

Anti-Constitutionalism: Frontiers sans Frontiers

By

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Abstract

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Anti-Constitutionalism: Frontiers sans Frontiers, maps and critiques a revitalized “rule-of-law” discourse in contemporary American politics, a discourse that cuts across and binds traditional ideological differences. I argue that this discourse generates a logic whereby the “law” is rendered a *per se* good threatened by two primary antagonists: lawlessness and politicization. All territories and persons, according to this vision, must be brought within the bounds of the rule-of-law and simultaneously the law must resist the temptations of politics. Drawing upon a variety of critical political and theoretical traditions that have witnessed the law as something other than synonymous with “justice” or “freedom,” including feminist legal theory and critical race studies, the dissertation argues that law void of political value is an impossibility. Thus, the very desire for a depoliticized legality is always a desire tethered to and through a particular political ordering of things. In advancing this argument, I look to several recent events in U.S. law and political life that have incited this flight of hope to legality: the Supreme Court decision in *Bush v. Gore*, the emergency “culture of life” legislation aimed at Terri Schiavo, and the “Torture Memos” authorizing torture as a method for imperial governance. Each of these cases suffers from being neither lawless nor political but rather from a radical singularity that undercuts the very possibility of a constitutive political ground. This thesis engages with contemporary political theorists on the question of “lawlessness” in the present and with theorists of the Early Republic (particularly Thomas Paine, James Madison and Alexis de Tocqueville) on the “politics” of law at constitutional inception.

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served as touchstones for my engagement with those canonical thinkers in this dissertation.

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In concluding this set of acknowledgments, I want to say thanks to a lovely creature that did not survive to see the completion of the dissertation, my feline writing buddy, Omar. Omar had been a constant companion. I could not imagine finishing this without him but he passed away before I could finish the final revisions. I do not hold that against him, but I do miss him. And thus I conclude with a cross-species wink and nod to the memory of my Mr. Turkey Man.

TABLE OF CONTENTS

- Introduction:** *politicized law & lawless politics*
Chapter. 1 **Judicial Power:** *this is not a decision*
Chapter. 2 **Executive Power:** *a law that is no law*
Chapter. 3 **Legislative Power:** *this death that leads to life*
Chapter. 4 **Sovereign Power:** *power & life amidst new kings & old tutors*

Introduction

POLITICIZED LAW & LAWLESS POLITICS

Imagine: “You are an American. You love your country. You think it is the greatest nation on Earth.” Then: “one day, quite by accident, you are shocked out of your complacency.” The communist tide has risen, quietly but certainly. As an example: “You pay a visit to your son’s schoolroom, his teacher is expounding to the class---including your son---some theories that sound strangely alien to you. They *are* alien to sound American thinking, but this teacher doesn’t label them as such.” The shock of the red tide rising compels you into action. You visit the principal of the school to demand the firing of this teacher who “sounds like a communist” or “at least a fellow traveler.” Yet you discover that you and your community are blocked from this action. What force enables the red menace and hobbles the true patriot? The Supreme Court of the United States.

The examples begin to multiply: you need an attorney and select one who is accredited by your state. However, you “aren’t talking to him long before you realize that if you give this man your case, you will have a communist representing you. You leave his office in a rage and go to your State Bar association.” You issue a demand for answers: how is that “this young man, only just out of law school, can be an accredited attorney in your state---particularly in the face of all we know about the communist conspiracy?” You learn that the local State Bar had in fact disallowed bar membership to communists, however the United States Supreme Court invaded the sovereignty of the state and invalidated this prohibition.¹

At this point “your mind is in a whirl.” What, you ask, “is happening to us---to me, to my country? Surely something is wrong somewhere.” Again and again your determined inquiry leads you to a Supreme Court that has limited the means by which real Americans may fortify their country “against tyranny from within and without.” These nine men who stand against America must be studied, we must know: “what makes them tick?” What is it about these men that enabled them to push the republic to the brink of extinction? How shall we combat them? What reforms are needed to wipe out all the changes they have wrought since the New Deal? What will ensure that after this resistance and return, we will be safe from a relapse into such despotic madness? We “must know the answers to these questions, because the future of our country---the country we love is at stake.”

These observations and questions emerged from the fevered world of the John Birch Society in the late 1950s. In *Nine Men Against America*, a book unknown and unremembered outside that cloistered Bircher world of conspiracy making and treason hunting, Rosalie Gordon offers a central thesis about the Court and its deeds since the presidency of FDR.² The Court decisions she decries, in the cause of a liberty to suppress, are purportedly the result of political machinations rather than legal thinking. The

¹ *Konisberg v. State Bar of California*, 353 U.S. 252 (1957). In fact, the issue was not fully resolved until *Baird v. State Bar*, 401 U.S. 1 (1971).

² ROSALIE M. GORDON, *NINE MEN AGAINST AMERICA: THE SUPREME COURT AND ITS ATTACK ON AMERICAN LIBERTIES*, opening quotations are from 3-8 (1958).

communist conspiracy infiltrated the jurisprudence of the United States because the modern Justices have been overwhelmingly drawn from the ranks of “politicians rather than jurists.” Justice William O Douglas, as example, was a “darling of the radicals,” but even worse he lacked “judicial experience” when named to the Court.³ Another Roosevelt appointee, Justice Murphy, likewise had no “previous judicial experience.”⁴ And of course Earl Warren, the embodiment of all that was amiss, moved directly from the Governorship of California into the seat of Chief Justice of the United States. In response, Rosalie Gordon endorsed a reform measure that would require appointees to possess at least ten years of judicial experience.⁵ It remained unexplained how and why “politicians” were more likely to turn against “Americanism” or how and why judicial experience would inculcate and fortify a devotion to “Americanism.” Even more, when Gordon accused Justice Douglas of writing opinions designed to propel him toward the Democratic nomination and the White House, it is clear that it was not nine men against America that so frightened her, but instead the possibility of a majority of Americans against Americanism. In so many ways this John Birch pamphleteer was ahead of her time.

The crux of Gordon’s argument is this: when the worlds of politics and the worlds of law blur, when the line between them wavers, the consequences are catastrophic for both. The law opens itself up to becoming a plaything of the communists and consequently political life is devoured by the rogue legality of the communists and their fellow travelers. Communism was the particular political movement, but its capacity for movement was only enabled by the breakdown of the more general jurisprudential order of things. More recently, Robert Bork has updated this argument. Still nursing the wounds of the Senate rejecting his nomination to the Supreme Court, Bork wrote a book in 1990 entitled *The Tempting of America: The Political Seduction of the Law*. The opening line of the book picks up where the subtitle leaves off: “In the past few decades American institutions have struggled with the temptation of politics.”⁶ Bork elaborates: “politics invariably tries to dominate another discipline, to capture it and use it for politics’ own purposes, while the second subject—law, religion, literature, economics, science, journalism, or whatever—struggles to maintain its independence. But retaining a separate identity and integrity becomes increasingly difficult as more areas of our culture become . . . politicized.”⁷ It is of note here that the seductress of the law is not liberalism or leftism or communism or nihilism or any of the other familiar specters haunting the right-wing imagination. Rather, the temptation is “politics” as such.

One might at this moment issue a charge of hypocrisy against Robert Bork. Who, after all, has done more to “politicize” the precincts of American law than Bork, the neoconservatives, the Federalist Society, and all of their fellow travelers? And such a charge would no doubt score points in a variety of liberal legal circles today as the Court stands at most one vote away from a root and branch assault on fifty-plus years of constitutional development. Such point scoring however presumes, rather than challenges, the mechanism by which the argumentative score is tallied. That is, it too

³ *Id.* at p. 40 and 43, respectively.

⁴ *Id.* at p. 45.

⁵ *Id.* at p. 150.

⁶ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1 (1990).

⁷ *Id.* at p. 1. See especially chapter three, *The Warren Court: The Political Role Embraced*.

accepts the deployment of “politics” as a rightful charge, a just accusation, a seduction to be resisted and temptation to be thwarted. Consider Columbia University President (and former Michigan Law dean) Lee Bollinger’s observation in the wake of Justice Sandra Day O’Connor’s retirement from the Supreme Court:

Everybody knows that there’s a difference between acting within a body of jurisprudence and acting politically . . . It’s a question of degree, and I think many sensible people fear a distortion of that balance. That’s what the Bork nomination was all about. And that’s why the O’Connor replacement is like the Bork issue, because it’s a critical decision point.⁸

So, we have at once an opposition to Bork and a perfect agreement with Bork. Jurisprudence in the Bollinger schema is marked by its difference from politics. The threat is not conservatism or right-wing fanaticism or reactionary illiberalism. Rather, the difference making the difference is “politics” as such.

The distinction between something called “law” on the one hand and something called “politics” on the other is often made. Sometimes the distinguishing move is driven by a hope to defend the former from the incursion of the latter, to keep the “law” safe and sequestered from the supposed unprincipled tawdriness of “politics.” It’s the juridico-political equivalent of seeking the separation of church and state (the Bollinger-Bork position). At other times, the distinction is rendered hierarchically as law over politics: the latter must submit to the requirements, demands, rules, methods, and style of the former.⁹ This is represented in the familiar assertion about the necessity and primacy of the “rule of law” over the “rule of men.” Similarly, law is sometimes presented as the frontier or boundary of politics; law keeps politics bounded and halts the political from transforming and transgressing into pure violence. The law guards politics from its extremes; when and where law is suspended or absent we have *nothing but* politics (we can call this the “lawlessness” position).

The “law is law because it is not politics” claim has been under assault for quite some time. To many observers, this move to distinguish law from politics has seemed misguided at best and disingenuous at worse. For instance, Marx first described the birth of the modern constitutional state and the emergence of the “rights of man” concordant with it as the bifurcation of human existence into civil society and the state. The location of political life in the state, and the realization of rights against it, only served to depoliticize powers coursing through civil society. Hence the legalities of constitutionalism worked *politically* in relationship to those powers of property and religion and “egoism” by presuming, securing, and enabling them.¹⁰ In addition, some

⁸ John M. Broder, *Have a Seat, Your Honor*, N.Y. TIMES, July 10, 2005.

⁹ David Kairys collapses the ‘separate’ and the ‘above’ in a manner that obscures the full power of the latter in a political culture of “rights.” On the significance of the latter, see Wendy Brown and Janet Halley, *Introduction*, LEFT LEGALISM/LEFT CRITIQUE (2002). Nonetheless, Kairys’ point that the ideal of separation is linked with the ideal of objectivity and neutrality is a correct diagnosis. See David Kairys, *Introduction*, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE, 3d ed. (1998).

¹⁰ Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER (Robert Tucker ed., 2d ed. 1978). I am not using the word “politically” here in the narrow and specific sense that Marx did in the essay.

Marxists later viewed the law more precisely as instrumental for capital, as a superstructural reflection of the capitalist economic relations underneath.¹¹

Critical Legal Theorists in the American legal academy have excelled in showing the “radical indeterminacy” of the law, an indeterminacy rendered determinate, they argue, by political calculations at odds with the popular perception of what constitutes proper methods of adjudication.¹² Meanwhile, in the behavioral social sciences, the assault on the division between law and politics is offered through grids of quantification and ‘scientific’ measurement: judicial votes are tallied, opinions are coded as “liberal” or “conservative,” party identifications of the judges are marked, and the perhaps disconcerting conclusion is reached:

the behavior we find do[es] not support [C. Herman] Pritchett’s statement “Judges make choices, but they are not the ‘free’ choices of congressman.” Indeed, given the extraordinary constraints on representatives imposed by constituents and party, we would conversely argue that members of Congress make choices, but they are not the free choices of Supreme Court justices.¹³

This unconstrained free choice for action thus means that “the decisions of the Supreme Court can be overwhelmingly explained” by the political attitudes and policy values of individual justices and that “traditional legal factors” are fictions exposed as such by “science.”¹⁴

These critiques need not overwhelm, or even *necessarily* be positioned in opposition to, the “law is law because it is not politics” claim. They could, at least in theory, operate as a lament, a hymn to loss and a call for a restoration. Louis Brandeis, for example, accepted several tenets of what today might read as a quasi-Marxist critique and responded with a call for the fortification of law and lawyering from the temptations of capitalist domination on the one hand and unruly labor radicalism on the other; to hover above and mediate between “political” antagonisms.¹⁵ Bollinger and Bork likewise could agree with the observations made, but see in them a diagnosis of juridical malady. In fact, this is precisely what Bork does.

Of course, this is not primarily what the critics have in mind. They are insisting, each in their specific way, that the law/politics distinction is fool’s gold. Moreover, the longing and fantasy of a law/politics disjuncture is itself potentially a constitutive element of forms of socio-political domination. Catharine MacKinnon presses this point when she argues that

¹¹ This is set forth by Marx and Engels: “Law, morality, and religion, are to him [the proletarian] so many bourgeois prejudices, behind which lurk in ambush just as many bourgeois interests.” See *Manifesto of the Communist Party*, in *THE MARX-ENGELS READER* (Robert Tucker ed., 2d ed. 1978). This critique of law has been extended beyond the negative rights and liberty of the eighteenth century constitutional state and to the provisions of the twentieth century welfare state. See for example, Jill S. Quadango, *Welfare Capitalism and the Social Security Act of 1935*, *AMERICAN SOCIOLOGICAL REVIEW*, Vol. 49, No. 5 (1984).

¹² For an intellectual survey of the Critical Legal Studies movement, see Alan Hunt, *The Theory of Critical Legal Studies*, in *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* (Alan Hunt ed., 1993).

¹³ HAROLD J. SPAETH AND JEFFREY A. SEGAL, *MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT* 288 (1999).

¹⁴ *Id.* at p. xv.

¹⁵ Louis D. Brandeis, *The Opportunity in the Law*, Address before the Harvard Ethical Society, 1905.

The state is male in the feminist sense: the law sees and treats women the way men see and treat women . . . the state's formal norms recapitulate the male point of view on the level of design. In Anglo-American jurisprudence, morals (value judgments) are deemed separable and separated from politics (power contests), and both from adjudication (interpretation).¹⁶

Or from the entirely different direction of the behavioralists, the fantasy of disjuncture is a mystifying mechanism for an antidemocratic institutional triumph. And *sans* the mystification, *sans* the deference; and *sans* the deference, *sans* the triumph. Each critique revels in the politics of exposure, and each revels too in wild reductionism: to class or to "sex" or to individualistic, conscious, and calculable political desire.

The most radical critique, in a sense, is the behavioralist one. It is also the most prominent and prevalent one in everyday political discourse. Thus, it bears pausing upon it. First, its radicalness. Whereas MacKinnon argues that the *specific* forms of jurisprudence embody and perform a masculinist epistemology and political logic, the specificity of the discourse is not abolished---there is a call for feminist jurisprudence, not the abolition of jurisprudence as such. Similarly, Marxist or Marxist-informed critiques of law position legal discourse as reflective of underlying class formations and/or legitimating those class formations regardless of what degree of autonomy is possessed by the specific profession, the guild, the vocabulary, the institutional organization. Again, we have a reductionism but with the maintenance of at least some differences in tact: it was the very specificity of law that gave it such a power. By contrast, the behavioralist charge is not that the distinctness of law reflects or constitutes a mode of classed or sexed or raced power and domination; there's no logic underneath; in fact, there's no logic at all. Further (and here's the radicalness) *there is no distinction*: "traditional legal factors, such as precedent, text, and intent, [have] virtually no impact."¹⁷

And this is the pivot around which the Bork-Bollinger position turns as well, but in a counter-rotation to Segal and Spaeth. That is, the transgression for the former is the norm for the latter. It is also what most commentators have in mind when they accuse an opinion, a judge, a court, a juridical epoch, as being "political." To be "political" is to abandon traditional legal factors for specific "policy ends" as judgment becomes unmoored from precedent, text, and intent. The most recent and sustained articulation of this may be located in the strenuous and comical efforts by Senator Arlen Specter to extract oaths of allegiance to "precedent" from Bush's final nomination to the Supreme Court. The desire for such unprofessional and unenforceable assurances was seen as that which would offer some protection for the "law" from the sharpened talons of "politics."¹⁸ That "traditional legal factors" might themselves be the carrier of an entire panoply of political investments was not seriously entertained in the Senate, in most legal commentary around the appointments (see e.g., Bollinger), or in the popular presses.

¹⁶ CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161-162 (1989).

¹⁷ Spaeth and Segal, *supra* note 13 at p. xv.

¹⁸ Senator Specter was rightly attacked on the Right as well but for different reasons (originalism) and with a symptomatic headline. See George Neumayer, *The Law of Lawlessness*, THE AMERICAN SPECTATOR, November 2, 2005.

The “law is law because it is not politics” claim seeks to sustain jurisprudential difference by abolishing politics from the realm; the law is “just politics” and thus not different at all claim seeks to abolish difference by flattening politics into an omnipresent and monological “politics” of hyperindividuated “interests.” One aim of this dissertation is to move against the imaginary of both difference without politics and politics without difference. Politics announces difference and difference announces politics, and the movements conjoined in structuring the terrain of contemporary disagreement desire to silence both.

We must ask: why does the charge of “politics” have purchase and bite when levied against legal interpretations and enactments? Why is *that* the term of reproach and disapprobation? What dangers and pitfalls inhere in such a justificatory-rhetorical regime? What limitations on political judgment does this enact? What confinements does this impose on political movements? What suffocations are potential in a desire to have law safe from politics when politics is itself legally saturated and oriented? What is produced and enabled by a politics is politics is politics debunking---an illumination or an occlusion? And might the untangling of these questions help us to think about the unravelings and unfoldings of a present that is vitalized and marked so intensely by these very questions?

The dissertation thus extends Marxist, feminist, and Critical Legal theoretical inquiry into the politics of law; but more, it seeks to think about the contemporary political implications of a “law without politics” desire so omnipresent on both the Right and the Left.

Another manifestation of the discourse of the law/politics division is an investment in erecting legal barriers around political movement; the law as a daywatchman, on the frontiers keeping things in. An always fragile and unsteady division of guardianship is thus at work: to keep politics from infecting the law on the one hand and to keep politics tamed by the law on the other. Whereas the trump move in the former case is the accusation of being “political,” the trump move in the latter instance is the accusation of being “lawless.” Both are seen as fatal to the so-called rule-of-law. We might benefit by thinking again about the deep necessity of both for the rule-of-law: it is worth recalling the *revolutionary* tradition that sought nothing less than absolutely new *political* orders on earth and did so via constitutional enactments and organization (however limited or particular those enactments might have been or might be is a *different* question).

Of special concern is the deployment of “lawless” as a *per se* critique of contemporary policies, practices, and justifications reanimated within the most recent petrol-theological crusades in the Middle East by the United States. The charge of “lawless” ultimately fails to grasp the peculiar and strange dynamic of the arrival on the scene of a law that is not law but which is *not* lawless. Too, the charge ultimately fails by quarantining the question to the areas directly around and within imperial aggressions and by generating a temporal rupture around “9/11.” Instead, we shall need to consider the operation of a law that is not law but also not lawless as

- (1) predating 9-11-2001,
- (2) emerging in locales and situations neither reducible nor tethered to the petrol-theological crusades, and
- (3) operating as a new mode of right-wing political action in governance.

By consigning this regime to the excitements and energies of the political Right, I do not mean to suggest that it is necessarily of that political stripe as theoretical matter; rather, I only mean that it is such in this political and historical moment.

We can call this new political force *anti-constitutionalist* in its orientation. What makes contemporary anti-constitutionalism unusual is the open-ended articulation of legal transgression within the field of law itself. It rules most intensely in the name of that which it simultaneously dismembers. It cannot do without that which it so relentlessly undoes. The primary response to this genuinely bewildering set of practices has been a revitalized embrace of the rule-of-law against both politicization and lawlessness.

This dissertation seeks to sustain an argument that this position is problematic in that (1) it suggests that historically the lawless has been counterposed to our specific constitutional-legal tradition (it hasn't) and (2) that the legal order has operated more-or-less neutrally or on the side of a particularly progressive-left conceptualization of freedom (it hasn't).

The argument to be offered is not that the anti-constitutional movements under investigation constitute an impermissible breach of the law by politics. Rather, it is a politics inappropriate to the moves of justification, modes of argumentation, and ethical-professional canons of law, law here read as the constitutive interpretative traditions of a specific and distinct community.¹⁹ Thus, an argument of this dissertation is that contemporary right-wing political movements interior to law undo the interiority of law by transgressing the constitutive tenets of the social practice. The situation is not one of unconstitutional politics but one of asymmetrical anti-constitutional violence. And this anti-constitutional force enacts violence not only within the present but also against the very possibility of a future. It has emerged with a vengeance in the present but has, in fact, been gathering force for quite some time.

As a movement and force, it cuts through a variety of institutional locations; it is not simply a cult of executive power, even when it finds its clearest voice there; nor is it only contingent upon the exigencies of imperial exertion, even if it pulsates through such global displays. To demonstrate the true scope and depth, the dissertation considers several places and cases.

Chapter one begins with the judicial power and centers the Supreme Court case of *Bush v. Gore*. Much of the response to that extraordinary ruling attempted to mark it as a decision marred by “politics” or an action unmoored from law. This chapter explores the politics always present in the law with a turn to the jurisprudential doctrines that expanded the Bill of Rights to the States in the twentieth century and the establishment of judicial review in the nineteenth century. Foregrounding the politics of these two instances enables us to see that the departure from the norms of jurisprudence in *Bush v. Gore* was not the surprise appearance of “politics,” but instead a politics of law against

¹⁹ See generally Stanley Fish, *Play of Surfaces: Theory and the Law*, in LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE (ed. G. Leyh, 1992). Or in language more in keeping with the themes of the dissertation: “Of course, law is a subcategory of politics. But it is a subcategory bound by certain authorities, customs, habits, and traditions.” Steve Shiffrin, *Chief Justice Roberts and the Affordable Health Care Act*, religiousleftlaw.com, June 28, 2012. Although, when Shiffrin insists, “partisan politics is out of bounds,” I wonder if we need wider bounds for the meaning of “partisan” and thus a more welcoming view of both the partisan and politics in the law.

the law itself. *Bush v Gore* shows the vital importance of futurity to the articulation and realization of constitutional principle, a futurity curiously lacking in the decision.

Chapter two turns to the inflation of executive power during the “war on terror” and offers a sustained consideration of the “torture memos” that emerged from executive-branch legal departments soon after September 11, 2001. The colonial violence facilitated by these legal memoranda is now well documented. However, in describing that violence as being fundamentally “outlaw” in nature, many critics of the violence of empire obscure the centrality of systematic forms of racialized violence that have defined American law from the beginning and continue into the present day. The abnormality of the torture memos is not in the precise acts they produced, but instead is in the paradoxical relationship of the legal memos to the legal tradition and practice in which they operated: the turn toward the law by the authors of the memos occurred in a manner that simultaneously undermined the basic tenets of legal interpretation and counsel. That paradox is a defining feature of contemporary anti-constitutionalism.

Chapter three looks at the federal legislative response to the case of Terri Schiavo. The U.S. Congress passed emergency “culture of life” legislation in an attempt to prevent the removal of feeding tubes keeping the brain-dead Schiavo “alive.” The singularity of the law in question had something of an echo of the temporal logic found in *Bush v. Gore*. Linking the tenuousness of the future of the law in the case with the paradigmatic subjects of the “culture of life” (the fetus and the vegetative patient), the chapter argues that anti-constitutional political orientations may best be situated within an apocalyptic imaginary that has come to structure New Right politics in the United States since the conclusion of World War II.

Finally, chapter four turns back to the Revolutionary period in American history and explores the confused and contradictory concept of “rule of law” during that time. On the one hand, the rule of law stood against despotic discretion under the monarchy and thus became nearly coterminous with the idea of “the people” and their newfound political power. On the other hand, the rule of law slipped quite quickly into a force outside of, and even against, popular politics generally. In the latter case, a new equation began to emerge: the people = politics = lawlessness. The law, the object of the people’s politics, turned against them: now as a guarantor of individualism that drained democracy of its collective force (see Thomas Paine) or as an aristocratic tutor in the art and science of republicanism (see Alexis de Tocqueville) or as a structural barrier against the capacity of the people to self-represent as a majority class in a class-ridden society (see James Madison). Thus, the Constitution is in some sense constituted against itself.

In the chapters that follow, I have permitted the full particularity and peculiarity of each case to bloom rather than shear all facts that do not fit neatly into a predetermined theory. In so doing, I have sought to find theory in both vine and flower of this baffling garland.

Chapter One

THE JUDICIAL POWER: THIS IS NOT A DECISION

**To be a surrealist means barring from your mind
all remembrance of what you have seen . . .**

-René Magritte

I.

As the 2000 decision by the United States Supreme Court to effectively deliver the Electoral College votes of Florida to George W. Bush (and hence the Presidency) recedes in time, its real meaning comes closer into view. If an immediate critique of the Court was that it had altered the rules of democracy after the fact, the perspective of distance permits us to see the fact that the rules were, in some sense, not altered at all. This too was an immediate critique of the Court, but the political question of the assumption of the Presidency blotted it out beyond the precincts of constitutional scholarship, and even there it receded into memory and something more like a bitter taste than a pressing political problem of first rank. But in retrospect, the selection of a particular candidate for the Presidency in 2000 is the least interesting element of the case, although it is no doubt that fact which is most remembered. What is of far greater consequence, in the long run (however short that might in fact be), is that the Supreme Court issued a landmark decision that marked the land not at all. Constitutionally speaking, all is barren in its particular wake. So the rather banal point that the best way to look at the impact of a case is from the vantage point of its future trajectory and elaboration becomes less matter of fact when it is the absence of a wake we must consider.

The post-election day legal contest between Bush and Gore over Florida's disputed electoral votes transpired in a variety of institutional settings across a period of five weeks, from the election day of Nov. 7 to the Supreme Court's *per curiam* decision on December 12, 2000. The entirety of the political contest, of which the legal was a constitutive component, ended when Vice President Gore conceded the election on the evening of December 13. Two primary Constitutional questions came to the fore during the litigation struggle: (1) What governmental power or decision-point within the State of Florida properly adhered to the Article II provision that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"? and (2) Did the ballot recount standards in the State of Florida after the election meet the requirements of the Fourteenth Amendment's Equal Protection Clause?

Three Justices of the U.S. Supreme Court argued that the entry of the Florida Supreme Court as arbiter of the recount, rather than the Florida Secretary of State (who

had certified Bush's victory prior to entry of the Florida courts into the matter) violated the express provision that it is the *Legislature* of the State that controls the selection of Electors. According to them, the election scheme devised by that State's legislature privileged the Secretary of State in election decisions. In addition, these Justices---Rehnquist, Scalia, and Thomas---hemmed in the Florida Court, even presuming it had authority to order the recount, to an (alleged) legislatively intended remedy date of December 12, the federal "safe harbor" date for electors. This date would be impossible to reconcile with a recount given that the Court issued its decision on the 12th. The need for a remedy without the time to remedy, a time made absent by the Court itself,²⁰ also held in the holding that managed to gather the 5 votes needed for a majority in the case, and now nothing less than the temporal arc of law itself had begun to buckle.

On December 8, 2000, the Florida Supreme Court had ordered a manual recount of all ballots in all counties that had not yet conducted such a recount. A machine recount had already occurred in keeping with the Florida election code, a recount triggered by the exceptionally small difference of votes separating each side (less than 1,800 votes out of approximately 6 million cast in the state). Manual recounts offered an assurance that all "legal votes" would be counted. Mechanical recounts could not always ascertain the "clear intention of the voter," especially in counties that used punch-card ballots. As even the *per curiam* opinion of the U.S. Supreme Court acknowledged, "punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter," and thus remain uncounted by mechanical techniques.²¹ Nonetheless, the *per curiam* opinion ruled that the recount ordered by the Florida Supreme Court was unconstitutional. Ultimately, it was a failure to provide explicit "uniformity" in the standards of the manual recount that doomed it.

The *per curiam* opinion of the Court rested upon Equal Protection analysis. The Court held that the lack of uniformity in ascertaining voter intent across different counties in Florida violated the Fourteenth Amendment. The State may not "value one person's vote over that of another."²² However, by that standard, the different voting mechanisms across the different precincts of Florida on election day itself appear to be Constitutionally suspect. As Akhil Amar has asked, "if the Florida recount was constitutionally flawed why wasn't the initial Florida count---which the Court's judgment reinstated---even more flawed? The initial count . . . featured highly uneven standards from county to county."²³ The vote, rather than the recount, stands in violation of Equal Protection under the Court's analysis. More strangely, the traditional subjects of Equal Protection analysis, "classifications, such as those based on race, ethnicity, or gender, that systematically disadvantage various social groups,"²⁴ simply disappeared in the analysis and in its place stood the "individual" in relationship only to other individuals. Yet, the lack of uniformity in the election (not the recount) tracked along precisely those

²⁰ The 5 conservative Justices had issued an injunction on December 9 to halt the recount until a decision in the case was reached. This was justified on the grounds that counting the votes could pose a threat to the "legitimacy" of Bush's victory (oddly still an open question of law and fact as of Dec. 9) and such a potential blow to legitimacy could threaten political "stability." (Scalia, J. concurring).

²¹ 531 U.S. 98 (2000).

²² 531 U.S. 98 (2000).

²³ Akhil Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. LAW REV. 945, 962 (2009).

²⁴ Owen Fiss, *The Fallibility of Reason*, in BUSH V. GORE: THE QUESTION OF LEGITIMACY 89 (Bruce Ackerman ed., 2002).

traditional categories and classifications of Equal Protection: “minority voters were roughly *ten times* as likely not to have their votes correctly counted in this election as were non-minority voters.”²⁵ So, the Court’s temporal framework severed itself from the past in two senses: it generated an apparent principle at odds with its previous Equal Protection jurisprudence *and* it limited the timeframe of inquiry into potential violation of the newly discovered principle to the recount rather than the initial vote itself, where both the old and new principles were most severely transgressed.

As already noted, the future tense time of remedy also disintegrated into an institutionally self-imposed present tense. The U.S. Supreme Court issued its opinion on December 12, 2000 and remanded the case back to the Florida Supreme Court with the instruction that any recount in accordance with the newly minted principle of individualized uniformity be completed by the legislatively determined deadline of: December 12, 2000. As this would be impossible, as it was evident “that any recount seeking to meet the December 12 date will be unconstitutional,” the recount ordered by the Florida Supreme Court was moot. An opinion that began by stating that when pursuant to Article II the “state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the dignity owed to each voter”²⁶ concluded by deferring to a legislatively determined calendar that nullified equality. The inequalities of the count and the recount of “legal votes” were constitutionally frozen into place, and the candidate who had lost the popular vote nationwide was installed into the executive power by 5 right-wing Supreme Court Justices.²⁷

If the December 12 deadline blocked the flow of principle into a future fact of remedy in the particular case, there was still the potential emergence of an Equal Protection holding that might serve as a basis for further constitutional articulation. But the future was lost not once but twice in the decision. From the *per curiam* opinion: “[o]ur consideration is limited to the present circumstances” in the “special instance of a statewide recount under the authority of a single state judicial officer.”²⁸ The lack of applicability of the newly imagined doctrine of “uniformity” was hinted at earlier in the decision as well: “after the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.”²⁹ The newfound doctrine of uniformity would seem to militate against the deference to the legislatures of the different States. If uniformity establishes a constitutional necessity of avoiding the “arbitrary and disparate treatment of the members of [the State’s] electorates,” then

²⁵ Laurence H. Tribe, *EROG v. HSUB*, in Ackerman *supra* note 24 at p. 50. There is also an important element of class discrimination in that poorer counties are less able to afford newer and more reliable technology. Unfortunately, the courts have been resistant to incorporating class analysis into the jurisprudence of Equal Protection even as class chasms have been radically widening. The Republic that once provoked Tocqueville’s analysis of a democracy born of a relative equality of conditions has become the living embodiment of Marx’s critique about the unbridgeable distance between constitutional law and constitutive political fact.

²⁶ 531 U.S. 98 (2000).

²⁷ Justice Breyer and Justice Souter agreed that the recount procedure generated Equal Protection problems, but they insisted that Florida be given time to remedy the infirmities.

²⁸ 531 U.S. 98 (2000).

²⁹ 531 U.S. 98 (2000).

surely something more than a likely examination of the already acknowledged disparity in vote tabulation would be required of the States. The future was thus lazily thought about on the one hand (and seemed implicitly undisturbed by the decision itself), and on the other hand the future was diligently attended to by the opinion and was deliberately barred by the explicit effort to limit the rule to “the present circumstances.”

Under normal conditions, for obvious reasons, disputes over constitutional rulings are centered upon the fact of their future effect. Under extraordinary conditions, such as with a sharp break from precedent or the emergence of a novel precedent-setting case, the future contours of the law and political life are even more illuminated as the terrain of contestation. If this was not the case, then the very logic of precedent would disintegrate into nothing other than “the present circumstances.” Thus it comes as no surprise to hear contemporary legal scholars praise Chief Justice John Marshall for his greatness as a judicial “prophet” because “prophets are the servants of the future.”³⁰ And critically, those less than stellar Justices such as Chief Justice Taney, may be viewed as “false prophets” rather than as anti-prophets even as their opinions form an “anti-canon” of constitutional thought.³¹ The future abandoned them, they did not abandon the future.

By contrast, leading constitutional scholars in the legal academy insisted that the significance of the Supreme Court’s *per curiam* opinion in *Bush v. Gore* was precisely the “jarring combination of an almost unprecedented equal protection analysis, with a proviso that this approach should not be presumed to apply to future cases.”³² However, the exceptionality of *Bush v. Gore* is rendered entirely unexceptional by prominent social scientific readings of the case. For the behavioralists in political science, judicial decisions, even or especially at the level of constitutional interpretation, are nothing more than the particular “preferences” of this or that judge binding on nothing and no one afterwards. The decisions rendered by the Supreme Court are individualized as merely “attitudinal” and politics is reduced to a question of tastes and instant outcomes. As such, “traditional legal factors, such as precedent, text, and intent, [have] virtually no impact” on interpretation.³³

At stake in this disagreement between behavioral social science and the legal academy is the configuration of the “past and future” as the “usual terrain” of the rule-of-law.³⁴ To understand how vital precedent is to the rule of law in the United States’ legal order, we should perhaps try to locate the past in present legal disagreements and decisions.

³⁰ Jack M. Balkin, *The Use that the Future Makes of the Past: John Marshall’s Greatness and its Lessons for Today’s Supreme Court Justices*, 43 WILLIAM & MARY LAW REV. 1331, 1338 (2002).

³¹ *Id.* at 1327 and 1338, respectively.

³² Kathryn Abrams, *Extraordinary Measures: Protest Rule of Law Violations After Bush v. Gore*, LAW AND PHILOSOPHY, Vol. 21, No. 2 (2002). See also Margaret Radin, *Can the Rule of Law Survive BUSH V. GORE?* IN *BUSH V. GORE: THE QUESTION OF LEGITIMACY* (Radin: “it’s not based on legal principles applicable to other cases and presumably will not serve as precedent for other cases” and thus is a “naked affront to the rule of law” at p. 118-119).

³³ HAROLD. J. SPAETH AND JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT p. xv (1999).

³⁴ Abrams, *supra* note 32 at p. 189-190.

II.

For precedent to govern as a force and as something other than a ruse for the force of individualized free-form preference, the behavioralists have established the following test: “if factors such as precedent can be used to support any position that a [Supreme Court] justice could take, such that one could not predict *a priori* how precedent might influence a decision, then precedent is *completely meaningless* as an explanation of the Court’s decision.”³⁵ If this narrow criteria is the criteria for analyzing the force of precedent, then the facts organized under this inquiry might indeed confirm and conform to the premise. However, precedent does not simply contour the decision of a case, precedent structures the very path of litigation from which a particular case and decision might emerge. Most questions never reach the Court, and this is determined in part by precedent and the imagined “plausibility” of a claim in light of it.³⁶

As example, if today there was a push to raise the minimum wage, at either the State or Federal level, how might a libertarian political opponent respond? She will organize against it with appeals to business pragmatism and effect. The arguments against the wage legislation will be that it will “dampen the economy” or “hurt profits” or “weaken business” or “raise unemployment.” That is, the claims will be ones of utility in the electoral realm rather than assertions of right in the constitutional realm. Why is this? Certainly there are those who imagine that the primary injustice of the minimum wage law is that it violates a fundamental freedom of the individual to enter into contractual agreements.³⁷ Yet it is unlikely that the opponents of the wage floor would assert a violation of liberty in the courts. Quite simply, the libertarian would have no argument as the Supreme Court many decades ago abandoned a theory of Due Process liberty that protected the contractual relationship from state regulation.³⁸ Even if such a case arose in the lower courts it is unlikely that one would find the votes necessary on the Supreme Court to even hear the argument.³⁹ The past then governs the present and the force of precedent appears as something other than “completely meaningless” in constitutional law.

Precedent shapes and binds even those right wing Justices whose interpretative commitments apparently undercut vast swaths of American law. There are three related, yet distinct, commitments that these Justices have articulated in opinions, speeches and articles. They are, in no particular order: 1) Textualism 2) Originalism and 3) Neo-Federalism.⁴⁰ Textualism finds meaning within the “four corners” of the text. Originalists

³⁵ Spaeth and Segal, *supra* note 13 at p. xv (emphasis added).

³⁶ MARTIN SHAPIRO, *THE SUPREME COURT AND THE ADMINISTRATIVE AGENCIES* 40 (1968).

³⁷ See generally MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962) especially chapter two, *The Role of Government in a Free Society*.

³⁸ See *West Coast Hotel v. Parrish* 300 U.S. 379 (1937) *overturning* *Adkins v. Children’s Hospital* 261 U.S. 525 (1923).

³⁹ This is in accord with the observation of Jack Knight and Lee Epstein: precedent works as a “norm” and social science researchers are “unlikely to detect its presence by conventional examinations of the vote.” *The Norm of Stare Decisis*, 40 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 1018 (November 1996). Of course, sustained shifts in the judiciary and changes in the facts and value underlying precedents do open up old decisions for new challenges. Precedents of course fall, but they fall to new precedent setting cases.

⁴⁰ To be clear, these three interpretative commitments do not necessarily imply right-wing consequences. As example, liberal Justice Hugo Black could have been called a “textualist,” white plaintiffs opposing affirmative action via the Equal Protection clause will find cold comfort in “originalism,” and proponents

may or may not be textually bound, but in either case look to the time-bound meaning of the Constitution. Justice Antonin Scalia combines textualism and originalism: “what I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text.”⁴¹ However, a critical concession is made by Justice Scalia: “[o]riginalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew.”⁴² This constraint on generating a purified jurisprudential *tabula rasa* helps explain why the right-wing Justices do not launch a full assault on each and every edifice of modern constitutional law. If they were simply unbound actors of individual preference as the behavioralists imagine, then we would expect a central tenet of modern U.S. constitutionalism, the doctrine of “incorporation” to be under severe stress in their decisions. Incorporation is the doctrine whereby the Bill of Rights slowly became applicable checks on the power of State governments vis-à-vis their citizens. Today, most of the Bill of Rights have been incorporated, including the First Amendment.⁴³

The First Amendment begins: “Congress shall make no law . . .” and for most of the history of the United States its prohibitions were so confined. The textual door through which the incorporation of the First Amendment (as well as others) occurred is the Due Process Clause of the Fourteenth Amendment. Here is the relevant text:

No State shall make or enforce any law which shall abridge the privileges and immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. [1868]

That “freedom of speech” now applies with equal force to, say, the State of California as well as the Congress of the United States is today taken for granted. At both the level of common sense in everyday political knowledge and within the conceptually dense political world of constitutional law, it is merely a given. But there is nothing at all *necessarily* given about it. In fact, it cuts against many of the premises and aims of the current right-wing majority on the Court.

There is thin textual support for an expansion of the First Amendment’s protective zone via incorporation. After all, the due process clause speaks explicitly of process: liberty may be deprived so long as there is due process of law. The textual case is further weakened by the existence of the exact same text within the Bill of Rights. Here is the relevant text of the Fifth Amendment:

Nor shall any person be . . . deprived of life, liberty, or property without due process of law [1791]

As John Hart Ely has noted,

of same sex marriage and marijuana legalization might themselves find shelter in the *nouveau vogue* jurisprudence of the Tenth Amendment.

⁴¹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997).

⁴² *Id.* at pp. 138 to 139.

⁴³ The First Amendment was not incorporated in its entirety in a single decision. Rather, from the late 1920s to the early 1940s the Supreme Court began applying the various provisions of the First Amendment to the States. For a mapping and discussion of this process, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988) § 11-2.

There is general agreement that the earlier clause [the Fifth Amendment] had been understood at the time of its conclusion to refer only to lawful procedures. What recorded comment there was at the time of the replication of the Fourteenth Amendment is devoid of any reference that gives the provision more than procedural connotation.⁴⁴

So, the committed textualist and originalist confronts a puzzle in affirming incorporation: how does the text of the Fifth Amendment stand as distinct from the First Amendment when the exact text of the Fourteenth Amendment is presumed to include the First? If we are to be bound by the “original meaning of the text,” then there is almost no support at all for applying the First Amendment to state action beyond Congress.

Yet in all contemporary cases involving the First Amendment, the disagreements do not center upon this issue. As but one of innumerable examples, the flag burning case of *Texas v. Johnson* illustrates this.⁴⁵ In that case the Court overturned a Texas law that made it a crime to desecrate the American flag. The majority opinion, authored by Justice Scalia, considers a series of constitutional questions: whether the conduct proscribed was within the orbit of “speech,” whether Texas had an interest other than suppressing the “content” of the conduct forbidden by the law, and whether the law survives “strict scrutiny” if it was aimed at content. The Court split 5 to 4 in the case with the majority overturning the conviction. Each side reached different conclusions on the questions just posed, however *all* sides in the case operated on the assumption that the First Amendment of the United States applied even to the proud State of Texas. It might seem “odd that a provision regarding ‘process’ has come to protect ‘substance.’ Nevertheless, history seems to have settled the issue.”⁴⁶

When ‘history’ becomes capable of action, it is necessary to consider what political forces succeeded so absolutely as to permit the fiction of history speaking in the singular, of creating that which it allegedly only records. It is tempting to think that the politics of law are present only in the stated disagreements of differing judicial camps. One could have answered the questions of speech, content, and scrutiny in *Texas v. Johnson* in a plausible manner on either side. 5 to 4 decisions almost by definition suggest the plausibility of incongruent correct answers. This is the crux of the behavioralist claim that “traditional legal factors such as precedent, text, and intent [have] virtually no impact.”⁴⁷ Or to go further: neither side is bound by “law” and is engaged only in something called “politics.” The questions posed in *Texas v. Johnson* were pure form, and form obscured substance. On this account, traditional legal factors have no impact on the politics of law precisely because they are imagined to have no political value. Since precedent is void of politics, politics may invoke precedent to carry on its masquerade in the theater of law.

Yet it is precisely in the traditions of law that the politics of law is most firmly present. The extension of most of the provisions of the Bill of Rights to the States is not a politically hollow formalism or a one-off adventure. In fact, it has slowly bound the law

⁴⁴ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 15 (1980).

⁴⁵ 491 U.S. 397 (1989).

⁴⁶ *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 428 (Daniel Farber, W. Eskridge, and P. Frickey eds., 2003).

⁴⁷ Spaeth and Segal, *supra* note 13 at p. xv.

to one side in the dispute between which sovereign is sovereign in the American political order, a dispute born out first in Madison's constitutional concept of a "compound republic."⁴⁸ It is one of the great ironies of history that Madison defended the compound republic on grounds of "amity" (it was nonsensical by the "standard of theory").⁴⁹ His resolution simply sewed our constitutional fabric with the threads of perpetual discord. This original disagreement saw the polity divide into two camps in its early years with Daniel Webster representative of the one side and John C. Calhoun of the other. In the twentieth century, the political currents informing the doctrine of incorporation reaffirmed that Calhoun had lost the battle and, more literally, lost the war.

Of course, Justices may turn against precedent, but that turn will be to establish new precedent even as it involves distinguishing from that which is turned against. In fact, it is only the possibility of precedent's future that makes the disagreement of any import at all beyond the facts of the individual case. The possible disjunction between the resolution of the individual facts of the particular case and the legal principle vindicated by a ruling irrespective of individual interests in the case at hand is nowhere more visible than in the most well-known case of American law, *Marbury v. Madison*.⁵⁰

In the gap of time between President John Adams' defeat for re-election in 1800 and the inauguration of Thomas Jefferson, the Federalists hurried to pass new laws and fill positions of government. Adams appointed William Marbury as a justice of the peace for the District of Columbia, yet the actual delivery of the commission was not delivered prior to Jefferson assuming the Presidency. Although Marbury's appointment had been confirmed by the Senate and his commission signed by Adams' Secretary of State, President Jefferson refused to deliver the commission to Marbury. Marbury sought to compel the delivery of the commission by seeking a writ of mandamus from the U.S. Supreme Court. The Supreme Court, in an opinion by Chief Justice John Marshall, held that the Judiciary Act of 1789 granted original jurisdiction in the case to the Supreme Court, but that this grant of jurisdiction conflicted with Article III of the Constitution. As such, the law was ruled unconstitutional and the Court, for the first time, established itself as arbiter of constitutional meaning. This critical victory for a High Federalist value (Judicial Review) was won by sacrificing the commissions of a few Federalist appointees.⁵¹

The decision by Chief Justice Marshall has long been viewed as one of political genius. The Jeffersonians won the small prize of a handful of insignificant appointments, while the Federalists won the far more significant prize of the constitutional question. And because Jefferson "won" the case in the immediate sense, he could not easily turn around and attack the Court for the principle articulated in securing that victory. Marshall had outmaneuvered Jefferson and delivered to him a quintessentially pyrrhic victory. But the pyrrhic nature of that victory hinges ultimately on the force of precedent as a force and source of law. And to be clear, the precedent of *Marbury* was drenched in politics:

⁴⁸ See THE FEDERALIST No. 51; THE FEDERALIST No. 62: "in a compound republic, partaking both of the national and federal character . . . no law can be passed without the concurrence, first of a majority of the people, and then of a majority of the States."

⁴⁹ THE FEDERALIST No. 62.

⁵⁰ 1 Cranch 137 (1803).

⁵¹ The original political hope of judicial review was driven by a desire to move power away from the immediate grip of the people and their majorities.

the law was indeterminate on the questions in the case and no mechanical judgment could resolve it. Rather, Marshall's opinion was a plausible one and it was buttressed by a political desire to "establish the judiciary on solid ground and use the power to defend the cause of national union."⁵²

Had the Marshall Court issued a writ of mandamus in the case on the basis of a newly discovered *anti*-federalist principle that would hold only in the case of *Marbury*, then it is fairly safe to say that the Supreme Court would have imploded amidst Republican laughter from the absurdity. The Republican-led impeachment of Federalist Justice Samuel Chase occurred in 1805 with far less provocation, and Chase's acquittal in no way disproves the intensity of the political currents swirling at the time. It is quite strange then to hear political scientists today argue that there is no difference between *Marbury v. Madison* and *Bush v. Gore*. Our analysis of *Marbury* must be turned inside out to accept that reading. If precedent has absolutely no value and no purchase on the future, then Chief Justice Marshall was a fool to abandon *Marbury* the individual for *Marbury* the decision. After all, why establish precedent, in this case the precedent of judicial review, if precedent does not matter? When the political scientists simultaneously acknowledge that the decision in *Marbury v. Madison* "gained sufficient acceptance among the American public to become the warp and woof of the constitutional fabric,"⁵³ we must note that it remains for the scientists to explain how precedent is irrelevant while at the same time speaking of the existence of a constitutional fabric woven of: *precedent*.

It is the inversion of *Marbury*'s logic that renders the *Bush v. Gore* holding so anomalous. It will not suffice, either analytically or politically, to say of *Bush v. Gore*: "that's not law, that's politics."⁵⁴ Condemnation in these terms transforms the monumental decisions of constitutional law from first-rank political questions into depoliticized historical ones: "history decides" is the removal of judgment from the possibility of political reconsideration, and such reconsideration is forbidden if and when "politics" becomes the no-mans-land of constitutional inquiry and decision. If the infirmity of the case is not one of politics as such, then perhaps the case suggests an emerging lawlessness in political life. In fact, many castigated the *Bush v. Gore* ruling as a "lawless opinion," and some have suggested that the one potential norm emerging in response to the case is a "consensus against lawlessness."⁵⁵

As a proposition, the accusation of lawlessness levied against the Supreme Court's ruling must be, at least to some degree, nonsensical. As a theoretical matter, it runs into the determinative fact of a jurisdictional and jurisprudential hierarchy: the final word is with the Court and the finality of the word is, at least in part, what produces the law. Justice Jackson's truism thus never rang truer: "we are not final because we are infallible, but we are infallible only because we are final."⁵⁶ Even more importantly for law as a social fact, the fact is that this so-called lawless decision ruled with the force of

⁵² ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (3rd ed. 2000).

⁵³ JEFFREY SEGAL AND HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 118 (2004).

⁵⁴ Gordon Silverstein, *The Last Conservative*, *THE NEW REPUBLIC*, May 1, 2009 (commenting on the decision in *Bush v. Gore*).

⁵⁵ Richard L. Hasen, *Bush v. Gore and the Lawlessness Principle: A Comment on Professor Amar*, 61 *FLA. LAW REV.* 979, 980 (2009) (asserting that the consensus against lawlessness is informed by a disagreement over which court was acting lawlessly, the Florida Supreme Court or the U.S. Supreme Court).

⁵⁶ *Brown v. Allen*, 34 U.S. 443, 540 (1953) (concurring).

law. The ruling halted the Florida recount. It also forced from Vice President Gore a political concession, a concession made in the name of the law and by the force of the law. On the evening of December 13, 2000, Gore addressed the nation:

Over the library of one of our great law schools is inscribed the motto: "Not under man, but under God and law." That's the ruling principle of American freedom, the source of our democratic liberties. I've tried to make it my guide throughout this contest, as it has guided America's deliberations of all the complex issues of the past five weeks. Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the Court's decision, I accept it. I accept the finality of this outcome . . . And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession.⁵⁷

A decision that turns the law inside-out nonetheless governs with the full prestige and power of the law. We do not confront lawlessness; we have instead entered into a self-negating yet force-making jurisprudential riddle.

As one scholar has rightly noted, "it is as if the Supreme Court had written an opinion, and then, in a bow to René Magritte, put as its last sentence: 'This is not an opinion.'"⁵⁸ To trace the inner workings of an emerging anti-constitutionalism in the case of *Bush v. Gore*, one should hold fast to the paradoxes of surrealist absurdity. It is: a decision of the court, a rule of law, a juridical force ordering the political future; it is also and at the same exact time: not a decision, an inversion of the rule of law, limited to the particular present-tense facts of the case. To simply call the case lawless or to see in the decision an invasion of the law by "politics" is to move too quickly along familiar lines for what will in the end turn into nothing more than a false exit. Even more, such a discursive regime in fact denies the very need for the real exit as it fails to give a proper account of the operative logic of the riddle we inhabit. Perhaps the most useful thinking on the matter comes from Michel Foucault, but not from his more widely cited works on power and governmentality. Instead, here is Foucault reading Magritte's painting, *Ceci n'est pas une pipe*: the "vague uneasiness provoked" by Magritte's masterpiece is produced by a sense of "being trapped in a double cipher" where each element of the riddle is "annulled as soon as it has been accomplished."⁵⁹ So, the seemingly inescapable conundrum of our anti-constitutional moment becomes: how to break out of this trap born of a double annulment where the disconcerting play of a paradoxical calligram has merged with the official vocabulary of the State?

III.

The initial dissents from some in the legal academy against the ruling in *Bush v. Gore* understood clearly that a trap had been sprung, that a right-wing movement had seized the executive branch with a heretofore-unimagined turn within *and* against the

⁵⁷ The full concession speech was published in the *N.Y. Times*, December 14, 2000.

⁵⁸ Chad Flanders, *Please Don't Cite this Case! The Precedential Value of Bush v. Gore*, 161 THE YALE LAW JOURNAL POCKET PART 141, 143 (2006).

⁵⁹ MICHEL FOUCAULT, THIS IS NOT A PIPE 20 (25th anniversary ed., 2008).

law. So the surprising instance arose where the call for extraordinary resistance sprang from the very quarters of political and intellectual life that had historically tended most carefully to the nurture and defense of ordinary means, even without regard to the ends pursued. As example of the departure from the norm, Professor Margaret Radin expressed a desire to move beyond “conservative” modes of restrained legal commentary and shift to “protest in the streets.”⁶⁰ Professor Kathryn Abrams also argued that “extraordinary” and “atypical” modes of resistance were required in response to the decision. Working against the exclusive resort to endless dialogue, Abrams insisted that it was the very destruction of the premises of normal disagreement that had to be resisted: “what is needed at this point is not simply more dialogue, but a frank objection to the truncation of dialogue, and an appeal to the importance of the social process that conventionally produces law.”⁶¹

Whatever collective creative burst that was generated in response to the decision soon dissipated or devolved into private complaint or flowed back into the old and well-worn paths of normal disagreement. A potential movement was isolated and a moment of genuine possibility slipped away almost as quickly as it had appeared.⁶² Even before the dust had settled and normality had returned, the turn to the streets had failed to move beyond the confines imposed by the paradox of anti-constitutionalism. Understanding the seriousness of the violation to the rule of law, the professoriate couched its demands in nothing less and nothing more than a return to the rule of law in contrast to the imagined “lawlessness” of the decision and the politicization of the law by the right-wing Justices. Professor Bruce Ackerman stated that he “protest[ed] in the name of the rule of law,”⁶³ and the unprecedented petition of 500+ law professors protested under the organizational rubric of “Law Professors for the Rule of Law.” Professor Radin, a leading voice in this movement, expressed some sense of surprise that “we had more of a commitment to the rule of law than we knew.”⁶⁴ This recommitment to the law was envisioned as “speaking truth to power.”⁶⁵

It is one of the ironies of our time that the very moment of such radical engagements with the rule of law by those so intimately embedded in its practice was also the exact moment when critical sensibilities towards the rule of law took flight from the scene. This flight went largely unnoticed. It went unnoticed, in part, because the relationship between the rule of law and rule of democracy blurred in the particular political battle. This conceptual in-distinction arose since the rule of law was called into question in the contested election of the executive power, with a primary dispute over vote counting. So, the battle for democracy marched under the banner of the rule of law, and those protesting for the return to the rule of law imagined that they were defending democracy as such. In this sense, they took Jurgen Habermas’ normative and historical

⁶⁰ Radin, *supra* note 32 at p. 125

⁶¹ Abrams, *supra* note 32 at p. 190-191.

⁶² It is unclear how broad and deep the initial revolt was. Abrams thought that most of the critiques that highlighted the rule of law violation rejected or ignored any possible turn toward novel forms of resistance to the “lawlessness” of the Court. Radin by contrast thought that many in the legal community shared her desire to move beyond legal argument for some kind of direct action.

⁶³ Bruce Ackerman, *Off Balance*, in *BUSH V. GORE: THE QUESTION OF LEGITIMACY* 195 (Bruce Ackerman ed., 2002).

⁶⁴ Radin, *supra* note 32 at p. 125.

⁶⁵ *Id.*

account of the relationship between modern constitutional law and democracy as a taken-for-granted fact of American political life.

Habermas has argued that an “internal relationship” developed between law and democracy beginning at the end of the eighteenth century.⁶⁶ Democratic methods conferred legitimacy on the coercive power of a law now shorn of divine sanction or natural right or ancient provenance: “the positivity of law . . . is bound up with the demand for legitimation . . . positively enacted law should guarantee the autonomy of all legal persons equally; and the democratic procedure of legislation should in turn satisfy this demand.”⁶⁷ The inner linking of the concepts and practices of law and democracy was necessary as a normative matter and also denoted a historical fact defining “constitutional reality of Western societies.”⁶⁸

Some variation of this presumption circulated in the demands to count and recount “every legal vote” in Florida. The short-circuiting of the recount by the Supreme Court was thus seen as a short circuiting of democracy. However, it is the accelerating disjunction of constitutional reality and democracy in the United States that must trouble any account of democracy being vindicated by the mere fact of a return to the rule of law. The law professors for the rule of law arrived in the streets after December 13, 2001. Yet the rule of democracy endured extreme resistance from the law well before that date. So, the law professors who spoke truth to power by protesting in the name of the rule of law only obscured the truth that the power of the law had long been waging war against democracy in the United States. And this war of law against democracy was perfectly alive and active during the entirety of the campaign and election of 2000.

An obvious place to begin is with the Constitution itself. The curious fact that the winner of the majority of the popular vote could legally be denied the Presidency highlights a theory of sovereignty where something other than the people as a people rule or, in more liberal terms, where each individual has equal value and voice. The determinative relevance in 2000 of an anachronistic institution such as the Electoral College served to remind that the inner links between law and democracy were less than certain in U.S. constitutional reality. Beyond the peculiar election mechanisms involved in selecting the executive, the non-democratic organization and demoralizing history of the U.S. Senate stand as an enduring refusal of democracy by the basic law of the republic.⁶⁹ Succinctly, “democracy” is not the first value or primary procedure of the U.S. Constitution.⁷⁰

In addition to the structural provisions of the federal Constitution, we must consider as well anti-democratic practices that have secured constitutional sanction. More exactly, democracy has become beset by three principal exclusions, exclusions that ran riot in 2000 and continue to this day. These exclusions extend across every zone of democratic action: association, deliberation, and decision. Party association has been

⁶⁶ Jurgen Habermas, *On the Internal Relation between Law and Democracy*, in *THE INCLUSION OF THE OTHER* (1998).

⁶⁷ *Id.* at p. 254.

⁶⁸ *Id.*

⁶⁹ For an excellent historical survey of the institution, see ROBERT CARO, *THE YEARS OF LYNDON JOHNSON, VOL. III: MASTER OF THE SENATE* (2002), especially ch. 1 *The Desks of the Senate* and ch. 3 *Seniority and the South*.

⁷⁰ Sanford Levinson offers a more sustained argument of this proposition in *OUR UNDEMOCRATIC CONSTITUTION* (2006).

limited by legal rules designed to block multiple parties from the ballot. Deliberation has been confined to narrow bands of possibility by the privatization of the rules of debate within a First Amendment universe organized around the concept of “state action.” And perhaps most critically, the ranks of citizens excluded from having any capacity to participate in electoral decision making via the vote has swelled to cataclysmic proportions from the perspective of democratic value. Concretely, these exclusions are exclusions from the ballot, from the debate, and from the voting booth.

As the election of 2000 slid into weeks of recounts, litigation and protests, it must have come as something of a shock to many that partial responsibility for the situation was placed at upon the shoulders of the Green Party candidate for President. The Green Party won almost 3 million votes and almost 3% of the total vote across the nation.⁷¹ In Florida, the Green Party candidate received nearly 100,000 votes where only 536 votes separated the Republican and the Democratic candidates for President. The shock of the many would have been born of the fact that so few would have considered the Green Party in any role at all in the election. Due to onerous rules of ballot access, the Green Party did not appear on the ballot in 7 States of the Union (totaling 57 electoral college votes).⁷² The laws were unsuccessfully challenged in court.⁷³

One criterion that many states use to determine ballot access is the percentage of the vote received by a party in the previous election cycle. To increase associational experimentation and develop broader support, parties have attempted to use fusion balloting. Fusion voting permits one candidate to receive nomination from multiple parties and is critical for the flourishing of smaller parties in an electoral arena that does not follow the rules of proportional representation. As an example, the Green Party could have the same candidate on the ballot as the Democratic Party. In this case, it would allow Green Party members to vote for the Green Party without worry that the right-wing party might win via a split vote. It also broadens the representational base of the victorious candidate. Nonetheless, the Supreme Court has held that States may outlaw the practice and most do. The effect of weakening, and ultimately excluding, multiple parties was cited by the Court as a principle in defense of these laws; exclusion as intent and effect became the guiding light of the law. Here is the Court’s majority in the case of *Timmons v. Twin Cities Area New Party* (1997): “Minnesota fears that fusion would enable minor parties . . . [and] the Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two party system.”⁷⁴ An imagined stability secured via a practice of exclusion thus trumped democratic expansion and participation.

Of course, the Green Party did make it onto the ballot in the other 43 States, including in Florida. And unlike previous election cycles, the Green Party candidate was

⁷¹ Data is available at www.fec.gov

⁷² The states included Georgia, Idaho, Indiana, North Carolina, Oklahoma, Wyoming, and South Dakota.

⁷³ They were challenged by the Brennan Center at NYU (www.brennancenter.org). The Brennan Center argues “the right to vote is more valuable when citizens are able to vote for the candidate of their choice.” But we should insist that there is another value beyond the individual and his or her choice and that value consists of the multiplication of associational opportunities and the emergence of new groups and claims into political life. That is, there is a collective and cultural dimension to democracy that is jeopardized by the exclusion of parties.

⁷⁴ 520 U.S. 351 (1997).

a well-known individual prior to his candidacy for the Presidency.⁷⁵ Despite this, or perhaps because of this, he was excluded from participating in any of the nationally televised debates. The decision of who is and is not included in the debate occurs outside of democratic channels in the United States. The presidential debate commission is a private non-profit corporation funded by private wealth. Consequently, state power may be called upon to police the exclusion of the candidates under the laws of trespass.⁷⁶ But since it was not the state that made the decision to exclude, the protection and values of the First Amendment are ruled inapplicable. And even when it is a public entity organizing a debate and thus subject to First Amendment scrutiny, the Court has been forgiving of such exclusions so long as they are formally “neutral.”⁷⁷

Richard Pildes has argued that the Court’s jurisprudence regarding third parties demonstrates a fear of “disorder” by the Court, a fear that helps explain the ruling in *Bush v. Gore*. Although Pildes describes the Court’s jurisprudence as representing one view of the prerequisites for democracy, he acknowledges a key point: the fears that have been elevated to constitutional value in the jurisprudence of the Court have historically defined “arguments about the desirability of democracy itself.”⁷⁸ It is within a theory of pragmatist “order” that the most coherent defenses of *Bush v. Gore* have been made.⁷⁹ Without the Court’s intervention: anarchy and lawlessness. However, if order, rather than participation, was already the watchword of the law of democracy, then the production of an “order without law”⁸⁰ in the decision suggests an authoritarian logic transcending any boundary between the law and its imagined other. The only question then is: which lawlessness? And if it is a democratic lawlessness in open antagonism with an authoritarian lawlessness, then the return to the rule of law from which we have allegedly departed will in fact also be the trump card for the latter.

The exclusions of the law of democracy extended all the way down to the voting booth and this exclusion preceded any legal controversy in the particular case or election. Again, the mantra of the effort to sustain the recount was this: count every legal vote. By counting every legal vote, it was imagined that democracy would be vindicated and affirmed. Speaking almost a decade after the case, Akhil Amar asserted that the provision of the Florida code authorizing recounts in this situation was in “harmony with the spirit and grand principles of the state constitution . . . which emphatically affirms the people’s right to vote and the right to have every lawful vote reflecting a clearly discernable voter intent counted equally.”⁸¹ The imagined constitutional commitment to democracy was likewise presumed by Richard A. Epstein, who agreed with the ultimate decision in *Bush*

⁷⁵ The Green Party ticket in 2000 was headed by Ralph Nader. Nader’s running mate was Winona LaDuke.

⁷⁶ Police blocked the Green Party candidates from entering into the debate hall in Boston in 2000 under threat of arrest. Over 30 pro-democracy protestors were imprisoned for attempting to gain entry. In 2012, Green Party nominee Jill Stein was arrested and handcuffed to a chair for eight hours for attempting to enter into the debate arena at a university in New York.

⁷⁷ See *Arkansas Educational Television Commission v. Forbes*, 532 U.S. 666 (1998).

⁷⁸ Richard H. Pildes, *Democracy and Disorder*, 68 *UNIV. OF CHICAGO LAW REV.* 695, 714 (2001).

⁷⁹ See RICHARD POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001). Posner’s pragmatist defense ultimately rests upon the claim “that it is a function of law in general . . . to produce order” and the Court successfully halted further confusion and tumultuousness with its decision. *Id.* at p. 161.

⁸⁰ Cass Sunstein, *Order Without Law*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein and R. Epstein eds., 2001).

⁸¹ Amar, *supra* note 23 at 953-954.

v. Gore, but did so on Article II grounds rather than upon Equal Protection. Epstein rejected an Equal Protection analysis by distinguishing the facts in Florida with earlier cases involving poll taxes or literacy tests and concluded, by contrast, nobody in Florida was “excluded from the polls.”⁸²

To say nobody was excluded from the voting polls in the election of 2000 is in some sense perfectly true but the truth of the statement makes false the pretense of democratic inclusion. The statement is true to this extent: it was *only* nobodies who were excluded from the polls. Article VI, sec. 4 of the Florida Constitution, the same Constitution that received such effusive praise from Professor Amar for its democratic principles, sets forth the following prohibition:

No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability.⁸³

No person convicted of a felony shall vote and the felony conviction thus transforms the individual into no person at all politically speaking. Their legal personhood is abolished and they are politically disappeared. In the United States, almost 5 million people are excluded from voting by these legal banishments and the numbers only grow: between 1995 to 2005 it is estimated that over 200,000 persons were disenfranchised in the State of Florida alone.⁸⁴

Every legal vote requires a legal person. When one is focused almost exclusively on counting *legal* votes then the necessity of giving any account of the expanding illegality of persons in the community is lost. Martin Luther King Jr. described the cumulative effects of daily living with white supremacy under Jim Crow as “forever fighting a degenerating sense of nobodiness.”⁸⁵ Article VI of the Florida Constitution produces this in a singular act and enshrines it as basic law. The constitutionalization of nobodiness first emerged in the white response to Reconstruction. Reactionary legislatures across the South enacted laws to disenfranchise newly emancipated black voters and this included an expansion of felony exclusions.⁸⁶ And the legacy of this is to be found in the extraordinary number of African-American citizens who are *today* denied the vote under these anti-Reconstruction provisions. As of 2007, approximately 7% of black Americans were barred from the polls, forbidden to cast any legal vote at all.⁸⁷

The Supreme Court has upheld laws that disenfranchise both those currently incarcerated as well as those convicted felons who have completed in full their prison and probationary terms. In *Richardson v. Ramirez*, the Court rebuffed a constitutional

⁸² Richard A. Epstein, “*In Such a Manner as the Legislature Thereof May Direct:*” *The Outcome in Bush v. Gore Defended*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein and R. Epstein eds., 2001).

⁸³ *Ex-Felon Voting Rights* (August 2008), report by the Florida Advisory Committee to the U.S. Commission on Civil Rights, p. 2.

⁸⁴ *Id.* at p. 6 and 18, respectively.

⁸⁵ *Letter from Birmingham Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 293 (James M. Washington ed., 1986).

⁸⁶ See Angela Behrens, et. al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, Vol. 109 *AMERICAN JOURNAL OF SOCIOLOGY* 559, 563 (2003).

⁸⁷ *Ex-Felon Voting Rights in Florida* supra note 83 at p. 6.

challenge to these laws. In his dissent, Justice Thurgood Marshall argued that the text of the Fourteenth Amendment should be read against a background commitment to democracy and that any restriction on casting a vote strikes “at the heart of representative government.”⁸⁸ Further, any acceptance of this exclusion as being consistent with constitutional value sanctified and solidified a rule and order that had “its origins in the fogs and fictions of feudal jurisprudence.”⁸⁹ The federal courts have also rejected more recent challenges to these feudalistic laws.⁹⁰

In addition to the disparate impact upon historically subordinated racial classes (that is, those members of the racial class are more likely to be barred from voting and the disbarment of increasing numbers of that class weakens politically the class *as a class*), we should perhaps begin to think of ex-felons as a class unto themselves. For the explosion of policing and criminal production in the United States has leaned heavily upon a campaign of turning acts of crimes committed by individuals into individuals defined solely by the fact that they have committed a crime.⁹¹ Thus they are not simply punished for this or that amount of time, but are in fact politically banished even after the particular time of punishment. This fact should heighten the solicitude of Equal Protection analysis given that a central factor of that analysis is whether the class in question is able to defend itself in the democratic process. Here, the class as a class is born and bound by nothing less than the exclusion from the democratic process. That there exists today a swelling class of the excluded who are a class due to their exclusion only confirms Justice Marshall’s observation in *Rodriguez*: the fogs and fictions of feudal jurisprudence have been brought forward from the past and find new vitality in the political life of the present.

Democracy is thus suffering from a proceduralist perspective: each and every individual is not respected by or included within the process. Democracy is suffering from a multicultural and anti-racist perspective: African-Americans are subordinated and the *Herrenvolk Republic* endures.⁹² Democracy is suffering from a membership-centered perspective: the material feudal fact can only mock universal and communal pretensions. Democracy is also suffering from a consequentialist perspective: disenfranchisement has reached levels “sufficient to change election outcomes,” and the 2000 election would “almost certainly have been reversed had voting rights been extended” to disenfranchised felons.⁹³ The quadrennial angst about which way some swing state might swing in the presidential race hinges on the exclusion of voters. *But for* systemic exclusionary practices, many swing states would not swing. Contemporary political grammars and electoral strategies in the United States rest upon the exclusion of 5 million people from

⁸⁸ *Richardson v. Ramirez*, 418 U.S. 24 (1974), 77 (quoting *Reynolds v. Sims*).

⁸⁹ 418 U.S. 24, 86 (Marshall, J. dissenting).

⁹⁰ *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005).

⁹¹ On the processes and implications of the transformation of diverse acts into the sure-sign grounds of the being behind and beneath them, see generally MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY*, VOL. I (1978).

⁹² Dominant groups in a society organize around democratic norms while subordinating other groups with antidemocratic and exploitative practices. Cheryl Harris, *Whiteness as Property*, 106 HARVARD LAW REV. 1707, 1744 (1993).

⁹³ Jeff Manza and Christopher Uggen, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, Vol. 67 AMERICAN SOCIOLOGICAL REVIEW 777, 778 and 792, respectively (2002).

the voting booth. Counting “every legal vote” will in no way alter the fact that the “legal” is precisely that which has politically abolished and banished several million citizens from citizenship. No other country in the democratic world excludes those convicted of felonies to the extent that the United States does or produces such astronomical numbers of those convicted. This is another way of saying that, properly speaking, the United States is not rightly a member of the democratic world. Protesting for democracy’s realization by expressing a desire for the “rule of law” shepherded by apolitical judges, rather than “political partisans,”⁹⁴ in fact secures rather than challenges the anti-democratic order. The danger is not that the law is overrun with political partisans. Democracy is not in need of neutral “umpires” in the law; she *is* in need of friends and fans, partisans rooting for her.

IV.

On the tenth anniversary of the decision in *Bush v. Gore*, a lawyer and journalist reported a curiosity about *Bush v. Gore*, a curiosity rendered visible both in retrospect and in contrast to another epoch defining case, *Brown v. Board of Education*. Whereas the decision by the Court in 1956 to strike down state-mandated segregation in public education ushered in a new legal regime, *Bush v. Gore* could point to no such legacy. Consider: during the ten years following *Brown v. Board of Education*, the Court had cited the case over 25 times, however during the ten years after *Bush v. Gore* it had cited the case not once: *zero*.⁹⁵ *Bush v. Gore* was not to be used as precedent in the law, and it was not; however it was the logic of the constitutional zero itself that would escape the particular political struggle and establish itself as a precedent for the decade to come. And it is the multiplication of that zero as a modality of governance and rule that would stand as a far greater consequence of the decision than the particular man the Supreme Court selected to lead the executive power. Although, given that he had assumed power via anti-constitutional means, one can at least understand how dense the attraction must have been to rule according to its non-rules when crisis came again.

⁹⁴ *Law Professors for the Rule of Law*, cited by Radin *supra* note 32 at p. 113.

⁹⁵ Jeffrey Toobin, *Precedent and Prologue*, THE NEW YORKER, December 6, 2010. According to Toobin, *Roe v. Wade* generated 65 citations in the decade following the ruling in 1973.

Chapter Two

THE EXECUTIVE POWER: A LAW THAT IS NO LAW

Our interrogations in Guantanamo were conducted . . . in circumstances so prolonged that it was practice to have plastic chairs . . . that could be easily hosed off because prisoners would be forced to urinate during the course of them.

Another practice . . . was “short shackling” where we were forced to squat without a chair with our hands chained between our legs and chained to the floor. If we fell over, the chains would cut into our hands. We would be left in the position for hours before an interrogation, during the interrogation [which could last as long as 12 hours], and sometimes for hours while the interrogators left the room. The air conditioning was turned up so high that within minutes we would be freezing. There was strobe lighting and loud music that would be played that was itself a form of torture. Sometimes dogs were brought in to frighten us . . . Sometimes detainees would be taken to the interrogation room day after day and kept “short shackled” without interrogation ever happening, sometimes for weeks on end.

--Shafiq Rasul and Asif Iqbal, detainees at Guantanamo (Human Rights Watch 2004)

Perhaps the oddest thing about my fortieth-birthday trip to Guantanamo and the naval brigs was that the plane was full of lawyers. This was an apt metaphor for many of the Bush administration’s terrorism policies: never in the history of the United States had lawyers had such extraordinary influence over war policy as they did after 9/11.

--Jack Goldsmith, Assistant Attorney General, OLC (2007, p. 129)

I.

The attacks upon the World Trade Center and Pentagon in 2001 simultaneously constituted a crime against humanity—as an intentional and systematic assault upon a civilian population with weaponry that would by definition kill and maim innocent

persons-and a crime against Empire in the deepest sense imaginable as an assertion and enactment of equality. Both crimes are linked in that this creation of terror via a technologically advanced aerial assault upon densely populated metropolitan areas also signaled the end of great-power State monopoly over such forms of violence. Since 1945, such actions had been the principle language of colonial engagement in Cold-War campaigns of proxy confrontation. For example, the entire foreign policy establishment in the United States spoke constantly about the campaigns of carpet bombing of Vietnam, Laos, and Cambodia as an attempt to “communicate” to rivals who could speak the same language and as a sign of force to those who spoke none at all; an instruction in behavioral training to animalized human herds across the globe. After 1989, that monopoly contracted further. Thus, the attacks of September 11, 2001 constituted a particularly shocking new fact arriving amidst the triumphalist discourse of sole superpowerdom and indispensable nationhood: the reemergence of multivocality in the grammars of modern mass terror and this time from subaltern locales. The disorientation generated by that combination in part explains why the incongruity between the boxcutters used by the hijackers on the one hand and the transcontinental jet planes at their disposal on the other so captured the U.S. public imagination immediately after the attacks. That anyone could now command such powers signaled a new egalitarian moment.

This new equality challenged a variety of orthodoxies, and could be properly viewed as an “existential” threat when existence beyond them had become unimaginable. Survivalist rhetorics that dominated after 9/11 continued a pattern of apocalyptic political thinking in American life that in the 20th century had produced the slogan “better dead than red” at the level of folk talk and sustained the doctrines of mutually assured destruction in the higher realms of theorization and policy. After the cessation of the Cold War, speculations about the ‘end of history’ only affirmed this trend as the global order became pictured not as a choice but as an inexorable logic. Standing against it was viewed as akin to standing against gravity or the sunrise. So, whatever historical claims or political visions present in/presented by the attacks on the U.S. were immediately transformed into gibberish from some medieval point in time proffered by men with whom nothing could be negotiated. From this perspective, the oft-repeated mantra that the United States “does not negotiate with terrorists” stands as something other than cowboy-inspired stubbornness; it is in fact a hegemonic world view immune to changes in style or party.⁹⁶

In addition to a general background of systematic non-recognition of equalitarian claims and a refusal to acknowledge rival systems presented by political equals (they are linked yet distinct), a constellation of more specific antagonisms and desires were

⁹⁶ Recently, President Obama’s U.N. Ambassador Susan Rice reaffirmed the position explicitly: “We don’t negotiate with terrorists, that’s the policy of the United States.” *Transcript of Interview by John King with Susan Rice*, STATE OF THE UNION WITH JOHN KING, August 9, 2009, <http://transcripts.cnn.com/TRANSCRIPTS/0908/09/sotu.01.html>. A refusal to negotiate with those people from some other time helps to shore up what Wendy Brown calls the “stories constitutive of modernity.” “Modernity is not only premised on the notion of *emergence* from darker times and places, it is also structured *within* by a notion of continual progress.” WENDY BROWN, *POLITICS OUT OF HISTORY* 6 (2001). The very possibility of negotiation or consideration is foreclosed because the presence of the men with beards who live in caves unravels the constitutive narratives that sustain the position from which one would negotiate. A rival *within* the present is different from a rival *with* the present.

inflamed by the 9/11 attacks. Organized by a religious cult with ties to Islam and carried out by members with nationalities of Middle Eastern origin, they were woven into preexisting efforts to maintain Anglo-American political economies of oil, viewed through the dynastic familial dramas of the non-elected and judicially-installed executive power, seized upon by the imperial hypernationalist ideologues of the neoconservative Right,⁹⁷ and narrated with theological urgency by powerful fundamentalist Christian sects within the United States.⁹⁸ From this brew emerged a level of fanaticism and imprudence that would lead to a worldwide spasm of militarized violence by an American-led “coalition of the willing.” A campaign to defeat religiously organized political forces in Afghanistan that it had previously helped create and maintain during the 1980s came first,⁹⁹ with massive bombardment and occupation commencing in October of 2001. Planning turned almost immediately afterward to Iraq, a state and society that had already endured a decade-long state of siege and periodic bombing by the U.S.-and a state and society with zero connections to the attacks the U.S. claimed to be confronting and rebuffing. Denied anything resembling an imprimatur of U.N. legitimacy, the U.S. nonetheless launched “Operation Iraqi Freedom” in March 2003. Subsequently, U.N. Secretary General Kofi Annan would judge the invasion and occupation to be an illegal breach of the United Nations charter.¹⁰⁰

In each theater of war the United States established detention centers to assist in coordinating the prosecution of the “global war on terror,” a war that had explicitly established the entirety of the globe as its field of battle. Iraq and Afghanistan were but pressure points and open fronts. For perhaps the first time in the history of modern nation states, a war without horizon was envisaged. Such a vision both abolishes all boundaries of political geography and erases the temporal prospects of a close to the action. As Judith Butler has rightly observed, here “state power restructures temporality itself, since the problem of terrorism is no longer a historically or geographically limited problem: it is limitless and without end . . .”¹⁰¹

⁹⁷ By “hypernationalist ideologues,” I mean that the exertion of national force outside of any constraints of multinational or international agreement is understood as being a good in and of itself, to be affirmed and entrenched via practice/repetition. A result and example of this is found in assertions that the Geneva Conventions do not apply to the *sui generis* category of prisoners labeled by the American executive power as “enemy combatants” and in the enthusiastic development of a doctrine of “preemptive unilateralism” in relation to other sovereign states in the context of international law.

⁹⁸ Contemporary polling techniques indicate that the base of support for torture is in white, evangelical and fundamentalist Christian populations, also a central base of support for the Right in general. A recurring tale from detainees within the American-run camps (and confirmed by independent reports) is the denigration of the Quran by interrogators and guards combined with religiously infused verbal abuse.

⁹⁹ See generally JOHN COOLEY, UNHOLY WARS: AFGHANISTAN, AMERICA, AND INTERNATIONAL TERRORISM (2002).

¹⁰⁰ The relevant sections of the U.N. Charter include Chapter VII of the Charter, “Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggressions” read in tandem with Chapter I, “Purposes and Principles.” Violations of these principles stood at the heart of the Nuremberg Trials as “crimes against peace.”

¹⁰¹ As Judith Butler (PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE 65 (2004)) has rightly observed, here “state power restructures temporality itself, since the problem of terrorism is no longer a historically or geographically limited problem: it is limitless and without end . . .” Butler’s sentence concludes: “and this means that the state of emergency is potentially limitless and without end, and that the prospect of an exercise of state power in its lawlessness structures the future indefinitely.” *Id.* This essay works, in part, to problematize that assertion regarding “lawlessness,” thus the elliptical break is

This “without end” thus logically segued into something of a modality of rule, and that rule has been since exposed as intimately and intentionally brutal. At Bagram Air Base in Afghanistan, at Abu Ghraib Prison in Iraq, at Guantanamo Bay in Cuba, at the U.S. Naval Brig in Charleston, South Carolina, and at countless other CIA-run “black sites,” the United States has systematically inflicted mental and physical suffering upon detainees. Early efforts to portray the spectacular acts of State-orchestrated sadism that burst into public view with the photographs from Abu Ghraib as nothing more than the curious and isolated work of a few “bad apples” have failed. Even the author of the Department of Defense’s report on the conditions at Abu Ghraib, Major General Antonio Taguba, declared that the abuse was not aberrational; it represented instead “a regime of torture.”¹⁰²

In keeping with the production of a regime, the stories emerging from the various prisons and camps have been reliably consistent and patterned. The first established camp was in Afghanistan, at Bagram Air Base. It was intended as a temporary detention center after the U.S. invasion began in 2001, with two primary functions: to gather intelligence for the war of occupation and to determine who would be sent on to detention at Guantanamo Bay. Interrogation practices have included beatings, hanging detainees from ceilings for long durations of time, sexualized abuse, sleep deprivation, and interrogations during surgeries. Numerous prisoners have died during the torture sessions, including a young Afghani man in 2002 who was beaten while shackled and stomped under foot with such ferocity that the tissue on his legs had been “pulpified” to the point of falling from the bone.¹⁰³

Death is not the aim; establishing “facts” is. As a previous White House advisor helpfully explained, in a manner so candid as to shock those so embedded in the conditions of the practice that they had long ago forgotten its truth: “(W)e are an Empire now, and when we act, we create our own reality.”¹⁰⁴ The unilateralism creating the camps and the uncertainty that permeates them are thus not impediments to the campaigns of “enduring freedom” but are rather the ineluctable core of their being: the radical certainty of making facts and the dreadful uncertainty of becoming one restores the asymmetries disrupted by the presumptuous attacks of 9/11. One Guantanamo prisoner provides a glimpse into the phenomenology of this from the other side: “I think the worst was not knowing . . . not knowing why you’re there or when you will go home.”¹⁰⁵

Every aspect of Guantanamo aims toward creating reality, teasing it out methodically. All structures and practices and norms and procedures of the camp become

theoretically intentional. Further, the flip side of Butler’s claim—that the discretionary powers of “petty sovereigns” is a rupture with the rule of law and that the separation of powers constitutes a sound basis for securing justice, individual dignity, and/or political freedom—troubles me as well. I will return to all of these points.

¹⁰² Antonio Taguba, *Preface* to PHYSICIANS FOR HUMAN RIGHTS, BROKEN LAWS, BROKEN LIVES (2008).

¹⁰³ LAUREL FLETCHER & ERIC STOVER, HUMAN RIGHTS CENTER AND THE INTERNATIONAL HUMAN RIGHTS LAW CLINIC OF THE UNIVERSITY OF CALIFORNIA, BERKELEY, GUANTANAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES 23 (November 2008) (hereinafter “DETENTION AND INTERROGATION PRACTICES”).

¹⁰⁴ Ron Suskind, *Faith, Certainty, and the Presidency of George W. Bush*, N. Y. TIMES MAGAZINE, Oct. 17 2004.

¹⁰⁵ DETENTION AND INTERROGATION PRACTICES.

merged into the logics of interrogation. Behavioral scientists are deployed; medical personnel treating the detainees work in tandem with the interrogators; and the camp commanders for the “first time integrated military intelligence personnel with the military guard force, blurring a line that had previously been impermeable in the Army.”¹⁰⁶ Like a mantra it was repeated: the work done was to “set the conditions” for interrogation. Prior to arrival at Guantanamo, the detainees were subjected to the ordeals of Bagram and then chained for a cargo flight halfway around the world. Once there, the camp commanders placed them into metal cages outside in the Caribbean sun, multiply shackled and clad in orange jump suits; the imagery is now an iconic representation of the Nation.

Conditions in the cages of Camp X-Ray, the name of the temporary camps initially established at Guantanamo, bordered on the exotic as scorpions, rats, and snakes wandered into the prisoners’ open-air cages.¹⁰⁷ This too would help “set the conditions” and establish the “facts” of the wildness of the detainees. Who but the beasts would live amongst them? However, the cages left open, literally, the possibility of communication between detainees and thus undermined the attempt to fully break them. To counter this, American officials built a more modern and permanent camp at the base, Camp Delta. The new container structures were explicitly modeled upon supermax prisons in the United States. Now, prisoners are fully isolated in individual cells and communication between the inmates ceases. Time alone in the cells can range from 22-24 hours per day and many prisoners slowly go mad: an attorney visiting Guantanamo reports that his client took advantage of the brief time out of his cell to discuss legal matters as an opportunity to find the tools necessary to attempt suicide via hanging.¹⁰⁸ This detainee survived; others have been luckier in finding success. And in a perfect loop of logic, the eruption of mass suicide attempts in response to the conditions at Guantanamo became the very basis and rationale for the conditions at Guantanamo. Camp commander Admiral Harry Harris summed it up precisely when he stated that the detainees “have no regard for life, either ours or their own. I believe this was not an act of desperation, but an act of asymmetrical warfare waged against us.”¹⁰⁹ To borrow from the common law of torts, *res ipsa loquitur* . . .

¹⁰⁶ *Id.* at 30. In addition, the U.N. Commission on Human Rights has reported that the primary objective of indefinite detention is not the prevention of renewed battle, but rather it is “to obtain information” (2006, p.12). The U.N. commission also held that medical officials at Guantanamo systematically violated international ethical standards in conspiring to turn medical knowledge into a weapon of interrogation (2006, p. 33).

¹⁰⁷ DETENTION AND INTERROGATION PRACTICES 34.

¹⁰⁸ *Id.* at 50.

¹⁰⁹ (BBC News 2006). Life is strangely precious in the camps. Sanction *does* land upon those who fail to prevent the death of the detainees. As a matter of technique, in the practice of interrogation and in the application of the “law” governing it, death constitutes failure. A guard from Guantanamo describes the *professionalism* at stake: “It is totally understood in the camp that if a detainee dies on your shift, you are done. I mean that’s it! You are going to be so in trouble that you don’t even want to have to deal with it.” DETENTION AND INTERROGATION PRACTICES 55. Or more succinctly from a CIA lawyer: “if the detainee dies, you’re doing it wrong.” This order of things thus differs from Giorgio Agamben’s theorization of *homo sacer* tethered to and produced via the allegedly paradigmatic camps of modernity. The two primary features of Agamben’s theoretical claim, that *homo sacer* may be killed by anyone without law’s sanction and the rites of law shall not govern his death, are undermined by the detail with which the camp law works at Guantanamo. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 100-15 (1998). Legal charges *can* be levied against those who do it wrong and, after the “facts,” a death sentence can be issued by the tribunal/appellate system. The asymmetry between “doing it wrong” in killing outside of

If Guantanamo Bay was where the “worst of the worst” in the global struggle went to establish the facts of that claim, all of Iraq itself was transformed into a laboratory of investigation and truth-making in the war on terror. The pure fantasy of the public rationales for the American invasion—weapons of mass destruction, imminent nuclear assault, linkages between Al Qaeda and the regime, the hidden hand of Saddam Hussein in the attacks of 9/11, the liberationist urgings of the Bush administration—worked to heighten and intensify these conditions. Most notoriously, a much-hated symbol of Baathist power in Iraq, the prison at Abu Ghraib on the outskirts of Baghdad, quickly turned into an enormous torture chamber operated by occupying American forces. Repeating the breakdown of operational boundaries at Guantanamo, military intelligence “*actively requested* that MP guards set physical and mental conditions for favorable interrogation”.¹¹⁰ Sexualized humiliation ran rampant in the prison. American guards/soldiers/interrogators stripped the detainees, threatened them with rape, exposed their genitalia to packs of dogs, forced them to pile upon each other naked while threatening to shoot them if they did not comply, photographed them in scenes of forced masturbation, and raped them with inanimate objects. A detainee describes the actions of the most well-known guard of the Abu Ghraib prison, Army Private Charles Granier:

Granier and his helper they cuffed one prisoner in Room #1, named [redacted], he was an Iraqi citizen. They tied him to the bed and they were inserted [sic] the phosphoric light in his ass and he was yelling for God’s help . . . That was Ramadan, around 12 midnight approximately when I saw them putting the stick in his ass.¹¹¹

II.

Much of the opposition to this regime of torture figures the practices and spaces of interrogation outside of the law and as the corruption of law. For many, the law is both the object of the first turn and the very last thing to cling to.¹¹² If only the law could be brought to these sites emptied of it; if only the law present could, at long last, extinguish its impurities and resist the temptations that perpetually corrupt and sully it. On the first account, we are confronted by a definitional injustice or impossibility of

procedure and the commission of an “act of war” in dying by one’s own hand is deeply colonial; the Admiral’s lament carries a profound if unintended truth, a truth unseen and thus exacerbated in Agamben’s critique of the camps. Assertions that the suicides were in fact covered-up homicides only buttress this point. Scott Horton, *The Guantanamo “Suicides”: a Camp Delta Sergeant Blows the Whistle*, HARPER’S MAGAZINE, March 2010.

¹¹⁰ THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen Greenberg & Joshua Dratel, eds., 2005) (emphasis added).

¹¹¹ *Id.* at 504. General Taguba’s report found that Private Granier received active and direct support and encouragement from those above him.

¹¹² The ACLU, for example, thinks “our commitment to the rule of law is tested” by the new regime and frets that “we may be failing this test.” William Fisher, *The other GITMO: Bagram Air Base*, THE PUBLIC RECORD (January 12, 2009).

justice, the specter of lawlessness. Guantanamo Bay is thus witnessed as an “outlaw prison,”¹¹³ and stands as a troubling and exemplary totem of an emerging “lawless world.”¹¹⁴ Thus, the violence of the imperial camps and prisons becomes unmoored from the practices and histories of the law and floats in a netherworld off the shore of the law’s domain. In this utter absence of law, in this spatial/temporal break from tradition and constituting value,¹¹⁵ a reign of pure discretion endures: a rule without rules. This vision is partially captured in the rhetorically powerful description of Guantanamo as a “legal black hole.”¹¹⁶

At this juncture one must return to this essay’s opening assertion by Jack Goldsmith (OLC lawyer under Bush) that a plane full of lawyers en route to Guantanamo could serve as a metaphor for the nature of the battle; it should also be apprehended in all of its literalness so that the metaphor not feel strained. Against the expulsion of the camps into outlaw status runs the jarring fact that such exquisite legal attention and devotion has been showered upon these spaces of brutality. Indeed, it has been widely noted that lawyers have been central, even if not sole, architects of the torture regime. The camps at Guantanamo may be lacking in many amenities, but “law” is not exactly one of them. And although the law under consideration ultimately undoes itself and works against its own possibility while nonetheless realizing the full power of law (however unintentionally, if intentionality is even relevant), that auto-negation cannot obscure the presence of that which is being nullified. As such, the camps are decisively *not* beyond the law or strangers to it; they are not lawless.¹¹⁷

This inconvenient presence of law has not been entirely ignored; instead the animating law has been denounced for being “political.” Man’s antique *telos* is now his original sin, insufferable in a “nation of law, not men.” A series of confusions tear open the thin membrane between politics and law; politics as such infects it and its spread is the sure ruin of law: the great malady is politicization. This diagnosis emerges from multiple locations and binds a type of consensus, a consensus that not incidentally serves as a principal violence of the law.¹¹⁸ From the liberals, a critique of the Bush Justice department for its “pervasive politicization” of the law¹¹⁹; from the far-right, the reverse accusation against the successor regime; back and forth, ever tighter bound, like a noose-knot around the very possibility of self-government. Merely political: this is how one of the lawyers metaphorically “in the plane” brushes off his critics; the charge now serves as

¹¹³ As example, The *New York Times* Editorial page argued: “That is the real nature of Mr. Bush’s grotesque legacy: abuse and torture at an outlaw prison . . .” Editorial, *Closing Guantanamo*, N. Y. TIMES (New York edition), Jan. 17, 2009 at WK12. Correcting this legacy, the editorial continues, is “essential to restoring the rule of law” and this return of the law will allow Americans to again “have faith in themselves and their government.” *Id.*

¹¹⁴ PHILLIPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S ILLEGAL WAR* (2005).

¹¹⁵ This imagined “break” works implicitly as the natal point for narratives of new orders of governance, a narratological break that can work justly only if that newness does not signal the facticity of imperial violence, the violence omnipresent in the law, and/or violence devoid of the law’s presence.

¹¹⁶ Neal R. Sonnett, *Guantanamo: Still a Legal Black Hole*, 33 HUMAN RIGHTS 8, 8-9 (Winter 2006).

¹¹⁷ See generally Leila Brannstrom, *How I learned to Stop Worrying and Love the Legal Argument*, 5 NO FOUNDATIONS 22 (2008) (also pushing against this dominant narrative).

¹¹⁸ This kind of violence is different from the violence normally associated with the law. Robert Cover, *Violence and the Word*, 95 YALE L. J. 1601 (1986).

¹¹⁹ Andrew Gumbel, *Justice, Bush-style*, THE NATION, October 20, 2008.

a perfect prophylactic from accountability, severing judgment from all its historical roots.¹²⁰ The disdain for politics shines even brighter in a slim denunciation of the lawyering responsible for the new camps and prisons. Confronting protests against his school for allowing the ongoing tenure of a torture-lawyer as professor, the dean of UC Berkeley's School of Law acknowledged that the professor in question had provided some "bad ideas and even worse advice during his government service." But the true vice for the dean of the law:

What troubles me *substantively* with the analysis in the [torture] memoranda is that they reduce the Rule of Law to the Reign of Politics . . .

.¹²¹

This critique by the dean, in fact (shall we say, "substantively"?), insulates the legal architects of the camps by acceding to and affirming the proposition that the crisis is simply the appearance of politics per se. Settling the confusion over disputed reigns becomes paramount at the same instant that it becomes oddly empty: the rule of law now carries no substance other than it simply being-in-place, and the only route to combating the facts of the camps and the "law" that produced them is disgraced.

Emptiness here is filled by history, or rather by memory. A nostalgia rules in law's stead for law's return. It is a movement for restoration that dares not pause to consider what has been lost because the "what" would invariably be a re-opening of the wound it labels "politics." The nostalgia is for an intertwined ideological-temporal return to law as such, and as such it is for a law that never was, devoid of the tumults exceeding it and bringing it to being as well as the politics always irrigating and sustaining it. Against this one must return to the old legal realist observation of Llewellyn that the law is what the law does, but without reducing the law to a tool ready to be wielded by any or by all or to a positivist "fact" to be observed in grids of empirical measurements. Law works not as an instrument, but instead as a relationship and a practice; one does not apply the rule, one "practices the law." As relationships and practices they are thus open, in a sense, as these things are, but they also carry the weight of the past in a manner that shatters all romance; it is, no doubt, an order of rule. Thus the siren calls for the return and restoration of "the rule of law" against the camps (or in them?) must answer a historical question, a *political* question: the return of what?

Before turning to a past that is heralded as the hope for the future, proper attention must be given to the "law" that produced the new imperial detention centers in question. For here, a genuine radicalism is at work. In using the term radical, I do not intend it as a pejorative or polemic; nor do I intend it to function symbiotically with either Empire or with violence, independently or in relationship with the law per se. Rather, the radicalism of the law engendering the camps rests upon the fact that the interpretations of

¹²⁰ The lawyer in question is John Yoo, now Professor of Law at UC Berkeley. Yoo served as deputy attorney-general in the Office of Legal Counsel from 2001-2003, and in that position he took an active role in generating the conditions mapped out above as an author of the authorizing "torture memos." Responding to mobilizations against his tenure at Berkeley, his membership in the profession of law, and his status as a free man, Yoo has stated that those challenges must all fail because they are "political rather than legal." Adam Liptak, *THE REACH OF WAR: PENAL LAW; Legal Scholars Criticize Memos on Torture*, N. Y. TIMES, June 25 2004.

¹²¹ Christopher Edley Jr., *The Torture Memos and Academic Freedom*, BERKELEY LAW, UNIVERSITY OF CALIFORNIA (April 10, 2008), <http://www.law.berkeley.edu/news/2008/edley041008.html>.

the law break the bonds of the practice of law while nonetheless relying upon the aesthetics, institutions, and powers of legitimization of the law. And in this there rests some other movement besides an outside-to-the-inside turn of exception and a concomitant “force of law” without it.¹²²

Interrogations: Were there to be limits? If so, where were they? How were they to be found? The commander-in-chief did not establish the answers without the help of counsel. Even the installed executive with all of his bluff and bluster could not do without it. And so in the late summer and early fall of 2002, lawyers within the Office of Legal Counsel (OLC) in the Department of Justice and JAG lawyers within the Department of Defense began to tackle the questions. Collectively, the responses would come to be known publicly as “the torture memos.” Multiple legal texts are in play: treaties, federal statutes, legislative histories, the Constitution. On August 1, 2002, the OLC sent a memo to the Attorney General interpreting the federal statute implementing the Convention Against Torture And Other Cruel, Inhuman and Degrading Treatment or Punishment. The law criminalizes any

act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain and suffering incidental to lawful sanctions) upon another person within his custody or physical control.¹²³

The memo zeros in on two elements of the statute: the intent requirement and the definition of pain/suffering. First, a high barrier to establishing intent is erected. An infliction of the forbidden pain “must be the defendant’s precise objective.” Ruminating between theory and precedent, the authors of the memo argue that “even if a the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent . . .” The door thus cracks open for all types of force against detainees, although the closet door for the sadist remains temporarily closed; the sin of the guards at Abu Ghraib was not that they pushed too far but that they enjoyed it too much. Continuing with the analysis of intent, counsel tells us that specific intent will also fail to be established with a “showing that an individual acted with a good faith belief that his conduct would not produce the result that the law prohibits.”¹²⁴ Now, the opinion begins to establish the conditions by which its own analysis will work to “take the gloves off” since the legal opinions themselves can

¹²² Thus I am unsure of Agamben’s turn to Derrida’s “force of law” lecture to think the space of “exception.” Or rather, I find both misapplied if applied to the appearance of the torture camps within American imperial jurisdiction. Agamben’s mobilization of Eichman’s defensive assertion in Jerusalem that “the words of the Fuhrer have the force of law” (GIORGIO AGAMBEN, *STATE OF EXCEPTION* 38 (2005)) seems inapt to capture, and indeed will lead us to miss, the fact that even our American Fuhrer must *turn* to the law; without the law he does not have words. If the law is what the law does, then the metaphysical anti-historicism of Agamben falters. Or, if I’ve misread the position, then what he takes as genealogical terrain needs elaboration beyond the curious deployment of “the West” which he sometimes confuses with “humanity.”

¹²³ *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen Greenberg & Joshua Dratel, eds., 2005). Formally, the memo was sent from then Assistant Attorney General (and now a Federal appellate judge of the Ninth Circuit) Jay Bybee to Presidential Counsel Alberto Gonzalez. It is now known that John Yoo authored it. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

¹²⁴ *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 175 (Karen Greenberg & Joshua Dratel, eds., 2005).

establish the required “good faith” that will prevent conviction. Officials in the field thus wait for word from the lawyers because the word will potentially immunize them from legal sanction; once that word arrives the primary limits will be the efficiency of technique on the one hand and the fears of publicity on the other (suspending for the moment the Nuremberg principle of refusing orders).

Understanding what the law prohibits requires turning next to the definition of “severe pain or suffering.” Immediately, an invocation of the canons of statutory interpretation: one begins with the text and its ordinary/natural meaning. The meanings become elusive; what exactly is “severe”? Indeterminacy drives the line of transgression to an extreme, thereby transforming a statute designed to forbid the abuse of detainees into one enabling a multitude of techniques. Jeremy Waldron has critiqued this interpretative line pushing in the following manner:

One way of thinking about the need for precise definition involves asking whether the person constrained by the norm in question-state or individual-has a legitimate interest in pressing up as close as possible to the norm, and thus a legitimate interest in having a bright line rule stipulating exactly what is permitted and what is forbidden by the norm.¹²⁵

Choosing between these two approaches, between the line-pushing for interrogation advocated by the lawyers in the OLC and the anti-cruelty normative order for rule-making advocated by Waldron, is an inescapable jurisprudential moment and one ultimately undecidable on grounds other than political vision. True, other interpretative moves that look more rightly “legal” to the outsider will sustain the elaboration and defense, but they will be just that: supplements. Such an observation is not remotely fatal to the practice of law; political vision is the very opening of law and that to which law must ever return *in practice*. Often the practice will return in a subterranean manner, beneath not just veneers of ideology, but secretly embedded in the steady hum of a million quotidian engagements and transactions. In other moments, the move is from assumption to question and political thinking bursts forth as the pivotal (that on which the law turns) calculation. Briefly then, the fact that the law cannot escape politics and politicization brings to the fore the politics always already present in the law.

The lawyertects of the regime believe the “key” to unlocking the secrets the detainees carry inside of Guantanamo, Abu Ghraib, and Bagram, is to be found in that line demarcating severe/not severe. It is now high-tide for right-wing consequentialism: the “dictionary defines ‘severe’ as ‘unsparing in exaction, punishment, or censure’ or ‘inflicting discomfort or pain hard to endure; sharp; afflictive; distressing; violent;

¹²⁵ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUMBIA LAW REVIEW 1681, 1701 (2005). Waldron compares two hypothetical situations to illustrate this point: 1) a taxpayer looking to claim maximum deductions under the code and 2) a man in a domestic relationship with a woman trying to determine how far he may push with bullying, intimidation, and force before it triggers the laws of domestic violence. *Id.* Waldron argues that the very seeking of limits in the second hypothetical is misplaced and a reading of the law that negates its design. In this vein, one must recall that the American military previously had a policy requiring soldiers to imagine that they were the ones being held captive and enduring the interrogation. From that angle, the indeterminacy of the text suddenly becomes more determinate and far, far closer to Waldron than to Yoo. Perspectival in theaters of equality is precisely what the Yoo position aims to abolish and what the camps work furiously to undo.

extreme; as *severe* pain, anguish, torture.”¹²⁶ That severe is severe begs the question, but from the plain language they conclude that the “pain or suffering must be to such a high level of intensity that the pain is difficult for the subject to endure.”¹²⁷ Unsure now as to the limits of the endurable (pulpification of the flesh? Shackled beatings? Sensory deprivation? Ass rape? Some combination? Something else?), the memo looks to other sections of the federal code “to shine more light on its meaning.”

What do they find in enlightenment? They discover that the “phrase ‘severe pain’ appears in statutes defining an emergency medical condition for the purpose of providing health benefits.”¹²⁸ Determining an emergency medical condition is admittedly far afield from establishing a limit on the forces of interrogation, but they have found what they are looking for, an extremity. A provision entitling care somehow serves as the basis for inflicting pain upon detainees until they need it. The conclusion from the lawyers: to meet the statutory requirement of “severe pain” the subject of interrogation must suffer a “sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions.”¹²⁹

One can sense the mental gears churning even at this undeniable outer limit, wondering what constitutes “failure” with regards to organs; or what bodily functions might be impaired without being serious; and what does “serious” modify, the impairment or the function—at one moment it is “permanent impairment of a significant body function,” in the next sentence it is “serious impairment of body functions.” If they die you are doing it wrong, but what short of death impairs “doing it”? The lawyers press onward, but now unmoored from statutory text. Classic legal reasoning: in the alternative . . . “[E]ven if an interrogation method arguably were to violate Section 2340A [the torture criminalization statute], the statute would be unconstitutional if it impermissibly encroached upon the President’s constitutional power to conduct a military campaign.” The President has the power to order interrogations as part of a military campaign; his powers are at a zenith in a time of war; we are in a state of permanent war; thus “*any effort* to apply Section 2340A in a manner that interferes with the President’s direction of such core war matters as the detention and interrogation of enemy combatants” must be Constitutionally impermissible.¹³⁰ To arrive at this maximalist conclusion on the depths of executive power, the memo looks primarily to the “text, history, and structure” of the

¹²⁶ THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen Greenberg & Joshua Dratel, eds., 2005) (emphasis in original)

¹²⁷ *Id.* at 176.

¹²⁸ *Id.* In exacting legal style, they helpfully provide a string citation: 8 U.S.C. §1369 (2000); 42 U.S.C. §1395w-22 (2000); *id.* §1395x (2000); *id.* §1395dd (2000); *id.* §1396b (2000); *id.* §1396u-2 (2000). The aesthetics of the law are in full force and work as a force: they help make it a “legal” analysis. At a glance, there is no confusing these texts for anything else, such as an essay, an editorial, a manifesto, or a poem.

¹²⁹ *Id.*

¹³⁰ THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 200 (Karen Greenberg & Joshua Dratel, eds., 2005) (emphasis added). The memo ultimately gives the President nearly unlimited powers once the matter is determined to fall within executive domain: “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.” *Id.* at 203. Harold Koh explains the logical outcome of this thinking: “the notion that the President has the constitutional power to permit torture is like saying he has the constitutional power to commit genocide.” PHILLIPE SANDS, LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES FROM FDR’S ATLANTIC CHARTER TO GEORGE W. BUSH’S ILLEGAL WAR 215 (2005).

Constitution and conveniently fails to consider the central Presidential powers' case in modern times, *Youngstown*¹³¹.

Youngstown stands as a rebuke to unchecked inherent executive power in times of war. In 1952, President Truman issued an executive order seizing the majority of privately owned steel mills in the United States. Escalating conflicts between labor and capital threatened to disrupt the level of steel production to a degree that the President deemed a threat to continued war in Korea. The Supreme Court held the seizure to be an unconstitutional exercise of executive power notwithstanding the situation in Asia and the explicit declaration of necessity for "national defense." Justice Black's opinion for the court held that:

We cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.¹³²

In an influential concurrence, Justice Jackson put Presidential power into motion as interdependent with, and contextually related to, the powers of the legislative branch. He writes: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with Congress."¹³³ Significantly, Justice Jackson placed executive power at "its lowest ebb" when the President "takes measures incompatible with the expressed or implied will of Congress."¹³⁴

Does *Youngstown* block the desire to refuse the limits placed upon interrogations and confinement in Section 2340A? Whatever answer one might give to this question, it is unavoidable as a question when interpreting the powers of the President in times of war and especially when those powers purportedly render applicable Congressional statutes as Constitutionally moot. Several experts in this area have noted this omission in the memo.¹³⁵ Douglass Cassel of Northwestern Law School describes the refusal to consider and engage binding case law as "not just poor judgment, that's incompetence."¹³⁶ One must go further: it is not law at all. And to be perfectly clear, it is *not* because it is "political" as opposed to "legal." Let's consider another case to see how critical it is to enter into the orbit of precedent (even to break from it), in practice. After the attacks of September 11, 2001 the spokesperson for the regime warned all residents in the United States that they should "watch what they say, watch what they do." Imagine if the President had subsequently turned to his counsel and inquired whether the federal government possessed the power to criminally prosecute those who failed to heed these grim warnings. More exactly, imagine that he wanted to pass a law making it illegal to make *any* false statements about the commander-in-chief. Would that be Constitutional?

¹³¹ *Youngstown Sheet and Tube, Co. v Sawyer*, 343 U.S. 579 (1952).

¹³² *Id.* at 587.

¹³³ *Id.* at 635.

¹³⁴ *Youngstown Sheet and Tube, Co. v Sawyer*, 343 U.S. 579, 637 (1952).

¹³⁵ Former Solicitor General, and previous director of the OLC, Walter Dellinger says that the opinion "goes beyond anything the OLC has ever stated" regarding Presidential powers and that it does so by ignoring relevant cases, particularly *Youngstown*. R. Jeffrey Smith, *Slim Legal Grounds for Torture Memos: Most Scholars Reject Broad View of Executive's Power*, WASHINGTON POST, July 4 2004 at A12.

¹³⁶ Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N. Y. TIMES, June 25 2004.

All routes of consideration would inevitably lead to the landmark case of *New York Times v. Sullivan* (1964) in order to answer that question. This case held that public officials could not recover civil damages for defamatory statements relating to their official conduct absent a showing of “actual malice.” My hypothetical involves criminal libel, but this would not alter the centrality of this ruling in any analysis. One simply could not form a *legal* opinion regarding libel against a public official without working very closely with the facts of the case, the holding by the Court, and the reasoning justifying it. Again, producing a legal opinion on this question would cease to be a legal opinion in any meaningful sense if this case was simply ignored. If that gap occurred on a law student’s examination, the grade would be failure; if it were found in the work product of a practicing attorney, the penalty would be disbarment for negligent practice.¹³⁷ So, we have in the August 1, 2002 “torture memo” a legal opinion effecting the force of law without being “law” at all. It constitutes not a novel turn in the law but a turn *against* it. Thus the spaces opened up and the practices set into motion by the memo tear asunder the constitutive bonds holding together the practice of law, but they are by no means “outlaw”: they rule as law and draw their force through the institutions from which they emerge (the OLC), the professional credentials of the authors (the elite sector of the profession), the form through which they communicate (the genre of the legal memorandum), and the power that they confer (the immunity they bestow upon the interrogators). It is a thoroughly legal regime that completely undermines the rule of law even as it extends it.

Crucially, rejection of the law that is not law, this rule of a juridically spectralized anticonstitutionalism, does not adhere necessarily/definitionally to a specific political position in the legal community even as this rule takes definite ideological form as a modality of right-wing governance. So off the mark was the reasoning, the memo was withdrawn when a new head of the OLC (Jack Goldsmith) took the position in 2003. A self-described movement conservative, and a Bush appointee, Goldsmith felt compelled to repudiate the work. Defending this move, he explained:

On the surface the interrogation opinions seemed like typically thorough and scholarly OLC work. But not far below the surface there were problems . . . the health benefits statute’s use of “severe pain” had no relationship whatsoever to the torture statute . . . the clumsy definitional arbitrage didn’t even seem in the ballpark.¹³⁸

That is, both the statutory interpretation substituting the trigger for a health-right as the threshold limit of violence before torture *and* the Constitutional explication asserting

¹³⁷ Common and binding ethical cannons hold that a lawyer is expected to have knowledge of those elementary principles of law which are commonly known by well-informed attorneys and to discover additional rules of law which may be readily found by standard research techniques. *Metzger v. Silverman*, 62 Cal. App. 3d Supp. 30 (1976). This includes a duty to discover additional rules of law that, although uncommon, may be readily found by standard research techniques. For example, *Goebel v. Lauderdale*, 214 Cal. App. 3d 1502 (1989), held that an attorney is not liable for every mistake he may make but he is expected to know the elementary principles of law commonly known to well informed attorneys.

¹³⁸ JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 145 (2007).

absolute power in the executive to apply/not apply techniques constituting torture had absolutely “no foundation in law.”¹³⁹

We must not confuse this critique of new modalities with a moral-ethical claim on behalf of the detainees in a project of universal human rights. That is not the point here. It does not hold that this rule must lead to the camps any more than the inverse proposition that defeating this rule must close them. The radicalism of the memos and the asymmetries that they extend clearly helped produce the facts of the camps and prisons of Empire. But those facts do not speak in and of themselves to a negation of the law in the practice of the law. One could make that move, and many do, through either the trumping language of international humanitarianism or the theologies that divinize man and/or subject him to sacred and inviolable rule. Quite different (even if potentially convergent politically in labors of coalition) is 1) the argument that the law of the camps cannot be law since they fail to meet the universal laws of man or the unyielding orders of Nature (divine or not); from 2) the argument that the interpretative norms constituting the practice and the rule-of-law are coming unhinged. That unhinged rule threatens many values (even as it opens the possibility of realizing others if properly conceived) and despite appearing most brutally in the camps, we must see in that something other than its exclusive signature.

Anticonstitutionalism must break faith in and with the law, but that should not lead to a misplaced faith in that which is broken. Jeremy Waldron is correct to claim that the torture memos are “shocking as a jurisprudential matter,” but he goes further to state that they rattle his “faith in the integrity of the community of American jurists.”¹⁴⁰ For Waldron, torture is normatively antithetical to the values supposedly embedded in a community that has devoted its very existence “to the study of the Rule of Law and the education of future generations of lawyers.”¹⁴¹ This could be read as a political standard by which to judge the law, and it is certainly that. However, it works as something more than a paradigmatic mooring: his confession of shock and a loss of faith suggests a historical understanding undergirding the constitutional vision. That is, it is a narrative of loss. Ironically, the violence of the prison and the camp again becomes figured as aberrational, new in time.

Upon closer inspection, or from “experience” in the case of groups historically subordinated by and through American law, there is no break at all in terms of the togetherness of violence and law. More specifically and on point, the operation of governance via the mechanisms of policing and detention is well established within the “homeland” and has been for some time.¹⁴² Preventive detention, policing discretion, life internment, expanded surveillance, systematic yet randomized violence (the very definition of “terror”) by State and State-contracted officials inside and outside the prisons, proliferating executions: these have all become what the law is. Why should it come as any surprise that the only thing that Bush could imagine giving the newly liberated Iraqis as penance for Abu Ghraib was a newly modernized maximum-security Abu Ghraib?

¹³⁹ *Id.* at 149.

¹⁴⁰ Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUMBIA LAW REVIEW 1681, 1687 (2005).

¹⁴¹ *Id.*

¹⁴² See generally JONATHAN SIMON, GOVERNING THROUGH CRIME (2007).

Recall again that when the detainees at Guantanamo continued to show resistance the camp commanders turned their eyes homeward and imported the architecture of the supermax prisons to the island base. Now, the current American president demands that we close the Guantanamo camps as they have become a source of shame for the Nation, somehow believing that the supermax prisons at home could be a source of its pride. Consider also the following *rebuttal* to right-wing criticisms of moving the detainees to American “soil”:

As military and national security officials who have spent our entire careers fighting to protect the American people and defend the country from attack, we all agree that the prison facility at Guantanamo Bay needs to be closed—as do five former Secretaries of State, Gen. David Petraeus, Joint Chiefs of Staff Chairman Adm. Mike Mullen, and Defense Secretary Robert Gates. We also agree with you that the discussion over closing Guantanamo and moving the detainees to a new facility needs to occur, as you have said, in a “civil and rational way.” That is why we were disappointed last week—during a town hall meeting in Standish, MI, whose prison is a possible site to detain terror suspects—to hear you politicize such a critical national security . . . The former warden of the Supermax facility said prisoners “spend up to 23 hours a day in their cells, every minute, every meal. The window in their cell is blocked so they can’t see the mountains.” Yet you stated that detainees housed in America “would have greater opportunities to command and control their networks through outsiders and to spread radical jihadist ideology.” The Supermax warden also stated that Ramzi Yousef has never left his cell. If the same—if not stricter—standards are applied to Guantanamo detainees held domestically, then how exactly would they command terrorist networks overseas? . . . Whether it’s in Standish, Michigan or the halls of Congress, politicizing national security is always dangerous. We ask you to return the debate to the “civil and rational” in order to stop the spreading of fear that plays into the very hands of the enemies we are trying to defeat.¹⁴³

What could be more apolitical and rational than a prison that holds people in cells for 23 hours per day with no view of the outside? And some prisoners *never* leave their cell, the warden reports, with the pride of a craftsman. Such conditions, as at Guantanamo, drive prisoners insane; they lose the capacity of language, they begin to hallucinate, they mutilate their bodies in the hope of death but even that hope is extinguished, taken from them by the warden. Prisoners have compared the experience to “living inside of a tomb.”

These institutions are not improvisations by rogue soldiers armed with dubious legal memoranda; rather, they are run by officials and backed by jurisprudence. The Thirteenth Amendment to the Constitution abolished slavery in 1865, but its text contains a key exception:

Neither slavery nor involuntary servitude, except as punishment for crime

¹⁴³ Lt. Col. Stephen Abraham et al., *Open Letter to Representative Peter Hoekstra*, NATIONAL SECURITY NETWORK (August 27, 2009), <http://sti.typepad.com/files/hoekstra-standish-letter.pdf>. The open letter is addressed directly to Republican Representative Hoekstra.

whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction. (1865)

Prisoners' rights will always be on the verge of turning into something of a conceptual and practical oxymoron if the concept of slavery is permitted to invade the category. Before *and* after 1865, American courts frequently "spoke of prisoners as slaves of the State."¹⁴⁴ After halting reforms in the early 1960s, prisoners have been reduced again to that condition in practice, in culture, and in jurisprudence. During the past 35 years an unrelenting counterassault has been waged on those movements inside and outside the prison seeking to enact abolition without exception. The law defeated them: in "virtually every major segment of prisoners rights jurisprudence, the [Supreme] Court's impact has been devastating."¹⁴⁵ The tombs of supermax are thus a realization and enactment of "law," and if the imagined path ahead is for the return of the rule-of-law without and against politicization, it will lead us inevitably back into them, sealed inside the "civility and rationality" of the age.

Circulation between the prison-industrial-complex of the mythical homeland and the far-flung imperial camps and prisons of the enduring freedom beyond it continues as of this writing.¹⁴⁶ So much movement and cross-fertilization is happening. A lone figure nonetheless stands out, as a sign: the American guard Granier of Abu Ghraib. Flowering as a true sadist in the Baghdad prison, and thus running amok of a cardinal virtue of the regime by finding genuine enjoyment in the pain he inflicted, his "work" in the prison was a familiar work. He was a reserve member of the Army, not a career military officer, and thus maintained a civilian job before being called up and sent to Iraq. The Taguba report notes somewhat dryly his occupation, in an addendum authored by a psychiatrist from the Air Force providing a "psychological assessment" of the abuse at Abu Ghraib: "CPL Granier had a civilian prison job."¹⁴⁷ The Associated Press reports that an abuse "scandal" erupted in the prison where Granier worked as a guard in rural Pennsylvania prior to his deployment. Dozens of prison officials were implicated in it, although Granier apparently was not. From the report:

Prisoners in the Pennsylvania scandal claimed in dozens of lawsuits that abuse was widespread at the maximum-security state prison and included beatings, sexual assault and body cavity searches in full view of other guards and inmates.¹⁴⁸

¹⁴⁴ William E. Hellerstein, *No Rights of Prisoners*. in *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* 71 (Herman Schwartz ed., 2002).

¹⁴⁵ *Id.* at 72.

¹⁴⁶ "Prison-Industrial Complex" is not intended here as a rhetorical flourish. Many smaller communities have developed a reliance on the prison system as a jobs program; the prisons become economic "interests."

¹⁴⁷ *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 448 (Karen Greenberg & Joshua Dratel, eds., 2005). Granier has been quoted as saying: "the Christian in me knows it's wrong [the torture], but the corrections officer in me says, 'I love to make a grown man piss himself.'" Steven C. Caton, *Abu Ghraib and the Problem of Evil*, in *ORDINARY ETHICS: ANTHROPOLOGY, LANGUAGE, AND ACTION*, 165, 177 (Michael Lambert ed., 2010)

¹⁴⁸ Charles Sheehan, *MP Investigated in Iraq Was at Pa. Prison During Abuse Scandal, but not Implicated*, ASSOCIATED PRESS, May 7 2004.

Again, the law is first and foremost *a practice*.

III.

As a practice, the violence of American law works asymmetrically, unequally. This legal tradition came into being, one might say, in the policing and production of difference. It is the proliferation of distinction, the practice of governance through it, that makes nonsensical the claim that “our age is nothing but the implacable and methodical attempt to overcome the division dividing the people . . . in a biopolitical project.”¹⁴⁹ The political and Constitutional history of the United States is rife with a fanaticism of distinction and division. Even at the historical moment of greatest intensity in the attempted fusion of blood and citizenship, in tracing citizenship through the performances of lineage, one finds a legal doctrine of “separate but equal.” The lie of the latter half of the doctrine affirmed and produced the truth of the first. And the white supremacists of the country, especially those in the American South, could entertain neither the liquidation of subordinated races nor their exile in schemes of Garveyite emancipation, if for no other reason than their sense of self as people (one cannot be superior unless there is something to be superior to) and their base of economic wealth would have literally disappeared.

Thus it is of no surprise that the prison systems in the American South after Reconstruction reintegrated the private law of contract with the public law of peonage thereby producing a racialized system of prison labor that worked both as profitable labor and also as a means of disciplining and racializing labor on the other side of its walls.¹⁵⁰ The laws of Mississippi, for example, made it “illegal for a tenant farmer to break his contract after taking an advance, no matter how small.”¹⁵¹ The largest prison in Mississippi at the time, Parchman Farm, had an African-American population of 90% and “functioned as a working plantation,” including whippings as punishment for violations of prison rules.¹⁵² Producing caste and accumulating racialized capital required the law, but was in no way exclusive to it. As is well known, the same period and place also witnessed a record number of lynchings of African-Americans.¹⁵³ Consequently, the violence of the regime unraveled the dyadic schema of an inside/outside the law,

¹⁴⁹ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 179 (1998).

¹⁵⁰ DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996); SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* (1997).

¹⁵¹ DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 120 (1996).

¹⁵² *Id.* at 137.

¹⁵³ Ida B. Wells described lynching as an “unwritten law” that was “cool and calculating” as opposed to an “outburst of uncontrollable fury” or the “unspeakable brutality of an insane mob.” IDA B. WELLS, *LYNCH LAW IN AMERICA* (1900). Likewise, Paul Thomas has observed in the photographs of lynching scenes that the white terrorists exhibit a sense of propriety and matter of factness about them and clearly “did not see themselves as lawless.” Paul Thomas, “Lovely Day for a Necktie Party,” Vol. 63 *Film Quarterly* (2010).

inside/outside the State, or inside/outside the norm and its exception. It was the very production of difference, of bodies, of law, and of violence that made it such an enduring order. As Kendall Thomas has written, such governance is neither the opposition of law-violence, nor the collapse of all violence inside or outside the law; rather, the relationship between the violence of the law and the violence outside the formal institutions of the law are “not merely coincident, but coordinate.”¹⁵⁴ Thus, white plantation owners would develop a theory of “law in action” decades before the progressive legal scholars at Yale and Columbia and Wisconsin: “there are four kinds of law in Mississippi, whites liked to say: statute law, plantation law, lynch law, and Negro law.”¹⁵⁵

This is governance with both the “contract and the whip” working as coordinate powers in a racialized capitalist economy rooted in and transforming a society no longer feudal yet not quite “modern.”¹⁵⁶ These practices produced and were produced by laws written and unwritten and are irreducible to a singular decision, order, or locale of sovereignty. One does not find in them the secret and unfolding paradigm of modernity, or the West, or the Law; only the particular convergences and departures of a variety of constitutional stories, political histories, material relations, and institutionalized epistemologies. Other peoples in other times have taken other turns, even if and when they have cross pollinated ways of thinking and co-produced the socio-political contours of contemporary being; Parchman Farm is not Auschwitz, Granier is not Eichmann, the tortured Yemeni prisoners of Guantanamo are not the exterminated Jews and Gypsies of the Reich, the decrees of the French Constituent Assembly are not the Amendments of the American Constitution, the union of Madison’s States is not the unity of Rousseau’s Nation, and the undoing of a tradition is not the decisive suspension of an order.

Granier’s prison—the one in Pennsylvania, with its “scandal” of routinized violence, was every bit as racialized as the plantation factory of Parchman Farm in the old regime of the Old South. An article from the *The Los Angeles Times* gives an account of the prison:

It was built for 1,500 of Pennsylvania's hardest-core prisoners, including about 110 on death row, and had the perks of modern corrections, such as central air conditioning and cable TV. But it was not immune from the age-old tensions of such institutions. While almost 70% of the inmates were black, many from big cities, SCI-Greene was in a rural part of the state near the West Virginia border, and more than 90% of the guards were white.¹⁵⁷

¹⁵⁴ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUMBIA LAW REVIEW 1431, 1469 (1992).

¹⁵⁵ DAVID OSHINSKY, “WORSE THAN SLAVERY”: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 124 (1996).

¹⁵⁶ SAIDIYA V. HARTMAN, SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA (1997).

¹⁵⁷ Paul Lieberman & Dan Morain, *Unveiling the Face of the Prison Scandal*, LOS ANGELES TIMES, June 19 2004. The article is a curious piece of portraiture in that the entire narrative is driven by the *slide* of Granier from a “white-collar” future into a lower-middle class milieu; only *they* could have be so deprived. He is an enigma of evil to the journalists because he did not *come* from there: as a boy he “mixed daily with the children of doctors and lawyers. Friends assumed a white-collar life would be the destiny” of the boy. A class-based worldview that pathologizes members of the working-class helps to situate torture “outside” the law, or at least that element of unguarded delight. It was the grin and the “thumbs-up” in the pictures from

Space here will not allow a proper and full accounting of the multitude of forces that produce the 70/90 divide within that prison or a mapping of the differences between the policing of the present and the Jim Crow of the past. Those differences cannot be collapsed, but the continuities with, or refigurations of, that past cannot be denied. Despite existing in a post-*Brown v. Board of Education* jurisprudential world, the racism of the prisons enjoys the prestige and confirmation of the judicial word. Two cases are emblematic. The first, *McCleskey v. Kemp*,¹⁵⁸ provided constitutional safe-harbor for a racially discriminatory *practice* of administering the death penalty. The condemned in this case (a case originating from a Georgia state court) was an African-American man convicted of murdering a white police officer. On appeal, the lawyers for McCleskey submitted a statistical study demonstrating that defendants in Georgia “charged with killing white victims were 4.3 times as likely to receive a death sentence as those charged with killing blacks” and that black defendants “who kill whites have the greatest likelihood of being sentenced to death.”¹⁵⁹ The Supreme Court accepted the validity of the study, but held that the statistics do not “*prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey’s particular case.”¹⁶⁰ Thus he was killed by the State. The Court worried that a holding in the alternative would open up constitutional challenges to inequality in all areas of criminal punishment. That fear of a “slippery slope” to equality was given as *a reason for* sustaining the application of the death penalty in the *McCleskey* case. This is a piece of one juridical cloth with the Torture Memos’ devotion to proving specific intent in the particular case; the regime as a regime recedes into the background of the law and becomes its very condition of enactment.

Another critical case in this vein, deepening the tradition that informs the present, came from the Supreme Court a decade later in *United States v. Armstrong*.¹⁶¹ There, a black defendant asserted a violation of equal protection (under the Fifth Amendment’s Due Process Clause) after being prosecuted by the federal state for a violation of the laws prohibiting the sale of crack cocaine. An affidavit presented by the defense at trial showed that of the 24 cases prosecuted in that federal district for dealing crack cocaine, every single defendant was black.¹⁶² Chief Justice Rehnquist, writing for the Court held:

In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective prosecution claim. *Berrios, supra*, at 1211. The study failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted.¹⁶³

The Court explained the reasoning for not permitting further discovery to proceed in this

Abu Ghraib that did Granier in. Unsurprisingly, the article spends most of its time trying to determine the classed psychology of Granier rather than investigating the prisons where he worked and the law that he applied. The description of the prison and its racial make-up was in passing.

¹⁵⁸ 481 U.S. 279 (1987).

¹⁵⁹ *Id.* at 287.

¹⁶⁰ *Id.* at 308 (emphasis in original).

¹⁶¹ 517 U.S. 456 (1996).

¹⁶² *Id.* at 458.

¹⁶³ *Id.* at 470.

case:

Having reviewed the requirements to prove a selective prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files and documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a *prima facie* case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.¹⁶⁴

This second line of reasoning must be understood to theoretically subsume the first even as they are presented separately: the constitutional transgression of equality must be shown, in each and every case to be specific and intentional in that particular case, in part to not slow down or diminish the prosecutorial powers and practices of the State. Attempting to show that discrimination in each and every particular case would bog down the racialized prosecutorial State, divert its resources and reveal its aims, therefore the policies must continue uninterrupted, at once *prima facie* and yet “undiscoverable.”¹⁶⁵

We can call this, for short, at present: “the rule-of-law.”

So, the concern that the imperial camps and prisons are raging, unchecked, wildfires of arbitrary lawlessness, that they, as Judith Butler has argued, lay waste to “the Constitution and the rule-of-law,”¹⁶⁶ must open up to another danger on the horizon: the smooth calculation and operation of the law, its extension to these sites and these peoples, not its suspension but its presence in non-paradoxical and non-negating form. One might say that it is the very potential of its nonsuspension that poses a conundrum. Even now,

¹⁶⁴ United States v. Armstrong, 517 U.S. 456, 468 (1996).

¹⁶⁵ In both the technical and social sense.

¹⁶⁶ JUDITH BUTLER, *PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE* 64 (2004). For Butler, rights are read as law and law is conceived as Constitutionally prescribed and derived; the concern is expressed as the executive branch unilaterally “suspend[ing] constitutionally protected rights.” More explicitly: “One might conclude with a strong argument that government policy ought to follow established law. And in a way, that is part of what I am calling for. But there is also a problem with the law, since it leaves open the possibility of its own retraction.” *Id.* at 86. My point centers on execution and realization rather than retraction. As many have noted, Euro/American conceptualizations of law and legality have been historically linked to colonial plunders and expansions, and not simply in the attempted dehumanization of subjects as subjects outside the law (as inconceivable (non)persons unjustly denied a proper accounting per Butler). As example, one might look to the shift that occurred in the American government’s (if we can suspend its plurality for a moment), approach to Native Americans. From the presidency of Andrew Jackson until the 1870’s the policy consisted of expulsion and genocide; after the 1870’s “the war continued” but now “with the weapons of the rule of law.” MARK S. WEINER, *AMERICANS WITHOUT LAW: THE RACIAL BOUNDARIES OF CITIZENSHIP* 37 (2008). The explicit aim of the Dawes Act of 1877 was to spread the “civilizing influence of private property” and thus to “infuse the Indian self with an Anglo-Saxon vision of law and so to destroy the Indian as a social fact.” *Id.* at 39. That is, juridical incorporation served as the *mechanism* of genocide.

with the slow extension of the ancient writ of habeas corpus and the attempt to “fix” (shall we doubt its double meaning after *United States v. Armstrong*? After *McCleskey v. Kemp*?) the military tribunals at Guantanamo, one can sense not the arrival of justice but the routinization of its other. Once political vision slips into the politics of the particular case and the intent specific to it, one has ceded the world before making the first claim upon it. Many scholars and activists have criticized the turn of the law or the rule of the law in producing the inequalities mapped in the cases of above. Some have compared the infamy of these cases to the paradigmatic and (ultimately) union-dissolving decision of *Dred Scott*.¹⁶⁷ But there is something off in the analogy despite the sure-footedness of the impulse behind it. For a result of the infamy of *Dred Scott* was the perfect clarity that it provided, illuminating in the public mind what was at stake politically in the formulation of the Constitutional decision. Inescapable was the “what” of the law as it ruled upon classes and on behalf of them; now, the “what” so easily eludes our thinking precisely because we are invited to think as the law now thinks: one defendant at a time.

The possibility of American jurisprudence as a “guide,” the turn to it as something that could “shed light on the question,” is never far from the minds of the architects of the camps. Again, all the thinking of the torture memos was “legally framed.”¹⁶⁸ In a memorandum from October 11, 2002 (this time from a JAG lawyer inside the DOD rather than an OLC lawyer from inside the DOJ), entitled “Legal Brief on Proposed Counter-Resistance Strategies,” the author begins with the facts: the detainees have developed “resistance strategies to interrogation,” and many interrogators feel constrained by the ambiguity of the rules; they do not want to do “anything that could be considered ‘controversial.’”¹⁶⁹ The memo quickly dispenses with international law by determining that only the limits of domestic law will govern: “the United States is only prohibited from committing those acts that would otherwise be prohibited under the 8th Amendment of the United States Constitution.”¹⁷⁰ According to the memo, the question determining the law of the Eighth Amendment is not the injury suffered or the precise quantum of force brought to bear (although an elaborate set of categories is developed, like steps on an infinite ladder), but whether the force was “applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically applied for the *very* purpose of causing harm.”¹⁷¹

Here is the text of the Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. (1791)

¹⁶⁷ This analogy emerged in the wake of the *McCleskey* decision (see Stephen Bright, Anthony Amsterdam, Hugo Bedau, and others).

¹⁶⁸ Leila Brannstrom, *How I learned to Stop Worrying and Love the Legal Argument*, 5 NO FOUNDATIONS 22, 25 (2008).

¹⁶⁹ THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 229 (Karen Greenberg & Joshua Dratel, eds., 2005).

¹⁷⁰ *Id.* at 230.

¹⁷¹ *Id.* at 232 (emphasis in original). Colin Dayan has also noted that the “Rehnquist’s Court’s Eighth Amendment cases prepared the way” for the torture of detainees with the shift from conditions to intent. COLIN DAYAN, THE STORY OF CRUEL AND UNUSUAL 59 (2007) (not noted by Dayan is how widespread this jurisprudential standard now extends).

Constitutional limitations upon punishment must be read in relationship to the rights articulated in the Fifth Amendment (the right to due process and the right to not be a witness against oneself), the Sixth Amendment (the right to a speedy and public trial), the suspension clause regarding the Writ of Habeas Corpus,¹⁷² and the Fourteenth Amendment (incorporating the Eighth Amendment via the Due Process clause).¹⁷³ Thus, the jurisprudential history of the “cruel and unusual clause” deals exhaustively with punishment inflicted after a conviction; that is, punishment arrived at via the mechanisms of the process due to the accused. Some punishments are forbidden by the very fact of their spectacular and prolonged display of pain—the pre-disciplinary exercise of sovereign power in the opening scenes of Foucault’s *Discipline & Punish* would be an example; other punishments are limited according to the age and mental capacity of the condemned¹⁷⁴; and still other Constitutional limits seek to forge a theoretical bond between the severity of the crime and the extent of the punishment.¹⁷⁵

The move to center the Eighth Amendment comes from all sides. One group of activists from the political Left (primarily, not exclusively) that has campaigned to have the lawyers and leaders of the regime held to account and brought to justice frame their call to action thusly:

Torture is illegal under both United States and international law. The Constitution prohibits cruel and unusual punishment under the Eighth Amendment, and it states that treaties signed by the U.S. are the “supreme Law of the Land” under Article Six.¹⁷⁶

Further, they argue that:

Despite this well-established law, under the Bush administration, torture was authorized by George Bush and kept secret using classified designations. The White House requested legal memoranda to support its use of torture and it received those authored by a host of attorneys, including John Yoo, Jay Bybee, and Stephen Bradbury. Attorneys who advised, counseled, consulted and supported those memoranda included Alberto Gonzales, John Ashcroft, Michael Chertoff, Alice Fisher, William Haynes II, Douglas Feith, Michael Mukasey, Timothy Flanigan, and David Addington . . . We have asked the respective state bars to revoke the licenses of the foregoing attorneys for moral turpitude. They failed to show “respect for and obedience to the law, and respect for the rights of others” . . . They failed to support or uphold the U.S. Constitution, and the

¹⁷² U.S. CONST. art. 1, § 9.

¹⁷³ *Robinson v. California* applied the Eighth Amendment’s restrictions to the actions of the State governments. 370 U.S. 660 (1962).

¹⁷⁴ *Roper v. Simmons* outlawed the use of the death penalty against someone who committed the crime while under the age of 18. 543 U.S. 551 (2005).

¹⁷⁵ *Kennedy v. Louisiana* prohibited the use of the death penalty when the crime is rape, even when the victim is a minor. 554 U.S. 407 (2008).

¹⁷⁶ VELVET REVOLUTION (last visited Sept. 28, 2012), http://www.velvetrevolution.us/torture_lawyers/index.php.

laws of the United States, and to maintain the respect due to the courts of justice and judicial officers, all in violation state bar rules.¹⁷⁷

This criticism has been carried forth more broadly, displaying the socio-cultural presence and prominence of legal discourse in shaping political questioning and the ongoing reduction of political questioning to the issue of “legality.” On the television show *60 Minutes*, the host Leslie Stahl pushed the issue to the fore in an interview with Supreme Court Justice Antonin Scalia. And as is so often the case, Justice Scalia helps us to see all of the right things for all of the wrong reasons. Here is the exchange between the journalist and the jurist:

STAHL: If someone’s in custody, as in Abu Ghraib, and they are brutalized, by a law enforcement person—if you listen to the expression “cruel and unusual punishment,” doesn’t that apply?

SCALIA: No. To the contrary. You think—Has anybody ever referred to torture as punishment? I don’t think so.

STAHL: Well I think if you’re in custody, and you have a policeman who’s taken you into custody . . .

SCALIA: And you say he’s punishing you? What’s he punishing you for? . . . When he’s hurting you in order to get information from you, you wouldn’t say he’s punishing you. What is he punishing you for? You punish somebody . . .

STAHL: Well, because he assumes you, one, either committed a crime . . . or that you know something that he wants to know.

SCALIA: It’s the latter. And when he’s hurting you in order to get information from you, you don’t say he’s punishing you . . .¹⁷⁸

On the one hand, Scalia’s assertion that torture is never used for punishment is patently false. On the other hand, the converse—that torture is therefore always punishment—does not really hold either. So, the curious legal proposition takes root: whatever one’s position on torture at Guantanamo or Abu Ghraib (and it is telling that in American life we have such a diversity of positions on this), it is not “punishment” at all. Constitutionally, the deprivation of life/liberty must follow along familiar procedural routes; namely, the trial. And this is at the heart of the radical reversal of the juridical schema at those sites: the punishment precedes the procedure, which makes it not punishment, and thus makes superfluous the procedure that is yet to come.¹⁷⁹ A key fact of the reversal of procedure and punishment is that the law is not abandoned, it is misplaced. That misplacement does indeed undo the law, but it also oddly pays a steep tribute to the law: all of the strange reversals and interpretations affirm rather than

¹⁷⁷ VELVET REVOLUTION (last visited Sept. 28, 2012), http://www.velvetrevolution.us/torture_lawyers/index.php.

¹⁷⁸ (*60 Minutes*, 2008).

¹⁷⁹ In this, I am in agreement with Judith Butler’s point regarding the earlier tribunal mechanisms established at Guantanamo: it is a “law that is no law, a court that is no court, a process that is no process.” JUDITH BUTLER, *PRECARIOUS LIFE: THE POWER OF MOURNING AND VIOLENCE* 62 (2004). See *Id.* at 62-77 for an excellent mapping of this auto-negation. I think this can be distinguished from the earlier theorization by Butler of lawlessness, sovereignty, and the rule-of-law.

suspend. The flood of the law washes into these allegedly “outlaw” spaces situating each and every relationship within them. If one was forced into using the omnipresent language of norm/exception, one would have to press the Tocquevillian observation about the place of law in America against the Agambenian claim on sovereign indistinctions: the norm haunts the exception, not vice versa.

In saying this, I do not affirm the existence of these spaces as constituting a “no man’s land between public law and political fact.”¹⁸⁰ The very distinction between “public law” and “political fact” can only be interpreted and understood through the grid of a particular political ordering; public law is always already an element of political fact and only through the organization and making of political/not-political fact does the public law operate. Here we can lean upon and relearn from Carl Schmitt—as well as the Marxist tradition and most feminist critique—in his writings on the “highly political” nature of even the seemingly tranquil vocabularies of civil law (tort, contract, etc):

A word or expression can simultaneously be reflex, signal, password, and weapon in a hostile confrontation. For example, Karl Renner, a socialist of the Second International, in a very significant scholarly publication . . . calls rent which the tenant pays the landlord ‘tribute.’ Most German professors of jurisprudence, judges and lawyers would consider such a designation an inadmissible politicization of civil law relationships . . . For them the question has been decided in a legal positivist manner, and the therein residing political design of the state is thus recognized.¹⁸¹

It is the very “political design” of the Constitution that recedes from view when the imagined “limit” between law and politics is located in the “abolition of the legislative, executive, and judicial powers.”¹⁸² First, the separation of powers was explicitly designed to thwart democracy in protection of the interests of private property, an interest conceived as the precondition of Constitutional order.¹⁸³ The new-found romance with this separation has yet to grapple with the powers solidified and made victorious by it. Secondly, sovereignty has never been established as a Constitutional fact, it is always a Constitutional question or future, and remains one.¹⁸⁴

Let me try to summarize: a political imaginary that envisions the defeat of the camps by the return or restoration of the “rule-of-law” misses several critical points at its own risk: 1) the precondition and condition of law is politics, as practice and pivot; depoliticization as a telos will always work as a political fact in relationship to it; 2) the practices of the law, and by this we mean the law in question since it is only to be in motion as a practice, stand soaked in violence, a violence delivered through an enactment and policing of differences, differences colonially informed and juridically prescribed as

¹⁸⁰ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE 2* (1998).

¹⁸¹ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 31 n. 12 (George Schwab, trans. 1996).

¹⁸² GIORGIO AGAMBEN, *STATE OF EXCEPTION* 9 (2005).

¹⁸³ See generally *The Federalist Papers No. 10*. It is by no accident that Alexis de Tocqueville will claim in his 1848 preface to *Democracy in America* that “the sacred rights of family and property” are preserved in America by the “principles of order, balances of powers, true liberty, and sincere and deep respect for the law” *Introduction* to ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* xiv (J.P. Mayer ed., Harper 1966).

¹⁸⁴ We should look to Article V of the U.S. Constitution, as a theory and a practice; it is perplexing and unique.

a “tradition”; 3) these new zones of violence are not “lawless” or rogue in their configurations, they are not strangers to the law even as they are “not law.”

Finally, if the foe is envisaged as either the hyperpoliticization of the law or the rule of a lawless power, then it is unsurprising that popular modes of resistance have been so tightly organized through a plea for the return of the rule-of-law. But this misdiagnosis of the situation unwittingly helps to consummate the legitimacy and fact of the regime and leaves us to imagine that with the combined force of lawful virtue and post-political piety, that this too shall pass. We are thus left with nothing more than the ever more empty incantations of “hope” and rapidly diminishing grounds for it.

Chapter Three

THE LEGISLATIVE POWER: THIS DEATH THAT LEADS TO LIFE

Living well, the search for the good life, means living not only in the here and now but in the past, not only in the past, but for the future.

-J. Broek, N. Jacobson, and S. Wolin¹⁸⁵

The District Court shall determine *de novo* any claim of a violation of any right . . . Nothing in this Act shall constitute a precedent with respect to future legislation”

-“Terri’s Law”¹⁸⁶

I.

On Sunday, March 20, 2005, both chambers of the United States Congress voted overwhelmingly to pass “An Act for the Relief of the Parents of Theresa Marie Schiavo.”¹⁸⁷ The one-page law provided:

SEC. 1. RELIEF OF THE PARENTS OF THERESA MARIE SCHIAVO.

The United States District Court for the Middle District of Florida shall have jurisdiction to hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo for the alleged violation of any right of Theresa Marie Schiavo under the Constitution or laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

SEC. 2. PROCEDURE.

Any parent of Theresa Marie Schiavo shall have standing to bring a suit under this Act. The suit may be brought against any other person who was a party to State court proceedings relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain the life of Theresa Marie Schiavo, or who may act pursuant to a State court order authorizing or directing the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life. In such a suit, the District Court shall determine *de novo* any claim of a violation of any right of Theresa Marie Schiavo within the scope of this Act, notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised, considered, or

¹⁸⁵ *Academic Freedom and Student Political Activity*, in *THE BERKELEY STUDENT REVOLT* 443, 443 (eds. Seymour Martin Lipset and Sheldon S. Wolin, 1965).

¹⁸⁶ Pub. L. No. 109-3, 119 Stat. 15 (2005).

¹⁸⁷ Pub. L. No. 109-3, 119 Stat. 15 (2005).

decided in State court proceedings. The District Court shall entertain and determine the suit without any delay or abstinence in favor of State court proceedings, and regardless of whether remedies available in the State courts have been exhausted.

SEC. 3. RELIEF.

After a determination of the merits of a suit brought under this Act, the District Court shall issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and laws of the United States relating to the withholding or withdrawal of food, fluids, or medical treatment necessary to sustain her life.

SEC. 4. TIME FOR FILING.

Notwithstanding any other time limitation, any suit or claim under this Act shall be timely if filed within 30 days after the date of enactment of this Act.

SEC. 5. NO CHANGE OF SUBSTANTIVE RIGHTS.

Nothing in this Act shall be construed to create substantive rights not otherwise secured by the Constitution and laws of the United States or of the several States.

SEC. 6. NO EFFECT ON ASSISTING SUICIDE.

Nothing in this Act shall be construed to confer additional jurisdiction on any court to consider any claim related--

- (1) to assisting suicide, or
- (2) a State law regarding assisting suicide.

SEC. 7. NO PRECEDENT FOR FUTURE LEGISLATION.

Nothing in this Act shall constitute a precedent with respect to future legislation, including the provision of private relief bills.

SEC. 8. NO AFFECT ON THE PATIENT SELF-DETERMINATION ACT OF 1990.

Nothing in this Act shall affect the rights of any person under the Patient Self-Determination Act of 1990.

SEC. 9. SENSE OF THE CONGRESS.

It is the Sense of Congress that the 109th Congress should consider policies regarding the status and legal rights of incapacitated individuals who are incapable of making decisions concerning the provision, withholding, or withdrawal of foods, fluid, or medical care.

A President well-known for a propensity to retire early in the evening and notorious for lethargy and indifference in the face of individual and collective suffering roused himself in the wee hours of the night (1:11 A.M.) to sign the bill into law. Almost all observers agreed, then and now, that “Terri’s Law,” as it came to be known, was an extraordinary piece of legislation.¹⁸⁸ Here, an atrophied and dysfunctional constitutional system,

¹⁸⁸ This observation holds across disagreement about other elements of the legislation. See O. Carter Snead, *The Surprising Truth about Schiavo: A Defeat for the Cause of Autonomy*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 (“this extraordinary avenue of relief”); Adam M. Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 (“Congressional action was both extraordinary and feeble”); Michael Stoke

purposely designed to operate in anti-democratic rhythms (and so from another perspective *perfectly* functional), suddenly moved at electric speed. The spectacle suggested the gravest of public emergencies, a collective political crisis of first-rank constitutional import. And the rhetoric ratcheted upward as if to confirm this: it was a matter of “life and death.”

Yet, one facet of the genuinely extraordinary nature of this statute surely rests in how achingly ordinary the facts generative of the case were. The end-of-life decision in the Schiavo case is commonplace as familial-medical practice, thoroughly regulated at the level of State law,¹⁸⁹ and hardly *sui generis* in the realm of Federal Constitutional jurisprudence.¹⁹⁰ Even a fierce critic of the decision (of the State order to remove the feeding tube from Schiavo and the Federal courts’ refusal to enjoin that order) acknowledged as much: “[t]his sort of thing, of course, happens all the time. The exceptional feature of the Terri Schiavo case is not the situation it presented or the result it produced, but the extraordinary attention it received, out of all proportion to anything genuinely unique about its facts.”¹⁹¹ One should not treat “life and death” cheaply, but one should not quickly overthrow legal thought with deceptively simple existential slogans either.¹⁹² After all, “life and death” might also be rightly called the “day-to-day” or the already proper objects of that which we call “law.”

The issue of proportionality then becomes a central one. What precisely is at stake in the matter? How would one measure proportion, in regards to time and object? What stands to be vindicated or brought forth? A new set of values in which proportion becomes moot? If so, then what dies when time and object escape the contours of proportionality, when the present is the only thing present?

The federal legislation passed in relief of the parents of Theresa Marie Schiavo followed years of dispute and litigation in the state court system. Terri Schiavo went into a “persistent vegetative state” in 1990 after suffering a heart attack. In such a condition, Schiavo “had little or no cognitive capacity.”¹⁹³ To keep her alive, doctors placed a

Paulsen, *Killing Terri Schiavo*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 (commending the “extraordinary efforts to save her life”).

¹⁸⁹ The Schiavo case arose in Florida. For that state’s statutory scheme, see Fla. Stat. § 765 (2012) (especially Part II, Part III, and Part IV).

¹⁹⁰ See generally *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁹¹ Michael Stoke Paulsen, *Killing Terri Schiavo*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 585. This point is seconded in Edward J. Larson, *From Cruzan to Schiavo: Similar Bedfellows in Fact and at Law*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 405.

¹⁹² Jill Lepore has argued that the reduction of political thinking to the extremities of “life and death” leads to a public discourse that is “no longer civil, pluralist, and yielding. And when this happens, day after day, year after year, there is no more politics; there is only one sort of impasse or another.” See Jill Lepore, *The Politics of Death*, THE NEW YORKER, Nov. 30, 2009, at 67. One can decline Lepore’s invitation to view “politics” as defined by civility and pluralist yielding (indeed the theater of civil yielding frequently excludes from view the unyielding operations of *political* power that mark off such spaces and practices and shroud the very real “life and death” questions at the heart of politics), yet still explore further the logic of the impasse as practice in the present. Such routinization of the “impasse,” its always being there to be overcome and thus never really overcomeable, might very well help explain the gathering forces and repeating force of contemporary anti-constitutionalism.

¹⁹³ I have tried to use facts that even radical critics of the Schiavo decision (and thus staunch supporters of Terri’s Law) do not dispute. Therefore, this quote is from Paulsen, *supra* note 191 at p. 586. Some supporters of the law, however, resorted to inventing “medical facts” to justify Congressional intervention.

feeding tube inside her to provide nourishment. Not until 1998 did her husband seek to have the feeding tubes removed. The litigation developed from a disagreement between Terri Schiavo's husband and her parents as to whether Schiavo would want (or more precisely, would have wanted) to cease this kind of treatment in such a permanent vegetative condition.

As noted, that litigation transpired within fairly settled legislative and constitutional arrangements. The radicalism of Terri's Law may be best approached from the shores of these broad jurisprudential settlements, settlements singularly suspended in the passage of Terri's Law. As method, this starting move moves closely with traditional conservatism. And as settlement stands starkly against suspension as value and practice, we can see that an issue presented by this matter is the opening of fissures on the Right regarding the place of constitutionalism in the constellation of their thinking.

The modern landmark case in the United States that first addressed the profound advancements of technology in the domains of medicine and directly confronted technology's ability to reroute the path from, and redraw the line between, life and death was the 1976 New Jersey Supreme Court case of *In Re Quinlan*.¹⁹⁴ Karen Quinlan collapsed at the age of 22 for unknown reasons and suffered severe brain damage due to a lack of oxygen. She never regained consciousness and entered into a "chronic vegetative state" whereby she lost the ability "to talk, to see, to feel, to think."¹⁹⁵ The hospital provided her with nourishment through a "nasal-gastro tube," yet she became "emaciated, having suffered a weight loss of at least 40 pounds" and her posture was described to the Court as "fetal-like and grotesque."¹⁹⁶ Quinlan also required the assistance of a respirator to breathe. Doctors treating Quinlan presented no hope of recovery for her. The case arose when her father, Joseph Quinlan sought declaration of guardianship and power to discontinue "extraordinary medical procedures allegedly sustaining Karen's vital processes and hence her life."¹⁹⁷

The New Jersey Supreme Court ruled for Joseph Quinlan, but critically and explicitly it was Karen Quinlan's rights that the Court understood as being vindicated. The Court held that if Karen "were miraculously lucid for an interval . . . she could effectively decide upon discontinuance of the life-supporting apparatus." Further, the Court stated that "we have no hesitancy in deciding . . . that no compelling interest of the State could compel Karen to endure the unendurable" and that there "comes a point at which individual's rights overcome" any State interest in the "preservation and sanctity of human life."¹⁹⁸ Confronting the reality of Karen's condition and not willing to defer temporally to some miraculous interlude of lucidity and right-bearing assertion by Karen, the Court rescued the right from practical oblivion by allowing the family guardianship to assert it upon Karen's behalf. At the same time, the Court discovered absolutely "no parental constitutional right that would entitle [Joseph Quinlan] to a grant of relief *in*

Majority Leader Bill Frist took the floor of the Senate and issued his own "medical diagnosis" of Terri Schiavo and claimed that she was not in a persistent vegetative state. None of the doctors who treated Schiavo concurred with Frist's fantasy projection and the autopsy confirmed that Schiavo's brain was "profoundly atrophied" and exhibited "massive and irreversible damage."

¹⁹⁴ 70 N.J. 10 (1976).

¹⁹⁵ *Id.* at 24.

¹⁹⁶ *Id.* at 26.

¹⁹⁷ *Id.* at 19.

¹⁹⁸ *Id.* at 40.

propria persona.”¹⁹⁹ The right being preserved was one of privacy, a right developed and defined in a series of U.S. Supreme Court cases that the New Jersey Supreme Court drew upon: *Griswold*, *Eisenstadt*, *Stanley*, and *Roe*.²⁰⁰

In the U.S. Supreme Court, the constitutional right to refuse medical treatment was assumed in *Cruzan* and affirmed in *Glucksberg*. In *Cruzan*, the Court considered a constitutional challenge to a Missouri law requiring “clear and convincing evidence” that a person in a “permanent vegetative state” would have wanted the life-sustaining medical procedures halted. There, the parents of Nancy Cruzan sought to have a feeding tube removed from their daughter after she suffered permanent brain damage in an automobile accident. Nancy Cruzan did not have a living will. Her parents claimed that Nancy had expressed several times before the accident that she would not want such medical measures deployed to extend her “life.”

The Supreme Court held in a 5 to 4 vote that the Missouri law did not violate the Constitution’s 14th Amendment’s Due Process clause. Specifically, the majority ruled that the standard of evidence did not violate Cruzan’s substantive liberty interest. However, the Court did *not* deny the existence of a right that must be accorded significant constitutional value. Indeed, 8 members of the Court agreed that a significant constitutional right was implicated in the *Cruzan* case. The dissenting Justices argued that the evidentiary standard demanded by Missouri set the bar too high and created an unconstitutional burden on the freedom in question. The crux of the disagreement centered upon what countervailing weight (if any) the State’s general interest in “preserving life” might receive. With the exception of Justice Scalia (who concurred in the judgment but not the majority’s reasoning), an overwhelming consensus emerged on the Court in *Cruzan* that a person has “a constitutionally protected liberty interest in refusing unwanted medical treatment.”²⁰¹

In the case of *Washington v. Glucksberg*, the Court did not extend this right to protect a general “right to suicide.”²⁰² Again writing for the majority, Chief Justice Rehnquist acknowledged that the Due Process clause is not exhausted by formal process concerns and that it “provides heightened protection against government interference with certain fundamental rights and liberty interests.” Following a very conservative path of interpretation, the Court reiterated that only those fundamental rights “deeply rooted in

¹⁹⁹ *Id.* at 42.

²⁰⁰ None of these cases spoke directly to a right to end life-sustaining treatment. *Griswold v. Connecticut*, 381 U.S. 479 (1965), overturned restrictive contraception laws and drew a zone of privacy around heteromartial sexual practices in the home; *Eisenstadt v. Baird*, 405 U.S. 438 (1972), redefined the right in *Griswold* to an individual right unmoored from the marital status; *Stanley v. Georgia*, 394 U.S. 557 (1969), secured a privacy right within the home to possess (but not distribute) texts the State deemed as obscenity; and *Roe v. Wade (Roe)*, 410 U.S. 113 (1973), established a right to abortion as fundamental and rooted it in the privacy right to make family planning decisions. Also, the N.J. Court cited Art I., Paragraph I of the State Constitution:

1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

N.J. CONST. art. I, § 1

²⁰¹ The quotation is from Chief Justice Rehnquist’s majority opinion in *Cruzan v. Missouri Dep’t of Health*, 497 U.S. 261 (1990).

²⁰² *Washington v. Glucksberg*, 521 U.S. 702 (1997).

our legal tradition” would trigger heightened scrutiny under substantive Due Process analysis. This was clearly no *avant-garde* majority writing the opinion. However, in mapping the liberty interest in question as outside the parameters of “tradition,” the Court distinguished this holding from the one reached in *Cruzan* and in so doing reaffirmed the basic thrust of that holding:

We began with the observation [in *Cruzan*] that “at common law, even the touching of one person by another without consent and without legal justification was a battery.” We then discussed the related rule that “informed consent is generally required for medical treatment.” After reviewing a long line of relevant state cases, we concluded that “the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.” Therefore for purposes of that case, we assumed that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.” . . . The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation’s history and constitutional traditions.²⁰³

This opinion flows from the pen of one of the most conservative and authoritarian Justices in Court history; even he here could locate a “right” and, importantly, do so with zero violence to his political and interpretative constitutional commitments.

So, a zone of movement for non-amending electoral politics remained open with respect to end-of-life decisions: states could distinguish the refusal to accept medical care (including feeding tubes) from assisted suicide²⁰⁴ and states could employ a range of evidentiary standards in assessing the “decision” of the individual (e.g., “best interests,” “clear and convincing,” etc.) but they could not prohibit the exercise of the fundamental right (e.g., could not override a living will with a generalized state interest in the “sacredness” of life). At this juncture, all states have responded by passing laws to regulate end-of-life decision-making, and at the time of Terri’s Law’s passage “virtually every state had legislatively provided that individuals are entitled to specific advance directives and/or to appoint health care proxies to direct their medical treatment if they should become incompetent.”²⁰⁵ As in Nancy Cruzan’s case, Schiavo did not have a living will either expressly stating her desires regarding medical treatment or establishing a health care proxy empowered to make end-of-life decisions. And as in Nancy Cruzan’s case, the state of Florida set forth a “clear and convincing” evidentiary standard. Thus, any conflict during the resolution of this particular case would be factual absent a direct constitutional challenge to the established law.

²⁰³ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁰⁴ Although *Glucksberg* did not recognize a fundamental constitutional “right to die,” nothing in the opinion foreclosed the possibility of states passing laws to permit assisted suicides. The Court held that such a distinction was not an irrational violation of the Equal Protection clause in *Vacco v. Quill*, 521 U.S. 793 (1997).

²⁰⁵ Robert A. Burt, *Family Conflict and Family Privacy: The Constitutional Violation in Terri Schiavo’s Death*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 429.

Predictably, the initial litigation centered upon fact, not law. The parties in conflict were the parents of Terri Schiavo and the husband of Terri Schiavo. Normally, statutory schemes governing in the absence of a living will designate a presumptive order of caretaking responsibility. For example: the partner/spouse first, the parents second, the court's guardianship third. The Florida statute went further and allowed family members who disputed the default proxy's decision to challenge it in Court.²⁰⁶ This is the legal crevice in which the familial dispute took root. As such, O. Carter Snead's point is well founded: "both the Schindlers [Terri Schiavo's parents] and Mr. Schiavo [Terri Schiavo's husband] agreed from the outset that the relevant good to be defended was Ms. Schiavo's right to autonomy and self-determination . . . all parties to the conflict agreed that self-determination was the paramount value."²⁰⁷

Based upon evidence presented at trial in 2000, a Florida judge held that Terri Schiavo would have elected to have the feeding tube removed in such a permanent vegetative condition. In early 2001, a Florida appellate court upheld the trial decision. In April of 2001, the Florida Supreme Court refused to stay the order to remove the feeding tube and thus let stand the appellate court decision. After a motion was filed alleging new evidence, the case was remanded back to the trial court by the Florida appellate court. In June 2003, the trial court again ruled that the feeding tube should be removed. Again, the state appellate court upheld the decision and again the Florida Supreme Court declined to disturb the ruling. In October of 2003, the Florida legislature passed its own version of "Terri's Law" (this is a year and a half prior to the Federal version). This law authorized Governor Jeb Bush to issue a "one-time" stay and also called for the appointment by the Courts of a special guardian to issue a report on Schiavo to the governor and judiciary. The special guardian issued the following judgment:

the trier of fact and the evidence that served as the basis for the decisions regarding Theresa Schiavo were firmly grounded within Florida statutory and case law, which clearly and unequivocally provide for the removal of artificial nutrition in cases of persistent vegetative states, where there is no advance directive, through substituted/proxy judgment of the guardian and/or the court as guardian, and with the use of evidence regarding the medical condition and the intent of the parties that was deemed, by the trier of fact to be clear and convincing.²⁰⁸

The Florida courts again ordered the feeding tube removed and also ruled that "Terri's Law" violated the Florida Constitution.²⁰⁹ After a series of stays pending further appeals,

²⁰⁶ This summary of state law is taken from Robert A. Burt, *Family Conflict and Family Privacy*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 430.

²⁰⁷ O. Carter Snead, *The Surprising Truth about Schiavo*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at p. 384.

²⁰⁸ JAY WOLFSON, A REPORT TO GOVERNOR JEB BUSH AND THE 6TH JUDICIAL CIRCUIT IN THE MATTER OF THERESA MARIE SCHIAVO (Dec. 2003), <http://news.findlaw.com/legalnews/lit/schiavo/>. Also available at this site is a treasure trove of documents related to this case. I would like to thank Etienne Pelaprat for directing me to this source and for guiding my eye to the full proceedings in the State of Florida prior to Federal intervention.

²⁰⁹ The Florida Supreme Court declared the law unconstitutional "on its face and as applied."

the feeding tube was removed from the body of Terri Schiavo on March 18, 2005.²¹⁰ By then, Terri Schiavo had been in a permanent vegetative state for almost 15 years.

By this point in time, however, the factual question had begun to slip. Schiavo's parents introduced a religious dimension into the case late in the proceedings, arguing that Terri Schiavo's "soul" was in peril given recent statements by the Pope. Further, the Vatican spoke out explicitly against removing the feeding tube from Schiavo's body. Randall Terry of the anti-abortion group "Operation Rescue" traveled to Florida and orchestrated vigils and demonstrations. Serious threats of assassination against court officials soon followed. These political interventions and movements quickly situated the case as a flashpoint in the contests over defining a "Right to Life." Consequently, the "public understanding of Terri Schiavo's death was refracted through the polarized politics of the abortion wars."²¹¹ Social theorists allied with the campaigns to criminalize women who have abortions and doctors who perform them likewise linked the issues rhetorically, conceptually, and politically. Robert George of Princeton University's James Madison Program in American Ideals and Institutions argued that that "those who oppose abortion, infanticide, assisted suicide, euthanasia, etc., as I do . . . view human life, even in developing or severely mentally disabled conditions, as inherently and unconditionally valuable."²¹²

The religious forces on behalf of "life" were emboldened too by the calendar. The final state court order in Florida directing the removal of Schiavo's feeding tube occurred days before Palm Sunday in 2005. And as with the glory of Christ entering into Jerusalem, the Congress of the United States fully entered into the Schiavo affair. From the "Palm Sunday Compromise" between the two chambers emerged the federal version of "Terri's Law." However, the divine flash seems to have blinded Congress to the fact that, properly speaking, it was no law at all. The law slices wide and deep through a variety of Constitutional provisions and undoes the basic premises of the constitutional tradition while at the same time burrowing in upon some quintessential modes of "legality": the political-theological frenzy produced nothing more than a law granting Federal courts "jurisdiction" in the case. The Congress simply refused to consider the Constitution as relevant;²¹³ yet it was not extrajudicial in its orientation: it was hyperjudicial.

Terri's Law granted the U.S. District Court jurisdiction to "hear, determine, and render judgment on a suit or claim by or on behalf of Theresa Marie Schiavo" for the violation of any right "relating to the withholding or withdrawal of food, fluids, or

²¹⁰ The University of Miami Ethics Program maintains a complete timeline of the case, with relevant orders, motions, opinions, statutes, and press statements. See <<http://www.miami.edu/index.php/ethics/projects/schiavo>>.

²¹¹ Robert A. Burt, *Family Conflict and Family Privacy*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 447.

²¹² Robert P. George, *Terri Schiavo: A Right to Life Denied or A Right to Die Honored?*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 421. Constitutional law places the *Schiavo* case squarely in George's "etc."; George seems not to notice and describes the case as one involving "euthanasia." Nowhere in this essay does the Professor of Jurisprudence even mention the Constitution or the jurisprudence of the Court in the area of substantive due process. He does cite the journal *First Things*, *The National Catholic Bioethics Quarterly*, his own interview in *National Review*, and an address by Pope John Paul II. Should we note the irony that this essay is published in the journal *Constitutional Commentary*?

²¹³ On the absence of constitutional consideration see Scott E. Grant, *The Contagion of Constitutional Avoidance*, 22 CONSTITUTIONAL COMMENTARY, no. 3, 2005 at 497.

medical treatment.” Only the parents of Terri Schiavo were granted standing in the case to file suit. Further, the law commanded that “the District Court shall determine de novo any claim of any violation of any right of Theresa Marie Schiavo . . . notwithstanding any prior State court determination and regardless of whether such a claim has previously been raised . . . the District Court shall entertain and determine the suit without delay or abstention in favor of state court proceedings . . .” As for remedy, the law allowed for the District Court to “issue such declaratory and injunctive relief as may be necessary to protect the rights of Theresa Marie Schiavo under the Constitution and the laws of the United States.” The law suddenly shifts gears at this point and seeks to limit the intervention by declaring that “nothing in this act shall be construed to create substantive rights not otherwise secured by the Constitution and the laws of the United States.” The singularity of the law is more deeply entrenched in the subsequent section of the act regarding time: “nothing in this act shall constitute a precedent with respect to future legislation.”²¹⁴

The Constitution of the United States contains an explicit prohibition to Congress: “No Bill of Attainder or *ex post facto* law shall be passed.”²¹⁵ This limit is so central to the constitution of the Constitution, that it is applied to the States as well.²¹⁶ A Bill of Attainder is legislation that singles out individuals or specifically named groups for forms of punishment. Tethered to the *ex post facto* clause, the text generates a value of generality in law and situates law within a particular conception of time. Both ideas are intertwined. Without dispute, Terri’s Law singles out an individual. The Constitutional question then hinges on whether the law falls within the category of being punitive. And this question leads us back to the analysis of the political values at stake.

If the “sacredness” of life trumps other values, including autonomy, then the legislation looks potentially more like relief and less like punishment: it was to “save” Schiavo.²¹⁷ But this is surely not so. Even the judicial defenders of abortion rights now use the language of “undue burden” suggesting that some burdens will be due.²¹⁸ The “culture of life” may ultimately succeed in exacting a terrible punitive price from women with unwanted pregnancies in the sacralization of the fetus, but only the depraved would call such suffering and sacrifice non-punitive. Indeed, the punitive is integral to a broader campaign of sexual policing: in that world, burdens are *always* due. Analogously, insisting that Terri Schiavo endure decades more time on Earth in a permanent vegetative state *regardless of what her wishes would have been* can be seen as punishment in the singular (a burden due) and, in fact, the singularity may itself be conceived as an element of the punitive.

²¹⁴ This has strong echoes of the majority opinion in *Bush v. Gore*, 531 U.S. 98, 109 (2000) (“Our consideration is limited to the present circumstances”). Although “precedent” has a different meaning in each institutional context, in both cases the law found itself in a heightened state of present-ism. Political forces seemed incapable of imagining governance beyond the instant.

²¹⁵ U.S. CONST. art. 1, § 9

²¹⁶ U.S. CONST. art. 1, § 10. The importance of this should not be underestimated as the 1787 Constitution was a Constitution of *federalism*.

²¹⁷ For an argument along these lines, see Steven Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NORTHWESTERN LAW REVIEW, no. 1, 2006 at 151.

²¹⁸ See the plurality opinion in *Planned Parenthood of Pennsylvania v. Casey* (*Casey*), 505 U.S. 833 (1992).

More damning for this legislation is the inconvenient fact that no body of U.S. law has *ever* held that a generalized “culture of life” may trump the right of the individual to refuse unwanted medical treatment. As we saw, this was at the heart of both *Cruzan* and *Glucksberg*, but it was not invented there: a conservative court steeped in a conservative reading of due process found the right to be “deeply embedded” in the Nation’s law and traditions. And it is worth recalling that the author of that opinion was Rehnquist, one of the two dissenting votes in *Roe v. Wade* and a dedicated opponent of Constitutional protection for reproductive freedoms. Thus, the slippage from a question of fact to one of value (a formulation that in no way denies the value already present in fact) is of monumental importance: its real logic is a constitutional coup. Some academic defenders of the law hint at such. Robert George, for instance, states that “though we regard individual autonomy as an important value, we understand it to be an instrumental and conditional one . . . many of our opponents take precisely the opposite view: autonomy has intrinsic worth; so-called biological life is of instrumental or conditional value.”²¹⁹ Michael Paulsen likewise hovers between fact and countervalue and expresses “very serious doubts about the moral propriety of the state” honoring the request “*even* where . . . the desire is expressed with unmistakable clarity.”²²⁰

The “culture of life” perhaps signals some rival constitutional value. But a constitutional value such as this, almost by definition, must yearn for futurity and generalized applicability. A one-time law for a single individual is conceptually the antithesis of this. And such an anticonstitutional move as this clearly transgresses the guarantee of Equal Protection under the law. It consigns Terri Schiavo singularly to a bizarre legal universe where *Cruzan* governs the Republic, but the “culture of life” governs her. Even assuming that it was designed for her “benefit,” the dignity of equality is tarnished. Moreover, it assumes that the benefit of the privilege is a benefit rightly and universally desired. However, one must acknowledge a position stretching from Aristotle to Arendt that would shudder at the ease of the imagined trumping benefit of “life” extended in singular exception to the shared orders of the polity. That is, equality can be a good of such worth that the loss of it makes whatever individual gain won at its expense always a lesser value.

Terri’s Law suffers from another infirmity. In placing religiosity in the governing fore, it potentially violates the principles of the First Amendment’s Establishment Clause. The proliferating references to the “sacred,” the evidentiary elevation of the clergy, and the open embrace of the Christian holiday by the authors of the legislation should all ring alarm bells. It seems clear that a new discursive order is attempting to congeal itself when a leading law professor on the Right writes in a prominent law review that “Respect for God’s creatures suggests that inflicting pain or denying relief in situations where one has a duty to care is morally wrong. I believe Michael Schiavo had an obligation to love his

²¹⁹ George, *supra* note 212, at 421.

²²⁰ Paulsen, *supra* note 191, at 587 (emphasis in the original). Translation: living wills may be ignored. Steven Calabresi also flirts with the position: “I have serious doubts about the morality of starving anyone to death—even a truly comatose person who can never recover and who indicated clearly that he or she wanted to be starved to death.” 100 NORTHWESTERN LAW REVIEW 151, 156 (2006). Translation: living wills may be ignored.

wife as Christ loved the Church.”²²¹ And that regime thinks nothing of cheering the Congress on in this case for siding with Pope John Paul II in “expressing itself in a culture of life issue.” In some sense, the case and the legislation are reduced to pure religious iconography, an expression of religious devotion. But more than that, the singularity of the case (in both time and object) oddly turns that constitutional vice into an anticonstitutional virtue: the one-time only, the specific, the unrepeatable, and unpredictable: we’ve abandoned the order of the law for the structure of the miracle. And most disconcertingly: in a statute that does nothing more than grant federal courts “jurisdiction.”²²²

If we agree with Oliver Wendell Holmes’ observation that the “life of the law has not been logic; it has been experience,” what are we to make of this one? We can say that this experience exhibits a logic whereby the “culture of life” attempts to trump the “life of the law.” One might say it is a fight to the death. To further explore this antagonism, to even begin to really understand the life and death of what, it will be useful to turn to another important case in constitutional law that establishes the obligations of the State (or lack thereof) in the protection of life, *DeShaney v. Winnebago County Dept. of Social Services*.²²³ The case is perhaps best known for the brief dissent authored by Justice Harry Blackmun, a dissent that embarrassed many in the legal community for being too “emotional.” That Justice Blackmun also authored the landmark case inaugurating the “culture of death,” *Roe v. Wade*,²²⁴ should not slide from our thought. Blackmun’s dissent in *DeShaney* began with a lament: “poor Joshua!”

Joshua DeShaney, at the age of 4, suffered a savage beating from his father that left him permanently brain-damaged and in a coma. Joshua’s father abused Joshua the duration of his young life. A year prior to the near-fatal beating, Joshua had entered the hospital covered in bruises and the doctors reported the suspected abuse to the state’s social services department. The department concluded that there was not enough evidence to remove Joshua from his father’s custody, but they did offer counseling to the father. Soon after this first intervention by the state, Joshua returned to the hospital with further injuries. The state took no action. Social workers subsequently visited the DeShaney home each month and observed wounds on Joshua’s head. The caseworker assigned to the case “dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more.”²²⁵ A few months after this report, Joshua was again admitted to the emergency room with injuries consistent with physical abuse. The hospital communicated this information to social services and social services visited the

²²¹ Calabresi, *supra* note 220, at 156. And apparently, hearing alarm bells in that is a sign that one “believes that morality . . . is not an issue.” *Id.* at 157. And this then leaves one inevitably in the ideological camp of “the culture-of-death forces.” *Id.* at 168.

²²² Federal Courts refused to issue an injunction to reverse the removal of the feeding tubes because the Schindlers could not show a “substantial likelihood of success on the merits.” The courts thus clung to the letter of the law in order to thwart the spirit of the law. However, only Judge Birch of the 11th Circuit confronted the constitutionality of the law and argued that it violated the separation of powers. Judge Birch noted that the courts had “hypothetically assume[d] jurisdiction to avoid resolving” the constitutional questions. 404 F.3d 1270 (11th Cir. 2005).

²²³ 489 U.S. 189 (1989).

²²⁴ 410 U.S. 113 (1973).

²²⁵ 489 U.S. 189 (1989).

DeShaney home; however the caseworker was unable to see Joshua during the visits as the father told her that Joshua “was too ill to see her.”²²⁶ Again, the state took no other action. The next recorded act of abuse left Joshua in the coma. The damage to Joshua was catastrophic: he will “spend the rest of his life confined to an institution for the profoundly retarded.”²²⁷

Joshua’s mother, who did not live in the DeShaney home, filed a lawsuit against the state of Wisconsin alleging a violation of Joshua’s substantive Due Process rights (Due Process also secures the right to abortion and the right to refuse medical treatment). The Supreme Court held that the State did not violate Joshua’s rights because no rights existed vis-à-vis the State in this case. Writing for a conservative-to-hard-right majority²²⁸ Chief Justice Rehnquist argued, “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors.”²²⁹ Moreover, a potential Constitutional violation emerged from the opposite direction: “had [the State] moved too soon to take custody away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.”²³⁰ Presumably, this majority would lend a more sympathetic ear to the right of the father than they did to the right of the child.

Bringing the *DeShaney* case to the fore helps illuminate critical issues in the politics of Terri’s Law. The “culture of life” campaign in defense of Terri’s Law advocated State action to violate the Constitutional liberty interests of Terri Schiavo. Indeed, any limits imposed by the law on State interference would be trumped by “life.” In much the same manner, opponents of *Roe v. Wade* feel little need to place breaks upon criminal sanction against women who elect to have an abortion. Women’s liberty and women’s equality is bested by the imagined State interest in the sanctity of life of the fetus.²³¹ So, on the matter of “state action” and private liberty, the gendered order of the power and the claimant of right inform the adjudication within a “pro-life” framework. The subject of the specific right to abortion is gendered: the right to abortion is a bedrock of any possibility of women’s rights as such.²³² And in the case of Terri Schiavo, like the earlier case of Karen Quinlan, it seems that the white feminine had to be rescued by her rescue. Her helplessness and need for protection (*from herself*) was legible in explicitly gendered terms. As example, one legal scholar *sympathetic to* divining Terri Schiavo’s intent and wishes in crisis medical situations could do so only by imagining how Schiavo

²²⁶ *Id.*

²²⁷ *Id.* Joshua’s father was convicted of child abuse and received a sentence of 2-4 years.

²²⁸ In the majority: Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, Justice White, Justice O’Connor, and Justice Stevens. In the dissent: Justice Brennan, Justice Marshall, Justice Blackmun.

²²⁹ 489 U.S. 189 (1989).

²³⁰ *Id.*

²³¹ This is also true, to a modified extent, in the line of cases establishing and affirming the right to have an abortion without criminal prohibition. See generally the trimester framework in *Roe* and the “undue burden” standard in *Casey*.

²³² A claim has also been made that the right to abortion must be central to any political movement for sexual/bodily freedom broadly and diversely construed. See Ann Scales, *Poststructuralism on Trial*, in *FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS* 395 (Martha Fineman, J. Jackson, and A. Romero eds., 2009).

would have viewed the decision: would she “have preferred to be seen as a ‘loving wife’ or a ‘loving daughter’?”²³³ A patrijuristic element is indispensable to the “culture of life.”

While similarities run between these positions on liberty, a divide cuts deep on the life-interest at stake. At first glance it appears to be a simple contradiction, one captured by Justice Scalia’s insistence that the sacredness of life “accorded the State the power to prevent, by force if necessary” Nancy Cruzan from refusing extraordinary medical intervention in contrast to Scalia’s absolution of State indifference to the plight of Joshua DeShaney;²³⁴ a contradiction captured by the current Republican Party’s maximalist position against abortion on the one hand and their effort to discredit the nomination of (now-Justice) Elena Kagan to the Supreme Court for her views about *DeShaney* on the other;²³⁵ a contradiction between the rhetoric of sacredness and the coordinated acts of fundamentalist-inspired blockades, bombings, and assassinations against abortion providers. This litany of seeming inconsistencies is sometimes produced to support an accusation of hypocrisy or “bad faith” politics by the partisans of “life,” but what if instead of hypocrisy there was a logic and a faith all too true?

II.

That disquieting possibility is what liberal legal theorists have long sought to elide. In *Life’s Dominion*, Ronald Dworkin acknowledges that a fundamentalist worldview has become more prominent in the United States and that this has contributed to an increasing polarization in politics generally and over abortion and euthanasia specifically.²³⁶ He also recognizes the potential stakes: “if the disagreement really is that stark, there can be no principled compromise but at best only a sullen and fragile standoff, defined by brute political power.”²³⁷ Spurred by a hope to avoid the “then” in that formulation Dworkin attempts to undo the “if.” Dworkin argues that, in fact, there is no radical disagreement in the constitutional and political turmoil surrounding the dominion of life. Rather, there exists a simple misunderstanding, “widespread intellectual confusion” over what the debates are really about.²³⁸ The actual disagreement is “about how to best respect a fundamental idea we almost all share in some form: that individual human life is sacred.”²³⁹

What Dworkin fails to engage is a sacred attachment that moves steadily against human life. Two historical events opened the door for this movement: the naturalization

²³³ Burt, *supra* note 205, at 433.

²³⁴ 497 U.S. 261 (1990) (Scalia, J. concurring opinion).

²³⁵ From the official party web site www.gop.com: “Kagan’s Memos as Clerk Reveal Views Far Left of the Mainstream.” Kagan served as clerk to Justice Marshall. As a criticism of Kagan the GOP contrasted the wise “conservative” ruling in *DeShaney* with Kagan’s “Liberal View” on the 14th Amendment that the “Constitutional Guarantee Of Liberty Should Be Read Broadly.”

²³⁶ RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM*, 4 (1993) (“Abortion is tearing America apart. It is distorting its politics, and confounding its constitutional law”)

²³⁷ *Id.* at p. 10.

²³⁸ *Id.* at pp. 10-11.

²³⁹ *Id.* at p. 13. Dworkin does not discuss the *DeShaney* case in *Life’s Dominion*.

of end-of-life atomic rationality during the Cold War and the historicization of end-of-times Christianity with the founding of the State of Israel. Martin Jay succinctly captures this post-WWII political development:

Reinvigorated by the creation of the state of Israel in 1948, which emerged from the ashes of a penultimate holocaust, strengthened by the spread of Christian fundamentalism from the Bible Belt to new, often urban, settings, emboldened by its successful entry into the political mainstream with the rise of the New Right, religious apocalypticism has continued to grow in importance.²⁴⁰

How does one reconcile or situate an apocalyptic desire for revenge against this world with/in a discourse of “pro-life” passion? Only with the rise of this New Right do we see a “growing preoccupation, indeed obsession, with fetal life.”²⁴¹ And this obsession has spread to the other end of life, to those who are here but not. Dworkin addresses these two instances as limits. The connection between abortion and euthanasia is one “between mortal questions at the two edges of normal life.”²⁴² Apocalyptic thinking turns this formulation upside down. In his study of eschatological thinking, Jacob Taubes described life as being “exiled in the world . . . the homeland of life is beyond the world.”²⁴³ But more, the beyond is rendered oppositionally: “Apocalypticism negates this world in its fullness. It brackets the entire world negatively.”²⁴⁴ So, we can now understand the fetus and the patient in a permanent vegetative condition as negative figures vis-à-vis the life of time and history (and thus law). The fetus represents a life never-to-come and the vegetative patient represent a death that never ends. They are the paradigmatic Edenic subjects of the culture of life and the first and last signatories to an anticonstitutional (non)order.²⁴⁵ This pairing realizes in political mobilization and constitutional theory the theological reversal of Augustine in his *Confessions*: “For all I want to tell you, Lord, is that I do not know where I came from when I was born into this life which leads to death-

²⁴⁰ Martin Jay, *The Apocalyptic Imagination and the Inability to Mourn*, in *RETHINKING IMAGINATION* 30, 31 (Gillian Robinson and John Rundell eds., 1994).

²⁴¹ VALERIE HARTOUNI, *CULTURAL CONCEPTIONS: ON REPRODUCTIVE TECHNOLOGIES AND THE REMAKING OF LIFE* (1997). Giorgio Agamben thinks that “politicizing” life and death is a threshold moment for biopolitics in late modernity. See *GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE* part III (Daniel Heller-Roazen trans., Meridian 1998) (1998). Agamben cites the *Quinlan* case as a critical event in this politicizing turn of events. He makes no mention of abortion. Without denying the importance of the politics of abortion and euthanasia in the biopolitics of “population” management, it seems incumbent to nonetheless create the space for thinking about these moments distinct from anxieties about the “health” of the body politic. In her recent book *Ourselves Unborn: A History of the Fetus in Modern America 189-90* (2011), Sara Dubow explains that “there have been many different fetuses in twentieth-century America . . . the fetus has been the vehicle through which people have wrestled with assumptions about science and religion, anxieties about demography and democracy, beliefs about feminism and motherhood, and ideas about conservatism and liberalism . . .” As distinct from the politics of biopower and race, we must consider a new fetus: the Augustinian one.

²⁴² RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 27 (1993).

²⁴³ Jacob Taubes, *OCCIDENTAL ESCHATOLOGY* 27 (David Ratmoko trans., Stanford Press, 2009) (2009).

²⁴⁴ *Id.* at 9.

²⁴⁵ In the midst of the Schiavo affair, Congress subpoenaed a brain-dead Terri Schiavo to “testify” before Congress; more recently, a legislative committee in Ohio invited a 9-week old fetus to “testify” on behalf of an antiabortion bill. No women who had ever had an abortion were invited to testify. The fetus and the vegetative patient are no longer objects of power, they are now most bizarrely *subjects*.

--or should I say, this death which leads to life?"²⁴⁶ Shared ground thus splits open into the most elemental antagonism imaginable. Dworkin's liberalism cannot accommodate this split because it is a split with Dworkin's liberalism. William Connolly maps this antagonism as end points upon a "line of possibility," with one pole representing an "ethos of existential revenge" and the other pole signifying a "care for the future."²⁴⁷

That care for the future should become a faction in, rather than a presumption of, political life is troubling enough; more unsettling is the fact that the question of the "future" has become a pressing and perplexing one even for those inclined to labor on its behalf. Long the ordering of the present *toward* something better than the present, the vector of futurity gathered thought and inspired political action across the spectrum of modern politics. Three thinkers in particular defined important dimensions of this increasingly eclipsed political temporality: John Stuart Mill, Karl Marx, and the Rev. Martin Luther King, Jr.

Mill imagined a successful march of "Truth" through time tethered to civilizational progress differently configured in the political present: time was fractured spatially, geographically, racially. Marx discovered the path to the emancipation of laboring humanity from alienation in the unfolding world historical logics and processes of material production: the future beckoned in the present undoing of the present as the seeds of the communist tomorrow were planted in the soil of capitalism's today. One simply had to wait for the bloom. King banked on labor in a different sense than Marx, believing that the hard work for social justice on Earth occurred within a Christian metaphysics of time and that the divine arc of time nurtured and sustained the necessary labors required to bring the future about: "truth is not to be found either in traditional capitalism or in Marxism. Each represents a partial truth" and the future realizes a "synthesis which reconciles the truth of both."²⁴⁸ Despite this shared progressive orientation, neither the liberal, the communist, nor the Christian socialist was blindly optimistic (or materially certain) with regard to the arrival of the future. Mill knew too well that truths could be lost and that progress could be overwhelmed by democratic absurdities and mediocrity. Marx foresaw the potential for "common ruin" in the place of universalized leisure and philosophy. And King perhaps despaired most of all that there was a possibility of being "too late" in politics and that we were in fact teetering on the brink of being there. We might look back and even think of King as the very last voice of the future, sounding when optimism and pessimism were in equipoise, when past/present/future still could hold as a coherent and viable slicing of time.

The contemporary political and theoretical consequences of the unraveling and repudiation of these progressive orientations and traditions are addressed directly by political philosopher Wendy Brown in *Politics Out of History*.²⁴⁹ Brown begins the inquiry thusly: "what effects attend the emancipation of history (and the present) from a progressive narrative?"²⁵⁰ More precisely: what is the condition of contemporary political

²⁴⁶ Augustine, *Confessions*, Book I, ch. 6 (Henry Chadwick trans., Oxford World's Classics 1998) (397 CE).

²⁴⁷ WILLIAM CONNOLLY, CAPITALISM AND CHRISTIANITY, AMERICAN STYLE 4-5 (2008).

²⁴⁸ King quoted in KENNETH L. SMITH AND IRA G. ZEPP, JR., SEARCH FOR A BELOVED COMMUNITY: THE THOUGHT OF MARTIN LUTHER KING, JR., 125 (1974).

²⁴⁹ POLITICS OUT OF HISTORY (Princeton University Press 2001). See esp. Chapter 7, *Futures: Specters and Angels: Benjamin and Derrida*.

²⁵⁰ *Id.* at 4.

life “out of these histories, indeed out of history as we have known it, which is to say, out of a history marked by the periodicity of this particular past/present/future and by the temporality of progressivism.”²⁵¹ With truth rendered infinitely plural and reduced to questions of strategy and with the proliferation of capitalist relations, ideologies and rationalities across all of the land, Brown situates our time as being both postliberal and postmarxist. The dissolution of those 20th century rivals, liberalism and Marxism, leaves us utterly unmoored at best, and relentlessly attached to past wounds and backward accounting at worst.²⁵² We can now grasp the predicament of being “out of history.” Without registering agreement or disagreement on these observations and arguments at this juncture, my aim here is instead to query in response: what political projects and temporal identifications were always discordant with and discounted (or miscounted) by modernist enterprises? Brown’s inquiry provokes us into asking what politics, and politics of history, are/have been outside of the history that we are allegedly out of; that is, what politics never were “in” it and, in fact, were arrayed against it? And to what extent do they circulate through the Schiavo affair?

A window into that outside opens in Brown’s discussion of Marx and Engel’s *Communist Manifesto*. Commenting upon the epoch making influence of the text, Brown observes that “as a written text it is rivaled only by the Bible as a force in history.”²⁵³ But as Brown has helped us to see in her diagnosis of the present malaise we inhabit, forces do not simply work in history; rather, forces conjure and contour history as such. Thus, we must consider what forces kept at bay by the political forces of modernity have been unleashed upon the present by the disintegration of the latter and what kinds of historical bearings do they inaugurate, from what counterhistories do they emerge, and to what relation do they stand to the constitutional or legal tradition under consideration?

The two primary aims of Enlightenment political projects, Truth and Emancipation, stood as the aim and end of a linear history. However “utopian” they may have been, they were resolutely conceived as earthly and realizable in human terms, even if they were shadowed conceptually by earlier theological forms and visions.²⁵⁴ “Whoever takes on the apocalyptic tone comes to signify to, if not tell, you something. What? The truth, of course . . . and that is why there would not be any truth of the apocalypse that is not the truth of the truth.”²⁵⁵ But if the apocalyptic tone says “the end is beginning”²⁵⁶ then one must ask what is coming to an end and not just “to what ends”? For the thinkers of progress, the truth of truth would be the end of politics in the realization of life during the time of the world. For Marx, class antagonisms and the State “whither” after politics; for Mill, an eerie near religious but not religious political silence prevails, where paradoxically the enemy of truth simultaneously heralds it; and for King we inhabit a

²⁵¹ *Id.* at 14.

²⁵² *See id.* at 138-42.

²⁵³ *Id.* at 148. . . . true even if “(the *Manifesto*) quickly made itself obsolete even by Marx and Engel’s own account.” *Id.*

²⁵⁴ In modern times, “[f]aith in an apocalypse by revelation had been replaced by faith in an apocalypse by revolution.” DAVID J. LEIGH, APOCALYPTIC PATTERNS IN 20TH CENTURY FICTION 14 (2008).

²⁵⁵ Jacques Derrida, *Of an Apocalyptic Tone Newly Adopted in Philosophy*, in DERRIDA AND NEGATIVE THEOLOGY 25, 53 (Harold Coward and Toby Foshay eds., 1992).

²⁵⁶ *Id.* at 53.

“beloved community” tied together in religiously informed brotherhood.²⁵⁷ While Brown describes this linearity as being crippled by being “exposed epistemologically as theological” it is incumbent to recall that, however true that might be it, in no way negates the radical shift such linearity tied to reason and materialism effected.²⁵⁸ Thus, what is important here is the negation of the Biblical order of time for that of the *Manifesto*, to state matters loosely and crudely.

Hannah Arendt argued that Christianity broke from ancient cyclical historical orderings: “according to Christian teachings, the relationship between life and world is the exact opposite of that in Greek and Latin antiquity: in Christianity neither the world nor the ever recurring cycle of life is immortal, only the single living individual. It is the world that will pass away; men will live forever.”²⁵⁹ Arendt further argued that the breaking of cyclical time by the early Christians did not in fact usher in the linear time familiar to modern accounts of history, for in “all truly Christian philosophy man is a ‘pilgrim on earth’ and this fact alone separates it from our own historical consciousness.”²⁶⁰ Our historical consciousness by contrast, the one that Brown rightly diagnoses as being in disarray, is marked by perpetual temporal unfoldings at each end of the “present” according to Arendt: “this twofold infinity of past and future eliminates all notions of beginning and end, establishing mankind in a potential earthly immortality. What at first glance looks like a Christianization of world history in fact eliminates all religious time speculations from secular history . . . thus [secular history] does not permit us to entertain eschatological expectations.”²⁶¹

A critical feature of the proliferating cracks in secular history is the reemergence of eschatological expectations in political life. These expectations are not simply entertained: they are feted. And more than a celebration of mere revelation, this orientation toward life and world does not wait faithfully or stand in anticipation: it is a movement *toward* a place out of time, the end of time. This is more than the disorganization of progress; it is the reorganization of progress in its negative form.

It may appear that this force in and of history simply materialized from the collapse of the old historical order, that it attempted to make sense when sense had evaporated. However new the appearance may be, one can still trace back through time the events and dislocations of its gathering. Nonetheless one must admit that in this age of observation it has remained largely hidden from sight or that it has stood in such plain sight that seeing it truly was simply impossible; it would be dismissed as “eccentric” or with proper temporal bite “anachronistic.” In some ways it is an echo or a repeat of the surprising birth of the modern age that it works with fury to supplant. The close observer and chronicler of that birth, Alexis de Tocqueville, was always struck by how the forces undoing the *ancien regime* had been “gathering almost as if in secret” for decades and even centuries prior to any event that would monumentalize the fact. People are “daily advancing into an unknown future, and when we think they are stationary, that is because

²⁵⁷ King too thought this a worldly aim: “though acutely aware that the Beloved Community is “not yet,” but in the future—perhaps even the distant future—Martin Luther King believed that it would eventually be actualized.” Kenneth L. Smith and Ira G. Zepp Jr., *Martin Luther King’s Vision of the Beloved Community*, in *CHRISTIAN CENTURY* (April 3, 1974).

²⁵⁸ WENDY BROWN, *POLITICS OUT OF HISTORY* 144 (2001).

²⁵⁹ HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 52 (Penguin Classics 1968).

²⁶⁰ *Id.* at 66.

²⁶¹ *Id.* at 68.

we do not see their movements.”²⁶² The world made “quite new” was in many regards not new at all. Only the sheer impossibility of not acknowledging it was. We must trace the contours of contemporary secrets backward in time to understand the eruption of eschatological illiberalism in American political life today.

III.

Two cities will serve symbolically as starting and centering points: Hiroshima and Jerusalem. In his early lectures on biopower, Michel Foucault identified atomic power as a paradoxical limit point in differing modalities of power.²⁶³ On the one hand there was nothing new in the sovereign “right to kill,” even if it was now on a scale of tens of millions. The limit-point for Foucault is that a nuclear barrage could terminate the logic of power in a biopolitical age and extinguish the underpinnings of a “right to make live.”²⁶⁴ What this formulation overlooks is how different the nuclear moment was with regards to the old sovereign right to kill. The newness was not in the numbers killed *per se*, but in the strange asymmetry that produced them. And this is something much more than the ebb and flow of power in a war of duration, of the superiority of numbers of men, of planes, of oil, of naval ships, etc. Prior to the bombing of Hiroshima, war had always been an affair of people on earth and this was no less true even in the most religious of wars. One might invoke God but one still had to mobilize and deploy men.

The mechanized slaughters of the twentieth century were no different. Consider for example the grim novelistic account by Remarque on the conclusion of a battle in World War I, a war in which 15 + million perished in the teeth of modern technology: “Still the little piece of convulsed earth in which we lie is still held. We have yielded no more than a few hundred yards of it as a prize to the enemy. But on every yard there lies a dead man.”²⁶⁵ By World War II the bonds had begun to fray between man and earth with the supremacy of air power in ascent. Yet even here, for most of the war, it appeared as trench warfare in the sky. Mass against mass: One nation’s pilots wrapped in armor confronted another nation’s pilots wrapped in armor. When the bombs fell on cities, as with the German blitz of London, it was recognizable as a familiar state of siege against a political center. And in the singular horror of the Nazi Holocaust against Jews across the continent of Europe, where a near monopoly of power confronted a near nakedness of humanity, the actors nonetheless moved along at least some familiar lines: armies advancing across frontiers, troops securing occupations, cruelty moving house by house and block by block and then town by town. Such cruelty almost always bore a unique human face. The nausea induced upon reflection of the vastness of the cruelty is in many respects worsened by the intimacy of its delivery.²⁶⁶ One phrase in particular is used with

²⁶² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 175 (George Lawrence trans., J.P. Mayer ed., Harper 1988).

²⁶³ MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE 1975 TO 1976*, 253 (Picador Press 1997).

²⁶⁴ *Id.*

²⁶⁵ ERICH MARIA REMARQUE, *ALL QUIET ON THE WESTERN FRONT* 84 (1967).

²⁶⁶ *See* PRIMO LEVI, *THE DROWNED AND THE SAVED* (Simon and Shuster 1988) (esp. the chapter *Useless Violence*).

great frequency to describe the Nazi Holocaust and to give the slaughter a meaning that functions as a warning to the present of what rests in the realm of possibility: it was the epitome of “man’s inhumanity to man.”²⁶⁷

By contrast, part of what so puzzled the residents of Hiroshima in the aftermath of the American atomic attack in August 1945 (Auschwitz had been liberated by the Red Army in January of 1945) was the feeling of near total disconnect from all other previous expectations and experiences of war. The United States had been bombing Japanese cities with traditional weaponry for many months prior to August and residents in Hiroshima were expecting to encounter a similar fate. Air raid sirens had sounded in the city for weeks and the sound of planes flying overhead to other targets was a familiar one. It was the sound of warfare between two totally militarized societies. On August 6, 1945, the air raid sirens in Hiroshima sounded early in the morning, but soon after the “all clear sounded at eight o’clock” much to the “relief” of the city’s inhabitants.²⁶⁸ Japanese radar had detected a weather plane flying overhead and two or three other planes that could certainly pose no major threat to the city. For many residences, the sound of the “all clear” would be one of the last sounds they would ever hear. Not long after the “all clear,” a survivor of the atomic attack would report that suddenly “everything flashed whiter than any white she had ever seen.”²⁶⁹

The flash of white light that came from nowhere, that in fact came from the “all clear,” killed nearly 100,000 people. Those who survived could not understand what had hit them, what kind of power had been unleashed, or from where it had come. Rumors of the weapon “were vague and incomprehensible” to the survivors in the aftermath.²⁷⁰ A German Jesuit living in Hiroshima, Father Wilhelm Kleinsorge, describes how in thinking of “the terrible flash” he was later reminded of “something he had read as a boy about a large meteor colliding with earth.”²⁷¹ Another survivor of the atomic blast, Hatsuyo Nakamura, confronted the wreckage of her city with a phrase of resignation: “Shikata ga-nai” (translated as: “it can’t be helped”).²⁷² The white light that came from nowhere simply slipped out of previous grids of thinking and knowing about power. Father Kleinsorge had to make recourse to extraterrestrial phenomena and objects to accurately grapple with the experience; Hatsuyo Nakamura would likewise locate understanding outside of the affairs of humanity:

The hell she had witnessed and the terrible aftermath unfolding around her reached so far beyond human understanding that it was impossible to think of them as the work of resentable human beings, such as the pilot of the *Enola Gay*, or President Truman, or the scientists who had made the bomb . . . the bombing

²⁶⁷ Although Elie Wiesel has recently rejected this understanding of the Holocaust as denying the specificity of the Holocaust: “The statement is: ‘It was man’s inhumanity to man.’ No! It was man’s inhumanity to Jews.” See Elie Wiesel, Remarks at the Dedication of Yad Vashem (March 15, 2005).

²⁶⁸ JOHN HERSEY, HIROSHIMA 11 (Knopf 1985) (originally published in *The New Yorker* in 1946).

²⁶⁹ *Id.* at 12. In thinking about apocalyptic thinking Derrida turns to the Book of Revelation, which “dominates the whole of the Western apocalyptic” and argues that “every apocalyptic eschatology is promised in the name of light, of the visionary and the vision, and of a light of light, of a light brighter than all the lights it makes possible.” Derrida, *Of an Apocalyptic Tone Newly Adopted in Philosophy*, in DERRIDA AND NEGATIVE THEOLOGY 25, 50 (Harold Coward and Toby Foshay eds., 1992).

²⁷⁰ Hersey, *supra* note 83, at 82.

²⁷¹ *Id.* at 18.

²⁷² *Id.* at 122.

seemed a natural disaster----one that it had simply been her bad luck, her fate (which must be accepted) to suffer.²⁷³

The break between “man’s inhumanity to man” reaching its apex in Auschwitz and a hell in Hiroshima “so far beyond human understanding that it was impossible to think” of it as the “work of resentable human beings” represents an epochal rupture in political and historical time. With Hiroshima, a difference in kind and not just scale emerges in the old sovereign “right to kill.” Foucault saw only an escalation of numbers on this particular point, and in fact, numbers have long dominated thinking about Hiroshima with an entire industry devoted to defending the American attack on the city with Benthamite precision and logic. However it was more than a shift in scale (although the radical shift in scale is a subcomponent of the shift in kind) as now the power of asteroids, of nature, of gods, of God, all at once fell into the hands of the leaders of leading nation states. No political theory of sovereignty had ever contemplated such an event. “Shikata ga-nai”: an attitude once reserved for divine events enters into political life whereas political life now busies itself with assuming the labors once thought divine.

This historical break was so profound that it could only really be captured in the absurd hyperbole common to American television talk shows. In 1955, the television show “This is Your Life” invited a survivor of the atomic blast onto the show and the host introduced him to the audience amidst a cacophony of showbiz bells and whistles with this: “*This is Hiroshima . . . and in that fateful second on August 6, 1945, a new concept of life and death was given its baptism. And tonight’s principal subject---you, Reverend Tanimoto!---were an unsuspecting part of that concept.*”²⁷⁴ We today are still a part of that concept and, in some regards, still without suspect. Ironically, Faulkner of all people, Faulkner who is still being cited for the proposition that the past is never past,²⁷⁵ grasped the enormity of the break with the past in that moment of new baptism. Speaking in Stockholm, Sweden in 1950 while accepting his Nobel Prize in literature, Faulkner spotted the chasm that stood between the few ticks of time separating the before and after of the fateful second:

Our tragedy today is a general and universal physical fear so long sustained by now that we can even bear it. There are no longer problems of the spirit. There is only one question: When will I be blown up? Because of this, the young man or woman writing today has forgotten the problems of the human heart in conflict with itself which alone can make for good writing because only that is worth writing about, worth the agony and the sweat. He must learn them again . . . Until he learns these things, he will write as though he stood among and watched the end of man . . .”²⁷⁶

The new concept of life and death baptized at Hiroshima effects then not only a break with the past, but a collapse of the future into the present. The previous certainties undergirding human life have been blown to bits and will not be easily retrieved. They will have to be *learned* again. The young writer writes “as though” she stood at the end of

²⁷³ *Id.* at 122.

²⁷⁴ *Id.* at 186.

²⁷⁵ The full quote is: “the past is never dead, it is not even past.”

²⁷⁶ William Faulkner, Nobel Prize Speech (December 10, 1950).

history because the writer today in fact writes when such possibilities loom as manifestly and materially *imminent*. But this space of the “as though” is also the content of “life” after the baptism of light. It is what makes it such a “new concept.”

Life and death thus reconceived, we can begin to understand what it might mean at present to be “pro life.” Faulkner divorced the problem of the spirit from the problem of being blown up. He insisted that the omnipresent threat of annihilation blotted out the spirit of man, the peculiarities of the human heart. It seems to never have occurred to Faulkner that such a nightmarish vision could be greeted not with dread but with the sound of men’s hands clapping. And while the antique categories of political philosophy dissolved in the face of these new powers on and over and against earth, contemporary conceptualizations within the tradition of constitutional thought would prove likewise incapable of reckoning with the sound of those hands clapping. That tradition remains incapable of even hearing them and so frets not about the consequences of not reckoning. If we could hear, with what would we reckon?

We would reckon with the Revelation of John; or more precisely with the political animation of the Revelation of John: the end of the earth as an earthly political project. For the new concept of life and death opened the door to a timely realization of “a new heaven and a new earth.”²⁷⁷ And by this I mean a disposition toward life and earth not confined to a theology although the theology will be indispensable to the disposition. Hiroshima was only one door in a set of doubles: Jerusalem too would soon swing open. Echoing if not mirroring the historical split within Jewish Zionism, between a secular project for nationality irrespective of geographic location and a nationalist project unimaginable absent a divinely ordained location, Christian supporters of the founding of Israel also split between liberal desires for justice in the wake of vicious (and post 1940, genocidal) anti-Semitism and theological longings for a return of Jews as a people to the lands of Jerusalem.²⁷⁸

President Truman recognized the State of Israel on May 14, 1948 the same day that the provisional government of Israel declared statehood. The recognition was brief, a few sentences devoid of religious perspective.²⁷⁹ However, as early as 1932, American political figures articulated their support for the Zionist project in explicitly Scriptural terms. For example, the American Palestine Committee, chaired by New York Senator Robert Wagner, viewed the possibility of a nation of Israel in Palestine as the potential “fulfillment of the millennial hope for the reunion of the Jewish people with the land of its ancient inheritance, a hope that accords with the spirit of biblical prophecy.”²⁸⁰ In contradistinction to Faulkner’s questions of the spirit, the spirit of biblical prophecy summoned the end of man, or the end of the world in which man lived, beyond all “agony and sweat,” in the name of “hope.” Most critically, this hope no longer required a patient and pious faith in the return of the Christian’s savior. As Rabbi Dan Cohn-Sherbok has observed, deliverance was no longer a divine affair, “it required labor.”²⁸¹

²⁷⁷ Revelation 21:1

²⁷⁸ DAN COHEN-SHERBOK, *THE POLITICS OF APOCALYPSE: THE HISTORY AND INFLUENCE OF CHRISTIAN ZIONISM* 113-15 (2006).

²⁷⁹ <<http://www.trumanlibrary.org>>.

²⁸⁰ PAUL C. MERKLEY, *THE POLITICS OF CHRISTIAN ZIONISM, 1891 TO 1948*, 102 (1998).

²⁸¹ Cohen-Sherbok, *supra* note 278, at 32.

Christian thought that is otherworldly is not new. Many religious scholars locate the origins of Christian thought with Augustine, describing him as the “real founder of Western Christendom.”²⁸² Augustine re-formulated Aristotle’s original demarcation between the life of politics and mere life.²⁸³ In Aristotle the ethical dilemma emerged at the pivot of ‘difference,’ but in Augustine that dilemma was ‘solved’ through Christian universalism. Animal life and the life of man have, to crucial extent, merged: “man, who would have become spiritual even in his flesh had he kept the commandment [in Paradise], now became fleshly even in his mind; and he who, in his pride, had pleased himself, was now, by God’s justice, handed over to himself.”²⁸⁴ But for Augustine, man over to himself must be against himself: Aristotle’s distinction again holds, but now as no distinction at all. Politics, no longer the preserve of rational animal, is now the shelter of sinful animal: irredeemable here on earth. Otherworldliness is thus not just a devotion to an other world, but devotion set in opposition to this one. The turn is against, not away. Here is Augustine: “the ‘animal’ man is not different from the ‘fleshly’ man. Rather, they are one in the same: that is, man living according to man.”²⁸⁵ This distinction that no longer is a distinction carries theological significance: “when a man lives according to man and not according to God, he resembles the devil.” And again, it stands directly against life on Earth: “if any man love the world, the love of the Father is not in him.”²⁸⁶ If life itself, (the life of man that is already in its entirety ‘fleshly’) signals the absence of the Holy Father, (an absence that is/resembles the devil, evil itself) the good Christian possesses a certain duty toward the world: “a duty of perfect hatred.”²⁸⁷ This duty of perfect hatred rests in and emerges from the politically impotent space of refuge and exile, and here one can reconcile it with life on earth as it stands removed from it; but when it enters the life of the world and the politics of man (as with Constantine’s conversion)---and when it is joined with Augustine’s blurring of death and life (as in the *Confessions*)---the logical end of politics shifts from the Aristotelian management of ‘mere life’ with the *telos* of a ‘good life’ to the total annihilation of life itself.

Of course, to be fair to Augustine, the usurpation of God’s power by men would be the most sinful thing imaginable. But then, such a thought was, even *in extremis*, completely unimaginable for Augustine. His outlook remained deeply spiritual. This is what enables Arendt to say that “Augustine’s attitude toward secular history is essentially no different from that of the Romans, albeit the emphasis is inverted: history remains a storehouse of examples, and the location of events in time within the secular course of history remains without importance.”²⁸⁸ So we must not blame the Bishop of Hippo for the madness of our time. That would be cruel. He wrote before the baptism of light, after

²⁸² THOMAS J.J. ALITZER, *HISTORY AS APOCALYPSE* 81 (1985).

²⁸³ ARISTOTLE, *POLITICS* book I (T. A. Sinclair trans., Trevor J. Saunders ed., Penguin Classics 1981) (350 BCE); also Book III, ch. ix: “But a state’s purpose is not merely to provide a living but to make a life that is good. Otherwise it might be made up of slaves or animals other than man, and that is impossible because slaves and animals do not participate in *eudaimonia*.”

²⁸⁴ AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* book 14, ch.15 (R. W. Dyson trans. 1998) (5th Century CE).

²⁸⁵ *Id.* at book 14, ch.4.

²⁸⁶ AUGUSTINE, *THE CITY OF GOD AGAINST THE PAGANS* book 14, ch. 8 (R. W. Dyson trans. 1998) (5th Century CE) (quoting the Apostle John).

²⁸⁷ *Id.* at book 14, ch. 6.

²⁸⁸ Arendt, *supra* note 259, at 66.

which religious concepts would proliferate throughout political life but now completely void of their original bearings.

Today the Augustinian inversion of Roman history is in a state of collapse. Increasingly large and important sectors of American Christianity now locate the spirit contra the flesh within the river of historical time and events. Augustine's otherworldly spiritual faith is converted into labor and toil. The director of the International Christian Zionist Center in Jerusalem explains the breakdown of the inversion:

The Bible, revered by true Christians as the inerrant Word of God, is really "just" the history of the land and people of Israel. Of course, I am not here dismissing the sacredness of the Scriptures. My purpose is simply to emphasize a basic truth that has all but evaporated during 2000 years of Christian teaching, teaching which has successfully managed to "spiritualize" in our thinking the very physical realities penned on the Bible's pages.²⁸⁹

Such thinking is challenged in the mainline Protestant denominations, but the divines of the New Right wholly embrace this view. Jerry Falwell instructed his flock that it was their "Christian duty to God to support the Jewish state in fulfillment of biblical prophecy" and Pat Robertson has stated that the political goal is nothing less than the fulfillment of "end time prophecy."²⁹⁰ In addition to speeding up the time of the end of time, many also see the tribulations of Revelations as no longer the work of God but authored by man. Hal Lindsey, author of the *Late Great Planet Earth* (a work of Christian apocalyptic "non-fiction" that has sold over 30 million copies since being published in 1970)²⁹¹, read the history in the Bible to read the Bible in history and predicted that Israel will be the "Ground Zero in the end times events . . . there will be a full-scale exchange of nuclear weapons, and it is at this time that 'the cities of the nations will fall.'"²⁹² Far from being fringe views, these prophets have been at the seat of political power since the election of Reagan in 1980. And aside from this or that particular policy decision, the New Right's understanding of the future has made deep cultural inroads in the wake of the dawn of the atomic age and the return of Jewish sovereignty to ancient lands. By 1984, 4 out of 10 Americans believed that "when the Bible speaks of the Earth being destroyed by fire, this means that we ourselves will destroy the earth in a nuclear Armageddon."²⁹³ And this apocalyptic vision is the *telos* at the end of *a*, and the end of, political desire. In the place of reason's Truth, labor's Emancipation, or fellowship's Community, stands only the "worthless rock hanging tideless in the last red and dying evening."²⁹⁴

²⁸⁹ See <http://www.israelmybeloved.com>.

²⁹⁰ Cohn-Sherbok, *supra* note 278, at 162-63.

²⁹¹ In addition, the similarly themed *Left Behind* series authored by Moral Majority co-founder Tim LaHaye has sold more than 60 million copies since being published in 1995.

²⁹² Cohn-Sherbok, *supra* note 278, at 153-54.

²⁹³ DAN COHEN-SHERBOK, *Introduction to THE POLITICS OF APOCALYPSE: THE HISTORY AND INFLUENCE OF CHRISTIAN ZIONISM*, at xii (2006).

²⁹⁴ William Faulkner, Nobel Prize Speech (December 10, 1950). The end of political desire: this becomes all the more true when we read the tideless time in contrast to the riparian imagery of Machiavelli: "I compare fortune [*fortuna*] to one of those violent rivers which, when they are enraged, flood the plains, tear down trees and buildings, wash soil from one place and deposit in another . . . Yet although such is their nature, it does not follow that when they are flowing quietly one cannot take precautions, constructing

This future that is no future is the temporal axis around which the law that is no law spins. In the previous chapter on torture we saw that the return of the “rule of law” (already backward gazing in the very desire for a “return”) offered slim grounds for justice given that the return promised a campaign of depoliticization at a moment when racial, class, and imperial powers work through the law to secure their continuity. Legality *sans* politics is a political position. But does this mean that justice stands hopelessly estranged from the law? In her reading of Derrida’s *Specters of Marx*, Wendy Brown highlights the temporal dimension of Derrida’s thinking about justice. Justice is “less institutional or spatial than temporal . . . not only must justice have futurity---it is what *makes* futurity, insofar as it generates the future’s relationship to the present as a ‘living on’ of present efforts and aims.”²⁹⁵ But for Derrida and Brown the law lacks the capacity to transmit the present into the future, to mobilize the forces to make the future so. This inability to project futurity stems from the fact that “[j]ustice cast in legal terms repeats the fundamental practices of the current order of justice and thus condemns us to the out-of-jointedness of our time.”²⁹⁶

Hewing to the terminology of Brown and Derrida, it appears at first glance that Marx haunts their thinking about the law and justice. After all, it was Marx who leveled devastating critiques of the “rights of man” that burst forth with the American and French Revolutions.²⁹⁷ Moreover, it was also Marx who directed our gaze away from the State and its official vocabulary to the circuitries of value at the heart of production as the primal scene of domination and unfreedom.²⁹⁸ However, the turn away from the law by Brown and Derrida in this instance is in terms not particularly Marxist in their provenance:

What conventionally sets time right again is the law; but in Derrida’s account, law’s traditional connection with vengeance, and even with blood revenge, can do no more than perpetuate the out-of-jointness of the times . . . [a] formulation of justice intended to rectify that disjointedness must rely on something other than the law; for Derrida, it must be beyond right, debt, calculation, and vengeance . . .

²⁹⁹

It appears now that the haunting of Brown reading Derrida reading Marx is Nietzsche. With Nietzsche, they castigate the backward gaze of the debtor and the future-denying

dykes and embankments so that when the river is in flood they would keep to one channel or their impetus lees wild and dangerous.” MACHIAVELLI, *THE PRINCE* ch. xxv, (Harvey C. Mansfield trans., University of Chicago Press 1998) (1532). The earthly embrace of Faulkner and Machiavelli represents a clear disagreement with Augustine and a direct repudiation of *Shikata ga-nai* in the face of enormity. And as neither romanticizes the forces on earth and the passions common to humanity, neither (and here especially Machiavelli) falls into dreaming of postpolitical futures on Earth as Mill, Marx, and King had tendencies to do.

²⁹⁵ WENDY BROWN, *POLITICS OUT OF HISTORY* 147 (2001).

²⁹⁶ WENDY BROWN, *POLITICS OUT OF HISTORY* 154 (2001).

²⁹⁷ See generally KARL MARX, *On the Jewish Question* in *EARLY WRITINGS* (Rodney Livingstone and Gregor Benton trans., Penguin Classics 1992) (1843).

²⁹⁸ See generally KARL MARX, *CAPITAL, VOLUME I: A Critique of Political Economy* (Ben Fowkes trans., Penguin Classics 1992) (1867).

²⁹⁹ WENDY BROWN, *POLITICS OUT OF HISTORY* 154 (2001). Brown suggests that Derrida’s claims are “corroborated by the boundless litigiousness of the present age, and especially by the conversion of historical-political claims of oppression to legal claims for rights or reparations.” *Id.*

longing for revenge.³⁰⁰ Yet Nietzsche understood the law as being originally the home of those *not* mired in guilt or paralyzed by a hunger for vengeance. Here is Nietzsche:

From a historical point of view, law represents on earth---let it be said to the dismay of the above-named agitator [Eugen Duhring] (who himself once confessed that: “the doctrine of revenge is the red thread of justice that runs through all of my efforts”)---the struggle against the reactive feelings, the war conducted against them on the part of the active and aggressive powers . . .³⁰¹

In a sense, the *repoliticization* of the law is made possible by Nietzsche’s rediscovery of war at the center of law’s founding and being. And if today the law is “sickly” and incapable of futurity, then surely it is because the “will to power” of the meek have overrun this original citadel of the strong. Here, still keeping with Nietzsche, we might say that what is needed is a revaluation of values, the revaluation of the value of law in our political thinking.

In so doing we will have to re-evaluate and revalue the idea of law without letting it become a historically empty concept (this is a mistake Derrida often makes that Brown almost never does). Both Marx and Nietzsche situated the law within the struggles for power in history. In Marx, the constitutional revolutions of the democratic capitalist age signaled and sustained the arrival of new modes of production and the new class formations and societies that emerged with them. They epitomized futurity in that they broke the older land-based feudal orders. In addition, the law was to assist in securing the *future* of capital. This was true not in any particular decision but in the very frameworks within which decision-making would transpire. And bourgeois society (and here we must include its law) was neither static nor nostalgic. Indeed, Marx argued that its very existence was predicated upon “constantly revolutionizing the instruments of production, and thereby the relations of production, and with them the whole relations of society.”³⁰² And without being too reductive, we can look to the great transformations of public and private law in the United States to see this revolutionary process: the disintegration of the Constitutionally sacrosanct right to contract, the emergence of welfare-state jurisprudence with regards to national regulatory power, the centering of cost-benefit analysis in the shifts of burden and liability in modern tort law, the reconceptualization of the corporate entity as a organism capable of “political speech,” etc., etc.

Nietzsche’s view of the democratic age was far dimmer than Marx’s (who critically saw the bourgeois revolutions as “progress”). Consequently, his vision remained blind to the great creative energy unleashed by those revolutions. This world-making energy is what Marx thought could be harnessed and what Tocqueville thought needed to be tamed.³⁰³ Our re-evaluation and revaluation of “law” will hinge, in part,

³⁰⁰ See generally FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Douglas Smith trans., Oxford World Classics 2009) (1887) (the second essay, especially §§ 20-23).

³⁰¹ *Id.* at second essay, § 11.

³⁰² KARL MARX AND FREDERICK ENGELS, THE COMMUNIST MANIFESTO 38 (Samuel Moore trans., Verso 1998) (1848).

³⁰³ Looking toward Europe (and France in particular) from America, Alexis de Tocqueville worried that “democracy had been left to its wild instincts; it has grown up like those children deprived of parental care . . . it is worshipped as the idol of strength; thereafter when it is weakened by its own excesses, the lawgivers conceive the imprudent project of abolishing it instead of trying to educate and correct it.” ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 13 (George Lawrence trans., J.P. Mayer ed., Harper 1988). An

upon where one ultimately stands in this divide between Nietzsche on the one hand and Marx and Tocqueville on the other. The revolutionary character of our constitutional heritage is difficult to deny. It is embedded in the very notion of a written constitution. In a brief address to the Association of American Law Schools, Hanna Pitkin proposed that we consider the “idea of a constitution” in two senses of its use. The first sense relates to the constitutive elements of a whole, as in Aristotle’s “shared way of life in the *polis*.”³⁰⁴ The second sense refers to the “human capacity to act, to innovate, to break the casual chain of process and launch something unprecedented.”³⁰⁵ In addition to launching, that capacity must realize itself across time and into the future. As Pitkin put it, “to constitute, one must not merely become active at some moment but must establish something that lasts, which, in human affairs, inevitably means something that will enlist and be carried forward by others.”³⁰⁶ If justice makes futurity (per Brown and Derrida) and if futurity is the indispensable element to the idea of a constitution (per Pitkin), then the frayed connections between law and justice must begin to be restitched. For it is the refusal to “carry forward” that defines so much of the anticonstitutionalist Right in American politics, what makes that force in fact anticonstitutionalist. Their future that is no future threatens to rob all of us of any possibility of forging one and as such stands against both justice in time and freedom in life. Recognizing this entails a certain refusal to accept a binarized choice between a turn toward/turn away from the law. Indeed, it seems that deconstruction would undo the neatness of an inside/outside “law” wherein/without justice might find home. In this hyper-ephemeral age, when “economic, social, and technological transformations occur so rapidly that they often do not even achieve solidity before metamorphosing into something else,”³⁰⁷ we must see in the law something other than a set of codes tied logically to a specific order of rule and instead (or in addition) see it as a critical place of memory, a reminder that the capacity to break causal chains and to carry new things forward in political life on earth is forever possible. This of course might be a legal fiction, but it is without doubt a necessary one.

idol of strength driven by wild instincts is precisely what Nietzsche thought absent in the democratic “herd.”

³⁰⁴ The address was published as *The Idea of a Constitution*, 37 JOURNAL OF LEGAL EDUCATION 167 (1987).

³⁰⁵ Hanna Fenichel Pitkin, *The Idea of a Constitution* 37 J. Legal Educ. 167, 168 (1987).

³⁰⁶ Hanna Fenichel Pitkin, *The Idea of a Constitution* 37 J. Legal Educ. 167, 168 (1987).

³⁰⁷ WENDY BROWN, POLITICS OUT OF HISTORY 139 (2001).

CHAPTER FOUR

CODA: SOVEREIGN POWER & LIFE AMIDST NEW KINGS & OLD TUTORS

the whole affair is a *felo de se* . . .

-Thomas Paine, *Common Sense*

I.

At the midpoint of the last century, in the Supreme Court case of *Terminiello v. Chicago*, Justice Robert Jackson issued a dissenting opinion that introduced a consequential maxim of constitutional interpretation, and thus a theory of constitutional order: “There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”³⁰⁸ The case involved a public speech at an assembly hall by a right-wing agitator, Father Terminiello. Terminiello’s speech denounced “Communist Jewish Zionism” while also hurling insults at the crowd protesting his speech outside of the hall. The protesting crowd replied with cries of “Fascists!” and surged into the hall causing small melees: broken windows, stink bombs, and scuffles between foes. The City of Chicago charged Father Terminiello with breach of the peace, and the jury instructions “permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest.”³⁰⁹ The jury convicted. The majority of the Supreme Court (it was a 5-4 decision) overturned this conviction and held that this jury instruction violated the Constitution.³¹⁰

Justice Jackson accused the majority of skirting the messy particulars of the tumultuous facts for the calm abstractions of First Amendment theorization. The chastisement in full:

The Court reverses this conviction by reiterating generalized approbations of freedom of speech with which, in the abstract, no one will disagree. Doubts as to their applicability are lulled by avoidance of more than passing reference to the circumstances of Terminiello's speech and judging it as if he had spoken to persons as dispassionate as empty benches, or like a modern Demosthenes practicing his Philippics on a lonely seashore.³¹¹

³⁰⁸ *Terminiello v. Chicago (Terminiello)*, 337 U.S. 1 (1949).

³⁰⁹ *Id.*

³¹⁰ It violated the First Amendment as incorporated via the Due Process clause of the Fourteenth Amendment. Justice Jackson spent some time suggesting that the Court should circumscribe the opinion because it was a municipal ordinance and the application of the First Amendment via incorporation was a judicial usurpation of power. The politics of incorporation and interpretation are discussed more fully in chapter two of this dissertation.

³¹¹ *Terminiello* at 13 (Jackson, J. dissenting).

This turn to circumstance unwittingly generates its own abstraction by which to think the particular. Justice Jackson's hypothetical instances of when a First Amendment situation would be most easy to judge is strangely no First Amendment situation at all. "Political" speech has long resided at the apex of speech protected by the First Amendment. Yet Jackson gives us scenes without people (plural) and speech without listeners (even in the singular): they are void of either disagreement or consent, as either fact or potential. In the place of exchange we find soliloquy. If Terminiello had preached to empty benches or endless seas there would have been nothing to judge at all.

This production of an ideal speech situation that is no speech situation thus suggests the possibility that Jackson has performed the very act he feared: he has produced a political dead space, a perfect political void. It is a suicide act converted from a jurisprudence of stillness rather than one too sympathetic to discord. Dispassionateness, the condition coterminous with emptiness, is heralded as a communicative virtue rather than the antidemocratic wonder it is. Here is Jackson elaborating on the reason for his dissent:

[W]e must bear in mind also that no serious outbreak of mob violence . . . or public disorder is likely to get going without help of some speechmaking to some mass of people. A street may be filled with men and women, and the crowd still not be a mob. Unity of purpose, passion and hatred, which merges the many minds of a crowd into the mindlessness of a mob, almost invariably is supplied by speeches. It is naive, or worse, to teach that oratory with this object or effect is a service to liberty. No mob has ever protected any liberty, even its own, but, if not put down, it always winds up in an orgy of lawlessness . . .³¹²

If unity and passion are wedded together into an orgy of lawlessness, then the rule of law must produce the antithetical couple of individuation and dispassion. But again, the logic of this formula produces both the empty bench and the lonely shore as *ideal*. Jackson may have been intentionally absurd, but the marking of an outer limit is quite often the opening of a window into inner thought.

The majority opinion of Justice William O. Douglas did not simply weigh the "risks" slightly differently than Justice Jackson and then decide they were worth taking. Rather, Justice Douglas challenged the fear of suicide with a theory of life that reconceived the danger and thus offered a rival political value and vision. Contrary to Justice Jackson's assertion that the majority chose abstraction to fact, the majority embraced the facts to guide the abstraction. In short, the majority did not flee the orgy; they sanctified it as the heart of democracy and thus paradoxically (as the orgy was one of "lawlessness") deserving of legal protection. Even more, Justice Douglas argued that the "vitality of civil and political institutions" did not simply require a begrudging tolerance of rancor and debate; instead vitality flowed from precisely these actions. The "function of free speech under our system of government is to invite dispute," Douglas insisted.³¹³ But he also pressed well beyond this Millian framing and claimed that free speech "may indeed best serve its high purpose when it induces a condition of unrest,

³¹² *Terminiello* at 32 (Jackson, J. dissenting).

³¹³ *Terminiello* at 4 (Douglas, J.).

creates dissatisfaction with conditions as they are, or even stirs people to anger.”³¹⁴ To translate into Jackson’s vocabulary, the vitality of political life depends, at least in part, on the passionate rousing of a mob from the crowd.

The art and science of distinguishing between the crowd and the mob, the anxieties of not being able to do so, the worries of not properly policing the demarcation once drawn, all of this is as old as the Republic.³¹⁵ Justice Jackson’s dissent thus carries forward almost two centuries of hard-won knowledge and deeply embedded fears. The disagreement between Justice Jackson and Justice Douglas on a jury instruction in a misdemeanor case in Chicago reveals fissures and factions in political life and thought that are as enduring as they are profound. On this point, they both agree. For Jackson, the decision threatens to transform the Constitution into a suicide pact. What is in jeopardy of being nullified by the “most extravagant hopes of both right and left totalitarian groups” is local democratic governance and public order.³¹⁶ For Justice Douglas, the *vitality* of political life is at stake. And here we might take into account two meanings and temporalities of vitality. Vitality signals strength, vigor, exertion, and development; it is future oriented. But in medical discourse vitality is also an immediate and existential question, for vitality is the “peculiarity distinguishing the living from the nonliving.”³¹⁷ Potentiality presumes existence, but existence also requires potentiality. And it is the tumultuousness of politics rather than the orderliness and prestige of local authority that ensures both and also that which “sets us apart from totalitarian regimes.”³¹⁸

One might read this exchange as a set of argumentative moves interesting and relevant only to historians of Cold War liberalism and of no import to political theorists of the present. However, Justice Jackson’s argument has survived and thrived out of that original context. It has, as is said, “taken on a life of its own.” His pithy admonition that the Constitution must not become a “suicide pact” has endured because it so perfectly flatters the age. Unmoored from the particular case, it free floats as an ideal adjudicatory supplement in an age of cost-benefit rationality, State authoritarianism, and ongoing Imperial crisis.³¹⁹ It carries and facilitates violence and domination within the “rule of law” and in the most lawyerly fashion. Its real magic is that it seems nearly incapable of locating firm limits while nonetheless professing them the *sine qua non* of law.³²⁰

³¹⁴ See generally JOHN STUART MILL, *ON LIBERTY* (Penguin Classics 2007) (1859) (on the value of invited dispute); See generally NICCOLO MACHIAVELLI, *Book I*, in *DISCOURSES ON LIVY* (Oxford World’s Classics 2009) (1531) (on the value of tumultuousness). Mill is directly on point; Machiavelli is on point, even if less directly so.

³¹⁵ See generally, JASON FRANK, *CONSTITUENT MOMENTS* (2010) (chapters 1-3).

³¹⁶ Of course, a political theory of life inheres in a jurisprudence of order. Sheldon Wolin teaches that “in the ontology of political thought, order has been then equivalent of being, anarchy the synonym for non-being.” *POLITICS AND VISION*, 218 (2004).

³¹⁷ *Vitality definition*, MERRIAM-WEBSTER MEDICAL DICTIONARY (2006).

³¹⁸ *Terminiello* at 4 (Douglas, J. dissenting).

³¹⁹ It might also be seen as working in tandem with an emerging “governmentality of neoliberalism” that “facilitates the dismantling of liberal democracy.” See WENDY BROWN, *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 52 (2005). Yet its cost-benefit logic still retains an end ultimately irreducible to the values and logics of the market. Perhaps it sutures the two orders together in some odd manner.

³²⁰ This happens in part by the production of “value” in the circulations and domains of authoritarianism and Empire. Human beings on the underside of those orders suffer from a deflationary spiral and become worth almost nothing. See JUDITH BUTLER, *PRECARIOUS LIFE* (2004). By contrast, Empire and State are transfigured into the most precious of all metals. Plugged into the jurisprudential economatrix of ‘law and

Recent arguments made by Alan Dershowitz (“America’s leading liberal lawyer”) on the legalization of preemptive and preventive torture offer a glimpse into this legal order. Dershowitz concedes that “the rule of law requires that all governmental action be subjected to legal constraints.”³²¹ But the constraint is necessarily loosened by the need for a balancing act, although it is the balancing act that is supposed to produce the constraint. Dershowitz continues: “democracies seek to operate within the rule of laws, and laws must realistically reflect the desirable balance between the legitimate needs of security and the equally legitimate claims of human rights.” However, the needs of security are so infinite that they threaten to outstrip the capacities of the law entirely: “the survival of states is not a matter of law.”³²² So the survivability of the state trumps the survivability of the rule of law even as the latter is allegedly the sign of democracy itself. As such, the law must perform its own self-negation to “survive” along with the State it now serves under rather than over. Unsurprisingly, Dershowitz concludes his argument with this: “to paraphrase Robert Jackson . . . the law must not be a suicide pact.”³²³

As we just saw however, suicide has not been avoided; for the State to live to its potential the law must potentially perish. And because the law desires nothing other than the survival of the State in the final instance, it will suffer autoimmolation to ensure it. Everything must be balanced, and at the end we discover decisive and true values. But because the law endured into the final hour, because it was not suspended but enveloped, we can attest that the rule of law was never violated. And since the law has made a pact to follow the State until the end of time there is no time without the law and this time of law is what grounds the violence waged in the name of the State: it is an ultimate virtue that is ultimately sacrificable. Here, we have the absolute nullification of vitality; it is now Justice Douglas’ position that is forced into the dissent.

But the question now, really is: the vitality of what? The self-sacrificial capacity of the law turns Justice Jackson’s dictate that the law must not be a suicide pact into a riddle: who was/are the self-preserving subjects of the forbidden pact? If the State is that which must be not be sacrificed by the law, that which may ultimately sacrifice the law, then what pact binds the State? Or what binding pacts produce the State? Now we have wandered into the well-tilled fields of social contract. But even here (or especially here), the law that must not be a suicide pact is predicated on the very potentiality of such an act at any and every moment of enforcement. This is what leads Hobbes to say that “he that attempteth to depose his Sovereign, be killed, or punished by him for such attempt, he is the author of his own punishment.”³²⁴ This is not lessened by Hobbes’ argument that no subject may be forced to harm himself as it runs counter to the “End for which the Sovereignty was ordained.” That one may justly disobey a sovereign’s command to “kill, wound, or mayme himself” is to only claim that the *end* of the pact logically is not suicide but that does not mean that the law ever escapes its potentiality (as opposed to end; in paradoxical realization of ends) as a suicide pact.

economics,’ we soon discover cruelty has no horizon at the same instant that there is an overproduction of procedure.

³²¹ Alan Dershowitz, *Should We Fight Terror with Torture?*, THE INDEPENDENT (July 3, 2006).

³²² *Id.* (quoting former U.S. Secretary of State Dean Acheson).

³²³ *Id.*

³²⁴ THOMAS HOBBS, *LEVIATHAN* (“*Leviathan*”), Chapter XVIII (Penguin Classics 1982) (1651).

Nonetheless, Hobbes' qualification is a critical one. It forces the question: what is the difference between a pact with the end of suicide and a pact with the omnipresent risk of suicide? Hobbes views the former as a logical impossibility when it comes to the covenants of sovereignty since the only motive and aim of sovereign pacts is "the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out of that miserable condition of Warre."³²⁵ After all, the sword is hitched to the covenant to "secure a man" who desires not political freedom but freedom from worry. And the bonds of political life dissolve when that protection wavers: "The Obligation of Subjects to the Sovereign, is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them."³²⁶ Man is thus not a political animal; he is an anxious one.

Dershowitz's liberalism inverts Hobbessian protoliberalism in one aspect and apparently realizes it in another. In order for the State to act, to produce the conditions of its action, it must saturate the life of the commonwealth with fear, not of certain punishment and awe, but of an open-ended "condition of Warre." Today, Dershowitz explains, we cannot simply hold prisoners "until the end of the war, because this is a war that will never end." Dershowitz empowers the Leviathan on the basis of unending war, but it was only on the promise of the cessation of that "miserable condition" that men covenanted to produce its power of restraint. Moreover, the State now has an existence divorced from its aim of protection: "States will do what they deem necessary, not only to ensure their own survival, but also to protect the lives of their citizens from catastrophic threats."³²⁷ We must rest for a moment with this "but also."

The disjunction between the existence of the State and the life of the citizen by Dershowitz echoes an observation that Sheldon Wolin made on the withdrawn and radical atomization of political life in Hobbes' thought: "The epitaph of the political community was that 'the individual existence has little embodiment in political existence.'"³²⁸ It is this disjunction between the life of the State and the life of the citizen that bifurcates the inquiry into the parties of the (non)suicide pact. The bifurcation intensifies even more when Dershowitz altogether drops the images of the citizen for the profoundly depoliticized life of the "civilian." In this new order (where the laws of war have merged with the laws of governance), we have nothing but belligerent combatants and innocent civilians. And the "innocent life" of the civilian is treasured insofar as it never wanders off that conceptual reservation. This explains, in part, why any political dissent or mobilization against the war-on-terror was so quickly swept into a division of for/against this or that belligerent, and why this then criss-crossed any actual formal barriers or boundaries of inside/outside the nation state.

If the citizen is severed conceptually from participation in political life, and if the citizen decomposes further into the innocent civilian (his innocence as an *a priori* can only be such in a situation where the life of the polity and the life of the citizen have been constitutionally reconfigured as strangers; that is, when the most vital of vital signs in democratic life are not present, not even faintly), then the penultimate adjudicatory rule of law in the rule of law (for the ultimate will not be adjudicatory) has killed the

³²⁵ *Leviathan*, Chapter XVII.

³²⁶ *Leviathan*, Chapter XXI.

³²⁷ Alan Dershowitz, *Should We Fight Terror with Torture?*, THE INDEPENDENT (July 3, 2006).

³²⁸ SHELDON WOLIN, POLITICS AND VISION 252 (2006).

imagined authorizing subject of the law in the United States' Constitutional system: the people as a People (however conceived or construed as partial or aspirational or fictive or hegemonic).³²⁹ We are thus confronted with either a homicidal act or a suicidal pact and must determine which. Or is it both—in that the coup d'état performed a coup de grace on the self-wounded creature?

The establishment of the Constitution in 1787 presupposed the existence of the people in contradistinction to persons. The people were new as both a political power but also a simple sociological fact: memories of arrival in the New World were fresh. Moreover, despite the racial exclusions and dominations at the constitutional core of the people, they bore the traces of differential origins. Thomas Paine, who did perhaps more than any other person in the 18th century to conjure and bind the people into a people, extolled those differences in both repudiating the fantasy of England as the “mother country” and in finding common ground and ‘common sense’ in political values rather than origin fables. These two moves were intertwined. Paine wrote in 1776 “not one third of the inhabitants, even of this province [Pennsylvania], are of English descent. Wherefore I reprobate the phrase of parent or mother country applied to England only, as being false, selfish, narrow and ungenerous.”³³⁰ Paine saw in the peoples’ differences the shared experience of flight and shared political basis for flight: “This new world hath been the asylum for the persecuted lovers of civil and religious liberty from *every part* of Europe. Hither they have fled, not from the tender embraces of the mother, but from the cruelty of the monster.”³³¹

This reading of Paine is in accord with Jason Frank’s argument that “the people are a political *claim*, an act of political subjectification, not a pre-given, unified, or naturally bounded empirical entity.”³³² With the emphasis on “claim,” Frank works to center the contestation and incompleteness in any and all invocations of the people. To paraphrase Frank, any representation can never represent the people in full. Unlike Frank, my interest is less in the “claim” (who is and is not in the people, who does and does not represent the people, etc.) and more in the “political” values in the subjectification as such.³³³

The Constitution by the People³³⁴ required first the constitution of the people. Or at the very least the Constitution by the people would have to simultaneously have been the constitution of the people.³³⁵ In fact, the people that emerged were already ascendant before and during the Revolution. And this political ascendancy was so entrenched by the time of the 1787 Constitution that there was no going back to, or constituting anew, feudal or aristocratic orders. This political change was also a social change and there was no corner of society that remained untouched by this ascendancy. All boundaries of rank

³²⁹ An analogous point is made by Arendt regarding international humanitarian law. Also, the value of ‘citizen’ should be read functionally rather than formalistically here.

³³⁰ THOMAS PAINE, COMMON SENSE (“*Common Sense*”) 22 (Modern Library 2003) (1776).

³³¹ *Common Sense*, p. 21.

³³² *Constituent Moments*, p. 3. (emphasis in original)

³³³ Since not all politics theoretically presumes the people, seeks them out as legitimating ground, invokes them rather than demotes and/or disaggregates them, etc.

³³⁴ See U. S. Const. pmbl.

³³⁵ Frank says that politics renders the people perpetually “not yet.” JASON FRANK, CONSTITUENT MOMENTS 5; 65 (2010). I am in disagreement with both Frank and Derrida on the near-infinite deferral of a people-to-come and a democracy-to-come. Against enclosure, the formula ironically enacts it.

were eroding. Lower orders trampled upon old distinctions: “farmers called themselves yeoman and gentleman at the same time.”³³⁶ Historian Gordon Wood has described the republican revolution of the eighteenth century as inaugurating “nothing less than new ways of organizing society.”³³⁷ It “offered new conceptions of the individual, the family, the state, and the individual’s relationship to the family, the state and other individuals.”³³⁸ Thomas Jefferson argued that this world-remaking force was invigorating to the individual and the polity. Equality was vitality for both: ““the sickly, weakly, timid man fears the people . . . the healthy, strong and bold, cherishes them . . .”³³⁹

The individual’s relationship to other individuals appeared as nothing more than a relationship between individuals. Individuals made history by abolishing it. If history was a majestic stage, the primary actors had exited. There were to be only private dramas now. Our time is thus not the first time that imagined it stood at history’s end. This conceit, of course, was the basis and target of Marx’s critique of the epoch. Looking at the French Revolution, Marx found it perplexing that “a nation which has just begun to liberate itself, to tear down all the barriers between different sections of the people and to establish a political community, should solemnly proclaim (*Declaration of 1791*) the rights of egoistic man, separated from his fellow men and from the community.”³⁴⁰ He also spied an inversion of revolutionary practice and natural-right theory. In practice, “the right of liberty ceases to be a right as soon as it comes into conflict with political life, whereas in theory political life is no more than the guarantees of the rights of man But practice is only the exception, while theory is the rule.”³⁴¹ The contradiction between the exception and rule is resolved in the establishment of the law and the birth of the constitutional state: “The *formation of the political state*, and the dissolution of civil society into independent *individuals* whose relations are regulated by law, as the relations between men in the corporations and guilds were regulated by privilege, are accomplished by *one and the same act*.”³⁴²

Marx throws light on the movement of power from the nakedly despotic state into the naturalized society of liberty in the very act of establishing the professed neutrality of the state in matters of despotism in the name of liberty. The protection of despotism from the reach of a politics is ensured and regulated by the rule of law. The rule of law is the cause and consequence of the cleavage between freedom in the state and freedom from the state. That is to say, the rule of law in the age of constitutionalism is not a guarantee of life as such, but is always and inextricably tied to the production and protection of a particular way of life. That particularity is a political project and consequently the rule of law is already something more than a pact of self-defense even in its most purely atomized articulation.

³³⁶ GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 118 (1992). Wood reports that this change was noted with “chagrin” by a young John Adams suggesting that old orders disappearing did not entail ancient antagonisms withering.

³³⁷ *Id.* at 96.

³³⁸ *Id.*

³³⁹ GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 97 (1992) (quoting Jefferson).

³⁴⁰ Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 43 (Robert C. Tucker ed., 2d ed. 1978).

³⁴¹ *Id.* at 44.

³⁴² *Id.* at 45-46 (emphasis in original).

The simultaneous action of rooting the public law in the imagined natural life of man *and* the naturalization of the life of man as apolitical in the political act of law-making is not a peculiar move of the French Revolution. Marx tracked it back to the many constitutions of the American States in the late eighteenth century. However, this order of thought swept up thinking beyond the formalities of this or that particular constitution. It defined the age and found its fullest realization in the writing of the great propagandist for that age, Thomas Paine. Paine believed that where the rule of law was absent, “freedom” was in a “fugitive” condition.³⁴³ It was fugitive in two senses: it was on the run from “tyranny” but also ephemeral in every instant if not constituted in and as law. Without law, there was only power “granted by courtesy,” and courtesy was the opposite of right, the enemy of right. Law thus became nearly synonymous with freedom and the necessary and proper telos of political revolt. Paine diagnosed the rapidly deteriorating colonial situation as being governed by “Legislation without law” and this left the “mind of the multitude” with no “fixed object before them.”³⁴⁴ The rule of law would both banish the capriciousness of courtesy and focus the minds of the many on proper objects. The multitude would be commonly aligned, an alignment that was the first task and precondition of the rule of law, without being perfectly unified. Paine argued that, “For as in absolute governments the King is law, so in free countries the law ought to be King.”³⁴⁵

The new law-king arose from the sum power of individuals and aimed at preserving the prepolitical preconditions of that power: “every man wishes to pursue his occupation, and to enjoy the fruits of his labours, and the produce of his property in peace and safety . . . when these things are accomplished, all the objects for which government ought to be established are finished.”³⁴⁶ The people were enshrined into sovereignty in a double sense: individually and collectively. And at the same moment a fissure appeared in sovereignty between law on the one side and the people on the other. This fissure in some ways tracks with Marx’s mapping of a series of disjunctions that signal the impossibility of freedom in the new age (without an account of the duality of the people beyond the exception/rule contradiction in revolutionary/theoretical *extremis*). Because Paine could never really get beyond a trustee-delegation mode of constitutional imagining, the constitutional subject of the people as a collective force could not endure beyond the moment of founding. The law would trump the people (and again, the content is not of concern at this moment) in the name of individual sovereignty. Here is Paine describing this transfer of power and the crowning of the law-king:

But where says some is the King of America? I’ll tell you Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming a charter; let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as approve of monarchy, that in America THE LAW IS KING . . . But lest any ill use

³⁴³ *Common Sense* at 33.

³⁴⁴ *Common Sense* at 47.

³⁴⁵ *Common Sense* at 31 (emphasis in original).

³⁴⁶ THOMAS PAINE, RIGHTS OF MAN (“*Rights of Man*”) 170 (Modern Library 2003) (1791).

should afterwards arise, let the crown at the conclusion of the ceremony be demolished, and scattered among the people whose right it is.”³⁴⁷

The smashing of collective sovereignty at the revolutionary moment of an insurgent collectivity in revolt is the decapitation of the people in the name of a law that presumes and produces the sovereign individual. It is the self-inflicted wound Marx saw so clearly.

This wound haunts Paine’s thinking, and he exhibits something of a desire to undo it or a regret for having done it or a magical thinking of not having done it at all. Today it is the still-open wound that so many of our legal theorists spend careers rubbing salt into; they imagine it as ointment.³⁴⁸ If the rule of law today has such good friends, then whom precisely is the foe? Are they all accounted for?³⁴⁹ But again to Paine. After securing the right of now-sovereign, now-divine individuals to pursue their own paths of commerce and enjoy the minor fruits of their labor, Paine frets, “commerce diminishes the spirit, both of patriotism and military defense.”³⁵⁰ Moreover, he revalues the law as now a good in itself and not simply a means to an end; it is its own end when it is *ours*.³⁵¹ This is why patriotism must not be deflated by an ethos of commerce. And it is why the breaking of the bonds of political solidarity is a crime far greater than even a military action against independence. Paine writes that a “distinction should be drawn, between, English soldiers taken in battle, and inhabitants in America taken in arms. The first are prisoners, but the latter traitors. The one forfeits his liberty, the other his head.”³⁵² There are no calculations of summed happiness here. The politics of friendship and equality that will sacrifice life for its betrayal establishes a new measure of freedom beyond lonely liberty. It is the same revaluation that a decade later led the French Revolutionaries to declare that the existence of Louis XVI represented a crime *per se*. “The people’s victory made him alone a rebel” Robespierre said, and the French reached the same verdict on treason as the Americans did.

If Hobbes thought individual life was inalienable in the logic of contractual sovereignty, the theorists of the American Revolution pledged life itself in the name of an emergent popular sovereignty. Hannah Arendt famously celebrated what she took as the principles of American Revolution (in sharp distinction to the French) and thought the Declaration of Independence was one of its signatures. Arendt thought the “principle” of the republic was “present in the ‘mutual pledge’ of life, fortune, and sacred honour, all of which, in a monarchy, the subjects would not ‘mutually pledge to each other,’ but to the crown.”³⁵³ But the mutuality of the pact, a pact between citizens or subjects, could certainly be present in a monarchy as well as a republic. Hobbes taught us that an implied horizontal contract could ground a vertical and total monarchical power. Thus,

³⁴⁷ *Common Sense* at 32 (caps in original).

³⁴⁸ For example, Jack Balkin recently told protestors to “occupy the Constitution” as if such occupation was in any way possible.

³⁴⁹ This question will come into better focus when we turn to James Madison and the class politics of the U.S. Constitution.

³⁵⁰ *Common Sense* at 39.

³⁵¹ *Common Sense* at 32 (“A government of our own is our natural right”). This is in conflict with his formulation where honor belongs to those who “should discover a mode of government that contained the greatest sum of individual happiness, with the least national expense.” *Id.* at 31.

³⁵² *Common Sense* at 46.

³⁵³ HANNAH ARENDT, *ON REVOLUTION* 130 (Penguin 1963).

mutuality is not what distinguishes the American effort: political vitality is. In this sense, Arendt is correct in spying the importance of a *double* dimension in the ‘happiness’ pursued in the Declaration of Independence.³⁵⁴ And in so doing, she (perhaps unintentionally) reminds us that the division of state/political (the realm of chimerical rights for Marx, the space of action and freedom for Arendt) and civil power (the true zone of human unfreedom for Marx, the place where political freedom was nonsensical and mute for Arendt) had not been fully established, and perhaps never has (contra Marx and Arendt).

To continue onward with our inquiry into the jurisprudential maxim that the law is not a suicide pact, let us look more closely at life and law in the Declaration of Independence. As noted, the original pledge was one of life, fortune, and honor (even as the Declaration declares “certain unalienable Rights” such as “Life, Liberty, and the Pursuit of Happiness”). The sacrificial pledging was the opposite of both the apocalyptic nihilism of the contemporary anti-constitutionalist Right as well as the innocent–civilian rationalization of today’s war-proceduralism liberal left. The Declaration argued that it was the “Right of the People” (and even their “duty”) to slough off despotism and institute a new government to “provide new Guards for their *future* security.”³⁵⁵ But the security was not so much for the individual person as it was for the people and their political constitution and thus their capacities as law–kings. This difference is certainly not categorical, absolute, or relentlessly maintained in the Declaration; it was, however, real.

The Declaration justified itself with a recitation of the “long train of abuses” suffered by the people at the hands of the King of Great Britain. The Declaration lists twenty-seven specific indictments against the King. The first: “He has refused his Assent to Laws, the most wholesome and necessary for the public good.” Second: “He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and . . . he has utterly neglected to attend them.” Third: “He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature . . .” Fourth: “He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.” It is not until much, much later in the litany of monarchical criminality do we read this, as indictment number twenty–four: “He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.” All combined, the conclusion is this: the King is “unfit to be the ruler of a free people.”

This valuation of freedom has become alien to our present-day thinking. Today, we have abandoned both the future and the freedom that in tandem defined the political vision of the Declaration. The primacy of the innocent civilian—whose life is precious enough to overturn a Constitutional order, to in fact, refashion the Constitutional order so as to place its “protection” at first rank (as life has been read backward into the fetal, the fetal has been read forward into life)—is the most radical inversion of the values of the

³⁵⁴ See generally, HANNAH ARENDT, *The Pursuit of Happiness*, in *ON REVOLUTION* 130 (Penguin 1963). We need to think of the political vitality in unsettling the demarcations of public/private, freedom/necessity, that Arendt held to.

³⁵⁵ DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). (emphasis added)

Declaration imaginable. The twenty-fourth indictment has become the first and last value. That those who trumpet originalism do this revaluation is a mockery; that this is also done by those committed to a “living” constitution is an unnoticed irony.

Whatever glory found in the political life of the Declaration must be held side-by-side to the unfreedoms it presumed and foretold. And as the Declaration announced the arrival of the people as a political force and tethered that force to the rule of law, we will need to consider the distinction between terror/tyranny on the one side and law/justice on the other. The Declaration praised legislative assemblies that resisted the dictates of the Crown for their surplus of “manly firmness.” The manliness of a vibrant political life was both a metaphor carrying a subordinating norm and a brute literal fact of spatial production. Alexis de Tocqueville made this observation on republican political life in the latter days of the Early Republic: “Almost all men in a democracy pursue a political career or practice a profession, whereas the women are forced, because of the limitations upon their income, to stay every day inside their houses to preside in person very closely over the details of domestic affairs.”³⁵⁶ A “woman’s independence is irretrievably lost”³⁵⁷ in this scheme and the irretrievable loss of independence was the original loss of the Declaration of Independence and the opening political move in the modern emergence of the “rule of law.” All the charges leveled against the King could be leveled against the domestic Patriarch; kingship was not abolished in the republican order, it was simply relocated and subjected to calculations of utility rather than freedom. Tocqueville believed that women accepted this “yoke” willingly; in which case we can say the law is in fact a suicide pact. But being unpersuaded by Tocqueville, one might say the law is not a suicide pact, it is a murder-suicide: in destroying half the population’s political freedom it destroyed political freedom as such. The utility calculation misfired.

Hannah Arendt lavished praise on the early Americans and their Revolution and she did so in systematic contrast to the failures of the French and their Revolution. A critical distinction she drew was the sustained respect for the law by the former. It kept men in check and its dissolution in the French Revolution opened the door for The Terror. The “American Revolution remained committed to the foundation of freedom and the establishment of lasting institutions, and to those who acted in this direction nothing was permitted that would have been outside the range of civil law.”³⁵⁸ By contrast, the French Revolution was defined by the “lawlessness of the ‘all is permitted.’”³⁵⁹ To properly think through this alleged historical and theoretical chasm, we should turn to Thomas Jefferson. Three years after authoring the Declaration of Independence, Jefferson was serving as the second governor of the State of Virginia. As an almost symbolic ratification of the new source of political sovereignty and legitimacy in the era of the rights of the people, Jefferson replaced a Chair of Divinity with a Chair of Law at the College of William and Mary. He selected his teacher, good friend, and legal mentor George Wythe as the first holder of the Chair of Law.³⁶⁰ George Wythe was

³⁵⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (“*Democracy in America*”) Book II, Chapter 11 (J.P. Mayer ed., Harper Perennial 1969) (1840).

³⁵⁷ *Id.*

³⁵⁸ HANNAH ARENDT, *ON REVOLUTION* 92 (Penguin 1963).

³⁵⁹ *Id.*

³⁶⁰ JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS THE MAKERS OF THE MASKS* 29 (2002).

a distinguished patriarch of the legal and political world of Virginia. He was “a lawyer, a signer of the Declaration of Independence, and a teacher of law . . . the first and most influential of American law professors.”³⁶¹

The first law professor, along with his brilliant pupils (Jefferson, et.al.), both before and after the Revolution, had to wrestle with the question of slavery. The dilemma confronting these bright legal minds was this: what kind of property, precisely, was the slave? In Arendt’s terminology, with regards to enslaved Africans on American soil, what was permissible within the range of the civil law? These were not easy questions. Judge John T. Noonan explains the delicate task the law assumed in acting as a stern and clear teacher to the slaves who were simultaneously conceived of as a form of property. Statutes “measured the amount of violence that masters might employ” because “without force, the alienability of the title to the human capital of blacks would have been worthless.”³⁶² The body would be broken, but broken with precision, precision in the form of a legal rule: ears could be nailed to pillories, but for no more than one hour; then in succession each ear could be sliced off the head, after each hour nailed; the naked back would then be lashed, but not more than thirty-nine lashes.³⁶³ In the awful silence following the thirty–ninth lash, one can almost hear Alan Dershowitz clapping and saying, “yes, see: constraints, limits, *law*.”

But the legal dilemma of what kind of property the slave was remained a difficult legal question to resolve. Were slaves real estate and thus tied to the laws of landed property? Or were they personal property transferable according to laws geared more toward the easy circulation of wealth? From 1776 to 1779 Jefferson and Wythe worked in committee to reform the laws so as to, as Jefferson put it, “render property certain.”³⁶⁴ However much the law wavered in producing with certainty the *type* of property the slave was, there was no uncertainty as to the status of the enslaved *as* property. When George Wythe was later sitting as a judge in the 1790s on cases involving the disputed transfer of slaves, he rendered judgment without any “need to ask about the slaves,” and in fact did not even “bother to record their names.”³⁶⁵ And this area of the civil law was of momentous importance to the polity as a polity: of the roughly 750,000 inhabitants of Virginia in the 1790 census, approximately 290,000 of them were enslaved.³⁶⁶

But enough with the magisterial restraint of the Americans and our civil law; to France, with Arendt, by contrast . . . At the historical moment George Wythe was busy judging enslaved “property,” the French Revolution was unfolding with increasing ferocity. Among the many to fall under the blade of ‘The Terror’ was Alexis de Tocqueville’s great–grandfather (and lawyer for Louis XVI at the Convention) Malesherbes. Tocqueville’s parents were also imprisoned and avoided the guillotine by the sheer luck of the timing of the fall of Robespierre. Alexis’s father, Herve de Tocqueville recounts the shattering of the normality of their lives in 1793:

³⁶¹ *Id.* at 32.

³⁶² *Id.* at 38.

³⁶³ *Id.*

³⁶⁴ *Id.* at 50.

³⁶⁵ *Id.* at 55.

³⁶⁶ U.S. CENSUS BUREAU, *Census Data for the State of Virginia*, in 1790 CENSUS INFORMATION, available at <http://www2.census.gov/prod2/decennial/documents/1790m.zip> .

On 17 December we were at the table when the concierge of the chateau came in with consternation on his face and, employing unusual language said: “Citizen Rosambo, outside are some citizens from Paris asking for you.” We all turned pale. M. de Rosambo left the room at once, and our anxiety was extreme when it became clear that he was not coming back.”³⁶⁷

Without denying or justifying (or condemning) the ‘terror’ this scene evokes, and even assuming for the sake of argument that Arendt is correct in identifying this scene (in its particularity and in its representative capacity) as ultimately a *lawless* one, it could not begin to compare to the organized and *lawful* violence and degradation—*the terror*—experienced by the enslaved persons of the State of Virginia. The unusual language that startled the concierge and bewildered Herve de Tocqueville was the language of an attempted equality: “Citizen Rosambo.” He was marked for death as an individual, a recognized being, a fellow member of political life. He lost his life but his humanity was not in doubt; his loyalty was.³⁶⁸ In France, the high were brought low and it was called lawless terror; in the United States, the low disintegrated into ‘property’ and it was called civil law. We might also note the sheer difference in scale, but I do not think terror is ultimately an empirical question. The question is, what is more terrifying: losing one’s life or being abolished while still living?

II.

If shattered individualized sovereignty and codified racialized slavery stood as the totemic twins of the rule-of-law, then the textual and historical recourse to “the people” as a unified force and source of fundamental law appears hopelessly out of place; not simply fictitious, but absurd. Yet, as we have seen, these precise orders sprang forth from antithetical origins: sovereignty was something shared prior to being scattered, and that sharing (like the scattering) was between equals even if and when equality rested upon foundational exclusions. Moreover, that equality only came from the sharing and so that power making the new world of “commons” and its “sense” operated prior to the rights it secured. But the right was understood as now more precious than the power and hence was to be, if not abolished, exiled back to the place it was imagined to have derived, in the home and the heart of the singular man. So, power and right rested together, and Paine could be perhaps seen as at one with Rousseau but in reverse: centrifugal rather than centripetal in the force and source of law. This might be why Paine was at once so at home during the French Revolution, as a “citoyen” and member

³⁶⁷ HUGH BROGAN, *ALEXIS DE TOCQUEVILLE: A LIFE* 15 (2008). Two days later the good citizens from Paris returned to the estate and arrested Malessherbes and Alexis de Tocqueville’s parents.

³⁶⁸ Saint-Just had in fact argued that Louis XVI should be judged as an “enemy,” as a lower order of humanity, and thus not be “raised to the rank of citizen” deserving of a trial. Saint-Just lost this motion and it was “Citizen Capet” who was put on trial and executed for attacking “the sovereignty of the people.” DAVID ANDRESS, *THE TERROR: THE MERCILESS WAR FOR FREEDOM IN REVOLUTIONARY FRANCE* 137 (2005).

of the Convention, and also so obviously doomed to oblivion within it, as ultimately a prisoner in the Luxembourg Prison, condemned to death and saved by fate alone.

Rousseau had sought to overcome faction via the formation of a “general will” that required and secured a division between private interests and public power, in both the individual and the body politic. In *The Social Contract*, Rousseau insisted that in a world of multiple interests, “it is what is common to those different interests which yields the social bond.”³⁶⁹ The common bond, that “act which made a people a people,”³⁷⁰ was not a collection of interests but a new thing altogether: a *public* interest in which each and every individual was to take part and to be partly refashioned by. Crucially, the common bond of the people did not abolish distinction, but simply prioritized that element within each individual that tilted toward the common good. Humans are creatures with multiple desires and “every individual as a man may have a private will contrary to, or different from, the general will that he has a citizen.”³⁷¹ The grand task of political life for Rousseau was to anchor the Republic from the potential storms of private interests, in the individual and in the polity, without in any manner denying or abolishing private interests as such. It is this element that the conservative liberalism of Alexis de Tocqueville will venerate sixty years after *The Social Contract* as “self-interest properly understood.”³⁷²

At first glance, the U.S. Constitution appears to be a close and comfortable cousin within this family of thought. The preamble is worth reconsidering in full:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Despite the opening by the people as a “we,” the chief theoreticians, political advocates, and architects of the U.S. Constitution departed radically with the unifying tendencies of Rousseau without entirely following the hyperindividualized inclinations of Paine.³⁷³ Famously, by contrast, Madison in *The Federalist Papers* conjured the people through the permanence of “faction.” The people as a people was already a people divided, and thus ironically never a people, and the collective was divided by “interests” as defined by relationships to, and in particular ownership of, property. If the unity of the people disappeared, so too did the individuality of its members: “unequal faculties of acquiring property . . . ensues a division of the society into different interests and parties. The latent causes of faction are thus sown in the nature of man.”³⁷⁴ The nature of man was tethered to the organization of interests and factions; the ontological ground of the Republic of Interests is therefore class based. Different people find political home within different genres of accumulated property, and it is where political thinking begins and returns consistently as well.

³⁶⁹ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 69 (Penguin Classics 1968) (1762).

³⁷⁰ *Id.* at 63.

³⁷¹ *Id.*

³⁷² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* Book II, Chapter 8 (J.P. Mayer ed., Harper Perennial 1969) (1840).

³⁷³ Even Paine’s redistributive economic plans stayed within this conceptual framework.

³⁷⁴ *THE FEDERALIST* NO. 10 (James Madison).

Thus understood, the people must itself be conceived as some kind of accumulation and a question for accounting. Consequently, “the people” works politically as the source of laws when it works in some majoritarian form; majorities exercise power, minorities possess rights (those with property, not those who were it). The particular numbering of that majority is not of concern here. Yet, whatever the numbering (50.1%, 64%, 70%), the majority as a majority was also the principal *object* of the rule of law. The majority was that which must be forever “checked” by an intricate labyrinth of Constitutional “balances.” Understood abstractly, it is the enduring and mysterious paradox of liberal constitutionalism; understood materially it is the victory of certain classes of white men over and against others. The paradox at the heart of the Constitution of 1787 is not that “[w]e cannot have democracy *with* constitutionalism, and we cannot have democracy *without* constitutionalism either.”³⁷⁵ Instead there is another double paradox: a propertied interest in a Republic of Interests is understood to have no interest at all, and the majority interest in a Republic of Interests shall be the one interest whose interest shall not be accounted for at all. The former is included in the meaning of American constitutionalism, the very heart of the rule-of-law, whereas the latter is banished as the true sign of lawlessness, the disorder and “confusion of the multitude.” To return to the Preamble of the Constitution, it is the People who now threaten Justice, Tranquility, and Liberty; one might even say that Justice and Liberty hinge on the production of Tranquility and the domestication of the People. Justice Jackson’s political theory in *Terminiello* thus has an originalist basis as well as a textualist hook.

It has been nearly a century since Charles Beard radically challenged the predominant belief (in being both reverential and divorced from standards of fact) that “the Constitution is not only the work of the whole people, but it also bears in it no traces of the party conflict from which it emerged.”³⁷⁶ Without following the path of economic history and biography that Beard took, and without taking too literally the political-economics of particular votes and individual interests (in some ways Beard lost all account of ideology in Marx and took direct representation of world into law to be the register of power and critique), one may start from a similar position but look in a different direction in reading *The Federalist Papers* on the ruleoflaw and the two paradoxes of interest sketched above. Madison explained that the fundamental division in society is between “those who hold and those who are without property . . . those who are creditors and those who are debtors, fall under a like discrimination.”³⁷⁷ Property itself subdivided into a multitude of types: landed, manufacturing, mercantile, and moneyed. Within each of these further subdivisions abounded as well.³⁷⁸ As noted, these divisions were the fonts of faction, and faction was the inextinguishable energy of the nation.

Real schisms existed between the forms of property and the men of “different sentiments and views” derived from them (as the sectional tariff crisis in the early 19th century would make clear)³⁷⁹, yet a terror bound them together in common cause and

³⁷⁵ BONNIE HONIG, *EMERGENCY POLITICS: PARADOX, LAW, AND DEMOCRACY* 27 (2009).

³⁷⁶ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 11 (Free Press 1941) (1913).

³⁷⁷ THE FEDERALIST NO. 10 (James Madison).

³⁷⁸ THE FEDERALIST NO. 10 (James Madison).

³⁷⁹ This spurred Calhoun’s “nullification thesis.”

defense. They confronted “common threats on the frontier”³⁸⁰ and remained a trivial power vis-à-vis the great ones of Europe. In the South, the fear of slave uprisings haunted the white imagination and also bound a collective psyche across economic division.³⁸¹ But the omnipresent threat to law and order was the specter of “*popular rights*”³⁸² made manifest in assembly. Political science would need to be developed and deployed to break the connection between popular will and constitutional assembly because that swelling and surplus majority faction of debtors and the propertyless might legislate in their self-interest (as understood by the authors of the *Federalist*). At no place is this concern more explicit than at the close of *Federalist #10*:

[D]emocracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property . . . theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

The explosion of material cleavages into the political realm via the perfect equality of political rights in the practices of democracy had to be forestalled. A contentious and tumultuous majority within one State “may kindle a flame” for a “rage for paper money, for an abolition of debts, for an equal division of property, or for any other wicked project,”³⁸³ but if “a popular insurrection happens in one state, the others will be able to quell it”³⁸⁴ with the newly empowered Union. Should the Union fail, the result would be nothing less than the erection of a “tyranny on the ruins of law and order.”³⁸⁵

The “civil war” in Massachusetts of 1786/87, precipitated by “desperate debtors” in revolt, presented a harbinger of what awaited the minority factions with the confederative status quo.³⁸⁶ Critically, the means of rebellion disturbed them far less than the ends. After all, these were all men of revolutionary experience, and the *Federalists* did not deny the right to revolt in principle. More alarming than the taking up of arms was the capacity of majorities to seize legislative powers for their wicked projects. Without sound constitutional design, the terror would move through the assemblies. So, the new Union would require the power to put down such revolts when they occurred

³⁸⁰ THE FEDERALIST NO. 25 (Alexander Hamilton).

³⁸¹ “[A]n unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who in tempestuous scenes of civil violence, may emerge into human character, and give a superiority of strength to any party which they may associate themselves.” THE FEDERALIST NO. 43 (James Madison). In this sense, the “tyranny of the majority” turns doubly frightful to the founders.

³⁸² THE FEDERALIST NO. 26 (Alexander Hamilton) (emphasis added). “The circumstances of a Revolution quickened the public sensibility on every point connected with the security of popular rights, and in some instances raised the warmth of our zeal beyond the degree which consisted with the due temperature of the body politic.”

³⁸³ THE FEDERALIST NO. 10 (James Madison).

³⁸⁴ THE FEDERALIST NO. 9 (Alexander Hamilton).

³⁸⁵ THE FEDERALIST NO. 21 (Alexander Hamilton).

³⁸⁶ THE FEDERALIST NO. 6 (James Madison). “If [Daniel] Shays had not been a *desperate debtor*, it is much to be doubted whether Massachusetts would have been plunged into a civil war.” *Id.* (emphasis in original).

outside the confines of legal formality and would need to be structured so that this majority power would be thwarted from assemblage and power. Recently, in response to the “terrorist” attacks of September 11, 2001, eminent constitutional scholars have debated whether or not the United States allows for emergency measures in times of imagined existential crisis.³⁸⁷ What is overlooked in this debate is that the Constitution is already an emergency response to a perpetual terror: the terror of the people as a people emerging into history and politics with interests all their own.

Here is the remedy provided by the Constitution to the politicized “tumors” threatening the social body with lawless ruin:

Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.³⁸⁸

There is a performative circularity to the Constitutional order: it breaks society as a deliberate political act and brokenness is the presumptive, natural and apolitical ground of the Constitutional order. In short, the interest that is no interest has produced the conditions of its permanence and its permanence is seen as the mark of its justness and rightness. Madison reconfigured the political clash between those without property and those with it, between those who labored under debts and those who issued it, as a battle between passion and interests on one side and “the rules of justice . . . [and] the permanent and aggregate interests of the community” on the other.³⁸⁹ The people are rendered transitory in contrast to the timelessness of property, even as the authority of the People must be drawn upon to secure the new regime. One is thus led to a partial agreement with Justice Jackson. As conceived by the *Federalist Papers*, and from the perspective of the people as a sovereign force, the Constitution is *not* a suicide pact; the futurity of a pact becomes the fact of the present: it is, instead, a suicide *act*. And from the perspective of a propertied oligarchy: *tranquility*.

III.

Alexis de Tocqueville sought, in a fashion, to weld the vitality of the people with the life of the law, each supplementing and suffusing the other. This required a “new political science” to break the barriers of egoism (in Marx’s terminology), abolish singularized sovereignty (of Paine’s variety) and resist the logics of commercialized protocapitalist class society (presumed and championed by Madison). At the same time, Tocqueville sought to “educate” and channel the youthful energies of democracy. Like the *Federalist* men of law and order at the end of the eighteenth century, Tocqueville worried about the emerging new power of the people. Unlike the men of reaction on both sides of the Atlantic, Tocqueville understood the spreading egalitarian sentiment to be an

³⁸⁷ See Bruce Ackerman, *The Emergency Constitution* (113 YALE L.J. 1029 (2004)) in contrast with Laurence Tribe, *The Anti-Emergency Constitution* (113 YALE L.J. 1801 (2004)).

³⁸⁸ THE FEDERALIST NO. 52 (James Madison).

³⁸⁹ THE FEDERALIST NO. 10 (James Madison).

“irresistible revolution.” In sum, the vitality of the people, the body and spirit of the republic, had to navigate two extremities or excesses emanating from the historical swell of egalitarianism that also produced their political capacities. First, one must stand guard against the excesses of self-interests whereby liberty degenerates into license, and man comes to exist “in and for himself” alone. Conversely, the excesses of men coming together, of working in collection, haunt Tocqueville too, as here the “disorderly passions” and “wild instincts” of the people open up and usher in revolutionary moments.³⁹⁰ As possible and partial antidote to these two tendencies, Tocqueville suggested that we look to the organization of the judicial power in the United States, as institutional order and sociopolitical practice.³⁹¹ The rule of lawyers now stood at the heart of the rule of law.

Tocqueville viewed the constitution of American judicial power as not only exemplary but singular. No other “nation in the world has organized judicial power in the same way as the Americans.”³⁹² It does however share some “traditional attributes” of judicial power with other national systems: the power rules upon the law with reference to a particular case; the power attends first to that particularity and only derivatively to general principles; and lastly, the power must be called upon rather than itself independently solicit the particularity on which it rules.³⁹³ The central difference Tocqueville identified between the American judiciary and other nations, what made it unique, is that the judiciary may ground its decision-making power on Constitutional grounds and thus render moot laws it interprets as unconstitutional. Tocqueville recognized that this configuration of judicial power had invested the judicial branch of the government “with immense political power.”³⁹⁴ Two things could temper this immense power: the traditional attributes of judicial power delineated above and the ability of the constituting sovereign power, the people as a People, to amend the Constitution and thereby ultimately “reduce the judges to obedience.” With such an immensity of power residing in the judiciary, one finds a political culture in which the “judicial authority is invoked in almost every political context.”

It is the ubiquity of this invocation that must generate an immense tension with Tocqueville’s notion of “liberty” and political vitality. For Tocqueville, liberty is not mere license to be left alone for purely private pursuits, a regime of “negative liberty;”³⁹⁵ rather, it is an invitation and incitement, perhaps even a demand, to relocate and reconceptualize interest in and through a politics of participation and shared self-governance: it is a *political* liberty. Such an intertwining of interests makes a “man care for his fellows, and, in a sense, he often finds his self-interest in forgetting about

³⁹⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 13; 16 (J.P. Mayer ed., Harper Perennial 1969) (1840). Here, the experience of revolutionary France is very much animating Tocqueville’s anxieties.

³⁹¹ *The Federalists* imagined the judiciary as the “citadel of the public justice and the public security” and “guardians of the Constitution.” *Federalist* #78. The judiciary was twice removed from the people in that its members were appointed by an executive power itself selected by an electoral college and confirmed by a Senate not directly determined by popular vote. Moreover, judges served for life tenures. The judiciary stood as calm reason in the face of the “impetuous vortex” of the legislative power. *Federalist* # 48.

³⁹² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 99 (J.P. Mayer ed., Harper Perennial 1969) (1840).

³⁹³ *Id.* at 100.

³⁹⁴ *Id.*

³⁹⁵ Isaiah Berlin, *Two Concepts of Liberty* (1958).

himself.”³⁹⁶ Liberty thus understood flourishes from bringing “men constantly into contact, despite the instincts that separate them.”³⁹⁷ And this too is critical for understanding liberty in the Tocquevillian sense. Our instincts in modernity run toward separation once the antique bonds of self and place dissolved with the feudal order, and thus liberty is a practice to be constantly performed in order to create and nurture democratic subjects. Without the constant exercise of these practices, without these “daily duties performed,” one might find order but one will not find freedom. This is why Tocqueville places such hope in administrative decentralization and the life of the township. It permits the handling and circulation of power throughout the sociopolitical body and places liberty “within the people’s reach.”³⁹⁸ Here we have power “broken into fragments” so that it can be handled and shaped and transformed by the “maximum number of people.”³⁹⁹ Power is broken, but the people are tethered together; power circulates in the name of liberty rather than being blocked in the name of right.

One must now ask: to what extent can Tocqueville’s thesis—that the organization of the judicial power in the United States is the best way to preserve order and maintain political liberty—survive an interrogation through Tocqueville’s own theoretical formulations about liberty and order? Recall that a defining characteristic of judicial power is that it is seized of the particular case, and that the judge’s decision is intended “just to affect some private interest.” Now, if judicial authority is, as Tocqueville tells us it is, invoked constantly in political contexts (it could not be not invoked constantly given the power residing there) and if that authority may be seized of a matter only through the articulation of the particular case, the private interest at hand, then there exists a structural incentive to disaggregate political claims and interests into private ones. And this practice ultimately runs counter to Tocqueville’s insistence that the “knowledge of how to combine is the mother of all forms of knowledge; on its progress depends that of all others.”⁴⁰⁰ Rather than locating private interest in participation in a common project, a common good, the judicial organization of power tempts us into a reversal and lays the groundwork for one of Tocqueville’s feared excesses: the disintegration of political life into the uncivilized lunge of a privatized and commercial one, a world of unchecked rivalry and unknown fraternity.

Further, judicial power operates in a highly formalized and professionalized space, a space clouded with the mystery of its “judicial attributes and procedures,” where the derivative attacks on general principles transpire within “obscure arguments,” thus serving to “partly hide the importance of the attack from public observance.”⁴⁰¹ This is the antithesis of Tocqueville’s celebrated township form of power; here is not the circulation of fragmented power wielded and handled by the maximum number of peoples: the democratic subject does not exercise power, the administered subject instead appeals to it. The space is now wide open for the supplanting of participation with spectatorship. True, Tocqueville informed us that the judicial power may be tamed, that

³⁹⁶ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 510 (J.P. Mayer ed., Harper Perennial 1969) (1840).

³⁹⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 511 (J.P. Mayer ed., Harper Perennial 1969) (1840).

³⁹⁸ *Id.* at 63.

³⁹⁹ *Id.* at 69.

⁴⁰⁰ *Id.* at 517.

⁴⁰¹ *Id.* at 102.

the judges may be brought to “obedience” by the people, but the problem here is not that the judiciary has too much power in the scheme of things. It is rather that the judicial power so organized and set into motion stands to undermine and even eviscerate the political liberty Tocqueville championed, the liberty, incidentally, which would be a prerequisite for taming this or that particular cluster of governmental power.

Nonetheless, even assuming that the organization of judicial power in the United States preserves liberty, what shall we make of the claim that it safeguards order as Tocqueville imagines? Liberty and order are closely linked for Tocqueville: “daily duties performed or rights exercised keep municipal life constantly alive. There is a continual gentle political activity which keeps society on the move without turmoil.”⁴⁰² Tocqueville harbors no longing for revolutionary activity or mass political action; surplus tumultuousness is to be carefully guarded against. It threatens vitality as much as atrophy, but from the opposite direction. How then does he imagine checking the overreach of judicial power without excess? As Tocqueville reminds us, the Constitution “rules both legislators and simple citizens.”⁴⁰³ It is not open to revision by the everyday politics, the simple legislative act; nor, however, is it immutable: the constituting power, the people, may change the Constitution.

If it involved only everyday politics, then the statement that the Constitution ‘rules both legislators and simple citizens’ would lose its theoretical and political bite. Now, we might ask generally, and cannot not ask our theorist of liberty as practice, what is a theory without a practice? That is, to render obedience, must not this power of rendering be not simply theorized, but *practiced*? And if it is so practiced, what then of certain stabilities required by a conservative, yet liberal, order? We would in fact a society on the move, but how could it be without certain degrees of turmoil, almost by definition? Tocqueville in fact understood the instability of the law in the ancient regime of France to have been an important source of its downfall. He argued that “contempt” for the law grew from the fact that the “eighteenth century government seems to have made a fetish of tinkering with the laws of the land.”⁴⁰⁴ In many ways, the practice of popular sovereignty seemed to carry within it the almost inevitable logic of the institutionalization of its very excess by the uncertain duration of basic law: “the danger [is] that revolutionary instincts will mellow and assume more regular shape without entirely disappearing, but will gradually be transformed into mores of government and administrative habits.”⁴⁰⁵

The survival of the life of the law and the republic therefore required a long view, which the people as the people constitutionally lacked in Tocqueville’s thinking.⁴⁰⁶ His worry about the impulses and instincts of democracy led him to reintroduce the

⁴⁰² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 69 (J.P. Mayer ed., Harper Perennial 1969) (1840).

⁴⁰³ *Id.* at 102.

⁴⁰⁴ ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 66 (Anchor Books, 1983).

⁴⁰⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 700 (J.P. Mayer ed., Harper Perennial 1969) (1840).

⁴⁰⁶ The tissue connecting time and law is precedent in the United States and England according to Tocqueville. This is what renders the law an ultimately *conservative* force. The breaking of precedent with no precedent to follow, the breaking of precedent *in toto*, a signature element of the anti-constitutionalist Right today, can only be viewed as profoundly *radical* from a Tocquevillian perspective. It is the radical rupture with conservatism that must be kept in view in *Bush v. Gore* (531 U.S. 92 (2000)), in Terri Schiavo’s case, in the Torture Memos (each discussed in previous chapters of this dissertation).

aristocratic element into the center of his theorizing and thus unleashed an order antithetical to a people ruling: they would instead be ruled by the “sovereignty of the law.”⁴⁰⁷ In the United States, devoid of old families connected across generations to land and place, the “aristocracy is found at the bar and on the bench.”⁴⁰⁸ The power of this aristocracy constituted the “most potent barrier against the excess of democracy” because the lawyers by training and temperament “conceive a deep distaste for the activities of the crowd and secretly despise the government of the people.”⁴⁰⁹ Even this strong counterpower to the democratic age could not overturn or reverse it however; and in some strange flash of self-interest, the people as a power would not resist that which distrusted it. Each would find its interest in the other. So, in relationship to the demos, lawyers “derive a twin power *from it and over it*.”⁴¹⁰ In contrast to edicts and constraint, the power of the law is subtle. The counterdemocratic aristocracy, that which is in fact sovereign as a practice, “wraps itself around society as a whole, it is felt in all social classes, constantly continues to work in secret upon them without their knowing until it has shaped them to its own desires.”⁴¹¹ On the one hand: the law is a tutor, a guide, a gentle brake; on the other: the law is a master, a foe, a domination. In both instances: inequality configures the relationship and reverses the order of obedience as conceived in popular sovereignty as Tocqueville himself conceived it. The submission is desired and the desire is produced by the practices of submission: a “new political science for a world itself quite new.”

IV.

In 1958, almost a decade after the decision in *Terminiello*, Justice William O. Douglas appeared on the nationally broadcast Mike Wallace Show. The interview was one of a series entitled “Survival and Freedom.” In tones infused with the lingering paranoia and fright of a receding McCarthyism, Wallace pressed Justice Douglas to consider the dangers of communism, the threat of espionage, the enemies here and there, the risk to survival with the expansion of freedom. At one point, Justice Douglas stated simply: “being alive is quite a risk!”⁴¹² Risk was that which life carried with it. Today, the divide of the life of the law and the life of “the people” is increasingly breaking down; ironically, it is the deterioration of both, paradoxically in the name of both risk elimination (in the age of terror) *and* in the abandonment of all sense of risk (in the time of apocalypse), that repositions them as close together as at any point since their joint arrival as *political* powers at the end of the eighteenth century. But it is a mistake to

⁴⁰⁷ The “sovereignty of the law” produces and protects a “healthy freedom.” ALEXIS DE TOCQUEVILLE, *THE OLD REGIME AND THE FRENCH REVOLUTION* 120 (Anchor Books, 1983).

⁴⁰⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 313 (Gerald Bevan trans., Penguin Classics, 2003).

⁴⁰⁹ *Id.* at 308.

⁴¹⁰ *Id.* at 310 (emphasis added).

⁴¹¹ *Id.* at 315. This stands side-by-side in Volume One of *Democracy in America* with Tocqueville’s statement that “[i]n America the sovereignty of the people is not, as with certain nations, a hidden or barren notion; it is acknowledged in custom, celebrated by law.” *Id.* at 68. Where should we look: to the celebration or to the secret? It is not always clear with Alexis de Tocqueville.

⁴¹² Archived at the Harry Ransom Center for the Humanities at the University of Texas at Austin.

forget the confusions and even antagonisms that shaped them as well from the beginning. If this chapter's analysis pressed to the fore one view of that relationship, it is for cause: to insist that at the twilight of a particular tradition we recall with reason why we might not cling too tightly to it. That position no doubt carries with it a variety of risks, but then it also carries with it the promises of life.

end

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