

# The Question of Sovereignty

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Because the concept of sovereignty is critical to both the domestic and the international orders, it has long had to bear more weight than it can sustain. Sovereignty is the point of intersection between these two systems of thought and practice. Each perspective tries to make its conception of sovereignty the vehicle through which it reorders the other. Thus, in the classical era of international law, the state's commitment to a conception of domestic sovereignty as unbounded authority led to an international legal order organized around the principles of nonintervention and consent. Today, pressure is in the opposite direction: Recognition of state interdependence is pushing toward a reconceptualization of the meaning of domestic sovereignty. Contemporary assertions of sovereignty are as likely to focus on a right to participate in transnational regimes as on a right of self-determination.<sup>1</sup>

Sovereignty has become an essentially contested concept. What had been an ontological concept is attacked today from the perspective of a global functionalism that emphasizes state interdependence in the face of common problems.<sup>2</sup> More is at stake here than political metaphysics. Behind this contest lies the deeper question of the character and meaning of political identity. The contemporary functionalists understand politics and political institutions as means to ends that are not themselves political—for example, individual well-being or environmental preservation. Their predecessors understood politics as an end in itself.<sup>3</sup> For the latter, politics was constitutive of identity; for the former, it is just one way of accomplishing various tasks. The contemporary dispute over sovereignty is unavoidably a dispute over the future of the political.

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<sup>1</sup> See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 27 (1995).

<sup>2</sup> See, e.g., Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *LIBERALISM AND THE MORAL LIFE* 159 (Nancy L. Rosenblum ed., 1989) (noting a similar distinction between an ontological perspective and an advocacy perspective in describing contemporary critiques of liberalism and arguing that ontological questions are too often confused with the advocacy of substantive moral or policy questions).

<sup>3</sup> This is already implicit in the Aristotelian idea that "man is a being meant for political association," by which Aristotle meant that only in a political community could man realize the truth of his nature. ARISTOTLE, *POLITICS*, BOOK I, at ch. 2, § 10 (Ernest Barker trans., Oxford University Press 1962). In classical international law, the state always had the right of self-defense because the continuation of the state's existence could not be subordinated to any other end. Cf. U.N. CHARTER art. 51 (recognizing the "inherent right of . . . self-defense . . . until the Security Council has taken measures necessary to maintain international peace and security").

## I. POSITIVE AND NEGATIVE SOVEREIGNTY IN INTERNATIONAL LAW

Preliminarily, we can borrow from Isaiah Berlin to distinguish between a negative and a positive conception of sovereignty. Sovereignty replicates Berlin's distinction of positive and negative liberty precisely because freedom is no less a problem for a political community than it is for an individual.<sup>4</sup> In Western thought and practice, these conceptions of the free community and the free person have been intimately bound with each other. This was obviously true in the classical Greek conception of the free citizen as a participant in a free city-state. It remained true as individual and community absorbed the lessons of interiority of the will from Christianity and of the primacy of reason from the Enlightenment.

Until recently, sovereignty worked primarily as a negative conception, reflecting the broadly liberal roots of international law. Sovereignty defined boundaries that were to protect one state from the intervention of others. This moment of negation—negating the impulse toward intervention—is a part of our broadly Christian inheritance. Historically, it emerges directly from the wars of the Reformation and represents the same kind of prudential response to diversity within the Christian faith that liberalism more generally represents. The prudential, however, rests on a deeper principle of Christian belief: The truth, and the true virtue of the individual, is located in the interior working of the will, in the way in which the subject brings himself into a relationship with God. Politically, this point supports a conception of the truth of the nation as a manifestation of interior self-realization, rather than outward power. It is not an accident that the United States began as a collection of Christian communities, pursuing a self-imposed exile—the moment of negation—in order to create a space for the positive realization of their own truth.

This double movement of negation and creation is characteristic of the modern nation-state, which must free itself from others in order to realize itself freely. Alexander Hamilton grasped this point quite clearly when he wrote of the world historical significance of the American constitutional project: "It has been frequently remarked that it seems to have been reserved to the people of this country . . . to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice . . . ."<sup>5</sup> This is the revolutionary idea that inspires political modernity: Societies of men can, and therefore should, knowingly form themselves.<sup>6</sup> Even when the state believes that self-realization is a matter of the application of reason, and that reason is objective and universal, the insistence on negative sovereignty is a rejection of any claim that reason can be imposed from the outside.<sup>7</sup> We still see this idea surfacing when the claim is made that

<sup>4</sup> ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121–134 (1969). See also ROBERT JACKSON, *QUASI STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* 26–31 (1990) (extending Berlin's distinction to a consideration of sovereignty).

<sup>5</sup> *THE FEDERALIST* NO. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>6</sup> President George Washington, Farewell Address (Sept. 17, 1796) (continuing to express this view in his warnings against "foreign entanglements").

<sup>7</sup> Napoleonic France had trouble just at this point of deciding whether it was to liberate nations or impose a regime of reason. See Conor Cruise O'Brien, *Nationalism and the French Revolution*, in

democracy cannot be imposed on a country from without.<sup>8</sup> The standards might be universal, but the task of self-formation falls to the unique subject. What could be more Christian?

An international legal order founded on negative sovereignty confronts, as a logical first principle, several ontological questions. Who or what is the sovereign? Which entities are protected under a regime of negative sovereignty? The idea of negative sovereignty does not point to any particular definition of the sovereign subject, such as an ethnic group, territorial region, or historical actor. These definitions depend on one's understanding of positive sovereignty, that is on a conception of the "self" of self-government and on the capacity to act on that conception. Accordingly, a regime of negative sovereignty is predisposed to fight its battles over jurisdiction, not substance. Disputes over sovereignty have historically been disputes over state borders—geographical, demographic, and institutional. The effort—military and ideological—went into establishing the claim to recognition as a single, unified subject—a nation—producing the familiar battles over territorial jurisdiction and populations. Just as a domestic order of political liberalism had to fight foundational battles over slavery, racism, and patriarchy, an international regime of negative sovereignty grappled with the foundational battles of colonization and decolonization.<sup>9</sup>

Positive sovereignty is a much more complex notion than negative sovereignty, in just the way that positive liberty is a more complex notion than negative liberty. The ideal of negative liberty is captured by the notion of being left alone; positive liberty requires a theory of the self that is the source and measure of actions taken or not taken.<sup>10</sup> It is much easier to say, "Leave me alone," than to ask, "Who am I?" I can be a puzzle to myself and yet still be clear on the demand for negative liberty. Negative liberty insists that there is a self; positive liberty tells us the content of that self. The same is true of sovereignty.

This question of identity is as complex in the political domain as it is for the individual: What does it mean to be true to the self-identity of the community? Various ideological movements of Western political thought have contested each other's answers. Only some of these answers have supported an international law regime of negative sovereignty. If we were committed to a conception of positive sovereignty that put the Catholic Church or the proletarian revolution at the center of national self-identity, negative sovereignty would have little appeal as a fundamental norm of the international order. If we think of some peoples as incapable of self-rule, we might feel a moral and political necessity to intervene in their domestic arrangements.

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THE PERMANENT REVOLUTION: THE FRENCH REVOLUTION AND ITS LEGACY 1789–1989, at 17, 36–48 (Geoffrey Best ed., 1989).

<sup>8</sup> See, e.g., JOHN STUART MILL, *A Few Words on Non-Intervention*, in *DISSERTATIONS AND DISCUSSIONS* 238–63 (1883). See also MICHAEL WALZER, *JUST AND UNJUST WAR* 87–91 (1977).

<sup>9</sup> When the United States claims that it is currently exercising sovereign power in Iraq, it reverts to the language of colonialism. The deployment of this language accounts, in part, for the resistance of much of the rest of the world to the United States' project in Iraq, which appears as a striking reversion to an earlier, imperial era. As in that earlier era, some see the colonial rule as an opportunity to redefine the juridical subject—one Iraq or several?—that will emerge from the inevitable process of decolonization. Leslie Gelb, *The Three State Solution*, N.Y. TIMES, Nov. 25, 2003, at A2.

<sup>10</sup> See BERLIN, *supra* note 4, at 132–33.

Many people today think that there can be no positive sovereignty that does not respect human rights. For them, negative sovereignty is no longer the foundation of the international legal order.

If decolonization was a contest fought largely on a battlefield of negative sovereignty, the Cold War was fought on that of positive sovereignty. One was a battle over the formal identity of the subject who claims the right of recognition as sovereign, the other a battle over the truth of the state. Of course, in some instances both battles converged: The wars of decolonization became points of Cold War confrontation. The post-Cold War world maintains an uneasy balance between the decolonization ideal of negative sovereignty and the Cold War ideals of positive sovereignty, giving rise to the questions about sovereignty that trouble us today.

Negative sovereignty was such a powerful norm in modern international law because the character of positive sovereignty had been redefined by the experience of revolution.<sup>11</sup> The American and French Revolutions, not the Peace of Westphalia, stand at the conceptual foundation of modern international law. Revolution begins with an act of destruction of the old order, but it only succeeds with the creative act of self-formation by a sovereign people. The revolutionary actor is always the people. In a successful revolution, a people defines itself as coterminous with the state.<sup>12</sup> The sovereign, accordingly, represents the unity of the state conceived as a self-reflective actor. In the modern era, the sovereign is always the people: Every modern state is a "people's republic." To protect a state from intervention, accordingly, is to protect the condition of self-formation of a people.<sup>13</sup>

Broadly speaking, the aspiration of the modern period was to match the regime of negative sovereignty—state boundaries—with the project of positive sovereignty, understood as the self-formation of a people.<sup>14</sup> The product of that effort is the nation-state, with the boundaries of the state corresponding to the being of the nation as a single, collective actor. There were, however, different views of the direction in which this relationship would move. Some believed that the nation—comprised of a relatively homogeneous ethnic group—preceded the state, and that the task was to draw state borders that were aligned with the nation. Others thought that a nation would form itself within the borders of a state through the very process of political self-determination, that is that nationhood would follow statehood. This broad division reflects that which generally exists between Romantic and Rationalist

<sup>11</sup> By the "modern" era of international law, I refer to the roughly 100-year period ending with the establishment of the U.N. Charter. For an insightful discussion of much of this period, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF MODERN INTERNATIONAL LAW 1870–1960* (2001).

<sup>12</sup> There is no such thing as an unsuccessful revolution. A failed revolution is always a failure of the people to appear. At best, it is an attempted coup.

<sup>13</sup> This is the source of the "domestic analogy" so often found in modern international law theory. Paul Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 30–32 (1987).

<sup>14</sup> Woodrow Wilson is the figure most closely identified with this project within U.S. foreign policy. See Lori Damrosch, *Nationalism and Internationalism: The Wilsonian Legacy*, 26 N.Y.U. J. INT'L L. & POL'Y 493, 493 (1994) ("Wilson gave expression to the nationalist aspirations of peoples around the world, through his endorsement of the principle of self-determination.").

responses to the question of positive sovereignty, but in truth each approach deeply penetrates the other. Each supports a regime of negative sovereignty as a goal of international law, once the borders have been properly established.<sup>15</sup>

Just as social contract theory occludes the origins of the subject—it assumes recognition of who is a subject—so the regime of negative sovereignty occludes the origins of the state. Possession of sovereignty is the result of force threatened and applied. The sovereign state emerges out of a bloody past. States are the results of wars fought and won, rather than of some sort of natural truth about the community. Sovereignty is a club of victors. Why is there no sovereignty for Quebec, Catalonia, Scotland, Burgundy, or Provence? Why is there sovereignty for the Democratic Republic of the Congo, the Islamic Republic of Pakistan, and a single Federal Republic of Germany? Each question is answered by a narrative of battles lost or of power successfully asserted.

An order of sovereign states, engaging in reciprocal and mutual acts of international law creation, is also an order in which war is recognized as a legitimate act of sovereignty. Under international law during the modern era, sovereign states could be at peace or at war. To be at war meant to contest the continued sovereignty of the other—the aim might be, for example, annexation of a part or the whole of the other state. Traditionally, this was expressed by saying that the international order remains in a state of nature or is anarchical. International law does not stand in place of war; it is war stabilized. The point of stabilization is the regime of negative sovereignty.

We are close to Carl Schmitt's conception of the sovereign here. Schmitt asserted that the sovereign always precedes law.<sup>16</sup> As the source of the creation of law, it has the power to suspend law for the sake of defending the necessary conditions of the law. Schmitt draws this contrast a bit too sharply, for even the exception can be a product of a legal regime. For example, the U.S. Constitution allows for the exceptional suspension of habeas corpus, and other constitutions allow for the declaration of state emergencies.<sup>17</sup> The sovereign power is not just at the border of law, but deep within the law as well. Schmitt is right, however, to see that the same sovereign power that is the source of law is the source of war. He is a dangerous political theorist because he suggests that as long as the aim of a regime of negative sovereignty is to protect the positive sovereignty of the nation, that regime will create the very conditions for its own violation. The more a community understands itself as a political people, the more it will find an ultimate meaning in that identity. It will protect that identity even at the cost of great sacrifice. In international affairs, there is no difference between protection and assertion: To protect the state is to assert its power to defend its "vital interests."<sup>18</sup> In short, every war looks like a war of self-defense to those who pursue it.

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<sup>15</sup> MICHAEL IGNATIEFF, *BLOOD AND BELONGING: JOURNEYS INTO THE NEW NATIONALISM* 6–10 (1993).

<sup>16</sup> CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 38–39 (George Schwab trans., University of Chicago Press 1996) (1932).

<sup>17</sup> See Oren Gross, *Once More Unto the Breach*, 23 YALE J. INT'L L. 437, 438 n.4 (1998) (describing emergency regimes of Constitutions of Netherlands, Germany, Portugal, and Slovenia).

<sup>18</sup> This is why a claim of self-defense was always understood to be one that a state had to judge for itself. See Kahn, *supra* note 13, at 10.

Positive sovereignty as an ontological experience will overflow the legal boundaries of negative sovereignty. This was just the experience of the first half of the twentieth century: A regime of nation-states was a regime at war or anticipating the possibility of war. The post-War era of international law—the era of the U.N. Charter—was, however, to be one in which the use or threat of force was eliminated while negative sovereignty was legally protected. It was understood that such a regime had first to complete the project of matching negative and positive sovereignty. This became the project of decolonization. What was not realized, however, was the intimate link between negative sovereignty and war. Negative sovereignty creates a domain in which differences are enabled. The resulting inequalities of power will be read as threats.<sup>19</sup> A regime of negative sovereignty creates political conditions that are in tension with, if not in violation of, its own normative conception. As a juridical concept, it has always protected positive sovereignty as a military and political reality. It still does.

Since the end of the Cold War, much of the world has become exhausted by the war system.<sup>20</sup> Many countries understand what the U.N. Charter drafters did not: Preserving negative sovereignty through law is not the answer to the war system, but yet another form of its expression. Accordingly, contemporary globalization suggests changes in both dimensions of sovereignty. A struggling Third World state, for example, confronts the Washington Consensus in its efforts to manage its economic order. Realistically, self-government finds itself subject to external standards and outside review.<sup>21</sup> This job of governance can be done with a relative degree of success, but the measure of such success is more likely to come from the World Bank and global markets than from a mobilized citizenry. Indeed, the citizenry is likely to mobilize in response to economic failure brought about by negative evaluations by these outside institutions.

As the line between the domestic and the international becomes less clear, the age of revolution is being replaced by that of transnational management. There is a growth of managerial institutions at the transnational level and a depoliticization at the domestic level. Paradigmatic of this shift has been the development of the European Union, which comprises transnational management institutions of increasing scope and domestic populations that are less and less concerned with a national politics of participatory self-rule.<sup>22</sup> For many around the world, the question is how to become more like the Europeans, which means less like the Americans.

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<sup>19</sup> This lesson was already known to Thucydides. THUCYDIDES, THE HISTORY OF THE PELOPONESIAN WAR 12 (trans. Richard Crawley, J.M. Dent & Sons Ltd. 1961) (“The real cause [of the war] I consider to be the one which was formerly most kept out of sight. The growth of the power of Athens, and the alarm which this inspired in Lacedaemon, made war inevitable.”).

<sup>20</sup> See generally JONATHAN SCHELL, THE UNCONQUERABLE WORLD: POWER, NONVIOLENCE, AND THE WILL OF THE PEOPLE (2003) (discussing the expansion of global violence, culminating in the nuclear stalemate of the Cold War).

<sup>21</sup> On the character of the Washington Consensus, see generally John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED? 7 (John Williamson ed., 1990).

<sup>22</sup> See generally LARRY SIEDENTOP, DEMOCRACY IN EUROPE (2001) (examining the European Union as a form of modern democracy).



How deep and how broad that change ultimately will be remains uncertain. The European Union is not the whole of the world. The same post-Cold War period has seen more than its share of war. Many of these wars were fought over the same issue that defined war in the era of negative sovereignty: the claim for recognition as a sovereign subject. Still, from Kosovo to East Timor, the contemporary response to these claims to sovereignty has been management by transnational regimes imposing an order of international human rights. Wars are no longer fought and won. Rather, wars create conditions of international crisis that must be managed by transnational regimes. This was the model emerging prior to September 11, 2001.

## II.     POPULAR SOVEREIGNTY IN THE AMERICAN CIVIC RELIGION

The contemporary complaint about sovereignty is that the concept of negative sovereignty in international law is lagging behind the changing reality of positive sovereignty.<sup>23</sup> In the United States, however, the conception of sovereignty—specifically, popular sovereignty—is not a lingering remnant of an outdated system of international law. Rather, this conception is embedded in a vital civic religion, the fundamental tenet of which is that the popular sovereign is manifest in the production and maintenance of the rule of law. Americans are born skeptics of the contemporary international legal order because it represents the separation of law from sovereignty.

For Americans, the rule of law bears the weight of political identity; it shapes the meaning of individual participation in the collective enterprise of the state. In and through participation in law, the American citizen realizes the political truth of his or her identity. This linkage of law and positive sovereignty produces the confusing appearance of a United States that seems to oppose international law in the name of law itself. Thus, a country that regards itself as fundamentally committed to the rule of law often appears lawless in its attitude toward the international order.

Efforts to disconnect the conception of law from the conception of popular sovereignty will not be seen as efforts at mere reform, but as attacks upon the national self-identity. This is the deepest source of the numerous crises over U.S. foreign policy today—the crisis of American exceptionalism.<sup>24</sup> The United States is the paradigmatic modern state: It was the first and remains the most successful state in the modernist project of collective will formation under the guidance of the new science of politics. However, the post-Cold War era represents a major turn away from a modernist politics to postmodern transnational management. At stake in this shift is the American culture of the political.

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<sup>23</sup> See, e.g., Kofi Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sept. 18, 1999, at 49–50 (considering the policies of humanitarian intervention by the United Nations on the eve of the twenty-first century).

<sup>24</sup> See, e.g., Paul Kahn, *American Exceptionalism, Popular Sovereignty and the Rule of Law*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., forthcoming 2004) (arguing that the American conception of law is a product of a conception of political autonomy that denies any cause or source of the state outside of itself).

### A. *Sovereignty and Cultural Study*

Sovereignty is not merely a legal conception. Rather, it represents an ethos; it absorbs an entire world of meaning. Political meaning is like aesthetic meaning: We cannot separate the idea of a work from its material expression. Similarly, there is no disembodied ideal of political order, but only the meaning achieved by particular communities. To understand positive sovereignty, then, we must deploy the conceptual tools of interpretation. The effort to understand is, in Clifford Geertz's terms, one of thick description. It is an attempt to see how a set of conceptions structures an entire worldview.<sup>25</sup>

There are two moments to such a cultural inquiry: exercises in mapping and in genealogy.<sup>26</sup> First, we must sketch the architecture of belief, exploring how a conceptual system can be structured such that by starting at any one point we are led through the whole. Actions, events, and subjects gain meaning within a network of mutually supportive concepts.<sup>27</sup> Meaning is generated through self-referential closure. With language, for example, we understand a single term only by seeing its place in a network of terms. The same is true of religion, for we understand one tenet only by placing it in relation to other religious tenets. An open system is always in danger of collapse, as it will be absorbed in one direction or another by a closed system. The opening allows us to see that something is not what we thought. Thus, science closed out the miraculous; it did not leave room for the exceptional, divine intervention. Today, economics promises to close out those disciplines of social order—including law—that thought they were opening only a partial space for an economic viewpoint. Because of this systemic closure, there is no translation function from one symbolic form to another; there are only multiple, incommensurable forms of experience. There may be an economic function of the aesthetic, but there is no way to express aesthetic meaning in economic form.

To be closed does not mean to be limited. A closed system makes sense of an entire world; it sees phenomena—any phenomenon—from a particular point of view. It does not limit what it sees. The aesthetic, for example, is a world of meaning that can attach to any phenomenon, no matter how unusual. Science is such a system as well, for nothing is beyond its explanatory power. So, too, is the law. There is no action or event about which we cannot ask, "Is it legal?" What, then, is the character of that system of belief within which Americans understand popular sovereignty? That cultural form is not the same as either our ordinary understanding of law or of electoral politics; it has been

<sup>25</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 3–30 (1973).

<sup>26</sup> See PAUL KAHN, *THE CULTURAL STUDY OF LAW: RESTRUCTURING LEGAL SCHOLARSHIP* 41–43 (1999).

<sup>27</sup> This is the fundamental insight shared by Cassirer's neo-Kantian philosophy of symbolic forms, Luhman's theory of autopoiesis, and Geertz's cultural anthropology. See ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* 25 (1944) ("[M]an lives in a symbolic universe. Language, myth, art, and religion are parts of this universe. They are the varied threads which weave the symbolic net, the tangled web of human experience."); GEERTZ, *supra* note 25, at 5 (claiming that the object of anthropological inquiry is the interpretation of "webs of significance [man] himself has spun"); NIKLAS LUHMANN, *ESSAYS ON SELF-REFERENCE* 3 (1990) ("[E]verything that is used as a unit by the system is produced as a unit by the system itself. This applies to elements, processes, boundaries, and other structures and . . . to the unity of the system itself.").



grasped neither by traditional jurisprudence nor by political science. I have referred to it as "the political," but it might more accurately be called our civic religion, which links popular sovereignty to the rule of law.<sup>28</sup>

The exercise of mapping must be supplemented by genealogical inquiry. The conceptions out of which we build and sustain an imagined world all have a rich history. We receive these conceptions as gifts from the past, which allow us to be who we are. We are necessarily shaped by these historical meanings well before we can take up projects of deliberate, self-conscious political or personal reconstruction. Again, think of language, science, or law. We must first learn how to speak before we can think about changing the character of speech; we must first have a conception of legal rights and responsibilities before we can think about changing them. Even the conception of change available to us is limited by the structures within which we already find ourselves operating. No matter how radical our revolution, it is conceived as the negation of something. In this way, past historical conceptions continue to shape the possible meanings we would create.<sup>29</sup>

Genealogy and mapping go hand-in-hand. They drive each other forward in any interpretive process, which always has the double character of expanding possibilities by exposing the already established. We inherit a set of possible meanings that we then realize in the circumstances of our own lives. Not all that is possible becomes actual, but the actual bears the weight of the entire range of possibility. We feel we move in a world in which meanings emanate in multiple directions from the possibilities that we do realize. Interpretation tries to unify this set of meanings, but this is an endless task. We exist in a world of inexhaustible meanings, and thus we can never be done with language, art, or science. The same is true of the political: the American popular sovereign is an inexhaustible source of meaning, not a determinate, finite content.<sup>30</sup>

### *B. Sovereignty and the Rule of Law*

It is commonplace to point out that American political life is characterized by a civic religion that has all the power of a traditional religion. Political theory can turn to a secular account of justice or power, but an understanding of American political culture must be sensitive to the religious strains in that culture. These strains include an imaginative structure of an ultimate meaning—the architectural moment—as well as the tradition of Judeo-Christian belief—the genealogical moment.

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<sup>28</sup> In this regard, Geertz speaks of the need for a "political theology" of the modern era. CLIFFORD GEERTZ, *Centers, Kings and Charisma: Reflections on the Symbolics of Power*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 121, 143 (1983). See also SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 9–54 (1988) (discussing the Constitution's role in the American civic religion).

<sup>29</sup> For an effort to describe the way in which systems of meaning maintain themselves and set the parameters of change, see generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

<sup>30</sup> The same is true of the Constitution: It cannot be reduced to a finite number of propositions. The textual formalist's failure to understand the character of meaning always leaves him dismayed by the actual process of constitutional interpretation. He would rather cabin the process by articulating once and for all the full meaning of the constitutional text.

The sacred and the sovereign are deeply intertwined in Western religious and political traditions. Indeed, for a very long time the religious and the political constituted mutually supportive aspects of a single tradition. The modern separation of church and state did not substantially change this. The power and character of sovereignty remained continuous with the older tradition of the sacred, even as the person of the sovereign changed from a monarch to the people.

The traditional European sovereign did not merely rely on a delegation of authority from the Church. Rather, the sovereign was a representation of the body of Christ. One could not imagine sovereignty outside of this religiously informed imagination. The sovereign body was the mystical corpus of the state in which all of the subordinate parts were present.<sup>31</sup> Just as the Church was the body of Christ, the state was the body of the sovereign. The sovereign overcame both the spatial and the temporal limits of the finite, maintaining a kind of omnipresence and eternal life. The sovereign body never died despite the death of the particular finite body in which the infinite appeared.<sup>32</sup> The sovereign had the divine power to heal the sick and to render judgment. Laying on hands and speaking judgment were both ways of reordering the world by bringing the profane in touch with the sacred.<sup>33</sup>

All meaning had to be seen as a manifestation of sacred otherness because the entire domain of the finite world was marked by the fall. Only that which endured could provide meaning in a world otherwise turning to dust. The capacity to endure is the fundamental character of the sacred, for it is literally a quality not of this world. Meaning is realized, in this view, not as propositional truth, but as presence and experience. Meaning must cure the existential condition of the individual who believes he has been born into a condition of original sin. Man cannot reason himself out of this state of being. Instead, one finds oneself in the presence of the sacred—an experience marked by terror and awe. This understanding allowed the sovereign to assume the role of the *mysterium tremendum*.<sup>34</sup> This is most obvious in the simplest fact of sovereign power: the power of life and death. Sovereignty is the Ur-point of the polity, for it is the point at which the sacred makes contact with and flows into communal life. It is the point at which the infinite appears in finite form. Thus, it is simultaneously the most dangerous and most wondrous point of experience.

The story of modern European political evolution is in substantial part a story of the growing autonomy of the sovereign from the Church, but it is wrong to think of that simply as a secularization of the sovereign. Rather, it was a process in which ultimate meanings shifted from the Church to the

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<sup>31</sup> See LOUIS MARIN, *Portrait of the King* 9–13 (Martha Houle trans., University of Minnesota Press 1988) (1981).

<sup>32</sup> See ERNST KANTOROWICZ, *The King's Two Bodies: A Study in Mediaeval Political Theology* 314–17 (1957).

<sup>33</sup> See MICHAEL WALZER, *Introduction to Regicide and Revolution: Speeches at the Trial of Louis XVI*, at 1–8 (Michael Walzer ed., Marian Rothstein trans., 1974).

<sup>34</sup> See RUDOLF OTTO, *The Idea of the Holy: An Inquiry into the Non-Rational Factor in the Idea of the Divine and Its Relation to the Rational* (John Harvey trans., Oxford University Press 2d ed. 1957) (1917) (describing the experience of the *mysterium tremendum* as one of an overpowering other that both fascinates and terrifies).

state—a process of sacralization of the state rather than secularization of authority. The meaning of the state is located in the being of the sovereign. The subject realizes that meaning only as he experiences the self as a part of that organic whole that is the sovereign corpus. When England's King Henry VIII proclaimed himself head of a national Church, he was only making particularly visible this transitional process by which the sacred was realized within a national conception of the political. The process takes different forms in different states, but it is never merely the rise of a secular authority in place of a religious-mythical form of meaning. It always includes the refocusing or reappearance of the sacred in the form of an autonomous national politics. Political identity, accordingly, is not so much opposed to religious identity as it is a cooptation of that identity. Not surprisingly, the French revolutionaries, after attacking the Church, found themselves reinventing a religion that would express the sacred quality of the nation.<sup>35</sup> Modern politics purported to tell citizens who they were and to define what mattered most to them. Indeed, it would even tell them what was worth dying for. Where—apart from the religious tradition—were the structures of the imagination of ultimate meaning to come from?

Sovereignty is a religious conception that migrates to the political.<sup>36</sup> In both the religious and political domains sovereignty expresses the participation of the finite in the sacred. The sovereign is a symbolic form of mediation by which the individual transcends the conditions of his own finitude. We cannot speak of sovereignty without speaking of the "deathless character" of the state and without speaking of a quality that is omnipresent within the state. Problems and challenges could arise in battles over succession or territorial reach, but that is only to say that political sovereignty, like that of religion, can be contested.

Sovereignty refers to this participatory experience in which being and meaning coincide. Sovereignty quickly takes us into the dimension of the symbolic and the magical. It finds the life of the nation localized in particular bodies—from king to citizen—and particular symbols, such as the flag. We see the lingering presence of this conception of sovereignty in the repeated resistance to the idea of treating the flag as merely a representation: Somehow, the very being of the nation is at stake in the flag. The metaphysics of the sovereign corpus, however, is only part of the story of the rise of a civic religion. Distinctive to the Judeo-Christian tradition was a bringing together of sovereignty and law. The same was true of modern politics.

In the Old Testament, law is the product of the sovereign will; it is the enduring record of sovereign revelation. Moses brought the law to the Jewish people; he brought a text in which the will of God was revealed. Law is the voice of God made both permanent and permanently accessible. Law is a permanent text that stands in place of prophecy. Through maintenance of the law, the nation maintains contact with its origins in the sacred covenant. The

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<sup>35</sup> See MONA OZOUF, *FESTIVALS AND THE FRENCH REVOLUTION* 267–271 (Alan Sheridan trans., Harvard University Press 1988) (1976).

<sup>36</sup> See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 32 (George Schwab trans., MIT Press 1985) (1922) ("All the pregnant ideas and institutions of modern political thought are in essence secularized forms of theological doctrines and institutions.").

origin gives unity to the nation as a temporal project of infinite value. Without the meaning-giving act of the sovereign creating law, the community would be only an arbitrary collection of individuals, working for ends that they may or may not share. Those ends could be defined quite apart from the collective's history and sense of group identity.

To participate in the law, in the Old Testament understanding, is to align oneself with the sovereign will, and thus to constitute oneself as a part of a sacred plan. Law defines the community's task; it is, in the first instance, to maintain the law. For both community and individual, law is constitutive of identity. Identity here is not just a representation of the self, but a physical becoming of the truth of the self. Accordingly, much of Jewish law focuses on the regime of the body: circumcision, food, dress, sex. To fail to maintain the law would be to become someone else or to lose all identity. Diaspora Jews maintain their connection to the sacred and thus their unity against the diversity of time and distance by maintaining the law. To choose life outside of participation in the sovereign is, for the religious imagination, to choose death. To choose law is always to choose life, even when it leads to the death of the body.

The twofold religious nature of sovereignty—mystical union and law—passes into the Western political tradition. On the one hand, the sovereign is the transtemporal unity of the state as a single subject. Sovereignty is always beyond language; it adheres in an experience of being as meaning. Just as the Church is the body of Christ and to be a Christian is to be reborn as a part of that body, the political community is the body of the sovereign and to be a citizen is to be reborn as part of that body. Here, the story of modernity is that of the transformation of the mystical corpus of the state from the body of the monarch to that collective body that is the people.

On the other hand, sovereignty is also the creation of law through the representation of the sovereign will. The Western political community is not just a participatory union of a people, but a nation under law. Seeing both aspects of the political sovereign—the Christian and the Jewish—has always been extremely difficult for theorists. It has, nevertheless, been the lived reality of political meaning in the modern nation-state, particularly in the United States.

The architecture of sovereignty in American political life replicates that of the religious tradition. Now, however, revolution has replaced revelation, and the popular sovereign has replaced the divine sovereign. The imaginative order remains structurally the same. Through law, individually and collectively, we maintain and affirm our contact with the sacred origins of the community. Those origins are located in the revolutionary action of the sovereign people, which is memorialized in the Constitution. The authority and legitimacy of the Constitution rest in the sovereign will. Already in *Marbury v. Madison*, the Court described the Constitution as the product of "a very great exertion" of the people, who have "superior" authority and "can seldom act."<sup>37</sup> In order that this act of the people "may not be mistaken, or

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<sup>37</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

forgotten, the constitution is written.”<sup>38</sup> The paradigms are right out of the Old Testament. The Constitution is our sacred text, and through law we participate in the sovereign will. The Supreme Court is our Temple and the Justices are our priests.<sup>39</sup>

The Court’s achievement in American politics is as surprising as it is thorough: In the contest of claims to represent the sovereign people, the Court has often trumped the political institutions of government. Institutions that rest on electoral politics do not represent the popular sovereign. Rather, they express popular opinion, which is always an aggregation of individual opinions limited by current circumstances. Electoral politics produces Rousseau’s will of all, while the Court has claimed the mantle of the general will.<sup>40</sup> The popular sovereign is, in the words of *Marbury*, “permanent.”<sup>41</sup> It stands apart from electoral competition among special interests or factions. When the Court speaks, it purports to speak in the voice of the sovereign people. Belief in this identification of the judicial voice with the people’s voice is the source of the Court’s legitimacy. For there is no further point of reference from which or by which we derive authority. To reach the people is to reach that unity of being and meaning constitutive of the sacred quality of the sovereign. Because of the widespread belief that the Court holds forth the expression of the popular sovereign, it is virtually unimaginable that any other political institution would defy the Court.<sup>42</sup>

The Court’s victory in this competition of representational claims was a contingent outcome. France, for example, was equally concerned with the expression of the will of the popular sovereign, but French courts have never seriously contested the representative claims of Parliament. The courts were associated with the *ancien régime* and as a result could not reasonably claim to speak as the popular sovereign. Furthermore, access to the popular sovereign was not mediated through interpretation of an historical text (indeed, the French are currently on their fifth constitution); rather, the people were institutionally present in the representative claim of Parliament. Neither has Britain ever recognized the courts’ ability to speak in the name of a popular sovereign in opposition to the representative institutions of Parliament. Instead, the courts speak the language of the common law, which is understood as an evolving source of reason, not of the sovereign will. For this reason, British constitutionalism recognized the power of Parliament to overturn any judicial decision. Less worried about the remnants of monarchical power, and much more worried about representative power in the form of majority tyranny, Americans have traditionally understood popular sovereignty to stand outside of representative institutions.<sup>43</sup> That the Court could locate its

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<sup>38</sup> *Id.*

<sup>39</sup> For an exploration and elaboration of these themes, see generally PAUL KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* (1997).

<sup>40</sup> JEAN JACQUES ROUSSEAU, *OF THE SOCIAL CONTRACT* 45–47 (Charles Sherover ed. & trans., Harper & Row 1984) (1817).

<sup>41</sup> *Marbury*, 5 U.S. (1 Cranch) at 176.

<sup>42</sup> Only here do we find the explanation for the remarkable deference to the Court’s decision in *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>43</sup> GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 319–328 (1969) (discussing the people outside of representative institutions).

authority in this nonrepresentational space was a possibility that arose as much from the religious imagination as from historical circumstance.

The techniques of judicial decisionmaking and constitutional interpretation make sense only from this point of view. The Court does not purport to reason from justice as an abstract ideal or to rely on the common law. It does not claim to make "all things considered" judgments of reasonableness. And it most certainly does not represent the personal views of the Justices. Constitutional hermeneutics is textual and historical. It is concerned with elaborating the meaning of the text as if it were the product of a single author: the popular sovereign. Debates over constitutional hermeneutics resemble debates over biblical hermeneutics, for both raise the question of how to be true to a revelatory text that provides the sacred ground of temporal unity for the community. This does not mean that one must be a formalist or an originalist—although one can see immediately the attraction of fundamentalism to both the religious and the religiously informed political imagination. It does mean, however, that one takes up the task of defending the legitimacy of an interpretive technique within a bounded concept of the relevant truth.

American constitutional discourse is quite exceptional in the world of contemporary constitutional democracies. For the rest of the world, a constitutional court expresses the voice of reason: Constitutional reasoning invokes proportionality or a balancing inquiry.<sup>44</sup> It represents a judgment as to whether government policy is rational in light of the objective sought and the effect on rights that must be guaranteed by any legitimate political order.<sup>45</sup> From this perspective, the American practices seem to fetishize an antiquated text and to proceed in a wholly irrational manner. Why should we care about the views of long dead white men, as opposed to the contemporary understandings of justice, equality, and due process? We care because in and through this tradition we maintain contact with the sacred origins of the community. We care because an experience of positive sovereignty is at stake. This manner of practicing the rule of law makes of us participants in a single, collective project of popular sovereignty.

We cannot exactly say what is cause and what is effect, but the fact is that our national political identity centers around a text that has authority because of a faith that it expresses the will of the popular sovereign—a transtemporal collective subject in which each citizen shares an identity. This system of belief is actively cultivated and maintained by an institution whose authority relies upon this faith: the Supreme Court. It would be wrong, however, to think that the popular belief that maintains the Court is somehow a product of artful construction—a kind of "noble lie." Faith in the Court is embedded within a several-thousand-year-old Western tradition of constructing the

<sup>44</sup> See, e.g., Constitution Act of 1982, R.S.C., app. B, no. 44, sched. B, pt. 1, sec. 1 (1985) (Can.) ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."). See also *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.) (providing the basic structure of proportionality reasoning applied under § 1 of the Charter).

<sup>45</sup> See, e.g., Paul Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. R. (forthcoming 2004). See also Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 93–97 (2002) (describing the judicial process of balancing).



sacred. Of course, there is no guarantee that this faith will continue here anymore than it has elsewhere, but we should not expect change to come easily or quickly.

Popular sovereignty and the rule of law are two of the critical terms defining the American imagination of the political. The third is sacrifice, which is again a religious conception that has migrated to the realm of the political. Sacrifice constitutes another link between citizen and popular sovereign. Traditionally, the sovereign had the right to determine life and death. One manifestation of this power was the right to go to war against noncitizens. Too often, political theory uses the same form of explanation with respect to citizens: The state is characterized as the institution that has a monopoly on the legitimate use of force. Citizens, like aliens, live under the threat of state violence.<sup>46</sup> But for a state that maintains a vibrant faith in sovereignty, the relationship is just the other way around. The power of the state is sustained by the willingness of citizens to take up the burdens of sacrifice. Without a willingness to sacrifice, the state can become an empty shell that lacks the capacity to resist new forms of political self-understanding.<sup>47</sup> This is an obvious fact on the battlefield: War ends when one side declines further sacrifice. But it is also true more broadly: When a state can no longer call for sacrifice, citizens have ceased to understand sovereignty as constitutive of identity. At best, politics becomes a complement to markets. At worst, politics becomes a source of oppression.

Political meanings are distinguished from those of other group experiences precisely in this dimension: Membership in the political community can be a matter of life and death. Citizens understand that circumstances may arise in which they will have no legitimate grounds for rejecting the state's claim on their lives. This does not mean that the citizen will always support the state's recourse to force; he can believe the government made the wrong decision to deploy force. It does mean, however, that the possibility of a right decision informs his imagination.

One mark of sovereignty is the legal right to conscript. Today, no international institution has this legal power; neither does any unit smaller than the state. When nonstate entities exercise a power to conscript, the situation is one of civil war, which is a contest over claims of sovereignty. When and if state conscription becomes unimaginable—not under particular circumstances, but in general—the modern politics of nation-states will be over. This may indicate that the state has been displaced by other political institutions or that politics itself no longer appears as an ultimate meaning.

Conscription and revolution point to the same idea of sacrifice at the foundation of the modern nation-state. In and through the possibility of sacrifice, we see again the basic structure of the political imagination. The state founded in a revolutionary act of popular sovereignty has the legal power to conscript. No theory of law that ignores the idea of sovereignty will ever

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<sup>46</sup> See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 30 (Wilfrid E. Rumble ed., Cambridge University Press 1995) (1832) (defining law as the command of the sovereign backed by a threat of evil or pain).

<sup>47</sup> We saw this link between sovereignty and sacrifice directly in the recent collapse of the Soviet Union and some of the states of Eastern Europe.

offer an adequate explanation of conscription. Sacrifice is outside of the conceptual world of contract, including the social contract.<sup>48</sup> But sacrifice and sovereignty are inseparable ideas in the politics of the modern nation-state.

To say that sovereignty and sacrifice are held together in our political imaginations is likely to sound unconvincing when put forward only as a matter of mapping the relationship of conscription to sovereignty and law. But when we turn to genealogy and see that this relationship is a remnant of Christian belief, the point becomes much clearer. We may not quite understand the linkage of sacrifice to sovereignty in the figure of Christ—it is, after all, a “mystery”—but we know that this linkage has been there and has been a powerful force in shaping the Western imagination. Christianity is a sacrificial religion; it has put the Eucharist at the very center of its ritual practice for two thousand years. Our conception of sovereignty traces directly to the Christian conception of Christ, the King of Kings.

The figure of Christ tells us that sovereignty is made manifest in the act of sacrifice. Sovereignty and sacrifice both express transubstantiation, which is the experience of the finite taking on the character of the sacred. Sacrifice is the internal experience of transubstantiation; sovereignty is the outward display of transubstantiation. The sovereign has the power to sacrifice; the believer willingly sacrifices. Christ is the point of linkage of the two, for He is both fully divine and fully human. In the broadly Christian tradition, sanctification through sacrifice is objectified in the sovereign whose basic form is renewal through death.

The citizen is willing to sacrifice for the sovereign, and, reciprocally, the sovereign can legitimately demand sacrifice of the citizen. Neither the language of consent nor that of demand quite captures the experience, for we are squarely within the ineffable dimension of the sacred in which life and death are inverted. Popular sovereignty began in the United States with the call to sacrifice in an armed revolutionary struggle. The revolutionary appearance of the popular sovereign allows the state to assume for itself what had been the oppositional politics of martyrdom. Sacrifice is not for a government, class, ethnicity, or religion. All have been absorbed in a new transcendent presence: the people. Had no one been willing to sacrifice in the revolutionary effort, it would have made no sense to speak of an American popular sovereign. There might have been political disagreement; there might even have been an eventual negotiation of separation. But there would have been no experience of a political identity that informed a new life.

To take the language of sacrifice seriously seems out of place in contemporary academic discourse about our own political order. This only shows how distant that discourse is from the phenomena that need explanation. For when we look to the character of American political rhetoric, no theme is more apparent than the call for sacrifice for the maintenance of the Constitution. The defining example of American political rhetoric is the Gettysburg Address, the theme of which is sacrifice: The life of the nation—

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<sup>48</sup> See MICHAEL WALZER, *OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR AND CITIZENSHIP* 80–88 (1990) (discussing Hobbes's failure to explain sacrifice for the State). The failure of liberal social-contract theory to explain sacrifice is central to my analysis in PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE* (forthcoming 2004).

the popular sovereign—is maintained through the death of the individual. Lincoln himself became the great Christ figure in the American civic religion, sacrificing himself for the rebirth of the nation.

None of these propositions describe facts in the world. Rather, they describe a structure of the imagination that makes possible the experience of political meanings. They describe a self-conception that links the individual citizen to a national political community. This structure is celebrated in the American narrative; it is elaborated in the voice of the Court and regularly appealed to in moments of high political significance. Americans continue to believe that their national project is a matter of ultimate meaning, which is located at the intersection of popular sovereignty, the rule of law, and sacrifice.

Of course, for the most part, we hope that we will not be called upon to sacrifice life and property in any dramatic form. I do not imagine that every time the state makes such a claim I would have to concede the right. Any particular administration can be mistaken in the policies it adopts, including its policies of national defense. I do not give up my capacity for political judgment, or of moral judgment, by virtue of my character as citizen. But even with my strong tendencies toward skepticism of governmental judgments, my moral sensitivities, and my revulsion at violence, I recognize that circumstances could arise under which *this state*, and no other, could make a claim on my life. That recognition is the foundation of a politics of positive sovereignty. Out of that imagining, the edifice of the modern state arises.

The modern political imagination is given concrete form in a nuclear weapons regime. Americans imagine the political in such a way that a policy of mutual assured destruction is conceivable. This was not merely an aberration of the Cold War, as demonstrated by the fact that the threat of weapons of mass destruction remains a forceful part of our self-understanding of political identity. The aggressor may have changed from the Soviet Union to the terrorist, but today we live our lives within color codes that remind us that political identity remains a matter of life and death. We are targets of violence for no reason other than the fact of our political identity.

I am not suggesting that mutual assured destruction was an appropriate policy of national defense, or that pursuing the war on terror through color codes is anything but silly. Rather, I seek to explain the character of the imagination of the political that allows these policies to be possibilities in the first place. We do not imagine that our taste in music is a matter of life and death; we do not imagine that defining ourselves along one career path rather than another is a matter of ultimate meanings; we do not even imagine religious practice as a matter of public concern anymore. The same is true of families: I do not imagine blood feuds and I do not feel myself to have much connection with a transtemporal project that is committed to maintenance of the family name, property, or tradition. Yet I do imagine that the state can make a claim on my life. Rather than dropping our weapons and turning away from the state in the face of a crisis, as the Eastern Europeans did in 1989, we declare war on terrorism and send the troops abroad.

The power of this set of beliefs is redemptive and dangerous, awesome and terrifying. If there is a kind of majesty in the strength of our two-hundred-year political accomplishment of constitutional government, there is also a

terrifying danger in the threat that we pose to ourselves and to others. Modern politics has been a deadly business, and it remains so for Americans. The American popular sovereign began with the revolutionary act of constitutional self-construction; it may end with the nuclear act of world annihilation.

### III. THE CONTEMPORARY DEBATE

For many, if not most Americans, popular sovereignty in and through the rule of law constitutes a civic religion of ultimate meanings. It is not their only source of meaning, but about matters of self-identity one does not make choices as if what were at stake were a course of study or a plan for self-improvement. I am already constituted by an understanding of the world and of my place in it. I need a reason of world-revealing force—e.g., social collapse, military defeat, or personal tragedy—to force me to see the world differently. Thus, while we are not bound to our traditions as we are bound to our physical nature, our traditions are the resources from within which we confront the possibilities of a meaningful life. For Americans, a vital conception of citizenship as participation in the popular sovereign remains very high on that list of options. What do the globalists, who would reject sovereignty, offer in its place?

The tenacity of American exceptionalism is not just similar to the tenacity of religious belief; it is made of the very same stuff. One cannot say to a Christian that, in reality, very little is at stake in differentiating Christian and Muslim identities, because the two faiths are in substantial agreement on particular norms of behavior. Everything is at stake—an entire world for the individual believer. Similarly, one cannot tell an American that there is not much at stake in sovereignty because we share so many values with other Western nations. Sharing values may suggest the direction of friendship, but it does not capture the meaning at stake in the conception of citizenship.

Your children may be very similar to my own in values, outlook, and character. Nevertheless, I am not indifferent to which of these children I join with in common endeavors. Sovereignty is constitutive of identity in just the same way. Indeed, one of the great puzzles to be explained by cultural inquiry into political phenomena is how nations that share many values can in fact go to war with one another. Sharing a Christian worldview was never much of a deterrent to war. Political differences are not necessarily moral differences, and a theory of the political falters if it collapses the political into the moral. The idea of sovereignty points in the right direction: It resists universalization.

To grasp what is at stake in sovereignty, we need to turn from the discourse of justice and liberty to that of love. Positive sovereignty within the nation-state has been an erotic phenomenon and it remains so in the United States. For this reason, my elaboration of the culture of the political spoke of bodies participating in mystical unions, of sacrifice and ultimate values, and of analogies to family and Church.

When contemporary scholars or leaders of international institutions declare that sovereignty is no longer an appropriate ideal in an age of globalization, they are proposing to the United States a change as significant as the

Reformation was in the Christian experience. Indeed, the example is more than an analogy. There are structural homologies between the two movements. Globalization of the rule of law is a kind of completion of the victory of Protestant thought in the modern age. A Protestant pluralism of interpretive communities is to displace the singular mystery of the sovereign body. Disagreements among political communities should, on this view, extend no further than differences in the interpretation of a common commitment to democracy, human rights, and free markets.

While Protestantism pursued many changes in religious doctrine and practice, at its center was a rejection of the idea of the Church as the body of Christ. What had been the instantiation of the sacred in and through the mystical corpus was to become a system of representation. The Reformation announced an end to the age of miracles, centering Christian practice on the sermon rather than the mass, on the biblical text rather than the body of Christ. Representation, as a vehicle for contemplation, displaced a magical world of sacred presence. The Protestant God can be the object of discourse, disagreement, and interpretation. Ritual participation was no longer the form of access to the sacred. With that, faith displaced works. Without the necessity of ritual participation, the need for authority was undermined. Priests possessed no more power than lay believers. Both were located firmly on the same side of the divide of the finite from the infinite. God existed entirely outside of the finite body.

The insistence on an unmediated relationship between the individual believer and God meant that the sacred was no longer present as an instantiated meaning. This meant the end of the ritual of the Eucharist by which the believer partook of the body of Christ. That ritual of transubstantiation expressed the reality of the Church as an organic experience of meaning. At its core was the phenomenology of sacrifice: to die in order to be reborn. To be a Christian had been to be a part of Christ, replicating the drama of sacrifice and rebirth. The Church sustained the magical form of the sacred. In a world of magic, the distinction between the sacred and the mundane is continually breached, as is the distinction between the animate and the inanimate. Sacrifice established the animating presence of the sacred, which the believer literally consumed in order to be one with it.

All of this was rejected by Protestantism, which claimed that religion was not a matter of being the truth, but rather of representing truth. Protestantism began as a dispute about doctrine, seeking the truth revealed in the biblical text. That question of truth brought about a revolution in the metaphysics of truth. The reformed Church was a collection of individuals who sought mutual support for their individual efforts to discern the truth that God had put in representational form, i.e., in a text. This is a church of talkers and of interpretations, rather than a church of the body. Protestantism assigns the body to the everyday, secular activities of labor, releasing it from the premodern regime of suffering. Religion is an affair of the individual soul, not the collective body.<sup>49</sup> The Reformation disbanded the monasteries, eliminated

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<sup>49</sup> See, e.g., STEVEN OZMENT, *PROTESTANTS: THE BIRTH OF A REVOLUTION* 135–36 (1993) (quoting Martin Luther, “A Christian community acts in a manner totally different from that of a worldly community; for in the world lords command what they will and their subjects obey; but

the multiple fast days and mendicant monks, abandoned priestly celibacy, and generally subjected the body to the secular regime of the state. Nothing is at stake in the body any longer.

Protestantism must simultaneously invest in faith—a faith that God will respond—and in representation. This produces the possibility of endless interpretive diversity, for representation can never exhaust faith. Protestantism is subject to congregational pluralism as communities organize themselves around new interpretations of the same biblical text. Faith is no longer challenged by diversity; rather, diversity expresses the fullness of faith. Doctrinal pluralism is possible because faith is located in the individual and precedes doctrine. If authority can no longer be rooted in presence and ritual, new forms of decisionmaking, such as exit and voting, must evolve.

This transformation of the shape of religious meaning fails to have a parallel effect on political meaning—or perhaps it has just the opposite effect on politics. The nation-state, well into the contemporary period, retains the instantiated form of meaning—the identification of being and meaning. To be a citizen is to have an embodied identity that is constitutive of the self. Political communities do not celebrate an interpretive diversity that leads to an increasing pluralism. Rather, they resist schism, secession, and division. As Robert Cover wrote twenty years ago, political communities may create jurisgenerative conditions for pluralism—interpretive diversity—but they operate in a jurispactic manner.<sup>50</sup> They maintain their unity, which is to say they insist on sovereignty.

In the modern era, the body of the popular sovereign steps into the place of the body of Christ. This is especially true of that most Protestant of nations: the United States. In France, the rise of the sovereign people required an attack on the other form of mystical unity, the Catholic Church. There, sovereign and Church continued to have a tense, competitive relationship for the next two centuries. In the United States, political identity has had an effective monopoly on the instantiated form of sacred meaning from the beginning. Indeed, the immigrant Catholic community labors under the burden of proving that it is sufficiently Protestant to be a part of the American popular sovereign. There is always a suspicion that the Catholic might fail at the moment of political sacrifice, for he is thought to experience the unity of being and meaning in the body of Christ, not in the body of the people.

Too often legal scholarship focuses only on the discourse of the political community, as if politics were merely talk. But the political always includes the action that follows talk. Talk can be endless and endlessly diverse. Politics is the moment of decision, the authoritative act. To understand politics, we have to ask: What is the imaginative structure that carries the citizen beyond the point of interpretative disagreement? For the ultimate act that stands always beyond the reach of political talk is that of sacrifice. Sacrifice is never completely out of sight in politics. This fact links the form of the political imagination of the modern American citizen to the possibility of nuclear destruction, just as the pre-nuclear generation understood political

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among you, Christ says, 'This shall not be. For among Christians each is judge of the other and each is subject to the other'").

<sup>50</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 51–53 (1983).



identity against the possibility of Antietam.<sup>51</sup> The nation-state, like the Church before it, is a sacrificial structure of belief. It is salvation through works—the act—not through faith alone.

To say that the modern experience of popular sovereignty is an instantiated form of meaning is not to suggest that the nation-state proceeds as if the Reformation and the Enlightenment never happened. We see the effect of the Reformation in the norm of political pluralism not within, but among, states. The nation-state has shed the universal aspirations of the Church. The experience of positive sovereignty may be an experience of the sacred, but it remains community-specific. The god of popular sovereignty is distinctly a local god. Its universal significance is bounded by the community of believers. Citizens will apply it universally; they do not weigh competing claims of sovereignty. Yet, they will not proselytize this god.<sup>52</sup> Rather, they will police the borders of immigration, admitting only those they believe capable of taking on, in their own bodies, this experience of the sacred.<sup>53</sup>

Equally important is the joining of the lesson of the Enlightenment with the experience of an organic conception of sovereignty. This is the point at which sovereignty is linked to revolution—to the people, not to the monarch. The task of the modern popular sovereign is to form itself by applying the insights of political and moral science. Self-formation becomes, as explained in the *Federalist Papers*, a process of deliberation and choice.<sup>54</sup> The object of that deliberation is the ideal structure of representative democracy, on the one hand, and the morality of rights, on the other. Theory is not opposed to the experience of positive sovereignty in the modern world. It is embraced and put at the very center of enlightened, political self-formation. There can be no revolution without a constitution, and no constitution independent of theory. This is popular sovereignty as the rule of law.

It is best to think about the relationship between instantiated and representational forms of meaning in the modern nation-state on a two-step model. First, the popular sovereign must create itself through the constitutive act of declaring a revolution. Second, it must determine *what* it will say with its newfound voice. It answers the second question by turning to political and moral theory. Newton's sovereign God spoke the world into existence by speaking the laws of physics. The modern popular sovereign speaks the language of democracy and individual rights. In both cases, if we want to understand the character of belief, we must not ignore the speaker. Politics is not just the speech; it is equally the experience of identity in and through the speaker.

The emergence of a global regime of law targets national sovereignty for the same reason that Protestants attacked the Church. It sees a deep incommensurability between truth as the content of a proposition and truth as

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<sup>51</sup> Oliver Wendell Holmes embodies in a particularly dramatic way the linkage of law, sacrifice, and sovereignty. See OLIVER WENDELL HOLMES, *The Soldier's Faith*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 73, 75–76 (Mark DeWolfe Howe ed., 1962).

<sup>52</sup> Colonialism was a conceptual contradiction for the modern nation-state, just as slavery was for a liberal order.

<sup>53</sup> In U.S. history, this attitude receives legal expression in *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>54</sup> See *THE FEDERALIST* NO. 1, *supra* note 5, at 59.

an experience of identity. It believes that our agreement on the content of moral truth makes our commitment to instantiated forms of meaning anachronistic. It understands that the latter commitment will play itself out in forms of authority and claims of inequality—citizens versus aliens—that are at odds with the universal claims of reason, expressed today in the doctrine of human rights. It sees only a continuing danger of war arising from the politics of sacrifice. This is, indeed, a real danger. Europe's worries that the United States is a "threat to peace" arise not just from disagreements on policy, but from an intuition that the American politics of popular sovereignty is still at home in the recourse to force and sacrifice.

When truth becomes a problem for interpretation, we have broken the closed system of meaning that was the Church and then the nation-state. The body is no longer the bearer of meaning, but is instead the source of production in the forms of labor and generation. This is a world in which sacrifice is a cost, not the realization of a nonpropositional truth. A regime of rights protects the body not because of its sacrificial importance, but in order to allow its investment in forms of production. This is the state whose ends are expressed by measuring gross domestic product and morbidity rates. Work has replaced sacrifice; the economy of production has displaced the economy of the sacred. Politics has become a matter of means, not ends. Contemporary disputes take place over who should own the outputs of production—issues of taxation and redistribution. An age of globalization is an age of individualism not because there is some sort of essential truth in the individual, but because globalization is a further step in the achievement of that intersection of Enlightenment thought and Christian belief that produced Protestantism. Meaning has become a matter of individual faith; individuals choose to join interpretive communities.

Of course, many American scholars and activists are leaders in this process of reformation. Like their religious predecessors in reform, they do not have a good view of the positive meanings for the sake of which their reform efforts are resisted. They see corruption, authoritarianism, self-interest, and danger in the old institutional forms. There is, undoubtedly, plenty of that in the old, just as there is in the new. They see irrationality in place of enlightened analysis, and narrow self-interest in place of a concern for global justice. The new reformers are not likely to take up a discourse on the possibility of meaning for finite man.

Each side to this debate misperceives the other by subjecting it to the wrong frame of reference. Each sees the other only as a form of resistance to its own value structure. The globalizers see the United States as hypocritically pursuing its own self-interest, claiming an exceptional status for itself while advocating cooperation and international institutions for others. The American sovereigntists see the globalizers as potential enemies who would use global regimes to undermine and attack U.S. power.<sup>55</sup> Neither view is entirely a

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<sup>55</sup> This is, for example, an American concern with the International Criminal Court ("ICC"). See, e.g., John R. Bolton, *The United States and the International Criminal Court: The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROB. 167, 173 (2001) ("[O]ur main concern should be for our country's top civilian and military leaders, those responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor.").

misperception, but neither gets to the heart of the confrontation. To approach that, we have to shift the analysis from a focus on a competition of interests and political advantage to the imaginative structure of belief.

There, we find a contemporary version of one of the oldest battles in the West. Must we live the truth or is the truth an object of our discourse?<sup>56</sup> Americans maintain a belief in the lived truth of popular sovereignty and imagine sacrifice as an affirmation of that truth. The contemporary cosmopolitans would strip the content of truth from the experience of the mystical corpus. They would substitute faith in the power of reason to discern the truth for faith in the lived truth of the nation. They would declare an end to the world of miracles and sacrifice, consign the body to production, and celebrate disagreement within diverse interpretive communities. It sounds completely rational. Unfortunately, political identity, like other forms of identity, is not a matter of reason alone.

Has the Reformation finally run its course with the emergence of a post-sovereignty, global regime of law? I suspect not. First, the Church never conceded defeat. Second, there was a massive conceptual migration of sovereignty into the form of the nation-state. The same forms of response may be going on today. The United States, like the Church before it, is not going to concede defeat. In the period following September 11, the tenacious character of the American political belief in its own sovereignty has become strikingly clear. We may also be seeing a shift in the locus of experiential forms of meaning away from the political sovereign to new communities. Attacks on globalization often take the form of charges of a democracy deficit. Democracy for these movements is not simply a procedural claim. The democratic ideal invokes a participatory politics of resistance, sacrifice, and meaning. Countercultural movements always have their own erotic appeal. If an individual no longer finds himself a part of the body of the popular sovereign, where will he locate the ultimate truth of his own finite existence? These movements suggest that the question remains important. These two forms of opposition to globalization are often themselves at odds, but so then were the Church and the nation-state.

The act that is at the end point of politics—sacrifice—transcends the burdens of finitude. There remains a deep need to overcome the body itself, to find life through death. If that possibility disappears from national politics, it is likely to reappear elsewhere. Consider in this regard not just new forms of countercultural resistance, but the rapid growth of evangelical faith and the reemergence of a vigorous ethnic nationalism. All of these promise a return to an older faith of sacred presence, of magic and instantiation. Whether these reappearances will be more benign than politics is an open question.

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<sup>56</sup> For an example of the European form of this battle, see JOSEPH MARIE DE MAISTRE, *CONSIDERATIONS ON FRANCE* 41–53 (Richard Lebrun trans., McGill-Queen's University Press 1974) (arguing for an identity of religion and politics, and denying that a constitution can be the product of reasoning alone). This conflict between speaking and living the truth is at the center of Lincoln's famous Lyceum speech of 1838, when he spoke of the need to supplement reason with "reverence for the constitution and laws." PAUL KAHN, *LEGITIMACY AND HISTORY* 32–35 (1992). More generally, we see this conflict running throughout the nineteenth century dispute between the Rationalists and the Romantics. See CHARLES LARMORE, *PATTERNS OF MORAL COMPLEXITY* 92–130 (1987).

## IV. CONCLUSION

The achievement of the modern politics of popular sovereignty was to link the organic unity of the Church to the Enlightenment belief in reason. This linkage describes the fundamental character of the American politics of popular sovereignty as the rule of law. This synthesis gave us a powerful experience of meaning along with the capacity to aspire for justice: literally a national church of liberalism. It also gave us a deeply militarized state that could call upon the ample willingness of its citizens to sacrifice. It gave us law and war.

Sovereignty is neither a matter of class interests nor of abstract reason. Sovereignty is a political concept—indeed, it is *the* political concept. To give sovereignty its due requires that we pursue a form of analysis open to faith, myth, transgenerational identity, and the sacred. We will not understand the twentieth century unless we take these terms seriously: It was a century marked by the development of national sovereignty, the rule of law, and incredible sacrifice. We may not foresee the struggles to come in the twenty-first century unless we adopt a form of study adequate to the phenomenon of the political. If we are not yet done with the need for the sacred, we may not yet be done with the politics of sovereignty.