

東京大学 21世紀COEプログラム

先進国における《政策システム》の創出

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"Invention of Policy Systems in Advanced Countries"



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William E. Connolly*

Johns Hopkins University

The Gang of Five

I am an American who typically votes democratic. I note this unsurprising fact to mark a defining feature of politics in a democratic state. Democratic politics requires partisanship. Does it also depend upon access to an impartial standard, procedure, or constitution through which to regulate partisanship? The answer is complex. The public authority of democratic constitutionalism cannot be established by fidelity to a written text alone. It cannot, first, because a constitution consists of words whose meanings are not definitively fixed even when initially composed; second, because those words must later be applied in new and unforeseen circumstances; and, third, because the spirit through which the open-textured document is applied must give priority to public elections if the democratic element of constitutionalism is to be honored. If judicial authorities in a demo-constitutional state override this last consideration citizen trust in the wisdom of judicial decisions becomes corroded.

Knowing this much, you will not be surprised to learn how outraged I was over the handling of the recount issues during the Presidential election of 2000. The key participants were the Republican Florida Secretary of State, the Republican Governor, the Republican state legislature, the national Republican campaign, the hired Republican guns who intimidated the recount Commission in one district at a pivotal moment and, above all, the Gang of Five Republican appointed judges on the Supreme Court who stopped the recount process before Bush's razor-thin lead was subjected to a recount of disputed ballots. I did not expect the parties to rise above partisanship, in the sense of applying a neutral standard wholly independent of it. I doubt there is such a place to which to rise. I expected the majority of the Supreme Court to fold partisanship for the integrity of democratic elections into its interpretation of the porous words of the law and Constitution, using those considerations to chasten partisanship for the candidate it favored. In this instance, however, the Gang of Five first jumped headlong into a situation they could have avoided or entered hesitantly and then halted the vote count authoritatively. They allowed partisan loyalty to a candidate to override partisanship for democracy in a setting where the applicable principles provided ample possibility to go in the other direction. That partisanship reduced public confidence in the Court and

*Krieger-Eisenhower Professor of Political Science, The Johns Hopkins University, Baltimore

eroded the bonds of trust between partisans upon which the legitimacy of a democratic state depends.

Most of the Gang of Five present themselves as “strict constructionists”. That allows them to pretend that no partisanship is involved in their decisions. But the doctrine of strict constructionism received a body blow from this action. Citizens who had ignored esoteric debates over the logic of constitutional interpretation now saw that doctrine and this decision placed side by side. The cover of strict constructionism was blown. That was mostly to the good. But because strict constructionism retains a prominent presence in popular discourse about constitutional interpretation, the loss of belief that the Court is guided by it exacerbates public cynicism.

In the middle of this quagmire, Justice Souter, previously appointed by a Republican President, emerges as a hero. Here are some statements from his dissenting opinion:

If this court had allowed the state to follow the course indicated by the opinions of its own Supreme Court, it is entirely possible that there would ultimately have been no issue requiring our review.

None of the state court interpretations were unreasonable to the point of displacing the legislative enactment quoted. As I will note below, other interpretations were of course possible and some might have been better than those adopted by the Florida court’s majority...

The {state legislature’s} statute does not define a ‘legal vote’...The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute...which contains a provision that no vote may be disregarded ‘if there is a clear indication of the intent of the voter as determined by a canvassing board’.

The majority might have concluded that ‘rejection’ should refer to machine malfunction...There is, however, nothing nonjudicial in the Florida majority’s more hospitable reading...Whatever people of good will and good sense may argue about the merits of the Florida Court’s reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation...”¹

Justice Souter acknowledges that the judges found themselves in uncharted territory. His language of “good will”, “good sense” and “reasonable statutory interpretation” conveys the sensibility he brings to such recurrent moments. He also expresses presumptive partiality for democracy when he seeks to allow “the state the opportunity to count all disputed ballots now.” When Souter encounters uncertainty in electoral law he fills it with partisanship in favor of counting the votes of all citizens.

What does this event teach about the challenge of sovereignty in a democratic state? What, more closely, is the relation between sovereignty and law at such moments of uncertainty? What kind of sensibility on the part of judges and ethos on the part of citizens is pertinent to democratic pluralism?

The Ethos of Sovereignty

According to theorists from a variety of intellectual traditions the Florida election case reflects a fundamental paradox located at the center of the rule of law in a democratic society. Jean Jacques Rousseau, Carl Schmitt, Kafka, Paul Ricoeur, Hannah Arendt, Bonnie Honig, Jacques Derrida, Alan Keenan, Gilles Deleuze, Giorgio Agamben, Michael Hardt and Antonio Negri, while disagreeing on numerous issues, concur in asserting that a democratic state that seeks to honor the rule of law is also one in which a sovereign power operating both inside and outside the law is brought into play. Since the paradox expresses the lawlessness upon which the rule of law depends it is often hidden from public view. Strict constructionism is merely one doctrine by which this rift at the center of constitutionalism is obscured.

While all these theorists confront the paradox of sovereignty, only a few link it to the politics of becoming. But the two are intimately connected. Because of the politics of becoming gaps and fissures open up periodically between positional sovereignty as the highest authority to interpret the law and sovereignty as the effective power to decide what it will be. These two dimensions of sovereignty often shade into one another. But the discrepancy sometimes becomes a fissure that is too dramatic to ignore.

Rousseau, the key founder of democratic theory, concentrates the paradox in the founding of a republic, asserting that “for an emerging people to appreciate healthy maxims..and follow the fundamental rules of statecraft, the effect would have to become the cause”.² That is, for a government of self rule to come into being out of a nondemocratic condition the public ethos needed for democratic governance would have to be preceded by the kind of laws that nourish it; but those good laws, in turn, would need to be preceded by that very ethos if *they* are to emerge. The laws and the ethos must precede each other. That is the paradox of founding. Rousseau resolved it through recourse to the fiction of a wise Legislator above the law who imbues people with an ethos of self rule. He knew this fiction is insufficient to the actuality of any people imbued with undemocratic customs, priorities, habits and norms. He knew, that is, that it is exceedingly difficult to found a democracy in a place that is not already democratic. Moreover, he knew that words, rules and laws encounter uncertainty as they bump into new and unforeseen circumstances.³ He thus saw that even when a democracy is successfully founded, the paradox returns as a recurring dimension of

democratic sovereignty.

His response is to imagine a regime where time crawls slowly, so that a homogeneous ethos of sovereignty can persist across generations. He also endorses an extensive micropolitics to install in the populace the very sentiments they are supposed to will into being through autonomous acts of governing. He thus supports a simple, single, public faith; a unified educational system; yearly festivals and rituals in which all citizens participate; close regulation of the theater; a common mode of dress for adults to discourage amorous relations with foreigners; tight rules of chastity to curtail the passions; a nuclear family in which the adult male alone represents it in public life; the minimization of commerce inside the regime; its further reduction with merchants outside the polity; a society of self-subsistent farms; severe restrictions on economic inequality; a citizen militia in which all young adult males serve; and so on and on. The effect of these institutions, disciplines, prohibitions and channels is to install the same habits, sentiments, and self-restraints in the citizenry, to create an national ethos of sovereignty.

Rousseau could provide a good critique of strict constructionism. He would say that while it is represented to provide the means by which to give detached readings of the constitution, those readings actually express a conjunction between the text and mores infused into the sensibilities of judges and citizens. Put another way, strict constructionism juridicalizes the ruse Rousseau invested in the legislator whom he introduced to negotiate the paradox of democratic founding. "It is this sublime reason, which rises above the grasp of common men, whose decisions the legislator places in the mouths of the immortals in order to convince by divine authority those who cannot be moved by human prudence."⁴ Substitute the phrase "the judges place into the mouths of the founding fathers", for "the legislator places in the mouths of immortals" and you uncover the esoteric meaning of strict constructionism. Strict constructionism is a political formula that bathes the discretionary power of judges in the rhetoric of servitude to an abstract document.

No democrat has plumbed the paradox of democratic sovereignty more deeply than Rousseau. But, for all that, the ethos he supports is too out of touch with defining features of contemporary life to past muster today. His response demands a small, isolated, unitarian polity crawling along at a snail's pace, while we inhabit large, pluralistic states, tied to global networks of power, in which the gap between the fastest and slowest zones of culture is large. Rousseau does not negotiate a response through which democracy, pluralism, law and sovereignty speak affirmatively to each other in a fast paced world. For that very reason, however, he does help us to discern why the desire to return to a slow world so easily becomes hitched to the micropolitics of strict constructionism and democratic fundamentalism.

Biopolitics and Micropolitics

Gorgio Agamben contends the paradox of sovereignty has become stark in late-modernity as the state installs itself deeply into biological life. Biological issues become prominent in state decisions regarding abortion, artificial insemination, the line between life and death, organ transplant, treatment of prisoners of war, social disciplines, strategies of citizen induction, and policies of “racial” inclusion and exclusion.

The democratic state, Agamben says, requires a final authority to resolve questions of law while that authority must often exceed the law in making its decisions. Modern sovereignty carries forward, if implicitly, the pagan logic of *homo sacer*, or the sacred man. Homo Sacer is “the life that cannot be sacrificed and yet may be killed.”⁵ This state logic is connected to sovereignty because the “sovereign sphere is the sphere in which it is permitted to kill without committing homicide and without celebrating a sacrifice.”⁶ The “logic” that binds sovereignty, the sacred, and biopolitics together, Agamben contends, leads to a state in which a supreme power can annihilate an entire minority in the name of national unity. It is the nexus between sovereignty, the sacred, and biopolitics that makes the concentration camp the paradigm of modern politics, with the Nazi regime expressing its outer limit. When you add the Guantanamo Gulag and Abu Ghraib to the list it is apparent how Agamben extends the paradox of American sovereignty from a constitutional dispute over an election to the logic of imperial power.

Agamben finds the paradoxical logic of sovereignty so immovable that he seeks a way to overcome its aporias entirely. Here are two formulations announcing that necessity:

And only if it is possible to think the relation between potentiality and actuality differently--and even to think beyond this relation--will it be possible to think a constituting power wholly released from the sovereign ban. Until {this happens} a political theory freed from the aporias of sovereignty remains unthinkable.

Only if it is possible to think the Being of abandonment beyond every idea of law will we have moved out of the paradox of sovereignty toward a politics of freedom from every ban.⁷

Nowhere in this book, however, is a way out actually proposed. Agamben thus carries us through the conjunction of sovereignty, the sacred, and biopolitics to an historical impasse. Sovereignty is indispensable to modern politics but it generates an unacceptable result. Is it possible to slip through Agamben’s insistence that the paradox must be overcome entirely by rethinking the logic of his

analysis? I think so. I will suggest that while Agamben's is insightful in identifying key elements in sovereignty and in pointing to their dangers, the very formalism of his analysis disarms the most promising route to negotiate these issues. I will examine three elements in his account: the role of the sacred, the relation between biopolitics and sovereignty, and the "logic" of sovereignty.

Something might be sacred because it is held to represent divinity, or be a book that is divinely inspired, or be a ruler divinely authorized, or be a set of rituals expressing the highest human relation to the divine. Those who disturb or snub such things are said to deserve punishment, or even death, not because they touch the sacred, but because they do so in a blasphemous way. They translate a divine symbol into an idol; or mock a sacred text; or ridicule a beloved priesthood, or disparage a sacred constitution. Spinoza was cursed and banned because he challenged the faith of the Elders in the beleaguered Hebrew community of Amsterdam in the 17th century. The banning fits Agamben's model of one who is "included while being excluded." But Spinoza is included as a pariah through exclusion because he defiled the sacred, not because he participated in it. When I call a governing faction of the Supreme Court "The Gang of Five", some will say that I show lack of awe for a body that occupies an essential role at the heart of sovereignty. To them, I defile a sacred institution.

There is often ambivalence in people's orientation to the sacred, an ambivalence concealed through fear of retribution by God or their compatriots. Those demanding punishment of others who defile what they take to be sacred, familiarly enough, often intensify the demand because of the very ambivalence they themselves feel. Spinoza, Nietzsche, and Freud, among others, read the punishment of blasphemy in this way. And each himself was accused of blasphemy because of that very analysis. None, however, says that *homo sacer* is part of the sacred.

The issue is pertinent because in a political culture of deep pluralism--a culture in which people honor different existential faiths and final sources of morality--different images of the sacred unavoidably and repeatedly bump into each other. What is needed today is a cautious relaxation of discourse about the sacred, doing so to come to terms affirmatively with the irreducible plurality of sacred objects in late-modern life. With respect to sovereignty it is important to underline the significance of acts by which deep conflicts are settled; but it is equally important not to elevate them to the level of the sacred.

Agamben also contends that biopolitics has intensified today. That intensification translates the paradox of sovereignty into a potential disaster. It is well to recall, however, that every way of life involves the infusion of norms, judgments and standards into the affective life of participants. Every

way of life is bio-cultural and bio-political. Lucretius, Augustine, Spinoza, Rousseau and Merleau-Ponty, writing at different periods, all appreciate the layering of culture into biological life. They treat the biological, not as merely the genetic or the fixed, but also as the introjection of culture into inter-wired layers of corporeality.

The moment of truth in Agamben's account is that in late-modern life technologies deployed by physicians, biologists, geneticists, prisons, corporate advertisers, military training camps, televangelists, media talking-heads, film makers, and psychiatrists sink deeply into the grammar of human biology. They help to shape bio-cultural being. Agamben's review of new medical technologies to keep people breathing after their brains have stopped functioning signifies the importance of this change, showing how a sovereign authority now must decide when death has arrived rather than letting such a decision reflect the slow play of bio-cultural forces. Numerous such judgments, previously left to religious tradition in predominantly Christian cultures, now become explicit issues of law and sovereignty in religiously diverse states.

But Agamben also tends to describe the state as a "nation-state". He fails to ask whether the disturbing developments he charts flow not simply from a conjunction between biopolitics and sovereignty but from a more fateful accord between them and intensive drives to national unitarianism. If and as the reactive drive to restore the fictive unity of a Christian--or even Judaic-Christian--nation is relaxed it becomes possible to negotiate a more generous ethos in which sovereignty is practiced. The nexus between biology, politics and sovereignty remains in a pluralist culture. But the most ominous dangers of sovereignty are reduced. Put another way, it is the quality of the ethos infusing sovereignty that is critical to political life, not the conjunction between sovereignty and biopolitics alone.

Agamben, as already implied, sometimes acts as if an account of the "logic of sovereignty" discloses ironclad paradoxes, paradoxes to be resolved only by transcending this logic. His mode of analysis engenders the eschatological gesture with which it closes. Politics and culture, however, do not possess as tight a logic as Agamben suggests. They are more littered, layered and complex than that. The dense materiality of culture ensures that it does not correspond neatly to any design, form, pattern of efficient causality, or iron clad set of paradoxes.

Agamben displays the hubris of intellectualism when he encloses political culture within a tight logic. Some theorists express that hubris by applying a tight model of causal explanation to social processes, others by applying a closed model of historical realization, and others yet by resolving the first two images into paradoxes so tightly defined only a radical reconstitution of the world could

rise above them. All three stances understate the extent to which the complexity of biopolitical culture exceeds a consummate logic of explanation, interpretation or paradoxicality. If you loosen Agamben's logic of paradox without eliminating it altogether you express more appreciation for the materialization of culture and locate more space to maneuver within the paradoxes he delineates. The best way to approach this issue, perhaps, is to delineate two ambiguities residing in sovereignty.

The first ambiguity, sometimes intimated by Agamben, is an equivocation inside the idea of sovereignty between acting with final authority and acting with irresistible power. This finds expression in the OED, in its definition of sovereignty as "supremacy in respect of power, domination, or rank; supreme dominion, authority or rule." The idea of finality runs through these terms; but in some it expresses final authority and in others irresistible effect. Both ideas find some presence in the terms "rank" and "rule". Agamben senses the difference, in his assertion that the sovereign decides the exception. But, within the idea of the exception "decided" by the sovereign, an oscillation lingers between a juridical authority that decides the exception when available law is insufficient and other cultural forces that insert themselves irresistibly into the outcome.

This ambiguity inside sovereign finality finds expression in Christian theology as well as state politics. The point of the medieval nominalist critique of finalist theology is that the projection of an intrinsic purpose in the world undermines the very idea of God's omnipotence. A sovereign God, the radical devotees contended, is one touched by no intrinsic purpose limiting His power. To love God devoutly is to subtract any limit from its Being. So they attacked the doctrine through which Christian theology had bestowed political meaning, limits and direction upon life. They expanded the sense of contingency in nature in order to obey more completely a God of absolute sovereignty. Their opponents said that this radical theology also subtracted meaning and purpose from the world over which God presided. The intensity of the debate is revealed by the fact that the future Saint Thomas Aquinas was officially defined by the Church as a heretic during the heyday of nominalism.⁸

This theological debate subsists within the contemporary practice of political sovereignty. *The finality of sovereignty circulates uncertainly between authoritative sites of enunciation and irresistible forces of power.* This is not a *confusion* in the idea of sovereignty--a misunderstanding to be eliminated by a sharper definition of the term. It is, rather, the *zone of instability* sovereignty inhabits.

The political significance of the dissonant conjunction between the effective and authoritative dimensions of sovereignty becomes apparent when linked to a second oscillation. Alexis de

Tocqueville discerned it in 19th century American democracy. “The principle of sovereignty of the people,” he says, “which is always to be found, more or less, at the bottom of almost all human institutions, usually remains buried there.”⁹ In European societies, the claim of Divine Right invested sovereign authority in the King; but below that authority, enabling and confining it, were the traditions infused into the multitude. The subterranean interplay between the multitude, tradition and positional sovereignty enabled some initiatives by the official sovereign, resisted others, and rendered others unthinkable.

The multitude, imperfectly infused with specific traditions, comes into the fore in a democratic regime. It helps to set the ethos in which official sovereignty is set. Better put, in democratic, constitutional states sovereignty circulates uncertainly between the multitude, traditions infused into it, and constitutionally sanctioned authorities. How would duck hunters and pick up truck drivers in the States today, for instance, respond to a Supreme Court decision that they give up all guns? Does an unconscious anticipation of that militance influence the cases brought by plaintiffs and decisions made by the court? For that matter, what would have happened to the decision of the Gang of Five if a militant electorate, insisting that the essence of democracy requires a concerted effort to count the votes accurately in a close election, had boycotted work, blocked expressways with cars and trucks, refused jury duty, and otherwise interrupted everyday life? The dangerous confrontation would have exposed how the constitutive components of sovereignty do not always coincide. The question is not purely hypothetical, because when the recount issue was still alive the electronic news media repeatedly reported that there would be a vitriolic response by Republicans if the official vote count went against George W. Bush. A thick context of the thinkable and the unthinkable, the habitually expected and the impermissible, the politically acceptable and the morally outrageous, enters into authoritative readings of constitutional texts and irresistible acts of sovereign power. The micropolitics of sovereignty inhabits the subterranean circulation between them.

According to Tocqueville the ethos infusing American sovereignty in the 19th century was above all agriculture and a protestant, Christian tradition. That is why Amerindians could not be included in the new settler society, regardless of what the positional sovereign asserted. So when a Supreme Court decision ratified the autonomy of the Cherokee people in the southeast, a sovereign ethos of Christian superiority personified by settler vigilante groups and the refusal by President Jackson to enforce the decision overwhelmed the positional sovereignty of the court. The irresistible demand that European stock and Christian belief provide the basis of the Republic overturned the positional authority of the Court. Here is how Tocqueville presents the relations between the “American government” and “the white population” each time a new area was reserved by treaty for the “Indians”:

Who can guarantee that they will be able to remain in peace in their new asylum? The United States pledges itself to maintain them there, but the territory they now occupy was formerly secured to them by the most solemn oaths. Now, the American government does not, it is true, take their land from them, but it allows encroachments on it. No doubt within a few years the same white population which is now pressing around them will again be on their tracks in the solitudes of Arkansas; then they will suffer again from the same ills without the same remedies; and because sooner or later there will be no land left for them, their only refuge will be the grave.¹⁰

Was the court prepared to order the settlers in and around Georgia to march north and west, instead of allowing the Cherokee to be sent to Oklahoma in the march of death? Tocqueville himself had regrets about this result. But he did not dissent militantly from it because of his view that Christendom must form the first “political institution” of America. Amerindians were thus set up to be the sovereign exception, the people to be excluded from the territory they occupied first. In every territorial civilization, Tocqueville says, “there are certain great social principles which a people either introduces everywhere or tolerates nowhere.”¹¹ Strict constructionists implicitly seek a return of that culture of sovereignty. To them a strict reading of the constitution inserts a conservative rendering of Christianity into the ethos of sovereignty.

The sovereign process Tocqueville describes is already invested in the 18th and 19th centuries in a fateful conjunction between biopolitics and sovereignty. The living space available to Amerindians was squeezed by the effective sovereignty over the land by Christian settlers. But the circulation Tocqueville charts does not fit the tight logic Agamben characterizes. *If* a political movement, drawing part of its sustenance from another dimension of Christian faith, had successfully altered the ethos in which Presidents governed, courts decided, and settlers responded to court decisions, the paradox of sovereignty would remain, biopolitics would persist, and the relevant constitutional language would still be insufficient to judicial decisions. But the alternative ethos would incline the confluence of court decisions and popular action in a different direction. Citizen participation in the ethos of sovereignty takes place through the micropolitics of sovereignty.

So the practice of sovereignty is composed by a plurality of elements--an oscillation between irresistible power and official authority and between the official site of sovereignty and the institutionally embedded ethos flowing into it. But would it not be more rigorous to cleanse the concept of this litter? Isn't sovereignty inflated into all of politics if you do not? My judgment is that it is possible to minimize the risk by focusing sovereignty on pivotal moments when final decisions are needed. It is precisely during such moments that the elements we have dissected reverberate back

and forth. When the next sharp turn in time arrives, when a sovereign decision is needed and established precedents are insufficient--these elements will again enter into circulation. They will form a protracted crystal of time from which the next settlement of sovereignty emerges. It is better, then, to include inside the concept the elements that enter into this circulation. Even though the conceptual cleansing operation will eventually fail, the attempt to accomplish it dampens citizen efforts to participate in the shape of sovereignty.

The relevance of this point to the contemporary world is underlined by reviewing its connection to the Nazi holocaust, the key example informing Agamben's study. The conjunction of biopolitics and Article 48 of the Weimar Republic did not alone generate the Nazi Holocaust against Jews, the Roma and homosexuals. A series of intense relays between those factors and a political culture suffused with antisemitism and resentment against defeat in World War I generated the devastating result. Without this vengeful ethos of sovereignty, the conjunction between biopolitics and Article 48 might have turned out differently. An ethos of sovereignty is both external to sovereignty and internal to sovereignty, both part of it and one of its cultural conditions of being.

Gilles Deleuze and Felix Guattari concur in the perspective advanced here. Agreeing that there is a rift at the center of sovereignty, they nonetheless find fascism to flow from a series of "resonances" between state action, fascist gangs, and a large segment of the populace providing passive support to fascism. They speak to the micropolitics by which that ethos of sovereignty was consolidated, allowing the negative case of fascism to provide clues to the corollary importance of micropolitics to a pluralist ethos of sovereignty:

But fascism is inseparable from the proliferation of molecular focuses in interaction, which skip from point to point to point, *before* beginning to resonate together in the National Socialist State. Rural fascism and city or neighborhood fascism, youth fascism and war veteran's fascism, fascism of the Left and fascism of the Right, fascism of the couple, family, school, and office: every fascism is defined by a micro-black hole that stands on its own and communicates with the others, before resonating in a great, generalized, central black hole...Even after the National Socialist State had been established, microfascisms persisted that gave it unequalled ability to act upon the 'masses.'^{1 2}

Pluralist Democracy and Sovereignty

The sovereign is not simply (as Agamben and Schmitt tend to say) *he* (or *she*) who first decides that there is an exception then decides how to resolve it.^{1 3} Sovereign is *that* which decides an exception exists and how to decide it, with the *that* composed of a plurality of forces circulating through and under the positional sovereignty of the official arbitrating body. Such a result may discourage those

who seek a tight explanation of the economic and political causes of legal action (the realists), a closed model of legal process (the idealists), or a tight model of legal paradox (the paradoxicalists). But it illuminates the complexity of sovereignty. It has another advantage, too: it points to strategic issues and sites to address by those who seek to infuse pluralism into the ethos of sovereignty.

In American democracy sovereignty circulates uncertainly between a Supreme Court now sanctioned *positionally* (after an early period of struggle and radical self-assertion) to decide contested issues authoritatively, a populace marked by an uneven distribution of power, and orientations to religious life and other traditions into which the populace is inducted. Today, one such tradition is protection of the integrity of national elections, as an expression of the most elemental act of democratic citizenship. If that tradition is abrogated, much else about democracy is placed in jeopardy. So, when the Gang of Five stopped the vote count before it was necessary to do so, it exercised positional sovereignty to curtail the democratic element in the civilizational ethos of sovereignty. The Gang gave priority to a candidate over partisanship for democracy in a setting where other possible decisions were consistent with the porous words of the law and Constitution.

What of those, like me, who protest this action? Do we not owe the Court respect and obedience, nonetheless, precisely because it occupies a position critical to constitutional democracy? We owe *positional* respect to the institution called upon to make authoritative decisions when the pressure of time compels them. That responsibility is met by a presumption of obedience to Court decisions and by public admission that democratic constitutionalism needs such a body in a non-parliamentary system. But to participate in partiality for democracy is to accept other responsibilities as well: to reveal how the negotiation of sovereign decisions draws upon a larger ethos; to expose the duplicity of those who preach strict constructionism in general and then point to this or that situation as if it were unique in being under-precedented; to publicize how the constitutive ambiguity between positional and cultural sovereignty was exploited in this case by the Gang of Five; and to struggle for a more democratic and pluralistic ethos of sovereignty. When the investment of sovereignty in a larger ethos is appreciated it becomes clear how important it is to struggle for a generous ethos in which positional sovereignty operates. We meet our first responsibility to sovereignty by a presumption to obedience that might be overridden on some occasions; we meet the second by contesting publicly the partisanship against democracy exercised by the Gang of Five.

There is a related issue. An ethos of sovereignty appropriate to the contemporary condition is not merely one that displays partiality for the integrity of democratic elections. It must also *become* one that points beyond the implicit connection between the drive to Christian superiority and strict construction of Constitutional provisions. For an exclusionary definition of Christian orthodoxy sets

the ethos in which strict constructionism is practiced, an ethos which numerous bicameral Christian citizens contest in the name of pluralism. In this respect a Justice such as Antonin Scalia agrees with Tocqueville of the early nineteenth century, though it is rather doubtful that a contemporary Tocqueville would continue to concur with Scalia. Tocqueville found protestant Christianity to play a compelling role in the ethos of sovereignty in nineteenth century America. He might well respond differently today, as the diversity of theistic and nontheistic faiths on the same territory continues to grow.

A lot has happened between 1830 and today. Stirred by the compression of distance through the acceleration of pace bio-political culture has bumped through several transformations. A new plurality of religious and non-religious orientations forms a constitutive part of bio-political culture today. To renegotiate the ethos of sovereignty in the contemporary context requires an audacious pluralization of the sacred and a corollary relaxation of what it takes to defile the sense of the sacred embraced by you, me, or others. Such a political project is demanding. But no more so than earlier drives to infuse a new plurality within protestant Christianity, or, after that, to fashion a more secular public culture, or, after that, to appreciate the wider heritage of Judaeo-Christian culture, or after that, to accept a broader range of ethnic diversity. When partisans of this or that confessional faith draw a specific confession of the sacred into public life, as most regularly do today, it becomes legitimate for others to contest some of its assumptions publicly and to explore critically pertinent aspects of its texts and rituals if and as the confessors seek to apply those dictates to everyone.

The demanding task is, first, to maintain presumptive respect for positional sovereignty, second, to pluralize the number of legitimate existential faiths (including non-Christian and nontheistic faiths) within the ethos of sovereignty, and, third, to relax what *counts* as an assault upon the sacred confessed by you or others.

The project is to generalize partiality for democracy and to infuse agonistic respect between diverse constituencies into the ethos of sovereignty. A launching pad for that project is the understanding that positional sovereignty is both indispensable to the rule of law and constitutively insufficient to itself. It is both conditioned by, and expressive of, an entrenched ethos. The contemporary need is to fold an ethos of bicameral citizenship into military, church, police, educational, judicial, corporate, labor and executive institutions.^{1 4} The struggle to negotiate a generous ethos of pluralism expresses the respect democrats bestow upon the indispensability and uncertainty of sovereignty.

The Global Dimension of Sovereignty

We have yet, however, to come to terms with another complexity in sovereignty that grows

more acute by the day. That is the way in which it increasingly stretches beyond the internal structure of the state to encompass extra state processes as well.

Sovereignty has long revealed a double face as well as an ambiguous profile. For internal state sovereignty rests to a significant degree upon whether other states recognize a regime to be sovereign. Moreover, classic theorists of sovereignty such as Hegel contend that the sovereignty of most states is always partial and limited. For a system of sovereign states to flourish a “world historical state” must emerge to limit, enable, and regulate the quasi-sovereignty of the other states. Even to accept Hegel’s thesis, however, would still be to obscure the extent to which sovereignty today exceeds the reach of any historical state, even a world historical state. For sovereignty now implicates supra-state institutions and capitalist processes that confine and channel state and inter-state activities.

Some theorists would say that this layer of supra-state power, to the extent it has arrived, announces the death of sovereignty. But Michael Hardt and Antonio Negri call such announcements into question. They suggest, wisely, that sovereignty itself becomes more complex today. More than Rousseau, Tocqueville and Agamben, Hardt and Negri reflect upon the global dimension of sovereignty.^{1 5} Their analysis, even if one questions its details, discloses both an additional level of sovereignty and new sites of citizen action appropriate to it.

Hardt and Negri claim that a new world order has emerged out of recent developments in capitalism and the remains of European imperialism. Their project, in the first instance, is to map and explain these institutional developments. In the second instance, it is to pursue the “transformation” of this world assemblage.

The most salutary contribution Hardt and Negri make is in the map that charts the migration of sovereignty to a layered global assemblage in which leading capitalist states, trans-national corporations, supranational regulatory institutions and global media networks are components. Here is one summary of the layered assemblage they name Empire:

First and foremost, then, the concept of Empire posits a regime that effectively encompasses the spatial totality of the civilized world...Second..Empire presents itself not as a historical regime

originating in conquest but rather as an order that effectively suspends history and thereby fixes the existing state of affairs for eternity...Third, the rules of Empire operate on all registers of the social order extending down to the depths of the social world... Finally, although the practice of Empire is continually bathed in blood--the concept of Empire is always dedicated to peace--a perpetual and universal peace outside of history.”¹⁶

The charting of this assemblage in Empire makes fascinating reading. Its multiple organs and levels render the assemblage both powerful and unsteady. It is easy to identify a hegemonic state within Empire--the United States, but less easy to identify a world historical state presiding over a world of semi-sovereign states. For the hegemon itself is contained and channeled by a variety of cross-state institutions and processes. The United States, moved by one desire to determine its destiny unfettered by other states and a conflicting drive to lead the rest in shaping extra-state institutions, is often pulled kicking and screaming into serving the new world order. Empire regulates and constrains it, even as it sits on the “narrow pinnacle” at its apex.¹⁷ The Hardt/Negri analysis of the United States in relation to supra-state institutions mirrors the relation between formal and civilizational sovereignty Tocqueville mapped inside 19th century America.¹⁸

There is a broad, second layer just below the pinnacle. The corporate system of capital, linked through mergers, market interdependencies, overlapping boards of directors, the priority of the commodity relation, managerial mobility, common techniques of management, investment priorities, common financial instruments, and media control sets a thick layer of global governance, entering into state priorities, investment decisions, work routines, habits of judgment, and moral propensities. These “huge transnational corporations construct the connective fabric of the biopolitical world...they directly structure and articulate territories and populations.”¹⁹ This layer constrains states as well as serving them. There are also the numerous supra-national financial, governing and judicial agencies that serve and regulate the global economy.

I will not review the map further, even though the details are fascinating. For there are critical omissions on it. First, institutional religion plays no significant role on it. It is sometimes ignored and at others treated as a mere proxy for supervening forces such as the expansion of capital into new zones of life or the mobilization of resistance to the expansion of capital. This comes out as Hardt and Negri insist, against impressive evidence to the contrary, that the belief in transcendence has lost its ability to inspire fear and hope in the late-modern world. “Today there is not even the illusion of a transcendent God,. The poor has dissolved the image and recuperated its power.”²⁰ Or when they say that “every metaphysical tradition is now completely worn out.” You might forget for a moment that Hardt lives in the United States, the western state where many constituencies organize much of their political lives around Christian faith. It emerges

also in their refusal to ask what role religious faith plays in the contested politics of the multitude. The multitude, for them, is a reservoir of passion and potential political energy under- colonized by Empire. Surely Christianity, Islam, Judaism, Hinduism and Buddhism play a role on the world stage that exceeds defining them as dependent phenomena. They enter into the passions of the multitude, if anything does. And they help to shape institutional governance at every level. Think, for instance, about Talal Asad's account reviewed in chapter 1 of how European secularism is grounded in a historical modification of Christianity that does not mesh well with the evolution of Islamic or Hindu practices. And these institutions sometimes generate impressive resistance to the priorities of Empire. Why is religion relegated to a minor role in the map of Empire?

Second, NGO's such as Greenpeace, Amnesty International, Oxfam, and Shanti Sena, treated by others as modes of pressure to restrain or move dominant forces in the world order, are construed by them to be subordinate partners of Empire. "Here, at this broadest, most universal level, the activities of these NGO's coincide with the workings of Empire, 'beyond politics', on the terrain of biopower, meeting the needs of life itself."^{2 1} The idea seems to be that in responding to crises of hunger, or publicizing prison of war abuse and torture, or providing health services these organizations protect Empire from radical opposition. Perhaps they do. But surely they are more ambiguous in actuality and possibility than that. What presses the authors to categorize them so categorically?

The depreciation of transnational religious energy and the confinement of NGO's to supporting roles within Empire expose a deep ambivalence running throughout the Hardt/Negri account. Two conflicting drives govern it. There is one drive to play up (in a Deleuzian manner) the uncertainties, porosities, and open future of Empire when it is *mapped* as an assemblage. There is another, counter drive to treat it (in a classic, Marxist way) as a closed structure of domination when it is *appraised* as a site of potential transformation. I find the map to be illuminating. But as I read the strategic narrative I am reminded of that delicious scene in The Life of Brian, when the revolutionary leader against Rome asks a leading question to his comrades huddled together in the catacombs, "What have the Romans ever done for us?" "Well, they built the aqueducts," blurts out one member huddling with him. "Yes, but besides the aqueducts, What have the Romans ever done for us?" "An education system", another mole shouts. We return much later to a laundry list of Roman accomplishments, reviewed in precise order by the meticulous leader, followed by the refrain, "Besides the aqueducts, education system, peace, etc, etc, etc.....What have the Romans *ever* done for us?" My question to Hardt and Negri is, "What has Empire, as you map it before translating the map into a strategic blueprint, done for many values you seek to advance?" I pose the question not to forgo vigorous critique of several dimensions of the emerging world order, but to call into question the wisdom of huddling in a corner waiting for "the multitude" to bring the edifice down.

The gap between the map and the strategic blueprint discloses how Deleuze and Marx are not, as the authors promise, folded into each other. Rather, each is given priority in turn, as the text shuffles back and forth between charting the loose structure of Empire and identifying the multitude as its protean, implacable opponent.^{2 2} Now we can discern why religion is downgraded and NGO's are degraded. The narrative depreciation of religion is needed to clear conceptual space to identify a virtual multitude as the implacable enemy of Empire. For if religion were endowed with more agency and ambiguity in the interior of the multitude itself its potential susceptibility to multiple possibilities of action would spring more sharply into view. It would become a vital object of contestation, not simply a potential force of transformation. And the location of NGO's entirely *within* Empire? That is a sign of the authors' unwillingness to translate porosities and uncertain potentialities discernible on their *map* into positive possibilities of *strategic citizen action* to twist capital, cross-state regulatory agencies and religious organizations in more positive directions.^{2 3}

In contrast to Hardt and Negri, I adopt much of the map they present without embracing the strategic rhetoric they advance. To me, Empire is an ambiguous, porous assemblage containing positive supports and possibilities as well as ugly modes of domination and danger. It is potentially susceptible to reconfiguration through the cumulative effect of selective state actions, changes of policy by international institutions, and militant cross-state citizen action. It would be disastrous were it to collapse, as it could perhaps do through a combination of internal crises, preemptive wars by the United States, and terrorist actions that disrupt the web holding it together. That being said, it is also imperative to contest many of its priorities at each level of organization. Sometimes NGO's and religious organizations can play pivotal roles in that contestation. At other times they are part of the problem. Deleuze got it right. Empire is a loose world assemblage to be tracked and challenged at numerous points in efforts to twist its uncertain and porous structure in more positive directions.

The strategic side of the Hardt/Negri ambivalence finds most dramatic expression in their identification of "the multitude" as a fugitive, mobile force that could transform Empire. The multitude assumes on a world scale the function the revolutionary version of Marxism once invested in the proletariat, though it does not have the same composition. Its task is transformation. But because Empire is also so pervasive and so retrograde nothing specific can be said by the authors about the direction transformation should take. It is not just that they have not gotten around to this assignment. Rather, their strategic orientation itself makes it both imperative and impossible. Here are a few samples of what the authors say:

Furthermore, we have not yet been able to give any coherent indication of what type of political subjectivities might contest and overthrow the forces of Empire.

Even when we manage to touch on the productive, ontological dimension..and the resistances that

arise there, we will still not be in a position--not even at the end of this book--to point to any already existing and concrete elaboration of a political alternative to Empire...It will only arise in practice.

“What we need is to create a new social body, which is a project that goes well beyond refusal. Our lines of flight..create a real alternative.., humanity squared, enriched by a collective intelligence and love of the community.” (their italics)

This is the point when the modern republic ceases to exist and the postmodern posse arises. This is the founding moment of an earthly city that is strong and distinct from any divine city...Only the multitude through its practical experimentation will offer the models and determine when and how the possible becomes real.^{2 4}

In presenting their strategic imaginary Hardt and Negri say that “contingency, mobility and flexibility” are Empire’s real strength, thereby disparaging at the outset ambiguous forces in it that might reshape it in this way or that. It appears that “collective intelligence and love of the community” can, for them, only subsist below institutional life. No wonder they cannot give “any indication” of the shape of the “new subjectivities” they demand. It is necessary to move beyond, first, identifying critical energies entirely with a fugitive constituency called “the multitude”, second, assuming that critical action is inevitably sucked into the tedious game of bare repetition unless it is transformative, and, third, refusing to specify in advance the proximate goals of cross-state citizen movements.^{2 5}

The dilemma they have created comes out poignantly in Michael Hardt’s participation during the spring of 2002 in a Theory & Event symposium on 9/11. Hardt issues a brief statement on how the “tragic event” signifies the possible emergence of a “civil war” in Empire.

In order for the 11 September attack or the responses to it to be acts of war, there would have to be two sovereign powers confronting one another. Since there are not, then these can only be considered acts of a civil war, that is, conflict within the space of one single sovereignty.^{2 6}

Insightfully, the fight between terrorists and dominant states is defined as a civil war. But where is the fire displayed in the book? Does the cooling occur because Hardt can neither embrace the event, oppose it vociferously, nor call for specific responses to it? He may hesitate to *oppose* the attack vociferously because Al Qaeda embodies the network mode of organization and intense oppositional energy that marks the multitude. A civil war, focused on the “nerve centers” of Empire, might be just the thing to dismantle it. But Hardt, to his credit, recoils from this upshot. He fails to *embrace* the event because, no doubt, he cringes

from its violence and because Al Qaeda, even as it embodies traits of the multitude, participates in a “fundamentalist” formation that he finds unacceptable. Finally, he cannot commend reform of the global assemblage in the aftermath of 9/11 because, given the *strategic* face of his reading, Empire is too fixed and bankrupt to be amenable to reform. Hence, a brief, cool statement, in which the contrasting terms “tragic event” and “civil war” stare bleakly out at the reader.

The Global Dimension of Citizenship

A positive rejoinder to the Hardt and Negri could be pursued with respect to critical cross-state issues of child labor, global warming, indigenous peoples, prostitution rings, labor movements, emission standards, preemptive state wars, the Geneva Conventions on war prisoners, religious freedom, North-South income distribution, and legal/illegal population flows across borders. The point to emphasize is that today creative citizen action must track the contemporary complexity of sovereignty. Citizens must address plural sites of action, depending on the scope of the issue, including local action, associational organization, state pressure, and cross-state citizen networks. Let’s focus on the last site through the issue of terrorism as crystalized through the events of 9/11.

As a Deleuzian with a liberal streak the ambivalence in my thinking differs from that in Hardt and Negri. To me, 9/11 and the American response reveal how fragile the supranational system of governance is in its justice and injustices; therefore, how important it is to draw upon some of these institutions when the dominant state becomes reckless; furthermore, how disastrous it would be if that porous assemblage were to collapse through internal crisis, the military adventurism of one country, and/or terrorist activity aimed at critical points of conjunction; moreover, how open Empire might be to twists and turns that speak more eloquently to the needs of the time than it now does; and, thereby, how incumbent it is upon critical intellectuals, religious leaders, liberal film actors, technical workers and assorted professionals in predominantly Christian, Jewish and Islamic states to mobilize cross-state citizen coalitions to oppose the state-terrorism of the Likud Party in Israel, to resist preemptive wars by the United States, and to press for a contiguous state of Palestine.²⁷ The idea is to support selective police action against Al Qaeda while addressing the unbearable humiliations that pull Islamic recruits into the movement and foster more widespread passive support for it.

The critical intellectuals and professionals invoked here do not compose the multitude; they are sunk up to their necks in Empire. For that very reason, they can coalesce to press the assemblage in new directions. Today it is imperative to insist that the policies of Israel, the United States and Hamas coalesce to foster Palestinian humiliation and hopelessness from which the networks of Al Qaeda and like-minded organizations are forged, financed and supported. It is because we participate in the state and interstate machinery through which this politics of humiliation is forged that it is possible and obligatory to mobilize

our states, corporations, universities, theaters, public media, and temples to exert new pressure for change.

As a pluralist, my highest ideal would be a greater state made up citizens now in the state of Israel and the occupied territories. A state in which all members have full rights of citizenship. One argument in support of that agenda is the extensive intermixing of populations and institutions on both sides of the border. But to make that project work there would have to be significant factions in both Israel and the occupied territory who support it. Citizen activists outside each territory could join then them to press the United States, Israel, Palestine and the UN to move in that direction.

But my sense is that there is not now a critical mass on the ground ready to support a pluralistic, one state agenda.²⁸ So, to relieve the suffering and humiliation now, it seems best to press for a state of Palestine, doing so in a way that maximize future chances for pluralism within both states. We must join critical activists inside Palestine and Israel to press, first, to support a state of Palestine, second, to provide it with the same amount of material and financial support currently bestowed upon Israel, third, to guarantee the security of both states with an international military force, and, forth, to pursue equal citizenship for all minorities in each state.

My concern, however, is less with the exact shape such a settlement might take and more with the pressures needed to compel the parties to reach a settlement. The United States will is unlikely to take a militant lead in this project without external pressure, for the formula of electoral success of each political party pulls it away from doing so. The United States requires as much internal/external pressure as the Israeli regime.

What shape can such a cross-state citizen movement take? It will be composed, above all, by free-thinking intellectuals, religious leaders, actors and professionals in and around the states and institutional faiths actively involved in the conflict. It will mobilize pressure upon the states and corporate structures in which its members participate to compel Israel to accept a state of Palestine and to inform the “settlers” Israel has placed there over several decades that they can either return to Israel or live in the new state of Palestine. It will publicize courageous actions within Israel and Palestine obscured by the electronic news media in the States, such as that taken by the Israeli pilots in 2003 who refuse to participate in future bombing missions over Palestine. And it will publicize the work of post-Zionists within Israel who have reexamined the official history of how the population already there was dispersed when Israel was formed. It is true that retrograde policies in Europe put tremendous pressure upon Jewish leaders to found a state of Israel. But grave injustices were also done to the people already on the ground; and their departure from Israel was forced through tough policies. Uri Ram, a professor at Ben Gurion University, summarizes the new exploration of the historical record:

In the conventional view, Israel is considered to have always been peace-seeking and given to

compromise while the Arab states are portrayed as stubborn aggressors. The new historians argue that the state of Israel declined opportunities for negotiation with Arab states, but on the other hand concluded an unwritten pact with the Jordanian kingdom to parcel between the two the territory known as the West Bank, so as to prevent the establishment of a Palestinian state there...Furthermore, new historians argue that Israel bears a large..responsibility for the creation of the Palestinian refugee problem. It is argued that during Israel's war of independence in 1948 Israeli military commanders..evicted hundreds of thousands of Palestinians from their villages and expelled them beyond the state's borders.^{2 9}

These are actions that need to be rectified, even as we evince appreciation of the holocaust that pressed them into being. To do so it is critical to rewrite popular memory of this history in Israel and the United States. For creative action in the present is always bound to the memories from which it proceeds.

It will take pressure within the churches, temples, universities and corporations to which participants belong to compel state and international agencies to withhold material support from Israel until it accepts a state of Palestine. Such a movement will assert forcefully that the pursuit of that state must not be stymied either by new terrorist action by Hamas *or* new acts of state-terrorism by the Likud government, as these two opposing forces collude to break attempts to form a state of Palestine. And it will press the United States, from inside and outside its borders, to decrease dependence upon Arab oil, to support the Kyoto Protocol, to promote policies of energy efficiency at home, to publicize the Geneva Accord between residents of Israel and Palestine, and to make future financial aid to Israel dependent upon its recognition of a state of Palestine. Such a cross-state collection of independent professionals strives to tap the energies of larger constituencies so that they too will apply critical pressure upon their states, temples and selves. It will push states such as France, England, Japan and Egypt, from inside and outside, to put more pressure upon the United States, Israel and Palestine to reach a settlement.

Perhaps a cross-state citizen campaign of divestment from Israeli corporations is needed until the regime changes its policies. Perhaps divestment from American oil companies and automobile corporations that refuse to build hybrid cars is needed. Mock International Tribunals can be established to try state and non-state terrorists. And actors, models and publicists of international stature can sponsor shows, commercials, film documentaries, modeling events and so on that mix into their music, acting and erotica political facts and proposals that counter those offered by right wing moguls in the United States who dominate the electronic news media. It is upon our ability to tap the *intensive* energies of *pluralizing* forces in Judaism, Islam, Christianity, Israel, Palestine, the United States and Europe that the best hope to reshape this dimension of Empire resides. The networks of communication that Empire engenders, and that Hardt and Negri identify so effectively, can be deployed on behalf of this effort.

Such an effort may fail, but it will not be because the structures of Empire make success impossible. It will be because the energies and tactics generated are insufficient at this time to move the inertia of Empire in this way rather than that.

In other cases, too, where Hardt and Negri embrace implacable resistance on behalf of vague transformation a better course is an energetic politics of citizen pressure within and above traditional state politics, pressure designed to move states and corporations in directions resisted by the inertia of Empire. The guiding idea is that the structures and priorities of Empire are not set in stone, even though the power distribution is heavily weighted. For the order of global capital conforms neatly neither to the logic of self-regulation and light state monetary policy commended by classical economists nor to that of necessary crisis elaborated by its revolutionary opponents. Therefore, it might be turned in new directions by an effective combination of institutional regulation, vital citizen movements and revised state priorities. The point is to exude neither pessimism nor optimism about the future. Those are spectatorial stances. It is, rather, to challenge existing priorities even if the *probabilities* of full success are low, doing so because the world *need* to progress on these fronts is so urgent and the current state and supra-state incentives to do so are weak.

One reason that modern capitalism has resisted both precise management and revolutionary overthrow is that its organization and trajectory exceed the smooth theories advanced by moderate economists and the system of contradictions identified by theorists of crisis. Proponents of each theory purport to know more about these jury-rigged processes than their uncertain trajectory allows. *And that which is not formed by a tight logic or design is also unlikely to succumb to a simple logic of management, revolution or transformation.* Hardt and Negri almost see this, but not as deeply or consistently as do two of their purported guides, Deleuze and Foucault.

Transformation is neither needed nor in the cards today; what is needed are creative modes of *intervention* posed at several strategic sites in the service of reducing economic inequality, fostering intra-and inter-state pluralism, and promoting ecological sanity. Such energies, aimed at slippery and mobile targets, will meet with failure and surprise on many occasions. That is because they enter into currents of power that, while weighted against them, exceed any agency's full control. It is mere hubris of state leaders, trans-national bureaucrats, neoclassical economics professors, neorealist IR theorists or Marxist intellectuals to say otherwise. Again, James, Bergson, Deleuze and Foucault know better. They realize that the world exceeds any system of explanation or control brought to bear on it. They strive to *intervene* creatively and proximately in events, not to know or master them from beginning to end or start to finish.

The most compelling contributions Hardt and Negri make, then, are in mapping another layer onto the politics of sovereignty and in opening a dialogue between heretofore separate traditions of inquiry into global politics. Their most serious deficiencies consist in a failure to pursue that dialogue far and a refusal to compose a strategic response beyond the empty politics of transformation by the multitude. Michel Foucault was also attuned to modes of critical action that exceed extant institutional channels. Here is a formulation by him that, once elevated to the global register, helps to define the cross-state citizen activism needed today. It speaks to those who appreciate the ambiguities circulating through state sovereignty, discern the global dimension of sovereignty, and seek levers of citizen action at each node through which the complexity of sovereignty circulates:

There's an optimism that consists in saying that things couldn't be better. My optimism would consist rather in saying that so many things can be changed, fragile as they are, bound up more with circumstances than necessities, more arbitrary than self-evident, more a matter of complex, but temporary, historical circumstances than of inevitable anthropological constants... You know, to say that we are much more recent than we think, is to place at the disposal of the work that we can do on ourselves the greatest share of what is presented to us as inaccessible.³⁰

¹ Justice Souter's opinion as quoted in its entirety in The New York Times, Thursday, December 14, 2000, pp. 28-29. The quotation from Souter in the next paragraph comes from p. 29 too.

² Rousseau, On the Social Contract: With Geneva Manuscript and Political Economy, trans. by Judith Masters (New York: St Martin's, 1978), Bk I, p 46. A thoughtful and detailed engagement of its role in Rousseau's theory is developed by Steven Johnston in Encountering Tragedy: Rousseau and the Project of Democratic Order (Ithaca: Cornell University Press, 1999). Johnston brings out how Rousseau developed an extensive theory of "governmentality" and "micropolitics" well before Foucault and Deleuze popularized the two themes.

³ See the discussion of the indeterminacy of language, rule and law in Rousseau in Connolly, Political Theory and Modernity (Oxford: Basil Blackwell, 1988), pp. 53-57. That section is also where I explore the paradox of founding in Rousseau for the first time.

⁴ Rousseau, On the Social Contract, pp 69-70.

⁵ Giorgio Agamben, Homo Sacer: Sovereign Power and Bare Life, trans. by Daniel Heller-Roazen (Stanford: Stanford University Press, 1995), p. 82.

⁶ Agamben, Homo Sacer, p. 83.

⁷ Agamben, Homo Sacer, pp. 44, 59.

⁸ This story is brilliantly told in Hans Blumenberg, The Legitimacy of the Modern Age (Cambridge: MIT Press, 1983).

⁹ Alexis de Tocqueville, Democracy in America, 2 vols., trans. George Lawrence (New York: Harper and Row, 1969), p. 58

¹⁰ Tocqueville, Democracy in America, p.336. I explore Tocqueville's rendering of the relation between the Christian civilization of America and Amerindians who were excluded by it in The Ethos of Pluralization (Minneapolis: University of Minnesota Press, 1995), ch 6.

¹¹ Tocqueville, Democracy in America, p. 294.

¹² Gilles Deleuze and Felix Guattari, A Thousand Plateaus, trans. By Brian Massumi (Minneapolis: University of Minnesota Press, 1987), p. 214.

¹³ Chantal Mouffe examines ambiguities in Schmitt's conception of the exception and the sovereign decision in The Democratic Paradox (New York: Verso Press, 2000), chapter 2. She too thinks that Schmitt's focus on the exception and the decision becomes problematical when you come to terms with his prior commitment to decisions that enforce, as she calls it, "homogeneity". To relax that latter demand is to set the stage to renegotiate the ethos of sovereignty. A fascinating engagement with the paradox of sovereignty can be found in Bonnie Honig, Democracy and The Foreigner (Princeton: Princeton University Press, 2001). Honig focuses on the creative role of the foreigner in responding to the gap between law and sovereign power.

¹⁴ In a thoughtful essay Mark Wenman compares Chantal Mouffe, James Tully and me on the question of pluralism and the constitution. While appreciating the place that pluralization, as the emergence of new identities, rights and practices, plays in my conception he finds me to be "naive" and "optimistic" in expecting a generous ethos to arise. He looks, rather, to "constitutional rules of the game" to limit sovereign exclusions. But both optimism and pessimism are spectatorial views, when what is needed is a politics of pluralization that enters into the ethos of sovereignty. Moreover, given the turns of time, no set of constitutional rules is self determining. Furthermore, as in the case of the Amerindians reviewed above, a court may decide the case on behalf of pluralism and be overruled by vigilantes, or a militaristic president, or a racist police force, or all three in conjunction. I present a generous ethos of engagement as a possibility to pursue, not a predicted probability.

When the paradox of sovereignty yawns a pluralist is *presumptively* inclined toward the inclusive decision, whereas a Schmittian--which Wenman is not--solicits military-executive action on behalf of unity, narrowly defined. Both actions might be consistent with constitutionalism, depending on the ethos which infuses it. See Wenman's "'Agonistic Pluralism' and Three Archetypal forms of Politics", Contemporary Political Theory (fall, 2003), 165-186.

¹⁵ In an earlier essay I develop a different counter-example to the Hardt-Negri celebration of transformation by the "multitude" than that pursued in this piece. There it is the cross-state politics of indigenous peoples; here it will be a cross state citizen activism which speaks to the Israeli-Palestinian conflict. For the first account see Connolly, "The Complexity of Sovereignty" in Jenny Edkins and Michael Shapiro eds, Sovereign Lives: Power in Global Politics (Osford: Macmillan, 2005, pp 23-40.

¹⁶ Michael Hardt and Antonio Negri, Empire (Cambridge: Harvard University Press, 2000), p. xiv. A more detailed summary of this structure is presented on pages 309-310.

¹⁷ Empire, p.181.

¹⁸ See Ian Angus, in "Empire, Borders, Place: A Critique of Hardt and Negri's concept of Empire" theory & event http://muse.jhu.edu/journals/theory_and_event/v007/7.3angus.html Angus argues, first, that the United States is more like an imperial power than a state at narrow pinnacle of Empire and, second, that Hardt and Negri do not appreciate how countries such as Canada, separated by a border from the United States, can experiment with possibilities that eventually put pressure upon the Imperial power. I think that Angus is partly right in his first critique. But he underplays the global effects of capital. He makes an important point in his focus on the continuing role of borders. I will discuss the potential power of cross-state citizen movements rendered possible by the global dimension of sovereignty. A focus on the resilience of borders complements rather than contradicts that analysis.

¹⁹ Empire, p. 31

²⁰ Empire, p. 157.

²¹ Empire, p 314.

²² There are, of course, multiple readings of Marx. For example the presentation/revision of Marxist materialism found in chapter 4 of Wendy Brown's Politics Out of History (Princeton: Princeton University Press, 2001), resonates with the position attributed to Deleuze here. This is a book, indeed, from which a creative interchange between Deleuze and Marx could begin.

²³ I presented an earlier version of this chapter on a panel at the APSA Convention in the fall of 2002 and Michael Hardt responded. He further clarified some aspects of the theory presented in the book, but he remained adamant about the multitude as the transformative force.

²⁴ Empire, pp. 205, 214, 204, 411.

²⁵ In a thoughtful review of Empire in theory & event Kam Shapiro says, "The Multitude thus operates in Hardt's and Negri's narrative as the engine of historical change, a de-territorializing force of 'liberation' around which the powers of sovereignty reactively coalesce but which they never manage to arrest...In seeking to invest itself in the biopolitical realm, therefore, Sovereignty is always tending towards its limit at a deeper threshold of difference and instability." "From Dream to Desire," http://muse.jhu.edu/journals/theory_and_event/v004/4r_kam.html This summary exposes an ambiguity in the idea of the multitude in need of further work: a) its use to mark multiple points of energy, resistance and creativity that exceed the governing power of Empire, and b) its identification as a quasi-constituency able to transform Empire. It is when you come to terms with that which is positive in the porous assemblage of Empire that the potential to move Empire by militant but non-revolutionary means becomes credible.

²⁶ Hardt, "sovereignty", theory & event, http://muse.jhu.edu/journals/theory_and_event/v005/5.4hardt.html

²⁷ This chapter was first composed in the summer of 2002, before the "coalition" invasion of Iraq. That invasion, besides imposing massive suffering on civilians and young American and Iraqi soldiers, disconnects the United States from supra-national institutions, misidentifies the sources of terrorism, foments new terrorist energies, and delays further the day when a state of Palestine is formed to co-exist with Israel.

²⁸ For two essays which contend that the situation on the ground, particularly the pattern of Sharon settlements in the occupied territories, requires a one state response, see Eyal Weizman, "The Politics of Verticality" and Rafi Segal and Eyal Weisman, "the Battle for the Hilltops" in Territories, ed. by Anselm Franke (Berlin: Institute For Contemporary Art, 2003), pp. 65-118 and 119-150. Each alternative needs debate, and each carries danger. A one state response does not, even if enacted, guarantee real equality of citizenship on the ground, and a two state response, while showing promise to relieve the worst suffering in the present, could create a volatile mixture of its own. Either is better than the current situation.

²⁹ Uri Ram, "From Nation-State to Nation---State, Nation, History and Identity Struggles in Jewish Israel" in Ephraim Nimni ed., The Challenge of Post-Zionism (London: Zed Books, 2003), pp. 31-33. The essays by Ilan Pappé, Ephraim Nimni, Hannah Herzog and Edward Said in this volume all speak to the history of the Israeli-Palestine issue in reflective ways.

³⁰ Michel Foucault, "Practicing Criticism," in Lawrence Kritzman, ed. Michel Foucault: Politics, Philosophy, Culture, trans. Alan Sheridan (New York: Routledge, 1988), p. 156.

7-3-1 Hongo, Bunkyo-ku, Tokyo 113-0033 Japan