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### Give and take

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# Give and Take: Arendt and the *Nomos* of Political Community\*

Hans Lindahl\*\*

*Abstract: Appealing to the original meaning of the Greek term nomos, Hannah Arendt claims that a bounded legal space is constitutive for political community. Can this seemingly anachronistic claim be substantiated in the conceptually strong sense that every polity—the Greek city-state as much as a hypothetical world state—must constitute itself as a nomos? It is argued that whereas Arendt falls short of justifying this claim, a reflexive reading of nomos can do the trick: the space of political community is necessarily bounded because no polity is imaginable that does not raise a claim to an inside as the community’s own space. A world state, were it ever to be founded, would globalize nomos, not suppress it. Whence the political problem: how does a polity deal with its outside? This problem is particularly pressing because Carl Schmitt’s defense of nomos radically challenges Arendt’s position. A reinterpretation of her analyses of the foundation of a political community suggests how the representational structure of a politics of boundaries parries Schmitt’s challenge.*

Key terms: *nomos*, space, reflexivity, representation, inside/outside, own/strange, citizen/foreigner.

## 1. Introduction

The law, Hannah Arendt argues, plays a constitutive role in politics and political community. Yet this constitutive role only becomes visible if we hark back to the original meaning of the Greek word *nomos*, a meaning that has become progressively concealed in the course of Western history. “We are so accustomed,” she notes,

to understanding legislation (*Gesetz*) and the law, in line with the Ten Commandments, as orders and prohibitions, the only meaning of which is to demand obedience, that we easily allow the originally spatial character of legislation to become forgotten. All legislation creates first of all a space in which it is valid, and this space is the world in which we can move in freedom. What lies outside this space is lawless and properly speaking without a world.<sup>1</sup>

Arendt contends that the semantic transformations governing the career of *nomos* systematically block an understanding of law’s fundamental contribution to political community. To rid this term of its metaphysical accretions is to clear the way for a renewed understanding of the law and its relation to other features of political community to which she incessantly returns in her writings: power, world, and freedom.

Arendt’s recovery of the originally spatial meaning of *nomos* demands justification: why should political and conceptual priority be granted to what is, at face value, no more than an etymologically prior notion of the law? I will argue hereinafter that this

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<sup>1</sup> Hannah Arendt, *Was ist Politik? Fragmente aus dem Nachlaß*, ed. by Ursula Ludz (München: Piper, 2003 [1993]), 122 (hereinafter, *WiP*).

claim can and must be justified in terms of the reflexive structure of legal space. Although there are important passages in Arendt's writings that point in this direction, it will be my view that she falls well short of the reflexive reading of *nomos* that could justify her claim. Drawing on Arendt when I can, and taking issue with her when I must, I propose to show that no political community is imaginable—not even a hypothetical world state—that does not close itself off as an inside over against an outside. Moreover, and no less importantly, by closing itself off as an inside with respect to an outside, a community posits a space as its own, and vice versa. This correlation is the heart of the reflexive structure of *nomos*; to hold that the space of political community is necessarily bounded is to hold that no polity is thinkable that does not raise a claim to an inside as the community's own space.

The interest guiding this reflexive reading of *nomos* is political as much as it is conceptual. In a well-known chapter of her book on totalitarianism, Arendt describes the extraordinarily precarious condition of the stateless who do not fall within the jurisdiction of the country in which they are located, yet have forfeited the protection of any other.<sup>2</sup> Having lost a legal place of their own, having become *atopos*, the stateless are anomalous in the strong sense of *anomos*; in the words of the aforementioned passage, the stateless have become “lawless,” “without a world.” The plight of the stateless illustrates, although it by no means exhausts, a strong form of exteriority called forth by the self-closure of a polity. Taking seriously Arendt's claim that *nomos* is constitutive for political community requires making sense of this exteriority and of how a polity deals with it.

Securing a reflexive reading of *nomos* requires steering clear of two pitfalls. The first is an etymological inquiry into this Greek term, an inquiry for which I am anyway totally unequipped. Although reference will be made in a general way to what etymologists take to be its initial meaning, this term will function primarily as a guidepost orienting an inquiry into the modes of appearance and genesis of the bounded space of a polity. The second trades in the notion of a “public space” for that of a “public sphere.” On this view, Arendt's references to a public space and a space of appearances are not only largely metaphorical but they also conceal that, in modernity, “the public becomes a virtual community of readers, writers, and interpreters.”<sup>3</sup> Whether or not the public becomes despatialized depends, however, on what it could mean to claim that a bounded space is constitutive for political community. This claim merits assessment on its own terms, despite—and even because of—the fact that Arendt's discussion of *nomos* often slips into a metaphorical mode.

## **2. *Nomos* and the Problem of Spatial Unity**

Arendt's recovery of *nomos* seems anachronistic and embarrassingly parochial to her contemporary readers. Citing Cornford, she reminds us that, for the Greeks, *nomos* never entirely lost its original meaning of “a range or province, within which defined

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<sup>2</sup> Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace, 1951), 286 (hereinafter, *TOT*).

<sup>3</sup> Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks: Sage, 1996), 200. See also Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. by Thomas Burger and Frederick Lawrence (Cambridge, Mass.: The MIT Press, 1989). Another commentator characterizes Arendt's work as a “phenomenology of the public sphere” (emphasis added). See Dermot Moran, *Introduction to Phenomenology* (London: Routledge, 2000), p. 287 ff.

powers may be legitimately exercised.”<sup>4</sup> The spatiality implied in the notion of a range is closely related to the substantives *nomós* and *nomè*, and the related compound adjective *ennomos*. If the substantives denote both pasturage or feeding place, and dwelling place or quarters, the adjective, “which later means ‘keeping within the law,’ ‘law-abiding,’ has the older sense of ‘quartered’ or ‘dwelling’ in a country, which is, as it were, the legitimate range of its inhabitants.”<sup>5</sup> Moreover, as both Cornford and Arendt point out, these different terms are related to the verb *nemein*, “which means to distribute, to possess (what has been distributed), and to dwell.”<sup>6</sup> In this line of thinking, Arendt emphasizes that the law of the *polis* “was quite literally a wall, without which there may have been an agglomeration of houses, a town (*asty*), but not a city, a political community. This wall-like law was sacred, but only the inclosure was political.”<sup>7</sup> But Arendt goes much further, generalizing the original Greek understanding of the law to a constitutive feature of political community as such: “*all* legislation creates first of all a space in which it is valid . . .” (emphasis added). What justifies this strong claim?

This question is apposite if we bear in mind that, as Arendt herself notes, the Roman interpretation of *lex* as an “enduring bond” is, in contrast to Greek *nomos*, potentially boundless in its spatial reach. Politics, for the Romans, began where it ended for the Greeks: at the walls of the city. Whereas *nomos* makes room for internal politics, *lex* does so for external politics.<sup>8</sup> Yet Arendt immediately qualifies this sharp opposition, noting that, “also for the Romans, the political domain could only arise and exist within the legal; but this domain arose and was enlarged where different peoples met each other.”<sup>9</sup> Hence, although *lex* enlarges the experience of action by incorporating conflictual relations into the concept of law, the legal enclosure of space conditions political community in Rome no less than in the Greek city-states.<sup>10</sup> Moreover, the steady expansion of Rome beyond its initial spatial confines—first the city, then the Italic peninsula—suggests why *nomos* deserves conceptual and political priority over other, derivative conceptions of law. In effect, given the innate boundlessness of action, *nomos* “prevents it from evaporating into an unsurveyable (*unübersehbaren*), continuously growing system of relations, [thereby ensuring that action] conserves the durable form that makes of it a deed that can be remembered and preserved in its greatness, that is, in its excellence.”<sup>11</sup>

It is doubtful whether this normative argument can carry the weight of the strong claim that the legal closure of space is constitutive for political community as such. But assuming it could, notice that Arendt’s appeal to *nomos* actually turns on the need to

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<sup>4</sup> F.M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (New York: Harper Torchbooks, 1957), 30, cited by Hannah Arendt, *On Revolution* (London: Penguin Books, 1990 [1963]), 186-187 (hereinafter, *OR*).

<sup>5</sup> Cornford, *From Religion to Philosophy*, note 3 above, 30.

<sup>6</sup> Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 63, fn. 62 (hereinafter, *HC*).

<sup>7</sup> Arendt, *HC*, 63-64.

<sup>8</sup> Arendt, *WiP*, 109-122.

<sup>9</sup> *Ibid.*, 114-115.

<sup>10</sup> See Jacques Taminiaux, “Athens and Rome,” in Dana Villa (ed.), *The Cambridge Companion to Hannah Arendt* (Cambridge: Cambridge University Press, 2000), 165-177.

<sup>11</sup> Arendt, *WiP*, 119. See also Arendt, *HC*, 198. The argument that *nomos* allows human relations to remain surveyable is vintage Aristotelianism. When considering the ideal size of a city-state in Book VII of the *Politics*, Aristotle asserts that “the same thing holds good of the territory that we said about the size of the population—it must be well able to be taken in at one view (*eusunoptos*) . . .” See Aristotle, *Politics*, trans. by H. Rackham (London, William Heinemann Ltd. 1944), Vol. 23, 1327a. I am grateful to David Janssens for pointing out this connection to me.

assure immortality for human action. So, paradoxically, it is *time*, or at least the experience of time available to action, that, in Arendt's view, ultimately justifies the bounded spatiality of political community. Arendt's concern with reclaiming the original meaning of *nomos* from forgetfulness is tributary to her concern with rescuing "from oblivion the striving for immortality which originally had been the spring and center of the *vita activa*."<sup>12</sup> Whatever else we might make of this justification, this much is certain: it fails to ground the necessity of *nomos* on its own terms, that is, as a spatial concept.

The need for such a grounding becomes even more urgent if we consider what is possibly Arendt's most trenchant statement about *nomos*:

Freedom, wherever it has existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the borders of national territory or the walls of the city-state comprehended and protected a space in which men could move freely. Treaties and international guarantees provide an extension of this territorially bound freedom for citizens outside their own country, but even under these modern conditions the elementary coincidence of freedom and a limited space remains manifest.<sup>13</sup>

At one level, the passage notes that the spatial boundedness of political community preconditions freedom. At a deeper level, it suggests that a closed space conditions the very possibility of citizenship. To put it provocatively, citizenship depends on *nomos* because if there can be no citizens without inclusion, likewise there can be no citizens without exclusion. Citizenship is topical.

Any attempt to ground these claims must begin by drawing attention to an aspect of *nomos* that remains largely implicit throughout Arendt's writings. Indeed, that political communities are always spatially limited is another way of saying that a political community constitutes itself as a spatial *unity*. Yet, despite her insistence on the constitutive character of *nomos* for political community, Arendt does not focus on the problem of spatial unity. Why?

Part of the answer lies in the manner in which Arendt celebrates plurality as an essential feature of politics. By postulating that plurality is the *conditio per quam* of speech and action, and of politics in general, Arendt relegates the legal enclosure of space to a merely "prepolitical" condition of action.<sup>14</sup> As she sees it, *nomos* provides a durable structure for "spaces of appearances" in which men, in the plural, can disclose and distinguish themselves through word and deed. Arendt is no doubt correct to argue that political theory must account for plurality as a condition of action. But reducing bounded space to a precondition of politics amounts to depoliticizing the spatial unity of a political community. This issue bears directly on the master distinction between public and private places. Although Arendt tends to restrict *nomos* to public places, it actually embraces places public *and* private. In virtue of their mutual implication and differentiation, private and public places are locations within a more encompassing spatial unity. Indeed, both public and private places presuppose and refer to the totality of places in which they are located—a range. In Cornford's words, *nomos* denotes "a dispensation or system of provinces, within which all the activities of a community are parceled out and coordinated."<sup>15</sup> Accordingly, the distribution (*nemein*) of space into public

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<sup>12</sup> Arendt, *HC*, 21. See also Arendt, *WiP*, 46.

<sup>13</sup> Arendt, *OR*, 275.

<sup>14</sup> Arendt, *HC*, 195.

<sup>15</sup> Cornford, *From Religion to Philosophy*, note 3 above, p. 30.

and private places is itself a political act or, to put it another way, the distinction between public and private places is itself public.

In the same move by which Arendt depoliticizes spatial unity she also “despatializes” action. It is striking that the constitutive significance of *nomos* notwithstanding, Arendt nowhere engages in a full-blown analysis of boundary-setting or of what might be termed the topogenesis of political community. However, power is never merely “in” space; power also always *spatializes*, in the strong sense of an act that by setting boundaries, posits a polity as a spatial unity. Notice, in this respect, that *nemein* does not only involve the distribution of places *within* a given range of law, for this already presupposes a prior act that gives rise to *nomos* itself, namely the *self-closure* of a political community. Crucially, neither a polity’s self-closure nor the distribution of public and private places can be reduced to an act of individual self-manifestation or to the sum of self-manifestations of a plurality of individuals who act and speak “directly to one another”;<sup>16</sup> it is the reflexive act of a *collective agent*. In other words, *nemein*, as the act of positing boundaries, is the self-manifestation of a “political unity.”<sup>17</sup> Obviously, this insight neither precludes plurality nor entails ontologizing a collective self. Instead, it indicates that justifying the spatial unity of political community requires elucidating the reflexive structure of *nomos*: a community closes *itself* off as an *inside over against an outside*.<sup>18</sup> Unless the move is made to a reflexive reading of *nomos*, the bounded spatiality of political community indeed tends to become a “topographical figure of speech.”<sup>19</sup>

### 3. From the Space of Appearance to the Appearance of Space

In short, the question concerning the appearance of space is prior to that of the space of appearance. The closing considerations of §2 suggest the key to the novel line of phenomenological inquiry Arendt opens up without fully exploiting it: space appears as a unity to the members of a community—and this means as an inside—because *nomos* is constituted reflexively. What is, then, the spatial unity of *nomos*, as revealed in the self-closure that gives rise to an inside and an outside?

Although Arendt, for the reasons indicated hitherto, does not develop a reflexive reading of *nomos*, she does point the way when noting that

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<sup>16</sup> Arendt, *HC*, 183.

<sup>17</sup> Arendt, *WiP*, 100. Significantly, Arendt uses this expression only rarely, not least because of her distrust of any form of politics premised on the unity of a political community. But the distinction between democratic and, say, totalitarian politics cannot be posed in terms of a simple and massive opposition between plurality and unity, but rather in the manner in which a polity deals with the inevitable *claim* to unity which constitutes it as a community. Arendt points in this direction in the final chapter of *Life of the Mind*, when linking the exercise of freedom to the emergence of a first-person plural, a We. See Hannah Arendt, *The Life of the Mind/Willing* (San Diego: Harcourt, 1978), 200-201 (hereinafter *LOC*).

<sup>18</sup> It may remain an open question, for the purpose of this essay, to what extent Arendt’s description of action addresses the issue of collective agency. While her references to power and “acting in concert” no doubt evoke this issue, intersubjectivity and collective subjectivity tend to run through each other in her analyses of action. Whatever the standpoint one may want to take on this general point, it is in any case safe to assert that Arendt does not elucidate *nomos* in terms of the reflexivity of collective agency. It is noteworthy in this respect that when Arendt takes up the genesis of political community in a reflexive key, she passes over in silence the genesis of spatial unity: “The only trait that all these various forms and shapes of human plurality have in common is the simple fact of their genesis, that is, that at some moment in time and for some reason a group of people must have come to think of themselves as a ‘We’.” See Arendt, *LOC*, 202. For a powerful analysis of collective agency and political reflexivity, see Bert van Roermund, “First-Person Plural Legislature: Political Reflexivity and Representation,” in *Philosophical Explorations* 6 (2003) 3, 235-252.

<sup>19</sup> Seyla Benhabib, “Models of Public Space,” in Craig Calhoun (ed.), *Habermas and the Public Sphere* (Cambridge, Mass.: The MIT Press, 1993 [1992]), 77.

a 'territory,' as the law understands it, is a political and legal concept, and not merely a geographical term. It relates not so much, and not primarily, to a piece of land as to the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs, and laws.<sup>20</sup>

This passage contains various important implications for our topic. To begin with, Arendt points out that territoriality is concrete: the commonality claimed for language, religion, history and the like entails the claim that a territory is the *common place* of a community. This suggests that *nomos* involves two correlative dimensions. The first is normative, and concerns a claim about the common interest of a polity. To be common, an interest must be bounded, and this means that a legal order necessarily selects certain interests to grant them legal protection and discards other interests as legally irrelevant. The second dimension is physical, insofar as the legal order's claim to common interests is determined by means of boundaries that partition space. More precisely, the two dimensions of *nomos* manifest themselves in boundaries, which are alike normative and physical. This explains, on the one hand, why boundary-crossings are normative no less than physical events, and, on the other, why boundaries are variable, even though their physical positioning does not change an inch (e.g. when import tariffs for foreign goods are increased or decreased, depending on which interest is endorsed). I shall refer hereinafter to territory as the concrete unity of both dimensions; as manifested in the boundaries of a legal order, this concrete unity is the mode of spatiality captured by the term *nomos*.

The concrete spatiality of *nomos* sheds light on a further issue that Arendt only hints at, without developing, in the passage cited at the outset of this essay: "all legislation creates first of all a space in which it is *valid*" (emphasis added). That the boundaries of a legal order are inextricably normative and physical means that boundaries determine where persons and behavior ought or ought not to be emplaced. A space of action is a *legal* space of action to the extent that it reveals places as *ought*-places. Remember, in this context, the two meanings of the compound adjective *ennomos*, namely "keeping within the law" or "law-abiding," and "'quartered' or 'dwelling' in a country" (Cornford). A phenomenology of *nomos* suggests that these two meanings are internally connected: *abiding*, in the twofold sense of abiding by the law and abiding in a place, is one of the spatial modes of appearance of legal validity. When abiding, an individual is emplaced, located where s/he ought to be. A second spatial mode of appearance of validity is *trespassing*, crossing over, in the double sense of becoming misplaced and crossing the law. When trespassing, an individual relates to a place in the form of not-where-s/he-ought-to-be. Abiding and trespassing are the two basic ways of defining and distributing places within a range of law.

The concreteness of *nomos* explains, additionally, in what sense *nomos* has a reflexive structure, that is, why *nomos* is linked to a *self*-reference of community. Notice, to begin with, that a territory is not merely a common place; it is deemed to be the common place *of* a community. Importantly, this sense of ownership precedes the notion of ownership that Arendt has in mind when opposing private places to public places. Whereas the ownership of private places involves property rights, this more fundamental sense of ownership refers to the primordial meaning of *nemein* as the self-closure of a

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<sup>20</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 1994 [1963]), 262.

community. In this second sense, ownership involves, on the one hand, the relation of a territory to a *collective agent*, that is, a collective that, claiming to act as a *whole*, posits the boundaries of a territory, both those that close it off from other territories and those that demarcate places within the territory. On the other, it refers to the relation of a territory to a collective as the community of individuals that are viewed as having a stake therein, that is, to the set of persons who are held to be interested parties to the territory and its boundaries. Access to private property and to public spaces is legally protected because it is claimed that the community as a *whole* has a stake in the distribution of places made available by the legal order, regardless of the specific places it assigns to specific individuals under legally determined conditions.

The reflexivity thesis casts the distinction between public and private places differently than Arendt does. For the one, the claim that a territory is the common place of a polity implies that the manner in which this polity separates public from private places is itself held to be common. In this fundamental sense, private no less than public places are deemed to be common places. For the other, the distinction between public and private places, between a “common” and an individual’s “own” place, in the restricted sense endorsed by Arendt, remains intact. But whereas, for Arendt, a public place fulfils its properly political role by providing the scene that allows men, in the plural, to appear through word and deed in their unique distinctness, the reflexivity thesis suggests that public places do not owe their political priority so much to being the scene of plurality as to being the locations where a community constitutes and maintains itself, in and through its plurality, as a *unity*, both spatial and personal. As opposed to private places, public places are common in virtue of being the locations of collective subjectivity and agency.

These considerations allow us, finally, to grasp the unity of *nomos*. As noted at the outset of this section, *nemein* denotes the act by which a community closes itself as an inside over and against an outside. And we now know that to close off a space is to qualify this space as an own territory. Hence, *by closing itself off as an inside with respect to an outside, a community posits a territory as its own, and vice versa*. An inside and an own territory are two sides of the same coin. Moreover, this correlation explains why, as Arendt correctly notes, a territory is not merely a “geographical” unity. Beyond the empirical fact that not all territories are geographically contiguous, the essential point is that the self-closure of a polity involves a qualitative differentiation of space: the community’s inside is *preferred* to its outside.<sup>21</sup> The correlation between an inside and an own place, and the preference granted to interiority, is constitutive for the spatial unity of *nomos*.

How are we to understand the mutual implication between an inside and a claim to an own place? A certain ambiguity in the notion of an “own” space highlights the fact that there are two different forms of inside and outside. First, the distinction between the inside and the outside of a political community is correlative to the contrast between a community’s own territory and *foreign* territories, territories to which other polities lay claim as their own. The opposition between “internal” and “external” affairs, which is the staple fare of nation-state politics, alludes to this contrast. Yet there is a second divide between an inside and an outside, which is correlative to the contrast between an own place and a *strange* place. The latter relates to individuals who are not in-legal-

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<sup>21</sup> As Waldenfels puts it, the act of separating an inside from an outside brings about a “preference in the difference.” See Bernhard Waldenfels, *Vielstimmigkeit der Rede: Studien zur Phänomenologie des Fremden 4* (Frankfurt: Suhrkamp, 1999), 197.



place, yet are not simply misplaced in virtue of not being where they ought to be; instead, they are *displaced*, that is to say, they claim a legal place of their own for which there is no place within the distribution of places made available by a region. Thus, different forms of boundary-crossings are at stake: whereas misplacement trespasses a boundary, displacement transgresses it. Whereas trespassing renders conspicuous the familiar unity of a totality of legal places as assigning a certain place to an individual, and which the individual does *not* occupy, transgression renders conspicuous a region as a totality of legal places in which an individual has no place. Strange places reveal an outside in a strong sense of the word, namely a “where” that is *elsewhere* than in the distribution of places laid out by a range of law. In this strong sense of an outside, all the boundaries of a legal order, including those that distribute places within a territory, are its *external* boundaries. The ambiguity of *nemein*, which cannot include without excluding, ensures that the commonality claimed for the boundaries of a range of law can always be subverted. Accordingly, the two manifestations of the inside/outside divide are mutually irreducible. The place from which a foreigner comes, when entering a polity, need not be strange; conversely, a strange place need not be foreign: it can irrupt from within what a political community calls its own place. This strong form of exteriority could serve as the point of departure for a critical recovery of Arendt’s notion of plurality.

The closing section of this essay will examine how a polity can at all deal with the strong form of exteriority called forth by the reflexive structure of *nomos*. First, however, we need to consider whether this phenomenology of bounded space, however abridged, lends credence to Arendt’s claim that the original understanding of *nomos* is a constitutive feature of political community as such.

#### 4. Globalizing *Nomos*

If, as noted at the outset of §2, Arendt’s defense of *nomos* seems anachronistic and embarrassingly parochial to the contemporary reader, this is above all because we live in an era that increasingly identifies itself as the era of globalization. Whatever position one might want to take on the question whether globalization is a political desideratum, a world state is a possibility that has come within the reach of humanity. From this perspective, a leading advocate of political globalization argues that borders, in the context of a world federation, could only mean “internal differentiation.”<sup>22</sup> In fact, to the extent that these are mutually implicative terms, the elimination of an outside entails the elimination of an inside as well. The emergence of a state that encompasses the whole face of the earth would mark, so it seems, the demise of *nomos*.

Arendt counters this forbidding prospect with a lapidary dictum: “Nobody can be a citizen of the world as he is the citizen of his country.”<sup>23</sup> The advent of a world state would mark the end of citizenship, not a novel form thereof, and the end of politics, not a new phase thereof. “A citizen is by definition a citizen among citizens of a country among countries. His rights and duties must be defined and limited, not only by those of his fellow citizens, but also by the boundaries of a territory” (*ibid.*). Arendt’s defense of *nomos* in her Jaspers article rests on the argument that whereas technology provides

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<sup>22</sup> Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (München: C.H. Beck, 1999), 303. Similarly, albeit in another context, Habermas, in an article co-authored by Derrida, expresses the hope of an “internal world politics.” See Jürgen Habermas and Jacques Derrida, “Nach dem Krieg—Die Wiedergeburt Europas,” in *Frankfurter Allgemeine Zeitung*, May 31, 2003, 33-34.

<sup>23</sup> Hannah Arendt, “Karl Jaspers: Citizen of the World?,” in Hannah Arendt, *Men in Dark Times* (San Diego: Harcourt Brace & Company, 1993 [1955]), 81. See also Arendt, *HC*, 257.

humanity with a common present, this shared present does not spring from a common past, nor can it ensure a common future. Notice that, the perceptiveness of this argument notwithstanding, Arendt again appeals to *time* to justify the constitutive character of *nomos* for political community. Once more, Arendt fails to ground the necessity of *nomos* on its own terms, that is, as a spatial concept.

The phenomenology of *nomos* outlined in the foregoing section does provide such a justification. In effect, the reflexivity thesis implies that whereas the divide between own and foreign territories is a contingent feature of political communities as we know them hitherto, the divide between own and strange places is constitutive for political community as such. Arendt's description of territoriality clears the way for this reflexive reading of what Cornford called a "range" of law. Regardless of the organizational principle that were to be adopted when founding a world state, this novel political community would have to claim that it holds sway over a common place. A world state would arise in the process of selecting certain interests as worthy of legal protection, and setting boundaries that define where behavior ought or ought not to take place. Certainly, a world state would have no outside in the sense of foreign territories located beyond its reach, or at least not initially. But the inclusion and exclusion of interests required to institute the territory of a world state would ensure that this polity harbors, at least latently, strange places in what it calls its own territory. *Nemein*, which includes and excludes, entails that also a world state would have an outside in the strong sense referred to earlier. Accordingly, a world state, were it ever to be founded, would be a specific historical articulation of *nomos*.

This insight allows us to justify Arendt's claim about the topicality of citizenship. Having asserted, in an earlier cited passage, that even in modern conditions there is an "elementary coincidence of freedom and a limited space," she drives home this point by noting that "freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle but, again, applicable only with limitations and even within spatial limits."<sup>24</sup> Yet, the point is not so much that a world state would dissolve citizenship into universal human equality, as Arendt intimates, but rather that citizenship in a world state would institute *political* equality, which, as she rightly contends, "is not given us, but is the result of human organization insofar as it is guided by the principle of justice."<sup>25</sup> Because the genesis of political community involves selecting certain interests as worthy of legal protection and discarding others as irrelevant, the world citizen is held to be committed, as a citizen, to the interests the world-state claims to be common, hence to conserving the territorial integrity of this community by respecting the boundaries that establish what counts as being in-legal-place. Accordingly, the institution of political equality in a world state—even one that claims to be a democracy under a rule of law that respects the full array of civil and political rights—inevitably opens up the possibility of instituting political inequality, such that world citizenship could ultimately be withdrawn from individuals who radically contest the polity's claim to a common place. World citizenship—no less than citizenship in the Greek city-state, the Roman Empire or the modern nation-state—is necessarily *emplaced* citizenship.

Where, then, could individuals go, if they were to forfeit their citizenship in a world state? Although the two notions of exteriority introduced in §3 are mutually irre-

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<sup>24</sup> Arendt, *OR*, 275. For a similar statement, see Arendt, *WiP*, 40-41.

<sup>25</sup> Arendt, *TOT*, 301. See also Arendt, *OR*, 31.

ducible, political asylum is a means of connecting them: by institutionalizing the possibility of obtaining abode in a foreign territory, political asylum recognizes and calls attention to the existence of strange places in what a polity claims to be its own territory. In other words, political asylum is a technique that uses the distinction between own and foreign places to counter the tendency of political communities to deny (the contingency of) the divide they set up between own and strange places. A reflexive reading of *nomos* strongly endorses Arendt's plea in favor of a plurality of states, to the extent that this plea involves a defense of political asylum and of the contingency of the spatial boundaries of a polity. Relatedly, the realization of "global" freedom would be unimaginable unless the globe becomes a bounded region—*nomos* on a planetary scale. And this entails that freedom in a world state would be an ambiguous achievement: although global freedom, beginning with the freedom of movement, would be unthinkable without the concrete distribution of places made available by a territory, this distribution of places also opens up the world state to the charge that freedom is *elsewhere*, in another world. In short, no world state, whatever its political organization, could ever escape the latent possibility of secession and, concomitantly, the reinstatement of the distinctions between own and foreign territories, citizen and foreigner.

Finally, the correlation between these two aspects of *nemein* obtains its initial and primordial expression in *citizenship*. It is no coincidence that the foundational act of a political community not only separates an inside from an outside but also identifies who counts as a citizen. For a "preference in the difference" accrues as much to the personal as to the spatial aspect of *nemein*: by closing itself off as an inside over against an outside, a collective first and foremost makes place for the individuals who, as members of a community, abide preferentially in its territory, i.e. who are the preferred bearers of rights and obligations. Accordingly, not only is citizenship always emplaced citizenship but *citizenship is also always the primitive—but never innocent—form of legal emplacement*. All other forms of legal emplacement are derivative thereof, the right to sojourn granted by a polity to foreigners residing in its territory no less than the myriad forms of legal emplacement in the course of everyday transactions. The "metaphorical" sense of inclusion and exclusion, respectively the ascription or withholding of rights and obligations, beginning with those accruing to citizenship, implies the "literal," "spatial" sense of inclusion and exclusion, and vice versa.<sup>26</sup> A world state would be no exception to this state of affairs; what would distinguish its foundation from that of a nation-state is that the territorially preferential status of citizenship remains concealed until such time as the spatial boundaries of this global polity are challenged from a strange place—from without. In short, Arendt's lapidary dictum must be inverted: one can only be a citizen of the world in the same way that one is the citizen of a country.

## 5. *Nomos* and the Politics of Boundaries

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<sup>26</sup> This insight would be the point of departure of a critical examination of the attempt to despatialize the notion of a "public sphere." For the one, the rights to freedom of expression and of association, which are essential to the functioning of a public sphere, are thoroughly topical; for the other, a public sphere presupposes *privileged* bearers of these rights—the citizens of the polity. A background question, which requires treatment in a separate paper, is how Arendt's reference to "a right to have rights" (*TOT*, 296) can be interpreted in the light of a reflexive reading of *nomos*. For contributions to this issue, see Frank Michelman, (1996) "Parsing 'a Right to Have Rights,'" in *Constellations* 3 (1996) 2, 200-208, Seyla Benhabib, "Citizens, Residents, and Aliens in a Changing World: Political Membership in a Global Era," in *Social Research* 66 (1999) 3, 709-744, and Seyla Benhabib, *The Rights of Others. Aliens, Citizens and Residents* (Cambridge: Cambridge University Press, 2004).

To sum up, Arendt's claim concerning the constitutive character of *nomos* for political community is well-founded, provided *nomos* is interpreted in a reflexive key. No polity is possible that does not close itself off as an inside over against an outside. The corollary to this insight is that no collective ever entirely succeeds in stabilizing the claim to a territory as its own place. Ineluctably, every polity must engage with its outside by way of a politics of boundaries; Arendt's fears notwithstanding, the emergence of a world state would not and could not mark the demise of politics. I will conclude this essay by looking more closely at this politics of boundaries. My analysis will not be normative, or at least not directly so. Instead, I propose to describe the basic features of boundary-setting that condition the very possibility of dealing in different ways with a polity's exteriority. In particular, attention must be shifted from *nomos* to *nemein*: how are boundaries posited?

Although, as noted, Arendt does not engage in a full-blown topogenetic inquiry, her discussion of the foundation of political community does provide a vital clue as to how boundaries are posited. Referring to the significance of this foundational act, she notes that "we are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."<sup>27</sup> At the same time that Arendt's observation calls attention to the reflexivity inherent to the foundation of a community, it raises a pressing question: what criterion establishes who belongs to the "we" that decide to band together and grant themselves mutual rights, beginning with those accruing to citizenship? It will not do to suggest that this criterion is itself the object of a prior covenant, for this, of course, is to embark on an infinite regress.<sup>28</sup> Arendt is well aware of this problem, and suggests how action deals with it: "every action, accomplished by a plurality of men, can be divided into two stages: the beginning which is initiated by a 'leader,' and the accomplishment, in which many join to see through what then becomes a common enterprise."<sup>29</sup> She elsewhere returns to the initial stage of foundation, asserting that in modern revolutions individuals "took the initiative" to create workers' councils.<sup>30</sup> Although these passages do not refer specifically to boundaries, they suggest that the self-closure of a political community gets going when the initiative is "taken" to set boundaries. Boundary-setting begins as a *taking*.

At this point, a confrontation between Hannah Arendt's and Carl Schmitt's interpretations of *nomos* becomes inevitable, even though, as far as I know, neither of the two referred, whether explicitly or implicitly, to the other's discussion of *nomos*. Schmitt's defense of *nomos*, based on the idea that law is a "unity of order and emplacement," poses a radical challenge to legal and political thinking, including that of Arendt.<sup>31</sup> His challenge stems not so much from the concrete spatiality of legal or-

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<sup>27</sup> Arendt, *TOT*, 301. For analyses of foundation in Arendt, see, amongst others, Bonnie Honig, "Arendt and Derrida on the Problem of Founding a Republic," in *American Political Science Review* 85 (1991) 1, 97-114, and Alan Keenan, "Promises, Promises: The Abyss of Freedom and the Loss of Political World in the Work of Hannah Arendt," in *Political Theory*, 22 (1994) 2, 297-322.

<sup>28</sup> I am indebted here to Bert van Roermund, who has exposed a comparable problem in Jürgen Habermas's discourse principle. See Bert van Roermund, *Law, Narrative and Reality: An Essay in Interpreting Politics* (Dordrecht: Kluwer Academic Publishers, 1997), 151.

<sup>29</sup> Arendt, "Personal Responsibility Under Dictatorship," in Hannah Arendt, *Responsibility and Judgment*, ed. by Jerome Kohn (New York: Schocken Books, 2003), 47. This passage effectively deconstructs the sharp opposition Arendt elsewhere sets up between "representation" and "action and participation." See Arendt, *OR*, 273. For, to initiate community, a "leader" must claim to act on behalf of a group. A representational act lies at the heart of action and participation.

<sup>30</sup> Arendt, *OR*, 278.

<sup>31</sup> "Einheit von Ordnung und Ortung." See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. by G.L. Ulmen (New York: Telos Press, 2003 [1950]), 42

der—something Schmitt has surprising little to say about—as from his analysis of the act that founds a range of law—*nemein*. Repeating almost verbatim Arendt’s definition of *nemein*, Schmitt notes that this Greek verb is usually taken to mean a sequence of acts whereby an initial act of division and distribution is followed by exploitation, i.e. a productive use and possession of what has been divided and distributed. This interpretation, as he sees it, neutralizes the political content of *nemein*. For the sequence of acts that compose it begins earlier: “in the same way that distribution precedes exploitation, a taking precedes distribution. Not the distribution, not the *divisio primaeva*, but a taking is what comes first.” For, he adds, “no human being can give, distribute and apportion without taking.”<sup>32</sup> This primordial act is an appropriation, a “taking of land” (*Landnahme*). An act that seizes land founds the law both internally and externally: internally, by making room for the allocation of ownership and property relations, whether public or private; externally, by demarcating a political community over against other political communities. Schmitt does not hesitate to draw the implications of this insight for a politics of boundaries: “all subsequent regulations . . . are either a continuation of the original basis or a disintegration of and departure from the constitutive act of land-appropriation . . .”<sup>33</sup> This, he would no doubt argue, is the unvarnished political content of Arendt’s insight that founding a community requires that someone “take” the initiative.

A brief consideration of the treaties founding the European Community, arguably the contemporary core of what Schmitt calls the *Jus Publicum Europaeum*, is of help in assessing his challenge. The Preamble to the Treaty of Rome states that the parties to the Treaty are “determined to lay the foundations of an ever closer union among the peoples of Europe.” Crucially, while the six founding member states claimed to represent European unity, they had received no mandate to this effect from all possibly affected parties, whether states or individuals. The founding states are in fact the self-proclaimed representatives of European unity. By taking the initiative of founding the European Community, the signatories take, seize, Europe, disclosing it as a common (internal) market and separating it from an external market—the rest of the world. To be sure, “many,” as Arendt puts it, may subsequently validate a land-appropriation, making it the point of departure of a common enterprise. But even if all the members of the community were to validate it, the land-appropriation that gives rise to the spatial unity of a community is never only the expression of power, in the Arendtian sense of the human ability to act in concert, but also of force, in the sense of a marginalization, both physical and normative, that lacks justification. To this extent, Arendt falls prey to Schmitt’s critique.

Schmitt’s point does not exhaust, however, the implications of this Consideration for the way in which boundaries are posited. Notice that although the Preamble refers to a plurality of peoples, it also claims that there *already* was a union at the time of laying

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(translation altered). For the record, Arendt does mention Schmitt in *TOT*, referring, amongst others, to his “ingenious theories about the end of democracy and legal government” (*TOT*, 339, fn. 65). Schmitt, for his part, mentions Arendt sporadically in his writings, albeit without a specific reference to her analysis of *nomos*. For a general analysis of the relation between Arendt and Schmitt, see William E. Scheurman, “Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt,” in David Dyzenhaus (ed.), *Law as Politics: Carl Schmitt’s Critique of Liberalism* (Durham: Duke University Press, 1998), 252-280.

<sup>32</sup> “Nomos-Nahme-Name,” in Carl Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker und Humblot, 1995), 573-591. See also “Nehmen/Teilen/Weiden,” in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 489-504.

<sup>33</sup> Schmitt, *Nomos of the Earth*, note 31 above, 78 (translation altered).

its legal foundation in the Treaty of Rome, a community of peoples that, by virtue of their shared interests, can go further together, engaging in a process of legal and economic integration. The wording of the Preamble implies that the Treaty of Rome does not initiate the community of European peoples; the Treaty claims to build on a prior closure, providing this community with an institutional setting and specific goals. Moreover, the Preamble to the Treaty of Rome views Europe as being itself *already* the product of an aboriginal cut that separates an undifferentiated space into two places: Europe and the rest of the world. The datable act of positing the European Community's boundaries claims to derive from a closure lost in an irretrievable, undatable past.<sup>34</sup>

The Preamble to the Treaty of Rome aptly illustrates a general feature of the topogenesis of political community: power can only posit the empirically identifiable boundaries of a polity by educing these from spatial boundaries that are not and never can be empirically identifiable.<sup>35</sup> *Nemlein* deploys a representational dynamic in the strong, paradoxical, sense of the expression: a closure is constituted as the *original* closure through its representations. Hence, and Schmitt notwithstanding, there is no original spatial unity that, posited directly at the foundation of a community, can be distinguished from and opposed to its subsequent representations. From the very beginning, spatial unity is presented mediately, in and through its representations. In the same vein of thinking, a politics of boundaries does not rest, as Schmitt contends, on the simple opposition between an act that posits the boundaries of a novel community and subsequent acts that maintain and secure those boundaries. If, as the Preamble to the Treaty of Rome shows, the act that posits the boundaries of a novel community moves to maintain and secure boundaries, the converse holds as well: the act of maintaining and securing boundaries posits them—founds anew the spatial unity of a community.

In the same way that Schmitt's move to simply oppose an original closure to subsequent acts that maintain and secure it proves reductive, no less reductive is its corollary, namely that a politics of boundaries aims to preserve the separation of the own and the strange, as fixed in the original land-appropriation. It is here, I believe, that Arendt's analysis of the own and the strange, as it arises from her discussion of statelessness, develops a powerful, albeit oblique, rejoinder to Schmitt's politics of boundaries. If citizenship is the primitive form of emplacement, Arendt effectively reminds us that statelessness is the primitive form of displacement. The crucial point is, as she sees it, that this situation undermines the legal order. For a politics of boundaries that reduces radical anomaly to the anomaly a legal order understands—misplacement—, ends up by compromising *nomos* itself: in the process of preserving the claim to an own territory, such a politics of boundaries renders this territory unrecognizable as the community's own place.<sup>36</sup> Although formulated with regard to statelessness, Arendt's insight has a general significance for displacement. As I read her, Arendt counters Schmitt's politics of boundaries by observing that if the community's own territory can become strange, this is because what he calls the original *Landnahme* inscribes strangeness in ownness in the very process of differentiating them: self-inclusion is coevally a *self-exclusion*.

This insight has two important implications, both of which pertain to the reflexive structure of *nomos*. The first concerns the inside/outside distinction. Although no

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<sup>34</sup> See my "Inside and Outside the EU's 'Area of Freedom, Security and Justice': Reflexive Identity and the Unity of Legal Space," in *Archiv für Rechts- und Sozialphilosophie*, 90 (2004) 4, 478-497.

<sup>35</sup> Returning to Arendt's argument that a bounded space keeps human relations surveyable (see fn. 11), the surveyability of these relations, as well as of the boundaries introduced by *nomos*, depends on a presupposed spatial unity that is empirically unsurveyable, regardless of the "size" of the territory.

<sup>36</sup> Arendt, *TOT*, 286.

political community can arise unless it closes itself off as an inside over against an outside, *nemein* ensures that from the very beginning community is also, albeit latently, *outside* the enclosure, as witnessed, amongst others, by heterotopic calls for “another Europe.” This by no means implies that the boundaries separating and opposing inside and outside are illusory or merely “relative”; rather, boundaries call forth another experience of boundedness, namely the experience of community being inside out. The second implication concerns the other aspect of the reflexive structure of *nomos*, namely a community’s claim to ownership of a territory. That there is no self-inclusion without a measure of self-exclusion entails that the question *who* is an interested party to a territory and its boundaries is never exhausted by any of the legal institutionalizations of spatial unity. There are always *other* persons who can appear as having a stake in a polity’s territory and its boundaries than those who are identified as such by the legal order. Here again, heterotopic calls for “another Europe” make clear that what is at stake in the reconfiguration of a European *nomos* is not only the inside/outside distinction but also the distinction between citizen and non-citizen.

Notice, moreover, that the problem of time has slipped into our discussion of boundary-setting. Although Arendt is at pains to relate *nomos* to time, she does so in a way that justifies the former with reference to a specific historical—the early Greek—interpretation of the latter: immortality. This approach fails to justify *nomos* on its own terms, i.e. as a spatial concept, and it also fails to connect the spatial to the temporal unity of a *polity*, that is, to the self-constitution of a community as a unity of past, present and future. Yet Arendt points the way to a more radical understanding of the internal connection between the spatial and temporal unities of a polity in a remarkable passage of *The Human Condition*, which refers to spaces of appearances as “predat[ing] and preced[ing] all formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized.”<sup>37</sup> Arendt calls attention to the fact that spatial unity, as founded in a legal order, leads back, both logically and chronologically, to a founding space—a *protospace*, if you will. Think, for instance, of the places where individuals gather to engage in acts of civil disobedience. No legal institutionalization of spatial unity exhausts these protospaces, which ensure that the *nomos* of political community never simply coincides with its positivization through an original *Landnahme*. Hence, Arendt’s remark must be construed strictly: “The law can . . . stabilize and legalize change once it has occurred, but the change itself is always the result of *extralegal* action,” that is, of action that, in the two-fold sense of the expression, takes place outside of *nomos*.<sup>38</sup> Protospaces are *displaced*.

Granting the importance of this insight, the key question concerns, however, the temporal structure implicit in Arendt’s discussion of the transition leading from a founding protospace to spatial unity as founded in a legal order. Notice that Arendt’s analysis of this transition interprets the foundation of a community as a simple temporal sequence going from “beginning” to “accomplishment,” such that both the unity of space and the unity of time unfold from and are guaranteed by an absolute presence and present. Certainly, no sense can be made of *new* boundaries unless the act that posits them ruptures the unity of founded space; a protospace announces itself as an initiative that comes from *elsewhere*. But to disrupt the spatial unity of a legal order is not yet to *found* a novel spatial unity. In this respect, the example of the Treaty of Rome suggests

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<sup>37</sup> Arendt, *HC*, 199.

<sup>38</sup> Hannah Arendt, *Crises of the Republic* (New York: Harcourt Brace Yovanovitch, 1972), 80 (emphasis added).

that the sequence going from “beginning” to “accomplishment” is too simple; Arendt’s temporal analysis of foundation must be radicalized: *nemein* is an *accomplishing initiation*. On the one hand, an initiation takes on the form of an accomplishment because the original self-closure of a community only becomes such *afterwards*, in and through the closures that accomplish it. This does not merely mean, as Arendt suggests, that the initiative that posits spatial unity requires subsequent confirmations, but rather that, paradoxically, this initiative is only possible as the accomplishment of an original self-closure—original in virtue of not being directly accessible. Remember that the wording of the Preamble to the Treaty of Rome claims that there was already a European self-closure at the time of signing the treaty, yet a self-closure lost in an irretrievable past. On the other hand, the accomplishment of a prior self-closure can only be seen as initiating spatial unity if it goes *before* community in the sense of anticipating a viable understanding of a common territory. Here again, the Preamble to the Treaty of Rome shows that the prior self-closure of Europe can only become such in the future, through the workable anticipation of a “union among the peoples of Europe.” Accordingly, all foundation is a *refoundation*, an act that, paradoxically, anticipates the past in the future. I would add that this anticipation of the past in the future is a *wager* rather than a Schmittian decision, because positing the boundaries of political community involves a reasoned initiative in the face of intractable uncertainty about both past and future. For the past is more than a smooth foil upon which an anticipated spatial unity can be retrojected, and the future more than the projection of what constitutes a community’s own place. A *politics* of boundaries is neither Schmitt’s repetition of an original *Landnahme* nor the endless and effortless confirmation of an anticipated commonality. The structure of a wager, in which taking the initiative is inseparable from taking a calculated risk, explains why the foundation of political community not only involves setting new boundaries but also “grave concern with the stability and durability” of *nomos*.<sup>39</sup>

These considerations suggest, finally, a response to Schmitt’s thesis that the history of a political community progressively unfolds or deviates from “the inner measure of an original, constitutive act of spatial ordering.”<sup>40</sup> As Schmitt also puts it, no community can give without having taken. In a sense, Schmitt’s argument is indisputable. But the paradoxical temporality of *nemein* dislocates the simple temporal sequence going from taking to giving, from an original *Landnahme* to the distribution of rights and places, whether public or private. Indeed, Schmitt’s epigram, “what comes first is a taking,” is only correct when sharpened into a paradox: what comes first is a *retaking*. Because a community has no direct access to its spatial origin, the boundaries of *nomos* are posited in an act that, distributing rights and places, anticipates who and what had been included and excluded by the original self-closure. This, precisely, is what it means to *give*. In this give and take, a politics of boundaries separates—and joins—what lies inside and outside the *nomos* of a political community.

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<sup>39</sup> Arendt, *OR*, 223.

<sup>40</sup> Schmitt, *Nomos of the Earth*, note 31 above, 78.