

Introducción

Damián Gálvez

Un laboratorio de (re)escrituras: la edición como espacio de experimentación y formación crítica

Intervenciones

Diamela Eltit
Mario Garcés

Pensar la revuelta

Rodrigo Karmy

Chile despertó

Begoña Ugalde

Piedra Papel Tijera

Artículos

Judith Butler

Para imaginar un mundo después de este, la democracia necesita las humanidades

Miguel Vatter

The Rule of Law as Concrete Order: From Neoliberal Capture to Postliberal Weaponization of Constitutionalism

Jacques Lezra

Insuficiencia

Nicolás del Valle

El crepúsculo de la civilización: dominio, naturaleza y razón instrumental en Max Horkheimer

J. Camilo Valdés

Sublevaciones: síntomas y potencias en el pensamiento de Michel Foucault y Georges Didi-Huberman

Lieta Vivaldi
Danitza Pérez
Mistral Ensignia

Regulación de las Tecnologías Reproductivas Asistidas en Chile: análisis crítico desde una perspectiva feminista

Javier Cristiano
Guido Montali

Toda espera es política. Acerca de las relaciones entre espera y poder

Claudio Espinoza

Hacia una comprensión de lo político: trayectorias teóricas y metodológicas de la antropología política

Laura Gentilezza

Los libros y los cuadros. Sobre las estrategias del quehacer nacional en Gainza y Zambra

Reseñas

Alejandro Fielbaum

Francisco Layna Ranz. *Trinchera, tribuna y periódicos. Lecturas políticas del Quijote (España y Latinoamérica, 1898-1950)*. Madrid: Iberoamericana Vervuert, 2025

Matías Escobar

Sheldon Wolin. *Democracia y revuelta*. Buenos Aires: Palinodia, 2025

The Rule of Law as Concrete Order: From Neoliberal Capture to Postliberal Weaponization of Constitutionalism

El Estado de derecho como orden concreto: de la apropiación neoliberal a la instrumentalización posliberal del constitucionalismo

O Estado de Direito como ordem concreta: da apropriação neoliberal à instrumentalização pós-liberal do constitucionalismo

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Abstract

This article puts forward a hypothesis as to what links neoliberalism to postliberalism, despite the apparent opposition between liberalism and illiberalism, globalism and nationalism, free market and homeland security that these ideologies mobilize. The hypothesis is that they both share a conception of the law as “nomos” or “concrete order,” opposed to democratic legislation, as well as an imperial interpretation of the “law of nations.” The article discusses the idea of law as “nomos” in relation to Carl Schmitt and traces its deployment in Friedrich von Hayek’s neoliberal conception of jurisprudence and in Adrian Vermeule’s recent, postliberal “common good constitutionalism”.

Keywords: Neoliberalism, postliberalism, nomos, imperial presidency, Schmitt, Vermeule.

Resumen

Este artículo plantea una hipótesis sobre qué vincula al neoliberalismo con el posliberalismo, a pesar de la aparente oposición entre liberalismo e iliberalismo, globalismo y nacionalismo, libre mercado y seguridad nacional que estas ideologías mobilizan. La hipótesis es que ambas comparten una concepción del derecho como “nomos” u “orden concreto”, en contraposición a la legislación democrática, así como una interpretación imperial del “derecho de gentes”. El artículo analiza la idea de la ley como “nomos” en relación con Carl Schmitt y rastrea sus aplicaciones en la concepción neoliberal de la jurisprudencia de Friedrich von Hayek y en el reciente “constitucionalismo del bien común” posliberal de Adrian Vermeule.

Palabras clave: Neoliberalismo, posliberalismo, nomos, presidencia imperial, Schmitt, Vermeule.

Resumo

Este artigo apresenta uma hipótese sobre o que liga o neoliberalismo ao pós-liberalismo, apesar da aparente oposição entre liberalismo e iliberalismo, globalismo e nacionalismo, mercado livre e segurança interna que estas ideologias mobilizam. A hipótese é que ambas partilham uma concepção do direito como “nomos” ou “ordem concreta”, em oposição à legislação democrática, bem como uma interpretação imperial do “direito das nações”. O artigo discute a ideia de lei como “nomos” em relação a Carl Schmitt e traça os seus usos na concepção neoliberal da jurisprudência de Friedrich von Hayek e no recente “constitucionalismo do bem comum” pós-liberal de Adrian Vermeule.

Palavras chave: Neoliberalismo, pós-liberalismo, nomos, presidência imperial, Schmitt, Vermeule.

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Introduction: the jurisprudence of *nomos* from neoliberalism to postliberalism

If the history of the history of neoliberalism is written one day, then the question of the “rule of law” will likely be seen to mark a caesura in the kinds of discourse written about this movement.¹ Before World War II many of the thinkers who would be later classified as “neoliberals” understood themselves to be reacting against socialist-inspired “command” or “planned” economies and advocated a conservative return to the classical principles of “laissez-faire” economics. But during the war and after the foundation of the Mont Pélérin Society in 1947 they began to understand themselves as revolutionary thinkers intent on bringing about an entirely new “liberal social order” (Hayek) to replace the social-democratic form of capitalism adopted by welfare states. The key shift from conservative to revolutionary mindset, so I argue, is to be located with the renewed attention to the *normative* conception of order that underlies formal and positive law and is presupposed by any system of political economy. Normative order refers to a “rule of law” that is established prior to written constitutions and positive legislation, and is genealogically to be traced back to the ancient Greek conception of law as *nomos*. The *nomos* denotes the appropriation, distribution and cultivation of a territory that lies at the basis of any legitimate use of violence and makes possible a political community.²

The *nomos*-based approach to understanding institutions was re-introduced into 20th century legal thought in the 1930s by Carl Schmitt and Leo Strauss, who translated it as “concrete order.”³ After World War II, the “nomothetic” understanding of law became central to Friedrich Hayek’s influential formulation of neoliberal thought.⁴ If, as Wendy Brown puts it, neoliberalism is “a peculiar form of reason that configures all aspects of existence in economic terms,” (Brown, 2015, p. 17) this is ultimately possible only because with Hayek and others, political economy took an “institutionalist” turn based on the conception of law as *nomos* and concrete order, whose immediate origins are to be found in Schmitt’s critique of legal formalism and liberal democracy. Michel Foucault was among the first to register the shift from an economic to a juridical logic within neoliberal discourse, an insight that was possible thanks

¹ See (Mirowski & Plehwe, 2009), (Slobodian, 2018) and (Cooper, 2026) on neoliberalism as a movement of global reach.

² On this conception of *nomos*, see (Schmitt, 1995) and (Schmitt, 2003). For discussion, see (Vatter, 2014) and (Meierhenrich & Simons, 2016).

³ See (Schmitt, 2004) and (Strauss, 1995). For Hayek’s late reconstruction of his theory in terms of “*nomos*” see (Hayek, 1973). Recent discussions of the rule of law in neoliberalism like (Biebricher, 2018, pp. 49 and 104) quickly mention *nomos* but do not delve into its significance for the functioning of law and political economy in neoliberalism.

⁴ I refer to my previous study (Vatter, 2018) from which I draw here.

to his interpretation of governmentality as *nomos*-based, i.e., derivative from a “pastoral” logic of power (Foucault, 2009). In the 1979 course on “the birth of biopolitics” Foucault establishes the hypothesis that neoliberalism reconceived neo-classical political economy based on the idea of “the principle of the rule of law in the economic order [*État de droit économique*]” (Foucault, 2008, p. 171),⁵ where the Austrian, German and North American variants of neoliberal doctrine could be distinguished, among other things, as a function of their distinct understandings of the *nomos*.⁶

With the current crisis of neoliberalism and the rise of “illiberalism” and “alt-right” discourses, coalescing in the Trump administrations, interpreters have asked whether there exists a connection between neoliberal and postliberal ideologies.⁷ In this article I argue that the connection lies in the continued reliance on the “planetary” or “globalist” reach of the idea of *nomos*.⁸ That neoliberal experiments began in earnest in the “global South” was not only a consequence of the failure to successfully implement the anti- and de-colonial principles of “development economics.” It also revealed that neoliberal constitutionalism rested on a Schmittian narrative of globalization as the imposition of an imperial and colonial “nomos of the Earth.”⁹ The link between an imperial understanding of *nomos* and the neoliberal “world order” has recently been revisited by historians of international law like Martti Koskeniemi in relation to the juridico-economical dynamics first worked out by Francisco de Vitoria in his justification of the Conquest of the Americas on the basis of *ius gentium* (the law of nations).¹⁰

By claiming that “tariffs” is the “most beautiful word in the dictionary,” the Trump administrations have set out to destroy the neoliberal confidence in *catallaxy*, viz. the belief that peace can be brought through international commerce, and in the process they have called into question the “rules-based” interna-

⁵ Foucault clearly states that *neoliberalism* contains two dynamics, one that introjects legal discourse into economics, and the other that projects economics into other social spheres. As he says, on the one hand, neoliberalism tests the hypothesis that “the overall exercise of political power can be modelled on the principles of market economy” (Foucault, 2008, p. 131); on the other hand, neoliberalism works from the beginning by denying the “naturalness” of economic relations, and instead posits the principle that the juridical “informs” the economic: “the economy must be a game: a set of regulated activities... but in which the rules are not decisions which someone takes for others. It is a set of rules which determine the way in which each must play a game whose outcomes is not known by anyone. The economy is a game and the legal institution which frames the economy should be thought of as the rules of the game” (Foucault, 2008, p. 173).

⁶ For Hayek as a thinker of the rule of law, see (Dyzenhaus & Poole, 2015), which however fails to recognize the priority of Foucault’s analysis. Neither Foucault nor the idea of *nomos* are mentioned in (Slobodian, 2018).

⁷ See for example (Slobodian, 2025), which focuses on the recovery of a socio-biological conception of “nature” to bridge Hayek with the alt-right movement. Slobodian, however, does not acknowledge the role played by a conception of nature drawn from “classical natural right,” which is directly related to the notion of *nomos*, and is found in (Deneen, 2019), one of the manifestos of postliberalism.

⁸ On the failure of development economics and the rise of neoliberalism, see the prescient analyses found in (Hirschman, 1981). On the “global” character of neoliberalism, see (Hardt & Negri, 2000).

⁹ On Schmitt and postcolonial thought, see (Kalyvas, 2018).

¹⁰ See (Koskeniemi, 2021).

tional order” that rested on Vitoria’s “liberal” interpretation of the *ius gentium*. By focussing on the recent work of the Harvard law professor Adrian Vermeule and drawing links to Trump’s recasting of the Monroe Doctrine, I show that “postliberal” attacks on “globalists” do not signal a retreat from empire to nation but rather reflect an equally “global” extension of *nomos*-thinking at the heart of the illiberal or alt-right understanding of constitutionalism. Vermeule’s thought is symptomatic of the new postliberal conception of *nomos* that was developed in order to support Trump’s culture war against “globalists.” But postliberalism is no less “globalist” than neoliberalism was: postliberalism is the form taken by neoliberalism when it becomes self-conscious, that is, when it sets as its highest good the protection of the imperial *nomos* that made its political economy possible in the first place.

On the priority of normative order over legislation in Schmitt and Neoliberalism

Hayek distinguishes between two senses of social order: one that is imposed deliberately and through hierarchical organization, the other which he calls “spontaneous order” or “catallaxy”, a Greek term which means a “peaceful” way of “connecting” people by making possible uncoerced “exchanges” between them (Hayek, 1984). The “spontaneous order” of free markets is one example of catallaxy. “The central concept of liberalism is that a spontaneous order of human activities, much more complex than any order which could be made by a deliberate action, shall form by itself under recognized universal rules of just conduct that protect the private domain of individuals” (Hayek, 1984, p. 365). The salient point here is that the “spontaneity” of order is generated in and through one kind of law, which Hayek calls *nomos*, and stands in tension with another kind of law, which he calls *thesis*, and is identified with “legislation”.¹¹ The former is “nomothetic” – it seeks to conduct the way in which individual actors choose to pursue their own interests without imposing any ends; the latter is “teleocratic” – it imposes substantive, collective purposes to which individuals must subject their self-guided pursuits. For Hayek the “rule of law” is conducive to “liberty” only when law is understood as *nomos*: this allows for “spontaneous order” as “an effective co-ordination of human activities without deliberate organization from a commanding intelligence” (Hayek, 2011, p. 229). By contrast, “legislation” – even one generated by a democratic government – always “requires that some should give orders and others obey” (Hayek, 2011, p. 229). It follows that for Hayek, an

¹¹ Hayek also formulates this distinction as that between a “nomothetic” and a “teleocratic” conception of the law (Hayek, 1973, p. 188).

authentic “liberal social order” will be one in which legislation transmutes itself into the “regulation” of conditions that allow for the self-generation and preservation of spontaneous orders: “the task of the lawgiver is not to set up a particular order [legislation/MV] but merely to create the conditions in which an orderly arrangement can establish and ever renew itself.... All that is required is a limited regularity in its behaviour; and the purpose of human laws we enforce is to secure such limited regularity as it will make the formation of an order [nomos/MV] possible” (Hayek, 2011, p. 230).¹²

Foucault’s lectures on neoliberalism were among the first to direct attention to the essential and internal connection between “free” markets and law as *nomos*. Previously, neoliberalism was understood as a species of libertarianism characterized by a “negative” conception of liberty as freedom from law.¹³ After Foucault’s analysis, neoliberalism shows itself as a theory of governmentality, viz., a series of tactics and dispositives designed to “conduct the conduct” of individuals as actors in a civil society characterized by “free markets”. Hayek in fact calls *nomos* the “rules of conduct.” For neoliberalism “liberty” becomes a consequence, rather than a presupposition, of a way of being governed by law as *nomos* prior to and outside of positive democratic legislation.¹⁴

Hayek credits thinkers of the Scottish Enlightenment like James Steuart, Adam Ferguson, Adam Smith and David Hume for “the discovery that there exist orderly structures which are the product of the action of many men but are not the result of human design” (Hayek, 1973, p. 37). What distinguishes “neoliberalism” from these classical “liberal” thinkers is the additional hypothesis that “the formation of spontaneous orders [free market/MV] is the result of their elements following certain rules [*nomos*/MV] in their responses to their immediate environment” (Hayek, 1973, p. 37).¹⁵ Hayek’s doctrine stands or falls on the nomothetic foundation of economic action.¹⁶ In this sense, Hayek’s neoliberalism is closely related with the “Ordoliberal” school and its polemic against classical “laissez-faire” doctrine which believes in the independence of free markets from regulation.¹⁷ Classical liberalism becomes “neo-liberalism” when the meaning of jurisprudence no longer depends on a system of “natural” rights but is understood as the search for those rules or principles of law/*nomos* that underpin the “natural system of interests.”

¹² As Biebricher puts it: “the neoliberal problematic concerns the political and social conditions of possibility for functioning markets” (Biebricher, 2018, p. 35). But notice that the legal aspect is here not emphasised in this last formulation. Biebricher’s account of the “political theory” of neoliberalism takes up its conceptions of “the state, democracy, science and politics” but not of law per se.

¹³ For examples, see (Kukathas, 1989) and (Caldwell, 2005), among others.

¹⁴ On governmentality, pastoral power and neoliberalism, see also (Dean, 2013) and (Lemke, 2019).

¹⁵ I draw here from my more extensive analysis in (Vatter, 2018).

¹⁶ See Hayek’s critiques of other economic and legal discourses that do not recognize the importance of law as *nomos* (Hayek, 1973, pp. 65ff, 135ff).

¹⁷ The rejection of classical “laissez-faire” economics in neoliberalism is the main point repeated by Slobodian and Biebricher in their recent books.

These rules or principles derive from a “pastoral” conception of power in which the economic “disposition” of a “population” over a “territory” was designed to provide “security” to the reproduction of its form of life. Hence Foucault’s definition of this form of power: “power that has populations as its target, political economy as its major form of knowledge, and apparatuses of security as its essential technical instrument” (Foucault, 2009, p. 108). In *The Birth of Politics* it becomes clear that the meaning of “security” in neoliberalism entails establishing the conditions of control of conduct that make it possible for the individual to be “free and responsible,” that is, to be “sovereign,” in a capitalist civil society or “system of natural interests” characterized by the workings of “free markets” that turn everyone into a means of everyone else’s self-preservation. The conditions by which the workings of free markets are “securitized” for the population take the paradoxical form of non-interventionist state regulations, for which Foucault coins oxymoronic neologisms like “la politique sociale privatisé,” “un gouvernement de société,” “une politique de société” (Foucault, 2004, p. 150-151). Foucault refers in this context to one of the key thinkers of German Ordoliberalism, Alexander Rüstow, who employs the term *Vitalpolitik* to describe the kind of biopolitical controls of society required by a free market economy (Foucault, 2004, p. 152).¹⁸

This biopolitical conception of security does not contradict Hayek’s claim that a “free market” works because of competition, and competition is not premised on the givenness of equilibrium but on the role of “unpredictable” factors related to the “freedom,” “creativity” and “responsibility” of the economic actor understood as an entrepreneur. The entrepreneur’s conduct is normative because they are routinely placed in the situation of having to decide where to invest their energies and capital and where not to, what to select, strengthen, and help live, and what to ignore, cast aside and let die. In this sense, the neoliberal ideal of entrepreneurship remains bio-political.

Roughly at the same time that Foucault was lecturing on neoliberal governmentality, Albert Hirschman offered his own genealogy of neoliberalism as an answer to Max Weber’s problem of the “legitimacy” of capitalist accumulation (viz. the problem of the “ethics” of capitalism). Like Foucault, Hirschman also identified the rule of law as the crucial element in the neoliberal deployment of “free markets” (Hirschman, 2013).¹⁹ For Hirschman, capitalism originated as an answer to a political question: how could one guide the conduct of human beings and restrain their “destructive passions” when both Christian religion and Greek philosophy had failed to do so? (Hirschman, 2013, p. 15). Hirschman’s hypothesis is that the solution consisted in adopting the “principle of counter-

¹⁸ See now the discussion of *Vitalpolitik* in (Biebricher, 2018: 41-46) but without any reference to the biopolitical context of these proposals. For a different understanding of how this “vital politics” is focussed on the family and joins together with neoconservative “family values”, see (Cooper, 2017).

¹⁹ This “ethical” motif in the discourse of neoliberalism is now picked up in (Whyte, 2019).

vailing passion" where government disposes one set of "innocuous" passions against another set of "dangerous and destructive" passions (Hirschman, 2013, p. 20). The "good" passion was reinterpreted in terms of the pursuit of one's "interests." Finally, it became possible for republican governments to establish the revolutionary "constitutional engineering" in terms of "checks and balances".²⁰

The analysis of interests had two great advantages for the art of government. First, it allowed for the "predictability" of human behaviour and so for governing the conducts of individuals. As Hirschman cites James Steuart: "were a people to become quite disinterested: there would be no possibility of governing them" (Hirschman, 2013, p. 50). For Hirschman, the concept of "interest" rendered people "transparent" to each other. In turn, this allowed for the outcomes of interactions to be calculable, making it possible for "the possibility of a mutual gain" to emerge "from the expected working of interest in politics". (Hirschman, 2013, p. 50). This principle of "mutual gain" would later be transposed into economic transactions by 19th century political economy and become the foundation for the justification of "free markets" as an essential component of human freedom, all the way to Friedrich Hayek and Milton Friedman.²¹

The second advantage of the introduction of interest into governmental reason is closely related to the above point: it allowed the pursuit of gain to be re-valued as a "harmless" pursuit compared with conquest and war-making (Hirschman, 2013, p. 56). From here derived the central idea, found in both Montesquieu and Kant, that money-making and commerce were "innocent and doux" and that the free commerce (of commodities but also of opinions) not only "polishes" the conduct of citizens and permits for a "civil society" but is also the basis of international peace. Montesquieu joins together the advocacy of the apparatus of "doux commerce" with the apparatus of "checks and balances" in order to bring about a definitive limitation of the sovereign power of the state, and so a "constitution of liberty".

It is no surprise that Hayek in particular advances the neoliberal agenda by a complex reappropriation of republican ideals of constitutionalism and rule of law that is ultimately employed against democratic legislation. Republican political independence is reframed as the independence of markets from state interference. Thus, Hayek's central argument is that the American colonies embarked on their revolution as a reaction to the "principle of parliamentary sovereignty unlimited and unlimitable" (Hayek, 2011, p. 261). It is against this sovereignty that they set up the ideal of a "limited constitution" i.e., "the idea of a constitution limiting the powers of government" (Hayek, 2011, pp. 264, fn.211).

²⁰ "The comparatively novel thought of checks and balances gained in persuasiveness by being presented as an application of the widely accepted and thoroughly familiar principle of countervailing passions" (Hirschman, 2013, p. 30).

²¹ See now the discussion in (Whyte, 2019).

Hence Hayek's general avoidance of the idea of a people's constituent power or popular sovereignty. Only in one place in *The Constitution of Liberty* does Hayek mention the fundamental idea of "power of the people": "The formula that all power derives from the people referred not so much to the recurrent election of representatives as to the fact that the people, organized as a constitution-making body, had the exclusive right to determine the powers of the representative legislature. The constitution was thus conceived as a protection of the people against all arbitrary action, on the part of the legislative as well as the other branches of government" (Hayek, 2011, p. 266). When interpreted as *nomos*, the republican constitution is employed by neoliberalism as a device to supplant the will of the people and its legislative activity in favor of judge-made laws that "secure" the distribution of property effected by the "free market". Returning to an old debate between Smith, Hume and Rousseau as to whether laws came before judges or judges before laws,²² Hayek argues that judges are instruments of the *nomos*, rather than of the legislative will of a people: the judge "is called in to correct disturbances of an order that has not been made by anyone and does not rest on the individuals having been told what they must do [by legislation/MV].... The judge is an institution of a spontaneous order" (Hayek, 1973, p. 95). Conversely, "the 'law' that is a specific command, an order that is called a 'law' merely because it emanates from the legislative authority, is the chief instrument of oppression" (Hayek, 2011, p. 224).

The "order" or *nomos* that judges are meant to re-establish even against the democratic will of the people is ultimately an order of appropriation. Law as *nomos* "make it possible at each moment to ascertain the boundary of the protected domain of each and thus to distinguish between the *meum* and the *tuum*" (Hayek, 1973, p. 107). Referring to the Roman law maxims of Ulpian, Hayek recognizes the connection between the protection of property and "the aim of rules of just conduct [which] is to assign to each his due [*suum cuique tribuere*]." But Hayek denies that Ulpian's maxim warrants the redistribution of property for the sake of social justice or for attaining the common good (Hayek, 1973, p. 377). For the point of law as *nomos* is to establish what (already) belongs to each, rather than to determine what everyone ought to share in common. For Hayek, only the action of an individual can be just or unjust, depending on whether the act is in accordance or not with the judge-made law. But since the way in which a free market distributes goods obeys no one's intention, then there is no sense in saying that the market is either just or unjust. The preoccupation with distributive justice, and thus the desire to unduly interfere in the workings of the market, is for Hayek exclusively to be placed on the shoulders of a teleocratic conception of the law as organization of the state, that is, on the public law understood as a political constitution. For Hayek, the neoliberal rejection of sta-

²² On the history of this debate, see (Hont, 2015).

te intervention into markets pushes back against “the progressive penetration into private law by public law during the course of the last eighty or hundred years.... [which] has meant a progressive substitution of rules of conduct by rules of organization” (Hayek, 1973, p. 190). I shall discuss below how postliberalism is decisively oriented by the rejection of the neoliberal capture of public law for private ends.

On neoliberal rule of law and dictatorship

Montesquieu’s formula for the rule of law is this: “so that there may be no abuse of power, it is necessary that, through the disposition of things (*par la disposition des choses*) power be stopped by power” (Hirschman, 2013, p. 78).²³ Both Foucault and Hirschman point out that law as *nomos* refers to this idea of a “disposition of things” that generates order and security for a given population. I have been arguing that Hayek’s understanding of neoliberal rule of law adopts this conception of *nomos*. However, in Hayek’s idea that a constitutional order must preserve a more primordial appropriation and division of property into “mine” and “thine” there appears the debt to Schmitt’s reading of the archaic sense of *nomos* as characterized by a primordial violent appropriation.

More or less in the same years that Foucault put forward his hypothesis, Renato Cristi – perhaps the first political theorist to attempt a theoretical understanding of Augusto Pinochet’s 1973 coup in Chile and its establishment of the first neoliberal regime/constitution in the world – uncovered the affinity between the ideas of Carl Schmitt and Friedrich Hayek with regard to the legal order as *nomos* (Cristi, 1984).²⁴ At stake in the Chilean experiment (arguably anticipated by the Suharto coup in Indonesia, minus the neoliberal constitutional framework) was the development of a “model” designed to end the emerging consensus during the 1960s and 70s on the necessity of a “democratic” transition from capitalism to socialism by reactivating ideas about “constitutional dictatorship” that had been worked out, in all essentials, by Schmitt’s Weimar discourse on dictatorship and were later applied to the imposition of neoliberal constitutionalism.²⁵

Despite Hayek’s explicit intention to place Schmitt’s idea of *nomos* on the side of teleocratic rather than nomothetic law,²⁶ Cristi shows that Hayek was here

²³ Citing *Esprit des Lois* XI, 4.

²⁴ (Biebricher, 2018, pp. 76-77) adopts Cristi’s idea that neoliberalism takes up Schmitt’s notion of “authoritarian liberalism,” viz., the idea that a “strong” state is needed to protect the “free market” from democratic and socialist interventions.

²⁵ For the history, see (Streeck, 2013) and (Klein, 2007). For the necessity of this transition to socialism, see (Schumpeter, 2008). For “constitutional dictatorship” see (Rossiter, 1948) and (Agamben, 2005); for the rehabilitation of dictatorship, see (Schmitt, 2014) and (Colón-Ríos, 2020).

²⁶ (Hayek, 1973, p. 71) where (Schmitt, 2004) is cited.

misrepresenting Schmitt. Hayek overlooks both the decisionistic elements in neoliberalism and the underlying coincidence with Schmitt with regard to the priority of *nomos* over legislation (Cristi, 1984, p. 531).²⁷ Both elements serve to explain the seemingly paradoxical unity of Hayekian civil society and Schmittian state as realized by the Pinochet regime, which is generally recognized as the first full-blown neoliberal takeover of a republic.

What is significant about the Schmittian conception of *nomos* is the reference to a violent “original act of appropriation and division” that unites a system of formal law with the sovereign authority of the state.²⁸ The idea of *nomos* refers to “the full immediacy of a legal power not mediated by laws”; it is a constitutive historical event – an act of legitimacy, whereby the legality of a mere law first is made meaningful”.²⁹ In other words, behind the establishment of *nomos* there always hides the potentiality of a “constituent” form of dictatorship theorized by Schmitt, which was exactly what drew the attention of Cristi in relation to the Chilean experiment with neoliberalism.

The second crucial feature of law as *nomos* reveals the primordial connection of law to the appropriation, distribution (division), and pasture (production) of land. Schmitt’s fundamental point is that “law is founded on land appropriation.... This primeval act of land appropriation is the basis of all law. It is the ‘terrestrial fundament’ in which ‘all law is rooted.’ Land appropriation precedes the distinction between private and public law, it precedes the distinction between *dominium* and *imperium*, and in fact it establishes the conditions in which such distinctions can evolve” (Loughlin, 2015, p. 74). In the last instance, *nomos* becomes the condition of possibility of the legitimate exercise of power because it establishes a “boundary which divides internal from external.... From this division between inside and outside, a people is formed. That is, a people is created not by blood ties but by virtue of being situated in a concrete order or *nomos*” (Loughlin, 2015, p. 75). Against the Marxist approach to political economy, Schmitt argued that the boundary established by *nomos* preceded and made possible the “production boundary” of political economy.³⁰ Of crucial importance here is the colonial and imperial context in which Schmitt expressly framed the origins of the western public law or *ius commune* as deriving from the conception of the rule of law as *nomos*. This context offers a way to understand how the aspirations of neoliberalism to constitute a new “global” or “world order” stand in continuity with the idea of a “nomos of the Earth.” This imperial context is essential to both neoliberal and postliberal jurisprudence, although they give expression to it in opposite ways.

²⁷ Hayek follows Schmitt’s conception of law more closely in (Hayek, 2011, p. 313).

²⁸ (Loughlin, 2015, p. 72). For a general statement on this “political” understanding of jurisprudence, see now (Loughlin, 2018).

²⁹ Citing from (Schmitt, 2003) in (Loughlin, 2015, p. 83).

³⁰ On the “production boundary” as constitutive concept of political economy, see now (Mazzucato, 2018).

Neoliberalism, Christian empire and the commercial *nomos*

In *The Nomos of the Earth* Schmitt argued that “international” law first emerges with the Spanish Catholic philosopher Francisco Vitoria when he was faced with the task of legitimating the Conquest of the “New World.” For Schmitt, Vitoria rejected all arguments based on a purported moral or racial superiority of westerners in relation to the indigenous nations they encountered. Rather, he defended the legitimacy of the Spanish Conquista based on the claim that the *nomos* of the Christian Republic clearly divided the terrestrial globe into spaces (under spiritual control of the Christian church) where property had already been legally divided among nations and individuals and unlimited appropriation was banned, and other spaces that were considered to be lawless, and whose conquest on orders of the Pope as spiritual *dominus mundi*, “owner of the world,” was legitimate in light of the Christian spiritual mission to evangelize pagans and embark on crusades against “infidels”.³¹

Koskenniemi has re-interpreted Schmitt’s thesis in order to propose an account of the globalization of neoliberalism. Koskenniemi understands there to exist a continuity between the Catholic Vitoria and the Protestant Grotius in the sense that for both, international law responds to an “international need” for globalization that was congenital to emergent capitalism. Koskenniemi interprets Vitoria as setting the basis for an idea of *nomos* as an “informal imperial domination that is achieved through a worldwide pattern of acquisition and exchange of private property”: a global empire of *private* law underpinning capitalist expansion (Koskenniemi, 2011, p. 32).³²

Koskenniemi ascribes to Vitoria the doctrine that all nations are “free and equal” because each is characterized by their own *nomos*, viz., by (ancestral) legal narratives that account for why each nation has received its part of the Earth that (by natural law) was originally given in common to humankind. This nomo-thetic assumption is then employed by Vitoria as basis to re-interpret in “private law” terms the *dominium* at stake in his idea of the *ius gentium*, so that the latter becomes a “*nomos of the Earth*” that sets limits to whatever states or empires would otherwise wish to do to other nations, for instance, wage war on them for purposes of increasing the glory or prestige of their leaders, or force them to convert to the religion of their priests.

Koskenniemi’s thesis is that the discovery of the New World gave Vitoria the occasion to repurpose three concepts from Roman Law - *dominium*, *ius gentium*, and *bellum iustum* – that would subsume the ancestral *nomos* of the Earth to the modern, global *nomos* of the Earth. On his interpretation, Vitoria is the first to give a “global” articulation to Roman law by offering a “subjective right” inter-

³¹ For discussion of this point and the pertinent literature, see (Vatter, 2026) on which I draw in what follows.

³² For another reading of Vitoria in relation to the justification of global capitalism, see (Fonseca, 2018).

pretation of categories of Roman natural and private law. In short, Vitoria creatively misinterpreted Roman law in order to set up the positive legal order (based on *ius gentium*) as a system of individual “natural” rights. The recognition and enactment of these rights is what legitimates the limited use of coercive power by political institutions.

The results of Vitoria’s globalization of Roman law as *ius gentium* defined the political imaginary of western modernity: they established the legal sovereignty of the modern territorial state on grounds that are independent from the “universalist” pretensions of Church and Empire; they helped to frame a “global economic system based on private ownership and profit”; last but not least, they gave a new purpose to the Roman, then Christian practice of continuous warfare between states as a containment mechanism for wars of aggression, viz., a prototype of the European “balance of power” mechanism that was more or less observed until the development of European imperialism unravelled into World War I.

Koskenniemi argues that Vitoria re-interpreted *dominium* and *ius gentium* as functions of commutative justice, the justice involved in the exchange of things and services, rather than distributive justice, the division and allocation of powers and offices. Traditionally, *dominium* covers the sense of jurisdiction in public law – basically, who rules – and the sense of ownership in private law. By making *dominium* a matter of commutative justice, Vitoria is saying that because all human beings have a power of ownership over their actions and things, the exchange of things and services between people ought to be the basis of their public law relationship. That means, on this reading, that global justice is first to be achieved on a free market basis, and market-based justice is the only one that can be truly globalized. Koskenniemi’s interpretation of Vitoria, thus, turns him into the first thinker of “*nomos* of the Earth” as a function of what Hayek will call *catallaxy*, a normative order in which the unrestricted but rule-bound system of exchanges leads to the overcoming of the distinction between friends and enemies in public law. “To disrupt commercial relations... is a violation of *ius gentium* that is punishable by war” (Koskenniemi, 2011, p. 29). Thus, the new regulation of war as “just war” that follows from Vitoria’s *ius gentium*, on this interpretation, is a consequence of the belief that the enforcement of a universal system of private freedom-rights based on global free exchange is the only legitimation for war, while, as a matter of legal principle, wars that seek to “rob” or “extort” nations of their wealth are to be condemned and punished by economic embargoes and sanctions.

However, Koskenniemi’s interpretation of Vitoria and the *ius gentium* is not the only possible reading. In the early 20th century, Brown Scott wrote *The Spanish Origin of International Law* in which he derived three basic ‘principles of the law of nations’ from Vitoria, principles that to date underpin the so-called

“rules-based” liberal international order: nations are to be recognized in so far as they conform modern territorial states; all states are of equal status, whether they belong to Christendom or not; states are ‘artificial’ legal persons through which groups of individuals exercise jurisdiction over a given territory by imposing a rule of law and representative forms of government on themselves (Scott, 1934, p. 281). For Brown Scott, international law extends the normative order found *within* these kinds of states to the *inter*-state condition. Since on this model principles of justice that apply within states also apply between states, ‘it follows that force between states could only justly be used to redress a wrong, and a resort to force was only to be tolerated because there was no court of the States’ (Scott, 1934, p. 282). The right to go to war (*ius belli*) was a marker of sovereignty in the *ius publicum europaeum*. It follows that wars of aggression could be made illegal only by internationalizing the constitutional order that emerged with the American Revolution and its Declaration of Independence. Thus, Brown Scott advocated for ‘the creation of an international court of justice by the States and for the States, in which their controversies would be decided in the same manner as within the State, [and] would render war both unnecessary and unlawful’ (Scott, 1934, p. 282). Only a few years later, in *The Nomos of the Earth* Schmitt will argue that the outlawing of wars of aggression was itself an aggression on the part of the Anglo-American empire against the Germanic empire. Schmitt considered the latter empire (*Reich*) to be covered under the European or Continental conception of the *ius gentium*.

Brown Scott’s derivation of a “rules-based” international order from Vitoria’s *ius gentium* depends on the assumption that the Anglo-American conception of the state can be universalized to all peoples and nations of the world. It is one possible interpretation of the Monroe Doctrine. However, before Schmitt contested this reading of the Doctrine, it had already been questioned by the Spanish jurist Barcía Trelles in his *Doctrina de Monroe y cooperación internacional* (1931), whose remote origins the Spanish jurist traces back to Vitoria.³³ Barcía Trelles accepts that Vitoria’s *ius gentium* sets forward a conception of global justice based on the equality of sovereign states, the existence of an international community with authority to enforce moral rules that apply to these states, and the orientation toward prevention of war between them (Beneyto, 2021, p. 1487). But he argues that the Monroe Doctrine of ‘America for Americans’ adopted an Iberian ideal of empire based on the division of the ‘whole world’ into great spaces that *excluded* intervention from other imperial powers. It was only with the American intervention in World War I that the Monroe Doctrine received a new interpretation that positioned the United States, ‘thanks to the domination of

³³ On Barcía Trelles, see (Beneyto, 2021). See also (Hohendahl, 2018, p. 62ff) for the claim that Schmitt and Hitler both employed distorted readings of the Monroe Doctrine that justify aggressive wars of occupation to fashion their conceptions of *Grossraum* and *Lebensraum*, respectively. See (Schmitt, 2011) on the Monroe Doctrine.

the sea', to pivot 'into the global reach of a world police order' along the liberal internationalist lines conceived by Brown Scott (Beneyto, 2021, p. 1490). On this reading, the United States adopted the British imperial vision only after World War I. This point becomes essential in understanding the most recent "postliberal" derivation of international law out of *ius gentium* as I discuss below.

The Postliberal Nomos and the Return of Classical Constitutionalism

Vermeule's *Common Good Constitutionalism* auspices the recovery of the *ius publicum europaeum* as a "nomos of the Earth" by showing that the main tradition of constitutional interpretation in the United States derives from this jurisprudence rather than from legal positivism or originalism (Vermeule, 2022, p. 106). Schmitt is cited once in the book, but in setting out the tenets of this "common good" constitutionalism, Vermeule adopts the technical term of "concrete order" introduced by Schmitt in the 1930s. Vermeule wants to show "the very nature of the United States as a concrete order, an embodied, living sovereignty that exists apart from and prior to the written larger-C Constitution" (Vermeule, 2022, p. 106). Vermeule also avoids the term *nomos* but instead adopts the Roman term *ius* ("overall body of law generally"), which he understands as "lower-c constitution" or "concrete order" and opposes it to the term *lex* ("enacted positive law") (Vermeule, 2022, p. 16). This way of understanding the distinction between *ius* and *lex* matches the distinction that Hayek makes between law/*nomos* and legislation. Like Hayek, Vermeule also identifies the principles of law-as-*nomos* with Ulpian's maxims: "the basic principles of right [*ius*] are: to live honestly [*honeste vivere*], not to harm any other person [*alterum non laedere*], to render to each his own [*suum cuique tribuere*]" (Vermeule, 2022, p. 66). But Vermeule assigns an entirely different purpose to these Ulpian maxims than Hayek does. He will employ them to underpin a *teleocratic* conception of the *nomos* oriented around the priority of the "common good" over the adjudication of individual rights. But the crucial point, as I shall demonstrate, is that this teleocratic understanding of the rule of law (*ius*, concrete order) is no less rooted in modern governmentality and pastoral power than neoliberalism's conception of the rule of law.

By the "common good" Vermeule understands "the structural political, economic and social conditions that allow communities to live in accordance with the [Ulpian] precepts of legal justice" (Vermeule, 2022, p. 66). These conditions make up the "concrete order," which is normative because it realizes, or gives "determination," to Ulpian's abstract maxims of legal justice. By "legal justice" one is not to understand the rulings of courts in reference to written legislation, but what the Aristotelian tradition calls *to dikaion*, the objective appropriation,

partition, and cultivation of a land or territory, which is synonymous with the *nomos* or “small-c constitution” of a polis, what Vermeule also calls “a larger objective order of legal principles” (Vermeule, 2022, p. 16).³⁴ This is the subject matter of what Vermeule calls “classical constitutionalism” or “classical law” and which Strauss renders simply as “classical natural right.”

The set-up of Vermeule’s argument is Thomist only in appearance, not in reality. Vermeule takes the definition of law as *ius* straight out of Aquinas’s *Treatise on Law* in the *Summa Theologica*: law is “a reasoned ordering to the common good,” “an act of purposive and reasoned rulership that promotes the good of the law’s subjects as members of a flourishing political community and ultimately as members of a community of peoples and nations” (Vermeule, 2022, p. 13).³⁵ I shall first analyse what Vermeule has to say about the “common good” of the political community and then pass on to discuss it in relation to the community of nations, the *ius gentium*.

The crucial idea is that law as *ius* orders life in common in view of the highest individual good, which in the Aristotelian tradition is happiness as a result of acting virtuously. The ordering of *ius* is teleological and rational, and it is to be determined by “rulership”: in other words, individuals can attain their highest good only under the direction of *ius*. This is a presentation of *ius* that is entirely within the scope of what Foucault calls a “pastoral” conception of government. The purpose of the community is set by the “living sovereignty” – a reference to the *lex animata* of the law-giver that initially imposes the *nomos* on a population and encloses it within a “political community” and its concrete order. Vermeule refers to a passage where Aquinas discusses why it is preferable for a “few wise men” to establish “law” (viz. *nomos*) since they are “animated justice” (*lex animata*: this is the Aristotelian idea that the *phronimos* is a “living law”), than for questions of justice (*to dikaion*, *ius*) to be decided, case by case, by positive law judges who necessarily lack perspective on what is required by the good of the community as a whole and over the long range (Vermeule, 2022, p. 135).³⁶

The *ius* is a “rational” ordering of the community in two fundamental, but distinct senses of reason. The first refers to an “ancient” conception of reason: the ordering realizes “principles” of law that are ultimately derived or connected with the orders of Nature and of God, that is, with the mind of God. The *ius* is also “rational” in the sense that each concrete ordering (what above I spoke of as “disposition”) is a matter of application (or what Vermeule calls “determination”) of principles of law in accordance to what is needed in a given situation:

³⁴ On this Aristotelian sense of legal justice, see (Villey, 1983).

³⁵ Citing from Aquinas, *Summa Theologica* parts I-II, q.90, art. 4 (Aquinas, 2000).

³⁶ Vermeule does not refer here to the Platonic tradition of the “statesman” who rules without laws because they are in possession of the true “political science”. On this topos of the rationally superior *nomothetes*, see now (Lane, 2023). For the history of the *lex animata* in western jurisprudence, I refer to (Vatter, 2020).

the orderings are the products of “regnative” prudence or *phronesis* (Vermeule, 2022, p. 24).³⁷ The point of this account of “determination” is that classical natural right does not require merely the “interpretation” by judges of standing law, but it needs political stipulations that cannot be directly derived from the principles of law but are at the discretion of the persons in authority. In *Natural Right and History* Strauss explains the decisionistic outcomes of “rational” *ius*: “there is no principle [of classical natural right] which defines clearly in what type of cases the public safety, and in what type of cases the [particular] precise rules of justice, have priority. For it is not possible to define precisely what constitutes an extreme situation in contradistinction to a normal situation. Every dangerous external or internal enemy is inventive to the extent that he is capable of transforming what, on the basis of previous experience, could reasonably be regarded as a normal situation into an extreme situation. Natural right must be mutable in order to be able to cope with the inventiveness of wickedness” (Strauss, 1953, p. 161, emphasis mine). The mutability of *ius* corresponds to the decision on who is friend and who is enemy which belongs to the authoritative holders of sovereignty.

The crucial distinction between Hayek and Vermeule is that whereas in Hayek the normative “ordering” is a “spontaneous” result of the free exchange of information and goods by individuals pursuing their interests in the “correct” manner (that is, in accordance with Ulpian’s principles), for Vermeule the normative “ordering” is the result of governmental action by the authoritative officers of the community. As Vermeule says, the upshot of “common good constitutionalism” is not the legitimacy of the market but of the state: “the common good, on this view, is a type of justification for public action” of officials who conduct, through various institutions, the private morals, or conduct, of individuals. “The largest point of the [*ius commune*] tradition is that public authority is both natural and legitimate rather than intrinsically suspect” (Vermeule, 2022, p. 21).³⁸ At issue for Vermeule is to establish the intrinsic “goodness” of the state and its powers of coercion; this can be achieved by reading classical natural right as a theory of legitimacy rather than legality. In other words, “the central aim of the constitutional order is to promote good rule not to ‘protect liberty’ as an end in itself.” (Vermeule, 2022, p. 76). “Common good constitutionalism” is the repudiation of “*constitutio libertatis*,” the legal constitution of freedom, which Arendt took to be the central lesson drawn by American revolutionaries from the tradition of natural classical right.

³⁷ Referring to ST pt II-II, q.50, art 1.

³⁸ Since authoritative decisions are needed to determine the common good, the essential principle of government becomes that of deference to established authorities for the provision of the “safety” of the community (Vermeule, 2022: 88). For Vermeule, it follows that common good constitutionalism has no internal relation to democracy (Vermeule, 2022, p. 89) since the institutions that may best achieve the common good at any given moment may not be democratic ones. What authoritative deciders need, at most, is the “representation and consultation” of their subjects, but not their voting.

The governmental (in a Foucaultian sense of the term) character of “common good constitutionalism” is clearly stated by Vermeule when, immediately after recalling the centrality of the Ulpian principles of right, he claims that it is early modern *ragione di stato* (he mentions Botero) that “articulates the central goods at which constitutionalism should aim... a famous trinity, peace, justice and abundance, which I extrapolate to modern conditions to include various forms of health, safety and economic security” (Vermeule, 2022, p. 21). Vermeule understands “justice, peace and abundance” as provided by “police powers” defined as “the power to legislate for the protection of the health, morals and safety of the people” (Vermeule, 2022, p. 68). This is very much the same content that Foucault, in his lecture *Omnes et singulatim: Toward a Critique of Political Reason*, assigns to the “police”: “the police... is what enables the state to increase its power... [and] to keep the citizens happy – happiness being understood as survival, life and improved living.” Indeed, for Vermeule police powers are “powers to regulate the conduct of its citizens” and Foucault defines “police” as the “conduct of conduct.”³⁹ Vermeule’s tryptich of peace, justice and abundance matches exactly with Foucault’s nomothetic tryptich of territory, security and population.

The rational ordering of the “police” is the second, modern sense of “reason” that Vermeule ascribes to the *ius commune*: it concerns the inner “rationality” of the state which places the “security” of the state above the respect of private morality and individual rights under the devise *salus populi suprema lex esto*.⁴⁰ It is striking that Vermeule does not attempt to derive Botero’s *ragione di stato* from Ulpian’s maxims of legal justice, nor does he try to bridge the evident tension between Thomism and Machiavellism. He simply assumes that there exists a jurisprudential continuum between the highest value of “salus populi” in Roman republicanism and the “safety and security” that is provided by modern governmentality in an entirely biopolitical sense.⁴¹ For Vermeule the continuum between Aquinas and Botero is provided by a narrative about police powers: the sum of governmental actions required to order a population into a form of life that allows for their “happiness” or “flourishing”. What is striking here is the total absence of the idea of “freedom” as *sui iuris* status, viz. freedom as independence or non-domination that underpins the Roman republican sense of *ius*. Vermeule’s reading of Ulpian’s maxims is entirely opposed to Kant’s interpretation of the same that opens his *Metaphysics of Right*. The bio-political health and safety of the community, not the “external freedom” of the individual, is the absolute value for Vermeule’s *ius commune*.

³⁹ Police powers “care for the morals and welfare of the community” (ibid. 126). It is in the context of discussing police powers that Vermeule mentions Schmitt for the only time, referring to *Catholicism and Political Form* (fn 180).

⁴⁰ See the discussion of “reason of state” in (Meinecke, 1997).

⁴¹ For the connection between *ragione di stato* and biopolitics, see (Foucault, 2009).

The imperial presidency and *ius gentium*: From Monroe to “Donroe” Doctrine

Despite the best efforts by Koskenniemi, the relation between neoliberalism and *ius gentium* remains an interpretative hypothesis among many others. Hayek’s employment of *nomos* is studiously silent about its relation to the domain of international law, the *ius gentium*. This is not the case with Vermeule’s postliberal adoption of *nomos* which follows Schmitt, without mentioning him explicitly, in his post-World War effort to situate the *ius publicum europeum* in a global, or perhaps better, “planetary” perspective of the “*nomos* of the Earth.” If in the 1930s Schmitt introduced the idea of concrete order to make sense of the *ius civile* and internal politics, during the Cold War his main preoccupation was with concrete order in relation to the *ius gentium* and foreign politics. His focus shifted from legitimating the exercise of sovereignty within the polity to that of justifying the European imperial and colonial enterprise, at least as long as it retained its internal relation to the *respublica Christiana*. Similarly, the most innovative and bold move made by Vermeule is to place in continuity the Thomist conception of *ius* with the constitutional justification of the United States imperial presidency.⁴²

Vermeule’s audacious hypothesis is that the *nomos* of the United States is not best expressed by its Constitution but by “an embodied, living sovereignty that exists apart from and prior to the written large-C Constitution” (Vermeule, 2022, p. 106). This sovereignty is ‘awakened’ in and through the exercise of foreign policy by the President and Commander-in-Chief of the nascent federation. “In this context, then, one finds at the very foundation of the American polity, the *ius gentium*, not the positive will of We the People embodied in the constitutional text enacted in 1788” (Vermeule, 2022, p. 106). For Vermeule, it is not the self-legislating, constituent power of the American “People” that “makes” for the Unity of the States of America. This “unity” – in the shape of a Nation with its proper *ius* (i.e., the *ius gentium*) – pre-exists the constituent/constituted People generated in and through the act of giving itself a Constitution. Vermeule’s anti-federalist conception of the United States provides a “national” rather than a “republican” interpretation of the American Revolution. As a republic, the United States might need a constituent power of the people, but as a nation it does not. This is not because, like in Sieyes, the nation is a priori subsumed into the constituent power, but rather for exactly the opposite reason: according

⁴² The extension of Thomistic natural law into the sphere of the *ius gentium*, setting aside the discussion in the 20th century over Vitoria, was most famously carried out by Jacques Maritain in the context of establishing the Charter of the United Nations and the Universal Declaration of Human Rights. Maritain makes Thomist natural law a pillar of the “rules-based international order”. Vermeule, on the contrary, will mobilize Thomism to undermine the principles of an international order centered around the respect of human rights. On Maritain and international law, I refer to (Vatter, 2013).

to Vermeule's reading of *ius gentium*, by the natural order of things, nations become what they are not in relation to their capacity to bear law (to be *sui iuris*, to give themselves a written legal constitution) but in virtue of finding themselves under the *ius* of nations, or international law/nomos of the Earth.

Surprisingly, for a text that purports to derive its conception of *ius* from Thomist philosophy and apply it to the constitutional order of the "New World", Vermeule does not mention at all Vitoria's Thomist conception of *ius gentium* and its derivation from natural law. Instead Vermeule bases his case on a reading of the *Curtiss-Wright* 1936 ruling of the Supreme Court which recognized the "plenary powers" of the President as commander-in-chief, which in this case Franklin Delano Roosevelt employed in order to impose an embargo on U.S. companies from selling arms to both Bolivia and Paraguay during the Chaco War. What is important here is the rhetoric of the imperial presidency: the assumption of plenary powers (placing the President above any controls of Congress) occurs for the sake of "peace," that is, the first of three substantive goals of any legitimate state according to Vermeule's reading of Ulpian and Botero. The reference is clearly to the Roman imperial conceit that only the emperor (as *imperator mundis*) of the Romans can assure "world peace," the *pax romana*, according to Virgil's famous injunction: *parcere subiectis, et debellare superbos*.⁴³

But this is not the only subtext of *Curtiss-Wright*: equally if not more pertinent was the shadow cast by the Monroe Doctrine, in its post-World War I interpretation, as an expression of the belief that Central and South American nations (as well as Canada to the north) were part of the "Grossraum" of the United States.⁴⁴ Vermeule does not mention the Monroe Doctrine in his reading of *Curtiss-Wright* but there is little doubt that it frames the Court's discussion of the "plenary powers" of the American Presidency in a neo-imperial key.

Vermeule interprets the Court's ruling as recognizing that "the American constitutional order [*nomos*] rests, not upon positive written law, but upon the *ius gentium*" (Vermeule, 2022, p. 149). The significance of this claim is dual: first, it means that the rights of "We, the People" are secondary with respect to the rights of the "United" nations and peoples, *nationes et gentes* (viz. the British colonies in North America that "united" and declared "independence"). Second, the superior rights of the true representative of these "United" states (viz., the President, not Congress) receive an imperial construal by Vermeule because if according to his argument the United States come under *ius gentium* for the sake of generating this Unity between its several states (ex-British colonies), the reference of the *gentes* does not extend equally to other peoples and nations of the

⁴³ "tu regere imperio populos, Romane, memento; hae tibi erunt artes; pacisque imponere morem, parcere subiectis, et debellare superbos." You, O Roman, govern the nations with your power- remember this! These will be your arts – to impose the ways of peace, To show mercy to the conquered and to subdue the proud. (*Aeneid* 6.847-853).

⁴⁴ For this understanding of the Monroe Doctrine, see (Schmitt, 2011).

Americas. On the contrary, the independence and sovereignty of the latter can in principle be trumped by the rights of the imperial presidency of the United States, as put in practice later by the Monroe Doctrine which designates “America for Americans” as a space “free” from “foreign” (European) intervention. In reality, starting after the Spanish-American War, the United States will continuously take exception to the right of self-determination of the other republics in Latin America in the name of “preventing foreign interventions,” especially during the Cold War struggle against “communism.” These interventions contradict, de facto, the Wilsonian and Leninist interpretation of the Monroe Doctrine (which turns around the primacy of national self-determination) but they are invariably couched in terms of bringing “peace” to warring and “indigenous” *gentes* and denying the legitimacy of their *ius bellum*. This is ultimately the background reasoning of *Curtiss-Wright*’s recognition of Roosevelt’s “plenary powers” as “peace-maker” between Bolivia and Paraguay on Vermeule’s reading. For Schmitt, as well, the most important result of the *ius publicum* or *ius commune* was that of regulating war and enmity within Europe, and exporting it “beyond the amity lines” to the rest of the world. For Schmitt, the *ius publicum europaeum* accepts two justifications for imperial (foreign) wars: there is the war against “perpetual enemies” of the Christian religion, namely, Jews and Muslims; and there is the war against “heathens” – Indigenous peoples – who are not considered “perpetual enemies” because they can “voluntarily” take up the Christian faith with sufficient “communication” and “commerce” established between Europeans and Indigenous peoples. The Monroe Doctrine is a secularized extension of this second justification of empire.

Vermeule’s claim that *Curtiss-Wright* turns foreign policy into the eminent domain for unchecked presidential powers, which the President holds in virtue of being the “guardian” of the *nomos* or concrete order of the United States, should be contextualized along with the roughly simultaneous debate in Weimar Germany between Kelsen and Schmitt about the question of who was the legitimate “guardian” of the Constitution, with Schmitt siding for the Reichs President over the constitutional court.⁴⁵

The winning arguments of the Court in *Curtiss-Wright* essentially asserted that, in foreign affairs and only in foreign affairs, the President enjoys “special powers to act as ‘sole organ of the federal government in the field of foreign relations’” (Vermeule, 2022, p. 100). What this means is that, in the field of foreign relations, the United States has only one representative of its singular or unitary sovereignty, namely, the President: the separation of powers and the presumptive superiority of judicial review after *Marbury vs Madison* does not apply in regards to foreign relations. But this is *exactly the opposite* conclusion that Brown Scott had arrived through his internationalist reading of Vitoria

⁴⁵ For the debate, see (Vinx, 2015).

and the Monroe Doctrine: for Brown Scott, the *ius gentium* was premised on the idea of a community of nations considered as one, global federal republic, within which disagreements between states were not to be settled through violent wars of aggression but in relation to an international law to be adjudicated by an international “supreme” court of justice. Vermeule justifies ante-litteram Trump’s most recent “excursions” and wars of aggression, and the breakdown of the international rules-based order, by opposing the national destiny of the “United States” to that of the world federation of “United Nations.” In this logic, the *salus* (safety, health) of the “United States” is inversely proportional to the capacity of nations to federate around the *ius gentium* of the United Nations and the Universal Charter of Human Rights. For Vermeule, it is not the case that the United States is a product of the modern *ius gentium* established after Vitoria: rather, the United States is a product of an imperial *nomos* that is set against the *ius gentium* of a community of equal nations.

On what is Vermeule’s imperial interpretation of *Curtiss-Wright* based? “*Curtiss-Wright* says squarely that the sovereignty of the United States and the foreign relations powers that flow from sovereignty was not created by the written Constitution of 1789, but arose even before the enactment of the Constitution through *translatio imperii*— by transfer of sovereignty from the British Crown according to preexisting general principles of international law, the *ius gentium*” (Vermeule, 2022, p. 150). This claim seems to refer to the *Preliminary Peace Articles* of 1782 and then to the *Treaty of Paris* of 1783, but it is misleading: the modern *ius gentium* as formulated for the first time by Vitoria *rejected* the mechanism of *translatio imperii* that (supposedly) bequeathed the task of world empire from the Roman emperor to the Catholic Pope and its “sword,” the Holy Roman emperor. Subsequently, this imperial function of the Christian republic, which receives the theological name of the *katechon*, is transmitted from the Holy See to the Catholic monarchs, in this case the Spanish and Portuguese kings, who between themselves “divided up” the world in the *Treatise of Tordesillas*. In this context one could perhaps even say, with only a small exaggeration, that the modern conception of the “sovereign nation” began in the Renaissance, before Bodin or Hobbes, with the repudiation by Valla of the myth of a *translatio imperii* between Roman Empire and Catholic Church in the *Donation of Constantine*. Vitoria and Grotius share at least their repudiation of this myth.

So why does Vermeule want to re-introduce the *translatio imperii* dispositive which was unheard of in the times of Ulpian? The reason for doing so seems to be that it allows him to adopt surreptitiously Schmitt’s claim about the *nomos* as an act of violent appropriation of territory. As Schmitt argues in *The Nomos of the Earth*, the fundamental conception of the *nomos* is most perfectly captured by the British Crown’s claim to have a “radical title” over its plantations and colonies. What Vermeule means by saying that the “United States” is born thanks

to the transmission of “empire” from the British Crown to the North American colonies is that the “United States” is constituted *ab initio* not as a republic but as an empire which claims “radical title” to the lands that it expropriates from the Indigenous *gentes*, whose belonging to the *ius gentium* is radically ignored in the genocidal expansion West and by the setting up of chattel slavery in the South. For Vermeule, the sovereignty of the United States is a priori an imperial sovereignty, not a republican one. Vermeule’s interpretation of the *ius gentium* is not a reading of Roman law as such, but of imperial Roman law, exactly in the same way as Schmitt reinterpreted the modern *ius publicum europaeum* as the secularization of the *respublica Christiana*. For Vermeule, the constitutional order of the United States, its *nomos*, considers the President from its inception as functionally analogous to the emperor, not to the consul (when it comes to foreign affairs).

By turning to a Schmittian understanding of the *ius commune* Vermeule can interpret the Constitution of the United States from out of a context in which the foreign policy friend/enemy distinction is primary, as much as the distinction between the “homeland” and the “shithole countries” (Trump) that lie beyond the American *Grossraum*. This is another way of saying that the individual protections specified by the Constitution are trumped by the goal of “homeland security”: appealing to “common good constitutionalism” is simply a way to make foreign policy primary over internal politics. As Machiavelli teaches, this is exactly the situation that was responsible for the end of the Roman Republic and the advent of Julius Caesar and led to the disastrous evolution of Republic to Empire.

The claim that *Curtiss-Wright* turns on the question of *translatio imperii* is emphasized by Vermeule by reference to the actual ruling of the Court: “the broad statement that the federal government can exercise no powers except those specifically encountered in the Constitution... is categorically true only in respect of our internal affairs... [S]ince the states severally never possessed international powers, such powers would not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.... Rulers come and go; governments end and forms of government change, but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.... The Union existed before the Constitution (Vermeule, 2022, p. 151).⁴⁶ Vermeule reads this text as indicating that, even up to 1936, the Supreme Court adopted Bodin’s idea that every republic is characterized by an indivisible, “supreme” and immortal “will” viz., a sovereignty that survives beyond all changes of government and constitutional forms. Ac-

⁴⁶ Citing *Curtiss-Wright*.

cording to this reading of the ruling, such sovereignty is required in the context of a “war of independence” in which the decision between friend and enemy is foremost, and that is why Vermeule speaks of “preconstitutional powers,” like the “powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with others sovereignties,” which the Supreme Court determined to be “necessary concomitants of nationality” derived from the “law of nations” and not from “the provisions of the Constitution.”⁴⁷

Indeed, Vermeule’s claim is that the President of the “United States” is the true representative of the Union “prior to” the 1789 Constitution that legally generates the office of the President. This claim ends up identifying the office of the President with that of the Partisan, in the technical sense given to this figure by Schmitt.⁴⁸ This could explain why Trump – as sitting President – incited and celebrated the January 6 Capitol insurrection against the United States Constitution and the electoral transition of power in the name of preserving an imperial conception of the United States Presidency. According to Vermeule, the term “United” in the “United States” refers to this mystical sovereignty which is antecedent to the power of the People and its Constitution, but is somehow always already represented by the President, as if the President of the United States, just like medieval sacral kingship, possessed a dual body: one mortal and sinful, and one immortal and always in the right (in this case, “right” refers to Vermeule’s peculiar reading of *ius gentium*).

Vermeule concludes his reading of *Curtiss-Wright* by stating that “the shockingly anti-originalist idea that the Union existed before the Constitution” exemplifies “the difference between our small-c constitution and the written text of the Constitution,” which is nothing but the Schmittian difference between constitution as *nomos* and constitution as positive law. It is not surprising that Vermeule employs, without attribution, Schmitt’s idea of concrete order: “our constitutional order is and always has been a concrete set of real, extratextual political institutions, arrangements and ever changing norms – a concrete order never fully captured by positive law” (Vermeule, 2022, p. 113).

Vermeule’s interpretation does not become any less Schmittian when he adds that Bodin’s “supreme will,” although it stands *over* the *ius civile* nonetheless also stands *under* the “the law of nations, the natural law, and the divine law” (Vermeule, 2022, p. 113). According to Vermeule, the appeal to the *ius gentium* in establishing the “plenary powers” of the President “is both enabling and constraining simultaneously; it both empowers [an imperial presidency/MV] and controls public authority in our constitutional order. As Henri de Bracton put it, ‘law makes the king’” (Vermeule, 2022, p. 113). Vermeule does not acknowledge that precisely this medieval legal formula

⁴⁷ *Curtiss-Wright* 299 U.S. at 318, cited on (Vermeule, 2022, p. 152).

⁴⁸ (Schmitt, 2007).

of the king being, simultaneously, *under and over* the law was first employed by Frederick II (to whom the legend of the “sleeping sovereign” is ascribed) to bring constitutionalism under the aegis of governmentality, as explained by Kantorowicz.⁴⁹ What we have with Vermeule is the replacement of the neoliberal use of nomos-constitutionalism to justify the unchecked power of capitalism by the postliberal use of nomos-constitutionalism to justify the unchecked power of an aspirationally fascist leadership.⁵⁰

⁴⁹ For the argument, I refer to (Vatter, 2019).

⁵⁰ (Connolly, 2017).

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