one were to try to force the three together, the end result would not be a mixture, but a mere democracy (a turn he certainly did not hold in high favor). So any "combination of royal, aristocratic, and democratic power makes only a democracy," says Bodin (92), because real monarchic (or aristocratic) sovereignty cannot, by definition, be subject to anything else, and, if it is so subject (as for example to a democratic "element"), then it is—ultimately—subject to the democratic will. To appreciate what is at stake in this for Bodin, one ought to recall that much of the cache of republican thought—from Polybius to the Renaissance—was a view which understood Rome in opposition to Athens, with the latter representing the dangers of the unimpeded democratic principle. In this sense, it was the great pride of those who advocated the mixed constitution that it was better than any of the three forms alone (and often especially democracy), and there would not have been, as we moderns understand it, a presumption of common cause between these writers and those who promoted a properly democratic agenda. Bodin's claim about democracy, then, must be read as an effort to diminish the prestige of the mixed constitution.

The second common manner of modernizing the Roman constitutional categories was to interpret them in keeping with the categories of contemporaneous northern European notions of kingship and aristocracy—each associated with contending theories of history which read the

naturalness of its post-sovereign form back into the history of feudalism. In these emergent forms of power-knowledge, familiar to us through Foucault's work on the emergence of race history, the classical constitutional principle of monarchy—meaning, in Greek, not kingship but literally the power of one, but representing also the Aristotelian *end* of a political community—which had served as the canonical interpretation for two millennia (since Herodotus) is now understood as kingly power, in the post-sovereign sense. At the same time, as viewed from the perspective of the theory of history of the emergent post-sovereign reaction of the northern European aristocracy against the new power of the kings, the condition of the Medieval feudal aristocracy in northern Europe (the naturalization of an ancient regime of privilege based on reactionary neo-patriarchy, primogeniture, and claims to genetic decent from prior invaders) is now viewed as the *end* of aristocracy, the rule of the best that a political community can produce.

By contrast, in the great republican writers—whether Polybius, Cicero, or Livy—monarchy, aristocracy, and democracy stand not for persons (kings or aristocracies), or even numerically-determined forms of constitutions, so much as necessary structural elements, inherent in the Roman form of the republic.[97] Thus, in Cicero's famous elaboration of the mixed constitution in *On the Republic*, one finds Scipio (speaking for Cicero) saying:

> Since these are the facts of experience, royalty is, in my opinion, very far preferable to the three other kinds of political constitutions. But it is itself inferior to that which is composed of an equal mixture of the three best forms of government, united, and modified by one another. I wish to establish in a Commonwealth, a royal and pre–eminent chief. Another portion of power should be deposited in the hands of the aristocracy, and certain things should be reserved to the judgment and wish of the multitude. This constitution, in the first place, possesses that great equality, without which men cannot long maintain their

[97] This position is shared by Cicero (1841-42), Machiavelli (1998), Sinclair (1968), and Crick (1998).

> freedom,—then it offers a great stability, while the particular separate and isolated forms, easily fall into their contraries (Cicero 1841: 64 (Barnham trans.).[98]

As still further support for this, Bernard Crick, also locates *The Discourses* in this precisely this tradition and points out that Machiavelli translates these elements variously as *qualita* (qualities) or *potenza* (forces or tendencies)—within a *vivere civil e politico* (a political and civic way of life) (Crick 1998: 25). Finally, each of the mixed constitution elements corresponded to a politico-structural element in the Roman constitution: The two Consuls, Senate, and Tribunes of the people (14).[99]

(v) Returning to the question of whether there was precedent for the modern kings' claim to hold legislative power, it is clear that, even if there was some thin grounds for making the claim, it certainly could have made no sense to any educated 15th and 16th c. person to think of this power as necessarily a **monopoly.** Yet, because this is an assertion which—although Bodin and Hobbes are only beginning to work it out—would become the modern definition *par excellance* in the wake of Weber's explication, it is worth reflecting on its applicability, even if the question is somewhat anachronistic.

Here, again, it is worth returning to Justinian's *Corpus Juris Civilis*, because even if one were to accept (with the moderns) that the thin reed of the *Institutes* provides sufficient basis for

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[98] Note that, when Scipio begins the account be saying that "royalty is, in my opinion, very far preferable to the three other kinds of political constitutions." recall that this would mean the rule of the best man, in a republic, not kingship at all, but the Platonic ideal.

[99] Turning, for explication, to the more familiar account of Titus Livy, the first principle is represented by the institution of the two consuls, who replaced the power of the two *rex,* after these early Roman "kings" were expelled in 509 BC (1988: 209). As Livy says, and Machiavelli repeats, the early consuls we given the specific powers and insignia of the kings, but not the name, so while these eroded and transformed over time, it is clear that the Roman *rex* actually had sufficiently little power that it could co-exist in a republican form of government (221).

recognizing a legislative power in kings, one is still faced with the contradiction—within that source itself—posed by the fact that this perhaps most powerful of all Roman emperors, Justinian, in the document he authored, recognizes eight other sources of law besides the emperor. In other words, and here we see the importance of the claims (and the tradition they sought to undermine) in Bodin and Hobbes that law can only be created by the sovereign, that it is territorially absolute, and that nothing except conscious legislative intention can make law, it had been the established tradition for more than two millennia that Roman magistrates, including *principi* (emperors), had no monopoly on lawmaking power and were understood to be subject to numerous forms of law. Thus the *Institutes* begin with discussions of two "outside" sources of law, including (1) natural law (*ius natural*, the law of nature, which was not religious, but referred to "that law which nature teaches to all animals" (marriage and children are mentioned specifically)),[100] and (2) external sources of law, especially those established by the elaboration of a kind of common law between communities through custom and practice (*ius gentium*, the law of nations (oft confused in modernity with international law, especially after the 16th c., as Maine so importantly pointed out), real law, "for nations have established certain laws, as occasion and the necessities of human life [especially war and business] required" (see also Crook 1984: 29).[101] This latter source of law being taken sufficiently seriously that we read that

[100] The full text of *Institutes* 1.2 (2004, Thatcher trans.) reads: "The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence comes the union of the male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides men are considered as having knowledge of this law."

[101] The full text is: "The law of the nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free. Further, by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others." Institutes 1.2.2 (2004, Thatcher trans.).

"[t]he people of Rome, then, are governed partly by their own laws, and partly by the laws which are *communi omnium hominum*" (1.2.1)—defined in the statute, depending on the translation, as not as natural law but as that which "obtains equally among all nations, because all nations make use of it" (Thatcher trans.) or as "'the law of all peoples' because it is common to every nation" (Krueger trans.).

In fact, to read the text carefully, it is clear that even in this great imperial codification the legislative power of the *principi* was understood to be more or less a secondary and limited source of lawmaking powers. This is clear from both the ordering of the sources of law in Book I which, when it subsequently turns to elaborating the civil law (*ius civile*, "the law which a people makes for its own government" (1.2.1)), treats the lawmaking of the emperor only after treating three other sources of lawmaking. The first two involve forms of lawmaking by the Roman people: *Leges* (the plural of *lex*) being made by the Roman people (*populous)* on a proposal by a senatorian magistrate, such as a consul; while a *plebiscitum* is that enacted by the plebs after being proposed by a plebeian magistrate, such as a tribune (1.2.4). The third form is the ***senatusconsultum*** which are that which the senate commands or appoints (1.2.5), and only after this does the codification treat emperor made law, a fact that could not have been inconsequential to a lawyer in this tradition. Nor is this type of lawmaking the final form mentioned, as if it serve to bring together all other previous sources of law—as in the claim that the moderns (and specifically Bodin and Hobbes) introduce that all previous law only remains law at the sufferance of the current sovereign (need quotes). Indeed, after this, the document proceeds to treat, in turn, the edicts of the *praetors*, the answers of the *jurisprudenti*, and unwritten law established by usage (1.2.7-9).

When the *Institutes* does finally turn to elaborating the law made by the *principi*, one cannot help but be struck by the obvious defensiveness of the claim. Again, it is important to put this in context of the entire history of the Roman emperors, and especially the dramatic history of the accumulation of power in the hands of emperors which marked that period, and yet, when the great Eastern emperor Justinian brought the greatest lawyers of his day to make an imperial-friendly codification, it begins not with a simple, untroubled assertion of right (as is done for the popular and senatorial forms), but with a claim that the people, in the historically specific *Lex Regia,* "make over to him their whole power and authority." (1.2.6) Implicit here, if one considers it carefully, is a recognition, that the Roman legal tradition always understood that, no matter how much one tried to wiggle space for imperial power, the power of the people must be understood to be both prior and superior to the any legislative power the *principi* could exercise, and so the burden of proof would always lay with any claim to imperial power. Thus, even at this very late date, the case still must be actively made here through peculiar and polemical turn to this idea of the *Lex Regia,* a law by which the people were supposed to have given over all their power and authority to the *principi.* In fact, history has shown that the *Lex Regia* was a fictitious basis, invented by sympathetic late classical jurists to support "the fiction that the people had transferred to the emperor the legislative power which it had held since the expulsion of the kings in 509 BC." (MacCormack 1998: 8; see also Tamanaha 2004). In fact, the act referred seems to have been an act which conferred powers on the emperor Vespasian (AD 69-79), which, according to Geoffrey MacCormack, explicitly states that similar powers were conferred on Vespasian's predecessors, that the law was not about the power of the *principi,* and that ultimately there was never a passing of the power to legislate (9).

In fact, as has been suggested already (and as Bodin knew), Augustus himself was never sovereign. Indeed, so unnatural to the Roman ear was the notion of kingly legislation, the power of the Principate of Augustus could not begin from some eternal claim to power, but began constitutionally as a "concatenation of magistracies" (Crook 1994: 20). In other words, there was no constitutional position holding this accumulated power, only the real person of Augustus holding the actual titles of the principal republican magistracies, which still relied constitutionally on the will of Roman people. If this power was fast waning, in both theory and practice, it is still true that most of the "legislative" enactments of the *principi*—including what was perhaps the single greatest expansion of power, Caracalla's edict of 212 AD conferring power on the whole free population of the Empire—were in their capacity as the holders of these magistracies (ibid.).

Moreover, and this is really to the point, because the expansion of the power of the *principi* was through these magistracies, it was not technically and legally speaking a form of legislative power at all, but rather what we moderns call an executive power. More properly this might be thought of as a magisterial power, relating to the implementing of the law, while legislative powers continue to reside in the Roman people. If by the time of Justinian, however, many scholars seem to think it had becomes natural to accept as definitive the jurist Ulpian's statement that "That which has been decided by the emperor has the force of law" (see Crook 20), the counter position was still sufficiently strong that the jurists who composed the *Institutes* felt the need to use remarkably defensive language to make the claim:

> Therefore whatever the emperor ordains by *rescript*, or decides in adjudging a cause, or lays down by edict, is unquestionably law. (1.2.6)

That these are "unquestionably law" seems to be the last thing one would need to stress, if the matter were really anywhere near as clear as these lawyers would have it.

In fact the case only becomes clearer when one looks closely at the details of the three kinds of emperor-made law—called collectively *constitutions*—that the lawyers recognized. First mentioned in the *Institutes* are *rescripts*, or written answers (writs), on queries as to the law submitted by officials or private persons in the form of a petition, to which the emperors answer was added at the bottom. Second are the decisions, *decreta*, that the emperor might issue, as in effect the supreme judge, on cases of either first instance or appeal. Though important to settling many points of law (primarily private), neither of these was really legislative, per se, but rather what we might call judicial, and primarily interpretive, and neither were powers utilized with great frequency. Finally, although it sounds formal enough and perhaps more legislative, edicts (*edicta*) were in fact just the name given to those decisions made my any magistrate (no matter how high or low) that were necessary to the carrying out of their specific brief. Though these would become an important basis for future claims to legislative power, they were initially really a case by case process, which only later came to be consolidated and codified, under the same pressures from imperial interests. (1.2.6) (see Crook 20-21; MacCormack 9-10). These were by no means as insignificant as a modern would think them to be, but they, nonetheless, suggest that imperial legislative power was always, in both theory and practice, at best a project and aspiration (at least until after Bodin and Hobbes)—and that the notion of a *principi* holding a monopoly on legislative power is not even hinted at in the *Corpus Juris Civilis.*

Finally, Book 1.2 of the *Institutes* finishes with a treatment of three other non-sovereign sources of law: the edicts of the *praetors*, the answers of the *jurisprudenti*, and unwritten customary usage. In each of these cases, which are viewed as anathema to modern law (and Bodin and Hobbes), we begin to see the outline of the deep relationship that modern positivism has to political modernity more generally. Thus, if positivism turns out coincide exactly with a

rejection of each of the main principles of Roman law elaborated here, one may be forgiven for inquiring whether its commitments ultimately have less to do with advocating a particular world-view, than with finding a set of terms which cannot co-exist with this earlier—nearly universally held—world-view. If this is so, it appears that Bodin and Hobbes understood that political life needed to be redefined in such a way as not just to support the adopting of the new model, but rather that the old tradition was nonsensical if one adopted the new language.

This is why it is so difficult for modern political thinkers to find room for non-state sources of law, because *it was the bracketing of every possible alternative then existing in the most sophisticated theory of law known—not a clear imagination of or desire for a centralized and sovereign modern state—which set the terms of legal modernity.* Positivism is the name given to the defense of these terms, however nonsensical. In fact, these three types of non-legislative lawmaking represented in the *Corpus* have, in the post-Roman world, always and everywhere held legal significance in some realm or another. Consider, first, the edicts of the *praetors,* which represent the real legal authority accorded to the historical accretion of the interpretive statements of sitting magistrates (essentially as judges). They are called the *ius honorarium*, "because those who bear honors [*i.e.*, offices] in the state, that is, the magistrates, have given them their sanction." (1.2.7). Nor can one dismiss this as past practice that Bodin and Hobbes understood the world would soon supersede, because (even if one associates this immediately with the so-called Anglo-American common law system) it is every bit as true (if within different limits) of the so-called Civil Law, of pre-Napoleonic Code continental law, international law, and now cosmopolitan law. Consider, also, the recognition of the legal authority of the answers of the *jurisprudenti*, the decisions and opinions of "persons who were authorized to determine the law." (1.2.8). Having recognized "anciently," the Institutes say, that

the "there should be persons to interpret publicly the law," Rome had an ancient tradition of allowing non-governmental legal experts to make interpretations of law. Over time, a certain number of the greatest of these lawyers—*jurisconsulti*—established reputations for both scholars and lawyers. Their authority was sufficiently strong that the *Corpus* says that, when the greatest among them were unanimous on an interpretation of law, a judge could not depart from the terms of their opinion. During the better part of the history of the Roman and post-Roman world, the opinions of historically prominent legal scholars—and their textbooks and their teaching—have been significantly more to the development and elaboration of law than legislation has. This has certainly been true of the early and classical Roman law, medieval law, canon law, international law, cosmopolitan law, and even internal state law, if one looks with clear eyes (see gen. Bellomo 1995, Stein 2002).

The final source of lawmaking the *Corpus* recognizes is "unwritten law." "Our law is written and unwritten," begins the text of the *Institutes* unequivocally (1.2.3). It is important to understand what is at stake in this statement, because this was the established tradition of legal knowledge in which Bodin and Hobbes, lawyers both, had been trained and achieved distinction. In contrast to this, two contradictory elements must be stressed immediately about law in the *Corpus* tradition. First, unwritten law *is* law, without reservation: Not, as even anti-positivist modern legality would have it, *like* law, or a lesser kind of law, or an available but not preferred method of lawmaking, or a form characteristic of early in the development of a legal system. In addition to the fact that unwritten law is unquestionably law, the *Institutes* is also absolutely clear in stating that it is not a lesser form of law. This is accomplished, legally, by the categorization of unwritten and written law as "two kinds" of civil law (1.2.10)—"the law which a people makes for its own government belongs exclusively to that state and is called the civil law"

(1.2.1). No priority made between these two forms. Rather, and here the text turns to Greek history to show that "some of their laws were written [Athens] and others were not written [Sparta, here called Lacedaemon] (1.2.3), and this must be understood as a statement about two available and viable methods for a political community to institutionalize its laws, with the Romans using both simultaneously.

Later in the text (1.2.10), this is elaborated still further through the recognition of the historically-specific origins of this distinction in "our law was originally modeled on the law of two city-states, Athens and Sparta" (1987 [535]: Birks and McLeod trans.). These are certainly not just so many comparative cases or models, however. This is a proper tradition in which– even in this very late and non-traditional process of codification—Athens and Lacedaemon stand as the foundation points, with the Roman law as re-foundation of this tradition. What is more, in this tradition the inclusion of "unwritten law" is not some half-hearted effort to explain anomalous facts appended in the final chapter of a modern law textbook (or a simple apologetics, as in international law). It is, rather, a statement about a great world-historical chapter of in the history of the *res publica/polis*, and it is embodied in, already at the moment the *Corpus* is compiled, a millennium in which every serious treatment of law and political has addressed and built upon a tradition of extremely complex and sophisticated knowledge about Lacedaemon's constitutional history.

Nor is this about truth claims, or who really understood what really happened in ancient Greece. Lacedaemon, rather, stands in bodily for many of the key conceptual categories—so often in binary opposition to Athens—at the heart of classical (and pre-modern) political thought. In this context, law was not something easily and universally assumed, it was a great experiment—with Athens and Lacedaemon as the two great and equally serious attempts—with

the question of how much, and in what form, a community should formalize its rules. Looking back at this history, classical thinkers came to understand that having formal laws (and a single formal law for an entire republic) offered radical new kinds of possibility and stability, but it had two important costs, each of which corresponds to one of the two great questions of classical law. First, creating a formal law for a *polis* (where groups lived on the communal principle and where there had been none) meant first, paradoxically, an opening up of the community, as the monopoly of traditional groups and communities (and their restraints) needed to be was broken before law could be enacted. Athens, in classical thought, stood for both this possibility and limit. It was understood to be a *polis* which had become the greatest city in the world, but one in which not enough had been done to establish institutions capable of balancing this with stability. Both Athens and Lacedaemon had created formal laws, but the difference was seen to be in how much each opened itself to do so. To appreciate this, one needs to remember how radical the idea of making (or even writing down) the law was to the early Greeks. One sees this in the numerous traditions of the necessity of bringing in external lawmakers—an outsider, someone not bound to the local traditions, or part of any faction)—to make the laws (Aristotle 1998: Book II, Ch. 12). Whether one reads Plato's *Laws* (1970: 361, Book Nine), Aristotle's *Politics* (1998: Book II, Ch 12), Polybius (2010: 290), Cicero (1841: 65), this is what Solon and Lycurgus stand for.

All of these forms of legal authority were recognized as not just available, but definitive by the Roman traditions. Nor was there any sniff of the modern sense of a clear teleological priority from informal to formal means. In fact, if one considers it, so recalcitrant is the legacy of this tradition, that even without its formal recognition these same forms of legal authority—even in every positivist state—retain real authority. If this authority has lost its name—its

recognition—as such, it nonetheless remains clear that these institutions themselves continue to operate for modern societies, without a clear understanding of why. The ahistorical and rationalist reasons late modern thinkers have proffered to explain this remarkable consistency of these categories may be essentially contested, but the internal logics of each institution—whether judicial interpretation, writings of legal scholars, custom and usage—remain startling consistent to this Roman model, as elaborated in the *Corpus*. Specifically, what are the terms under which a custom, a legal opinion, or a work of scholarship has legal authority for us, and how exactly, legally and practically, does that authority operate. What are the hidden rules, patterns and logics by which are always invoked when we call something, by calling something custom or law or whatever?

The point to emphasize here is that it was in this Roman legal tradition, as embodied in Justinan's *Corpus,* that Bodin and Hobbes had been educated and in which each had spent his life working. Yet both radically redefined the place that law holds in political community. The following discussion will treat the tools they used to accomplish this, and in particular the concept that would become definitive of modern legality—monopoly. Neither Bodin, nor Hobbes uses the term, nor even emphasize its implications openly, but both do make clear statements that imply monopoly. The reason is clearly tactical. Writing at a moment when the claim that a king can legislate at all is extremely controversial, it would clearly have been foolhardy to risk overextending one's argument by pushing further to suggest that this kingly power had an absolute monopoly on this legislative power. Yet, make no mistake, both explicitly and directly use language which could mean nothing else. Thus, the marks, or powers of sovereignty, that he has elaborated (including lawmaking), "apply only to a sovereign prince"

(49), says Bodin, "to the exclusion of all others" (56), and one can find in Hobbes statements that the sovereign has "the whole power of prescribing the rules" (125). It is an important fact, however, that these quotes are found in somewhat less famous chapters having to do, in both cases, with the question of law. This, it is argued here, is not accidental, but proceeds from the special role that law plays for both Bodin and Hobbes—as a wedge—capable of simultaneously breaking open the earlier Roman legal tradition and necessitating the idea of a monopoly on lawmaking power.

Here is the problem that faced Bodin and Hobbes. They were advocating a strictly unconstitutional and untraditional position that kings, alone and without counsel of any kind, could have lawmaking powers, and thus could be sovereign, alone. The problem was that—given the very real realities on the ground in which traditional forms of power were held by innumerable forces (such as estates, aristocracies, cities, ancient constitutional institutions like the common law, and Church), and given the recognition by the tradition of the Roman law that the coexistence of multiple sources of law and power was the only form known to post-Roman history—even a recognition of kingly lawmaking, as such, would not have been enough to undermine the other forces with which the new kings were contending. What was needed was a claim that could legitimate kingly lawmaking, but also de-legitimate their opponents.

They found this in the notion—which turns out to be the true kernel and key of their work and of all subsequent modernist political thought—that sovereignty means not being subject to any one or any institution, which they interpreted as not just that there could be no superior, but that there could be no co-equal sources of law either. Once one accepts this definition of kingly sovereignty, however, one has already committed oneself to the necessary correlate that, if only the sovereign can make law, then all other forms of lawmaking or quasi-lawmaking (unwritten

law, custom, judge-made law, international law) must be anathema, or the sovereign won't be sovereign. Thus, the definition doesn't just empower kings, it categorically de-legitimates everything else.

The question then arises as to where this idea—of what is implicitly a theory of the monopoly of lawmaking power—came from, if, as has been said, it was radically counter to constitutional thought and practice? The answer turns out to have been of absolutely the first importance to world history. The problem was that even if one could drastically empower the new kings, these kings remained confined within traditional constitutional limits about the jurisdictional breadth and specificity of power. Traditional institutions of power, as has been discussed, had boundaries and often overlapped, but they also had very elaborate rules and procedures that need to be followed exactly and which had been formed in response to historically-specific conflicts, not rational elaboration. (Even the Roman constitution operated entirely on this principle, where power operated not through the modern idea that all power was interchangeable and potentially (depending on the will of the individual exercising it) total, but through the exact specifications of ideas of concepts like *jurisdiction*, *imperio*, magistracies.) Put simply, kings could claim relative precedence over other traditional institutions, but there was no precedent, of any kind, for a northern European king to exercise authority *over* many of them. What had existed before (whether in the ancient constitutional model or in feudal thought) was essentially a set of conflicting loci of power—which might be more or less strong, and more or less able to push others to follow their will, but none of which exercised what moderns understand as power *over* the others, much less the comprehensive rationalization of power and idea of generalized authority which this presupposes.

There was, however, one form of constitution known well to that age in which a single preeminent authority and clear legislative powers existed—*republics*. Only in a republic, as Bodin and Hobbes knew well, were all the traditional institutions of power potentially bracketed by a single notion of authority. The reason is that only in the form of a republic was there a single and paramount institution—the public sphere—which was understood to represent (if only potentially) all men equally, through the institutions of citizenship and of a single law capable of applying to all citizens, regardless of their traditional identities and affiliations. Indeed, more than this, it was a single law which claimed precedence over—inherent in the distinction between public and private—every other tradition. In every political and legal theory of that age, only this space offered the possibility of imagining a single (universal) law applicable to every member of a community equally. What is more, even if, as this essay has argued, the legislative power associated with this was more limited than many modern scholars have assumed, it is nonetheless true that no real legislative power could even be imagined except in this same space, because, by the modern definition, it would not have been possible to legislate in a community that had multiple overlapping sources of law. Put simply, historically and conceptually, general laws (and legislative power to make or change that law), even in the slightly limited Roman form, presuppose a single public sphere defined by equal citizenship.

To modern thinkers, who base all political models on a-historical rational choices games played by individuals, this can produce only the most minimal paradox, but, read through the lens of the of the Roman political and legal traditions, the fact that general and universal laws only existed in one available tradition made all the difference. In fact, despite many modern writers' attempts to diminish its importance or suggest that it is broadly generalizable, the Roman tradition recognized unequivocally that, precisely because they understood the alternative

as communal, for a community to choose to become republic was an extremely radical and violent undertaking—one that necessitated a profound revolution in the political order. What these writers' of the earlier era understood was encapsulated in the role played by their account of the early history of the Greek *poleis* (and especially Athens) in their political traditions, ideas associated especially with the names Solon and Cleisthenes—and which Rome had made the foundation of its own political tradition. In every account of that tradition which followed Aristotle's, the universal Athenian *polis* is recognized as the product of open conflict among the communally organized families and traditional institutions on which early Athens was based, and especially between those for whom those identities were advantageous and those for whom they were not. On the verge of civil war (and ultimately one tyranny or another), it was recognized that, to sustain a *res publica* built around a single law affecting all equally as citizens, it was not enough to build good institutions. Given how much was at stake in the traditional institutions, they would always emerge as in opposition to the *polis* community, until such time as one had positively and decisively broken every link between traditional and contemporary power.

To accomplish this, Cleisthenes understood, would require a radical and total reorganization of the constitution—and every single political identity recognized in it. The exact institutions he utilized—as laid out in the classical account of this in Aristotle's *Constitution*—are quite complicated, but the goal of the project was to create new institutions based on territorially assigned political identities which not only didn't recognize the traditional identities but actively mixed members from different traditional communities so that their political interests—defined institutionally and constitutionally—would be at cross purposes. This is the gist of what is at stake in Aristotle's most famous statement on the question in *Politics.* There, he describes as "useful," Cleisthenes' project:

> For different and more numerous tribes and clans should be created, private cults should be absorbed into public ones, and every device should be used to mix everyone together as much as possible and break up their previous associations (1998: 1319b20-26).

Thus, as we shall see in greater detail in the conclusion, it is clear that this must be understood as nothing less than a *total* political *revolution*.

Before moving back to Bodin and Hobbes, it is worth emphasizing one final point, in particular, about this history and the argument being made here. What is clear when one looks at the Greek and Roman texts that make up the tradition is first that, as we have seen, one must understand the emergence of the republican form of government as the product of a proper *political* revolution, understood as much more radical, perhaps even total (to speak politically), than modern writers (living in a world where this history has been made natural) have recognized. It also needs to be emphasized how deeply conflictual and coercive this process was. Every bit as important, however, is a second element that receives absolutely no mention in the modern literature, even among many classical scholars. This is to emphasize that the transition that is being marked here is not one to democracy, but to the *republican form* (in its specific instantiation as the polis), defined by the existence of monopoly of authority in a common public sphere, a universal citizenship, the existence of a single law for all, and the possibility of legislating which that in turn opens. Modern writers, pro and con, have emphasized this as a history of democracy, but democracy is only one possibility within a republic. It is, in fact, a much later development historically, and it is an idea which could not have made sense before the republican form had taken hold. What the classical writers

understood was that it is the decision to create a republic, not a democracy, which is the single most radical realignment that a community can make.[102]

To return to Bodin and Hobbes, then, the problem was that, through their background in Roman law, they had naturalized certain republican and Roman presumptions in their account of law. This was not surprising or unusual. The Roman law necessarily reflected a community based on these republican assumptions, and even its treatment of private law reflects this legacy unambiguously. As a result, far beyond the borders of the old Roman Empire, every community which had turned to Roman law as a source and model—as a supermarket for ideas, as Stein says (2002)—took up, as well, a great many assumptions about a monopoly by a common public authority, the generality of law, individual citizenship, and legislation.

This is precisely why both Bodin and Hobbes introduce and push their arguments for a king's monopoly on lawmaking powers through their treatments of law. Law, given the broad hegemony of Roman law, was certainly the one area in which this republican presumption was most naturalized in the minds of both expert and lay opinion. In sum, then, one must understand that the basis for the possibility of this perhaps most crucial element of modern sovereignty, that of a kingly monopoly on legislative power, comes directly and specifically from a republican tradition based in popular sovereignty, and here, again, we see why both Bodin and Hobbes chose to refer to their subjects as republics and commonwealths.

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[102] The subsequent decision to become a democracy, or even radical socialism (since that in modern theory always followed from a presupposition of a republican government), is much less radical. If this appears to be less of an issue in modernity, it is only because the power of the republican ideal was so basic in the post-Roman world and because the American Revolution took place in a context of widely shared republican values and in a colony in which (because of the preponderance of lower class immigrants, distance, new wealth and mixed nations of origin) the marks of status were much less profound than in Europe. The better correlate for Athens was France, where, similarly, it became necessary to legislate everything down to names of address.

One final fact about the modern legacy of this Bodin and Hobbes' intervention needs to be stressed. As has been said, it was in this Roman legal tradition, as embodied in Justinan's *Corpus,* that Bodin and Hobbes had been trained and had worked professionally. Yet both radically redefined the place that law holds in political community in a way which made not only possible, but *necessary and inevitable*—logically and conceptually—many of the key subsequent developments that define political modernity, including legal positivism, the form of the state, and the Westphalian system on inter-state relations. Though it is viewed in modern legal pedagogy as merely a school of legal thought among others, the terms of ***legal positivism***, in particular, which are so definitive of the high modernist vocabulary of law, turn out to be the product of an earlier and much more sudden transition than has generally been recognized. This is because, while the full elaboration of legal modernity and positivism took several generations (through, most importantly, the work of Bentham and Austin), it is possible to state categorically that it is Bodin and Hobbes who are both the original and primary sources for the key terms of modern positivist legality. If later writers, with less immediate adversaries, systematized and clarified this account of law, Henry Maine (that uniquely astute lawyer and historian of law) is correct to say that these ideas, of what modern legality was to become ,were no older than Hobbes (or really Bodin), and essentially fully defined by the time they were done writing. Bodin himself was characteristically self-aware about the central role that legislative monopoly played in his thought. Indeed, he states quite clearly that it was the ultimate kernel of his argument, and that all other rights and prerogatives of a sovereign could be "comprehended in" it, so that "strictly speaking we can say there is only one" (58). Ultimately, then, the argument presented here is that the great modern doctrine of positivism, so central to political modernity,

must be understood not as a proper account of a modernist vision, but as a response to—indeed a conceptual undoing of—the terms of Roman law, and especially the *Corpus*.

ADDENDUM: **On the impossibility of universal temporal authority before the Reformation, under the dualism**

On Dualism

As has been argued in Chapter 6, for almost a millennium and a half, the idea that there were two conceptually distinct and fundamentally autonomous spheres of authority—one temporal (*potestas*) and one spiritual/priestly/Church (*auctoritas*)—was at all times, and without exception, determinative for the main currents of political and Church thought and—especially—constitutional practice. Both because this is a rather controversial claim, and because the politico-theological arguments are presently in florescence in anthropological and other critical scholarship (Schmitt 1985 [1922], Kantorowicz 1957, Asad 2003, Mahmood 2006, 2008, 2009, Anidjar 2006, Brown 2010), it will be worthwhile here to treat with some extra care this claim about *dualism*, and, in particular, its implications for thinking about the role of the secular in classical and post-Roman thought and practice, including that of the Roman Church.

Following closely on the very sensitive non-modern reading of Brian Tierney (1979, 1979 [1954], 1982, 1988), It will be argued here that, without exception, the terms of the practical relations between these two powers were always based on an explicit recognition of this binary, and the dominant theoretical understandings always accepted this division. Indeed, so hegemonic was this view that even the most extreme theoretical exponents of papal or imperial never departed from it. It would be easy to misunderstand the terms of this conflict by describing it in modern terms—as a timeless struggle for something called power—between popes, emperors, and kings, but this would radically misunderstand what was at stake. These claimants understood themselves, rather, as the products and re-founders of great traditions of authority to which they believed themselves to be bound, and to which they wished to bound. In

other words, they were desirous, not of power, but of themselves acceding to the great traditional roles (see gen Ullmann 1966). As such, they could at most hope to reorient the established key texts (and the traditions of reading those texts) that determined traditions. However, even in the most extreme moments of rhetorical excess, the terms of the conflict between church and secular leaders never amounted to more than a claim that the competing authority owed its ultimate authority, theoretically and formally (and distinct from practice), to the other. It never approached a claim that one form of authority could supersede or incorporate the other. In sum, while much ink has been spilled on the long conflict between church and temporal, what receives almost no attention is the broader commitment that both claimants share—popes and emperors may fight over the precise place of the boundary line, but neither side ever failed to agree on the necessary prerequisite claims that there were two spheres (which is to say that authority was always binary) and that neither could lay claim to the other.[103]

Early Founders of the Dualist Tradition

Perhaps, it could not have been otherwise for a religion whose founder had enjoined his followers to "render therefore to Caesar the things that are Caesar's; and to God the things that are Gods" (Luke 20:25 (Holy Bible: Revised Standard Version)). Yet, to appreciate why this became so, it is helpful to remind oneself of Christianity's origins. It is a fact, not taken seriously enough today, that Christianity's first dialectical Other and antithesis was the universal republic, Rome. This was critically important to the form that Christianity would take for at least

[103] Indeed, so deeply entrenched was this dualism that, even after the formal destruction of the tradition by the Reformation (and Counter-Reformation), even the most radical forms of late modern Christian fundamentalism almost never make a claim that religion can replace the political or that the Bible itself ought to serve as the law (much less that political societies should be reorganized in the form of a church or a religion).

two reasons: first, because it would have been hopeless to challenge Rome for political authority (or, to put it more accurately, the early success of Christianity certainly owed much to the fact that it made no challenge to Roman temporal power, and even acknowledged and accepted the temporal power), and, second, because Rome itself was founded on an inner dualism, that between the *res publica* (or, public) and the private (in the classical sense in which all the forms of life and all the commitments that are politically bracketed by the *res publica*). Unlike Judaism, where the law of God is the law of the world, this fundamental dualism inherent in the Christian tradition (which was determinative, in the lands of the Western Empire until the Reformation) must be understood as an institution and expression of the Roman private sphere.

Though they certainly contain some contradictory language, the New Testament texts, compiled by the founders of the new religion, would serve as founding document for a tradition of citation that would define Church doctrine on the question throughout much of the Middle Ages (until they became more legalistic in the 12th c.). In these traditions, certain biblical citations emerged, as will become clear in a moment, as definitive sources of authority, and over which learned men contested interpretations. The single most important and productive of these, for present purposes, were the famous words of Christ, cited in Luke 22:38: "And they said, 'Look, Lord, here are two swords.' And he said to them, 'It is enough.'" This idea of *two swords*—one spiritual and one temporal—would emerge as the great textual source over which the question of dualism would be debated, both within the Roman Church and between church and secular ruler.

Furthermore, beyond its place in the broader structures of Christianity, the practical importance of the doctrine of dualism was dramatically reinforced, within the tradition of the Roman Church (in the lands Western Empire), by the fact that it served as the basis for (and was

inherent in) the three great subsequent claims for the expansion of the power of the papacy (in particular, and of the Roman Church in general)—(i) the papacy's claim to supremacy within Christianity, (ii) the Roman Church's claim to autonomy from the Eastern Emperors, and (iii) the expansion of papal power against the Holy Roman emperors. As before, the great textual basis for the papacy's claims to preeminent authority within the new Church was based on Christ's words to the Apostle Peter: "I will give to you the keys of the kingdom of heaven" (Matthew 16:19). It will go a long way to understanding the success that dualism had (in the lands of the Roman Church) that the papacy's own claim to supremacy—the so-called *Peterine mandate*—thus rested on the claim that the pope's had inherited the apostolic authority and therefore on a textual sources that explicitly recognized no temporal authority and a dualistic distinction between the kingdom of heaven and the political authority of Rome.

Later, for example, (after the conversion of Constantine, the Christianization of the empire, and the movement of the capital to the East in 330 AD) the figures known to us as the *Church Fathers* pushed towards a policy of the consolidation of *papal power*, and, once again, in this founded their arguments on dualism. In doing so, both the papacy and the doctrine of dualism benefited from common cause with the wider claims for Western autonomy against the Eastern Empire. With imperial power now located in the east, dualism formed the basis for both claims to Western autonomy and resistance to imperial power. At the center of asserting this position were three figures whose writings on this question would be canonical for the Church: St. Ambrose, St. Augustine and Pope Gelasius. Indeed, it was Ambrose, bishop of Milan and Augustine's teacher, who—in his infamous dispute with the Eastern Emperor Theodosius (which lead to the latter's excommunication and famous public penance in the cathedral at Milan before he was readmitted to communion)—established the dualistic terms of the conflict between popes

and emperors, writing, in a letter in response to the Theodosius' claim that everything was subject to the power of the emperor that "Palaces belong to the emperor, churches to the priesthood," and, in response to an imperial summons to appear, "when matters of faith are concerned it is the custom for bishops to judge Christian emperors, not Emperors to judge bishops" (Tierney1988: 9).

Far and away the most sophisticated, as well as most determinative, statement of the dualist position, however, was that of Ambrose's student, Augustine of Hippo, in *The City of God*, in his account of two cities—a City of God and a City of the World (413-416 AD) (1987). Augustine, it must be remembered, was a Christian (and ultimately Church father) but also a great and acknowledged Ciceronian, and it was his work which established the terms of the reconciliation between Christianity and Roman political thought which would serve as the primary basis for both the traditions of political and Christian thought for nearly a thousand years (at least until the implications of Aquinas' writings took hold in theory and practice) (see gen. Fortin 1994). The City of God, then, represents the spiritual ideal and aspiration for Christians, but it does not attempt to transcend or replace the temporal city (understood here to be Rome, the universal city and the universal expression of the temporal authority). Nor is this earthly city re-rationalized in Christian terms. It retains its fundamental Roman understanding, and its relationship to the heavenly city is fundamentally dualist:

> Thus the things necessary for this mortal life are used by both kinds of men and families alike, but each has its own peculiar and widely different aim in using them. The earthly city, which does not live by faith, seeks an earthly peace, and the end it proposes, in the well-ordered concord of civic obedience and rule, is the combination of men's wills to attain the things which are helpful to this life. The heavenly city, or rather that part of it which sojourns on earth and lives by faith, makes use of this peace only because it must, until the mortal condition which necessitates it passes away (Tierney 1988: 12).

If one reads the medieval sources (until at least the 13th c.), one finds, again and again, writer's citing directly these overtly dualist and Ciceronian words by Augustine.

Finally, the great summation and distillation of the dualist position—cited, and later included formal compilations—were the words of Pope Gelasius (492-496), from a letter to the Emperor Anastasius (494). This language, which came to be known as the *Gelasian Doctrine*, was the great traditional statement of dualism for the disputes in the Middles Ages: "Two there are, august emperor, by which the world is chiefly ruled, the sacred authority of the priesthood [*auctoritas*] and the royal [sic] power [*potestas*]" (Tierney 1988: 13). This too would be the source of continuous citation, and dualism was the official policy of the papacy from that point on, as, for example, in Pope Gregory II's early letter to emperor Leo III (727AD): "The pontiffs who preside over the church do not meddle in the affairs of state, and likewise the emperors ought not to meddle in ecclesiastical affairs" (19).

Nor was dualism alien to the Eastern Empire, and indeed it served as the language of imperial authority there as well. Justinian himself had famously written, in a letter (*Novella VI)* from 535 AD which was to become incorporated in the *Corpus juris*, that "[t]he greatest gifts given by God to men from his heavenly clemency are priesthood and empire [*sacerdotium et imperium*]. The former serves divine things, the latter rules human affairs…" (15). The dualist doctrine thus stood squarely as the basis for both the tradition of arguments about imperial authority (both West and East) and for the Roman law tradition based on the *Corpus*.

It was the requirements of this same dualism doctrine, as well, which precipitated the ultimate break with Byzantium, as well as determining the specific form that it took. Hegemonic acceptance of language of dualism meant that, from the moment the line of the Western emperors ended in 476 and therefore devolved unquestionably back onto the Eastern emperors, it was no longer possible for the papacy to challenge the temporal authority of the Eastern emperors, nor was it possible for the Church to claim and exercise temporal authority in the West. This, in turn, meant that the Eastern Empire (as inheritors of the legacy of the Roman emperors) could always claim—*de jure*, if not always *de facto*—uninterrupted title to temporal authority in the West. It was this circumstance to which the invention and constitution of the Holy Roman Empire of the West was a response. Absent the possibility of a legitimate claimant to the temporal authority in the lands of the Western empire, the Roman Church turned to the blatant fiction that the mere fact that Charlemagne then held Rome entitled him to be emperor, and that the popes had the power to confer it on him.[104] Neither claim had a basis in constitutional practice, nor any other kind of historically based justification, and, in fact, so radically unconstitutional was this claim that the Eastern emperors were "indignant," and Charlemagne himself is said, according to the famous account of Einhard, to have opposed it, probably because it established a troubling precedent of letting the pope crown the new emperor, where the ancient tradition was always (as it always had been for Rome, as we have seen elsewhere) that "acclamation by the people was the constitutive act" that established a new emperor (18).[105] The famous crowning of Charlemagne, as "emperor and Augustus," by Pope Leo III in 800 AD was thus the necessary creation—in dualistic terms—of a Western emperor who could claim temporal power against the East.

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[104] See The Roman council of A.D. 800. *Annales Laureshamenses,* in Tierney (1988: 22): "for he held Rome itself where the Caesars were wont to reside…"

[105] See the account of Einhard. *Vita Caroli Magni* (817-830)(Tierney 1988: 22).

The Conflict Between Popes and Emperors

The subsequent era—the era of the so-called "crisis of church and state"—was then defined by the contest for power and preeminence between the papacy and the newly emergent German emperors, and, once again, the contest took place precisely over how dualism should be understood. At the start of this was an ascendant papacy, asserting its right to determine Church practice, necessarily against temporal rulers, beyond Rome. In doing so, the popes were able to build upon the great church reformist movements of the 11th century—embodied in St. Benedict, the Benedictine order, and the foundation of the abbey of Cluny—which had organized itself precisely around the question of dualism, as a response to contemporary practices of secular rulers selling church office, known as simony. Indeed, the primary impetus for the founding of Cluny was to formally create a new kind of space in which clerical self-election would be assured and in which secular rulers could exercise no power. Thus, the founding charter of Cluny (910) states categorically that "monks shall have power and permission to elect any one of their order…abbot and rector…[by] purely canonical election" and that "no one of the secular princes, no counts…shall invade the property" (28-9). Similarly, Pope Leo IX travelled across France and Germany in the mid-11th c. to a series of councils of local bishops and clergy at which general reform decrees were promulgated, which also used dualist language to simultaneously claim church non-interference from secular rulers, while also re-emphasizing the church's position of non-interference in temporal affairs. One example was the Decree of the Council of Rheims (1049), which reiterated principles of clerical election (and stated that "no

layman" shall hold ecclesiastical office), but in which church leaders also acknowledged that "no clerics should bear arms or follow worldly occupations" (31-2).

The appreciate the impulse behind this movement—and especially the interesting and critically important alliance between reformism and the project of the centralization and rationalization of Church authority, it is useful to recall that, where Roman authority had lapsed, it had not been uncommon for *de facto* temporal power to devolve onto bishops. The problem was that the medieval system of feudalism had no means for recognizing temporal-Church dualism. It instead was predicated on the logic of land tenure as possession, and what this meant was that—especially with the passage of time, as these bishops acquired and entered into possession of a great complex of historically-contingent feudal estates and jurisdiction, feudal era thinking could only understand this as one indissoluble juridical entity–though such a bishop was now both prelate of the church and vassal of the king. The eventual solution to this would be to recognize two distinct juridical entities, but this had to wait the better part of a century for the Concordat of Worms in 1122. In the meantime, the conflict between emperors and popes took place over these secular bishops—as both sides contested the definition of a single juridical entity which had always previously been understood as dualistic.

It was, therefore, this high point in the interrelationship between church and lay authority which precipitated the great reform movements of the 10th and 11th centuries, as reformers sought to limit the corruption of the ecclesiastical role, precisely at the moment when these bishops were becoming increasingly worldly. Furthermore, as the practice of simony increased and as the sale of far flung bishoprics became increasingly a source of income for secular rulers and a way of flowting papal power, the reform project was to find common cause with the centralization project of the emergent papacy, as both sought reinforce church authority precisely by

disempowering local bishops of their temporal power. This confluence of interests goes a long way to explaining the continued hegemony of the dualism doctrine throughout this period (as well as within the church thereafter).

The Investiture Contest

This inchoate conflict emerged as an open contest between popes and emperors in the mid and late 11th century in the famous Investiture Contest, which took place over the same question of lay investiture of church leaders, and which continued until it was finally settled at the Synod of Worms in 1122. Yet, as Tierney argues convincingly, the striking aspect of this contest is that "hardly any of the major participants propounded really extreme doctrines of papal or royal theocracy" (Tierney 1988: 74). In other words, both sides remain committed to dualism in both theory and practice.

The initial salvos of the conflict took place in the 1050s in form of a rhetorical dispute between two great cardinals—Humbert and Peter Damian—over the direction the church should take. In the end the day was won for the anti-investiture position by the party of the church reformers, following Humbert. The next pope, Nicholas II, supported this position, and it became official church doctrine after the promulgation of a list of new canons in 1059. This stated "That no cleric or priest shall receive a church from laymen in any fashion" (44). Yet what is especially noteworthy, for present purposes is that both sides fully accept the doctrine of dualism. Indeed both Humbert and Peter Damian base their arguments on dualist grounds. Nor, does either side attempt to break down or supersede the dualist division.

Remarkably, the same holds true of the infamous contest between Pope Gregory VIII and King Henry IV of Germany (lasting rough from 1076-1084), which ultimately ended in the excommunication of the later and his seeking penance from Pope Gregory at the mountain fortress of Canossa in 1077. All this erupted over the question of the emperor's attempts to invest new bishops. The practice—though strange to modern ears—was very common and well established in practice, but it posed a threat to the papacy's efforts to rationalize the church. The problem then arose for the pro-imperial forces that when, as at that moment the papacy and emperor were in opposition, the forbidding of lay investiture meant that the papacy would always fold vast powers (the priestly authority throughout the prince's lands, but also all of the accreted power and authority temporal accumulated and historically exercised, de facto, as well). In the same way, to accede to imperial investiture of bishops

Even here, where among the most extreme positions were taken in the history of contests over dualism, both sides always accepted the idea of a separation between temporal and church spheres, and, to again quote Tierney, both "fell far short of claiming absolute theocratic power" (1988: 57). To appreciate what is at stake here, it is useful to emphasize less what is said than what is not said. Thus Gregory never goes so far as to suggest anything that a king's authority is delegated to him by the pope, that he could assume the role of king and combine the dual powers, or that the right to choose a king fell primarily with the pope (he acknowledged that belonged to the princes). Similarly, Henry, in defense of his privileges, relied primarily the two swords analogy (which he accused Gregory of breaking) and never made any claim which could be understood as a claim that he could hold both temporal and spiritual authority. Even the single most extreme expression of the imperial position, the election of an anti-pope by the German and Lombard bishops who supported Henry, must itself be understood as the ultimate

statement of the necessary permanence of dualism. Put simply, the emperor and his supporters could more easily countenance creating an alternative claimant to the papacy than seize or do away with the sphere of authority that he represented.

As a momentary aside, do not fail to recognize here that neither side of this debate can pretend to anything like sovereign powers, either within their own spheres or against the other—and neither ever claimed anything like that much. What they claimed for was much more akin to the kind of relative pre-modern understanding of power discussed elsewhere in this essay. They sought, in other words, a relative priority—perhaps best thought of as a paramouncy—over the other. Nor were these thought by any participant, ever, to be two institutions exercising an interchangeable and generic power. They understood these debates rather in terms of the historically-specific concepts of authority and *imperium*, *auctoritas* and *potestas.* Finally, the battle these two forces fought was over a complex and overlapping terrain in which very specific historical practices and contests had established—through debates and in practice—a historically contingent relationship between the two spheres.

Throughout this whole era, all of the greatest contributions to this debate explicitly maintain their commitments to dualism, including those of Manegold of Lautenbach (1080-85) for the papacy, the author of *Liber de Unitate Ecclesiae Conservada* (1090-93) for the imperial cause, the canonist Ivo of Chartres (1097), and the moderate royalist Hugh of Fleury (1102-04). The only case that even arguably approaches being an exception to this is the writing of the anonymous royalist author of the so-called York Tractates, written in England around 1100. This Anonymous of York, famous especially today from rightist medievalist Ernst Kantorowicz's description of his project as one of sacral kingship, in which kingly and Christly

power are described as perfect analogs in which the king is like Christ-like (and, not incidentally) Christ is now understood as sovereign (Kantoriwicz 1954). Note especially the not incidental implications of this view, for what sacral kingship enacts is an attempt to fully transcend the dualism with an appeal to a higher order of divinity itself (a fact which reminds us that the spiritual authority, for the dualist tradition, never about divinity itself, but rather the place in this world of the priestly power). From this, Kantorowicz effectively projects sacral kingship backwards as the natural state of the past, while projecting it also forward to legitimate sovereignty. One ought, however, be deeply suspicious about this political theology, and, at the heart of this account of dualism, is an effort question the theory of history that accepts that view.

This is because, while it is certainly true that the biblical passages which the Anonymous relies on speak of Christ-the-king, the idea that this was descriptive of the main currents of thought or practice then, or before, is simply incorrect. As we have seen, it had never been so before this, and it will not be so in what follows. In fact, the thin reed on which Kantorowicz built his case needs to be understood, historically, as an extreme and polemical account produced on the periphery of the Christian world in a very particular historical context. This was, it must be remembered, just one generation after the Norman victory, a moment in which the new kings were struggling to legitimate an unconstitutional foreign kingship. Even given that fact, the arguments presented by the Anonymous remained peripheral until late modernity when scholars of the right, like Kantorowicz, began to base their arguments on his very exception case.

What historical practice shows is that neither the citations to the language of Christ the king, nor the equation between Christly and kingly power were ever an important part of the dominant traditions of thought and argument—church or political. The key word here is tradition. To fully understand what is at stake in this argument, it is important to reemphasize

here that this is not a history of radically free hermeneutic disputation in the modern sense. Traditions were dispositive of both the arguments presented, and the manner in which authority could be sought. Yet, whether in the traditions of the Apostles, the Church Fathers, the medieval church or secular traditions, neither these specific citations (nor these interpretations) were ever traditional. As a point of emphasis, one must remember even the Bible itself never served as an open source for citation and arguments. Instead, for entirely historically contingent reasons, the great church traditions established themselves of a limited set of questions, arguments and citations which, while always pliable according to the case and to changing circumstance.

It is therefore deeply troubling that Kantorowicz plays such an important role in contemporary political pedagogy, as one of a small number of medievalists a student may encounter in a non-specialist education. Then, too, one is rarely confronted with his history of overt polemicism for the right, though this is well known through the writings of, for example, Norman Cantor (1991). Nor does one encounter even counter texts by those who provide an alternative view, such as that of the medievalist and self-defined conservative Brian Tierney, who nonetheless rejects the naturalization of both the leader principle and of religion.

Ironically, perhaps the strongest case for Tierney, and against Kantorowicz, is to be found in the writings of the Anonymous himself. For one point that Kantorowicz neglects is that even this apparently most extreme voice begins his argument in *Tracatus Eboracenses* from, and in explicit reference to, the Gelasian doctrine and the dualist question of *potestas* and *auctoritas* (Tierney 1998: 76-8) Several points ought to be emphasized here about the limits of this project. First, even the great advocate of sacral kingship, clearly understood himself to be working within a tradition of citation linking him back to the foundations of the church. Thus, far from a reliance on arguments from pure divinity (or nature), the authorities relied upon as authoritative

are always those (Augustine, Gelasius, etc.) who were determinative for the established tradition. Second, the Anonymous never abandons dualism fully (either explicitly or implicitly). Rather, in the interest of unshackling royal power from the limitations effectively placed on that power by the autonomy of the church, he sought to subvert the division by transcending it (as sovereignty later would in a different way), through an appeal a higher order. The concept that did this work for the Anonymous was that of divinity, as based on his understanding of Christ's divinity. The practical political reality behind this claim was that kings were more or less excluded from making new claims on the priesthood by the dualist doctrine. The Anonymous wished to create for the emergent English kings a doctrine capable of reordering this fact. Divinity was intended to create a logic which could bracket the power of the priesthood and church by effectively distinguishing between the proper divinity of Christ and the place of the priestly power in this world. Thus reduced, the argument could then be made that the priesthood on earth was less an expression of the divine than the kingship:

> In Christ the royal power is greater and higher than the priestly in proportion as his divinity is greater and higher than his humanity. Hence…the royal power is greater and higher than the priestly (77).

And thus "kings receive in their consecration the power to rule this church" (ibid.). That this circuitous argument—necessitating a radical break with parts of the tradition and relying on the tortured argument that Christ was more king than priest—was the only way to make claim suggest how established dualism and the established traditions which supported it in fact were. Yet even here, as we have just seen, the Anonymous always retained and relied upon the standard understanding of dualism and of fundamental and insurmountable division as a description of what lay underneath the divine, and even Christ is of this dual nature—"king and priest" (ibid). Finally then, with regard to the political theology thesis, one must understand that

this equation of Christ's divinity and kingship can never be viewed as the product of a simple binary between religion and secularism, because—understood properly, in terms of the traditions that preceded it—the sacral kingship thesis must be understood, fundamentally, as a critique of church authority by the secular power. In sum, the sacral kingship thesis, as we understand it today, is an entirely modern invention, has never been more than a minority position in the post-Roman world, and has always been associated with projects directed towards anti-traditional and anti-constitutional accumulation of power in the hands of kings.

Nor did the Anonymous have an especially significant legacy on either the thought or practice of his day, and, in fact, the traditional Ausgustinian and Gelasian dualist doctrine remained hegemonic. Spurred by the waning (in Germany in particular) of Roman authority and, in its place, the simultaneous rise of feudalism and the spread of influence of an invigorated papal authority, the overlapping claims produced by a Roman conception of Christian dualism and a feudal notion of a single indivisible juridical relationship to ones liege produced a fundamental crisis between church and secular authorities that lasted for more than 100 years. The reason must be understood as systemic. Even with the reform movement emphasizing the separation, as long as bishops continued to exercise any of the combination of temporal and ecclesiastical powers they had accreted to themselves under feudalism, the crisis was—theoretically—irresolvable, at least in feudal terms. Yet, even with every theoretical impulse pointing in the direction of extremism, both sides remained always committed to dualism, in theory, and in practice.

The ultimate resolution to the investiture crisis was the product of the moment of the great weakness of the empire and produced the great Concordat agreed to and signed by the

emperor Henry V and Pope Calixtus II at the synod of Worms in 1122. The basis for this resolution was the expansion of the dualist doctrine into the feudal relationships between secular officials and bishops through the drawing of a dualist distinction between the spiritual and temporal offices of a bishop (see Tierney 1998: 74). There would henceforth be two legally distinct juridical identities in the person of the bishop. What is more, Henry also conceded the church the right to canonical election of bishops and gave up the emperor's claim to invest them with ring and staff. The Church, in return, conceded to the emperor the secular rulers the right to be present and to receive homage from the new bishop for the feudal lands of their churches.

This Concordat, and the new order it formalized, needs to be understood as an effectively world-historical turning point—as the moment of the ultimate triumph of dualism in northern Europe. It must equally be understood as the end point of the possibility of imperial theocracy—the possibility that the emperors might build a claim to either a non-dualist encompassing temporal authority, or a claim to exercise both forms of authority simultaneously. Without this expansion of dualism, no systematic or constitutional block existed to the increased growth and centralization of imperial power. With regards to the overall purposes of this essay, in conceding a recognition of dualism, imperial authority was renouncing any possible claim to precisely what modern's call sovereignty. Once again, no one knew this better than Bodin himself, since this relationship to church authority, after all, had been one of two reasons why he had argued that the Holy Roman Emperors had never been sovereign (the other was because their power was relative and paramount, as shall see later).

All of this raises one final point: The acceptance of this dispensation by the emperors and their successors suggests ultimately nothing so much as how fundamentally hegemonic dualism really was. Had the emperors had any claim to anything approaching modern

sovereignty (either in theory or in practice), they could never have conceded this dual jurisdiction within their own lands. This is especially true when one considers carefully the vast church holding of that era, but, in addition to those strictly within the organizational structure of the church (where canon law prevailed), it must recalled that this also applied to the lands of all the monastic order—sometimes amounting to almost quasi-states themselves, which were fully independent of the Roman Church and often maintained a charged relationship with local political questions. They were now recognized to be self-governing, with their own autonomous systems of justice for their members. That the emperors were never to repudiate this, even when once again ascendant, is thus one of the strongest arguments for the impossibility of sovereignty (in either thought or practice) before modern thought.

On Universal Temporal Authority,

Or on the Theocratic Idea of a Papal World Monarchy

With a formal check now placed on the emperors' power *vis-a-vis* the popes, the great question of the late 11th and early 12th centuries now became how far papal authority could be extended. At its heart were a series of specific questions contested between 1150 and 1250 by the Hohenstaufen dynasty of German emperors and a series of great and ascendant popes (at the level of formal constitutional legality): Did the emperor receive his imperial power from the pope? Could popes depose emperors? At its heart and limit point, however, was the question of whether popes could exercise temporal jurisdiction? And, once again, dualism would prove decisive.

This contest took place at two levels: First at the level of practical political conflict between, especially, the emperor Frederick Barbarossa and a series of great popes, including

Alexander III, Innocent II, Gregory IX and Innocent IV, and, second, at the level of legal disputation in the emergent universities. In both cases, the era was marked by the more overtly political quality of these disputes, as compared to earlier periods, and by strong new legalism, based on a reinvigoration of the Roman law. This is, then, the great Age of the Lawyers in which a revitalized study of Roman jurisprudence—associated initially with Irnerius (around 1100) and the law school at Bologna—recognized, and committed itself to the emulation of, the great sophistication and systematicity of that model. This Roman emphasis on law as a coherent body organized according to ordered deductions from rational principles (Tierney 1988: 97) would, in turn, influence every medieval political and religious institution—including, or perhaps especially, the Church.

At its base then, the twelfth century needs to be understood as a great moment of the legalization—and, more properly, Romanization—of the Church, led by a series of great lawyer popes themselves trained in the new Romanist system and at the new universities (Alexander III, Innocent III, Gregory IX, Innocent IV). This transition took place through institutional reforms at two closely related levels—the Church administrative machinery and the canon law—both of which were based on the Roman model. The Roman law presented Church reformers with a model of a much more rationalized, centralized and coherent system of organization, and in so doing it provided a model form—and perhaps even made necessary—the growth of Church . Consider, for example, that as an ordered system (as it has throughout history) the first effect of the Roman law model is to show up the decided lack, and so it has very often produced, as it did at this moment, a tendency to necessitate the full apparatus of the system. It is, therefore, extraordinarily difficult to borrow part of the system. Tierney, as an example, cites the example of new appeals procedures "borrowed from Roman law" which opened up appeals to Rome (98).

All of this led to a dramatic growth in the complexity and breadth of Church administrative machinery, much of which was based on the constitution and expansion of such Roman and Roman legal institutions, within the Church, as papal courts, judges and bureaucrats. The administrative structure of the Church was thus court-based and the basic recognized categories of Church administrative organization were those of Roman law.

The other great project of the age was the systematization and codification of the existing system of ecclesiastical law and Church canons. Once again, this had always been based in Roman law, but faced with the model of a sophisticated Roman law—and the contemporary flourishing of legal thinking. The great figure in this process is the great Bologna monk and lawyer Gratian who produced, in 1140, a massive compilation of the great traditional texts utilized in the traditional forms of Church disputation over the first thousand years of its existence. This book, called *Decretum*, which would henceforth serve as the basis for a newly constitutionally formalized, codified and universal (within the Church) canon law, organized, for the first time, these canons in an orderly and comprehensive collection, based on the *Corpus Juris*.

Two points of clarification need to be made on the new canon law, however. To begin, it is not possible to underestimate the Roman law element in this new law, despite the fact that it became the legal system for the non-temporal sphere. Two reasons, in particular, may clarify this argument. First, the new canon law codification and the administrative mechanisms must be understood as Church administrative tools first. The role of what moderns call region and spirituality had always had an attenuated role, when compared to questions of authority and jurisdiction, in the history of the Church, and the new legalism certainly re-emphasized this fact. Though counter intuitive to moderns, it was this Romanist legalism that would, over time, extend

itself increasingly into spiritual questions, not the reverse. Second, it must be stressed again how fundamentally and directly indebted the canon law was to the basic concepts, categories, definitions, structure and relationships underlying the Roman law—especially the sources of law (which assumed a republican and imperial form), subjects of law (the individual legal subject), inherent structural relationships (e.g. the public-private distinction), and the elementary logics of specific legal forms (e.g. of what contractual and property entailed). The Church (and the religious orders), it must be recalled, owned vast lands inhabited by innumerable people, contracted vast business interests and administered its own entirely independent and co-equal system of courts in which strictly temporal and material matters had always been heard.[106] The new canon law formalized this tradition, but it also re-emphasized the Romanness. Consider, for example, the implications of the manner in which the new law was organized and presented in text—laid out on in chapters and based on the elementary categorical presumptions of the Roman law, covering initially the same areas of law. The canon law thus becomes yet another source for the modern naturalization of Roman legal concepts as they came down to modernity. Canon law thus served as a great institution for the spread and naturalization of Roman law categories into new geographic areas, throughout communities. When moderns looked around themselves for confirmation of the naturalness or rationality of their legal practices the simultaneous appearance of these same forms in Church law served as a great source of favorable comparison.

What is more, it was also through the taking up of Roman categories that the great lawyer popes of that age enabled and enacted the greatest expansion of papal power in the history of that institution. Once again, the key text here is the *Decretum*, and, once again here, Gratian turned

[106] That the Church owned these lands by *law* and conducted its external business based on law (as opposed to some strictly divine categories of possession (one can imagine for example something like holy ground), is yet another reminder of the historical and conceptual priority of the temporal sphere. The Church thus had always carried on its relations with the temporal sphere in temporal terms.

to explicitly Roman ideas—analogizing the papal power for the first time to the power of the Roman emperors—to enact a new language capable of allowing a vast expansion of papal power, beyond anything that was then known. That this was positively a program for the supporters of the 12th century papacy can hardly be doubted. Gratian was the greatest lawyer of his age and at the center of the Church, and he certainly understood well the implications of his work. Thus, while the great imperial popes—Alexander III, Innocent III, Gregory IX, Innocent IV—are most famous to us today, the learned Gratian had already established, in a text much celebrated by contemporary medievalists for its sophistication and genius, the full precedential basis for that expansion. The *Decretum* thus must been understood as the great constitutional reorganization and refounding of the Church, on Roman legal grounds. Far from merely an arrangement of past practices or the codified basis for the future development of canon law, Gratian's work introduced a radically new legal definition of the papal authority as "supreme judge and legislator in all ecclesiastical affairs" (Tierney 1998: 98). The key move here is in claiming, for the first time, that the pope is to be understood through the definitively Roman and temporal categories of judge and legislator. Neither concept, whether de jure or de facto, had ever described earlier papal power, but the new language enabled the imperial popes to ultimately triumph over dissenters within the Church favoring a more decentralized structure. From the moment Gratian's text became canonical once could say the battle had been won by the imperial party. The greatest political import of this moment, however, was that the formation of the Roman law-based *Decretum* as the basis for Church law meant that each and every provision of the new law (and every analogy available through reference to Roman law scholarship at the great universities) already incorporated and referenced the presumption of the single imperial judge and legislator of Justinian age. Thus, the most prosaic daily usages in Church law would

henceforth serve as yet another great source for the naturalizations of both Roman legality and imperial authority.

Yet something else needs to be said before moving on to treat the details of this period, and that is that, as we shall see, even in expanding on the implications of this new form of papal authority, even the great imperial popes of that age never abandoned the doctrine of dualism in their continued conflict with the Hohenstaufen emperors. Even the most notorious popes of the age—including Innocent IV—never abandoned this.

For those not convinced that papal imperial authority was radically unconstitutional and counter to tradition and therefore needed to be created on some new ground, the great case is the first 12th c. incident in the conflict between the popes and the Hohenstaufen emperors. In that famous incident, Pope Hadrian IV—representing the imperial wing of the Church, now buttressed by the new canon law—had sought to extend papal power over the formal lordship over the emperors. Faced with a new and untested emperor, in the person of Frederick Barbarossa, Hadrian sent a deliberately vague letter in the hope that it would go unchallenged and in the process establish a precedent. The letter, read to the imperial Diet of Besancon in 1157, used deliberately obscure language which had not been part of the constitutional tradition. It read that the Church had conferred on Frederick the "emblem of the imperial crown" and expressed a desire, in the future, to bestow still greater "benefits" [*beneficium*] (105). The problematic term here is the later which generally meant favor or benefit (though it could also have a technical meaning as a fief). The constitutionally important implications of the Besancon crisis, for this study, stem from the fact that so great was the outrage at this novel claim that not only the imperial camp, but the assembled bishops of Germany, revolted against it and ultimately forced the pope conciliate. Obviously the claim that the emperor held his authority from the

popes in the manner of a fief could never have been acceptable to the emperors, but, perhaps more importantly, the mere claim to add anything new (beyond the mere fact of papal coronation in Rome) to the what the popes could constitutionally claim to confer on the emperor—even mere benefits or favors—was as yet unacceptable to not just the temporal authority but the majority of the Church (outside the emergent imperial papal wing), even as late as this. Against any claim that the papacy itself had had from time immemorial vast and unconstrained sovereign powers, the Besancon case reminds us of how drastically constrained (as well as broadly hegemonic) the traditional constitution of papal authority remained, even on the eve of its greatest expansion. A tiny number of traditional terms—established and elaborated through precedent as past practice—expressed exhaustively the terms through which papal and imperial authority could engage. Anything else, even (or perhaps one should say especially) the novel claim to confer favors and benefits, was strictly unconstitutional and *ultra vires*.

The expansion of papal authority thus proceeded piecemeal over the following century even as the extreme faction in the Church consolidated its control of the papacy. Indeed the next pope, Alexander III, was the former Cardinal Ronaldus was a distinguished canonist who had been the papal representative at Besancon and was the single most controversial candidate from the perspective of the emperor. Alexander's papacy was marked by a schism precipitated by a group of pro-imperial German bishops who named their own favorite candidate as an anti-pope. Frederick supported this claimant, and the conflict persisted to the point that Alexander excommunicated Frederick. Still, even here, this relationship was ultimately patched up and Frederick rejected the anti-pope. What is truly remarkable, however, is that with regard to the question of dualism Alexander must still be understood to have been a moderate pontiff, and who never made a general statements regarding a papal claim of temporal power. In other words, this

conflict took place in dualist terms, and even the power to excommunicate must be understood as a power recognized by all parties, Frederick as much as Alexander, as constitutional (and thus nothing less than the anti-thesis of a claim to secular power or sovereignty). Indeed, in and equally famous act, Alexander (in 1165) wrote a letter to Thomas Becket, Archbishop of Canterbury, quashing, on the basis of papal authority a temporal judgment that had come down against Becket (i.e. defending the ecclesiastical sphere against a temporal judgment), but he also urged him to seek a negotiated settlement and to repair relations with King Henry II in their great dispute (114). So too, Alexander's best known contribution to the canon law a decretal stating that ecclesiastical law did not assume that there exists a necessary, general right of appeal from temporal to ecclesiastical courts (114-115).

Within the Church, the contest between the expansionist and moderate parties took place in the form of debates between the great canon lawyers of the day, debates which at this moment took place through commentaries, based on a dialectical method, made on the *Decretum*. The most extreme of these lawyer-scholars (at the universities in Bologna, Paris, and Oxford), known collectively as the *Decretists*, sought to base an expansion of papal authority on a single canon from the new corpus (*Dist.* 22 c.1) which quoted a dubious paraphrase by Peter Damian (though it was wrongly attributed to Pope Nicholas II) of the canonical verse in St. Matthew quoting Christ's grant of apostolic authority to Peter and his descendants. Here the original language ("I will give you the keys of the kingdom of heaven and whatsoever though shall bind on earth it shall be bound in heaven," which for a millennium had been understood as the very basis of dualism) is re-rendered in the following words: Christ "conferred simultaneous on the blessed key-bearer of eternal life rights over a heavenly and an earthly empire" (119). The apparent

plain meaning of this language—which appeared for the first time in Gratian's text—to the effect that the pope might be thought the ultimate authority for both temporal and ecclesiastical spheres had never before this been Church doctrine, there was no record that Peter Damian had believed as much at the time, and modern scholars generally believe that this was intended to be nothing more than a paraphrase of Matthew. Yet its inclusion, as canonical, produced the greatest threat to dualism in the history of the Church.

This took place, initially through the writings of the Bologna canonist Rufinus who, around 1157, was the first to propose the new interpretation (117), and it reached its greatest expression in the writings of the great advocate of papal authority and Bologna canonist, Alanus. Both scholars, however, remain essentially dualist in critical, and ultimately determinative ways. Rufinus, for example, argued that the popes held supreme authority, both temporal and spiritual, but—confronted with the great legacy of dualism—he pulled back from this through a distinction he introduced between "authority" and "administration" (essentially de jure vs. de facto) (ibid.). He thus only claimed a kind of ultimate de jure temporal authority for the papacy, even as he renewed dualism at the level of practice. Similarly, in a commentary (c. 1202), Alanus also carried the implications of the plain reading of the Gratian canon to its logical extreme, arguing that the popes are the source of all legitimate authority, both temporal and spiritual. Yet, as with Rufinus, Alanus pulled back from the full implications of his claim. Instead, he quickly acceded to a kind of revised dualism, explicitly based on the classic distinction between the two swords, based on the fact that a pope could not retain or keep what he called the material sword (i.e. "dispense with the services of secular rulers altogether") because "the Lord divided the two swords" (118).

Yet even as this new interpretation–of the at least formal priority of papal authority even in the temporal sphere—opened the way for radically expansive claims of papal authority during the first half of the 13th c., the limits of this new phase must be emphasized. First, this period, during which dualism was at least potentially within danger of being eclipsed, was an extremely short window. It was, after all, only a half century after Alanus' intervention, in 1254, that the papacy of Innocent IV, the last and greatest of the imperial popes, ended. Second, in addition to the absolute opposition of the emperors to this program, one must not forget that an important and active tradition of opposition to the new interpretation continued to exist both within the Decretists specifically, and the Church more generally. Indeed, against any modern claim that papal authority would have seemed inevitable or natural to the writers of that age, the works of Rufinus and Alanus were each explicitly refuted by contemporaries, known to us, whose historicist and anti-sovereign counter-claims and analysis are quite brilliant. In particular, the French author of *Summa Et Est Sciendum* argued in the early1180s, against Rufinus, that popes could not have authority over emperors because there were "emperors before there were popes" and because emperors were chosen by "the people," not popes (120-121), and, indeed, two statements more directly opposed to modern political theological assumptions cannot be imagined. So too, the writer most associated with the opposition position in this period, the great Bologna canonist Huguccio, make clear that the traditional dualist doctrine remained canonical for the opposition (122-125).

The absolute high point of papal claims to authority within the temporal sphere is the first half of the 12th c. and, in particular, the papacies of two great lawyer popes, Innocent III (1198-1216) and Innocent IV (1243-54), who critics, since their own day, have accused of desiring to

set themselves up as "lord of the world."[107] Modern scholars, in turn, have described these projects as claims for, variously, world or universal papal monarchy, sovereignty, or theocracy. Yet, even as we remain skeptical of these claims and their claimants, we cannot allow ourselves to fail to see that (as a close readings of the documentary records for both suggest) their relatively extreme positions remained dualist, and therefore that the categories of monarchy, sovereignty and even theocracy are, both conceptually and historically, inapt.

Consider, first, the case of Innocent III, who builds his claims for papal authority almost entirely upon the reinterpretation of the Petrine mandate put forward by Rufinius and Alanus. Throughout Innocent's writings and sermons there are frequent references such as that the Lord "left to Peter not only the universal church but the whole world to govern" (in a letter to the patriarch of Constantinople (132) or that "Peter alone assumed the plenitude of power" (in a sermon (132)). From this he concluded that God had "instituted the two great dignities," but that the "royal power derives the splendor of its dignity from the pontifical authority" and is therefore "a lesser one" (letter to the prefect Acerbus and the nobles of Tuscany (132)). From this, as has just been said, Innocent has been accused, since his own day, of seeking to defend the idea of a theocratic papal world-monarchy. To the contrary, however, just as with Rufinius, Alanus, and Alexander III (to quote Tierney again):

> [Innocent III] always saw the need for two orders of government in Christian society, a priestly one and a royal one, and he never claimed that either order could be abolished or wholly absorbed by the other..[the extent of this claim, however, amounted to no more than that he] claimed that the pope held a unique position as head of both orders…because the pope alone exercised on earth the full powers of Christ, who had been both priest and king. (1988: 130)

[107] See church histories of Albert Hauck and Johannes Haller (in BT 127).

His was then, as we have seen before, a limited claim merely to a formal authority over the temporal authority, not a claim to be able to exercise or hold temporal power on earth. For this reason, distinguished modern scholars such as Maccarrone, Mochi Onory, Kempf, Tillman, and Tierney have argued that in papal-imperial constitutional matters he in fact advocated a "cautious dualism," not a theocratic doctrine of united temporal and spiritual power in the papacy (128).

This distinction is even more apparent in the writings of his successor, Innocent IV, who is always understood as the most apparently extreme of the imperial popes. Innocent himself was one of the great lawyers of his day, he had lectured at Bologna and was among the foremost exponents of the contemporary mid-13th century school of canon disputation called the *Decretalists*, after the latest compilation of the canon law (called the *Decretales*) which had been promulgated in 1234. Again here his arguments are similar to those of Innocent III in his acceptance of dualism with the new prioritization of the papal power on the same basis that papal and regal power had been inherent in the papacy since Christ embodied both. Yet Innocent IV is even clearer and more direct in his acknowledgment of the reasons why this claim must be necessarily limited and the necessary form that limit must therefore take, as in the text On *Decretales* (c. 1250), in which papal temporal power is acknowledge to be "*de jure* though not de *facto"* (156).

Indeed, a close reading of Innocent's writings suggests some very surprising points, to modern ears at least. In particular, in a discussion of the canon *Licet* [No. 79] (again c. 1250), Innocent shows in his thought a surprising but sophisticated historicism

as the base of his arguments for papal power. There, in a discussion of the origins of political authority deeply indebted to that of the Roman law tradition, Innocent elaborated an account of three distinct stages in the development of papal authority in which, as Tierney nicely describes, papal temporal power is "at first merely 'potential' and that it became 'actual' only over the course of the centuries as different princes acknowledged the temporal authority of the popes and submitted to it." (151-2). Even the most extreme of the so-called imperial popes, then, clearly understood a papal claim to temporal power as something that had never existed historically in practice and something which had to be based on actual claims—crucially legalist and Roman in their terms—if it was to acquire it through historical accretions of power. In other words, this must be understood not a claim to a timeless or Biblically based authority, but as a historically specific project of the papacy.

Perhaps the crucial fact that makes this point the clearest is Innocent's own explicit recognition that even this limited papal claim to potential and formal temporal authority was still further limited to jurisdictional questions involving papal relations with the emperor only, not kings or other holders of temporal authority (again from his same discussion of *Licet* [No. 79] (c. 1250)). This, as he understood it, was the product of the papacy's understanding of its own traditions and precedents which claimed that Charlemagne's acceptance of the crown from Pope Leo III in the year 800 had established a specific constitutional arrangement in their relations with the emperors, but that this could not be applied to kings. It was a recognition, too, of the historical particularity and specificity of pre-modern power, such that, even in the greatest moment

of the expansion of papal power vis-à-vis the emperors, these greatest of the imperial popes understood themselves to be strictly limited, by historical precedent.

Conclusion: On the Historical Particularity of Pre-Modern Power

So-called common sense readings of the claims to temporal power made by the imperial popes have encouraged generations of modern scholars to view the 13th c. as the world-historical moment of the ideological triumph of a claim to exercise papal *sovereignty* (or *monarchy*),and therefore as a crucial step moment in the evolution of sovereignty. Recently, for example, Jean Beth Elshtain's book, *Sovereignty: God, State, and Self* (2005), which itself sets out to historicize sovereignty and to critique the implication of the taking up of the idea of sovereignty in thinking about religion and morality, as well as politics, nevertheless falls back on the use of the term sovereignty in its discussions of pre-modernist thought back to the classical era. As a result, Elshtain describes the projects of Popes Innocent III and Innocent IV as "a grand declaration of papal sovereignty and supremacy" and a claim to be "de jure the universal monarch" (48). In fact, neither the term sovereignty, nor monarchy, is adequate as a description of this project, much less its materialization in constitutional practice. What is more, in so doing she naturalizes sovereignty as effectively a trans-historical and trans-cultural institution, glosses over the difference between sovereign and non-sovereign institutions, and undermines even those currents of modernist thought which have sought to keep distinct vocabularies for political and non-political forms of authority.

All this reminds us of how of the limits of the project of studying something called political theory or political thought.[108] Influenced by this distinctly modern idea, when one reads the great writers for the most extreme claims of papal authority, Alanus, Hostiensis, Innocent IV (and this was certainly as true of the Anonymous and the extreme claims to Norman kingly authority), one needs to be reminded that study of *what key thinkers have thought politically* is likely to skew heavily to extremism, as the poles necessarily stand in as limit points for a spectrum of thought. Any scholarly approach to the political then is bankrupt which does not take account of the relationship of thought to actual constitutional practice, that fails to prioritize the dominant understandings of a moment, or that fails to elaborate the dominant traditions, institutions, structures, and forms of pedagogy that produced and enabled the thinking of a moment. Most of the figures read by modern scholars represent extreme views which never came near to being determinative for contemporary traditions of thought—much less actual constitutional practice, material or formal. Indeed, to the extent that they do ever become determinative, for many it is only generations later when these individual texts come to stand in for past practice. Political thought and what key thinkers have thought politically, then, will be crucial to this project, but only in so far as they view these as parts of traditions and practices.

[108] If one wants to build on and develop a tradition of a thinking comparatively, philosophically and non-contextually about political texts , there will certainly be a place for that in the universities, but it ought to be recognized by those who are not engaged in that work as a very specific tradition, and not as claimant to be a Queen political science.

CONCLUSION:
Cosmopolitan Law and the Return of Political Tradition

> *Tantae molis erat*…["So great was the effort required…]
>
> (Virgil 1990: bk. I, line 33)
>
> …to unleash the 'eternal natural laws'…
>
> (Marx 1970: 9

If the argument made above is that the political is going global, how then should we as anthropologists understand the concept of the political? At the core of this thesis is to attempt to construct an anthropologically and politically sensitive account of the political which rejects the various presumptions of naturalness, universality, instrumentality, rationality and progress essential to the modern understanding. The goal is to re-establish this form of community—and indeed this was how it was understood before political modernity—as what recent scholarship has called local, provincial, and historically-specific, but it is also to call into question the very modernity of political modernity itself, including both its triumphal claims of its inherent progressiveness and of its own hegemonic success.

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Both the direction of this work and the answers given are deeply indebted to the now well established historical, Foucauldian, and postcolonial turns in critical anthropological scholarship, which have—through their historicizations of the imposition of modern political categories through colonial rule and Orientalist and modernist assumptions in scholarship—done much to

call into question the naturalization so crucial to the modern political and legal vocabulary (one must especially think of the work of Talal Asad, Bernard Cohn, Nicholas Dirks, Mahmood Mamdani, Partha Chatterjee, Brinkley Messick, Timothy Mitchell, and David Scott, what we should perhaps now call the Columbia school of postcolonial political history).[109] Unfortunately, the implications of this work, which includes—though it has not yet been adequately recognized—some of the most important contributions to political thought in the post-War era, have remained largely provisional for scholarship on the development of political and legal traditions of the metropole, and we await still a political theory and vocabulary which would allow us to think outside of the terms of the project of political modernity (and especially its great sovereignization, subjectification and positivization of political life), much less to truly understand the political as historically contingent.

The great and invaluable exception to this is the work of Hannah Arendt, which gestures at the possibility of a political vocabulary which both refuses the modern project's redefinition of polis-as-sovereign and which recognizes political institutions, through its insistence on the continued relevance of the pre-modern form of the political, as both fundamentally historically specific and yet still the single great structurating fact in world history (esp. Arendt 1990 1998).[110] This work builds off of Arendt's provocation, and is an attempt to construct a general

[109] The texts referred to will be self evident Asad (1972, 1988, 1993, 2003a, 2003b), Cohn (1985, 1989, 1990), Cohn and Dirks (1988), Dirks (1987, 2001a, 2001b, 2006), Mitchell (1991, 2002), Scott (1992, 1994, 1996, 1999, 2003, 2004, 2006), Chatterjee (1993, 2004, 2005), Mamdani (1996a, 1996b, 1998a, 1998b, 2001, 2009), and Messick (1996), with the exception of Asad's 1972 *Man* essay on Hobbesian assumptions in anthropology: *"*Market Model, Class Structure and Consent: A Reconsideration of Swat Political Organization.*"* Other anthropologists and related scholars whose work would be essential to any list would be Mundy (1995), Mundy and Smith (2007) and Chanock (1989, 1998).

[110] Arendt writes of her work that: "It was written out of the conviction that it should be possible to discover the hidden mechanics by which all traditional elements of our political and spiritual world were dissolved into a conglomeration where everything seems to have less specific value, and has become unrecognizable for human comprehension, unusable for human purposes" (Arendt 2004: xxvi).

theory of the concept of *the political*, in which the political (and in particular its most crucial categories: public-private, citizenship, the polis-republic and the law) can be understood once and for all—against modern political pedagogy's iniquitous naturalization of the Aristotelian dictum that man is by nature a political animal—as the product of *fortuna*, tradition, political judgment, local history, labor, conflict between political classes, and force.

Crucial to this theorization is an understanding, building here also off Mamdani's (1996) invaluable discussions on the structurating implications of legal identities, that the internal logics inherent in the concept of the political are as basic and trans-historically structurating as economic forms, and in a manner that imbricates every institution and individual. (Arendt 1996). The lesson of this—against end of history and democratic peace liberalisms—is that these political forms cannot be easily generalized to communities operating on different internal logics (e.g. traditional, communal, religious, tribal, but also state-based international law) without profound implications involving a properly *revolutionary* internal reorganization (e.g. ancient Athens, ancient Rome, the first French republic, the late 19th c. sovereignization of the Holy Roman Empire (through the laws on mediatization and secularization) after its defeat by Napoleon, and now the creation of cosmopolitan law).

The most recent and also least known of these is the mediatization and secularization of the Holy Roman Empire (Bryce 1866). In the period between 1803 and 1806, the vast majority of traditional entities and bodies constituting the Empire were mediatized by legislation enacted under pressure from Napoleon. Most observers understand this as a process of smaller "states" being swallowed up by larger ones, but, technically, the process of implies the losing one's imperial immediacy (one's direct relationship to the Empire, called *Reichsunmittelbarkeit* (e.g. as in feudal relations)). In this sense, mediatization and secularization involve what one might call

the "sovereignization" of the complex, overlapping and non-rationalized traditional relations of the Holy Roman Empire in which different types of entities (cities, ecclesiastical bodies, monasteries, towns, and numerous feudal institutions of local rule). The process involved the rationalization and centralization of power, but it also involves the redefinition of traditional relations in the new master terms of "sovereign power" which now alone describes relationships. Thus sovereignty—and the project of political modernity—does not come to most of central Europe until the 19th c.

In contrast to our lost modern tradition, the *classical political tradition* understood (from Aristotle, Polybius, Cicero, and Livy to Machiavelli and the founders of the US constitution), the choice of a single republican law for a community is radically incompatible with communal or religious-based forms of community, and, as a result, the republican form involves the necessity of *force* to break the traditional orders. Contrast, for example, the modern view with Jefferson's exposition of the classical republican view, in his famous letter to Adams of 1823, that to obtain the goal of universal republicanism "rivers of blood must yet flow, and years of desolation pass over: yet the object is worth rivers of blood and years of desolation" (Jefferson 1988). It is this complex classical and republican understanding of the fraught relationship between power and the possibilities of political life that modern thought elides—liberalism through its naturalization of modern democracy, progress and consensus, and classical modern and recent critical thought (effectively the new dominant paradigm in critical and critical anthropological scholarship, through the turn to Agamben, Benjamin, and Schmitt) through its reduction of political community in the language of mere power.

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To understand the specific pre-modern and local legacies inherent in our concept of the political, one ought to begin from the understanding that law (as the main currents of modernist thought have understood it)—as a single set of rules applicable to all citizens (though of course not necessarily all persons) in the same manner—could have historically originated only in a republican form of community of citizens and that this way of life must be understood as the product of historically-specific circumstances. Indeed, recent scholarship—based on literary, historical, archeological evidence, and especially the discovery in the late 19th c. of what is certainly the single most important document for the consideration of political and constitutional history, Aristotle's *The Constitution of the Athenians* (1996)—has done much to bring this fact to the forefront of scholarship across many fields. The last of these is Aristotle's sophisticated and in depth account (according to general consensus, though some believe it was the product of one of his unknown students) of the eleven constitutions that proceeded that of his day—an account which makes it clear that Aristotle himself never believed that man was, by something like modern human nature, a political animal.

Tragically, the very beginning of the text has been lost, but its account shows the Mediterranean polis—as *political* community—was itself only possible through a number of historically-specific prerequisites. The first of these was the product of what Machiavelli called *fortuna,* a great historical accident, but one with important political-structural consequences. In the Greek context, as the work of Jean-Pierre Vernant (and others based on the most important findings of 20th c. archeological scholarship) has stressed, the complete collapse and loss, in the period of the so called Greek Dark Ages (approximately 11th-9th c. BC), of an institution moderns call kingship (the figure of the *wanax,* associated with Crete and Mycenae), as well as writing and much of the traditions, culture and external connections of the earlier communities (1982: 32-

37). Left in its wake, as the highest traditional roles, were only the figures of the *basileus*, the *oikos* (the household and the ancient family, called incorrectly aristocracy, nobility, or *genos*), and the village community, based on a right of assembly—none of which exercised anything approaching dominance, much less subjecting power or sovereignty.

Debates have proliferated in numerous disciplines as to both the exact terms defining the relations between these roles, and especially whether the *basileus* can or should be understood through the terms king or sovereign (e.g. within relatively recent classical studies, as Thalmann nice summarizes, Thalman, Rihll, Geddes, Andreev, Drews, Runciman, and de Polignac argue in opposition to the king/sovereign thesis, while Carlier, Starr, Finley, Hoffman, Murray, Luce, van Wees, Farron and Rose argue for it (Thalmann 1998: 243-27, esp. 254 fn. 42). However, only the grossest kind of systematic anachronism has made it seem acceptable to name and comprehend the *basileus* through the same term as modern sovereign kingship, when, in peace time, as the *Iliad* shows us in its famous description of the Assembly at Ithaca, there were multiple *basileis* within a community such as Ithaca, without a hierarchy or any right to exercise power over (much less subject) each other or the traditional institutions (Homer 1990: 2.1-259). What role and status they had was primarily the result of holding a monopoly on religious ceremonies within a lineage, or proto-legal, as when disputants might mutually agreed to commit disputes to them for resolution. Quite simply, whether in relation to colonies or the metropole, nothing has done more to disable political thought and practice than the near universal tendency (no discipline escapes it) to comprehend traditional roles through the naturalization of the rationalized, juristic and subjecting concept of sovereignty and sovereign monarchy.

Out of this Dark Ages sovereign-less, polis-less and tradition-shallow context emerged, over the course of several generations, the proto-polis through the slow accretion of the priority

of the public sphere at the expense of the *oikos* and the other traditional roles. This process, of course, is more or less familiar to us through the 19th c. writings of Morgan (1978), Fustel du Coulanges (1980), Maine (2003), and others, which (whatever its inadequacy) at least thought the emergence of the form the political something that required an explanation. Both the difficulty and slowness of this process has been emphasized especially nicely by the historian Michael Gagarin in the importance he places on the fact that the first reference to an "Athenian" happens only with a single use in Draco's laws of 621 BC (after at least two centuries of developments), and the term would not have been possible before that time (1986:80). Even then, however, the term is only used obliquely and negatively to refer a term for which there was no name, the collective of the traditional Athenian roles and statuses (*genos*, etc.) that made up pre-public life (lines 26-29)—since there could as yet be no single status or name applicable to every person equally and in the same manner (e.g. as citizens or individuals).

It must be underscored here, however, that his process could never have been one of simple progress or rational development of a community, and, indeed, as *The Constitution of the Athenians* shows, in Athens the polis-as-republic was only possible after centuries of civil strife (including large scale intra communal violence, dispossession, and expulsions) between contending factions, and which took place primarily along two deep structurating lines of class cleavage (1996). The first of these was the conflict between those who represented the traditional institutions and the advocates for the expansion and opening of power and participation possible only through the emerging public sphere and the new ethics of *isonomia* (political equality). Indeed the first coherent passage in Aristotle's text begins with the words (according to the Rackham translation):

> Afterwards it came about that a party quarrel took place between the notables and the multitude that lasted a long time (Ch. 2).

While later, of the moment leading up to Solon's *politea* (constitution), the text continues:

> Such being the system in the constitution, and the many being enslaved to the few, the people rose against the notables. The party struggle being violent and the parties remaining arrayed in opposition to one another for a long time (Ch. 5).

Modern scholarship and translations have tended misinterpret this to read this latter group as "democratic" (thus naturalizing the entire preliminary process of the formation of the *polis* as a necessary prerequisite to the development of democratic values), or it has tended to naturalize ideal type modern or medieval social and economic class divisions (e.g. rich-poor, bourgeoisie-proletariat, haves-have-nots, elites-mass/multitude, aristocracy-people, free-slave) which could not have been possible before the triumph of the *polis*. Nor can one escape this confusion through the use of specialized literatures, which often suffers from a lack of historical perspective based on close study of other periods. Specialists, too, have modern eyes, and so we cannot forget that the great erudition of G.E.M. de Ste. Croix (e.g. 1954) is explicitly Marxist, and that of Moses Finley (e.g. 1977, 1985) openly Weberian. What is more, the modern search for truth, common to all disciplines, has largely viewed the traditions as obfuscations to be unmasked. To avoid anachronism, it would be more correct to say that it was a proto-*polis* (i.e. proto-public sphere). As the writers of the classical republican tradition understood, the incredible growth in this period of the population and of new wealth doomed the traditional system, which (as Maine reminds us) recognized one almost exclusively through ones place in the traditional lineages. They understood however that this would necessarily be a time of deep

dissention and violence, as the entrenched powers sought to defend their traditional privileges in the face of what was an existential challenge to their way of life.

The second and closely related systemic source of violence and dispossession was the subsequent question of how much this breaking of tradition would open the old system and what would replace it. As the Greeks tradition understood so well, the breakdown of tradition necessary to the creation of a polis also necessarily produced for the first time—as two sides of the same coin—the possibility of radically non-traditional claims to power (this is what the concept of tyranny stands for both conceptually and historically) impossible within the terms of the traditional lineages. For this reason, it is not incidental that this period is associated with tyranny, especially from the failure of Cylon's tyranny (c. 632 BC) which produced the first formal institutions of the polis in the form of Draco's written laws, through Solon's *politea* (c. 594 BC) down to the period of tyranny under the Peisistratids (546-510 BC) which ended with Cleisthenes *politea* (after 508 BC).

Indeed, as Aristotle reports, so recalcitrant were the Athenians in their commitments to their communal and factional identities, that the *polis* (as *res publica*) only truly becomes possible after Cleisthenes had been named to the formally unconstitutional position of *nomothetes* (translated invariably as lawmaker, though "founder" is closer to its political implication) and had radically reorganized the community. Two key factors need to be underlined to understand this process. The first has to do with how we should understand the form of authority which could claim for itself the right to change the *politea* (or constitution) of a community—which here more than anywhere must be understood in Aristotle's sense as the essential existential essence of a people's existence—in a context where the existence of such a community had not yet been formalized, and in which the idea of a general law for all, and

especially of lawmaking as legislation, had no basis in the traditional institutions and was never a normal structure of government.

This helps us to understand what was at stake for the Greek political tradition that the initial act of lawmaking was almost always understood to have been done by outsiders (the first says Aristotle was "a certain shepherd named Zaleucus" for Locri, but this is true as well of Draco, Lycurgus, Solon, and Charondas in Sicily)—often foreigners (Demonax for Cyrene, Andromadas for Thracian Chalcis, and Philolaus for Thebes)—who served as essentially benevolent tyrants on behalf of the forces of the emerging polis in time of civic turmoil (Gagarin 1986: 58-60). This pattern was established, first, with new colonies, and then increasingly for the emerging metropolitan *poleis* themselves, in precisely the same way the fullest early expression of the republican principle in modern European history would be in the North American colonies.

The second essential element to understanding the form the political has taken has to do with the form of the new *politea* Cleisthenes created (on Cleisthenes see gen. Vernant 1982; Leveque and Vidal-Naquet 1996; Castoriadis 1996; Chatelet 1962). As Aristotle describes in *The Politics*:

> [D]ifferent and more numerous tribes and clans should be created, private clubs should be absorbed into a few public ones, and every device should be used to mix everyone together as much as possible and break up their previous associations (Aristotle 1998: 1319b23-26).

This prehistory, then, is what is elided in the modern notion of the *polis*—the political—as a natural and universal institution.

Why was this necessary? In a future project I hope to be able to treat in detail the development of the political in the early polis, but here I am not making any claim to accurately describe positively what pre-polis condition of the people who would come to be known as Athenians. One suspects, however, that we would not be wrong to say that one found various overlapping forms of inter-communal relations based on traditional relations (bearing some relationship to our understandings of kinship, status, class, caste, and religion), but without any sense of a single public sphere, a rationalized hierarchy of abstract power relations, one single law for all, or anything approaching a single homogenous category of citizen. Whatever the exact terms of the pre-polis community were, because these older identifications deeply structured every aspect of a people's lives (in a way modern people have trouble comprehending, though it could never have been anything near determinative in the way reactionary modern projects of neo-traditionalism would have it), it could never have been enough for a ruler or government (no matter how powerful) to simply proclaim the new priority of the public sphere, nor even for a majority to desire it.

This is because the extant traditional institutions (e.g. obligations to family, *oikos*, or region), which in the pre-polis period gave authority to certain things and not others, continued to exist largely undiminished as the main sources for determining rights and obligations. Indeed, for a large minority at least (including many of the powerful families), they had a clear priority over the new public institutions. Nor is the territorial aspect, as is often suggested, the key to understanding the origin of the *polis*, though territorial representation played a part in the new program in the form of the new *deme*. However broad the support for the ideology of the *polis* may have been before Cleisthenes, people from the same traditional associations (e.g. tribe, house or region) could still make common cause under a territorial system. In other words,

citizens could—and did—unite on the basis of the traditional relationships, continue to represent their established interests first and foremost through the traditional system, and, in so doing, deny the priority of the emerging public sphere.[111]

So, while it had been known since at least the time of Draco (among those most excluded from representation by the traditional forms) that the priority of the public sphere would require a revolutionary reorganization of both what could constitute authority within the community and the form that this authority would take, this, variously, was what the creation and the writing of law meant.[112] As Aristotle relates it, the genius of Cleisthenes' *politea* program was twofold. First, it was based on the recognition that to break the priority of the traditional institutions would require more than a majority or the one-time creation of an ideal constitution (i.e. more than any reform program could hope to actuate), it would require an effectively universal commitment the priority of the public sphere. It was thus understood that to accomplish this with any degree of permanence (in a context of open conflict) would require the re-organization of the constitution in such a way that each citizen's political rights and obligations would in the future run—not just possibly, but in fact—counter to those of his traditional interests: "[D]ividing all citizens…with the aim of mixing them together," as Aristotle says (1996: 226)

This is what was meant by the reformulation of the tribes (*phylae*), the name for the ultimate jurisdictional community in which each citizen participated, in entirely novel terms not in keeping with any previous division, and, instead, including in each an equal number of

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[111] The public [as *polis* and *politea*] is obviously an ancient Greek category, but Arendt adopts the modern term private to refer to what she quite correctly understood as the *oikos*, representing the traditional Athenian family and household, and indeed the whole traditional form of life. In my opinion, Arendt would have been better off (given the tremendous import of the concept of the private and privacy for modern life) naming this division as the priority of the public to the non-public.

[112] In the *Politics*, Aristotle specifically describes the excluded, who benefited from the Cleisthenic program, as illegitimate children and those with only one citizen parent, who were excluded from membership in the traditional institutions (1998: 182).

representatives of the dominant traditional cleavages. Moreover, because one of the great traditional cleavages (between city, coast and inland) took the form of a territorial division, the most basic unit or division of the new *politea* (the *deme*) (associated in modern scholarship the territorial understanding of the political) could not take the form of a territorial representation, because to do so would allow traditional cleavages to endure through mere contiguity of residence. Instead, in order to ensure the long term survival of the new re-division and mixing, (political) *deme* membership was determined by means of rules of descent (266). Lest there be any doubt about the depth and systematicity of the new program, citizens were now banned from using their traditional patronymics and were required to take instead the newly created name of their *deme* (226).[113] Only in such a context—the product of *fortuna*, history, and the imposition of a revolutionary reorganization of the community—could a full-fledged *political* community become possible, marked by the public-private distinction and one law for every citizen. To paraphrase Marx paraphrasing Virgil, "so great was the effort required" (Virgil 1990: Bk. I, line 33) to "unleash the 'eternal natural laws'" (Marx 1970: 927) of the political.

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One final note ought to be added, however. Though clearly revolutionary, this must be understood as, in the purest sense, a political revolution, which differs from more total social and economic forms of revolution (from Platonic to the present) in that it does not reorganize every aspect of communal relations but in fact retains the traditional ways of life, though now as private. If one is perhaps surprised to see even Aristotle—the great man of the middle—sympathetic to the Cleisthenic program, it is clear it relates to this fact that it "left the citizens free to belong to clan groups, and phratries, and hold priesthoods in the traditional way" (1996:

[113] Prior to Cleisthenes *politea* citizenship (used here anachronistically) was determined by membership in a phratry, or family group. Cleisthenes established 139 demes with basic civil, religious and military functions. Each deme was included with two others in a trittyes (Aristotle 1996: 226).

226). It is this possibility of the retention of the traditional-as-private, every bit as much as in its revolutionary political equality, that, as Arendt insists, is the basis for the world-historical success of the concept of the political. It is also important to understand, though its critics have always insisted otherwise (e.g. Constant, Fustel du Coulanges), the new Cleisthenic *politea* or constitution (and indeed the whole Athenian political tradition) were marked for nothing so much as their limits, in political terms. This was not a comprehensive legal code applying to every aspect of life; rather, it was predominantly confined to questions of what we would think of as the definition of citizenship (i.e. access to the institutions of the *polis*), and most of the prosaic legal provisions (from criminal law to inheritance) only came into existence as specific and constrained responses to the recalcitrance of the traditional forms.

This basic Athenian account of law, and the account of the political that lay behind it, was to become the explicit basis for the Roman understanding (familiar to us from Polybius, Livy and Machiavelli) of the historical exceptionality and growth the of the Universal City, as the products of its ability to open (and generalize) its laws to include new communities and new people, as citizens, where others could not. If it is true that they viewed the Athenians as the iconic example of what it meant to fail to open one's citizenship sufficiently, they nonetheless accepted, tout court, that this was the true end and measure for a political community. The related modern idea of Rome as the *universal republic* (which presumes a republic without substantive or local content), while its importance cannot be overestimated, is strictly speaking the end of the political (e.g. see Arendt on "world politics" 1990: 53). Instead, it must be supplemented with an account of at least two deeply historically-specific elements of this potentially universal law and about which the Roman writers were very much aware.

First, as Arendt shows so brilliantly in *On Revolution*, it must not be forgotten that the recognized Roman institution which could initially create—as authority—the wholesale taking up of Greek political pedagogy (based primarily on the authority of Plato) and republican practice was its comprehension through some preexisting traditional Roman form of authority (1990). The Roman concept of tradition *(auctoritas)*, famous from the writings of Cicero and Livy, expresses that understanding of the history of the Roman city—a theory of history, if you will—in which its' founding represents an originary principle which subsequent generations are to simultaneously conserve and renew (201). Given this, it was natural for the Romans to follow the authority of the Greek traditions in their political thought and practice because it embodied and took the form of their great theory of history and authority. In other words, the Romans followed traditions, not because it was convenient or rational or even the way things had been done, but rather it had authority for them because it followed the specific logic of their traditions. It is these traditions, which preceded institutionalization in law and which represent a much broader Roman cultural normative system, that have outlived its community, entrenched in the very marrow of the concept of law (esp. the authority of precedent) handed down the present.

Second, the development of the Roman republic and its laws must be understood within the light of Henry Maine's deeply misunderstood but crucially valuable perspectives on Roman and European legal history. Maine, though he is today largely read as a kind of proto sociologist, was first and foremost a Romanist historian of law (deeply influenced by Gibbon and Savigny, in particular), and, if one reads his less familiar writings (which deal with public law issues such as criminal law (2003[1861]: esp. ch. X), modern sovereignty (2003[1875]: esp. chs. 12-13), and international law (2003[1883]), the clearly stated initial purpose guiding his work was to call into question the presumptions of the newly emergent legal modernists thinkers (esp. Hobbes,

Bentham and Austin), in precisely the moment before their thought would become hegemonic in the Anglo-American world, and ultimately beyond.

As such (if we can bracket for a moment his relationship to the naturalization and form of the colonial project in India), Maine's famous theory of "status to contract" was not (at least initially or in its finest expositions) intended as a triumphal account of modern contract; rather, Maine clearly sees his as a historicist retort to the new positivist legality, which viewed contract (or wills, or sovereignty, or criminal law) as either universal, or as purely modern and abstracted institutions (see gen. 2003[1861]. More than this, his intervention was a closely laid out series of genealogies showing that the key institutions of Roman law were never initially the product of rationalism, modern style reformism through legislation, straight line evolution, or created out of whole cloth. Instead, Maine shows them to have been—because of preexisting (and deeply socially embedded) laws and traditional forms of authority—the product of the slow accretion of importance in pre-existing legal forms (e.g. *mancipium* or mancipation), which were usually initially obscure or unimportant and had little to do the purpose to which they were ultimately put. Put simply, the genius of Maine's argument here is the opposite of how it has been understood: Modernity (here modern law) is understood to be neither a homogenous, general process, nor a rational or universal quality. It is seen, rather, as a historically specific relationship of the relative opening up of specific existing local legal traditions for the purpose of superseding other specific local legal traditions. Read this way, legal modernity was only ever a relative institution, and post-Roman law (so long as it retains its key categories, both public and private: law, citizen, contract, will, etc…) can never wholly escape—no matter how much of the earth it covers—its pre-modern origins.

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Modern legal positivists look at the world and at history (especially Athens and Roman) and seeing similarities in law understand them as the product of universal human nature or necessary rationalist solutions to timeless problems. Modern natural lawyers see the same similarities and attribute them to a universal ethical content. If this account of the political is correct, what they are in fact seeing—in a manner analogous to Alasdair MacIntyre's account of the fate of Aristotelian ethics in the wake of the Enlightenment—is the corpus of Roman law coming down to them through the residuum of their broken traditions (MacIntyre 2002). To comprehend this clearly, as we shall see in, it will be necessary to radically reformulate our sense of the form that post-Roman history takes, as well as the provocations and targets that informed the modern legal project. Against the until recently hegemonic account of the Dark Ages as a fundamental and unbridgeable rupture in history, a flood of recent scholarship has sought to show the remarkable strength and continuity of Roman political traditions and institutions within the Mediterranean world.

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Before elucidating that case, a preliminary note will be necessary to situate this work. Certainly, it will already be clear this position shares some terrain with the very provocative recent florescence of critiques of secularism, much of it influenced by the invaluable work of Talal Asad (2003), in both critical (Anidjar 2006, 2009; Brown 2010) and postcolonial anthropological scholarship (Mahmood 2006, 2008, 2009). In that scholarship, too, a claim is being made about the inherently pre-modern (but there Christian) character of modern political and legal categories. Unfortunately, however, this work has remained insufficiently attuned to the full implications of two theoretical movements on which it often relies for source material. The first of these, and the most dangerous, is the resuscitation of the avowedly rightist political

theological theories of the early Schmitt (1985[1922]), Kantorowicz (1957), Dumezil (1988), and others, who had utilized it to assert the timelessness of the concept of the sovereign and leader. Indeed, Schmitt's own later work on the concept of *nomos* effectively refutes his earlier position that sovereignty is the essence of political life with an account of *nomos* as the historically-specific, trans-historical, and structurating essence of a community (2003[1950]. In addition, this literature also risks becoming too comfortable with various undertheorized tendencies in scholarship to comprehend something called "religion" too naturally as the primordial condition of humanity, as well as to view as bright line binary between tradition (as religion) and modern (as secular) (e.g. from Constant (2002) and Fustel (1980) to Walzer (1965) and Taylor (2005, 2007).[114] To use Asad's own critique of Geertz (1993), it was the western Catholic Church, never religion, which was determinative for the post-Roman world. What is more, if Asad himself is much too careful a thinker to ever suggest that there is only single genealogy of secularism, many who invoke his work have not been so meticulous in their reserve. Neither sovereignty, nor political power, can be comprehended as a derivation from Christian concepts. If there is any pre-modern legacy shaping modern political thought, it is the legacy of the Roman system conceptual system, and this was built on a commitment to the priority of a deeply secular notion of the public sphere. In fact, as we shall see later, it was classical political concepts that again and again determined church doctrine throughout history—from Paul's acceptance of classical public-private dualism in the command to give to Caesar what is Caesars, to the great tradition defining synthesis of classical and church ideas by the great Ciceronian Augustine, to the medieval reorganization of the church and its doctrine through the adoption of canon law (a system based on and incorporating every aspect of the Roman law system).

[114] Within political history, Pocock makes this same criticism against Walzer (2003: 46, 336-339, 346).

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It was these same Roman traditions, as the invaluable work of Quentin Skinner (2000, 2001) and J.G.A. Pocock (1987, 2003) have done so much to show, that formed the real object of the interventions of Hobbes and Bodin, which took place against a background of the great Renaissance and early modern florescence of republican ideas and institutions. In this context, Machiavelli's brilliant summation and refounding of the Roman tradition, his *Discourse on Livy*, was everywhere the most important political text of the day, and the republican form of community was being adopted for the first time in northern Europe, with Holland and the English Commonwealth. The alternative genealogies worked out here suggest that we ought, rather, view *political modernity* as a *project*, in Alasdair MacIntyre's sense (2002), and, re-read in this light, it is clear that its founders, Bodin and Hobbes, both explicitly sought to create a new political vocabulary precisely in order to break the dominant political and legal traditions of their day. Indeed, both acknowledged as much, with specific reference made to the four great extant classical traditions of reading and pedagogy, based variously on the authority of the classical republican writers (esp. Cicero), Justinian's *Corpus Juris* (Roman law), the Roman historians (esp. Polybius and Livy), and the writings of the Aristotelian corpus. To fully accomplish this rupture, it was logically necessary—and this is what the concept of the state of nature accomplishes—to create an entirely new set of terms for both establishing authority and understanding political life, in terms which had no basis in, or reference to, the extant traditions. Both the new forms of authority which define political modernity—(human) nature—and the new master term (power), which would now be used to describe every political community across time and space, are non-traditional concepts, which had played no role in two millennia of political history in the classical or post-Roman world.

If it is hard to overstate the success of this project to rupture tradition, nonetheless, in their own positive theorizations, especially of law, both Bodin and Hobbes largely brought back in the common sense political and legal thought and practice of their day, though now re-rationalized in modern terms. As a result, in manner directly analogous to MacIntyre's account of the history of ethics, pre-modern forms continue to exist as relatively ordered system through various political, legal and pedagogical traditions, even though no sense can be made of it in the modern vocabulary (2002). So deeply embedded were these same men in the traditions of their day, that what they chose to construct with their political projects differs very little in terms of the legal forms, even if the bases for its ultimate authority have changed. For the great lawyer Hobbes, for example, the internal working of specific legal forms remained essentially familiar, and it is in this fact that we see, again, the crucial element in the production of the deeply traditional understandings of the internal workings of law (e.g. precedent), without a clear sense as to why. The new common sense apologetics for the continued internal consistency of that system (now based on the authority of assumptions about human nature and logical derivations) is what has come to be called legal positivism and natural law.

This is the answer to the claims of those who say tradition is something purely of the past, that it has been broken by the forces of modernity, and that that it cannot—because it is based on pre-modern forms of authority—be retied. This is true even for some of Arendt's more skeptical writings (1977b: 17; 1977c: 91), though she has surely done more to reinstitute this tradition than anyone (1990, 1998). Perhaps one cannot be held responsible for having thought

so in the mid 20th c. with the success of both the bourgeois social and of Marx's thought (which Arendt understood as itself a project to break the political tradition through the prioritization of the economic to the political (the private to the public) for the first time in nearly three millennia) (1977b). What we have perhaps missed was the very real resiliency of the tradition through the process of foundings and renewals Arendt herself described with so much importance in *On Revolution* (1990) and especially her essay, "On Authority." (1977b): Traditions, in other words, may include the means for their re-founding through their renewal.

What we've also missed is the remarkable continued authority of—and in fact great expansion of the authority of—law, in its new global and European formulations. To the question of how, as in the *Tadić* interlocutory judgment, the global courts could violate every principle of the statist legality which had defined both domestic and international law for 350 years and yet appear even more legitimate in its wake, the answer is that it is the product of the deep structurating fact of their basis in the dominant modes of political and legal pedagogy and practice for two and half millennia. Of course, it certainly helps to explain, too, the truly remarkable breadth of global support for the ICC (almost universal outside the American and Serbian rights), and especially on the left and even among many self-described anarchists (e.g. at the alternative global people's court or Chomsky). In fact, far from a disenchanted modernity, the argument presented here that the project of political modernity was a failure and these same great traditions continue to have real authority for us in our present.

Are we moderns then simply living by the haunting logics of a lost past, following the motions of system we no longer comprehend? It would be easy to dismiss it as such, but it

would be unfair. In fact, far from a disenchanted modernity, these same great traditions—and in particular the republican political tradition—continue to have authority for, and perhaps even still enchant, our present. Remarkably, contemporary critical scholarship, which ought to be the place in which the enchantment of pre-modern legacies would be taken seriously, has largely (and in particular with the contemporary florescence of scholarship invoking the early Schmitt, early Benjamin and Agamben) taken up an conceptual paradigm that abandons political practice for critique and that accepts the concept of radical disenchantment originally proffered by the advocates of a polemical project to break tradition as an accurate description of the present. Nor would a return to the Foucauldian, Derridean, Heideggerian or Nietzschean terms that preceded it help us to help us to make sense of the continuity of these traditions. We would do better to build our approach to late modern political life through the work of those disparate, but crucial, scholars (e.g. Maine, Arendt, Schmitt's late work on *nomos*, Castoriadis, MacIntyre, Skinner, Pocock, Tully, Tuck, and Ober) who have attempted to strip away the brutal naturalizations of political modernity in order to reveal the forms of our late modern enchantments, in particular the concepts of the political, republican community, citizenship, political equality, and law.

The most immediate and important historical instance of this is what has happened to law. If, as has been argued here, sovereignty was a carefully elaborated project to constrain—*formally*—the expansive *telos* of precedent at the kernel of Roman law, pointing simultaneously in the direction of both ordered system and expansion to new territories, terrains and subjects, then the decline of state sovereignty (whatever the causes) could certainly be expected to have dramatic implications for how law works. This is indeed exactly what has happened with the creation of the Yugoslavia Tribunal and the Tadic Decision. This is because the material system

of law remained largely unchanged, and so, with the first important precedents of subjecting sovereign states to global law, the old Roman *material* system of law (based on the pre-modern logic of precedent) has re-emerged, apparently as vigorous and healthy (however inadequately or variously the process is understood) as it was before the legal modernity's intervention. If this is so, then we must understand this as the return of political history—or, more properly, the return of the Roman (political) *traditions*.

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