The state theory of Grotius

The state theory of Grotius

The State Theory of Grotius

Introduction - On State Theory and Grotius[1]

To write of Grotius's "State Theory" – and its possible relevance for us today – risks compounding a misunderstanding of Grotius with an anachronism.

The charge of misunderstanding Grotius is that to speak of a Grotian State Theory runs against the grain of numerous authorities on Grotius which consistently maintain Grotius did not have a modern state concept of the kind so recognizably found in contemporaries (such as Hobbes) or in influential near-contemporaries (such as Bodin). In a more recent version of this claim, Richard Tuck concludes that Grotius's account of sovereignty in *De Jure Belli ac Pacis* restates a "medieval idea in a modern form" by refusing the conclusion that there must be a singular locus of

[1] Versions of this article were presented over several years at NYU Law School, Aberdeen Law School, Durham Law School, University College London's Faculty of Laws, the Lauterpacht Centre for International Law of the University of Cambridge, and the Institute of Historical Research's Seminar in the History of Political Thought. The author thanks all participants in those events, and also thanks Benedict Kingsbury, Grainne de Burca, Kimberley Trapp, Silvia Suteu, Irene Couzigou, Robert Schütze, Eyal Benvenisti, Surabhi Ranganathan, Fernando Bordin, Waseem Yaqoob, Quentin Skinner and Andrew Fitzmaurice for these invitations. A critical impetus for the completion of the article was provided by Kimberley Trapp and Silvia Suteu's invitation to present a Current Legal Problems lecture in March 2019. Thanks also go to Maia Perraudeau for her work in preparing the article for publication.

Comments on the paper were additionally received from Guus van Nifterik, Sarah Mortimer, Emile Simpson, Benjamin Straumann, Andrew Fitzmaurice, Quentin Skinner, Lucia Rubinelli, Stephen Neff, Benjamin Schupmann, Samuel Moyn, Rotem Giladi, Thomas Poole, Martin Loughlin, Anthony Pagden, Matthias Goldman, Marco Barducci, and Alexandra Braun.

sovereignty in a polity, distinguishable from the government that actually exercised power on a daily basis.[2]

My argument in this article is that despite Grotius's many diverging accounts of the place and character of sovereign power within a political order, he nonetheless articulates a modern theory of state that can take its place alongside Bodin and Hobbes as one of the ways in which early modern civil philosophy sought to solve the problem of the authority and validity of political order. This is interesting, I argue, because Grotius's account of the state draws a picture of the relationship between political and legal ordering, and history, in which the interrelationship of the political and the legal allows a range of adaptive and adaptable state-forms.

The essence of this re-interpretation of Grotius can be summarized as follows: for Grotius, a 'state' (although he does not use this word) is a "perpetual and eternal" society (*consociatio*) which is not subject to the will of another human or legal person. It is characterized by a comprehensive order of supremacy and subordination, such that to be a civil order with sovereign power (*summum imperium*), there must be an agency of rulership which has the capacity to substitute a decision as to the general will or interest, in place of the decision or judgment of the individual will of any subject; civil order necessitates and authorizes *subjection*, and the unity of wills that characterizes it is not a unity of actual reasoning by individual subjects but a unity attained through the finality of an instance of decision – even if different kinds of final decision may be *distributed* across different agencies of rulership. Grotius's sovereign power (*summum imperium*), as an artificial unity of wills, has two aspects or moments: it is a kind of generative social force that arises from the fact of human

[2] Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy,* (CUP 2016) 85.

collectivities formed for a common purpose of civil peace and flourishing (an end mandated and consecrated by natural law), *and*; it is a governing power of rightful coercion that is recognized by the natural legal order, and which is amenable to a range of durable or temporary forms of legal and political organization, reflecting the historical circumstances of the creation and maintenance of political order for a given people at a given time. The range of possible modalities for organizing the system of legal and political rule in actually-existing political orders is, therefore, very broad: between two pure types, "Kings properly so called" and "Free Peoples," there are many variations (cognizable as sovereign to natural law) that can be discerned through the study of exemplary historical communities. While the concentration of sovereign power and sovereign right into one place or agent might be convenient or "Good Policy," there is no *necessity* for such a concentration in the nature of sovereignty itself; for Grotius, it is a question of examining the specific historical conditions under which this legal and political organization of sovereignty has been created and sustained, and ultimately whether, as a matter of real functioning, these arrangements continue to be able to produce and maintain the legal and political unity which is the condition of possibility of the sovereign political order. This unity is not, demonstrably, the unity of power and authority in *one* organ or agent of rule (although it *might* be), but rather a complex composite unity of law, concrete political existence, and history. This unity does not require some essential and timeless unity of the People as a substance, or through the establishment of a singular agent and organ of a perpetual sovereign power. Rather, it is a unity of "spirit" that persists even as functions and powers can be divided and distributed legally and constitutionally. The constitutional "order" of Grotius can inhere under certain circumstances in the life and ways of a concrete people, their institutional traditions

and their territory. But in other places and times, this unity can be in the form of a powerful monarchy, or in the body of the people. In the concluding part of this article, I argue that, understood in this way, the State Theory of Grotius is not only as modern as Bodin and Hobbes, but provides in its methods and insights, a potential answer to one of the key conceptual deadends of modern theories of sovereignty: the idea that sovereign power must be perpetually concentrated in one organ or entity if it is to retain what makes it sovereign.

But does anything in the present turn on this claim for the modernity of Grotius's state theory? To answer in the affirmative invites the charge of anachronism to which no glib answer should be given. As Andrew Fitzmaurice has argued recently, *making sense* of the meaning of a complex architecture of legal and political concepts in history, requires at least a suspension of our contemporary understandings in order to place that architecture of concepts within the web of meanings that were available to the author.[3] Presentism of a vulgar kind, which assumes that meanings of concepts travel frictionlessly across time and contexts, leads not only to misunderstanding "what's at stake" in a text and "what's going on" around it, but also to underwriting contemporary ideological claims about the inevitability *or* boundless malleability of the present.[4] But by the same token, an unyieldingly nominalist approach to the meaning of concepts in the history of legal and political thought dissolves these concepts into their historical contexts, leaving students of this history with the conclusion that "not only are there no stable concepts in history, but also that there are

[3] Andrew Fitzmaurice, "Context in the History of International Law" (2018) 20(1) *Journal of the History of International Law* 5.
[4] Lauren Benton, "Beyond Anachronism: Histories of International Law and Global Legal Politics," (2019) 21 *Journal of the History of International Law* 1, 7.

no stable, or recurrent, problems in the history of (political) philosophy either."[5] As Straumann argues, such an epistemological commitment is difficult to reconcile with what we can observe *in* history – that the histories of *some* concepts can be written showing long-term conceptual stability *or* change, and that once we attempt such histories – "and this is simply what good historians of ideas such as Skinner have been doing for a long time – we are in a position to argue that some problems are indeed perennial, while others perish and entirely new ones arise. *We are also in a better position to free ourselves from our own context and not remain trapped in our own assumptions*."[6] Straumann's contention is that we can take a "biographical" approach to some families of ideas, understanding certain kinds of concepts as emerging out of "conceptual and empirical problem situations,"[7] and, for so long as the "problem situation" persists, the content of the concept can indeed be "a determinate idea to which various writers contributed."[8] Another implication of Straumann's productive suggestion is that concepts are not inert epiphenomena of other processes, but themselves carry a kind of energy that is *part* of the ways in which social reality is made and re-made: "once a concept is deployed in argument or conflict – in a 'problem situation' … it may assume considerable traction and thus *kinetic* energy. … [W]hen a concept goes out of use, say, due to lack of the kind of necessary historical conditions for it to find application – it might be said to have *potential* energy. This does justice to our sense that concepts and arguments, when

[5] Benjamin Straumann, "The Energy of Concepts: The Role of Concepts in Long-Term Intellectual History and Social Reality" [2019] *Journal of the Philosophy of History* (2019) 1, 19.
[6] ibid 20.
[7] ibid 24. Here Straumann is citing philosopher of science Arabatzis, quotation marks omitted.
[8] ibid.

they are being rediscovered and reapplied, were in a way potentially available … Given the proper set of historical problems it may find application again, its kinetic energy rising as soon as someone apprehends the concept in question."[9]

To say that the modernity of Grotius's state theory provides a vantage point from which to think about the nature and idea of the state in the present, would be to suggest that the "problem-situation" in relation to which it sought to provide answers, may contain lessons that can be discerned from within our contemporary "problem-situation." Part I of this article revisits the "problem-situation" of state theory in our epoch, and elaborates on the notion that state-concepts and state-theories are worthy of specific attention because their *performative* character allows them to have a (potentially) significant role in shaping social reality. Parts II and III of the article develops my argument concerning Grotius's state theory, as foreshadowed above. Part IV concludes by reflecting on how Grotius's state theory provides us with insights into aspects of our own reality, that might well, as Straumann says, allow us to free ourselves from our own context and revisit our own assumptions.

Part I – The Problem-Situation of State Theory

As a historically determinate theoretical phenomena, "state theory" refers to a family of mostly German theoretical and political writings from the 19th and 20th centuries: *Staatslehre* or *Staatsrechtslehre* (State Theory or State Law Theory).[10] A central problematic of this theoretical constellation was how to characterize the fundamental nature of the state and how to theorize the sources of state power and

[9] ibid 28-29.
[10] Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn Books 2001); Duncan Kelly, *The State of the Political: Conceptions of the State in the Thought of Max Weber, Carl Schmitt and Franz Neumann* (OUP 2003).

authority. A closely related question concerned the source of the political order embodied in the state, and whether that order was productive of or parasitic upon legal order.[11] That German legal and political thought was preoccupied with grasping the foundations and essential qualities of state and law at this moment in German history reflects the upheavals experienced by German politics and society from the French Revolution through monarchical restoration, liberal revolt and industrial transformation.[12]

The theoretical answers given to such questions as 'what is the nature of the state?' and 'who is the bearer of the sovereignty of the state?' ranged from an idea of the state as an organism or person (Bluntschli), to Gierke's emphasis on Germanic *Genossenschaft* as the true source of national law's binding qualities, to Stahl's attribution of state personality to the real person of the monarch.[13]

The intellectual ferment over state theory was thus a ferment over the intellectual foundations of the modern state and the basis upon which its sovereign power was generated, authorized and wielded. As such, it was intimately connected with arguments about the nature of public law and of public authority as exercised through and under law.[14] Where one stood on such state-theoretical questions carried

---

[11] Duncan Kelly, "Egon Zweig and the Intellectual History of Constituent Power" in Kelly L Grotke and Markus J Prutsch (eds), *Constitutionalism, Legitimacy, and Power* (CUP, 2014).

[12] See Duncan Kelly, "Popular Sovereignty as State Theory in the Nineteenth Century," in Richard Bourke and Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (CUP 2016) 270-296; Jo Eric Khushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (OUP 2013), Part I ; Martin Loughlin, *The Foundations of Public Law*, (OUP 2010), Part III.

[13] For an overview of these theories, see Kelly, *The State of the Political* (n10) and also Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Essays in Political Theory and Constitutional Law* (JA Underwood tr, Berg 1991), chapters 1-4.

[14] Martin Loughlin, "In Defense of Staatslehre" (2009) 48(1) *Der Staat* 1.

strong implications for what kind of domestic *and* supra-national legal and political orders were conceivable and considered realizable. To argue about the state and its essential nature (or lack of it) is to make claims about the foundations of its coercive authority; it is also to make an argument about law's authority as it relates to these foundations.[15]

Stepping back from the precise historical context of *Staatslehre* and its disputations, we might recognize that the types of questions and problem-situations which characterized "state theory" continue to preoccupy us today. There is undoubtedly a pervasive sense that we inhabit, and reflect upon, a world in which state-centred thinking and *staatliche* concepts have lost purchase, and in which fundamental legal-political categories and vocabularies appear to have been decisively untethered from the concrete historical circumstances that gave birth to them (democracy, the rule of law, constitutionalism, administrative law, solidarity, public authority, to name a few). But despite - or perhaps precisely because of, the ever-louder exhortation to think ourselves "beyond the state," we are also living through a period in which some of the animating questions of state theory are being disinterred, re-examined and renovated. The statist (or, *staatliche*) presuppositions of our inherited political and legal vocabularies are being subjected to profound scrutiny, whether with a view to demonstrating their severability from plausible theoretical accounts of concepts such as democracy and constitutional order, or, in order to

[15] Law's authority might variously be claimed to be derivative of a real political substance found outside the law (as for Gierke and Schmitt), as the sine qua non of the state-form standing alongside that political substance (as for Bluntschli and Jellinek) or as simply coextensive with the concept of the state extrinsic of any empirical claims about the substance of the political order (as for Kelsen).

underline the deep conceptual puzzles generated by attempting to coherently articulate a concept like "global law."[16]

Another global field of intellectual and practical endeavour has also brought state theory to the fore: state-building. Beginning in the last years of the Cold War, international organizations, coalitions of sovereign states and non-government organizations have engaged in lengthy and intensive attempts to re-found durable political orders in the aftermath of civil conflict or foreign intervention, usually under the auspices of United Nations-mandated peace-making and peacekeeping initiatives,[17] and more dramatically after foreign interventions (Kosovo, Iraq, Libya). The result is a new techno-practical discourse of state-ness, in which the state is understood as a technical achievement, amenable to a variety of programs of intentional institutional design, therapeutic political techniques (such as transitional justice) and expert knowledge claims about how to generate 'state strength' and combat 'state weakness.'[18] The relationship between state failure and the threat of

---

[16] For recent examples: Hans Lindahl, *Faultlines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2013); Hans Lindahl, *Authority and the Globalization of Inclusion and Exclusion* (CUP 2018); Neil Walker, *Intimations of Global Law* (CUP 2015); and Alexander Somek, *The Cosmopolitan Constitution* (OUP 2014).

[17] For the vast literature see, Roland Paris, *At War's End* (CUP 2004); Simon Chesterman, *You the people: the United Nations, transitional administration, and state-building* (OUP 2004); Gregory Fox, *Humanitarian Occupation* (OUP 2008); Lise Morjé Howard, *UN Peacekeeping in Civil Wars* (CUP 2007); Timothy D Sisk and Roland Paris (eds), *The Dilemmas of Statebuilding: Confronting the contradictions of postwar peace operations* (Routledge 2009); Francis Fukuyama, *State-building: Governance and World Order in the 21st Century* (Cornell University Press 2004).

[18] For a reading of this discourse, see Nehal Bhuta, 'Against State-Building' (2008) 15 *Constellations* 517-542 and Nehal Bhuta, 'Governmentalizing Sovereignty: Indexes of State Fragility and the Calculability of Political Order' in Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power through Quantification and Rankings* (OUP 2012).

transnational non-state terrorism has accelerated and deepened this tendency, with a strong interest in being able to claim to understand the 'drivers' of state-fragility in order better to intervene so as to contain them and the security risks they intimate. This technical-functional terminology of state-ness has started to penetrate the categories of international law governing state sovereignty, with an accelerating willingness to accept the idea that weak states of a certain kind (those 'unable or unwilling' to control non-state terrorist groups on their territory) may be subject to the lawful use of military force against them, through tactics such as drone strikes.[19]

In both its theoretical and technical registers, our contemporary reflection on the state returns us to such questions as, what is a state? How is a state founded? How does it vindicate its claim rightfully to coerce a population and control the territory? How are political, social and economic power generated and concentrated into an apparatus of government? What is the relationship between legal norms (and normativity generally) and factual power of the kind that the state must both generate and rest upon? [20]

The activity of answering questions such as these in relation to a phenomena such as "the state" can reasonably be called "theory," but it is a kind of theorizing not easily amenable to clear-cut distinctions between Is and Ought, Fact and Value, or the Descriptive and the Normative. At the time of its emergence as a distinct and

---

[19] See the dispassionate but generally supportive argument of Therese Reinhold, "State Weakness, Irregular Warfare and the Right to Self-Defense Post 9/11" (2011) 105(2) *AJIL 244*. See also Christian J Tams, "The Use of Force against Terrorists" (2009) 20(2) *EJIL* 359; and Paulina Starski, "Right to Self-Defense, Attribution and the Non-State Actor – Birth of the 'Unable or Unwilling' Standard?" (2015) 75 *Heidelberg Journal of International Law* (2015) 75 455.

[20] Skinner recently complained that reducing the concept of the state to that of government and governance ignores its "complex intellectual heritage … in such a way as to leave ourselves astonishingly little to say about it." Quentin Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (CUP 2018) 378.

distinguishable term towards the end of the 16th century,[21] "the state" was at once a descriptive and prescriptive concept – articulated and argued for in order to re-present a contemporary reality in a way that "help[ed] particular people understand and define, and thus begin to deal with, certain problems."[22] A state-concept is at once a theory-dependent notion, and a reality-shaping theoretical instrument. In other words, a state-concept has the characteristics of what philosopher John Searle calls "Declarations."[23] A Declaration is a kind of performative speech act which is necessary (if not sufficient) to create social institutions. Declaration-type utterances create and partly constitute reality by representing that reality as existing and fitting the declaration.[24] In Searle's theory of social reality, social kinds such as money, states, corporations or private property, could not exist without performative utterances like declarations; words alone will not bring them into existence, but without language they could not exist and function in the way we observe. Changing the way we conceptualize them (and "declare" them) can also change the way they are, although again this only obtains for Searle where collective intentionality is brought along sufficiently with the new meanings and understandings given to social institutions such as property or money.[25] In Searle's argument, understanding the nature of declaration-type uses of language allows us to understand the nature and

---

[21] Quentin Skinner, "A Genealogy of the Modern State: British Academy Lecture" (2008) 162 *Proceedings of the British Academy* 325.
[22] Raymond Geuss, *Philosophy and Real Politics* (Princeton University Press 2008), 43-4.
[23] John Searle, *Making the Social World: The Structure of Human Civilization* (OUP 2010), chapter 1.
[24] ibid,13, 85.
[25] ibid, chapter 2, chapter 5, chapter 7. For Searle, collective intentionality underlies all social facts. A social fact is any fact that contains a collective intentionality about its meaning and extension. Some kind of collective intentionality is a boundary condition for a human society of two or more people: see chapter 2.

importance of concepts in creating non-conceptual or extra-conceptual social realities – "In these cases [such as money or property], we use the semantics of language to create a power that goes beyond semantics … Thus money, government, and private property [for example] are created by semantics but in every case the powers go beyond semantics. Meanings are used to create powers that go beyond meaning."[26]

The idea that state-concepts and state-theories are performative captures a dynamic in the history of political thought about the state that is described well by Geuss:

> In interesting cases, like 'the state,' introducing the 'concept' requires one to get people not merely to use a certain word, but also to entertain a certain kind of theory, which has a strong 'normative' component. … Characteristically, the concept 'the state' is introduced *together with* a theory about the nature and source of the authority which the abstract entity so named is supposed to have. In the early modern period this was usually some version of the social contract theory.... [27]

One of the consequences of a (successful) conceptual innovation such as "the state" is that "when such innovations work, they imprint themselves upon the world ... Conceptual innovation ... is a complicated process in which descriptive, analytic, normative, and aspirational elements are intricately intertwined. ... Conceptual innovations often 'stick,' escape our control and become part of reality itself. [Once invented,] the idea of the 'state' can come into contact with real social forces with unforeseeable results. The 'tool' develops a life of its own, and can become an inextricable part of the fabric of life itself."[28]

---

[26] ibid 113.
[27] Geuss, *Philosophy and Real Politics* (n22) 44-6.
[28] ibid 47-9.

Theoretical claims about what the state is, how it is formed, stabilized, and justified, do not only describe, they also (where successful) generate schema of interpretation that orient action, spur attempts to realize certain designs, and underwrite certain kinds of abstentions or interventions.[29] To theorize the state at certain junctures and in the crucible of certain great epochal shifts, is to engage in an effort to interpret *and* change the world by endeavouring to shift the schemata of intelligibility and reference that orient thought, judgment and action. Foucault captures pellucidly this movement between the "conceptual" and the "real" in the European state theories of the early 17th century:

> It would be absurd to say that the set of institutions we call the state date from this period of 1580 to 1650 ... After all, big armies had already emerged ... Taxation was established before this, and justice even earlier. ... But what is important ... and what is at any rate a real, specific, and incompressible historical phenomenon is the moment this something, the state, really *entered into reflected practice*.[30]
>
> ...
>
> The state is therefore a schema of intelligibility for a whole set of already established institutions, a whole set of given realities … *The state is therefore the principle of intelligibility of what is, but equally of what must be*; *one understands what the state is in order to be more successful in making it exist in reality*.[31]

A model or theory posits a world, in order to gain purchase upon a reality that (at least in the first instance) confronts it. The action of theorizing takes an ambiguous

---

[29] Quentin Skinner, "Retrospect: Studying Rhetoric and Conceptual Change," in *Visions of Politics: Volume 1, Regarding Method* (CUP 2002)176-7.
[30] Michel Foucault, *Security, Territory, Population: lecutures at the Collège de France, 1977-78* (Michel Senellart ed, Graham Burchell tr, Palgrave Macmillan 2007) 247.
[31] ibid 286-7.

and obscure reality and endeavours to articulate it as a connected order of facts, concepts and so forth. Articulation implies description but exceeds it, bringing new properties into being by composing elements and stabilizing compositions and relations between composites.[32] If the composition "catches on" and becomes assimilated into thought, argument or as a rule informing practice and judgment, the theoretical action (conceptual innovation, in Geuss's terms) has described reality but also transformed it. The path to such a "catching on" may be surprising and indirect, and will always be the result of the human and technological mediators acting in contexts. For example, conceiving of human agency as a rational faculty equivalent to a relationship of dominium over property - as the late Scholastics did - was not an ex nihilo theoretical innovation.[33] But it was an arduous recomposition of Thomist and Dominican thought that paved the way for a transformational new theory of state power - a theoretical innovation indispensable to the architecture of legal order (natural and civil) more generally. Such a theory of human agency became the presupposition for a theory of public power and of legal obligation, that was concretely enacted and contested through real actions - as assertions of authority, defenses of right, and above all through violence and coercion within and between human communities.

Grotius life and work traversed a fifty-year period during which order - natural and civil, moral and political - was both an urgent practical problem and a profound intellectual challenge. At the heart of the intellectual problem was precisely the relationship between a natural order of reason, liberty and right, and a civil order of

---

[32] Emmanuel Didier, "Do Statistics Perform the Economy?" in Donald Mackenzie et al, *Do Economists Make Markets? On the Performativity of Economics* (Princeton University Press 2007); and Foucault (n30) 305-6.

[33] See, with the most subtlety, Annabel Brett, *Changes of State* (Princeton University Press 2011), chapter 2.

human artifice that supervenes natural liberty and authorizes coercion in the name of civil power and authority.

It is at the denouement of the century-long collapse of the medieval ideal of lawful ontology of political order and civil obligation, that we ought to situate Grotius's account of natural law and his theory of the state. A recognizably modern theory of sovereignty - sovereign power as *summum imperium* and *plenitudo potestatis* and markedly distinguished by *non-dependence* (perfection, self-sufficiency) on the authority of universal powers - begins to emerge, although even in Bodin the strong legacy of the medieval 'lawful' state theory is visible through his cautious attitude towards the maintenance of fundamental norms of the ancient constitution.[34] With the reformation, the germ of resistance theory inhering in the Thomism and high medieval juristic thought[35] flowered into bitter religious civil wars in France, the Low Countries and the Holy Roman Empire and communal confessional violence.[36] Rivalries between territorial rulers supplemented and fuelled confessional conflict and enlarged the conflict across Northern Europe and into Italy.[37] While the Thirty Years War (1618-1648) is commonly identified as the window of epochal transition, medieval Europe's sense of unity had been gravely and

---

[34] See Daniel Lee, "Office is a Thing Borrowed", (2013) 41(3), *Political Theory* 409.

[35] On the latter, especially the debate over the lex regia, see Magnus Ryan, "Political Thought", *The Cambridge Companion to Roman Law*, (David Johnston, ed) 2015, chapter 20.

[36] "[A]ll the churches – Lutheran, Reformed and Roman Catholic – were agreed that those who opposed them were guilty of 'heresy'… [T]he consequence of heresy was damnation": Sarah Mortimer and John Robertson, "Nature, Revelation, History: Intellectual Consequences of Religious Heterodoxy C.1600-1750" in Sarah Mortimer and John Robertson (eds), *The Intellectual Consequences of Religious Heterodoxy, 1600-1750* (Brill 2012) 10-11.

[37] Ronald G Asch, *The Thirty Years War: the Holy Roman Empire and Europe, 1618-1648* (St Martin's Press 1997), chapter 1.

irrevocably damaged by a confessionalization that began in 1521 and only intensified after the 1555 Peace of Augsburg.[38] In a discernably modern way, the foundation of political order becomes widely theorized as in some manner immanent to the specific human society generating that order, and equally immanent and this-worldly are the ends of such order: security, civil peace, prosperity.[39] Of course, the exact mechanism of the immanent generation of order varied widely across streams of political thought, and in its most sophisticated forms (such as the mid-sixteenth century Dominican and Jesuit thought), the foundation of civil order began in a theory of human agency that took divinely-given natural law and legalistically conceived natural right, as the modular building blocks for the awesome edifice of sovereign power.[40] But the relationship between the order of nature and natural law, and the political and legal order of the human civitas, could no longer be the straightforwardly hierarchical one conceived of by high medieval Thomism; the function of nature and natural law as a warrant for the authority of civil order becomes a problem to be solved rather than a solution to the problem of authority. As Brett summarizes:

> Common to all the different types of what is considered 'civil philosophy' in this period ... [is the key question of] how to construct a unity out of the natural plurality and diversity of individuals [and protect it from dissolution.] ... Nature and natural law, seen as a set of substantive rules of action which form an unchanging baseline of moral rectitude, generate precisely the threat to the legal autonomy or integrity of the city that civil philosophy strove to avoid.[41]

---

[38] See Stephen Toulmin, *Cosmopolis: the hidden agenda of modernity* (Free Press 1990); Wolfgang Reinhard, "Reformation, Counter-reformation and the Early Modern State: A Reassessment" (1989) 75(3) *The Catholic Historical Review* 383.
[39] See, for example: Amos Funkenstein, *Theology and the Scientific Imagination* (2nd ed, Princeton UP 2018), part V.
[40] Brett, *Changes of State* (n34) 62: the construction of human beings as free coincides with the construction of the subject of law. Government by law works by commanding choice, and it demands a subject capable of choice.
[41] Annabel Brett, "Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius" (2002) 45(1) *The Historical Journal* 31, 32-33.

Brett points out that in two of Grotius's key texts that address the nature of civil power, *unity* and its constitution is a crucial preoccupation.[42] The classical idea of unity as the *sine qua non* of the *polis* or *civitas qua* authoritative order, underwrote the high medieval Church's hierocratic claim of *plenitudo potestatis* and its status as *corpus mysticum* and universitas with supreme jurisdiction.[43] As many have observed,[44] this powerful image of supremacy-in-unity, with its account of "the absolute and universal jurisidiction of the supreme authority,"[45] was foundational to theories of the self-sufficiency of civil power from the later Middle Ages. Woolf remarks that while the "theory of the State as a secular and non-universal institution was never achieved in the Middle Ages […], [t]he Middle Ages laid the foundation of the theory …"[46] It was the fundamental schism of the Reformation that accelerated the realization of the theory because, "as a result of the Reformation, the spiritual unity of Christendom was no longer an axiom of political thought."[47] At the heart of different contemporary visions of political and legal life was the problem of the foundation of an ordering unity, in the face of sectarian conflict over religious truth and parallel political and military conflicts contesting the reach of Imperial authority. Unity as the *archê* of authority required a revised foundation, to be reassembled from

---

[42] ibid, passim.
[43] Michael J Wilks, *The Problem of Sovereignty in the Later Middle Ages: the papal monarchy with Augustinus Triumphus and the publicists* (CUP 1963), chapter 1. See also John Neville Figgis, *Political Thought from Gerson to Grotius: 1414 – 1625, Seven Studies* (Batoche Books, 1999 [1907], 8.
[44] Wilks (n43) 113-117; Ernst H Kantorowicz, *The Kings Two Bodies: a study in mediaeval political theology* (Princeton University Press 1997) 267-272.
[45] Figgis (n43) 8.
[46] Cecil N Sidney Woolf, *Bartolus of Sassoferato: His Position in the History of Medieval Political Thought* (CUP 1913) 368.
[47] ibid.

"certain new-old ideas" that "now allied themselves with political needs and … active forces…"[48]

Part III – Grotius's Revolt : The Force of Law between History and Reason

One important current of thought among various attempts to recast the foundations of legal and political order was scepticism and Tacitism. In Tuck's influential account of the "new humanism", the "disillusionment with the strife and bloodshed of Reformation and religious wars"[49] was reflected in the emergence of theories of state-craft that emphasized the importance of force and the disciplining of populations to create a *political* unity under the command of a Prince knowledgeable in the effective use of coercion and the manipulation of interests: "The prince's power was to rest on a realistic assessment of the nature of coercion and on a combination of arms and money … [A]t all levels of late sixteenth century society, men were disillusioned with the claims and counter-claims of the dogmatists …"[50] Paolo Sarpi, Servite monk, critic of Papal power and adviser to the Senate of Venice from 1606 to 1623, lamented the rise of Catholic and Protestant regicidal theories when he wrote that "I cannot help getting angry when this new doctrine, which, against all human and divine laws, asserts that a prince can be killed with the pretext of religion."[51] Sarpi's intellectual biographer observes that Sarpi's critique of religious jurisdiction and his absolutist view of monarchical sovereignty, were part of an important current of thinking that expressed "an anxious longing for peace and tranquillity" in the

[48] Figgis (n43) 9.
[49] Richard Tuck, *Philosophy and Government 1572–1651* (CUP 1993) 61.
[50] ibid 64.
[51] Sarpi to Lechassier, 8 June 1610, quoted in Jaska Kainulainen, *Paolo Sarpi: A Servant of God and State* (Brill 2014) 223.

aftermath of the wars and conquests of the sixteenth century.[52] There was a preoccupation with re-establishing a foundation for a political system that could guarantee stability and tranquillity, in the face of what many contemporary observers – under the influence of a scientific revolution that rejected Aristotelianism in natural philosophy and sympathized with Epicurean ideas of the inconstancy of all nature (including human will) – concluded to be the ceaseless motion of the universe.[53] This scepticism and pessimism concerning humans' capacity to form effective political unities through their own reasoning, was congenial to a strain of absolutism that believed it was only "the sovereign ruler, invested with absolute power who, while representing God on earth, provided an element of order amid chaos."[54] Such neo-Tacitean or "Neo-Stoic" [55] currents of thoughts emphasized obedience to higher authority, the need for discipline (especially in the formation of national armies, and in statesman and servants of the state), and an inner constancy achieved through an acceptance of the fate that God reserves for each human. [56]

In Tuck's reconstruction of Neo-Stoic thought in late 16th century western Europe, scepticism concerning the reliability of human judgment and human reasoning led to quietism in respect of effective authority and positive laws.[57] Sarpi, Lipsius and Montaigne encouraged a detached acquiescence in the existing laws and

---

[52] Kainulainen ibid 4.
[53] See Funkenstein (n39) Part I.
[54] ibid 56.
[55] See Gerhard Oestreich, "Political Neostoicism" in G Oestreich, *Neostoicism and the Early Modern State* (Brigitta Oestreich and H G Koenigsberger (eds), David McLintock (tr) Cambridge 1982) 57 – 75. The propriety of describing some of these theories as Stoic is contested by contemporary historians of thought (Straumann, Brooke), who tend to emphasize the Ciceronian heritage of the early modern Stoic revival. See Brooke, n86 and Straumann, n64.
[56] Tuck, *Philosophy and Government* (n49) 53-54.
[57] ibid 49-50.

customs of one's own country, because human self-deception meant that claims of natural law or higher truths were unreliable. Positive laws founded on effective authority were the foundation of this-worldly justice, because "Justice exists among those who have agreed to live with certain laws and not take offence."[58] Sarpi, presaging a point that would be made also by Hobbes, rejected the notion that positive law was to be obeyed "not in virtue of law, but only in virtue of reason and convenience" and maintained rather that "[a]ll things commanded by human laws are such that before [viz. prior to – NB] the law there was no obligation by reason to act in one way rather than the other; but once the law is made the obligation comes by virtue of it and *not of reason*. Every civil law is of this kind."[59] The existence of natural law is not denied per se, but the unreliability of individual human judgment of right and wrong required a constant ruling will with the necessary habitus of good judgment and virtue.[60] Higher law and justice might exist, but human positive law of the civil power needs be obeyed to avoid the ills of disobedience and disorder; the *summum bonum* of order is preserved by authoritative decision concerning the common good, to which individual interests are subordinated. The prince's rulership at once *enabled* him to see beyond individual interests to the common interest, and was at the same time *evidence* of his consecrated authority to decide what the common good required.[61] Honestum, common good, order, were to be identified with the pursuit of "good" reason of state – the *interests* of the unifying will of the prince who acted with temperance and constancy to preserve the state against internal and

[58] Sarpi, *Pensieri* no.261, quoted in Kainulainen (n51) 247.
[59] Sarpi, *Scritti Scelti*, quoted in Kainulainen (n51) 248 (emphasis added).
[60] See Tuck, *Philosophy and Government* (n49) 54-56.
[61] "Quello che a private parerà male, al principe, che vede la ragione di tutto il governo, lo conosce bene necessario." Micanzio, *Annotazioni e pensieri*, no. 50, 786-7, quoted in Kainulanen (n51) 251.

external disorder and strife, and not merely in order protect his own power. The priority of a political unity founded in public law, over any necessary religious unity founded in theological truth, was a cognate doctrine of the French *Politiques* who set the interests of the unity of the state, as common good directly mandated by divine right, above the widely held belief in the need for the unity of religious creed.[62]

At the stake, ultimately, is what is to be understood as validating the exercise and maintenance of authority, and the extent of (and motivating reasons for) obedience due to civil power. The implication of a theory such as Sarpi's concerning the binding force of positive law and necessity of obedience to custom, was that the facticity of effective power was its own legitimation (albeit mandated by God), and that historically-constituted authority should be licensed to do what is necessary to preserve itself. *Honestum* (morality and justice) and *utile* (interest) become difficult to differentiate, because on this account what serves the interests of the maintenance of order is also that which is necessary for the common good:

> But the care of the common good, this God has entrusted only to the prince together with the majesty (*con la Maestà*); wherefore it pertains to him [the prince] exclusively to prescribe the ways in which to conserve and maintain this good, whether with impositions, with war, with laws or other means …[63]

The justness of positive law, its *epikeia*, derived from its origin not in divine or natural law, but rather in the this-worldly supremacy of the princely office as the viewpoint from which what is truly necessary to the common good can be discerned.

For Grotius, this sceptical position and its implications posed a range of difficulties, as Straumann has shown. Scepticism's emphasis on the *epikeia* of

---

[62] Figgis (n43) 17.
[63] Sarpi, quoted in Kailunainen (n51) 233-4 (Italian original at note 152).

existing civil law and custom did not seem to provide much warrant for determining the justness of relations as *between* princes or other kinds of civil powers. One implication of such a deference to positive laws in the specific context of Grotius's apology for Dutch colonial expansion in to the East Indies, would have been the colourable soundness of the Spanish and Portuguese assertion of exclusive control over trade and shipping in the region. These claims were based on a European state practice that "consisted of a division of the waters among the main seafaring powers … [T]he Iberian trade monopoly, based on papal donation, discovery, and possession, remained and was of a fully customary nature."[64] The vindication of the Dutch East India Company's persistent challenge to this trade monopoly, which resulted in the naval conflict that led to the seizure of the Portuguese carrick the *Santa Caterina* and sale of its cargo in Amsterdam,[65] required a different theory of the sources of law on the high seas, where the Santa Catarina was seized: "a radically new doctrine that lent legal norms taken from antiquity relevance to the practice of the early seventeenth century. … Grotius' doctrine of legal sources formally declared 'nature' to be the source of the law relevant to the oceans …"[66]

---

[64] Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius's Natural Law* (Belinda Cooper (tr) CUP 2015) 28-29.

[65] The value of the sale was "three million guilders, a value equivalent to just less than annual revenue of the English government at the time and more than double the capital of the English East India Company." David Armitage, "Introduction," Hugo Grotius, *The Free Sea* [1604] (Richard Hakluyt (tr) Liberty Fund 2004), xii. The seizure of the Santa Catarina was part of a longer attempt by the newly independent Dutch republic to wrest control of East Asian trade from the Spanish and Portuguese: Peter Borschberg, "The Seizure of the Santa Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance," (2002) 33 *Journal of South East Asian Studies* 31.

[66] Straumann, *Roman Law in the State of Nature* (n64) 29.

The broader problem of the foundation of all legal and political orders, including empires, could not be divorced from the particular questions of the justice of the seizure of the Santa Catarina. Straumann, partially refuting Tuck's reading of Grotius in *Philosophy and Government*, argues that the centrality that Grotius accorded to Carneades' scepticism about whether or not the justice of human laws could be criticised from some superior vantage point of natural legality, derived not from a direct confrontation with the views of contemporary sceptics (Sarpi, Lipsius, Montaigne, Charron) but from the fundamental underlying problematic highlighted by scepticism:[67] if all law is based only on this-worldly convention and interests, no civil power or empire rested on anything except force and contingent history – calling into question at once the historical justness of Rome's empire *and* the contemporary rightfulness of Dutch military force in the East Indies.

But also at stake in any question of the foundations of legal and political order, was the legitimacy of the Dutch republic's claim to exclusive public power and territorial independence in Europe vis-à-vis its historical overlords, the united imperial crowns of Spain and Portugal. The 30- year conflict was punctuated by sectarian strife, political assassination and grave disorders occasioned by foreign invasion, attempted reconquest and efforts at forcible repression of religious non-conformity. The revolt against Spain gave rise to a variety of political and legal justifications for its legitimacy, but by 1580 the account which was most well-established emphasised a constitutionalist and legalist rationale: that King Philip II's conduct had violated the specific historical contracts of rulership between the Dutch Estates (the towns, cities and other corporate orders that represented the people of the

[67] ibid 97: "Carneadean debate, in short, was very much a topos of sixteenth century natural law writing."

Provinces) and the Imperial crown, giving rise to a constitutional right of resistance culminating in the abjuration of the Philip's rulership by the States General, on the grounds essentially of a breach of contract.[68] The reproach against the King of Spain was that he had "violated his oath, assaulted their [the Hollanders'] liberty and had sought to subject them to a barbarous tyranny, to ruin and to wreck them."[69] This legalist and jurisprudential rationale – which Grotius wholeheartedly reprised in his own official history of the Dutch revolt[70] - emphasised the historical legitimacy of the ancient constitution of Dutch political order, with its liberties, privileges, representative institutions and corporatist bodies. A defence of the foundations of the new Dutch state required a defence of the legal validity of historical contracts of rulership, privileges and liberties, rather than more extensive monarchomachic theories of popular sovereignty or natural rights of resistance.[71] Indeed, van Gelderen observes that while "both the Monarchomach and the Dutch justification of resistance were essentially legalistic in character," in the Netherlands,

> the political justification of the Revolt was largely built on an appeal to, and interpretation of, indigenous Dutch constitutional charters, themselves the outcome of struggles for power between towns, provinces and lords. Dutch constitutional traditions, exemplified by the great charters of the late medieval period, were the principal point of reference for the justifications of the Revolt and the articulation of the ideology of the Dutch political order as based on

---

[68] Martin van Gelderen, *The Political Thought of the Dutch Revolt, 1550-1590* (CUP 1992) 160-162.

[69] Offer of sovereignty by the States of Holland to the Duke of Anjou, May 1576, quoted in van Gelderen, *The Political Thought of the Dutch Revolt* (n68) 166 at note 1, reference omitted.

[70] Hugo Grotius, *The Antiquity of the Batavian Republic*: *with the notes by Petrus Scriverius* (Jan Hendrik Waszink (ed, tr) first published 1610, Van Gorcum 2000).

[71] Van Gelderen, *The Political Thought of the Dutch Revolt* (n68) 273-276.

liberty, constitutional charters, representative institutions and popular sovereignty. [72]

At the same time, the validity of this historical constitutional framework as a basis for the complete independence of the Dutch from the Spanish Crown, required some foundation exceeding the authority of ancient constitutionalism and its late medieval commitment to respect for privileges and liberties. For the same medievalism that underwrote the authority of custom and ancient liberty, also emphasized that in the end all authority must derive from the will of a superior[73] – and here, Philip II was undoubtedly the legal superior (and in this sense, sovereign) as the Count of Holland. In Grotius's 1610 account, a positive contract containing a concrete set of *historical* legal obligations and particularistic corporate privileges and liberties, grounded and enlivened the Dutch claim to become a republic without any superior because it rested on a *natural* legal order that both gave it binding force *and* provided *ex delictu* remedies for its breach. According to Grotius, the original natural liberty and independence of the Batavian peoples, whose exclusive dominium over the territories of Holland derived from original possession under natural law[74] and which was never ceded or relinquished due to cession or subjection, was preserved in positive law through conditions attached to the governmental power of the Hapsburg and Burgundian Dukes.[75] The attempt by Philip II to exceed these conditions led to

[72] ibid 273 – 4.
[73] Joseph Canning, *The Political Thought of Baldus de Ubaldis* (CUP 1987); Joseph Canning, *Ideas of Power in the Late Middle Ages, 1296-1417* (CUP 2011), chapter 5. Dieter Grimm, *Sovereignty : the origin and future of a political and legal concept* (Belinda Cooper (tr) Columbia University Press 2015) 14-16; Magnus Ryan, "Political Thought" (n35)
[74] Grotius, *Antiquity* (n70) 57.
[75] ibid 69, 72-77, 87.

his deposition "from the principate because of his violations of the law regarding the extent of this power."[76] The underlying and unbroken non-dependence of the Dutch political order was an unextinguished legal status ratified by natural law; the positive legal framework of the ancient constitution reflected this distribution of power, and left (on Grotius's argument) "the highest power (summum imperium) in the Councils of the Dutch States."[77] This highest power *reassumed* its governance functions once the Count of Holland was deposed. Philip II may have been King in Spain and Portugal, but was only ever as a matter of historical fact, the Count of Holland *in* Holland, enmeshed in the agreements and positive laws that made up the Dutch political and legal order.[78] All of this historical circumstance is given legal force by natural law, which establishes the essential sovereignty (*summum imperium*) of Dutch councils and can find (in Grotius's eyes at least) no factual foundation for the legal relinquishment of this *summum imperium* in favour of another (the Hapsburgs or Burgundians).

The function of natural law in Grotius's argument concerning the Dutch revolt is noteworthy here, and I will argue further below that it is consistent with the place of natural law in the state theory as found in later works. Sovereignty, understood by Grotius as *summum imperium* and a plenary power over a territory unbound by positive law,[79] is a concrete unity of authority generated in and through human wills *in* history:[80] the history of the Dutch led to a concentration of supreme power within

---

[76] ibid 105.
[77] ibid 63.
[78] Grotius, *Antiquity* (n70) 91, 93.
[79] ibid, 85, 91 – where the non-sovereignt status of the Count of Holland (the Hapsburg Emperor) is maintained by Grotius because his "power is limited by positive law."
[80] The nature and "location" of this unity is something that has greatly exercised different readers of Grotius. I will discuss this issue in detail in Part IV, below.

the Councils of the towns and regions, which appointed a "princeps" to exercise governing power while continuing to "contain" sovereignty "within their own community."[81] The historically-specific mode of this unity is not itself a natural legal institution, but is given legal force by natural law – not unlike private property in Grotius's later account.[82] Once instituted, the legal rights and duties of sovereignty can be modified or distributed through positive law by acts of will – promises, cessions, relinquishments, and these acts in turn are enforceable through the structuring principles of the natural legal order (enforceable perfect rights such as contract and delict). Natural law gives legal validity to the facticity of sovereign power by recognizing certain statuses as generative of legal force, thus requiring other legally-cognizable reasons for displacing or substituting this status; history may generate such reasons, or it may not.[83]

Van Gelderen notes that, by 1580, the legacy of three decades of conflict and disorder in the Netherlands included a preoccupation with the need to overcome strife and division in order to strengthen the new republic. The disobedience and faction unleashed by the conflict with the Spanish was bitterly criticized by writers as damaging the welfare of the country and impeding the exercise of the civic virtue need to rebuild the state. While early decades of the revolt had seen a flowering of resistance theories influenced by diverse sources, including "French Monarcomachs, … Spanish neo-Thomists and some Italian authors,"[84] from the 1580s an air of pessimism and desperation "was taking root in some Dutch circles."[85] The resulting

[81] Grotius, *Antiquity* (n70) 87.
[82] Hugo Grotius, *The Rights of War and Peace* (Liberty Fund, Tuck, ed. Barbeyrac trans, 2005 [1738], I.I.X.4 (154), and I.II.I.3 (184).
[83] See further below, part IV for further discussion.
[84] Van Gelderen, *The Political Thought of the Dutch Revolt* (n68) 163.
[85] ibid 179.

criticism of resistance theories – exemplified by Lipsius's work and evident in the discussion of Sarpi above – emphasized the necessity of strong leadership by a virtuous prince in order to restore justice, concord and fortitude in pursuit of the common good (as determined by the prince and his judgment). It would be an exaggeration to align Grotius's thinking too closely with these Lipsian currents,[86] and his discussion of the Dutch constitution in *The Antiquity of the Batavian Republic* is notable for its praise for the virtues of a mixed constitution which combines the strengths of the authority of one prince with the constraints imposed by laws and by the power of representative bodies and estates. At the same time, Grotius painstakingly avoids any reliance on upon Monarchomachic resistance theories and their strong universalist theory of popular sovereignty as the source of all kingship and rulership.[87] A casuistry of history remains essential to the logic of these arguments: Grotius accepts both monarchy (kingdom) and popular sovereignty as pure types of *summa imperia* – of stateness with sovereign power – and contends that each has its strengths and flaws.[88] Praising the Dutch constitution and its aptness for the Dutch people and their history, need not "detract [from] those who use another … For it must be acknowledged that there is not one form which fits all people."[89]

It is perhaps this refusal of a reductive or monistic account of the institutional architecture of civil power, that has led to the persistent charge that Grotius's account of civil power, and of the juridical possibilities of organizing sovereignty, are late

---

[86] See the critique of Tuck and Oestreich in Christopher Brooke, *Philosophic Pride: Stoicism and Political Thought from Lipsius to Rousseau* (Princeton University Press 2012), chapters 1-2.
[87] See Daniel Lee, *Popular Sovereignty in Early Modern Constitutional Thought* (OUP 2016), chapter 4 for this feature of monarchomachic thought.
[88] Grotius, *Antiquity* (n70) 54-55.
[89] ibid 113.

medieval. For example, Richard Tuck's key criticism of Grotius's account of sovereignty as medieval rests on the claim that Grotius – unlike Bodin – fails to lay the ground for a distinction between sovereign power and government, between "sovereign legislator and government."[90] Tuck's account of sovereign power as the essence of modern stateness, identifies modern sovereignty with organ sovereignty – the idea that sovereign power, to be properly sovereign, had to be unified in one organ or place that stood behind or above the day-to-day or commissioned administration of laws by magistrates and offices.[91] He understands Bodin, and later, Hobbes, to have pioneered the analytical clarification of this reality of modern statehood, with others such as Grotius having in some sense been unable or unwilling to follow through on the logic of sovereignty, resulting in both confusion and bizarre conclusions such as the idea that a German prince (the Holy Roman Emperor) remained King of the Romans, and that the Pope could exercise sovereign power if the throne was vacant.[92]

I contend in the next part of the article, however, that Grotius's account maintains the core of the modern idea of statehood: that the state is not merely a hierarchy of instances of legally limited powers (as the feudal concept might have it),[93] but is a comprehensive relationship of supremacy and subordination between a ruler and individual subject (even if rulership is exercised by a body of the people as *civitas*), where rulership (whatever its organs) entails a *status* of supremacy over

---

[90] Tuck, *The Sleeping Sovereign* (n2) 85.
[91] ibid, chapter 1. On organ sovereignty see Jean L Cohen, *Globalization and Sovereignty : Rethinking Legality, Legitimacy, and Constitutionalism* (CUP 2012) 27.
[92] Tuck quotes Grotius's conclusion from Grotius, *Rights of War and Peace* (n82), II.IX.XI.2
[93] Lee, *Popular Sovereignty* (n87), Introduction. Grimm, *Sovereignty* (n73) 14-15.

positive law and non-dependence on any superior power.[94] This supremacy – a defining idea of modern statehood – is not so much constrained by natural law as embedded in, and validated by, a natural legal carapace which enables a casuistic[95] oscillation between the positive-legal and the natural-legal, between history and reason, that is a kind of generative grammar for political order, authorizing what could be described as a variable geometry of order that can accommodate a spectrum of historically-constituted relations of freedom and unfreedom as nonetheless lawful and capable of being public powers with sovereign rights. I conclude by suggesting that it is precisely Grotius's historicist non-reduction of sovereign power and unity to any one organ, person or collective subject, that allows us to revisit him as particularly interesting for a range of contemporary questions concerning stateness and sovereignty.

Part III – Between Kings and Peoples – A Historicist State Theory

a. A Moral Thing

[94] Heller is his 1927 book captured the essence of the modern state concept succinctly by contrasting it the Middle Ages: "We call sovereign those decision making units that are subject to no effective universal decision making units … [The sovereignty of today's states] must be considered as an historical category. The Middle Ages had nothing resembling the modern state – *a monist association of territorial authority that brings order and subordinates every decisive entity on its territory into a central decision-making unit.*" (Hermann Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (David Dyzenhaus (ed), Belinda Cooper (tr), OUP 2019), 87.

[95] The use of the term 'casuistic' in relation to Grotius has become fraught, as for some it implies a pejorative dismissal of his arguments as sophistry. I do not use the term in this sense, but in a literal manner: the case-by-case application of principle to solve moral problems. On the controversy, see Benjamin Straumann, 'Adam Smith's Unfinished Grotius Business: Grotius Novel Turn to Ancient Law and the Genealogical Fallacy,' (2017) 38 *Grotiana* 211-228, especially 215-217.

Annabel Brett has recalled the importance of casuistic reasoning in Grotius's treatment of *materia moralis*.[96] Sovereignty, says Grotius in the Rights of War and Peace,[97] is a "moral thing" and should be reasoned about accordingly. A moral thing or moral entity was to be understood in distinction to the natural:

> Natural things are necessitated, as ice necessarily melts in the sun … Moral things are a function of the human will … Moral necessity is generated by the 'end,' the final cause, which does not operate physically but morally in making something the only *morally* possible choice for the will … Moral entities also include laws, rights, powers, offices, statuses, prices and signs …[98]

Brett observes that Grotius adopted a distinction in contemporary Aristotelian moral science between the methods of reasoning apposite to moral things and those apposite to natural things: "*naturalia* can be made into a science (ars) because they are certain and invariable. The implicit contrast is with *moralia*, those imprecise and circumstantially variable phenomena …"[99] Civil power is a moral faculty[100] and thus to be analysed with methods appropriate to moral entities, which Brett shows to be "resolutive" or empirical and a posteriori, moving from effects and phenomena to first principles. In resolutive reasoning, which is appropriate to political phenomena that create moral necessities (as well as positive legal phenomena that stem from human will), the effective reality of arrangements as exemplified in various historical

---

[96] Annabel Brett, "The Subject of Sovereignty: Law, Politics and Moral Reasoning In Hugo Grotius" (2019) 17 *Modern Intellectual History* 619-645.
[97] Grotius, *The Rights of War and Peace*, (n82), I.III.VI (257ff)
[98] Brett, "The Subject of Sovereignty" (n96) 624.
[99] ibid 629.
[100] Grotius, *The Rights of War and Peace* (n82) I.III.VI 257-258.

arrangements of civil power and sovereignty, must be taken into account in determining the possible "locations" and modalities of sovereign power.

An important implication of highlighting this feature of Grotius's method is to understand his refusal to define sovereign power as a particular *kind* of power with a necessary *location* in the polity, as a coherent approach to the characterization of sovereign power as a "moral thing" backstopped by natural legal principles which govern its formation, cognizability, extension, transfer and demise. Brett points out,

> Grotius was able to construct an interface between moral and legal science that allowed for a complex back-and-forth between the two kinds of reasoning … [T]he 'resolutive' approach that characterizes moral reasoning allowed him to take the effective reality of a political situation into account whilst still claiming to offer a legal rather than a political analysis.
>
> … Grotius [did not see] the 'universal' element of law-making as any more a sovereign activity than the 'particular' activities of deliberation or judgment. *Sovereign* power is just this tripartite civil power with *summitas* – highest-ness, subjection to none, layered on top (*addita summitate*).[101]

b. *Unity through Command and Subjection*

So what, then, is the nature of this moral thing, sovereign power, for Grotius? And in what sense is this a recognizable state theory? Grotius does not use the term sovereignty or *souveraineté*, although the term would have been available to him through the work of Bodin. But Grotius does use another term, also found in Bodin, to

[101] Brett, 'The Subject of Sovereignty,' (n96) 634 (footnote omitted).

identify the essence of sovereign power: *summum imperium*.[102] In Bodin's *Methodus*, *summum imperium* is defined not by incidents of power (specific rights such as deliberation and judgement, which can have different holders), but rather by a particular *type of rule*: a common rule that is final, public and supreme over other limited authorities, such as the authority of a father over a family.[103] An important corollary of *summum imperium* as common rule is *common subjection*, which in Bodin is the essence of the relationship of citizenship (*cive*).[104] *Supremacy* and *subordination* are two sides of the same coin of *summum imperium*, which unites more limited associations (villages, camps, and cities, in a city-state; peoples, in an empire) through its power of command.[105]

A critical feature of Grotius's discussion of *summum imperium*, or "the sovereignty," is its emphasis on this dyadic structure of supremacy and subordination as a necessary feature of sovereign power. Sovereign power in Grotius is a unity which obliges and coerces,[106] and has no will *superior to it* that may *subject it's will to another's*.[107] "The sovereignty" is a unity – a "moral thing" – that is in some sense an expression, manifestation or emanation of a real human community (whether a *civitas*, *respublica*, *regnum* or empire) characterized decisively by a *unity of wills* such that, at a minimum, a *general will* can be substituted for the particular will of an

---

[102] See Jean Bodin, *Method for Easy Comprehension of History* (Beatrice Reynolds (trs), Octagon Books 1945) 156, where "*summum imperium*" is rendered as sovereignty in English, and used interchangeably in the translation with supreme government, supreme authority and supreme power.
[103] ibid 157-158.
[104] ibid 158, 164, 166, 172
[105] ibid 168. "Then an alliance of diverse city-states, exchanges of goods, common rights, laws and religions do not make the same state, but union under the same authority does."
[106] Brett, "The Subject of Sovereignty," (n96) 636.
[107] Grotius, *Rights of War and Peace* (n102), I.III.VI 259.

individual within that community. Unlike the family, human communities with sovereign power are artificial,[108] not natural, but natural law validates their juridical features because the creation and maintenance of civil power enables humans to live cooperatively in society at a larger scale, and thus prosper to a greater extent:

> "[T]he lesser social units began to gather individuals together into one locality, … in order to fortify that universal society by a more dependable means of protection, and at the same time, with the purpose of bringing together under a more convenient arrangement the numerous different products of many persons' labour which are required for the uses of human life …
>
> … Accordingly, this smaller unit, formed by a general agreement for the sake of the common good – in other words, this considerable group sufficing for self-protection through mutual aid, and for equal acquisition of the necessities of life – is called a [respublica]; and the individuals making up the commonwealth are called [cives] … According to Cicero, Jupiter himself sanctioned the following precept, or law: All things salutary to the commonwealth are to be regarded as legitimate and just."[109]

This power to oblige and coerce for the common good and in the interests of the commonwealth is understood by Grotius as enacted through the substitution of particular wills and interests, by a supreme will which, ex hypothesi, manifests a general interest as it is an emanation of a unity. A unity is an identity, but also a set of

---

[108] "Human society does indeed have its origins in nature, but civil society as such is derived from deliberate design", Hugo Grotius, *Commentary on the Law of Prize and Booty* (Liberty Fund, van Ittersum ed., Williams trans. 2006 [1868/1604]) 137.

[109] Grotius, *Commentary on the Law of Prize and Booty* (n108), chapter 2, 36.

juridical equivalences,[110] that permits or requires the substitution or replacement of one thing by another, and this is the juridical logic of sovereign command:

> "in questions involving a comparison between the good of single individuals and the good of all (both of which can correctly be described as 'one's own,' since the term 'all' does in fact refer to a species of unit), the more general concept should take precedence on the ground that it includes the good of individuals as well. In other words the cargo cannot be saved unless the ship is preserved. …
>
> … Moreover, since it is the will involved that constitutes the measure of a good, … it follows that the will of the whole group prevails in regard to the common good, and even in regard to the will of individuals, in so far as the latter is subordinate to the former.[111]

The foundation of this subordination of individual wills to the will of the whole is consent (explicit) or acquiescence (tacit), with a resulting unity of wills that is generative of the force of law that may bind any particular will.[112] This jurisgenerative or jurispathic quality of a concrete human community is a marker of its of "highest-ness" or "subjection to none" – also referred to by Grotius as its "self-sufficient"[113] or *sui juris* character. There is an interesting homothetic property of human wills on this account: the *sui juris* nature of the individual will is precisely what allows its scalable aggregation to a unity of wills, which attains a *sui juris*

---

[110] ibid, Prolegomena, 28.
[111] Ibid, chapter 2, 38-39.
[112] Ibid 36, 40, 43.
[113] ibid 47, 97.

agency of its own: "one of the attributes of free will is the power to accommodate one's own will to that of another."[114]

The idea of the commonwealth as an artificial unity of wills that, internally, exercises a power of general command, and therefore can be perceived from without as a "whole entity"[115] (rather than a mere collection of individual wills) is critical to Grotius explanation of why the power to wage public war resides (as a matter of jus gentium and jus natural) in the respublica.[116] The "publicness" of the Dutch States General – and thus their right to use force (through the VOC) to wage public war against the Portuguese in the East Indies – was explained by Grotius by the States General's *capacity to command the allegiance and obedience* of inhabitants of Dutch territories (including the VOC):

> "For all persons within the territory in question have pledged allegiance by oath to that assembly [the States General], or else tacitly given adequate assurance, by making themselves part of the political community governed by the latter, of their intention to live in accordance with the customs of this community and to obey the magistrates recognized by it . …. Moreover, the States General should be obeyed by its subjects not only because the rule of this assembly is at present the accepted form of government, but also because its sovereignty is supported by common law. For the Dutch, and those who have formed a federation with the Dutch, owe no allegiance nowadays to any prince whatsoever."[117]

---

[114] ibid 40.
[115] ibid 97.
[116] ibid 96.
[117] Grotius, *Commentary on the Law of Prize and Booty* (n108), 409, 411.

In both *De Jure Praedae* and *De Jure Belli ac Pacis*, Grotius emphasizes the necessary relationship between *summum imperium* and subjecthood. In *De Jure Praedae*, he would lean heavily upon this relationship of supremacy and subordination in order to explicate the nature of public powers, and why wars *between* public powers could be just for subjects on both sides of the conflict. He explains that the power to wage war resides primarily in the *respublica*, which must be understood as something *sufficiens sibi et totum aliquod per se*.[118] A few lines later he reiterates that the power to wage war has always been rightfully exercised by *omnibus populus, qui sui fuerunt juris* and *inter duas liberas civitates*. "Peoples [populus] who lived *sui juris*" and "free peoples [liberas civitates]" were thus examples or instances of entities which are "self-sufficient for themselves and a whole be." As we have seen above, these defining qualities of public power (and thus to hold a *jus ad bellum*) are expressions of a unity of wills the essence of which is that an individual will is subject to a superior will that is, axiomatically, general rather than particular, and which has no superior to itself. To be *sufficiens sibi et totum aliquod per se*, is to bear the power and authority to unite particular human wills into a kind of group agency, which then stands apart from the mere aggregate of individual wills and has the capacity to act (and compel) *sui juris* vis-à-vis its constituent wills, and vis-à-vis other wills without it.[119]

In his explanation of why the subjects of two public powers at war may regard the war as just on both sides Grotius provides further clues to his understanding of the

[118] Hugo Grotius, *De jure praedae commentarius* (1604, HG Hamaker edition, Martinus Nijhoff 1868) 63.
[119] This group agency can be delegated to offices such as magistrates, who may, under specific constitutional arrangements, be "entrusted with a mandate for the waging of war." Grotius, *Commentary on the Law of Prize and Booty* (n108), 97.

nature of sovereign power and the status of *summum imperium*. A "subject", Grotius tells us in *De Jure Praedae*, are those who serve another as an instrument, and whose deeds are performed subject to the commands of others.[120] Slaves, and members of households under a *pater familias*, are examples of subjects. In *De Jure Belli*, Grotius maintains this characterization, noting that "even the Stoics acknowledge there is a kind of Servitude in Subjection" (Bk 1, 285) and that "in the Holy Writ the subjects of Kings are called their servants." Thus, "subjects subordinate to a given state [*subditis sub republica*] or magistrate occupy a position analogous to that occupied by children and slaves [*idem in filiis et servis*], who are subject respectively to the solemn *patria potestas* and to the power of the masters [*qui in sacris paternis aut dominica sunt potestate*]."[121] For this reason, a subject waging war commanded by a lawful superior will (the respublica or a constituted magistrate to whom authority to declare war has been delegated) must, subject to one proviso, obey such a command because "we have laid down the rule to the effect that 'The authorities must be obeyed'…"[122] Grotius, in referring to the rule established earlier in the text, Grotius returns the reader precisely to his demonstration in Chapter 2 that "the will of the whole" in the *respublica* becomes a command for the individual. For subjects, this superior will's law or command is "justice itself," and the subject does not act unjustly *even if* the effect of the command "constitutes a wrong in relation to the party against whom the war is directed."[123] Grotius here introduces a dualism of justice, as between the perspective of the subject subordinate to the will of the bearer of sovereign power –

---

[120] ibid 94, 95.
[121] Grotius, *De jure praedae commentaries* (Hamaker) (n118) 80; Grotius *Commentary on the Law of Prize and Booty* (n108) 120.
[122] Grotius *Commentary on the Law of Prize and Booty* (n108) 118; Grotius, *De jure praedae commentaries* (Hamaker) (n118) 78.
[123] Grotius *Commentary on the Law of Prize and Booty* (n108)122.

for whom the command of respublica is justice itself, – and the perspective of the *other* public power against whom war is possibly waged unjustly; injustice between public powers *inter se*, does not necessarily amount to an injustice by subjects of those powers who are bound to them in relations of obedience.

A striking implication of this argument is that the this-worldly obligation of obedience to the civil power is strongly conditioning – if not decisive – in the subject's own judgment as to the justness of a prescribed course of action. The substitution of the judgment of the public power on questions of justice for the conscience of the individual – and the concomitant privatization of morality and ethics relative to positive public justice – is one of the defining features of the modern state concept in both its liberal and non-liberal forms.[124] The key limitation which Grotius introduces on this conditioning presumption of the justness of the war commanded by the sovereign, is also telling in its modesty: a subject must obey *unless* his reason is "opposed thereto after weighing the probabilities."[125] Where the subject's "reason rebels" after the weighing the probabilities of obeying the command to go to war, she or he may be blameworthy if she or he does wage war. But Grotius makes it clear that the test of whether reason is opposed "after the weighing of probabilities" is a high one indeed: the judgment of the factual preconditions for the right to wage war is rarely conclusive, but rests on preliminary assumptions.

Magistrates and constituted authorities

[124] Reinhart Koselleck, *Critique and Crisis*: *Enlightenment and the pathogenesis of modern society* (MIT Press 1988); Hans Kelsen, *General Theory of Law and State* (Anders Wedberg (tr) Harvard University Press 1945); Max Weber, *Economy and Society: A new translation* (Keith Tribe (ed, tr), Harvard University Press 2019).
[125] Grotius *Commentary on the Law of Prize and Booty* (n126) Grotius *Commentary on the Law of Prize and Booty* (n108) 120, 121.

> have the support of the weightiest preliminary assumptions, partly because of the oath they customarily take, partly because of the general consent expressed by the state and the testimonial of confidence given by the citizens …
>
> [A]nyone holding a different opinion in regard to these officials would not only be charging the magistrates themselves with treachery but would also condemn a vast multitude of persons on a charge of folly … And when the magistrates hold that things justifying entry into war have befallen the citizens, why should not faith be placed in those authorities, as in persons who speak *the truth*?[126]

Notwithstanding the caveat, *dum ratio probabilis subditorum non repugnet*, to be subject to a superior sovereign will here entails a substitution of individual judgement concerning the justness of war, with the sovereign (or its agent's) judgment, and a high level of deference to that reasoning (essentially a form of reason of state) by the subject. Judgments of public justice by the holder of the *summum imperium*, and the legal obligations that go with them, are accorded strong presumptions of rightfulness and indeed Grotius proposes no actual example in which a subject's *ratio probabilis* might lead to a justified repudiation of the order to wage war. Not only is the place of natural reason profoundly constrained within the civil state, and thus the *epikeia* of "domestic" positive law and command is underlined, the argument seems to oblige a posture of very considerable "order bias" in the attitude of subjects towards sovereign decision. This "order bias" (or, bias towards the existing effective order) is a point of convergence with the conclusions of sceptical thinkers

[126] Grotius *Commentary on the Law of Prize and Booty* (n108).

such as Lipsius[127] and Sarpi, who raised strong doubts about the reliability of natural reason in individuals unless it was bounded by an authoritative order that could restrain the *publica mala* of strife and civil war. Grotius echoes these doubts in one of his several refutations of the claim that the Governed can be legally superior to the Governor because "all Government was ordained for the Sake of the Governed." We will consider Grotius's rejection of the necessity of popular sovereignty further below, but relevant to the point here is that one of his arguments against any necessary priority of the judgment of the Subject over the Sovereign, is an argument that emphasizes the practical need for an instance of final decision in civil order:

> I do not deny but that the Good of the Subject is the direct End proposed in the Establishment of most Civil Governments; and it is true … that Kings were constituted to administer Justice to the People. But it does not therefore follow … that the People are superior to the King. … [I]n Civil Government, because *there must be some dernier Resort*, it must be fixed either in one Person, or in an Assembly; whose Faults, *because they have no superior Judge*, GOD declares, that he takes Cognizance of … [my emphasis].[128]

A few pages later, when discussing the monarchomachic theory that there is a reciprocal dependence between King and People, "so that … the People ought to obey the King whilst he makes a good Use of his Power; but likewise, when he abuses it, he becomes in Turn dependent on the People", Grotius again betrays his concerns

---

[127] On the biographical connection between Lipsius and Grotius, see Jan Waszink, "Lipsius and Grotius: Tacitism" (2013) 39(2) *History of European Ideas* 151: "Grotius's father was a former pupil and close personal friend of Lipsius," and when in 1594 Grotius entered Leiden University (where Lipsius had taught until 1591), he became "a star pupil of Josephus Justus Scaliger (Lipsius's successor)." (153, 155).

[128] Grotius, *Rights of War and Peace* (n82) I.III.VIII.2 274.

about the disorder that can arise if sovereign judgements could be constantly doubted and second-guessed by non-sovereign agents:

> But the Goodness or Badness of an Action, especially in Civil Concerns, which are liable to frequent and intricate Discussions, *are not fit to distinguish those Limits* [of who bears sovereign power]; from whence would necessarily follow the utmost Confusion; because under Pretence that an Action appeared Good or Bad, the King and People would each, by Vertue of their Power, assume to themselves Cognizance of one and the same Thing; which Disorder, no Nation (as I know of) ever yet thought to introduce.[129]

A defining element of *summum imperium* – which like all moral Things must be reasoned about through consideration of its ends and its effects – is thus its characteristic of being a final and supreme instance of decision, *from the standpoint of its subjects*, concerning the Goodness or Badness of an Action (or use of public power, one could add). This supremacy relative to the judgment of individual or collective subjects is also *logically entailed* by Grotius definition of 'subject' as one whose particular will is subordinate to a general will that defines the general interest.

In his extensive rejection of the claim of a general right of resistance, Grotius makes clear his "order-thinking" in this respect: the "order of government"[130] requires a relationship of supremacy and subordination that is a necessary consequence of the ends of civil government. Civil society, "being instituted for Preservation of Peace" gives rise to a "superior right in the [civitas] over us and ours so far is necessary for that End." The aptness of this consequentialist logic flows of course from the moral nature of the Thing called civil power and *summum imperium*, as we have seen. But

[129] Grotius, *Rights of War and Peace* (n82) I.III.X 277.
[130] ibid I.IV.IV 347.

Grotius explicates this rational necessity through arguments that for their emphasis on the dyadic quality of supremacy and subordination. A "promiscuous right" to disobey a sovereign would defeat the ends of civil power and summum imperium by destroying the unity, and thus agency, of the civitas and rendering it a mere "multitude without union" (*dissociata multitudo*) or a "Mob where all are speakers, and no hearers" (*Confusa turba, nemo ubi audit neminem*).[131] The authority and dignity of a sovereign, be it a King or a civitas, is maintained by an order of laws and penalties; permissive disobedience to laws and penalties would destroy that authority and dignity,[132] and thus defeat the ends of civil peace. In this order, like in any Order, there must "something that is First" (ordinem non dari nisi cum relatione ad aliquid primum), and this in turn logically implies "*subordination*."[133] In his account of the nature of supremacy and subordination that characterizes the relationship of *summum imperium* to its subjects within a Civil government, Grotius's arguments lead to conclusions that are not far removed from those of Bodin or indeed Hobbes.

c. *The creation of* Summum Imperium.

Grotius's account of the origins of sovereign power are complex. As van Nifterik has recently pointed out, the contractualist account given in *De Jure Praedae*[134] does not exhaust Grotius's thinking on the matter.[135] The right to govern others (the right over

---

131 Grotius, *Rights of War and Peace* (n82) I.IV.II 339. Latin taken from Hugonis Grotii, *De iure belli ac pacis libri tres: in quibus jus naturae & gentium, item juris publici praecipua explicantur,* I.IV.II (1650 edition published by Apud Ioannem Blaeu).
132 Grotius, *Rights of War and Peace* (n82) I.IV.II 342.
133 ibid I.IV.VI, italics in translation.
134 Grotius *Commentary on the Law of Prize and Booty* (n108) 137.
135 Gustaaf van Nifterik, "A Reply to Grotius's Critics. On Constitutional Law" (2018) 39(1) *Grotiana* 77; Guus van Nifterik, "Sovereignty" in Randall Lesaffer

another) is one of two basic definitions of right contained in the early pages of *De Jure Belli*,[136] and examples given are that of a Father over his Children, or a Lord over his Slave. Both childhood and slavery are legal statuses validated by natural law, which entail forms of subjection to the will of another who holds the right to govern.[137] The relationship of supremacy and subordination is in some sense the essence of these statuses and the key to their natural legal modalities as necessary forms of authoritative ordering: submission by a servant to his master is "necessary, and Useful to Mankind"[138] and the same principle is the foundation for the duties of children to obey their parents, and the duty of subjects to rulers.[139] This right over others arises also in any human community that forms a society, according to Grotius; it is a *logical* moral necessity, flowing from the purpose of the emergence of such a collectivity. A civitas is one means of forming such a perfect society, which engenders this 'power to oblige' itself and its members. A "society" thus formed "constitutes a people"[140] and has a "power to oblige itself, either by itself or by its major part".[141] This power is coeval with, and comes into existence upon, the formation of that unity which is the Body of the People:[142]

> Now this Spirit or Constitution in the People, is a full and Compleat Association for a political life; *and the first and Immediate Effect of it is the Sovereign Power*, *the Bond that holds the [respublica] together, the Breath of*

---

and Janne Nijman, eds, *The Cambridge Companion to Hugo Grotius* (CUP, forthcoming 2021).

[136] Grotius, *Rights of War and Peace* (n82), I.I.V. 138.

[137] ibid, II.V.

[138] Grotius, *Rights of War and Peace* (n82), I.IV.IV 348.

[139] ibid.

[140] ibid II.IX.II.2 668.

[141] Grotius, *Rights of War and Peace* (n82), II.XIV.XI.2 812.

[142] See Van Nifterik's summation in "A Reply to Grotius's Critics" (n135) 81 (in line references omitted).

> *Life* …. For these artificial Bodies are like the natural. The natural Body continues to be still the same, tho' its Particles are perpetually upon an insensible flux and change, whilst the same form remains.[143]

Brett points out that this account of sovereign power is indebted to scholastic thought, which understood political power over a community as co-original with the emergence of the community itself: "an all-embracing power for the preservation and well-being [of the community] … [that] originates at the moment in the community as a whole. In order to be exercised effectively, however, it needs to be transferred … to a ruler or rulers"[144] who are concrete agents of the collective power engendered by the community.

Importantly for our purposes, the generation of that form of integrative social energy and authority through the emergence of a human collectivity – what Grotius calls the "Spirit or Constitution" that is part of the formation of the Body of the People - is not identical with the specific agency of rulership or even with the Form of the organization of rulership. The Spirit or Constitution is that which seems to define the limits of existence of the artificial body as an integrated unity; it need not be exclusive to one territorial centre, or even one singular type of concrete historical existence, but can change over time and develop and adapt itself *in history*, surviving even displacement en masse. [145]

The limit case of the extinction of a People – and thus of the condition of possibility of sovereign power – is reached "when the Body of the People is

---

[143] Grotius, *Rights of War and Peace* (n82) II.IX.III 666-67.
[144] Brett, "The Subject of Sovereignty" (n96) 637. Indeed, it is clearly evident in Vitoria's relection on Civil Power: Francisco de Vitoria, *Political Writings* (Anthony Pagden and Jeremy Lawrance (eds), CUP 1991).
[145] Grotius, *Rights of War and Peace* (n82) II.IX.III, 668

destroyed, or when the Form or Spirit (which I mentioned) is intirely gone."[146] The Body of the people is destroyed when "all its Members … are at once destroyed; or when its Frame and Constitution is dissolved and broken."[147] The destruction of the Body of the People is thus either physical extinction en masse (for example, by volcanic eruption) or a complete fragmentation and dissipation of the unity of persons ("the frame and constitution of the body") making up the Body of the people, by their own decision, by disease, or by force.[148] The destruction of the "Form or Spirit" of the People takes place when the unity-maintaining structure of public right for those people is so eviscerated that, "tho' they retain their personal Liberty, they are utterly deprived of the Right of Sovereignty …" and become a "dependent multitude" – a collection of individual wills no longer capable of generating the unifying agency of a sovereign (general) will because of the destruction of all will-forming institutions. By contrast, a People may retain their "People-ness" (and thus their sovereign power-generative potential) even if they "only leave the Place [in which they lived as a people], either of their own Accord, through Famine, or any other Misfortune, or by Compulsion … if the Form, I mentioned, continue, they do not cease to be a People, much less if only the Walls of the City be thrown down."[149]

A corollary of this internal relationship between "people-ness," its physical existence and "togetherness" (Frame/Constitution), and its common purpose of public peace and order, instituted through organs of public right, is that a wide range of human collectivities can also become Peoples with sovereign power-generative potential, and remain so even if they commit "some Acts of Injustice, even by public

[146] ibid 669.
[147] ibid.
[148] ibid 670.
[149] Grotius, *Rights of War and Peace* (n82) II.IX.VII 671.

Deliberation … A sick Body is yet a Body. And a State [*civitas*], however distempered, is still a State [*civitas*], as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights".[150] Thus, a People which commits robbery outside its bounds, and which is "abounding in Robbers" is "yet a Nation [*latrociniis foecunda gens, sed gens tamen*]."[151] Grotius goes on to explain, by way of example, that "Robbers and Pirates," although initially united for common criminal purpose ("confederated only to a Mischief"/*sceleris causa coeunt*), could over time "become a Civil Society. … [citing St Augustine] *If this Mischief by a great concourse of desperate Men should grow so great, that they should seize on certain Places, settle themselves in them, take Cities, and subdue Nations*, *it then assumes the Title of a Kingdom*."[152] Human communities, however predatory their origins, can form into a Peoples with sovereign power, even if they govern poorly or viciously. The origins of a civil government in a common criminal purpose, such as Band of Robbers, does not disqualify it from becoming a public power with sovereign rights, provided the human collectivity develops a common purpose beyond that of doing "Mischief," and creates a mode of rulership over places and persons that is not exclusively a criminal enterprise.

The unity of wills characteristic of sovereign power can, in Grotius's account, also be produced through the submission of multiple wills to one will, rather than exclusively through the formation of a human collectivity joining together for a common purpose of civil peace. This unity of wills he refers to as "despotic Power"[153], in comparison to "civil government" generated through a *societas* or

---

[150] Grotius, *Rights of War and Peace* (n82) III.III.II.2 1249.
[151] ibid 1251.
[152] ibid.
[153] Grotius, *Rights of War and Peace* (n82) III.VIII.II 1377.

consociatio. Under despotic government, People are no longer a *civitas* or *respublica*, but a "multitude of slaves," and Sovereign power and all the rights it entails, are exercised in the interests of the Governor. While this may be a form of Government that Grotius considers suboptimal, it is nonetheless a lawful mode of existence of Sovereign Power – one in which the King is at once the Head and the Body of the People, uniting both aspects of sovereignty qua integrative force and sovereignty qua rightful coercion. It is a mode which occurs *in history*, through the Conquest of one People, or of a territory inhabited by a disunited multitude (perhaps a former People that has lost its "frame and constitution"), by another Sovereign. In such a circumstance, the Governor's (whether a King or another People such as the Romans) will *is* the unity that is the *sine qua non* for the sovereign power, and it achieves this through the particular conditions under which conquest is effected:

> "Sometimes the Situation of Publick Affairs is such, that the [*civitas*] seems to be undone without remedy, unless the People submit to the absolute Government of a single Person… But now as Property, or Rights of Goods of an enemy may be acquired by a lawful War … so may also Civil Dominion, or an absolute Right to command and govern the Enemy."[154]

In some circumstances the conqueror may leave the *jus civitates* in place, or annul it completely and thus destroy the Form or Spirit of the People, depriving them of civil government.[155] But despite having turned a People into a "multitude of slaves," sovereign power and sovereign right are in the Governor. The upward absorption of

---

[154] Grotius *Commentary on the Law of Prize and Booty* (n108) 264-265. Similarly, a few pages (262) earlier Grotius writes: "There may be many Causes why a People should renounce all Sovereignty in themselves, and yield it to another: As when they are upon the Brink of Ruin, and they can find no other Means to save themselves; or being in great Want, they cannot otherwise be supported."
[155] Grotius, *Rights of War and Peace* (n82) III.VIII.IV, 1379.

sovereign power and acquisition of sovereign right through conquest constitutes, for Grotius, a clear counter-example to the monarchomachic claim that there is always "a reciprocal dependence between the King and People".[156] While the "generality of Kings enjoy the sovereign power by a usufructuary right",[157] some Kings can hold sovereign power "by a Full Right of Property"[158] because they have "acquired the sovereignty by Conquest, or those to whom a people, in order to prevent greater Mischief, have submitted without Conditions".[159] What seems to maintain the integrative force of sovereign power here is, not dissimilar to Hobbes, submission to a unifying will out of a fear of some worse alternative to despotic rule, such as disorder or civil war.[160]

d. The organization of sovereign power

Grasping sovereign power as the natural-legal emanation of the unity of wills that is produced *historically* – through the formation of human collectivities with civil peace as their objective, or through submission to a conqueror or to a singular despotic will as an alternative to disorder[161] - allows us a vantage point on series of paired

---

[156] Ibid I.III.IX 276.
[157] ibid 279.
[158] ibid I.III.X 280.
[159] ibid. As Barducci shows in his fascinating study of the reception of Grotius's work during the English Civil War, *both* monarchists and anti-monarchists relied upon Grotius to maintain the legality of obliging obedience to a government that had achieved power through victory (conquest) in a (civil) war. Marco Barducci, *Hugo Grotius and the Century of Revolution 1613-1718 : transnational reception in English political thought* (OUP 2017) 39.
[160] Indeed, Grotius is sanguine about the results of such submission: "The examples of other Nations, who for many ages, lived happily under an arbitrary government, may have influenced some." (Grotius, *Rights of War and Peace* (n82) I.III.VIII, 264).
[161] Thereby also creating civil peace, albeit under arbitrary or despotic government.

contrasting terms that Grotius utilizes in his account of sovereignty: between the Common and Proper subject of sovereignty; between the Thing Itself (Sovereignty) and the Manner of Holding it, and; between sovereign power (the Sovereignty) and the Rights of Sovereignty. The first of each of these terms in this triptych, corresponds to that generative social force which originates in the unity of wills – "the Bond that holds the [*respublica*] together, the Breath of Life which so many thousands breathe" (*vinculum per quod respublica cohaeret, spiritus vitalis quem tot millia trahunt..*).[162] This "moral thing" as we have seen, is cognizable in natural law and is attributed important legal qualities (eg. personhood) and rights (foremost among them being the right to rule, the right to judge and punish and the right of war).

The second of each of these pairs reflects Grotius's consistent juristic treatment of sovereignty as *always also necessarily* a *legal* phenomenon with variable legal forms and modes of effectivity, which emerge as a result of the particular historical conditions under which sovereign power *qua* cohering social force comes into being and is organized into an effective system of rule over a territory and its inhabitants. It begins with the basic premise that, like any Thing, corporeal or incorporeal, in Roman law, law recognizes the distinction between the Thing itself (*Aliud esse de re quaere*) and the Mode of Holding it (*aliud de modo habendi*). The underlying *res* of sovereign power must be organized within extant natural legal relationships before it can be an active and effective mode of rule; as we have seen, sovereignty is not *ab origine* in the *dominium* of the People, but is a potentia co-original with their emergence. This is the sense in which the People are the "common subject" of sovereignty.[163] Sovereign power becomes a mode of rulership once "the

[162] Grotius, Grotius, *Rights of War and Peace* (n82) II.IX.III, 666.
[163] See generally Brett, "The Subject of Sovereignty" (n96).

manner of holding" it is resolved, and the "Proper" subject of sovereignty is identified as the holder of the *Rights* of sovereignty. Moving within the Roman legal modalities of rights in and over things, Grotius identifies three possible legal relationships that could characterize the Proper subject's "Manner of Holding" sovereign power: "these [incorporeal Things (*incorporalibus*), such as sovereign power] some have by a full Right of Property (*jure pleno proprietatis*), some by a usufructuary right (*jure usufructuario*) and others by temporary right (*jure temporario*)."[164] "Free peoples" (populi liberi, viz. one which has never been subject to conquest) and "a King that is really so" (*regis qui vere rex sit*) are equally capable *in law* of holding the rights of sovereignty by the full right of property (ie. as full dominium); whether and how they do so, depends on the historical circumstances under which the free people or king came to acquire these rights – whether by conquest (or never having been conquered), cession, or agreement (tacit or explicit). "Real" sovereignty is always organized through legal arrangements reflecting the actual historical conditions of the establishment of the modality of rulership for that people and territory; it need not "revert" to one source or be necessarily concentrated in one subject perpetually.

Grotius's rejection of any monistic "subject," "location" or "manner of holding" sovereign power is what has led most frequently to claims concerning the 'non-modern' or inchoate character of his state theory. For example, Gierke characterizes Grotius's approach as a failed attempt to reconcile two competing accounts of sovereignty – Ruler Sovereignty versus Popular Sovereignty – available to him from 16th century controversies concerning the true foundation and nature of sovereign power. Gierke complains that, with his dual subject theory and his elaborate examples of the many different possible relationships between them, Grotius "fails to

[164] Grotius, *Rights of War and Peace* (n82) I.III.IX 279.

attain a true conception of the single personality of the State … Refusing to recognize a real sovereignty of the People as always and everywhere present … he was condemned to see his doctrine of the State inevitably dwindling into an empty shadow."[165] This, it seems to me, is also the essence of Tuck's claim for the modernity of Bodin and Hobbes, as against the "neo-medievalism" of Grotius. But Gierke's reading is more careful when he notes in frustration that further evidence of Grotius lack of a real theory of the state is found in Grotius's constant demonstration of the contingency of so much of the legal organization and allocation of the rights of sovereignty: "whether any of these possibilities [of the legal organization of the rights of sovereignty] is actually realized *is made to depend entirely on the way in which the fortunes of the original sovereignty of the People have been affected by the accident of a particular method of acquiring Ruling power*."[166] This objection would possibly be sound if we equate a "real" theory of state sovereignty with a Bodinian or Rousseauian account, monistic and organ-sovereigntist. The complaint misses its mark, however, if we see Grotius as having understood – and pointedly criticized – such an account as mistaking the difference between what is legally necessary in the creation and organization sovereign power, and what is simply preferable from the point of view convenience; in that case, it is not that Grotius failed to choose between popular sovereignty and ruler sovereignty as the "true" nature of the state, but that he believed such a choice was was unnecessary to give an account of the essence of sovereign power and sovereign right.[167]

---

[165] Otto von Gierke, *Natural law and the theory of society 1500 to 1800* (Ernest Barker (tr, ed), with a lecture on The ideas of natural law and humanity, by Ernst Troeltsch, CUP 1934) 55-56.
[166] ibid 57.
[167] Charles Merriam, writing in 1900, and perhaps in light of the American federal experience, has no qualms about understanding Grotius's theory as "close

Grotius expressly distinguishes his method from Bodin's by differentiating the "Art of Politicks" from "the invariable rules of Justice."[168] The former, he argues, give rules about what may be profitable or advantageous, and should not be confused with the latter, which aim to determine what natural law permits and requires. "Good Policy" may be consistent with what law permits, but is a different kind of reasoning that should not be confused with juridical possibility. The juridical question in relation to the organization of sovereignty is not whether "by the ideas that such or such a person may form of what is best [least inconvenient], but by the will of him that conferred that Right."[169] An artificial Thing created through human wills, such as sovereign power, can be seen simultaneously in the perspective of "*juris atque imperii"* (rights and sovereignty) by the Jurisconsultus, and at the same time in the perspective of relations between governor and governer (*relatio partium inter se earum quae regunt, & quae reguntur*) by the Politicus.[170] In Grotius's inquiry into the nature of *summum imperium*, and the modes of creating and organizing it, answering the juristic question revolves around discerning the true legal nature of the Right evinced in the governing arrangements of historically exemplary political communities – the Romans, the Ancient Greeks, the Persians, the Ancient Israelites etc. The real mode of existence of a given political community at a particular point in its history – and thus the possibilities of political organization to be inferred as

---

to the idea of State sovereignty" because "one may say, consequently, that the State as a whole [referring to the body politic or civitas] is sovereign, or that the special organ, the Government, is sovereign." Charles E Merriam, *History of the Theory of Sovereignty Since Rousseau* (Columbia University Press 1900, reprinted Batoche Books 2001) 11.

[168] Grotius, *Rights of War and Peace* (n82), Preliminary Discourse, 131.

[169] ibid I.III.XVII 307.

[170] Hugonis Grotii, *De iure belli ac pacis libri tres: in quibus jus naturae & gentium, item juris publici praecipua explicantur,* II.IX.VIII.2.

available in the natural legal order - is to be understood not by theories of the *best* political form or formal legal claims and titles ("the Shew of outward Things") but by an inquiry into the real legal nature of powers authorized and exercised,[171] and by whom: "For the Nature of moral Things is known by their Operations, wherefore those Powers, which have the same Effects, should be called by the same Name."[172] In another implicit criticism of Bodin for his failure to differentiate Politics and Jurisprudence as methods, Grotius maintains that the Roman Dictator – a magistrate with plenary but temporary sovereign powers – was properly understood as Sovereign for so long as he held the commission. Bodin had denied the sovereign nature of the Dictator because the Dictator's commission was limited in time, and not perpetual as Bodin considered essential to sovereign power. But Grotius insisted that real legal substance of the power wielded by the Dictator was equal to that of a sovereign, because "during the whole Time of his Office, [he] exercised all the Acts of civil Government with as much Authority as the most absolute King; and nothing he had done could be annulled by any other Power. *And the Continuance of a Thing alters not the Nature of it.*"[173]

Grotius riposte to Bodin, that what is *necessary* for Moral Things such as the juridical nature of sovereign power is to not be confused with what may be good policy or desirable in the organization of such a power, is crucial to his fundamental distinction between "the Thing itself and the Manner of enjoying it,"[174] and his equally significant distinction between the "sovereign power itself" and the "Right[s]

---

[171] Or, as Brett puts it "Grotius was able to craft a kind of jurisprudence that could accommodate the reality of power in a political community without collapsing into reason of state … It is precisely his conception of "morals" that allows him this position." Brett, "The Subject of Sovereignty" (n96) 640.
[172] Grotius, *Rights of War and Peace* (n82) I.III.XI.
[173] Grotius, *Rights of War and Peace* (n82) I.III.XI 283-284.
[174] ibid, I.III.IX, 279.

of sovereignty." Grotius might well (but never did) concede that the indivisibility of sovereign power in one organ, People or Ruler (viz. the unification of the Thing itself and the Manner of holding it) was good policy or reduces certain inconveniences, but he would maintain that this should not be confused with whether such monism is *necessary* in natural law. For him, such a monistic approach is not required by the laws that govern artificial Things, and indeed what such laws show is a great deal of historical variability and flexibility between the *generation* of sovereign power ("the sovereignty" or "sovereignty itself" or "the Thing itself"), and its *legal and political organization* ("the Right of Sovereignty") in any given historical polity. This crucial move in Grotius's state theory is in many ways the key to its coherence, and to making sense of its various dialectical rejections of other contemporary theories and claims about the nature of sovereignty, civil power and the 'state'.

The consequence of this set of distinctions, between the common and proper subject of sovereignty, between the Thing itself and the manner of holding it, and between sovereign power and the Rights of sovereignty, is a powerful legal-analytical matrix through which to categorize, and grasp the legal consequences of, a large variety of historical possibilities in the modes of rulership and their constitutional structure.[175] Both Kings and People, as pure types of rulership, can in theory within this framework, hold sovereign power as a full right of property (*pleno proprietatis*). As we have seen, a king might acquire such patrimonial rights over a territory and human collectivity through conquest, or through a moment in which a People

[175] As Brett puts it in "The Subject of Sovereignty", "running sovereignty through the matrix of rights in this way gave Grotius huge analytic power in addressing the contemporary state of Europe, because the extreme contingency inherent in 'perfect' rights allowed for its complicated history." Brett, "The Subject of Sovereignty" (n96), 639.

alienates all power to him completely and for all time in order to protect themselves from worse outcomes; but equally, a free People, through its organs of rulership, come to acquire over *other* peoples a right of sovereignty in a similar manner.[176] Where the rights of sovereignty are held in the Full right of property over a place and its inhabitants, these rights can be alienated to another King or People without consulting the inhabitants, and also passed on by succession without their consent. But as noted above, Grotius believes that most kings at the time he wrote held sovereign power not by full right of property (and thus, were not "Kings properly so-called), but by "an usufructuary right".[177] As Nifterik points out, a usufructuary right here is not a *precarious* or *temporary* right.[178] The key difference between a right *pleno proprietatis* and a right *usufructuario* is in its alienability: a Thing held by usufructuary right cannot be transferred solely by the will of the user, even if the use rights are otherwise as absolute as an owner. Thus, Grotius maintains that a King who holds sovereign power in the manner of a usufruct, might well rule absolutely but cannot pass his kingship through succession and cannot alienate parts of the public domain without the consent of the People.

Grotius's analytic also allows him to accommodate scenarios in which diverse Peoples have the same Head (ruler/proper subject of sovereignty), who may exercise different bundles of the Rights of Sovereignty vis-à-vis each Peoples,[179] depending on how those Peoples came to be integrated into that relationship of rulership. Some,

---

[176] "There were also some People that have other people under them, who are no less subject to them than if they were under Kings." Grotius, *Rights of War and Peace* (n82) I.III.XII, 288-290.
[177] Grotius, *Rights of War and Peace* (n82) I.III.X-XII, 280, 296.
[178] Guus van Nifterik, "Sovereignty" in Randall Lesaffer and Janne Nijman, eds, *The Cambridge Companion to Hugo Grotius* (CUP, forthcoming 2021).
[179] Grotius, *Rights of War and Peace* (n82) I.III.VIII 260-261.

being conquered, could be subjects of the sovereignty held pleno proprietatis by the ruler, even as that ruler holds only jure usufructario vis-à-vis another peoples.[180] Moreover, depending on how history unfolds, legal rights may change their complexion if new factual realities are jurisgenerative and give rise to rights cognizable in natural law:

> *What is originally invalid, can never be made valid by a retroactive Effect;* yet does it admit of this Exception, *unless some new Cause, capable of itself to create a Right, shall intervene.* Thus, the true and undoubted Sovereign of any People may lose the Sovereignty, and become dependent on the people; and on the contrary, he who was only Chief of the State, may become King or true Sovereign; and that Supreme Power which was lodged before entirely either in People or the Prince, maybe divided between them.[181]

The specific constitutional arrangements in the organization and distribution of sovereign rights can therefore be highly variable, and precise *juridical answers* to how the rights of sovereignty are held in a particular place and time require an inquiry into the circumstances of the creation of those arrangements and whether promises or conditions were attached to the holder of sovereign rights, such that the exercise of those rights became void or countermandable under *natural* law in the event of a

---

[180] As Simpson has pointed out, this flexibility is highly serviceable to creating and maintaining differentiated legal frameworks for colonization: Emile Simpson, "States and Patrimonial Kingdoms: Hugo Grotius's Account of Sovereign Entities in *The Rights of War and Peace*" (2018) 39 *Grotiana* 45-76. This is correct, but it seems to me that Grotius's first concern here is giving an account of how an Philip II of Spain and Portugal can be king and sovereign *pleno proprietatis* over some parts of his empire, but merely a usufructuary or temporary prince in another, such as in the Netherlands, where Grotius's claim was that Philip II held the status of Count of Holland only subject to stringent conditions.

[181] Grotius, *Rights of War and Peace* (n82) II.IV.XI 500.

breach of those conditions. Hence, Grotius finds no contradiction between the idea of sovereign power as founded in a unity of wills with no superior (in the sense of a generative force inherent in a community answering to no other), and the possibility of a dividing and tailoring of the rights of sovereignty (viz. the manner of holding) among different proper subjects. :

> … Though the sovereign Power be but one, and of itself undivided, consisting of those Parts above mentioned, with the Addition of Supremacy, that is *accountable to none,* yet it sometimes happens, that it is divided, either into *subjective Parts,* as they are called, or *potential; (that is, either amongst several Persons, who possess it jointly; or into several Parts, whereof one is in the Hands of one Person, and another in the Hands of another). …* So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction. This however does not take place, (as I have shewed already) as often as the King is obliged by some Promise; but only then, when either the Partition is expressly made, (of which also we have treated above) or when the People being (as yet) free, shall require certain Things of the King, whom they are chusing, by way of a perpetual Ordinance; or if any Thing be added, whereby it is implied, that the King may be compelled or punished. For every Ordinance flows from a Superior, at least in Regard to what is ordered. And Compulsion is not always indeed an Act of a Superior, for naturally every Man has Power to compel his Debtor; but it is repugnant to the State of an Inferior; therefore from Compulsion there at least follows an Equality, and consequently a Division of the sovereign Power. [182]

[182] Grotius, *Rights of War and Peace* (n82) I.III.XVII 305-307.

A great deal of work is ultimately done by the distinctions between sovereign power and rights of sovereignty, and between the Thing itself and the Manner of holding it. It accommodates a wide spectrum of forms of rulership, with varying degrees of civil freedom and unfreedom; it demands a deeply historical understanding of what natural right authorizes in terms of ruling arrangements in particular polities, and ultimately makes all questions of a right of resistance *specifically historical* questions of whether a given power has been exercised on terms that breach the conditions under which it was given, and also whether there might be some other constituted power or organ of rulership that could lawfully – under natural law – hold the right to enforce this condition.[183] The "real" place of sovereign power, and who or what might wield that power against constituted authorities, can be determinedly only by an historical inquiry rather than through axiomatic or universalistic claims about who or what is necessarily sovereign.

Grotius's historical-legal casuistry concerning the organization of sovereign power in the state can be understood as a decisive intervention in – and critical deflation of – the bitter legal and political controversy concerning which person or *corpus* was the true and proper *dominus* of a place and its inhabitants. As Lee (2016) has shown vividly, at stake in this dispute was which agent - Kings or Peoples - could claim that public powers were "proper" and "exclusive" to themselves, even if these powers were delegated to other agents to exercise. Lee notes that, in the context of the wars of religion and the fracturing of European political orders that unfolds over the 17th century, both royalist Humanists and anti-royalist Monarchomachs shared a concern with identifying where true dominium lay, and thus who might be claimed to

[183] Van Nifterik, "A Reply to Grotius's Critics." (n154) 85. See in particular Grotius, *Rights of War and Peace* (n82) I.IV.

rightfully authorize and decide the powers and jurisdiction of constituted offices.[184] Grotius's theory denies the necessity of any such categorical and essential allocation of the final place of sovereign power, and permits Kings or Peoples to claim this legal authority, depending on history. Thus he strenuously rejects the view of those "who will have the Supreme Power to be always, and without exception, in the People; so that they may restrain or punish their Kings, as often as they abuse their Power."[185] Likewise, there is there is no essential or necessary relationship of superiority between the constituting Power and the constituted[186] – this depends entirely on the terms under which a People may have authorized the rulership of the King. It may not even be claimed, according to Grotius, that all Government is Ordained for the sake of the Governed, for some kinds of rule benefit the Governor (such as Kingdoms acquired by conquest);[187] once again, it depends on the specific circumstances under which the modality of ruling has been created over a given place and its inhabitants.

IV. Conclusion – Modern or Post-Modern Sovereignty?

I have argued above that the Grotius's account of the state is modern in all its essential elements. It diverges from Bodin's and Hobbes's in its emphasis on the historical particularity through which a given human collectivity creates and legally organizes sovereign power. Sovereign power is a unity, but the essence of that unity is

---

[184] Royalists such as Dumoulin sought to show that Kings were "a kind of *dominus* with a *plenissima iurisdictio* over the kingdom" (Lee, *Popular Sovereignty* (n107) 115) while the Monarchomachs – also "direct heirs of the humanist analysis of jurisdictional authority" (at 157) – maintained that "all public powers of the realm, even those of the monarch … are always 'proper' and 'exclusive' to the people as a whole, just as if they are, corporately, a *dominus*." (at 156-7).

[185] Grotius, *Rights of War and Peace* (n82) I.III.VIII 261.

[186] Grotius, *Rights of War and Peace* (n82) I.III.VIII 272.

[187] ibid 273. See also Grotius's rejection of the theory of mutual dependence of Kings and Subjects, discussed above.

a composite relationship of laws, institutions and people. In *The Antiquity of the Batavian Republic*, Grotius recounts that:

> A state [*civitas*] continues to exist most of all because it *has* existed … *Prince* and *States* do not mean the same thing everywhere… In some place sovereignty is held by one, and advice given by many; and in some places the laws are subordinate to the prince, and in others the prince to the laws …
>
> A constitution does not immediately become a different one if the names and functions of the magistrates change, as long as *the main force of the government and the supreme power and the mind … moves and binds the whole* remains the same.[188]
>
> For very true is the saying of the ancients, that a state is preserved in tact, as long as there is strong unanimity within it, but it will fall apart, when this harmony is broken.[189]

The "unanimity" and "harmony" of the legal and political order – and its identity – inheres in this historically-produced "force" that "moves and binds the whole".

Skinner has recently argued that the most "medieval" aspect of Grotius's state theory is his dependence on an essentially Bartolist conception of the body of the People.[190] The Bartolist theory of the city states (*civitates*), as a species of *universitates*, accorded them a separate representative personality and recognized some of them (famously) as *sibi princeps* with *merum imperium*.[191] But Skinner points out that this Bartolist theory did not have a distinct theory of the *persona civitatis*, the person of the state, but rather of the *persona populi* (the corporate person of the People).[192] As such it fell back on to an idea of the people as a pre-existing

---

[188] Grotius, *Antiquity* (n70) 5-6.
[189] ibid 95.
[190] Skinner, *From Humanism to Hobbes* (n20), chapter 2.
[191] Woolf, *Bartolus of Sassoferato* (n46), chapter 2.3; Canning, *Ideas of Power in the Late Middle Ages* (n73), chapter 1 and 5; Canning, *The Political Thought of Baldus de Ubaldis* (n73); Lee, *Popular Sovereignty* (n87), chapter 2.
[192] Skinner, *From Humanism to Hobbes* (n20) 41.

unity, a unified and corporate group somehow capable of "such a unitary legal act as contracting and hence consenting to government."[193] It is precisely this idea of a pre-formed corporate whole - "free and natural communities in which the *universitas* or body of the people possessed sovereign power"[194] – that is placed in doubt by the sectarian and anti-monarchical civil wars of 17th century Europe, and which leads Hobbes to conclude that there is simply no such thing as the body of the people as a pre-given unity.[195]

As is well-known, Grotius's concept of the state of nature retains not only a thick juridical structure, but is also one in which human sociability and our inclination towards this-worldly peace leads us form human collectivities on a larger and larger scale.[196] One terminus ad quem of such a development is the *civitas*, which could be at the scale of a city-state (Athens, Sparta, Venice), or a much more extensive territorial formation such as the Roman Republic or the Batavian Republic. In such political orders, which are exemplary ones for Grotius, the Body of the People is a free community capable of forming the unified will necessary to alienate the right to rule, with or without conditions and partitions, to an agent of rulership; in this sense, Skinner seems to me to be correct in that there is in Grotius a kind of *historical archetype* of the Body of the People which is the common subject of sovereignty.[197] But as we have also seen, Grotius's account of the origin of sovereign power and of its organization into a structure of rulership, is by no means limited to circumstances

---

[193] ibid 200.
[194] ibid 211.
[195] ibid 211.
[196] See generally Straumann, *Roman Law in the State of Nature* (n64), chapters 4 and 6.
[197] "Grotius and Gentilis and Bodin do not merely quote Bartolus, but are what they are largely because of him." John Neville Figgis, "Bartolus and the Development of European Political Ideas," (1905) 19 *Transactions of the Royal Historical Society* 147, 147.

where there is a strongly unified Body of the People capable expressing its will *uno actu*. The "people-ness" of a People is co-extensive with its legal and political organization (found not only in its Spirit but also in its "frame and constitution," and in its organs of public right). The unity of the People capable of engendering *summum imperium* is not presupposed, but rather is a potential within human collectivities (even those initially founded for a criminal purpose, as we saw above) that come to live together for the purposes of civil peace and prosperity. While the categories of Kings and Free Peoples, as pure types of sovereign political order, are resolutely Bartolist, Grotius's historico-juridical treatment of sovereign power and its organization leaves us with an open-textured account of human communities as amenable to different kinds of unification, before and after the genesis of sovereign power. There is a kind of dialectical back and forth between a factual and a juridical unity.

It is in this sense that we can agree with Tuck when he concludes that for Grotius, "a people as a sovereign entity … has in general no capacity to exercise sovereign power …"[198] The people are not a demiurge of sovereign decision, even if in some fundamental sense sovereign power is always a product of a concrete human collectivity. But there is nothing essentially medieval about this; rather, it reflects a different strand of modern thinking about the state, law and sovereign power – a distinctive way of trying to address the "problem-situation" of modern statehood, namely the factual and normative foundations of its supremacy and comprehensive authority over a territory and its inhabitants. Grotius's casuistry of history, reason and law, is a self-conscious alternative to Bodin's account. Bodin (and his admirer Richard Tuck) attribute to sovereign power a perpetual monistic substance, a quality

[198] Tuck, *The Sleeping Sovereign* (n2) 85.

which makes it quasi-transcendental but which can never really account for its concrete emergence and maintenance: it becomes an axiom of thought,[199] a fictitious presupposition which leads to one of the conceptual cul de sacs of modern state theory: the problem of who or what is the real source of this power. Grotius's partitioned account of sovereign power – distinguishing between the thing and the manner of holding it – defers the problem of singular organs of perpetual power to a historical background condition which largely *stays in the background* while the continuity and juridical unity of that specific human community is not irrevocably shattered. In this way, Grotius's approach is not only modern but perhaps even startlingly so – prefiguring the increasing in interest in "post-sovereign" polity-making that has been a salient feature of the last thirty years of constitutional reform and renovation, especially in territories riven by deep conflict or transitioning from dictatorship.[200]

As an account of the foundations of the legal and political order of the state, organ sovereignty (and its monistic corollary) is as performative as any other state theory in the sense described at the beginning of this paper – it not only stakes a claim to describe the nature of such power, but also intimates routes towards its realization, "*in order to be more successful in making it exist in reality*."[201] For this reason, modern state theory has almost always had a technical or instrumental aspect

---

[199] Emblematic of Vaihinger's "as if" thinking – see Hans Vaihinger, *The philosophy of "As if" : a system of the theoretical, practical and religious fictions of mankind* (Charles Kay Ogden (tr), Kegan Paul, Trench, Tubner and Co 1924) 33-54.

[200] See Andrew Arato, *Post Sovereign Constitution Making: Learning and Legitimacy* (OUP 2016).

[201] Foucault (n30).

concerned with *making and preserving* the state[202] before or in the wake of changes of state brought about by civil conflict, war, grave political turmoil or reconstruction. But identifying sovereign power with a single individual or group agent (such as the unitary Sovereign People) which wills and decides, and thus is always necessarily outside or beyond all legal organization, encounters well-known difficulties. Arendt famously argued that the pure popular sovereign as order-giving power and authority, attempted to place the figure of the People in the empty conceptual seat of the sacerdotal king.[203] Stripped of the inherited authority of positive and customary law, attempts to refound and maintain a political order through any given organ claiming to represent the People, proved both short-lived ("built on sand" in Arendt's words) and susceptible to radical extra-legal violence.[204] But an alternative emplacement of the People as a final instance of plebiscitary approbation, as in Carl Schmitt's theory, leaves the people formless and amorphous.[205] Such a people, while notionally capable of a final yes/no decision on the form and substance of political order, "cannot advise, deliberate, discuss, rule, administer, norm … or even choose the questions for organized referenda to which a yes/no answer can indeed be given."[206]

These antinomies of the People as singular organ of sovereign power are summarized powerfully by Arato:

> As an actor, the people are fictional, unless they are defined in legal terms as the collectivity of citizens or the electorate in which case they become an entity produced by law, rather than

---

[202] Carl Schmitt, *Dictatorship. From the Origin of the Modern Concept of Sovereignty to Proletarian Class Struggle* (1921, Michael Hoelzl and Graham Ward (trs), Polity Press 2014), chapter 1, p.6-7.
[203] Hannah Arendt, *On Revolution* (Faber and Faber 1963) 200ff.
[204] ibid.
[205] Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer (ed, tr), Duke University Press 2008) 129.
[206] Arato, *Post Sovereign Constitution Making* (n200) 25.

> the ultimate source of law. The theory of imputation, according to which the unified as a collective origin can be ascribed to constitutions as long as they make the claim of acting *as* or in the name of *the* people … is also a myth, a liberal myth. … [It] is difficult to admit, at least normatively, the need for mythical group constructs … Yet exactly such lack of sociological identity characterized the concept of the people, from the very moment of the invention of popular sovereignty.[207]

Arato goes on to observe that late 19th and 20th century state theorists such as Carré de Malberg and legal theorists such as Hauriou, challenged the classical theory that could only conceive sovereign power as embodied and united in a "fully identifiable person, institution or group actually capable of decisions."[208] The real presence of a unitary people was not found in any singular topos within or without legal and political institutions of government, but remained as a "negative principle of legitimacy, referring to a whole that cannot be embodied in a part, and can be represented only through plurality and division, leaving the power of the king an empty place."[209] Hauriou in particular sought to capture the legal and political reality of modern national sovereignty by arguing for its double nature: sovereign power rested *within* the legal organs of binding coercion *and also* rested *upon* the pre-existing social order's orderliness; that social order in turn relied upon the medium of law to stabilize itself and to act on, against or with the juridical order.[210] The unity characteristic of state sovereignty is found in the articulated relationship between these factual and the normative-legal dimensions.

---

[207] Andrew Arato, *The Adventures of Constituent Power: Beyond Revolutions?* (CUP 2017) 29.
[208] ibid 25.
[209] ibid 80.
[210] See Maurice Hauriou, "The Notion of an Objective Juridical Order," and "The Theory of the Institution and the Foundation", in Albert Broderick, ed, *The French Institutionalists : Maurice Hauriou, Georges Renard, Joseph T Delos* (Harvard UP, 1970), pp.52-60, 93-124.

Grotius's state theory, as I have interpreted and reconstructed it, sidesteps the many pitfalls of organ sovereignty: he sees such a monistic reduction of sovereign power as possible but not necessary. The possibilities for the organization of rule are discerned in and through history; the natural legal order provides the carapace for the juridical validity of these diverse modes of organizing effective sovereign power, and generates an architecture of sovereign right that is amenable to partitioned exercises of sovereignty through diverse organs. The potential for conflict and contradiction is managed casuistically and juridically, but the final source of unity is not reduced to one agent or actor, but resides within and between the the composite equilibrium ("harmony") of a concrete historical human collectivity and its legal and political institutions of rulership. The result is thus highly pluralistic as well as historicist in its approach to understanding how sovereignty "really" works in a given place and time. Sovereign power "in itself" is produced by the People, but it is a kind of social force that is stabilized and given form (perfected) through its legal and political organization, the latter being a reflection of historical contingencies. "Peoples" are neither merely legal fictions, but nor are they protean demiurges of legal and political order waiting to be awakened from their slumber. They are a complex unity that is composed of legal, factual and ideal dimensions. In an era of proliferating claims to know or express the intentions and desires of the real People, and where to find them, Grotius's account is a relevant propadeutic to breaking the hold that one imaginary of sovereign power has over us.