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# Reconstructing the Limits of Schmitt’s Theory of Sovereignty: A Case for Law As Rhetoric, Not As Political Theology

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# Reconstructing the Limits of Schmitt’s Theory of Sovereignty: A Case for Law As Rhetoric, Not As Political Theology

Brook Thomas\*

*The act of metaphor then was a thrust at truth and a lie, depending where you were: inside, safe, or outside, lost. Oedipa did not know where she was.<sup>1</sup>*

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## I.

An essay written in the United States today with “sovereignty” in the title is almost obligated to mention, as I am about to, Carl Schmitt. That was not always the case. A standard reference work for political thought published in 1987 went from Frederick Schiller to Joseph Schumpeter, leaving out Schmitt.<sup>2</sup> David Luban’s Lexis search revealed five law review references to Schmitt from 1980 through 1990, and 420 from 2000 through 2010, with almost twice as many from 2006 through 2010 as in the five previous years.<sup>3</sup>

There are multiple reasons for this increased interest, but the most obvious is the United States’ response to 9/11. A thinker who conceives of the political as a

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1. THOMAS PYNCHON, *THE CRYING OF LOT 49*, at 105 (First Perennial Classics ed. 1999) (1965).

2. *THE BLACKWELL ENCYCLOPAEDIA OF POLITICAL THOUGHT*, 466–67 (David Miller et al. eds., 1987); see Tracy B. Strong, *Foreword* to CARL SCHMITT, *THE CONCEPT OF THE POLITICAL*, at ix, xii (George Schwab trans., Univ. Chi. Press expanded ed. 2007) (1932).

3. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 *CASE W. RES. J. INT’L L.* 457, 468 (2010).

contest between friends and enemies and who defines the sovereign as “he who decides on the exception”<sup>4</sup> is well suited for those engaging some of the most hotly debated legal issues in a post-9/11 world, especially because “exception” is a translation for *Ausnahmestand*, which in German means the “state of emergency” in martial law. Neoconservatives can turn to him for powerful intellectual justification of Bush administration policies. Leftists can use him to expose how liberal, pluralistic democracy’s pretensions to rule by law are built on a foundation of the sovereign’s exceptional use of force.

Schmitt’s impact is evident in the call for papers for this symposium. Among the topics listed for “empirical inquiry” is “sacrality/profanity: investigation of law’s dueling ontologies, derived on the one hand from the realm of divinity and sovereignty (the transcendental), and on the other from the realm of disposition and administration (the governmental).”<sup>5</sup> The identification of sovereignty with the sacred in no small measure derives from Schmitt’s claim that “[a]ll significant concepts of the modern theory of the state are secularized theological concepts.”<sup>6</sup> In this Article I want to test some of Schmitt’s influential claims about political theology, sovereignty, and the law.

Because my approach might seem a bit idiosyncratic—if not exceptional—I need to take a moment to explain it. The Schmitt boom in the United States has two primary sources. One is American scholars trained in continental thought. Since Schmitt’s death in 1985, they have made his work available in translation, and they have responded to and explained his importance for continental thinkers such as Jacques Derrida, Chantal Mouffe, Étienne Balibar, and—especially—Giorgio Agamben, who has stressed Schmitt’s engagement with Walter Benjamin. The other source is legal scholars like Oren Gross, Mark Tushnet, John Ferejohn, and Pasquale Pasquino, who rely on the other scholars’ accounts of Schmitt to debate his merits for understanding the legal ramifications of post-9/11 antiterrorism policy.<sup>7</sup> As important as that work and those debates are, I am not going to engage either extensively. What I want to do instead is look at an aspect of Schmitt’s work that both tend to neglect. The introduction to the first translation of *Political Theology* reports that, “because Schmitt was regarded in England and America as . . . a Nazi theoretician,”<sup>8</sup> he had long been neglected in the English-speaking world. In fact, in his influential book, *Constitutional Dictatorship*, Clinton Rossiter engaged Schmitt with no mention of his Nazi connections.<sup>9</sup> Rossiter dedicates his book to his former professor, Edward

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4. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 1 (George Schwab trans., Univ. of Chi. Press 2005) (1922).

5. Call for papers (on file with author).

6. SCHMITT, *supra* note 4, at 36.

7. For a summary of this debate, see William E. Scheuerman, *Survey Article: Emergency Powers and the Rule of Law After 9/11*, 14 J. POL. PHIL. 61, 64 n.11, 70 (2006).

8. See George Schwab, *Introduction to SCHMITT*, *supra* note 4, at xl.

9. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP* (1948).

Corwin, the famous constitutional scholar and uncompromising advocate of presidential power. It is no accident that Rossiter's work, like Schmitt's, has been revisited in the post-9/11 world. It is also no accident that Agamben prematurely dismisses Rossiter while some of the most important legal counters to Schmitt rely on him.<sup>10</sup>

But it is not only the case that an American, like Rossiter, engaged Schmitt before the present boom. Schmitt himself cites American examples. That he does so is not surprising. First, in the late nineteenth and early twentieth centuries there was an extensive exchange between American and German-speaking thinkers about sovereignty. Schmitt's work grows out of that exchange. Second, whereas one of Schmitt's best American critics called the Weimar era the "most notorious crisis in the history of constitutional democracy,"<sup>11</sup> a case could be made that the American Civil War and its Reconstruction aftermath was a pretty significant crisis as well, one that raised fundamental questions about sovereignty and the use of special powers in times of emergency. Schmitt knew this and strategically, if not extensively, cited American examples from this period to provide perspective for his own troubled times.

My critique of Schmitt follows from placing him in that transatlantic tradition and evaluating his neglected comments on the American scene. My first goal is historical. I want to resurrect the transatlantic exchange that helped shape Schmitt's ideas, explaining why the period of the Civil War and Reconstruction was important for theorists of sovereignty and Schmitt in particular. Given the limits of time and space, I will focus particularly on John W. Burgess, a now neglected figure, who in his day was the foremost expert on sovereignty in the United States. Although this part of my Article looks to the past, it has implications for Schmitt's reception in post-9/11 America. Schmitt's interventions into Weimar debates and his subsequent embrace of the Nazi party cause neoconservatives to evoke him with caution. For instance, Eric A. Posner and Adrian Vermeule pointedly claim that "Weimar has received too much attention"<sup>12</sup> in post-9/11 debates. "Civil libertarians invoke the shadow of Weimar to imply, and occasionally say, that expanding government's powers during emergencies will produce another Hitler. It will not, in today's liberal democracies anyway . . ."<sup>13</sup> At the same time, neoconservatives frequently and favorably cite the example of Lincoln and various Reconstruction measures. In contrast, given Lincoln's majestic reputation and the commendable goals of Radical Reconstruction, Civil War and Reconstruction examples are complicated for those on the left, while Schmitt's Nazi connections make reference to him politically

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10. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 6–9 (Kevin Attell trans., Univ. of Chi. Press 2005) (2003); see Scheuerman, *supra* note 7, at 80.

11. John P. McCormick, *Introduction* to CARL SCHMITT, *LEGALITY AND LEGITIMACY*, at xiii (Jeffrey Seitzer ed. & trans., 2004).

12. ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 39 (2007).

13. *Id.*

useful. What gets neglected in all this is Schmitt's own use of American examples and the way in which American theorists of sovereignty at the time, like Burgess, viewed emergency powers.

My second goal is more theoretical than historical, although it relies on my historical evidence. I use a comparison between Schmitt and Burgess to take exception to Schmitt's influential claim that we should understand law *as* political theology. I will argue instead that it is more productive to affirm the traditional understanding of law *as* rhetoric. To understand law *as* rhetoric will, I hope, place some gentle pressure on one goal of this symposium, which is to place pressure on doing legal history by looking at law *and* something else, such as society, religion, economics, culture, etc. For instance, the call for "law *as* . . ." proposed imagining law and something else as the same phenomenon.<sup>14</sup> But to think of "law *as* . . ." is to think metaphorically. We turn to metaphor because of a failure of self-identity. Metaphoric language consists of tropes, a term etymologically linked to the Greek word for "turn" or "turning." We use "turns of speech" when we cannot name things directly. Schmitt suggests at least one implication of this insight for the law through his important distinction between legality and legitimacy. The legitimacy of rule by law, he insists, can never be found within the law itself.<sup>15</sup> Thus, he *turns* to political theology. Recent scholars intent on challenging the widespread Weberian disenchantment of the law have followed him. By turning instead to rhetoric, I am not claiming a relationship of identity. But I am suggesting that political theology is not the only place to turn for an alternative to the relentless hermeneutics of suspicion that has characterized much recent critical legal history. I also want to highlight the rhetorical implications of different attempts to define the law metaphorically. Not all metaphors are the same.

My rhetorical/historical approach and its use of American examples are not meant to downplay the importance of understanding Schmitt through a continental lens. In fact, my challenge to Schmitt's political theology relies on Hans Blumenberg, a major—though neglected in the United States—continental thinker. Nonetheless, comparing Schmitt with an American predecessor can provide a different perspective on issues of sovereignty and political theology. For one, it highlights how exceptional Schmitt's theory of sovereignty was in the context of the transatlantic exchange out of which it emerged. In contrast, Burgess's definition was much more conventional. For him, the sovereign is "that which imposes the limitation."<sup>16</sup> But despite—or perhaps because of—its conventionality, Burgess's definition can, I will argue, help us see the limits of Schmitt's much more provocative definition. In my last section, I try to back up that claim by briefly looking at the rhetorical implications of understanding

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14. See Catherine L. Fisk & Robert W. Gordon, *Foreword: "Law As . . .": Theory and Method in Legal History*, 1 UC IRVINE L. REV. 519 (2011) (symposium issue).

15. McCormick, *supra* note 11.

16. 1 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW: SOVEREIGNTY AND LIBERTY* 53 (Boston, Ginn & Co. 1890).

sovereignty in terms of exceptions and limits for three controversial constitutional issues today whose roots can be traced to the Reconstruction and post-Reconstruction era. The first is the constitutionality of the trials of those accused of terrorism at Guantanamo. Whereas a number of people have turned to Schmitt mediated through Agamben to analyze those trials, I will argue that we get a much better understanding of the Bush—and to a certain extent the Obama—administration policies by tracing Burgess's response to the landmark case of *Ex parte Milligan*, mediated through Corwin and Rossiter.<sup>17</sup> The other two involve immigration, which Susan Coutin, Justin Richland, and Véronique Fortin analyze in depth in their essay,<sup>18</sup> and the national debt, loosely related to Christopher Tomlins' somewhat different concerns about capitalism and debt.<sup>19</sup>

## II.

Carl Schmitt was born in 1888 and grew up a devout Roman Catholic in Westphalia. He studied law in Berlin, Munich, and Strasburg, moving on to an academic career that was interrupted by military service in World War I. Although Catholicism remained important for him, he was excommunicated for a second marriage after the church failed to recognize his divorce. His most important work resulted from his participation in debates over the Weimar government. Soon after Hitler came to power in 1933, Schmitt joined the Nazi party and held various official posts until 1936, when infighting ousted him from positions of power. At the end of World War II, he spent a year in an internment camp, refusing efforts at de-Nazification. Barred from academia, he continued to write, give lectures in Franco's Spain, and remain intellectually connected with people interested in his work. Whether Schmitt's membership in the Nazi party was opportunistic or sincere remains as hotly debated as the extent to which his ideas can be separated from his Nazi connections. What is certain is that although he remained a staunch conservative, in his later years he had personal correspondence with thinkers across the political spectrum, such as Blumenberg, Leo Strauss, Ernst Juenger, Jacob Taubes, and Alexander Kojeve.

Much older than Schmitt, Burgess was born in 1844. A native of Tennessee, he courageously resisted enlistment in the Confederate army and fought for the Union. After the war, he studied at Amherst College and then in Germany. He has been called the "father" of American political science, both because of his scholarship and because of his creation of the School of Political Science at Columbia University.<sup>20</sup> A practicing lawyer, he simultaneously taught at the

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17. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)

18. Susan Bibler Coutin et al., *Routine Exceptionality: The Plenary Power Doctrine, Immigrants, and the Indigenous Under U.S. Law*, 4 UC IRVINE L. REV. 97, 101–05 (2014).

19. Christopher Tomlins, *Demonic Ambiguities: Enchantment and Disenchantment in Nat Turner's Virginia*, 4 UC IRVINE L. REV. 175, 176 (2014).

20. ALBERT SOMIT & JOSEPH TANENHAUS, *THE DEVELOPMENT OF AMERICAN POLITICAL SCIENCE* 3 (Irvington Publishers 1982) (1967).

Columbia Law School. Active in founding the Academy of Political Science and its major journal, he hired wisely, adding to the faculty—among others—Edwin Seligmen, James Harvey Robinson, Charles Beard, and William A. Dunning of the infamous “Dunning school” of Reconstruction studies. Burgess cemented his academic reputation with his monumental *Political Science and Comparative Constitutional Law* (1890), followed by influential studies of the constitutional issues related to the Civil War and Reconstruction. If people know of him today, what most know is that he, like Dunning, should not be read. No one is more responsible for that view than W.E.B. Du Bois, who condemns Burgess and Dunning in his book *Black Reconstruction*. With good reason, Du Bois singles out Burgess’s racism more than Dunning’s. Indeed, if Burgess is cited today, the citation is almost always to a racist passage Du Bois drew attention to years ago.<sup>21</sup>

Yet, despite Burgess’s racism, there are reasons for reading him carefully. Creating a somewhat distorted account himself by calling Burgess an ex-Confederate, Du Bois concedes that his account is “more than fair in law,” adding, “subtract from [him] his belief that only white people can rule, and he is in essential agreement with me.”<sup>22</sup> What makes Burgess provide a fair account of the law of the Reconstruction era is his view of sovereignty derived from his pro-Union beliefs and his studies in Germany. In the end, his loyalty to Germany, much more than the racism that offended Du Bois, discredited him in his lifetime because of his opposition to the United States’ entry into World War I. Before the war, however, he was famous enough to be named the first Roosevelt Visiting Professor at the University of Berlin. In Berlin 1906–1907, Burgess gave a large lecture course in German on the constitutional history of the United States and a graduate seminar in English on American constitutional law.

Just missing direct contact with Burgess, Schmitt began his studies in Berlin in the fall of 1907. Even though Schmitt did not have direct contact with Burgess, his theories of sovereignty came out of the transatlantic exchange that influenced and was influenced by the Columbia professor who dedicated his major work to Professor Johann Gustav Droysen. The influence of Germany on nineteenth-century America is well documented, but the exchange was not confined to one direction. There was a practical reason for German interest in American constitutional history and theory. German unification had created a federal state. German theorists, therefore, turned to the United States and its efforts to understand sovereignty in a federal context.<sup>23</sup> Prior to the Civil War, most people agreed with *The Federalist Papers* that in the United States sovereignty was divided between the nation and individual states. This belief was affirmed in *Chisholm v. Georgia* (1793), in which the Court declared that “[t]he United States [is] sovereign as to all the powers of Government actually surrendered: Each State in the Union

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21. See, e.g., PETER NOVICK, THAT NOBLE DREAM 75 (photo. reprint 2008) (1988).

22. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 720, 726 (1935).

23. See, e.g., SIEGFRIED BRIE, DER BUNDESSTAAT (Leipzig, Verlag von Wilhelm Engelmann 1874); see also HUGO PREUSS, GEMEINDE, STAAT, REICH (photo. reprint 1964) (1889).

is sovereign as to all the powers reserved.”<sup>24</sup> Joseph Story explained how sovereignty could be divided by noting two different uses of the term. Sovereignty in “its largest sense is meant, supreme, absolute, uncontrollable power, the *jus summi imperii*, the absolute right to govern.”<sup>25</sup> But the term is also used in a more limited sense to refer to “such political powers, as in the actual organization of the particular state or nation are to be exclusively exercised by certain public functionaries, without the control of any superior authority.”<sup>26</sup> For Story, as for Daniel Webster and Lincoln, the nation was sovereign in the absolute sense, and individual states in the more limited sense.

That view was challenged by John C. Calhoun, who argued that sovereignty could not be divided. Sovereignty, he claimed, is “an entire thing;—to divide, is,—to destroy it.”<sup>27</sup> For him, individual states alone were sovereign. Calhoun responded to the Constitution’s explicit division of powers between the national and state governments by distinguishing governmental functions held, for instance, by the executive and legislative branches, from sovereignty itself. Emanating from the sovereign state, but not identical to it, these governmental powers could be divided, as they had been when states delegated some of their capacities to the federal government. But the delegation was by no means a cession of sovereignty.

Francis Lieber, whose first academic position was in Calhoun’s South Carolina and later taught at Columbia, agreed that sovereignty could not be divided. But he located it in the nation, not individual states. He did so by relying on two ideas he brought with him from Germany. Despite their disagreements, both Calhoun and Webster believed that the people, not a monarch, were sovereign. In Germany, however, reaction to the French Revolution’s claim to popular sovereignty led to the idea that the state, not the people or a monarch, was sovereign. To be sure, the state was linked to the people, but not, as conceived of in the United States, as an aggregate of contracting individuals. It was instead a *Gesamtperson*, whose character was greater than the sum of its parts embodying a corporate personality. Because of linguistic confusion caused by the claims of individual “states” to be sovereign, Lieber described this sovereignty to be located in the nation, not the state. Nonetheless, with the idea of an organic nation-state, he tried to counter the feeling described by Tocqueville that “[t]he sovereignty of the Union is an abstract being that is attached to only a few external objects,” while that of the states

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24. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793).

25. HENRY ST. GEORGE TUCKER, *LECTURES ON CONSTITUTIONAL LAW* 33 (Richmond, Shepherd & Colin 1843).

26. 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 207, at 192 (Boston, Hilliard, Gray & Co. 1833).

27. JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT* 146 (Richard K. Cralle ed., Charleston, Steam Power-Press of Walker and James 1851).

comes before all the senses; one comprehends it without difficulty; one sees it act at each instant. . . . The sovereignty of Union is the work of art. The sovereignty of the states is natural; it exists by itself without effort, like the authority of the father of a family.<sup>28</sup>

Nathaniel Hawthorne expresses similar sentiments, describing the country's "anomaly of two allegiances (of which that of the State comes nearest home to a man's feelings, and includes the altar and the hearth, while the General Government claims his devotion only to an airy mode of law, and has no symbol but a flag)." <sup>29</sup> Lincoln tries to alter such feelings in the First Inaugural by describing national "bonds of affection . . . stretching from every battle-field, and patriot grave, to every living heart and hearthstone, all over this broad land."<sup>30</sup> In a different register, Lieber's idea of a collective people embodied in an organic nation-state tried to do the same.

With the victory of the Union, Lieber's argument would seem to have prevailed, and to a certain extent it did, although—as we will see—the question of national and state sovereignty remained a thorny one. It also remained a subject for debate in the German-speaking world. The German Confederation created in 1815 consisted of forty sovereign states. Like the United States under the Articles of Confederation, it was a *Staatenbund*, not a *Bundesstaat*. But, as the move toward German unification took force, the relationship between these states and a federal state was unresolved. In 1853, Georg Waitz developed an influential theory of divided sovereignty, similar to antebellum theories in the United States. But Bismarck's political push toward unification placed pressure on that theory. If Waitz argued that individual states and the federal state were sovereign in different spheres, the question arose as to who determines the boundaries of those spheres. In 1868, Georg Meyer's answer was that a state is sovereign when it has the power to determine its own jurisdiction. With the formation of the German Empire four years later, Meyer added that sovereignty lies in the constitution-making power, which is superior to both central and state governments. Or, put another way, lack of a legal superior constitutes sovereignty. As Paul Laband put it in 1876, if you want to know who is sovereign, you simply ask who has the power to determine the limits of jurisdiction for a community.<sup>31</sup>

Although this theory of undivided sovereignty had many followers, it was

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28. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 157–58 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

29. Nathaniel Hawthorne, *Chiefly About War-Matters*, *ATLANTIC MONTHLY*, July 1862, at 48.

30. 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 271 (Roy P. Basler ed., 1953).

31. Recently, a number of scholars have argued that jurisdiction is more important than sovereignty. See, e.g., Shaun McVeigh & Sundhya Pahuja, *Rival Jurisdictions: The Promise and Loss of Sovereignty*, in *AFTER SOVEREIGNTY: ON THE QUESTION OF POLITICAL BEGINNINGS* 97, 97–114 (Charles Barbour & George Pavlich eds., 2010). Yet in this period, the two are intricately related because sovereignty was defined as the power to determine jurisdiction. See BRADIN CORMACK, *A POWER TO DO JUSTICE* 288–89 (2007); *Juris-Dictions*, *ENGLISH LANGUAGE NOTES*, Fall/Winter 2010, at 1.

challenged by Otto von Gierke. Gierke's views of sovereignty grew out of his extensive research into the history of German laws of associations, including groups like medieval guilds. His research challenged a number of assumptions of those trained primarily in Roman law and the Roman influence on the Napoleonic code. Romans, according to Gierke, conceived of both an absolute and indivisible person and state. The state was unlimited in the realm of public law, and the individual person in that of private law. But this left no human associations between the individual and the state. In contrast, German *Genossenschaftsrecht* focused on the communal groups above the individual and below the state. These groups, comprising what today we would call civil society, were as important for an individual's sense of identity as his or her relation to the state. Indeed, for Gierke, "men everywhere and at all times has borne a double character, that of an individual as such and that of a member of a community."<sup>32</sup> Similarly, sovereignty can have a double character. For Gierke, the state does not rule over the law or the law over the state. Instead, the two are equal powers, inconceivable without one another.

Extending Gierke's work, Hugo Preuss raised important questions about the idea of absolute sovereignty by looking at relations above and below the state. First, he argued that it was incompatible with developments in international law, which would place certain restrictions on individual states. Second, it was incompatible with the existence of communal groups within the state who have existences, at least in part, independent of the state. As a result, Preuss argued that the idea of sovereignty, while useful to describe the absolutist state of Bodin, should be abandoned in relation to the modern state.

Gierke and his influence on Preuss are important for my argument for two reasons. First, both are prime targets of Schmitt in *Political Theology*. True to his Roman Catholic upbringing, Schmitt strongly believed in an absolute, indivisible sovereign. He is especially dismissive of Preuss. Helping to frame the Weimar Constitution, Preuss, staying true to the "associationalist" beliefs he learned from Gierke, tried to make sure that communities between the state and the individual had sufficient power. For Schmitt those assurances devastatingly weakened the power of the state. The second reason for Gierke's importance has to do with the transatlantic exchange about sovereignty that I have briefly outlined. Bringing us almost to the start of Schmitt's career, it is analyzed and explicated in detail in the first book by Charles E. Merriam, Jr., considered the "father" of behavioral political science. Merriam wrote much of the book while studying with Gierke in Berlin. He was sent there by Dunning, who was his dissertation director. At the time, Dunning was turning his attention from Reconstruction to a multivolume history of political theory. Merriam also acknowledges the importance of seminars he took with Burgess, who, reversing the direction of Dunning's career, was at

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32. CHARLES EDWARD MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 59 (1900) (quoting Otto von Gierke).

work on *Reconstruction and the Constitution*, published in 1902, two years after Merriam's *History of the Theory of Sovereignty since Rousseau*.<sup>33</sup> It is time, therefore, to turn to the relation between Burgess's theory of state sovereignty and his understanding of Reconstruction.

### III.

According to Burgess, a proper answer to legal questions of Reconstruction and its aftermath cannot be achieved without clarifying the "proper conception of what a 'State' is in a system of federal government."<sup>34</sup> Confusion arises because of

the tendency to confound the idea of a "State" in such a system with a state pure and simple. Until the distinction between the two is clearly seen and firmly applied, no real progress can be made in the theory and practice of the federal system of government. Now the fundamental principle of a state pure and simple is sovereignty, the original, innate, and legally unlimited power to command and enforce obedience by the infliction of penalties for disobedience. On the other hand, the nature of a "State" in a system of federal government is a very different thing. Such a "State" is a local self-government, under the supremacy of the general constitution, and possessed of residuary powers.<sup>35</sup>

Individual states, Burgess felt, should be called "[c]ommonwealth[s]"<sup>36</sup> or placed in quotation marks to distinguish them from real states.

Burgess's views of sovereignty made him a harsh critic of Lincoln's and Andrew Johnson's presidential plan for Reconstruction. First, he felt that the Constitution clearly indicated that Congress, not the executive branch, should have presided over Reconstruction. Second, he dismissed Lincoln's insistence that the rebellious states never left the Union, that it was not states that rebelled but the act of combinations of disloyal persons. In contrast, Burgess felt that Charles Sumner's doctrine of "state suicide"<sup>37</sup> was "sound political science and correct constitutional law."<sup>38</sup> Since individual states depend on the nation for their existence, the moment rebellious states voted for secession, they ceased to exist as states. Their populations and territories continued to be under the control of the nation, but, as with any populations or territories not organized as states, they were "subject to the exclusive jurisdiction of Congress"<sup>39</sup> and could be readmitted

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33. JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION, 1866-1876* (1902); MERRIAM, JR., *supra* note 32, at v.

34. BURGESS, *supra* note 33, at 1-2.

35. *Id.*

36. *Id.* at 3.

37. WILLIAM ARCHIBALD DUNNING, *ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION* 105 (1904).

38. BURGESS, *supra* note 33, at 60.

39. DUNNING, *supra* note 37, at 105.

to the Union as states only in accord with procedures outlined in the Constitution that gave special powers to Congress over territories.<sup>40</sup>

Given their belief that “states” themselves had never left the Union, Presidents Lincoln and Johnson felt that the major work needed for Reconstruction was simply restoration of local governments within the states. Given his belief in the doctrine of “‘state’ suicide,”<sup>41</sup> Burgess felt that was inadequate. In fact, for him, even Radical Reconstruction was not radical enough. To be sure, the South was divided into military districts, but “states” persisted under what Dunning called the “theory of forfeited rights.”<sup>42</sup> The boundaries and jurisdiction of the formerly rebellious states remained in place, but were temporarily in “suspended animation.”<sup>43</sup>

In disagreeing with the actual course that Reconstruction took, Burgess did not confine his criticism to congressional Republicans. He also targeted the Supreme Court. For instance, in *Texas v. White* (1869), Chief Justice Chase, Lincoln’s former secretary of the treasury, memorably declared, “The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”<sup>44</sup> When Justice Matthews in the 1884 *Virginia Coupon Cases* cited Chase, Burgess compared Matthews’s logic to “Dogberry’s charge to the watchmen in *Much Ado*.”<sup>45</sup> Similarly, when the *Slaughter House* (1873) majority insisted on distinguishing between national and state citizenship and the privileges and immunities both afford, Burgess called the opinion “entirely erroneous,”<sup>46</sup> lamenting that the Court had “thrown away the great gain in the domain of civil liberty won by the terrible exertions of the nation in the appeal to arms.”<sup>47</sup> For Burgess, the past of slavery proved that we cannot trust individual states, which are only local forms of government, to protect civil liberties. On the contrary, “[i]f history ever taught anything, it is that civil liberty is national in origin, content and sanction.”<sup>48</sup> The Civil War was a turning point in history because, prior to it, the United States was “lagging in the march of modern civilization”<sup>49</sup> due to “[s]lavery”<sup>50</sup> and “State sovereignty.”<sup>51</sup> But with “emancipation”<sup>52</sup> and “nationalization”<sup>53</sup> the United States asserted “its supremacy, forevermore.”<sup>54</sup>

40. BURGESS, *supra* note 33, at 60.

41. DUNNING, *supra* note 37, at 105.

42. *Id.* at 109.

43. *Id.* at 111.

44. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868), *overruled in part by* *Morgan v. United States*, 113 U.S. 476 (1885).

45. John W. Burgess, *The American Commonwealth: Changes in Its Relation to the Nation*, 1 POL. SCI. Q. 9, 11 (1886).

46. 1 BURGESS, *supra* note 16, at 228.

47. *Id.*

48. *Id.* at 224.

49. 1 JOHN W. BURGESS, *THE CIVIL WAR AND THE CONSTITUTION, 1859–1865*, at 135 (1901).

50. *Id.*

51. *Id.*

Burgess's views on Reconstruction both shaped and were shaped by his theory of the nation, the state, and government. For him, a nation has geographic and ethnic unity. Geographic unity means a "territory separated from other territory"<sup>55</sup> by a natural geographic boundary. Ethnic unity is a "population having a common language and literature, a common tradition and history, a common custom and a common consciousness of rights and wrongs. . . . Where the geographic and ethnic unities coincide, or very nearly coincide, the nation is almost sure to organize itself politically, —to become a state."<sup>56</sup>

Relying on Johann Kaspar Bluntschli, Burgess defines a state as "a particular portion of mankind viewed as an organized unit."<sup>57</sup> States have four characteristics. They are "all-comprehensive."<sup>58</sup> Their organization "embraces all persons, natural or legal, and all associations of persons."<sup>59</sup> There are no "stateless persons within the territory of the state."<sup>60</sup> A state is also "exclusive."<sup>61</sup> The state may constitute "two or more governments"<sup>62</sup> and "assign to each a distinct sphere of action . . . but there cannot be two organizations of the state for the same population and within the same territory."<sup>63</sup> Third, "the state is permanent."<sup>64</sup> But of all these characteristics, the most essential is sovereignty. Sovereign power, Burgess insists, must be unlimited. Sovereignty is "that which imposes the limitation."<sup>65</sup>

Very similar to Laband's, Meyer's, and others', Burgess's definition is not at all exceptional for anyone familiar with the German-speaking thought of the time. But, because of American debates, Burgess, more than others, stressed the distinction between the state and the governments that serve it. Sovereignty rests in the state, not in governments. "[A] great deal of confusion,"<sup>66</sup> he insists, results from "the failure to distinguish between the state and the two governments"<sup>67</sup> of a federal system.

The individual is not a citizen of either *government*, but of the *state* back of both. He derives his citizenship, with all its immunities and rights, from the state; and the two governments have only the duty and the power of

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52. *Id.*

53. *Id.*

54. *Id.*

55. 1 BURGESS, *supra* note 16, at 2.

56. *Id.* at 2–3.

57. *Id.* at 50.

58. *Id.* at 52.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 53.

66. *Id.* at 220.

67. *Id.*

observing and protecting those immunities and rights, each in the sphere assigned to it by the state.<sup>68</sup>

This distinction between the state and the government explains why Burgess's insistence on unlimited sovereign power is not inconsistent with the Anglo-American tradition's belief that civil liberties can be protected only by limiting governmental power. Burgess acknowledges that governments can threaten civil liberties. But the unlimited power of the state limits governments. "[T]he government is not the sovereign organization of the state. Back of the government lies the constitution; and back of the constitution the original sovereign state, which ordains the constitution both of government and of liberty."<sup>69</sup> According to Burgess, Laband, Otto von Holst, and Georg Jellinck understand this attribute of sovereignty through their studies of the American system.

There is, however, one situation in which Burgess's distinction between the government, the constitution, and the state temporarily breaks down. When, in time of "war and public danger,"<sup>70</sup> the "life of the state is threatened,"<sup>71</sup> the "central government may temporarily suspend the constitutional guarantees of individual liberty and rule absolutely; *i.e.*, assume the whole power of the state, the sovereignty."<sup>72</sup> As Burgess makes clear, there are notable precedents for suspending the constitution in order to save the state. But instead of relying on the obvious example of "the great Roman state"<sup>73</sup> or those "formed out of the amalgamation of Teutonic and Roman ideas,"<sup>74</sup> he prefers to evoke the example of "the pure Germanic state."<sup>75</sup> Citing Caesar, he describes how "the ancient liberty-loving Germans,"<sup>76</sup> when needed, suspended "government by the assemblies of the freemen"<sup>77</sup> and allowed the "complete dictatorship of the duke."<sup>78</sup> Like every Teutonic state before it, the United States, according to Burgess, has provisions for such a "temporary dictatorship."<sup>79</sup> For instance, noting that "Congress has the power to ordain universal military duty in the United States, and provide for calling the entire population into the service of the United States,"<sup>80</sup> he concludes that the "entire population would be made subject to the rules and regulations governing the army and navy . . . without regard to the

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68. *Id.*

69. *Id.* at 57.

70. *Id.* at 245.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 245–46.

78. *Id.* at 246.

79. *Id.*

80. *Id.*

system of civil liberty.”<sup>81</sup> Admitting that “[t]his would . . . be an extraordinary procedure,”<sup>82</sup> he, nonetheless, insists on its constitutionality.<sup>83</sup>

Burgess was, therefore, an ardent supporter of Lincoln’s actions during the war, as well as the use of military force to ensure loyalty by former Confederates during Reconstruction. Despite his love of civil liberties, he was also a sharp critic of the most important civil liberties case to come out of the Civil War. During the war, Lambdin B. Milligan, an outspoken critic of Lincoln’s war effort, was accused of conspiring with the Confederates. Denied habeas corpus, he was tried by a military tribunal in his home state of Indiana and sentenced to hang. Not hanged during the war, he appealed his case to the Supreme Court. In *Ex parte Milligan*, the Court freed him in a unanimous decision, ruling that the president had no authority to try a civilian in military courts when civil courts were open. According to Justice David Davis, who delivered the Court’s opinion,

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people . . . No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of [the Constitution’s] provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . . .<sup>84</sup>

To the objection that the military commission was justified by martial law, Davis replied, “If this were true, it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation.”<sup>85</sup>

Soon after World War I, Charles Warren noted that *Ex parte Milligan* had been “long recognized as one of the bulwarks of American liberty.”<sup>86</sup> Soon after World War II, Allan Nevins ventured that “[t]he heart of this decision is the heart of the difference between the United States of America and Nazi Germany or Communist Russia.”<sup>87</sup> But at the time, the decision was controversial. First, it seemed retroactively to declare the military trial of Lincoln’s assassins unconstitutional. Second, it raised questions about trying Jefferson Davis in a military court. Third, although the Court unanimously declared the military tribunal authorized by the president unlawful, it split over another, extremely contentious, issue. Five justices ruled that not only the president, but also Congress, had no constitutional power to create military tribunals of the sort that tried Milligan. Their opinion provoked a strong dissent from the other four justices, who argued that “in such a time of public danger, Congress had power,

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 118–19, 121 (1866).

85. *Id.* at 126.

86. 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 149 (1922).

87. Allan Nevins, *The Case of the Copperhead Conspirator, in QUARRELS THAT HAVE SHAPED THE CONSTITUTION* 90, 101, 108 (John A. Garraty ed., 1964).

under the Constitution,” to authorize military trials, even when civil courts were open.<sup>88</sup>

Many worried that the majority’s ruling would hamstring Congress’s plans for Radical Reconstruction. The Republican press went so far as to compare *Ex parte Milligan* to *Dred Scott* as an example of the Supreme Court’s catering to Southern interests. The comparison was not completely unfounded. *Milligan*, like *Dred Scott*, limited congressional power. *Dred Scott* overruled the Missouri Compromise, which gave Congress power over U.S. territories. *Milligan* limited Congress’s power to establish military tribunals to try civilians. Both controversial rulings were made in what at the time were considered dicta, not necessary for the outcome of the case, by a five-justice majority. Furthermore, both majorities justified their rulings in the name of civil liberties. If *Milligan* guaranteed citizens the right to be tried in civil courts, *Dred Scott* was the first Supreme Court decision to evoke the Bill of Rights to overturn congressional legislation. It did so when Justice Taney cited the due process clause of the Fifth Amendment to argue that the Missouri Compromise deprived a U.S. citizen of “his liberty or property, merely because he came himself or brought his property [a slave] into a particular Territory of the United States.”<sup>89</sup>

That a case Nevins calls a “great triumph for the civil liberties of Americans in time of war or internal dissension”<sup>90</sup> was compared to *Dred Scott* by defenders of African Americans indicates the extent to which proponents of Radical Reconstruction believed in the authority of the national state. Burgess too felt that the decision was very bad political science:

It is devoutly to be hoped that the decision of the Court may never be subjected to the strain of actual war. If, however, it should be, we may safely predict that it will necessarily be disregarded. In time of war and public danger the whole power of the state must be vested in the general government, and the constitutional liberty of the individual must be sacrificed so far as the government finds it necessary for the preservation of the life and security of the state. This is the experience of political history and the principle of political science.<sup>91</sup>

For Burgess, “[t]he practices of the Administration are, therefore, to be considered as the precedents of the Constitution in civil war rather than the opinion of Court.”<sup>92</sup> Picked up by Corwin, Burgess’s views on *Milligan* have exerted influence long after he himself has been forgotten. To cite just one example, Mark E. Neely, Jr., in his Pulitzer Prize-winning book on Lincoln’s record on civil liberties, strategically quotes the same passage from Burgess used

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88. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 140.

89. 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, at 216 n.102 (1971).

90. Nevins, *supra* note 87, at 107.

91. 1 BURGESS, *supra* note 16, at 251–52.

92. 2 BURGESS, *supra* note 49 at 218.

by Corwin in a chapter called “The Irrelevance of the *Milligan* Decision.”<sup>93</sup> A number of presidents, able to evoke the majestic example of Lincoln, have indeed acted as if his practices are the true precedent.

Those presidents, or their defenders, can cite another of Burgess’s pronouncements on the case to justify their actions. As much as Burgess disagrees with the Court’s decision, he also points out that it recognizes “occasions upon which the government can establish martial law, *i.e.* suspend all the constitutional guaranties of individual liberty.”<sup>94</sup> This is precisely the point John Yoo makes about *Milligan*. According to Yoo, “[t]he Court recognized . . . that the Constitution grants the government the power to respond to attack, and that this includes the power to suspend habeas corpus or impose military rule in areas under attack”; Yoo goes on to note that “*Milligan*’s protections do not reach citizens who have actually joined enemy forces. Nor do they extend to detainees, citizen or not, at the front or on battlefields abroad.”<sup>95</sup> If they had, Confederate soldiers—all of whom, according to Lincoln, were still American citizens—would have had to be tried in civilian courts rather than handled by the military. Compared to Burgess, Yoo is temperate, not going so far as explicitly to proclaim that “the President must have despotic power when he wages war. The safety, the life perhaps, of the state requires it.”<sup>96</sup>

#### IV.

Schmitt just missed meeting Burgess when he began his studies in Berlin, but his understanding of the American system registers Burgess’s indirect influence. Like many German speakers, Schmitt was fascinated by Calhoun, whose “theoretical significance for the concepts of a constitutional theory of the federation,” he declared, “[was] . . . still great and in no way settled by the fact that in the war of secession the Southern states were defeated.”<sup>97</sup> What attracted Schmitt, however, was not Calhoun’s doctrine of states’ rights, but his belief that sovereignty was absolute and indivisible. In fact, Schmitt’s understanding of Calhoun’s historical impact is closer to what Burgess argued should have been the case than what actually occurred. Although, as we have seen, the Supreme Court continued to grant limited sovereignty to individual states, Schmitt believed that after the Civil War, states were simply “organizational components of extensive legislative autonomy and self-government.”<sup>98</sup> Schmitt’s source turned out to be a

93. MARK E. NEELY, JR., *THE FATE OF LIBERTY* 181 (1991). Neely claims that Burgess was careful to limit his claim to the Civil War, which was unique in our history; but Burgess wrote with the United States involved in another civil war involving the newly acquired Philippines. *Id.*

94. 1 BURGESS, *supra* note 16, at 249.

95. JOHN YOO, *WAR BY OTHER MEANS* 145–46 (2006).

96. 2 BURGESS, *supra* note 16, at 261.

97. CARL SCHMITT, *CONSTITUTIONAL THEORY* 390 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

98. *Id.* at 392.

book edited by Columbia University President N. Murray Butler, who was profoundly influenced by Burgess.<sup>99</sup>

That Schmitt, a proponent of a strong central government, would want to believe this view of the American scene is not surprising. But much more important than Calhoun for his interventions into German debates was Lincoln. In *Die Diktator*, Schmitt provides comprehensive historical analysis of the constitutional dictatorship from the time of the Romans to the early twentieth century alluded to by Burgess. He distinguishes between a *kommisarische Diktator*, one who suspends the constitution in order to restore it, and a *souveräne Diktator*, one who suspends it to change it.<sup>100</sup> If Cromwell is a prime example of the latter, the advocate of government of the people, by the people, and for the people is the prime, recent example of the former. Lincoln believed he had to suspend civil liberties because people intent on destroying the Constitution evoked its protections to further their aims. Convinced that Germany faced a similar situation, Schmitt felt that Lincoln was perfectly justified in suspending the Constitution in order to save it. Whether Lincoln acted as Schmitt thought he did is open to debate. Most of Lincoln's defenders today deny that he actually suspended the Constitution. Schmitt, however, was relying on views held by some of the most respected figures of the time. For instance, in his influential *American Commonwealth*, Lord Bryce cites a widely circulated statement Lincoln allegedly made to Salmon Chase, who would later become Chief Justice and write the minority opinion in *Milligan*: "These rebels are violating the Constitution to destroy the Union. I will violate the Constitution if necessary to save the Union; I suspect, Chase, that our Constitution is going to have a rough time of it before we get done with this row."<sup>101</sup> Similarly, Dunning in *Essays on the Civil War and Reconstruction* devotes an entire section to "[t]he Presidential Dictatorship,"<sup>102</sup> adding later, in an uncritical tone, "In the interval between April 12 and July 4, 1861, a new principle thus appeared in the constitutional system of the United States, namely, that of a temporary dictatorship."<sup>103</sup> Dunning even anticipates Tushnet's claim, inspired by Schmitt, that restraints on executive power during a state of emergency come from public opinion, not rule by law. The only "limit"<sup>104</sup> on Lincoln's dictatorial power, Dunning observes, "was not the clear expressions of the organic law, but the forbearance of a distracted people."<sup>105</sup>

99. EDUCATION IN THE UNITED STATES (Nicholas Murray Butler ed., Am. Book Co. 1910) (1900). Schmitt quotes from the German translation of this volume, which was prepared for the United States exhibit at the Paris Exposition of 1900. *Id.*

100. CARL SCHMITT, *DIE DIKTATUR* 131–34 (7th ed. 2006).

101. ROSSITER, *supra* note 9, at 229 n.17.

102. DUNNING, *supra* note 37, at 14.

103. *Id.* at 20–21

104. *Id.* at 15.

105. *Id.*; see also Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 280–81, 284–85, 302 n.104, 307 (2003) (examining Lincoln's exertion of executive power during wartime).

Thus, it is no surprise that in discussing martial law, Schmitt cites *Ex parte Milligan* to justify the use of military tribunals. Paying no attention to the majority opinion declaring them unconstitutional, he focuses, as does Yoo, on the Court's recognition of times when they are permissible. Most likely Schmitt did not read the entire decision. But the sources he relies upon are revealing. One is James Wilford Garner, a member of the "Dunning school" of Reconstruction studies, whose account of Mississippi Du Bois singles out for its fairness. A professor at the University of Illinois, Garner had a distinguished career, being named the Hyde lecturer in French universities in 1921 and holding a similar visiting position at the University of Calcutta. He wrote a comparative study of the German war code, and used his understanding of the Civil War and Reconstruction to evaluate Woodrow Wilson's crackdown on civil liberties during World War I, just as Dunning did in a widely read comparison of Wilson and Lincoln. Indeed, Wilson himself wrote on the question of Reconstruction and sovereignty and reviewed Burgess's work.

Another of Schmitt's sources was William Winthrop, a professor of law at West Point, who noted that the validity of military tribunals was so widely recognized that they were allowed to decide over two thousand cases during the Civil War and Reconstruction.<sup>106</sup> A third was *Military Government and Martial Law*, written by William E. Birkheimer, who based his book on research he conducted after he was asked to provide legal justification for his commanding officer's declaration of martial law in the Pacific Northwest to protect Chinese from violent intimidation in 1886.<sup>107</sup> Distinguishing between military government, which is military control of enemy territory abroad, and martial law, which is a suspension of civil law at home, Birkheimer evokes the precedent of *Milligan* to justify military commissions at the same time that he praises the wisdom of Lincoln's course during the war.<sup>108</sup> Significantly, for him the Reconstruction Acts were justified only as declarations of martial law.<sup>109</sup> To the objection that technically Reconstruction was during a time of peace, he argues that, in fact, the South was in a "state of latent rebellion."<sup>110</sup> He goes on to argue that if the military had used the full force it was authorized to use, the country would have been spared the "disagreeable experience [that] followed."<sup>111</sup> Almost the same point made by Burgess, it is one that certainly would have impressed Schmitt, who tried to convince Germans to use extraordinary powers to avoid a crisis of even more severity.

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106. WILLIAM WINTHROP, AN ABRIDGMENT OF MILITARY LAW 331 (4th & rev. ed. 1901).

107. WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW*, at v-vi, 278 (3d ed. 1914).

108. *Id.* at 458-65.

109. *Id.* at 465.

110. *Id.* at 484.

111. *Id.*

## V.

As Schmitt's references to the United States indicate, he has numerous similarities with Burgess. Both were practicing lawyers as well as theorists. Both assumed that sovereignty rested in individual nations that ideally had a homogeneous ethnic make-up. This belief contributed to their racism. It also led them to advocate centralization. Although both worked within federal systems, neither recognized the sovereignty of individual "states" or "lands." For both, sovereignty was indivisible, absolute, and prior to rule by law. This meant that both defended suspension of the constitutional order if necessary to save the state. It also meant that, for both, legality alone was not enough to legitimate the state.

One of Schmitt's most important contributions to any consideration of "law as . . ." is his distinction between "legality" and "legitimacy." Legality is *gesetzmäÙsig*. Legitimacy is *rechtmäÙsig*.<sup>112</sup> Legality is the realm of the bureaucrat and is concerned with establishing a set of abstract, value-neutral, procedural norms. Legitimacy is concerned with questions of right and pays attention to the concrete demands of life. A legal system, Schmitt argues, can never find true legitimacy in abstract legality. Burgess agreed. For instance, he favorably cites von Holtz, the German-born expert on the U.S. Constitution, when he mocks the "canonizing of the constitution," *i.e.*, the making of a political bible out of it.<sup>113</sup> A political system, Burgess insists "cannot be perpetuated simply through the guaranty contained in its written constitution." Instead, "[w]e must go back of the constitution," to find the true foundation of the state.<sup>114</sup>

Because for Burgess, in the end, the Constitution was not the foundation of the state, he disagreed with an attorney for Milligan, who argued that the president "exercise[s] no authority whatever but that which the Constitution of the country gives him. Our system knows no authority beyond or above the law."<sup>115</sup> Likewise, he disagreed when another of Milligan's lawyers, the Attorney General for ineffective President Buchanan, claimed that "[a] violation of law on pretence of saving such a government as ours is not self-preservation, but suicide."<sup>116</sup> On the contrary, he would have agreed with Justice Jackson's dissent in a landmark civil liberties case soon after World War II that used a legal technicality to overturn the conviction of a hate-spouting Nazi priest. Having recently served as prosecutor at the Nuremberg war crimes tribunal, Justice Jackson pointed out the danger of letting people like the priest exploit our protection of civil liberties in order to destroy our democratic form of government: "There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert

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112. HANS BLUMENBERG & CARL SCHMITT, BRIEFWECHSEL, 1971–1978, at 38 (Alexander Schmitz & Marcel Lepper eds., 2007).

113. Burgess, *supra* note 45, at 9.

114. *Id.* at 13.

115. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 30 (1866).

116. *Id.* at 81.

the constitutional Bill of Rights into a suicide pact.”<sup>117</sup> Discussing *Milligan*, Burgess contrasts the proper “practical” response with the mistaken “judicial” response.<sup>118</sup> Similarly, Schmitt argues that value neutrality in legal systems has no place when its enemies push it to “the point of system suicide.”<sup>119</sup>

Those who agree that legality alone cannot serve as the foundation of rule by law seek legitimacy somewhere other than in the forms of the law. As similar as they are in this respect, Burgess and Schmitt seek it in different realms. Schmitt turns to political theology, while Burgess turns to political science, one that he felt could be based on scientific reason. Confidently announcing the “beginning of the modern political era,”<sup>120</sup> Burgess made the following declaration:

At last the state knows itself and is able to take care of itself. The fictions, the makeshifts, the temporary supports, have done their work, and done it successfully. They are now swept away. The structure stands upon its own foundation. The state, the realization of the universal in man, in sovereign organization over the particular, is at last established,—the product of the progressive revelation of the human reason through history.<sup>121</sup>

A proper understanding of the state depends upon a scientific exploration of the “domains of geography and ethnography, the womb of constitutions and of revolutions.”<sup>122</sup>

Today, it is all too easy to recognize how Burgess’s turn to geography and ethnology links him to the period’s notorious scientific racism that offended Du Bois. Burgess strongly believed that, for the government to fulfill the state’s duty to protect the civil liberties of its citizens, political rights had to be restricted. Convinced that the Teutonic people are “particularly endowed with the capacity for establishing national states,”<sup>123</sup> he concludes that “in a state whose population is composed of a variety of nationalities the Teutonic element, when dominant, should never surrender the balance of political power.”<sup>124</sup> The “exercise of political power”<sup>125</sup> is not “a right of man,”<sup>126</sup> and non-Teutonic elements should be allowed to exercise it “only after the state shall have nationalized them politically.”<sup>127</sup> Whereas it is unfair to delay such nationalization, it is unwise to “hasten the enfranchisement of those not yet ethnically qualified.”<sup>128</sup> Indeed, one reason Burgess advocated military rule during Reconstruction was because he so

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117. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

118. 1 BURGESS, *supra* note 16, at 247–48.

119. SCHMITT, *supra* note 11, at 48.

120. 1 BURGESS, *supra* note 16, at 66.

121. *Id.* at 67.

122. Burgess, *supra* note 45, at 13.

123. 1 BURGESS, *supra* note 16, at 44.

124. *Id.*

125. *Id.* at 45.

126. *Id.*

127. *Id.*

128. *Id.*

strongly opposed African American suffrage. To be sure, there is some truth to his claim that radical Republicans insisted on giving the vote to freedmen in order to guarantee Republican rule in the South. But Burgess's response to that political maneuver was extreme:

From the point of view of sound political science, the imposition of universal negro suffrage upon the Southern communities, in some of which the negroes were in a large majority, was one of the 'blunder-crimes' of the century. There is something natural in the subordination of an inferior race to a superior race, even to the point of enslavement of the inferior race, but there is nothing natural in the opposite.<sup>129</sup>

As Schmitt's example demonstrates, the turn to political theology does not guard against racism. Nonetheless, for some it provides a much better explanation of the workings of state power than attempts, like Burgess's, to provide the modern *Rechtsstaat* with a secure foundation in scientific rationality. Thus, conservative Schmitt has joined the honored company of leftist twentieth-century thinkers who challenge progressive accounts of the triumph of rule by law as a move from barbarism to civilization. Foucault, for instance, insists that "the law is a calculated and relentless pleasure, delight in the promised blood, which permits the perpetual instigation of new dominations and the staging of meticulously repeated scenes of violence."<sup>130</sup> Benjamin, with his widely discussed "Critique of Violence," links law's inherent violence to religious ritual. Benjamin, in turn, knew and was influenced by Schmitt.<sup>131</sup> They both argue that to understand the law, we need to take into account what Derrida, in his own influential essay, calls "The Mystical Foundations of Authority."<sup>132</sup> The attempt to transform law into a set of value-free normative rules is to forget its sacred violent origins. We indulge in that act of forgetting, we are told, at our own peril, and Schmitt's political theology, especially for those associated with the journal *Telos*, has become a vital tool in diagnosing our present malaise. As Russell A. Berman (recent president of the MLA) and Michael Marder put it, the "century of secular universalisms leaves us in the state of a general and all-encompassing nihilism."<sup>133</sup> With unmistakable echoes of the New Left, they contrast the "bureaucratic-legalistic" model of rule by law and its abstract proceduralism to the true legitimacy of a political community. Yet, like Benjamin, they search for hope in our situation. In "Theses on the Philosophy of History," Benjamin, alluding to Schmitt, describes the task of bringing about a "real state of emergency [*Ausnahmezustand*]" that "will

129. BURGESS, *supra* note 33, at 244–45.

130. MICHEL FOUCAULT, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 139, 151 (Donald F. Bouchard ed., 1977).

131. WALTER BENJAMIN, *Critique of Violence*, in REFLECTIONS 277, 294–300 (Peter Demetz ed., Harcourt Brace Jovanovich, Inc. 1978) (1955).

132. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 3–67 (Drucilla Cornell et al. eds., 1992).

133. Russell A. Berman & Michael Marder, *Carl Schmitt and the Event: Introduction*, *TELOS*, Summer 2009, at 3, 3.

improve our position in the struggle against Fascism.”<sup>134</sup> Similarly, Berman and Marder insist that “the collapse of everything that went under the name of the New World Order could be a harbinger of ample opportunities for imagining new and competing forms of legitimacy. Such would be the event of legitimacy in the eclipse of legality.”<sup>135</sup>

I fully agree that neither efforts to produce a set of value-free procedural norms nor those to ground law in scientific rationality are adequate to convince people of the legitimacy of the state. As Lincoln knew, that goal requires an effective appeal, which is why he evoked “bonds of affection” encompassing battlefields, patriot graves, hearts, and hearthstones. If legality is more akin to the realm of reason, legitimacy has affinities with the realm of myth. It requires appeals to tradition and renewable symbols and stories of founding moments. That said, I find appeals, like Berman’s, to Schmitt’s political theology as flawed as Burgess’s appeal to political science.

The great myth of the enlightenment might have been the belief that human beings could transcend the need for myth and place human institutions on a rational foundation. But not all myths are the same. We still need to be wary of what Ernst Cassirer, responding to Nazi Germany, called various “myths of state.”<sup>136</sup> As Blumenberg puts in the title of one of his most important books, we need to work on and with myth.<sup>137</sup> For that reason it is premature to dismiss the modern *Rechtstaat* simply because of its inability to generate its own rational foundation. If all human institutions had to demonstrate foundations in reason, we would have very few institutions left. At times, perhaps, it is rational not to demand too much rationality. Likewise, even if law had its origin in the sacred and even though many people employ religious metaphors to describe the law, it does not follow that we have to understand law today as a form of secularized theology. There are alternatives.

To give one example from the historical period I am treating, Wilson, in his review of Burgess, draws on a distinction very similar to Schmitt’s between legality and legitimacy. Praising Burgess’s logical understanding of constitutional law, which deals with “such part of political life as is operative within the forms of law,” Wilson faults his understanding of “the actual facts of political life, the actual phenomena of state growth.”<sup>138</sup> Wilson does not, however, reject Burgess’s move to political science. He simply gives a very different account of what it entails. According to Wilson, political science deals with aspects of political life “lying

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134. WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 253, 257 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955).

135. Berman & Marder, *supra* note 133, at 3.

136. See ERNST CASSIRER, *THE MYTH OF THE STATE* (Murray Printing Co. 1961) (1946).

137. Robert M. Wallace, *Introduction* to HANS BLUMENBERG, *WORK ON MYTH*, at vii (Robert M. Wallace trans., MIT Press 1985) (1979).

138. Woodrow Wilson, *A System of Political Science and Constitutional Law*, ATLANTIC MONTHLY, May 1891, at 695, 697.

entirely outside the thought of the lawyer,” such as the way “states come into existence, take historic shape, create governments and institutions, and at pleasure change or discard what forms or laws they must in order to achieve development.”<sup>139</sup> Burgess’s limitation in dealing with those aspects is registered in his style. While he writes in the “language of science,” political science demands the “language of literature.”<sup>140</sup> Wilson admits that great political scientists do not “pretend to be making literature.”<sup>141</sup> Nonetheless, he goes on, “they have no choice; if they do not write literature, they do not write truth. For political science cannot be truthfully constructed except by the literary method . . . .”<sup>142</sup>

As a literary critic, I am tempted to enlist Wilson to join numerous law and literature scholars to argue for seeing law *as* literature. But elsewhere I have identified various problems with that move, including the lack of clarity about what we mean by literature.<sup>143</sup> It is, for example, not clear precisely what Wilson understands by the “language of literature.” I want to propose, instead, that we understand law, as it has been since the Greeks, as rhetoric. There is of course little new in that claim, and understanding law as rhetoric will produce neither the certainty that Burgess wanted nor the decisiveness that Schmitt desired. It is also no sure guard against dangerous myths of state. Nonetheless, insofar as it acknowledges the need for persuasion, it allows for Blumenberg’s work on and with myth. Indeed, some reasons for making this claim come into clearer focus when we play Burgess’s appeal to political science off of Schmitt’s appeal to political theology.

Schmitt faults legality for lacking attention to life. But that charge cannot be leveled against law conceived as rhetoric. One fact of life is the need to act. Even though human beings inevitably fall short of their aspiration to base actions on rationality, not instinct, we still need to act. As a result, in many situations, we have learned to rely on rhetoric, whose “axiom,” Blumenberg argues, is “the principle of insufficient reason.”<sup>144</sup> This is especially true of law in which norms need to be established and decisions rendered with no certainty as to what is right.

Rhetoric’s function helps account for the limits of thinking of law as science, not only in Burgess’s case, but also in present efforts to draw on the “science” of economics. For example, describing his position as juridical skepticism, Judge Richard Posner admits that the law is not an autonomous discipline that can find within itself grounds for legal policy. He then goes on to seek those grounds in economics.<sup>145</sup> But sophisticated modern scientists know that their knowledge is

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139. *Id.* at 695.

140. *Id.* at 699.

141. *Id.*

142. *Id.*

143. Brook Thomas, *Reflections on the Law and Literature Revival*, 17 *CRITICAL INQUIRY* 510, 511 (1991).

144. Hans Blumenberg, *An Anthropological Approach to the Contemporary Significance of Rhetoric, in AFTER PHILOSOPHY: END OR TRANSFORMATION?* 429, 447 (Kenneth Baynes et al. eds., 1987).

145. Richard A. Posner, *The Jurisprudence of Skepticism*, 86 *MICH. L. REV.* 827, 890–91 (1988).

not certain. Thus, the scientific community has learned “to put up with the provisional character of its results indefinitely.”<sup>146</sup> Law cannot afford that luxury. The results of science can, and probably should, be appealed to, but because they are always provisional, we still need to ask whether they should be the basis for legal actions. The authority for legal action, in other words, is always open to rhetorical dispute, a rhetoric that is not controlled by transcendental principles or scientific laws. “The decisive difference” between rhetoric and science, according to Blumenberg, “lies in the dimension of time; science can wait, or is subject to the convention of being able to wait, whereas rhetoric . . . presupposes, as a constitutive element of its situation” the necessity to act while “[l]acking definitive evidence.”<sup>147</sup>

Of course, Schmitt’s political theology understands the need to act. An advocate of decisionism, Schmitt argues that to understand a legal system we must look to the decisions made, not the norms articulated. Nonetheless, for him the answer does not lie in rhetoric. On the contrary, he is part of a long antirhetorical, antidemocratic tradition beginning with Plato. Schmitt is, for instance, strongly influenced by Hobbes, who objected to democracy because it relies on rhetoric to make decisions more “by a certain violence of mind” than by a right reason.<sup>148</sup> Likewise, in *The Crisis of Parliamentary Democracy* (1923), Schmitt criticizes modern mass democracies for their partisan politics. Disgusted with people whose primary loyalty seems to be to their political parties rather than the good of the state, he accuses them of being unwilling to “concede the force of the better argument.”<sup>149</sup> Thus, Schmitt turns to a single individual, the president—elected by all of the people—as the defender of the constitution, granting him the sovereign power to declare the state of exception.

Schmitt’s state of exception might seem to point to the limits of rhetoric. If it makes sense to understand law as rhetoric rather than science because of the need to act, an emergency demands action that cannot wait for rhetorical deliberation. Nonetheless, a flaw in Schmitt’s argument becomes apparent if we turn to Burgess. Like Schmitt, Burgess recognizes that the initial response and reaction to an emergency must come from the executive, who in such cases has “despotic power.”<sup>150</sup> Criticizing the majority decision in *Ex parte Milligan* for allowing local courts to decide the state of emergency, he writes that it

would place in the hands of a relatively insignificant and irresponsible official the power of life and death over the state, in times of its greatest peril. War is the solution of a question by force; and this proposition would introduce into the process, at its most critical point, the pettiest kind of legalism. Scientifically, the view is weak and narrow; practically, it

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146. Blumenberg, *supra* note 144, at 437.

147. *Id.* at 437, 441.

148. *Id.* at 452.

149. SCHMITT, *supra* note 97, at 29.

150. 2 BURGESS, *supra* note 96, at 261.

cannot be realized. The commander has only to close the court-room, and place a guard at the door, and this criterion of war or peace will be made to conform to the determinations of power.<sup>151</sup>

With its realistic understanding of the “determinations of power” and its attack on the “pettiest kind of legalism,” this account could well be written by Schmitt. But, unlike Schmitt, Burgess does not grant the president sovereignty. The president may be the first to act but that does not mean that his actions are in the end legitimate. “[I]f Congress wills otherwise,” Burgess points out, “it has the constitutional power to render the president’s act null and void, to treat it as an usurpation and to remove him from his office.”<sup>152</sup>

Alluding here as much to Congress’s battles with President Johnson over Reconstruction as to Lincoln, Burgess’s example reveals his affinity, if not total agreement, with advocates of rule by law, such as Bruce Ackerman and David Cole, who insist that the decision to end emergency power should not rest with those who exercise it.<sup>153</sup> Acutely attuned to the need to act decisively, Burgess also knows that the person charged with an initial response need not be considered sovereign. This crucial difference between Burgess and Schmitt reveals a problem with the latter’s claims about political theology. Rather than provide an accurate description of a historical process, Schmitt’s argument about the state’s use of secularized theological concepts turns out to be a rhetorical ploy to legitimate his authoritarian desire to give a single individual sovereign control over partisan politics. Indeed, Schmitt’s American examples reveal the historical inaccuracy of his argument about political theology. For instance, he asserts that nineteenth-century Americans believed that “the voice of the people is the voice of God.”<sup>154</sup> But Lieber explicitly states that “‘Vox populi, vox Dei,’ cannot be endorsed.”<sup>155</sup> Even more telling is Schmitt’s claim that “[t]he exception in jurisprudence is analogous to the miracle in theology.”<sup>156</sup> Just as deism “banished the miracle from the world,”<sup>157</sup> so rationalist defenders of the “modern constitutional state”<sup>158</sup> refuse to acknowledge the necessity of the exception.<sup>159</sup> But what are we to do with Burgess, a rationalist defender of the modernist constitutional state if there ever was one, and his defense of the exception? One thing I hope is that we use him to note the audacity of Schmitt’s comparison of the sovereign’s declaration of

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151. 1 BURGESS, *supra* note 16, at 250.

152. John W. Burgess, *The Relation of the Constitution of the United States to Newly Acquired Territory*, 15 POL. SCI. Q. 381, 387 (1900).

153. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1030 (2004); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2565–66 (2002).

154. SCHMITT, *supra* note 4, at 49.

155. MERRIAM, JR., *supra* note 32, at 173 n.511.

156. SCHMITT, *supra* note 4, at 36.

157. *Id.*

158. *Id.*

159. *Id.*

martial law with a divine miracle. Schmitt's claims for political theology depend on such analogies.

Acknowledging that dependency, Bonnie Honig affirms Schmitt's metaphor of the exception as a miracle but offers a different version of political theology by drawing on Franz Rosenzweig's account of miracle while extolling the "miracle of metaphor."<sup>160</sup> But over forty years ago, Blumenberg offered a different way of understanding Schmitt metaphorically. Noting Schmitt's assertion that "[a]ll my statements on the subject of political theology have been the assertions of a legal scholar about a systematic structural kinship between theological and juristic concepts,"<sup>161</sup> Blumenberg points out that a structural kinship is not necessarily a relation of secularization. Secularization occurs when concepts that are originally theological determine how a realm outside of theology conceives of itself. But in Schmitt's case the terms he uses are "not determined by the system of what is available for borrowing but rather by the requirements of the situation in which the choice is being made."<sup>162</sup> The theological tradition makes available to Schmitt metaphors that allow him to create an aura of legitimacy for his authoritarian views of sovereignty. Thus, Schmitt's "[p]olitical theology," Blumenberg concludes, "is a metaphoric theology: the quasi-divine person of the sovereign possesses legitimacy, and has to possess it, because for him there is no longer legality, or not yet, since he has first to constitute or to reconstitute it."<sup>163</sup>

Schmitt may use metaphorical theology rather than political theology to legitimate his theory of sovereignty, but at least its results are concrete. We have no doubt who is sovereign. In contrast, Burgess's use of "science" to legitimate the sovereignty of the state seems hopelessly abstract. As important as Burgess's distinction between the government and the state is, it leaves us unclear about what precisely constitutes the state. Who or what actually imposes the limit?

Wilson noted this problem. A Democrat of his time, he was much more sympathetic to the doctrine of "states' rights" than Burgess.<sup>164</sup> But he does not go so far as to grant individual states sovereignty. Making a fine distinction, he grants them "dominion," reserving "sovereignty" for the federal state.<sup>165</sup> He does not

160. BONNIE HONIG, *EMERGENCY POLITICS* 90 (2009).

161. HANS BLUMENBERG, *THE LEGITIMACY OF THE MODERN AGE* 94 (Robert M. Wallace trans., MIT Press 1983) (1966).

162. *Id.* at 93.

163. *Id.* at 101. On Blumenberg and Schmitt, see BLUMENBERG & SCHMITT, *supra* note 112. See generally Graham Hammill, *Blumenberg and Schmitt on the Rhetoric of Political Theology*, in *POLITICAL THEOLOGY AND EARLY MODERNITY* 84, 84–99 (Graham Hammill & Julia Reinhard Lupton eds., 2012); Anselm Haverkamp, *Richard II, Bracton, and the End of Political Theology*, 16 *LAW & LITERATURE* 313 (2004). For the importance of metaphor for Blumenberg, see HANS BLUMENBERG, *PARADIGMS FOR A METAPHOROLOGY* (Robert Savage trans., Cornell Univ. Press 2010) (1960).

164. WOODROW WILSON, *Political Sovereignty*, in *AN OLD MASTER AND OTHER POLITICAL ESSAYS* 61, 90–95 (New York, Charles Scribner's Sons 1893).

165. *Id.* Wilson was from the Old Dominion state. His distinction between dominion and sovereignty most likely owes something to Britain's establishment of various white dominions in the empire that still owed sovereignty to the monarchy. In debates at the time of the American

stop there. For him, sovereignty cannot be located by general reference to the state, as it can for Burgess.<sup>166</sup> Sovereignty is, instead, “the highest political power in the state.”<sup>167</sup> For Wilson, this means “the highest originative or law-making body of the state.”<sup>168</sup> By granting sovereignty to the “law-making organ” of the state, Wilson self-consciously counters ideas of popular sovereignty.<sup>169</sup> To be sure, he admits,

In a very profound sense law proceeds from the community. . . . But law issues thus from the body of the community only in vague and inchoate form. It must be taken out of the sphere of voluntary and uncertain action and made precise and invariable. It becomes positive law by receiving definition and being backed by an active and recognized power within the state.<sup>170</sup>

Wilson locates sovereignty in the law-making organ of the state. Schmitt locates it in the president. The concreteness of both highlights the vagueness of Burgess’s theory. But, before we dismiss Burgess’s notion of the state as a hopeless metaphysical abstraction, it is worth trying to ascertain the rhetorical role it plays within his system. That role, I would like to suggest, is very similar to the role legal fictions play in the law. Necessary to allow a legal system to function, legal fictions are one more reminder that the law cannot construct its own rational foundation. To be sure, Burgess would have resisted that comparison, since he believed that science had allowed him to transcend the scaffolding of fictions. In contrast, Schmitt had an astute awareness of their necessity. In one of his first publications, he defines a fiction as a “self-consciously arbitrary or false assumption” whose “value and justification” lie in “its unavoidable indispensability for the practice of thought and communication.”<sup>171</sup> As we have

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Revolution, James Wilson anticipated the granting of dominion status by arguing that members of the British Empire were “independent of each other, but connected together under the same sovereign in right of the same crown.” ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 119 (2010) (quoting 2 JAMES WILSON, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament*, in *THE WORKS OF JAMES WILSON* 501, 542 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)). Wilson, in turn, was likely appropriating Blackstone’s claim, noted by Michael Meranze at the symposium, that because the colonies were conquered territory, “the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions.” Michael Meranze, *Hargrave’s Nightmare and Taney’s Dream*, 4 U.C. IRVINE L. REV. 219, 224 (2014) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* § 4, at 105 (William S. Hein & Co. 1922) (1765)). Wilson made an even stronger claim for dominion status by denying Blackstone’s further claim that the colonies were, nonetheless, subject to “the control of parliament.” *Id.* These arguments serve as background to Justice Marshall’s declaration of Native American tribes as “domestic dependent nations,” and the Supreme Court’s declaration of the Insular territories as foreign in the domestic sense. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

166. WILSON, *supra* note 164, at 94.

167. *Id.* at 90.

168. *Id.* at 90–91.

169. *Id.* at 95.

170. *Id.*

171. BLUMENBERG & SCHMITT, *supra* note 112, at 301–02 (my translation).

seen, rhetorically Schmitt's account of sovereignty as political theology helps him create a myth of legitimacy for the decisive actions of an individual over the muddled workings of partisan politics.

Burgess's account of sovereignty functions very differently. His failure to name with precision what constitutes the state makes his account uncannily compatible with William Connolly's very up-to-date critique of Schmitt and Agamben. According to Connolly, we need to think of sovereignty without a definite location; we need to think of sovereignty with no doer behind the deed. Not located in one person or governmental body, sovereignty for Connolly is an assemblage of various actors and comes into being only after sovereign acts have been performed.<sup>172</sup> If this sounds paradoxical, it is, constituting what Connolly and Bonnie Honig call the generative "paradox of politics."<sup>173</sup> In Burgess's hands, that paradox allows him to limit governmental power by granting unlimited power to the state. Indeed, as counterintuitive as it is for critics of state power, for Burgess the legal fiction of the state serves an equitable function.

Like Schmitt's definition of sovereignty, equity is concerned with the exception. Acknowledging that law, a product of human beings, is inevitably flawed, Aristotle introduced the concept of equity to provide remedies for those cases in which the norms of even fair systems can produce injustices. But, because it deals with the exceptional, equity can never be properly institutionalized. As a result, especially in English-speaking countries, equity was traditionally associated with the Crown, since only the sovereign was considered to have the authority to disregard human-made law to deal with exceptional cases. Schmitt's link between the sovereign and the exception works within the same conceptual framework, and, although attempts to institutionalize equity inevitably fail, we have residues of the old system. Richard Posner, for instance, in one of his most decisionist moments, claims that equitable remedies are available through the discretionary power of judges.<sup>174</sup> More directly, the former link between equity and the sovereign accounts for the pardoning power granted to the president in the Constitution. It is no accident that Lincoln, who declared exceptional powers during wartime, also had a reputation as the great pardoner. But the most important role that equity plays today is rhetorical. Even without actual institutions of equity, the metaphor remains, marking the limits to the law and providing a perspective to criticize unjust outcomes. For Burgess, the sovereign state—which marks the limits of both law and the government—serves that

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172. WILLIAM E. CONNOLLY, PLURALISM 131–60 (2005).

173. *Id.* at 145; HONIG, *supra* note 160, at xvi. Just as Honig endorses Schmitt's metaphor of the miracle for the state of exception, *id.* at 90, so Connolly accepts his definition of the sovereign with one substitution, CONNOLLY, *supra* note 172, at 145. For Connolly, the sovereign is "*that* which decides an exception." *Id.* I take issue with both the metaphor and the definition.

174. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 113 (1988).

function, allowing him to criticize specific laws, Supreme Court decisions, and governmental actions while still defending the modern *Rechtsstaat*.

Although equity points to a limit of law, equity has its own limitations when it comes to assuring justice. As noble as appeals to it sound, there is no agreement about what is equitable. Thus, when George Washington Cable responded to the civil rights cases in 1883 by arguing for equal citizenship for African Americans in an essay called “The Freedman’s Case in Equity,” Henry Grady responded with “In Plain Black and White,” claiming that the truly equitable solution was separate but equal segregation.<sup>175</sup> Burgess’s sovereign state may serve an equitable function, but there is no guarantee that it is in fact equitable. What is equitable is always open to rhetorical debate.

Indeed, Burgess is not the only one to use the “legal fiction” of the state rhetorically. When Berman claims that political theology serves as the “marker of the inescapable limitation on politics and state power,” what he really means is governmental power exercised in the name of the state. But for Berman to argue for limitations on governmental power would be to sound very much like the liberalism he rejects. To give one example, a 1946 *Life* editorial characterizes liberalism by its beliefs that government needs to acknowledge some outside limit to its power and that no political system—not even those based on rationality—can offer perfect answers.<sup>176</sup> To make a case for limitations on governmental power would also require attention to different organs of the government, such as the executive, legislative, and judicial, as well as (in the United States) the national and state governments. As the examples from the post-Civil War era amply demonstrate, these different organs are often in conflict. In contrast, to call for limits on “state” power allows the construction of simplified narratives about power emanating from a unified source. For instance, in their influential book about race in the United States, Omi and Winant assert—without proving—“Despite all the forces working at cross-purposes within the state . . . the state still preserves an overall unity.”<sup>177</sup> No one responsive to the complicated legal history of race and Reconstruction, with its conflict between the sovereignty of the national state and individual states, could make that statement.

My point is not that we need to eliminate the legal fiction of the state. On the contrary, I find Agamben as naïve as Burgess on the possibility of doing without fictions when, in *The State of Exception*, he argues that the answer to the abuse of power is to “halt the machine” that “is leading the West toward global civil war,” by exposing the “fiction” of the “very concepts of state and law.”<sup>178</sup> If fictions are necessary, exposing them as fictions will not eliminate them. What we

175. George Washington Cable, *The Freedman’s Case in Equity*, 29 CENTURY MAG. 409, 412–13 (1885); Henry W. Grady, *In Plain Black and White*, 29 CENTURY MAG. 909, 909–10 (1885).

176. Editorial, *What Is “Liberalism”?*, LIFE, Jan. 7, 1946, at 25, 26.

177. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 84 (2d ed. 1994).

178. AGAMBEN, *supra* note 10, at 87.

can do, however, is try our best to understand the function of different fictions of the state. Rhetorically, they can serve both proponents of state power, like Burgess, and critics of state power influenced by Schmitt, like Berman, because both need some way to mark limits. Thus, I want to close with a brief comparison of the rhetorical effects of Schmitt's definition of sovereignty in terms of the exception and Burgess's in terms of the limit, followed by a look at three controversial legal issues today in which, it seems to me, Burgess's definition proves more helpful than Schmitt's.

## VI.

"Exception" implies a norm. An *Ausnahme*, it is the "taking out" of an example that does not fit. Its connotations are primarily temporal, as indicated by another German term, *Ausnahmefall*, which means an "exceptional incident." This temporal dimension served Schmitt's purposes well since he felt that the situation in Germany had become an *Ausnahmезustand*, a "state of emergency," requiring the declaration of martial law. In contrast, "limitation's" connotations are equally spatial and temporal. We have limits to a territory as well as to time. The spatial dimension served Burgess well in post-Civil War debates over whether the nation or "states" should have jurisdiction over a particular territory. The temporal dimension allowed his theory of sovereignty to accommodate the state of emergency. To be sure, the temporal and the spatial are not in strict opposition. Schmitt, for instance, calls his definition a *Grenzbegriff*, a border concept, with *Grenze* meaning a border or a limit.<sup>179</sup> For Schmitt, the exception marks the limit of attempts to base rule by law on a set of rational norms.

In the post-9/11 world, Agamben has drawn on Schmitt to argue that the exception has become the norm. That view is encouraged by the English translation of *Political Theology*, which uses "exception" to refer to Schmitt's varying deployment of *Ausnahme*, *Ausnahmefall*, and *Ausnahmезustand*. Thus, although Schmitt's definition of the sovereign refers to the very specific case of the *Ausnahmезustand*, it comes across in English as referring to the exception in general. As much as the rhetoric of Schmitt's argument encourages the conflation of these three terms, the English translation is unfortunate. After all, it is one thing to note that we are in exceptional times. It is quite another to say that those times are so exceptional that martial law must be declared. Despite numerous descriptions of the country being in a perpetual state of emergency, I follow Hans Kellner in arguing that we should not, as Schmitt and his followers tend to do, collapse the productive tension between the exception and the norm by turning the exception into the norm. Capable of accommodating temporary moments of the state of exception without jettisoning the important function of normativity in the law, Burgess's much more conventional definition of sovereignty in terms of the limit seems to be more productive in today's world.

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179. CARL SCHMITT, POLITISCHE THEOLOGIE 13 (2004).

If the exception implies a norm, limitation implies something “above or beyond” that can impose the limit. In a Christian context that thing was God. Thus, Giordano Bruno was burned at the stake over the idea of infinity, the possibility that the world of the here and now has no limits. Despite Schmitt’s claims about political theology, however, Burgess’s sovereign state does not function in the same manner as God. With unlimited authority, God knows no bounds. In contrast, Burgess’s state is bounded. It has unlimited authority only over a limited territory. That authority is beneficial for those living within that territory, Burgess believed, because of the legal norms that govern it. But those norms do not apply to people beyond the limits of the state’s jurisdiction. For at least three controversial constitutional issues in today’s America, injustice is more likely to be perpetuated by limiting—even relinquishing—sovereignty than by asserting it in Schmittian fashion.

My first example is the detention and trying of terrorist suspects at Guantanamo. Despite clarification in *Boumediene v. Bush*, 553 U.S. 723 (2008), a number of people continue to believe that the denial of full constitutional protections to the accused resulted from a sovereign assertion of the “exception.” On the contrary, the Bush administration’s legal argument was based on the fact that, because Guantanamo is leased and not technically sovereign U.S. territory, full constitutional guarantees were not required. Historically, it is important to remember that the lease for Guantanamo grew out of the imperialism of the Spanish-American War. Although it did not acquire Cuba, the United States arranged for the permanent lease of a naval base there. In the meantime, in the *Insular Cases*, the Supreme Court gave Congress plenary power over the territories the nation did acquire, denying their residents full constitutional protections because the territories were not fully incorporated into the country.<sup>180</sup> Given Burgess’s defense of the state’s unlimited sovereign power, it might seem that he would have endorsed the Court. On the contrary, he was outraged, appalled that it did not honor the sovereign duty to protect the civil liberties of all within its territory.<sup>181</sup> Understanding this logic, the Bush administration recognized that the best way to deny constitutional protections was to relinquish a claim to sovereignty, not to assert it.

The fact that imperial expansion relies on the assertion of sovereignty at the same time that relinquishment of it can lead to what many consider human rights abuses should make it clear that state power is neither the benevolent force that Burgess posits nor the unmitigated evil that its critics decry. Even the use of

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180. A number of Americans assume that the absence of judicial review makes plenary power an example of the state of exception. It is not. The state of exception is a state of emergency when the civil legal order is suspended as in martial law. Plenary power is a particular form of administrative law.

181. John W. Burgess, *How May the United States Govern Its Extra-Continental Territories?*, 14 POL. SCI. Q. 1, 3 (1899); John W. Burgess, *The Decisions of the Supreme Court in the Insular Cases*, 16 POL. SCI. Q. 486, 498–504 (1901); Burgess, *supra* note 152, at 382–83.

emergency powers is double edged. Although its potential for abuse is obvious, in the Reconstruction and post-Reconstruction period it was used to combat the Ku Klux Klan and, as Birkheimer makes clear, to protect Chinese immigrants from lynching. Indeed, one reason this period is so helpful for a consideration of issues of sovereignty is that it dramatizes a paradox that continues to have consequences today. On the one hand, Reconstruction failed in large measure because the national state, for various reasons, did not fully assert the sovereignty it won in the Civil War over individual “states.” On the other, when it asserted that sovereignty in immigration, Native American affairs, and the Spanish-American War, it frequently did so with great injustice.<sup>182</sup>

Involving immigration, my second example shows the extent to which we are still living in the wake of that paradox. Prior to the Chinese Exclusion Acts, a national state apparatus to control immigration barely existed. Indeed, individual states alone often handled immigration. But with the Acts of 1882 and 1892 the national government asserted control and claimed the right both to exclude and to deport aliens. When Chinese protested, the Supreme Court, citing the doctrine of national sovereignty, sided with the government. Burgess fully agreed, appealing to a state’s right to protect “its nationality against the deleterious influences of foreign immigration.”<sup>183</sup> But there was an unexpected consequence of this assertion of unlimited sovereignty. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the U.S. government tried to deny birthright citizenship to the son of a Chinese couple living in San Francisco. Wong Kim Ark pointed to the citizenship clause of the Fourteenth Amendment, noting that he had been born in this country. But the government argued that, because his parents were subjects of China, he was not, as the amendment requires, fully subject to U.S. jurisdiction. Indeed, it was no accident that the government’s attorney was an ex-Confederate who continued to believe in limitations on national sovereignty. In contrast, Wong Kim Ark’s lawyers cited pro-Reconstruction Charles Sumner and the need for one supreme sovereignty.<sup>184</sup> The Court agreed with Wong Kim Ark. Today, those wanting to deny birthright citizenship to children of illegal immigrants dispute the ruling in *Wong Kim Ark*. They do so by adopting an argument similar to that of the ex-Confederate governmental attorney in 1898. They too deny the national state unlimited sovereign authority over all of the people in its territory.

My final example deals with another provision of the Fourteenth Amendment. Some important Reconstruction cases defining the relation between

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182. Constitutionally this divide can be traced to the *Slaughter House Cases*. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). By defining the privileges and immunities of U.S. citizenship so narrowly, the Supreme Court left the control of many domestic relations to individual states. But the national government still—and with increased authority—governed relations with immigrants, Native American tribes, and other countries.

183. 1 BURGESS, *supra* note 16, at 43.

184. Lucy E. Salyer, *Wong Kim Ark: The Contest Over Birthright Citizenship*, in *IMMIGRATION STORIES* 51, 73 (David A. Martin & Peter H. Schuck eds., 2005).

the nation and the individual state, such as *Texas v. White*, 74 U.S. 700 (1869), had to do with the debt the Confederate government and individual states accrued during the Civil War. Given Lincoln's legal fiction that states had never left the union, those debts raised a thorny legal issue. As a result, Section 4 of the Fourteenth Amendment unconditionally recognizes the "validity of the public debt of the United States" while forbidding the United States or any individual state from assuming or paying "any debt or obligation incurred in aid of insurrection or rebellion against the United States."<sup>185</sup> As with other measures of the Fourteenth Amendment, Section 4 affirms national sovereignty. Indeed, as frequent references to "sovereign debt" to describe today's financial crisis in the Eurozone confirm, a crucial component of sovereignty is control of a nation's debt. Much of the resentment from Greek citizens, for instance, comes from their sense that the European Union is imposing limits on how their country deals with its debt. Thus, when in 2012 Republicans threatened not to honor the U.S. debt, they were, in effect, arguing to limit U.S. sovereignty. To be sure, some might claim that the size of the debt has become such a crisis that the Constitution should be disregarded and a state of emergency declared. We might, then, turn to Schmitt to ask who has the power to declare such an emergency. But the very question points to a problem with his definition of sovereignty. Even though massive debt contributed to the crisis of the Weimar government, it is unlikely that even Schmitt would have wanted to attribute that "sovereign debt" to the individual declaring an *Ausnahmezustand*.

I hope that this and other examples I have raised through my historically based rhetorical analysis have persuaded at least some that, as indebted to Schmitt as we are for provocative questions about sovereignty, there are major limitations to his account of political theology and the state of exception.

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185. U.S. CONST. amend. XIV, § 4.

