

**The London School of Economics and Political
Science**

*Toward a Negri-inspired theory of c/Constitution: A
contemporary Canadian case study*

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Abstract

This thesis excavates Antonio Negri's theorization of the distinction between 'the material and formal constitution' (one which I distinguish throughout by way of capitalization as 'the material constitution' and 'the formal Constitution' or, in the shorthand contraction, 'c/Constitution'). In the first half of the thesis this is undertaken by way of a theoretical line of inquiry (Chapter I-III) and in the second as a series of concretized case studies drawn from contemporary Canadian constitutional historiography (Chapters IV-VI).

The first chapter of this thesis (Chapter I) presents the October 1970 *Front de libération de Québec* (FLQ) Crisis as an event which contains within itself, not unlike similar events surrounding the kidnap and murder of Aldo Moro by the *Brigate Rosse* (BR) in 1978 Italy, the contours of a Negri-inspired entry into the subject matter. Chapter II offers a more situated analysis of some of Negri's key texts on the c/Constitution from the sixties, seventies, eighties and nineties to further ground the conceptual experiment underlying the thesis. Chapter III examines how Negri's thought is developed and brought up to date in his English language collaboration with Michael Hardt. Here, a significant detour will be taken through the critical literature responsive to *Empire* (2000). This is done first in a contemporary Canadian analysis of the form of sovereignty corresponding to 'Empire' (Chapter IV); second in a Canadian inquiry into the form of collective subjectivity understood by the concept of 'the multitude' (Chapter V); and, third in an Indigenous Canadian consideration of possible alternatives to the Constitution of the State in the 'constitution of the common' (Chapter VI).

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PART I

Chapter I - Introduction

I do not believe that either Quebec or Canada can be sovereign and independent today or in the future in the same way as was thought possible in 1970.

W. Tetley, *The October Crisis, 1970* (2010)¹

The crisis of sovereignty is today serious and profound. The king really has no clothes. Sovereignty tends to become simply useless domination.

M. Hardt & A. Negri, in *Reflections on Empire* (2008)²

During the raids on homes of suspects after the War Measures Act had been imposed, one cop seized a book on Cubism, convinced he held a Cuban revolutionary tract in his hot hands.

M. Richler, *Oh Canada! Oh Quebec!* (1992)³

This thesis begins with a broad form of comparison between the Canadian and the Italian historical situation in the sixties and seventies to open up the possibility that neither Canada, nor Italy, is as unique as might be supposed. The aim is explicitly *not*, however, to offer up a scientific (re)construction of Canadian and Italian history in that or any other period. To do so would be well beyond the purview of this thesis and the expertise of its author. Instead, this chapter seeks more modestly to introduce a plausible 'Negri-inspired' constitutional theory which it will develop and defend in subsequent chapters in a more and more specified Canadian context.

In the broadest sense thesis is aimed at a Canadian reader interested in constitutional theory who might be less than expert, or even unfamiliar with Negri's long intellectual development prior to his English language collaboration with American Italianist and critical theorist, Michael Hardt, in *Empire*.⁴ To engage a Canadian readership, it therefore begins with a well-known event in contemporary Canadian history, the 'October Crisis', shorthand for the October 1970 kidnap murder of Quebec Minister of Labour, Pierre Laporte, by the *Front de libération de Québec* (FLQ). An event which can be brought into conversation with the similarly infamous and equally grizzly one in contemporary Italian history, one which is linked, however erroneously quite lastingly,

¹ W. Tetley, *The October Crisis, 1970* (Montreal: Queens-McGill Press, 2010) xxxv.

² M. Hardt & A. Negri, 'Sovereignty' in A. Negri, *Reflections on Empire* (London: Polity, 2008) 57.

³ M. Richler, *Oh Canada! Oh Quebec!* (Toronto: Penguin, 1992) 134.

⁴ M. Hardt & A. Negri, *Empire* (Cambridge Mass.: Harvard University Press, 2000).

to the name of Antonio Negri himself. Namely, the 1978 kidnap murder of former Italian Prime Minister and Christian Democrat leader, Aldo Moro, by the *Brigate Rosse* (BR).

Even outside of Italy it is well known that Antonio Negri was among 22 Italian 'extra-parliamentary' left intellectuals and activists rounded up in a dragnet and arrested by Italian authorities in April of 1979 in connection with the BR terrorist events of the prior year. After retelling the basic story surrounding this event and what is offered as its Canadian point of comparison in the October Crisis, this chapter lays down the basic thesis that it is possible to coherently expound a 'Negri-inspired' constitutional thought and praxis and propose a Canadian instantiation of it, something which has not yet, to my knowledge, been attempted.

I begin with the question of terrorist violence, for it is the lingering taint of the accusation, trial and conviction of Negri in connection with the kidnap and killing of Aldo Moro by the BR which makes him controversial for so many people. Not only for those who harbour suspicions that Negri might indeed have been guilty of being the terrorist mastermind that his accusers alleged, but for those who wonder if he was not at least guilty of being the favoured theorist of the BR. It is a given that these are two entirely different lines of inquiry, both of which may or may not be relevant to judging Negri's philosophical texts; and, both which are interesting questions which can only be meaningfully researched by a non-Italian speaker to a limited extent. However, it is worth noting that, at least on the basis of trial transcripts available in reliable English language translation, neither suspicion would seem, in any way to be borne out by the 'evidence'. Nevertheless, it is not necessary for this thesis to get bogged down in such an immensely difficult question, one which would be well beyond the scope of anyone to resolve. Instead I will simply assert plainly my own reading, which is fallible like any, and move on: Negri's disagreement not only with the BR's tactics, but with its ideology, is quite plain and speaks for itself.⁵ This point is in the end itself relatively minor insofar as the arguments made in this doctorate do not turn on autobiographical details of Negri's life but rather in the interstices of a highly specified and very narrow tranche of his thought.

⁵ For a useful translation of some of Negri's key exchanges with his accusers at trial see generally S. Lontringer & C. Marazzi (eds), *Autonomia* (Los Angeles: Semiotext(e), 2007) 188-194. In response to interrogation, Negri summarizes the distinction between *autonomia* as a decentralized social movement and the BR as a terrorist paramilitary organization along two axes: (1) 'The BR has an extremely centralized idea of organization (the party), which is presented as the fundamental and exclusive weapon and the determining factor in the clash with the State...'; and, ' "Autonomia Operaia," on the contrary – on the basis of the tradition of Italian revolutionary Marxism – considers organization as mass organization of social production...'. In other words, 'For the BR, the concept of insurrection is connected to the issues of taking over State power. For 'Autonomia,' take-over is a meaningless objective.

A. Social movements and terrorist violence: Italy and Canada of the sixties and seventies

When Canadian Prime Minister Pierre Elliot Trudeau invoked the *War Measures Act*⁶ at 4:00 a.m. on October 16, 1970, resulting in the deployment of 7,500 Canadian Forces troops to Montreal (and still more further afield in Ottawa and elsewhere), over 450 arrests, many in the middle of the night, on suspicion of collusion with, or belonging to, the FLQ,⁷ it was clear that Canada was in no way insulated from the tendency of western governments in the seventies to react to terrorist militancy with overwhelming power and the suspension of legal norms. For most ordinary Italians living in and around the urban violence of the seventies there was very likely much sympathy for just such an approach. The senseless violence carried out by the BR throughout the seventies and early eighties was deeply unpopular. In this sense, the response of the

⁶ The *War Measures Act*, 1914 RSC. 1970 c. W-2 was originally promulgated by Prime Minister Robert Borden's (Liberal-Conservative) World War I 'Unity Government' to feed the Imperial Parliament's need for dominion men to fight. Its primary use was to combat anti-conscription riots in Quebec. The Act was once again declared in force in World War II under similar circumstances. It was later amended in 1960 to specify that its provisions were *not* bound by the new *Canadian Bill of Rights*. The Canadian Bill of Rights, SC 1960 c. 44, s. 6, was a legislative precursor to the *Canadian Charter of Rights and Freedoms. Constitution Act 1982* (Sched B to *Canada Act 1982* (UK), c. 11) (enacting the *Canadian Charter of Rights and Freedoms* (the "Charter"). The *War Measures Act* was enacted by Parliament pursuant to their s. 91 of the *Constitution Act, 1867* jurisdiction to make laws for the peace, order, and good government of Canada." Canadian constitutionalists know it as 'the p.o.g.g. power'. The Act itself was triggered on occasions "war, invasion, or insurrection, real or apprehended", like all emergency powers or marshal laws, it permitted the State to carry out acts which would be illegal in peacetime even with special statutory authority see generally P.W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson, 2006) 453 fn1, 475, fn128-129. Six years after the adoption of the Charter, the *War Measures Act* would be repealed and substantially overhauled by the *Emergencies Act*, SC 1988, c. 29. The new Emergency Act however was not proclaimed into force until 2003, nearly two decades after it was originally passed by Parliament, and a full two years *after* the events of 9/11 and the global War on Terror had begun. There is an immense literature detailing the expansion of emergency powers in this period, its convergences and divergences from other jurisdictions, the US and the UK in particular see eg K. Roach, 'Did September 11 Change Everything – Struggling to Preserve Canadian value in the Face of Terrorism' (2002) 47 *McGill Law Journal* 4, 893; D. Jenkins, 'In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British and American Anti-Terrorism Law' (2003) 66 *Saskatchewan Law Review* 419; K.L. Scheppele, 'North American Emergencies: the Use of Emergence Power in Canada and the United States' (2006) 4 *International Journal of Constitutional Law* 2, 213-243; R. Whitaker, 'Keeping Up with the Neighbours – Canadian Responses to 9/11 in Historical Comparative Context' (2007) 41 *Osgoode Hall Law Journal* 2/3, 381-414. For a more critical and hard hitting view of the Canadian situation specifically, rather than a comparative or social scientific study of statutory schemes in the US, UK and Canada see W. Pue, 'The War on Terror: Constitutional Governance in a State of Permanent Warfare?' (2003) 41 *Osgoode Hall Law Journal* 267. For a more purely theoretical outlay of the problem with examples from the Canadian situation see D. Dyzenhaus, 'Puzzle of Martial Law' 59 *University of Toronto Law Journal* 1-64.

⁷ For a defence of the Trudeau government's proclamation of a 'state of apprehended insurrection' and the special regulations implemented by order-in-council of the Federal Government see generally n 1 above at 82-83. For a more critical treatment see G. Bouthillier & E. Cloutier (eds), *Trudeau's Darkest Hour* (Montreal: Baraka Books, 2010) 15. For the text of the *Public Order Regulation, 1970* authorizing arrest, detention and imprisonment of up to five years for any member of the FLQ or similarly aimed organizations see <http://www.mcgill.ca/maritimelaw>.

Italian state to the BR, whose kidnapping and murder of Christian Democratic Party (CD) leader Aldo Moro in 1978 was however extreme, not unlike the response of the Canadian Government to the FLQ's kidnapping and Quebec Minister of Labour Pierre Laporte nearly a decade earlier, largely in tune with public sentiment. Both cases involved acts of extraordinary violence by a marginal extreme left group against a high profile centre right political leader at the peak of a period of intensifying terrorist attacks.⁸

On April 7, 1979 the Italian police rounded up 22 prominent intellectuals and activists, Antonio Negri among them, on charges of being complicit in, even masterminding the BR. A reliable English language translation of the charges against Negri is not available. What is plain however is that in the years which followed, the Italian prosecution services would not as easily release detained innocents or acknowledge its errors in the same way as their Canadian brethren⁹ (Negri himself would of course famously spend well over two decades in prison and exile on account of the refusal of authorities to acknowledge the illegitimacy of its arrest, trial and conviction¹⁰). But the

⁸ In 1977 the BR began its 'strategy of annihilation' in which terrorist activities were directed indiscriminately at various personages and symbols of public or state power, its primary target was CD officials and appointees, but it also targeted the PCI for its willingness to collaborate with the CD. In 1976 the BR and affiliated groups killed eight and wounded 16, in 1977 they killed seven and wounded 40. In 1978, the numbers of dead, Moro among them, spiked to 29. Things continued apace in 1979 and reached a high point of 30 deaths in 1980. P. Ginsborg, *A History of Contemporary Italy* (London: Palgrave, 2003) 383-385. Exact comparison between the BR and the FLQ in terms of body count would be meaningless. However, there can be little doubt that FLQ was comparatively weaker and killed fewer people. Nevertheless, it had also killed and terrorized with zeal before its dramatic kidnap and murder of Quebec Minister of Labour, Pierre Laporte n 1 above at xxviii, xxxvii-xxxviii, 18, 26 (describing the FLQ's culpability between 1963 and 1970 in over 200 bombings as well as robberies and kidnappings resulting in at least "six violent deaths" prior to Laporte's, one in 1963, two in 1964, two in 1966 and two in 1970 inclusive of one at National Defence Headquarters in Ottawa and Laporte). The basic argument is not that the BR and the FLQ were roughly the same in size or capacity for violence, but simply that their most high profile acts took on a similar national profile.

⁹ Shortly after the *War Measures Act* was put into effect on October 16, 1970, the Federal Government established the Committee to Aid Persons Arrested under the War Measures Act. Of the 497 arrested under the act, 435 were released without charge, 62 charged and only 32 held without bail. Less than a year later in March of 1971 the Government of Quebec agreed to provide compensation of up to \$30,000 for each person unjustly arrested, by July of the same year Quebec's ombudsmen recommended compensation for 103 of the 238 complaints arising from arrests and detention during the October Crisis. Four men, Bernard Lortie, Paul Rose, Jacques Rose and Francis Simard were eventually arrested, tried and convicted for the kidnap and murder of Laporte. n 1 above at xxv-xxvi, xl-xliii. After his release in 1982 Simard wrote a book in which he acknowledged participating in Laporte's murder but refused to name which among the co-defendants had actually slain Laporte see F. Simard, *Pour en finir avec octobre* (Montreal: Stanké, 1982). For a complete list of the convictions and sentences of FLQ members see n 1, Appendix 4 at 234-235.

¹⁰ Negri was arrested in April of 1979 in a dragnet alongside other prominent Italian intellectuals and activists on suspicion of terrorist ties. He remained under conditions of imprisonment or exile until April 25, 2003. During these 25 years, 11 were spent in prison and 14 in exile. A. Negri, *Empire and Beyond* (London: Polity, 2008) vii.

initial Italian response to the BR kidnap murder of Moro as much as the Canadian one to the FLQ kidnap murder of Laporte was similar.

What is immediately clear in the reaction of the Canadian and the Italian authorities to the kidnap and murder of one of its members is a survival instinct (which is, of course, to be expected). From the martial response of the Government in Canada, inclusive of its invocation of war powers, to the anti-intellectual dragnet targeting left thinkers and activists by the Republic in Italy, the same reactionary tendency of sovereign power is on display. Let us further examine the analogies.

First rule: No negotiation. 'We do not negotiate with terrorists' is the only permissible phrase in respectable government circles during a terrorist crisis in both the Italian and the Canadian situation. Second rule: The usual rules are suspended. In both the Canadian and Italian cases, there is a similar cycle of activism and terrorism leading to some dramatic suspension of 'the Rule of Law'. In both cases this is triggered by a terrorist attack on the political institutions of the State or persons representing those institutions.

In the Canadian case, the FLQ's kidnap and murder of the Pierre Laporte triggers the activation of the *War Measures Act*. The Act is a draconian piece of legislation which, while suspending certain basic civil liberties and rights of due process characteristic of the Rule of Law, permits the deployment of military forces within Canada for the purpose of the keeping of public order, quelling imminent insurrection and preserving the State from existential threats to its survival.¹¹ In the Italian case, the arrest, trial and imprisonment of leading intellectuals and activists like Negri contains elements of the same tendency, a similar break, albeit this time unspoken, with the Rule of Law and a similar assertion of the Political in its place (and by extension, its autonomy from legal or other forms of constraint). How is this convergence to be explained?

Certainly, in the postwar period Italy was poised on the razor's edge between an ascendant, expansionist American style liberal capitalism to the West and increasingly intransigent Stalinist totalitarianism to the East. In this sense it was very different from postwar Canada which, having been separated from Europe and Asia by immense oceans was spared from attacks on its cities and countryside. It therefore emerged, perhaps even despite having lost a part of a generation on European soil,¹² in some

¹¹ n 5 above.

¹² Canada had 22, 910 casualties in World War II including 13, 134 confirmed fatal battle wounds. http://www65.statcan.gc.ca/acyb02/1947/acyb02_19471126002-eng.htm. Leading Canadian historian

material senses strengthened in the post-war years, not only in terms of its industrial output, national infrastructure and military might, but also in terms of its political influence abroad and independence at home.¹³ The situation for Italy, in which the loss of human life and the destruction of property was greater, was worse. Not only had its government been complicit in the fascist experiment, its people and land was exhausted from war and privation.¹⁴ Without much choice in the matter, Italy entered into a period of quasi-imperialist tutelage under the occupation of the allied powers, led by the US. Nevertheless, by the sixties and seventies Italy would begin to catch up, particularly in its industrial north, to Canada in terms of economic production and global influence.¹⁵

By 1975, Italy's 'economic miracle' made it a sufficiently powerful actor to be a founding member of the Group of Six (G-6) leading industrial democracies and one of the leading institutions of what Hardt and Negri term 'the formal Constitution of

Desmond Morton offers a significantly larger figure of war dead at 43,000. D. Morton, *A Brief History of Canada* (Toronto: McClelland & Stewart, 6th ed., 2006) 246.

¹³ Canada's Gross National Product (GNP) more than doubled between 1939 and 1945.

<http://www.statcan.gc.ca/pub/11-516-x/pdf/5500096-eng.pdf>. Perhaps surprisingly, even its consumer spending rose in the same period. This fact alone offset a quadrupled national debt incurred fighting in Europe and Asia. D. Morton n 12 above at 246. See also 236-237 in same, describing wartime prosperity as tangible: "wages were frozen but they were certain...By European standards the hardships and sacrifices were slight, and many Canadians found the war years a bright contrast with the grim Depression...Boring jobs or military routine had at least lifted people from pre-war status". By war's end, Canada's air force was the fourth largest in the world, its navy the third largest and its standing army of over 730,000 proven as a major force in the European land offensive including the role of its 1st Infantry Division which joined the Sicily landing of July 1943 and partook in fighting on the Italian peninsula, much of which was a bloody rehearsal for its expanded military role in the D-Day assault and the final grim offensives of the war, including the one which liberated the Netherlands immediately prior to Germany's surrender on May 6, 1945. Canada's postwar boom was also facilitated by its role as a major lender to the destroyed European economies, Britain in particular. Its postwar move away from colonial ties to a new military and economic 'partnership' with the vastly more powerful US would follow. In the latter half of the twentieth century Canada's powerful new position in the global hierarchy was nevertheless self-consciously offset by its 'moralizing and self-important' role as a leading 'middle power' in emergent *trans*, *inter* and *supranational* forums like the United Nations (UN), the North Atlantic Treaty Organization (NATO) and the Commonwealth see 251-256 in same.

¹⁴ The Italian Resistance had 100,000 fighting members, some of whom were also Communist militants and factory workers, at least 35,000 died. Many were mutilated or deported to Germany for torture and execution by the SS. In the immediate aftermath of the liberation of northern Italy there were also a series of settlings of scores in which up to 15, 000 suspected and confirmed fascists were killed. By late in the war, living conditions deteriorated radically with lack of winter heating and major food shortages compounded by Allied bombing raids. In 1945 Italian industrial production was a third of what it had been in 1938. P. Ginsborg n 8 above at 63-64, 68, 70, 93.

¹⁵ P. Ginsborg n 8 above at 157-159, 212-225. The precursors to the 'economic miracle' of the fifties and sixties lay in postwar Italy's entry into the European Economic Community, the American sphere of influence and the key institutions of transatlantic security including NATO. See also 233- 239 in same describing the dynamism of Italian capital and the unmanaged, even spontaneous quality of postwar economic growth in the central and northern part of the country.

Empire'.¹⁶ Canada was accommodated by an expanded G-7 a short year later.¹⁷ Italy's postwar economic miracle, albeit much less miraculous than their old axis allies in West Germany and Japan, did bring it back into upper echelons of global capital. This was no doubt in large part due to a variety of factors ranging from the immense capital infusion afforded by the US Marshall Plan, the investment of public funds into domestic industry and Italy's integration into an emerging European project.¹⁸ All of which meant, at least in its northern industrial heartland, Italy was by the sixties at least finally experiencing the growth of the same type of which had been felt in the other major liberal capitalist states of the West (inclusive of Japan).

An early transition to Empire

For Canada, not unlike Italy, the postwar epoch was one in which it would move more closely into the US orbit, as the global power of Europe and Britain in particular began to wane. For this reason alone, Canada and Italy both, like many other countries around the globe, albeit always in localized and specific ways, began a broader transition, both domestically and geopolitically in the latter half of the twentieth century. At least this is one of the (Hardt and) Negri-inspired theses which I consider in this doctorate. The suggestion is, of course, not that Italy and Canada are the same or convergent in any specific way, but rather that they are part of a tendency which was not exclusive to any country. To make sense of this it might be useful to begin with something more Italian, or at least particular to its southern Mediterranean and Adriatic neighbourhood at mid-century: Namely, the spectre of fascism and civil war.

In postwar Italy, the entire political class, whether on the centre right or on the centre left, were interested in avoiding civil war or a return to fascism more than anything else. Certainly in this sense, there can be no question of comparing it with postwar Canada's

¹⁶ n 4 above at 314-320. The Constitution of Empire is characterized more by an ancient/ Polybian constitutional model (based on an imagined power sharing between monarchical, aristocratic and democratic *bodies*) than it is the modern/liberal/unitary model (inclusive of its imagined Montesquieuan division between the executive, legislative and judicial *forms*). Like the ancient constitution, the Constitution of Empire is characterized by "a functional equilibrium" between: (1) "the monarchic unity of power and its global monopoly of force [the US, NATO, etc.]"; (2) "aristocratic articulations through transnational corporations and nation-states"; and, (3) "democratic-representational *comitia*, presented again in the form of nation-states along with the various kinds of NGOs, media organizations, and other 'popular' organisms."

¹⁷ Italy and Canada were cofounders of NATO in 1949. Italy was a founding member of the Group of Six (G-6) in 1975 a year prior to Canada's accession, which made it the Group of Seven (G-7) in 1976. The next round of expansion came with Russia's accession in 1997 which made it the G-8. In 1999 Canadian Finance Minister (and later Liberal Prime Minister) Paul Martin, would successfully lobby for an at least partial widening of the group to a G-20 outer circle including 'emerging', 'developing' or 'transitional' economies (thereby extending a second tier, partial or transitional membership, to South Africa, Mexico, Argentina, Brazil, China, South Korea, India, Indonesia, Saudi Arabia and Australia).

¹⁸ P. Ginsborg n 8 above 213.

comparatively tame political situation. The threat, real or imagined, of a fascist coup did not factor into the Canadian equation during this period. In fact, the only effect of European fascism in Canada was the extent that the country had been emboldened domestically and internationally as a result of its participation in fascism's military defeat overseas. As to the question of communism, or perhaps more specifically Communist Party politics, Stalin's ugliness was quite rapidly conflated with the communist name in Canada. So much so, that the various Communist and Marxist Leninist Parties which cropped up in Canada over the twentieth century and continue to exist in the twenty-first, never amounted to a significant political factor. Canadians also succumbed, at least to some (much lesser) degree, to a sort of tamer McCarthyism, for a while, fleshing out home grown communists as 'the next big threat'.¹⁹

During the FLQ Crisis, and alternatively at various points over the last 40 years, Quebec nationalism has occupied this negative imaginative and symbolic space in the Canadian national psyche. First Nations people in Canada also find themselves interposed on the same terrain, particularly where they make themselves heard by way of militant actions which disrupt or otherwise intervene with the day to day function of capital and the state. No doubt similar spaces continue to exist in the Italian national psyche in which the radical other is occupied by Romani caravans, the Arab or African asylum seeker escaping the confines of the refugee camps on Lampedusa island, or even still a full century and half after *Risorgimento*, the Sardinian, Sicilian and Calabrian countrymen who remain perennially 'Other' on the southern half of the peninsula (the Northern League's own separatist rumblings reflect the usual centrifugal aspirations in the opposite direction). Any extended or wider historical consideration of this sort is outside the reach of this thesis. Nevertheless, the fact that as many compelling and very obvious analogs exist between Italy and Canada, as much perhaps as between any two such similarly located 'democratic' or 'western' states generically, cannot be ignored or lost sight of.

To avoid doing just this, the simple departure point in this chapter has been that both Italy and Canada are crosscut by immense difference and subalternity. Both contain as much antagonism as can be imagined in any political arrangement. Both are relatively young states.²⁰ Both are loose multi-ethnic, multilingual and utterly non-homogeneous

¹⁹ D. Morton n 12 above at 258-259.

²⁰ Canada is a 'parliamentary democracy' or a 'constitutional monarchy'. It retains the British Monarch as sovereign. It is also a federal state. It was peacefully founded on July 1, 1867 in the union of Upper and Lower Canada, New Brunswick and Nova Scotia (with Upper Canada becoming Ontario and Lower Canada becoming Quebec). In subsequent years it expanded to include three federal territories in the

entities. It is also quite plain that a reasonable argument can be made that both the Italian and Canadian states contain multiple nations within themselves. Even that despite their relative contemporary stability, both Italy and Canada have been periodically brought to the precipice of crisis in the latter half of the twentieth century (again, in this chapter we focus in particular on the shared question of terrorist violence).

Again, it is possible to say many other states share these very same qualities and that they are the mark of no particular congruence or commensurability between Canada and Italy. This would be right. However, I am still not inclined to think that the generality of their similarities hopelessly weakens the case for their intellectual joiner. Already, in very obvious ways, by the sixties and seventies, both the Italian and Canadian states were swept up in broader patterns of global capital well beyond their capacity to control unilaterally or even in concert with likeminded partners. Both were cogs, at best privileged, but still junior players, in an immense post-war economic growth cycle which continued into the sixties and ended in widespread recession, unemployment and stagnation in the seventies. No doubt this served as a basis for a shared sense of experimentalism among youth in Canada, Italy and further afield.²¹ It is by no means controversial to say that the youth-led counter-culture of the sixties and seventies produced effects globally not only in Italy and Canada, not only in the West, but beyond. This meant new forms of cultural and social pressure and new forms of political desire which overflowed the representative institutions of the State (its parliamentary politics and its basic imagining of the social contract) and the monetary form of value (its insistence on the translation of labour into the work and the time of the wage, 'wage work'). Negri makes this argument powerfully in the context of his native Italy in the sixties and seventies and more generally across the global terrain

north and a series of other former British colonies as provinces equal in status with the original four with the final addition of Newfoundland and Labrador in 1949. Canada is today comprised of ten provinces and three territories. Italy is, like Canada, a parliamentary democracy however it is a unitary republic rather than a constitutional monarchy and a federation. It was founded on March 17, 1861 following the immense tumult of the *Risorgimento*. The *città irredente* did not join the Kingdom of Italy (1861-1946) until the Treaty of Saint-Germain-en-Laye in 1919 placed Trentino, South Tyrol, Trieste, Istria and a spattering of Dalmatian islands under Italian sovereignty. The Italian Republic succeeded the Kingdom of Italy on June 2, 1946 after a popular referendum breaking with the monarchy and establishing a new constitutional order in the same year. Italy is today comprised of 20 regions, five of which have a special autonomous status. It is also further subdivided 110 administrative provinces and thousands of municipalities, all of which enjoy varying degrees of jurisdiction subordinate to that of the Republic.

²¹ I have found three books about this era in particular to be instructive. Relative to Italy, Lonringer & C. Marazzi (eds) n 5 above. Relative to Canada and Montreal in particular, S. Mills, *The Empire Within* (Montreal: McGill Queens University Press, 2010). Relative to the US as a broader point of comparison and a point of reference for both Italy and Canada see T.H. Anderson, *The Movement and the Sixties* (Oxford: Oxford University Press, 1995).

with Hardt in *Empire*. Empire is a global phenomenon presaged by many earlier instantiations of globalization but it is also a specifically autonomist, or 'post-autonomist' idea which, before it can be traced out in a potential Canadian iteration, must still first be properly situated in its Italian context.

The specificity of the Italian situation

To find the specificity of autonomist thought, Negri's in particular, on the question of constitution, we might look to *Potere Operaio* (PO), a group which, despite its short life span, from its co-founding by Negri and other autonomist intellectuals in 1970 to its dissolution in 1973, single-mindedly obsessed the Italian Republic's case against Negri and the other 21 intellectual and activists arrested alongside him.²² It was an organization which Negri's interrogators and accusers could not comprehend (or were not prepared to accept) was *not* led by a single personality or personalities, but was simply one current within a variety of overlapping and competing social movements, to which Negri refers collectively as 'the Movement' in the transcript of his examination at trial in Padua.²³

In the transcript of Negri's examination at trial in Padua, it is quite clear that the prosecutor and the judge have a limited knowledge of the loosely 'extra-parliamentary left' politics they were impugning as terrorist. Certainly, beyond sharing some form of neo-Marxist proclivity, they nevertheless were internally differentiated in extraordinary ways.²⁴ This is of course not to say that within the variously denominated strains of extra-Parliamentary left thought in Italy during the late sixties and early seventies

²² A portion of the trial transcript recorded on May 19, 1979 is translated and included in the English language anthology of autonomist writings, Lotringer & Marazzi (eds) n 5 above at 188-194. It is contextualized by way of a very brief but pointed preamble indicating that Judge Palombarini and Chief Prosecutor Calogero's interrogation of Negri at trial in Padua on May 18, 1979 was one in which Negri agreed to participate (to the extent consent was possible under conditions of pre-trial imprisonment) in a way which other similarly situated autonomist intellectuals, such as Oreste Scalzone in particular, did not. The editors tell us that Scalzone and others may have wished to avoid playing into the Republic's strategy of impugning autonomist intellectuals with their theoretical writings. Negri however, the editors suggest, thought it advisable to answer to his accusers even where they could not be assumed to be in good faith.

²³ Ibid.

²⁴ Lotringer and Marazzi's English language anthology provides an unparalleled glimpse into this turbid intellectual milieu. A milieu from which autonomia arises subsequent to a major break in the Italian extra-parliamentary left after the dissolution of *Potere Operaio* (Worker's Power) in 1973, a break which arose in large part over factional disagreement about the use of terrorist violence as a revolutionary strategy. What autonomia carries over from *Potere Operaio* however, Lotringer and Marazzi suggest, is a basic insistence the autonomy of labour as an engine of social and immaterial as much as industrial and material productivity. Lotringer & Marazzi n 4 above at v-xvi, 188-194.

(building toward the 'hot autumn' of 1969²⁵ and culminating in the restless decade to follow) there were no important commonalities. Indeed there were many, but one thing which was widely disagreed upon was the role of violence or the use of terrorist tactics.

What various strains of extra-parliamentary left thought do *not* share is the specifically autonomist insistence that it is not only the old, centralized and hierarchical formulations of the Communist Party (the PCI) and particularly its collaboration with the bourgeois State in coalition (or endless negotiation directed at coalition or Historic Compromise) with the Christian Democrats, that is to be eschewed, but any form of centralization or hierarchy whatsoever, including any dictatorship of the proletariat or vanguard. Many of the loosely autonomist groups, including PO, drew on a deep materialist tradition, one which is given its own variation in the Italian peninsula and perhaps cannot be fully or even meaningfully accessed by a non-Italian speaker, but which is nevertheless steeped in the fertile mixture of Catholic worker's liberation theology and German metaphysics. This intellectual background informs Negri's thought in a way which is largely out of sight for this thesis and it is acknowledged to be a limitation. One which I acknowledge but defend insofar as that what I am proposing is a self-consciously Negri-*inspired* theory of constitution. Not, a work of textual hermeneutics. Instead, the first half of this thesis (Part I: Chapters I-III) is proposed as a form of experimental theory which mobilizes some of the conceptual modalities and arguments developed in Negri's key texts on the constitution available in reliable English language translation. Three texts in particular are developed at some length: 'Toward a Critique of the Material Constitution' (1977),²⁶ *The Savage Anomaly* (1981);²⁷ and *Insurgencies* (1991).²⁸

²⁵ The *autunno caldo* or 'hot autumn of 1969' had really begun in 1968 in smaller factories among non-unionized labour and students. *Potere Operaio*, with which Negri and so many leading autonomists are associated, was only one of the groups which sprung up during this period. Along with other similarly revolutionary, albeit differently accented neo-Marxist groups, it corresponded to an intensification of student and worker militancy. In the fall of 1969 specifically, a loose agglomeration of student activists and intellectuals worked alongside trade unions, both nominally secular and aligned with the PCI as much as nominally Catholic and aligned with the CD, to shirk their bosses and political masters better judgment and engage in unauthorized work stoppages and strikes. Much of the action began in the metalwork factories of central and northern Italy in the fall of 1969 and spread in the early seventies to the petro-chemical, automobile, railway and even white collar sectors. For a brief history of this period see generally P. Ginsborg n 8 above at 309-320.

²⁶ A. Negri, 'Toward a critique of the material constitution' in A. Negri, *Books for Burning* (London: Verso, 2005) 180-230.

²⁷ A. Negri, *Savage Anomaly* (Minneapolis: University of Minnesota Press, 1981).

²⁸ A. Negri, *Insurgencies* (Minneapolis: University of Minnesota Press, 1991).

The specificity of the Canadian situation

In the Canadian context, Sean Mill's recent *The Empire Within* (2010),²⁹ presents a ten year study of social movements in Montreal from 1963 to 1973. In so doing, it offers a rare glimpse at certain potentially convergent vectors flowing beneath the Canadian as much as Italian social terrain in the sixties and seventies. By the seventies especially, in Canada as much as Italy, it is quite clear that the desire for revolution, particularly among the young, had the potential to exceed the bounds of 'civil disobedience' and 'non-violent protest' set in the prior decade. If in the Canadian context we can look at recent scholarship such as Mills' to understand this period, in the Italian context we can look to Christian Marazzi and Silvère Lotringer's edited anthology, *Autonomia*.³⁰ If Mills' research is presented in a sociological and historical register, Marazzi and Lotringer's anthology of first-hand accounts of participants and observers is a combination of polemical and theoretical texts, many both. In both anthologies it is very clear that much of what changed historically in this epoch was at the level of the family as much as at the level of the broader forms of social production which existed in the economy. So much so, that the old relationship between civil society and the State, which had been taking shape with an almost unstoppable forward trajectory since the Treaty of Westphalia,³¹ was becoming, at the outermost limits of the twentieth century social welfare model, an anachronistic and hidebound one in much the same way as the old structure of the bourgeois family.³²

Recall also that by the seventies yet another twentieth century global boom bust economic cycle had come full circle; here the post-war baby boom generation felt the effects of recession, war and inflation with greater intensity than they could recall (albeit at a less intense level of depravation than their depression era parents). Certainly, if there is any common thread running between May of 1968 in France and the American civil rights movements of the same epoch, as much as the Canadian and

²⁹ Mills n 21 above.

³⁰ n 5 above.

³¹ For an at least partially Negri-inspired critique thereof see my book review of T. Jacobsen, C. Sampford & R. Thakur (eds) *Re-Envisioning Sovereignty: The End of Westphalia* (London: Ashgate, 2008) in *27 Australian Yearbook of International Law* 281-293.

³² The traditional family's hegemonies and modes of production began to change in Italy of the sixties and seventies as much as did those associated with the public sphere of the state and the private sphere of exchange (both of which are tied together heuristically in the social contract). An idea to which Hardt and Negri would return in the third volume of the trilogy, see A. Negri & M. Hardt, *Commonwealth* (Cambridge, Mass: Harvard Belknap Press, 2009) 159-163. Just as the imagined family is the baseline rationality of social organization at the level of biological life, fecundity and sexuality, the imagined social contract is baseline rationality of social organization at the level of political life, sovereignty and the (re)production of society. This basic idea is where feminist and queer theory inform, albeit only rarely explicitly, Hardt and Negri's unique reading of Foucaultian biopolitics see eg n 4 above at 40, 140-141, 196-201, 274-275, 405-406; *Multitude* (London: Penguin, 2005) 199-200, 224.

Italian situations, it is this. The post-war generation stumbled into a major roadblock in the seventies. In many cases, I argue, in a way which develops Negri's thought, but is nevertheless particular to my own impressions, that this crucial transition between the sixties and seventies opens up an impulse to question the inherited social contractual imagining of the state, which, by the sixties and seventies could no longer bear the demands being placed upon it. I choose the October Crisis of 1970, in connection with the FLQ kidnap and murder of Quebec Minister of Labour Pierre Laporte in Canada, like the 1978 BR kidnap and murder of CD party leader, Aldo Moro, in Italy, as a way of opening up this thematic in a meaningful way for an Italian as much as a Canadian or other English language reader.

I proceed on the assumption that if we are to understand Negri, not only about the specificity of his native Italy, but more generally about the formulation of a constitutional theory, we must first contextualize Negri himself relative to his contemporaries and comrades in the events leading to his arrest in 1979. Even more ambitiously for the purposes of this thesis, however, we must also meaningfully link this analysis to the Canadian experience in the same period. This is something which I begin to do in this chapter and have taken up in earnest, in the latter half of the thesis in the form of three distinct case studies (Part II). First in Chapter IV, the 1997 Asia Pacific Economic Cooperation Economic Community ('APEC') Summit in Vancouver; second, in Chapter V, the era of Canadian 'mega-constitutional politics' (1982-1998); third in Chapter VI, in the emerging distinction between 'Aboriginal Law' and 'Indigenous ontology'.

B. Toward a possible convergence in the Italian and Canadian examples

For the moment, however, I have begun by suggesting that Italy is *not* unique insofar as it, like Canada, is at once crosscut by pre and postmodern modes of production and political subjectivity. It is for example well known that in the south many Italians lived in the mid twentieth century as they had for thousands of years.³³ Primitive family bonds trumped any solidarity within a broader civil society. The Italian Republican and State apparatus, to the extent it penetrated the consciousness of southerners was as a basic form of police and local bureaucracy. Both of which were steeped in clientism and corruption.³⁴ In the south of Italy, many still lived without access to electricity, running water, basic educational or medical services at the time of the fascist takeover.³⁵ Many

³³ Ginsborg n 8 above at 28-36, 122, 210-212.

³⁴ Ibid. 181,286-290.

³⁵ Ibid. 28-29.

First Nations people in Canada continue to live in similar conditions today.³⁶

Developmental trajectories and material conditions vary greatly, not only internal to the global horizon of Empire, but internal to states, which are today themselves only an internal category of Empire. Italy and Canada are no exceptions. This is admittedly an assertion that neither be proven nor established as false. But I believe it to be the basis of a sound argument and one worth exploring at least in a preliminary sense here.

In *Empire*, Hardt and Negri go some distance toward making this argument possible insofar as they pose Empire as a smooth global surface in which the first and third world interpenetrate, coexist and comingle across territorial as much as temporal space.³⁷ Here, the old social contract and its imagining of a rights bearing citizenry, a model which is, in the formal sense, always present, but which is, in a material sense, less or more borne out by the facts, is presented in an altogether different and more critical light. The result, there may be a greater or lesser degree of convergence between the formal apparatus of the Constitution and what Negri calls 'the material constitution'.³⁸ Anglo-American normative political philosophy, typically in the

³⁶ A disproportionate number of First Nations peoples are without access to clean safe drinking water and living in cramped quarters. A fact which demonstrates in the most basic material sense, the degree to which the first and third world overlap in Canada see eg National Aboriginal Health Organization, 'Drinking Water Safety in Aboriginal Communities in Canada' (May, 2002). http://www.naho.ca/documents/naho/english/publications/ReB_water_safety.pdf; <http://www.cbc.ca/slowboil/>; 'Safe Drinking Water in Aboriginal Communities' (Background Paper, Library of Parliament, Publication no. 08-43-E, Revised May 28, 2010). <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0843-e.pdf>; http://www.vancouversun.com/story_print.html?id=4702680&sponsor. For a comprehensive longer term assessment of endemic poverty and substantive inequality according to virtually all statistical indices from 1981-2001 see M. Cooke, D. Beavon, McHardy 'Measuring the well-being of Aboriginal Peoples: An Application of the United Nations Human Development Index to Registered Indians in Canada' (Strategic Research and Analysis Directorate Department of Northern and Indian Affairs Canada, 2004). <http://dsp-psd.pwgsc.gc.ca/Collection/R2-345-2001E.pdf>.

³⁷ On question of the 'the constitution of time' as a broader subset of the question of 'ontological constitutionalism' see generally, A. Negri, *The Constitution of Time* (1981) in A. Negri, *A Time for Revolution* (London: Continuum, 2005) 20-135, at 84 defining the closure of '*juridical time*' in which "the law affirms 'its continuing validity and therefore its universality by superimposing the fixity of an eternal present over the fluidity of time and therefore, explicating its axiological validity through formal validity'...". See also, *Insurgencies* n 27 above at 315: "Constitutions can come one after the other – each time or, rather, each historical period, has its own constitution – but time must always be constitutionalized. And different times must be reduced to zero. The machination of this reduction is temporal and the constitution is a temporal machine. The formal constitution is superimposed over (and at the same time proceeds) a material constitution. In other words, it is an interweaving of power and interests, limits and conditions, the establishment of norms of participation and exclusion, temporally and historically defined. [citation omitted] The temporal machine is closed, the measure of time is that of command, and the normative value is that of exchange in its relative autonomy... Even the rules of representation are themselves brought back to this dialectical schema and subjected to the concrete temporality of the norm of reproduction of the system or the rule of enterprise. When constituent power is absorbed in the system, it is with respect to its dynamic capacities and on the condition of its constant dialectical neutralization."

³⁸ A concept which is recurring in Negri's texts over half a century and which this thesis traces with particular intensity to the 1977 'Toward a Critique of the Material Constitution' n 26 above and the 2000

hegemonic liberal register, describes this as the distinction between formal and substantive equality.³⁹

The Indigenous question

The best example of this strange combination of social engineering and rights-based politics lies in the Canadian situation lies with the contemporary experience of Indigenous, First Nations or Aboriginal peoples who, particularly 'status Indians' whose administration under the *Indian Act*⁴⁰ is as intensive a race-based administrative intervention as any.⁴¹ In Italy we might also think of the treatment of refugee claimants⁴² and Romani populations, both of which are treated as 'the Other' which resides persistently in the space of the state.⁴³ It is well beyond my expertise to comment on this. In Canada, however no analysis of the contemporary situation is possible without the *Indian Act*. It is a species of formal Constitution which produces and reproduces a hyper-administered population in which certain very material outcomes result. It is a species of biocolonialism which shapes the material constitution

Empire n 4 above. For its most basic formulation see n 26 above at 180: "The Constitution is no longer the law of all laws: laws proceed by themselves, following the pace and coherence of the constitution of a new structure of political power. A *new regime* is taking shape day by day and a *new material constitution* is arising." See also n 4 above at xiv: "by 'constitution' we mean both the *formal constitution*, the written document along with its various amendments and legal apparatuses, and the *material constitution*, that is, the continuous formation and re-formation of the composition of social forces." Although the use of capitalizations to distinguish between the two forms of c/Constitution (material and formal) are dropped in *Empire*, their conceptual usefulness remains. For more expansive treatment see Chapter II to follow.

³⁹ Sometimes this distinction is formulated in the language of liberal normative constitutional philosophy as between 'thin' and 'thick', 'formal' and 'substantive' equality. For an explanatory gloss see P. Craig, 'Formal and Substantive Notions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467-487.

⁴⁰ The *Indian Act*, RSC 1985, c. I-5.

⁴¹ Hogg n 6 above at 617 (addressing the historical origins of the Indian Acts and their classificatory schemata, which, although significantly revised, remain active in their basic structure): the term 'Indian' is term of art which has been subject to an unending series of Supreme Court decisions arising from Parliament's s. 91(24) jurisdiction over "Indians and lands reserved for the Indians."

⁴² A phenomenon which is increasingly tied to a penal and security model in Italy and elsewhere across the globe see eg M. Welch & L. Schuster 'Detention of Asylum Seekers in the US, UK, France, Germany and Italy: A Critical View of the Globalizing Culture of Control' (2005) 5 *Criminology & Criminal Justice* 4, 331-355. In Canada see F. Crépeau & D. Nakache, 'Controlling Irregular Migration in Canada – Reconciling Security Concerns with Human Rights Protection' (2006) 12 *IRPP Choices* 1. <http://ssrn.com/abstract=1516626>. See generally M. J. Gibney, *The Ethics and Politics of Asylum* (Cambridge: Cambridge University Press, 2004).

⁴³ The question of indigeneity quietly slides into the question of (im)migration for Italy, particularly relative to the Roma, Ashkali and Sinti Peoples (collectively Romani) see Y. Matras, 'Romani Migrations in the Post-Communist Era' (2000) 13 *Cambridge Review of International Affairs* 2, 32-50; N. Sigona, 'Locating "the Gypsy Problem". The Roma in Italy, Stereotyping, Labelling and "Nomad Camps"' (2005) 31 *Journal of Ethnic and Migration Studies* 4, 741-756; P. Colacicchi, 'Ethnic Profiling and Discrimination Against Roman in Italy: New Developments in a Deep Rooted Tradition' 2 *Roma Rights Journal* (2002) <http://www.errc.org/cms/upload/media/03/B8/m000003B8.pdf>.

of reality for those who are formally denominated as 'Indians' as much as those who are not.⁴⁴

Today, as in the sixties and seventies, material inequalities inclusive of significant, perhaps slowly closing, variations in rates of infant mortality and life expectancy, *within* Canada and Italy themselves, as much as throughout the globe, exist in a variety of ways which overlap with various forms of subalternarity and indigeneity. Many of which are not difficult to uncover in widely available statistics.⁴⁵ It is therefore perhaps worth noting, even if only in passing, that many of the available statistics and research on the life of Canada's Indigenous peoples and Italy's Romani and Sinti populations converge, particularly on markers of poverty, exclusion and disadvantage.⁴⁶

The movement of bodies: (im)migration

This thesis is *not* a quantitative one, rather it is exclusively qualitative. It asks after the movement of human bodies themselves, not as a question of statistical analysis but rather as a tendency increasingly integral to the global form of capitalist production.

This idea is signalled in *Empire*, but has a much earlier genesis in the Italian experience of the post-war epoch, an epoch in which the so called 'economic miracle' of the sixties in northern and central Italy emerged, at least in part, on the backs of the

⁴⁴ Pursuant to the *Indian Act* n 40 above at s. 32 above qualifying Indians are registered with the Federal Government and the Department of Indian Affairs. There are approximately 500,000 "status Indians" in Canada. There are at least as many "non-status Indians." Only status Indians are eligible for the privileges, protections, entitlements and distribution of resources afforded by the federal legislation: "Indian" means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

⁴⁵ In Canada see Statistics Canada, *Aboriginal Peoples Survey 2001: Well-being of the non-reserve Aboriginal population* (<http://www.statcan.ca/Daily/English/030924/d030924.htm>) (reflecting gross inequalities in health, education and poverty rates among Aboriginal and non-Aboriginal peoples living off reserve); National Council of Welfare, *Aboriginal Peoples and Inequality* (http://www.wuf3.fum3.ca/networking_events/events_doc/NCW_Inequality_100081.pdf) (documenting: (1) off-reserve urban poverty rate of Aboriginal peoples as "more than double (2.2 times) the rate for non-Aboriginal people in the same cities"; (2) lower rates of home ownership among off-reserve Aboriginal and non-Aboriginal peoples; (3) gross inequality of incarceration rates; (4) gross inequality of life expectancy and suicide rates among both on and off-reserve Aboriginal peoples, etc.). See also n 36 above. In Italy, statistics of a similar sort are slightly less available. Nevertheless, there is significant evidence from media and reliable non-governmental sources that matters are as bad or worse for Roma and Sinti peoples in Italy see eg D. Storia, 'EU Values and the Roma Migration Challenge' available online at http://www.osservazione.org/documenti/ITALY%20REPORT_Daria%20Storia.pdf (documenting a life expectancy of 40-45 years and endemic rates of poverty and ghettoization). There is also recognition at the EU level of the degree to which 'gypsies have long been "objects" rather than active "subjects" in attempts to deal with issues affecting them' (no doubt, the same language could be used to describe the position of Aboriginal peoples in Canada under *Indian Act*, see n 40 above) see generally Final Text Report to the European Committee on Migration on 'The Situation of Gypsies (Roman and Sinti) in Europe' (Strasbourg, May 22, 1995) Part VII, s. 85. available online at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=535912&SecMode=1&DocId=521630&Usage=2>.

⁴⁶ *Ibid.*

local proletariat as bosses began sourcing labour cheaply from the south. This is itself a sort of internal colonialism driven by migrating unskilled labourers from south to north and rural to urban, coming to work, often as contractors or scabs, outside of the union, as inexpensive substitutes for the workers of the highly proletarianized central and northern regions.⁴⁷ This created a pattern of migration internal to Italy which was reproduced at the international level as waves of (particularly southern) Italian immigrants fanned out across the globe (first just over the border in Switzerland, France and Germany and soon as far afield of North and South America).⁴⁸

Perhaps Italy's pattern of domestic migration and increasingly international immigration, particularly by landless southern labourers, operated as sort of premonition or foreshadowing of what *Empire* would later describe taking shape on a global level in the final decades of the twentieth century. Namely, the deterritorialization of labour and the emergence of a nomadic multitude,⁴⁹ which, in post-war Italy, was driven by the northward migration of peasants and their transformation into an urban proletariat in the massive automobile, steel and petrochemical plants ringing Milan, Turin and the Veneto.⁵⁰ In Canada, during this very same period, the country was changed by a massive influx of immigrants from post-war Europe, Asia, Africa and Latin America, particularly into its cities and urban areas.⁵¹

The crisis of public and private rationalities

The importance of the association between the deterritorialization of capital flows and the migratory patterns of living labour would become a hallmark of Hardt and Negri's theorization of globalization in *Empire*.⁵² So too would what they understand to be the expansion of the social state in the twentieth century. Even in his own native Italy, in which the 'centre right' CD denominated the government of the post-war epoch (briefly in a coalition with the Italian Socialists (PSI) and Communists (PCI), 1945-1947), an expansive public sphere prevailed. Much of the Italian economy was run by the State or least in large part owned by it.⁵³ In practical terms, the levers of Capitalist and State Power in the sixties and seventies split between CD functionaries in collaboration with local oligarchies and speculative capital at all levels of the economy. There could be

⁴⁷ Ginsborg n 8 above at 223.

⁴⁸ Ibid. 211.

⁴⁹ n 4 above at 212-214. See also 'A Conversation about Empire' in *Reflections on Empire* n 2 above at 30-31.

⁵⁰ Ginsborg n 8 above at 212, 217-22, 233- 239, Statistical Appendix at 435-439.

⁵¹ Morton n 12 above at 262-263, 337.

⁵² See eg n 4 above at xii, 52, 61, 123-124, 206-207, 213.

⁵³ Ginsborg n 8 above at 214.

no doubt that the CD had integrated itself at the levels of civil society to propose a public Power, of a distinctly corporatist variety, as the solution to 'the problem' of material inequality (or, in the more Anglo-American liberal formulation, substantive inequality).⁵⁴

In Canada during this period, there were elements of a similar structural confusion between the public and the private as the welfare state grew.⁵⁵ In both countries, the result was an exponential increase in public sector deficits at the hands of centre left and centre right governments of the seventies and eighties alike,⁵⁶ followed by a period of austerity during which the social welfare state was consolidated and a combination of public and private rationalities continued to blur in response to a succession of economic crises operating on an increasingly transnational or global level.⁵⁷ In Italy, which had to contend with Paris and Bonn as much as the International Monetary Fund (IMF), all of which demanded significant 'structural reforms' in exchange for a seat at the high table of post-war Europe, things were perhaps more complex than they were for Canada.⁵⁸ A country which Trudeau famously described as 'a mouse at the foot of the elephant',⁵⁹ eluding to the fact that the dominance of the US in the Canadian geopolitical space. In Italy, we can think not only of US occupation and the Marshall Plan, but of the emerging supranational structure of Europe in the form of the European Economic Community (the EEC), the European Union's (EU's) predecessor – a sort of 'new old' Europe which integrated Italy at its transcendental heartland, but at a price: a material distinction between it and (what remained of) its old axis partner in West Germany (which did not begin to close in earnest, and even then, only in the

⁵⁴ Ibid., 153. In fact, the CD's electoral strategy and form of structural hegemony was partially guaranteed by augmentations of the Welfare State as well as intensification of State ownership and control of industry. Italy is not alone in this regard. The social democratic parties of the west were often outdone by their centrist peers elsewhere as in Canada where the Liberal Party, like Italy's CD, was so dominant in the post-war epoch as to be termed a 'natural governing party'.

⁵⁵ Morton n 12 above at 30.

⁵⁶ In Italy see Ginsborg n 8 above at 420, 446 (Statistical Appendix). During this time, the PCI slipped into third place behind the Socialists (PSI) because it was unable to contend with centrist consensus on reducing rather than developing the social welfare state. After that the PSI were able to position themselves as fiscally conservative and humanitarian alternatives to the centre right CD as much as 'the hard left' PCI. In many ways, this transitional 'third way' was required to mark the passage between the public and private State, or better their totalizing interpenetration. To some extent this was driven by structural deficits which threatened, at least according to bourgeois economists, to eclipse the creditworthiness of national central banks. In Canada see Morton n 12 above at 364 addressing the 1993 election of a Liberal Government which dismantled vast swaths of the welfare state and privatized public sector corporations.

⁵⁷ In Italy see Ginsborg n 8 above 246-247, 352-354. In Canada see Morton n 12 above at 272-275.

⁵⁸ Ginsborg n 8 above at 246-247, 352-354.

⁵⁹ In remarks before the Washington Press Club addressing Canada-US relations on March 15, 1969. http://archives.cbc.ca/politics/prime_ministers/clips/13249/.

north, until the so called 'economic miracle' had begun to take root in the early sixties).⁶⁰

What I am suggesting here is less than a remarkable convergence between Italy and a variety of other states, including Canada, all of which are broiling with critique and revolutionary thought and praxis in the sixties and seventies, than an actual sense in which for many countries, in this case Canada as much as Italy, a new theoretical and conceptual apparatuses becomes increasingly necessary at this point, namely the point of passage between the modern and the postmodern.

The emergence of the global metropolis

Mills' *The Empire Within* presents a ten year study of social movements in Montreal from 1963 to 1973 and documents the complex crosscurrents of radical thought among Francophone, Anglophone and Allophone workers, youth, people of colour, women, Aboriginals and left intellectuals in Montreal during this epoch. The portrait of political struggle and activism, as well as cultural and artistic consciousness raising and social experimentation presented in the book, glimpses the Canadian metropolis perhaps most profoundly influenced by the events of May '68 in France and the intensification of the civil rights movement in the US, Montreal.

Montreal, like other global metropolises (including the Italian ones), was in the sixties and seventies capable of generating its own unique and autonomous forms of struggle. Something which Mills presents in both the self-described 'anti-colonial' strategies of white Catholic Quebecois nationalist militants, some of whom went so far as to style themselves '*les Nègres blancs*' of North America,⁶¹ and the more diverse anti-racist, feminist and labourite struggles of students, activists and youth, all of whom began, in the sixties and seventies, to propose what Mills calls a "constantly metamorphosing counter-hegemonic challenge to Empire" across the social terrain.⁶²

Despite his lack of citations to Negri, other than the one obliquely contained in the title of his book itself, the imagining of constitution which Mills finds presented in Montreal's urban social movements of the sixties and seventies is intensely Negrian: "Along the way, an increasing number of people came to believe that society, rather than being

⁶⁰ Ginsborg n 8 above at 246-247, 352-354.

⁶¹ An incendiary, and extraordinarily inaccurate, coinage attributable to Pierre Vallières book of the same name. See P. Vallières, *White Niggers of America* (Toronto: McClelland and Stewart, 1971).

⁶² Mills n 20 above at 11.

the natural or inevitable result of history, was an active project of creation.”⁶³ This statement at least has the Dionysian spark, which, I argue, is among the hallmarks of Negri’s autonomism. It also has the same joyful and never cynical tonality in which Hardt and Negri so famously write. Rather than treating the transition from the sixties to the seventies in terms of terrorism and death as grasped in the events of October 1970 (as they are most often presented in Canadian historical retrospectives, whether federalist or nationalist⁶⁴), Mills offers an account of the period teeming with life, one which does not revolve around the police violence of the State any more than the militant reaction to it (or vice versa). His argument is that despite outbreaks of terrorist violence in the period, the intense revolutionary spirit which broke forth in the bodies and minds of the metropolis, particularly amidst the young and creative, was a new form of subjectivity, non-nationalist, heterogeneous, extra-parliamentary, and in the standard gloss of the period, too often forgotten.

Crucially, Mills presents the complex way in which global, *sub*, *supra* and *transnational* events coincide with the civil rights struggle of subaltern peoples in Montreal, which was, like many of Italy’s central and northern cities at the time, a hotbed of social experimentation at least as much, or more, than one of terrorist violence.⁶⁵

Nevertheless, terrorist violence did explode in spectacular fashion in the seventies in Italy, Canada and elsewhere. And wherever it did, it raised the question of complicity between social movements and violence. In Italy we know the story well, and Negri is a central character.

In Canada there was no similar dragnet of intellectuals.⁶⁶ However, the kidnap murder of Pierre Laporte led to an even more extraordinary jettisoning of the rule of law, the

⁶³ Ibid. 8.

⁶⁴ For a leading federalist formulation see n 1 above at 18-19: “The October Crisis was not merely a series of events that took place from October to December 1970. It was rather one episode in an accumulation of revolutionary, clandestine, and terrorist activities from 1963 to 1973...” Nationalists find this type of construction tiresome see eg Bouthillier and Cloutier n 6 above at 17: “To begin the narrative with Pierre Laporte means that it will end with Pierre Laporte. Our memory of events remains locked up, gagged, like he was, in the trunk of a car...The shame – or guilt – about October is palpable, at least in Quebec and particularly among sovereigntists.”

⁶⁵ Relative to the Italian situation, Lotringer and Marazzi’s anthology contains a variety of writings by and about autonomist forms of social experimentation, collective life, performative politics and feminist intervention see eg E. Cherki & M. Wieviorka, ‘Autoreduction Movements in Turin’ Lotringer & Marazzi n 5 above at 72-79; M. Torealta ‘Painted Politics’ in same at 102-106; J. Malina, ‘Nonviolence in Bologna’ in same at 122-129, L. Magale, ‘The City in the Female Gender in same at 136-144. See also Ginsborg n 8 above at 298-347.

⁶⁶ The role of Quebec nationalist ‘intellectuals’ in the October Crisis generally flows from the initiative of 16 self-described ‘eminent personalities’, all of whom drafted and signed an open letter on October 14, 1970 urging the Quebec Government to release jailed FLQ members whom they described as ‘political prisoners’ in exchange for Cross and Laporte. None of these eminent personalities were arrested or detained and those who remain alive today continue to be public personalities in Quebec and Canada

suspension of the normal legal order and a declaration of a real or apprehended insurrection under the *War Measures Act*.⁶⁷ Speaking of that moment in history, Mills writes, “[w]hile the political violence of the FLQ, which was both morally and politically destructive, needs to be understood, there is a serious danger of allowing that single group to represent the periods’ activism.”⁶⁸ Negri made the same point about the relationship between the various social movements of the sixties and seventies and the RB in response to his interrogators at trial.⁶⁹ There can be little doubt however that spectacular shows of violence tend to make a historical impression which overshadows millions of more mundane but nevertheless equally meaning laden acts.

The legacy of violence

Although Canada did not emerge from the same historical experience of fascism and total war as Italy, both countries were faced in the post-war epoch with the remembrance of some fairly grievous wrongs perpetrated by the State during wartime. In both cases, this meant a certain recollection of violence and state excess which remained fresh. Grievous wrongs had occurred at the hands of Mussolini’s fascist dictatorship. They also occurred in Canada, albeit at times in a less dramatic sense, in the hands of its democratically elected wartime government. Guy Bouthillier and Edouard Cloutier, two Quebec commentators, connect this epoch in which there was much suspension of dissent and marginalization of anti-conscription Quebeckers, as carrying over into the events of October 1970. In their preface to their fortieth anniversary edited anthology retrospective on the October Crisis, *Trudeau’s Dilemma*, they recall a chain of early twentieth century occasions upon which the Federal Government evoked the *War Measures Act*, thereby permitting it wide ranging emergency powers including the suspension of basic civil liberties of all sorts.⁷⁰ All of

(despite having been described by Prime Minister Trudeau, his chief of staff, Marc Lalonde, top ministers in the federal cabinet, Montreal Mayor Jean Drapeau and federalist news outlets, as conspiring to form a ‘provisional government’ in Quebec. For a critique of this over-stated and unproven allegation see P.C. Newman, ‘A Meticulously concocted lie’ in *Trudeau’s Darkest Hour* n 6 above at 95-110). The 16 signatories included René Lévesque, then leader of the opposition Parti Québécois (PQ) (who would become Premier and lead the province in its first failed referendum in 1980) Claude Ryan the editor of *Le Devoir*, Jacques Parizeau, president of the Executive Council of the PQ (who would also later become Premier and lead the Quebec’s another failed referendum on sovereignty in 1995) and a variety of university professors and union bosses. See n 1 above at 50-58 for a scathing critique of the petition which Tetley describes as riddled with factual errors and “written in polemical and disputatious language.” For a full text copy of the petition and a list of all signatories see n 1 above at Appendix 3, 232-233.

⁶⁷ n 5 above.

⁶⁸ Mills n 20 above at 8-9.

⁶⁹ A translated transcript of which is included in Lotringer and Marazzi’s anthology n 5 above at 188-194.

⁷⁰ A formulation which is arguable only as a question of semantics, something which federalist commentators and participants like former Bourassa cabinet minister (and current McGill Law Professor) William Tetley, offer up in defence of the Provincial Liberal Government in Quebec City and

which occurred a generation before the FLQ had begun its terrorist campaign in the sixties and Trudeau's government had been provoked into cracking down on it. These included in Quebec specifically, the conscription crises of 1914 and 1940 in which the draft led to widespread outrage among Francophones unwilling to spill blood in 'Europe' or 'Britain's War'.⁷¹ It also occurred across Canada more generally in the persecution and internment of suspected fascists, communists, Jehovah's Witness conscientious objectors and Canadians of Japanese, German and Italian descent for 'security' and 'counter-espionage' reasons which reached fairly high degrees of excess.⁷² All of which ultimately add to the shameful Canadian record at home while its men fought to vanquish fascism overseas, a strange little irony (and one shared by its neighbour to the south). None of these historical events of course in any way compare with colonial conquest itself, which wiped out the mass of Indigenous people from the continent in prior generations. However, they are more recent. They also explain, at least in part, why up until the very end of the twentieth century and perhaps still in some quarters today, a significant portion of Francophone Quebecois to view English Canada with unbridled suspicion.

The objective thus far has only been to lay the groundwork for this thesis which draws, particularly in its more concretized second half, on events or narrative trajectories in the eighties and nineties which had their precursors in the earlier decades of the post-war period. In the context of the October Crisis, when the *War Measures Act*⁷³ was invoked on October 16, 1970 it would still not be the first time in living memory for the older generation. For many, particularly in Francophone Quebec, the conscription crisis of the early forties had been the defining moment of their youth. Some had lost fathers in 'the great war' and recalled struggles between police and young people bitterly.⁷⁴ They were in many ways the sympathetic multitude of deserters which Hardt and Negri

the Federal Liberal Government in Ottawa see eg n 1 above at xxiv: "...it is often said that it was Prime Minister Pierre Elliot Trudeau who was responsible for the imposition of the *War Measures Act*, not [Quebec Premier Robert] Bourassa or the city of Montreal. This is wrong. Montreal called for the application of the act...It is also generally believed that the War Measures Act Regulations of 16 October 1970 took away all civil rights. Again, this is quite wrong..." At the other end of the spectrum see Bouthillier & Cloutier n 7 above at 15: "The War Measures Act is based on unbridled authority, fear, and the threat of violence...That act was invoked in the middle of the night on October 16, 1970, at 4 a.m. to be exact. Soldiers had already been deployed in Quebec...The War Measures Act and its regulations declared that the FLQ was illegal and that it was a crime to be, or to have been, a member. The prime minister provided three official reasons for invoking the act: the kidnappings, the request made by the government of Quebec, and 'confused minds.' These reasons are curious and suspicious..."

⁷¹ n 12 above at 185-188 (relative to World War I) and 238-239 (relative to World War II).

⁷² Bouthillier & Cloutier n 7 above 14-15, Morton n 12 above at 225, 237.

⁷³ n 6 above. For a legislative history of the *War Measures Act* see n 1 above at 81-83; and for historical commentary see D. Morton n 12 above at 176.

⁷⁴ n 71 above.

so valorize in *Empire*.⁷⁵ While the Italian youth were fleeing the front in droves the Quebecois youths refused conscription, same war, opposite sides, same basic instinct or desired line of flight.

C. Canadian liberalism, the rule of law and rethinking the legacy of Trudeau: what can Negri contribute?

In their analysis of Canada in 1970, Bouthillier and Cloutier in particular suggest that the actual uniqueness of the historical moment was tied less to the anomaly of resort to emergency powers, something which was already well established, if not normalized, in twentieth century Quebec.⁷⁶ But rather, to a more central contradiction in the legacy of Pierre Elliot Trudeau, Canada's immensely charismatic and long serving Liberal Prime Minister.⁷⁷ Someone who, a decade after his death, has been assimilated into the great man theory of history in Canada without further ado, someone whose basic form of liberal multiculturalism, its hybridization of the rights and the social state, remains utterly hegemonic in Canada only to be debated in universities and highbrow editorial pages wherever the basic tension between the autonomy of the political and 'the Rule of Law' come into contact, usually in some violent sense.

If the conscription crisis was the parents' subjectivizing moment, the October crisis was their children's. In it, Trudeau, like all politicians or statesmen, was willing, where necessary, to accent the political autonomy over the rule of law. That is, where it is necessary to defeat a threat to the state or an existential crisis for sovereignty itself. Usually Trudeau is himself the central protagonist or antagonist, depending on which side of the federalist-nationalist debate one is on. Although Negri does not write on Trudeau or Canada, both of which would likely be a fairly far removed or even marginal to his own life experience, he can be said to offer certain important potential critique of the form of constitutionalism understood to be Trudeau's primary legacy. A legacy which is bookended by two events: the 1970 FLQ Crisis and the 1982 patriation of the Charter. In this introductory chapter I have emphasized the first as a fault line which opens up around the question of whether Trudeau is to be credited for staring down the FLQ terrorists and securing the peace or conversely, of suspending civil liberties in a massively overblown way which betrayed a shallow commitment to the rule of law and more fundamental impulse toward the assertion of sovereign power. Again, depending on your ideological proclivities, things tend in Canada to be read one way or the other.

⁷⁵ n 4 above at 212-214.

⁷⁶ See generally n 6, 71- 73 above.

⁷⁷ Trudeau was Prime Minister 1968-1979 and 1980-1984.

For Negri, however, the dilemma or choice between the assertion of political autonomy and its curtailment in the rule of law, is a false dialectic. As is, this thesis suggests the entire terrain of the social contract upon which these types of formulations rely for their meaning, particularly insofar as they interpose themselves as species of de-ontological normative science. It is therefore impossible for him to turn toward the types of liberal ideological coordinates put in play in Trudeau's thought and praxis and to rely on them uncritically. This is not only what distinguishes Negri from many who are, and were, much closer to him than the liberal and at times mildly social democratic Trudeau. It is more than anything an insistence on social, rather than political autonomy, of an attention to material rather than only formal constitution. To explain what might be meant by this in a more concretized sense, it is necessary to defer the reader to the second case study on Canada's epoch of mega-constitutional politics (Chapter V).

For the moment, however, what is necessary to reiterate and explain is the basic and relatively non-controversial baseline of this thesis: Trudeau's civic nationalism, federalism and bilingualism, combined with his multiculturalism in a way which would theoretically prevail over resurgent nationalism in Quebec by promoting a plurality of diverse constituencies, all of which are, in one way or another, recognized beyond the old 'two nations' theory of confederation.⁷⁸ This basic Trudeauian project has not only been exported across the world to a variety of 'emerging' or 'transitional' federal states,⁷⁹ it became so deeply entrenched, even hegemonic in Canada itself. Its coordinates were inscribed in the Charter and subsequently expounded by more and more emboldened and 'activist' courts, some of whose justices were appointed by Trudeau and others by his Conservative successor, Brian Mulroney. The result is a distinctly different judicial theory of interpretation north and south of the border. I add this comparative note only insofar as it is usually fairly taken for granted that judicial appointment process in Canada is more insulated from political ideology than it is in the US.⁸⁰ The analysis of which is well outside the scope of this thesis but nevertheless worth bearing in mind.

⁷⁸ See eg R. Graham (ed), *The Essential Trudeau* (Toronto: McLelland & Stewart, 1998) citing Trudeau at 145: "The decision by the Canadian government that a second language [French] be given increased official recognition is, in indirect fashion, support for the cultivation and use of many languages, because it is a breach of the monopoly position of one language and an elevation of the state of languages that are 'different'Every single person in Canada is now a member of a minority group. Linguistically our origins are one-third English, one-third French, and one third neither..."

⁷⁹ See generally S. Choudhry, 'Does the World Needs More Canada' in S. Choudhry (ed), *Constitutional Design for Divided Societies* (Oxford: Oxford University Press, 2008) at 141-172. See also my review of same, 'Rethinking 'Constitutional Design' and the Integration/Accommodation Dichotomy' (2010) 73(4) *Modern Law Review* 656-678.

⁸⁰ See eg B. Alarie & A. Green 'Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada' (2008) 58 *University of New Brunswick Law Journal* 73: "...the literature tends to find a clear difference in how justices on the US Supreme Court vote,

It is certainly in no way controversial to suggest that Canada's Supreme Court has been decidedly more and more purposive and more and more expansive in its interpretation of the Constitution, to say that it shares very little in terms of judicial philosophy or culture with their strict constructionist counterparts on the dominant right flank of the US Supreme Court is to state a fact.⁸¹ This is an interesting question of comparative jurisprudence and ideological analysis which I will leave to others. In Canada it is necessary to emphasize at the outset, the Supreme Court often leads Parliament and even the Canadian population on questions on touchstones of progressive politics in the west, like abortion⁸² and 'gay rights',⁸³ all of which were things about which Trudeau took a progressive position, and prevailed, at least in a formal if not always in a material sense. For this, he is fairly, and I think at least instinctively, regarded as a man of the left and a principled liberal by friends and foes alike. However, if one examines the events of October 1970 in particular and thinks about them more generally in terms of seventies as an epoch in the west, things look potentially quite different.

Much of the literature on Trudeau in fact begins at the basic question of the October 1970 evocation of the *War Measures Act*, at his suspension of the rule of law in the face of terrorism, at his fundamental assertion of the autonomy of the political, at his Schmittian move. How could this be the same Trudeau of May 1982 who triumphantly signed the Charter into law? Perhaps 1970 and 1982 can be proposed, in the Canadian case, as basic dialectical counterpoints. Not only in the historical and biographical scholarship on Trudeau, but in the Supreme Court jurisprudence of the era.

Ultimately, the only thing which unites 1970 and 1982 theoretically for Trudeau, and his Liberal Party successors, is their tie to the basic representational frame of the social contractual relation between the many and the one, constituent and sovereign power,⁸⁴

depending on whether they were appointed by a Republican or Democratic president...In Canada, under a very different appointment process, recent empirical research has found that there is a much weaker connection between how justices vote on divisive cases and the Prime Minister who appointed them. Generally, Canadian Supreme Court justices appear to agree more often than the justices do in the US and, when they disagree, the lines of disagreement are less predictable than in the US..”

⁸¹ Ibid.

⁸² *R. v. Morgentaler* [1988] 1 SCR 30.

⁸³ *Vriend v. Alberta* [1998] 1 SCR 493.

⁸⁴ See eg n 78 above at 46: “While understanding as well as anyone else the limits of government and the law, the liberal knows that both are powerful forces for good and does not hesitate to use them”; 66: “The problems of organizing society are really problems of getting men and women to agree to the social contract, which really means getting them to accept the basic premises on which the society is founded...”

one which Negri is determined to treat by way of immanent critique and conceptual innovation rather than by way of uncritical reception. However, Negri did not write about Trudeau or the Canadian situation and very likely knew little of it. I must therefore further explain why and how it is that I believe Trudeau is a necessary departure point for this Negri-inspired thesis.

For the better half of the last century, and even after his death in 2000, Trudeau remains a figure as much reviled as he is lionized. Unlike many historical Prime Ministers before and after him, he is rarely the subject of casual disinterest or ignorance among Canadians. It is in this sense not surprising that his historical personality would be one onto which a variety of peculiarly Canadian anxieties are projected. Some of which are distilled in the central contradiction between Trudeau's assertion of the autonomy of the political as a material response to the terrorist violence of nationalist militants in 1970, which Bouthillier and Cloutier describe as "Trudeau's darkest hour" in their book of the same name,⁸⁵ and his assertion of the rule of law as a formal response to the same underlying federalist/nationalist tension in the 1982 patriation of the Canadian Charter of Rights and Freedoms.⁸⁶

How is it, virtually every historical commentator seems to suggest, that the very same figure who evoked the *War Measures Act* and sent the army into the streets of Montreal, could a short 12 years later be celebrated as a democratic innovator? It is in part to answer this difficult question that commentators and participants, like Tetley, insist Trudeau acted 'at the request of' (the equally federalist) Quebec Premier Robert Bourassa's (equally Liberal) Government in Quebec City,⁸⁷ as if such a distinction were pivotal to determining the 'legality' as much as the morality and democratic bona fides of Trudeau and of the federalist 'side' more generally.

Twelve years after the October Crisis, still as Prime Minister, an older, wiser Trudeau masterminded 'patriation', Canada's adoption of a new, wide ranging constitutionally entrenched Charter of Rights and Freedoms ('the Charter').⁸⁸ This is the central

⁸⁵ n 6 above.

⁸⁶ See generally P.W. Hogg n 6 above at 55-62, describing '*patriation*' as a uniquely Canadian coinage which refers to the (1) "autochtony" of the constitutional order or the requirement that "a constitution be indigenous, deriving its authority solely from events within Canada..."; (2) "termination of imperial authority"; and, (3) "autonomy" of amendment power within the legislative competencies of the provincial and federal governments (in other words, the removal of any role for the British Parliament in constitutional amendment).

⁸⁷ n 1 above at xiii-xiv.

⁸⁸ "The Constitution of Canada" is a term of art which refers to the list of instruments contained in the schedule to the *Constitution Act*. Two legislative instruments were required to separate the provisions relating to the UK parliament (in the *Canada Act*) from those relating to the Canadian Parliament and

contradiction of his life and legacy and it is a good a preliminary historical and contextual departure point for this thesis. Why? Because in the 40 years since the FLQ crisis, as much as the 29 since patriation of the Charter, the central question remains: How could the Liberal Prime Minister who went on to become the father of Canada's contemporary constitutional order have the taint, earlier in his career, of having suspended the very legal order, which he sought not only to improve, but to surpass at its end? It may be impossible to answer these types of questions in any definitive sense. Certainly Trudeau's better biographers have tried.⁸⁹ Yet, it is still worth considering how all of this might be said to be opened up as part of a broader period of tension between the State and terrorist violence in the seventies, which was by no means specific to Canada or its leaders.

D. Conclusion

Recall in Italy, where, in the aftermath of the kidnapping of Aldo Moro, the PCI would find itself in a similar position to Trudeau's Liberal government. Both offered the public some preliminary version of the George W. Bush alternatives to their populace: 'You are either with us or against us'. Predictably the answer is always the same: 'With us.' In fact, all members of the political class in Italy and Canada, left and right, joined with their parliamentary rivals to support the government's refusal to negotiate for the release of hostages at the moment of high national crisis in the seventies.⁹⁰ The immediate results in both countries could not have been grizzlier. Both Laporte and Moro were murdered in violent and spectacular fashion.⁹¹

Provincial Legislatures (in the *Constitution Act*) see generally n 6 above. Section 52(1) of the *Constitution Act* provides: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." This provision is crucial because it generates a new myth of origins by terminating Parliamentary supremacy and transferring the locus of sovereignty from Parliament to the Constitution itself.

⁸⁹ See eg S. Clarkson & C. McCall *Trudeau and Our Times: Vol. I: The Magnificent Obsession* (Toronto: McClelland & Stewart, 1991) who make one of the more interesting attempts to explain this contradiction: "Though he anguished in private as a democrat about suppressing civil liberties in favour of military action, Trudeau—the student of Carl Friedrich, the offspring of the Weimar Republic, which had succumbed to Hitler's terrorism for lack of adequate emergency powers – invoked the *War Measures Act* to deal with the crisis and then talked to reporters as though he were playing yet another 'I'm superior to you guys' game. 'Just watch me,' he shot back provocatively when asked how far he would go in seeking to put down terrorism."

⁹⁰ In Canada both the provincial government in Quebec City led by Robert Bourassa's Liberal Party and the federal government in Ottawa led by Pierre Trudeau's Liberal Party refused to negotiate for Cross or Laporte's release (although the separatist PQ opposition in Quebec took the opposite view and in Ottawa both the major opposition parties also had reservations). Negotiation would have meant freeing jailed members of the FLQ n 1 above at 38-49. In Italy the PCI joined with the governing CD in the refusal to negotiate for Moro's release (however the socialist PSI urged a more moderate stance). Ginsborg n 8 above at 383-385.

⁹¹ Laporte's strangled body was found on October 17, 1970. His kidnapers, Francis Simard, Paul Rose, Jacques Rose and Bernard Lortie were captured, tried and convicted. When released Simard published a

Nothing here is especially new. The outcome of terrorist violence is always the same: State, police and military counter-violence. Perhaps there is no alternative to this cycle. What would we have the State do? Offer tea and biscuits to those who seek to destroy it, formally if not materially, by striking at the life and limb of the multitude? This is not what I am suggesting here. But I do very much see, like most who are progressive in the most basic sense, that there is something positively undemocratic about the balance the State achieves when it intervenes directly against its 'enemies', particularly those which are 'internal' to it, or in its midst. I can also see that the term 'terrorism' is not unlike its inverse, 'security', an extraordinarily empty and perhaps even irredeemably empty signifier. This is not to suggest, as some do, that any form of state action against terrorism is 'State sponsored terrorism'. This type of formulation obscures more than it illuminates insofar as the two types of violence imagined and their claims to moral or legal legitimacy are rarely equivalent. Not necessary better or worse, but quantitatively and qualitatively different.

Even the usual civil liberties tact of critiquing as much as combating state excesses in response to terrorism has its limits insofar as it does not reach toward new concepts or ways of thinking about sociality beyond those of citizenship or human right. It is, in other words, a form of discourse which is neutralized or suspended, without a hint of irony, by legal right itself (in Canada pursuant to the *War Measures Act*, itself a statutory instrument). Not only is all of this a highly tautological legal illegality, but the meaning of violence, by or against terrorists, and its political import, as well as its relation to a broader social bond can vary radically from one situation to the next. As can the definition of terrorism itself. So much so, that it is almost impossible to make any sort of definitive statement on the phenomena, let alone offer up a Negri-inspired one.

Nevertheless, the question of terrorism and in particular any possibility of its relation to a 'legitimate' constituent power is one which Negri takes very seriously and continues to grapple with today. Most poetically and pithily he has recently taken it up in three short plays: 'Swarm' (2004), 'The Bent Man' (2005) and 'Cithaeron' (2006). Each of which explores, in a different context, the tragic boundary between resistance and

book in which he admitted to participating in the murder however he did not identify who whose hand, among his co-defendants, took Laporte's life see generally n 9 above. Aldo Moro was killed on May 9, 1978 and his body dumped, in a show of grizzly symbolism, on Via Caetani in Rome equidistant from both the DC and PCI headquarters. Although Antonio Savasta, a leading member of the RB and confessed killer was very likely responsible for Moro's murder, 22 activists and intellectuals arrested on April 7, 1979 were tried and convicted by Judge Pietro Calogero in Padua (who was himself closely tied to the PCI). This is a miscarriage of justice which is now largely admitted by even bourgeois historians see eg Ginsborg n 8 above at 386-387.

death. Each time treating the act of self-destruction or suicide as a radically individualizing and essentially negative act which can, nevertheless, take on different forms of being, from the martyrdom of the solitary suicide bomber whose act is motivated by frustration and desperation, to the rebellion of the resister or anti-fascist partisan whose death is as part of an act of strategic subversion. And finally, to the more complex death which comes not from “direct and/or dialectical opposition of forces” but instead from a more collective “oblique or diagonal stance”, a line of flight or an interruption of it.⁹²

For Negri, the question of revolutionary as much as terrorist violence is always played out somewhere on this complex terrain. For the moment, however, it is the task of the literature review chapter to follow to flesh out precisely what it might mean to say that I am proposing, in this thesis, what I call a ‘Negri-inspired’ theory of constitutionalism. Once again, this will mean a return to the sixties and seventies. This time, rather than focusing on Canadian or Italian legal or political events, I look to Negri’s key texts written at the time, particularly insofar as they are required to ground a more sustained presentation of Negri’s English language collaboration with Hardt in Chapter III and a more concretized reading drawn against the backdrop of Canada’s post-Charter epoch in the second half of the thesis (Part II: Chapters IV-VI).

⁹² T.S. Murphy, ‘Translators Introduction’ n 26 above at xiv-iv.

Chapter II - Literature Review: Unearthing a 'Negri-inspired' theory of c/Constitution

Paradoxically, in the last fifteen years [since the 1948 postwar Italian Constitution], the Constitution has become so firmly embedded in the consciousness of Italians, juricists and politicians alike, that today we consider as solid bases what yesterday were most suspect: its ideological and political foundations. If ever they believed there were a need to go beyond the Constitution, they would do so in the service of those foundations!

A. Negri, 'Labour in the Constitution' (1964)¹

The old Constitution was founded on the hypothesis of regulating civil society and its conflicts. As the Constitution confronts the intrusiveness of social capital and the virtual withering of civil society (in the real subsumption of social labour under capital), its obsolescence is the qualitative outcome of the accumulation of contradictions that completely unsettles the terrain of constitutional expectations...the old Constitution – presents a surface full of malfunctions and asymmetries, the analysis ought to move on the deeper contradictions that underlie these superficial aspects.

A. Negri, 'Toward a Critique of the Material Constitution' (1977)²

Spinoza uses the social contract (in the first phase only, however) as a scheme of a constitutive process, rather than as a motor for the transfer of Power (potestas)...He poses potentia [power] against potestas [Power]. [citation omitted]. It is no coincidence that Spinoza's thought would appear 'acosmic' to the eyes of Hegel, that great functionary of the bourgeoisie!...Spinoza is the clear and luminous side of Modern philosophy. He is the negation of bourgeois mediation and of all the logical, metaphysical, and juridical fictions that organize its expansion....His contemporaries, preoccupied with debating the definition of bourgeois mediation of development, could not conceive of this but as anomalous and savage.

A. Negri, *The Savage Anomaly* (1981)³

¹ A. Negri, 'Labour in the Constitution' in M. Hardt & A. Negri, *Labour of Dionysus* (Minneapolis: University of Minnesota Press, 1994) 56.

² A. Negri, 'Toward a Critique of the Material Constitution' in A. Negri, *Books for Burning* (London: Verso, 2005) 207.

³ A. Negri, *The Savage Anomaly* (Minneapolis: University of Minnesota Press, 1981) 140,142-143.

[C]onstituent power is the definition of any possible paradigm of the political. The political has no definition unless it takes its point of departure from the concept of constituent power. Thus, far from being an extraordinary apparition or clandestine essence caught in the net of constituted power, constituent power is the totalizing matrix of the political. Both the traditional metaphysical definition of the political command over the community or the irrational definition that imagine the political as the realm of more or less legitimate violence haplessly fall away in front of what the political actually is: the ontological strength of a multitude of cooperating singularities...

A. Negri, *Insurgencies* (1991)⁴

A. Introduction

Antonio Negri's constitutional theory in the sixties and seventies is introduced in this chapter primarily through two key essays: 'Labour in the Constitution' (1964)⁵ and 'Toward a Critique of the Material Constitution' (1977).⁶ Both rely on a distinction between the 'material constitution' and the 'formal Constitution' which I refer to by way of the shorthand contraction, 'c/Constitution'. These essays are prerequisites to a more expanded examination of Negri's critique of the social contract in the eighties and nineties in two monographs: *The Savage Anomaly* (1981)⁷ and *Insurgencies* (1991).⁸ In this chapter I present these four texts, alongside a variety of other texts authored by Negri and like-minded autonomist thinkers, as a basis for the next chapter's (Chapter III) consideration of the more recent English language collaboration between Negri and his co-author, Michael Hardt. A collaboration which takes shape in three volumes, *Empire* (2000),⁹ *Multitude* (2005)¹⁰ and *Commonwealth* (2009),¹¹ each of which grounds one of the Canadian case studies in the latter half of the thesis (Part II: Chapters IV-VI).

B. The material and the formal c/Constitution

Although the crucial distinction between the material and formal c/Constitution is not consistently formulated by way of capitalization in (Hardt and) Negri's texts over five decades, the basic distinction is apparent already in Negri's early 'Labour in the Constitution' (1964), an essay in which he recasts the "problem central to constitutional science" as the "problem of the relationship between the material foundation and

⁴ A. Negri, *Insurgencies* (Minneapolis: University of Minnesota Press, 1991) 333.

⁵ n 1 above.

⁶ n 2 above.

⁷ n 3 above.

⁸ n 4 above.

⁹ M. Hardt & A. Negri, *Empire* (Cambridge Mass.: Harvard University Press, 2000).

¹⁰ M. Hardt & A. Negri, *Multitude* (London: Penguin, 2005).

¹¹ M. Hardt & A. Negri, *Commonwealth* (Cambridge Mass.: Harvard Belknap Press, 2009).

formal constitution of order”¹² . The same concept is developed explicitly by way of capitalization over a decade later in ‘Toward a Critique of the Material Constitution’ (1977):

The Constitution is no longer the law of all laws: laws proceed by themselves, following the pace and coherence of the constitution of a new structure of political power. A *new regime* is taking shape day by day and a *new material constitution* is arising.¹³

Having prophesied the arrival of a new material constitution, Negri develops a critique of ‘bourgeois constitutional science’. Here, his attack is aimed at all those on the (centre) left or right, who continue to assume the representational apparatus of ‘the [formal] Constitution’ as their privileged object of study. Or perhaps more specifically, it is aimed at reformists who continue to uncritically presuppose the instrumental relationship between the formal Constitution and the material constitution and in so doing, wrongly assume that the former is driven exclusively by the latter in a top down relationship:

We can now begin to appreciate the extent to which bourgeois constitutional ‘science’ flails about in the confusion of an exhausted task (the realization of the Constitution) and a vaguely perceived need for the (the modifications in the material constitution). We have begun to catch sight of some of the characteristics of the new era of class struggle – those that impose an adequate modification of the material constitution from the view point both of the dimension of struggle and the quality and incisiveness of behaviours.¹⁴

Clearly, the organizational distinction between the two forms of constitution (material and formal or c/Constitution) did not emerge suddenly or without warning in *Empire* (Hardt and Negri’s most widely read, published and translated monograph). It has deeper roots in Negri’s earlier texts in the sixties and seventies. Nevertheless, it is important enough, and perhaps less familiar to their expanded English language readership, for Hardt and Negri to remind readers of its centrality and to offer a simplified definition of it immediately in the preface to *Empire*: “by ‘constitution’ we mean both the *formal constitution*, the written document along with its various amendments and legal apparatuses, and the *material constitution*, that is, the continuous formation and re-formation of the composition of social forces.”¹⁵ Although this formulation does not employ capitalization to distinguish between the two types of constitution in the same way as Negri’s earlier texts on the c/Constitution in the sixties

¹² n 1 above at 53-135, 63. See also n 2 above at 180, 188, 208; n 3 above at 188; n 4 above at 199, 292-293.

¹³ n 2 above at 180.

¹⁴ Ibid 189.

¹⁵ n 9 above at xiv.

and seventies, it does sharpen and update a theoretical application which may be useful for Anglo-American and specifically Canadian critical constitutionalists.

The starting point here is *conceptual* and I use the term ‘conceptual’ advisedly. I realize it implies that (Hardt and) Negri engage, more than anything else, in a species of conceptual philosophy. Something which, despite Negri’s recent suggestions to the contrary,¹⁶ I believe they do.¹⁷ I am thinking here of a recently published book length interview with Cesare Casarino, in which Negri attempts to differentiate his own form of thought, less by distinguishing it from the definition of philosophy developed by Deleuze and Guattari’s in their final book, *What is Philosophy?*, as “the production of concepts”, which he likes, as a departure point, but rather by pressing ahead to the process of material constitution itself:

[I]t is not exactly the case that their [Deleuze and Guattari’s] definition of philosophy as production of concepts is incorrect or misguided: this definition does capture an important element of philosophical activity – and yet it is still inadequate. Neither is it the case, of course, that concepts are unnecessary or unimportant—on the contrary. What is crucial, however, is not to mistake the definition of a concept – which at most constitutes a propaedeutic instrument – for a real transformation in history, which is what the concept should help us analyze and understand.¹⁸

For Negri then, conceptual philosophy is a crucial component of the philosophical project, however it does not and cannot exhaust the material praxis which underlies it. For a concept to become useful, Negri suggests, it must be converted into a material act of constitution, an actual praxis, something which is *not* purely a species of representation. It is the productive quality of concepts and the antagonism which they contain, in other words, which interests Negri:

[T]he construction of concepts is not only an epistemological operation but equally an ontological project. Constructing concepts and what they call ‘common names’ is really an activity that combines the intelligence and the action of the multitude, making them work together.¹⁹

In this sense we can say the depth of Negri’s reading of the concept in Deleuze and Guattari’s *A Thousand Plateaus* (1980) in which the authors give a very similar

¹⁶ See A Negri & C. Casarino, *In praise of the common* (Minneapolis: University of Minnesota Press 2008) 35-36, 185.

¹⁷ See eg n 9 above at xiv, fn2 at 415 describing Empire “*not* as a metaphor” but “as a concept, which calls primarily for a theoretical approach [citing ‘Le concept d’empire,’ in Maurice Duverjer, ed., *Le concept d’empire* (Paris: PUF, 1980)]”.

¹⁸ n 17 at 185.

¹⁹ n 9 above at 302.

definition of concepts and the task of philosophy toward it: “[w]ords are concepts” and:

Nowhere do we claim for our concepts the title of a science. We are no more familiar with scientificity that we are with ideology; all we know are assemblages.²⁰

Nearly two decades before Deleuze and Guattari had written these words, which would along with the book in which they were written, be significant for both Hardt and Negri’s intellectual trajectory, a much younger Negri wrote ‘Labour in the Constitution’ (1964). A formative essay, in which he introduced the basic thesis, taken up in this doctorate, that “the relationship between the *material* foundation [of capitalist production] and the *formal* constitution of [the political] order [emphasis my own]” is *the* “problem central to [modern] constitutional science”.²¹ This relationship is one which Negri suggests even by the early sixties reaches a point of crisis in advanced capitalism where the Marxian notion of the real (and no longer simply formal) subsumption of labour to Capital realizes itself in such a way as to cause “the distinction between economic [material] constitution and political [formal] constitution to ‘drop out’”.²²

In the 1964 ‘Labour in the Constitution’, Negri polemicizes, rather than celebrates, the recognition of labour as a constituency at the head of Italy’s 1948 Constitution. Treating it as a reformist trick of capital and sovereign power; by the time he would write ‘Toward a Critique of the Material Constitution’ in 1977, he had radicalized even further. In that essay Negri makes explicit that the space between the formal and material C/constitution has continued, over the 13 years between the texts, to make an impact in more and more obvious ways. Speaking of the demise of the modern constitutional form (the formal Constitution), or at least its declining effectiveness in determining or shaping the real constitution of labour and of the social (the material constitution), Negri is clear:

This is not news: we all know that Constitutions are transient and sticky institutions, and the formal continuity of the Constitution of 1948 will hardly be put into question; but liturgical ceremonies and visits to the temple are probably going to continue, even more often as faith in them fades. However, ‘Germany is no longer a State,’ [citation omitted] that is, the (Hegelian) state required by those leaders and administrators who demand the correspondence, in principle, between the formal and the material character of the constitutional process, as required by the system of ‘certainty’ of right [*diritto*]. The Constitution is no longer the

²⁰ G. Deleuze & F. Guattari, *A Thousand Plateaus* (London: Continuum, 2000) 25.

²¹ n 1 above at 63.

²² *Ibid.*

law of all laws: laws proceed by themselves, following the pace and coherence of the constitution of a new structure of political power. A *new regime* is taking shape day by day and a *new material constitution* is arising. [citation omitted]²³

By 1977 Negri would grasp the 1948 (formal) Constitution of Italy as more discordant with the (material) constitution of labour than ever. He would argue that the modern science of the Constitution and the truth apparatus to which it corresponds is becoming increasingly destabilized. To convey this idea, Negri evokes the language of the event: “[t]his essay aims to demonstrate that the political event of the [Italian] Constitution of 1948 is now over.” In a similar sense, this thesis aims to demonstrate that the political event of ‘patriation’ the Canadian Constitution and the Canadian Charter of Rights and Freedoms²⁴ is now over.

Our argument, like Negri’s in 1977, will be that the temporal closure of the formal Constitution, its representation at a specific historical interval and the ultimate generalization of its rationalities and imperatives into the future cannot (particularly where it is in the species of a representational compromise between interests, constituencies or stakeholders) resist the forces of insurrection and resistance immanent to its own unfolding. It cannot, in other words, withstand the test of time. When Negri says that “a *new material constitution* is arising”,²⁵ he is suggesting as much.

Another way of putting this, perhaps borrowing somewhat from Negri’s later thought, is as follows. The multitude of productive bodies or living labour are producing and literally constituting a form of being and a collective subjectivity which refuses the social contractual mystification of sovereign Power (and the de-ontological normative science of the formal Constitution to which it corresponds). Similarly, when Negri writes “liturgical ceremonies and visits to the temple are probably going to continue, even more often as faith in them fades”,²⁶ he is saying that even as the formal Constitution is increasingly unable to carry the burden of representing or recognizing the material constitution (if it ever was), it will stipulate for its own centrality all the more. In this way, he implies, constitutionalists of all sorts (be they social scientists, normative philosophers or public lawyers) will continue to insist on the determinative primacy of the formal Constitution over the material one. This is a point Negri would continue to

²³ n 2 above at 180.

²⁴ *Constitution Act 1982* (Sched B to *Canada Act 1982* (UK), c. 11) (enacting the *Canadian Charter of Rights and Freedoms* (the “Charter”). Two legislative instruments were required to separate the provisions relating to the UK parliament (in the *Canada Act*) from those relating to the Canadian parliament and Provincial Legislatures (in the *Constitution Act*).

²⁵ n 2 above at 180.

²⁶ *Ibid.*

insist on, not only in his collaboration with Hardt, but in his own writings in subsequent decades.

Jumping forward significantly to Negri's most explicit interface with English language critical legal theory in 'Postmodern Global Governance and the Critical Legal Project' (2005), he would sound a note which recalled the old autonomist one, but which was, at the same time, intensely biopolitical: "Why is it – for this is precisely the paradox – that the efficacy of the constitution grows weaker and weaker to the point of extinction at the very moment in which the constitutional production of 'jurisdiction' [*giurisdicITÀ*] extends its cover into life ever increasingly, directly arranging [*disponendo*] subjects and objects therein?"²⁷

Well before Negri had begun to engage with English-speaking critical lawyers after the publication of *Empire* however, he had already grasped, in the distinction between the material and the formal c/Constitutions, a potential answer to his own question: The productive power of language. Itself, simultaneously a species of corporeal reality (materiality) and of incorporeal (formal) representation, or what Christian Marazzi calls verbal "*dialogue between fleshy beings*".²⁸

C. The constitution of language

For Marazzi, much like Negri, language contains a materiality and corporeality as well as a purely symbolic and formal function.²⁹ Here social autonomy and sociality themselves are grounded on language. Language is therefore both symbolic and real. I open up this parenthetical on Marazzi only insofar as it sets out the matter well. Glossing the scientific literature on the human capacity for speech and referring heavily to the philosophy of language expounded by Felice Ciamatti, Marazzi describes what

²⁷ A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005) 16 *Law and Critique* 27, 29. Note, I am not ignoring the fact that the word 'constitution' is left in lower case in a passage in which it might have been capitalized to specify its signification of the formal rather than material constitution. Nevertheless, I have acknowledged that Negri is not entirely consistent in his usage, sometimes not even in single texts, let alone across decades. Nevertheless, there can be no question that the basic distinction between formal and material C/constitution is ever present and largely clear.

²⁸ C. Marazzi, *Capital and Language* (Los Angeles: Semiotext(3), 2008) 32.

²⁹ See eg A. Negri, *The Porcelain Workshop* (Los Angeles: Semiotext(3), 2008) 164-165: "...we believe it is possible to use the entirety of Foucault's teaching and give them political weight – a weight that Foucault strongly emphasized in his last years, in particular when he considered the possibility of a biopolitical transformation of bodies at the intersection of passions and language...We are thus in a condition we might perfectly define as an *Aufklärung* of bodies, in which political subjectivity is constituted by the doubling of subjectivity into a singular body and a common project." See also *Commonwealth* n 11 above at 46: "The common is the language spoken by the multitude, which is handed on, accumulated, and invented always anew – a process in which all of us participate. The method of legal science needs therefore to get ever more close to linguistic community [*comunità linguistica*] and retrieve that materialist and creative *telos*, which constitutes it. In this situation, law's grammar (which is to be rebuilt) will be able to bow before the word of liberation."

he calls the compelling argument of 'the biological theory of language' in which (1) "language is neither historical, because man certainly didn't invent language, nor simply natural, because it is equally true that without the participation of the human animal our language wouldn't exist"; and, (2) "the human animal is what it is because it literally constructed itself around language." The result, Marazzi suggests, is a fairly significant breakthrough insofar as it demonstrates "how the language faculty, the fact of talking, is one and the same with our bodies." Or even more plainly, "our language faculty developed physically/physiologically (in nature) inside the phenomena of life, right from our very first proto-semiotic interactions."³⁰

For Marazzi and other autonomist and post-autonomist thinkers including Negri, the corporeal and bodily quality of language, its formulation as a species of living labour, which has as its product something which is, at the same time as its utterly symbolic and representational (and therefore immaterial), also completely embedded in the unique capacity of the body (and therefore material) is the only possible departure point for theory and praxis. Negri's autonomist reading of the *Grundrisse*, in particular, is perhaps in Marazzi's mind when he writes "[l]anguage not only a vehicle for transmitting data and information, but also a *creative force*."³¹ What precisely animates this creative force, whether it is life or sociality, living labour, or something else is not made explicit, however it is clear that all of them overlap for Marazzi as much as they do for Hardt and Negri. Such a thought is increasingly interested in language as a mode of constitution and not simply an instrument of communication, one which poses language not only as a species of abstraction or representation, but as a species of concreteness and materiality which flows from the social capacity of bodies and minds.

Certainly, English speaking jurists will be on familiar grounds when they find, sprinkled throughout Negri's collaboration with Hardt, and elsewhere over the last decade, an increasingly Wittgensteinian grasp of language. Language is for Hardt and Negri, as much as it is for Wittgenstein and countless other key thinkers of the twentieth century from the English legal positivists to French poststructuralists, *the* question. For Hardt and Negri this idea goes back to Wittgenstein more than any other because it is he who identifies language as a very serious game indeed; a game whose play refuses any dialectical closure or determined teleology³² to insist instead

³⁰ n 28 above at 30.

³¹ *Ibid.* 27.

³² n 9 above at 379: "Wittgenstein recognizes the end of every possible dialectic and any meaning that resides in the logic of the world and not its marginal, subjective surpassing."; n 11 above at 122: "We should highlight two aspects of Wittgenstein's operation. First, by grounding truth in language and language games, he removes truth from any fixity in the transcendental and locates it on the fluid, changeable terrain of practice, shifting the terms of discussion from knowing to doing. Second, after

only on contingency and variability. The result is to open up a problematic with which we continue to grapple today.

Locating Negri relative to his peers on the loosely 'poststructural' left

To understand how Negri's theorization of the material constitution can be grasped as a philosophy of language, it might be worth fleshing out the similarities and differences between Negri and what he describes as more 'Heideggerian left'³³ colleagues from Derrida to Agamben for whom language is an equally important question. What distinguishes Negri from these and other more Heideggerian inflected thinkers is that he does not view the margin as a space of pure play between the formal and the material, the representative and the real, but as a space of invention and ultimately of affirmative politics, of resistance or counter-power. To make this argument, Negri works his way back, not only to Marx (again, whom he suggests more Heideggerian inflected thinkers tend too easily to forsake, even when they are ostensibly on 'the left'), but to Spinoza³⁴ as much as Wittgenstein.³⁵ In what follows, I explain this by way of the conceptual apparatus of 'the constitution of language'.

Returning to Negri's 1977 essay, 'Toward a Critique of the Material Constitution' in which he argues, "the formal continuity of the Constitution remains but its material dimension does not."³⁶ We might say that this formulation points to the way in which the modern social contractual mystification of sovereignty (and the conceptual apparatus upon which it relies) can be said to be at the limits of its representational capacity. Or even to be on precipice of exhaustion. At this juncture, Negri seems to suggest, the modern social contractual heuristic for explaining the legitimacy as much as the foundation of the Political, has become, already by the sixties and seventies, inadequate to the task. So much so, they tend to collapse into a dialectic of terrorist violence and state brutality.

destabilizing truth he restores to it a consistency. Linguistic practice is constituent of truth that is organized in forms of life: 'to imagine a language means to imagine a form of life.' Language and language games, after all, are organizations and expressions of the common, as is the notion of a form of life."

³³ A terminology with Mandarinini credits to Negri see generally M. Mandarinini, 'Beyond nihilism: notes towards a critique of left-Heideggerianism in Italian philosophy of the 1970s' in L. Chiesa & A. Toscano (eds), *The Italian Difference: Between Nihilism and Biopolitics* (Melbourne: re.press, 2009) 55-80, 61-62, 62 at fn19.

³⁴ n 29 above at 85-86: "Spinoza identified, in the density of being, the potential (*puissance*), the *dynamis* that renews being itself...The Spinozian potential (*puissance*) is opposed to the Heideggerian *Dasein* in the same way as *amor* is posed to *Angst*, *mens* to *Umsicht*, *cupiditas* to *Entschlossenheit*, *conatus* to *Anwesenheit*, *appetitus* to *Besorgen*..."

³⁵ *Ibid.*

³⁶ n 2 above.

In the prior chapter (Chapter I), I argued that in the Canadian case, the opening event of the contemporary epoch is the FLQ's kidnap and murder of Pierre Laporte in 1970, while in the Italian case it was the BR's kidnap and murder of Aldo Moro in 1978. In both, I suggested, we glimpsed a mutation in the uncritically presupposed social contractual balance between political autonomy and the rule of law and saw instead how political autonomy, in the form of legally unchecked state or police power, folded quite quickly into absolute power in crisis. Even in so called western liberal democracies like Canada and Italy. This was true in the Canadian case, insofar as the *War Measures Act* was evoked and in the Italian case insofar as there was a prosecutorial dragnet of prominent autonomist intellectuals, Negri among them.

To offset this effectively negative formulation of the problem, I presented the various social movements of Montreal in the sixties and seventies as excavated in Mills' recent historiography of the period. For a needed insight into the Italian situation, I relied on Marazzi and Lotringer's edited anthology, *Autonomia*. A book whose mixture of informed editorial curation and translated archival materials from the sixties and seventies (the seventies in particular), permits a hitherto unavailable glimpse into the Italian situation of the time. In it a variety of writings and texts speak to the autonomist experiment, in language and life. Particularly as it was carried out in central and northern Italian cities at the same time as similar experiments were being carried out in Montreal (as much as New York, Paris and countless other metropolises).

Only by understanding how *autonomia's* insistence on autonomy of the social (rather than the political or the legal) shapes in the seventies in particular, is it possible to proceed with this thesis. When Negri and other autonomists speak of the social terrain, they are necessarily speaking of language. For them, language is only one thing: sociality. From here, the response is to imagine the relationship between the body and language as the intersection of the material from the formal c/Constitution. In what follows I will explain what might be meant by this in some detail.

Beyond the Constitution of the State and the subjectivity of 'the People': Toward an alternative conceptual rubric

Already by 1977, Negri tells us, the "leaders and administrators" of the bourgeois state apparatus can be seen to "demand the correspondence, in principle, between the formal and the material character of the constitutional process, as required by the system of 'certainty' of right [*diritto*]." Long before his collaboration with Hardt therefore, it is apparent here that Negri had already begun to mount a wide-ranging attack, not only on the Political Science view of the State, but also on the jurisprudential view of the Constitution. This is, in itself, perhaps not remarkable. But what *is* remarkable is

the extent to which he proposes an affirmative alternative other than the usual legislative reformism or juridical incrementalism, both of which are effectively legal technical language games. In favour, not of a higher level constitutional reformism or juridical reversal of prior case law, but instead of a moment of linguistic reinvention or at least an opening to a form of conceptual philosophy not hitherto understood to be a process or act of material constitution.³⁷ For the moment however, it suffices to take Negri's words in the seventies seriously.

In the seventies Negri is no more a social democratic crusader than he is a liberal reformer. Instead, he is resolutely communist. His interest is therefore in the exercise of class antagonism and its productive potentiality. In 'Toward a Critique of the Material Constitution', Negri writes that it becomes possible to not only to imagine, but also to exercise and discern "[a] *new regime*" taking shape and "*a new material constitution*" with it.³⁸ I have repeatedly emphasized this passage very early on in this thesis because of its centrality. Now, I connect it yet again, albeit in a different way, to the question of language.

Well before his millennial collaboration with Hardt and the development of his Spinozian interest in the alternative political subjectivity of the multitude (rather than 'the People') and its alternative project of constituting the common (rather than the State), both of which began in earnest in *The Savage Anomaly*,³⁹ Negri had already taken a first radical step toward reconceptualising constitutionalism. Particularly insofar as he suggests in the sixties and seventies that the formal Constitution, in which language is a species of pure representation, could be defeated or at least decentered by an adequate remobilization and re-theorization of its materialist alternative.

I noted earlier that if this thesis proceeds on any a priori assumption whatsoever it is the following: If it is convincing for Negri to speak of "the political event of the [Italian] Constitution of 1948" (the adoption of its formal Constitution) as being decisively "now over," it should be possible to make a similar assertion relative to the political event of patriation in 1982 (the adoption of the Charter). To make this argument more broadly, particularly in the Canadian case studies developed in the latter half of the thesis (Part II: Chapters IV-VI), it is first necessary to understand how it is that Negri perceives 'the

³⁷ It is this very same idea which Negri suggests in the subheading to *The Porcelain Workshop: a new political grammar* n 29 above. Paolo Virno makes the same move in his *A Grammar of the Multitude* (London: Semiotext(e), 2004).

³⁸ n 2 above at 180.

³⁹ n 3 above 9

State', namely, as a representation of, and at the same time, as a transcendental mystification of, sovereign Power, an operation which it carries out by way of the formal Constitution.

To explain, for Negri, language is at once the necessary and central most feature of the formal Constitution as well as its greatest betrayer. It is that which makes possible the formal Constitution while constantly exposing the gap between its representational metaphysics (its deferral of foundations to the historical outside) and the actual material constitution of the present (or what Negri will later describe as *kairòs*⁴⁰).

Things might be summarized as follows: the question of language is essential to social contract theory in a superficial sense, whether as the object of a Constitutional Science (usually positive) or a normative philosophy (usually liberal) or in the deeper sense of a taken-for-granted quality of the coincidence between the formal and material c/Constitution, one which is more than anything covered over and hidden in language itself.

Rather than insisting on legal certainty in a system of right (with the formal Constitution as its Kelsenian *grundnorm*), Negri insists instead that there is, by the latter half of the twentieth century an increasing excess of social antagonism which cannot be mediated and meets directly on a plane of immanence. So much so, "[t]he [formal] Constitution is no longer the law of all laws: laws proceed by themselves, following the pace and coherence of the constitution of a new structure of political power."⁴¹

But what is this new structure of political power being constituted? Is it co-extant with the rising of "a *new material constitution*"? Certainly this is what Negri seems to suggest. And, what does any of this have to do with the question of language? Is not language the essence of the formal, pure representation? No. This is precisely what we are resisting. Instead, we ask, how might language itself also be understood as a species of materiality? To the extent it is possible to begin answering these questions it is necessary to note that Negri connects his own thought on the material constitution in particular to Carl Schmitt and C. Mortati's earlier usages of the phrase.⁴² In a footnote to their English language translation of 'Toward a Critique of the Material Constitution', Bove and Murphy point readers back to those crucial passages in the earlier 'Labour in

⁴⁰ *Kairòs* is the opposite of *chronos* or "the linear accumulation of time". It is, in other words, *not* the realization of a particular telos but instead the "moment when the arrow [of time] is shot by the bowstring" see eg n 10 above at 357; A. Negri 'Kairòs, alma venus, multitudo' in M. Mandarinini (ed) *Time for Revolution* (London: Continuum, 2003) 141, 241-242, 248-261; n 24 above at 148; A. Negri 'Logic and Theory of Inquiry: Militant Praxis as Subject and as Episteme' in S. Shukaitis, D. Graber & E. Biddle (eds) *Constituent Imagination* (Edinburgh: AK Press, 2007) 63.

⁴¹ n 2 above at 180.

⁴² *Ibid.* fn 3, 223.

the Constitution' (1964) which introduce the idea in its Negrian particularity.⁴³ In this crucial earlier essay, Negri tests the outer limits of the narrative of formal Constitutional completion against the material reality of life and the inequitable distribution of power and resources to which it tends to correspond. In so doing, he opens up the ground to critique the inclusion of labour at the head of the postwar Constitution, insisting against the dominant viewpoint of PCI functionalists and even some Marxist intellectuals, that the working class can enjoy no real autonomy within the bourgeois State and its formal Constitution.⁴⁴ Here, a more radically communist praxis requires an alternative theory of language. One in which language is as much as species of material reinvention as it is formal representation.

D. A communist constitutionalism

For Negri, only social autonomy and spontaneous organization of the multitude, as a species of collective living labour, define a radically communist project. Therefore, wherever the old autonomy of the political reasserted itself, whether as insisted upon by legal or political scientists, or by the PCI leadership, the problem was the same. For Negri, the formal Constitution could not, from the beginning, in any way be married to, let alone underpin, "a mode of democratic socialist, or at least anti-capitalist, society". It could not, in other words, "establish prescriptive [*ordinante*] criteria for social transformation. [citation omitted]."⁴⁵ This was because the movement politics of the sixties utterly surpassed reform as a terrain of struggle or progressive politics. In other words, it threw the loftier aspirational rhetoric of the formal Constitution right up against its own administrative techniques, its Power. This is what I believe Negri intends to convey when he writes, "[t]he sixties sweep away reformist politics along with the juridical form of its management."⁴⁶

What Negri begins to grapple with in a variety of ways in the two major essays, 'Labour in the Constitution' (1964) and 'Toward a Critique of the Material Constitution' (1977), is

⁴³ Ibid.

⁴⁴ n 1 above at 56. In this seminal essay, Negri insists that the working class is weakened by its subsumption, not only to Capital, but to the State, a form of subsumption constantly reproduced and deepened by the Constitution's reflexive insistence on itself as a unified and ultimately final authority. Here, *the* Constitution is a "normativity" which escapes the legislative field to "invest the entire orientation of political discourse". It is, in other words, a transcendental structure, a meta-narrative and a positive law at the same time. One which subsumes everything, bringing it all within its subjectivizing networks, and remaking the entire social terrain in accordance with its own logic (formal/legal technical) and modalities (representative/mediatory). Against the Constitution of the State, Negri proposes an alternative line of inquiry into the constitution of labour itself, one which tracks the basic distinction between the material and formal c/Constitutions. He also introduces a powerful polemic against constitutional reformism as a strategy. Both of which become fundamental to his radicalism in the coming years.

⁴⁵ n 2 above at 180.

⁴⁶ Ibid.

the possibility of a renewed and radically communist polemic against liberal and social democratic parliamentary politics and formal constitutionalism. A sort of critical left attack on representational government and parliamentary democracy *tout court*. One which is perhaps more than anything reminiscent of what was seen on the opposite side of the political spectrum a generation earlier in Schmitt's famous Weimar polemic against 'parliamentary democracy'.⁴⁷ Ultimately, this theme returns again and again in these early essays, both of which have only relatively recently become available in reliable English language translation. What we grasp in them is that in the sixties and seventies, as Western European Communist Parties in Italy and elsewhere sought 'historic compromise' with the bourgeois State and its Constitution, they became, albeit perhaps inadvertently, reactionary and co-opted insofar as they began to believe that changes to the formal Constitution of the Political might resolve the immense inequalities which characterized the material constitution of the social.

Beyond socialism: the critique of the social welfare state

Negri observes, in a variety of texts, that the governance and economic management theory of Keynes, which was ascendant in the sixties and seventies (only to go into decline in the eighties and nineties), was a mirage of leftist progress.⁴⁸ In so arguing, Negri has consistently gone against the grain, even on the mainstream left. For him, the socialization of the State as the realization of a social democratic Welfare State was no prelude to revolution, only a species of real subsumption in which the entire productive capacity of labour is brought into the administrative architecture of the formal Constitution and the State. In fact, he has argued that the social state is Capital's lifesaving measure, that which permits it to thrive more rather than less, by administering the private as much as the public sphere.

For Negri, it was already clear in the sixties and seventies that reformist politics, whose quest is for inclusion and representation (of labour or any other previously unrepresented constituency, in the formal Constitution) could not be endorsed. The template for this position was in Negri in his seminal 1964 essay, 'Labour in the Constitution', in which he suggests that the PCI successfully fought for the description of Italy as a 'republic of labour' at the head of the Constitution, only to find the material reality of the bourgeois State unchanged, even strengthened. For Negri, a representation of the proletariat in the institutions of the bourgeoisie is no victory at all, incremental or otherwise. Quite the opposite, it is a moment of capture, expropriation

⁴⁷ See generally C. Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge Mass.: MIT Press, 1985).

⁴⁸ See eg A. Negri 'Communist State Theory' (1974) in *Labour of Dionysus* n 1 above at 169-171.

or corruption.⁴⁹ Going back to the question of language we might say that this is a key early formulation of the distance between the formal promise in the language of the Constitution, and the material reality, in the language of class struggle.

By 1977, Negri could only say of “juridical representation” that it was “still effective despite its mystifications”⁵⁰ but nevertheless increasingly challenged to deal with the constitutive materiality of new forms of class relations and new forms of antagonism between labour and capital. Negri foresaw already at this point “the capitalist restructuring” which was coming in the eighties and nineties, even sensed its shadow lurking beneath the cover of Keynesian economics and social democratic politics in the sixties and seventies. Here, at the height of what Negri calls ‘the social’ (rather than the merely ‘rights’) state, the formal Constitution (and perhaps earlier and more hazily the imagined social contractual basis of it), is generalized absolutely across the social terrain. Primarily as an apparatus of capture and expropriation, none of this will suffice for Negri. Nor, as emphasized, will any dynamic of constitutional reform, or political representation which does not acknowledge the reality of this situation:

The new material constitution is taking shape around the capitalist attempt to end its crisis. The Constitution of labor of 1948 registered a certain set of relations in order to control them: it accounted for a state of diffuse conflict in the relations of production that was nevertheless not meant to turn into antagonism. *Today the dimension and quality of conflict are instead immediately antagonistic: the whole circuit of reproduction is involved in such antagonism.* Thus, the new material constitution must be tested against the reality of this antagonism, and more specifically against the new dimensions and quality of workers’ struggle, the new composition of the proletariat and the working class. Unexpectedly, capital hysterically declares a general interest in production and in the co-management [*cogestione*] of social profit. The urge to achieve a new state form and a *regime* that denies conflict while heightening co-management corresponds to the realization that class struggle has definitively blown up the proposition of developments from both the quantitative and qualitative points of view.⁵¹

Here, Negri is already relying on his unique reconstruction and interpretation of Marx’s nascent argument in the *Grundrisse*. Namely, that it is the form of exchange itself which capital must overcome as a barrier or limit to its productive capacity (in 1978 he would deliver lectures at the College de France on this very subject at the invitation of Althusser and publish them a year later as *Marx Beyond Marx*⁵²). Here we find the concept of material constitutionalism, as praxis, action or verb is capable of throwing up a crucial barrier to the old a priori of the formal Constitution, as a noun, as pure

⁴⁹ See generally n 1 above.

⁵⁰ n 2 above at 181.

⁵¹ n 2 above at 181-182.

⁵² A. Negri, *Marx Beyond Marx* (London: Pluto Press, 1979).

representation or mediation. The result which is most interesting for this thesis is that it drives the social contractual political, as much as the economic, model of exchange into crisis.⁵³ Here, the basic framework of contract, which underpins capitalism as much as the State form, is refused. No longer is any representation of work in exchange for the monetary form of value, or the representation of unlimited freedom (in the state of nature) in exchange for limited freedom, security and order (in the civil state), be left undisturbed as an underlying structure or metaphysical frame. No longer, in other words, is the hegemonic logico-semantic frame of social contractualism permitted to persist unchallenged.

Realist or idealist?

Some of Negri's critics charge him with being idealist but this arguable in the extreme.⁵⁴ Negri's approach is thoroughly realist, particularly insofar as realism is consistent with materialism and not with formalism, which on the contrary, finds its partner in idealism. For Negri, the concreteness of bodily intervention infuses every form of sociality and dictates the need for language; it also produces language in a sense beyond the usual formal or representative apparatus to which it is usually seen to correspond:

The Constitution of 1948 attests to social organization (and its regulation) that is founded on conflict, exchange and the functioning of the law of value (and secondarily on compromise). These conditions are in the process of changing; the Constitution too must be altered materially. But how? 'Competition generally, this essential locomotive force of the bourgeois economy, does not establish its laws, but is rather their executor' [citing the *Grundrisse*]. Therefore, the Constitution has to change....⁵⁵

Negri's reading of the *Grundrisse* suggests that once the working class begins, as it did in the sixties and seventies, to assert itself in mass movements which refuse the exploitative exchange between labour and capital, the formal Constitution faces a double crisis. Not only does it need to facilitate capital's surpassing of exchange, insofar as it spreads itself even more generally across the social terrain (as a form of value *tout court*), Negri argues, but it must mediate labour's insistence on a new deal. This is the basic crisis of capital which leads to FDR's New Deal and Keynesian social state. Again, Negri argues that both are generalized in a variety of ways to bolster,

⁵³ Ibid. 10.

⁵⁴ See eg J. Dean 'The Networked Empire Communicative Capitalism and the Hope for Politics' in P.A. Passavant and J. Dean (eds) *Empire's New Clothes* (London: Routledge, 2004) 266 suggesting "Hardt and Negri substitute hope for politics". For a more comprehensive examination of the critical literature treating *Empire* in particular see Chapter III to follow.

⁵⁵ n 2 above at 183.

rather than defeat capital. Here, the social State becomes an intervention by public on behalf of private Power, nothing more or less.

This basic structure, that of the social or welfare State, which can be understood to be the interventionist but nonetheless rhetorically liberal, is never far from Negri's mind. This specific passage is evinced in the language of an expanded social as much as individual rights discourse, one in which the model of the high modern individual, or the rights bearing citizen subject, is generalized across what is said to be 'society' and given over to (what Negri believes is an ultimately false, diversionary and propagandistic approximation of) communitarian and social democratic platitudes. Negri cannot abide this position and it is one which he repeatedly polemicizes as reformist and associates with the electoral strategy of the PCI rather than any properly radical communist politics.⁵⁶

The reason for this is not because Negri is temperamentally immoderate, but because the struggle between labour and capital is, in the better part of the twentieth century increasingly laid bare in the drift between the representational apparatus of the formal Constitution and the real productive capacity of the material constitution. A year before his lectures at the College de France, which would eventually become *Marx Beyond Marx*, in 'Toward a Critique of the Material Constitution', the beginnings of a novel reading of the *Grundrisse* was already being fleshed out. In that crucial essay, Negri argues that the dialectical relation between labour and capital can no longer, if it ever could, be resolved in the form of exchange, settlement or contract.⁵⁷ The reverberations of this idea flow through this thesis in a variety of ways.

⁵⁶ See eg n 1 above at 54, 56, 63 in which the young Negri articulates a critique of the first article of Italy's 1948 Constitution. The article, a result of postwar negotiations aimed at preventing the alienation of Italy's communist partisans from the new constitutional order, recognized Italy as a "democratic republic founded on labour". Many on the Italian left fought for the provision and regarded its inclusion as the head of the constitution as an unmitigated victory. Negri however, did not. Instead, he treated it as a symptom of: (1) the real subsumption of labour to capital; and, (2) the convergence of the bourgeois political and economic modes of production. Or what is denominated, in an original idiom, as the 'factory-society.' In the 'factory society', Negri argues, bourgeois constitutionalism can easily absorb, in fact must absorb, the species of reformism advocated by its internal 'socialist' critics. One which is bereft of genuinely liberatory or communist potentiality insofar as does little more than make "the relationship between the material foundation [of capitalist production] and the formal constitution of [the bourgeois political] order" more explicit.

⁵⁷ n 2 above at 189-191, 194. In Volume 2 of *Capital* Negri finds "the concept of *social capital* as resulting from (and presupposed by) the social character of capitalist production" which interest him immensely. He would soon find a more ambitious outline of this concept in his reading of the *Grundrisse* as presented in *Marx Beyond Marx* n 48 above. What is crucial in both, is a departure from all naturalizations of the exchange model in political economy. This is true whether in: (1) the social contract modality (at the level of public political Power in the exchange of freedom for security); or, (2) in the wage work modality (at the level of the private economic Power in the exchange of labour and for capital). In *Marx*, Negri argues, reproduction means something other than the constant transformation

At this still introductory stage, it is sufficient to draw attention to a couple of Negri's conceptual formulations of the matter in the seventies. Particularly insofar as he treats the "*massification and socialization of labour*" which renders the formal Constitution obsolete as *the* question of the epoch: "[t]he [formal] Constitution is obsolete and in crisis not simply because of its failure to constrain the massification of labour within the rule of exchange and the proportions of planning, but especially because of its inability to respond to the *alternative valorization* the working class carries out on and of itself."⁵⁸ This is what Negri is driving at when he repeatedly declares that the formal Constitution is obsolete.⁵⁹

The purpose of all of this is *not* to propose the material constitution as an idealized alternative to the formal one. This is prohibited immediately in the title of the essay itself (which is 'toward a *critique of the material constitution*' and not 'toward a valorization of the material constitution'). For Negri, the material constitution of reality is as much a product of exploitative forces in both the public and private sphere (which are increasingly intertwined) as it is the affirmative constituent capacity of living labour, the multitude or constituent power. Certainly, sovereign Power and Capital also have a species of material constitution, often one which takes the form of material lack rather than plenitude, suffering rather than joy, isolation rather than sociality, etc. In this way Negri is careful not present the material constitution as facile negation of the formal Constitution. This aspect of Negri's argument in 'Toward a Critique of the Material Constitution' is coincident with his writings more generally in the seventies and the intellectual milieu of *autonomia* specifically, all of which pose to a strongly realist view, attached not to a negative dystopian alternative, but an affirmative one which is not utopian, but constitutive.

of labour into the commodity form, then into capital and back again. Rather than this cycle of capitalist production and consumption, he offers in the concept of the material constitution, the imagining of labour as having substance beyond the commodity or monetary form of value. This is closely related to the idea of political subjectivity as something other than the abstract citizenry or sovereignty of 'the People'. What is presented is instead corporeal and bodily (re)production as much as it is social and linguistic (re)production. This is nowhere more true, Negri argues alongside fellow autonomist thinkers, than in the move from Fordist to post-Fordist production, or simply the move from material (usually industrial and factory-based/hierarchical/centrally organized) to immaterial (variously informatic/affective/communicative/de-territorialized/decentralized/horizontally networked) production.

⁵⁸ n 2 above at 184.

⁵⁹ Ibid. 208. Drawing a sharp distinction between the "old, lifeless, and dying [formal] Constitution" and the "new" material constitution which emerges in the contemporary epoch, when the "'autonomy of the political' disappears the moment the political and the social, the state and the economy are superimposed and become interchangeable terms."

E. Refusing the determination of labour by capital as much as constituent by constituted power

During the sixties and seventies Negri developed the theory, in concert with other leading autonomists, that labour's refusal of work permits it a means of escape, a short circuiting of, or a line of flight from, the old hegemonic binaries, labour and Capital as much as constituent and constituted Power.⁶⁰ The result, the representative metaphysics and transcendental mystifications of modernity, the social contract first among them (the ultimate in idealist iterations) can no longer be insisted upon as the foundation or structural apparatus of the formal Constitution.

In the place of the usual social contractual modality of the formal Constitution, Negri offers a return to the act of constitution itself, material as much as immaterial. The project is again not an idealist one but a realist one which takes up the making of the present as praxis. Again, an idea Negri develops more recently, as *kairòs*.⁶¹ The point is *not* simply the representation of the constituent moment at some isolated zero hour, or of isolating some mystical point of origin, some historical determination of the dialectic between constituent and constituted Power. But rather, the isolation of the dynamic of social production itself, the way in which the present is constituted, materially as much as formally.

Well before the language and conceptual rubric of the multitude had begun to emerge in earnest in *The Savage Anomaly* (1981) and at least two years prior to Negri's unique reading of the *Grundrisse* in *Marx Beyond Marx* (1979), the basic contours of the formal and material constitution, as a species of productive antagonism and of a potentially radical critique of the extant state of affairs, was already emerging. The result was not so much a preference for the material over the formal c/Constitution in a blunt or oversimplified sense, but instead, dissolution altogether of the obviousness of the distinction between the two:

This means that the [formal] Constitution is failing in the face of the collapse of the law of exchange because the reduction in necessary labour (and its social medium: the wage) is becoming rigid and expanding. But above all, the [formal] Constitution is failing when confronted with the quality and articulation that the reproduction of the working class is assuming, according to the rhythm of the rising cost of necessary labor. The refusal of work (and all the political and social phenomena related to it) assumes a positive connotation: in pursuit of capitalist development, it shifts the terrain of struggle from production to the totality of social (production and) reproduction; here again, it anticipates capital and determines not only the crisis but also its quality,

⁶⁰ See generally n 1 above; n 2 above; n 48 above.

⁶¹ n 40 above. For a more exhaustive treatment of this concept see Chapter III s. ix.

framing the crisis around its own needs. *The refusal of work defines the modes of working class self-valorization in reproduction*, it demands differential and/or indirect wages – it no longer seeks to realize itself on the terrain of production – it determines counterpower and proves itself willing to exercise it.⁶²

As is typical of autonomia scholarship, there is no distinction between the economic and the political mode of production or the formulations of subjectivity to which they correspond. This is a crucial anti-dialectical movement. Here, constitutional theory is rearticulated in a distinctive way. Certainly, the basic thrust and originality of this line of thought is linked more than anything to the particularities of Negri's very much autonomist reading of Marx. Negri's Marx emphasizes how distinctions between historical epochs are graspable by a contemplation of a mutation in the social form of production, in other words the material constitution of living labour itself. After having written so extensively on Marx during the autonomist period of the seventies, the jailed Negri of the eighties would begin to look for answers in Spinoza. A crucial philosopher who would permit him to build on the earlier distinction between the material and formal c/Constitutions in autonomist thought toward a more wide ranging critique of the social contractual apparatus underlying bourgeois constitutionalism.

F. The Spinozian turn

Like other subversive and iconoclastic philosophers in prior generations (perhaps most notably, Nietzsche) and in his own (Deleuze, Balibar and Matheron), Negri turns to Spinoza as a kindred spirit. Well before his co-authorship of the trilogy with Hardt had begun in earnest, and less than three years after the publication of *Marx Beyond Marx* (1979), while serving time in Rovigo, Rebibbia, Fossombrone, Palmi and Trani prisons, from April 1979 to April 1980, Negri wrote, *The Savage Anomaly* (1981). Translated by Hardt a decade later, it introduced English language readers to a reading of Spinoza which revealed a thinker centuries ahead of his time, a strong counterpoint to the hegemonic strain of western modernity galvanizing, not only around his contemporary Hobbes, but also in the dominant thinkers of subsequent centuries, Rousseau and Hegel as much as Locke and Kant. The savage anomaly which Negri attributes to Spinoza is "the irreducibility of his thought to the development of Modern rationalism and empiricism". Unlike the hegemonic formulations of modernity, "always dualistic" and "versed in transcendence",⁶³ Spinoza's alternative, Negri writes, looks to the "ontological elements" which adhere to "the constitution of reality".⁶⁴

⁶² n 2 above at 184-185.

⁶³ n 3 above at 202, 211.

⁶⁴ Ibid.

The constitution of reality

In his conceptualization of 'the constitution of reality', Negri finds in Spinoza the tools for a critique of the self-serving "relation between the prudence of the politicians and of the rulers and the *multitude* as a living reality to be contained within determined limits."⁶⁵ In addition to his grasp of the emergence of the populace as a going concern to be managed, governed and administered (a premonition of Foucault's piercing insight centuries later), Negri argues, Spinoza suggests an alternative to what was to become the hegemonic form of the social contract (most notably an alternative to his contemporary, Hobbes, for whom the transcendental mystification of sovereign Power was the necessary basis for any imaging of constitutionalism). This is a subterranean branch in western thought Negri distinguishes sharply in *The Savage Anomaly* from Spinoza's more ambitious ideas of 'absolute democracy' or 'absolute process'. All of this is yet another important node in Negri's theorization of the material constitution of the social as an alternative to the formal representation of the Constitution of the Political. For the moment however, what is crucial is that Spinoza refuses the bargain or exchange entailed by the form of the social contract, most notably, the exchange of liberty for security, freedom for order and the 'natural' for the 'civil' state.

Alternatives to the formal Constitution and the de-ontological normative science to which it corresponds

Much like Machiavelli before him, Spinoza is of acute interest to Negri insofar as his thought reveals an early modern tension within the imagining of politics itself. One which he regards as having significant lessons for the present, on the one hand, as a praxis-based politics: Prudence as art of government; and, on the other, as theoretical metaphysics: Prudence as science of government. Although both trajectories are (early) modern insofar they address the crisis of authority and truth arising from the passage between the religious and secular forms of authority and social organization, Negri suggests they are useful today insofar as they demonstrate how to forego the de-ontological normative register of what *ought* to be done for a less abstract consideration of what *is* (and its potentialities). Something which Negri terms 'the constitution of reality', a concept which has everything to do with the material constitution (and very little to do with the normative science of the formal Constitution and its social contractual heuristics):

Politics is not the realm of the what 'ought' to be done; rather, it is the theoretical practice of human nature seen in its effectual capacity. This is very nearly a summary of chapter 15 of Machiavelli's *The Prince*.

⁶⁵ Ibid. 187.

[citation omitted] Here, though, it is not only the great Florentine who is evoked; rather, this passage involves the entire seventeenth-century critique of the utopia, from Hobbes to Descartes; this involves the spirit of the century. And yet with what difference! In Spinoza the crisis does not constitute a horizon but a condition; it does not characterize being but only qualifies its effectiveness. The hegemony of being over what 'ought' to be makes being equally as effectual as it is dynamic and tendential, capable, that is, of comprehending the development within itself, of knowing itself as efficient cause.⁶⁶

Moving ourselves in the crisis of the transition from feudal to modern imaginings of sovereignty, from its religious to its increasingly secular representation, we can detect the problematic of 'the constitution of reality' as far back as the seventeenth century. For Hobbes and Descartes, albeit in different ways, Negri argues, the normative ought is a representation of the closure or determination of crisis in order and rule. The same can be said for the dominant trajectory of bourgeois thought which was to harden in the vast permutations of social contractualism. In Negri's reading of Spinoza and Machiavelli however, there is a different imagining of the constitution theory or science. Here, the normative ought is from the beginning absent. In its place, there is only the thought of caesura. For Negri, who will later employ a similar idiom in his treatment of the contemporary epochal passage, Spinoza best exemplifies what it means to develop an interregal philosophy. The millennial and epochal resonances between Spinoza's position at the opening to the modern and Negri's at the opening to the postmodern are very much implied.

In modernity's antechamber, between a feudal cosmological imagining of the world and a secular rationalistic rendering of it, there is a vacuum of meaning, a loss of ordering and a collapse of reliable metaphysics. In other words the trust that the formal determines the material begins to wane. This is as true in today's interregnum, between the modern and the postmodern as it was in the last between the feudal and the modern. In both cases, Negri suggests, the epochal passage is experienced alternatively as crisis or catastrophe. Evoking Hobbes and Spinoza as the primary thinkers of the last historical interregnum between modes of production, economic as much as politics, he suggests that unlike Hobbes, Spinoza is not struck by panic for a reconstituted order, which albeit insistently secular, retains in its bosom the verticality and hierarchy of its absolutist forbearers.

For Hobbes, the crisis of passage calls for management by a reinvigorated transcendentalism and absorption into a new order, a new representational apparatus for sovereign Power; a new formal Constitution, one which would eventually, in

⁶⁶ Ibid.

successive thinkers of the social contract throughout western modernity, collapse the multitude into 'the People' and the common into the 'State'. For Spinoza this tendency is suspect from the beginning. Or at least, this is part of what Negri suggests in *The Savage Anomaly*.

For Spinoza, Negri insists, there is no form of politics removed from the immanent constitutive praxis of the multitude, a constituent power which seeks to escape the transcendental ordering and vertical hierarchy of constituted Power, *not* reassert it. This is a basic formulation which recurs in Negri's thought after being set up in the highest levels of abstraction, first as a critique of Cartesian rationalism in *Political Descartes*,⁶⁷ and then as a reading of Spinoza in *The Savage Anomaly*.

What is most crucial for the purposes of this doctorate's Negri-inspired critique of the social contractual modality, can perhaps be distilled as follows: For Negri, it is Spinoza rather than Hobbes who breaks decisively with medieval thought to herald something original. Against the transcendental imagining of sovereign Power and the re-constitutive tendency to which it corresponds in Hobbes, Spinoza proposes an immanence of the many which refuses representation or dialectical closure. In the transition between epochs, he warns, the conservative drive to stabilize and otherwise contain the multitude within fixed and clear parameters of order is strong. This is as true, Negri seems to suggest, today in the passage from the modern to the postmodern as much as it was three and a half centuries ago in the passage from the feudal to the modern.

No historical passage or interregnum can be, nor need be, isolated in one particular event or constellation of events, they are better grasped as tendencies, not only in the mode of production but in the structure of authority. First as grasped in the early modern movement of authority from the Catholic Church and the aristocracy toward the market structure of cities and the emerging commercial thoroughfares of a mercantile bourgeoisie. Second, as Negri would later develop the idea with Hardt in *Empire*, in the late twentieth and early twenty-first century movement of authority from the State and its ruling class toward the market structure of Empire and the merging commercial thoroughfares of global markets. To understand history in this broad sweep Negri insists first on Spinoza rather than Hobbes. The reasons are instructive and give many crucial clues to uncovering the Negri-inspired theory of constitution I aim to propound in this thesis.

⁶⁷ A. Negri, *Political Descartes* (London: Verso, 2007).

For Hobbes, the great patrician of public law and the first of the modern social contractarians, the passage from one mode of social organization to another presents a historical vacuum into which a reconstituted metaphysics must be inserted. Spinoza however is read by Negri to present a potent alternative to this reflex. If Hobbes is the genesis of the social contract and the modern logico-semantic frame of the (formal) Constitution which flows from it, Spinoza is its anomaly, the stubborn insistence that the many enjoy a materiality and immanence which refuses representation or metaphysical closure *tout court*. By seeking to explode the modern horizon of representational politics and transcendental sovereignty before it had even established itself, Spinoza, Negri suggests, presaged the next great epochal passage, our own. This is a crucial basis upon which his autonomist thought in the sixties and seventies corresponds to his widening interest in the critique of bourgeois constitutionalism in the nineties. A decade after *The Savage Anomaly* Negri would enter directly onto this terrain in *Insurgencies*.⁶⁸

G. Insurgencies: previewing the collaboration with Hardt

In the place of those subjectivities comparatively weakly represented in the idiom of 'the People' and its derivative 'popular sovereignty', Negri posits constituent power in *Insurgencies*, a crucial bridge to his collaboration with Hardt, as an unlimited, open, contingent and possibility laden capacity. To this end he writes, "constitutive strength never ends up as power, nor does the multitude tend to become a totality. Instead, he [Spinoza] describes it as a set of singularities, an open multiplicity."⁶⁹ At this juncture, Negri returns to the Spinozian idiom of 'absolute' process, government and democracy, all of which present themselves as an alternatives to the 'due process' and 'limited government' of the liberal social contractual model as it was to evolve in modernity. Namely, as an ostensibly more and more 'democratic' reformulation of the absolutist Hobbesian structure and its metaphysics as much as its language and its conceptual apparatus.

For Negri, only constituent power is coterminous with democracy and therefore inherently unlimited, or again, in this peculiarly Spinozian sense, absolute in its purview. This is why he applies the prefix 'absolute' in connection to 'power' (a prefix explicitly *not* to be conflated with 'absolutism' as it is usually understood). The absolute quality of constituent power is, for Negri, one which is indicative of its sociality, expansiveness, strength and will, its desire to drive history and reconstitute the

⁶⁸ See generally n 4 above.

⁶⁹ n 4 above at 14.

'politicodemocratic dynamic anew'.⁷⁰ This is the dynamic in which Negri investigates the basic distinction between the two forms of power (power/Power) and their complex relation to the two forms of c/Constitution (material/formal or constitution/Constitution). It is also one which leads him to polemicize sovereign power in whatever its form. This all converged when *Insurgencias* was published in the nineties, particularly insofar as it simplified many of the more difficult to unlock arguments contained in Negri's work on Spinoza and Marx in prior decades.

In this thesis, which seeks to propose a Negri-inspired theory of constitution based on a critique of the social contract (and at the same time to open up a conceptual alternative to it), *Insurgencias* like *The Savage Anomaly* and 'Toward a Critique of the Material Constitution' and 'Labour in the Constitution' in prior decades, is essential insofar as it continues to open up a series of constitutional phraseologies and conceptual formulations worthy of expanded consideration and experimental usages. These include: (1) 'the constitution of time'(which imagines the opening and closing of the aperture of historical time in the constitution of events); (2) 'the constitution of the common' (as a production and emancipation of property from the logics of private as much as public expropriation); (3) 'the constitution of space' (which opens up an analysis of imperialism); and, (4) 'the constitution of labour' (which reminds readers of the autonomist sense in which modes of production, political, economic and legal, tend to converge in the social). Each of which will feature prominently in this thesis and operate, not only as part of the backdrop for exposition in the case studies (Part II: Chapters IV-VI), but for the presentation of *Empire* and the critical literature surrounding it (Chapter III).

For the moment however, it will suffice to say that each of these myriad forms of constitution, (1)-(4), which are greatly concretized in *Insurgencias* and carried forward into the trilogy with Hardt, have a fundamental continuity with Negri's earlier treatment of the distinction between the material and the formal c/Constitutions. This passage from *Insurgencias* is useful by way of summary. Particularly insofar as it anticipates the

⁷⁰ Ibid.

deeply ontological theory of constituent power which Negri would continue to build in the nineties and beyond:

Constituent power is the creative strength of being...Constituent power constitutes society and identifies the social and the political in an ontological nexus...But one might object that from the humanistic revolutions to the English Revolution, from the American Revolution to the French and Russian ones, and to all the other revolutions of the twentieth century, once the exception and uncontainable moment of innovation is over, constituent power seems to exhaust its effects. Now, as Marx pointed out and as we think we can continue to sustain, this is not true. This appearance of exhaustion is the effect of the mystification that the practices of constitutionalism stage in order to block the investment of the social and the political in being...The rationality of modernity is in fact, as we have seen, a linear logic that corrals the multitude and subjects it to a unit and controls its difference through the dialectic...modern rationality blocks the constituent process and founds modern constitutions: this obstacle is posed through the determination of subjects, the naturalization of their creativity the fixation of their temporality and therefore through a series of operations of normalization and movement.⁷¹

There could be no better summary of Negri's critique of modern constitutionalism or of the desire which drives his research: To understand what renders constituent power so indomitable, as much as what makes it resistant to repeated constitutional attempts to corral its productive capacity. In many ways this is precisely where he would begin in *Empire*, yet another decade later, this time with Hardt.

H. Conclusion

This chapter has presented at the highest level of generality, drawing from a variety of crucial texts, the complex and yet nevertheless immensely important distinction Negri makes between the material and the formal c/Constitutions. To the extent that much is left unexplained or at too high a level of abstraction in this chapter, it is hoped that further clarity about this long standing distinction, along with further development of some of the key Negrian formulations of the constitution of time, space, the common and labour, will emerge in subsequent chapters. The overarching question of the constitution of language itself will come into sharper relief in the analysis of Negri's collaboration with Hardt. An English language collaboration which I will argue, in the next chapter (Chapter III), updates and clarifies the ideas contained in Negri's earlier work while staying true to their originality and immense conceptual and linguistic inventiveness.

⁷¹ Ibid. 327.

Chapter III - Thinking about Empire: Updating a Negri-inspired theory of c/Constitution

The end of the outside is the end of liberal politics.

M. Hardt & A. Negri, *Empire* (2000)¹

The transformation of a political vocabulary is a real process, which will involve the elimination of some of the fundamental political categories of modernity...

A. Negri, 'Living the Imperial Transition – In Order to Struggle' (2004)²

Now, democratic political representation no longer works. If there is something that has been burnt out by this brief century, it is democratic representation....

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)³

The political lexicon of modern liberalism is a cold, bloodless cadaver.

M. Hardt & A. Negri, *Multitude* (2005)⁴

A. Introduction

The best possible connector between the first more theoretical half of this thesis and the second more concretized one, may lie in the way which Negri, both prior to his English language collaboration with Hardt, and after, emphasizes tertiary as much as binary concepts. Here, the productive power of difference expresses itself as something other than the negation of its opposite. The concept of the common, as the constituent project of the multitude, within and against Empire, is a prime example of what Hardt and Negri call an *alter* (rather than purely *anti*) dialectical methodology.⁵ Common, because at its most basic level, it is that which refuses ownership outright, public as much as private expropriation. However, it also refuses to accept a tepid ontology of friendship, encounter or 'being in common'. Rather, it insists on "the process of making the common".⁶ This complex distinction belies an imagined alternative to the constitution of the state, neither on a realist nor an idealist plane, but in an active, constitutive, even Dionysian sense.

¹ M. Hardt & A. Negri, *Empire* (Cambridge Mass.: Harvard University Press, 2000) 189.

² In A. Negri, *Empire and Beyond* (London: Polity Press, 2008) 38.

³ A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005) 16 *Law and Critique* 30, 40, 45-46.

⁴ M. Hardt & A. Negri, *Multitude* (London: Penguin Press, 2005) 273.

⁵ M. Hardt & A. Negri, *Commonwealth* (Cambridge MA: Harvard Belknap Press, 2009) 102-118.

⁶ *Ibid.* 125.

Negri's fundamentally constitutive ontology *always* shines through. In his millennial collaboration with Hardt, it is something which takes the shape of the collective subjectivity and constituent power of the multitude and its project of constituting the common.⁷ Both of which are given over to concretized development in the second and third volumes of the trilogy. Nevertheless, the three concepts should not be artificially separated insofar as they work together. Again, as a productive conceptual triangulation, to grasp a contemporary form of sovereignty and constituent power as much as a template for a renewed communist project. I found this was too often overlooked or left to the side, even by the best reviewers of *Empire*.

One of the reasons for this may be that the logico-semantic frame or conceptual apparatus attached to Negri's English language collaboration with Hardt can strike first time readers as strange. This is nowhere more true than relative to Hardt and Negri's oft repeated (and perhaps for some, counter-intuitive) argument that although *Empire* permits of no exterior from which to resist, it remains possible, indeed it is the only possible iteration of a democratic politics, for the multitude to form a line of flight from it. This, after all, is a construction upon which Hardt and Negri repeatedly insist, using a largely Deleuze (and Guattarian) idiom to make the point.⁸ Tellingly, it is this which is most irksome to *Empire*'s sharpest reviewers. Notably Žižek, who asserts Hardt and Negri treat this type of conceptual experimentation as an exercise in obscurantism reducing it to an empty 'Deleuzian jargon'.⁹ I disagree with Žižek and aim to develop a counter argument which largely defends Hardt and Negri's presentation, or at least my

⁷ Not only as specific conceptual experiments in the two successor volumes to *Empire* n 1 above, *Multitude* n 4 above and *Commonwealth* n 5 above, but as formulations of collective subjectivity or constituent power and collective production. As initially outlined and enumerated quite clearly in *Empire* itself. First, in the constituent subjectivity of the multitude at 103, second, in the constituent act as the constitution of the common, a project which is, among other things, a conceptual frustration of the public/private dyad hegemonic in western thought. A crucial concept which Hardt and Negri italicize in extremis at 302-303: "*Capitalism sets in motion a continuous cycle of private reappropriation of public goods: the expropriation of what is common...The rise and fall of the welfare state in the twentieth century is one more cycle in this spiral of public and private appropriations... what is the operative notion of the common today, in the midst of postmodernity, the information revolution, the consequent transformation of the mode of production...A new notion of 'commons' will have to emerge on this terrain. Deleuze and Guattari claim in What Is Philosophy? that in the contemporary era and in the context of communicative and interactive production, the construction of the concept is not only an epistemological operation but equally an ontological project. Constructing concepts means making exist in reality a project that is a community....*"

⁸ Ibid. 299. This is explicit in *Empire* insofar as Hardt and Negri pick up an alternative "democratic model" in "what Deleuze and Guattari call a rhizome, a non-hierarchical and noncentered network structure..."

⁹ S. Žižek, 'Have Michael Hardt and Antonio Negri Rewritten the *Communist Manifesto* for the Twenty-First Century?' (2001) 13 *Rethinking Marxism* 3/4 at 192: "...one immediately gets a sense of the boundaries to Hardt and Negri's analysis. In their social-economic analysis, the lack of concrete insight is concealed in the Deleuzian jargon of the multitude, deterritorialization, and so forth."

interpretation of it. In so doing, I return at the heart of the chapter to the distinction between the two forms of c/Constitution.

B. The old question of form and content

Recall, Hardt and Negri present the distinction between the formal and the material constitutions as one which is wrapped up with the constitution of language itself. To make this point obvious Hardt and Negri permit language a line of flight which operates textually in *Empire* by way of intermittent use of poetics, italics, unconventional prose, unusual forms of headings, transitional passages and exclamation marks scattered throughout the text. In this way, Hardt and Negri constantly experiment with the constitution of language, the form as much as the content of their writing. Where they are successful, I argue, they are able to provocatively link otherwise difficult or unusual arguments and conceptual experiments in ways which are inspiring and original. Unfortunately, few of the reviews of *Empire* hone in on the question of language in a way which speaks directly to this originality.

Some, like Paul Passavant, the co-editor of a major English language anthology of critical essays on *Empire*, *Empire's New Clothes* (2004),¹⁰ grasp the linguistic element of the distinction between the formal and the material c/Constitution it in its broad strokes but stop short of naming it or connecting the intersection of language and representation in the formal, as much as the material constitution. Or perhaps more precisely, the way in which biopolitical production mobilizes the human capacity for language and the animal capacity to speak in ways which are capable of upsetting virtually all the settled assumptions of what Passavant calls 'postmodern liberal legal jurisprudence':

According to Hardt and Negri, representation is everywhere in crisis. Postmodern liberal legal jurisprudence has likewise abstracted law from social conflict, producing and empty and abstract unity through the exclusion of difference...The history of modernity, for Hardt and Negri, represents a struggle between the democratic forces of immanence and the transcendent power of sovereignty. The American Revolution and the U.S. Constitution, however, represent something of an exception to this history of modernity...The Constitution, as illustrated by Negri's reading of the *Federalist Papers*, absorbs constituent power and its subject through its centralizing powers...During the first half of the nineteenth century, America's 'material constitution' exceeded its formal 'formal constitution,' according to Negri, as the 'constituent principle and its determination of freedom and originality manage

¹⁰ P.A. Passavant & J. Dean (eds) *Empire's New Clothes* (New York: Routledge, 2004).

each time to materialize and break through the constitutional wrapping' [citation omitted].¹¹

Passavant's reading of the consistency between *Insurgencies* and *Empire*, as an ongoing critique of the hegemonic formulation of constituted power is quite accurate. However, it does not adequately consider how 'the constitutional wrapping', or the formal Constitution, might point to the representational and subjectivizing limits of the existing language of the social contract. There are also those among Hardt and Negri's shrewdest reviewers, like Laclau and Žižek, who critique *Empire* for slipping back into the language of right and the formal Constitution. Back, in other words, into the very same representational apparatus from which the multitude had supposedly sought to carve a line of flight.

For Laclau,

I can only say that I do not disagree with any of these plans [right to global citizenship, wage and reappropriation of the common]—although it is clear that they do not amount to a full-fledged political program—but what sounds strange, after a whole analysis centered on the need to strike everywhere from a position of total confrontation with the present imperial system, is that these three political aims are formulated in the language of *demands* and *rights*...¹²

For his part, Žižek adds,

The authors propose to focus our political struggle on three global rights: the rights to global citizenship, a minimal income, and the reappropriation of the new means of production (i.e., access to and control over education, information and communication). It is a paradox that Hardt and Negri, the poets of mobility, variety, hybridization, and so on, call for three demands formulated in the terminology of universal human rights. The problem with these demands is that they fluctuate between formal emptiness and impossible radicalization.¹³

What each of these critiques, for all their persuasiveness and apparent obviousness, seems to miss however, is that formulating rights in terms of the collective right of the multitude to freedom of movement and access to the resources of the common (as Hardt and Negri do toward the end of *Empire*),¹⁴ is conceptually *very* different than the usual formulation of rights afforded to the individual citizen or more recently, specific identitarian constituencies. So different, it cannot be inserted into the social contractual model of the formal Constitution as a species of reform. The right of the multitude to

¹¹ P. A. Passavant, 'From Empire's Law to the Multitude's Rights: Law, Representation, Revolution' n 10 above at 101-103.

¹² E. Laclau, 'Can Immanence Explain Social Struggles?' n 10 above at 30.

¹³ n 9 above at 192.

¹⁴ n 1 above at 396-407.

freedom of movement and access to the resources of the common is no return to the old fashioned language of high modernity, the rights state or even the late modern social state. It instead nothing short of the right to (re)make, (re)constitute and (re)produce the political situation and the social coordinates to which it corresponds, from the bottom up, now.

Because so few commentators on *Empire*, even those as acute as Žižek and Laclau tend to grasp the creativity Hardt and Negri muster to presenting a species of conceptual philosophy which grapples with the constitution of language itself, albeit by experimenting with concepts, more than by making arguments drawn from the philosophy of language or even from semiotics, they miss much of what is of value in *Empire*.

In the English language bourgeois press which took an unprecedented interest in *Empire*, the figure of the multitude is generally grasped as a species of global subaltern and *not* as a simple postmodern reincarnation of the old industrial working class, which is indeed the case. At first this much would seem obvious and require little by way of analysis. Commentators like Lev Grossman of *Time Magazine* are typical. They chide Hardt and Negri for what they suggest are unnecessarily complex and ornate arguments as much as utopian or idealistic formulations, all of which seem, at least to them, a little bit farfetched. This, a simple and bluntly defensive response to a book the magazine would not have asked him to review had it not already proven itself. *Empire* is many things. Among them is *not* an exercise in intellectual puffery.

Even Grossman, from his perch in midtown however, grasps in response to *Empire's* sequel, *Multitude*, a question of collective subjectivity, political capacity and constituent power: “[m]ultitude’ is the word for a whole new kind of political entity, one made up of the entire population of the world in all its infinitely complicated, irreducible variety.”¹⁵ It is however, a formulation which he finds thoroughly unbelievable, again “utopian”, even at risk of “shading into utter fantasy”.¹⁶ Unfortunately Grossman does not comment on how the usual imagining of ‘the People’ might be preferable or any less fantastical than that what is understood by the more inclusive, non-difference dampening, collective subjectivity understood by the multitude.

Of course, Grossman has an excuse insofar as he is not writing for an academic audience. But he is not the only one to simply graze the surface of the distinction Hardt and Negri draw so decisively between ‘the People’ and their ‘popular sovereignty’ on

¹⁵ L. Grossman, ‘The Multitude Strike Back’, *Time Magazine*, August 9, 2004.

¹⁶ *Ibid.*

the side of constituted Power and ‘the multitude’ and their refusal of sovereignty on the side of constituent power. However, because he is not a theorist, the way in which he does it is blunter.

I have made this slight detour into the bourgeois media’s reception of *Empire* only to reveal an unexpected commonality between its reading of *Empire* and that one on the more theoretical and critical left. In both groups, few recognize the depth of the distinction which Hardt and Negri make between ‘the People’ and ‘the multitude’ as one which is related, not only to the question of collective subjectivity and autonomy, but also to the complex relationship between language and representation, meaning and power. There are however notable exceptions. Among them is Saveiro Ansaldi’s contribution to the special ‘Dossier on *Empire*’ edition *Rethinking Marxism*, itself a veritable treasure trove of incisive reviews of *Empire*.¹⁷

C. The (new) question of constitution

Ansaldi’s ‘The Multitude in *Empire*: Biopolitical Alternatives’ (2001)¹⁸ is not only written in a more theoretical register but offers a more thoughtful critique of Hardt and Negri than does Grossman. It also grasps a quality which even Žižek and Laclau do not. Ansaldi develops the question of the formation of subjectivity itself to ask why it is necessary to speak of ‘the multitude’ in the singular rather than ‘the multitudes’ in the plural. This seems to me to be a very pertinent aspect of any inquiry into the constitution of language and one which opens up a variety of avenues in Hardt and Negri’s thought which others tend too quickly to gloss over:

Why think about the power of the multitude in terms of the *subject*? In other words, why introduce a unifying and organizational element into the nomadic and dispersed multiplicity of the *multitudes*? Doesn’t the notion of the subject risk introducing the threatening shade of the dialectic there where, precisely, there exists no longer a dialectic, where the nomadism of the biopower of the multitudes is *already* constituent.¹⁹

This is a perceptive critique which both absorbs the obviousness of the intended distinction between ‘the People’ and ‘the multitude’ while at the same time pushing the multitude to remain internally differentiated, horizontal, non-uniform and most of all plural, so as to avoid any returns to the old hegemony of the social contract between the People and the Sovereign (as grounded in the metaphysics of the Constitution and the dialectical form of logic which supports it). It is also worth noting here that the

¹⁷ n 9 above.

¹⁸ S. Ansaldi, ‘The Multitude in *Empire*: Biopolitical Alternatives’ n 9 above at 137-143.

¹⁹ Ibid. 143.

French language journal *multitudes*, an interdisciplinary journal devoted to theoretical writing within the conceptual nodes of a loosely 'post-autonomist' thought, and to which Hardt and Negri are themselves frequent contributors take this plurality for granted in the title of the journal itself.²⁰

While the European debate on language which prevailed throughout sixties, seventies, eighties and nineties spilled into critical jurisprudence and radical political theory in North America and the UK as much as it did in Europe, it remained a marginal influence in major Anglo-American and Canadian Law faculties. I take this to be a relatively non-controversial observation which should come as no real surprise insofar as most legal theorists writing on the constitution in the English language formulate their thought in the language of normative political philosophy or social science. Both of which are without a doubt quite reflexive insofar as those interested in the science of the norm, like jurists and political scientists, cannot see things in any other way. In the US, the departure point for all of this was the social contractual theory of John Rawls. In Europe figures like Jürgen Habermas, for whom a renewed democratic public sphere was required to ground a more perfect communications-based understanding of democracy, featured prominently.

Recall, in the last three decades of the twentieth century endless similar questions of social order and collective life were being considered in all quarters of the western intelligentsia. At the broadest level, Hardt and Negri place Rawls and Luhmann at the head of the pack in this universe. Certainly, neither is a jurist nor a constitutionalist. Luhmann is a social scientist and Rawls a normative philosopher. Taken together however, Hardt and Negri make the novel argument that they point to the most perfect social scientific formulation of the Constitution of Empire possible. Like the Luhmannian systems theory or the Rawlsian social contractalism, Empire knows no limits within its sphere of competence. Unlike them, on the other hand, it cannot be bound into a particular representational architecture, system, structure or foundation.²¹

Shortly after the publication of *Empire*, perhaps wishing to make this point before the English language legal audience which needed to hear it the most, or simply detecting it had perhaps been less obvious to his newly expanded English language readership than he might have thought, Negri reintroduces the strange union of Luhmann and

²⁰ *Multitudes* publishes in both an experimental print and online format, both of which contain visual and design flourishes well beyond the text ranging from photographs to innovative visual arts of other sorts. The journal *multitude* publishes four times annually and it is the successor entity to the earlier *futur antérieur* founded by Negri during his period of exile in Paris with Jean-Marie Vincent and Denis Berger (1990-1998). Both the *Futur Antérieur* and *multitudes* archives are online at <http://multitudes.samizdat.net/>.

²¹ n 1 at 13-15.

Rawls in a keynote address to the 2001 annual UK Critical Legal Conference held at the University of Kent on the weekend before what was to become known as 9/11.

On this occasion, Negri delivers his remarks by video link from Rebibbia Prison in Rome and uses the moment to revisit the strange pairing, describing it, in an obvious reference to the recently mapped human genome as “a destructive double helix”. One which he warns is taken up by critical legal thought only at the risk of collapsing completely into a de-radicalized and purely reformist, never genuinely revolutionary modality:

[I]n Luhmann and Rawls (once they are not taken to be conflicting, a singular resemblance and connection between the two becomes discernible)... there is a destructive double helix...whether that be a postmodern, luhmannian, or rawlsian awareness, the creative sense of the ‘dispositive’ between reality and normativity, history and orientation, is entirely cancelled out and legal realism is not only diluted but destroyed...as well as the entire tradition of reformism, for that matter.²²

My sense in passages like this one, which draw unusual or unexpected parallels between thinkers, is that (Hardt and) Negri are reconnecting to an earlier critique, not only of representation in the formal Constitution, but of the transcendental mystification of sovereign Power in the social contractual imagining which undergirds it. A tendency which they suggest in *Empire* runs in a fairly solid line through modernity and which has come to mutate in extraordinary ways in postmodernity. More than a simple hypermodern valorization or anti-modern reversal and negation of hegemonic structures of meaning and Power, (Hardt and) Negri opt, following Foucault and Deleuze, to present new dispositives of power which break open, escape and carve lines of flight from the old determinisms and hierarchies. This is not a utopian dream or a ‘Deleuzian jargon’, as Žižek suggests,²³ it is an original contribution to legal and political theory, and especially the hybrid field of constitutional theory. A terrain in which various forms of rationality, political and legal in particular, come in ways which are increasingly difficult if not impossible to disentangle without more and more complex forms of interventions by courts and legislatures (both Chapters V & VI explore this tendency in contemporary Canada from different angles).

Normative philosophers from the Anglo-American tradition like Rawls, as much as critical social scientists from the European one like Luhmann, Hardt and Negri argue early in *Empire* (and Negri pointedly reinforces before an English language critical legal audience in 2001), converge unexpectedly insofar as both can be said to share an all-

²² n 3 above at 38-39.

²³ n 9 above.

encompassing grasp of political, legal and social ordering. An ordering which is, in some way indexical to the logics of the formal Constitution of Empire, and yet at the same time tends either to overlook it, or fundamentally misunderstand the nature and quality of the material constitution which it (re)produces and is (re)produced by.

In Rawls, (Hardt and) Negri make the point, we can think of what it means to be inside or outside the social contract as *the* question or organizational dialectic and in Luhmann of what it might mean to be inside or outside of a variety of closed normative system at all times. In the political sense this has, albeit inadvertent, Schmittian implications. Insofar as it leaves undisturbed not only the basic friend/enemy distinction which so easily explodes in violence but also the basic legal/illegal distinction to be infinitely manipulated by political ideology.

I take it is a decisive clue to unwinding some of this, that Hardt and Negri's remarks on the matter appear on the same page of the preface to *Empire* in which they define, as readers will require from the prior chapter, the distinction between the formal and material constitutions: "by 'constitution' we mean both the *formal constitution*, the written document along with its various amendments and legal apparatuses, and the *material constitution*, that is, the continuous formation and re-formation of the composition of social forces".²⁴ Later, they offer the following pithy formulation: "the concept of Empire, is characterized fundamentally by a lack of boundaries".²⁵ For some reviewers of *Empire* this is an especially mind boggling point.²⁶ However, it is properly congruous with Negri's broader project of understanding c/Constitution in two ways:

- (1) as a noun, as in the case of the formal Constitution which has as its basic formulation the use of language for the representation and stabilization of boundaries; and,
- (2) as a verb, the act of material 'constitution', which has as its basic function the (re)production language for the (re)invention and destabilization of boundaries as much as the (re)production of life.

Together, I have argued, (1) & (2) take us back to the increasing centrality of a postcolonial problematic in Hardt and Negri's thought. One which intensifies with each subsequent volume of the trilogy and plays itself out at the most basic level of language: Language is at play in the distinction between the two species of

²⁴ n 1 above at xiv.

²⁵ *Ibid.*

²⁶ n 12 above at 26.

c/Constitution in particular. Again, insofar as the formal Constitution is a question of representation and the material constitution a question of life. Both of which are simultaneously necessary for theory and praxis.

Some of the strongest English language critical interfaces with *Empire* to grasp this, or at least approach it, are found amongst the contributions to the special 'Dossier on *Empire*' double edition of *Rethinking Marxism* devoted to reviewing it.²⁷ There is also an English language critical anthology dedicated to critiques of, and critical commentary on, *Empire*. It contains the representative contributions by Passavant and Laclau cited above.²⁸ Outside of the English language publications universe, an enthusiastic response to *Empire* also emerged in Paris, primarily around the intellectuals and artists who were Negri's colleagues, students and collaborators while he was in exile. Many of whom had collaborated with him in the now defunct French language journal *future antérieur*,²⁹ and many of whom would again do so in writing for the *multitude*,³⁰ a successor journal which continues to publish today, and to which Hardt and Negri continue to contribute.³¹

D. Why the multitude?

No doubt, there is no single concept which fascinated and inspired *Empire*'s readers more than that of multitude and of the collective subjectivity to which it corresponds. In the most obvious sense this is very likely why Hardt and Negri titled their follow-up up to *Empire*, *Multitude*, as they did. As much as it inspired a younger generation of thinkers the concept also quite directly spoke to Negri's generational peers and countrymen on the Italian critical left. Including Paolo Virno, who was himself arrested in the same dragnet as Negri in the spring of 1979. Virno has recently written two major monographs, both of them very different but equally inventive, addressing the multitude

²⁷ n 9 above.

²⁸ n 10-12 above.

²⁹ n 20 above.

³⁰ Ibid.

³¹ Ibid. For purposes of background reading informing this thesis I have found three of Negri's contributions to *multitude* to be especially useful: (1) 'L'Europe, un plaisanterie pour les sujets de l'Empire' (2000) 3 *multitudes* 62 (arguing that the European project is itself a facet of Empire into which the multitude is inserted as a subversive subjectivity and more generally carving out the postmodern as a mutation of the modern European tension between French *civilization* and the German *Kulture*, for an interesting and perhaps surprisingly similar departure point in a Badiouian register see I. Stramignoni, 'Illusion and betrayal: the city, the poets, or an ethics of truths?' (2011) 7 *Utrecht Law Review* 2, 5); (2) 'Pour une definition ontologique de la multitude' (2002) 9 *multitudes* 32 (reemphasizing the crucial distinction between the hegemonic formulation of the thoroughly de-ontological and thoroughly transcendental Hobbes, Rousseau and Hegel and its immanent critique in the thoroughly ontological and immanentist Spinoza and Marx); and, (3) 'Réponse à Pierre Macherey' (2005) 22 *multitudes* 111 (affirming a species of materialist critique in which the body of the multitude is interposed as capacity or strength, or as a biopolitical rationality, as much as a species of living labour).

in the years after *Empire*. The first, *A Grammar of the Multitude* (2004),³² published immediately prior to Hardt and Negri's *Multitude*, took up the constitution of language directly; the second published a year before *Commonwealth*, titled, *Multitude: Between Innovation and Negation* (2008), examined hitherto under-developed psychoanalytic dimensions of the multitude.³³ It should also be noted that the multitude is one of the core concepts clarified and addressed in two volumes of translated essays, lectures and reflections on *Empire* by Hardt and Negri themselves, both prior to,³⁴ and after,³⁵ the publication of *Multitude* in 2005.³⁶

In all of these texts, the concept of the multitude, as a collective subjectivity, captures centre stage to propose an imagining of collectivity and constituent power which has become immensely influential in 'post-autonomist'³⁷ circles, and become a loose rallying cry for 'anti', or perhaps more precisely, *alter*globalization activists and artists of all sorts.³⁸

Reviewers of *Empire* often report being both exhilarated and rattled by *Empire's* conceptual ambitiousness, by its willingness to work with large and even atypical notions, the multitude in particular. For Žižek, in yet another review, this one published in the special edition of *Rethinking Marxism*, the suggestion is however that while Hardt and Negri succeed in proposing an affirmative template for a renewed communist project, they ultimately lose grip and reconstitute the very form of dialectical logic which they so cacophonously rejected.³⁹ More than anything, Žižek is referring here to the

³² P. Virno, *A Grammar of the Multitude* (London: Semiotext(e), 2004).

³³ P. Virno, *Multitude: Between Innovation and Negation* (London: Semiotext(e), 2008).

³⁴ A. Negri, D. Zolo, M. Hardt et al, *Reflections on Empire* (Cambridge: Polity, 2008).

³⁵ A. Negri, *Empire and Beyond* (Cambridge: Polity Press 2008).

³⁶ n 4 above.

³⁷ In their edited anthology Chiesa and Toscano use the term 'post-workerist' to mean approximately the same thing. L. Chiesa & A. Toscano (eds), *The Italian Difference: Between Nihilism and Biopolitics* (Melbourne: re.press, 2009). In their edited anthology of newly translated original autonomist texts, Lotringer and Marazzi open the space for a post-autonomist frame of reference as well. S. Lotringer & C. Marazzi (eds) *Autonomia* (London: Semiotext(e), 2007).

³⁸ Here much of what is/was available is web-based and contains more or less reliable translations of Negri and other loosely post-autonomist writers, activists and critical commenators. The essays, photo journals and other forms of textual and multimedia sources available online are demonstrative of the real, or at least affective virtual circulation of Hardt and Negri's key concepts. Some arise from interdisciplinary conferences between theorists, artists and journalists on the loosely 'post-structural' as much as 'neo-Marxist' left. Perhaps most notably, the now only partially retrievable website set up in connection with the October 2001 'make-world' festival in Munich:

<http://www.makeworlds.org/1/index.html>. Again, it is the English language journal, *Rethinking Marxism*, <http://rethinkingmarxism.org/cms/>, alongside the French language journal, *multitudes*, <http://multitudes.samizdat.net/> which are the most reliable north stars in the field.

³⁹ Ansaldi n 19 above.

proposed Empire/multitude conceptual dyad which does indeed provide a sort of conceptual structure for their work. As emphasized above, Laclau converges with Žižek on this point.⁴⁰

Some critical commentators suggest instead that Hardt and Negri's use of sources and intellectual universe shows a failure to adequately grasp the theoretical vectors flowing through postcolonial thought.⁴¹ Some of these critiques have merit and very likely struck Hardt and Negri as constructive. No doubt still others do fall prey to fundamental misunderstandings.⁴² One of the things which all of them treat too lightly and without adequate reflection is the question, or better the problem of, biopolitics and biopower (which is essential to *Empire* and which most closely links Hardt and Negri to their

⁴⁰ n 12-13 above.

⁴¹ Jose Rabasa is perhaps the most persuasive and hard hitting in proposing this critique. He does not hesitate in formulating a very strong polemic, charging that *Empire* contains: "inconsistencies, slogans commonplaces, generalizations" which "vitiates the force of their analysis of colonialism and, consequently, of the political proposals for a Counter-Empire". Or worse that in *Empire*, "mention of non-European referents, locations, cultures, and histories—to the so-called Other—are incidental." J. Rabasa, 'For *Empire*' n 9 above at 8. In the same see also P.K. Mishra, 'The Fall of the Empire or the Rise of the Global South?' at 96-97 (arguing that Hardt and Negri's description of a deterritorialized global multitude "leaves out all those people in the world, especially the Third World, who have not moved, or if they have moved, then only within the Third World, from rural to urban spaces..."); J. Hutnyk, 'Tales from the Raj' in the same at 128, 130; D. Moore, 'Africa: the Black Hole at the Middle of Empire?' in the same at 101: "One wonders, then, if Empire, based on the European—let's face it, white—experience, can adequately recognize the African multitude?" (which is answered with a mixed yes and no: "...some of Empire's merits trickle down to Africa, but one has the impression that if Hardt and Negri's multitude shake of the shackles of Empire, Africa still will have to pass through a lot of pain..."); K.C. Dunn, 'Africa's Ambiguous Relation to Empire and *Empire*' in *Empire's New Clothes* n 10 above at 143 charging that that Hardt and Negri "fail to provide many non-Western examples" and ignore Africa in a way which exhibits "core elements of Eurocentric thought."

⁴² The difficulty with critiques like these is that they tend to overlook the extent to which *Empire* itself is characterized by the intermixture and hybridization of European and non-European forms of being and ways of thinking see eg M. Hardt & A. Negri, *Empire* at n 1 above at xii-xiii: "In contrast to imperialism, Empire establishes no territorial center of power and does not rely on fixed boundaries or barriers. It is a *decentered* and *deterritorializing* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers. Empire manages hybrid identities flexible hierarchies, and plural exchanges through modulating networks of command. The distinct nation colors of the imperialist map of the world have merged and blended in the imperial global rainbow"; 103 noting that "[n]umerous excellent studies are appearing today, when the pressure of immigration and multiculturalism are crating conflicts in Europe, to demonstrate that, despite the persistent nostalgia of some, European societies and peoples were never really pure and uniform. [citation omitted]"; 128: "*Reality is not dialectical, colonialism is.*"; 139: describing postmodern thought as favourable insofar as it, like postcolonial thought, attentive to fact that "the hybridity and ambivalences of our cultures and our sense of belonging seem to challenge the binary logic of Self and Other that stands behind modern colonialist, sexist, and racist constructions"; 141: "the binaries and dualisms of modern sovereignty are not disrupted only to establish new ones; rather, the very power of binaries is dissolved as 'we set differences to play across boundaries' [citation omitted]."; 145: "Hybridity itself is a realized politics of difference, setting differences to play across boundaries. This is where the postcolonial and the postmodern most powerfully meet: in the united attack on the dialectics of modern sovereignty and the proposition of liberation as a politics of difference..."; 172: describing the US Constitution, as the template for the formal Constitution of Empire insofar as both "could not but be the production of the political and cultural management of hybrid identities."

peers on the contemporary European critical left, many of whom are as interested in unearthing the potential within this Foucault's theoretical legacy as are Hardt and Negri).

E. The problem of biopolitics and biopower

Ultimately, the Deleuze and Guattarian Hardt and Negri are as distinct from the Hegelian Lacanian Žižek as they are from other critical European left intellectuals widely translated into English, including Negri's friend, Giorgio Agamben. This divergence is nowhere more obvious than in *Empire* where Hardt and Negri distinguish between what they call *homo homo* in a reference to early humanist, republican and the materialist strains of modernity and what Agamben calls *homo sacer*. For Hardt and Negri this triangulates broadly in the joining of Machiavelli-Spinoza-Marx (a triangulation into which Nietzsche, Bergson and others may be added in a variety of less intensive and more minor ways, largely by way of Deleuze). The result, a Dionysian creativity and strength, but most of all a capacity for production or constitution: a "*humanity squared, enriched by the collective intelligence and love of the community*".⁴³ This basic formulation of *homo homo* is perhaps the most central to Hardt and Negri's collaboration from the beginning and is nowhere more obvious than their choice of title for their first collaboration prior to *Empire, Labour of Dionysus* (1994).⁴⁴

By the time *Empire* is published a half a decade after Agamben's *Homo Sacer* (1995),⁴⁵ Hardt and Negri would begin to describe their own thought as a species of "antihumanist (or posthuman) humanism".⁴⁶ In so doing, they simultaneously signal that they are interested, like Agamben, who also experiments with a Foucault's scattered and under-developed theorization of biopolitics and biopower, to theorize the present. However, the form of subjectivity which Agamben arrives at, particularly in the concept of *homo sacer*,⁴⁷ is refused by Hardt and Negri outright who treat it as an overly Heideggerian response to the dissolution of the margin in postmodernity.⁴⁸

As emphasized in the preceding chapter (Chapter II), Negri prefers a Spinozian and Marxian ontology to any other. This puts him at odds with Agamben, whose reading of

⁴³ Ibid. 204.

⁴⁴ M. Hardt & A. Negri, *Labour of Dionysus* (Minneapolis: University of Minnesota Press, 1994). Which, I am consciously excluding from any presentation or analysis as a freestanding monograph insofar as it is an edited anthology comprised of two new co-authored essays with earlier and earlier newly translated essays from Negri's archive.

⁴⁵ G. Agamben, *Homo Sacer* (Palo Alto: Stanford University Press, 1998).

⁴⁶ n 1 above at 91-92.

⁴⁷ Ibid. 366.

⁴⁸ Ibid.

Foucault in particular takes shape via variously Heideggerian and Schmittian lenses.⁴⁹ Again, to the extent that Negri and Agamben come into conflict it is where they meet on the terrain of Foucault. For Negri this occurs in the passage from the disciplinary to control power. The very passage in which the contemporary form of biopower and the exercise of biopolitical resistance to it becomes simultaneously possible:

Foucault's work allows us to recognize the *biopolitical* nature of the new paradigm of power. [citation omitted]. Biopower is a form of power that regulates social life from its interior, following it, interpreting it, absorbing it, and rearticulating it....These two lines of Foucault's work dovetail with each other in the sense that only the society of control is able to adopt the biopolitical context as its exclusive terrain of reference. In the passage from the disciplinary society to the society of control, a new paradigm of power is realized...Disciplinarity fixed individuals within institutions but did not succeed in consuming them completely in the rhythm of productive practices and productive socialization; it did not reach the point of permeating entirely the consciousness and bodies of individuals...By contrast, when power becomes entirely biopolitical, the whole social body is comprised by power's machine and developed in its virtuality...Power is thus expressed as a control that extends throughout the depths of the consciousnesses and bodies of the population—and at the same time across the entirety of social relations.⁵⁰

For Agamben however, the notion of biopolitics points to an earlier and more basic capacity of sovereign power to inscribe itself in the life of the body, social as much as biological, individual as much as collective:

[T]he inclusion of bare life in the political realm constitutes the original – if concealed – nucleus of sovereign power. *It can even be said that the production of a biopolitical body is the original activity of sovereign power.* In this sense, biopolitics is at least as old as the sovereign exception. ...In Foucault's statement according to which man was, for Aristotle, a 'living animal with the additional capacity for political existence,' it is therefore precisely the meaning of this 'additional capacity' that must be understood as problematic.⁵¹

⁴⁹ In January of 2011 I instigated a series of email exchanges and a Skype conversation with Michael Hardt. I had at that point largely completed my research and wanted to informally clarify a few questions about my reading of his work, both alone and with Negri. I found the exchange edifying and it helped to clarify some points. For purposes of presenting theoretical propositions or conceptual apparatuses in this thesis however, I have relied, exclusively on his published texts. During my exchange with Hardt, my sense that Agamben's project, or any other which attaches a Schmittian and/or Heideggerian apparatus to Foucault's reading of biopolitics, stands at some distance from the project pursued by the multitude in the constitution of the common was however confirmed.

⁵⁰ n 1 above 23-25.

⁵¹ n 45 above at 3.

In some sense Agamben is not far from Hardt and Negri here, but in others he is. Perhaps close insofar as both perceive in Foucault the key insight that “the production of a biopolitical body” is “the original activity of sovereign power.” Further apart, however, insofar as Hardt and Negri treat what Agamben calls bare life as an inadequately stripped down, even weak or negative form of (minimally collective) subjectivity. One which is not given a democratic horizon in the concept of homo sacer, only mystified. The fundamental difference between Hardt and Negri and Agamben in reading the Foucaultian concept of biopolitics in particular, is that Agamben does not examine the robust revolutionary capacity, the materially constitutive and productive quality of the biopolitical body and its potential to resist, even to (re)constitute and to (re)produce or square itself. This is a significant, complex and potentially serious difference between the reading biopolitics and biopower presented in *Homo Sacer* and the one presented in *Empire* and it is one which requires further study and consideration.

Although interested in a similar set of questions having to do with the intercession of life and politics, Hardt and Negri’s treatment of Foucault’s legacy is to make it coexist with an autonomist reading of Marx,⁵² while for Agamben he is retrieved alternatively in a Schmittian⁵³ or Heideggerian register.⁵⁴ These two approaches do not sit well alongside each other.

⁵² Most explicitly see n 5 above at 31: “Foucault adopts many disguises – larvatus prodeo – in his relationship with Marxism, but that relationship is nonetheless extremely profound.”

⁵³ n 45 at 11: “Carl Schmitt’s definition of sovereignty (‘Sovereign is he who decides on the state of exception’) became a commonplace even before there was any understanding that what was at issue in it was nothing less than the limit concept of the doctrine of law and the State, in which sovereignty borders (since every limit concept is always the limit between two concepts) on the sphere of life and become indistinguishable from it.”; 25: “The sovereign decides not the elicited and illicit but the originary inclusion of the living in the sphere of law or, in the words of Schmitt, ‘the normal structuring of life relations,’ which the law needs.”; 36: “Exteriority – the law of nature and principle of the preservation of one’s own life – is truly the innermost center of the political system, and the political system lives off it in the same way that the rule, according to Schmitt, lives off the exception.” See also 43-44 in the same in which Agamben explicitly highlights a major convergence with, and equally major divergence from Negri’s *Insurgencies* (it will be recalled that *Homo Sacer* was published between it and *Empire*). For *both*, constituent power “conceived in all is radicality, ceases to be a strictly political concept and necessarily presents itself as a category of ontology”. Both he and Negri, Agamben emphasizes, seek to develop an “ontology of potentiality” (which Agamben describes as “beyond the steps that have been made in this direction by Spinoza, Schelling, Nietzsche, and Heidegger”). Negri’s complex relation to ‘weak thought’ (a term widely adopted from Vattimo’s essay of the same name, ‘*pensiero debole*’) is however different than Agamben’s. Thus Agamben’s castigation of Negri’s study of constituent power in *Insurgencies* for its purported failure to “find any criterion in his wide analysis of the historical phenomenology of constituting power, by which to isolate constituting power from sovereign power”, a difficulty which leads Agamben back to Schmitt in a way which it does not in Negri.

⁵⁴ *Ibid.* 1, 188: “Today *bios* [“a form or way of living proper to an individual or group”] lies in *zoē* [“the simple fact of living common to all living beings (animal, men, or gods)”] exactly as essence, in the Heideggerian definition of *Dasein*, lies (*liegt*) in existence”. Failure to grapple with this basic fact, Agamben warns, risks “unprecedented biopolitical catastrophe.”

Perhaps more precisely, Foucault is for Hardt and Negri given a Deleuzian reading and combined with Marx. This generally has a tendency to rankle even some of those who are otherwise most impressed with *Empire*.⁵⁵ This was clearly the case with Žižek, for whom *Empire* was, from the beginning, weakened by its ‘Deleuzian jargon’.⁵⁶ Relative to Agamben, a different type of thinker, the sticking point is not precisely the same.

Hardt and Negri reject what they perceive to be Agamben’s fetishization of the limit, the gauzy quality of the liminal points between life and death, inclusion and exclusion. Instead, they insist, mixture and boundary dissolution is itself a crucial engine of production and of constituent power (and therefore necessary to any understanding of the present and the modes of power, production and subjectivity to which it corresponds). For Hardt and Negri, the Agambenian approach, particularly the imagining of homo sacer, goes too far toward the edge of the abyss. It is from this perspective which Hardt and Negri are coming when they suggest that Agamben risks collapsing into the ultimately negative ontology and fundamentally reactionary thought, again referring, sometimes more explicitly than others, to the Schmittian and Heideggerian elements in Agamben’s thought.⁵⁷ Other late twentieth century thinkers like Derrida, however, fall equally, according to Hardt and Negri, into a similar trap.⁵⁸ There is no doubt a weakness in Hardt and Negri’s treatment of this matter insofar as Heidegger and Schmitt are conflated at a variety of points in the text without adequate explanation. As are a variety of other thinkers loosely designated on ‘the Heideggerian left’, however, the gist of what Hardt and Negri are saying is clear (particularly insofar as it implies an insistence on an affirmative Spinozian rather than negative

⁵⁵ Some Negri scholars, like Toscano, suggest that the intellectual marriage of Marx and Foucault is risky, particularly insofar as it is taken to support a “dichotomization between biopower and biopolitics”. A. Toscano, ‘Always Already Only Now: Negri and the Biopolitical’ in T.S. Murphy & A.K. Mustapha (eds), *The Philosophy of Antonio Negri (Vol. II)* (London: Pluto Press, 2007) 113. Others like Mandarini are more supportive of Negri’s broader project: “for all the theoretical and practical fractures in the development of his thinking, all attempts to separate a Marxist (or Marxist-Leninist) Negri from a postmodern or, more precisely, a post-structuralist one (his very own ‘epistemological break’) fail to grasp either his Marxism or his post-structuralism.” M. Mandarini, ‘Antagonism, contradiction, time: Conflict and organization in Antonio Negri’ (2005) 53 *Sociological Review* 192-214. Toscano’s suspicion is representative of a broader one among Foucault scholars. Hardt and Negri responded to this type of criticism in *Commonwealth* by examining some of the hitherto under-emphasized overlap between Marx and Foucault see eg n 5 above at 31.

⁵⁶ n 9 above at 192.

⁵⁷ n 1 above at 333; n 4 above at 364 fn 37; n 5 above at 57-58.

⁵⁸ n 5 above at 114. Recall, Hardt and Negri distinguish their own ideas from what they identify as a ‘weak’ form of postmodern thought arising in the eighties and the nineties n 53 above, first as a species of Derridian deconstruction and on then on the broader ‘Heideggerian left’ in the thought of key peers like Nancy and Agamben. The basic critique of the so called Heideggerian left and its variants, Hardt and Negri launch, is that it offers only the negation of the dialectic, which, however necessary, offers nothing by way of a programmatic for action or new forms of socially autonomous political intervention (a bottom up democracy instead of the old top down or autonomous ‘politics’).

Heideggerian ontology).⁵⁹ Once again, the affirmative alternative they propose in its place: *kairòs*.

F. *kairòs* and the constitution of temporal events

Much as they refuse an Agambenian reading of the limit, Hardt and Negri do not adopt Badiou's theorization of events,⁶⁰ one which they describe in *Commonwealth*, perhaps over simplistically, as a 'retrospective' rather than prospective, or constituted, rather than constituent.⁶¹ To clarify, what Hardt and Negri propose as a prospectively constituent event rather than retrospectively (Badiouian) constituted one, we can look to the concept of *kairòs*.⁶²

⁵⁹ Working back from *Commonwealth* n 5 at 124, 181, in which Hardt and Negri pose to the basic distinction between Spinoza at the opening of the modern and Heidegger at its closure, it becomes possible to clarify the theoretical break between themselves and Agamben, but also those like Merleau-Ponty, Derrida and Levinas, whom they describe as asking after "the state of being in common" rather than the affirmative "process of making the constitution." This notion has as its backdrop a broader Spinozian theory of the constitution of Being by love. This effectively is what Hardt and Negri understand by ontological constitutionalism: "When we engage in the production of subjectivity that is love, we are not merely creating new objects or even new subjects in the world. Instead we are producing a new world, a new social life. Being, in other words, is not some immutable background against which life takes place but is rather a living relation in which we constantly have the power to intervene. Love is an ontological event in that it marks a rupture with what exists and the creation of the new. Being is constituted by love." Over and over again, Hardt and Negri describe the form of ontological constitutionalism which they prefer as one which is antithetical to Heidegger's and coincident with Spinoza's: "This ontologically constitutive capacity has been a battlefield for numerous conflicts among philosophers...Spinoza stands at the opposite end from Heidegger..." See also A. Negri, *The Porcelain Workshop* (Los Angeles: Semiotext(e), 2008) 86: "Spinoza counters Heidegger, on this great theatre of being and presence. The Spinozan potential (*puissance*) is opposed to the Heideggerian *Dasein*..."; 173: "Heidegger was probably right in telling us that we had to immerse ourselves wholeheartedly in the ontological materiality...Yet he was wrong to consider this delving [into real temporality] to be fated, without issue, and to make Being a weight on our shoulders (or a rock to hang from our necks, so as to better sink into the sea of Being)...He was wrong because this ontological delving into temporality, into despair and poverty, is immediately transfigured by love understood as an ontological power (*puissance*): it becomes fundamental for the production of political subjectivity as well as the production of riches...*To become the multitude is to become democracy.*"

⁶⁰ Like the differences between Negri and Agamben, the differences between Negri and Badiou are often subtle and difficult. In both cases they are also largely determined by the question of biopolitics. A. Badiou, *The Meaning of Sarkozy* (London: Verso, 2008) (orig. pub. 2007) 13. Despite what he regards as the common ground between himself and Negri (namely a shared fidelity to 'the communist hypothesis'), Badiou emphasizes an equally fundamental break between himself and "Deleuzian friends", in an obvious reference to Hardt and Negri (and one in which he aligns himself with Žižek, who admonished Hardt and Negri for their 'Deleuzian jargon' n 9 above. In this case, the concern would seem to be that a Deleuzian reading has been permitted to ground an implausibly sharp, even definitive periodicization between the ascendant biopolitical 'society of control' and the modern 'society of sovereignty', something which is, Badiou implies is, at best, an oversimplification of Foucault's legacy, or at worst, a misreading.

⁶¹ n 5 above at 60.

⁶² The notion of *kairòs* does not figure prominently in *Commonwealth*, which only gives it a passing, albeit precise and useful, definition as "the opportune moment that ruptures the monotony of chronological time". n 5 above at 165. For a more expansive treatment see A. Negri, *Kairòs, Alma Venus, Multitudo* in M. Mandarinini (ed), *Time for Revolution* (Continuum: London, 2003) in which Negri evokes

Kairòs is defined as the constitution of 'biopolitical events'. Biopolitical events are for Negri prospectively constituent or constitutive events insofar as they are brought about by the collective subjectivity of the multitude and its common intelligence (as much as its desire to assert its social autonomy, again, the basic autonomist impulse transplanted into the present). In what follows, I shall briefly explain how the concept of *kairòs*, as the launching of the time's arrow, begins to tie to the constitution of meaning, truth and event into the present moment, at the tip of the arrow.⁶³ What is described here should not be mistaken for a reconstituted teleology or even a will to power. There is neither a Hegelian nor fully Nietzschean impulse which overwhelms Hardt and Negri's writing.

In *Commonwealth* in particular, Hardt and Negri use the language *kairòs* interchangeably with the constitution of time and the production of 'biopolitical events' which they describe as a form of coordinated and collective resistances to biopower. Perhaps elliptically, this leads us back again to the subjectivity of the multitude and its affirmative, constitutive capacity: "[t]he biopolitical event that poses the production of life as act of resistance, innovation, and freedom leads us back to the figure of the multitude as political strategy."⁶⁴

In most regards Hardt and Negri's three volume collaboration is a mixture of plainspoken prose and compelling philosophical and literary writing, in some areas such as this it seems to trail off into the difficulty of posing the multitude as constituent power, Empire as constituted Power and the common as an alternative to 'the People', 'the Constitution' and 'the State'. It certainly does not account for temporality on its own. In a three part series of essays, *Kairòs, Alma Venus, Multitudo* (2000) which emerged from Negri's more explicitly philosophical prison writing contemporaneous with his collaboration with Hardt in *Empire*,⁶⁵ Negri more than makes up for the lack.

In these three interlocking essays, translated into English by Matteo Madarini and published, alongside a much earlier short book, *The Constitution of Time* (1981), we can grasp the concept of *kairòs* better than anywhere else in Negri's thought. For our

the concept of *kairòs* to link the tradition of materialism, particularly in the triangulation of Machiavelli, Spinoza and Marx, with an ontological approach as much as a materialist one. See also A. Negri, *The Porcelain Workshop* (Los Angeles: Semiotext(e), 2008 (orig. pub. 2006) 97 describing *kairòs* as "the instant of creation, the moment of potential (*puissance*) spreads on the edge of being, that is the capacity to invent..."; A. Melitopoulos & A. Negri, *Antonio Negri: The Cell* (a 3 part DVD of interviews from Negri's period of exile in Paris in 1997, his incarceration in Rebibbia in 1998, and after his release in 2003) see specifically the 2003 interview segment, 'Subjectivity and *Kairòs*'.

⁶³ Ibid.

⁶⁴ n 5 above at 61.

⁶⁵ All three essays were subsequently bundled and published as an edited translation *Time for Revolution* n 62 above.

own purposes, the concept of *kairòs* matters because it points, once again toward alternative formulations of both the recent and historical past as well as the present. By this, I mean the constitution of events which are collectively grasped as ‘truths’. Certainly a similar idea to what Badiou has in mind, but nevertheless distinguishable in a variety of crucial ways which point to the novelty not only of Negri’s thought, but also his English language collaboration with Hardt.

Perhaps at the risk of over simplification or caricature, what Negri styles in the Greek word *kairòs* is the affirmative alternative to what he polemicizes as ‘weak thought’, in what is obviously a reference in the most basic sense to Vattimo’s *Pensiero Debole*,⁶⁶ (perhaps as much as it is a variety of other formulations with which Negri does not agree, and which he has begun increasingly to associate with a broadly ‘Heideggerian left’⁶⁷). Again, the concept of *kairòs* also brings (Hardt and) Negri into conversation with Badiou, the most celebrated thinker of the event in contemporary European critical theory. Certainly Hardt and Negri are at times indiscriminate, over generalized and even somewhat unclear in their critique of their contemporaries, particularly those of equal stature who are equally widely studied in the English language. Nevertheless, with the concept of *kairòs* some of it begins to come together.

In his editor’s introduction to *Kairòs, Alma Venus, Multitudo*, Mandarini describes *kairòs* as “the event of knowing, of naming, or rather knowing as singularity, interweaving of logical innovation and ontological creation... and so making the name adequate to the event and constructing legitimation, not over or beyond, but within the common.”⁶⁸ In the idea of *kairòs* specifically, Negri presages the form of ontological constitutionalism on display in *Commonwealth*, all of which very much links to, and builds upon, his critique of Badiou as much as his fundamental belief that Heidegger is irredeemably reactionary.⁶⁹ This is perhaps what he is driving at when calls *kairòs* “an extremely singular force of production of temporality, the reverse of the very sad and naked Heideggerian figures of powerlessness”.⁷⁰

⁶⁶ For Vattimo’s own intellectual history of the concept see G. Vattimo & P. Paterlini, *Not being God: A Collaborative Autobiography* (New York: Columbia University Press, 2009) Chapter 35 ‘Weak Thought’. See also, G. Vattimo, ‘Nihilism as Emancipation’ in L. Chiesa & A. Toscano (eds) *The Italian Difference* (Melbourne: re.press, 2009) 31-36.

⁶⁷ See generally n 5 above at 114 and n 58-59 above. For an analysis of the contours of this complex and multi-faceted set of theoretical differences see M. Mandarini, ‘Beyond Nihilism: Notes Toward a Critique of Left-Heideggerianism in Italian Philosophy of the 1970s’ in *The Italian Difference* above at 61-62. See also A. Zinini, ‘Weak Thought Between Being in Difference’ in P. Virno & M. Hardt (eds) *Radical Thought in Italy* (Minneapolis: University of Minnesota Press 1996) 53-59; M. Hardt, *Deleuze* (Minneapolis: University of Minnesota Press, 1993) xvii, 10-13, 57-58.

⁶⁸ *Kairòs, Alma Venus, Multitudo* n 62 above at 142.

⁶⁹ n 59 above.

⁷⁰ *Kairòs, Alma Venus, Multitudo* n 62 above at 142.

In place of this sad and naked Heideggerian ontology, Negri proposes a Spinozian alternative in which desire or *cupiditas* directs time's arrow toward the ends of the archer, which, in this case is the multitude, which acts according to its common intelligence and constituent desire. Elliptical perhaps, but not without reason - this is where Negri uses the phrase: "time of ontological constitution".⁷¹ A concept which was very much foreshadowed in *Insurgencies*, particularly relative to the French Revolution, which it treated as a question of the constitution of time, or perhaps more precisely, the opening and closing of the aperture of time by the multitude (see generally Chapter II, s. G).⁷²

G. Conclusion

But what is to be made of these schisms between Negri and other major critical left intellectuals of his generation? How does it speak to the initial question posed by *Empire*? Namely, what is this contemporary situation in which the arrangements in the formal Constitution, as the holdover of representation and modernity, seem increasingly divergent from the material constitution of reality even where they are interposed at the most expansive and generalizable level across the social terrain? The answer, it would seem, insofar as it is possible to formulate one, at least as a hypothesis, is that the material constitution of Empire has as its autonomous subject: the multitude. This is not to suggest the material constitution and the multitude are coterminous or synonymous. But, that the multitude carves itself out from the material constitution in a variety of immensely powerful ways. The multitude is, after all, nothing if it is not living labour, a form of productive strength which underpins life, being and sociality at once. And one, which cannot, even under conditions of real subsumption, ever be fully expropriated. It is, in other words, a return to the subjectivity corresponding to the concept of 'the common' which was so completely obliterated in the passage from the feudal to the modern as much as the Indigenous to the European.

What has been crucial for the purposes of this chapter has been that Hardt and Negri refuse the negativity or weakness of which they associate with a Heideggerian left ontology.⁷³ And by extension, the idea that even among their friends and otherwise likeminded critical left colleagues, many of whom have earnestly taken up Heidegger and Schmitt with the hope of retrieving something of value from their thought is that they cannot, for all their considerable intellectual work, formulate an affirmative

⁷¹ Ibid.

⁷² A. Negri, *Insurgencies* (Minneapolis: University of Minnesota Press, 1991) 2, 193-230.

⁷³ n 58-59, 66-67 above.

alternative or any renewed constituent project. Let alone account for how such possibilities might be understood to arise from human life and sociality. The potential distinction between Negri and his close friend, Agamben in particular, is perhaps more illustrative than any other.⁷⁴

By the time *Commonwealth*, the third (and final?) volume of the trilogy is published, Hardt and Negri's position is clarified. It is clear that they regard the reception or renewed interest in Heidegger and Schmitt on the European critical left as, broadly speaking, a good sign, even a spark insofar as it presents a willingness to pursue subversive readings of complex but fundamentally reactionary sources. But only a spark and *not* a revolution insofar as it does not, in the sense of the *Communist Manifesto*, destroy the present state of affairs as precursor for their reinvention rather than merely their negation or inversion.⁷⁵ More specifically, Hardt and Negri would seem to suggest, the revival of Schmitt is helpful in a descriptive sense insofar as his imagining of sovereign power foreshadowed what Foucault would later call biopower. Nevertheless, they also quite clearly suggest, it is ultimately inadequate insofar as it does not offer any theory of biopolitical resistance. Hardt and Negri are interested instead in the affirmative praxis of the present which is entirely forward looking and toward the future. Again: *kairòs*.

In this chapter, before we could speak of the distinction between the theoretical apparatus of Hardt and Negri and those like Agamben whose project is more Heideggerian (than Spinozian) and whose reading of Foucault is more Schmittian (than Marxian), we had to consider *Empire's* earliest and most persuasive reviewers. Many of whom, like Žižek and Laclau, were quite right to suggest that Hardt and Negri, despite their intensely anti-dialectical polemics, themselves use the dialectic as an engine for their thought, at least insofar as what they style 'productive antagonism' is akin, more than anything else, to an open-ended and non-deterministic variation on the (closed and deterministic) dialectic. The problem, I argued, with such critiques is that they tend to miss how Hardt and Negri do their own form of highly subversive semiotic tinkering,⁷⁶ both within and against the dialectical form. Or better, as an immanent critique of it.

⁷⁴ Ibid.

⁷⁵ A question which is sufficiently important to inform Žižek's pointed query in the special edition of *Rethinking Marxism* devoted to review of *Empire* n 9 above.

⁷⁶ A turn of phrase I borrow from Lotringer's description of the revolutionary strategies employed by the Italian autonomist movement and how sharply they differed from the terroristic strategies of the BR. S. Lotringer, 'In the Shadow of the Red Brigades' in n 37 above at v.

In *Commonwealth*, Hardt and Negri reinforce their project relative to that of others by defining it as a species of *alter* rather than *post*, *hyper* or *anti*-modern thought.⁷⁷ In so doing, they are very careful, even more basically, to distinguish themselves from more crudely anti-dialectical stances taken a generation earlier. However, they are equally careful to distinguish themselves from the sort of hypermodern or reinvigorated modernity proposed by neo-Kantian thinkers as diverse as Habermas and Held, who attempt, again and again, to resurrect the promise of the humanist Enlightenment in the formal institutions of the bourgeois State and its Constitution. It is in this way, which Hardt and Negri attempt, in *Commonwealth*, to explicate conceptually (a decade after *Empire* and no doubt having absorbed much of what was written about it) their thought as a species of *alter*, again rather than *anti*, *hyper* or *post*modernism.

What Hardt and Negri call altermodernism in *Commonwealth* channels the antagonisms of both the anti-globalization (or perhaps more specifically 'alter-globalization') movement⁷⁸ and the struggle of Indigenous peoples to retain their traditional cultures and forms of being (or what Hardt and Negri terms 'Indigenous' or 'Amerindian ontology').⁷⁹ What is proposed here is something quite different than the bluntly anti-colonial nationalism of the immediate decolonization period. It is also something which is at some distance from the form of ethnic or identitarian politics in which difference is represented, mediated or otherwise recognized in the formal Constitution. Instead, it coincides with modes of being characteristic of subaltern peoples everywhere. This is where the collective subjectivity of the multitude can be said to arise spontaneously, from life, and yet also have a capacity to organize and exercise its collective intellect and to assert its social rather than strictly 'political' autonomy.

This way of thinking leads in a very different direction than the one familiar to students of contemporary Canadian constitutional historiography. In the second half of this thesis I am to concretize this (Part II: Chapter IV-VI). First, insofar as I examine the strange relationship between the so called 'Rule of Law' and 'the autonomy of the political' in *Empire* (Chapter IV). Second, insofar as I consider the difficulty, or better

⁷⁷ *Commonwealth* n 5 above at 113. Hardt and Negri locate their thought in the vein of an emerging 'altermodernity' introduced for two purposes as: (i) a way of breaking the modern/antimodern dialectic; and, (ii) an alternative to the two dominant late twentieth century modernisms of the (more or less) critical left, 'hypermodernism' and 'postmodernism'.

⁷⁸ *Ibid.* 102.

⁷⁹ *Ibid.* 123-125. On Indigenous ontology generally see Chapter VI.

impossibility, of containing, representing, recognizing or mediating the subjectivity of the multitude in any discourse of reformism (Chapter V); and, third, as I consider the possible outlines of an Indigenous ontology of the common within and against the emerging constitutional subfield of 'Aboriginal Law' (Chapter VI).

PART II

Chapter IV - The APEC Affair and the Constitution of Empire

Today a notion of politics as an independent sphere of the determination of consensus and a sphere of mediation among conflicting social forces has very little room to exist...Politics does not disappear; what disappears is any notion of the autonomy of the political...

M. Hardt & A Negri, *Empire* (2001)¹

[T]he political is not an autonomous domain but one completely immersed in economic and legal structures. There is nothing extraordinary or exceptional about this form of power. Its claim to naturalness, in fact its silent and invisible daily functioning, makes it extremely difficult to recognize, analyze, and challenge.

M. Hardt & A. Negri, *Commonwealth* (2009)²

What united the various protesting groups [at the 1997 APEC Summit] was a belief that the economy cannot be separated from everything else...it is possible that the apolitical pretence of APEC was itself partly responsible for officials' disregard of civil rights. Immunization of world leaders from political dissent probably seemed less problematic for meetings seen as purely economic and not political.

J. Bakan, 'The Significance of the APEC Affair' (2000)³

I was in extreme pain – I was soaked head to toe in pepper spray; it was honestly one of the worst experiences of my life...My eyes were firmly shut, I couldn't see, my nose was just running and full of mucous and it just felt like my entire face and my ears were burning up....

Anti-APEC student militant (1997)⁴

"Pepper? I put it on my plate."

J. Chrétien, Prime Minister of Canada (1997)⁵

¹ M. Hardt & A. Negri, *Empire* (Cambridge Mass: Harvard University Press, 2001) 307-308.

² M. Hardt & A. Negri, *Commonwealth* (Cambridge Mass: Harvard University Press, 2009) 5.

³ J. Bakan 'The Significance of the APEC Affair' in W. Pue (ed) *Pepper in our Eyes* (Vancouver: UBC Press, 2000) 79.

⁴ Complainant statement as cited in *Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Conference Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* ('the Hughes Report') s. 28.5. <http://www.cpc-cpp.gc.ca/prr/rep/phr/apec/apec-28-eng.aspx>.

⁵ http://archives.cbc.ca/war_conflict/civil_unrest/clips/2016/

A. Introduction

Empire presents a series of concepts which are likely to be unfamiliar to English speaking constitutionalists, some because they are drawn from the particularity of the Italian Marxist tradition and others because they contain an experimental and at times poetic extension of Deleuze and Guattarian (as much as Foucaultian) thought to the sphere of constitutional theory. In this chapter, I aim to further familiarize English speaking Canadian constitutionalists with some of the key turns in *Empire* and the literature surrounding it. I do so by way of a situated reading of the 1997 Asia-Pacific Economic Cooperation (APEC) conference in Vancouver. The focus is, in particular, on one event: The summit meeting of November 25, 1997 held at the University of British Columbia (UBC) Museum of Anthropology, a meeting of 18 heads of state and government relatively contemporaneous with the time of Hardt and Negri's completion of their draft of *Empire*.⁶ An event which is today remembered less as the historical occasion of APEC's expansion from 18 to 21 'member economies' (its most recent expansion to date in which it acceded to the membership of Peru, Vietnam and Russia⁷) than it is for being the site of an explosive student protest and clash with police.⁸ Or, what I argue in this chapter is an early expression of antagonism between the multitude and Empire.

B. Canada, APEC and Empire

In the last chapter (Chapter III) I explained that Empire has as its symptom not only the blending of the political and the legal, the political and the economic modes of production, but of the emergence of a possible alternative conceptual landscape which takes none of the old vernacular for granted. In the chapter before (Chapter II), I suggested that Negri's autonomism is based, throughout his life, on an insistence on the autonomy of the social in the place of the autonomy of the political, at least insofar as sociality implies a quality of bottom up and common being whereas the political implies an form of organization which is necessarily a species of top down or centralized command. In this chapter I consider how these complex notions might be grasped in a portrait of the form of sovereignty corresponding to the concept of Empire

⁶ A. Negri, *Reflections on Empire* (Cambridge: Polity Press, 2008) 2.

⁷ Then members included Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong-China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Philippines, Singapore, Chinese Taipei, Thailand and the US. See Decision by APEC Economic Leaders on APEC Membership (Vancouver, Canada, November 1997).

http://www.apec.org/etc/medialib/apec_media_library/downloads/sec/pdf.Par.0021.File.v1.1.1

⁸ See generally Pue (ed) n 3 above.

in Canada. Specifically on the occasion of the meeting of APEC heads of states and government at the UBC Museum of Anthropology on November 25, 1997.

APEC as an organization, a form of *inter*, *trans* or *supranational* institution, takes great pains to insist explicitly on its website that it is definitively an economic and *not* a political club: “The word 'economies' is used to describe APEC members because the APEC cooperative process is predominantly concerned with trade and economic issues, with members engaging with one another as economic entities.”⁹ What is expansive, in other words, is capital, not purely, or even primarily, the variously imperialist or humanitarian aspirations of member states.

On APEC’s publicly available and freely downloadable membership application, applicants are introduced to the various conditions for joining. They are asked, rather perfunctorily, to commit to a litany of neoliberal policy reforms as prerequisites for application. Some involve the privatization of the state apparatus and the de-regulation of its markets.¹⁰ The preconditions for entry have all the familiar hallmarks of neoliberal (de)regulation. From banker and technocratic ‘peer review’ of applicant progress in exchange for the ostensible benefit of new foreign direct investment to other forms of intrusion into the sovereignty of the State over the old levers of public Power. All of this is largely in the name of free trade and capital flows.¹¹ Whatever real imbalances there may be in the material constitutions of member states, those imbalances can be remedied, APEC suggests, by increased trade liberalization. APEC tells applicants, or better ‘applicant economies’, that an end to protectionist policies and the privatization of vast swaths of the publicly owned economy is the requisite exchange, the price of entry into this *lex mercatoria* of the Pacific Basin. Certainly this configuration is familiar to any constitutionalist or political scientist who has studied the nascent institutions of global capitalism. Anyone who grasps neoliberal capitalism at the most rudimentary level will know that ‘economic integration’ is one of its key tropes. Although not specifically cited by Hardt and Negri, APEC is part of the global architecture of neoliberal capital and it is a component of the formal Constitution of Empire.

Recall, Empire is anchored by wealthy ‘middle powers’ like Canada. Canada is a country which enjoys a seat with the major powers in certain forums,¹² while being

⁹ http://www.apec.org/apec/member_economies.html

¹⁰ Ibid.

¹¹ Ibid.

¹² Most notably, the Group of 8 (G-8) (Canada joined in the then G-6 in 1976, Russia joined in 1997 making it the G-8, today the group remains the inner core of the broader G-20 which contains ‘emerging’ as well as established economies), the North America Free Trade Agreement (NAFTA) (Canada is inserted alongside the US and Mexico here) and the North Atlantic Treaty Organization (NATO) (Canada is among the founding members).

excluded from others¹³. Nevertheless it has one of the world's largest economies by any indication, an immense natural resources cache, a comparatively well regulated banking system and robust military spending output which keep it at the head table, albeit as a definitively junior partner in Empire.¹⁴

Carrying forward a Negri-inspired analysis of the nature of the relation between formal and material C/constitution, I toggle throughout this chapter between the formal and material constitutions of Empire as grasped in clashes between police and student protestors at the APEC summit in 1997. In so doing, APEC is treated as emergent institution in the formal Constitution of Empire. Its expansion and generalization, which was again re-affirmed in Vancouver by the ascension of three new 'emerging' or 'transitional' economies to the fold, was on display for all to see. But few will remember it today. Instead, what they are more likely to recall is the spontaneous outbreak of student militancy which greeted it and the police response it engendered. The suggestion is quite plainly that the APEC Affair is a crucial event, a template for similar one across Canada and the world with ever greater intensity in the coming decade.

The question of locality: what does it mean to imagine a deterritorialized form of constitutionalism?

Despite its decentered quality, Empire's generalized ubiquity, its real subsumption of the entire social terrain, its dispersion, makes instantiating it in a particular place both possible but necessarily partial. It is important to recall that there can be no conventional understanding of Empire as having a centralized authority or symbolic head. Certainly, we are able to examine the APEC Summit in this chapter as an instantiation or facet of Empire, but we are not suggesting that it is anything more than a symbol. The point is, of course, not to imply that one can properly mount a frontal or critical attack on Empire. But rather, to insist it remains possible to destabilize it from within, to situate an immanent critique of it from anywhere from within its immense reach. This is among Hardt and Negri's most crucial points in *Empire*.¹⁵ It is also important to recall that since Empire's characteristics are most obvious at the level of generality and often do not have any physical or territorial markers,¹⁶ they can indeed pervade a variety of institutions and apparatuses of governance without explicitly announcing themselves as such. This is why Hardt and Negri famously insist that

¹³ Canada is not a permanent member of the United Nations (UN) Security Council nor does it enjoy 'equal status' with the US, Britain or France (the three states to which it is most closely related, albeit very differently, by ties of history) in terms of economic, military or cultural clout.

¹⁴ <http://data.worldbank.org/country/canada>;
<http://www.policyalternatives.ca/newsroom/updates/canadas-military-spending-ranks-13th-highest-world>

¹⁵ n 1 above at 58.

¹⁶ *Ibid.* 45, 297, 346-347.

Empire is a decentered form of sovereign Power.¹⁷ What they mean is that it stands ready to respond to the multitude's attack anywhere across the globe without needing to be permanentized in any single structure, institutional apparatus or particular jurisdiction.

At the APEC Summit in 1997, Empire's security apparatus or police Power passes through the bodies and brains of the multitude as Royal Canadian Mounted Police (RCMP) pepper spray. It is a form of biopower. Pepper spray is a chemical dispersant used by RCMP to subdue and disable protesters and activists staging a variety of non-violent direct actions at the UBC summit site (ranging from the erection of signage containing humanitarian platitudes to the occupation of ostensibly public spaces to the more provocative charging of a security fence). In what follows I will consider how political interference and police excess escalated into a full blown crisis of the so-called 'Rule of Law' on November 25, 1997.

We have already underlined APEC's self-described mission, its unification of markets unfettered by the political interference. What we get, when we critique it, when we are being naughty or tangential, is pepper-sprayed and dispersed. Arrested and detained. We can grasp the material constitution here in both how our bodies revolt against Empire as much as how they are subjectivized, conditioned and made docile by it. Any reader of Foucault will feel this in their bones. Although the outlines of the material constitution and of a theorization adequate to it do not come easy without careful study of Hardt and Negri, some of its outlines are also discernable in the leading critical legal commentary on APEC.

APEC's rules of entry and the logic of Capital

Before examining the critical legal literature responsive to APEC, we might remind ourselves of the guidelines for aspiring members of APEC: "an applicant economy should be pursuing externally oriented, market-driven economic policies".¹⁸ Note, the language of politics is totally removed and a purely economic register is preferred. Nevertheless, even here, a subterranean politics persists. The 'member economies' are named as such for political reasons. Not only to avoid upsetting the delicate balance between the three Chinas: the Republic of China (Taiwan), Hong Kong (the then newly reabsorbed former British protectorate) and the Peoples Republic ('Mainland China'), but also to de-emphasize the question of democratic bona fides and human rights and

¹⁷ Ibid. xii-xiii, 245, 294.

¹⁸ APEC Ministerial Statement on Membership, November 1997 (Approved by the 9th APEC Ministerial Meeting held in Vancouver).
http://www.apec.org/etc/medialib/apec_media_library/downloads/sec/pdf.Par.0008.File.v1.1.

to mark them as outside the purview of APEC. APEC is not a democratic club, it is an economic club, we are insistently told. One whose members (or at least their representatives) negotiate the rules of global Capital in the interest of global Capital.

APEC describes its own 'mission' accordingly: "Our primary goal is to support sustainable economic growth and prosperity in the Asia-Pacific region. We are united in our drive to build a dynamic and harmonious Asia-Pacific community by championing free and open trade and investment, promoting and accelerating regional economic integration, encouraging economic and technical cooperation, enhancing human security, and facilitating a favourable and sustainable business environment."¹⁹

The 1997 APEC Affair forced Canada to answer to a moral and ultimately political challenge to Empire. To consider, at least fleetingly, the ideological coordinates and real human life animating transnational neoliberal forms of global governance like APEC. It is no coincidence that APEC takes pains in all of its communications to emphasize that it is an association of private economies, *not* of public states. Canada's then Prime Minister, Jean Chrétien, would also find this fact convenient in his own rhetoric. The reasons again go well beyond diplomatic niceties. There are deeper reasons for insisting on the neutrality and non-ideological quality of neoliberal capitalism. And, when the cavalry arrived on campus, UBC militants saw through the whole facade.

The APEC Affair: mise-en-scène

On November 25, 1997 when anti-APEC protesters penetrated the security perimeter surrounding the summit site and motorcade route, events began to unfold quickly. For those students living inside the perimeter of the security barriers in the Green College residence at UBC, including soon to be President of the BC Civil Liberties Union and then enterprising law student Craig Jones, this meant unfurling various banners and signs designed to catch the eyes of summit delegates on their way to draft the final communiqué at the University's famed Arthur Erickson Museum of Anthropology. Most of these signs were quite formulaic and un-provocative.

Jones' sign for instance was inoffensive and liberal in the extreme. It read simply: 'Free Speech, Democracy and Human Rights'. Nevertheless, his sign, along with a variety of other similarly aimed ones were removed by the RCMP. In the days before the summit campus opposition groups to APEC had been infiltrated, harassed and arrested by police. On the day of the final summit meeting at UBC there would be violent clashes

¹⁹ <http://www.apec.org/About-Us/About-APEC/Mission-Statement.aspx>.

and mass arrests between police and protesters. All of this would eventually become a matter of national importance as evidence began to surface that the Prime Minister's Office (the PMO) had directed police to violate protesters Charter rights.²⁰

APEC is not only an organ of the pyramidal structure of (the formal Constitution of) Empire²¹ and student protest a species of (material) resistance to it. The APEC Affair is itself what Hardt and Negri call a 'biopolitical event'. In *Commonwealth* Hardt and Negri define a biopolitical event as an "innovative disruption of *la parole* beyond *la language*" which "translates to an intervention in the field of subjectivity". But most of all as a creative, productive and constitutive force: "this irruption of the biopolitical event is the source of innovation and also the criterion of truth."²²

To unwind the contours of the APEC affair as a species of biopolitical event, I begin with the Canadian critical legal literature addressing it. Particularly UBC Law Professor Wesley Pue's edited anthology, *Pepper in Our Eyes* (2000),²³ in which he quite rightly sets the tone for subsequent contributions, asking provocatively: "What did police do in the autumn of 1997 to so stir the University of British Columbia's notoriously docile students?"²⁴

Unfortunately, few of the contributions to the anthology answer this question. In fact, we never really get a satisfactory response because most of the contributions to the book operate exclusively in the language of the formal Constitution. Most emphasize 'the Rule of Law' as a constitutional principle or axiomatic whose meaning and importance, as reflected in the preamble of the Charter.²⁵ Few of the contributors, including Pue himself, succeed in posing the APEC imbroglio as anything other than a species of technical dispute or moral crisis for the formal Constitution. However, from Pue's colleague, Joel Bakan, also a critical constitutionalist, there is something which

²⁰Something which was left unresolved and very much suspicious even in the Hughes Report itself see n 4 above at s. 9.5.4 (ambiguously finding that while Jean Carle, the Prime Minister's Aid, interfered with the rights of peaceful protesters he did so to preserve a 'retreat-like atmosphere' at the summit rather than to violate the Charter rights of protesters); s. 11.7 (finding evidence of Carle's interference in the removal of student protesters occupying the protest site: "the RCMP's conduct in removing the tents was directly attributable to the actions of the federal government. I am satisfied that, in this instance, the federal government, acting through the Prime Minister's Office, improperly interfered in an RCMP security operation."); s. 30.4 ("...The other instance of improper and inappropriate federal government involvement in the RCMP's provision of security services was with respect to the size of the demonstration area adjacent to the law school...").

²¹n 1 above 309.

²²n 2 above at 59, 61.

²³n 3 above.

²⁴Ibid. 5.

²⁵*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act* 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. The preamble states: "[w]hereas Canada is founded upon principles that recognize the supremacy of God and the rule of law..."

perhaps more closely resembles a Hardt and Negri-inspired approach to the APEC Affair.

A 'Charter-free zone'? Reconsideration of 'the Rule of Law' as much as the 'autonomy of the Political'

Bakan scratches below the surface of the various questions posed under the rubric of the 'Rule of Law' and in so doing begins to peel back certain legal science presuppositions taken for granted by the other contributors to the anthology. He signals this move by asking, "but what is the *real* [emphasis my own] significance of the APEC affair?" And answering: it rendered UBC "a 'Charter-free zone'".²⁶ No doubt, this plain answer was one which would eventually be borne out, in a variety of more subtle ways, in the 40,000 pages of testimony taken before the RCMP Public Complaints Commission culminating in the much anticipated report of Commission Chair, Judge Ted Hughes, "the Hughes Report",²⁷ a report which itself was religiously fixated on 'the Rule of Law' (in this case, as grasped in the formal Constitution and its language treating the mediation of legal and political Power). However, by declaring, even before the commission had completed its inquiry, that the APEC Affair was "about more, much more, than Charter violations", Bakan signals the importance of what Hardt and Negri call the material constitution. Primarily by grasping the hallmark convergences of economic, political and legal rationalities at play in the APEC Affair.

Let us examine where this leads us. If APEC protesters express a desire which is, as Bakan tells us, only awkwardly inserted within the familiar idiom of liberal constitutionalism, its "civil rights narrative" and "free speech" semantics, the result is a need to invent alternatives. Bakan poses one such alternative insofar as he acknowledges the relevance of the protesters themselves, inclusive of their "general concerns about world exploitation and oppression, and the growing power of transnational corporations". In other words, questions about the nature and quality of Empire. Bakan also quite rightly emphasizes the non-uniformity of student protesters. They are, as Bakan tells us, constituted of "a large array of groups and individuals holding divergent, even contradictory, positions".²⁸ In so doing, he takes note of their internal differentiation, their multiplicity in a way which is potentially congruent with Hardt and Negri's description of the multitude.²⁹

²⁶ n 3 above at 79.

²⁷ The Commission is struck pursuant to the *Royal Canadian Mounted Police Act* (1985) RSC c. 8. Part VII s. 45.45 (14) (the *RCMP Act*) n 4 above.

²⁸ n 3 above at 80.

²⁹ See eg n 1 at 103 ("The multitude is a multiplicity, a plane of singularities, an open set of relations, which is not homogeneous or identical with itself and bear an indistinct, inclusive relation to those

APEC protesters were not a homogenous mass dialectically posed against APEC. They had no single uniform ideology which placed them in critical opposition to the summit. Student protests were not orchestrated exclusively by any single group, they had elements of spontaneity as much as elements of organization. In fact, student protesters, some more organized than others, gathered for the first time on the day of the summit. Many, including myself (I was a UBC undergraduate at the time), were freshly radicalized by witnessing what appeared to be a paramilitary takeover of (what we had perhaps naively regarded as) 'our university'. Anecdotally, we were incensed by the hypocrisy of a Federal (Liberal) Government which insisted, in true mercantilist form, in concert with the other APEC member 'economies', that the question of trade was necessarily separate from the question of politics.³⁰

Bakan grasps with alacrity what galvanized diverse protesters: the common refusal of "the neoliberal ideology that dominates today's public discourse",³¹ a refusal which was and remains to some extent sufficiently nascent, to be confusedly and loosely framed in a language of rights, justice and humanitarianism. But which is perhaps something altogether different, namely, a striving to invent a new conceptual and terminological landscape adequate to the novel and experimental forms of democratic praxis invented within and against Empire (or as an immanent critique of it).

It is perhaps in this way that it may be possible to translate some of Bakan's insights into a more Hardt and Negrian idiom. Again, especially insofar as *Empire* insists that the old distinction between private and public Power has increasingly dropped out to become coordinated and interpenetrated.³² This is nowhere more obvious than in organizations like APEC which, as Bakan tells us, were explicitly founded to "transcend politics" by turning "neoliberal ideology into 'truth'" in which "neoliberalism's all-too easy division between economics and politics" becomes farcical.³³ Bakan arrives here at a very Hardt and Negrian point indeed. Particularly insofar as he suggests the autonomy of the political is now in the past. Or, that the political is now a function of the economic (or perhaps more precisely, that all forms of production, economic as much as political,

outside of it. The people, in contrast, tends toward identity and homogeneity internally while posing its difference from and excluding what remains outside of it"); M. Hardt & A. Negri, *Multitude* (New York: Penguin, 2005) 99 ("The multitude is composed of a set of *singularities* – and by singularity here we mean a social subject whose difference cannot be reduced to sameness...The plural singularities of the multitude thus stand in contrast to the undifferentiated unity of the people"); n 2 at 320 (describing the multitude as "*singularity against identity*" and adding that the multitude can never be reduced to identity 'or "made a unity").

³⁰ See Prime Minister Chrétien's post-APEC comments in response to a question from reporters "No, I don't think APEC will ever have a human rights agenda."

[http://archives.cbc.ca/war_conflict/civil_unrest/clips/2016/.](http://archives.cbc.ca/war_conflict/civil_unrest/clips/2016/)

³¹ n 3 above at 80.

³² n 1 above at 300-303.

³³ *Ibid.* 82.

tend, in the neoliberal present, to overlap). This is perhaps the basic, even today banal, insight upon which most critical left thinkers can largely agree. It might in this sense therefore be only the most superficial or basic form of similarity between Bakan's reading of the APEC Affair and what would be a properly (Hardt and) Negri-inspired one.

Bakan's hypotheses

Bakan especially does not use the type of Deleuzian language upon which Hardt and Negri rely. Nor does he go beyond pure ideological critique into the realm of conceptual philosophy in the way that Hardt and Negri do. Bakan does not, in other words, invent a new conceptual or logico-semantic frame as a means of escaping the old dialectic between public and private, political and economic rationalities. He does however show that he understands very clearly what is at stake in events like the APEC Affair. In answer to the most basic question, "how could a university campus become a 'Charter-free zone' for a day?"³⁴ he offers "two speculative hypothesis", both of which go some way to examining the force which animates the multitude in its struggle against Empire.

The first hypothesis is as follows:

[T]here may be a connection between the low value ascribed to civil rights by state officials and the neoliberal character of the APEC meeting. When the economy is understood as technical and apolitical, political protest is, by definition, irrelevant – akin to protesting the politics of gravity. When the public interest is defined [ironically in the same way as the private one] as the advancement of business interests, protesting business-friendly economic policy as undermining public interests is oxymoronic. Neoliberal logic compels the conclusion that protesters are ill-informed and irrational, driven by ideology and ignorance rather than by reasoned understanding of economic science...³⁵

And, the second hypothesis:

[T]he crackdown of APEC protesters relates to broader aspects of neoliberalism. Political power is maintained either through legitimization or coercion, with most systems using some balance between the two. The last few years have been marked by what appears to be a greater readiness on the part of state agencies to quell dissent with coercion, and increasing intolerance of 'unruly' citizens. The APEC crackdown joins the ranks of increasingly frequent and disturbing examples of state repression within Canada: municipal laws that ban panhandling, busking, and sign posting on public property; back-to-work legislation as the norm rather than the

³⁴ Ibid. 83.

³⁵ Ibid.

exception in labour disputes; crackdowns on protests by poor and homeless people; and quasi-military actions against First Nations dissidents.³⁶

Let us consider these hypotheses alongside *Empire* and the complex relationship between the material and formal c/Constitution. Bakan's first hypothesis relates to the insistence on the "the neoliberal character of the APEC meeting" and the corresponding notion that participating governments, including Canada's, were participating in a "technical and apolitical" form of peer to peer international cooperation driven by hard economic science rather than any deliberative social policy. This provides an interesting complement to Hardt and Negri's assertion in *Empire*:

The multitude affirms its singularity by inverting the ideological illusion that all humans on the global surfaces of the world market are interchangeable. Standing the ideology of the market on its feet, the multitude promotes through its labour the biopolitical singularizations of groups, and sets of humanity, across each and every node of global interchange.³⁷

The multitude is for Hardt and Negri the only possible antidote to the "technical and apolitical" character of Empire's formal Constitution and institutions like APEC which reside near its pinnacle. The multitude is more than anything a form of biopolitical resistance to Empire and the ideology of the market. Although Bakan certainly does not use the same idiom as Hardt and Negri to theorize the affirmative quality of the material constitution, as embodied by the subjectivity of the multitude which carves itself out of it, there is a grasp of the administrative and techno-bureaucratic guises of neoliberal ideology which it resists:

A first principle that defines imperial administration is that in it *the management of political ends tends to be separate from the management of bureaucratic means*. The new paradigm is thus not only different from but opposed to the old public administration model of the modern state, which continually strove to coordinate its system of bureaucratic means with its political ends... it is created by conforming the structural logics that are alive in the construction of Empire, such as the police and military logics (or really repression of potential subversive forces in the context of imperial peace), the economic logics (the imposition of the market, which in turn is ruled by the monetary regime)...³⁸

For Hardt and Negri the idea of western rationality, as means/ends, instrumental relationship, must be de-naturalized along with the various false universalisms which it supports. Hardt and Negri recognize that the impersonal neutrality rhetorically insisted upon by modern western rationality is, not unlike Bakan suggests, something which

³⁶ Ibid.

³⁷ Ibid. 395.

³⁸ Ibid. 340-341.

occludes its ideological coordinates or worse, denies them. What distinguishes Hardt and Negri substantially from Bakan is that they do not stop here. They develop a conceptual philosophy, a new grammar of constitution: an affirmative alternative.

Police Control (bio)Power: Understanding the relationship between ‘police right’ and ‘the Rule of Law’

For Bakan, “the crackdown on APEC protesters relates to broader aspects of neoliberalism” in which there “appears to be a greater readiness on the part of state agencies to quell dissent with coercion, and increasing intolerance of ‘unruly’ citizens”.³⁹ In this general sense we find a confluence with some of the arguments formulated by Hardt and Negri in *Empire*. Recall, *Empire* is a form of police (bio)Power. It is a new form of sovereignty whose imperative is to absorb and incorporate modern ideas of scientific rationality and ideological neutrality and set them to work for capital. This is the very same contemporary context in which Hardt and Negri describe in the transformation of modern juridical and political right into postmodern police right and law of the exception:

In order to take control of and dominate such a completely fluid situation, it is necessary to grant the intervening authority (1) the capacity to define, every time in an exceptional way, the demands of intervention; and (2) the capacity to set in motion the forces and instruments that in various ways can be applied to the diversity and the plurality of the arrangement in crisis. Here, therefore, is born, in the name of the exceptionality of the intervention, a form of right that is really a *right of police*. The formation of new right is inscribed in the deployment of prevention, repression, and rhetorical force aimed at the reconstruction of social equilibrium: all this is proper to the activity of the police. We can thus recognize the initial and implicit source of imperial right in terms of police action and the capacity of the police to create and maintain order...⁴⁰

This takes us some way toward an appraisal of Bakan’s treatment of APEC, particularly his second hypothesis which suggests that “the crackdown on APEC protesters relates to those broader aspects of neoliberalism” in which there “appears to be a greater readiness on the part of state agencies to quell dissent with coercion, and increasing intolerance of ‘unruly’ citizens”.⁴¹ Bakan is speaking to what Hardt and Negri call ‘a *right of police*’ is today expanded across the global terrain. Indeed anyone who has ever considered the unusual semantics of ‘armed intervention’ or ‘peacekeeping’ will be immediately struck by the collapsing of police and military actions onto the domestic as much as the *sub, trans, supra* and *international* terrains. This notion can

³⁹ (Bakan’s second hypothesis) n 3 above at 83.

⁴⁰ *Ibid.* 17.

⁴¹ n 3 above at 83.

perhaps best be explained by the recent reawakening, in International Law, of the old medieval doctrine of *bellum justum*,⁴² of the “so-called *right of intervention*” in which “the dominant subjects of the world order intervene in the territories of other subjects in the interest of preventing or resolving human rights abuses, guaranteeing accords, and imposing peace” are global instantiations of police right. Here, “the right of the police is legitimated by universal values”.⁴³

Hardt and Negri link this notion of ‘police right’ and the *intra, supra, trans* or *international* level with a tendency of the modern State to become absorbed within, and part of, the rationality of Empire. Here, the national police, the RCMP, comes increasingly to correspond to the more generalized military logic of Empire. Indeed, armed intervention by military and police around the globe in the name of human rights is central to Canada’s foreign policy (Canada’s immediate past and present deployments in Cyprus, the former Yugoslavia, Somalia and Afghanistan are only the most high profile examples). Across the surface of the globe however, we can also say that domestic police operations which suspend constitutional norms and invoke emergency powers are by no means rare. In the Canadian context, the FLQ crisis is the most obvious historical example which is why we introduced it in the first chapter (Chapter I),⁴⁴ however, the various forms of paramilitary action against First Nations people⁴⁵ and the poor⁴⁶ referred to by Bakan are part of the same continuum of “police right”.

Each time riot police or special forces move against a politically activist or insurgent group, we have a manifestation of what Hardt and Negri call police right. This is not unlike what Bakan may be driving at when describes “a greater readiness on the part of state agencies to quell dissent with coercion, and increasing intolerance of ‘unruly’

⁴² n 1 above at 12.

⁴³ Ibid. 18.

⁴⁴ See generally Chapter I.

⁴⁵ The incidents of militant, even violent insurrectionary action by Indigenous peoples in Canada are too voluminous to catalogue here and would require a separate thesis to link together. However, excellent scholarly analysis of the militancy of the Mohawk Nation on the Kahnawake Reserve in relation to the so called ‘Oka Crisis’ in Quebec and the Chippewas of the Kettle and Stony Point First Nations in ‘the Ipperwash Affair’ in Ontario in are available see eg M. Baxendale, C. MacLaine & R. Galbraith, *This Land Is Our Land* (Montreal: Optimum, 1990); G. York and L. Pindera, *People of the Pines* (Toronto: Little, Brown & Co., 1991); A. (T.) Alfred, *Heeding the Voices of our Ancestors* (Toronto: Oxford University Press, 1995); P. Edwards, *One Dead Indian* (Toronto: Stoddart, 2001).

⁴⁶ Advocacy groups for the poor in major Canadian cities like Vancouver, whose downtown eastside is the site of frequent clashes between police, the homeless, sex workers and drug addicts have legal staffs devoted to ‘poverty rights’. During the 2010 Olympics in Vancouver as well as the 2010 G-8/G-20 meeting in Toronto the intercession of the struggle of the urban poor and disenfranchised with that of Indigenous anti-globalization activists came into increasingly sharp focus. See generally C. M. O’Bonsawin, ‘No Olympics on Stolen Land: contesting Olympic narratives and asserting indigenous rights within the discourse of the 2010 games’ (2010) 13 *Sport in Society* 1, 143.

citizens”.⁴⁷ It is also perhaps a part of the answer to the question of how the UBC became a “Charter free Zone” on the occasion of the 1997 APEC Summit.⁴⁸

The strange confluence of the material and formal c/Constitution in ‘Police right’

The formal Constitution of Empire powerfully intervenes not only in the materiality of life. It subsumes the formal Constitution of the State: “[T]he imperial process of constitution tends either directly or indirectly to penetrate and reconfigure the domestic law of the nation-states....”⁴⁹ This is a key point insofar as it points to how Empire can be localized or instantiated at the state level when ‘police right’ comes to prevail. Pursuing this line of inquiry, which is slightly different than the usual one taken up in the context of globalization and constitutional law, one which tends to examine how new forms of trans or supranational organization, like the EU in Europe or NAFTA in North America, might be said to whittle away the sovereignty of underlying member states (depending on whether their constitutional order is rigid or semi-rigid, etc.), Hardt and Negri ask instead about the question of police right. Whether exercised on behalf of, or by the state, in conjunction with, or impossible to discernable from, a new form of supra/trans/international sovereignty:

How can we call right (and specifically imperial right) a series of techniques that, founded on a state of permanent exception and the power of the police, reduces right and law to a question of pure effectiveness? In order to address these questions, we should first look more closely at the process of imperial constitution that we are witnessing today. We should emphasize from the start that its reality is demonstrated not only by the transformations of international law it brings about, but also by the changes it effects in the administrative law of individual societies and nation-states, or really in the administrative law of cosmopolitical society...⁵⁰

From here, it is not difficult to imagine how Canada and its Charter might come to be subsumed by, or incorporated wholly within Empire and its form of imperial or police right. It will also be recalled here, that the degree to which APEC, like virtually all of the nascent institutions of Empire, defines itself according to its coincidence with the generalized fact of the market, it is a part of the emerging formal Constitution of Empire.⁵¹ The extent to which this is the case however, is not entirely graspable by the type of (still largely ideological) critique which Bakan develops. To make the necessary leap we again require some form of conceptual invention. This point relates to the

⁴⁷ n 3 Bakan above at 83.

⁴⁸ Ibid.

⁴⁹ n 1 above at 17.

⁵⁰ Ibid. See also 20, 26, 87, 189.

⁵¹ Ibid. 25, 31-32, 150, 236,255, 271-272, 307, 309-310, 317-319.

broader notion that Empire is coincident with the termination of the autonomy of the political:

The contemporary phase is in fact not adequately characterized by the victory of capitalist corporations over the state...We need to take a much more nuanced look at how the relationship between state and capital has changed. We need to recognize first of all the crisis of political relations in the national context. As the concept of national sovereignty is losing its effectiveness, so too is the so-called autonomy of the political. [citation omitted] Today a notion of politics as an independent sphere of the determination of consensus and as sphere of mediation among conflicting forces has very little room to exist....Government and politics come to be completely integrated into the system of transnational command....Politics does not disappear; what disappears is any notion of the autonomy of the political.⁵²

Again, this brings us closer to grasping how UBC became 'a Charter free zone' during the APEC summit. Once, as in Empire, capital and the state come into ever closer orbits. Eventually, capital eventually over determines the state and it is impossible to think of any formulation of political power autonomous from it.⁵³ The spill over effect is a total integration of the command rationalities of public and private Power and the exercise of police right as their guarantor. Here, what were previously graspable as fundamental questions of the Rule of Law are no longer resolvable as such because they are increasingly taken up with the contemporary epochal passage in which the law bound character of political Power gives way to a more generalized economic over determination of the social terrain (or at least a generalized blurring between private and public rationalities).⁵⁴ The result is a situation in which the formal Constitution of Empire might be said to correspond as much with 'a Charter-free zone' as it does with the human rights and civil liberties rhetoric of liberal thought and the formal Constitution which it comprehends. Again, this is true whether at the domestic, sub, *supra*, *trans* or *international* level.⁵⁵

⁵² Ibid. 307.

⁵³ Ibid.

⁵⁴ Ibid. 188-189. 197. A similar point is made in the Canadian critical legal commentary. Particularly on the occasion of the twentieth anniversary of patriation, from a liberal feminist perspective see eg P. Hughes, 'The intersection of public and private under the *Charter*' (2003) 52 *University of New Brunswick Law Journal* 201, 202, 207. For a critical legal and social democratic reading see A. Petter, 'Twenty years of *Charter* justification: from liberal legalism to dubious dialogue' in same at 187, 189.

⁵⁵ n 1 above at 236-237.

The crumbling of the old and the emergence of the new

By linking APEC, however obliquely, to other contemporary forms of insurrection playing out both globally and in Canada, or more specifically, to other instances of legally unmediated police interventions on the bodies of the multitude (from the pepper spraying, arrest and detention of student protesters to the far worse fate of Indigenous militants and other subaltern activists), Bakan signals a good appreciation for the complexity and non-uniformity of what Hardt and Negri describe as the multitude. A multitude which exists within and against Empire, itself a non-place in which the rule of law continues to exist as a rhetorical flourish while nevertheless becoming interchangeable with a coercive police right or simply police Power (in an increasingly normalized state of exception).⁵⁶ Once the rule of law becomes interchangeable with Police right, as it does in what Bakan describes as APEC's 'Charter free zone', all the usual formulations fail. Here, the so called Rule of Law is effectively suspended and has ceased to imply any mediation between social forces. The inevitable result: direct confrontation between police Power and the multitude.

Insofar as Bakan identifies a linkage between the response of police to protest at APEC and a more generalized "crackdown" by Canadian courts on "panhandling, busking, and sign posting on public property" as well as "protests by poor and homeless people" and "quasi-military actions against First Nations dissidents",⁵⁷ he grasps the way in which the various localized struggles within and against Empire (again, immanent to it) may leap up from anywhere on the surface of the globe and touch each other at highest level of generality.⁵⁸ Every deployment of police Power, whether it be at the *supra*, *sub*, *trans* or *intemational* level, today partakes of the same tendency to crackdown on subversives who rebuff what Bakan calls the "neoliberal strategy."⁵⁹ To make matters more complex however, their refusal is then recoded back into the language of the formal Constitution. So much so that it is possible, even in a country like Canada, to gloss over police violence and still insist on a view of the polity as one in which a diversity of viewpoints and subjectivities are permitted to coexist peacefully.

⁵⁶ Ibid. 26.

⁵⁷ n 3 above at 83.

⁵⁸ n 1 at 58.

⁵⁹ n 3 above at 83.

The question of 'difference'

I highlight Bakan's contribution to the critical legal literature treating the APEC Affair because it foregrounds the rhetorical slippage in the aspirational imagining of Canada as a multicultural "pluralist state" (with a "pluralist ideology" holding "sway among elites (albeit often as lip-service)") and the reality of neoliberal economics in which pluralism is valued only as multiplier of markets rather than as a real ethico-political project. Hardt and Negri make a similar point: "The imperial 'solution' will be not be to negate or attenuate these [cultural, linguistic, religious, ethnic, racial, gender, sexual, etc.] differences, but rather to affirm them and arrange them in effective apparatus of command."⁶⁰ Bakan understand that in a self-regarding liberal pluralist State like Canada, one which frames both its own 'national identity' and its 'international role' within a mixture of an idealist rhetoric (a reinvigorated, cosmopolitan social contractualism) and a worship of the market (and a naturalization of its logic) certain avenues of critique must be quashed.

Recall, Negri, not only in *Empire*, but in earlier texts, made a similar point (see generally Chapter II). Negri's *Insurgencies* in particular sets out the bourgeois model of the social contract as unswervingly evolving from early modernity onward in the nexus of the private Power of property and the public Power of sovereignty,⁶¹ most rudimentarily in Hobbes and the social contractual exchange of freedom in the state of nature for security in the civil state.⁶² Later in Locke and Kant, as much as Rousseau before them, and Hegel after them, the same arrangement is refined and accompanied less or more with a species of natural rights flourish. All theories of social contract, despite their various cleavages however, together perfect the metaphysics of the old Hobbesian model (as does Rawls in our own epoch). Today, (Hardt and) Negri consistently argue, this old model has reached a point of crisis.

Capital and sovereign Power are always entwined in the State. That they share a mutual enterprise of representing value, mediating conflict and ordering the productive power of the body and mind cannot be contested. One does not have to be an autonomist to see things this way.⁶³ Economic and political production are today connected at an even higher level of intensity than they were when Marx launched his

⁶⁰ n 1 above at 200. See also 45, 154, 192-194, 198.

⁶¹ A. Negri, *Insurgencies* (Minneapolis: University Minnesota Press, 1991) 111, 147.

⁶² *Ibid.* 116, 138-139.

⁶³ Indeed, these ideas are today relatively non-controversial even among mainstream commentators see eg N. Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (New York: Basic Books, 2004) (for a largely neoliberal defence of global capitalism and the transition toward a new form of Empire); E.M. Wood, *Empire of Capital* (London: Verso, 2003) (for a more traditionally Marxist critique of neoliberal Empire).

path breaking critique of 'political economy'. In this sense, although there is no evidence that Bakan has read Hardt and Negri, he makes some of the same preliminary moves as them simply by letting this fact operate in the background. Particularly insofar as he grasps the bleeding together of economic and political rationalities, of private and public, in emerging institutions and forms of global rule like APEC. Something which is felt wherever there is a suspension of law, a state of emergency, or in Canada, a 'Charter-free zone'.

Exception: the (new) norm

This brings us some way from *Empire* to its successor, *Multitude*. In *Multitude*, Hardt and Negri explain how the apparent generalization of war power, emergency and Schmittian exception has become the new norm (marking the permanent exception as the reality of the new millennium).⁶⁴ APEC was an early instantiation of the type of anti-globalization protests which would explode across the world in subsequent decades (all staged in a carnivalesque but deadly serious ways, all variously interposed against the backdrop of large symbolic gatherings of Empire).⁶⁵ Although there is no evidence that Bakan has read *Empire*, his article is published contemporaneously with it. In both cases, a similar set of important questions open.

Resistance is not futile: Constituting the biopolitical event

In the various forms of direct action staged by students against APEC, bodies coordinated and placed themselves against police truncheons and pepper spray canisters. Suddenly the deterritorialized, decentered form of Empire whose presence protesters had perhaps sensed before had suddenly become intensely localized and powerfully represented in a single event. Bakan does a good job of setting this up. Yet, what Bakan ultimately offers is more in the order of ideological critique than what Hardt and Negri have in mind. Hardt and Negri are better able to theorize forms of protest within and against globalization (in other words as an immanent critique and alternative to it). This is perhaps because they grasp how the formal Constitution, both of the State

⁶⁴ Although *Empire* had not predicted the neoconservative takeover of Bush years, this takeover was in actual fact *not* the death knell of Empire (or any of the basic hypotheses pursued in the first volume of the trilogy) see *Multitude* n 29 above at xii-xiii. Instead, it fluctuated between a schizoid rearguard action against Empire (a last final gasp of the old vertical imperial form of power) *and* an intensification of its logics see eg 14, 22-23, 30, 32, 37, 39, 44, 46-47, 54, 60-61.

⁶⁵ A world-wide phenomenon as grasped by mobilizations against neoliberal trade and global financialization growing out of high profile clashes between police and protesters at the 1999 WTO Summit in Seattle, which Hardt and Negri describe as the "coming-out party" of a new cycle of struggles, the 2001 G-8 Summit in Genoa (where summit protester, Carlo Giuliani, was killed in a confrontation with police) and other examples cited by Hardt and Negri in *Multitude* n 29 above at 215. We can point to a series of specifically Canadian instantiations of the same struggle at the 2001 G-20 Summit in Ottawa, the 2001 Summit of the Americas in Quebec City, the 2002 G-8 Summit in Kananaskis Alberta and the 2010 G-20 Summit in Toronto.

and the emerging global order in Empire, remains simultaneously a product of and producer of, the material constitution which lies beneath it. This is why the politicization of the global multitude occurs at a radically local level and passes through bodies of real people as much as it is capable of suddenly leaping up to the level of the global.⁶⁶ In such instances the total immanence of the multitude's critique as well as the unmediated relations of force circulating between it and Empire are at least momentarily unleashed in extraordinary ways.

Deterritorialization: APEC as machine of deterritorialization

The militancy of protesters and the police violence which met it at the APEC summit in Vancouver was a disturbing spectacle for Canadians because it was disjunctive and out of keeping with the civilized imagining they had of their country. A country imagined (greatly assisted by the subjectivizing effects of the post-Charter epoch in English-speaking Canada at least) as an idealized bastion of liberal pluralism and cosmopolitan idealism. *Not* as an oriental despotism:

The lasting image of the summit, seared in Canada's collective memory, was that of a Canadian Broadcasting Corporation television cameraman being pepper-sprayed by irate-looking police officers. Newsworthy and dramatic, video footage of this incident has been broadcast repeatedly since...Such images jarred Canada's self-understanding. Using a noxious chemical to attack non-violent protesters who appeared to be *obeying* police orders seemed un-Canadian. The apparent 'taking out' of a news camera looked more like something that police and soldiers in other, less civil, countries would do.⁶⁷

This is a very telling way of recapping the national mood in response to the APEC Affair represented on their television screens (it will be recalled that in 1997 neither mobile phones nor the internet had achieved the degree of ubiquity or sophistication that they enjoy today). It reminds us that one of the central theses in Hardt and Negri's *Empire* is a spatial one: there is no longer any distinction between the first and the third world, between the centre and the periphery.⁶⁸ As a result, the modern imagining of the political community no longer suffices.

The animus of protesters and militants were directed not only at the reliable Asiatic bogeymen in attendance (including notorious enemies of democracy such as then Chinese President Jiang Zemin, Indonesian President (General) Suharto, and then Malaysian Prime Minister Mahathir Mohammed, all of whom featured prominently in contemporaneous news media reports) but also at their own Head of Government and

⁶⁶ n 1 above 44-46, 362.

⁶⁷ n 8 above at vii.

⁶⁸ n 1 above at xiii, 254, 263-264, 335.

the various Heads of State and Government of Canada's closest 'western' or 'liberal democratic' friends and allies (including then US President Bill Clinton and then Australian Prime Minister John Howard, recall, APEC's only real unique characteristic is that neither Europe nor Africa is territorially integrated into it). There is therefore no central or singular figure at which the rage of all protesters is uniformly directed; only a collective "revolt against the imperial constitutionalization of the world order" which culminates in a "machine that imposes procedures of continual contractualization that lead to systematic equilibria – a machine that creates a continuous call for authority."⁶⁹ And of course, a machine is not a single person, territory or political leader but rather a modality of control.

What is APEC if not such a machine? ⁷⁰ For Hardt and Negri the formal Constitution of Empire is pithily defined as "a heterogeneous set of associations (including more or less the same powers that exercise hegemony on the military and monetary levels)."⁷¹ These include groupings of the leading neoliberal economies to which Canada clearly belongs (indeed, Canada is a member of the elite G-7 and now G-8/G-20 as well as being among the founding members of APEC). Canada is, was, and remains in this way, very much a part of the formal Constitution of Empire. ⁷² But what of the material constitution of Empire, what of the multitude which resists it?

Even the best critical commentators on the APEC Affair, like Bakan, have difficulty naming or meaningfully conceptualizing the productive antagonism (the creative dynamism, Dionysian spark, or constituent power) generated by protesters in their clash with police. Bakan does not fully grasp the breadth of the challenge to the formal constitution of Empire presented by the material strength, corporeality and potentiality of the multitude. Others also fail to grasp what Hardt and Negri describe in the negative as "not representational but constituent activity."⁷³ A close reading of the *Interim Report of Commissioner Ted Hughes of the Commission for Public Complaints Against the RCMP arising out of the APEC Affair*, 'the Hughes Report',⁷⁴ and Pue's critical comment on it, take us some way further, albeit not all the way, toward grasping this distinction.

⁶⁹ Ibid. 14.

⁷⁰ Hardt and Negri are very much willing to cast the formal Constitution of Empire in structural as much as they are thoroughly poststructural Deleuzian or rhizomatic terms. In fact, they use as its theoretical template for the joiner of Rawlsian social contractualism and Luhmannian systems theory to the global level see n 1 above at 13, 309 (describing Empire as a pyramidal structure whose apex is occupied by the US superpower undergirded by the leading industrial and emerging powers in the G-7/G-8, UN Security Council, etc.). See also A. Negri, *The Porcelain Workshop* (Los Angeles: Semiotext(e), 2008) 81-82.

⁷¹ n 1 above at 309-310.

⁷² n 7-14 above.

⁷³ n 1 above at 413.

⁷⁴ n 20 above.

C. The Hughes Report

The Hughes Report is a creature of statute. Section 45.43(1) of the *RCMP Act*, permits the Commissioner of the RCMP, under the authority of the Solicitor General of Canada, to appoint commissions of inquiry to hear complaints of police misconduct and make “findings” and “recommendations” with respect thereto. It therefore falls, like the immense regulatory apparatus surrounding APEC itself, within the broad definition of what Hardt and Negri describe as the formal Constitution, “the written document [the Constitution] along with its various amendments and legal apparatuses”.⁷⁵ This is so, *not* because the Hughes Report itself is a species of positive or Constitutional Law (although it is clearly a source of interpretive authority), but because it is the product of a legal apparatus statutorily permitted to make findings and policy recommendations pertaining to, the interpretation and application of the formal text of the Constitution. In this case, section 2 of the Charter,

Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.⁷⁶

The Hughes Report itself is an instantiation of what Hardt and Negri define as the formal Constitution insofar as it deals with questions relating to the Charter. Both in terms of interpretation of the sort demanded by section 2, but also insofar as it pertains to the rule of law more generally as a foundational principle or metaphysical centre embedded in the preamble to the Charter itself.⁷⁷ Aporetically, ‘the Rule of Law’ is such an important principle in Canadian Constitutional Law that it is simultaneously written and unwritten at the same time. Preambles always occupy such an ambiguous terrain between the natural and the positive law, but they are no less fictional than the boundary they attempt to stabilize.

For the Supreme Court of Canada, ‘the Rule of Law’ is an “unwritten or implicit principle” which, along with “democracy”, “the independence of the judiciary, the protection of civil liberties and federalism” and (perhaps somewhat redundantly) “constitutionalism” itself, is the essence of the constitutional culture and the normative

⁷⁵ n 1 above at xiv.

⁷⁶ n 25 above.

⁷⁷ *Ibid.*

sciences to which it corresponds. We need look no further than the Court's unanimous decision in the 1998 Quebec *Succession Reference* for a reminder and clarification of this.⁷⁸ Namely the rule of law as a basic, unwritten principle which has "profoundly influenced the drafting of the [formal] text" (see generally Chapter V to follow),⁷⁹ yet, what good is the rule of law is where it faces up to an unbridled expression of political autonomy?

The Commission of Inquiry as species of Formal Constitution

The RCMP Commission of Complaints is itself is a quasi-judicial body of statutory creation, which although it has no power to determine civil or criminal liability, is capable of making "findings" and "recommendations" of all sorts.⁸⁰ The Commission therefore remains well within the definition of what Hardt and Negri describes as "the *formal constitution*" (at least in the American template) as "the written document *along with* its various amendments and legal apparatuses" [emphasis added].⁸¹

In the particular case which concerns us here, the Commission takes as its object of inquiry "events that took place during, or in connection with, demonstrations during the APEC Conference in Vancouver between November 23 and 27, 1997 on or near the UBC Campus and subsequently at the UBC and Richmond Detachments of the RCMP." The Hughes Report tells us that the guts of the Commission's work was procedural and formal, it was compiled after 170 days of hearings, examination of 153 witnesses, scrutiny of 710 exhibits and review of over 40,000 pages of testimony. All of which is swallowed up into the Report itself.

The Hughes Report groups the 52 individual complaints, many of them by student protesters, into "17 separate events or situations."⁸² This method of presentation permits the Commissioner to make more generalized findings about what happened in connection with a variety of overlapping claims over a period of several days. While it is not possible to review all 17 findings or more thoroughly anatomize the Commission, its internal structures or functions (including the significant requirement that a Commission of Inquiry's findings be presented as an *Interim* Report with the *Final* Report to be issued, after review, by the government appointed Chair of the Complaints

⁷⁸ *Reference re Secession of Quebec* [1998] 2 SCR 217 see generally Chapter V.

⁷⁹ P.W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 2006) 428, 898. See also P.W. Hogg & C.F. Zweibel, 'The Rule of Law in the Supreme Court of Canada' (2005) 55 *University of Toronto Law Journal* 715.

⁸⁰ n 4 above at s. 2.4. See generally 'the Krever decision' as cited by Commissioner Hughes, *Canada (Attorney General) v. Canada (Commissioner of Inquiry on the Blood System)* (1997) 38 ALR (2d) 1.

⁸¹ n 1 at xiv.

⁸² This is Commissioner Hughes self-description of his methodology see n 4 above at s. 3.

Commission⁸³), it is nevertheless crucial going forward to present what Pue ably summarizes as “a nutshell” of the allegations the Commission is called upon to investigate:

- (1) Allegations of improper or even criminal actions by individual police officers (wrongful arrests, unnecessary roughness, gratuitous use of pepper spray, police dogs, improper strip-searches, use of pepper spray as punishment, and so on);
- (2) Allegations that the police wrongfully attempted to buffer visiting dignitaries from the sight or sound of peaceful demonstrations, in so doing, violating fundamental rights of Canadian including the freedom of speech, freedom of association or assembly, freedom of movement, and so on [s. 2 Charter language].
- (3) Allegations that the police did all or some of these things in direct response to wrongful orders from the Prime Minister’s Office. (It was alleged in the hearings and in the media, the House of Commons, and elsewhere that these orders originated from Prime Minister Chrétien himself. Commissioner Hughes, however, had no jurisdiction to investigate the Prime Minister’s conduct as such. Consequently, this intriguing, extremely important, question was never ‘before’ the Commission [citation omitted] and has not been dealt with in any forum.)⁸⁴

Certainly it could be said that Pue is guilty of editorializing to some extent in his summary of the Commission’s task. But the veracity of the underlying research cannot be ignored. Some very serious consideration ought also therefore be given to the lengthy parenthetical attached to the third provision. A parenthetical which points to Pue’s well documented opinion that the events of November of 1997 entailed political interference with police Power at the highest level.⁸⁵ As much as his view that the

⁸³ In 2001 the RCMP Public Complaints Commission was renamed the Commission for Public Complaints Against the RCMP. Commissioner Hughes notes the purpose of this change was to “clarify” the Commission’s independence from the police force it investigates and the Chair’s independent investigative power. n 4 above at s. 2. The Hughes Report is only an ‘Interim Report’ because its findings are reviewed by the political appointed Commission Chair before they are finalized. See APEC Chair’s Final Report Following a Public Hearing <http://www.cpc-cpp.gc.ca/prr/rep/phr/apec/fr-rf-eng.aspx>. Pue rightly notes that the genuine independence of the Commission is undermined by this review of its findings by a Chair who is, him or herself, a high level appointment by the Solicitor General, the minister responsible for the RCMP and therefore a member of the federal cabinet and the executive branch as well as the Parliament. W. Pue, ‘The Prime Minister’s Police? Commissioner Hughes’ APEC Report’ (2001), 39 *Osgoode Hall Law Journal* 165, 170.

⁸⁴ *Ibid.* 168.

⁸⁵ *Ibid.* See also G. Morin, QC, ‘Personal reflections on the ill-fated first APEC Inquiry’ n 8 above at 161, 163.

Hughes Report was too timid, deferential and narrow in its findings, but nevertheless utterly damning to the Government and the Police if properly accented.⁸⁶ Because I am largely in agreement with Pue's construction of events and views of the matter, I will not take time to quibble with them, but I acknowledge that such quibbling may be possible by those wishing to take up either the RCMP or the Government's defence, which I am not.⁸⁷

Regarding “allegations of improper or even criminal actions by individual police officers”

Commissioner Hughes repeatedly emphasized that “the CPC [RCMP Criminal Complaints Commission] is not in the business of finding fault, criminal responsibility, or liability as such”. The result, Pue correctly notes, is that all allegations of police Charter violations are treated very gingerly. So much so, they are given a quasi-criminal standard of proof and carefully defined so as to avoid findings against individual officers. In this sense, the Commission is able to absolve the police of any wrongdoing without acknowledging the substantial likelihood that alleged abuses occurred. This is the typical move of the Criminal Law and it is legitimate and proper within a rule of law frame. Nevertheless it is oddly applied so as to overwhelmingly favour the police in this case. So much so, that Pue describes the wording of the Hughes Report as something which “lay readers would likely think overly forgiving of the police officers concerned”. Or more generally as failing to show that there were in fact, no “vermin lurking in the shadows.”⁸⁸

Regarding “allegations that the police wrongfully attempted to buffer visiting dignitaries from the sights or sound of peaceful demonstrations, in so doing, violating fundamental rights of Canadians”

The Hughes Report did find that the RCMP's organization of the security for APEC was a massive debacle. Pue writes by way of summary that it is possible to conclude that “even straightforward, seemingly obvious, matters were not attended to” and most damningly, “RCMP command left its officers open to improper pressure from the Prime Minister's Office and from the Chinese consulate.” Reminding critical readers of the degree to which the Hughes Report refrains from finding any sort of wrongdoing against particular RCMP officers, he notes that even where the Commissioner does find one of the student protester's allegations of abuse credible, he is by no means outraged. Implying that although unprovoked and unnecessary pepper-spraying is

⁸⁶ See generally Pue n 83 above.

⁸⁷ To his credit, Pue gives ample opportunity to their defenders in his edited anthology of essays on the APEC Affair see eg G. Puder, ‘Forcing the Issues: Police Use of Force at the APEC Protest’ n 8 above at 128-140.

⁸⁸ Pue n 83 above at 172-173.

neither justifiable, appropriate, nor legally sanctioned, it was nevertheless still a relatively 'minor incident'. To make his point that the Hughes Report is overly restrained, Pue cites the visceral, even corporeal, testimony of one student before the Commission. In so doing, he is able to distinguish between the formal neutrality of the Report and the materiality of actual police brutality:

I was in extreme pain – I was soaked head to toe in pepper spray; it was honestly one of the worst experiences of my life...My eyes were firmly shut, I couldn't see, my nose was just running and full of mucous and it just felt like my entire face and my ears were burning up...the best analogy that I can come up with is, I'd somehow gotten my face stuck on a hot burner, an element, and I couldn't peel it off. And during that time, I was hyperventilating, sobbing, screaming, kicking the door – basically just begging and pleading for somebody to help me, to make it stop.⁸⁹

This language is a sharp break from the usual language of Charter rights and civil liberties. In it, we have a very good snapshot of the circulation of police biopower. Not only its extreme violence, but also of its capacity to control at the same time as it produces a particular form of subjectivity, in this case one which strips life completely to its animal instincts and its bodily vulnerabilities (what Agamben calls bare or creaturely life).⁹⁰

Regarding “allegations that the police did all or some of these things in direct response to wrongful orders from the Prime Minister’s Office”

The Commission’s capacity to make findings in this very delicate matter was formally circumscribed from the beginning by the immense limits on its jurisdiction and capacity to compel witnesses. It must also be born in mind that the Commission was hobbled by allegations of political interference and bias at every stage of its inquiry.⁹¹ Pue

⁸⁹ Ibid 175 (citing to the Hughes Report n 4 above at s. 28.5).

⁹⁰ G. Agamben, *Homo Sacer* (Stanford: Stanford University Press, 1998) 4-5 (describing the entry of bare life into the sphere of the polis the “decisive event of modernity” and linking it with the late life thought of Foucault, particularly his 1982 seminar at the University of Vermont and its link with “the study of the *political techniques* (such as the science of the police) with which the State assumes and integrates the care of the natural life of individuals into its very center...”). Hardt and Negri would not dispute this basic formulation, but they avoid some of Agamben’s pessimism to emphasize “the productive manifestations of *naked life*” rather than “the (more or less heroic) conditions of human passivity” n 1 above at 366.

⁹¹ There had already been one aborted prior Commission in which a board of three Commissioners including its Chief Commissioner, Judge Morin, resigned midstream, based on an express belief that the Commission’s independent fact-finding judicial function was being inhibited by unwarranted political obstruction and interference by Ottawa. n 8, 86 above at 161, 163: “In the final analysis, I [Morin] resigned because of significant disagreement with PCC [Public Complaints Commission] chair [Shirley] Heafey over the respective roles of the commission and the panel...Ms. Heafey met with the panel over dinner and expressed her displeasure with the amount and type of media exposure the issue of student funding [the Commission’s refusal to grant legal defence monies] had received. She stated that she ‘was under a lot of pressure in Ottawa.’ This and other comments lift the impression that she had been in

observes the efforts of Commissioner Hughes were doomed from the outset: the “Commission’s ability to prove the facts was inhibited in a variety of ways.” So much so, “that it became impossible to fully investigate the substance of any allegations of political interference.”⁹²

Perhaps most shockingly for transparency watchdogs (and perhaps delightfully for conspiracy theorists), Pue does point to those sections of the Hughes Report in which it becomes fairly clear that there is at least a prima facie case that the PMO’s Director of Operations, Jean Carle, directed police to arrest peaceful student protesters and tear down their signage.⁹³ There is also evidence that Carle shredded key evidence requested by the Commission.⁹⁴ Certainly the Hughes Report does much to suggest that although it is in possession of inadequate evidence to make findings of fact on these matters, it most certainly views the underlying allegations as having merit. Even despite the non-cooperation and production of evidence by the PMO, it is possible to make certain damning conclusions as to the existence of political interference in the police or law enforcement roles of the RCMP.

Like all good critical legal realists, Pue is attentive to the gap between the material distribution of resources as much as the formal representation of equality in legal processes. He is therefore attentive to the problems of power: “for all practical purposes, the combined RCMP-Government of Canada team enjoyed unlimited access to lawyers, background research and preparation...”⁹⁵ And yet, even despite this immense structural barrier, one added to the already extreme reticence of Commissioner Hughes to make sensitive findings of fact, Pue emphasizes “[t]he APEC

contact with the Solicitor General or officials from his department...I felt that the independence of the panel was being threatened...I felt that Ms. Heafey had crossed the line.”).

⁹²Pue n 84 above at 170 arguing: (1) “Much important evidence was solely in the hands of a federal government determined to shield potentially damaging evidence from scrutiny”; and, (2) the structure of the Commission itself was bias insofar as contained no provision or independent counsel as was comprised entirely of federal government appointments (a shortcoming “akin to giving the fox the key to the henhouse”).

⁹³ Ibid 171. At least according to an article in the *National Post* cited by Pue, reporting that on August 28, 1999 an unnamed RCMP informant produced walkie-talkie communications from November 23, 1997, containing the words “Jean Carle wants that” and “Jean Carle wants this. While the Hughes Report is careful to note the difficulty of making such evidence accord to a criminal standard of proof, especially in absence of subpoena power or voluntary cooperation by the PMO, it does however find Carle in particular overstepped the conventional separation of police and political power n 4 above at ss. 3, 9.5.1.3 & 11.

⁹⁴ n 84 at 170. Pue relies primarily on the allegations of Alexa McDonough’s, then leader of the New Democratic Party (Canada’s social democratic party), who said in the usual rhetorical fashion of a parliamentarian on September 24, 1998: “Today we learned that former operations director, Jean Carle, has admitted to destroying documents pertaining to Spray-PEC”. Unfortunately Pue does not give us any more information about this admission and it is certainly not one which the Commission accepted readily. Nevertheless, it remains a question mark hanging over the affair.

⁹⁵Ibid. 171 -172.

report revealed that the RCMP had allowed itself to be subjected to political influence on at least two occasions.”⁹⁶ Firstly, in moving a security fence separating students and the summit site at the request of the PMO in a manner inconsistent with the rule of law and the separation of powers in a democratic society and the secondly in relation to complainant protesters’ Charter rights.

The irony of jurisdiction

As is typical of formal legal processes, the RCMP Public Complaints Commission is hampered by jurisdictional restraints. In this case its jurisdiction is over the federal police, the RCMP exclusively. It has no jurisdiction over municipal police forces which cooperated in providing security at APEC, nor does it have any powers of compulsion exercisable over Parliament (inclusive of its typically Westminsterian fused legislative and executive branch, PMO included). It is therefore a commission which is on one hand tasked with investigating the matters which touch on the rule of law itself while at the same time being under immense constraints as to the scope of its investigation. In this case, the Commission faced political pressure to avoid certain conclusions as well, particularly those which pointed indisputably to the total interpenetration of police and political power at the highest level of the State. On the basis of the foregoing, Pue suggests that it is a miracle that Commissioner Hughes was able to make any substantive findings at all.

In particular, Pue emphasizes, Commissioner Hughes ably distils two facts which are very much worth emphasizing. First, the finding that the security fence separating student protesters from the summit site was moved forward, at the request of the PMO in a manner “inconsistent with respect for the *Charter* because it limited the protesters’ rights for reasons unrelated to security.”⁹⁷ A finding which Pue, tellingly summarizes as follows: “[i]n short, the ‘security’ perimeter had become a ‘political’ perimeter.” Second, that the PMO “was quite conclusively and unambiguously found ‘guilty’ of persistently and aggressively seeking to improperly direct the police for colourable reasons.”⁹⁸ Again, insofar as we are canvassing a (Hardt and) Negri-inspired reading, we can grasp here a very palpable sense in which political power collapses completely into the control power of the police. We can see here the outlines of an *Empire*-type analysis as Pue marks the breakdown of any coherent juridical doctrine of the rule of law in comfortable coexistence with the autonomy of the political.

⁹⁶ Ibid. 176.

⁹⁷ Ibid. 180 (citing the Hughes Report) n 4 above at s.13.2.2.

⁹⁸ Ibid.

Despite Commissioner Hughes' reticence to more expansively 'connect the dots', Pue argues, the rule of law, as a formal proposition contained in the Charter and understood as axiomatic to the formal Constitution, was by no means safeguarded on the UBC campus on November 25, 1997. Drawing out the most damning conclusions of the Hughes Report, albeit still narrowly and cautiously, Pue notes the Commission's finding that police told witnesses that they had been ordered by the PMO to enforce a 'no signs and no people' order along the APEC motorcade route and at the UBC summit site. Nevertheless, because witnesses and complainant protesters were unable to identify whether this utterance had been made by RCMP or Vancouver Police personnel (over whom the Commission had no jurisdiction), the Commissions could draw no conclusions.⁹⁹ Having emphasized Commissioner Hughes' tepid and rather non-conclusive findings of 'fact' as much as his more courageous ones, Pue returns again to highlight the structural problem. Namely, the ultimate impossibility of answering certain questions:

...[T]he matter could not as a practical matter be pursued in order to find out who had uttered these words ['no signs and no people'], or whether such improper view of police officers' duties [as beholden to the demands of its political masters] was widely shared amongst the police. There was no way for this tribunal to find out how many police officers thought of their duties in this way or how they might have come to this conclusion. Thus, the fact that Ms. Pearlston's [a student protester complainant] signs were taken down and that she was threatened with arrest could only be treated as a case of a single 'bad apple' or 'stressed cop' making a dumb 'mistake'. Why the police officers invoked the Prime Minister's name, Commissioner Hughes could not say.¹⁰⁰

Because of, not in spite of, Commissioner Hughes "extraordinary caution in all matters of fact finding", Pue relies very heavily on those instances in which the Hughes Report *does* make definitive findings of "improper political interference with the police". Particularly insofar as it details "stunning" insights into the involvement of Jean Carle, "[a]n *extremely* close personal friend of the[n] Prime Minister [Jean Chrétien]" and senior members of the PMO, with the actions of police against protesters, before and during the APEC summit.¹⁰¹

Pue also cites the Hughes Report at some length for the finding that the arrest of peaceful protesters was carried out in the absence of any real security concerns¹⁰² and concluding, citing directly to the Hughes Report: "I am satisfied that, in this instance, the federal government, acting through the Prime Minister's Office, improperly

⁹⁹ Ibid. 176.

¹⁰⁰ Ibid. 177.

¹⁰¹ Ibid. 178.

¹⁰² Ibid.

interfered in an RCMP security operation.”¹⁰³ Pue also reminds readers of the fact that the Prime Minister was invited to testify before the Commission but refused (fully cognizant the Commission had no subpoena powers).¹⁰⁴

While it is clear from the plain language of the Hughes Report and from Pue’s summary of it that the independence of police and political power became a farce at APEC. Beyond this, we are left to draw our own conclusions insofar as Pue leaves us with little by way of additional critical analysis. Yet what he does say in his conclusion is instructive for a variety of reasons:

[Prime Minister] Chrétien has not wished to respond to the Hughes Report’s central finding. *The APEC affair moves now from the realm of law and in inquiry process into ‘politics’* [emphasis added]...The choice the Prime Minister faces is to either accept personal responsibility for a fundamental and unprecedented constitutional violation, or to try to distance himself from the matter by excoriating a key aide who is also a close personal friend. These choices must be equally unpalatable. The third choice is to ignore this issue hoping that it will go away.¹⁰⁵

These words were written almost a decade ago and it is now very clear that the third choice was taken. A few important addenda are however required to complete the story. First, let us consider the extent to which the APEC Affair might be a symptom of the blurring of lines, not only between police and political Power, but between the political and the legal forms more generally, a tendency which we have described as characteristic of Empire.¹⁰⁶ Second, let us consider the weaknesses as well as the strengths of Pue’s critical reading of the Hughes Report. Namely, that it may not make sense to view the APEC Affair, in the way that Pue seems to suggest, as largely a matter of personal responsibility, excess or wrongdoing by the Prime Minister and his minions in the PMO. Might such an approach, in other words, not be a simple dialectical inversion of the facile insistence that APEC is an economic and *not* a political organization?

¹⁰³ Ibid.

¹⁰⁴ Ibid. (directing readers to his earlier article on jurisdiction at the APEC Inquiry, W. Pue, ‘Executive Accountability and the APEC Inquiry: Commend on ‘Ruling on Applications to Call Additional Government Witnesses’ (2000) 34 *University of British Columbia Law Review* 335).

¹⁰⁵ n 85 W. Pue above at 182.

¹⁰⁶ This notion flows immediately from (Hardt and) Negri’s thesis that the doctrine of the autonomy of the political is at an end. A formulation which has roughly four overlapping meanings: (1) the imperatives of capital and its private economic rationality increasingly coincide with the command Power of the formal Constitution; (2) a radical politics requires the assertion of the autonomy of the social rather than the autonomy of the political (and sovereign Power generally); (3) political, legal and economic rationalities tend to converge increasingly in a generalized police Power; and, (4) Empire has no outside from which autonomy can be asserted. See eg n 1 above at 38-41, 45, 88, 188-90, 307, 353-56. This point is nowhere more clearly and summarily restated than in the epigram to this chapter taken from the opening pages of *Commonwealth* n 2 above at 5.

A decade after the Hughes Report and over thirteen years since the events of November 25, 1997, we can only observe the following: Not only did then Prime Minister Chrétien continue to ignore the Report for the duration of his term in office, his successor, former Finance Minister Paul Martin (a neoliberal doyen and Davos favourite¹⁰⁷) came and went to be succeeded by the Conservative Party's Stephen Harper, an economist (whose centre right minority government proved every bit as keen on neo-liberal principles as that of his centre left predecessors). None of them looked back at the Report and its findings. It should therefore come as no surprise that the very same spectacle which played out on the UBC campus in Vancouver has since repeated itself, globally from Seattle to Genoa, but elsewhere in Canada, from Quebec City to Toronto, at subsequent meetings of Empire's elites.¹⁰⁸ Each time the same basic drama is played out between police and protesters, each time with a different Prime Minister and a different government. Prior to concluding this first case study, I consider how this might be theorized as a species of 'biopolitical event' rather than simply as a species of political, legal or constitutional scandal.

APEC as 'biopolitical event'

Recall, the Hughes Commission heard 52 complaints, each of which, in one way or another, grew from clashes between protesters and police. Each of which can be said to involve some form of antagonism between the two forms of constitution which Hardt and Negri define, or better revisit, in the preface to *Empire* as the "*formal constitution*", again inclusive of its "the written document [the Constitution]" and "its various amendments and legal apparatuses"¹⁰⁹ as much as the "*material constitution*" as "the continuous formation and reformation of the composition of social forces".¹¹⁰ I repeat this formulation again to point to its importance, centrality and usefulness.

To grasp the form of this antagonism however we must move beyond the specificity of each of the 52 complaints toward the generality of a singular event which binds them together. One which goes well beyond the Commission's very constrained and temporally closed description of its own jurisdiction to examine "the events that took place during, or in connection with, demonstrations during the APEC conference in Vancouver, B.C. between November 23 and 27, 1997 on or near the UBC Campus and subsequently at the UBC and Richmond Detachments of the RCMP".

¹⁰⁷ Davos is among the elite neoliberal clubs at the upper echelons of Empire n 1 above at 310.

¹⁰⁸ n 65 above.

¹⁰⁹ n 1 above at xiv.

¹¹⁰ Ibid.

Hardt and Negri's definition of the material constitution as "the continuous formation and re-formation of the composition of social forces"¹¹¹ today coincides with the circulation of biopower and the mode of biopolitics to which it corresponds. In this vein, mass student protests and arrests at APEC might be said to mark what Hardt and Negri describe in *Commonwealth* as species "biopolitical event".¹¹² Something arising from a "tightly woven fabric of events" which "disrupts the normative system"¹¹³ by proposing a "materialist telos" leading "back to the figure of the multitude as a political strategy".¹¹⁴

If we examine the direct action of APEC protesters we can detect these very qualities: first, insofar as a direct action is understood only in terms of a "phenomenology of bodies"¹¹⁵, a species of material constitution driven by the "continuous formation and re-formation of the composition of social forces";¹¹⁶ second, insofar as we grasp the normative system as profoundly overlapping with the formal Constitution. In Canada, this means not only by reference to the enumerated clauses of the Charter but also the broader doctrine of the rule of law, or what we have styled 'the Rule of Law' to accentuate at its highest order of generality. This why, when I spoke of the formal Constitution as "the written document along with its various amendments and legal apparatuses",¹¹⁷ I included the Commission and its Report (in this case, the Hughes Report) as part of it.

My logic here is explicitly not to be confused with the old, less wrong than misleadingly oversimplified, legal realist assessment that law is politics by another name. What I am proposing instead, is a Negri-inspired theory of c/Constitution. One which is, less a renewed form of ideological critique than a species of immanent critique combined with conceptual experimentation, in which the two rationalities, legal and political, are shown to overlap so much as to become indistinct in events like those comprising the APEC Affair.

By beginning to think about how the postmodern circulation of biopower through the bodies and minds of the multitude might open up new lines of sight and practices of liberation responsive to this reality, Hardt and Negri suggest, in a way which presents equal parts risk and opportunity, a novel perspective. In what remains of this chapter therefore, I attempt, in the context of the ongoing APEC case study, to flesh it out

¹¹¹ n 1 above at xiv.

¹¹² n 2 above at 59, 61.

¹¹³ *Ibid.* 59.

¹¹⁴ *Ibid.* 61.

¹¹⁵ *Ibid.* 27.

¹¹⁶ n 1 above at xiv.

¹¹⁷ *Ibid.*

further. This will involve the subtle and difficult move of explaining the conceptual relationship between biopower and biopolitics in Hardt and Negri's thought. One which is itself, fairly sharply distinguishable from other critical left thinkers similarly interested in the legacy of the rue d'Ulm in a new century and millennia.

The relation between biopower and biopolitics

Empire is not exclusively a formal concept.¹¹⁸ For Hardt and Negri imperial rule has a "material functioning" which does much more than simply represent the benevolence and logic of the market, it is a form of biopower. Hardt and Negri grasp this, following not only their own ambitious reading of Foucault, but also Deleuze and Guatarri before them, to emphasize: "Power is now exercised through machines that directly organize the brains (in communication systems, monitored activities, etc.) and bodies (in welfare systems, monitored activities, etc.)."¹¹⁹ This formulation of biopower is evident in the APEC Affair insofar as (bio)Power itself might be said to coincide with the logics of 'police right', not only in the brutality of pepper spraying and violent arrest, but more generally in the security or war footing which it reveals. Or perhaps most plainly, in the way the UBC campus itself, at least in the context of hosting the APEC Summit, became a 'Charter free zone'.

Rather than taking this analysis of the norm and the exception in the direction of Agamben and others, including on the critical left, who return to Schmitt, Hardt and Negri emphasize instead the massification of students as bodies and minds against police as a form of biopolitical resistance. Or an exercise of constituent power in which the multitude collectively and spontaneously refuses or subverts a particular arrangement of (bio)Power. Here, student militants experience clashes with police as a species of war.¹²⁰ In every lungful of pepper spray the form of sovereignty coterminous with Empire is circulated in the body. First in the body's defensive wheezing response to the inhalation of noxious gas and second in its counter-offensive in which it launches itself against police barricades and security perimeters. Some of this dynamic, I

¹¹⁸ Hardt and Negri argue in *Empire* that "[j]uridical concepts and juridical systems always refer to something other than themselves" and that that something is "the material condition that defines their purchase on social reality." n 1 above at 22. Similarly, *Empire* defines the formal Constitution as the "the written document along with its various amendments and legal apparatuses" which refers itself to "the *material constitution*, that is, the continuous formation and re-formation of the composition of social forces." n 1 at xiv. This idea has long figured prominently in Negri's thought see generally Chapter II.

¹¹⁹ n 1 above at 23.

¹²⁰ *Multitude* n 29 above at 13 defines war as "the general matrix of all relations of power and techniques for domination, whether or not bloodshed is involved...War has become a *regime of biopower*, that is form of rule aimed not only at controlling the population but producing and reproducing all aspects of social life..."

believe, is uniquely graspable in how Hardt and Negri set up the distinction between biopower and biopolitics:

Both of them [biopower and biopolitics] engage social life in its entirety, hence the common prefix *bio* – but they do so in very different ways. Biopower stands above society, transcendent, as a sovereignty authority and imposes its order. Biopolitical production, in contrast, is immanent to society and creates social relationship and forms through collaborative forms of labour.¹²¹

If “[b]iopower is a form of power that regulates social life from its interior, following it, interpreting it” and biopolitics is the form of struggle which plays out within and against the circulation of biopower,¹²² Empire is the new species of sovereignty to which biopower corresponds, one in which the disciplinary form of power adumbrated by Foucault, moves outside the walls of institutions to permeate the entire social terrain. Here, Negri’s autonomist idea of the ‘factory society’ intersects directly with his (as much as Hardt’s) Deleuze-inspired Foucault (see Chapter III s. iii). This is *not* to say however, that the relationship between biopolitics and biopower is (any more than the one between the material and the formal c/Constitution, Empire and the multitude) an accidental or inadvertent return to the dialectic so loudly protested elsewhere (see Chapter III, s. D). Instead, Hardt and Negri’s treatment of the relation between biopower and biopolitics is a facet of a broader analysis of the rhizomatic quality of language as much as its sociality. A phenomenon which has no definitive or closed structure, only open ended and indeterminate roots and stems, all living and dynamic, all capable of producing and (re)producing meaning through life, democratically from below.

The way in which Hardt and Negri develop the idiom of biopower and biopolitics in *Empire* is closely related to what they describe as a contemporary epochal transition from the modern disciplinary form of Power to the postmodern form of control Power. Without wishing to retrace the ground covered in the previous chapter (Chapter III), this line of inquiry necessarily reintroduces itself as a part of a broader, admittedly controversial reading of Foucault offered by Hardt and Negri:

Disciplinary power rules in effect by structuring the parameters and limits of thought and practice, sanctioning and prescribing normal and/or deviant behaviours....We should understand the society of control, in contrast, as that society (which develops at the far edge of

¹²¹ Ibid. 94-95.

¹²² n 1 above at 22-23.

modernity and opens toward the postmodern) in which the mechanisms of command become ever more 'democratic', ever more immanent to the social field, distributed through the brains and bodies of citizens.¹²³

A decade later in *Commonwealth*,¹²⁴ after having refined this idea in a variety of other texts,¹²⁵ Hardt and Negri would become far more explicit in linking the language of biopolitics with the language and concept of the event. In *Commonwealth*, they describe the biopolitical event in contradistinction to Alain Badiou's (perhaps more widely known) theorization, which entails a formulation of the event Hardt and Negri pointedly critique as a messianic, retrospective reconstruction rather than an active, prospective and affirmative one. This distinction is crucial for Hardt and Negri especially insofar as they are interested in constitutive praxis or the material constitution of reality rather than the old determinist science of the formal Constitution:

...[R]ecognizing biopolitics as an event allows us both to understand life as a fabric woven by constitutive actions and to comprehend time in terms of strategy...Foucault's notion of the event is at this point easily distinguishable from the one proposed by Alain Badiou....In Badiou an event – such as Christ's crucifixion and resurrection, the French Revolution, or the Chinese Cultural Revolution, to cite his most frequent examples – acquires value and meaning primarily *after* it takes place. He thus concentrates on the intervention that retrospectively gives meaning to the event and the fidelity and generic procedures that continually refer to it. Foucault, in contrast emphasizes the production and productivity of the event, which requires a forward—rather than backward-looking gaze.¹²⁶

Without needing to take a position on Hardt and Negri's critique of Badiou, I emphasize this passage to explain what makes Hardt and Negri's formulation of the biopolitical event different relative to Badiou's more widely known theorization. Even more crucially however, this passage is interesting for what it implies beneath the surface. To explain, we must again turn in earnest to yet another crucial concept, one which Hardt and Negri have begun increasingly to designate as *kairòs*.

Kairòs: the constituent event as temporal intervention

In the prospective rather than retrospective constitution of events, Hardt and Negri hint at what they describe elsewhere as *kairòs*. *Kairòs* is the opposite of *chronos* or "the linear accumulation of time". It is, in other words, *not* the realization of a particular telos

¹²³ Ibid. 23.

¹²⁴ n 2 above at 56-63.

¹²⁵ See eg A. Negri, *Kairòs, alma venus, multitudo* in M. Mandarini (ed) *Time for Revolution* (London: Continuum, 2003) 248-261; n 70 *The Porcelain Workshop* above at 148; A. Negri 'Logic and Theory of Inquiry: Militant Praxis as Subject and as Episteme' in S. Shukaitis, D. Graber & E. Biddle (eds) *Constituent Imagination* (Edinburgh: AK Press, 2007) 63.

¹²⁶ n 2 at 60.

but instead the “moment when the arrow [of time] is shot by the bowstring”. *Kairòs* is constitutive of events materializing in time and space insofar as they arise from “accumulation of common and cooperative decisions” and present a “moment of rupture or *clinamen* that can create a new world”. Or better, “a new constitutive temporality” which inaugurates “a new future”.¹²⁷ Insofar as *kairòs*, which means in ancient Greek, a ‘just or opportune moment’ or ‘time of God’¹²⁸, points to the constitutive moment, it intersects precisely with what Hardt and Negri call the biopolitical event.¹²⁹

Ultimately, Hardt and Negri refuse any idea of the event which is coterminous with the closure of time and its historicization, its hardening into truth. One which they attempt to correct by emphasizing the absolute immanence of the event to being and history:

The event is, so to speak, *inside* existence and the strategies that traverse it [emphasis my own]. What Badiou’s approach to the event fails to grasp, in other words, is the link between freedom and power that Foucault emphasizes from *within* the event [emphasis my own]. A retrospective approach to the event in fact does not give us access to the rationality of insurrectional events and break from the dominant political subjectivities. Without the internal logic of making events, one can only affirm them from the outside as a matter of faith, repeating the paradox commonly attributed to Tertullian, *credo quia absurdum*, ‘I believe because it’s absurd.’ [citing *Being and Event*]... The biopolitical event that poses the production of life as act of resistance, innovation, and freedom leads us back to the figure of the multitude as a political strategy.¹³⁰

The first point to remark upon is the immanent quality of the event, the way in which the event is grasped in Hardt and Negri as a temporal fold which refuses, rather than permits itself to be named. Hardt and Negri are less interested in the truth apparatus which corresponds to the event than they are in composing a strategy to bring about new events. This explains their insistence on a forward looking interpolation of the “the multitude as a political strategy”. Rather than treating the event as a form of relation to

¹²⁷ n 29 *Multitude* above at 357.

¹²⁸ A. Negri & R. Scelsi, *Goodbuy Mr. Socialism* (London: Serpent’s Tail, 2008) 243.

¹²⁹ The notion of *kairòs* does not figure prominently in *Commonwealth* which only gives it passing, albeit precise and useful definition as “the opportune moment that ruptures the monotony of chronological time” n 2 above at 165. See generally n 126 *Kairòs, alma venus, multitudo* above at 142, 241-242 in which Negri evokes the concept of *kairòs* to link the tradition of materialism, particularly in the ironclad triangulation of Machiavelli, Spinoza and Marx, with an ontological approach differing from the ‘negative’ or ‘reactionary’ thought of Schmitt and Heidegger. In it, *kairòs* is defined as “an extremely singular force of production of temporality, the reverse of the very sad and naked Heideggerian figures of powerlessness”. Instead, what is imagined is a revamped Spinozian formulation in which desire or *cupiditas* directs time’s arrow. This is where Negri coins the phrase, “time of ontological constitution”. See also n 70 *The Porcelain Workshop* above at 97 (describing *kairòs* as “the instant of creation, the moment of potential (*puissance*) spreads on the edge of being, that is the capacity to invent....”).

¹³⁰ n 2 above at 61.

a retrospectively constituted truth, no matter how dynamic, Hardt and Negri insist that events are prospective and affirmative. Or better, constitutive.

For our own purposes what is most crucial in Hardt and Negri's critique of Badiou is their claim that he fails to grasp the prospectively constituted quality of truth (even its character as an act of material constitution) or its essence as "a materialist telos." For Hardt and Negri, biopolitics is coincident with the particularity of Deleuze's Foucault (admittedly, a controversial Foucault much less happily embraced by Badiou, Žižek and others¹³¹):

Gilles Deleuze casts the biopolitical production of life, in a similarly partisan way, as 'believing in the world' when he laments that we have lost the world or it has been taken from us. 'If you believe in the world you precipitate events, however inconspicuous, that elude control, you engender new space-times, however small their surface or volume....Our ability to resist control, or our submission to it, has to be assessed at the level of our every move.' [citation omitted] Events of resistance have the power not only to escape control but also to create a new world.¹³²

The aspect of biopolitical resistance which tracks closest to the praxis of material constitution is the one entailed by what Hardt and Negri describe in *Commonwealth* as a 'phenomenology of bodies', as a particular capacity to act in time, to constitute truths prospectively rather than retrospectively. Again, this is the terrain onto which (Hardt and) Negri move in their description of the constitutive quality of time in the idea of *kairòs* and it is one which is not without a variety of precursors in (Hardt and) Negri's earlier texts.¹³³ It means the production of new truths and new meanings as field of constitutive praxis.

¹³¹ See eg S. Žižek, 'Have Michael Hardt and Antonio Negri rewritten the *Communist Manifesto* for the twenty-first century?' (2001) 13 *Rethinking Marxism* 3/4, 190 (describing *Empire*'s weakness as an overabundance of "Deleuzian jargon"); A. Badiou, *The Meaning of Sarkozy* (London: Verso, 2008) 13 (in an inexplicit but quite obvious reference to Hardt and Negri: "Should we speak, like our Deleuzian friends, of a 'society of control' essentially different from a 'society of sovereignty'? I do not think so..."). See generally Chapter III s. vi. There is also an especially useful debate between Toscano and Callinicos on the role of Deleuze within Negri's thought. A. Toscano, 'Always Already Only Now: Negri and the Biopolitical' in T.S. Murphy & A.K. Mustapha *The Philosophy of Antonio Negri (Vol. II)* (London: Pluto Press, 2007) 125-126 (disagreeing with Callinicos' suggestion that (Hardt and) Negri adopt a purely (Guattarian and) Deleuzian project and highlighting instead the subtle but important differences between them in "the profound if anomalous *humanist* impetus at the core of Hardt and Negri's work"); A. Callinicos *The Resources of Critique* (London: Polity, 2006) 120-1 (describing Negri as a theoretical heir to Deleuze whose status as such separates him from leading European critical contemporaries of his stature such as Derrida, Laclau, Badiou, Žižek and others).

¹³² n 2 above at 61.

¹³³ *Insurgencies* more exhaustively than anywhere else in which the acceleration and deceleration of time becomes key: "Constitutions can come one after the other – each time or, rather, each historical period, has its own constitution – but time must always be constitutionalized. And different times must be reduced to zero. The machination of this reduction is temporal and the constitution is a temporal machine. The formal constitution is superimposed over (and at the same time precedes) a material

To explain what they grasp by the biopolitics of the event, Hardt and Negri broadly distinguish their own readings of Foucault from those of their peers other than Badiou. Schematically,

- (1) Ewald and Esposito, Foucault's friends and translators, whom Hardt and Negri accuse of inadequately grasping the dual nature of biopolitics insofar as they analyze "the terrain of biopolitics primarily from the standpoint of a normative management of populations" which although rich in "philological fidelity" to Foucault's texts "leaves us with a merely 'liberal' image of Foucault and biopolitics insofar as it poses against this threatening, all-encompassing power over life not alternative power or effective resistance but only a vague sense of critique and moral indignation..."
- (2) Agamben, whom Hardt and Negri describe, alongside Derrida and Nancy, as accepting that "biopolitics is an ambiguous and conflictive terrain" but nevertheless conceiving of "resistance acting only at its most extreme limit, on the margins of a totalitarian form of power, on the brink of impossibility." In other words, of adopting a Heideggerian ontology which Hardt and Negri refuse: "These authors seek in Foucault a definition of biopolitics that strips it of every possibility of autonomous, creative action, but really they fall back on Heidegger in these points of the analysis to negate any constructive capacity of biopolitical resistance..."
- (3) Chomsky, Simondon, Stiegler and Sloterdijk, whom Hardt and Negri describe, despite not explicitly invoking the language of biopolitics, as grasping "a certain autonomy conceded to biopolitical subjectivity, for example, in the invariable logical-linguistic structures proposed by Noam Chomsky or the ontological duration of preindividual or interindividual linguistic and productive relations in authors such as Gilbert Simondon, Bernard Stiegler, and Peter Sloterdijk." Whom, Hardt and Negri argue, tend to turn back from at first penetrating insights into the old form of dialectical resistance. Here, a new outside is

constitution." n 61 at 314-315. Negri reminds readers of the extent to which his reflections "on temporality and its ontological import" are linked more broadly to his particular reading of Marxian historical materialism both with and beyond Marx. This is an obvious reference not only to his masterwork, *Marx Beyond Marx* but also to his *The Constitution of Time* and other texts in the eighties which acknowledge "the impossibility of retaining, and in any case of defending, the theory of exploitation and of revolution" grasped by a classical or orthodox Marxist teleology n 126 in *Time for Revolution* above at 143 (reflecting, in 1999, on his own earlier work). Instead, what is offered is a theory of "temporality turned upside down by the [postmodern/post 1968]." Negri's treatment of the constitution of time and the idea of *kairòs* is also closely linked to the capacity of the multitude to act in common, to exercise a common decisional capacity to constitute the present see eg n 29 above at 338-339.

imagined from which to launch a critique or from which to posit a newly naturalized baseline for truth.¹³⁴

Elements of each of these approaches to biopolitics, or something which at least namelessly approaches it, can be felt in the Canadian critical legal commentary on the APEC affair. In Bakan and Pue, whom I have presented as the leading examples, we find a different variation of the critical legal realist treatment of the matter. I might also have included Craig Jones, who both participated in and wrote about the events surrounding APEC,¹³⁵ Trevor Farrow,¹³⁶ Jackie Esmonde,¹³⁷ or a variety of others. Many earnestly critiqued the deployment of police Power and political coercion at APEC. Some surpass the familiar language of civil disobedience and the rule of law to approach a solid ideological critique. Some do not. None adequately approach biopolitics or biopower in their analysis.

Neither Bakan nor Pue, by far the shrewdest critical constitutionalists commenting on the APEC Affair, formulate their critique in the language of biopolitics or biopower. In this way they most resemble the critical modernists Hardt and Negri place under the third heading (3) (Chomsky, Simondon, Stiegler, Sloterdijk, et al). They also grasp without explicitly giving it a name, “a certain autonomy conceded to biopolitical subjectivity” only to immediately mistake it for new form of dialectic. In each case their politics are a reaction against “existing power structures” rather than the collective constitution of something new. The result is constraining insofar as it closes the

¹³⁴ n 2 *Commonwealth* at 58.

¹³⁵ See eg C. Jones, ‘Immunizing universities from *Charter* review: are we ‘contracting out’ censorship?’ (2003) 52 *University of British Columbia Law Journal* 261.

¹³⁶ T.C.W. Farrow, ‘Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System; Issues, Parties and Time’ (2003) 28 *Queen’s Law Journal* 665, 703 (critiquing new policing technologies in which student protesters would be engaged in negotiated de-escalation with police mediators (rather than actual engagement with elites) and mounting an eloquent, but still fundamentally liberal, defence of student activism, concluding with the old civil disobedience homily and its nod to ‘the Rule of Law’: “real participatory progress occurs. *Lawful* anti-globalization protests—parades, sit-ins, tent cities, placards, snake marches, and so on—are part of that debate and part of that *progress*. [emphasis my own]”). Or elsewhere, de-radicalizing his project and unflinchingly describing it as being “in the name of institutional tinkering and future reform.” T.C.W. Farrow, ‘Citizen Participation and Peaceful Protest: Let’s Not Forget APEC’ in P. Hughes & P.A. Molinari *Participatory Justice in a Global Economy* (Montreal: Éditions Thémis, 2004) 231.

¹³⁷ J. Esmonde, ‘Bail, Global Justice, and the Limits of Dissent’ 41 *Osgoode Hall Law Journal* 323, 327, (critiquing cumbersome and unconstitutional bail prohibitions placed on illegally arrested and detained Canadian activists and not repeating Farrow’s error of treating anti-poverty, anti-globalization and other forms of direct action as reiterations of twentieth century civil disobedience. Instead, recognizing that while “classic liberal political theorists who staunchly defend ‘the Rule of Law’ have argued that disobedience is justified in a democratic state where the government has failed to fulfill the conditions of the ‘social contract’...” Within this logic, Esmond rightly emphasizes, anti-globalization activists and student protesters are *not* participating in the structure of the social contract, “they are refusing it altogether.” At her best, Esmonde goes further than ideological critique and critical legal realist analysis to make the very Negrian observation that “the possibilities and limits of a liberal democracy must” be assessed “from within the possibilities and limits of capitalism itself.”

problem of protest “within its invariable, naturalistic framework”. Here, no possible horizon of freedom or democratic action is presented other than the general catchall of an imagined return to ‘the Rule of Law’.

Bakan and Pue’s theorization of APEC however also contains elements of the first (1) and second (2) strains of proto-biopolitical theory outlined above. They resemble those like Ewald and Esposito, whom Hardt and Negri suggest fail to fully grasp the dynamic existing between two forms of power (power and Power) and whom they suggest collapse biopolitical resistance into a reaffirmed liberal politics, a species of reformism. At their best however, Bakan and Pue resemble those like Agamben, who grasp the real antagonism between the two forms of power but nevertheless imagine resistance at the outer limits of the possible. What they do not consider is the constitutive quality of the event, the way in which it opens up or sets in motion a series of subsequent protests and radical critiques of globalization over the next decade.

In the ‘liberal’ distillation of biopolitics which Hardt and Negri attribute to Ewald and Esposito’s philologically accurate but nevertheless unambitious reading of Foucault, we feel as we do when we read Bakan and Pue. A rendering of police and political Power as a “threatening, all-encompassing power over life”, but one which does little to subvert the language of liberal constitutionalism; at their best however, Bakan and Pue share with Agamben (and perhaps in a similar way Derrida, Nancy and others) a sense of the liminal. The idea that biopower is so all encompassing that resistance is graspable at a vanishing margin. Still however, the problem remains: “no alternative power or effective resistance” is on offer. Hardt and Negri do not fall into this trap.

In Bakan and Pue there is more than “a vague sense of critique and moral indignation”, but it is not translated into a radical politics. It does not escape the old dialectics of legal and political power, in this case the legal use of coercion by the Police at the behest of the PMO. For Bakan therefore, the matter is graspable primarily in “the issue of separation of power and especially the important line which is supposed to buffer police from political control.” Bakan goes as far as to say the Canadian polity became a ‘police state’ in the context of APEC at UBC: “the defining feature of a police state is that the police are used to achieve political purposes.”¹³⁸ For Pue, the same point is made: “[u]nlike civil servants, they [police] are not supposed to respond to ‘political

¹³⁸ n 3 above at 79.

masters.’ Their job, simply, is to enforce the law.” Or again, in very similar terms for Bakan, “taking orders from politicians is a prescription for lawlessness, a harbinger of a ‘police state.’”¹³⁹

Certainly Hardt and Negri would agree. They would however not view it as adequately radical to simply make this declaration. In certain ways, what Hardt and Negri say of Agamben (and to some extent Derrida and Nancy) also applies to Bakan and Pue. They conflate biopower with “a totalitarian form of power”, a negative limit rather than an affirmative opportunity to develop forms of biopolitical resistance. Bakan and Pue do not, of course, use the Foucaultian language of biopower or biopolitics. But, they do undoubtedly grasp in the forms of student protest at APEC, an interpolation of “alternative forms of life”, even the possibility that biopolitical resistance might be a form of active or material constitution. Yet they fall short, in the same way as many others, including some of the most independent thinkers on the radical left, of proposing something genuinely new. But most of all of unwinding the morphology of a real constitutive process:

[Foucault’s] analysis of biopower are aimed not merely at an empirical description of how power works for and through subjects but also at the potential for the production of alternative subjectivities, thus designating a distinction between qualitatively different forms of power [‘power’ and ‘Power’ and in this thesis I argue correspondingly, ‘constitution’ and ‘Constitution’]. This point is implicit in Foucault’s claim that freedom and resistance are necessary preconditions for the exercise of power: ‘When one defines the exercise of power as a mode of action upon the action of others, when one characterizes these actions by the government of men by other men – in the broadest sense of the term – one includes an important element: freedom. Power is exercised only over free subjects...’ Biopolitics, in contrast to biopower, has the character of an *event* first of all in the sense that the ‘intransigence of freedom’ disrupts the normative system. The biopolitical event comes from the outside insofar as it ruptures the continuity of history and the existing order, but it should be understood not only negatively, as rupture, but also as innovation, which emerges, so to speak, from the inside.¹⁴⁰

The question of language

Hardt and Negri’s rendering of biopolitical resistance as both revolutionary praxis and immanent critique of biopower is clear. Only biopolitical resistance is capable of producing or bringing about events. Events are not dialectic determinations, negations or systematic closure. They are ruptures in time and being opened up by the constitutive capacity of the multitude. For Hardt and Negri, this reading of Foucault is

¹³⁹ n 84 above at 167.

¹⁴⁰ n 2 above at 59.

opened up as soon as he engages in the question of language and meaning, of discourse. In this crucial way, the biopolitical event is, at least in part, a retooling of language, time and truth-- all of which run through the body:

Foucault grasps the creative character of the event in his earlier work on linguistics: *la parole* intervenes in and disrupts *la langue* as an event that also extends beyond it as a moment of linguistic intervention. [citation omitted] For the biopolitical context, though, we need to understand the event on not only the linguistic and epistemological but also the anthropological and ontological terrain, as an act of freedom. In this context the event marked by the innovative disruption of *la parole* beyond *la langue* translates into an intervention on the field of subjectivity, with its accumulation of norms and modes of life, by a force of subjectification, a new production of subjectivity. This irruption of the biopolitical event is the source of innovation also the criterion of truth. A materialist teleology, that is, a conception of history that emerges from below guided by the desires of those who make it and their search for freedom....¹⁴¹

It is no coincidence that Hardt and Negri emphasize Foucault's intervention on the field of linguistics and his interest in the construction of meaning. Here, we can imagine the event as an intervention, a prospective act of constitution or *kairòs* in which meaning is produced. APEC is one such event insofar as it "intervenes in and disrupts" in the same way that *la parole* intervenes on *la langue* to bring about a truth. There is probably very little difference between Negri and any of his peers on the critical left on this. When Hart and Negri however write, "we need to understand the event on not only the linguistic and epistemological but also the anthropological and ontological terrain, as an act of freedom", they distinguish themselves from those like Pue and Bakan who do not take this step.

Hardt and Negri emphasize the innovative disruption of the event as analogous with the way in which "*la parole* moves beyond *la langue*" and "translates into an intervention on the field of subjectivity, with its accumulation of norms and modes of life, by a force of subjectification, a new production of subjectivity." What is imagined here, Hardt and Negri tell us, is nothing less than an "irruption of the biopolitical event". Its status as "the source of innovation also the criterion of truth" may sound exaggerated but it is not. Instead, we arrive finally at the point in which it makes sense to begin speaking of "a materialist teleology, that is, a conception of history that emerges from below guided by the desires of those who make it and their search for freedom."¹⁴²

¹⁴¹ Ibid. 59-60.

¹⁴² Ibid.

To the extent that Hardt and Negri do not engage with Canadian critical constitutional scholarship and it does not, with a few exceptions engage with them,¹⁴³ it is perhaps speculative to bring Bakan and Pue's theorization of APEC into conversation with Hardt and Negri's broader theorization of Empire as I have attempted to do in this chapter. Nevertheless, Hardt and Negri repeatedly distinguish, particularly in *Commonwealth*, between what their reading of 'biopolitics' and the one preferred colleagues on the broader critical left imply. They also point out the outlines of the biopolitical event in intellectual movements like American Pragmatism, which retain great, if sometimes invisible or too obvious to be mentioned, influence in the Anglo-American critical legal science academies:

The biopolitical event thus breaks with all forms of metaphysical substantialism and conceptualism. Being is made in the event. It is interesting to note the strong resonance of this notion of the biopolitical event with American Pragmatism. 'If nature seems highly uniform to us,' writes Charles Peirce, 'it is only because our powers are adapted to our desires.' ...Pragmatists propose, in effect, a performative analysis of the biopolitical event and demonstrate that the movement of biopolitical powers functions equally in the opposite direction: our desires, in other words, are also adapted to nature.¹⁴⁴

The idea here is to consider how subjectivity as much as corporeality, the artificial and the natural, are conjunctive. Indeed how "the virgin/whore dichotomy" critiqued by feminist theory and the similar gay/straight dichotomy critiqued by queer theory (in both cases passing through the body and constructed at the level of subjectivity) have porous borders across the social terrain. It is worth highlighting Hardt and Negri's insistence on the "biopolitical event" as necessarily and in fact "always a queer event, a subversive process of subjectivization that, shattering ruling identities and norms, reveals the link between power and freedom, and thereby inaugurates an alternative production of subjectivity."¹⁴⁵ The notion is of a blurring or a mutation, not a simple negation, reversal or determination. It is not the outcome of the old dialectic but rather the outcome of productive difference itself. Events are, in other words, biopolitical and queer at the same time. In *Commonwealth*, Hardt and Negri would be prepared to

¹⁴³ See ie J. Tully, *Public Philosophy in a New Key (Vol. II)* (Cambridge: Cambridge University Press, 2008) 173, 183-184 (excerpting several lengthy passages from *Empire* and describing global power relations in terms of "an informal imperial system" in which "the production and communication of information" has become the leading sector of capitalist production"); R. Buchanan & S. Pahuja, 'Legal Imperialism: *Empire's* Invisible Hand?' in P.A. Passavant & J. Dean (eds), *Empire's New Clothes* (New York: Routledge, 2004) 74, 77-79 (charging *Empire* with: (1) failing "to understand the mechanisms by which the World Bank and other multilateral economic institutions have constructed, and construct in an ongoing way, the current putatively 'emperial' global order"; (2) uncritically naturalizing the world market and therefore for "rendering it more rather than less powerful..."; and, (3) over-exaggerating the decline of modern state sovereignty and the ascendancy of postmodern decentered/deterritorialized alternative).

¹⁴⁴ n 2 above at 63.

¹⁴⁵ *Ibid.*

theorize this by schematizing Foucault in a very specific way. Primarily in the “double” nature or construction of power in Foucault’s thought in both *Discipline and Punish* (1975) and the first volume of *The History of Sexuality* (1976):

In those books Foucault’s notion of power is always double. He devotes most of his attention to disciplinary regimes, architectures of power, and the applications of power through distributed and capillary networks, a power that does not so much repress as produce subjects. Throughout these books, however, sometimes in what seems like asides or marginal notes, Foucault also constantly theorizes another to power (or even an other power), for which he seems unable to find an adequate name. Resistance is the term he most often uses, but it does not really capture what he has in mind, since resistance, as it is generally understood, is too dependent on and subordinate to the power it opposes. One might suggest to Foucault the Marxist notion of ‘counterpower,’ but that term implies a second power that is homologous to the one it opposes. In our view, the other to power that runs through these books is best defined as an alternative production of subjectivity, which not only resists power but also seeks autonomy from it...¹⁴⁶

In Hardt and Negri’s reading of the doubleness of Foucaultian power, they grasp much of what they have already sensed in their more foundational reading of Spinoza and the distinction between the two forms of power (p/Power) which exist in modernity.¹⁴⁷ It is the parenthetical “(or even another power)” which is perhaps most telling in this passage. When, Hardt and Negri describe “an other power” they are pointing to the strength which resists constituted Power, refuses its temporal as much as metaphysical closure.

Before getting to the construction of biopower as the template for Power in the transition from the modern to the postmodern, or biopolitics as the template for a praxis of resistance in the same transition, Hardt and Negri locate Foucault in the antagonistic, rather than dialectic structure of power. In this way they inscribe themselves in the materialist tradition which stretches from Machiavelli to Spinoza to Marx. Readers of the earlier books in the trilogy as well as the authors’ earlier writings alone and together will be familiar with the idea of “the doubleness of power”. It is also repeatedly emphasized in this thesis insofar as it formulates the basis for the

¹⁴⁶ Ibid. 57.

¹⁴⁷ In modern thought there are two distinct forms of power. They are poorly denoted in the English language. In German, *Macht/Vermögen*, in French, *pouvoir/puissance*, in Italian, *potere/potenza*, and in Latin *potestas/potentia*: in each case, the first half of the binary is grasped as command, domination, rulership or *imperium*; and the second half as capacity, potential, strength or resistance. See M. Hardt, ‘Translator’s Forward’ in A. Negri, *The Savage Anomaly* (Minneapolis: University of Minnesota Press, 1999) above at xiii. Hardt’s schematization in the preface of *The Savage Anomaly* is plain: “Throughout Negri’s writings we find a clear division between Power and power, both in theoretical and practical terms. In general, Power denotes the centralized, mediating, transcendental force of command, whereas power is the local, immediate, actual force of constitution.”

organizational distinction between the material and formal c/Constitutions as much as multitude and Empire:

This understanding of the doubleness of power helps us approach Foucault's attempts to develop the concept of biopower...Here to Foucault's attention is focused primarily on the power over life – or really, the power to administer and produce life – that functions through the government of populations, managing their health, reproductive capacities, and so forth. But there is always a minor current that insists on life as resistance, an other power of life that strives toward an alternative existence. The perspective of resistance makes clear the difference between these two powers: the biopower [Power] against which we struggle is not comparable in its nature to the form of the power of life [power] by which we defend and seek our freedom. To mark this difference between the two 'powers of life,' we adopt a terminological distinction, suggested by Foucault's writing but not used consistently by him, between biopower and biopolitics, whereby the former could be defined (rather crudely) as the power over life and the latter as the power of life to resist and determine an alternative production of subjectivity.¹⁴⁸

So we have here in the clearest terms possible, the interpretation of Foucault by Hardt and Negri, albeit one which they detect only in "in what seems like asides or marginal notes".¹⁴⁹ What they propose, again not without significant controversy, is a nascent Foucault (a sort of Foucaultian *Grundrisse* or *Political Treatise*), a speculative alternative to the established reading. Their point is not to be overly 'philological', but creative. In so doing they revisit the notions that: (1) the familiar modern mode of Power is mutating from the disciplinary capacity to administer or produce life to expanded or generalized postmodern control biopower (or better, 'bioPower'): and, (2) this new form of biopower does not comprehend frontal opposition or dialectics, only the affirmative constitutive capacity of power within and against it, the exercise or praxis of which it called 'biopolitics' or 'biopolitical resistance'. Biopolitics is then the privileged site for the production of subjectivity, both within and against, the circulation of biopower. We have called *kairòs* that unique point in which such a subjectivity is created in the present. In this chapter we argued that APEC might be one such instance, a properly biopolitical event.

D. Conclusion

I began this chapter arguing that APEC is an excellent example of what Hardt and Negri grasp in Empire as the emergence of a new formal Constitution. In APEC, we have a group of self-described 'Pacific Rim economies' from three continents bound by

¹⁴⁸ n 2 above at 57.

¹⁴⁹ Ibid. 56.

economic, trade and business interests (and quite explicitly, *not* political ones). Recall, the formal Constitution of Empire is, according to Negri, representable schematically as a loosely pyramidal structure, in which organizations like APEC appear near the top, frequently above individual States. In this chapter I have considered the occasion of the APEC summit in Vancouver, inclusive not only of its neo-liberal ideological coordinates, but its totalizing conflation of police and sovereign Power, law and politics, private and public, as illustrative of new theoretical and practical difficulties which constitutional theory must be capable of engaging with if it is to take seriously the basic breakthroughs associated with Hardt and Negri's *Empire*.

The events surrounding the APEC summit in 1997 should not be permitted to sink into the gauzy past. In the thirteen years since the APEC imbroglio many of the questions it raised remain largely unanswered. This is true despite the national scandal it provoked and the extent to which it might be said to have been a harbinger of things to come. It is also true that despite high profile allegations of political interference, police misconduct and conflict of interest depicted in the Hughes Report, the findings now seem rather less shocking. The events portended by the so called 'APEC Affair' spoke to certain unsettled questions which have since re-emerged in a variety of ways. Both at subsequent meetings of neoliberal capital hosted by the Government of Canada like the 2001 Summit of the Americas in Quebec City as well as the various G-7, G-8 and G-20 summits hosted in other Canadian cities over the last decade. At each of which, protesters have mobilized with various forms of direct action and been met with mass arrests and violence. Nowhere more spectacularly than at the recent 2010 G-8/G-20 Summit in Toronto.¹⁵⁰

The suggesting therefore is that we might look at the events surrounding APEC as an opening onto the current epoch and the particular form of constitutional dynamics which characterize it, in other words, as a glimpse at the contemporary morphology of Empire, both as a formal representation and a material reality.

¹⁵⁰ Over ten thousand protesters converged on the G-20 security perimeter in Toronto in June 2010, hundreds were arrested detained and injured. Again, the issues of police power, excessive use of force and protester Charter violations arrived in the bourgeois media. In this case violence by the self-described Black Bloc anarchist group against commercial and corporate targets as well as public and private property sufficiently irritated Toronto Police Chief Bill Blair sufficiently to describe all militants as terrorists. In what can only be described as the eternal return of the same, we see key elements of the APEC Affair revisited on an even grander stage 13 years later.
[http://www.theglobeandmail.com/news/world/g8-g20/toronto/standoff-ends-in-downtown-toronto/article1620135/singlepage/;](http://www.theglobeandmail.com/news/world/g8-g20/toronto/standoff-ends-in-downtown-toronto/article1620135/singlepage/)
<http://www.globaltoronto.com/Independent+review+ordered+into+police+conduct+during+summit/3241994/story.html>.

No Canadian can forget the video footage of Canadian Broadcasting Corporation (CBC) cameraman Robb Douglas who, at the centre of the most perfect Debordian spectacle, found himself and his camera indiscriminately pepper sprayed on the National (CBC's cross-country evening news broadcast).¹⁵¹ Again, all of this was quite alarming then, it is now commonplace.

APEC was also a few short years before the ubiquitous camera phone immediately uploadable to youtube (which not so tangentially, has again redefined how it is we imagine the distinction or non-distinction between private and public life) had become a fixture. On the evening of November 25, 1997, Canadians learned that a security perimeter had been erected around the UBC summit site at the Museum of Anthropology. It was clear that the access road along Southwest Marine Drive for the delegates' motorcades had been cleared of student protesters (materially/corporeally of their bodies) and their signage (immaterially/intellectually of their politics). These two facts may have disturbed some and not others, depending on their ideological proclivities and their attitude toward so called 'civil disobedience'. What was clear for all to see however was that students were corralled and arrested. Canadians were also treated to the footage of their Prime Minister scoffing at questions on the matter. When asked his thoughts on the pepper spraying of students, he famously quipped (making one of his trademark verbal puns), 'pepper, I put it on my plate'.

In the days and months which followed the APEC Affair, Canadians were kept apprised of investigations of rumoured political interference with the RCMP. As such they were constantly reminded of the law-bound nature of police Power.

Again, although this type of police conflagration with protesters at summits of neoliberal capital are today commonplace, so much so that we are largely inured from them when we see them in the media, they were at the time quite new. The Prime Minister's early and highly dismissive comments on the matter ultimately captured the imagination of the Canadian media and its parliamentarians for several years. The best critical legal scholars like Bakan and Pue ask the right question. How can we explain how an 'apathetic' student body became so suddenly radicalized? What, in other words, had caused students to channel their energies into the anti-globalization struggle and its critique of neo-liberalism in such a militant fashion? Unfortunately, this is never satisfactorily answered. Nor is the more precisely jurisprudential question of how UBC

¹⁵¹ Beginning with the iconic video CBC video footage of Royal Canadian Mounted Police (RCMP) Staff Sergeant Hugh Stewart, later nicknamed "Sergeant Pepper" by protesters and media, indiscriminately spraying the crowd behind the security perimeter n 5 above.

became a 'Charter free zone' on the occasion of the APEC Summit.¹⁵² It has not been my intention to present an answer to these questions although I have hopefully carved out some paths for future research of this type.

¹⁵² Here again the cross-section of essays published in the Pue edited anthology n 3 above both hits and misses the point a representative manner.

Chapter V - 'Mega-Constitutional Politics'

If nothing else were wrong with legal politics I would still oppose it for its fundamental *dishonesty*. As dishonest politics, it is, in effect, doubly dishonest. It goes one better the ordinary expected dishonesty of conventional politics in the central pretence that is *not politics at all*, in other words, that power has nothing to do with it. In order to accomplish this, legal politics disguises itself as *interpretation* and then takes us through a maze so complicated that we lose track of what it was we were actually talking about in the first place. The next thing we know, we start talking as if politics did not exist, as if nobody was deciding anything at all, as if the personal impartial *law* was doing all the deciding.

M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (1994)¹

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

Supreme Court of Canada, *Succession Reference* (1998)²

Today liberalism tends not even to be able adequately to represent the elites. In the era of globalization it is becoming increasingly clear that the historical moment of liberalism has passed.

M. Hardt & A. Negri, *Multitude* (2005)³

If there is something which has been burnt out by this brief century, it is democratic representation. An infinite number of specific, historical, elements come together to define this crisis in its bare materiality.

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)⁴

¹ M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson, 1994) xi.

² *Re Secession of Quebec* [1998] 2 SCR 217, 240 ("the Secession Reference").

³ M. Hardt & A. Negri, *Multitude* (London: Penguin Press, 2005) 273.

⁴ *Ibid.* 40.

A. Introduction

The last chapter (Chapter IV) examined aspects of the formal and the material C/constitution of Empire in student protests which erupted at the Asia Pacific Economic Community (APEC) summit held at the University of British Columbia in November of 1997. This chapter continues with a related, but slightly different line of inquiry. Part of its aim is to begin conceptualizing the multitude as a form of collective subjectivity which operates within and against Empire, and then to construct a Canadian case study capable of elucidating it. However, the formulation of the problem in this chapter differs from the one in the preceding chapter insofar as it does not highlight one singular event, but rather presents a series of related events linked together in what has already hardened, surprisingly quickly, into a distinct periodicization of Canada's contemporary constitutional history; one which is widely known to Canadians by the name of 'mega-constitutional politics'.⁵

This chapter treats period of 'mega-constitutional politics' as a narrative bookended by two high profile and widely commented upon exercises of the Supreme Court of Canada's distinctive reference power pursuant to s. 53 of the *Supreme Court Act*. A provision which gives the Supreme Court authority to render advisory opinions on questions referred to it by the Federal Government. It is almost exclusively used in relation to questions of constitutional law: "the Governor in Council may refer to the court for hearing and consideration important questions of law or fact... [and when such a reference is made]...it is the duty of the Court to hear and consider it and to answer each question so referred."⁶ In this chapter we examine two very high profile

⁵ This phraseology is employed by Canadian political scientists, jurists and media to refer to the period of federal-provincial negotiation and popular consultations between patriation and the defeat of the Charlottetown Accord (1982-1992) see P. H. Russel, 'The End of Mega Constitutional Politics in Canada?' in K. McRoberts and P. Monahan (eds), *The Charlottetown Accord, the Referendum, and the Future of Canada*, (Toronto: University of Toronto Press, 1992), 211-221 (in the political science context); P. Oliver, 'Canada, Quebec, and Constitutional Amendment' (1999) 49 *University of Toronto Law Journal* 519 (in the legal context). Ran Hirschl uses the similar term 'mega-politics' which he defines in a way which I find non-objectionable and equally applicable to 'mega-constitutional politics', albeit in a more general and not specifically Canadian sense, as "the transfer to the courts of contentious issues of an outright political nature and significance." R. Hirschl, 'The Judicialization of Politics' in K.E. Whittington, R.D. Kelemen, G. A. Caldeira (eds) *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008) 120. See also 123 in the same describing the contemporary tendency of governments in multiple jurisdictions to rely increasingly "on courts and judges for dealing with what we might call 'mega-politics': core political controversies that define (and often divide) whole polities."

⁶ *Supreme Court Act*, RSC, 1985 c. S-26.

usages of the reference power in Canada's recent past: (1) In *Re Resolution to Amend the Constitution* (1981) ('the *Patriation Reference*')⁷; and, (2) In *Re Secession of Quebec* (1998) ('the *Succession Reference*').⁸

The Supreme Court of Canada's jurisdiction to hear reference questions is a relatively *sui generis* one not common to other jurisdictions in which federal and provincial governments are permitted to refer relatively speculative questions to the Court. In this case, relative to the constitutionality of proposed legislation before it has been enacted.⁹ In the 1981 *Patriation Reference* the court was asked to rule on whether the Federal Government was permitted to proceed with a constitutional amendment unilaterally, and if not, what type and/or level of consultation and/or approval from the provincial legislatures was required to do so.¹⁰ In the 1998 *Succession Reference*, the court was asked to issue an opinion, once again prospectively, on Federal Government's legal obligations in the event of unilateral declaration of independence

⁷ (1981) 1SCR 753. The Trudeau government joined with several of the provinces asking the Supreme Court of Canada, in anticipation of patriation, whether, and if so, to what degree, provincial consent was required to relay a proposed constitutional amendment package to (the old imperial) British Parliament. The Court held that although there was no legal provision addressing the question as matter of political conventions a "substantial degree" of provincial consent was required. However, it explicitly added, political conventions were not enforceable legal obligations. The province of Quebec's follow up question as to whether its consent was required to meet the "substantial degree" threshold did not find its way into the Supreme Court of Canada's docket until after the British Parliament enacted the *Canada Act* rendering the question moot in the extreme. Undaunted, the Court answered the question anyways, holding that a substantial degree of consent had indeed been achieved, thereby preventing the strange spectre of an 'unconstitutional constitution'. See *Re Objection by Que. To Resolution to Amend the Constitution* [1982] 2 SCR 793 (the Quebec Veto Reference); P. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Carswell, 4th ed, 2006) 24.

⁸ The *Succession Reference* n 2 above.

⁹ See *Supreme Court Act* n 6 above. Many comparable common law jurisdictions refuse to permit their highest appellate course to issue advisory opinions. For a comparative overview of various jurisdiction and their treatment of the 'political questions' doctrine and the constitutionality of the reference power see Hirschl n 5 above at 124-125.

¹⁰ n 7 above. The Trudeau government joined with several of the provinces asking the Supreme Court of Canada, in anticipation of patriation, whether and to what degree provincial consent was required to relay a proposed constitutional amendment package to the imperial Parliament at Westminster. The court held that there was no strict constitutional law governing the matter, but "as a matter of convention" a "substantial degree" of provincial consent was required. Crucially, it also made the point that there was however no enforceable legal obligation (for convention is not a species of law) on the Federal Government to consult. The province of Quebec's follow up question as to whether its consent was required to meet the "substantial degree" threshold did not find its way into the Supreme Court of Canada's docket until after the imperial Parliament at Westminster had enacted the *Canada Act* making the question moot in the extreme. Nevertheless, in its usual fashion, the Court took up the question. Not surprisingly, it answered in that a substantial degree of consent had indeed been achieved *without* Quebec, thereby preventing the strange spectre of what would have been an, as Hogg so aptly puts it, an 'unconstitutional constitution'. See the Quebec Veto Reference n 7 above and Hogg n 7 above at 24.

by a province.¹¹ In both cases, the central province in the drama is Quebec. In what follows, the objective is to scratch the surface of this story a little.

B. The irresolvable (?) dialectic between the French and English language in post-Charter Canada

We might trace the organizational dialectic between French and English Canada, or Quebec and 'the rest of Canada', to the competition between France and Britain for hegemony in North America in the seventeenth and eighteenth century, to the subjugation of the French language and the Catholic religion in the nineteenth and early twentieth century, or to any number of sociological or historical sources. As will be seen the next chapter (Chapter VI), this old 'two Nations' theory of Canada is in itself entirely imperialist and exclusionary insofar as it presents in its duopoly the essence of the European expulsion of Indigeneity from history.

The dialectic, between nationalist French and federalist English Canada, or Quebec and the rest of Canada, is not adequate. How, for example, does one explain in the old language of ideology, that the most hard line federalist Prime Ministers in recent history, Trudeau and Chrétien were French-speaking Quebecers?

In the narrative construction of events taken to comprise the period of mega-constitutional politics, the distinction between the federalist and the nationalist formulations is at play in the formal sense, but they do not track class or ethnic lines. So much so that in the recent Canadian election, the social democratic New Democratic Party (NDP) made first time historical inroads in Quebec to eviscerate both the Liberal (federalist) and Bloc Québécois (nationalist) alternatives.¹² This is perhaps not to say the old dialectic is defeated, but rather that it is not possible to readily predict it as a form of normative science.

To make sense of all of this, it will first be necessary to peek through Canada's recent, or post-Charter, constitutional history, a history which quite self-consciously and even

¹¹ The *Succession Reference* n 2 above at 240. The court held no unilateral declaration of independence by a province (hypothetically Quebec or any other) would be legal under Canadian Constitutional Law or International Law. Nevertheless it also held that a mandate for good faith negotiations between a provincial and the federal government could be earned on the basis of a 'clear majority' in favour of a 'clear question' on succession in a province-side referendum. The court then went further, holding that such (still quite hypothetical) negotiations, should they be legally required, would then be subject to four 'unwritten rules' or 'constitutional conventions': (1) "the rule of law"; (2) "federalism"; (3) "democracy"; and, (4) "respect for minorities". All of which the court styles as a whole 'constitutionalism'.

¹² There are 308 seats in the House of Commons, a threshold of 155 seats is required to form a majority government, in the 41st Parliament of Canada as decided by the election of May 2, 2011 the distribution of seats is as follows: (1) Conservative, 166; (2) NDP, 103; (3) Liberal, 34; (4) Bloc Québécois, 4; (5) Green, 1. <http://www.elections.ca/scripts/ovr2011/default.html>

splendidly, at least for some, began on April 17, 1982, the date upon which the Queen proclaimed the *Constitution Act* in Ottawa in the presence of onlookers and officials thereby triggering the event known as patriation.¹³

Patriation

April 17, 1982 marked the event of patriation. However, even historical beginnings are also culminations, or better, nodes along pre-existing temporal trajectories. It would therefore be dangerous to treat this event in splendid isolation from its historical precursors. Acknowledging this, one might imagine a vast temporal regress which would lead us all the way back to September 12, 1759 when British General James Wolfe defeated his French counterpart, General Louis-Joseph Marquis de Montcalm on the Plains of Abraham, thereby solidifying the rule of the British Crown over what is today Quebec. Viewing that as too remote, we could, in the alternative, halt our historical regress at the very date on which Canadian historians usually rest, July 1, 1867. July 1, 1867 *is* Canada's constituent event, at least its first foundational moment as a sovereign state.

Or perhaps, if we are looking for foundational moments entailing the complex relationship between French and English Canada, we might equally convincingly return to October 16, 1970. The familiar date with which this thesis began, and which coincides Prime Minister Trudeau's evocation of the *War Measures Act* in response to the kidnap of Quebec Minister of Labour, Pierre Laporte, and British Trade Envoy, James Cross, by the *Front de libération du Québec* (FLQ) (see generally Chapter I s. i). Alternatively, we might simply trace the historical trajectory leading to patriation to a much more proximate event and far more explicitly juridical one on September 18, 1981 - an event which preceded the date of patriation itself, April 17, 1982 by six months, but which nevertheless contained in its DNA the epoch to follow.

On September 18, 1981, the Supreme Court of Canada held, in a complex split decision addressing multiple questions from the Federal and Provincial Governments, that the Federal Government had the power to convey a constitutional amendment package overseas to the old imperial Parliament at Westminster, which until Canada had adopted its new amending procedure, was still required by virtue of a final, albeit largely symbolic, dominion era holdover, to approve what would effectively be an

¹³ *Constitution Act 1982* (Sched B to *Canada Act 1982* (UK), c. 11) (enacting the *Canadian Charter of Rights and Freedoms* (the "Charter")). For archival footage of Prime Minister Trudeau's nationally televised speech in which he articulates the legal and political meaning of patriation, no doubt drawing on his background as a constitutional lawyer see <http://archives.cbc.ca/politics/constitution/clips/13264/>.

amendment to its own 1867 *British North American Act* establishing Canada as a dominion. Although there were significant dissents on ancillary questions, the justices were however unanimous that *political* convention required consent from the provinces for the Federal Government to refer any amendment package to the imperial Parliament at Westminster with any degree of legitimacy. However, it also held that conventions are *unenforceable* by a court of law because they are strictly political and *not* legal. Hence, they exist in limbo, recognized by the Court and the Constitution but not enforced by it.¹⁴

Confused? This was perhaps how the Canadian public felt when they were treated, for the first time, to Supreme Court of Canada's ruling televised nationwide. Trudeau who was at the time, in his usual aloof and impertinent manner, overseas, left then Justice Minister Jean Chrétien to respond to reporters on his behalf. Reached in South Korea, Chrétien related, the Prime Minister was relieved, if not emboldened by the decision.¹⁵

Let us recall, Trudeau, the very same Prime Minister who faced down the FLQ over a decade earlier. He saw in light of the Supreme Court's decision an endgame in sight. When he returned to Canada he offered the nine provincial Premiers, save Quebec's nationalist Premier René Lévesque, a compromise. The compromise was as follows: Support the amendment package and the patriation project and get a provincial 'opt out' clause from certain of the less 'fundamental freedoms' guaranteed in the Charter.¹⁶ The premiers of the nine provinces, other than Quebec of course, agreed and the amendment package was conveyed to the imperial Parliament at Westminster which duly rubber stamped it.¹⁷

¹⁴ n 8 above.

¹⁵ A first in Canadian history, for archival television footage, commentary and an interview with then Justice Minister Jean Chrétien see <http://archives.cbc.ca/politics/constitution/clips/6043/>.

¹⁶ The nine provinces other than Quebec used the Supreme Court of Canada's decision finding a convention that substantial provincial consent was required for amendment to secure two key concessions from the Federal Government, both of which significantly weakened the amendment package as originally conceived by Trudeau and Chrétien: (1) the s. 33 'override' clause in the Charter; and, (2) the s. 38(3) 'opt-out' clause. The override clause is also sometimes known as the 'notwithstanding clause' because it permits provinces to enact legislation, declared as such, for a fixed period of five years, to "operate notwithstanding a provision included in s. 2 or ss. 7-15 of this Charter." The 'opt-out' clause permits a province to 'opt out' of any proposed amendment to the Constitution which would derogate from its legislative authority or jurisdiction see Hogg n 7 above at 25, 68, 79.

¹⁷ Albeit with some navel gazing regarding its colonial past and the Crown's paternalistic obligation to Aboriginal peoples who took their case right to the doors of Westminster, massifying as it were, a single line in Desmond Morton's authoritative words is telling: "British politicians wrestled briefly with the residue of colonialism, undeterred by native protesters." D. Morton, *A Short History of Canada* (Toronto: McClelland & Stewart, 2006). By way of legal technical precision it is important to emphasize the basic mechanics of patriation which meant that for any future amendment to be completely Canadian and Canadian alone, the UK Parliament had to enact the *Canada Act, 1982* (UK) to trigger the coming into effect of the *Constitution Act, 1982* (Canada) (thereby passing sovereignty symbolically across the

Despite seriously damaging the relationship with Quebec City, the Trudeau government proceeded to patriation with much fanfare. Deep wounds were to persist and to flare dramatically in the coming decades. Nevertheless, when English speaking Canadians refer to the patriation of the Constitution, they are proud, nostalgic and patriotic. For English Canada and federalists in Quebec it was a final phase in Canada's institutional becoming (and certainly not, as in Quebec nationalist quarters, a sign of the fundamental illegitimacy at the heart of the state).

To understand the particularity of the legal scientific view of some of these questions there is probably no voice more authoritative than that of Peter Hogg. Hogg describes the 1982 'patriation' of the Canadian Charter of Rights and Freedoms (hereinafter 'the Charter')¹⁸ as "a major achievement, curing several longstanding defects in the Constitution of Canada."¹⁹ Hogg also tells us, equally authoritatively, the term 'patriation' is a uniquely Canadian coinage from which he infers several very much overlapping features: (1) "autochthony" or the requirement that "a constitution be indigenous, deriving its authority solely from events within Canada..." (2) "Termination of imperial authority"; and, (3) "autonomy" of amendment power within the legislative competencies of the provincial and federal governments.²⁰ Without overly dissecting this definition, the impression is of a major historical break with the colonial past and an assertion of Canadian sovereignty *in* the formal Constitution.

What is perhaps most revealing is Hogg's rendering of the Constitution as a defect-ridden object set on the road to repair with patriation. A Negri-inspired approach cannot unflinchingly embrace such a conceptualization. Instead, it demands that we consider whether the narrative of 'mega-constitutional politics'²¹ which we take to begin with patriation in 1982 and extend for nearly two more decades until the 1998 decision of

Atlantic at the highest level of formal abstraction). This entire schematic was divined by the liberal legal scholars and lawyers in the Trudeau Government and the Chrétien Ministry of Justice which quite brilliantly, reshaped the Constitution of Canada to force the imperial Parliament to well and truly emphasize: "No Act of the Parliament of the United Kingdom passed after *Constitution Act, 1982* comes into force shall extend to Canada as a part of its law..." The *Canada Act*, as much as it was a final (?) severance of the old colonial bond, was also the Charter's implementation instrument, "[a]n Act to give effect to a request by the Senate and the House of Commons of Canada" to have the *Constitution Act, 1982* (Canada), which appears as Schedule B to Canada Act 1982 (UK), become the new Constitution of Canada. At this moment there was a form of kabuki in which sovereignty was (re)circulated but nevertheless remained reassuringly very much within the recognizable template of the past. It is for instance no coincidence that Canada retains the Queen as head of State and does not recognized itself as a republic.

¹⁸ n 13 above.

¹⁹ Hogg n 7 above at 69.

²⁰ *Ibid.* 57-62.

²¹ See n 5 above.

the Supreme Court of Canada in the *Succession Reference*, might not be grasped quite differently.

Some alternative formulations of the very recent past

The objective here is to move decisively beyond the narrative departure point of patriation as a potent symbol of Canada's passage from national infancy to maturity toward a consideration of patriation as having broader significance in what might just as easily be interposed as Canada's passage from modern to the postmodern epoch. Or, more generally its passage from the form of sovereignty associated with the modern State to the one associated with Empire. To arrive at this formulation however, we must examine very closely what Hogg and others, including even some of the more progressive constitutional theorists writing on the Canadian situation tend to overlook, or sometimes even cover over (occasionally with a vaguely self-congratulatory rhetorical flourish).²² Namely, the most crucial question of all: how, if at all, does the formal retrenchment of constitutional rights reliably translate into social cohesion or is this even the desired effect? Or perhaps better, how, if at all, can the material and the formal c/Constitutions, be said to exist in a (re)productive rather than purely determinative relation?

I pose these types of questions not to suggest that formal retrenchment of constitutional rights in the way that it is conceived by the hegemonic Canadian debate between nationalist and federalists, is necessarily *without* benefits; but rather, to raise the possibility that the net detriments of Charter constitutionalism may be as incalculable as the net benefits. To reformulate things in a still more Hardt and Negrian fashion, it might be said that if the multitude is to be grasped as a species of constituent power, with both a material heft and an ontological intensity, it will be because it demands it. Because it carves itself out from the material constitution and develops a counter-hegemonic subjectivity from the bottom up. Refuses, in other words, as a species of the usual elite-driven reform or judicial politics for an exercise of constituent power, a constitution power which subverts and refuses the formal Constitution rather than demanding its reform- we might also say here that the multitude is the subjectivity which presents itself as the immanent and unmediated force which cannot be contained in any formal metaphysics of the Constitution. If we

²² See, eg, W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) 22: "Canada, with its policy of 'multiculturalism within a bilingual framework' and its recognition of Aboriginal rights to self government, is one of the few countries which has officially recognized and endorsed both polyethnicity and multinationality"; P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) 125: "...Canadian sovereignty over Aboriginal people and territory is not per se illegitimate; its legitimacy rests on the extent to which the constitutional order protects interests associated with indigenous difference."

were to arrive at such a point we might longer be able to regard the Charter as having purely emancipatory implications. Instead, we might begin to view it as modern hangover, a representational and mediatory apparatus increasingly ill-suited to carrying out anything other than an ever more expansive normative science of the Constitution. In other words, a way of proceeding with matters which is, if not simply uninteresting, at least distinctly a-critical and thoroughly de-ontological.²³

To think about Canada's period of mega-constitutional politics in a properly Negri-inspired register, we must differently conceptualize the existing narrative. Recall, there are already several key narrative signposts between the event of patriation, and the 1998 *Succession Reference*²⁴ which conventionally comprise the epoch (1982-1998). These include, most notably, the failed 1987 Meech Lake²⁵ and 1992 Charlottetown²⁶ Accords as much as the near victory of Quebec separatists (49.4 percent in favour, 50.6 percent against) in the 1995 referendum on Quebec sovereignty.²⁷

The Supreme Court of Canada's decision in the Secession Reference,²⁸ binds these already very much interlocking narrative events. One which is characterized, as Hogg so tellingly formulates it himself, by an impulse to resolve or otherwise cure lingering defects in the existing story (namely, Quebec's exclusion). Moreover, the concept of 'mega constitutional politics',²⁹ implies the existence of a bygone era of lower-stakes constitutionalism, a normal, non-emergency or non-crisis historic-temporality in which lower level more routine constitutional politics prevail, is the departure point for any discussion of the post-Charter epoch.

²³ See eg 'Pour une definition ontologique de la multitude' (2002) 9 *multitudes* 32.

²⁴ n 2 above.

²⁵ The Meech Lake Accord is named after the First Ministers' conference held at Meech Lake, Quebec, on April 30, 1987. Its purpose was to secure the Government of Quebec's belated assent to patriation. Despite the assurances of the various provincial premiers, the accord ultimately failed to garner the requisite legislative unanimity of the ten provincial legislatures see generally Hogg n 7 above at 71.

²⁶ The Charlottetown Accord is named after the First Ministers agreement reached at Charlottetown, Prince Edward Island, on August 29, 1992. The proposed amendment package addressed a variety of grievances in addition to those of Quebec. Unlike the elite-driven Meech Lake round, the Charlottetown round proceeded by public consultation. On October 26, 1992, the accord was put before the Canadian people in a referendum and was defeated nationally 54 to 44.6 percent see generally Hogg n 7 above at 71-72.

²⁷ On October 30, 1995 Quebec voters held a referendum on Quebec sovereignty in which 49.4 percent voted in favour as against 50.6 percent against. Having been present as a first year university student in the streets of Montreal that night I can attest to both the electricity and the extraordinary intensity in the air. Despite significant disappointment on the nationalist side there was not however an iota of violence. The mood, at least in more English speaking parts of the city, took on a considerably joyous air after the results were announced. The vote tally itself was not disputed and has been confirmed by the Government of Quebec which administered the referendum as well as independent analysis:<http://www.electionsquebec.qc.ca/francais/tableaux/referendum-1995-8481.php>; <http://faculty.marianopolis.edu/c.belanger/quebechistory/stats/1995ref.htm>.

²⁸ n 2 above at 240.

²⁹ n 5 above.

At a broader level of generality in this thesis the need arises to consider whether mega-constitutional politics might march in relative lockstep with the ever-expansive, socially subsumptive and hyper-inclusive rationality of Empire; or, alternatively, whether it represents a manifestation of an older, even anachronistic rationality rooted in modernity. In either case however, it is the enigmatic figure of the multitude which must be brought into the analysis in order to move beyond the standardized construction of the formal Constitution, as object of knowledge or prediction.

C. Defining mega-constitutional politics

Perhaps more than anything, the enigmatic quality of the multitude lies in its capacity to resist the totalizing rationality of constitutionalism, or what Hardt and Negri describe as “a *decentred* and *deterritorializing* apparatus of rule.”³⁰ Multiple narrative flashpoints occur in the period of mega-constitutional politics, between the 1982 patriation and the *Succession Reference*. None are more crucial than the 1991 Charlottetown Accord, which, like the 1987 Meech Lake Accord before it,³¹ sought to secure Quebec’s still outstanding assent to the Charter.

The Charlottetown Accord amendment proposal differed from the earlier Meech Lake Accord in that it added an immensely wide-ranging and expansive set of proposals responsive to grievances expressed by the provinces, aboriginal peoples, women and ethnic minorities as well as a variety of other ‘Charter’ and aspirational ‘Charter Canadians’.³² Perhaps not surprisingly, after the defeat of the Charlottetown Accord³³ in a popular nation-wide referendum, mega-constitutional politics morphed into mega-constitutional crisis.

By the time of the Supreme Court of Canada’s decision in the 1998 Secession Reference, the country was recovering from a palpable sense of shock and anxiety arising from the near literal breakage of the polity in the 1995 referendum on Quebec sovereignty. An anxiety which the Court, as emphasized in the epigraph,³⁴ set out, quite systematically, to calm by way of an insistence that the Federal Government

³⁰ M. Hardt and A. Negri, *Empire* (London: Harvard University Press, 2001) xii.

³¹ n 25-26 above.

³² The Charlottetown Accord included the major elements of its Meech Lake predecessor in addition to an array of other provisions, inclusive of, but not limited to: (1) a guarantee of 25 percent of the seats in the House of Commons to Quebec; (2) a double majority requirement for Senate approval of bills materially affecting the French language or culture; (3) a grant of exclusive jurisdictions to the provinces on matters of culture; (5) Senate reform augmenting the representation of the western provinces; (6) Aboriginal self-government provisions; (7) various provisions pertaining to the recognition of Canada’s multicultural character; and, (8) a “social and economic charter.” See generally Hogg n 7 above at 71.

³³ *Ibid.*

³⁴ n 2 above.

would have an obligation to enter into good faith negotiations with the government of a province with a mandate to negotiate succession from its electorate. Provided that mandate was established on the basis of a 'clear question' and a 'clear majority' in a province-wide referendum.³⁵ Having spelled out these basic criteria to trigger a good faith obligation to negotiate, the Court went on to specify what is meant by good faith negotiations. In so doing, it outlined four 'fundamental', albeit 'unwritten' and hitherto 'conventional' principles of Canadian 'constitutionalism': 'federalism', 'democracy', 'the protection of minorities' and 'the rule of law'.³⁶

My argument is that the Supreme Court's calming and systematizing instinct was a logical outgrowth of the broader post-Charter narrative of the radical inclusion and integration, rather than exclusion or excision, of difference. One which I argue, like its persistent rhetorical commitment to the rule of law, dovetails with the basic logics inhering to Empire and the postmodern form of sovereignty which it represents.

A mutation in the form of sovereign Power

To grasp this it is necessary to begin reading Negri well before *Empire*. Recall, in the sixties and seventies, Negri had already begun to observe a mutation in the form of sovereign Power which began in his native Italy with the postwar Constitution (see generally Chapter II). He described it as the passage from the 'rights' to the 'social State'.³⁷ In this transition, Negri suggested, political and economic, as much as private and public rationalities and forms of Power, were increasingly interpenetrated and overlapping. I argue that in the *Succession Reference* we find an extraordinarily sophisticated next step in this very same tendency. Not easily grasped in the familiar language of legal formalism or legal positivism, the *Succession Reference* moved directly into what had previously been the gauzy extra-legal terrain of political convention. In so doing, it radically unified at least two broad sources of authority. Strikingly, writing on the limits of the hegemonic forms of legal science in his native

³⁵ Ibid. 220, 222, 268, 271-272, 292-295.

³⁶ Ibid. 240.

³⁷ We can begin with A. Negri 'Keynes and the Capitalist Theory of the State' in M. Hardt & A. Negri (eds) *Labor of Dionysus* (Minneapolis: University of Minnesota Press, 1994) 23-51, 28-29. Written a few years after Negri's formative 'Labour in the Constitution' (1964), 53-136 in same, in which he had argued that the recognition of labour in the formal Constitution, had at its effect *not* freedom or emancipation, but subsumption of labour's productive power (see generally Chapter II s. ii, iv-v). The essay on Keynes identifies labour as "a dynamic element with the system", which, by way of its radical subsumption not only to capital, but to sovereign Power itself, could in some way offer an immanent critique of the formal Constitutions' insistence on the determination of the material one "in the form of [social] planning".

Italy in 1964, much of what Negri suggests might usefully be said of the Canadian situation in 1998:

Juridical science has accelerated the process of the unification of sources, and thus it has been receptive – sometimes despite itself – to the tendency of the movement of social reality...We could give the period of juridical positivism the label, adopted from political historiography, of the ‘the era of security’ – secure faith in the social and political presuppositions of the ordering certainty in the present perfection, or if you like, the indefinite perfectibility of the juridical system. Hegel and Kant, in two difference cases, are the guardian spirits of the era. The so-called problem of sources, then, is born not before but after the construction of the system and is related to the need not to found the system but rather to define it in a conclusive way. It is not insignificant to recall here that the unity of the bourgeois scientific world remained formal and ideological until the development of the factory-society brought science within the realm of capital. As a result, the system prefigured its own material substrate and the sources and the sources were defined by the arrangement, not only in the obvious sense that every system defines its own productive mechanism, but rather in the sense that such a mechanism was adopted only because it was functional to the preconceived interest of the system...To pose it in extreme terms, the system seemed to invent the sources...We should look more closely at these sources. Are they within the system, or can they no longer be found, or can they be found everywhere? Material and formal sources, internal and external sources, written and unwritten sources, primary and secondary, immediate and mediate, legitimate and illegitimate, legal and customary, and so forth: the confusion crowns the position of the problem on the system....It is useless to try to make the foundation of the system appear as a problem while at the same time you try to locate it within the system itself. At this point the most dignified way out is still the classic exit of idealist philosophy: make jurisprudence the foundation of right.³⁸

I have reproduced this quotation at some length for its centrality to the arguments put forward in this chapter and this thesis. For Negri, “the crisis of positivism” is the first and most crucial symptom of the passage from the rights to the social State. Nevertheless, it is “at the same time a restructuring or a positive reworking of positivism in the context of the constitution of the social State...”³⁹ Or elsewhere, the setting in which “[t]he conditions of the sovereignty of law disappear, and at the same time the juridical world is completely redefined.”⁴⁰ Toggling back to the *Succession Reference*, we might say that what Negri is after is well captured in the *Succession Reference*. In which, much like the referendum politics which precipitated it, we can grasp at virtually every level in what Negri understands to be the hegemonic rationality as much as the subsumptive quality of the social State:

³⁸ ‘Labour in the Constitution’ above at 84-85.

³⁹ Ibid. 90.

⁴⁰ Ibid. 91.

In the social State, the specific modes of the maintenance and production of right as norm and plan of development will therefore be modes of the composition of social dissent and consent. This is the new positivity of right that must therefore make itself adequate to the movement of the social body, where juridical command makes sense only as a mapping of social contestation and a determination of the guide to the mediation between contestation and the necessity of development. The search for this type of consensus, as the mediation of dissent and development, becomes increasingly urgent. The efficacy of right can be guaranteed only in a vast realm of consent, and the validity of right is merely the synthesis of command and consent. The production of right is a process of continual synthesis, of continuous mappings of consent and continual mediation with the needs of development. The juridical ordering extends itself increasingly further covering more and more of society.⁴¹

Although referring in this passage primarily to the inclusion of labour in the Constitution and the role of labour legislation in the social State, Negri is also very much addressing the changing nature of right in the social state more broadly. Even the emergence of an idea of right in which the direct formation, command and control of the material substratum of 'society' is placed or better, subsumed under the sign of Capital. Over subsequent decades, Negri would revisit this type of formulation in a variety of ways. Nowhere more directly and conclusively than nearly fifty years after 'Labour in the Constitution' in the 2005 'Postmodern global governance and the critical legal project', an essay in which Negri poses the following question at a global scale:

What is happening? Why is it – for this is precisely the paradox – that the efficacy of the constitution grows weaker and weaker to the point of extinction at the very moment in which the constitutional production of 'juridicity' [giuridicit ] extends its cover into life ever more increasingly, directly arranging [disponendo] subjects and objects therein?⁴²

Here the language of biopolitics is obviously present in a way it was not in Negri's early essays in the sixties. Nevertheless, some of the themes Negri had examined and some of the conceptual experimentation he had begun decades earlier, would continue to radiate across his texts over the subsequent decades. It is therefore no surprise to find, in a critique of contemporary critical legal realism, delivered in a paper before an Anglo-American critical legal audience in 2001, nearly a year after the publication of *Empire*, a series of points which Negri had already made much earlier. What unites Negri's thought over these many decades is a searing critique of bourgeois constitutional science. One in which a legal form or rationality is extended further and further across the social terrain. The result of which I argue, at least in Canada, has been to handover some chunk of sovereign Power to the judiciary itself. This is

⁴¹ Ibid. 94.

⁴² A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005) 16 *Law and Critique* 27, 29.

nowhere more obvious in Canada than where the court is permitted, pursuant to its statutory reference jurisdiction, to make more speculative interventions into the political realm.

D. The reference power and the collapse of the law/politics binary

S. 53 of the *Supreme Court Act* gives the Supreme Court authority to give advisory opinions on questions referred to it by the Federal Government. It is almost exclusively used in relation to questions of constitutional law: “the Governor in Council may refer to the court for hearing and consideration of important questions of law or fact... [and when such a reference is made]...it is the duty of the Court to hear and consider it and to answer each question so referred.”⁴³ In most jurisdictions the rendering of advisory opinions is not permitted, particularly in common law jurisdictions which tend to shy from hearing anything other than live disputes between specifically denominated parties involved in a specific factual, rather than merely hypothetical, dispute. It is on this basis that the High Court of Australia has refused to return advisory opinions.⁴⁴ In the US, the refusal to render advisory opinions is consistent with the limitation of the jurisdiction of all federal courts (including the Supreme Court) to “cases and controversies”.⁴⁵

The Succession Reference 1998

Although the Supreme Court began the *Succession Reference* by confirming its already clear jurisdiction pursuant to s. 53 of the *Supreme Court Act*, it went a step further holding bluntly that the consideration of speculative question of constitutional politics was in no way incompatible “with its appellate jurisdiction”.⁴⁶ At first not a tectonic shift, just a confirmation of the court’s basic and quite unique role within the Canadian constitutional order. However, upon closer examination, it reveals well beyond the formal apparatus of s. 53 of the *Supreme Court Act*, just how completely the political and the legal had come to overlap in post-Charter Canada.

⁴³ *Supreme Court Act* n 6 above.

⁴⁴ *Re Judiciary and Navigation Act* (1921) 29 CLR 257 as cited by Hogg n 7 above at 251 fn 78.

⁴⁵ The jurisdiction of the US Supreme Court extends exclusively to live ‘cases or controversies’. The exact verbiage is carried in Art. III s. 2(2) of the US Constitution: “The Judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States...to Controversies to which the United States shall be a Party....” This area of US Constitutional Law provides a glimpse into the murky overlap of the legal and the political in the formal Constitution (an overlap which I read Hardt and Negri to suggest that the emerging Constitution of Empire has taken as its template). For an authoritative gloss of the US situation see G.R. Stone, L.M. Seidman, C.R. Sunstein, M.V. Tushnet, *Constitutional Law* (New York: Aspen Publishers, 4th ed., 2001) 86. For a Canadian comparison see Hogg n 7 above at 251 fn 79, 251-259.

⁴⁶ *Supreme Court Act* n 6 above at s. 53.

After being re-elected for a second time in 1997, with a specific mandate from English Canada and federalist Quebecers still reeling from the near victory of Quebec nationalists two years before, voters gave Chrétien's Liberal Government a new electoral mandate to deliver on its campaign promise to set the bar high for any future unilateral declaration of independence by Quebec. Chrétien, the old federalist warhorse, who it will be recalled, had himself been the Minister of Justice and Attorney General in the patriation era Trudeau government, led his own government in posing the Supreme Court three questions in 1998: (1) Under the Constitution of Canada can the government of Quebec effect the secession of Quebec from Canada unilaterally? (2) Can the government of Quebec effect the secession of Quebec from Canada unilaterally under international law? (3) In the event of conflict which law would take precedence? The answer to the three questions came in the form of a majority decision penned by then Chief Justice Antonio Lamer (himself a Trudeau era appointment). It can be summarized as follows: (1) and (2) were answered in the negative and it was therefore not necessary to answer (3).

Having found that the Government of Quebec could *not* unilaterally declare independence under the 'Constitution of Canada' or 'International Law' the court's decision was lauded by many for simply diffusing the possibility of any successful unilateral declaration of Quebec from Canada.⁴⁷ The court's decision would then take shape in the Federal Government's drafting of what would subsequently become the *Clarity Act*, 2000.⁴⁸ Pursuant to the guidelines set for it in Chief Justice Lamer's decision, Parliament drafted the act to clarify the terms of the Federal Government's obligation to negotiate with a secessionist province in the event of a future referendum. The decision also gave direction any future nationalist government in Quebec (or hypothetically any other province) as to how it would be expected (if not required) to conduct itself in negotiations with its federal counterpart on the basis of any future referendum mandate from its electorate. In response to the judgment, there were those, predictably, who bemoaned it as the ultimate invasion of political autonomy and juridical overstepping imaginable.⁴⁹

⁴⁷ See eg D. Mullan, 'It will stand the test of time' (1999) *Public Law* 100; N. Des Rosiers, 'From Quebec Veto to Quebec Secession: The Evolution of the Supreme Court of Canada on Quebec-Canada Disputes' (2000) 13 *Canadian Journal of Law & Jurisprudence* 171; C.L. Ford, 'In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference' (2001) 39 *Alberta Law Review* 511.

⁴⁸ *Clarity Act*, 2000, SC c. 26. For review of different jurisdictions and the key judgments of constitutional and supreme appellate courts on the justiciability of 'political questions' see R. Hirschl, 'The Judicialization of Politics' n 5 at 124-129.

⁴⁹ See eg M.D. Walters, 'The Common Law Constitution in Canada: Return of *Lex Non Scripta* as Fundamental Law' (2001) 51 *University of Toronto Law Journal* 91 (form a more conservative Common

Four of our own purposes, what is perhaps most telling about the judgment is the manner in which the court answered the first question as to whether or not the ‘the Constitution of Canada’⁵⁰ permitted, in the absence of any written provision explicitly disallowing it (and it is usually the case in the common law tradition that the law permits what it does not proscribe), succession of a province from confederation. From a Negri-inspired perspective this presents a fascinating study of the limits of the formal Constitution.

Recall the definition of the formal Constitution, which is developed earlier in Negri’s thought, and repeated in the preface to *Empire* as “the written document along with its various amendments and legal apparatuses.”⁵¹ Here, insofar as the written document did not provide the rule of its own application, the legal apparatus, this time in the form of the court and the *Supreme Court Act*, stepped into the breach to resolve the impasse by resort to four unwritten foundations of Canadian constitutionalism: (1) ‘federalism’; (2) ‘respect for minorities’; (3) ‘democracy’; and, (4) ‘the rule of law’.⁵² Which together, it held, grounded a legal obligation on the Federal Government to negotiate succession with the Government of Quebec (or any other province hypothetically), if it could satisfy the requirement of presenting a referendum mandate garnered in answer to a ‘clear question’ with a ‘clear majority’ in favour of succession.

Pointedly *not* carving out a supervisory role for itself or stipulating precisely what numerical value reached the required threshold of a ‘clear majority’ nor indeed what verbiage was required for a ‘clear question’, the court took some small symbolic steps to recognize some continued form of political autonomy. But, by stipulating that negotiations would have to be carried out respect to the four ‘fundamental’ unwritten principles of Canadian ‘constitutionalism’,⁵³ the court signalled its increasingly central role in shaping political as well the juridical outcomes. Or better, of radically blurring the boundary between the two. As such, the court’s use of unwritten constitutional rules to create positive constitutional obligations went far beyond prior precedents.

Particularly the *Patriation Reference*, in which the court had been far more capacious in recognizing the existence of unwritten conventions (which it explicitly held were exclusively ‘political’ rather than legal).⁵⁴ Much critical attention has therefore been focused on the court’s broadening of its role in this way. I disagree however with the position of prominent Canadian constitutionalists, such as Hogg, who argue that the

Law perspective); J. Leclair ‘Canada’s Unfathomable Unwritten Constitutional Principles’ (2002) 27 Queen’s Law Journal 389.

⁵⁰ “The Constitution of Canada” is a term of art which refers to the list of instruments contained in the schedule to the *Constitution Act*, 1982 see generally n 13, 17 above.

⁵¹ *Empire* n 30 above at xiv.

⁵² n 2 above at 240.

⁵³ *Ibid.*

⁵⁴ n 7 above.

Supreme Court could, or ought to have, made the same findings as it did without resort to unwritten constitutional principles. I find this position to be illustrative of the most severe form of legal scientism and gravitate instead towards what I present as an alternative, Hardt and Negri-inspired, treatment of the matter.

Crisis

At the heart of this reading is the sense of crisis which predominated throughout the period of mega-constitutional politics preceding the decision of the Supreme Court of Canada in the *Succession Reference*. This crisis manifests itself at several points of intensity between patriation and the *Succession Reference* over a period of sixteen years (1982-1998). Most recently, in a near referendum victory for Quebec separatists in 1995 which turned what had been a crisis of representation into a more existential crisis of sovereignty. A referendum victory for Quebec separatists would have been a complete repudiation of the Canadian legal order from a significant portion of its population over what is a massive chunk of its landmass. Including the extraordinarily crucial commercial and transportation hub provided by the Saint Lawrence sea way and contiguous land bridge between Ontario and the Atlantic provinces to the east of Quebec.

This material as much as formal crisis would have played itself out, but for, a less than one percent of Quebec voters who hesitated to pull the trigger on the 131 year old confederation and voted narrowly to remain Canadian. To make matters more complex however, particularly for Canadians outside Quebec, English speaking Quebecers, allophone immigrants, Aboriginal peoples and other constituencies within Quebec less than enthusiastic about the idea of Quebec sovereignty, were suddenly nervous and looking to Ottawa for leadership. What they would find in the years which followed however was that it was not only the Federal Government and the English speaking provinces, but the Supreme Court itself which faced a crisis of legitimacy in Quebec. So much so, that the Quebec Government refused to participate in the *Succession Reference* pleadings thereby necessitating the appointment of *amicus curiae* (rather than the Attorney General of Quebec, as would usually be the case), to argue, that the Constitution of Canada would have no role to play in the aftermath of the referendum victory and that International Law supported a unilateral declaration of independence by Quebec after a plurality of votes were cast favour thereof. Which would indeed logically be the argument the Government of Quebec would have presented had it chosen to participate. However it pointedly did not.

Interestingly, just as the entire reference procedure was looking to become an exercise in absurdity, particularly insofar as Quebec, the central player in the drama, was

protesting matters with its absence, things would soon change and the decision, once it had been rendered, would ultimately carry a great deal of weight. Even grudgingly in some of the hardest of Quebec nationalist circles.⁵⁵ Over a decade later, it would indeed seem that the *Succession Reference* managed, through creative and broad ranging judicial intervention, to calm the waters somewhat. Presumably however anything would have been a notch down in the level of intensity arrived at in the 'close call' of the 1995 referendum. Which was, no doubt itself a reminder of earlier memories going back to the violence of 1970 October Crisis (see generally Chapter I) and a comparatively more recent referendum in 1980.⁵⁶

By the time matters arrived before the Supreme Court of Canada in 1998, had the court stuck solely to the terms of the written constitution or formal Constitution, its legitimacy would have been unlikely among separatist Quebecers. Quebec did, after all, harbour serious grievances and had dissented from the patriation. And, as any student of Canadian politics knows, Quebec also perceived itself, as the referendum results had shown, rightly or wrongly, as the victim of two recent rounds of failed attempts at reform. I am referring of course to Meech Lake in 1987 and Charlottetown in 1992.⁵⁷ In the *Succession Reference* however, the court gets involved to break the political deadlock. In so doing it goes further than it has ever gone in giving attention to social, historical and political circumstances, in other words highly 'extra-legal' considerations.⁵⁸

I return repeatedly to the question of so called 'extra-legal' sources because I think it is illustrative of the broader form of logic which inheres to Empire. Among Canadian constitutionalists, Hogg is again the leading exponent of the view that the Supreme Court risks illegitimacy by invoking unwritten rules to ground positive legal

⁵⁵ See eg C. Ryan, 'What if Quebecers Voted Clearly for Secession?' in D. Schneiderman (ed) *The Quebec Decision* (Toronto: Lorimer, 1999) 150.

⁵⁶ In 1980 Quebecers were asked to vote for or against a 'sovereignty-association' with the rest of Canada, code in the strange idiom of nationalist-federalist politics, for succession. In that first referendum the no side defeated the yes side handily 59.56 percent to 40.44 percent.

⁵⁷ n 25-26 above.

⁵⁸ This turn of phrase along with the related 'extra-textual' repeats itself in the literature see eg M.D. Walters n 49 above at 94 speculating after the *Succession Reference* "perhaps one legal regime in Canada has been surreptitiously jettisoned through *extra-legal* manipulation in favour of a new one [emphasis added]..." For an unusual and original take on the question of extra-textuality as much as extra-legality in the *Succession Reference* see B. Darby, 'Amending Authors and Constitutional Discourse' (2002) 25 *Dalhousie Law Journal* 215 (examining the *Succession Reference* through the lens of Trudeau's 1968 statement "constitutions are made for men and not men for constitutions" and that of Foucault's relatively contemporaneous 1965 essay 'What is an Author?' in which he probes what it means to be the producer of a text).

obligations.⁵⁹ There are others such as Walters who go further to argue that ‘extra-legal’ or ‘unwritten’ sources have a venerable history in the common law doctrine of *lex non scripta*. In other words, in the notion shared by Coke, Blackstone, Hale and other common law jurists which insist, in the natural law tradition, that all written norms are underpinned by deep rooted unwritten norms which transcend the limits of the written word. Nevertheless, even by this standard, the *Succession Reference* itself is quite aptly described as “a paradigmatic case of extra-ordinary interpretation.”⁶⁰ Let us examine it a bit further while continuing to develop its relevance as a potentially unexpected instantiation of the form of Power associated with Empire.

Of written and unwritten c/Constitutions

Leading constitutionalists, jurists and public lawyers, like Hogg, recognize the basic distinction between countries without a written constitution such as the US and those like the UK (and Canada, at least until patriation) in which there is an unwritten or ancient rather than written or modern constitution. In the case of countries lacking a written constitution Hogg and Zwibel note that it is relatively easy to adopt Dicey’s definition of constitutional law as “all rules which directly or indirectly affect the distribution and exercise of the sovereign power of the state.”⁶¹ Martin Loughlin a leading public lawyer in the UK calls this *droit politique*.⁶²

In countries such as Canada or the US, Hogg and Zwibel describe constitutional law in terms of adjudication revolving around the written rules of the constitution, no doubt, a basic formalist and legal positivist baseline. However, they make allowance for the practical critiques that this might be a myopic focus on judicial review of the written constitution. A focus which represents only small portion of the manner in which the governmental power is exercised – to this end, they allow that Parliamentary customs and conventions may properly be considered part of the constitutional law -- a sort of small juridical nod to what is effectively a legal pluralist ethos. Nevertheless they express misgivings about the court’s usage of unwritten principles and distinguish them from customs or conventions which “do not even prescribe rules of behaviour that can be applied by public officials and institutions.”⁶³

⁵⁹ Hogg n 7 above at 1-6, 214-216, 251-255, 299-304 see also P. Hogg & C. Zwibel, ‘The Rule of Law in the Supreme Court of Canada’ (2005) 55 *University of Toronto Law Journal* 719.

⁶⁰ S. Choudhry & R. Howse, ‘Constitutional Theory and the Quebec Secession Reference’ (2000) 13 *Canadian Journal of Law & Jurisprudence* 715, 143, 157.

⁶¹ n 59 above.

⁶² M. Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003).

⁶³ P. Hogg & C. Zwibel n 59 above at 720.

Importantly, any attempt to move away from the text is given direction from the preamble to the Charter itself which states that Canada is founded on principles that recognize 'the supremacy of God and the rule of law'. As noted by Hogg and Zwibel, this language came to the Canadian constitutional order when the Charter was adopted as part of patriation in Part I of the *Constitution Act*, 1982.⁶⁴ The closest thing which Canada had to a written constitution prior to that was the confederation era *British North American Act*, 1867. Which stated that Canada had a constitution 'similar in principle to that of the United Kingdom', a provision subsequently interpreted by the Supreme Court to include recognition of 'the rule of law'.⁶⁵ In all cases, however, Hogg insists, the Supreme Court should not invoke preambular language "on the same plane as a direct provision of the constitution."⁶⁶

The Problem with Hogg and Zwibel's formalistic objection is that it shackles the creativity of the court and prevents it from responding to questions of legitimacy and crisis by drawing an arbitrary distinction between preambular language and "direct provisions." This goes back perhaps more to the fundamental questions of constituent and constituted p/Power than it does to the more obvious, and I argue less interesting dialectic between strict and purposive forms of legal interpretation. Can a preamble, in other words, be distinguished from the enumerated clauses which follow it in the formal written text of the Constitution? Can it be grasped as more direct expression of constituent power, a temporal desire, rather than a temporally closed legal order? These are perhaps at least the type of more Negri-inspired questions we might be tempted to ask in place of the usual ones.

No doubt any pragmatic and left leaning constitutionalist will gravitate, usually for principled reasons, to a purposive over a strict interpretive approach. This is the standard critical left or critical realist move. However, it misses much of what might be most important by leaving the question here. Nevertheless, while it might be worth examining this type of argument in some other context it is not necessary to open it further in this one. Instead it should suffice to say that there is a potentially alternative interpretation of the *Succession Reference* available. One which is hinted at in how the court articulates federalism, respect for minorities, democracy and the rule of law, all unwritten or conventional rules it combines as a species of 'constitutionalism',⁶⁷ a formulation which is itself nothing less than a movement from unwritten or ancient

⁶⁴ n 13 above.

⁶⁵ P. Hogg & C. Zwibel n 59 above at 720-721.

⁶⁶ *Ibid.*

⁶⁷ n 2 above at 240.

constitution into the written or modern Constitution and then back again, by way of juridical interpretation.

Once the old unwritten constitution is acknowledged explicitly in this way, what concerns more established constitutionalists like Hogg is the foundational boundary between law and politics. A boundary which they quite clearly believe, not unlike most conventional public lawyers, must be zealously guarded in the Constitution and the Public Law. On the other side of the Atlantic, Martin Loughlin makes a similar argument insisting that Public Law or what he styles in French, *droit politique*, functions to safeguard the autonomy of the political from legal intervention as much as does submit it to the Rule of Law.⁶⁸ This gatekeeping role is a reflex in the leading English language constitutional scholarship insofar as its practitioners are used to residing in the conceptual abyss between law, as normative science and politics as praxis of government.

Relative to the *Succession Reference* in particular, Hogg and Zwibel argue that the court could have kept political and legal rationalities appropriately separated and achieved the same substantive results (namely, of establishing a formal legal framework for any future succession of the province of Quebec from confederation) without explicitly invoking ‘the rule of law’ (in other words, that the court ought to have been more sparing in its rhetoric and not have introduced unnecessary conceptual baggage). Hogg and Zwibel however clearly agree with the holding that the democratic principle must be balanced against the protection of minority rights – therefore requiring negotiation (presumably rather than violence or prolonged stalemate, both of which would be undesirable in the extreme). They however see no reason to extend beyond the formal Constitution in achieving the desired end (which would be, one presumes, some abstract notion of social cohesion).

Recall, the formal Constitution is the written text, the modern Constitution. By fixing on what are effectively its minutia, its technical lacunae, its interpretation, application and instrumentalization, Hogg is able to retain his role as high priest of Canadian Constitutional Law without really signalling the novelty of the *Succession Reference* and perhaps more broadly the period of mega-constitutional politics it culminated.

⁶⁸ Loughlin n 62 above at 3, 6, 134, denominating ‘public law’ as “the law of the political”, in early modernity as *droit politique* or *Staatsrecht* and in antiquity as *lex regia* or *jus publicum*. See also 69 (defining *droit politique* “as a set of precepts and maxims enabling the state to maintain itself and to flourish”, as a species of normative science as much as social contract) and 71 (stating that “[t]he juristic dimension to constitutional ordering can be grasped only by resurrecting a conception of law which draws on the affinities between the legal and the political – that is, by adopting a concept of public law as *droit politique*”) in same.

Nevertheless, his argument is instructive as an entry point into the shifting sands beneath the formal Constitution of Canada at the closure of the period of mega-constitutional politics in 1998.

E. Crisis in the conceptual hegemonies of the autonomy of the political and the rule of law

More than anything, the period of mega-constitutional politics, including the nearly two decades between decision of the Supreme Court of Canada in the 1981 Patriation and the 1998 *Succession Reference*, is characterized by the strange, and at times total, interpenetration of the legal and the political.⁶⁹ This is a tendency captured by critical legal realist Michael Mandel in the title of his excellent monograph, *The Charter of Rights and the Legalization of Politics in Canada* (1994).⁷⁰

Recall, the reference power is itself enjoyed by the Supreme Court of Canada in way which is not by the US Supreme Court, itself constitutionally barred from hearing anything other than live “cases and controversies”.⁷¹ The ultimate suggestion in this chapter has been that the Supreme Court of Canada’s extraordinarily wide-ranging reference power might itself be a way of grasping the legal/political binary and how it dissolves into a specified Canadian iteration of Empire. This avenue of analysis continues the one presented as the crisis of the called arising in 1997 APEC Affair (as canvassed in the first case study, Chapter IV). In both the APEC Affair and in the *Succession Reference* in particular, it is the law-bound quality the political (in other words the intersection of ‘the Rule of Law’ and ‘the autonomy of the Political’) which is central most.

No doubt there are many variations of Hobbesian or Schmittian thought which are popular today for their willingness to insist on the possibility of decisively asserting the autonomy of the Political *against* the Rule of Law, or at least allowing the necessary assertion of political autonomy where unilateral or unconstrained political decision is required (usually in what is conceived of as an emergency or crisis). A tendency celebrated by some⁷² and moderated by others.⁷³ There are also liberal normative

⁶⁹ The *Patriation Reference* n 7 above.

⁷⁰ M. Mandel n 1 above.

⁷¹ n 44 above.

⁷² In the UK Martin Loughlin is the key figure here. His major monographs on the question were both published in the first half of the last decade see M. Loughlin, *Sword & Scales: An Examination of the Relationship Between Law & Politics* (Portland: Hart Publishing, 2000); M. Loughlin, *The Idea of Public Law* n 62 above. I owe my familiarity with this literature to Professor Loughlin who taught my graduate seminar in Constitutional Theory at the LSE.

⁷³ In the US the key figure is Bruce Ackerman (from a legal theoretical perspective), in Canada David Dyzenhaus (from a political theory perspective). B. Ackerman, ‘The Emergency Constitution’ (2004) 113

theories which celebrate the rule of law as the only bulwark against political excess and argue for its neo-Kantian generalization and expansion across the globe.⁷⁴ There are also those who critique the limits of such a reinvigorated idealism.⁷⁵ If this neo-Kantian approach was dominant in the nineties, the neo-realist one was dominant in the post 9/11 years to follow. We have yet to see which formulation will predominate in the years to come. By the time Hardt and Negri write *Multitude* they will make a fairly convincing argument that both the neo-Schmittian realism attributable to neo-conservatives and the neo-Kantian idealism of neo-liberals, tend now to coexist, often in strangely mutually reinforcing ways, as bourgeois modalities in *Empire*.⁷⁶

In the 1998 *Succession Reference*, unlike the 1970 October Crisis (see generally Chapter I), it is 'the Rule of Law' which is asserted to constrain an assertion of political autonomy, either by nationalist forces in Quebec or federalist ones in Ottawa. In 1970, the *War Measures Act* (see generally Chapter I) was used to suspend the Constitution, to carve out an exception from the rule of law, *not* expand its rationality or broaden its authority as in the *Succession Reference*. The oscillation between these two tendencies, particularly insofar as they mark the difficulties of distinguishing between

Yale Law Journal 1029 (making the case for the legalization of the exception itself); D. Dyzenhaus, *The Constitution of Law* (Cambridge: Cambridge University Press, 2006) (arguing, in typically Canadian fashion, that certain unwritten or conventional rules contained in the broad concept of 'the rule of law' ought to be augmented during times of emergency where political autonomy is most strongly asserted).

⁷⁴ In this case the literature is largely a response to renewed millennial interest in Kant's *Toward Perpetual Peace* (1795) which is reread as an idealist alternative to the anti-humanist tendencies at work in Schmitt. I. Kant, *Toward a Perpetual Peace* in M.J. Gregor (ed) *Practical Philosophy* (Cambridge: Cambridge University Press, 2006) 311-33. Writing thereon or in support thereof see eg J. Habermas 'Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years Hindsight' in J. Bohman & M. Lutz-Bachman (eds), *Perpetual Peace* (Cambridge MA: MIT Press, 1997); J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); D. Held, 'Law of states, laws of peoples' (2002) 8 *Legal Theory* 1.

⁷⁵ For a more critical view see of this reinvigorated Kantian premise eg D. Zolo 'A Cosmopolitan Philosophy of International Law? A Realist Approach' (1999) 12 *Ratio Juris* 4, 429; D. Archibugi, 'Cosmopolitan Democracy' (2000) 4 *New Left Review* 137; E. Balibar, *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton New Jersey: Princeton Press, 2004); C. Douzinas, *Human Rights & Empire* (London: Routledge, 2007). For Negri's more expansive and very sceptical treatment of the European integration project as an experiment in cosmopolitanism see A. Negri, 'L'Europe, une plaisanterie pour les sujets de l'Empire' (2000) 3 *multitudes* 64; A. Negri, *Empire and Beyond* (New York: Polity, 2008) 81-116.

⁷⁶ *Multitude* n 3 above at 6: "Modern sovereignty was thus meant to ban war from the internal, civil terrain. This conception was common to all the dominant veins modern thought, among liberals and non-liberals alike."; 234: "The various right-wing arguments that focus on the benefits of and necessity of the *U.S. global hegemony* agree with the liberal cosmopolitans that globalization breeds democracy, but they do so for different reasons..."; 331: "Schmitt did argue bitterly in Weimar Germany against the forces of liberal, parliamentary pluralism, which he thought either naively negated the rule of the sovereign and thus inevitably lead toward anarchy or dishonestly mask the sovereign in the play of plural powers, undermining its capacities. We should emphasize once again, however, that modern sovereignty does not require that a single individual – an emperor, a führer, or a Caesar – stand alone above society and decide, but it does require that some unitary political subject – such as a party, a people, or a nation – fulfill that role..."

the legal and the political in the contemporary epoch, is among the hallmarks of Empire.

If the period of mega-constitutional politics is bookended on either side by two crucial invocations of the reference power, first in the 1981 *Patriation Reference*,⁷⁷ and second in the 1998 *Secession Reference*,⁷⁸ it is because in both instances, the Supreme Court of Canada is structurally required to stabilize the line between the legal and the political in a way which is increasingly responsive to how Empire itself is instantiated across the very same social terrain. Before continuing with a consideration of how this plays out, we ought stop for a moment to take note of Hogg's assertion that there is "no general separation" between "the judicial and the two political branches", which, of course, makes sense insofar as the legislative and executive branches are necessarily fused in the Westminster system of Government (which Canada has inherited from the UK).⁷⁹ And yet, recall, s. 53 of the *Supreme Court Act* explicitly provides "the Governor in Council may refer to the court for hearing and consideration important questions of law or fact."⁸⁰

The question would therefore seem to be: how can a political question be referred to the judiciary unless it is decider of the Political (at the same time as it is the paragon of the Rule of Law)? Herein lays the strangeness of a reference power. Over the years it has been used by the Federal Government in cases of very politically contentious legislation and has proved itself quite useful indeed.⁸¹ All ten provincial legislatures have now enacted similar legislation granting reference jurisdiction to the highest appellate court in the province with an automatic right to appeal without leave to the Supreme Court of Canada.⁸²

Because the Supreme Court of Canada does not, like its US counterpart, have to restrain itself to the hearing of live cases and controversies; and, because the Canadian Supreme Court is, despite the explicit wording of s. 101 of the *Constitution Act*, which describes it as "a general court of appeal for Canada", capable of becoming, upon the exercise of its reference power, something else entirely,⁸³ it is given the latitude to step into the political breach in a way most courts (in other comparable

⁷⁷ n 7 above.

⁷⁸ n 2 above.

⁷⁹ Hogg n 7 above at 214.

⁸⁰ n 6 above.

⁸¹ This uniquely Canadian willingness to exercise a reference power began with the Privy Council's decision in *A-G. Ont. v. A.-G. Can.* (Reference Appeal) [1912] AC 571 and was upheld by the Supreme Court of Canada in the post-patriation epoch in the *Succession Reference* n 2 above.

⁸² Hogg n 7 above at 250.

⁸³ The Supreme Court of Canada confirmed this n 2 above at 230.

jurisdictions) are not.⁸⁴ So much so, that it is duty bound to answer the question put before it. It does not even have the sometimes convenient excuse of the US Supreme Court to refuse adjudication of 'political questions'.⁸⁵ This does, of course, not mean that it *must* answer the questions put to it. If a question is not yet ripe, the facts underlying have become moot, it is too vague, or it is persistently '*not a legal question*', the Supreme Court of Canada remains free to decline to hear the reference. However all of these formulations are immensely mutable and the tendency has therefore been, at least in the latter half of the twentieth century, *not* to decline jurisdiction on any of these grounds.⁸⁶

Flashback: The Patriation Reference 1981 – the beginning and the end of a narrative?

A year before the adoption of the Charter in 1982, the *Patriation Reference* came before the Supreme Court of Canada. The circumstances were in some ways analogous with those which present themselves nearly two decades later in the 1998 *Succession Reference*. In both cases, the Federal Government was reeling after having failed, unilaterally to solve a problem politically. In the pre-patriation era by way of agreement between the provincial legislatures and federal parliaments on an amendment package for the imperial Parliament; and, in the post-patriation era, by way of a failure to foresee the degree of nationalist sentiment in Quebec after it had been effectively left out of the constitutional fold.

In 1981 after the Federal Government of then Prime Minister Pierre Trudeau had failed to secure the consent of the provincial legislatures to his draft amendment to the Constitution, in the *Constitution Act*, 1982, as it would later become, the government turned to the Supreme Court and the reference power. Here, the political branch was faced with an impediment to its will and looked to the judicial branch for resolution, as it had done before and as it would do again in 1998.⁸⁷ If in 1998, the Federal Government looked to the Supreme Court for guidance as to the nature and quality of any negotiations it might enter into with a province wishing to secede, in the *Patriation Reference*,⁸⁸ the Federal Government's purpose was to ascertain whether it could proceed with the required constitutional amendment in the absence of provincial

⁸⁴ Hirschl n 5 above.

⁸⁵ For a gloss of the key cases and authoritative commentary thereon see Stone, Seidman, Sunstein, Tushnet et al n 45 above at 112-136.

⁸⁶ Earlier in Canada's constitutional history the Court was far more prudent in the exercise of this power see eg *A.G. Ont. v. A.-G. Can (Local Prohibition)* [1896] AC 348, 370 (refusing to answer a reference question which gave rise to no immediate controversy and was therefore "academic rather than judicial").

⁸⁷ See generally n 2 above.

⁸⁸ n 7 above.

consent. To make the first move, as it were, unilaterally. Unilateral moves signify assertions of political autonomy and of sovereign Power in the clearest possible terms. They are therefore quite excitable matters.

The *Patriation Reference*, predictably, saw the provinces argue that no possible unilateral move to amend the constitution would be legal. In a complex judgment, the majority of the Court held (7-2) that there was no definitive legal requirement for provincial consent. At the same time however, it held, albeit by a slightly narrower majority (6-3) that there nevertheless was a constitutional convention that a “substantial degree” of provincial consent would be required for any amendment touching on provincial interests.⁸⁹ In a prelude to the dramatic instantiation in the post-Charter *Succession Reference*, the Supreme Court looked beyond positive law, formal law or strictly constitutional law to convention or unwritten rules for increasingly specific direction about the nature and quality of majoritarian and constitutional democracy in Canada.

Commenting on the extent to which the *Patriation Reference* would amount, retrospectively at least, to an immense blurring of the legal and political spheres converging in Canadian politics in the latter part of the twentieth century, Bakan, Borrows, Choudhry et al, write authoritatively: “the decision has been credited with forcing the federal government and the provinces back to the negotiating table, because although the Court acknowledged the legality of the unilateral federal move, it effectively declared that such a move would be politically illegitimate if not illegal.”⁹⁰ Canadians can certainly be forgiven for asking if there ever was any real difference. As if to make the political quality of its entry into the fray even more explicit, the court would hold, a year later in a retaliatory reference initiated by the Government of Quebec, that there was by no convention requiring Quebec be included for any finding of a “substantial degree” of provincial consent. This case became known as the “Quebec Veto” decision and was much maligned in Quebec Nationalist circles.⁹¹

In each instance the very essence of the epoch of mega-constitutional politics is distilled. First at its opening, in the *Patriation Reference* and the Quebec Veto decisions which would continue to hang over Canada in the decades after patriation, and later, at its closure in the *Succession Reference*. Between these two historic poles we find certain repeating facts. Having been a non-signatory to the Charter, the

⁸⁹ Ibid.

⁹⁰ J. Bakan, J. Borrows, S. Choudhry, et al, *Canadian Constitutional Law* (Toronto: Edmond Montgomery, 2003) 451.

⁹¹ *Re Objection by Quebec to Resolution to Amend the Constitution*, [1982] 2 SCR 793.

Government of Quebec, would be aggressively wooed by the Federal Government. This was as true of Trudeau's Conservative successor, Brian Mulroney, a friend of Regan and Thatcher's personally and ideologically, but also an extraordinarily talented thoroughly bilingual retail politician from Montreal, as it was for Chrétien when he returned the Liberals to power in 1993.

Once the Charter had been adopted the entirety of the political establishment in Canada both centre right and left, would fundamentally embrace patriation as a part of Canada's narrative of progress. Yet, there was always the question of Quebec, and the existential possibility of Canada's dissolution on the horizon, one which Trudeau had attempted to resolve by way of patriation and which Mulroney would stake his government trying to forestall and avert.

Faced with this ongoing crisis, Mulroney bargained twice on a strategy to bring Quebec into the constitutional fold. First in the Meech Lake Accord and second in the Charlottetown Accord, both debacles, both species of reformism which collapsed, whether because they were elite-driven as in the case of Meech or due to exhaustion and scepticism as in the case of Charlottetown. Mulroney stepped down from the Prime Ministership and his Conservatives were eviscerated by the Chrétien-led Liberals in 1993.

The intensification of Quebec separatism and the changed post-1995 situation

Between its election in 1993 and the scare of the 1995 referendum, the new Chrétien government (which included some of the most hard line Quebec federalists in Ottawa, led by Chrétien himself, who was like Trudeau before him, very ill disposed to the nationalist impulse in his home province) failed to foresee that the nationalist spirit in 1980 had not waned. It had strengthened and hardened. Overly focused on the immense failures of the Mulroney government in pacifying Quebec's nationalist leaders by way of reform, and of the Canadian electorate's rebuke for it, the new Chrétien government turned its attention to matters other than constitutional politics. For the first time, a government in Ottawa was willing to say that for the foreseeable future further representation or recognition of Quebec as a 'distinct society' or a 'nation within a nation', was very unlikely to be forthcoming.⁹²

⁹² I am referring here to the frequent fall back or compromise position taken between the very hard line federalist position that Quebec is a Canadian province like the other nine (the preferred position of right wing western populists in particular) and the equally hard line nationalist position that it is a sovereign state (the preferred position of the more militant nationalists in Quebec). One which has, since the spectacular failures of both the Meech and Charlottetown Accords, been given a bad name in both English and French Canada alike see *The Meech Lake Accord* (text of proposed amendment) in M.

Foreclosing on reopening reform, and proceeding largely to ignore the constitutional question outright, the new government began a series of deep deficit cutting and austerity measures. It did so, ironically, because it found itself in a similar situation as the centrist Obama Administration would find itself after the Bush years in the US. In both cases, the prior administration, a self-described conservative one, had been on a spending spree and incurred massive long term structural deficits. In the case of Canada, Chrétien and then Finance Minister Paul Martin decided to attack the deficit earlier rather than later. This is no doubt one of the reasons that Canada has managed to avoid the fate of its US and European allies, including Italy, which are today on the brink of bankruptcy. At the time, perhaps surprisingly, this was not an entirely unpopular move among English Canadians. It certainly did not help in the more social democratic and Keynesian Quebec however.

By 1995 Quebec looked set for a nationalist breakthrough and the Federal Government was caught flat footed focused more inwardly on the country's finances than outwardly on its legitimacy.⁹³ In fact, the Chrétien government's decision *not* to appease Quebec nationalists or reopen reform led to predictable results: yet another Quebec referendum on sovereignty. One which, like its predecessor in 1980, which Mordecai Richler described as posing a 'notoriously mealy-mouthed'⁹⁴ question, asked Quebecers if they wished for the province to enter into a 'sovereignty-association' with Canada. All of this however, in Quebec referendum politics is resolved mysteriously by way of that strange gap filling void that is meaning. Which is, at least in this rare case, was still somehow stunningly clear: separation from Canada - yea or nay?

When they were voting, Quebecers knew themselves to be contemplating whether to authorize the provincial government to claim a mandate for negotiations with Ottawa aimed at removing the province from the federal architecture of Canada, in other words

Mandel n1 above at Appendix B, 476-481 including the proposed s. 2(1) amendment which reads in part: "The Constitution of Canada shall be interpreted in a manner consistent with...(b) the recognition that Quebec constitutes within Canada a *distinct society* [emphasis added]." In the Charlottetown Accord, Appendix C in same at 482-502, the proposed 'Canada Clause' did a similar job stipulating in a similarly worded s. 2(1): "The Constitution of Canada, including the *Canadian Charter of Rights and Freedoms*, shall be interpreted in a manner consistent with the following fundamental characteristics...(c) Quebec constitutes within Canada a *distinct society* [emphasis added], which includes a French-speaking majority...(2) The role of the legislature and Government of Quebec to preserve and promote the distinct society of Quebec is affirmed."

⁹³ At least this was the general consensus among media commentators at the time. In a relatively early retrospective on the Chrétien years, the failure to anticipate the depth of nationalist sentiment in his home province is highlighted as the low point of his long tenure. 'The Chrétien Years' *The Globe and Mail*, August 22, 2002. Similarly, preeminent Canadian historian Desmond Morton notes that the margin of victory for the no side was less than the number of spoiled ballots, adding, "[c]ritics attacked Chrétien for failing to derail the separatists, though no one had anything clever to suggest." D. Morton n 17 above at 367-368.

⁹⁴ M. Richler, *Oh Canada! Oh Quebec!* (Toronto: Penguin, 1992) 124.

from its formal Constitution and its existing social contractual metaphysics. Whatever the specific details of currency, citizenship and territorial contiguity, their vote was a step in the direction, one way or another, toward or away from, Quebec's nationalist aspirations. Unlike the pre-Charter 1980 referendum which had been resolved quite anti-climatically by 59.56 percent majority against succession to 40.44 percent in favour thereof, the 1995 referendum, with its equally mealy-mouthed question, asking voters if they wished to grant the provincial government a mandate to make "a formal offer to Canada for a new economic and political partnership" saw a much closer outcome. This time a razor sharp 49.4 percent in favour and a near identical 50.6 percent against.⁹⁵

F. Resolving the crisis of referendum brinkmanship: the quest for legal certainty?

Faced with these numbers, the Chrétien Government returned to the polls to seek a mandate from Canadians to move forward with what would become the *Succession Reference* and eventually the *Clarity Act*.⁹⁶ Having received a second majority from Canadian with a mandate to do just this, the newly re-elected government asked the Supreme Court of Canada in simple terms whether the Constitution of Canada permitted a declaration of unilateral succession by one province (a question which is in no way explicitly asked or answered by the text of the formal Constitution). It also asked whether there was any right to self-determination under International Law, a whole new dimension, which might ground the legality of a hypothetical unilateral declaration of independence by a province. Finally, it will again be recalled, a third question was asked as to whether Canadian or International Law would take precedence in the event of a conflict between a federal and a provincial government about the legality of succession.⁹⁷

It was necessary for the Federal Government to ask all of these questions because the complex amending formulas contained in Part V of the 1982 Constitution explicitly did *not* contemplate unilateral succession of one province from confederation. Why after all, would it contemplate its own dismemberment?⁹⁸ It is, of course in the nature of any

⁹⁵ The second Quebec sovereignty referendum was held October 30, 1995. The question presented to voters (in an arguably inverted and disingenuous manner) centred on whether the National Assembly (the Legislature of Quebec) should be given a mandate to make "a formal offer to Canada for a new economic and political partnership." The first Quebec referendum was held in 1980 and asked voters, in an equally obtuse fashion, to grant the Provincial Government a mandate to negotiate "sovereignty-association" with the government of Canada. See Hogg n 7 above at 73.

⁹⁶ n 48 above.

⁹⁷ n 2 above.

⁹⁸ J. Bakan, J. Borrows, S. Choudhry, et al n 91 above at 451-452 authoritatively glossing the interplay of the s. 38(1) 'general amending formula' or the '7/50 rule' which applies to all provisions in the

formal Constitution that it imagines itself as infallible. However, it is also an elementary rule of the common law that what the law does not explicitly forbid, it permits. In this case, perhaps predictably for some, the court was sanguine answering both the first and second question in the negative and therefore in declining to answer the third.

Nevertheless, in the *Secession Reference*, as much as the earlier *Patriation Reference(s)*, the court's willingness to wade into the legal fray is obvious and again the subject of much consternation among writers and commentators. In both the 1981 and 1998 references, the question of constitutional convention or unwritten law is the primary vehicle by which the court makes its logico-semantic moves. I emphasize this because it points to the limits of the formal Constitution and to the immense exigencies of the material constitution which makes demands on it from below.

Constitutional conventions or 'unwritten' principles are frequently a mechanism for avoiding irresolvable confusion between the legal and the political rationalities. To illustrate the importance of all this, we can look to an immense volume of constitutional law scholarship on the question of their proper relation.⁹⁹ To see a fundamental confusion which lurks below the surface we can however look to some of the confused language with which leading Canadian Constitutional Law textbooks treat the question. Hogg, who is, once again, the leading authority, writes,

[c]onventions are rules of the constitution that are not enforced by the law courts. [citing Dicey as first among the authorities on this questions] Because they are not enforced by the law courts, they are best regarded as non-legal rules, but because they do in fact regulate the working of the constitution, they are an important concern of the constitutional lawyer.¹⁰⁰

Constitution unless otherwise stipulated in subsequent sections of Part V. Part V stipulates for a lower threshold of amendment requiring only the Federal Parliament and the Legislatures of 2/3 of the provinces having a minimum of 50% the total population of Canada, this is the default rule and is subject to a variety of procedural, time constraint, opt out privileges etc. pursuant to ss. 38(3), 39(1)-(2), 40 & 42. S. 41 contains a 'unanimity procedure' (for any changes to the office of the Queen, Governor General, Lieutenant Governors, minimum number of seats each province is permitted in the House of Commons, the bilingual status of the country, the composition of the Supreme Court or the amending formula itself. This is somehow the heartland of sovereignty and it is not easy to unsettle. Finally, there are several more permutations: s. 43 'bilateral procedure' in which consent to amendment affecting only one province requires only the consent of effected province; s. 44 'federal unilateral procedure' (permitting unilateral amendment by Parliament in relation to functions or powers which are uniquely its own); s. 45 'provincial unilateral procedure' (another homology permitting unilateral amendment by a Provincial Legislature of its own Constitution insofar as it is not in relation to functions or powers which it shares with other provinces or the Federal Government).

⁹⁹ See Hogg n 7 above at 21, fn. 10.

¹⁰⁰ *Ibid.*

As if to clear up the confusion, Hogg continues “[w]hat convention do is to prescribe the way in which legal powers shall be exercised.”¹⁰¹ Strange addenda insofar as he has just told us those conventions are ‘non-legal’ rules which nevertheless ‘regulate the working of the constitution’. He does not of course say that they are political rules. In fact, the implication is that they are customary and therefore not political in the modern sense, really a throwback to the pre-political or ancient constitution. In their more critical alternative to Hogg’s Constitutional Law textbook, Bakan, Borrows, Choudhry et al, write something else altogether. While conventions are “not laws in the strict sense of enforceable rules” they are nonetheless “part of the Canadian constitutional order.”¹⁰² For the uninitiated all of this would seem very much contradictory and nonsensical. However it is not, it is an attempt to make sense of a very complex meeting place between rationalities which are inherent to both the material as much as the formal c/Constitution of Empire, to both the political as much as the legal.

Much ink has been spilled asking the question: are conventions law? And, if not, what are they? These sorts of questions engage late twentieth century jurisprudential debate insofar as it is becoming increasingly plain, that profoundly political questions are creeping into the legal order. This notion itself is of course not new. It found itself articulated in the pens of critical legal realists throughout the latter decades of the twentieth century. In the Canadian context we have seen this tendency most clearly in what Michael Mandel styles the post-Charter ‘the legalization of politics’.¹⁰³ Although Negri has not, to my knowledge, engaged with a critical legal audience in Canada, he has done so in the UK, in the course of which, he endorsed the basic ethos of the critical legal project while at the same time worrying over its tendency to preserve or simply reverse dialectical configurations rather than escape them altogether. To make this point, he has emphasized as much as the increasingly non-existent fault line between the legal and the political,¹⁰⁴ the even more fundamentally porous one between the private and the public.¹⁰⁵

G. The refusal of certainty and the crisis of the public/private as much as the legal/political binaries: the subjectivity of the multitude and project of the common as antidote

The breakdown of the public/private distinction has marched in relative lockstep, at least in Canada’s post-Charter epoch with the more high profile breakdown of the political/legal distinction understood to enter into crisis in the period of mega-

¹⁰¹ Ibid.

¹⁰² n 91 above at 4.

¹⁰³ See generally n 1 above.

¹⁰⁴ *Empire* n 30 above at 307, 309.

¹⁰⁵ Ibid. 141, 188-189, 301.

constitutional politics (1982-1998). An equally strong case can perhaps even be made that during this time the Supreme Court of Canada was forced to respond to an ever more complex overlap in private and public rationalities as much as it was legal and political ones. Liberal feminist scholars like Patricia Hughes are often best attuned to this tendency. Writing on the lead case of *R.W.D.S.U. v. Dolphin Delivery* (1986) (hereinafter, *Dolphin Delivery*),¹⁰⁶ she frames the matter thus: “how the *Charter* is applied breaks down the barriers between private and public, through the *Charter* values doctrine, and the importance of understanding the particular relationship between the public and private sphere in any given case.”¹⁰⁷ The ‘Charter values’ doctrine points to the need to maintain Charter-like norms even in the realm of private relations between citizens. To make the absolute blurring and intermixing of public and private rationalities clearer, she adds in a pragmatic accent, “[t]he Court’s decisions with respect to which entities or conduct falls within subsection 32(1) do not make it easy to determine which entities are ‘government’ and which are not.”¹⁰⁸

¹⁰⁶ [1986] 2 SCR 573. *Dolphin Delivery* revolved around a labour dispute between scab workers and a striking union over the constitutionality of an injunction against ‘secondary picketing’. The Court held that the trial court’s jurisdiction to order injunctive relief was not subject to Charter scrutiny insofar as the interests involved were exclusively matters of private law. And therefore within the lacunae of common law rules and obligations about which the Charter had *no* interest whatsoever: “the Charter is intended to apply only to public bodies or, put another way, private actors owe no constitutional duty to other private actors.” Nevertheless, *Dolphin Delivery* rapidly became an important case for critical constitutional theorists because the formal holding of the majority was difficult to balance against obiter distinguishing the Court’s general obligation to “apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the constitution,” among them that private parties owe a duty of care.

¹⁰⁷ P. Hughes, ‘The Intersection of Public and Private Under the *Charter*’ (2003) 52 *University of New Brunswick Law Journal* 201, 207. In the post-*Dolphin* case law, Hughes argues, the steady expansion of the Charter or Charter-like liability tests adopted into the common law of tort, contract, property and other fields of private law is striking. *Ibid.* 207. She emphasizes the following decisions: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 (finding a reverse onus on the claimant who alleges common law infringements on Charter rights, nevertheless permitting that such a claim is possible); *Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.* [2002] SCC 8 (describing, again in obiter, a private party litigation as “a ‘Charter values’ case). What Hughes documents with extreme clarity is perhaps not unlike what Mandel has called ‘the legalization of politics’, albeit from a different angle. Here, the boundary becomes increasingly difficult to draw between ostensibly private and public spheres of life as much as economic and political rationalities. In every case the law is elevated to in some way provide (needed) mediation between the two. Again, this is grasped by Hughes when she writes, “how the *Charter* is applied breaks down the barriers between private and public, through the *Charter* values doctrine, and the importance of understanding the particular relationship between the public and private sphere in any given case.” To make the absolute blurring and intermixing of public and private rationalities clear, she adds in a pragmatic accent, “[t]he Court’s decisions with respect to which entities or conduct falls within subsection 32(1) do not make it easy to determine which entities are ‘government’ and which are not.”

¹⁰⁸ *Ibid.* 209 citing cases in which the distinction between private and public power is inscribed by way of ever greater degrees of legal technical contortions see eg *McKinney v. University of Guelph*, [1990] 3 SCR 229, 266 (holding the Charter applied to a university insofar as it was “performing a governmental objective” but not insofar as it was of concern only to “non-governmental entities created by

In the crisis of the relation between private and public, perhaps as between the political and the legal, the formal Constitution has run up against a serious impediment. It constantly seeks an outside which no longer exists (thus the need for more and more complex resort to the 'unwritten principles' in the field of public law and to the Charter itself in the field of private law). The result for the formal Constitution is a crisis. Particularly insofar as the contemporary form of life which it hopes to represent is no longer really interested in performing according to the old rules set for it. It refuses prefabricated subjectivities by subverting them from within. The multitude refuses private as much as public expropriation of the common. From here, perhaps we can say that the common is a total obliteration of the private/public binary, a refusal of its language and logic. But really it is an immanent critique of it.

To grasp the origins of this reading its barest essentials in Negri's intellectual formation, we can trace a line directly back from the very recent *Commonwealth* to *The Savage Anomaly's* much earlier pronouncement: "that in Spinoza there is a profound refusal of formal considerations of the constitutional process: The limits are forces; the bounds of Power (*potestas*) are defined by powers (*potentia*)."¹⁰⁹ Here, the public/private binary, like the legal/political one, is really just a circuit of productive antagonism, through which both forms of power (power/Power) constantly surge. In every case, the multitude is the subject and the constitution of the common is its only telos. Here, the hegemonic formulation of the binary itself is finally subverted. This idea repeats itself throughout the trilogy with Hardt. In the next chapter I hope to present it in greater detail.

Prior to doing this, it remains crucial to emphasize the degree to which the common's very conceptual formulation, implies line of flight from the rigid dichotomy between private and public as much as the legal and the political. Returning to some of the departure points in *The Savage Anomaly* and Negri's subsequent treasure trove of essays on Spinoza,¹¹⁰ the recent *Commonwealth* clarifies this at some length (once

government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility").

¹⁰⁹ A. Negri, *The Savage Anomaly* (Minneapolis: University of Minnesota Press, 2008) 206.

¹¹⁰ A. Negri, 'Reliqua desiderantur: a conjecture for a definition of the concept of the democracy in the final Spinoza' in T.S. Murphy (ed.) A. Negri, *Subversive Spinoza* n (Manchester: University of Manchester Press, 2004) 28-58; A. Negri, 'Democracy and eternity in Spinoza' 101-112 in same. In both essays, Negri schematizes some of the central arguments in his earlier *The Savage Anomaly*. First by presenting his own admittedly speculative, but nevertheless rigorous, reading of Spinoza's unfinished *Political Treatise*. A reading in which presents the posthumously compiled draft as a firm step beyond the more widely interpreted and known *Ethics* and *Theologico-Political Treatise* (Negri made the same move relative to Marx in *Marx Beyond Marx*, preferring the speculative and unfinished *Grundrisse* over the established *Capital* Volume I in particular). In Spinoza's *Political Treatise* Negri catches as glimpse, not only of an immanent critique of the social contractual modality, but of an affirmative alternative to it 32-33 :

again, in largely Spinozian terms).¹¹¹ Here, Hardt and Negri's treatment of the common is directly relevant to our reading of the Canadian critical literature in the post-Charter epoch insofar as it builds on the concept of the multitude understood to be missing in both the *Succession Reference*, with its recourse to unwritten principles, and in the more day to day interpretation of which spheres of life are given Charter protection. A typically formalistic line of inquiry in which the legal scientific 'interpretation' and 'application' of specific Charter provisions takes up all the oxygen.

If I have suggested that mega-constitutionalism speaks to the total integration of political and legal rationalities, not only in reformist procedures and referendum drama, but also more generally across the terrain of post-Charter Canada, it is not to suggest that there are not very significant economic crosscurrents at play as well. Economic rationalities coexist and most importantly, radically intermingle even sometimes over determining, political and legal ones. The destabilization of the private/public organizational binary is of a similar nature.

H. Conclusion

Beyond the by now quite banal truism that "there has been a continuous movement throughout the modern period to privatize public property", Negri has long considered the reasons, not only for the demise of the Keynesian welfare state (the late modern social state), but for the continuation, even expansion, of the normative science and de-ontological philosophy which purported to correspond to it as much as its predecessor (the high modern rights state).

"...we can say, then, that social contract theory is in general a theory of the absolutist State, whereas the rejection of the theory, or its usage in terms that exclude the idea of a transfer of Power represents the republican traditions that are polemical when confronted with any ideology of representative government and any statist praxis of alienation....the presence of social contract theory in the *Tractatus Theologico-Politicus* (in certain way it is almost unnoticed, it's possible effects unrecognized, a tribute to the hegemonic currents of the century) nevertheless limits the possibilities of a radical innovative orientation. [citation omitted]. In the *Political Treatise*, on the other hand, corresponding to the absence of the contract there is a complete freedom of theoretico-political development...Right and politics have nothing to do with the negative and the dialectical essence of contrarianism; their absoluteness participates in and reveals the truth of action." Or even, the material constitution of reality. In 'Democracy and eternity in Spinoza' at 101-102, 105, 110, Negri directs his attention toward this very "constitution of reality" as a philosophical question *and* as a democratic praxis of the multitude. In so doing, he gives some hints as to how his own reading of Spinoza converges with that of Matheron and Deleuze in particular. He also suggests a broader and more serious break with Heideggerian ontologies which he presents as a reactionary or negative inversion of the dialectic, rather than its surpassing or subversion of it.

¹¹¹A fact which is overwhelmingly obvious from the first pages of the book in which Hardt and Negri explicitly pose Spinoza against thinkers as varied as his contemporary Hobbes and the much later Hegel (as much as to the twentieth century Heidegger) see eg M. Hardt & A. Negri, *Commonwealth* (Cambridge MA: Harvard Belknap, 2009) 52-53 (Spinoza contra Hobbes); xiii-xiv, 180-181 (Spinoza contra Heidegger). For more frequent pairing of Spinoza, if not explicitly then conceptually, contra Hegel and the Hegelian critiques of *Empire* see *Multitude* n 3 above at 225-227, 395 fn 46-47.

Hardt and Negri's argument today is, in effect, that both the rights and the social state have been combined and spread across the globe in the amalgam of sovereign Power and Capital called Empire. The result, I have suggested in this chapter, is that wherever the formal Constitution, imagined as the science of mediation between the legal and political as much as public and private, is interposed, it is as a reaction to a crisis of representation, something which even the best and often most progressive Canadian constitutionalists do not consider, even as a possibility.

Chapter VI - An affirmative alternative: toward an Indigenous ontology of constitution

To the extent that identity theories are political, they are about power and oppression...Cultures that locate identity in a politics of ideas, e.g. those belonging to Greek thought, tend to colonize other cultures, and rule politically oppressive states...

A. Waters, 'Ontology of Identity and Interstitial Being' (2004)¹

Why do we continue to stumble and resist and deny when it comes this Aboriginal role in Canada? The most obvious answer is that we don't know what to do with the least palatable part of the settler story. We wanted the land. It belonged to someone else. We took it.

J. Ralston Saul, *A Fair Country: telling truths about Canada* (2008)²

The dominant forces of modernity encounter not mere *differences* but *resistances*.

M. Hardt & A. Negri, *Commonwealth* (2009)³

A. Introduction

In this final substantive case study, we examine: (i) the constitutive ontology of Canada's Aboriginal people (whose participation in the global struggle of Indigenous people joins them to the Chiapas and other Amerindian examples more familiar to readers of Hardt and Negri's trilogy and the literature surrounding them⁴); and, (ii) the argument that between the Aboriginal and the European imagining of the constitutional, there is something other than a conventional dialectic in which the Indigenous is radically 'outside', 'excluded' or 'other' to the Constitution. From here, I will consider

¹ A. Waters, 'Ontology of Identity and Interstitial Being' A. Waters (ed) *American Indian Thought* (Oxford: Blackwell, 2004) 153-170, 154.

² J. Ralston Saul, *A Fair Country* (Toronto: Viking, 2008) 27, 64.

³ M. Hardt & A. Negri, *Commonwealth* (Cambridge MA: Harvard Belknap, 2009) 69.

⁴ Negri's work prior to his collaboration with Hardt rarely contained significant treatment of Indigenous questions and his attention to matters of interest to postcolonial scholars was either peripheral or hinged on the broader struggle against Capital and the State form (as articulated in a largely European register). This would change in *Empire*, which outlines its solidarity with major postcolonial figures from Fanon to Said and Spivak to Bhabha. Some postcolonial commentators and reviewers received this poorly insofar as it appeared to them that Hardt and Negri had cited these authors without developing their ideas other than as a means of supporting their own central arguments (for my summary and response to this line of critique see Chapter III, s. D). Hardt and Negri clearly absorbed this critique insofar as the subsequent volumes of the trilogy, *Commonwealth* in particular, contain an enhanced and deepened engagement with both postcolonial and Indigenous themes. On the question of Indigeneity specifically see J. Rabasa, 'For Empire' in 13 *Rethinking Marxism* 3/4 (2001) 8-16; J. Rabasa, 'Negri by Zapata: Constituent Power and the Limits of Autonomy' in T.S. Murphy & A.K. Mustapha (eds), *The Philosophy of Antonio Negri: Resistance in Practice (Vol. I)* (London: Pluto Press, 2005) 163-204.

whether the Charter might in fact be graspable as something other than a machine of radical and constant integration. But instead as a form of constant production, the production of man by man: *homo faber*.

This chapter brings together Hardt and Negri's theorization of what they describe as 'Indigenous ontology' in *Commonwealth* with a selection of critical literature in the field loosely denominated as Canadian 'Aboriginal Law'. Consistent with the broader methodological approach underpinning this thesis, it does not rely exclusively on 'primary sources' of legal authority, whether formal constitutional texts, legislation, case law or other forms of positive law. Instead, its emphasis is on the 'secondary' or critical literature itself.

The 1999 Nunavut⁵ and Nisga'a⁶ Agreements (granting hitherto unprecedented autonomy to the Nunavut and Nisga'a peoples over their land, resources and cultural heritage, to the extent such things can be administered) as much as the long line of Supreme Court of Canada case law in the eighties and nineties connecting the breakthrough pre-Charter decision in *Calder v. A.G.B.C.* (recognizing for the first time the outlines of a possible 'Indian title')⁷ to a series of other post-Charter decisions delineating the scope and limits of Aboriginal peoples' newly recognized section 25 and 35 Charter rights.⁸ This narrative culminated in a legal decision much as did the one

⁵ *Constitution Act, 1999* (Nunavut), SC 1998, c. 15, Pt. II (enacted pursuant to s. 44 of the *Constitution Act, 1982* and granting wide-ranging autonomy and self-government powers to the Nunavut peoples over the previously federally administered eastern portion of Canada's vast, resource rich, North West Territories).

⁶ *Nisga'a Final Agreement Act, 1999* (BC), S.B.C. 1999, c. 2 (a treaty and land rights claims pursuant to ss. 25&35 of the *Constitution Act, 1982* granting wide-ranging autonomy and self-government power to the Nisga'a peoples over the Nass River Valley area in northwest British Columbia). See generally *Constitution Act 1982, Schedule B to Canada Act 1982* (UK), c. 11) (enacting the new *Canadian Charter of Rights and Freedoms*) inclusive of s. 25 stipulating that no Charter provisions shall "be construed so as to abrogate or derogate from any aboriginal treaty or other rights and freedoms" and s. 35 recognizing the existence and legitimacy of existing Aboriginal rights generally.

⁷ *Calder v. A.G.B.C.*, [1973] SCR 313, 328, 346-347 (an early precedent rejecting the patently racist view of Indigenous peoples as having 'rudimentary and incomplete' legal systems 'wholly without cohesion' and incapable of grounding any claim to land: '...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means.').

⁸ *R. v. Guerin*, [1984] 2 SCR 335, 378 (dampening immediate post-Charter optimism of an expansive reading of Aboriginal treaty rights holding that 'Indians' right in the land were obviously diminished', despite continuing 'rights of occupancy and possession' by the common law 'principle of discovery' justifying Canada's 'ultimate title in the land' and confirming a paternalistic relation in which the Crown owes a fiduciary obligation or 'trust like' relation to Aboriginal peoples); *R. v. Sparrow*, [1990] 1 SCR 1075, 1097, 1103 (further dashing post-Charter hopefulness holding '...there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown'); *R. v. Van der Peet*, [1996] 2 SCR 507 (raising expectations of a new opening holding that Aboriginal rights recognized by s. 35(1) of the Charter do indeed include a variety of practices and modes of existence forming a crucial part of the cultures of Aboriginal peoples at the time of first contact, albeit short of outright title and to be determined based on a 'morally and politically defensible conception of rights' incorporating 'both [Common Law and Aboriginal Law] legal

canvassed in the preceding chapter. If Canada's period of 'mega-constitutional politics' was somehow concluded by the *Succession Reference* in 1998, its period of Aboriginal Law expansion reached a similar high point in *Delgamuukw v. A.G.B.C.* in which the Supreme Court recognizes oral testimony on equal footing with written evidence to ground Aboriginal land claims.⁹ All of this is not simply to remind readers of the obvious. Namely, that on many occasions during the same period there were militant forms of direct action taken by Aboriginal peoples, about which equally much has been written, particularly relative to the 1990 Oka Crisis¹⁰ and the 1995 occupation of Ipperwash Provincial Park (both of which have some overlaps with mobilization of the multitude presented in Chapter IV),¹¹ but to focus instead on the basic conceptual building blocks which permit Canadian constitutionalists to develop what is denominated as 'Aboriginal Law' both as a field of knowledge and legal technical intervention.

Rather than revisiting the already well-trodden terrain of literature addressing key cases in the subfield of Aboriginal Law, my purpose in this chapter is to look to the treatment of Aboriginal Law as a disciplinary subdivision of the broader field of 'Constitutional Law'. One which is interesting insofar as it brings together legal and political theory as well as philosophy and anthropology in a variety of innovative ways.

perspectives', 'traditional [oral or written] laws or customs are those things passed down, and arising from the pre-existing culture and customs of Aboriginal peoples' but nevertheless 'directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.')

⁹ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 (placing oral evidence on an equal plane with documentary evidence in cases involving the assertion of Aboriginal rights).

¹⁰ In the spring of 1990 militant members of the Mohawk Nation residing on the Kahnawake reserve in Quebec protested a plan by land developers and the municipality of Oka to build a golf course on the site of what they maintained was an ancestral burial ground by setting up a barricade blocking the Mercier Bridge connecting Oka to the major highways serving the city of Montreal. On July 11th at the request of the Oka Mayor, Quebec Provincial Police (the Sûreté de Québec) intervened and exchanged gunfire with militants resulting in the death a police officer. The conflict then radicalized with Mohawks expanding their claim into a nationalist register and culminated in then Quebec Premier Robert Bourassa asking the Canadian Armed Forces to intervene in the standoff. The barricades came down without any final resolution in the early fall of the same year see generally, M. Baxendale, C. MacLaine & R. Galbraith, *This Land Is Our Land* (Montreal: Optimum, 1990); G. York and L. Pindera, *People of the Pines* (Toronto: Little, Brown & Co., 1991); A. (T.) Alfred, *Heeding the Voices of our Ancestors* (Toronto: Oxford University Press, 1995); <http://www.histori.ca/peace/page.do?pageID=343>.

¹¹ In the fall of 1995 radicalized members of the Chippewas of the Kettle and Stony Point First Nations occupied Ipperwash Provincial Park. Events culminated in a standoff between Ontario Provincial Police (the OPP) and an unarmed Stony Point militant, Dudley George shot by a police bullet. After the defeat of the Conservative Government almost a decade later, the subsequent Liberal Government commissioned an official inquiry into the matter. Its report was released in 2007 and found that there had been significant police error and misconduct, as well as racist comments made by former Ontario Premier Mika Harris at the time events were unfolding. The Provincial Government subsequently returned the disputed land to the Chippewas of the Kettle and Stony Point First Nations (after a two year transition period the park was turned over to the exclusive control of the First Nation in May in 2009). See generally, P. Edwards, *One Dead Indian* (Toronto: Stoddart, 2001); <http://www.histori.ca/peace/page.do?pageID=344>; <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html>.

Some of which might in some way speak to the Hardt and Negrian conceptual horizon. Particularly what Hardt and Negri denominate in *Commonwealth* as Indigenous or 'Amerindian ontology'.¹² Stated differently, my purpose will be to consider the potential nexus between what is understood by Canadian legal and political theorists as 'Aboriginal Law' and what Hardt and Negri describe as 'making the common' as much as 'being in common'.¹³ James Youngblood Henderson approaches this concept in his major monograph *First Nations Jurisprudence and Aboriginal Rights* in which he presents a species of "First Nations knowledge and jurisprudence",¹⁴ within which is grasped, a constitutive theory and praxis "organized around four insights: the insights of the covenants of creation, embodied spirits, implicate order, and dynamic transformation."¹⁵

B. Indigenous Ontology: what is it?

In what Henderson calls 'the covenants of creation' there is an imagining of a creative force, a "Life-Giver or Creator" which, rather than being defined by a "unity in the way suggested by Judeo-Christian religion as a universal being or transcendent person, contrasted with the earth and life forms on earth" is characterized by a force immanent to nature.¹⁶ Here, there is total convergence "between being, goodness, and nature."¹⁷ Rather than taking shape in the form of a religious covenant, like the one between God and Abraham or a secular social contract such as the one envisaged by modern bourgeois thought between 'the Sovereign' and 'the People', what is grasped here is a "covenantal relationship to the land as being 'on loan' from the great Spirit". Crucially, this relationship is based not on the grant of Lockian ownership interests, but on a legacy of "[i]anguage, teaching, prophecies, ceremonies, rituals and protocols".¹⁸ It is in other words a form of collective intelligence as well as a cultural bounty, an immaterial as much as a material common(s). We can find a similar notion in *Commonwealth*, in which Hardt and Negri describe the common as the product of "[i]ntellectual, communicative, and affective means of cooperation". All of which are immanent to being, created in "productive encounters themselves" and impossible to direct from any imagined or real "outside."¹⁹

¹² n 3 above at 124.

¹³ Ibid. 123.

¹⁴ J.Y. Henderson, *First Nations Jurisprudence and Aboriginal Rights* (Saskatoon: University of Saskatchewan Press, 2006) 129.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Ibid. 130.

¹⁸ Ibid.

¹⁹ Ibid. 140.

Taking a closer look, what is presented by Henderson as First Nations jurisprudence, is something quite apart from the familiar social contractual imagining of constitutionalism:

In the contract, individuals are drawn into a vertical relations with the figure of authority and not horizontal relations with others like them. An individual can never produce the common, no more than an individual can generate a new idea without relying on the foundation of common ideas and intellectual communication with others like them. Only a multitude can produce the common.²⁰

A second insight which Henderson attributes to First Nations jurisprudence is the notion of “embodied spirits” as a form of constitutive capacity which is never closed, always open and creative:

Although Aboriginal people view the realms of spirit as eternal, those realms are in a continuous state of transformation...All these forces can change their shape, form, or content; but collectively they create the force called life. This insight is consistent with the scientific view that all matter can be seen as energy, shaping itself to particular patterns.²¹

Here again, we can grasp several elements of constitution which dovetail nicely with Negri’s theory of constitutive ontology, both as developed in collaboration with Hardt and on his own. First, in terms of the question of the constitution of time, or better, the open time of constituent power (constitution) rather than the closed or historicized time of constituted power (Constitution),²² and, second, in the imagining of the multitude as a corporeal subjectivity which constitutes the common.

Henderson’s third axiom of a potential First Nations Jurisprudence, the concept of ‘implicate order’ might present a further degree of coincidence with what Hardt and Negri describe in *Commonwealth* as Indigenous ontology. Here again, we pick up on

²⁰ Ibid. 303.

²¹ Ibid. 136.

²² This notion has a pedigree in Negri’s thought before his millennial collaboration with Hardt see ie A. Negri, *Insurgencies* (Minneapolis: University of Minnesota Press, 1999) 2, 41-42, 48, 198, 232 (treating “the temporality of constituent power” as the constitutive opening of “the aperture of time” against the “closure of time” associated with reactionary liberal or bourgeois thought in a critique of the “unsustainable” the familiar bourgeois juridical mystification of constituent power as arising “from nowhere” to organize and found law, while simultaneously insisting that it be “limited temporally...closed, treated, reduced in juridical categories, and restrained in the administrative routine...”; A. Negri, *The Constitution of Time in Time for Revolution*, (London: Continuum, 2003) 84-86, 92-93 (“...the constitution, any constitution, is a slice of time...with regards to juridical time: the law affirms ‘its continuing validity and therefore its universality by superimposing the fixity of an eternal present over the fluidity of time and therefore implicating its axiological validity through formal validity’ ...there is no contradiction between Fascist State and Constitutional State....The State operates under the necessity of removing the collective dimension and the productive autonomy of time, of temporal being, because their emergence means antagonism.”)

familiar themes. Namely, the constitutive quality of language and its intersection with corporeality and life:

What the sounds of the language contain is the great flux, eternal transformation, and an interconnected order of time, space, and events. [citation omitted] With this fluidity of verb phrase, every speaker can create new vocabulary 'on the fly,' custom-tailored to meet the experience of the moment, to express the very finest nuances of meanings...Through unique word-endings, languages divide the world into the animate (breathing) and the inanimate (non-breathing), or what is intrinsically respected and not. In English this process or experience can be described as the implicate order.²³

The implicate order points to the constitutive quality of a linguistic common, its Wittgensteinian dimensions. There is also some degree of confluence with the type of philosophy which Deleuze and Guattari famously describe in *What is Philosophy?* as the invention of concepts.²⁴ This complex nexus of crucial ideas can perhaps be usefully fleshed out in an Indigenous register what Henderson describes it as “the interconnected order of time, space and events”. Here, the ontological dimension of Hardt and Negri’s thought and its intersection with a potential First Nations ontology of constitution becomes increasingly plausible. To grasp it, it is instructive think of what (Hardt and) Negri call *kairòs*. *Kairòs* is the opposite of *chronos* or “the linear accumulation of time”. It is, in other words, *not* the realization of a particular telos but instead the “moment when the arrow [of time] is shot by the bowstring”. *Kairòs*, Hardt and Negri tell us, speaks to the action which is constitutive of events materializing in time and space and arising from an “accumulation of common and cooperative decisions”. It presents a “moment of rupture or *clinamen* that can create a new world”. Or better, “a new constitutive temporality” which inaugurates “a new future”.²⁵

Insofar as *kairòs*, which means in ancient Greek, a ‘just or opportune moment’ or ‘time of God’²⁶ (Negri’s usage here suggests this meaning rather than the more obvious theological concept of destiny). It might be suggested that *kairòs* is precisely that which overpowers any predetermined outcome to define itself within the intelligent mind and body of the archer. This has a certain resonance in Henderson’s formulation of a

²³ n 14 above at 144-145.

²⁴ I make this assertion advisedly in light of Negri’s recent comment on *What is Philosophy?* in interview with Cesare Casarino see C. Casarino & A. Negri, *A Conversation on Philosophy and Politics* (Minneapolis: University of Minnesota Press, 2008) 185-186. Despite Negri’s subtle points distinguishing his own project from the invention of concepts as articulated in Deleuze and Guattari’s final book, I think that the broader arc of Negri’s writing, particularly in his English-language millennial collaboration with Hardt, contains an overwhelming tendency to treat philosophy as the invention, reinvention, production and reproduction of concepts.

²⁵ M. Hardt & A. Negri, *Multitude* (London: Penguin, 2005) 357.

²⁶ A. Negri & R. Scelsi, *Goodbye Mr. Socialism* (London: Serpent’s Tail, 2008) (orig. pub. 2006) 243.

potential 'First Nations Jurisprudence', particularly insofar as he develops the idea of implicate order.²⁷ A notion which points to the extent that Aboriginal languages are capable of shrugging off the hegemonic constructions of modern constitutional philosophy and science, or at least subverting them from within, of generating and sustaining an immanent critique.

What a potential First Nations Jurisprudence offers then is something other than the dominant historicized representation of the Constitution of the State. Henderson reinforces this reading in the Cree word, *ê-miciminitômakahki*, a transitive verb/noun which again points to the "interconnected order of time space and events" and is better able than any European construction to grasp the dynamic quality of being. What is crucial here is the materiality of language itself, its capacity to produce or constitute the real (rather than its usual hegemonic western or European function of representing or mediating the real). This is equally what is grasped by Henderson as the distinction between "the animate (breathing) and the inanimate (non-breathing), or what is intrinsically respected and not." If we can imagine the constitution of the common as something which is breathing and animate, whether in its formulation as the natural environment (inclusive of man and beast) or in its formulation as a communicative and ideational realm (as an intellectual one), we can begin to see how the constitution of the State might be decentered, even viewed as inanimate, dead, closed or reactionary in comparison.

Constitution as transformation or mutatio

The fourth and final dimension of what Henderson calls a First Nations Jurisprudence is 'dynamic transformations'. Here again, the confluence with what Hardt and Negri describe as the constitution of the common, in both its linguistic and corporeal, representational and material dimensions, is striking. Once more, the analysis passes through Wittgenstein and the distinction between the affirmative act of constituting

²⁷ *Commonwealth* n 3 above at 165. See generally A. Negri, *Kairòs, Alma Venus, Multitudo* in M. Madarini (ed), *Time for Revolution* above n 22 at 142, 241-242. Here, many of the themes developed with Hardt in *Commonwealth* are presaged: (1) a materialist epistemology in *kairòs* ("the event of knowing, of naming, or rather knowing as singularity, interweaving of logical innovation and ontological creation... and so making the name adequate to the event and constructing legitimation, not over or beyond, but within the common"); (2) a materialist politics in *Alma Venus* (based on love of the common rather than its expropriation, rulership and command); and, (3) a materialist subjectivity in *multitudo* (an insurgent postmodern subjectivity in which all forms of subjectivity associated with the individual, group or corporatist nation-state are abandoned in favour of "the power of singularities" to act linguistically and communicatively in productive "co-operative constellations". See also A. Negri, *The Porcelain Workshop* (London: Semiotext(e), 2008) 97 (describing *kairòs* as "the instant of creation, the moment of potential (*puissance*) spreads on the edge of being, that is the capacity to invent....").

(which is fluid without being flimsy) and the negative finality of what is already constituted (which is mystificatory in the extreme):

We should highlight two aspects of Wittgenstein's operation. First, by grounding truth in language and language games, he removes truth from any fixity in the transcendental and locates it on the fluid, changeable terrain of practice, shifting the terms of discussion from knowing to doing. Second, after destabilizing truth he restores to it a consistency. Linguistic practice is constituent of truth that is organized in forms of life: 'to imagine a language means to imagine a form of life.' [citation omitted] Wittgenstein's concepts manage to evade on one side individual, haphazard experience and, on the other transcendental identities and truth, revealing instead, between or beyond them, the common. Language and language games, after all, are organizations and expressions of the common, as is the notion of a form of life. Wittgensteinian biopolitics moves from knowledge through collective practice to life, all on the terrain of the common. [citation omitted]²⁸

Similarly, in Henderson's language:

First Nation jurisprudence is preoccupied with changes. Because of the embodied spirits, life forms are always capable of overcoming all of the conditions or determination of their existence...The insight that all life can grow beyond the limits of its own existence structures the languages, perception of the earth, and stories. Aboriginal languages focus on the flowing order of movements and irregularity of existence without attempting to structure them into a normative explanation or order.²⁹

A variety of crucial points are evident here beyond the obvious (albeit absolutely central ones) of change and dynamism. All contain significant overlaps with (Hardt and) Negri's theorization of constitutionalism as something other than the science of 'the Constitution' of 'the State' ('Constitutional Law' as species of political or legal science) and the de-ontological (usually liberal) normative philosophy of social contract to which it has come to correspond in the hegemonic strain of western modernity (albeit not without various weak social democratic, communitarian or 'egalitarian' permutations).

C. Problematizing 'Aboriginal Law'

In the central part of this chapter, the convergence between what Hardt and Negri describe in *Commonwealth* as 'Indigenous ontology' and what Henderson styles in the Canadian context as 'First Nations jurisprudence' is further examined. As are the contours of a potentially broader relationship between what can be styled 'Indigenous ontology' and what is called 'Aboriginal Law'. Aboriginal Law is treated

²⁸ n 3 above at 122.

²⁹ n 14 above at 153-154.

(relatively uncontroversially) as an interdisciplinary subfield in which political and legal theory combine, sometimes alongside anthropological approaches, to examine the 'traditional' or 'customary' laws of Indigenous peoples, both autonomously and as objects of 'recognition', 'accommodation' or 'integration' by (Constitutional, Administrative, Criminal, Family and other fields of) Canadian Law.

My argument is that there is a marked tendency in the literature to confuse so called 'Aboriginal Law' with Indigenous ontology in a way which tends to obscure an interesting distinction between them. One which tracks what Hardt and Negri describe as 'hypermodern', 'postmodern' and 'altermodern' forms of rationality.

Distinguishing between forms of modernity: *hyper, alter, post (and anti)*

In what follows, I draw upon *Commonwealth* insofar as it explicitly locates itself in the vein of an emerging 'altermodernity'. Altermodernity is introduced both as a way of breaking the modern/antimodern dialectic and as an alternative to the two dominant late twentieth century modernisms of the (more or less) critical left, 'hypermodernism' and 'postmodernism'.³⁰ Hardt and Negri associate hypermodernity with the project to renew or otherwise fulfill the promise of the modernity, as exemplified by largely neo-Kantian and cosmopolitan renaissance in the intellectual milieu of the nineties which saw "no break with the principles of modernity but rather a transformation of some of modernity's major institutions."³¹ For its part, postmodernism is treated as a breakthrough insofar as it "marks a much more substantial rupture" with modernity and its core elements, a rupture, which is alternatively celebrated or lamented by postmodern authors depending on their ideological proclivities.

Although Hardt and Negri allow that the postulation of a postmodernity remains essential to elucidate the "historical break that presents new conditions and new possibilities in a wide variety of social fields: on the economic terrain, for example, with the reorganization of relations of production in the emergence of the hegemony of immaterial production; and on the political terrain with the decline of structure of national sovereignty and the emergences of global mechanisms of control",³² they insist things cannot be left at that. The postmodern break must now, Hardt and Negri write, be surpassed, particularly insofar as it does not alone offer an affirmative alternative to the modern epoch which it so effectively describes in its twilight. This is what Hardt and Negri mean when they describe the term 'postmodernism' as carrying an undesirable degree of conceptual ambiguity. It fails to suggest what might be

³⁰ n 3 above at 113.

³¹ Ibid.

³² Ibid. 114.

imagined in the aftermath of modernity other than its simple negation. In other words, what might be beginning rather than ending.³³

Commonwealth steps into this breach. A ambitious task which it undertakes in three interrelated and mutually reinforcing steps: (1) a “philosophical and historical” analysis of “the republic, modernity and capital, each of which is treated as an obstruction and corruption of the common”; (2) a “political and economic analysis of the contemporary terrain of the common”; and, (3) a consideration of “the current state and potential of the multitude” alongside “a reflection on the contemporary possibilities for revolution and the institutional processes it would require.”³⁴ At each stage, the constitution of the common is developed as an alternative to both the public rationality of the State and the private rationality of Capital. This formulation is *altermodern* rather than *post*, *hyper* or *antimodern* insofar as it presents an alternative formulation within and against modernity, which is neither its dialectical negation nor its structural opposite but rather its immanent critique.

Henderson’s imagining of First Nations jurisprudence, as much as similar and related constructions by other noted Aboriginal Law scholars, like Borrows, whose recent book, *Canada’s Indigenous Constitution*,³⁵ points to a similar set of propositions, share much with what Hardt and Negri describe in *Commonwealth* as Indigenous or ‘Amerindian ontology’ (itself a species of altermodern rationality).³⁶ The difficulty, however, is that even among those, like Henderson and Borrows, who are creative and progressive there is little interest in radically reinventing the broader field of Constitutional Law. Reformists will of course respond incredulously: why should there be? Perhaps a serious reformism is as worthwhile or more than a speculative radicalism. I do not know. However, as long as Aboriginal Law is a subfield of Constitutional (and Administrative, Criminal, Municipal and a vast variety of other areas of) Law, the question must be posed.

My point here is perhaps more than anything about what any so called ‘Aboriginal Law’ inherits from its parent, ‘Constitutional Law’ is plain: an unshakable, deference to the Supreme Court and the Constitution. Or what I have called, following Hardt and Negri’s definition in *Empire* a deferral to “the *formal constitution*, the written document along with its various amendments and legal apparatuses”. Which, in contra distinction to “the *material constitution*, that is the continuous formation and

³³ Ibid.

³⁴ Ibid., xiii.

³⁵ J. Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

³⁶ n 3 above at 124.

ref-formation of the composition of social forces”,³⁷ revolves exclusively around de-ontological questions of normative science.

What renders ‘Aboriginal Law’ as a species of Constitutional Law at the highest level of generalization is that it tends to employ a legal pluralist ethos and methodology to address the question of Indigeneity in a way which, although well intended and based on a progressive impulse, is a poorly formed instrument for the liberation of the common. To remark on the Eurocentric imagining of ‘the Constitution’, ‘the State’ and ‘the Law’ as productive categories, representations or structures of meaning, is really only the beginning. Unfortunately, Canadian Aboriginal Law scholars tend to vacillate between a hypermodern fortification of the dominant discourse (hypermodern insofar as they seek to augment or deliver on the promise of Enlightenment in an updated and improved manner) or antimodern negation of it (insofar as they seek to negate or reverse its balance, hence the sometimes strange attraction between subaltern peoples and the premade subjectivity of the noble savage).

To make matters more complex however, there is also a very real postmodern dimension to Aboriginal Law. This is nowhere more obvious than in the hybrid or combinatory construction of the field. At the highest level of generality all of this is patently obvious in the foundational conjunction of ‘Aboriginality’ and ‘Law’ itself. It is in this basic hybridity which Aboriginal Law can be said to be a postmodern as much as it is hypermodern. Aboriginal Law is, after all, nothing if not the postmodern blurring of the boundary between Indigenous and European forms.

Few contemporary Canadian thinkers pick up on this subtle point better than John Ralston Saul, whose monograph, *A Fair Country*,³⁸ describes Canada as a ‘Métis civilization’, as neither purely European nor purely Aboriginal People. Although this phraseology is not without its descriptive usefulness, it takes for granted the idea of Canada itself (inclusive of the State, Constitution and Law to which it corresponds). The same is true of jurists like Borrows who critiques the idea of Canada as bi-juridical (French Civil and English Common Law) jurisdiction and instead proposes it simply as a multi-juridical (Civil, Common and Indigenous).³⁹ The difficulty in each

³⁷ M. Hardt & A. Negri, *Empire* (Cambridge MA: Harvard University Press, 2000) xiv.

³⁸ n 2 above.

³⁹ This terminology is widely used and increasingly taken for granted see Borrows n 35 above at 107 rendering the Indigenous Constitution as a species of legal pluralism in action: “Bijuridicalism refers to ‘the co-existence of two contemporaneous legal systems’ and is firmly entrenched within Canadian legal thought and practice]...While bijuridicalism is a fair description of Canada’s legal framework, it can also be problematic because it is underinclusive...numerous Indigenous legal traditions continue to function

case is that Canada is treated as a conglomerate of 'Nations' housed within a broader 'State' on what is effectively a European template. What may be elided in these types of otherwise progressive idioms is the real subsumption of the Indigenous to the European. Or even the possibility that the contemporary Canadian legal order may in fact *not* be moving along a progressive telos toward a truly accommodative ethos in which all its imagined founding peoples are placed (on anything other than a purely formal or representationally) equal footing.

The (hegemonic?) narrative of Aboriginal Law

Ultimately, this chapter is written on the basis of the belief that more sober scrutiny and critique is required of the increasingly dominant, even hegemonic, legal pluralist current in Canadian constitutional thought, one which broke into the mainstream a decade and a half ago with James Tully's *Strange Multiplicity* in which he (not unlike Negri, albeit to somewhat different and less radical effect) combines Wittgenstein's language theory and Indigenous thought to reconsider the field of constitutionalism. Perhaps what distinguishes Tully most obviously from Negri is the logico-semantic frame he employs. One which permits him to describe the central conundrum of constitutionalism only in terms of the politics of identity or 'cultural recognition' in which 'identity' and 'culture' are "aspectival rather than essential: like many complex human phenomena, such as language and games..."⁴⁰ This is only part of the way toward what Hardt and Negri are driving at and it tends to slip into the sort of discourse theory and identity politics Hardt and Negri warn against in *Commonwealth*.

Tully relies heavily on Bill Reid's iconic sculpture, *The Spirit of Haida Gwaii*. A sculpture in which Haida cosmology is presented as a potential alternative to the social contractual metaphysics in which what is constituted is not, as in western thought a unity or a singularity, but as in Indigenous thought, a common and a multiplicity. It is still however not fully coincident with the Araweté cosmology drawn upon by Hardt and Negri in their incorporation of Viveiros de Castro's reading in which "perspective is not a representation", "Becoming is prior to Being" and "the relation to alterity is not just a means of establishing identity but a constant process: becoming-jaguar, becoming other".⁴¹ Certainly, the Haida cosmology highlighted by Tully is one in which things are "not always as they appear" and our "habitual forms of recognition are often stultifying forms of misrecognition that need to be upset and reversed..."⁴² However, in the post-

in ways that are integral to Canada's legal systems. Therefore, Canada would better be described as multi-juridical..."

⁴⁰ J. Tully, *Strange Multiplicity* (Cambridge: Cambridge University Press, 1995) 13.

⁴¹ *Commonwealth* n 3 above at 123-124.

⁴² n 40 above at 25.

Charter era generally, and the field of Aboriginal Law specifically, it is Tully's brand of Indigenized legal pluralism and dialogic recognition-based constitutionalism which has increasingly found its way into the jurisprudence of the Supreme Court of Canada. As such, it has largely been de-radicalized, even subsumed.

This is nowhere more obvious and explicit than in the celebrated judgment of Chief Justice Beverly McLachlin in *Haida Nation v. British Columbia* (2004) in which she held that "[t]he honour of the Crown requires that these [Aboriginal] rights be *determined, recognized and respected* [emphasis my own]."⁴³ Or earlier in *R. v. Mitchell* (2001) in which she wrote "aboriginal interests and customary laws were presumed to survive the assertion of [Crown] sovereignty, and were absorbed into the common law as rights..."⁴⁴

It is on the basis of these types of judicial constructions, which are often lauded by commentators, many of whom celebrate the language of recognition, reconciliation and absorption without adequate critical reflection, that Ralston Saul has been able to describe the Supreme Court as among Canada's most progressive institutions, one which is ahead of the curve or otherwise leading the way in the fair and just treatment of Aboriginal people.⁴⁵ Or that Borrows is able to treat Chief Justice McLachlin's language in *Haida* and *Mitchell* as a "strong endorsement of the need to determine, recognize, and respect Aboriginal rights in Canada"⁴⁶ (seemingly forgetting his earlier assertion, that "we must jettison stereotypes that imply the ancient legal traditions of Indigenous people are static"⁴⁷).

⁴³ *Haida Nation v. B.C. (Minister of Forests)*, [2004] 3 SCR 511 at para. 25.

⁴⁴ *R. v. Mitchell* [2001] 1 SCR 911 at para. 8.

⁴⁵ n 2 above at 64: "our [Canadian] courts are far ahead of our political scientists, politicians and philosophers" (see Chapter V in this thesis which takes this as a thematic).

⁴⁶ See eg n 35 above at 136.

⁴⁷ *Ibid.* 60. A comment which constitutes a nod to the central difficulty of historicizing Indigenous 'identities' and cultures everywhere in the world, but particularly in white settler states see eg M. Barcham, '(De)Constructing the Politics of Indigeneity' in *Political Theory and the Rights of Indigenous Peoples*, D. Ivison, P. Patton & W. Sanders (eds) (Cambridge: Cambridge University Press, 2000) 137-151 (describing the situation in New Zealand: "problems of 'indigenous identity'" are symptomatic of a "fundamental deficiency in current theories and praxis of indigenous rights: the recognition of difference only in terms of the maintenance of prior identity...[i]n their rush to accommodate the notion of indigenous rights – and its associated 'politics of difference' – theorists and practitioners alike have created and reified an ahistorical idealisation of the indigenous self whereby the constitution of oneself as an 'authentic' indigenous self has been conflated with specific ahistorical assumptions concerning the nature of indigeneity, a process intricately linked to the continued subordination of difference to identity..."); J. Rabasa, *Without History* (Pittsburgh: University of Pittsburgh Press, 2010) 15 (in Mexico: "One can rush to demand the recognition of one's history by state, but one should also ask to what extent one is engaging in a new – perhaps even more nefarious – form of policing the past").

D. Toward the constitution of the common: possibilities and limits in 'Aboriginal Law'

By way of summary, if we take Henderson's conceptualization of a 'First Nations jurisprudence', Borrows 'Indigenous Constitution'⁴⁸, or Tully's 'Strange multiplicity' seriously, we find an increasingly influential current in Canadian constitutional theory. One which is nevertheless *not* adequately radicalized insofar as it:

- (1) Treats 'Aboriginal Law' as a disciplinary subset of 'Constitutional Law' (implying an unbreakable link between the two and the ultimate subordination of the former to the latter); and,
- (2) Collapses an intersubjective, dialogic and recognition-based ethics, with what Hardt and Negri style 'Indigenous ontology' in a way which privileges the former and occludes the latter).

Productive antagonism

Tully, particularly where he evokes Bill Reid's iconic sculpture, *The Spirit of Haida Gwaii*, as a template for an Aboriginal constitutionalism (something which he posits in terms of negotiation and collaboration) has an unfortunate tendency to slip into dialogic and recognition-based descriptors. However, his imagining also points to elements of what Negri might describe as productive antagonism. In this sense, the canoe paddled by members of the Haida pantheon depicted in the iconic sculpture, is at the same time a representation of "the common place where the vying and squabbling endlessly goes on" and a vehicle for forward movement and dynamism arising from the combination of productive difference and common purpose.⁴⁹

Becoming rather than being

We find another crucial element of what Hardt and Negri theorize as the constitution of the common in Henderson's description of First Nations jurisprudence as "sociable" and communicative, revolving "around 'becomings' rather than 'beings,' what happens as opposed to what is."⁵⁰ The same can be said of Borrows, who describes the Inuit notions of "*Piliriqatigiinniq* (working together for a common cause)", "*Ikajuqatigiinniq* (assistance and cooperation without barriers)" and

⁴⁸ n 35 above at 79, 84-85. If for Henderson there are four useful headings to imagine a Native Jurisprudence, namely, covenants of creation, embodied spirits, implicate order and dynamic transformation, Borrows locates a similar set of ideas among the Ojibway people for whom the principle of *bimeekumaugaewin* points to "the Creators's vision in setting life in motion" and for the Cree people for whom *wahkohtowin* refers to "the overarching law governing all relations" or more generally in terms of *miyo-wicehtowin*, the constitution of "peace between people of different places and perspective").

⁴⁹ n 40 above at 33.

⁵⁰ n 14 above at 168-169.

“*Qaujimautittiarniq* (information sharing)” as among the central notions of the Inuit legal tradition.⁵¹

An altermodern common?

In his *Peace, Power, Righteousness* (2009), Taiaiake Alfred, a non-jurist political theorist, grasps the juridico-political intersection of the Indian better than most. He also defines the project of Indigeneity as one which is defined by something very much akin to what Hardt and Negri call altermodern rationality, a philosophy which is “neither derived from the Western model nor a simple [antimodern] reaction against it”.⁵² For Alfred, this means looking across and between the infinite multiplicity of Indigenous peoples to “identify certain common beliefs, values, and principles”, “an intellectual, social, and political movement that will reinvigorate those values, principles, and other cultural elements that are best suited to the larger contemporary political and economic reality.”⁵³ Or elsewhere, a form of “dynamic interaction” which “cannot be replicated or properly expressed by a single person ‘objectively’ studying isolated parts of the reality” but is instead the product of a collective intelligence and cooperative effort.⁵⁴

The corruption of the common and the domestication of Indigenous ontology (the risk of subsumption)

What is grasped, with an at least partially Indigenous lens, is a glimpse at the constitution of the common rather than the usual Constitution of the State. If Tully is among the first to move in this direction, many have since followed suit. So much so that this approach has become increasingly ubiquitous, even commonplace. It is perhaps no coincidence that Bill Reid’s iconic sculpture, *The Spirit of Haida Gwaii*, which Tully so heavily relied upon as a heuristic device in *Strange Multiplicity*, originally appeared in the courtyard of the hypermodern (Trudeau commissioned Arthur Ericson designed) Canadian Chancery in Washington and today graces the back of Canada’s twenty dollar bank note. Worse, a massive facsimile of *The Spirit of Haida Gwaii* is also the first thing which greets arriving passengers to the arrivals concourse at the Vancouver International Airport. In both cases, there is a sense this potent symbol of the common has not only become iconic, it has been domesticated and robbed of whatever may have been its earlier more radical potential. This is why its insertion into the deterritorialized non-space of Empire (for

⁵¹ n 35 above at 103.

⁵² n 3 above at 113.

⁵³ T. Alfred, *Peace, Power, Righteousness* (Oxford: Oxford University Press, 2009).

⁵⁴ *Ibid.* 14.

what is an Airport breezeway or paper bill if it is not this?⁵⁵) strikes us unremarkable. Of course it is there, we say to ourselves, it *is* Canadian.

What Hardt and Negri present in *Commonwealth* as the constitution of the common and describe as a species of *alter* rather than either *hyper* or *postmodern* constitution, is approached by certain innovative Indigenous thinkers such as Alfred, at least insofar as they offer Indigenous concepts as viable alternatives to the “endless references to the ‘market,’ ‘fiscal reality,’ ‘Aboriginal rights,’ and ‘public will’”⁵⁶ as much as other “European concepts” such as “taxation, citizenship, executive authority, and sovereignty”.⁵⁷ Many of which are retained, even augmented, in hypermodernity, critiqued in postmodernity (without the proposition of an alternative) or simply crudely negated or reversed in various forms of antimodern thought.

Approaching the constitution of the common as an alternative, Alfred describes as “perhaps the only pan-Indian commonality” or only “common elements of the indigenous tradition”, the notion that “[i]deas transform when they make the journey from the mind of one person into the collective consciousness.”⁵⁸ In *Commonwealth* Hardt and Negri write: “An individual can never produce the common, no more than an individual can generate a new idea without relying on the foundation of common ideas and intellectual communication with other. Only a multitude can produce the common.”⁵⁹ This would seem a very significant convergence which points toward a definition of the common which can already be understood to exist within the present Canadian situation.

Where we have come from and where we are going

For Hardt and Negri, the constitution of the common rather than the modern State is the only political project which can today be contemplated as a radical or even progressive one. Having passed from modernity to postmodernity through the crucible of the Charter, Canada, like any State, is wholly within the broader productive networks of Empire. Nevertheless it retains many of its characteristics insofar as it, like any state, may or may not coincide with dual or even multiple nations beneath its formal apparatus.

⁵⁵ G. Simpson, ‘The Guises of Sovereignty’ (2008) in T. Jacobson, C. Sampford, R. Thakur (eds), *Re-envisioning Sovereignty* (London, Ashgate, 2008) 51-69.

⁵⁶ n 53 above at 10.

⁵⁷ *Ibid.* 11.

⁵⁸ *Ibid.* 14.

⁵⁹ n 3 above at 303.

Left-leaning theorists and commentators at least will agree Canada is itself possible to justify, if at all, by some versions of the ‘3 nations theory of confederation’ or what John Borrows calls its ‘multi-juridical legal culture’.⁶⁰ Ralston Saul calls its hybrid or ‘Métis civilization’. The idea here would be of a culture founded on biological as much as an intellectual miscegenation (also of one which is triadic rather than purely binary, dialectical or dyadic, and by extension, a very Negrian formulation). It means the old imagining of Anglophone and Francophone Canada (as emphasized in the case study presented in the preceding chapter, Chapter V) is displaced. Not only by the realities of multiethnic and multilingual immigration, but by the earlier and pre-existing claims of Canada’s Aboriginal, Indigenous or ‘First Nations’ peoples to the land itself. This is the postcolonial reading and perhaps somewhat surprisingly, it has made its way, quite literally, into the formal language of the Constitution (Charter ss. 25, 35).⁶¹

Increasingly over the last three decades, Indigenous peoples have seen their claims borne out by both Supreme Court jurisprudence and in the exponential growth of treaty, self-government and autonomy negotiations between Canada’s Aboriginal peoples and all levels of the Provincial and Federal Governments.⁶² All of this has been observed upon endlessly. What has *not* however been adequately theorized is what it might mean other than as a series of simple culminations of prior struggles.

E. The Constitution of the common

One of the crucial findings of the research underpinning this chapter lies in the critical convergence between Negri’s constitutive ontology, his imagining of the collective subjectivity of the multitude and its project of constituting of the common, and that of the *sui generis* (and this is the precise phraseology used by the Supreme Court of Canada) quality of Aboriginal Law.⁶³ What is *sui generis* in the Aboriginal claim to constitutional autonomy is its praxis and strategy of exodus or escape, its Deleuzian qualities. Canada’s Aboriginal people are no longer, if they ever were, looking for further integration into the Charter, but rather to the possibility of a constitutive project marked by Indigenous ways of being. It is here that Canada’s Aboriginal people, both in their institutional and governmental (and Negri does not deny these things exist and matter), as well as their ethical and philosophical

⁶⁰ n 35 above at 125.

⁶¹ n 6 above.

⁶² Most notably see the Nunavut and Nisga’a Agreements n 5-6 above.

⁶³ This descriptor entered into Supreme Court jurisprudence in *Guerin* n 8 above. This decision was comprehensively theorized in the secondary literature in the years to follow see eg B. Slattery, ‘Understanding Aboriginal Rights’ (1987) 66 Can. Bar Rev. 727, 730-31, 748-49; Henderson n 14 above at 41.

contributions to Canadian thought, have sought to resist or escape sovereign Power, first in the modern colonial epoch and now in the postmodern transition to Empire.

What the Supreme Court of Canada has quite rightly captured as the *sui generis* quality of Aboriginal 'customary law', particularly its framing of questions of 'sovereignty' and 'property',⁶⁴ might help elucidate and concretize what is grasped by a Negri-inspired theorization of the constitution of the common in particular. The same can be said of treaty claims which open up the possibility of: (i) an immanent critique of the social contractual metaphysics upon which the Charter (like all 'Constitutions') relies; (ii) an alternative praxis of ontological constitution (one marked by innovation, contingency and openness rather than order, determinism and historic-temporal closure); and, (iii) a generalized confounding of the public/private binary upon which modern constitutional rationality relies. Here, at some distance from reformist and sovereignty dialectics of 'mega-constitutional politics' (as presented and in the preceding Chapter V), we are faced with the non-dialectics of immeasurability and the refusal of formal representation. Both of which characterizes the immanence of the multitude as much as the democratic quality of its project, again, the constitution of the common.

The basics of a Negri-inspired alternative: materialism, immanentism and antagonism

We have considered how the hegemonic language of modern constitutionalism begins to crack under the immense pressure of an insistent Indigenous ontology. An ontology which asserts the autonomy of the common against all formations of public as much as private Power and interposes itself as an immanent critique of, and exodus from, Capital and the State and their cooperative duality (the dual corruption of the common by private and public expropriation, or Empire, at least at its highest degree of generalization). Here, Aboriginal strategies of self-government and treaty negotiation in post-Charter Canada might be said to coincide with Negri's constitutive ontology of the common insofar as both are premised on the autonomy of the social rather than the autonomy of the political. Again, this productive intersection of Negri's theorization of the common and its instantiation in recent real and symbolic victories of Canada's Aboriginal peoples might be instructive. But it is one which risks being misunderstood if it is not carefully grounded in Negri's materialism.

⁶⁴*Vanderpeet* n 8 above; *Delgamuukw* n 9 above. See also *Haida Nation* n 43 above holding: "European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights..."

For Negri, materialism begins with a simple triad: Machiavelli-Spinoza-Marx. It is posed as something of an alternative to, and an immanent critique of, the transcendental and de-ontological triad grasped in the hegemonic triangulation of Hobbes-Rousseau-Hegel. In order to properly understand this as something other than a strangely recreated dialectic it is necessary to stress the question of immanence. The materialist and ontological elements exist *within and against* modernity. They are *not* species of external critique or neutral science.

The stance of being *against* and opposite is no longer really possible here. It is only possible to imagine being enmeshed with and indeed of the same stuff as everything else. This is at the most fundamental level, what it means to be a materialist. Yet, things cannot be understood in this way and left at that. What must also be grasped is the (re)productive, rather than determinative, quality of social 'antagonism' itself.⁶⁵ Again, at the most basic level this is understood by Tully's example of Bill Reid's *The Spirit of Haida Gwaii*. However, Negri takes things a step further to pose the matter of social antagonism in an explicitly anti-dialectical fashion (to insist constantly that while the dialectic, self and other, same and different, is productive only of teleological closure and determinism, a more free flowing social antagonism is productive of the common).

Operating in the background of all these formulations is a concept more precisely delineated in other European languages: in German, *Macht/Vermögen*, in French, *pouvoir/puissance*, in Italian, *potere/potenza* and in Latin *potestas/potentia*. In each case, the first half of the binary is grasped as command, domination, rulership or *imperium*; and the second half as capacity, potential, strength or resistance. In his translation of *The Savage Anomaly*, Hardt renders this distinction by way of capitalization, 'Power' in the case of *potestas* and 'power' in the case of *potentia*.⁶⁶

Tully's un-capitalized reference to 'the people' as a non-descript base unit upon which diversity unfolds reveals much. As does his similarly uncritical usage of terms like 'reform' and 'recognition', all of which require some form of organizational binary or dialectic to be understood. Although he perhaps closes the door to making the fulsome transition from 'the state of being-in-common' to that of 'making the common', which

⁶⁵ See Hardt's authoritative schematization in the preface of *The Savage Anomaly*: "Throughout Negri's writings we find a clear division between Power and power, both in theoretical and practical terms. In general, Power denotes the centralized, mediating, transcendental force of command, whereas power is the local, immediate, actual force of constitution." M. Hardt in A. Negri, *The Savage Anomaly* (Minneapolis: University of Minnesota Press, 1981) xiii.

⁶⁶ *Ibid.*

Hardt and Negri insist upon,⁶⁷ Tully's contribution to Canadian constitutional theory is closer to what Hardt and Negri envision than most. Even closer however is Ralston Saul, who describes Canada as "a Métis civilization".⁶⁸

In Ralston Saul's analysis of Canadian constitutional history, we find the striking assertion that "the idea of egalitarianism that we have today is far closer to that of seventeenth- or eighteenth-century First Nations than it is to [European] newcomers of that period."⁶⁹ Or elsewhere, "the broad reality was an integrated First Nations role, central to the shaping of this country, which went on for twice as long as Canada has existed as a Confederation."⁷⁰ Ralston Saul suggests this hybridization extends to the linguistic as well as the cultural common:

Here [in Canada] our sense of both languages [French and English] has been subtly shaped by Aboriginal assumptions. I'm referring to our practical use of these languages but equally to the philosophical, ethical and metaphysical...For example, we struggle endlessly with the concept of *sovereignty*. Why? Because the concept we are searching for is not part of the Western tradition. We are after is an indigenous idea with which we have centuries of experience. The Mohawk call it *tewatutowie*. It is all about being able both to help yourself and to look at yourself: 'Sovereignty is harmony achieved through balanced relationships.' This is very different from the England-U.S. English meaning of the France French meaning. In the European tradition, sovereignty is built around all sorts of rigid legalistic implications defining borders and the application of laws...Yet it is this European sense that dominates our universities, our standard legal theory and our civil services...Why are we so eager to use this European intellectual approach?⁷¹

Eschewing the notion of the nation-state (or perhaps more precisely 'the Nation-State' and sovereign Power) in its standard modern formulation, one which is more European and less Indigenous than the Canadian one (at least according to Ralston Saul who emphasizes instead that "the Mohawk idea of how things should be done – harmony achieved through balanced relationships – seems much more accurate than the linear, carefully measured, theoretically rational assumptions of common or civil law"⁷²), we

⁶⁷ *Commonwealth* n 3 at 125.

⁶⁸ This resembles in some ways what Negri understands in the experience of early American republicanism and in the thought of the founding fathers, who treated the new Republic as an invention or experiment in representational democracy see eg *Insurgencies* n 22 above at 141-190; *Empire* n 37 above at 160-183.

⁶⁹ n 2 above at 38.

⁷⁰ *Ibid.* 40. Other political theorists as notable as Ralston Saul have made similar points about other European settler colonies see J.G.A. Pocock, 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity in the Māori' (2000) in D. Ivison, P. Patton, W. Saunders et al (eds) *Political Theory and the Rights of Indigenous Peoples* n 47 above.

⁷¹ n 2 above at 40-41.

⁷² *Ibid.* 43.

are on what *Commonwealth* might understand as thoroughly altermodern terrain. Unfortunately, collaborative, cooperative and communicative forms of constituent praxis so frequently traced to Indigenous peoples as alternatives within and against, or immanent to, modernity, are too often mistakenly rendered in dialogic or communitarian vocabularies. This is a trap which virtually all the thinkers of Canadian Aboriginal Law profiled in this chapter fall into to varying degrees. At the same time however, as we saw in the first part of this chapter, the best literature does tend to grasp, in Indigenous cosmologies in particular, a variety of profoundly ontological modes of addressing the constitution of the common.

F. Toward a radical critique of the status quo ante: beyond ‘Aboriginal Law’ as discreet subset of ‘Constitutional Law’?

In this more generous way of thinking, ‘Aboriginal Law’, even when it is translated and mediated, made representational in the Charter or otherwise subsumed, remains vital insofar as it at least contains the potential to push Canadian constitutionalism onto a totally different axis. Here, Canada’s modernity, its historiography since the arrival of Europeans on its shores, as much as its more recent, post-Charter historiography is marked by what Ralston Saul calls a “tendency to run society as an ongoing negotiation”. Although he comes as close as any, particularly Tully, to sliding into the language of discourse theory, he, again quite like Tully, self-corrects by emphasizing the extent to which Aboriginal imaginings of law “delight in complexity” in a way which is inconsistent with the positivistic legalism and procedural archaism of the sort which dominates in the European or American models.⁷³ He links this back with some of the themes developed in the proceeding chapter which presented then post-patriation narrative of ‘mega-constitutional politics’ as a symptom of Empire:

When [then Prime Minister] Pierre Trudeau first introduced his Charter of Rights, many felt it had a U.S.-European liberal air about it. In other words, it tended toward legalistic views of equality and individualism, which in countries such as France and the United States have produced an unexpectedly formalized class system. By the time the negotiations over the Charter were finished, its imported liberalism has been buried in a purposely unresolved tension between individuals and groups. Since then, the Charter decisions of the courts have anchored that Canadian reality ever more deeply in how we function....The fascinating missing piece in all of this is the original concept for the Canadian approach...The most obvious origins in Canada are Aboriginal. Again, the newcomers – the francophones from the seventeenth century on, the Scots from the late seventeenth but increasingly the eighteenth century on and the German religious minorities from the eighteenth century on – all settled here in difficult, isolating circumstances and

⁷³ Ibid.

made their way thanks to the First Nations and later the Métis. Their relationship evolved over time, often for the worse. But it was a slow evolution, a matter of centuries. Ways of relating to *the other* and ways of doing things settled in, became habit, became culture.⁷⁴

Ralston Saul is of course not the first to emphasize the degree to which European survival in what is today Canada was made possible only by the good will and collaborative efforts Aboriginal peoples. This fact has been verified in particular by anthropological and historical social science literature as much as more theoretical or philosophical texts.⁷⁵ There are of course also legitimate questions as to whether Ralston Saul stumbles, in the same way as Tully and others, insofar as he relies on the old dialectic between individual and group and permits the idiom of 'egalitarianism' to slide around imprecisely in his writing. The risk here is the familiar one which Hardt and Negri repeatedly warn against in *Commonwealth*. Namely, the tendency on the critical left to fall back to, even in their purportedly most radical formulations, an inquiry into the nature of 'being-in-common' rather than process of 'making' or constituting the common.⁷⁶

Nevertheless, Ralston Saul goes part way toward describing something akin to the constitution of the common insofar as he introduces the Indigenous notion of the social "as an inclusive circle that can be enlarged". Here again drawing on Indigenous cosmologies and customary law, we see the glimpse of a common which is haltingly asserting itself within and against the State, the Constitution and sovereign (public Power) as much as Capital (private Power).⁷⁷ This corruption takes the form of expropriation, accumulative and consumptive in the material sense and organizational and taxonomic in the formal sense. Here, the vacillation between the two forms of c/Constitution (or better, 'constitution' as materialist praxis and 'Constitution' as formal philosophy or science) are constant, so much so as to become the central irritant or antagonism which drives Canadian constitutional historiography.

The problem of nationalism, the State and their continuing hegemony

Since the 1998 decision of the Supreme Court in the *Succession Reference*,⁷⁸ souverainiste sentiment has not overtaken the headlines in Quebec. There have however been numerous developments involving the recognition, integration or

⁷⁴ Ibid.57.

⁷⁵ See e.g. Weatherford, J., *Indian Givers: How the Indians of the Americas Transformed the World* (New York: Crown Publishers, 1988).

⁷⁶ n 3 above at 125.

⁷⁷ n 2 above at 59.

⁷⁸ *Re Secession of Quebec* [1998] 2 SCR 217 (see generally Chapter V).

(perhaps ironically) the representation of 'sovereignty' in relation to Aboriginal peoples, tribes and 'Nations'.⁷⁹ Some of which take shape in Charter litigation and others in lengthy negotiated treaty settlements between Aboriginal peoples and the two levels of government (the Federal and Provincial Crowns).⁸⁰ Even Ralston Saul, who is by no means an expert on Aboriginal Law, but instead a generalist philosopher and public intellectual, recognizes this fact and its centrality to Canada's recent history. Canada is more than an English/French hybrid; it is also more than a multicultural land of migrants. It is the home of a pre-existing and internally diversified Indigenous people. This is the only real axiomatic of 'Canada'. Ralston is only the most recent to remind us of this.

It is no surprise that Aboriginal Law scholars like Borrows and Henderson make this point with unparalleled rigor, both as a matter of formal Constitutional Law and as a line of inquiry approaching the constitution of common as much as the State. What is interesting however is that they do not give up on the possibility of configuring society as some sort of social contract, one which although potentially renegotiated by Aboriginal peoples, is nonetheless permitted to survive *within* the primary or hegemonic formulation of sovereign Power understood to exist in present day Canada. This fact alone necessitates the possibility of an even more forceful or radical critique.

Ralston Saul offers one such possibility in his theory of hybridization: "Canadians carry both the Aboriginal and the European tradition." Capitalistic insofar as they contain the "Western Manichean drive" and yet proud of "our non-monolithic society" and desirous of preserving its peace: "of course, there are European liberal elements in our way of life, but our deep roots are here [in Canada] not there [in Europe]". Canadians are in other words, "far more indigenous than liberal."⁸¹ While I very much doubt an assertion like this can ever be empirically tested, it is certainly an interesting and productive one. We all wonder about the ways in which European forms of sovereignty might indeed be undermined by Aboriginal ones insofar as they make their way, at least representationally, into Canada's formal legal arrangements and its constitutional architecture. In so doing, we must think about Ralston Saul's assertions that, (a) "our [Canadian] courts are far ahead of our political scientists, politicians and philosophers"; and (b) post-Charter Supreme Court jurisprudence absorbs something of the "Aboriginal roots of Canadian civilization: egalitarianism, individual and group rights

⁷⁹ Indeed this is one of the usual designations which Aboriginal people afford their communities both in militant and non-militant stances in North American political as much as legal discourse.

⁸⁰ n 5-9 above.

⁸¹ n 2 above at 63.

and obligations, balanced complexity, reconciliation, inclusion, continuing relationships, minority rights.”⁸²

Ralston Saul is of course correct that any account is wrought by a tension between a hegemonic “description of Canadian history” which “highlights key moments” such as 1763 Royal Proclamation, the 1840 *Quebec Act*, the 1948 Durham Report, Confederation in 1867, etc. And, on the other hand, a counter-hegemonic historiography in which Canada is shaped by encounters between Aboriginal and European subjectivities and the intermixing of values which translate into, what he describes as the more communitarian, ‘egalitarian’ or socialist democratic strains in Canadian statecraft and government:

This is the shared foundation for equalization payments and single-tier health care and public education. What I am describing here is not the technical footing of particular policies, but the origins of the mindset that makes them possible. I am making an argument about culture, not about mere instrumentalism... You can see it happening in three pivotal Supreme Court judgments—*Guerin*, *Delgamuukw* and *Oakes*.⁸³

First in *Guerin*,⁸⁴ in which the Supreme Court recognized for the first time the “the roles of consensus and of the oral” as admissible culturally relevant and persuasive evidence in relation to Charter claims by First Nations peoples. Second in *Delgamuukw*⁸⁵ where “the justices [of the Supreme Court] had in effect swept away the European concepts of progress” by positing the written as coequal with the aural, at least in evidence relating to prior occupancy of land as a matter of Aboriginal rather than merely the Common Law of property rights.⁸⁶ Third in *Oakes*,⁸⁷ which despite having nothing on the surface “to do with Aboriginal questions”, or Aboriginal Law in

⁸² Ibid. 64.

⁸³ Ibid. 68-69.

⁸⁴ n 8, 63 above.

⁸⁵ n 9 above.

⁸⁶ n 2 above at 72.

⁸⁷ *R. v. Oakes* [1986] 1 SCR 103 is the leading case on the construal of s. 1 of the Charter: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Oaks* involved the constitutionality of s. 8 of the *Narcotic Control Act* (1970), RSC 1970, N-1 which created a ‘rebuttable presumption’ that once possession of a contraband narcotic was proven beyond a reasonable doubt there was no need to prove intent to traffic. The court held that although the impugned section of the *Narcotics Act* violated s. 11(d) of the Charter’s and its guarantee of the presumption of innocence in criminal prosecutions, it might still be constitutional if the Government could demonstrate it was within the s. 1 “reasonable limit” on Charter rights “demonstrably justified in a free and democratic society.” Such a gut level political determination was, as is the emerging Canadian pattern, left to the court to resolve. The court’s resolution was however opaque and legal technical, overly formalist. ‘The *Oakes* test’ asks future courts to assess s. 1 defences by reference to whether the Government can show a “sufficient importance” of policy objectives to justify curbing a Charter right.

the abstract, in actual fact heralded the increasing tendency for the Supreme Court to intervene in ever more assertive ways to protect the vulnerable from political excess.⁸⁸ Exemplifying Negri's "counter-hegemonic conscience [*coscienza antagonista*]",⁸⁹ Ralston Saul insists that this tendency is *not* "an expression of liberalism". Or even simply a repeat of the modern 'Rule of Law' instinct, but something else entirely: "all of this is the precise opposite of liberalism, with its notions of the autonomous individual versus the state, interest-based relationships, the autonomous market and the ethical force of commercial trade".⁹⁰ Instead, "these approaches are not derived in a line from the Euro-U.S. philosophy": "they are born out of meeting between people with a philosophy built in this place over thousands of years and mixtures of people who were in essence fleeing the philosophy of Europe and the United States."⁹¹

It is perhaps possible to say that Canada, in this way, shares with other 'internally colonized' 'white settler states' like Australia. This is perhaps why both Australia and Canada closed the twentieth century with a series of monumental appellate decisions pointing to what appeared to be certain very major changes in the common law traditions of both former British colonies. This was true particularly insofar as these decisions recognized for the first time, the formal validity of Aboriginal treaty rights, including some which had hitherto thought to have been extinguished by the assertion of Crown sovereignty. If in Australia the watershed moment came with the 1992 decision of the High Court of Australia in *Mabo v. Queensland*,⁹² it came two decades earlier in Canada (still a full decade before patriation) in the Supreme Court of Canada's decision in *Calder*.⁹³ A 1973 decision in which the colonial era representation of Indians as having "rudimentary and incomplete" legal systems "wholly without cohesion" and incapable of grounding any claim to land as bad law and affirming that Indian title existed on the basis of prior occupancy alone: "...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. That is what Indian title means."⁹⁴

Despite its late break with brute colonial forms of racism in the *Calder* decision, the Canadian record is hardly impressive. Even the basic symbolic move of extending the franchise to Aboriginal people in Canada did not occur until 1960, a fully forty three years after it had been extended to women and well after it had been extended to

⁸⁸ *Ibid.*

⁸⁹ A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005) 16 *Law and Critique* 27- 46.

⁹⁰ n 2 above 78.

⁹¹ *Ibid.* 78.

⁹² *Mabo v. Queensland*, (1992), 107 ALR 1 (H.C. Aust.).

⁹³ n 7 above.

⁹⁴ *Ibid.*

many immigrant minorities.⁹⁵ The termination of the most blatantly racist and paternalistic provisions of the *Indian Act* were also a shamefully long time coming.⁹⁶ Nevertheless, by the time the Supreme Court of Canada acknowledged in *Calder* that the Eurocentric mode of treating ‘the customs and culture of our original people’ as ‘rudimentary and incomplete’ would no longer suffice in light of ‘present day research and knowledge’, a corner had been turned.⁹⁷ Yet, the “present day research and knowledge” which the court so proudly relied upon to legitimize its judgment still treated Aboriginal peoples as objects of scrutiny and governance possible to administer via a mass of biopolitical data gathered from and about them, not only through the immense reach of the still persistently unabolished *Indian Act*,⁹⁸ but through the intensification of the study of Aboriginal peoples and Aboriginal phenomena in social scientific fields as diverse as anthropology and public policy.

Representation and recognition as horizon of formal Constitution

By the time of patriation and the Charter which recognized Aboriginal rights in both abstract and relative terms,⁹⁹ the legal ground had already shifted, at least formally, if not materially. The fact remains, however, the Supreme Court of Canada historically did not make it easy for the Aboriginal peoples to advance their claims. For all the supposed progress it heralded, the immediate post-Charter *Guerin* court treated it as obvious that Indian “rights in the land” were “diminished” by Crown assertions of sovereignty at the time of first contact. Something which the court counterbalanced

⁹⁵ *Dominion Elections Act*, 1900 SC c. 12 (restricting the federal franchise to the portion of the non-Native, usually non-minority, European men permitted to vote in provincial elections); *Dominion Elections Act*, 1920 SC c. 46 (amended to extend the franchise to include all men and women of the age of majority excluding Aboriginal peoples and anyone else, including many European and non-European religious and ethnic minorities, still refused the vote by the provinces); *Dominion Elections Act*, 1938 SC c. 46 (amended to specify at s. 14(2)(i) race as a permissible ground of exclusion from the federal franchise). Until 1960, with *The Canadian Bill of Rights*, Aboriginal peoples were required to give up their status under the *Indian Act* and declaim any potential treaty rights in exchange for the right to vote.

⁹⁶ *R. v. Drybones* [1970] SCR 282 (striking down s. 94(a) of the *Indian Act* prohibiting status-Indians from being intoxicated off-reserve pursuant to s. 1(a) of *The Canadian Bill of Rights* guarantee of legal equality before the law and legal protection by the law).

⁹⁷ *Calder* n 7 above at 346-347. For treatment of this wording see Borrows n 35 above at 16.

⁹⁸ For a brief legislative history of Canada’s *Indian Act*, currently, the *Indian Act*, 1985 RSC 1985, c. I-5 see P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) 211-212; P.W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson, 2006) 617. Both address the origins of the *Indian Acts* and their classificatory schemata, which, although significantly revised, remain active throughout Canada’s history until the present day. Pursuant to the *Indian Act*, qualifying Indians are registered with the Federal Government and the Department of Indian Affairs. There are approximately 500,000 “status Indians” in Canada. There are at least as many “non-status Indians.” Only status Indians are eligible for the privileges, protections, entitlements and distribution of resources afforded by the immense bureaucratic and communicative network underpinning the *Indian Act*. What is most astounding is that these racial typologies have shown no signs of abetting.

⁹⁹ n 6 above at ss. 25&35.

only vaguely with the acknowledgment that “their [Indian] rights of occupancy and possession” might be “unaffected”¹⁰⁰ in other ways. If *Guerin* left a confused treatment of prior occupancy, the doctrine of discovery and other questions of title, or so the usual story goes, *Sparrow*¹⁰¹ was perhaps clearer, but still more discouraging. The *Sparrow* court declared “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such [alleged Indian] lands vested in the Crown.”¹⁰²

After the first decade of Charter jurisprudence nevertheless, Borrows points to a growing consensus that “it is factually apparent that at Canada’s formation there was no first *discovery* on the part of the Crown that would justify displacing Indigenous law.”¹⁰³ At this point, at least in academic and critical commentary in Canada, no doubt heavily influenced by postcolonial sensibilities and a burgeoning assertiveness of Indigenous people globally, would begin to reject the vestiges of the old common law doctrine of discovery in terms stronger than, if not at least approximating, those of the High Court of Australia in the *Mabo* decision in Australia. This pressure reached its highpoint in the 1996 *Report of Canada’s Royal Commission on Aboriginal Peoples* which stated plainly that the doctrine of discovery is “legally, morally and factually wrong” as the basis for any extinguishment of Aboriginal claims.¹⁰⁴

By 1990, the Supreme Court of Canada had already at least partially absorbed Aboriginal critiques and counter-formulations within the formal Constitution. This was particularly apparent in the *Delgamuukw* decision giving oral evidence of prior occupancy and usage of Crown land equal status with the type of documentary evidence hitherto unquestionably preferred by the Common Law.¹⁰⁵ Yet another decade later in the 1999 *R. v. Marshall*,¹⁰⁶ the Supreme Court of Canada reached a high water mark when it upheld the existence of ongoing treaty rights in Mi’kmaq claimants relative to the province of Nova Scotia, at least insofar as they touched on traditional usages of the land at the time of first contact, in this case harvesting eels, but *not* necessarily post-contact activities like the large scale harvesting of wood.

¹⁰⁰ *Guerin* n 8 above at 378, as cited by Borrows n 35 above at fn 76, 296.

¹⁰¹ See generally *Sparrow* 8 above.

¹⁰² *Ibid* at 1103 see also as cited by Borrows n 35 above at 17.

¹⁰³ Borrows n 35 above at 17, fn 80, 296-297 elaborating the various critiques of the doctrine of discovery.

¹⁰⁴ *Ibid.* 297, fn 81 (citing *The Final Report of the Royal Commission on Aboriginal Peoples: Looking Forward and Looking Back (Vol. I)* (Ottawa: Supply and Services Canada, 1996) recommendation 1.16.2 at 696).

¹⁰⁵ n 9 above.

¹⁰⁶ *R. v. Marshall* [1999] 3 SCR 456.

G. Sharpening the distinction between Indigenous Ontology & Aboriginal Law

Some acutely anti-nationalist postcolonial Indigenous scholars like Alfred are, even more than Tully, who is himself concerned about the structures of a continuing ‘internal colonization’, interested in the way in which Aboriginal progress may have been exaggerated in the post-Charter era. Particularly insofar as it is marked by the incorporation of colonial modalities into what are ostensibly postcolonial contexts: “In this supposedly post-colonial world, what does it matter if the reserve is run by Indians, so long as they think like businessmen, behave like bureaucrats and are paid to carry out the same old policies?”¹⁰⁷

It could be said that Ralston Saul, Albert, Tully and others speak to different and potentially clashing strains of Negrian thought. Namely, the crucial fault line between post-structural and neo-Marxist elements of his formation (one which is featured heavily in the critical literature on Negri and which underpins Italian intellectual experimentation in the latter half of the twentieth century, see Chapter II-III). In this case the distinction between post-structural imaginings of hybridity and neo-Marxist imagining of subsumption might be operative. One way to make sense of this is to return to Negri’s consideration of the constitution of time whether as a European teleology of closure and resolution (in the settler states like Canada and Australia in terms of final treaty claim settlement and binding Supreme Court decisions) or as an Indigenous insistence on openness and irresolution (whether in terms of negotiation or struggle). Here, a thoroughly ontological line of inquiry is permitted to break what might otherwise be an apparent tension in Negri’s thought, which as Hardt and Negri clearly realize in *Commonwealth*, has a peculiarly Indigenous dimension.

It must be recalled here that the formal Constitution is for Negri nothing if it is not a technology for the closure of the time of revolution and the consolidation of sovereign Power. In other words, for the containment of the volatility and explosiveness of the material constitution in the order and finality of the formal Constitution, a point Negri makes quite plainly as part of his critique of bourgeois constitutionalism in *Insurgencies* and in a more abstract way in the earlier *The Constitution of Time* and the immediately post-*Empire* collection of essays, *Kairòs, Alma Venus, Multitudo*.¹⁰⁸ Let us consider in this light Ralston Saul’s suggestion that because Canada was carved out of the ‘new world’ it was only peripherally on the model of the European Nation-State and therefore

¹⁰⁷ n 53 above at 11.

¹⁰⁸ Note, the 1981 short monograph, *The Constitution of Time* and the post-*Empire* collection of three essays, *Kairòs, Alma Venus, Multitudo* were recently translated into English and published together in *Time for Revolution* n 22 above.

less a species of the hegemonic strain of western modernity than a dynamic productive relationship between totally intermixed singularities, one in which Aboriginal formulations of sovereignty and political life are increasingly present at the heart of Canada's constitutional order, its formal legal apparatus or Constitution.

Both in terms of negotiated alterations to the Canada's distribution of sovereignty and its federal structure; we might think most recently here of the "the Nunavut agreement, which in 1999 cut the Northwest Territories in half to give the Inuit a self-governing territory" or just as easily "the Nisga'a Agreement, which in 1999 established a new approach to First Nations settlements; and perhaps most strategically, the Supreme Court's 1997 *Delgamuukw* ruling, which introduced, or rather reintroduced, oral culture into the heart of Canadian Law."¹⁰⁹ Having cited these specific constitutional nodes, all of which have a strongly juridical and formal components, Ralston Saul looks to Canadian historiography more generally to remark, again in keeping with his theory of hybridity, "[t]he idea of egalitarianism that we have today is far closer to that of seventeenth- or eighteenth-century First Nations than it is to [European] newcomers of that period."¹¹⁰ Or elsewhere, "the broad reality was an integrated First Nations role, central to the shaping of this country, which went on for twice as long as Canada has existed as a Confederation."¹¹¹ The result which he describes is thoroughly altermodern, a savage anomaly in the constitutional history of modernity (or at least its hegemonic strain).

Conscienza antagonista

Ultimately the most progressive commentators on Aboriginal Law are those who go furthest to move beyond the de-ontological liberal normative horizon of the formal Constitution, whether from the legal (Henderson, Borrows), political science (Tully, Albert) or broadly philosophical (Ralston Saul) academies. These thinkers go some way toward cultivating what Negri calls *conscienza antagonista*.¹¹² In our case, *conscienza antagonista* is largely coincident with the bringing of Indigenous ontologies to bear on a field which had until recently been framed in an almost exclusively positivist and scientific logico-semantic frame. Where they fall short perhaps is insofar as their methodology remains case law driven. The risk here is to continue, perhaps without meaning to, a narrative of incremental progress, by way of representation, rather than one of revolution or reinvention by way of material constitution. At their

¹⁰⁹ n 2 above at 36.

¹¹⁰ *Ibid.* 38.

¹¹¹ *Ibid.* 40.

¹¹² n 89 above at 45.

best however, certain commentators are able to open up an Indigenous alternative and a properly immanent critique of the status quo ante.

Ralston Saul can be understood to suggest that a *conscienza antagonista* has found its way into the post-Charter jurisprudence of the Supreme Court (which, ironically, would suggest that it is no longer truly counter-hegemonic and has been largely domesticated or subsumed). Or perhaps more precisely, that an analysis of key decisions by the Supreme Court furnishes evidence of his thesis that Canada is a 'Métis Nation', one in which a mixed Indigenous and European hybrid. The risks here are myriad (and they are certainly not exclusive to Ralston Saul but shared by many commentators. The first, it is to exaggerate the penetration of Aboriginal ideas into the 'the Constitution', or worse, to ignore the possibility that such an uptake might amount not only to formal but real subsumption of Aboriginal Law (which is already something quite apart from the Indigenous ontologies which inform it).

One could of course ask what is doing the subsumption or the subsuming. The answer would be Constitutional Law, which like a variety of other fields of law, takes Aboriginal Law to be a subset, however broad, of itself. At the most obvious level the risk is of uncritically contributing to a rhetorically repackaged colonialism (here, what Tully critiques as 'internal colonialism', the limited political 'autonomy' of Aboriginal peoples to live within thoroughly Eurocentric forms of 'self-government', administrative and regulatory authority). Second, it is to treat language uncritically or as ideologically neutral in a way which Negri does not. This risk here is especially elevated in the thought of those like Ralston Saul and Tully who tend, advertently or inadvertently, to describe Indigenous ontologies in the register of communitarian or egalitarian political philosophy.

Although many experts and commentators on Aboriginal Law grasp crucial distinctions between Indigenous traditions of governance, politics and law, particularly relative to the privileged concepts of sovereignty and property (public and private Power), few Aboriginal Law commentators or experts make the leap toward a more fully articulated theory of an Indigenous constitution. In this chapter I have also suggested that despite their immense erudition and progressive ethos, some Indigenous theorists of the Constitution and of the particularity of Aboriginal Law within and against it, are insufficiently attentive to the role of the counter-hegemonic intellectual in contesting or otherwise destabilizing the field in which they write. This is evident particularly insofar as few identify the constitution of the common as an explicit critique and alternative to the Constitution of the State. Whether as something entirely distinct or alternative to the accommodative stance of: (i) formal constitutional reformism (as addressed in

Chapter IV); or, (ii) nationalist competition (as addressed in Chapter V).

H. Conclusion

The purpose of this chapter has been to consider whether or not, and to what extent, and within what limitations, Aboriginal Law scholars on multiple sides of the disciplinary divide might be said to produce a critique of formal Constitutionalism or even the proposition of an affirmative alternative consonant with what I have described throughout as a Negri-inspired reading of an Indigenous ontology of the common. The result has been mixed.

Chapter VII - Conclusion

Let us finally recognise that this old, 20th century dualism is no longer tenable. The logical form of the binary is unusable.

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)¹

In what manner could a material basis for law be brought within our grasp again?

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)²

I wonder whether today there are politicians and lawyers who could actually set up, maintain, and develop a constitutional discussion.

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)³

The common is the language spoken by the multitude, which is handed on, accumulated, and invented always anew – a process in which all of us participate. The method of legal science needs therefore to get evermore closer to linguistic community [*comunità linguistica*] and retrieve the materialist and creative *telos*, which constitutes it. In this situation, law's grammar (which is to be rebuilt) will be able to bow before the word of liberation.

A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005)⁴

¹A. Negri, 'Postmodern Global Governance and the Critical Legal Project' (2005) 16 *Law and Critique* 27, 35.

² *Ibid.* 37.

³ *Ibid.* 42.

⁴ *Ibid.* 46.

A. Bringing things up to date

I began this thesis by considering certain convergences and divergences between the Italian and the Canadian situations in the sixties and seventies. Most of the analysis in the subsequent chapters has explicitly not however been comparative. Instead, it has involved scrutiny of some of Negri's key texts on the question, or better, the process of, what I have designated, in a Negri-inspired fashion, as 'c/Constitution'. In so doing I hope to have marked, however tentatively, a theorization of the very recent past, one which I intend not as a historicized imagining, or perfunctory periodicization, but rather as a (re)conceptualization of very familiar events which is put to work in a way which is potentially different, unusual or even provocative, but most of all productive in its own right.

In this final chapter, my hope is to generate, in a forward motion or trajectory which leaps slightly beyond the instantiations of the Canadian situation in the latter half of the thesis (Part II: Chapters IV-VI) and the more plain presentation of a Negri-inspired theory of c/Constitution in the first (Part I: Chapters I-III), to consider not only the present situation or the contemporary iteration of the c/Constitution, but also what Negri, who is himself very much a living and productive author, might have us do. All of this however must somehow be carried out without artificially interposing at the end, through the back door as it were, a historicist or positivist reconstruction, a stages theory of history. To avoid such a crudely Hegelian teleology, we return, at a very general level, to the examples of Canada and Italy initially posed in the introductory chapter (Chapter I) in a manner which is more open ended than closed.

As emphasized in the introduction (Chapter I), this thesis can be taken to make the basic argument that Canada, or Italy, or anywhere else for that matter, is today within the circuits of Empire. Empire subsumes earlier forms of state-based sovereignty. It does not destroy them but rather is a part of a mutation within them. It sets them to work and makes them productive. This has been, I hope, a major lesson of this thesis. However, the notion that the old State, both the high modern rights state as much as the twentieth century social state, coexist and comingle today with the form of sovereignty understood in Hardt and Negri's concept of Empire, is essential to all of this. Nevertheless, the situation is ongoing. It is therefore, like all situations, not from one moment to the next what it was. I hope this final chapter captures that fluid character of temporality as it cascades over the writer's capacity to determine matters if even in the smallest momentary of ways.

My point of emphasis on temporality here, my insistence that no strict periodization or stages theory of evolution should be permitted to reconstitute itself is purposeful. But it does not necessarily make my task in concluding this doctorate easier. Nor do many of the lines of inquiry which I have taken up in what was effectively a highly experimental and perhaps at times naïve reading of Negri by a non-Italian speaker who lacks formal philosophical training. Nevertheless, it is necessary to insist right up until the end that this thesis was intended as a legal theoretical conceptual experiment with merit to two potential readerships: (1) Canadian critical constitutionalists; (2) Negri scholars. Its project: the presentation and deployment of an experimental Negri-inspired language and logic of the c/Constitution.

In this final chapter, which should perhaps, as a matter of structural homology conform with the first one (Chapter I), in which we looked to the Canadian and Italian situations in the sixties and seventies, in what I hope was a bringing of two comparable events (the kidnap murder of Aldo Moro by the BR and the similarly grizzly kidnap murder of Pierre Laporte by the FLQ). Both of these events launch a temporal arrow from which meaning is constituted. We can understand a similar interest in the constitution of time, particularly the constitution of the present, in what Negri calls '*kairòs*'.⁵ *Kairòs*, as a concept of temporality of the constitution of time emphasizes the distinction between Negri's Spinozian ontology and the ultimately 'reactionary' alternative he and Hardt attribute to Heidegger.⁶ The result of all of this for (Hardt and) Negri is to look at the present as a species of history in the process of being constituted but not yet fully there, nor ever so. Only this captures the productive element of temporality. Again, in this chapter I hope to pick up on and write within such a temporality in the contemporary Canadian and Italian situations.

Harper & Berlusconi: birds of a feather?

For Canada, the dominant political personality of the last several years has been Prime Minister Stephen Harper and his Conservative Party of Canada ('the Tories'). For Italy it has been Prime Minister Silvio Berlusconi and his *Forza Italia*. In both countries,

⁵ A. Negri, *The Porcelain Workshop* (Los Angeles: Semiotext(e), 2008) at 97 (describing *kairòs* as "the instant of creation, the moment of potential (*puissance*) spreads on the edge of being, that is the capacity to invent....). Although it does not emerge explicitly in the first two volumes of the trilogy, *kairòs* is given a precise and useful definition in *Commonwealth* see M. Hardt & A. Negri, *Commonwealth* (Cambridge MA: Harvard Belknap Press, 2009) 165 (defining *kairòs* as "the opportune moment that ruptures the monotony of chronological time"). For a more expansive treatment see generally A. Negri, *Kairòs, Alma Venus, Multitudo* in M. Mandarini (ed), *Time for Revolution* (Continuum: London, 2003); A. Melitopoulos & A. Negri, *Antonio Negri: The Cell* (a DVD consisting of three video interviews spanning Negri's period of exile in Paris in 1997, his incarceration in Rebibbia Prison in 1998, and his release in 2003) see specifically the 2003 interview entitled 'Subjectivity and *Kairòs*'.

⁶ Ibid. *Commonwealth* above at 50.

recent decades have seen the existence of a newly formed conservative parliamentary blocs or alliances which morphed into powerful new political machines marrying the centre and far right. In both countries, and perhaps many others, this arrangement has led to a series of stalemated and more or less stable minority or coalition governments. There has also been an extraordinary expansion of executive power in the Prime Minister's Office (the PMO) and the person of the Prime Minister himself, in Canada as much as Italy. In both, there has also been a strident pro-American foreign policy abroad and sort of above the law bravado at home. The point however is of course not to compare the personalities of Mr. Harper and Mr. Berlusconi, any more than it is Canada and Italy specifically, as objects of inquiry. Instead, it is to unravel some of the tendencies which might be present in both countries; and, perhaps by extension, many others or even perhaps all others, in one way or another. And which, once again, correspond to the morphology of Empire.

No doubt, Berlusconi, the showman, the bacchanalian, the epicure, has very little in common with Harper, the notoriously aloof and taciturn Alberta economist. Neither is a renowned statesman on the 'international stage'. Mr. Harper blends in with the furniture and Mr. Berlusconi with the entertainment. Whatever their gaffs, however, is of little consequence. Both are proving to be political survivors who aren't afraid to play dirty. The result at home, whether Mr. Harper misses the photo op at the G-8 because he is in the loo, or Berlusconi acts the fool at a state dinner, is of very little consequence. In both cases, at a more general level, their cooperation with the sound functioning of Empire is apparent in virtually every move they make.

Both Berlusconi and Harper have presided over the apparatus of the state in recent epochs in which political power, particularly executive power, interposes itself against the more democratic impulses of its own aspirational as much as formal Constitution. In Berlusconi's Italy this has meant the Prime Minister's suspension of corruption trials and investigations by assertion of executive immunity and his usage of a mass media empire to propagandize on his behalf.⁷ In Canada it has meant an endless opacity on questions of the Prime Minister's role within the Constitution.⁸

⁷ For critical left summary and analysis of the contemporary situation in Berlusconi's Italy see P. F. D'Arcis, 'Berlusconismo' (2011) 68 *New Left Review* 121; M.E. Shin & J.A. Agnew, *Berlusconi's Italy: Mapping Contemporary Italian Politics* (Philadelphia: Temple University Press, 2008); A. Mammone & G.A. Veltri (eds), *Italy Today: The Sick Man of Europe* (New York: Routledge, 2010).

⁸ Mr. Harper's request to the Governor General to prorogue parliament in order to force opposition parties into election is well known. <http://www.cbc.ca/news/canada/story/2008/12/04/harper-jean.html>; <http://www.theglobeandmail.com/news/politics/prorogation-a-travesty-yet-clever/article1415391/>. For powerful critiques of Harper and his government see L. Martin, *Harperland: The Politics of Control* (Toronto: Viking Canada, 2010) ; C. Nadeau, *Rogue in Power* (Montreal: Lorimer Publishing, 2011).

In a strange and perhaps surprising way, it may even be correct to say that both Canada and Italy remain within the Bush template of Empire. This would at least seem to be the case relative to other parts of Europe and North America. Perhaps this is too strained however, we have seen the UK and Germany, as much Italy and Canada, continue to steer a more conservative course electorally. Certainly it is also true that Italy and Canada can be said to diverge today, once again, both with each other, and similarly located states, as much as they converge. Nevertheless, their convergence, as much as Canada and Italy's insistent presence at the margin, *is* telling.

Some might still ask: can I seriously be presenting 'the State' or the state form itself in this completely neutralized way? Or worse, re-introducing the margin at the end? Anticipating this line of critique I can only again say that I am obeying the necessary structural homologies required of a doctoral thesis. In the first chapter, the Italian and Canadian situation in the sixties and seventies was presented. The thematic of terrorism in particular was given attention. The basic argument was simply that 'terrorism' was a phenomenon common to the Italian and the Canadian experience in certain very surprising ways (Chapter I, s. A-B). From here things became more complex because it was necessary to further introduce my reading of Negri before bringing it into conversation with the Canadian case studies presented in the latter half of the thesis (Part II: Chapters IV-VI). The next two chapters were therefore taken up with presenting a Negrian definition of c/Constitution over the period of several decades situated in certain key texts (Chapter II) and updated by Negri with Hardt in their English language collaboration (Chapter III).

At the close of this thesis, we can perhaps return to the open questions, if not to answer them, then at least to acknowledge their persistence. In so doing, we also insist on the need to deal openly with a blockage between the second and third chapters of this thesis (Chapters II & III). *Empire*, insofar as it was co-authored by American Italianist Michael Hardt and written directly in English by both authors in a hitherto unseen or unfamiliar style, provoked a much larger English language audience than had Negri's prior texts (or at least a quite distinct variation on the audience who had already been digesting Deleuze and Guattari's *Thousand Plateaus*). Its timeliness was also compounded by the fact that it was published at the pregnant interval between centuries at an outstanding level of conceptual innovation. A blend of hyper-analytic prose, clever polemic, poetic wordplay and old fashion evidence based argument. Neither a work of normative philosophy, a descriptive social science nor fictional species of 'literature', and at the same time all of them (or at least an immanent critique of them). *Empire* demanded to be heard and it was. Widely reviewed, read and

commented upon outside of theoretical or philosophical circles it made a serious impression (see generally Chapter III, s. F).

Perhaps the fact of *Empire*'s novelty and originality combined with the shockwaves which circulated around the globe in the aftermath of 9/11 meant that much of the discussion on that book was arrested prematurely and still has yet to be fully developed. For the moment it is certainly worth reminding ourselves of the fact that *Empire* was so different than virtually any other recent philosophical or socio-political theoretical text on globalization or any of the contemporaneous treatments of the resurgent interest in the historical formation and decay of Empires. So different in fact was it from its peers, it made readers all the more interested in the authors' insights into events which were rapidly approaching.⁹

Strangely, perhaps because the events of 9/11 intervened shortly after its publication, the full impact of *Empire* may have been somewhat diminished by the post 9/11 shift toward terror and the state of emergency. Or more generally, the shift from a neoliberal rights discourse to a neoconservative discourse of war, emergency and crisis. Nevertheless, the very recent publication of *Commonwealth* clarifies and augments much of what is said in both *Empire* and *Multitude* before it. It has thereafter specifically, perhaps even disproportionately shaped this thesis.

The only reason to re-emphasize the obvious, namely the importance of *Empire* both as a major monograph of direct relevance to numerous disciplines, and as a concept, is to defend its relevance to a subversive reading of post-Charter Canadian constitutional history and theory. Something which I attempted, I fear not adequately, to develop in earnest in the latter half of this thesis. Because this is a conclusion however, and not an introduction to yet another thesis, it does not make sense to overly belabour this point. I make it also knowing that for all their successes and failure, ups and downs, both Italy and Canada, like any wealth-maximizing corporations, can be judged largely insofar as they have prospered according to formal indicators which purport to represent a material reality - in this case, at least according to the usual (and by now rightly suspect markers of neoliberal capital): GDP, GNP, and etcetera. I also acknowledge that the inadequacy of personality-driven comparison of Canadian and Italian Prime Ministers. The forms of corruption which are alleged against Mr. Harper

⁹ On the solidly neoliberal capitalist side of the equation see N. Ferguson, *Empire* (New York: Basic Books, 2002). For a more stylized and postmodern, but nevertheless glumly defeatist and sometimes too apolitical take on globalization see P. Legrain, *Open world: the truth about globalisation* (London: Abacus, 2002). On the more critical left anti-imperialist side of the equation see E. Hobsbawm, *On the Edge of the New Century* (New York: The New Press, 1999); E.M. Wood, *Empire of Capital* (London: Verso, 2003); and, C. Douzinas, *Human Rights and Empire* (London: Routledge, 2007).

are less notorious than those alleged against the Mr. Berlusconi. Both however, stand accused of abuses of power, of assertions of political autonomy which are surprisingly convergent.

B. Unexpectedly similar trajectories of the Italian and the Canadian States in the first decade of the twenty-first century

What might be meant by this or how it might attach to the Negri-inspired theory of c/Constitution depends on your perspective. It may be that some imagined coup against Empire carried off by George W. Bush and his henchmen had two surprising outliers in contemporary Italy and Canada. Although this is unlikely in any strict sense, there is no doubt a sense in which Berlusconi's Italy and Harper's Canada bear the hallmarks of intensely conservative species of sovereign Power whose worst enemy is often outliers in the bourgeoisie itself. Divided at the top, between the instantiation of Empire which formulated itself in the nineties and the one which constituted itself in the first decade of the new century, on the basic tenets of sovereign Power and free market Capital, Empire experienced immense growing pains in the recently closed first decade of the twenty-first century.

Without wishing to get side-tracked in what would be a highly speculative form of commentary, it is perhaps fair to say that, the economic collapse and global recession of 2008 was, at least in part, a sign of an obvious realignment of capital somewhat away from the old Euro Atlantic zone toward a more Asian and Sothern hemispheric orientation. All of this is *not* a question of mapping territories or of carving it up into a renewed imperialist patchwork. But rather of thinking, like Hardt and Negri suggest in *Empire*, of the imperialist rainbow whose colors fade into one another and which, rather than strictly delineating structural limits, signal their porous quality. Under these conditions if we are to continue speaking of 'Canada' and 'Italy' as 'States', which I have implied we can, we must also consider how 'the State' itself might be specifically interposed within (or even against) Empire.

We must ask, in other words, might the State itself be, at times if only strategically, understood as an immanent critique of Empire? Perhaps, but the basic formal architecture of the State is descended from the high modern rights State as much as the late modern social State (see generally Chapter V s. v). Empire is therefore as much as anything, a hybrid of the two formulations. The fear, from the beginning relates, whether the question be that of the rights and the social state, the formal and the material c/Constitution, or in the idiom of Empire and the multitude more recently, has always been the same. That of reconstituting or otherwise falling back into a dialectical configuration, I guarded against this tendency, I hope, *not* by abandoning

any conceptual dichotomies outright (to do so would not only have been impossible and incongruent with (Hardt and) Negri's conceptual apparatus, which itself does not suggest this step), but instead by emphasizing triadic as much as binaric formations in the trilogy. The three nodes of which provide the template for an alternative theory of c/Constitution: Empire, multitude and the common (as sovereign Power, constituent power and the collective form of (re)production).

What Hardt and Negri articulate is the affirmative project of the multitude. Its capacity not only to resist or carve a line of flight from Empire, its refusal of the dialectic itself, but its capacity liberate itself from private as much as public expropriation and constitute a third conceptual tie-breaker in the common. This has perhaps been at the most general level, Negri's lifelong project, the liberation and constitution of the common. By suggesting, particularly in the latter half of this thesis, that the State has itself been subsumed to Empire and the forms of organization which it carries out in keeping with the evolving demands of Capital (which increasingly pressurize the political and the legal as much as the private and the public into overlapping realities), we take Hardt and Negri's concerns seriously. All of this is however linked back to the quite basic idea that Italy and Canada are particular species of, or permutations of, both the material and formal c/Constitution of Empire.

Revisiting Italy and Canada as material and formal nodes of Empire

Today, what we see in both Berlusconi era Italy and the Harper era Canada might be symptomatic of mutation within Empire which evolved over the last decade and which, in contemporary Italy as much as Canada (and undoubtedly further afield), has intensified and made more pronounced certain tendencies which were already latent within *Empire* over a decade ago. All of this has subsequently become difficult to unwind insofar as the historical trajectory taking shape at the end of the cold war in the nineties was derailed by the (unexpected?) events of 9/11 (see generally Chapter III s. iv in which I explain why I elected to privilege a largely pre-9/11 critical literature).

Roughly a decade after 9/11, and over a decade since the publication of *Empire* immediately prior to it, let us look afresh at the facts. Drawing once again, not only on the Canadian but also the Italian situation, we might begin here with the capacity to wage war and to participate in international police actions designed to guarantee, protect and test Empire's global hegemony. Certainly, both Canada and Italy have seen a decade of enhanced military engagements abroad. At the time of writing, both Italian and Canadian jets are supporting and participating in the NATO led airstrikes in

Libya¹⁰ and both remain supporters and participants in the US and NATO-led War in Afghanistan.¹¹ Italy even contributed troops, albeit tokenistically, in the US-led Iraq War debacle.¹² Canada, under its earlier Chrétien Liberal Government pointedly, did not. In so doing, it aligned itself, surprisingly for some, with the 'old Europe' of France and Germany rather than its traditional English-speaking allies in the US, UK and Australia. All of whom, like Italy, supported the US war effort more uncritically (deaf to the vociferous opposition of the multitude in city streets and squares).

Beyond these telling historical footnotes about Canada and Italy's relatively minor roles in the military apparatus of Empire and its capacity to wage war across the surface of the globe, in other words, these very material contributions to Empire's bio(Power), we still cannot forget that today both Italy and Canada have strongmen Prime Ministers,¹³ albeit of different sorts.

¹⁰ Both Italy and Canada are also part of an ongoing multi-state coalition participating in airstrikes against Libyan target pursuant to UN Security Council Resolution 1973.

¹¹ Both Canada and Italy contributed troops to the NATO-led International Security Assistance Force (ISAF) in Afghanistan from 2001 until the present pursuant to UN Security Council Resolution 1386. Italy has a forward operating base in the Herat Province. Canada concluded its recent combat operation in November of 2010 and handed control of its Kandahar base to its US successors (however it still retains a troop presence in the country for 'support', 'training' and other 'non-combat' operations).

<http://www.isaf.nato.int/troop-numbers-and-contributions/canada/index.php>;

<http://www.isaf.nato.int/troop-numbers-and-contributions/italy/index.php>. Overall military spending in

both countries has also increased. In Canada see the Report of the Polaris Institute, 'Its Never Enough: Canada's Alarming Rise in Military Spending' October 25, 2005.

<http://www.ipb.org/Canada's%20Alarming%20Rise%20in%20Military%20Spending.pdf> (detailing the post 9/11 rise toward the end of the Chrétien and the beginning of the short-lived Martin Liberal Government and laying out a statistical comparison with Italy and other allies). See also from the Canadian Centre for Policy Alternative, S. Staples & B. Robinson, 'More than the Cold War: Canada's Military Spending 2007-2008' online

http://www.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/2007/More_Than_the_Cold_War.pdf (chronicling the an even sharper upsurge in military spending in the post-2005 Harper Conservative Government and laying out a statistical comparison with Italy and other allies). In Italy see F. Andreatta, 'Italian Foreign Policy: Domestic Politics, International Requirements and the European Dimension' (2008) 30 *Journal of European Integration* 1; P. Foradori & P. Rosa, 'Italy and Defence and Security Policy' in S. Fabbrini & S. Piattoni (eds) *Italy and the European Union* (London: Rowman and Littlefield, 2008) 173-188. Both offer a recent history and a subtle analysis of the Berlusconi Government's strengthening bilateral relations with the Bush-led US in particular.

¹² Italy contributed a 3000 troop contingent to the non-UN authorized US-UK-led War in Iraq. It began a phased withdrawal in 2005 largely as a result of immense domestic pressure and opposition. For a classical functionalist political science analysis thereof see S. Chan & W. Safran, 'Public Opinion as Constraint Against War' (2006) 2 *Foreign Policy Analysis* 2, 137, 141, 144-145, 150-151 (comparing Italy with Canada and its peers more generally). In a more theoretical register see generally D. Levy, M. Pensky, J. Torpey (eds) whose *Old Europe New Europe* (London: New Left Books, 2005) contains an anthology of essays which, taken collectively, are a new classic and an excellent summation of the post 9/11 schism which opened up in 'the West' around the Iraq War.

¹³ I am not using the term 'strongman' here to refer to primitive or tribal society, but to an advanced western democracy. Not only in the sense of Weber's charismatic leader, but in the sense of figure who combines the contemporary form of capital with that of sovereignty, of private with public power in a way which has very little to do with personal charisma.

Mr. Berlusconi's immense personal wealth is accrued in the most post-Fordist sector of the economy of all, media and entertainment, in which what is produced are subjective affects, usually pleasure, distraction or desire (sometimes 'news' and 'information' as subsets thereof). What might this mean? Mr. Berlusconi's personal business ventures provide the template for the form of production which is increasingly hegemonic to Empire. No doubt, the shroud of corruption, arrogance and shamelessness which surrounds him in the conduct of his public and private affairs is however as notorious, or more, than his immense wealth. Nothing of the sort can be said of the staid Harper who has few business interests and a private life that seems rather bland. Once again, the personality driven comparison would seem to hit a dead end. By inserting the concept of Empire into the situation however we might reframe matters somewhat.

Today, the problem for Empire would seem to be that Berlusconi's Italy is becoming less and less of a sideshow as the Italian economy falters alongside the rest of Europe's southern flank, dragging the continent further and further into crisis (or at least this is the narrative which is rapidly establishing itself in the bourgeois media at the time of writing).¹⁴ Canada is no problem for Empire. It is a boon. Harper secured and electoral majority and is now firmly in control of Parliament. Canada's economy has done very well relative to all its peers insofar as its banking industry avoided collapse, its markets appears better regulated than its peers (in other words Canadian Banks do not carry unmanageable debt to asset ratios) and its natural resource cash imagines itself as unlimited.¹⁵

¹⁴ The offensive acronym 'PIGS' (Portugal, Italy, Greece and Spain) is often utilized in both media and academic commentary. The connotations are quite chauvinistic and show no small amount of bias toward northwest Europe in Brussels as much as Paris, Berlin and London. The acronym has sometimes been extended to 'PIIGS' (Portugal, Italy, Ireland, Greece and Spain) or more provocatively to 'PIIGGS' (Portugal, Italy, Greece, Great Britain and Spain). Here the idea becomes one in which the Franco-German axis is deepened and the broader European project permitted to experience its first existential challenge. Certainly, it is no coincidence that the citizens of PIGS (PIIGS or PIIGGS) have been at the forefront of the contemporary struggle between the multitude and Empire, at least in what remains of 'the West'. For a summary of the economic situation written from a broadly bourgeois press in the English speaking world see <http://news.bbc.co.uk/2/hi/8510603.stm>; <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020504411.html>. For an English language summary of the political situation written from a more radical youth-led perspective, if not from the street level, the blogosphere is now key and Michael Hardt is particularly active in it see eg <http://legermj.typepad.com/blog/2010/12/the-collective-intelligence-of-the-movement-of-the-movements-has-created-a-new-form-the-book-bloc-on-november-24-2010-it.html>; <http://news4europe.wordpress.com/2011/02/>.

¹⁵ This has made Canada somewhat of a standout among its peers in the West and has caused it to be much lauded in global capitalist circles and the centre right financial press see eg 'Don't blame Canada: a country that got things right' in *The Economist* May 14, 2009; 'Canadians see better days ahead' in *The Wall Street Journal* online edition June 27, 2011 at <http://blogs.wsj.com/in-charge/2011/06/27/canadians-see-better-days-ahead/?KEYWORDS=Canada+and+economy+and+banking+or+resources>.

All of this goes well beyond the specific personalities of two Prime Ministers or the supposed structural soundness of either Canada or Italy's (imagined and real) economies. It is about a tendency, or a form of sovereign Power, which instantiates itself within Empire. It presents itself regardless of personality or ideology, we saw this first in the 1970 October Crisis presented in the introductory chapter (Chapter I) and second in the APEC Affair presented in the first Canadian case study (Chapter IV). Relative to the APEC Affair we asked, how was it that the office of then Prime Minister Chrétien, managed to insulate itself from judicial review arising from its apparent intervention with police power? The same question might be asked in Harper's Canada as much as in Berlusconi's Italy and indeed it is.¹⁶

What is perhaps most strange is the way in which both Canada and Italy, at least in terms of their formal and material apparatus, resemble components of a Bush era template of Empire more than the contemporary Obama one.¹⁷ If, after the 2008 economic crisis and US presidential election a minor leftward re-adjustment of liberal social as well as economic policy was felt globally it did not necessarily last. In fact, in Italy and Canada it never really came at all (the same is true elsewhere to lesser or greater degrees in Germany, France, the UK, all of which currently have right of centre governments).

In 2005 Berlusconi was consolidating his position and more and more completely shirking judicial oversight, constraining the 'independent' media and extending the tentacles of his own massive media empire.¹⁸ In Canada at the same time, the Liberals would be defeated by a resurgent Conservative Party led by Stephen Harper, who, for the first time in over a decade, returned the Tories to power. By 2005, things were rapidly lurching rightward in both Rome and Ottawa. Ironically, this occurred just at the time in which the second Bush administration was entering into its less strident post-

¹⁶ n 7-8 above.

¹⁷ Both are determined 'middle powers' who can be quite calculated in their courtship of their American ally. In the Canadian context relations with the US hit a low since the tumultuous overlap of the Trudeau and Nixon years, in the first half of the 2000s during the final Chrétien years. The enmity between Chrétien and Bush was especially pronounced, particularly over Chrétien's strident electioneering refusal to support the US in Iraq. With the election of the first Harper Government the relationship with the Bush Administration was greatly ameliorated. Nevertheless Canadians continued to believe in a widely circulated poll, in 2005, that the Bush Administration posed a greater threat to world peace than had Saddam Hussein. <http://25461.vws.magma.ca/admin/articles/TheStar03Nov2006.pdf>. On this period and the complex quality of the Canada-US alliance during it see A. Richter, 'From Trusted Ally to Suspicious Neighbour: Canada-US Relations in a Changing Global Environment' (2005) 35 *American Review of Canadian Studies* 3; P. Andeas, 'The Mexicanization of the US-Canada Border' (2005) 60 *International Journal* 2, 449-46; K.R. Nossal, 'Defence Policy and the Atmospherics of Canada-US Relations: The Case of the Harper Conservatives' (2007) 37 *American Review of Canadian Studies* 1, 23-34.

¹⁸ There have been a number of English books cataloguing the extension of Berlusconi's tentacles into all realms of Italian society see eg n 7 above.

Rumsfeld second term and the US was beginning its halting correction in Obama. So much so that five years later Rome and Ottawa are both quite to the right of Washington. If this is not a sign that the old left/right binary cannot fully grasp the situation I do not know what is.

If the centre left, albeit very much neoliberal and free trading, Chrétien Government of the nineties and early 2000s had distinguished itself by standing up to the neoconservative Bush administration, refusing to support its war effort in Iraq (although it did participate robustly in Afghanistan),¹⁹ the new Harper Government (2005-present) was determined to reset relations between the two countries. Reaching out in a solicitous manner to Bush before he was defeated by Obama, Harper, like John Howard in Australia, Tony Blair in the UK and Berlusconi in Italy, had few compunctions about close ties with the unpopular Bush Administration. He struck the absolute opposite tone of the stridently anti-Bush Chrétien. During the period of overlap between the Harper and Bush years, the Harper Government would follow the model of countless others, Italy included, to 'out America America'. At home, this would mean derailing the Martin government's commitment to implementation of the Kyoto Treaty on Climate Change; and, doubling down on its commitment to North American missile defence.

If for Italy it was the question of illegal migrants from North Africa which led Berlusconi's government furthest down the path to Lampedusa Island,²⁰ it was for Canada the spectre of the enemy within, suspected terrorists, which triggered its worst excesses. In certain very high profile cases, Canada permitted its citizens to fall into the hands of foreign governments known to torture, particularly where there was diplomatic pressure from Washington, for whatever reason, to see things go this way.²¹

¹⁹ n 12 above.

²⁰ Lampedusa Island is a small sparsely populated Italian fishing island which lies between the peninsula and North Africa, it has for a long time been a magnet for economic migrants from Africa, many of them through thoroughfares in Tunisia and Libya. The boatloads of arrivals have accelerated in the aftermath of the Arab Spring in response to the inability of countries like Tunisia and Libya to provide haven for African immigrants from Somalia, Eritria and further afield. Berlusconi has responded stridently and with extraordinary lack of humanitarian impulse to the situation. Among his government's policies have been the transport migrants from Lampedusa to Sicily and the mainland for warehousing prior to extradition see generally T. Kington, 'Berlusconi Claims He Will Empty Italian Island of Migrants in *The Guardian* online March 30, 2011. <http://www.guardian.co.uk/world/2011/mar/30/berlusconi-empty-island-lampedusa-migrants>. The heading of the *Corriere Della Sera* read as follows 'Berlusconi Pledges to Clear Lampedusa in 2 or 3 Days: Premier Promises Tax Free Zone and Nobel Candidature [to the Islands local resident]'" and citing his claim to have bought a villa on the island and to be interested in opening a casino. <http://www.corriere.it/International/english/articoli/2011/03/31/clear-lampedusa.shtml>. See also the Amnesty International Report of the same day: <http://www.amnesty.org/en/news-and-updates/thousands-stranded-appalling-conditions-italian-island-2011-03-30>.

²¹ The two most notorious cases over the last decade have been that of Maher Arar, a Canadian citizen of Syrian origin who was detained while travelling through the US en route to his home in Canada and

In both Italy and Canada, the extra-legal quality of the so called global 'War on Terror' made itself felt at the domestic as much as the international level. Surveying the very recent historical record, not only did both the Harper and the Berlusconi governments behave in a manner which was happily subservient to the Bush Administration, even at the height of its excesses, they also consolidated power in the Prime Minister's Office (in Canada, 'the PMO') in way which was reminiscent of the consolidation of power around the executive branch in the Bush White House. For Berlusconi this meant asserting his own judicial immunity in response to a variety of serious civil and criminal cases against him. For Harper, a much cleaner and more technocratic politician, whose only tentacles into the mass media are ideological, there continues nevertheless to be a marked arrogance and tightening of control around the PMO (again, we saw a similar tendency take shape in the prior centre left Chrétien Government, indeed that was the essence of the case study on the APEC Affair see generally Chapter IV).²²

Strangely, for both Harper's Canada and Berlusconi's Italy, the legacy of the Bush years, at least in terms of ideology, is perhaps felt as much or more than it is in the US. However, sometimes what appear to have been relatively recent mutations are in fact subterranean tendencies which Hardt and Negri already identified well below the surface in the nineties when writing *Empire*. Some of which, I emphasized, particularly on the case study examining the epoch of so called 'mega-constitutional politics' in Canada (1982-1998) (Chapter V). It has also been my argument more generally, that the blurring of rationalities, political and legal, perhaps as much as private and public,

extradited to Syria where he was interrogated and tortured for over a year. He was eventually returned to Canada and cleared of any wrongdoing by a special Federal Government Commission of Inquiry struck to examine the incident see Commissioner D. O'Connor, Commission Chair, *Report of the Events Relating to Maher Arar: Analysis & Recommendations* (Ottawa: Federal Government Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, 2006) available online at http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf. Amnesty International was first among the major human rights groups to follow this case closely and retains a useful archive online at http://www.amnesty.ca/human_rights_issues/maher_arar_overview.php. A second notorious case revolved around the 2002 battlefield arrest of fifteen year old Canadian citizen, Omar Khadar, for killing a US Special Forces soldier in Afghanistan while acting as a child soldier. Khadar found himself in the Guantanamo Bay Military Prison shortly thereafter and was subsequently interrogated, tortured and tried by a US Military Tribunal rather than being returned to Canada, which did not, under the leadership of the Harper Government, seek Mr. Khadar's repatriation. When Mr. Khadar's Canadian lawyers sought injunctions in Federal Court forcing the Federal Government to seek his repatriation and were successful, the Government repeatedly appealed. One January 29, 2010 the Supreme Court of Canada ruled that Khadar's s. 7 Charter rights were violated and ordered the Government to remedy the situation (although not explicitly to repatriate him). *Canada (Prime Minister) v. Khadr* (2010) 1 SCR 44. On October 25, 2010 Khadar reached a plea deal with the US Authorities which will have him to serve an additional year in US Custody prior to eligibility for repatriation to Canada. For a general timeline of events and collection of relevant legal, political and diplomatic decision see generally http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617. For the Amnesty International Record see http://www.amnesty.ca/iwriteforjustice/take_action.php?actionid=367&type=Internal.

²² n 8 above.

are a hallmark of the form of sovereignty associated with Empire. However, our inquiry can still not end here. For example, how are we to explain the fact that in Canada in particular, the post 9/11 epoch has been one of immense growth and prosperity (at least as compared to the US and Western Europe, who have felt the effects of the global recession of 2008 in a much more intense and direction fashion)?²³ Does this not show a sort of unevenness across the surface of Empire? A combination of growth combined with stagnation?

In Italy, the perfect storm of a wasteful and decadent state combined with the corruption of Berlusconi and his allies, brought the implosion of the US housing market and the global banking crisis to its shore at the worst of times. Presently, Italy is tottering on the brink of bankruptcy alongside its southern European and Adriatic neighbours (as much as previously high flying Ireland and Iceland far to the north, but equally at the limits of the Western Europe core).²⁴ Certainly, the fact that Canada has largely avoided the explosion of public sector debt and with it the coming catastrophe facing 'the West', at least as conservative economists and much of the popular commentary would have us believe,²⁵ makes the present era a *relatively* good one for Canada. At least according to the various economic indicators of Empire and the logic of neoliberal capital to which it corresponds. If in Italy this is not the case it is because Empire is as always home to every possible permutation, to the existence of endless interplays of difference and variation.

C. Of difference and sameness in a post-binaric world: can we now see there really is no longer an outside?

It is possible to look at the developing post 2008 era as one which is for most of the West (and Canada is clearly somewhat of an outlier here) takes up the position of 'the

²³ For a snapshot of the Canadian national economic situation which is indeed 'mixed' even relative to economic indicators like GDP, GNP, unemployment, etc., but nevertheless surprisingly resilient as compared to the US and its European peers see 'Canada's Recent Economic Performance', Briefing Note (Ottawa: Office of the Parliamentary Budget Officer, 2009) available online at http://www.parl.gc.ca/PBO-DPB/documents/Recent_Economic_Performance.pdf; . Earlier in the century and on a more comparative footing (including relative to Italy) see D.J. Straw, 'Canada's Productivity and Standard of Living' (Ottawa: Government of Canada Economics Division, 2002) available on line at <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0223-e.htm>. In the global financial media see 'A Survey of Canada: Peace, Order and Rocky Government' in *The Economist*, December 1, 2005 available online at <http://www.economist.com/node/5243159>. From the perspective of the private sector see the Conference Board of Canada's economic forecast and analysis online at <http://www.conferenceboard.ca/hcp/details/economy/income-per-capita.aspx>.

²⁴ n 15 above.

²⁵ See eg L. Ratnovski & R. Huang, 'Why are Canadian Banks more Resilient?' (2009) IMF Working Paper No. 09/192 available online at <http://www.imf.org/external/pubs/ft/wp/2009/wp09152.pdf>.

Rest'. Of Latin America, Asia and the other 'emerging economies' in the nineties.²⁶ What a strange and marvellous role reversal which the first decade of the new millennia brought. Today it is the old core which is finding itself on the periphery, and the old periphery which is ascending to the core. In this equation, Canada, for a variety of complex economic factors, including massive natural resources caches, a *comparatively* well regulated banking industry and a tame public sector debt, is better positioned than other similarly situated western democracies. Of all its peers, perhaps only the smaller Australia thrives in Empire in quite the same way.²⁷ But Canada's economic hiccup, its comparatively mild recession and slightly below average unemployment rates are not predestined. Nor are the cost benefits equations associated with more and more expensive resource extraction practices from more and more remote and inhospitable locations in the Canadian north and on First Nations lands.²⁸

It is also perhaps worth highlighting the basic fact that Italy's immediate problems have been Canada's in the not so distant past. By the late eighties and early nineties public sector deficits and debt were soaring in Canada. This was true not only at the level of the Federal Government but at the level of the Provincial Governments. There were also in the nineties, particularly in the Province of Ontario, under the government of Conservative Premier Mike Harris, immense protest movements directed at the aggressive deficit cutting and social spending austerity measures cutting needed funding to the provinces' schools, universities, and hospitals. Collective action and mass mobilization brought public sector unions, students and activists together in

²⁶ Something to which Hardt and Negri have turned their attention toward as a crucial form of the circulation of capitalist biopower in Empire see eg A. Negri & M. Hardt, *Multitude* (London: Penguin, 2005) 165, 172-176.

²⁷ See eg C. Jordan & A. Jain, 'Diversity and Resilience: Lessons from the Financial Crisis' (2009) 32 *University of New South Wales Law Journal* 416 which places Australia and Canada, along with other major western states, in a post-2008 comparative frame available on line at http://cclsr.law.unimelb.edu.au/files/Diversity_and_Resilience_14_September_2009_.pdf.

²⁸ Conflicts between Canada's First Nations Peoples, around oil and natural gas drilling in the Alberta Tar Sands abound, along with deep tensions over increase mining and natural gas exploration in Canada's far north are only among the more high profile examples which have drawn a response from Indigenous peoples both inside and outside of Canada see eg C. Thomas-Mueller, 'Tar Sands: Environmental justice, treaty rights and Indigenous Peoples' March/April 2008, *Canadian Dimension* available online at <http://canadiandimension.com/articles/1760>. For an authoritative gloss of the environmental as much as social and cultural dimension of resource extraction in the Alberta Tar sands see A. Nikiforuk, *Tar Sands* (Vancouver: Greystone Books, 2010). For a broad authoritative gloss of the legal and political situation in the north in particular see M. Byers, *Who Owns the Arctic?* (Vancouver: Douglas & McIntyre: 2009).

regular shows of constituent power at Toronto's Queens Park, the iconic Provincial Legislature throughout the nineties.²⁹

If today, Italian students, feminist and activists, protest Berlusconi with the zeal of the multitude, Canadian students have proven themselves willing to do the same in response to both draconian public sectors cuts not only in Ontario but in all of the provinces.³⁰ This cycle of austerity and protest which occurred in Canada during the nineties and it is now repeating itself in the US and a variety of European countries in the midst of a public sectors debt crisis (chief among them, Italy) is more than just interesting. It might plausible be part of the broader and repeating reality of Empire.

Today, unemployment levels are so high in much of 'the west' as to cause serious concerns as to public order in many countries which used to think of themselves at the centre of the global order. The signs which were complex and difficult to read in the nineties are clarified increasingly in everyday life. During the final months of drafting this thesis matters have continued to develop with great intensity. Today the multitude is asserting itself everywhere across the surface of the globe and its effects have brought about revolutions, some peaceful, some less so, some partial, some only just begun, but revolutions nonetheless.

My hope in this thesis has been only that the more fulsomely developed Canadian reading, as well as the occasionally touched upon example of Italy, has been useful. Particularly insofar as it might be seen as a template for grasping the type of 'problems', often very much conceptual and logico-semantic, which present themselves in Empire.

²⁹ See D. Rapaport, *No Justice No Peace* (Montreal: McGill-Queens University Press, 1999); J. Turk, 'Days of Action: Challenging the Harris Corporate Agenda' in D.S. Ralph, A. Régimbald, N. St-Amand (eds) *Open for Business/Closed to People* (Nova Scotia: Fernwood Publishing, 1997) 165.

³⁰ For a general overview over several decades across see M. Hammond-Callaghan & M. Haday (eds) *Mobilizations, Protests and Engagements* (Nova Scotia: Fernwood Publishing, 2008).

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