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# Reifying Law—Government, Law and the Rule of Law in Governance Systems

Larry Catá Backer\*

## Abstract

The roots of the current “rule of law” debate are ancient. Its political, social and religious expressions are bound up in ancient notions of law and government as two possibly distinct categories. Starting with Bracton’s notions of *gubernaculum* and *jurisdictio*, which together define the character, scope and authority of coercive systems of governance, debates about the meaning of both and their relationship went hand in hand with the almost simultaneous construction of modern democratic constitutional states, as well as the most authoritarian states of the twentieth century. *Gubernaculum* and *jurisdictio* serve as the basis for reifying law and the nature of its “rule” as the world moves toward systems of coercive global law, understood either as common law binding on states, or as the precursor to global governance institutions (e.g. an International Criminal Court). But its jurisprudential expression, especially since the mania for positivism in the construction of political “constitutional” societies took hold in the nineteenth century, produced a certain “amnesia” of the ancient, and often violent, contests over the nature of law. That contest, in jurisprudential form, invoked religion, political theory and philosophy to determine the relationship between governance and authority.

The paper interrogates that discourse in modern terms. Using the

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*gubernaculum* and *jurisdictio* distinction in Bracton, it focuses on Francis Bacon's defense of James I/VI's instrumentalist view of law (separated from the normative system it expresses) and Edward Coke's organic view of law as the embodiment of the normative values of the political community that serves to bind and limit its government. These opposing visions of law are then explored in the context of the jurisprudential oppositions of nineteenth and twentieth century political theory. Then, more broadly, the paper examines the Bacon-Coke opposition in post-modern and global terms.

In the context of post-modern theory and globalization, the Article emphasizes the emerging understanding of law as technique and on the managerial aspects of modern law systems. The Article also suggests the way in which the constitutional deadlock of seventeenth century England, now broadened and freed of the artificial boundaries between public and private law, reproduces itself on a global level in the twenty-first century. To that end the Article explores the way in which the contested understanding of law as object or subject becomes a critical element in the management of networks of power at the international global level and in the reconstitution of legal reification in global common law and private transnational legal systems.

The Article ends by exploring the implications of these theories in the construction of modern transnational constitutionalism, both secular and theocratic. On one side are those who would resist invasion of ancient or traditional rights by increasingly powerful and aggressive institutional bodies—government, religion, corporation, and society. The source of resistance is the sure belief in the power of an autonomous reified complex of law. On the other hand, institutions, conceiving themselves representatives of the whole or complete parts of the power of those they represent, and convinced of the perfection of the authority derived from such representation, resist the imposition of checks and restraints applied in new and more restrictive ways. The source of this resistance is the sure knowledge that law is separately constituted but is passive and instrumental, to be used by legitimate authority in the construction and articulation of normative standards that exist apart from law and subordinate to the genius of the political community. And perhaps, both the struggle and its inevitable frustration, more than anything else, illuminates the autonomy, the distinct personalities, of law reified, as the great insight for the twenty-first century.

## I. Introduction

In the West, the relationship of law and human organization, the relationship of law and the individual, and the relationship of the

individual to the organizational forms individuals embrace, has been turbulent. At various times since the seventeenth century, law has been understood as an object separate from the state and its apparatus (usually a government).<sup>1</sup> In this aspect, law has been constructed as the sum of the common relationships of the people amongst themselves—it is in this sense the manifestation of the people themselves as an aggregate body. Sometimes those relationships also included the political, social and economic relations of the social order. Sometimes it did not. Sometimes, this separate organism called law was considered superior to the state, or at least to the political organs of state power. Sometimes it was viewed as on par with those organs. But law, and especially the basic law customs and laws of the community could be disturbed by the state, through its government, only at great risk to itself.<sup>2</sup>

At the same time, and increasingly since the seventeenth century, law has been viewed as the expression of state power,<sup>3</sup> or at least that of its government.<sup>4</sup> In this view, the state, rather than law, is understood as organic. And law is understood as serving as the instrument of the state. In those cases, law was viewed as either process or language.<sup>5</sup> As a manifestation of state power, or at least of the power of the apparatus of state, law was considered a means of ordering that manifestation of power, sometimes of cloaking that manifestation in process. Sometimes law was thought to encompass the whole of the rulemaking power of any

1. In the West, the distinction between law and government goes back to the ancients. See ARISTOTLE, *POLITICS* (William Ellis trans., J.M. Dent & Sons 1912) (350 B.C.). The division was grounded in the notion that though the magistrates, and certainly the people, might have had direct regulatory authority, the primary focus of the state was “executive power” as Americans have come to understand that term in the context of their own constitutionalism. Law was essentially organic—customary—though not completely so. But the state intruded on the customs of the people at its own peril. See discussion *infra* at text and notes 12-16.

2. Thus, for example, even Jean Bodin, a great friend of the authority of the state suggested the limits inherent in the core assumption of the relationship of state to law.

I think it extremely dangerous to make any change in the law touching the constitution. The amendment of laws and customs touching inheritances, contracts, or servitudes is on the whole permissible. But to touch the laws of the constitution is as dangerous as to undermine the foundations, or remove the corner-stone on which the whole weight of the building rests. Disturbed in this way, apart from the risk of collapse, a building often receives more damage than the advantage of new material is worth, especially if it is old and decaying.”

JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* Bk. IV, ch. III, 125 (M. J. Tooley trans., Basil Blackwell 1955).

3. See, e.g., FRIEDRICH KARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayward trans., Littlewood 1975) (1814).

4. FRANCIS BACON, *ESSAYS AND NEW ATLANTIS*, Essay No. 56 (Classics Club ed., Walter J. Black, Inc. 1942) (1612).

5. See CARL SCHMITT, *LEGALITY AND LEGITIMACY* 18 (Jeffrey Seitzer trans., Duke U. Press 2004) (1932).

society. Sometimes law was viewed as substantially less complete—that is, as a partial manifestation of power over behavior. Sometimes law was seen as proceeding from the community, sometimes it was understood to proceed from God. Sometimes law was God. Sometimes law was God’s inverse—chaos or worse. And sometimes, in Marxist lands after 1917, law was deemed a manifestation of politics and institutionalized class struggle.<sup>6</sup> Thereafter in the West, “legal realists” and elements of self-styled legal post modernism echoed this suggestion.<sup>7</sup> Especially since the 1990s, ironically enough, and in the context of economic globalization, law was deemed to be largely irrelevant, at least in its traditional forms and for its traditional functions.<sup>8</sup>

This turbulence, once confined to great battles over the nature of governance and power within states, has now become a source of great debate among those interested in the construction of transnational and international legal systems. It underlies the disputes between those advocating an authoritative and binding effect and power of “organic” and customary law in international and transnational systems, and those who view lawmaking as grounded in authentic and legitimate legal instruments produced by positive action of some fraction of the community of nations.

When law is said to “rule” in the West, then, it is meant to cover a large terrain of complex and inconsistent meaning. Thus, law itself serves as a veil over its own nature. However conceived, law remains important to the discourse of power. That people have embraced the idea

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6. Sheryl Miller reminds us that:

Chinese-Marxist legal theory views the relationship between law and politics as a dialectic relationship. Believing that all is interconnected and that there is a unity between opposites, Marxist scholars believe that politics and law are not mutually exclusive. Policy is the will of the ruling class and law is the manifestation of that policy. Under this philosophy, the law should change as policies change. However, laws take much more time to change than policies.

Therefore, in practice as policies change, the interpretation and enforcement of laws, rather than the laws themselves, change.

Sheryl Miller, *Institutional Impediments to the Enforcement of China’s Bankruptcy Laws*, 8 INT’L LEGAL PERSP. 187, 200 (1996).

7. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) (“program of unmasking law as politics [as] central to American Legal Realism.”). Marxism and legal realism blended nicely in some forms of critical legal theory. See, e.g., William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 710 (1991) (“critical legal realists . . . argued that all law is politics and thereby impugned the neutrality and legitimacy of law.”).

8. See Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007).

that law is a *thing* is beyond dispute. The exact nature of that “thingness” is quite another story. Yet the “thingness” of law is critically important for the ordering of power relationships among people, institutions and communities. I am little interested in the “true” meaning of law as an abstract proposition, or even as a question of fact. I am not sure the question is particularly relevant, except perhaps as a means of gaining advantage in the never ending cultural wars for control of perceptions of meaning. Human behavior is driven by what people believe and the choices they make in adopting certain “privileged” beliefs when constructing their communities, rather than any abstract truth of those beliefs.

For this essay, I explore the way in which law is reified, that is, the way that law is sometimes understood as a thing, process, aspect or character apart from and in addition to its particular content. And I explore the way that this reification has been contested, that is, the development of the notion of law as a mere instrument of power, of law as no more than its content and no less than the power of the institutions whose will it expresses. I suggest some of the important ways in which law-as-a-thing-apart has been recreating itself in the post-Soviet globalized world. I am particularly interested in the ways that law is now said to rule. In ways reminiscent of the dynamics of conversations about law in seventeenth century in England, law has become again amorphous, capable of simultaneous multiple meanings. Law is an important object for capture among those whose systems of institutionalized power relationships require an object around which to legitimate compulsion, behavior and the management of conduct at every level of human organization. I then look forward to the modern expression of these ancient conundrums by exploring the current expression of law as technique.<sup>9</sup> Specifically, I explore the way in which the contested understanding of law as object or subject becomes a critical element in the management of networks of power at the international global level and in the reconstitution of legal reification in global common law and private transnational legal systems.<sup>10</sup> I end by exploring the implications of these theories in the construction of modern transnational constitutionalism, both secular and theocratic.<sup>11</sup>

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9. See Section II, *Gubernaculum* and *Jurisdictio*, *infra*.

10. See Section III, Law as Technique: The Management Networks of Power at the International Global Level and the Reconstitution of Legal Reification in Global Common Law, *infra*.

11. See Section IV, God as Law; Humanity as Law: Divergence in the Management of State Power in Modern Constitutionalism, *infra*.

## II. *Gubernaculum* and *Jurisdictio*

In the seventeenth century in England and the American colonies, law was reified as the great bulwark against personal and institutional power. It was a thing that stood outside of the state and its apparatus, but also within it. Law was the reification of the people and their customs, which no single person could undo, but which mediated the relations between the estates of the realm. Law, and especially the common law, as a whole could not be undone by either Crown or Parliament, but reflected them as well. Only the High Court of Parliament could serve as a law making body.<sup>12</sup> In this sense, law making could be understood as exceptional, requiring the invocation of an institution representative of all of the constituents of common law. The state and its apparatus and the law were thus two quite different things.<sup>13</sup>

This understanding had ancient roots. Aristotle clearly distinguished state (the magistrate, or power relationships) from law (the rule, or obligation and duty of individuals and behavior regulation). Though it was clear that there was a relationship between them, that relationship was not vertical. Law was not merely an instrument of state power. At the same time, the state was not merely the expression of law. Aristotle, for example, noted, "all laws are, and ought to be, framed agreeable to the state that is to be governed by them, and not the state to the laws."<sup>14</sup> But at the same time he cautioned that "the laws are different from what regulates and expresses the form of the constitution; it is in their office to direct the magistrate in the execution of his office and the punishment of offenders."<sup>15</sup> Aristotle's works had been recovered in Western Europe by the twelfth century.<sup>16</sup> The founders of the American republic were well aware of Aristotle's work, including the *Politics*, which formed the basis of classical education for the American ruling classes at the time of the founding. Echoes can be found in Madison's *Federalist No. 10*,<sup>17</sup> and also in Hamilton's works.<sup>18</sup>

12. EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* 51 (Cornell U. Press 1955).

13. See PAOLO GROSSI, *MITOLOGIAS JURÍDICAS DA MODERNIDADE* (Florianópolis, Brasil, Fundação Boiteux 2004).

14. ARISTOTLE, *supra* note 1, at Bk. IV, ch. I.

15. *Id.*

16. See ARTHUR HOGUE, *ORIGINS OF THE COMMON LAW* 90 (Liberty Fund 1986) (1966).

17. See ALEXANDER HAMILTON & JAMES MADISON, *THE FEDERALIST PAPERS NO. 10* (Penguin Classics 1987); see also, Ralph L. Ketcham, *Notes on James Madison's Sources for the Tenth Federalist Paper*, 1(1) *MIDWEST J. OF POLITICAL SCI.* 20-25 (1957).

18. ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, *THE FEDERALIST PAPERS NO. 18* (Chicago, Ill., Encyclopedia Britannica, Inc. 1952) (1787). See generally, MICHAEL D. CHAN, *ARISTOTLE AND HAMILTON ON COMMERCE AND STATESMANSHIP* (U. of

Its most important roots, however, were a sophisticated medieval jurisprudence.<sup>19</sup> For our purposes Bracton provides the most important late medieval foundational source. As Charles McIlwain well put it,<sup>20</sup> for English constitutionalists at the end of the medieval period, there was “a separation far sharper than we make in our modern times between government and law, between *gubernaculum* and *jurisdictio*.”<sup>21</sup> Within the sphere of *gubernaculum*, the power of those who hold authority to act is absolute. That power could be expressed by action—the enforcement action of the state—and also by enactment of law, narrowly conceived. The narrowness of the conception is grounded in the fundamental distinction between enactments of an administrative character, and the power to define a legal right. Thus, to Bracton, “*leges* (in the narrow sense of the word), *constitutions*, and *assisae* are nothing more than administrative orders, and therefore part of ‘government’—something which ‘pertains to the administration of the realm (*pertinet ad regni gubernaculum*)—and as such are properly within the king’s exclusive control.”<sup>22</sup>

Within the authority of government, more narrowly defined, law is essentially instrumentalist in character. It serves as an expression of the king’s (and thereafter the parliamentary) will. It is fundamentally administrative in character (understood in the modern French or German sense), though it is expressed in the forms of statute. It corresponds roughly to the *measures* whose transformation into law was so derided by Carl Schmitt<sup>23</sup> in his attacks on Weimar constitutionalism.<sup>24</sup> There is a residue of this notion still in the differentiation within French constitutional law, between the idea of *lois*, the province of the nation expressed through its Assembly, and *reglement*, which under Article 37 of the French Constitution are within the power of the executive authority.<sup>25</sup> And this division has been urged as a basis for global governance.<sup>26</sup>

The space within which *gubernaculum* operates is broad but not

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Mo. Press 2006).

19. See GROSSI, *supra* note 13.

20. CHARLES MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (Cornell U. Press, rev. ed. 1947).

21. *Id.* at 77.

22. *Id.* at 82-83.

23. See SCHMITT, *supra* note 5.

24. *Id.* at 68-74, 97-98.

25. 1958 CONST. art. 37 (Fr.). On the differences between Anglo-American and French regulatory system theories, see Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341 (2004).

26. See Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT’L L. 187, 192-95 (2006).



unlimited. The absolute authority of *gubernaculum*, was limited by *jurisdictio*, understood as a “higher,” or in modern terms, constitutional law. This higher law described rights, whose breach was beyond the power of government. These rights were not inherently instrumental, that is proceeding from a conscious act of government. They were positive, organic and limiting principles.

Definitions of “right,” . . . share the character of the immemorial custom they define, and these, Bracton says, “since they have been approved by the consent of those using them and confirmed by the oath of kings, can neither be changed nor destroyed without the common consent of all those with whom counsel and consent they have been promulgated.”<sup>27</sup>

Government, within its sphere, had the absolute power to act, through administrative orders (in statutory or other form). But the rights of the political community, expressed in its organic privileges and customs, acquired a life of their own, unmoored from the state or the governance rights of the monarch. In the aggregate, these rights served as a body of law, an expression of an autonomous power of the political community against its governing apparatus (traditionally in the person of the monarch).<sup>28</sup> “When King John substituted his will for the law, in proceeding against vassals whose wrong had not been judicially proved, civil war and the Great Charter were the result.”<sup>29</sup> *Gubernaculum* had no power over *jurisdictio*, but was required to act within its normative limits. These limits eventually would be expressed through the courts, in its current form as judicial review. Originally it was expressed through assertions of rights by royal vassals, and in the extreme, for example in the 13<sup>th</sup>, and 17<sup>th</sup> centuries in England, and in the 18<sup>th</sup> century in the American colonies, as revolution. Law, in this sense, is not instrumental, but is “positive and coercive, and a royal act beyond those bounds is *ultra vires*.”<sup>30</sup>

This understanding of the separation of law from government, of the state from the system of rules that bind the apparatus of the state, was popularized within the English elites through Sir John Fortescue’s treatise on the *Governance of England*.<sup>31</sup> Fortescue carried forward Bracton’s notions of a law existing as a limiting power beyond the government’s, “formed by the rights of his subjects which the king has sworn to maintain, and which he cannot lawfully change or blemish or

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27. MCILWAIN, *supra* note 20, at 83.

28. WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 252-56 (2d ed. 1923).

29. MCILWAIN, *supra* note 20, at 86.

30. *Id.* at 85.

31. CORWIN, *supra* note 12, at 35-38.

arbitrarily transfer from one to another.”<sup>32</sup> These traditional notions of law reified as *jurisdictio* found its most influential modern expression in England during the reigns of the early Stuarts.<sup>33</sup> In Sir Edward Coke’s writings, it also served as a great basis for American constitutionalism. Coke was widely known in the colonies. His work, especially on property, though expensive, was often a prized part of personal law libraries in the American colonies.<sup>34</sup> And the views he expressed were in sympathy with colonizing communities, especially north of the Potomac River.

One of the most influential expressions of the idea of law as an entity separate from government is found in Coke’s report of *Dr. Bonham’s Case* (1610).<sup>35</sup> The case related to the power of the College of Physicians to regulate the medical trade in London. With respect to the extent of Parliament’s power to grant a concession against common law, Coke reported:

And it appeareth in our Books, that in many Cases, the Common law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant or impossible to be performed, the Common law will controll it, and adjudge such Act to be void.<sup>36</sup>

To a great degree, law was meant to protect against the inclusions of power by setting up another power, beyond the reach of an individual, even the holder of governmental authority. It fractured power and set its mechanisms beyond the reach of the sovereign.

Law stood as the thing through which a system of opposing power—entrusted to and managed by a large class of well-socialized acolytes (the bar)—could resist the power of the state to coerce behavior. As Mary Sarah Bilder suggests:

Although during the seventeenth century, Coke and then Hale would develop increasingly elaborate understandings of the common law, the common law remained a system in which pleas to the judiciary required addressing “reason”—“the faculty acquired by training that extracted some workable rules from a formless body of immemorial

32. McILWAIN, *supra* note 20, at 88.

33. SIR THOMAS SMITH, *THE MANNER OF GOVERNMENT OR POLICIE OF THE REALME OF ENGLAND* (London, Henrie Middleton 1583).

34. Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *YALE J.L. & HUMAN.* 47, 88 (1999) (Coke’s writings on property were especially sought-after).

35. *Dr. Bonham’s Case*, (1610) Eng. Rep. vol. 8, 113 b (8 Co. 107a), *reprinted in* EDWARD COKE, *THE SELECTED WRITINGS OF SIR EDWARD COKE*, vol. 1, 264 (Steve Sheppard ed., Liberty Fund 2003).

36. *Id.* at 275.

knowledge”—not appealing for what any ordinary person could claim was justice, equity, or mercy.<sup>37</sup>

Thus, the law was intolerant of the notion that a monarch had the power to personally decide cases at common law. Corwin well recounts this idea in action in the famous confrontation between Coke and James I at Hampton Court on November 10, 1608, in which the judges of the Realm sought to resist the notion that James, as King, had authority to decide cases at common law in his own person.<sup>38</sup> Responding to the idea that reason alone was sufficient to apply the law, Coke responded that:

causes which concern the life, or inheritance or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of the law which law is an act which requires long study and experience before a man can attain to the cognizance of it.<sup>39</sup>

James well understood the implication—the King himself was under law. This, James thought, “should be treason to affirm,”<sup>40</sup> to which Coke responded with Bracton’s words: “*Quod Rex non debet esse sub homine, sed sub Deo et lege*” (“The King ought not to be subject to man, but subject to God and to the law”).<sup>41</sup> Of course, Coke meant to twist the meaning of Bracton, who wrote at a time in which the law proceeded from God through His Church. For Bracton, all authority may have derived from law, but law derived from God as *Logos*. With this conflation it was an easy matter (and no treason) to place King under law: that is, under God. A King acting solely on the basis of the authority of his own will acted as a mere man, like any other. Critically for Coke, the Divine connection was not relevant to make the statement true. Now it was common law as *jus*, not proceeding from the divine that served the purpose of differentiating between *lex* and *homine*.

This understanding of law contributed eventually to the production of a doctrine of Parliamentary supremacy *under* law. Law was understood to exist to some extent beyond the State, though capable of modification (in part) through it.<sup>42</sup> Law was both the expression of power (in terms of ordering behavior), and also opposed to power (in terms of resisting assertions by individuals or institutions to order behavior *ultra vires*). Under this conception of law, government (and the

37. Mary Sarah Bilder, *The Origin of Appeal in America*, 48 HASTINGS L. J. 913, 925-26 (1997).

38. CORWIN, *supra* note 12, at 38-39.

39. *Id.*

40. *Id.* at 39.

41. *Id.*

42. *Id.* at 57.

state) is viewed as fiduciary in nature. Its power is derivative and limited. It is thus a partial rather than a total power to order behavior. Government (first King, then King in Parliament, then Parliament alone) might ultimately express law as a conscious and positive act. But Government can never be law, nor reduce law to an instrument of governmental will. In this sense law remains an "other" to government, that is, a thing in a very real sense. It may not be delegated,<sup>43</sup> nor may it be reduced to an instrumental character. The "community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."<sup>44</sup> Law, like God, remains outside the reach of individuals, or the people, but moves with them, and serves to protect them from themselves in a complicated conversation.<sup>45</sup>

But, law also constituted its own point of resistance. "[T]here are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised."<sup>46</sup> Law here retains its composition as thing, but now it is a thing whose purpose is to serve as instrument of the very power it appeared to resist, and managed for this purpose by the same large class of well-socialized acolytes. Thus, Francis Bacon reminds us in oft quoted language that:

Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law; else it would be like the authority claimed by the Church of Rome, which, under pretext of exposition of Scripture, doth not stick to add and alter, and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty.<sup>47</sup>

Judges, like law, assume an instrumental character. "Let judges also remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."<sup>48</sup>

This also found an odd reflection in the American colonies. Mary Sarah Bilder reminds us of the strong colonial embrace of equity,

43. JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* ch. 11, 183 et seq. (Oxford, Penguin Classics 1964) (1690).

44. *Id.* at ch. 19, 224 et seq.

45. CORWIN, *supra* note 12, at 68-69.

46. MICHEL FOUCAULT, *Powers and Strategies*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-77*, 134 & 142 (Colin Gordon, ed. and trans., New York, Pantheon Books 1980).

47. BACON, *supra* note 4, at 221.

48. *Id.* at 230 (footnote omitted).

founded in part on an appeal to authority beyond the narrowness of law, bound up in the development of appeal.<sup>49</sup>

The system that the colonists adopted and adapted contained a substantive theory of justice that differed from the rule of law. Their belief in the importance of equity from an accepted hierarchical political authority led them to create a new culture of appeal. The new culture ironically was based on a procedural device that was linked to institutions they despised (Rome, the Pope, ecclesiastical courts, the king), but with a set of meanings that held forth a promise of justice nonexistent in England.<sup>50</sup>

Bacon and Coke represented the jurisprudential opposing poles of what would eventually require violent resolution in the English Civil War, which greatly influenced the development of American legal culture. As Kevin Philips explains in a remarkable study of the socio-religious and cultural connections between the English Civil War, the American Revolutionary War and the American Civil War, the “English Civil War is the necessary starting point . . . where the events and alignments leading up to the American Revolution began. The latter was really a second English-speaking civil war, drawing many of its issues, antagonisms, and divisions from the seventeenth- and eighteenth-century British Isles.”<sup>51</sup> Philips argues that the pattern of rebellion and loyalty in those conflicts “leads to religion.”<sup>52</sup> And the road from theology to law and politics is broad and direct, especially before the nineteenth century.<sup>53</sup>

This idea of theology creating a path to law and politics reconstitutes itself in Hobbes, and the beginning of a “positivist” school of jurisprudence in which government is conceived as the monopoly holder of legitimate power. All other forms of its expression are marginalized and subordinated:

Those that speak of this subject, confound *jus* and *lex*, *right* and *law*, but they ought to be distinguished. RIGHT, consisteth in liberty to do or to forbear; whereas LAW, determineth, and binds people to do or to forbear. Law and right differ as much as do obligation and liberty, which are inconsistent when applied to the same thing.<sup>54</sup>

This, of course, is one of the bases not of eighteenth century, but of

49. See Bilder, *supra* note 37.

50. *Id.* at 967.

51. KEVIN PHILLIPS, *THE COUSINS' WARS: RELIGION, POLITICS, AND THE TRIUMPH OF ANGLO-AMERICA* xx (Basic Books 1999)

52. *Id.* at xxi.

53. *Id.* at 516-22.

54. THOMAS HOBBS, *LEVIATHAN* 86 (Pearson Longman 2008) (1651).

twentieth century American notions of law and its relationship to the state. In the early nineteenth century, Justice Marshall famously explained American political theory as grounded in a division of governmental authority in which the whole of the legislative power was vested in the Congress.<sup>55</sup> However, Justice Marshall did not suggest that law was merely the instrument through which this whole of the legislative power was exercised, that is that law was mere servant of legislator who otherwise acted unbounded. By the end of that century though, Americans had come to believe, as Thomas Paine has suggested at the time of the founding of the Republic,<sup>56</sup> that the extent of the law was co-extensive with the power to legislate, and that indeed, that law did not exist except as a concession of the legislator, or more generally the people constituted as a legislative body.

Thus, the nineteenth century witnessed a great reconstitution of the relationship between *gubernaculum* and *jurisdictio*. By century's end, *jurisdictio* had become something more like modern constitutionalism, conceptually less organic than medieval notions of constitutional custom (*consuetudo*) and more directly bound up within sovereign positivism (the right of the people to reconstitute themselves through acts of political will). These are notions indirectly expressed in English constitutionalism<sup>57</sup> and more directly expressed in American constitutionalism. In the Weimar Constitution and the French constitutions, of course, the positivist notion completely overcomes *consuetudo*: the people, constituted in a national assembly become the living embodiment of right. And, in modern constitutionalism, *gubernaculum* becomes the sole space within which *jurisdictio* can be asserted.<sup>58</sup>

In common law jurisdictions, the relationship between law and power, or more precisely, between law and the state, become increasingly conflated from the nineteenth century. And in the conflation, the relationship between them becomes multiple and inverted. The absolutism embedded in the administrative *gubernaculum* is extended to *jurisdictio*, and *jurisdictio* becomes an instrument of *gubernaculum*. The template is set in the seventeenth century in the

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55. See *Marbury v. Madison*, 5 U.S. 137 (1803).

56. See Thomas Paine, *The Rights of Man*, in *COMMON SENSE, THE RIGHTS OF MAN AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE*, Part II (New York, Signet Classics 2003) (1792).

57. A.V. DICEY, *AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 3-35 (8th ed. 1915).

58. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (W. Rumble ed., Cambridge, Cambridge U. Press 1995) (1832); JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW*, two vols. (4th ed.) (R. Campbell, ed., London, John Murray 1879, *reprinted in* Bristol, Thoemmes Press 2002).

debate between Coke and Bacon. McIlwain nicely expresses this insight:

In the seventeenth century, the royalists, citing the undoubted precedents for absolutism in government alone, extended those without warrant into the sphere of mere jurisdiction; while the parliamentarians, seeing the limits of the medieval *jurisdictio*, with equal lack of justification, applied these to acts of government as well as to the definitions of right.<sup>59</sup>

From the eighteenth to the end of the nineteenth century everywhere, though to the greatest extent in France:

Law was an effective instrument for the constitution of monarchical forms of power in Europe, and political thought was ordered for centuries around the problem of Sovereignty and its rights. Moreover, law . . . was a weapon of the struggle against the same monarchical power which had initially made use of it to impose itself. Finally, law was the principle mode of representation of power.<sup>60</sup>

The scientism of law, especially as articulated in the nineteenth century by English thinkers uncomfortable with the protean ambiguity of custom, paralleled the rationalization of all human relations that was perhaps the greatest legacy of the Enlightenment. “For Bentham and Austin, the law was, indeed, capable of being a rational science.”<sup>61</sup> Rationalization of the common law had been in the air among elites since the end of the Napoleonic Wars with Bentham’s suggestions to that effect.<sup>62</sup> As Alcott nicely summarizes:

What came to be called Austinian legal positivism was thus the means by which the general cultural phenomenon of positivism was allowed vestigially to affect the minds of lawyers. Law could be explained without reference to the extra-legal, the mysterious, the ideal or the moral. The Austinian orthodoxy was also prophetic, as the partly reformed parliament (after 1832) became, or came to seem to be, the engine for revolutionary transformation of British society.<sup>63</sup>

In the United States, this march toward scientism affected everything in law. For example, legal education was rationalized in the nineteenth century, joining other academic disciplines in the University where its disciples have worked for over a century to make a science of the law.<sup>64</sup>

59. MCLWAIN, *supra* note 20, at 86.

60. FOUCAULT, *supra* note 46, at 140–41.

61. PHILIP ALCOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 47 (Cambridge, Cambridge U. Press 2002).

62. JEREMY BENTHAM, *CODIFICATION PROPOSAL* (London, J. M’Creery 1822).

63. ALCOTT, *supra* note 61.

64. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 29–38, 122–32 (New York, Oxford U. Press 1994).

This scientism has affected the way in which the law is used to rationalize and model human behavior as well, especially in American criminal law.<sup>65</sup> Contemporary Americans were no less willing to abandon the unruliness of Coke and custom for Bacon, hierarchy, and rationality. Codification of the common law had been in the air since at least the time of Justice Joseph Story.<sup>66</sup> That work continues in the bar, through the century of legal rationalization of the common law.<sup>67</sup>

Entities like the American Law Institute continue the work of conversion of the common law into something like an Imperial Roman Codex. The American Law Institute ("ALI"), building on the "Bractonian and Blackstonian treatises, declaring the common law on the empirical foundations of judicial decisions,"<sup>68</sup> fearing the "chaos in a legal world of 48 states"<sup>69</sup> but afraid to undertake legislative codification, invented the form of the Restatement. Restatements constituted a synthesis of sorts, "analytical, critical and constructive,"<sup>70</sup> seeking to reduce to a single systematic form the underlying principles that gave a legal field coherence "and thus restore the coherence of the common law as properly apprehended."<sup>71</sup> They serve once to synthesize and to innovate.<sup>72</sup> Though not binding, ALI Restatements have proven to be authoritative in many American courts.

French constitutionalism from the time of their eighteenth century revolution expressed well this new relationship of law to state. Law was a function of will expressed through the nation, and it was the nation, rather than law, that was reified, in the French case, in the form of the assembled and legitimate representatives of the nation.<sup>73</sup> These

65. See Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 *YALE J.L. & FEMINISM* 1 (2005).

66. See Joseph Story, *Codification of the Common Law*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 702 (William W. Story, ed., Boston 1852) (1837); William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 *SUFFOLK U. L. REV.* 771, 775-76 (1986).

67. See FRANK GAHAN, *THE CODIFICATION OF LAW* (London, Grotius Society 1923).

68. See AMERICAN LAW INSTITUTE, *CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK* vii (Philadelphia, American Law Institute 2005).

69. *Id.*

70. *Id.* at 5.

71. *Id.*

72. *Id.*

73. Thus, with respect to what was to become the Code Napoleon, the process of national transformation of the old customary law systems that constituted French law proceeded from the state. "In 1792, the Convention appointed a drafting committee, which made rapid progress and produced a plan for a Code of 779 Articles. In 1796, a new plan for a Code of 1,104 Articles was produced. In all, five plans were discussed before the final Code was begun in 1800." F.M.H. MARKHAM, *NAPOLEON AND THE AWAKENING OF EUROPE* 57 (London, English U. Press 1954).



assembled representatives together constituted as the nation—another reification. Thus reified, this aggregation served to give concrete form to that abstraction, the state. So manifested, the state could express its will as law, and thus, express the state as a unitary community.<sup>74</sup> The Code Napoléon thus proceeded from the nation, as an act of wholly contained sovereign will.<sup>75</sup> Yet the Code Napoléon expressed not merely internal, but also external will. “In one aspect of his imperial policy Napoleon was consistent—the introduction of the Code Napoléon into the annexed territories and vassal states. The Code was the container in which the principles of the French Revolution were carried throughout Western Europe, even as far as Illyria and Poland.”<sup>76</sup> Thus, the set of assumptions that shaped the legal culture producing the Code Napoléon also produced the set of assumptions necessary to use that Code (and others like it from other states) as part of the European imperial projects of the nineteenth and twentieth centuries.

Here one encounters a sort of reification inverted. The objectification is not systemic—there is no intangible but compelling body of law independent of the state apparatus, there are only intangible instruments of the national will whose physical expression is written rule proceeding from the lawgiver. It did not exist outside the state; its objectification was instrumental and dependant on government. This is law as technique, assuming a form generalized as the disciplines by Foucault almost two centuries later.<sup>77</sup> And it fit nicely into developing European notions that conflated ethnos, demos, state and government. Thus, for example, Savigny, in a way that was no longer remarkable by the nineteenth century, could articulate a systemic theoretics grounded in the idea that every people constitutes a state. “By transcending the distinction between people and state, Savigny makes it possible to think of private law as the emanation of the people’s spirit (*Volksggeist*), and still conceptualize private international law as a system of conflicts between state laws.”<sup>78</sup> For these theorists, of whom Savigny serves as a great early example, it became an object of faith that “just as the people

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74. In 1789, there was nothing approaching a state of legal unity of the French nation. There were no less than 366 local Codes in force, and a fundamental division between north and south. In the south, property rights were based on written Roman law, the Code of Justinian; in the north, on Teutonic customary law. *Id.*

75. *Id.*

76. *Id.* at 115.

77. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* (Robert Hurley trans., 1978) [hereinafter FOUCAULT, *HISTORY OF SEXUALITY*].

78. Ralf Michaels, *Globalizing Savigny: The State in Savigny’s Private International Law and the Challenge of Europeanization and Globalization* (Duke Law School Working Paper/Faculty Scholarship Series, Paper 15, 2005), at 12, available at <http://lsr.nellco.org/duke/fs/papers/15>. (footnote omitted) (last visited Dec. 28, 2007).

only attain reality through the state, so the people's (private) law becomes law only through the state."<sup>79</sup>

The reification of ethnos through law as opposed to the reification of law through demos continues to drive important areas of continental law making. It has proven important in the development of European constitutional theory in the context of the construction of that great supra-national entity, the European Union. This conceptualization of law as an expression of ethno-reification through state formation was nicely expressed, for example, by the German Federal Constitutional Court in considering the character of the European Union within German constitutionalism.<sup>80</sup>

Democracy, if not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests and ideas, in the course of which political objectives are goals also clarified and modified and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which he is subject. . . . [A]ctual conditions of this kind may be developed in the course of time, within the institutional framework of the European Union.<sup>81</sup>

State and government nicely reify people (as ethnos) through the mechanics of law that serves the ultimate purpose of preserving the autonomy of every ethnos. "Each of the peoples of the individual States is the starting point for a state power relating to that people."<sup>82</sup> The state then serves as source and limit of law. "The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls"<sup>83</sup> through an instrumentalist law, "in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically."<sup>84</sup>

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79. *Id.* at 11 (footnote omitted).

80. Bundesverfassungsgericht [BVerfG] [federal constitutional court] 1993, 89 *Entscheidungen des Bundesverfassungsrichts* [BVerfGE] 155 (F.R.G.) (commonly known in the English speaking world as *Brunner v. European Union* or the German Maastricht decision).

81. *Id.* ¶¶ 41-42.

82. *Id.* ¶ 44.

83. *Id.*

84. *Id.*

Napoléon, and his successors (especially though by no means limited to the great nineteenth century German theorists) marked the end of a long period of development of customary and positive law not centered on the state.<sup>85</sup> Roman law, for example, even as a sort of set of general principles, became formally fractured and incorporated within the ethnic genius of the law codes of European tribes now organized as fully formed Westphalian states. But even on the Continent, the medieval notions of custom and constitutions guaranteed to political subdivisions (the “ancient rights”) survived in some form. They remain a potent force to this day in places like Catalunya, whose twenty-first century struggle for autonomy is based on a political program to vindicate its fourteenth century rights derived from, and confirmed by, the Crown.<sup>86</sup>

Carl Schmitt captures well the Continental suspicion of approaches to law whose legitimacy and content was to some extent beyond the control of government. Marginalized as mere “custom” “its actual polemical-political significance was determined through the opposition against the legislative right of the absolutist Monarchs. . . . [T]he recognition of customary law always means a limitation on the parliamentary lawmaker to the benefit of other [state] organs, especially, of course, the judiciary.”<sup>87</sup> This strongly echoes Coke and places a modern, state centered gloss on law as the reified “other,” separate from the state and its apparatus. Of course, this was the worst of all worlds for theorists like Schmitt, as well as for the great legal system builders of the nineteenth century in Europe, from those who crafted the Code Napoleon, to nineteenth century German law theorists busy creating a normative foundation for the construction of the Reich and the expression of its genius in law, the great *Bürgerliches Gesetzbuch*, the

85. See GROSSI, *supra* note 13.

86. Spanish foral law, like French customary law, has been at the center of a struggle between a centralizing monarchy and aristocratic local governments. Monopolistic positivism, centered on the person of the monarch was meant to serve as a basis for reducing the power of the older local aristocracy, which relied on its rights, derived from custom, to resist royal power. On the Code Napoleon and the consolidation of the French state and French law, see text at notes 72-74, *supra*. On Spanish foral law, see, e.g., J.H. ELLIOTT, *THE REVOLT OF THE CATALANS: A STUDY IN THE DECLINE OF SPAIN, 1598-1640*, 17, 118, 206 & 255 (1984).

The king’s powers in the States of the Crown of Aragon for the administering of justice, the exacting of tributes or the raising of armies were hedged about with legal restrictions. At every turn, a ruler would find himself limited by the *fueros*, the laws and liberties he had sworn to observe, and each of the territories possessed a standing body, like the Catalan *Diputació*, whose specific function was to defend the national liberties against the arbitrary power of the Crown.

*Id.* at 7.

87. SCHMITT, *supra* note 5, at 17-18.

German civil code.<sup>88</sup> For the great state builders of the nineteenth century, from Hamilton and Thomas Paine in the United States, to the state builders all across Europe, and ultimately the builders of totalitarian state regimes in Europe in the early twentieth century,

[t]he images of legal science and legal practice were (and still certainly are) mastered by a series of simple equivalences. Law = statute; statute = the state regulation that comes about with the participation of the representative assembly. Practically speaking, that is what is meant by law when one demanded the “rule of law” and the “principle of the legality of all state action” as the defining characteristic of the Rechtsstaat.<sup>89</sup>

The positivist basic norm posits the “congruence of law and statute. The state is law in statutory form; law in statutory form is the state. . . . There is only legality, not authority or commands from above.”<sup>90</sup>

In the twentieth century, the spirit of Francis Bacon, now rationalized as a “social science,” was strongly felt, but within an altered landscape of law and government. By mid century, among many influential circles of the Western elite, law was displaced by politics; the focus on the formal elements of systems was displaced by the substantive analysis of power. In the United States, the so-called pragmatists and even more ironically misnamed “legal realists” sought to reduce common law notions to a caricature of its system despised by civil lawyers.

Justice Scalia has been among the most astute advocates of positivist instrumentalism of the late twentieth and early twenty-first centuries. For Scalia an autonomous reified law disappeared at the same time that the common law was replaced in the United States by notions of democratic constitutionalism. Scalia’s boldest pronouncement in this regard could not be clearer and is worth quoting. Referring to autonomous systems of law based on a common law framework whose autonomy was protected by an independent judiciary, Scalia writes: that such a legal system in the United States “is now barely extant, the system that Holmes wrote about: the common law. That was a system in which there was little legislation, and in which judges created the law of crimes, of torts, of agency, of contracts, of property, of family and inheritance.”<sup>91</sup> Sounding very much like a legal realist, with strong Nietzschean roots,<sup>92</sup>

88. See generally FRIEDRICH VON SAVIGNY, *supra* note 3.

89. SCHMITT, *supra* note 5, at 18.

90. *Id.*

91. Antonin Scalia, *Book Review* (reviewing STEVEN D. SMITH, *LAW’S QUANDARY* (Harvard U. Press 2005)), 157 *FIRST THINGS* 37-46 (Nov. 2005), available at [http://www.firstthings.com/article.php3?id\\_article=245&var\\_recherche=Steven+Smith+%22Law%27s+Quandry%22](http://www.firstthings.com/article.php3?id_article=245&var_recherche=Steven+Smith+%22Law%27s+Quandry%22).

92. See Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on*

Scalia inverts cause and effect to construct an explanation for this.

And just as theories such as the Divine Right of Kings were necessary to justify the power of monarchs to make law through edicts, some theory was necessary to justify the power of judges (as agents of the King) to make law through common-law adjudication. That theory was the “brooding omnipresence” of an unwritten law that the judges merely “discovered.”<sup>93</sup>

But, Scalia argues all that has changed now. In place of both the King (undeniably overthrown in the American revolution) and the brooding omnipresence, the Americans have taken on a new golden calf. Presto! Just at the moment that the American colonies organized to form a true common law republic, something magical happened, the substitution of a reified idea, democracy for the old body of the King.

But democracy has overtaken all that. Modern governments, or modern governments in the West at least, are thought to derive their authority from the consent of the governed, and the laws they prescribe are enacted by the people’s representatives. Such a system is quite incompatible with the making (or the “finding”) of law by judges—and most especially by unelected judges.<sup>94</sup>

For Scalia, democratic theory occupies the same place as the theory of the legal effect of the “royal will” occupied for Francis Bacon in Stuart England. In both cases, a view of law as existing outside the power of *gubernaculum* was inconceivable. In both cases, *jurisdictio* outside *gubernaculum* was viewed as subterfuge—the necessary *post hoc* theorizing of a group seeking to retain power for itself under a system in which such power grabs was inconsistent with the theory of *gubernaculum*, and therefore inconsistent with its *jurisdictio*. We are as far away from our founding roots as we can get—and according to Justice Scalia all is necessary in the name of our founding roots. Scalia thus carries forward, in a very illuminating way, the extremist rhetorical style of the eve of the English civil war, and he takes up the cause of the initial loser in that battle.<sup>95</sup>

In the Soviet Union (and its satellites) and later in the People’s Republic of China, realism of a different sort prevailed, that of the Marxist-Leninist insight of the conflation of state-law-power and Party. Theorists in Europe, and then the United States, refined and combined the insights of legal realism and Marxism, in a number of politico-

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*the Dominion of Judges*, 12 WM. & MARY BILL OF RTS. J. 117 (2003).

93. Scalia, *supra* note 91.

94. *Id.*

95. *Id.*

theoretical movements usefully understood as post-modernism. For our purposes, all of these movements had one important characteristic in common—they all sought to embrace, in one form or another the reduction of law to little more than a means by which power is authoritatively communicated. There is only authority and it commands from above. Law is their instrument or the veil through which power is imposed. The only important question for law, then, was its utility in expressing political ideology.<sup>96</sup>

But the reification of law as instrument, a commonplace by the end of the twentieth century, in turn produced its own sources of resistance.<sup>97</sup> One source was reactionary—a return to reification of law through religious normative systems, the same basis of law that Bracton would have understood. In the United States, this reactionary turn has its own instrumentalist turn, much of its progress has been won through a revived Religion Clause jurisprudence. Another source is post-modern, seeking universal norms within a global human common law edifice created either through emerging international institutions (human rights universalism) or in private law<sup>98</sup> or in combinations of both.<sup>99</sup> Both are discussed below.

Another inversion of sorts was noticeable by the end of the century. Substituted for a system based on the centrality of “Law-and-Sovereign,”<sup>100</sup> was one of force relations through which the mechanism of power can be more usefully examined.<sup>101</sup> But this power was essentially instrumental as well—a tool without a master, and without a purpose except as expressed in the aggregate by the consequences of its use. “The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another.”<sup>102</sup> Power, thus understood, is exercised and not possessed. It is immanent in all relationships,

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96. See Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the “Three Represents”), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16(1) J. TRANSNAT’L LAW & CONTEMP. PROBS. 29 (2006).

97. See STEVEN D. SMITH, *LAW’S QUANDARY* (Harvard U. Press 2005); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (Cambridge U. Press 2005).

98. See Catá Backer, *supra* note 8.

99. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) [hereinafter Catá Backer, *Multinational Corporations*].

100. FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 77, at 97.

101. *Id.*

102. *Id.* at 93.

whatever the formal methodologies of expression of those relationships. It comes from below. It is rational and intentional, “the rationality of power is characterized by tactics that are often quite explicit at the restricted level where they are inscribed.”<sup>103</sup> And it engenders its own resistance.<sup>104</sup> To use more traditional language, systems of power express the common practices of the people; “[m]ajor dominations are the hegemonic effects that are sustained by all these confrontations” of force relations.<sup>105</sup>

Ironically, there is a strong echo of Coke’s understanding of common law in Foucault’s characterization of power. Just as Coke proposed the common law, a passive bottom up aggregating force, against the conscious law-as-state-instrumentalism of James I, so Foucault posits a similarly constituted concept—“power”—against the positivist instrumentalism of consciously created top down control systems. What can be more Coke-like than an assertion that “[b]y power, I do not mean “Power” as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state”?<sup>106</sup> Except that for Foucault, power has no master—no systems of acolytes charged with its preservation and interpretation. Foucault offers us power/law in the form of an uncontrollable pantheism as an alternative to Coke’s institutionalist model. Yet both models posit the importance of an executive authority in the state; Foucault as an increasing anachronism in the face of the disciplinary power of totalitarian technologically driven governance, and Coke as a monarch whose principal obligation is to keep the peace within the scope of his prerogatives.

The study of law as politics, and politics as power, tends to focus on Marxist-Leninist regimes. And indeed, Marxist-Leninist regimes, through the end of the twentieth century inverted the relationship of law and politics, and centered all power on the state (or more precisely on the Communist Party and the vanguard of the new order).<sup>107</sup> But it cannot be forgotten that modern fascism shares a similar view of the relationship of law to power. Mussolini suggested that:

[t]he nation is created by the State, which gives the people, conscious of their own moral unity, the will, and thereby an effective existence. The right of a nation to its independence is derived not from a literary and ideal consciousness of its own existence, much

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103. *Id.* at 95.

104. *Id.* at 94-95.

105. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 94.

106. *Id.*

107. See Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 J. TRANSNAT’L L. & CONTEMP. PROBS. 337 (2004).

less from a *de facto* situation more or less inert and unconscious, but from an active consciousness, from an active political will disposed to demonstrate in its right; that is to say, a kind of State already in its pride (*in fieri*). The State, in fact, as a universal ethical will, is the creator of right.<sup>108</sup>

One of his theorists, Alfredo Rocco, suggested a concession theory of law and right, reflecting the institutionalist and corporatist mentality of fascism, and its obsession with reification.

Our concept of liberty is that the individual must be allowed to develop his personality on behalf of the state, for these ephemeral and infinitesimal elements of the complex and permanent life of society determined by their normal growth the development of the state. . . . Freedom therefore is due to the citizen and to classes on condition that they exercise it in the interest of society as a whole and within the limits set by social exigencies, liberty being, like any other individual right, a concession of the state. What I say concerning civil liberties applies to economic freedom as well.<sup>109</sup>

Even current systems of globalization, in their national and trans-border organization, appear to substitute power, and power relations—that is governance and regulation—for law and government. The only difference, perhaps, is the substitution of an institutionalized “system” for state, and “rule” for “law.”<sup>110</sup>

It has no others. It arouses disparities, it solicits divergences, multiculturalism is agreeable to it but under the condition of an agreement concerning the rules of disagreement. . . . These rules determine the elements that are allowed and the operations permitted for every domain. The object of the game is always to win. Within the framework of these rules, freedom of strategy is left entirely open. It is forbidden to kill one’s adversary.<sup>111</sup>

Yet there are similarities with more traditional approaches. It found expression in the eighteenth century in the work of Jean Jacques

108. Benito Mussolini, *The Conception of the State, in The Doctrine of Fascism: Fundamental Ideas, in READINGS ON FASCISM AND NATIONAL SOCIALISM*, ¶ 10 (Alan Swallow ed., Project Gutenberg 2004), (reprinted with permission from I.S. MUNRO, *FASCISM TO WORLD-POWER* (I.S. Munro ed. & trans., Alexander Maclehoze 1933)), available at [http://www.gutenberg.org/files/14058/14058-h/14058-h.htm#THE\\_DOCTRINE\\_OF\\_FASCISM](http://www.gutenberg.org/files/14058/14058-h/14058-h.htm#THE_DOCTRINE_OF_FASCISM) (last visited Dec. 27, 2007).

109. Alfredo Rocco, *The Problems of Liberty, of Government, and of Social Justice in the Political Doctrine of Fascism, in The Political Doctrine of Fascism, in READINGS ON FASCISM AND NATIONAL SOCIALISM* (Alan Swallow ed., Project Gutenberg 2004).

110. JEAN-FRANÇOIS LYOTARD, *POSTMODERN FABLES* (Georges Van Den Abbeel trans., U. of Minn. Press 1997).

111. *Id.* at 199-200.



Rousseau: "Were there a people of gods, their government would be democratic. So perfect a government is not for men."<sup>112</sup> Law for Rousseau was also essentially *instrumental* and partial. It serves increasingly as the conceptual framework from which both totalitarian and democratic governance in the West are grounded. Law becomes more and more the codification of power. It need not have a particular character. There are echoes of this in pre-Second World War German notions of *Rechtsstaat*,<sup>113</sup> and its transmogrification in the theories of Carl Schmitt.<sup>114</sup> But it also bears fruit in that most liberal of all twentieth century republics, the United States, especially in the post-Second World War American ideas of process constitutionalism.<sup>115</sup> Indeed, the so-called "countermajoritarian difficulty" that has enthralled several generations of American legal and academic elites,<sup>116</sup> and that has served as the basis for a campaign to scare the electorate about the power of the judiciary,<sup>117</sup> reduces itself to a twentieth century version of the perhaps more elegantly proffered argument of Francis Bacon. Bickel and his disciples in their turn, like Francis Bacon before him, argued that lawyers and the courts ought to exercise their authority under the authority of the sovereign.<sup>118</sup> For Bacon, that sovereign took the form of the King, for Bickel, that sovereign was the "people" through their elected representatives to which popular authority had been transferred.<sup>119</sup> In both cases, they move far from that other great legal tradition, still vibrant at the time of the founding of the American Republic—that understood law as organic and the sovereign power as principally executive in nature.<sup>120</sup>

Like its eighteenth and nineteenth century counterparts, the newer approaches tend to view law as instrumental, though instrumental in a different sense. That difference, in part, reflects the possibilities for the

112. Jean Jacques Rousseau, *The Social Contract or Principles of Political Right*, Bk. III, pt. 4, in 38 THE GREAT BOOKS 387, 411 (G.D.H. Cole trans., 1762).

113. See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 CAL. L. REV. 1307, 1318 (2001).

114. See SCHMITT, *supra* note 5, at 18.

115. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88-103 (Harvard U. Press 1980).

116. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (Bobbs-Merrill 1962).

117. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (Free Press 1990).

118. See ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (Harper & Row 1978) (1970).

119. See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (Yale U. Press 1975) [hereinafter BICKEL, *THE MORALITY OF CONSENT*].

120. This was the case either under Bodin's reading of sovereignty, or Coke's common law version in which the lawyer class stood as a bulwark against executive intrusion in the law (at least the higher law) of the Kingdom. See BODIN, *supra* note 2, at Bk. IV, ch. III, 123-27; COKE, *supra* note 35, at vol. 1.

assertion of newer techniques of power made possible by advances in the technologies of control. The centrality of law—and the state—is substantially weakened once one eliminates the ideas that the state is the supreme repository of power with a monopoly over the institution of power as law, and that law proceeds in specific form solely from the acts of political communities.<sup>121</sup> Consequently, it has been fashionable to speak of law as an instrument of power, as its mask.<sup>122</sup> “Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial.”<sup>123</sup> In its twentieth century mode, “power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.”<sup>124</sup> And so it appeared to function effectively in this way in both the democratic West and the totalitarian East. For both societies, law served as the veil behind which the panoptic state could be constructed—providing a regularity and formal legitimacy to many of its techniques, while deflecting the extent of their insinuation in the social order. And Western scholars have devoted substantial energy to unmasking law in the service of this or that system of subordination or more generally of its intensification of force relations of any kind.

Foucault did not live long enough to understand the way in which he both served to describe an epoch about to end and to point the way to that epoch’s reconstitution. We have come to live in an age in which the form of “law with its effects of prohibition needs to be resituated among a number of other, non-juridical mechanisms.”<sup>125</sup> We are in a position now to better understand Foucault’s assertion that:

If it is true that the juridical system was useful for representing, albeit in a nonexhaustive way, a power that was centered primarily around deduction (*prélèvement*) and death, it is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus.<sup>126</sup>

Today, power applied systems of force relations, have taken up a thread of Foucault’s discourse of law/power. I want to explore the great shift from the post-modern—with its obsession with power and its techniques, with subordination and its abolition—to an age in which the techniques

121. See FOUCAULT, *supra* note 46, at 140.

122. *Id.*

123. *Id.* at 141.

124. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 86.

125. FOUCAULT, *supra* note 46, at 141.

126. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 89.

of power have been deployed in the service of management. We live in Foucault's asylum: "to effect moral syntheses, assuring an ethical continuity between the world of madness and the world of reason, but by practicing a social segregation that would guarantee bourgeois morality, a universality of fact, and permit it to be imposed as a law upon all forms of insanity."<sup>127</sup> We live in the age of true disciplinary power, power "exercised through its invisibility; at the same time it imposes on those whom it subjects a principle of compulsory visibility."<sup>128</sup> The only marker of these disciplines in law, now put to another use—a post-monarchical use, in which we are all subject to the disciplinary machines. Thus, we live in a world, not of a singular hierarchy of disciplinary machines,<sup>129</sup> but one in which there are multiple simultaneously functioning and imperfectly horizontally integrated pyramidal organizations producing power and distributing individuals (and other organizations) "in this permanent and continuous field."<sup>130</sup>

What are the characteristics of law in this new age of management? What are the techniques of its power/knowledge? To what extent are the techniques of this new age explained through law? I will attempt to extract some answers through an examination of law as technique among transnational actors and God as law within emerging modern traditions of state-based constitutionalism. In this extraction I remain aware that "[i]nstitutional legal history abounds with crooked and confused paths forced unnaturally straight by previous generations of scholars whose vested interest in preserving the rule of law extended to rewriting the past. Accepting an illogicality about institutional development, we might follow a few paths to their cultural complexity."<sup>131</sup>

### III. Law as Technique: The Management Networks of Power at the International Global Level and the Reconstitution of Legal Reification in Global Common Law

To speak in terms of disciplinary power—to speak in terms of techniques of control—is to look to rising systems of behavior management that increasingly characterize the organization of social and economic communities operating autonomously on a global scale. We

127. MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* 259 (Richard Howard trans., Vintage Books 1965) [hereinafter FOUCAULT, *MADNESS AND CIVILIZATION*].

128. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 187 (Alan Sheridan trans., Vintage Books 1977) [hereinafter FOUCAULT, *DISCIPLINE AND PUNISH*].

129. FOUCAULT, *MADNESS AND CIVILIZATION*, *supra* note 127, at 177.

130. *Id.*

131. Bilder, *supra* note 37, at 968.

move from the state to systems, to networks of power relationships.<sup>132</sup> It is only in the early twenty-first century that power, as Foucault understood the term, has unmasked itself. But in a world of force relations, of techniques of control and management, has law become a marginal element? Rather than recede, what we find is that law was redefined itself to suit the needs of a new set of power relationships. These relationships point to global post-nationalism as an organizational focus.<sup>133</sup> Thus naturalized, it survives in a new world order.

This construction of a global system of private law making is spearheaded by an important group of large multinational corporations. It is rising in the shadow of, and parallel with, less successful attempts by national and international bodies to develop a system of public law rules to govern multinational behavior. It is now readily apparent in the construction of webs of contractual relationships between multinational corporations and their global networks of suppliers, usually factories located in the developing world and retail operations worldwide. This modern global law making relies on the participation of key elements of civil society to help determine the content of these provisions and to act as monitors of supplier conduct. It also relies on the participation of media, both to publicize breaches of conduct norms by suppliers and the efforts of multinationals to correct these breaches. This global system of supplier agreements evidences how large multinational corporations, elements of civil society and the media, increasingly perform powerful quasi-governmental roles, roles encouraged by the human rights establishment in Geneva and loathed by most Western states, at least as official policy.<sup>134</sup>

The characteristics of this emerging system are substantially different from the traditional public law based system derived from the activities of political communities.<sup>135</sup> The system is based on private law making. Though in this case, private law *forms* mask the public law character of the system.<sup>136</sup> This system consists of four principal

132. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3-28 (Christian Joerges, Inger-Johane Sand & Gunther Teubner eds., Oxford & Portland, Oregon, Hart Publishing 2004).

133. See, e.g., Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Gráinne de Burca & Joanne Scott eds., Hart Publishing 2001).

134. See Catá Backer, *Multinational Corporations*, *supra* note 99.

135. For the traditional division between public and private law spheres, see GERALD TURKEL, *DIVIDING PUBLIC AND PRIVATE: LAW, POLITICS, AND SOCIAL THEORY* (Praeger Publishers 1992) (“Law constitutes core relations through which the public/private division is recreated in agents of social action at the same time that it is being socialized at deeper structural levels.”). *Id.* at 227.

136. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 127 (W.D. HallsGeorge

participants: corporations and other enterprises, non-governmental organizations, the media (news, information, and advertising), and individuals acting as consumers of the products offered by the other three actors (goods, services, investments, or information and the markets through which these objects are consumed). These actors have interests, albeit fundamentally adverse interests, yet are dependent on each other. That adverse interest dependency is deepened in a system that increases the authority and legitimacy of each of the actors through their regularized interactions. Together, these actors produce a complete system of regulation, from legislation to enforcement, that are focused and limited in scope but dynamic and effective within its limits and growing. Within these systems, grounded in the relationships in individual TNCs with NGO, media, customer and investor communities, the role of the state and other public bodies becomes secondary rather than primary, and it becomes difficult to determine, at the international level, whether law is being sourced from consensus in private behavior or legal norms developed through the deliberative political process.<sup>137</sup>

An incident reported in 2006 by the British Broadcasting Company (“BBC”) on its web site provides context.<sup>138</sup> The BBC reported on what might have appeared to be a curious series of events. It explained how a human rights NGO working in China discovered allegations of substandard working conditions for Chinese workers at one of Apple’s iPod factories in China.<sup>139</sup> These allegations were reported in English newspapers and the story was eventually picked up by the BBC. In response, Apple immediately affirmed its obligation to ensure appropriate working conditions for workers in its supplier’s factories in China and that it would investigate the allegations and correct deficiencies in the factory.<sup>140</sup> Eventually, Apple released a report of its investigation and remedial measures.<sup>141</sup>

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Simpson trans., New York, Free Press 1864).

In order to completely separate the two sorts of law, it would be necessary to admit that there is really a private law, whereas we believe that all law is public, because all law is social. All the functions of society are social, as all the functions of the organism are organic.

*Id.*

137. See Catá Backer, *supra* note 8.

138. See British Broadcasting Corporation, *iPod Slave Claims Investigated*, BBC NEWS (UK VERSION), Business, June 14, 2006, available at <http://news.bbc.co.uk/1/hi/business/5079590.stm> (last visited Dec. 27, 2007).

139. *Id.*

140. *Id.*

141. See Apple, Inc., “Report on iPod Manufacturing” (Aug. 17, 2006), available at <http://www.apple.com/invesTor/> (follow “Responsible Supplier Management” hyperlink; then follow “iPod Manufacturing Report” hyperlink) (last visited Dec. 27, 2007) [hereinafter Apple, Report on iPod].

There are several points to this story that make it interesting from the perspective of law and power. First, Apple had adopted a code of conduct that essentially exports a set of behavioral norms onto its suppliers.<sup>142</sup> That code forms part of the contractual relations between Apple and its suppliers, giving Apple a substantial amount of regulatory control over the way in which suppliers operate. Though the supplier code appears targeted to its suppliers, it actually is meant to induce an appropriate response from its investors (the consumption of its shares and other investment instruments). Apple thus targets communication of this information to its investor community in a way that has a set of very specific objectives other than governance.<sup>143</sup> It explains that “Apple is committed to ensuring that working conditions in Apple’s supply chain are safe, that workers are treated with respect and dignity, and that manufacturing processes are environmentally responsible.”<sup>144</sup> The Supplier Code itself is also available not only to affected suppliers but also to the investment and consumer communities.<sup>145</sup> The code itself is interesting. It is based on a model code prepared by the relevant industry group (this comes as no surprise), but it also incorporates certain international human rights and labor norms.

Apple’s Supplier Code of Conduct is modelled on and contains language from the Electronic Industry Code of Conduct. Recognized standards such as International Labour Organization Standards (ILO), Universal Declaration of Human Rights (UDHR), Social Accountability International (SAI), and the Ethical Trading Initiative (ETI) were used as references in preparing this Code and may be useful sources of additional information. A complete list of references is provided at the end of the Code.<sup>146</sup>

Second, Apple’s reaction to reports of the story of sub-standard wages was positive. It did not deny the allegations, it did not lash out at the monitors who brought the story to the press. Instead, it reaffirmed its commitment to its behavioral norms as set forth in its voluntary code, and promised an investigation of the allegations.<sup>147</sup> Third, Apple worked diligently to investigate and produce a report that was broadly distributed

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142. See Apple, Inc., “Supplier Code of Conduct” (Nov. 13, 2005), available at <http://www.apple.com/investor/> (follow “Responsible Supplier Management” hyperlink; then follow “Supplier Code of Conduct” hyperlink) (last visited Dec. 27, 2007) [hereinafter Apple, Supplier Code of Conduct].

143. See Apple, Report on iPod, *supra* note 142.

144. Apple, Supplier Code of Conduct, *supra* note 143, at.

145. See *id.*

146. See Apple, Inc., “Supplier Code of Conduct,” *supra* note 142.

147. See Apple, Report on iPod, *supra* note 142.

to its consumers and the investment community.<sup>148</sup> Fourth, elements of civil society played a key role in monitoring Apple's Supplier Code of Conduct. It was a Chinese human rights organization that did the work to uncover and report allegations of substandard conditions—that is of conditions that violated the Apple Supplier Agreement. Fifth, the media played a critical role in conveying information in a way that legitimated it. Sixth, the state played little if any role in this event. Apple stands at the center of a network of relations that produce behavioral norms that acquire an existence separate and apart from the state.<sup>149</sup> This is coercion aimed to manage behavior.

But where is law as traditionally understood, within these networks of relations? Law assumes a more traditional role, not as positive pronouncement but as framework principles applied as the situation demands. Law resides at the margins of this system. Power is diffuse and pervasive. It is now a function of relationships and norms set forth in contract. But contracts are rarely the subject of litigation under this system. Instead, contracts form the basis through which relations (and behavior) are managed. For example, when Wal-Mart learned that its suppliers in Jordan might be violating both Jordanian labor law and international human rights norms, they sent auditors to the company, they reviewed behavior, they met with factory managers, they withheld payment pending changes in behavior tied to the set of contractually based norms that guided the relationship between Wal-Mart and the supplier, and then Wal-Mart recertified a supplier whose behavior now better conformed to norms systems acceptable to Wal-Mart. There was no litigation; there was no appeal to state authorities. There was an interaction between the multinational, supplier, the NGO community and the media.<sup>150</sup>

Law here exists apart from its objects. It has been stripped of the juridical patina that Foucault thought was its most marked characteristic. It is also law that again exists outside the usual abode of power, traditionally understood as political power. But power is no longer expressed as politics. It speaks the language of economics; Marxist-Leninists should see the irony. Private lawmaking networks at the trans-border level appear to revive Coke's notions of the separation of common law from government, yet also in a dynamic relation with it.<sup>151</sup>

Foucault was right to broaden our understanding of law/power. The system of corporate private law making is the essence of the force

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148. *Id.*

149. See Teubner, *supra* note 131.

150. These relationships are elaborated in Catá Backer, *supra* note 8.

151. See Teubner, *supra* note 132.

relations of power he describes: a “network of power relations . . . forming a dense web that passes through apparatuses and institutions, without being exactly localized in them.”<sup>152</sup> But he missed the essential nature of authority in the mix. And for authority some form of legal reification remains essential. Lyotard perhaps had it right when he described the authority/law matrix:

In the modern system, and even more so in the postmodern one, authority is a matter for argument. It is never attributed, or conceded, so to speak, to an individual or a group, which may occupy the location of authority only for a limited time. That location is, in principle, empty. Authority is designated by a contract, even if it is the final word in which the Law itself speaks.<sup>153</sup>

Thus, in this global system is evidenced a new law/power relationship. But the law/power relationship being constructed outside of the formal structures of traditional public law shares a certain similarity to law in its pre-Enlightenment forms. It harkens more to Coke than to Bacon, more to Locke than to Schmitt. The new law/power matrix is custom and practice backed by social and economic power. The example of Apple related above evidences the way in which the disciplines, as understood by Foucault in the context of the erection of a surveillance society,<sup>154</sup> have become dynamic forces in the reconstruction of systems of law/power.<sup>155</sup> But it also demonstrates that even the most dynamic and subterranean of forces cannot resist reification. It might surprise Foucault to see that even the disciplines can serve as a “common law” to be deployed against state and individual actors seeking to impose their will against normative principles the disciplines further.

#### IV. God as Law; Humanity as Law: Divergence in the Management of State Power in Modern Constitutionalism

Yet even as power is increasingly exercised as technique beyond the traditional understanding of law as “thing,” traditional uses of law as an instrument of asserting the power supremacy of the state continue to flourish in modern form. Foucault surely rejects this constitutionalism as an act of delusion—for him law cannot but be partial and legal discourse misdirected. It is to the techniques, to the disciplines, the underground

152. FOUCAULT, *HISTORY OF SEXUALITY*, *supra* note 77, at 96.

153. LYOTARD, *supra* note 110, at 77.

154. *See* FOUCAULT, *DISCIPLINE AND PUNISH*, *supra* note 128, at 187.

155. The relationship of law/power systems, surveillance and governance are explored in Larry Catá Backer, *Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities*, 13 *IND. J. GLOBAL LEGAL STUD.* (forthcoming 2008).



structure of behavioral compulsions that he looks. And yet law can reconstitute itself, and in the reconstitution, attempt to broaden its purported reach to the limits of human understanding. Bombast? No, rather a sign of law folding back on itself as an expressive device—as the Logos, the manifestation of an aspect of the universality of humankind or God.<sup>156</sup> Law thus becomes the tip of an iceberg—a tool of ideology, or more generally, an expression of the disciplines through which human norms become action. But even the tip of the iceberg Foucault rejects has a point. And in the twenty-first century the point has been sharpened, taking three primary forms: first, traditional self-contained systems of legal hierarchies, second, legal hierarchies limited by the great principles of international behavior norms; and third, legal hierarchies subordinate to a higher law represented by the pronouncements of organized religion of one form or another.

#### A. *Traditional Self-Contained Systems of Legal Hierarchies*

Modern constructions of the American, French and English constitutions are the best examples. These are constitutions that by their terms represent the highest possible legitimate law making power, but which themselves remain subordinate to the active will of the sovereign power (usually, but not always, the people). Constitutions in this sense are law deeply embedded within the framework of the state and its own conception of itself. This is law as Bacon and Hobbes (along with Tom Paine) understood it—law as essentially instrumental and bounded by the will of the legislator. It is the legitimate language of political power by those with the authority to wield it. Its only borders are those embraced by the lawgiver. And these borders may be changed at any time. Just as the United States abandoned slavery in the nineteenth century, it could again impose the practice in the twenty-first. Just as France emancipated her Jews in the nineteenth century, it might undo that emancipation in the twenty-first, by rejecting all prior acts as inconsistent with the current will of the lawmaker. This is a legal theory that, in its pure form,

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156. These ideas are explored in more detail in Larry Catá Backer, *Fides et Ratio: Religion and Law in Legal Orders Suffused by Faith*, in *LAW AT THE END OF THE DAY*, July 30, 2007, available at [http://lcbackerblog.blogspot.com./2007\\_07\\_01\\_archive.html](http://lcbackerblog.blogspot.com./2007_07_01_archive.html) (last visited Dec. 28, 2007).

Self-constituted communities are bounded by the Truth of their constitution, a truth that necessarily embodies faith and reason in the sense that Benedict describes. Political communities like religious and social communities, are bounded by the Truth of their constitution—rationally bounded by rules and understandings within which the infinite is possible. Faith provides the ongoing principles of that community—its morals, ethics and theology. Reason serves as the means to incorporation and application of those principles.

*Id.*

democrats and Marxist-Leninists might applaud—but in defense of very different conceptual frameworks. In the United States, expression of an instrumentalist reification of law has provided the essential framework for the great debates of American constitutional theory. Bickel's majoritarian difficulty<sup>157</sup> and Weschler's neutral principles<sup>158</sup> are natural expressions of the idea that even foundational law is an object of positivist manipulation. Each works to justify a judicial role in a normative system of legal instrumentalism.<sup>159</sup> This justification assumed critical importance especially as it related to a judicial system designed to operate under a normative conception of law as autonomous rather than instrumental. Weschler and Bickel express the efforts, in the American context, to reconstitute the American judiciary on the Stuart model, as "lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."<sup>160</sup> Bacon, of course, would understand the conceptual difficulties of judicial review of legislative or executive action; Coke would not. Where law is reified as autonomous and systemic, rather than instrumental and consequential, the difficulties of judicial review, even within democratic theory, tend to fall away.

Likewise, the American presidents' repeated attempts at early Stuart type rule—President Truman with the steel mill seizures<sup>161</sup> and President George W. Bush with the detention of American citizens during combat operations<sup>162</sup>—show the power of this sort of instrumentalism in action. In both cases there was a clash of legal culture. On the one hand, the idea of law as the servant of state power and, on the other, the idea of law as an autonomous set of normative limits of state power. Ironically, in both cases, the judiciary tended to push very little beyond a core instrumentalism tied to a positivist conception of the American Constitution.

These limitations were nicely illustrated in the various opinions in *Hamdan v. Rumsfeld*<sup>163</sup> on the president's power to establish military commissions. The opinion provided an opportunity to refine the great debate between constitutional structuralists, political constitutionalists and ideological supremacists. These three great schools of normative constitutionalism in the United States reflect the tensions in American

157. See BICKEL, *supra* note 116.

158. See Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

159. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L. J. 153 (2002).

160. BACON, *supra* note 4, at 230.

161. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

162. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

163. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); 126 S. Ct. 2749 (2006).

legal thought between law as conceived by Coke and as articulated by Bacon. Constitutional structuralists assert that the Constitution is the sole source power, positive and negative, applicable to political actors, and that the function of the Supreme Court is to apply those limits, and only those limits. Political constitutionalists believe the Constitution creates a flexible matrix for governance that ought to be molded to political necessity and applied by the political branches without substantial judicial interference. The wild cards in the mix are ideological supremacists. For them the key is natural law, theology or a global common law of human rights and governance behaviors.

Constitutional structuralism is . . . the view adopted by the Hamden majority. Political constitutionalists [include] . . . the view adopted at least in the dissent of Justice Alito. Ideological supremacists believe that the Constitution was written to serve higher moral, ethical or ideological purposes, though there is little agreement among groups of ideological supremacists over which set of ideologies the Constitution serves. For them, the Constitution must be bent in the service of these higher causes by the Courts or by any other institution necessary for that purpose. This is the view that most clearly comes out in Justice Thomas's dissent, and much more subtly in the dissent of Justice Scalia.<sup>164</sup>

The first two views are substantially instrumentalist, based on the idea of positively managed structural limits on governmental power. The last suggests legal autonomy, but of a kind that might implicate a different sort of instrumentalism—a religious or moral one, discussed in the next section.

It is against the limitlessness of this instrumentalist rule of law that Brian Tamanaha centers his critique from a secular perspective.<sup>165</sup> Tamanaha points to the importance of autonomy. Steven Smith, following a similar path but from a religious perspective, also is uncomfortable with an instrumentalist reification of law.<sup>166</sup> Smith, in particular, is sensitive to the tensions in modern American jurisprudence—a jurisprudence in which both Coke's autonomous law and Bacon's instrumentalist law exist simultaneously. Smith argues that "[s]ince at least the time of Holmes, lawyers and legal thinkers have scoffed at the notion that "the law" exists in any substantial sense or that it is not reducible into our discourse and practices. Law is not a

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164. Larry Catá Backer, *Hamdan v. Rumsfeld: Some Preliminary Thoughts on a Conservative Opinion*, LAW AT THE END OF THE DAY, July 1, 2006, available at <http://lbackerblog.blogspot.com> (last visited Dec. 28, 2007).

165. See TAMANAHA, *supra* note 97.

166. See SMITH, *supra* note 97.

“brooding omnipresence in the sky.”<sup>167</sup> Smith argues that the rejection of the ancient notion of an organic and autonomous law (including a binding “higher law”) arises from what he describes as a correct perception “that our ontological inventories (or at least those that prevail in most public and academic settings) could not provide any intelligible account of . . . this preexisting thing called ‘The Law.’”<sup>168</sup> However, Smith argues that though our heads may tell us that law is at best an instrumental reification, our hearts still belong to the more ancient English conception.

At the same time . . . [there is] cogent evidence suggesting that we still do believe in “the law” . . . . Our actual practices seem pervasively to presuppose some such law: our practices at least potentially might make sense on the assumption that such a law exists, and they look puzzling or awkward or embarrassing without the assumption.”<sup>169</sup>

And perversely, these criticisms mirror, in some respects the criticisms of Western law through the critical legal studies movement and its various offshoots.

*B. Legal Hierarchies Limited by the Great Principles of International Behavior Norms*

The creation of “higher law” restraints on government finds parallel development in the efforts to create a higher law of nations after 1945. These efforts bore fruit in the great exercises in constitution making after the Second World War, from the German and Japanese post-war constitutions to South Africa’s post-apartheid constitution at the close of the twentieth century. These constitutions still adhere to the hierarchies of the traditional constitutions. Each acknowledges that there are some choices that the state cannot write into law. And some provide that certain restraints may not be erased from the domestic constitutional order.<sup>170</sup> But these restraints are derived from a different normative legal order. This set of boundaries beyond the law making power of the state are not found in some law that is separate from, but at the same level as the state law of constitutions. Instead, the boundaries are impermeable because they derive from consensus at a level higher than the state—as part of a consensus among the community of nations.<sup>171</sup> This new transnational or post-national constitutionalism is the hallmark not only

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167. *Id.* at 62.

168. *Id.*

169. *Id.* at 63.

170. For the provision in the German Basic Law, see GG art. 79.

171. See, e.g., S. AFR. CONST. 1996, art. 39, pmbl.

of modern national constitutions, but also of new supra-national constitutional orders, such as the European Union.<sup>172</sup>

These global higher law restraints emerge, in the first instance, from the communal traditions of the community of state's themselves. It shares aspects of both higher common law (the norms reflect the shared mores of the community, its lived reality and shared vision of itself in its highest aspirational form) and natural law (the norms represent the only or "best" expression of human values). These traditions become authoritative when expressed in their ideal form—as an expression of their highest communal aspirational views of themselves, as civilized, advanced, and normatively perfect states. These traditions point to a set of moral and ethical behavior rules thought generally to apply to all civilized states. These rules then serve as the basis for a global framework of higher law.

These norms become law when deliberately adopted as binding international norms by the collective family of nations through their global institutions. The U.N., in particular, has served as the great source of the communal civilizer of states through international law now limiting constitutions.<sup>173</sup> For the most part, global consensus, among the community of nations has focused, since 1945, on what is commonly referred to as "human-rights universalism."<sup>174</sup> Thus, for example, because the international community has arrived at a consensus, expressed in positive international law through binding conventions, that slavery violates all acceptable behavioral norms, slavery may not be incorporated into the constitutional system of a sovereign political community, even one in which a majority of whose members are otherwise willing.

Law in this context appears reified in two perhaps surprising ways. First, law again assumes a character as a thing separate from the state—a body of consensus among the community of states—a common law of humanity. The irony here is that this traditional form of reification, now centered at a level above the state, exists in a system in which the governments on which this form of human rights universalism is imposed embrace, as a matter of national law, the notion of the identity of law and government. Coke's notion has moved beyond the state to a

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172. See Marlene Wind, *The European Union As A Polycentric Polity: Returning To A Neo-Medieval Europe?*, in *EUROPEAN CONSTITUTIONALISM BEYOND THE STATE* 103 (J. H. H. Weiler & Marlene Wind eds., Cambridge U. Press 2003).

173. Cf. MARTII KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960* (Cambridge U. Press 2002).

174. Harold Honhju Koh, Luncheon Address, *reprinted in The American Law Institute Remarks and Addresses at the 83<sup>rd</sup> Annual Meeting*, 83 A.L.I. PROC. 70 (May 17, 2006), at 70.

global stage. At this level, higher law, as global consensus, can exist without challenge from states. But this is a more deliberative law system than that conceived by Coke. As Jill Frank nicely expressed in her consideration of Aristotle on constitutionalism, “[d]eliberative democrats tend to treat the constitution as a rule of right reason and to reify and freeze it by locating it out of time, in an invariable realm that transcends human affairs.”<sup>175</sup>

But this reification of law as autonomous is itself a positivist exercise. In this context, law is reified in a different sense, as an instrument—serving to provide the framework within which political communities may authoritatively act through law while permitting states to retain a monopoly of legislative power within their territories. Thus, law retains its positivist and instrumental character within a state, even as it loses that character in the construction and interpretation of the “higher law” of the state—its constitution. With respect to this higher law, law understood in its global context as a common higher law, stands separate from and beyond the authority of any state legislature, and even the sovereign authority of the people. Thus, the limiting framework was external to any individual state constitutional system. It was secular. It could be changed but only by the consensus of the community of nations.

That separateness is not guarded by a cohort of common law lawyers, as on Coke’s world, but by a group of what Peter Fitzpatrick calls “deific substitutes”<sup>176</sup> who reify global constitution limits “by treating it as a ‘dead’ rule for the future, a fact of social acceptance.”<sup>177</sup> Thus, global common law acquires form only through positive acts expressing a deliberate consensus among the community of states. Law in this sense is a self-immanent expression of the members of the global common law community, and thus authoritative as an aggregate expression of that unity.<sup>178</sup>

### C. *Legal Hierarchies Subordinate to a Higher Law Represented by the Pronouncements of One or Another Organized Religion*

These are the great theocratic states, from Iran to Iraq and Afghanistan. Law stands apart from the state, but is merely the instrumental form of higher law. It takes a middle place between human power and divine command. Law is reified, to be sure. But it is both

175. Jill Frank, *Aristotle on Constitutionalism and the Rule of Law*, 8 THEORETICAL INQUIRIES IN LAW 37, 49 (2007).

176. Peter Fitzpatrick, *What Are the Gods to Us Now?: Secular Theology and the Modernity of Law*, 8 THEORETICAL INQUIRIES IN LAW 161, 178 (2007).

177. Frank, *supra* note 175, at 49.

178. Fitzpatrick, *supra* note 176, at 178.

thing (a reflection of the substance of the Divine voice in human affairs) and instrument (the means through which obedience to this voice may be compelled). Thus, for example, consider the relationship between law and the divine in a system in which the constitution provides that all international human rights conventions are to be incorporated as domestic law and also provides that all law or constitutional provisions must be consistent with the rules, morals and ethics of an identified religion, which is also thus incorporated into domestic law. In a system of this kind it is more than likely that the doctors of the law will be required to consult with their effective superiors, the doctors of the church to interpret constitutional provisions.<sup>179</sup> This notion served as the legal bedrock on which the Afghani government was required to proceed in an action against a Muslim convert to Christianity.<sup>180</sup> Law is thus an instrument of Divine will (that which proceeds from the mouth of God) and the Divine will itself (is God).<sup>181</sup> People who have the ear of God hold the key to the transmission of law to his servants in government. Nietzsche, though highly critical, perhaps understood it best:

[I]n Paul the priest wanted power once again—he could use only concepts, doctrines, symbols with which one tyrannizes masses and forms herds. What was the one thing that Mohammed later borrowed from Christianity? Paul's invention, his means to priestly tyranny, to herd formation: the faith in immortality—that is, the doctrine of the "judgment."<sup>182</sup>

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179. IRAQI CONSTITUTION 2005, art. 21, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/10/12/AR2005101201450.html> (last visited Dec. 28, 2007).

180. See Larry Catá Backer, *Constitution and Apostasy in Afghanistan*, LAW AT THE END OF THE DAY, Mar. 28, 2006, available at <http://lbackerblog.blogspot.com> (last visited Dec. 28, 2007) ("In applying the law, the courts, including the Supreme Court, is obligated to apply the interpretations of a particular jurisprudential school of Islamic Shar'ia to decide questions of law.").

Article 131 of the Afghani Constitution (Chapter 7, article 15) provides that: [w]hile processing the cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence [one of the traditional schools of Islamic jurisprudence] and in a way to serve justice in the best possible manner.

*Id.* In that case, the courts avoided a confrontation with the West over the issue by returning the matter to prosecutors on procedural grounds. "Suggesting both procedural defects and the sense that only mental illness could explain apostasy (conversion from Islam to Christianity), the courts returned the case to prosecutors." *Id.*

181. In the more traditional formulation perhaps better understood in the West: "In the beginning was the Word, and the Word was with God; and the Word was God. . . . All things were made through him and without him was made nothing that has been made." *John* 1:1-1:3.

182. Friedrich Nietzsche, *The Antichrist*, in THE PORTABLE NIETZSCHE, ¶ 42 (Walter

Using the legal systems language of the present we come back to a time before Coke. We can take Kant literally now in this context when he suggested the connection between the genius of human striving for perfection and a higher law “so holy (inviolable) that it is already a crime even to call it in doubt [which must be thought] as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying ‘All authority is from God’ means.”<sup>183</sup> Kant meant to celebrate the divine essence of collective humanity. But in place of a perfectible Enlightenment humanity this system understands perfectibility literally as God, understood as *Logos*.<sup>184</sup> Law is reified as an emanation of the divine presence in human affairs. The separation of human *gubernaculum* and *jurisdictio* is a necessary requirement in a world in which God and law are one which is served by humanity through its governance apparatus.

In the West, this form of legal reification takes a distinctly Christological form—as *Logos* and Church.<sup>185</sup> And in this sense law is again reified, as against the state, in the sense Bracton understood that reification, not as Coke and Locke later understood it. In Islam, the reification follows a different path—through the Qu’ran and the ummah.<sup>186</sup> In either case, Law is reified as both standing as a thing apart from people and their social organizations (Law is God, or God is Law), and constituting the divine source within humanity (*Logos* as reason)<sup>187</sup> and the ummah as Law in Islam.<sup>188</sup>

These systems appear as assertions of complete power through legal

Kaufmann trans., New York, Viking Press 1968) (1888).

183. EMMANUEL KANT, *THE METAPHYSICS OF MORALS* 6:319 (Mary Gregor trans., Cambridge U. Press 1996) (1797).

184. See Larry Catá Backer, *The Mechanics of Perfection: Philosophy, Theology and the Perfection of American Law*, in *ON PHILOSOPHY IN AMERICAN LAW* (Francis J. Mootz, Jr., ed., Cambridge: Cambridge University Press, forthcoming 2009).

185. For a fine but controversial exposition, see Benedict XVI, *Faith, Reason And The University*, Apostolic Journey Of His Holiness Benedict XVI, To München, Altötting And Regensburg (Sept. 9-14, 2006), Meeting With The Representatives Of Science, Lecture Of The Holy Father, Aula Magna Of The University Of Regensburg, Tues., Sept. 12, 2006, available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/september/documents/hf\\_ben-xvi\\_spe\\_20060912\\_university-regensburg\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html) (provisional text, Sept. 16, 2006) (last visited Dec. 28, 2007).

186. Christopher Stewart, *From “Mother of the World” to the “Third World” and Back Again: The Harmonization Cycle Between Islam and the Global Economy*, in *HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE, AND RESISTANCE* 279, 282-85 (Larry Catá Backer ed., Carolina Academic Press 2007).

187. See Benedict XVI, “Faith Reason and the University: Memories and Reflections,” Address Delivered at the University of Regensburg, Germany, Sept. 12, 2006, available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2006/september/documents/hf\\_ben-xvi\\_spe\\_20060912\\_university-regensburg\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html).

188. See RODOLPHE J.A. DE SEIFE, *THE SHAR’IA: AN INTRODUCTION TO THE LAW OF ISLAM* 34 (Austin & Winfield 1994).



ordering, expressed in a written constitution. And indeed, they can be considered complete within their spheres of authority.<sup>189</sup> But those spheres are themselves severely limited by territory or the community of believers. State power loses legitimacy and authority beyond the borders of a *staté*. Where power is based on a relationship to a divinity as lawgiver, God's power loses force beyond the community of believers. The Muslim *ummah* has little authority over the community of Shinto. Yet, like "the voice heard long ago by Abraham and Mohammed, the voice of the muezzin echoes through the cities and the deserts to remind all that there is no authority in human affairs other than the Law proclaimed by that voice."<sup>190</sup>

## V. Implications

And so we arrive where we started. Or better put, we have moved from Foucault's unifying matrixes of power/disciplines underlying juridical law to Lyotard's "system" of post-modern politics.<sup>191</sup> "Postmodern politics are managerial strategies, its wars, police actions. . . . As for the legitimacy of the system, it consists in its ability to self-construct."<sup>192</sup> And thus, law is reified again, both as a thing apart from the authoritative institutional repositories of power, and as an instrument of that institutional power repository. But law now includes the disciplines; it has moved beyond the confines of government. The state, and the positive law it purports to produce, is a subset of a broader understanding of law as power/discipline—as the trivia of managing individuals, entities, religions, and ultimately, the state. Law serves those communities for whose benefit, or management or perfectibility, it is deployed. Law continues to construct itself, to suit the situation, or the tastes around which consensus on the nature of its reification are developed, sustained, modified and abandoned in favor of another. Law is particularly suited to management in the post-modern. Law is both system and discipline/technique of power in the current order.

Law remains as indeterminate a force in the twenty-first century as it was in the seventeenth century in England and the United States. Whatever the ultimate truth of the nature of law, its reality among communities of believers has been both mutable and unstable. Law constitutes both subject and verb, a thing and a tool. It constitutes the state and it remains something apart from the state. What four hundred

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189. See Inger-Johanne Sand, *Polycontextuality as an Alternative to Constitutionalism*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 41-65 (Christian Joerges, Inger-Johanne Sand & Gunther Teubner eds., Hart Publishing 2004).

190. LYOTARD, *supra* note 110, at 77.

191. *Id.* at 199-216.

192. *Id.* at 200.

years of debate seems to confirm is only this: law is a powerful totem for belief systems. Control of the meaning of law is among the greatest techniques of power. On one side are those who would resist invasion of ancient or traditional rights by increasingly powerful and aggressive institutional bodies—government, religion, corporation, and society. The source of resistance is the sure belief in the power of an autonomous reified complex of law. On the other side are those institutions, which conceive themselves as representatives of the whole or complete parts of the power of those they represent. Convinced of the perfection of the authority derived from such representation, these institutions resist the imposition of checks and restraints applied in new and more restrictive ways. The source of this resistance is the sure knowledge that law is separately constituted but is passive and instrumental, to be used by legitimate authority in the construction and articulation of normative standards that exist apart from law and subordinate to the genius of the political community. And perhaps, both the struggle and its inevitable frustration, more than anything else, illuminates the autonomy, the distinct personalities, of law reified, as the great insight for the twenty-first century.

Ironically, while Foucault is immeasurably important in helping understand the dynamics of this relationship, Foucault himself was too much in the contest for control. As a consequence, his analysis may suffer from the same partial quality as the law systems he critiques. But his insights are sound. Foucault is right to assert that power is both partial and fractured among all actors among whom power is deployed. Power can be reified as law, or can use law as an instrument of naturalizing power. The partial nature of power is reflected in law to the extent that law itself is connected with power. But law itself can exist in all areas in which power is deployed. It is independent of the state, at least in the sense that as the state cannot contain power, even within its borders, neither can it contain law. And the nature of law, like the nature of power, is bounded. But the bindings are constructed. They reflect the willingness of actors affected within networks of power, to believe in the limits of power/law, and to act within those limits.

Thus, one ends where modernity began—with faith as the basic ordering principle of power.<sup>193</sup> Law must be “more than the positive law derived from statutes and any rules able to be discovered in judicial decisions.”<sup>194</sup> The fundamental relationship of power comes around

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193. See Larry Catá Backer, *The Mechanics of Perfection: Philosophy, Theology and the Perfection of American Law*, in *ON PHILOSOPHY IN AMERICAN LAW* (Francis J. Mootz, Jr. ed., Cambridge, Cambridge U. Press forthcoming 2009).

194. Sian Elias, Address, reprinted in *The American Law Institute, Remarks and Addresses at the 84<sup>th</sup> Annual Meeting*, 84 A.L.I. PROC. 67, 78 (May 16, 2007) (“Law

again to a balancing of faith and law—or perhaps more ironically put, between faith and reason,<sup>195</sup> or in its equally antique forms, between *jurisdictio* and *gubernaculum*.<sup>196</sup> Even overlaid with the protection of a caste of lawyers charged with its maintenance, the separation is at once tangible and intangible, and moral as against a usurping individual force.<sup>197</sup> It assumes a moral dimension even in secular states.<sup>198</sup> In its more secular form, the reification of law, as corpus or instrument, as outside or as within the state and its apparatus, continues as the great battleground of “politics now as it has been in all past ages. The two fundamental correlative elements of constitutionalism for which all lovers of liberty must yet fight are the legal limits of arbitrary power and a complete political responsibility of government to the governed.”<sup>199</sup> The *expression* of that law—the sources of power and its arbitrary exercise—changes. The methodologies of power relations may be vested within juridical, political or other power communities. Law can break the boundaries of its traditional confines as the technologies and expressions of political organization change. Communities move from Logos, to custom, to state, to non-state communities, to the community of nations or humanity as Logos expressed as global custom, a reinvention of *jus gentium*, or Logos over humanity expressed as reason or command. Each of these foundations produce a distinct system in which the character of law, and the relation of law to the basic substantive organizing principles of the political community, changes to reflect that relationship. Law is understood differently, sometimes radically so, within theocratic, secular, customary, supra-national and global communities.

The constitutional deadlock of seventeenth century England, now

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responds to a deeply held ethical need.”). Quoting in part Lord Radcliffe, New Zealand Chief Justice Elias explained:

[t]hat if law means little more than the “vast and complicated mass of things [a citizen] is compellable to do or not do by virtue of some Act of Parliament or some other order or regulation,” then people will adhere to it only for the purely practical purpose of keeping out of trouble. If that is so, he said, “[S]omething has gone wrong. Some clue has been lost.”

*Id.*

195. See BODIN, *supra* note 2, at Bk. I, ch. I. For its expression in Catholic doctrine, see John Paul II, *Encyclical Fides et Ratio* (Sept. 14, 1998), available at [http://www.vatican.va/edocs/ENG0216/\\_INDEX.HTM](http://www.vatican.va/edocs/ENG0216/_INDEX.HTM) (last visited Dec. 28, 2007).

196. See Corwin, *supra* note 12.

197. In its seventeenth century incarnation, as I have suggested, an incarnation with deep roots in the United States, see COKE, *supra* note 35, at vol. 1.

198. See, e.g., BICKEL, *THE MORALITY OF CONSENT*, *supra* note 119, at 104. For its application in the context of the debate over same sex marriage, see, e.g., Larry Catá Backer, *Religion and the Discursive Language of Same Sex Marriage*, 30 CAP. U. LAW L. REV. 221 (2002).

199. MCILWAIN, *supra* note 20, at 146.

broadened and freed of the artificial boundaries between public and private law, reproduces itself on a global level in the twenty-first century. On the one hand are the difficulties of applying law to states themselves. When states seek to engage in activities as private actors, law assumes a different character. The traditional boundaries between public and private law are weakened and its instrumental character might require redefinition.<sup>200</sup> On the other is the rise of governance systems in which law, as a formally constituted expression of political power, is absent.<sup>201</sup>

Struggles for control of law as a normative construct will be the great battleground for theory and practice in this century. None will win. All will attempt to work within networks of private and public power that emerges as institutions and political communities come to terms with the fracturing of power that is with the diminution of political communities to assert anything approaching a monopoly power over the control of behavior. How that happens will set the course for the coming era. And perhaps both the struggle and its inevitable frustration, more than anything else, illuminate the autonomy, the distinct personality, of law. The permanence of the resulting constitutional deadlock, derived from great differences in the characterization of law reified, is the great insight for the twenty-first century.

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200. See Larry Catá Backer, *The Private Law of Public Law: Public Authorities As Shareholders, Golden Shares, Sovereign Wealth Funds, And The Public Law Element In Private Choice of Law*, 82 TULANE LAW REVIEW (forthcoming 2008).

201. See Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (forthcoming 2007-2008).

