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NOMOS

MARTIN LOUGHLIN

On what will man base the economy of the world he wants to rule? If left to each individual's whim, what confusion! If on justice, he knows not what it is. Certainly, if he did know, he would not have laid down that most common of all men's maxims, that a man must follow the customs of his own country. The glory of true equity would have held all nations in its sway. We should see it enacted by all the States of the world, in every age, instead of which we see nothing, just or unjust, which does not change in quality with a change in climate. Three degrees of latitude overthrow jurisprudence. A meridian determines the truth. Law has its periods...

From this confusion derives the fact that one man will say the essence of justice is the legislator's authority, another the king's convenience, and a third, present custom. This last is the safest. Following reason alone, nothing is intrinsically just; everything moves with the times. Custom is the whole of equity for the sole reason that it is accepted. That is the mystical basis of its authority. Whoever tries to trace this authority back to its origins, destroys it. ... The art of criticizing and overthrowing States lies in unsettling established customs by delving to their core in order to demonstrate their lack of authority and justice. They say they have to go back to the fundamental and original laws of the State, which unjust custom has abolished. This is a sure way of losing everything; nothing will be just on those scales. ... This is why the wisest of legislators used to say that the good of mankind requires them to be deceived ... He must not be allowed to be aware of the truth about the usurpation. It was introduced once without reason and has since become reasonable. He must be made to regard it as genuine and eternal, and its origins must be disguised if it is not to come to a swift end.

Blaise Pascal, *Pensées*, [1670] § 94.

ORIGINS

Every jurist seeking to explain the constitution of political authority sooner or later encounters the problem of origins. In order to avoid an infinite regress, theorists invariably try to convert the historical into a normative inquiry, often with unsatisfactory consequences. Expressing his frustration over abstract appeals to 'justice', Pascal places his faith – as have others before and since – in custom. But he recognizes that, if subjected to close analysis,

this answer will not satisfy many: custom, it will be suggested, merely bolsters established authority and legitimates a regime that founds itself on an original act of usurpation. Accepting the force of that point, Pascal acknowledges that there is a mystical basis to authority which is unable to withstand intense scrutiny. If measured according to the power of one's 'sovereign reason' every claim to authority will be suspect: puncture the mystical and authority is destroyed. Pascal's warning is directed primarily to the future: modernity, on the threshold of which he stood, is a condition characterized by unwillingness to accept the authority of appeals to the 'eternal past'. Its defining feature is the need to discover a rational basis of political authority.

Many political theorists – Thomas Hobbes and John Locke being prominent examples - have tried to resolve these difficulties by deploying the idiom of a social contract. This converts the question of origins into an exercise of imagination. The challenge becomes that of showing how reason dictates that humans should abandon such freedom as they possess within their 'natural state' and, for the purpose of securing and sustaining freedom, subject themselves to an order of government. There are evident difficulties even before we leave the seminar room. How is it possible for a multitude of strangers able to meet, deliberate and rationally agree a constitution for the common good? Rousseau explicitly recognized the paradoxical character of the exercise. For this to happen 'the effect would have to become the cause', in that humans would have to be beforehand that which they can only become as a consequence of the foundational pact. How can this entity called 'the people' deliberate and establish a political union if they are identifiable as such only by virtue of the pact?¹

Faced with such difficulties, constitutional lawyers have tended to retreat to the field of positive law. Law, they maintain, is created by the establishment of a constitution and how and by whom that constitution is authorized are questions lying beyond the boundaries of legal knowledge. By this manoeuvre, legal science is founded only once the authority of a

¹ J.J. Rousseau, *The Social Contract* in his *The Social Contract and other later political writings* V. Gourevitch trans. (Cambridge: Cambridge University Press, 1997), 71. Political theorists have enjoyed playing with this paradox ever since: see, eg, L. Althusser, 'Rousseau: *The Social Contract* (the Discrepancies)' in Althusser, *Politics and History: Montesquieu, Rousseau, Marx* B. Brewster trans. (London: Verso, 2007), 113-160; J. Derrida, 'Declarations of Independence' (1986) 15 *New Political Science* 7-15; B. Honig, 'Arendt and Derrida on the Problem of Founding a Republic' (1991) 85 *American Political Science Review* 97-114.

constitution is pre-supposed. That view, most coherently expressed by Hans Kelsen,² has become generally accepted. Constitutional lawyers maintain the purity of their discipline only by accepting that law is a system of norms authorized by a founding norm, the authority of which must simply be assumed. On this account, an autonomous legal order exists only when it is not only ‘purified of all political ideology’, but also of all empirical knowledge, that is of ‘every element of the natural sciences’.³

In their distinctive ways, political and legal theorists have sought to retreat to the normative plane in order to avoid having to engage with the actual political circumstances through which constitutional authority is established and maintained. For the discipline of political jurisprudence, however, this is unsatisfactory. While acknowledging the power of normative constructions, political jurisprudence finds itself on the assumption that, if existing political conditions are ignored, a distorted view is formed not only of the nature of political authority but also of the concept of law.⁴

The moment we move out of the seminar room an altogether different narrative presents itself. Rousseau again offers insight. In his *Discourse on Inequality* he addresses the origins of modern government as a matter of historical fact in order to show that the types of constitution jurists treat as presuppositions of legal knowledge are invariably deceptive and fraudulent devices. They are documents drafted by the wealthy who have ‘invented specious arguments’ to win over the people to the established order of things. They exist to transform ‘a skilful usurpation into an irrevocable right’.⁵ The tricks that political theorists perform, and the lines that constitutional lawyers draw, function to uphold and legitimate an order of exploitation.

Rousseau’s insights are radicalized by writers such as Georges Sorel and Walter Benjamin whose general aim is to reveal the violent underpinnings of law that liberal political thought and normativist legal thought shields from view. Sorel and Benjamin claim not only

² H. Kelsen, *Introduction to the Problems of Legal Theory* B.L. Paulson and S.L. Paulson trans. of first edn. [1934] of *Reine Rechtslehre* (Oxford: Clarendon Press, 1992), 57: ‘What is to be valid as norm is whatever the framers of the first constitution have expressed as their will. ... this is the basic presupposition of all cognition of the legal system resting on this constitution’.

³ *Ibid.* 1.

⁴ For an account of this idea of public law as political jurisprudence, see M. Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

⁵ J.J. Rousseau, *Discourse on the Origin and Foundations of Inequality Among Men* [1755] in his *The Discourses and other early political writing* V. Gourevitch ed. (Cambridge: Cambridge University Press, 1997), 111-222, at 173.

that law finds its origins in violence; it also achieves reaffirmation in acts of violence.⁶ All violence, Benjamin asserts, ‘is either law-making or law-preserving’.⁷ Although Hobbes conceived life in the state of nature as a perpetual ‘war of all against all’, he used this image to convince us of the rational need to cede our natural rights and vest authority in the sovereign. In Benjamin’s critique, Hobbes’s ingenious device of the social contract not only transforms chaos and violence into order: the office of the sovereign instituted as a consequence of the contract also legitimates the continuation of violence.

Benjamin presents a radical critique of liberal political thought. His challenge cannot be altogether avoided by those who seek to maintain the purity of legal ordering by severing the connection between legitimacy and legality. In ridiculing the tradition of natural law on the ground that it is perennially focused on ‘the eternal question of what stands behind the positive law’, for example, Kelsen maintains that those who continue to seek an answer ‘will find, I fear, neither an absolute metaphysical truth nor the absolute justice of natural law’. Rather, whoever ‘lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power’.⁸ This might count as a criticism of the attempt by natural lawyers to fix a connection between law and justice. But Kelsen appears not to recognize that his argument also highlights the problem of presupposing the autonomy – and authority – of an extant legal order since, for many, legal order suggests not merely efficacy but legitimacy.

Pascal tells us that wise lawgivers used to say that ‘the good of mankind requires them to be deceived’, that these violent origins be masked. But the contemporary situation is different: today, it seems, the ‘wise’ scholars – the normative political and legal theorists – have come to believe their own myths and, rather than participating in statecraft, are in the business of deceiving themselves. If a sense of reality is to be restored, the discipline of political jurisprudence must be rejuvenated, not least because it tries to ensure that the normative and the factual, the imaginary and the real, reason and history are drawn into an appropriate relationship. It accepts that unless the question of the origins of political order,

⁶ G. Sorel, *Reflections on Violence* [1915] J. Jennings ed. (Cambridge: Cambridge University Press, 1999); W. Benjamin, ‘Critique of Violence’ in W. Benjamin, *Selected Writings* M. Bullock and M. W. Jennings trans. (Cambridge, Mass: Harvard University Press, 1996), 236–252.

⁷ Benjamin, *ibid.* 243. For analysis see: J-W Müller, ‘Myth, law and order: Schmitt and Benjamin read *Reflections on Violence*’ (2003) 29 *History of European Ideas* 459–473; S. Weber, ‘Taking Exception to Decision: Walter Benjamin and Carl Schmitt’ (1992) 22 no3/4 *Diacritics* 5-18.

⁸ Kelsen (1927), cited in D. Dyzenhaus, ‘Constitutionalism in an old key: legality and constituent power’ (2012) 1 *Global Constitutionalism* 229-260, at 229.

including its origins in violence or domination, is addressed, a skewed, if not thoroughly ideological, conception of law is likely to result.

In approaching the question of origins from the perspective of political jurisprudence, I examine the topic through a study of one of its most controversial practitioners. Carl Schmitt argues that the basic error of modern legal thought flows from the fact that jurists have systematically ignored the question of origins. This he attributes to the dominant influence of normativism and positivism, the effect of which has been to presuppose and bracket the violence of an original act of acquisition. Schmitt therefore returns to the question of origins for the purpose of restoring a more adequate understanding of the constitution of political authority and setting in place a more realistic concept of law. The core concept in his analysis is that of *nomos*. This Chapter examines and evaluates Schmitt's treatment of this concept.

THE ORIGINAL MEANING OF *NOMOS*

Schmitt investigates the meaning of *nomos* through an exposition in five introductory corollaries and three concluding corollaries to his major work, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (NE).⁹ His primary objective is to restore its original meaning. The crux of his argument is that the word has undergone many shifts in meaning over the last 3,000 years and its original meaning has since been overlooked. Although his explanation involves a significant amount of historical and philological analysis, Schmitt's purpose is juristic. The objective is to specify its original legal-constitutional meaning 'in its energy and majesty' (NE 67) in order to demonstrate how jurists who translate *nomos* simply as law or, if they are to differentiate it from written law, as custom, do not get to the root of the matter.

The Greek noun *nomos*, Schmitt explains, derives from the Greek verb *nemein* and, in common acceptance, *nemein* has three main meanings: these are (in German) *nehmen* (to appropriate), *teilen* (to divide) and *weiden* (to pasture). In its first meaning it signifies a taking, especially a land-appropriation. This process of land-appropriation forms the basis of the history of every settled people and 'not only logically, but also historically, land-

⁹ C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* [1950] GL Ulmen trans (New York, Telos Press Publishing, 2003).

appropriation precedes the order that follows from it'. This first meaning of *nomos* thus signifies the constitution of 'the original spatial order, the source of all further concrete order and all further law'. Schmitt contends that 'all subsequent law and everything promulgated and enacted thereafter as decrees and commands are *nourished* ... by this source' (NE 48).

Although the first meaning of *nomos* as an appropriation has long been forgotten in jurisprudence, Schmitt notes that the second – the process of division and distribution – has not. This original division and distribution is the basis of property. He shows this with reference to the passage in *Leviathan* in which Hobbes explains that 'the introduction of *propriety* is an effect of commonwealth'; it is the product of the law-making act of the sovereign. This, Hobbes notes, 'they well knew of old, who called that *Nomos*, that is to say, *distribution*, which we call law; and defined justice, by *distributing* to every man *his own*.'¹⁰ *Nomos* in this second sense entails an authorized property distribution, the allotted share of goods within a commonwealth. Schmitt contends that the earth is connected to law in three ways: 'She contains law within herself, as a reward for labour; she manifests law upon herself as fixed boundaries; and she sustains law above herself, as a public sign of order' (NE 42).¹¹

The third meaning of *nomos*, pasturage, signifies the type of productive activity that normally accompanies ownership. Through this type of activity the division of land becomes more apparent. The land is 'delineated by fences, enclosures, boundaries, walls, houses and other constructs' and eventually 'the orders and orientations of human social life become apparent' (NE 42). This third meaning 'obtains its content from the type and means of the production and manufacture of goods' (NE 327).

These three meanings of *nomos* are conceived to form a fixed relation: appropriation precedes division, just as division precedes production. Schmitt emphasizes two points. The first is that appropriation is the most fundamental stratum of *nomos*: the constitutive process of a land-acquisition 'is found at the beginning of the history of every settled people, every commonwealth, every empire' (NE 48). No one 'can give, divide and distribute without taking', and in the beginning, 'there was no basic norm, but a basic appropriation' (NE 345). The second point is that this most basic stratum of *nomos* is the one that has been

¹⁰ T. Hobbes, *Leviathan* R. Tuck ed. (Cambridge: Cambridge University Press, 1996), ch.24.

¹¹ With respect to the law as the 'public sign of order', Schmitt notes the relation between this second meaning of *nomos* as *teilen* and the German word for judgment, *Urteil*, which in a literal sense (*Ur-teil*) means original division (NE 326).

consistently repressed in modern thought. The sense of *nomos* as ‘the first measure of all subsequent measures’ and as ‘the first partition and classification of space’ has been eclipsed.

THE SHIFT IN THE MEANING OF *NOMOS*

Schmitt’s explanation of the original meaning of *nomos* is corroborated in studies undertaken by classical scholars. Many have analysed Pindar’s fragment 169 which speaks of *nomos basileus*, *nomos* as king.¹² Although interpretation is notoriously difficult because of the semantic ambiguities of the term, it is commonly accepted that in Pindar’s work *nomos* is ‘an all-pervasive power governing with extreme violence the affairs of both gods and men’ and that this is conceived as a ‘very general concept of a sovereign power governing everything, including the gods’. *Nomos* acts as ‘a supreme regulator and an amoral, violent agent’.¹³ In this understanding, *nomos* expresses a sense that violence or force is an intrinsic aspect of constitutive power. What results is not a vindication of ‘might is right’. Rather, it is an expression of the tragic dimension to the political: political order is the product of necessity.

Classical scholars also explain that the term underwent a shift in meaning during the fifth century BC.¹⁴ Before then, it was acknowledged that *nomos* conferred a sense of obligation ‘motivated less by the authority of the agent who imposed it than by the fact that it is regarded and accepted as valid by those who live under it’.¹⁵ *Nomos* signified order. It acquired its more conventional meaning as statute only during the fifth century. The significance of this shift has been generally acknowledged, with Martin Ostwald explaining that it ‘reflects a deeper change in Athenian thinking about the nature of law and the attitude of the Athenians toward their laws’.¹⁶

One consequence of this shift is that the original meaning of *nomos* was lost. This was aided by a series of distinctions drawn by the Sophists, the most important of which is that between *nomos* and *physis*. Since *physis* signified nature, drawing the two into antithesis led to a

¹² See, eg. H. Lloyd-Jones, ‘Pindar Fr. 169’ in his *Greek Epic, Lyric, and Tragedy* (Oxford: Clarendon Press, 1990), 163-164. For Schmitt’s account see NE 72-6.

¹³ P. Kyriakou, ‘The Violence of Nomos in Pindar fr. 169a’ (2002) 48 *Materiali e discussioni per l’analisi dei testi classici* 195-206 at 198-199.

¹⁴ M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford: Clarendon Press, 1969); P. Cartledge, P. Millett and S. Todd eds, *Nomos: Essays in Athenian Law, Politics and Society* (New York: Cambridge University Press, 1991); F.M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (Princeton: Princeton University Press, 1991), esp. 27-34.

¹⁵ Ostwald, *ibid.* 55.

¹⁶ Ostwald, *ibid.* 6.

sense of opposition between *physis* (nature) and *nomos* (convention). This stressed the artificial and purely conventional aspect of laws, making *nomos* indistinguishable from mere prescription.¹⁷ By counterposing *nomos* and *physis*, the original meaning of *nomos* was converted from a fact of life (*sein*) into a prescribed ought (*sollen*). As a mere norm, *nomos* could no longer 'be distinguished from *thesmos* (law or legislation), *psephisma* (plebiscite), or *rhema* (command), and from other categories whose content was not the inner measure of concrete order and orientation, but only statutes and acts' (NE 69).

Schmitt seeks to restore the original meaning of *nomos* 'not to breathe artificial new life into dead myths or to conjure up empty shadows' (NE 69) but as part of the exercise of following the constitution of political authority to its source. All questions of collective order are to be traced back to the three processes of appropriation, distribution, and production. The character of every legal, economic and social order is determined by answers to a set of basic questions. Where and how was it appropriated? Where and how was it divided? Where and how was it produced? (NE 327-8). The Greek concept of *nomos* in its original meaning, as the concrete form of life established in answer to those questions, expresses this most basic grasp of the nature of legal ordering. *Nomos* is an expression of the constituent power to establish order through an original act of appropriation and division.

This philological exercise throws into relief the significance of the constitutive moment. Modern jurisprudence too readily works within the frame of an unquestioned established order that frames legal thought and conceptual practice. In a situation in which 'there is no longer any horizon other than the status quo', normativism and positivism 'become the most plausible and self-evident matters in the world' (NE 341). Further, once *nomos* becomes the antithesis of *physis* and 'ought' is separated from 'is', 'one could play endlessly on the antithesis of right and power' (NE 342). It is, for example, only once the shift in the meaning of *nomos* to that of 'mere enactment' has been accepted that Pindar's text can be interpreted as meaning 'nothing more than the arbitrary right of the stronger' (NE 73). By virtue of this shift, we lose sense of *nomos* as the constitutive act of spatial ordering, as 'the full immediacy of a legal power not mediated by laws' and as 'an act of legitimacy,

¹⁷ H. Arendt, *On Revolution* (Harmondsworth: Penguin, 1963), 186.

whereby the legality of a mere law first is made meaningful' (NE 73). As a consequence, we lose sense of the true meaning of 'the normative power of the factual'.¹⁸

Restoring the original meaning of *nomos* thus serves the contemporary purpose of placing in question the authority of the predominant positivism and normativism of modern legal thought. Schmitt argues that today the term 'legality' has come to mean only 'the functional mode of a state bureaucracy', with the unfortunate consequence that 'terms, concepts, and conceptual antitheses of our contemporary, completely deteriorated situation are projected into discussions of the genuine and original word *nomos*' (NE 71). This process was aided by the manner in which the Sophists also made a connection between *nomos* and *logos*. *Logos*, meaning something that lacked passion and which therefore stood for reason, 'was placed above the instinctual and emotional character of the human individual' (NE 342). Schmitt identifies this move as the source of confusion over the contemporary idea of 'the rule of law'. This is because, recognizing that *nomos* is without passion, Aristotle contended that 'not men, but laws should rule'.¹⁹ This, Schmitt argues, transforms the meaning of Pindar's *nomos basileus*, though the 'intellectual trick' can be identified only if the linguistic shift in the meaning of *nomos* has been grasped (NE 342).

THE FIRST *NOMOS* OF THE EARTH

In ancient mythology, the earth was known as the mother of law. The earth contained within herself an inner measure, her fertility, and as land was cleared and cultivated by human effort, precise divisions were created and subsequently delineated by boundaries and enclosures. The earth sustained law 'as a public sign of order' (NE 42). In its original meaning, *nomos* is recognized as the measure by which the land in a specific location is appropriated and divided and thereby determines the form of political, social, and religious ordering. Measure, order, and form coalesce to 'constitute a spatially concrete unity' (NE 70). *Nomos* is the unity of *Ordnung und Ortung*, of order and location, or, more euphoniously, of order and orientation.

¹⁸ NE 342. On 'the normative power of the factual' (*die normative Kraft des Faktischen*), cf. G. Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd edn. 1922), 337-44.

¹⁹ Aristotle, *The Politics* [c.335-323 BC] T.A. Sinclair trans., T.J. Saunders ed. (Harmondsworth: Penguin, 1981), 226. Schmitt believes that Aristotle did in fact maintain elements of the original meaning of *nomos*, but explains that it 'is necessary to read these passages in Aristotle's *Politics* very carefully, in order to recognize the difference with respect to modern ideologies of the "rule of law"?' (NE 68).

In this way, law was bound to land. The *nomos* by which ‘a people becomes settled, i.e., by which it becomes historically situated and turns a part of the earth’s surface into the force-field of a particular order, becomes visible in the appropriation of land and in the founding of a city or colony’ (NE 70). Law is founded on land-appropriation: this appropriation is the ‘primary legal title that underlies all subsequent law’ (NE 46). Although the specific histories of law-formation and settlement are varied, with a rich diversity of property law arrangements emerging in particular regimes, the original law of property derives from a ‘common primeval act’. Every land-appropriation ‘creates a kind of supreme ownership of the community as a whole, even if the subsequent distribution of property does not remain purely communal’ (NE 45).

This primeval act of land-appropriation is the basis of all law. It is the ‘terrestrial fundament’ in which ‘all law is rooted’ (NE 47). Land-appropriation precedes the distinction between private and public law, it precedes the distinction between *dominium* and *imperium*, and it in fact establishes the conditions in which such distinctions can evolve (NE 46). That land-appropriation precedes the establishment of political order, both historically and logically, has been recognized by many great legal philosophers. Schmitt cites, by way of illustration, Vico’s account of the first division and demarcation of the land,²⁰ Locke’s recognition of the significance of ‘radical title’ which establishes political authority through jurisdiction over the land,²¹ and Kant’s acknowledgement of the fact that ‘supreme proprietorship of the soil’ forms the basis of ‘territorial sovereignty’²² (NE46-8).

Since *nomos* is a measure that constitutes a concrete spatial unity, it establishes a boundary which divides internal and external. Originally determined by mythical notions, ‘such as the ocean, the Midgard Serpent, or the Pillars of Hercules’, the security of these regimes was maintained by ‘exclusionary defensive structures, such as border fortifications’ whose purpose ‘was to separate a pacified order from a quarrelsome disorder, a cosmos from a chaos, a house from a non-house, an enclosure from a wilderness’ (NE 52). From this division between inside and outside a people is formed. That is, a people is created not by blood ties, but by virtue of being situated in a concrete order or *nomos*. This people, attached to a common territory and bound by commitment to a common way of life,

²⁰ Vico, *The First New Science* [1725] L. Pompa trans (Cambridge: Cambridge University Press, 2002), ch. XXVI.

²¹ J. Locke, *Two Treatises of Government* P.Laslett ed. (Cambridge: Cambridge University Press, 1998), II. § 121.

²² I. Kant, *Metaphysical Elements of Justice* [(Part I of the *Metaphysics of Morals*; known as the *Rechtslehre*), J. Ladd trans. (Indianapolis: Hackett, 1999), Pt II: Public Right, Note B (land rights)]

constitute an ‘intensity of association’ able to form a group organized on a friend/enemy antithesis.²³ Every powerful people considered ‘their dominion to be the domicile of freedom, beyond which war, barbarism, and chaos ruled’ (NE 352). The boundary division between internal and external became the boundary division of peace and war, establishing the essential conditions for state formation.²⁴

Nomos is an *ordo ordinans*, an order of ordering, that performs the constitutive act of establishing a spatially-determined regime of rule. Schmitt notes that the Greek term *archy* means ‘from the source’ and, as monarchy, signals monotheistic power emanating from God. Similarly, *cracy* means ‘power through superior force and occupation’, as in aristocracy and democracy. *Nomos*, he explains, penetrates both *archy* and *cracy*, and neither can exist without *nomos* (NE 337-8). The critical point is that *nomos*, ‘even if it were to be raised to the level of a personalized ruler, is something impersonal’ (NE 338). Monarchies, aristocracies and democracies all aim to rule ‘in the name of the law’. When Schmitt argues that law ‘is certainly power and appropriation, but as pure law it is only pure appropriation’(NE 349), he reveals *nomos* as the fundamental ‘law of the political’.²⁵

Although land-appropriation is the primal act of law creation, there was in a strict sense no ‘*nomos* of the earth’ before the great Age of Discovery, ‘when the earth first was encompassed and measured by the global consciousness of European peoples’ (NE 49). Consequently, no global sense of the planet existed before the fifteenth century. The first phase of *nomos* was entirely land-bound, it placed Europe at the centre of the earth, and its reach was limited to the boundaries of European empires.²⁶ This first phase of *nomos* was eroded only when the oceans were made accessible for exploration and the earth was, for the first time, circumnavigated.

²³ C. Schmitt, *The Concept of the Political* [1932] G. Schwab trans. (Chicago: University of Chicago Press, 1996), 38.

²⁴ In the second concluding corollary, ‘*Nomos – Nahme – Name*’, Schmitt also explains how *nomos* is not only the source of the German word, *nehmen* (to take) but also *nahmen* (to name). There is, he argues, a close relation between taking and naming: ‘A land-appropriation is constituted only if the appropriator is able to give the land a name’ (NE 336-50 at 348).

²⁵ I develop this point further in M. Loughlin, ‘Politonomy’ in J. Meierhenreich and O. Simons (ed), *The Oxford Handbook of Carl Schmitt* (New York: Oxford University Press, forthcoming, 2014) ch.21 <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199916931.001.0001/oxfordhb-9780199916931-e-004?rskey=S6qDb8&result=3>

²⁶ In *Land und Meer: eine weltgeschichtliche Betrachtung* (Leipzig: Reclam, 1942), Schmitt argues that although pre-modern regimes, such as Athens, Rome and Venice, did develop a sea-faring culture they remained fundamentally tied to the land, with the ‘inland sea’ of the Mediterranean remaining a boundary line (at 23-25).

THE SECOND PHASE OF *NOMOS*

The second phase of *nomos*, the first global *nomos*, arose because of discoveries made of land and sea by European peoples. This opened up a new spatial order of the earth as the European powers competed for land-appropriations in these newly-discovered territories. Through exploration and contest, the European peoples ‘appropriated, divided and utilized the planet’ (NE 352).

In the newly-discovered continent of America, this appropriation was achieved by the establishment of colonies in what was characterized as ‘free space’, ‘an area open to European occupation and expansion’ (NE 87). Lands in Asia could not be appropriated in similar manner and in this sphere of the globe ‘the Eurocentric structure of *nomos* extended only partially, as open land-appropriation, and otherwise in the form of protectorates, leases, trade agreements, and spheres of interest; in short, in more elastic forms of utilization’ (NE 352). And it was only during the 19th century that the European powers were able to undertake the task of dividing up the continent of Africa. The essential point, however, is that this second phase of *nomos* was global in reach but entirely Eurocentric in structure.

This phase of *nomos*, lasting for a period of about 400 years, resulted in a new set of appropriations, distributions, and divisions. The ongoing struggle between the European powers was stabilized as a result of the emergence of a dual set of balances: between land and sea, on the one hand, and between the land powers on the European continent, on the other. The first involved a balance between land and sea because there was no balance of sea powers: the British alone came to dominate the seas. And the balance of the European land powers, Schmitt maintains, was also underpinned by British sea power.

The emergence of these power-balances during this second phase of *nomos* was of considerable legal significance. This is because, within this second phase, a new European spatial order founded on the institution of the state was created. The state, understood as a territorially-enclosed organized political entity, was established as a consequence of these power-balances. As Schmitt emphasizes, ‘statehood’ is not a universal category, ‘valid for all times and all peoples’. It is ‘a concrete historical fact’ and the ‘singular historical particularity of this phenomenon called “state” lies in the fact that this political entity was the vehicle of secularization’ (NE 127). It became the institution that could neutralize religious conflicts and end ‘the European civil war of churches and religious parties’ (NE 128). Recognition of

the territorial order of the state – ‘spatially self-contained, impermeable, unburdened with the problem of estate, ecclesiastical and creedal civil wars’ – was an achievement of the second phase of *nomos* (NE 129).

The formation of the state became the foundation on which an elaborate set of concepts and practices of modern public law could evolve. Although an entirely European creation, these public law concepts assumed a global significance in the modern era through colonization or other forms of imperialism and hegemonic influence. The pivotal concept of public law is that of sovereignty, which signifies in jural form the essential nature and quality of political relationships that emerge within this second phase of *nomos*. Sovereignty has both external and internal dimensions. One set of relations concerns the position of the state in the international arena. A regime is recognized as a sovereign state when its governing authority is in no way legally dependent on any higher authority, whether that of pope or emperor. Correlating with this external aspect is the internal dimension. From the internal perspective, sovereignty expresses the conviction that the state is the ultimate source of law. There can be no fetter on the law-making authority of the state, whether deriving from divine law or natural law. The law made by the authorized institutions of the state – the positive law - is supreme. Sovereignty expresses the state’s independent status as a political entity in the world and its absolute authority to make law.

The sovereign state is an autonomous entity that acknowledges other similar entities in the sphere of international relations on the basis of formal equality. During this second phase of *nomos*, this status of sovereignty, which was confined mainly to the European powers, created the circumstances for the establishment of public international law. Established within the frame of the *jus publicum Europaeum*, these rules reflected the nature of these balances, not least in drawing a distinction between land and sea with respect to concepts of war, enemy and booty.²⁷

Schmitt explains that in international law land war ‘was not conducted between peoples, but only between the armies of European states’ and the ‘private property of civil populations was not booty according to international law’. Sea war, by contrast, was essentially war over commerce and in sea war, ‘the enemy was any state with which the

²⁷ See Schmitt, *Land und Meer*, above n.26, esp. 42-46, where he explains that the sea could never be bounded in the same way as land and, as a consequence, the distinction between trade, conflict, and piracy could not be clearly drawn.

opponent had commercial dealings'. Consequently, the 'private property of civil populations of warring states, and even of neutrals with whom they had trade relations was fair booty, according to blockade and prize law' (NE 353).

The event that shapes the form of this new body of law is that of discovery and colonial expansion: 'when an old world sees a new one arise beside it, it is challenged dialectically and is no longer old in the same sense' (NE 87). The opening up of new worlds provided the exceptional conditions that helped to normalize the rules of interaction in the old. This operated across two dimensions. First, a distinction arose between ordered land and free sea, illustrated by the fact that although the Stuart kings were bound by the *lex terrae* in their domestic affairs, their prerogative powers were considered absolute on the seas.²⁸ Colonial expansion thus provided opportunities for sovereigns to exercise their prerogative powers 'beyond the seas' untrammelled by the 'law of the land'.²⁹ Secondly, the significance of the establishment of 'amity lines' became of vital importance in formalizing rules of international law. These amity lines, marked by treaties between European powers, sought mainly to delineate spheres of jurisdiction. By marking the lines at which 'Europe' ended and the 'new world' began, they also established the boundary between norm and exception.³⁰ In doing so, they helped to embed the rules of public international law within the 'normal' boundaries of European engagement, leading to a bracketing and formalization of war. But beyond these lines the conventions of European public law had no meaning: 'the struggle for

²⁸ It might be noted that the boundary line between prerogative (abroad) and law (at home) is the central constitutional question in the case of Ship Money: *R v Hampden* (1637) 3 St.Tr. 825. More generally note the debate between Grotius and Selden on the question of free or closed seas and the issues of state policy that underpinned it: see H. Grotius, *Mare Liberum* (1609); J. Selden, *Mare Clausum* (1619) and discussed extensively in R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), 59-63, 86-91; id., *Philosophy and Government, 1572-1651* (Cambridge: Cambridge University Press, 1993), 170-9, 212-7; id. *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999), 90-4, 114-20. Tuck explains that Grotius' work 'had in fact been prepared ... at the express request of the East Indies Company, who wished to influence the peace negotiations then in progress' (*Philosophy* at 170) and that the first draft of Selden's work was never published until 1635 when it was 'completely rewritten at the request of Charles's government, as part of its anti-Dutch propaganda' (*Philosophy* at 212) and in the context of a fishing dispute between England and Holland and which 'led, incidentally, to Ship Money; the fleet for which the tax was intended was designed to protect English fishing' (*Natural Rights*, at 86).

²⁹ This general point is more complicated in British practice since the legal position with respect to colonies depended on whether they had been settled or conquered. If the former, British subjects carried their common law rights with them whereas colonies by conquest or cession fell under the Crown's prerogative power without limitation: see, *Calvin's Case* (1608) 7 Co.Rep. 1a, at 17b; *Campbell v Hall* Lofft 655, 741; *Forbes v Cochrane* (1824) 2 B.& C. 448; *Campbell v Kyte* (1835) 3 Knapp 332.

³⁰ See, eg. A. Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500-1800* (New Haven: Yale University Press, 1995); D. Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2000), esp. ch.4.

land-appropriations knew no bounds’, there were no legal limits to the conduct of war, and ‘only the law of the stronger applied’ (NE 93-4).

This second phase of the *nomos* of the earth – the first on a global basis - established a Eurocentric order that left it marked in measurement (think only of the Greenwich meridian), in naming (think only of America, Louisiana, New Amsterdam/New York), but most of all by the distinction between the juridical processes of ‘constitutionalization’ of the state and formalization of international law within the ‘norm’ of the European spatial order and colonization through settlement or subjugation (or both) in the ‘exceptional’ spheres beyond. When Hobbes in the mid-17th century used the device of the state of nature characterized as a ‘war of all against all’ to resolve the problem of the foundation he had in mind not only the threat of European religious wars but also the race for land-appropriation ‘beyond the pale’ in the new world. That is, the image of the state of nature could be deployed not only as a temporal heuristic to address the issue of foundational origins, but also as a spatial heuristic to differentiate a sphere of civilization from that of chaos. When in the late-17th century Locke evokes a more benign image of life in a state of nature to justify the establishment of a liberal constitutional regime, he nevertheless has this distinction between norm and exception in mind. ‘In the beginning’, he reminds us, ‘all the world was America’.³¹ And when in 1670 Pascal wrote that ‘three degrees of latitude overthrow jurisprudence’, ‘a meridian determines the truth’, and ‘law has its periods’, he was not dealing with the banalities of differences in the laws of different states. Pascal’s meridian, Schmitt suggests, ‘is actually nothing but the amity lines of his time, which had created an abyss between freedom (the lawlessness of the state of nature) and an orderly “civil” mode of existence’ (NE 95).³²

LAW AS INSTITUTIONAL ORDER

³¹ Locke, above n.21, § 49: ‘Thus in the beginning all the World was America, and more so than that is now’. See NE 96-7.

³² Schmitt notes that Grotius and Pufendorf were similarly influenced. He argues that although some European powers concluded treaties with native leaders ‘no European power considered itself to be the legal successor to the natives’. In asserting their position, he explains, they are not relying on classical sources but on the distinction Grotius makes between original and derivative acquisition: *De jure belli ac pacis* (1625), Bk II, ch 2 (NE 136). And Pufendorf recognizes ‘a type of original property acquisition that takes the form of a “common seizure by a majority of persons”’, which involves the creation of ‘general property’ and thus to be distinguished from ‘the origin of specific private property’. See S. Pufendorf, *De jure naturae et gentium* (1672), Bk 4, ch 6 (Acquisition by virtue of the right of the initial occupant). This, Schmitt concludes, is ‘very close to actual land-appropriation’ (NE 137).

This Eurocentric *nomos* of the earth drew to a close as a consequence of the First World War.³³ Schmitt's argument on this point is complicated, but in outline it concerns: the relativization of Europe as a consequence of the growth of American power and the influence of other non-European states; the decline of *jus publicum Europaeum* and the conversion of international law into a set of universal norms lacking substance; the consequent growth of a 'normative industry' leading to the 'nihilistic inflation of numberless, contradictory pacts emptied of any content by stated or unstated provisos' (NE 239) and generating 'an illusory science of international law' (NE 243); and, given the inability to establish a global balance, the emergence of an east-west 'cold war' driven by a dialectic of isolation and intervention.

These developments have resulted in the displacement of the European-centred order established on a land-based balance of power: in place of European powers determining the spatial order of the world, during the 20th century the world determined the spatial order of Europe. The balance between sea and land was also undermined, not only by the loss of British domination of the seas, but also as a result of the emergence of technologies that have 'robbed the sea of its elemental character' (NE 354) and have created a third dimension – airspace – which has established itself as a new battleground and transformed understanding of the *nomos* of the earth. Schmitt contends that every new age comes into existence as a result of new spatial divisions, resulting in the formation of new spatial orders of the earth. Writing in the 1950s, he believed that either one the superpowers would defeat the other and this would be the staging for the ultimate unification of the earth or, more likely, that a new equilibrium would emerge constituted by the existence of several relatively independent *Großräume*.

My objective here is not to speculate about these developments, but to try and understand the general significance of Schmitt's argument about law as *nomos*. His most basic point with respect to the issue of origins is that order, in the beginning, was not established on the basis of consent or on some universal principle or a basic norm. In the beginning, there was a land-grab and only after the violence of that initial appropriation and division

³³ For a general appraisal see M. Koskenniemi, 'Histories of International law: Dealing with Eurocentrism' (2011) 19 *Rechtsgeschichte* 152-176, at 158: 'Until late-19th century, histories of international law were unthinkingly Eurocentric. Europe served as the origin, engine and *telos* of historical knowledge. In the 20th century, it became more difficult to articulate the normative goal of international law.'

had been completed, ‘when the problems of founding anew and of transition have been surpassed’, could ‘some degree of calculability and security’ be achieved and *nomos* emerge as the expression of order (NE 341). Like Pascal’s concept of custom, law evolves; it is not fully formed at the foundation, though it remains ‘nourished’ by this source.

Nomos founds a concrete spatial entity, but the basis of order continues to evolve in response to answers offered to ‘the fundamental question of the problematic sequence of appropriation, distribution, and production’ (NE 333).³⁴ World history ‘is the history of development in the object, means, and forms of appropriation interpreted as progress’. It is a development proceeding from ‘the *land-appropriations* of nomadic and agrarian-feudal times to the *sea-appropriations* of the 16th to the 19th century, over the *industry-appropriations* of the industrial-technical age and its distinction between developed and underdeveloped areas, and finally, to the *air-appropriations* and *space-appropriations* of the present’ (NE 347). The concrete form of *nomos* thus alters according to the development of world history.

From this account it is evident that *nomos* carries a rather different connotation to that of the norms of positive law. Law as *nomos* is an expression of the substantive order of a political unity created by the processes of appropriation, division and production. Given this understanding, *nomos* can now be related to other key concepts, such as state and constitution. For Schmitt, the state is ‘the concrete, collective condition of political unity’;³⁵ in modernity, it becomes the ‘master ordering concept’ of this political unity.³⁶ It is similarly clear that Schmitt’s concept of constitution (in its absolute sense) differs from the notion of constitutional law as that enacted in modern documentary form. Since the order that emerges within the state arises from ‘a pre-established, unified will’,³⁷ Schmitt argues that the state ‘does not *have* a constitution’; rather, ‘the state *is* constitution’. In this sense, the state/constitution is ‘an actually present condition, a *status* of unity and order’.³⁸ The basic

³⁴ See NE 330-335, where Schmitt shows the contrasting positions of various liberal and socialist theories. Whereas liberalism ‘solves the social question with reference to increases in production and consumption’ (331), socialist positions vary: Fourier ‘subsumed all problems of appropriation and distribution under a fantastic increase in production’, Proudhon’s socialism is ‘essentially a doctrine of division and distribution’ (333) and Marx’s launched an attack ‘on the expropriation of the expropriators’ (334).

³⁵ C. Schmitt, *Constitutional Theory* [1928] trans. J. Seitzer (Durham, NC: Duke University Press, 2008), 65.

³⁶ C. Schmitt, ‘Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff’ [1941] in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 375-85, at 375: ‘In diesem Zeitalter ... ist der Staat der alles beherrschende Ordnungsbegriff der politischen Einheit’.

³⁷ Schmitt, *Constitutional Theory*, above n.35, 65.

³⁸ Schmitt, *ibid.* 60.

law of the state finds its authoritative expression not in enacted legal norms but in ‘the political existence of the state’.³⁹

Once brought into alignment it would appear that state (the political unity), constitution (the status of unity and order) and *nomos* (the order of a concrete spatial unity) are, to all intents and purposes, synonyms. Schmitt recognizes that, like *nomos*, the state and the constitution continue to evolve: the state expresses ‘the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this *unity* from a fundamental or ultimately effective *power* and *energy*’.⁴⁰ And he recognizes that the ‘continuity of a constitution is manifest as long as the regress to this primary appropriation is recognizable and recognized’ (NE 326, n6). If state highlights unity, and constitution the form of that unity, then *nomos* accentuates the motive forces that shape the form of that unity: it is ‘the full immediacy of a legal power not mediated by laws; it is a constitutive historical event – an act of *legitimacy*, whereby the legality of a mere law first is made meaningful’ (NE 73).

In earlier studies, such as *Political Theology* and *Constitutional Theory*, Schmitt had emphasized the decisionist elements of order-maintenance: the sovereign is thus identified as the institution that ‘decides’ when the norm is displaced in the exceptional moment,⁴¹ and constituent power ‘is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence’.⁴² By the late-1920s, however, Schmitt started to shift the emphasis of his argument. In place of decision, he accentuated the institutional aspect of unity and order. This is evident in the Preface to the second edition of *Political Theology* in 1933, in which he writes that: ‘I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one’.⁴³ ‘Whereas the pure normativist thinks in terms of impersonal rules, and the decisionist implements the good law of the correctly recognized political situation by means of a personal decision, institutional legal thinking

³⁹ Schmitt, *ibid.* 65.

⁴⁰ Schmitt, *ibid.* 61.

⁴¹ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, [1922] trans. G. Schwab (Chicago: University of Chicago Press, 2005), 5.

⁴² Schmitt, *Constitutional Theory*, above n.35, 125.

⁴³ Schmitt, *Political Theology*, above n.41, 2.

unfolds in institutions and organizations that transcend the personal sphere'.⁴⁴ Institutional thinking seeks to capture 'the stable content' inherent in the political unity.

This institutional argument is most clearly presented in his 1934 book, *On the Three Types of Juristic Thought*.⁴⁵ In this work, Schmitt explained that all legal theories comprise three basic elements: norm, decision and concrete order formation. Legal theories may be distinguished according to the emphasis they place on each of these elements and the type of political regime they envisage is invariably linked to the predominance given to one or other of these elements: 'Every form of political life stands in direct, mutual relationship with the specific mode of thought and argumentation of legal life'.⁴⁶ In this work, Schmitt again criticizes normativism, but he also argues against decisionism and in favour of a type of institutionalism that he calls 'concrete-order' thinking.⁴⁷

For institutionalism, order is not primarily the product of a set of rules. Norms or rules do not create order; they perform a regulatory function only on the basis of an already-established order. Normativism remains an appealing type, especially in comparison to the personal character of decisionism, primarily because it 'can appeal to being impersonal and objective'.⁴⁸ Schmitt argues that in various formulations that emanate from Pindar's *Nomos basileus*, including *Rex*, *Lex* and the idea of a *Rechtsstaat*, normativists promote the 'rule of law' over the 'rule of men'. But he explains that *nomos* 'does not mean statute, rule, or norm, but rather *Recht*, which is norm, as well as decision and, above all, order'.⁴⁹ The 'rule of law' cannot mean simply 'the rule of rules'; it must 'contain certain of the highest, unalterable, but concrete ordering qualities'.⁵⁰ He emphasizes that one 'can speak of a true *Nomos* as true king

⁴⁴ Schmitt, *ibid.* 3.

⁴⁵ C. Schmitt, *On the Three Types of Juristic Thought* [1934] trans. J. Bendersky (Westport, CT: Praeger, 2004). In his introduction, Bendersky, explains the shift in the following terms: 'It was one thing to advocate sovereign decisionism within the Weimar constitutional framework or even to entrust Paul von Hindenburg, a political figure of proven responsibility deeply devoted to German traditions and western civilization generally, with broad exceptional powers in an *Ausnahmestand*. It was quite another when such decisions would be made by the leader of a dynamic, revolutionary movement unrestrained by the values, traditions, and institutions that conservatives such as Schmitt cherished' (at 14). This may be right, but there would appear to be more basic theoretical reasons for this shift and these difficulties were evident even in 1928, when in his *Constitutional Theory* he recognized the importance of homogeneity in democratic order.

⁴⁶ Schmitt, *ibid.* 45.

⁴⁷ This could not be termed institutionalism because Schmitt – for evident political reasons in 1934 – sought to avoid any association with neo-Thomism exhibited in Hauriou's work: see Bendersky's note in *Three Types* at 112 (n59).

⁴⁸ Schmitt, *ibid.* 49.

⁴⁹ Schmitt, *ibid.* 50.

⁵⁰ Schmitt, *ibid.* 50 (translation modified).

only if *Nomos* means precisely the concept of *Recht* encompassing a concrete order and *Gemeinschaft*.⁵¹

Normativists promote a purely conceptualistic understanding of law, law as a set of rules and principles. The arguments of decisionists, by contrast, are reduced ultimately to factual analysis. Institutionalism (concrete order thinking) is Schmitt's attempt to finesse the distinction between normativity and facticity.⁵² Rules and decisions are integral parts of legal order, but they carry meaning only as formulations of concrete order. Law as norm does not yield sound jurisprudence because a norm 'cannot apply, administer, or enforce itself' and decisionism is not sustainable because a legal decision does not spring from a normative vacuum.⁵³ Legal order is maintained as an expression of the underlying order of *nomos*. Rules and decisions achieve regularity by reliance on 'concepts of what, in itself, is normal, the normal type and the normal situation'.⁵⁴

Schmitt's concrete order thinking has many similarities with the institutionalism propounded by the early 20th century French public lawyer, Maurice Hauriou.⁵⁵ Hauriou, whose work Schmitt admired,⁵⁶ is particularly helpful in this respect since Schmitt does not specify in much detail what he means by institution. Hauriou argued that the basis of legal order was not social contract, nor the 'rule of law', nor legislative authority, nor even directly the state. The 'real basis' of legal order, he explained, is 'the institution'.⁵⁷ Institutions, which stand for 'duration, continuity, and reality', provide the juridical basis of the state.⁵⁸

Hauriou drew a clear distinction between institution and positive law. He emphasized that '[i]nstitutions make juridical rules; juridical rules do not make institutions'.⁵⁹ Institutions are generative and provide stability and continuity, whereas legal rules 'only

⁵¹ Schmitt, *ibid.* 50-1.

⁵² Schmitt, *ibid.* 53.

⁵³ Schmitt, *ibid.* 51, 62.

⁵⁴ Schmitt, *ibid.* 54.

⁵⁵ Hauriou developed a juristic concept of 'directing ideas' (*idées directrices*) that, he claimed, performed a generative role in the shaping and giving meaning to public institutions. Directing ideas give meaning to the basic principles of French public law, which unfold progressively with the power to shape the character of governmental institutions. See M. Hauriou, *Précis de Droit Constitutionnel* (Paris: Sirey, 2nd edn. 1929), esp.73-74.

⁵⁶ Schmitt refers to Hauriou as 'the master of our discipline' (NE, 210). See also C. Schmitt, *Legality and Legitimacy* [1932] trans J. Seitzer (Durham, NC: Duke University Press, 2004), 57 (referring to Hauriou as 'an outstanding French public law specialist').

⁵⁷ M. Hauriou, 'An Interpretation of the Principles of Public Law' (1918) 31 *Harvard Law Review* 813-821, at 813.

⁵⁸ M. Hauriou, 'The Theory of the Institution and the Foundation: A Study in Social Vitalism' [1925] in A. Broderick (ed), *The French Institutionalists* (Cambridge, Mass: Harvard University Press, 1970), 93-124 at 93.

⁵⁹ Hauriou, *ibid.* Cf Schmitt, *Three Types*, above n.45, 57: 'a change in the norm is more the consequence than the source of a change in the order'.

stand for ideas of limitation instead of incarnating ideas of enterprise and of creation'.⁶⁰ The distinctive function of the institution is to transform 'an organization of fact into an organization of law' and thereby to transform 'the real into the right'.⁶¹ Hauriou's concept of institution comprises three main elements: the ordering idea (*idée directrice*); the formation of a power able to structure and give effect to the idea; and a widespread acceptance of the directing idea in social and political practice.⁶² Schmitt's concept of concrete-order is similar to Hauriou's concept of institution. Schmitt also follows Hauriou in taking over his concept of *superlégalité*: super-legality refers to that set of principles and institutions that give form to this concrete order.⁶³ Superlegality, resting on shared understandings, has affinities with Pascal's notion of 'present custom'.⁶⁴ And it can be grasped as an expression of *nomos*.

Schmitt's institutionalism brings his legal thought much closer to Hegel's legal and political philosophy, in which 'the state is a "form (*Gestalt*), which is the complete realization of the spirit in being (*Dasein*)"; an "individual totality", a *Reich* of objective reason and morality'.⁶⁵ This type of state, he emphasizes, is not an 'order of a calculable and enforceable legal functionalism' (ie, the product of decisionism) and nor is it a 'norm of norms' (normativism). The state 'is the concrete order of orders, the institution of institutions'.⁶⁶ Schmitt notes that 'the concrete jurisprudential consideration of an orderly state administration can best provide the element of a general theory of "institutions": jurisdictional authority, hierarchy of offices, inner autonomy, internal counterbalancing of opposing forces and tendencies, inner discipline, honour, and official secrets, and with these the all-important fundamental presupposition, namely a normal stabilized situation, a *situation*

⁶⁰ Hauriou, *ibid.* 123. Cf R. Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review* 4 (on jurisgenerative and jurispathic tendencies).

⁶¹ Hauriou, 'Interpretation', above n.57, 815. He accepts that in the beginning 'an organization is created simply by force' and then seeks peace. But to obtain peace 'the new organization must obtain pardon for its origin ... peaceful existence is possible only when the demands of law are satisfied' (at 816).

⁶² Hauriou, 'Institution', above n.58, esp. at 123.

⁶³ This is analogous to the idea of constituent power: see Hauriou, *ibid.* at 114; Schmitt, *Legality and Legitimacy*, 57-8. See C. Klein, *Théorie et pratique du pouvoir constituant* (Paris: PUF, 1996), 159.

⁶⁴ Schmitt, *Three Types*, above n.45, 86: 'Thus English case law would embody an example of concrete-order thinking, which adheres exclusively to the inner *Recht* of a specific case. The precedent, including its decision, then becomes the concrete paradigm for all subsequent cases, which have their *Recht* concretely in themselves – not in a norm or a decision.' See also C.B. Gray, *The Methodology of Maurice Hauriou* (Amsterdam: Rodopi, 2010), 91: 'Practical direction gives custom a great role in law of creating a system of legal expectations, of "superlegality", since the question of such ends is not the question inside of law'.

⁶⁵ Schmitt, *Three Types*, above n.45, 78.

⁶⁶ Schmitt, *ibid.* 78-9.

établie?⁶⁷ This, it might be noted, is not Hegel's state in which the universal is willed; it more closely approximates his concept of *Notstaat*, the state based on need, an expression of the form within civil society 'wherein the livelihood, happiness, and legal status of one man is interwoven with the livelihood, happiness, and rights of all'.⁶⁸

Schmitt provides a more specific illustration of his institutionalism in *Staat, Bewegung, Volk* (1933), his highly controversial attempt to sketch a constitutional framework for the Nazi regime.⁶⁹ He seeks to show that the entire basis of public law, including those provisions taken over from the Weimar Constitution, is now 'situated in a completely new context'.⁷⁰ Relations between offices of state can no longer be determined 'through formalistic ... interpretations of the words of the Weimar Constitution' since public law must 'promote awareness of the fact that the absolute supremacy of political leadership is the effective basic law of today's state'.⁷¹ Political unity is the product of a tripartite synthesis of state, movement and people which provides 'the essential structural and organizational policies of the concrete arrangement of the state'.⁷² This unity is not determined by positive law (*Legalität*), which has become merely 'the functioning mode of the state administrative apparatus'; rather 'to the law (*Recht*) in a substantive sense belongs the first guarantee of securing political unity'.⁷³ Every state 'needs a coherent internal logic of its institutions and norms' and 'a unitary form of thought (*formgedanken*) that gives constancy of shape (*Gestalt*) to all the spheres of public life'.⁷⁴ However various the rules and regulations may be, a 'consistent main principle must be recognized and maintained'.⁷⁵ Though he does not use the expression, Schmitt here contrasts positive law and *nomos*.

NOMOS IN CONTEMPORARY JURISPRUDENCE

The concept of *nomos* features prominently in the work of Friedrich Hayek and Michael Oakeshott. Both use *nomos* in its post-5th century meaning, suggesting an equation between

⁶⁷ Schmitt, *ibid.* 87-8.

⁶⁸ G.W.F. Hegel, *Philosophy of Right* [1821] T.M. Knox trans. (Oxford: Oxford University Press, 1952), § 183.

⁶⁹ Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg: Hanseatische Verlagsanstalt, 1933).

⁷⁰ Schmitt, *ibid.* 9.

⁷¹ Schmitt, *ibid.* 10.

⁷² Schmitt, *ibid.* 11.

⁷³ Schmitt, *ibid.* 15.

⁷⁴ Schmitt, *ibid.* 33.

⁷⁵ Schmitt, *ibid.* 33.

the terms *nomos basileus* and ‘the rule of law’. For Schmitt, this usage is an ‘intellectual trick’, since Hayek and Oakeshott construct their accounts on the distinction between norm and decision, with *nomos* being understood as meaning ‘norm’ rather than ‘concrete order’.

The idea of order plays a key role in Hayek’s thought but it is not conceived as an independent variable. By drawing a sharp distinction between spontaneous order (organism) and constructed order (organization), Hayek effectively absorbs the idea of order into either norm or decision.⁷⁶ Spontaneous order is associated with the emergence of an idea of law as evolving rules of just conduct and therefore as a set of norms, and constructed order is tied to an image of law as command (legislation) and consequently is treated as the product of decision.⁷⁷ Having identified the distinction between norm and decision as the central tension of legal order, Hayek contends that *nomos*, which he calls ‘the law of liberty’, yields the true meaning of law. *Nomos* is taken to be an expression of universal rules of just conduct; in its true meaning, law acts as a restraint on the exercise of power. Law as legislation, by contrast, conceives of law as an instrument of power.⁷⁸ For Hayek, the emergence of the latter conception of law – which consists predominantly of public (as distinct from private) law⁷⁹ - has been a retrograde step, is inimical to liberty,⁸⁰ and must be strictly restrained.⁸¹

Oakeshott comes closer to sharing Schmitt’s view of legal order. Since ‘all governments began in violence’, Oakeshott acknowledges that the attempt to locate authority in origins will prove fruitless. He is also sceptical of the attempt to convert the question of authority into a philosophical problem that can be resolved by contract and consent.⁸² Authority is established not by virtue of a specific historical *event* but from a much more haphazard historical *process* in which force, in order to preserve its own position, is eventually required to yield to customary practice. ‘All were aware of anarchy just below the surface’, Oakeshott notes, and few modern governments ‘have won for themselves anything but a very precarious authority’.⁸³ He notes that the process by which ‘power’ is obliged to work through customary ways might be regarded as one in which power is ‘moralized’. But

⁷⁶ F.A. Hayek, *Law, Legislation and Liberty: Vol. 1 Rules and Order* (London: Routledge, 1973), ch.2.

⁷⁷ *Ibid.* chs 4-6.

⁷⁸ *Ibid.* 92.

⁷⁹ *Ibid.* 132.

⁸⁰ F.A. Hayek, *Law, Legislation and Liberty: Vol. 2 The Mirage of Social Justice* (London: Routledge, 1973).

⁸¹ F.A. Hayek, *Law, Legislation and Liberty: Vol. 3 The Political Order of a Free People* (London: Routledge, 1979).

⁸² M. Oakeshott, *Lectures in the History of Political Thought* (Exeter: Imprint Academic, 2006), 465.

⁸³ M. Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), 190-1.

he suggests that it is better conceived as being analogous to the rights of squatters, that is, as involving a process in which ‘rights’ to govern ‘grow out of acquiescence and the absence of objection, and they are acquired by prescription, when what was once a demand receives recognition as a “rightful” claim’.⁸⁴

Oakeshott’s treatment of political order differs considerably from Hayek’s and is much closer to Pascal. He recognizes that if, like Hayek, the state is conceived to be analogous to an organism, then strictly there is no place for a ruler or for government: ‘It would live and move as a vital unit, its vitality being continuously distributed in all its parts’.⁸⁵ This, in Oakeshott’s view, falls into the category of ‘implausible and gimcrack beliefs’⁸⁶ – ‘the sort of thing only a philosopher would think of’.⁸⁷ The ambiguous character of the state can be grasped, he suggests, only by considering two images of the state that manage to incorporate important directions of thought. These are the state as *societas* and the state as *universitas*.⁸⁸ In *On Human Conduct*, Oakeshott unpacks these ideal characters in detail, but it might be noted that in his *Lectures* these two images are referred to as *nomocracy* and *teleocracy*: ‘government understood as the rule of its subjects by means of law’ and government ‘imposing on its subjects a substantive condition of things representing a single “purpose” pursued by all’.⁸⁹

Oakeshott here uses *nomocracy* and *teleocracy* as analogies for norm and decision in the constitution of legal order. He recognizes that these terms represent ideal modes of association and explains that these ideal characters of state, government and law have become ‘two well-trodden paths’ that remain irreconcilably opposed to one another.⁹⁰ He accepts that some might reject this interpretation ‘on the ground that it leaves an incoherence which, it is thought, should be capable of resolution’. And – in an allusion to Hayek among others – he notes that some writers ‘have tried to make it intelligible to themselves by recognizing one of these dispositions as dominant and the other as

⁸⁴ Oakeshott, *Lectures*, 466-7.

⁸⁵ *Ibid.* 405.

⁸⁶ Oakeshott, OHC, 191.

⁸⁷ Oakeshott, *Lectures*, 405.

⁸⁸ Oakeshott, OHC.

⁸⁹ Oakeshott, *Lectures*, 483-4.

⁹⁰ Oakeshott OHC, 317, 319.

recessive'.⁹¹ But this, he suggests, is unconvincing: 'the most one can do is to offer these terms as the most effective apparatus for understanding the actual complexity of a state'.⁹²

Oakeshott rightly keeps open the tension between normativism and decisionism in the act of imagining legal order. But as a consequence of adopting the reformulated conception of *nomos*,⁹³ he is without a method by which to mediate the gulf between the characters of *societas* and *universitas*, and of legal ordering as norm and decision. The great value of Schmitt's restoration of the original meaning of *nomos* and its elaboration in the idea of concrete order is to offer a concept which is able to bridge that gulf. Schmitt's tripartite scheme does not bring resolution to the issue of the equivocal character of the modern state and its mode of legal ordering. But it does follow Oakeshott in recognizing that these dispositions are historical self-understandings and not universal types. 'Each has to be recognized as a contingent response to a historic situation', Oakeshott emphasizes, and this suggests that 'they should not be so starkly opposed to one another: each is a historic character and a character on the wing continuously exposed to modification in intercourse with the other'.⁹⁴ Schmitt would not disagree. All that is needed to enrich Oakeshott's account of the character of the state is Schmitt's understanding of the original meaning of *nomos* as the concrete order that grounds the meaning and variable importance of norm and decision in the constitution of its legal order. And this is not so far removed from Pascal's conception of 'present custom'.

The one scholar for whom *nomos* in its original sense performs a major role in the construction of her political and legal thought is Hannah Arendt. Arendt read Schmitt, agreed with his general critique of the influence of normativism in legal and political thought,⁹⁵ and directly followed his account of the original meaning of *nomos*. She relies heavily on Schmitt's work in drawing similar conclusions on the true meaning of *nomos*.

In *On Revolution*, Arendt acknowledges the violent nature of the beginning. 'That such a beginning must be intimately connected with violence', she writes, 'seems to be

⁹¹ OHC 320.

⁹² OHC 323.

⁹³ Oakeshott, *Lectures*, 80-82.

⁹⁴ OHC, 325-6.

⁹⁵ Arendt's concrete order thinking is evident, eg, in a research proposal of 1956 in which she stated that her objective would be to 'examine the concrete historical and generally political experiences which gave rise to political concepts. For the experiences behind even the most worn-out concepts remain valid and must be recaptured and reactualized if one wishes to escape certain generalizations that have proved pernicious'. See E. Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven: Yale University Press, 2nd edn. 1982), 325.

vouched for by the legendary beginnings of our history as both biblical and classical antiquity report it: Cain slew Abel, and Romulus slew Remus; violence was the beginning and, by the same token, no beginning could be made without using violence, without violating'. She also notes that 'whatever brotherhood human beings may be capable of has grown out of fratricide, whatever political organization men may have achieved has its origin in crime'.⁹⁶ Most significantly, Arendt recognizes that 'although the word *nomos* came to assume different meanings throughout the centuries of Greek civilization, it never lost its original "spatial significance".'⁹⁷

Arendt develops the spatial dimension to *nomos* in *The Human Condition* in which, closely following Schmitt's argument about the derivation of *nomos*,⁹⁸ she explains that law was originally identified with a boundary line and that in the polis 'it retained its original spatial significance'. The law of the city-state, she emphasizes, 'was neither the content of political action' (ie, decision) and 'nor was it a catalogue of prohibitions' (ie, norm). Rather, it was 'quite literally a wall, without which there might have been an agglomeration of houses ... but not a city, a political community'.⁹⁹ In a late work, Arendt brings the lines of this interpretation of *nomos* together in a statement that could have been written by Schmitt himself:

Just as the walls of a city ... must first be built before there can be a city identifiable by its shape and borders, the law determines the character of its inhabitants, setting them apart and making them distinguishable from the inhabitants of all other cities. The law is the city wall that is instituted ... inside of which is created the real political realm where many men move about freely. ... The law is ... something by which the polis enters into its continuing life, something it cannot abolish without losing its identity, and violation of the law is an act of hubris, the overstepping of a limit placed on life itself. The law is not valid outside the polis; its binding power applies only to the space that it encloses and delimits. ... The crucial point is that law – although it defines the space in which men live with one another without using force – has something violent about it in terms of both its origins and its nature. ... The law produces the arena where politics occurs, and contains in itself the violent force inherent in all production.¹⁰⁰

⁹⁶ Arendt, *On Revolution*, above n.17, 20. See also at 87-8.

⁹⁷ Arendt, *ibid.* 186.

⁹⁸ H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 63, n.62: 'The Greek word for law, *nomos*, derives from *nemein*, which means to distribute, to possess (what has been distributed), and to dwell'.

⁹⁹ *Ibid.* 63-4. Arendt also notes (64, n64): 'The word polis originally connoted something like a "ring-wall".'

¹⁰⁰ H. Arendt, 'Introduction into Politics' in her *The Promise of Politics* J. Kohn ed. (New York: Schocken Books, 2005), 93-200, at 180-1.

Arendt's account is of particular interest for two reasons. The first stems from her claim that political power is a phenomenon that is not only distinct from but also directly opposed to violence.¹⁰¹ Power is generated through the capacity of humans to act in concert. Political power begins in action,¹⁰² but since it is accepted that the beginning requires the use of violence, the relation between power and violence is more complicated than Arendt suggests. The second reason concerns law. Arendt makes use of the Roman concept of law: law as *lex*, which is a relational notion. Since *lex* 'was not coeval with the foundation of the city' and could not be conceived as 'pre-political' (i.e. as constitutive of the political), it presupposes the existence of a people.¹⁰³ This is evidently a different concept to *nomos*. It signifies what Montesquieu conceived as the 'necessary relations' by which power was sustained: authority is established by 'augmentation of the foundations' (or, in Schmitt's word, 'nourishment').¹⁰⁴ *Lex* presupposes *nomos*. But this concept of *lex* is also more basic than the norms of positive law.¹⁰⁵ Arendt opens up a more complex and layered understanding of law in which positive law presupposes *lex*, which in turn presupposes *nomos*.

CONCLUSIONS

The most basic insight we obtain from a study of Schmitt's account of the concept of *nomos* is that law is linked to space. The idea of law is tied to the existence of a defined and bounded territory that is able to distinguish inside from outside. Without this boundary, expressed in the concept of *nomos*, there can be no domain of the political. In this respect, it might be said that *nomos* is constitutive of the political. The space that is enclosed is not merely a geographical notion; as Arendt's work highlights, it is also a legal and political concept which relates 'not so much, and not primarily, to a piece of land as to the space

¹⁰¹ Hannah Arendt, *On Violence* (New York: Harcourt, Brace, 1970), Pt II, esp. at 56: 'To sum up: politically speaking, it is insufficient to say that power and violence are not the same. Power and violence are opposites; where the one rules absolutely, the other is absent.'

¹⁰² Arendt, *Human Condition*, above n.98, ch.5.

¹⁰³ Arendt, *On Revolution*, above n.17, 187.

¹⁰⁴ Montesquieu, *The Spirit of the Laws* A. Cohler, B. Miller and H. Stone trans. and ed. (Cambridge: Cambridge University Press, 1989), I.1; H. Arendt, 'What is Authority?' in her *Between Past and Present* (New York: Penguin, 1977), 91-141, at 121-2: 'The word *auctoritas* derives from the verb *augere*, "augment", and what authority and those in authority constantly augment is the foundation'.

¹⁰⁵ I discuss Arendt's concept of *lex* and its role in the method of political jurisprudence in Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), ch.8, esp.141-2.

between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs and laws'.¹⁰⁶ The space of political freedom is created only through the formation of these relationships. Arendt explains that wherever freedom has existed 'as a tangible reality', it has always been spatially limited: 'if we equate those spaces of freedom ... with the political realm itself', she states, 'we shall be inclined to think of them as islands in a sea or as oases in a desert'.¹⁰⁷ In a political sense, freedom is both an achievement and, from the outset, is ordered.

Nomos gives expression to that concrete order of political freedom. Schmitt, Arendt and Oakeshott all agree that the initial action – the taking – invariably involves an exercise of force or violence. They also agree – though they express this in their own distinctive terminology – that through 'customary practices' (Oakeshott), the emergence of 'intimate connection or relationship' (Arendt), or the establishment of institutional order (Schmitt), force is tamed and 'moralized' and power is thereby generated. Law is neither norm nor decision as such; it is an arrangement of norms and decisions that emerges within a concrete order.

Schmitt may not have been as explicit as other scholars in acknowledging this power-generational aspect of state-building, but he was not unaware of this phenomenon. In an essay on pluralism and the state published in 1930, he explains that political unity is never in reality as monistic as jurists, through simplification, or pluralists, for polemical reasons, present it. Even the so-called absolute prince of the seventeenth and eighteenth centuries was obliged 'to respect divine and natural law – that is, to speak sociologically, church and family – and to take into account the manifold aspects of traditional institutions and established rights'. The political unity of the state 'has always been a unity of social multiplicity'.¹⁰⁸

Elaborating on this theme, Schmitt recognizes that there are many ways of building political unity:

¹⁰⁶ H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, rev. edn. 1965), 262.

¹⁰⁷ Arendt, *On Revolution*, above n.17, 275.

¹⁰⁸ C. Schmitt, 'Ethic of State and Pluralistic Ethic' [1930] in C. Mouffe (ed.), *The Challenge of Carl Schmitt* (London: Verso, 1999), 195-208, at 201.

There is unity from above (through command and power) and unity from below (from the substantial homogeneity of the people); unity through enduring association and compromise between social groups or through an equilibrium achieved somehow by some other means between such groups; unity which comes from within and one which rests only on external pressure; a more static and a permanently dynamic, functionally integrated unity; finally, there is unity by force and unity by consensus.¹⁰⁹

In this essay, Schmitt notes that pluralists consider that only a unity achieved by consensus can be ethically justified. But this, he explains, is not an unambiguous criterion. Every consensus must, by some means or other, be established. Power is generally required to produce consensus, including ‘a rational and ethically justified consensus’. But so too can consensus produce power, including ‘an irrational and – despite consensus – ethically repugnant power’.¹¹⁰ Schmitt here recognizes the complexity, uncertainty and amorality of the processes by which institutional order is capable of being ‘nourished’ from its original source.

The overall significance of Schmitt’s exegesis on *nomos* is to demonstrate that if the originating act of taking/closure is overlooked in legal thought our grasp of the character of law in modernity will be skewed. Jurists have avoided this question either by treating the foundation as a pure act of representation (as promoted by normativism) or by presupposing some mysterious prior substantive equality of the people (as promoted by decisionism). On this fundamental point, Schmitt surely is correct. But his basic insight needs to be amended and developed. As Lindahl has noted, ‘an initiation takes on the form of an accomplishment because the original self-closure of a community only becomes such afterwards, in and through the closures that accomplish it’.¹¹¹ That is, the act of foundation can be understood as such only after the event: the original appropriation – the first meaning of *nomos* as the constitution of ‘the original spatial order, the source of all further concrete order and all further law’ (NE 48) – can be identified as foundational only once the second and third aspects of *nomos* (distribution and production) are institutionalized. This gives *nomos* a reflexive dimension, one that is augmented only with the assistance of Arendt’s rendering of the relational quality of *lex*. The authority of the state is established and maintained

¹⁰⁹ Schmitt, *ibid.* 201-2.

¹¹⁰ Schmitt, *ibid.* 202.

¹¹¹ H. Lindahl, ‘Give and take: Arendt and the *nomos* of political community’ (2006) 32 *Philosophy & Social Criticism* 881-901, at 897.

through a continuous interaction of the modes of ordering that are grasped by *nomos*, *lex* and positive law.