Reifying Law—Government, Law and the Rule of Law in Governance Systems

Larry Catá Backer*

Abstract

The roots of the current "rule of law" debate are ancient. Its political, social and religious expressions are bound up in ancient notions of law and government as two possibly distinct categories. Starting with Bracton's notions of *gubernaculum* and *jurisdictio,* which together define the character, scope and authority of coercive systems of governance, debates about the meaning of both and their relationship went hand in hand with the almost simultaneous construction of modern democratic constitutional states, as well as the most authoritarian states of the twentieth century. *Gubernaculum* and *jurisdictio* serve as the basis for reifying law and the nature of its "rule" as the world moves toward systems of coercive global law, understood either as common law binding on states, or as the precursor to global governance institutions (e.g. an International Criminal Court). But its jurisprudential expression, especially since the mania for positivism in the construction of political "constitutional" societies took hold in the nineteenth century, produced a certain "amnesia" of the ancient, and often violent, contests over the nature of law. That contest, in jurisprudential form, invoked religion, political theory and philosophy to determine the relationship between governance and authority.

The paper interrogates that discourse in modern terms. Using the

* Visiting Professor of Law, Tulane Law School, New Orleans, Louisiana; Professor of Law, Pennsylvania State University, Dickinson School of Law, State College, Pennsylvania; and Director, Coalition for Peace & Ethics, Washington, D.C. The author can be contacted at lcb911@gmail.com. An earlier version of this essay was presented at a Faculty Workshop, Birkbeck College, Faculty of Law, University of London, London, United Kingdom, October 25, 2006. My great thanks to the workshop participants for their very valuable comments, and especially to Peter Fitzpatrick and Leslie Moran, both of the faculty of law, Birkbeck College. Special thanks to Matthew Cronin, Laura Ashley Martin, and the staff of the *Penn State International Law Review* for their enthusiastic and very able editorial work on this contribution as well as for their enthusiastic support of this symposium.

individual to the organizational forms individuals embrace, has been turbulent. At various times since the seventeenth century, law has been understood as an object separate from the state and its apparatus (usually a government).[1] In this aspect, law has been constructed as the sum of the common relationships of the people amongst themselves—it is in this sense the manifestation of the people themselves as an aggregate body. Sometimes those relationships also included the political, social and economic relations of the social order. Sometimes it did not. Sometimes, this separate organism called law was considered superior to the state, or at least to the political organs of state power. Sometimes it was viewed as on par with those organs. But law, and especially the basic law customs and laws of the community could be disturbed by the state, through its government, only at great risk to itself.[2]

At the same time, and increasingly since the seventeenth century, law has been viewed as the expression of state power,[3] or at least that of its government.[4] In this view, the state, rather than law, is understood as organic. And law is understood as serving as the instrument of the state. In those cases, law was viewed as either process or language.[5] As a manifestation of state power, or at least of the power of the apparatus of state, law was considered a means of ordering that manifestation of power, sometimes of cloaking that manifestation in process. Sometimes law was thought to encompass the whole of the rulemaking power of any

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1. In the West, the distinction between law and government goes back to the ancients. *See* ARISTOTLE, POLITICS (William Ellis trans., J.M. Dent & Sons 1912) (350 B.C.). The division was grounded in the notion that though the magistrates, and certainly the people, might have had direct regulatory authority, the primary focus of the state was "executive power" as Americans have come to understand that term in the context of their own constitutionalism. Law was essentially organic—customary—though not completely so. But the state intruded on the customs of the people at its own peril. *See* discussion *infra* at text and notes 12-16.

2. Thus, for example, even Jean Bodin, a great friend of the authority of the state suggested the limits inherent in the core assumption of the relationship of state to law.

> I think it extremely dangerous to make any change in the law touching the constitution. The amendment of laws and customs touching inheritances, contracts, or servitudes is on the whole permissible. But to touch the laws of the constitution is as dangerous as to undermine the foundations, or remove the comer-stone on which the whole weight of the building rests. Disturbed in this way, apart from the risk of collapse, a building often receives more damage than the advantage of new material is worth, especially if it is old and decaying."

JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH Bk. IV, ch. III, 125 (M. J. Tooley trans., Basil Blackwell 1955).

3. *See, e.g.*, FRIEDRICH KARL VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., Littlewood 1975) (1814).

4. FRANCIS BACON, ESSAYS AND NEW ATLANTIS, Essay No. 56 (Classics Club ed., Walter J. Black, Inc. 1942) (1612).

5. *See* CARL SCHMITT, LEGALITY AND LEGITIMACY 18 (Jeffrey Seitzer trans., Duke U. Press 2004) (1932).

that law is a *thing* is beyond dispute. The exact nature of that "thingness" is quite another story. Yet the "thingness" of law is critically important for the ordering of power relationships among people, institutions and communities. I am little interested in the "true" meaning of law as an abstract proposition, or even as a question of fact. I am not sure the question is particularly relevant, except perhaps as a means of gaining advantage in the never ending cultural wars for control of perceptions of meaning. Human behavior is driven by what people believe and the choices they make in adopting certain "privileged" beliefs when constructing their communities, rather than any abstract truth of those beliefs.

For this essay, I explore the way in which law is reified, that is, the way that law is sometimes understood as a thing, process, aspect or character apart from and in addition to its particular content. And I explore the way that this reification has been contested, that is, the development of the notion of law as a mere instrument of power, of law as no more than its content and no less than the power of the institutions whose will it expresses. I suggest some of the important ways in which law-as-a-thing-apart has been recreating itself in the post-Soviet globalized world. I am particularly interested in the ways that law is now said to rule. In ways reminiscent of the dynamics of conversations about law in seventeenth century in England, law has become again amorphous, capable of simultaneous multiple meanings. Law is an important object for capture among those whose systems of institutionalized power relationships require an object around which to legitimate compulsion, behavior and the management of conduct at every level of human organization. I then look forward to the modern expression of these ancient conundrums by exploring the current expression of law as technique.[9] Specifically, I explore the way in which the contested understanding of law as object or subject becomes a critical element in the management of networks of power at the international global level and in the reconstitution of legal reification in global common law and private transnational legal systems.[10] I end by exploring the implications of these theories in the construction of modern transnational constitutionalism, both secular and theocratic.[11]

9. *See* Section II, *Gubernaculum* and *Jurisdictio*, *infra.*

10. *See* Section III, Law as Technique: The Management Networks of Power at the International Global Level and the Reconstitution of Legal Reification in Global Common Law, *infra.*

11. *See* Section IV, God as Law; Humanity as Law: Divergence in the Management of State Power in Modern Constitutionalism, *infra.*

Its most important roots, however, were a sophisticated medieval jurisprudence.[19] For our purposes Bracton provides the most important late medieval foundational source. As Charles McIlwain well put it,[20] for English constitutionalists at the end of the medieval period, there was "a separation far sharper than we make in our modern times between government and law, between *gubernaculum* and *jurisdictio*."[21] Within the sphere of *gubernaculum*, the power of those who hold authority to act is absolute. That power could be expressed by action—the enforcement action of the state—and also by enactment of law, narrowly conceived. The narrowness of the conception is grounded in the fundamental distinction between enactments of an administrative character, and the power to define a legal right. Thus, to Bracton, "*leges* (in the narrow sense of the word), *constitutions,* and *assisae* are nothing more than administrative orders, and therefore part of 'government'—something which 'pertains to the administration of the realm (*pertinet ad regni gubernaculum*)—and as such are properly within the king's exclusive control."[22]

Within the authority of government, more narrowly defined, law is essentially instrumentalist in character. It serves as an expression of the king's (and thereafter the parliamentary) will. It is fundamentally administrative in character (understood in the modern French or German sense), though it is expressed in the forms of statute. It corresponds roughly to the *measures* whose transformation into law was so derided by Carl Schmitt[23] in his attacks on Weimar constitutionalism.[24] There is a residue of this notion still in the differentiation within French constitutional law, between the idea of *lois*, the province of the nation expressed through its Assembly, and *reglement*, which under Article 37 of the French Constitution are within the power of the executive authority.[25] And this division has been urged as a basis for global governance.[26]

The space within which *gubernaculum* operates is broad but not

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Mo. Press 2006).

19. *See* GROSSI, *supra* note 13.

20. CHARLES MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN (Cornell U. Press, rev. ed. 1947).

21. *Id.* at 77.

22. *Id.* at 82-83.

23. *See* SCHMITT, *supra* note 5.

24. *Id.* at 68-74, 97-98.

25. 1958 CONST. art. 37 (Fr.). On the differences between Anglo-American and French regulatory system theories, *see* Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341 (2004).

26. *See* Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 192-95 (2006).

arbitrarily transfer from one to another."[32] These traditional notions of law reified as *jurisdictio* found its most influential modern expression in England during the reigns of the early Stuarts.[33] In Sir Edward Coke's writings, it also served as a great basis for American constitutionalism. Coke was widely known in the colonies. His work, especially on property, though expensive, was often a prized part of personal law libraries in the American colonies.[34] And the views he expressed were in sympathy with colonizing communities, especially north of the Potomac River.

One of the most influential expressions of the idea of law as an entity separate from government is found in Coke's report of *Dr. Bonham's Case* (1610).[35] The case related to the power of the College of Physicians to regulate the medical trade in London. With respect to the extent of Parliament's power to grant a concession against common law, Coke reported:

> And it appeareth in our Books, that in many Cases, the Common law doth controll Acts of Parliament, and sometimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant or impossible to be performed, the Common law will controll it, and adjudge such Act to be void.[36]

To a great degree, law was meant to protect against the inclusions of power by setting up another power, beyond the reach of an individual, even the holder of governmental authority. It fractured power and set its mechanisms beyond the reach of the sovereign.

Law stood as the thing through which a system of opposing power—entrusted to and managed by a large class of well-socialized acolytes (the bar)—could resist the power of the state to coerce behavior. As Mary Sarah Bilder suggests:

> Although during the seventeenth century, Coke and then Hale would develop increasingly elaborate understandings of the common law, the common law remained a system in which pleas to the judiciary required addressing "reason"—"the faculty acquired by training that extracted some workable rules from a formless body of immemorial

32. MCILWAIN, *supra* note 20, at 88.

33. SIR THOMAS SMITH, THE MANNER OF GOVERNMENT OR POLICIE OF THE REALME OF ENGLAND (London, Henrie Midleton 1583).

34. Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 YALE J.L. & HUMAN. 47, 88 (1999) (Coke's writings on property were especially sought-after).

35. Dr. Bonham's Case, (1610) Eng. Rep. vol. 8, 113 b (8 Co. 107a), *reprinted in* EDWARD COKE, THE SELECTED WRITINGS OF SIR EDWARD COKE, vol. 1, 264 (Steve Sheppard ed., Liberty Fund 2003).

36. *Id.* at 275.

state) is viewed as fiduciary in nature. Its power is derivative and limited. It is thus a partial rather than a total power to order behavior. Government (first King, then King in Parliament, then Parliament alone) might ultimately express law as a conscious and positive act. But Government can never be law, nor reduce law to an instrument of governmental will. In this sense law remains an "other" to government, that is, a thing in a very real sense. It may not be delegated,[43] nor may it be reduced to an instrumental character. The "community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject."[44] Law, like God, remains outside the reach of individuals, or the people, but moves with them, and serves to protect them from themselves in a complicated conversation.[45]

But, law also constituted its own point of resistance. "[T]here are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised."[46] Law here retains its composition as thing, but now it is a thing whose purpose is to serve as instrument of the very power it appeared to resist, and managed for this purpose by the same large class of well-socialized acolytes. Thus, Francis Bacon reminds us in oft quoted language that:

> Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law; else it would be like the authority claimed by the Church of Rome, which, under pretext of exposition of Scripture, doth not stick to add and alter, and to pronounce that which they do not find, and, by show of antiquity, to introduce novelty.[47]

Judges, like law, assume an instrumental character. "Let judges also remember that Solomon's throne was supported by lions on both sides; let them be lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."[48]

This also found an odd reflection in the American colonies. Mary Sarah Bilder reminds us of the strong colonial embrace of equity,

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43. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT ch. 11, 183 et seq. (Oxford, Penguin Classics 1964) (1690).

44. *Id.* at ch. 19, 224 et seq.

45. CORWIN, *supra* note 12, at 68-69.

46. MICHEL FOUCAULT, *Powers and Strategies, in* POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS, 1972-77, 134 & 142 (Colin Gordon, ed. and trans., New York, Pantheon Books 1980).

47. BACON, *supra* note 4, at 221.

48. *Id.* at 230 (footnote omitted).

twentieth century American notions of law and its relationship to the state. In the early nineteenth century, Justice Marshall famously explained American political theory as grounded in a division of governmental authority in which the whole of the legislative power was vested in the Congress.[55] However, Justice Marshall did not suggest that law was merely the instrument through which this whole of the legislative power was exercised, that is that law was mere servant of legislator who otherwise acted unbounded. By the end of that century though, Americans had come to believe, as Thomas Paine has suggested at the time of the founding of the Republic,[56] that the extent of the law was co-extensive with the power to legislate, and that indeed, that law did not exist except as a concession of the legislator, or more generally the people constituted as a legislative body.

Thus, the nineteenth century witnessed a great reconstitution of the relationship between *gubernaculum* and *jurisdictio*. By century's end, *jurisdictio* had become something more like modern constitutionalism, conceptually less organic than medieval notions of constitutional custom (*consuetudo*) and more directly bound up within sovereign positivism (the right of the people to reconstitute themselves through acts of political will). These are notions indirectly expressed in English constitutionalism[57] and more directly expressed in American constitutionalism. In the Weimar Constitution and the French constitutions, of course, the positivist notion completely overcomes *consuetude*: the people, constituted in a national assembly become the living embodiment of right. And, in modern constitutionalism, *gubernaculum* becomes the sole space within which *jurisdictio* can be asserted.[58]

In common law jurisdictions, the relationship between law and power, or more precisely, between law and the state, become increasingly conflated from the nineteenth century. And in the conflation, the relationship between them becomes multiple and inverted. The absolutism embedded in the administrative *gubernaculum* is extended to *jurisdictio,* and *jurisdictio* becomes an instrument of *gubernaculum*. The template is set in the seventeenth century in the

55. *See* Marbury v. Madison, 5 U.S. 137 (1803).

56. *See* Thomas Paine, *The Rights of Man, in* COMMON SENSE, THE RIGHTS OF MAN AND OTHER ESSENTIAL WRITINGS OF THOMAS PAINE, Part II (New York, Signet Classics 2003) (1792).

57. A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 3-35 (8th ed. 1915).

58. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (W. Rumble ed., Cambridge, Cambridge U. Press 1995) (1832); JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW, two vols. (4th ed.) (R. Campbell, ed., London, John Murray 1879, *reprinted in* Bristol, Thoemmes Press 2002).

This scientism has affected the way in which the law is used to rationalize and model human behavior as well, especially in American criminal law.[65] Contemporary Americans were no less willing to abandon the unruliness of Coke and custom for Bacon, hierarchy, and rationality. Codification of the common law had been in the air since at least the time of Justice Joseph Story.[66] That work continues in the bar, through the century of legal rationalization of the common law.[67]

Entities like the American Law Institute continue the work of conversion of the common law into something like an Imperial Roman Codex. The American Law Institute ("ALI"), building on the "Bractonian and Blackstonian treatises, declaring the common law on the empirical foundations of judicial decisions,"[68] fearing the "chaos in a legal world of 48 states"[69] but afraid to undertake legislative codification, invented the form of the Restatement. Restatements constituted a synthesis of sorts, "analytical, critical and constructive,"[70] seeking to reduce to a single systematic form the underlying principles that gave a legal field coherence "and thus restore the coherence of the common law as properly apprehended."[71] They serve once to synthesize and to innovate.[72] Though not binding, ALI Restatements have proven to be authoritative in many American courts.

French constitutionalism from the time of their eighteenth century revolution expressed well this new relationship of law to state. Law was a function of will expressed through the nation, and it was the nation, rather than law, that was reified, in the French case, in the form of the assembled and legitimate representatives of the nation.[73] These

65. *See* Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J.L. & FEMINISM 1 (2005).

66. *See* Joseph Story, *Codification of the Common Law, in* THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 702 (William W. Story, ed., Boston 1852) (1837); William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 771, 775-76 (1986).

67. *See* FRANK GAHAN, THE CODIFICATION OF LAW (London, Grotius Society 1923).

68. *See* AMERICAN LAW INSTITUTE, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK vii (Philadelphia, American Law Institute 2005).

69. *Id.*

70. *Id.* at 5.

71. *Id.*

72. *Id.*

73. Thus, with respect to what was to become the Code Napoleon, the process of national transformation of the old customary law systems that constituted French law proceeded from the state. "In 1792, the Convention appointed a drafting committee, which made rapid progress and produced a plan for a Code of 779 Articles. In 1796, a new plan for a Code of 1,104 Articles was produced. In all, five plans were discussed before the final Code was begun in 1800." F.M.H. MARKHAM, NAPOLEON AND THE AWAKENING OF EUROPE 57 (London, English U. Press 1954).

only attain reality through the state, so the people's (private) law becomes law only through the state."[79]

The reification of ethnos through law as opposed to the reification of law through demos continues to drive important areas of continental law making. It has proven important in the development of European constitutional theory in the context of the construction of that great supra-national entity, the European Union. This conceptualization of law as an expression of ethno-reification through state formation was nicely expressed, for example, by the German Federal Constitutional Court in considering the character of the European Union within German constitutionalism.[80]

> Democracy, if not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests and ideas, in the course of which political objectives are goals also clarified and modified and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which he is subject. . . . [A]ctual conditions of this kind may be developed in the course of time, within the institutional framework of the European Union.[81]

State and government nicely reify people (as ethnos) through the mechanics of law that serves the ultimate purpose of preserving the autonomy of every ethnos. "Each of the peoples of the individual States is the starting point for a state power relating to that people."[82] The state then serves as source and limit of law. "The States need sufficiently important spheres of activity of their own in which the people of each can develop and articulate itself in a process of political will-formation which it legitimates and controls"[83] through an instrumentalist law, "in order thus to give legal expression to what binds the people together (to a greater or lesser degree of homogeneity) spiritually, socially and politically."[84]

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79. *Id.* at 11 (footnote omitted).

80. Bundesvergassungsgericht [BVerfG] [federal constitutional court] 1993, 89 Entscheideungen des Bundesverfassungsrichts [BVerfGE] 155 (F.R.G.) (commonly known in the English speaking world as Brunner v. European Union or the German Maastricht decision).

81. *Id.* ¶¶ 41-42.

82. *Id.* ¶ 44.

83. *Id.*

84. *Id.*

German civil code.[88] For the great state builders of the nineteenth century, from Hamilton and Thomas Paine in the United States, to the state builders all across Europe, and ultimately the builders of totalitarian state regimes in Europe in the early twentieth century,

> [t]he images of legal science and legal practice were (and still certainly are) mastered by a series of simple equivalences. Law = statute; statute = the state regulation that comes about with the participation of the representative assembly. Practically speaking, that is what is meant by law when one demanded the "rule of law" and the "principle of the legality of all state action" as the defining characteristic of the Rechtsstaat.[89]

The positivist basic norm posits the "congruence of law and statute. The state is law in statutory form; law in statutory form is the state. . . . There is only legality, not authority or commands from above."[90]

In the twentieth century, the spirit of Francis Bacon, now rationalized as a "social science," was strongly felt, but within an altered landscape of law and government. By mid century, among many influential circles of the Western elite, law was displaced by politics; the focus on the formal elements of systems was displaced by the substantive analysis of power. In the United States, the so-called pragmatists and even more ironically misnamed "legal realists" sought to reduce common law notions to a caricature of its system despised by civil lawyers.

Justice Scalia has been among the most astute advocates of positivist instrumentalism of the late twentieth and early twenty-first centuries. For Scalia an autonomous reified law disappeared at the same time that the common law was replaced in the United States by notions of democratic constitutionalism. Scalia's boldest pronouncement in this regard could not be clearer and is worth quoting. Referring to autonomous systems of law based on a common law framework whose autonomy was protected by an independent judiciary, Scalia writes: that such a legal system in the United States "is now barely extant, the system that Holmes wrote about: the common law. That was a system in which there was little legislation, and in which judges created the law of crimes, of torts, of agency, of contracts, of property, of family and inheritance."[91] Sounding very much like a legal realist, with strong Nietzschean roots,[92]

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88. *See generally* FRIEDRICH VON SAVIGNY, *supra* note 3.

89. SCHMITT, *supra* note 5, at 18.

90. *Id.*

91. Antonin Scalia, *Book Review* (reviewing STEVEN D. SMITH, LAW'S QUANDARY (Harvard U. Press 2005)), 157 FIRST THINGS 37-46 (Nov. 2005), *available at* http://www.firstthings.com/article.php3?id_article=245&var_recherche=Steven+Smith+%22Law%27s+Quandry%22.

92. *See* Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on*

theoretical movements usefully understood as post-modernism. For our purposes, all of these movements had one important characteristic in common—they all sought to embrace, in one form or another the reduction of law to little more than a means by which power is authoritatively communicated. There is only authority and it commands from above. Law is their instrument or the veil through which power is imposed. The only important question for law, then, was its utility in expressing political ideology.[96]

But the reification of law as instrument, a commonplace by the end of the twentieth century, in turn produced its own sources of resistance.[97] One source was reactionary—a return to reification of law through religious normative systems, the same basis of law that Bracton would have understood. In the United States, this reactionary turn has its own instrumentalist turn, much of its progress has been won through a revivified Religion Clause jurisprudence. Another source is post-modern, seeking universal norms within a global human common law edifice created either through emerging international institutions (human rights universalism) or in private law[98] or in combinations of both.[99] Both are discussed below.

Another inversion of sorts was noticeable by the end of the century. Substituted for a system based on the centrality of "Law-and-Sovereign,"[100] was one of force relations through which the mechanism of power can be more usefully examined.[101] But this power was essentially instrumental as well—a tool without a master, and without a purpose except as expressed in the aggregate by the consequences of its use. "The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another."[102] Power, thus understood, is exercised and not possessed. It is immanent in all relationships,

96. *See* Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the "Three Represents"), Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16(1) J. TRANSNAT'L LAW & CONTEMP. PROBS. 29 (2006).

97. *See* STEVEN D. SMITH, LAW'S QUANDARY (Harvard U. Press 2005); BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW (Cambridge U. Press 2005).

98. *See* Catá Backer, *supra* note 8.

99. *See* Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006) [hereinafter Catá Backer, *Multinational Corporations*].

100. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 97.

101. *Id.*

102. *Id.* at 93.

> less from a *de facto* situation more or less inert and unconscious, but from an active consciousness, from an active political will disposed to demonstrate in its right; that is to say, a kind of State already in its pride (*in fieri*). The State, in fact, as a universal ethical will, is the creator of right.[108]

One of his theorists, Alfredo Rocco, suggested a concession theory of law and right, reflecting the institutionalist and corporatist mentality of fascism, and its obsession with reification.

> Our concept of liberty is that the individual must be allowed to develop his personality on behalf of the state, for these ephemeral and infinitesimal elements of the complex and permanent life of society determined by their normal growth the development of the state.... Freedom therefore is due to the citizen and to classes on condition that they exercise it in the interest of society as a whole and within the limits set by social exigencies, liberty being, like any other individual right, a concession of the state. What I say concerning civil liberties applies to economic freedom as well.[109]

Even current systems of globalization, in their national and trans-border organization, appear to substitute power, and power relations—that is governance and regulation—for law and government. The only difference, perhaps, is the substitution of an institutionalized "system" for state, and "rule" for "law."[110]

> It has no others. It arouses disparities, it solicits divergences, multiculturalism is agreeable to it but under the condition of an agreement concerning the rules of disagreement.... These rules determine the elements that are allowed and the operations permitted for every domain. The object of the game is always to win. Within the framework of these rules, freedom of strategy is left entirely open. It is forbidden to kill one's adversary.[111]

Yet there are similarities with more traditional approaches. It found expression in the eighteenth century in the work of Jean Jacques

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108. Benito Mussolini, *The Conception of the State, in The Doctrine of Fascism: Fundamental Ideas, in* READINGS ON FASCISM AND NATIONAL SOCIALISM, ¶ 10 (Alan Swallow ed., Project Gutenberg 2004), (*reprinted* with permission from I.S. MUNRO, FASCISM TO WORLD-POWER (I.S. Munro ed. & trans., Alexander Maclehose 1933)), *available at* http://www.gutenberg.org/files/14058/14058-h/14058-h.htm#THE_DOCTRINE_OF_FASCISM (last visited Dec. 27, 2007).

109. Alfredo Rocco, *The Problems of Liberty, of Government, and of Social Justice in the Political Doctrine of Fascism, in The Political Doctrine of Fascism, in* READINGS ON FASCISM AND NATIONAL SOCIALISM (Alan Swallow ed., Project Gutenberg 2004).

110. JEAN-FRANÇOIS LYOTARD, POSTMODERN FABLES (Georges Van Den Abbeele trans., U. of Minn. Press 1997).

111. *Id.* at 199-200.

assertion of newer techniques of power made possible by advances in the technologies of control. The centrality of law—and the state—is substantially weakened once one eliminates the ideas that the state is the supreme repository of power with a monopoly over the institution of power as law, and that law proceeds in specific form solely from the acts of political communities.[121] Consequently, it has been fashionable to speak of law as an instrument of power, as its mask.[122] "Law is neither the truth of power nor its alibi. It is an instrument of power which is at once complex and partial."[123] In its twentieth century mode, "power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms."[124] And so it appeared to function effectively in this way in both the democratic West and the totalitarian East. For both societies, law served as the veil behind which the panoptic state could be constructed—providing a regularity and formal legitimacy to many of its techniques, while deflecting the extent of their insinuation in the social order. And Western scholars have devoted substantial energy to unmasking law in the service of this or that system of subordination or more generally of its intensification of force relations of any kind.

Foucault did not live long enough to understand the way in which he both served to describe an epoch about to end and to point the way to that epoch's reconstitution. We have come to live in an age in which the form of "law with its effects of prohibition needs to be resituated among a number of other, non-juridical mechanisms."[125] We are in a position now to better understand Foucault's assertion that:

> If it is true that the juridical system was useful for representing, albeit in a nonexhaustive way, a power that was centered primarily around deduction (*prélèvement*) and death, it is utterly incongruous with the new methods of power whose operation is not ensured by right but by technique, not by law but by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus.[126]

Today, power applied systems of force relations, have taken up a thread of Foucault's discourse of law/power. I want to explore the great shift from the post-modern—with its obsession with power and its techniques, with subordination and its abolition—to an age in which the techniques

121. *See* FOUCAULT, *supra* note 46, at 140.
122. *Id.*
123. *Id.* at 141.
124. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 86.
125. FOUCAULT, *supra* note 46, at 141.
126. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 89.

move from the state to systems, to networks of power relationships.[132] It is only in the early twenty-first century that power, as Foucault understood the term, has unmasked itself. But in a world of force relations, of techniques of control and management, has law become a marginal element? Rather than recede, what we find is that law was redefined itself to suit the needs of a new set of power relationships. These relationships point to global post-nationalism as an organizational focus.[133] Thus naturalized, it survives in a new world order.

This construction of a global system of private law making is spearheaded by an important group of large multinational corporations. It is rising in the shadow of, and parallel with, less successful attempts by national and international bodies to develop a system of public law rules to govern multinational behavior. It is now readily apparent in the construction of webs of contractual relationships between multinational corporations and their global networks of suppliers, usually factories located in the developing world and retail operations worldwide. This modern global law making relies on the participation of key elements of civil society to help determine the content of these provisions and to act as monitors of supplier conduct. It also relies on the participation of media, both to publicize breaches of conduct norms by suppliers and the efforts of multinationals to correct these breaches. This global system of supplier agreements evidences how large multinational corporations, elements of civil society and the media, increasingly perform powerful quasi-governmental roles, roles encouraged by the human rights establishment in Geneva and loathed by most Western states, at least as official policy.[134]

The characteristics of this emerging system are substantially different from the traditional public law based system derived from the activities of political communities.[135] The system is based on private law making. Though in this case, private law *forms* mask the public law character of the system.[136] This system consists of four principal

132. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory, in* TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 3-28 (Christian Joerges, Inger-Johane Sand & Gunther Teubner eds., Oxford & Portland, Oregon, Hart Publishing 2004).

133. *See, e.g.*, Neil Walker, *The EU and the WTO: Constitutionalism in a New Key, in* THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Gráinne de Burca & Joanne Scott eds., Hart Publishing 2001).

134. *See* Catá Backer, *Multinational Corporations, supra* note 99.

135. For the traditional division between public and private law spheres, *see* GERALD TURKEL, DIVIDING PUBLIC AND PRIVATE: LAW, POLITICS, AND SOCIAL THEORY (Praeger Publishers 1992) ("Law constitutes core relations through which the public/private division is recreated in agents of social action at the same time that it is being socialized at deeper structural levels."). *Id.* at 227.

136. EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 127 (W.D. HallsGeorge

There are several points to this story that make it interesting from the perspective of law and power. First, Apple had adopted a code of conduct that essentially exports a set of behavioral norms onto its suppliers.[142] That code forms part of the contractual relations between Apple and its suppliers, giving Apple a substantial amount of regulatory control over the way in which suppliers operate. Though the supplier code appears targeted to its suppliers, it actually is meant to induce an appropriate response from its investors (the consumption of its shares and other investment instruments). Apple thus targets communication of this information to its investor community in a way that has a set of very specific objectives other than governance.[143] It explains that "Apple is committed to ensuring that working conditions in Apple's supply chain are safe, that workers are treated with respect and dignity, and that manufacturing processes are environmentally responsible."[144] The Supplier Code itself is also available not only to affected suppliers but also to the investment and consumer communities.[145] The code itself is interesting. It is based on a model code prepared by the relevant industry group (this comes as no surprise), but it also incorporates certain international human rights and labor norms.

> Apple's Supplier Code of Conduct is modelled on and contains language from the Electronic Industry Code of Conduct. Recognized standards such as International Labour Organization Standards (ILO), Universal Declaration of Human Rights (UDHR), Social Accountability International (SAI), and the Ethical Trading Initiative (ETI) were used as references in preparing this Code and may be useful sources of additional information. A complete list of references is provided at the end of the Code.[146]

Second, Apple's reaction to reports of the story of sub-standard wages was positive. It did not deny the allegations, it did not lash out at the monitors who brought the story to the press. Instead, it reaffirmed its commitment to its behavioral norms as set forth in its voluntary code, and promised an investigation of the allegations.[147] Third, Apple worked diligently to investigate and produce a report that was broadly distributed

142. *See* Apple, Inc., "Supplier Code of Conduct" (Nov. 13, 2005), *available at* http://www.apple.com/investor/ (follow "Responsible Supplier Management" hyperlink; then follow "Supplier Code of Conduct" hyperlink) (last visited Dec. 27, 2007) [hereinafter Apple, Supplier Code of Conduct].

143. *See* Apple, Report on iPod, *supra* note 142.

144. Apple, Supplier Code of Conduct, *supra* note 143, at.

145. *See id.*

146. *See* Apple, Inc., "Supplier Code of Conduct," *supra* note 142.

147. *See* Apple, Report on iPod, *supra* note 142.

relations of power he describes: a "network of power relations . . . forming a dense web that passes through apparatuses and institutions, without being exactly localized in them."[152] But he missed the essential nature of authority in the mix. And for authority some form of legal reification remains essential. Lyotard perhaps had it right when he described the authority/law matrix:

> In the modern system, and even more so in the postmodern one, authority is a matter for argument. It is never attributed, or conceded, so to speak, to an individual or a group, which may occupy the location of authority only for a limited time. That location is, in principle, empty. Authority is designated by a contract, even if it is the final word in which the Law itself speaks.[153]

Thus, in this global system is evidenced a new law/power relationship. But the law/power relationship being constructed outside of the formal structures of traditional public law shares a certain similarity to law in its pre-Enlightenment forms. It harkens more to Coke than to Bacon, more to Locke than to Schmitt. The new law/power matrix is custom and practice backed by social and economic power. The example of Apple related above evidences the way in which the disciplines, as understood by Foucault in the context of the erection of a surveillance society,[154] have become dynamic forces in the reconstruction of systems of law/power.[155] But it also demonstrates that even the most dynamic and subterranean of forces cannot resist reification. It might surprise Foucault to see that even the disciplines can serve as a "common law" to be deployed against state and individual actors seeking to impose their will against normative principles the disciplines further.

IV. God as Law; Humanity as Law: Divergence in the Management of State Power in Modern Constitutionalism

Yet even as power is increasingly exercised as technique beyond the traditional understanding of law as "thing," traditional uses of law as an instrument of asserting the power supremacy of the state continue to flourish in modern form. Foucault surely rejects this constitutionalism as an act of delusion—for him law cannot but be partial and legal discourse misdirected. It is to the techniques, to the disciplines, the underground

152. FOUCAULT, HISTORY OF SEXUALITY, *supra* note 77, at 96.

153. LYOTARD, *supra* note 110, at 77.

154. *See* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 128, at 187.

155. The relationship of law/power systems, surveillance and governance are explored in Larry Catá Backer, *Global Panopticism: Surveillance Lawmaking by Corporations, States, and Other Entities*, 13 IND. J. GLOBAL LEGAL STUD. (forthcoming 2008).

democrats and Marxist-Leninists might applaud—but in defense of very different conceptual frameworks.In the United States, expression of an instrumentalist reification of law has provided the essential framework for the great debates of American constitutional theory. Bickel's majoritarian difficulty[157] and Weschler's neutral principles[158] are natural expressions of the idea that even foundational law is an object of positivist manipulation. Each works to justify a judicial role in a normative system of legal instrumentalism.[159] This justification assumed critical importance especially as it related to a judicial system designed to operate under a normative conception of law as autonomous rather than instrumental. Weschler and Bickel express the efforts, in the American context, to reconstitute the American judiciary on the Stuart model, as "lions, but yet lions under the throne, being circumspect that they do not check or oppose any points of sovereignty."[160] Bacon, of course, would understand the conceptual difficulties of judicial review of legislative or executive action; Coke would not. Where law is reified as autonomous and systemic, rather than instrumental and consequential, the difficulties of judicial review, even within democratic theory, tend to fall away.

Likewise, the American presidents' repeated attempts at early Stuart type rule—President Truman with the steel mill seizures[161] and President George W. Bush with the detention of American citizens during combat operations[162]—show the power of this sort of instrumentalism in action. In both cases there was a clash of legal culture. On the one hand, the idea of law as the servant of state power and, on the other, the idea of law as an autonomous set of normative limits of state power. Ironically, in both cases, the judiciary tended to push very little beyond a core instrumentalism tied to a positivist conception of the American Constitution.

These limitations were nicely illustrated in the various opinions in *Hamdan v. Rumsfeld*[163] on the president's power to establish military commissions. The opinion provided an opportunity to refine the great debate between constitutional structuralists, political constitutionalists and ideological supremacists. These three great schools of normative constitutionalism in the United States reflect the tensions in American

157. *See* BICKEL, *supra* note 116.
158. *See* Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
159. *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty*, 112 YALE L. J. 153 (2002).
160. BACON, *supra* note 4, at 230.
161. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
162. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
163. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); 126 S. Ct. 2749 (2006).

"brooding omnipresence in the sky."[167] Smith argues that the rejection of the ancient notion of an organic and autonomous law (including a binding "higher law") arises from what he describes as a correct perception "that our ontological inventories (or at least those that prevail in most public and academic settings) could not provide any intelligible account of . . . this preexisting thing called 'The Law.'"[168] However, Smith argues that though our heads may tell us that law is at best an instrumental reification, our hearts still belong to the more ancient English conception.

> At the same time . . . [there is] cogent evidence suggesting that we still do believe in "the law". . . . Our actual practices seem pervasively to presuppose some such law: our practices at least potentially might make sense on the assumption that such a law exists, and they look puzzling or awkward or embarrassing without the assumption."[169]

And perversely, these criticisms mirror, in some respects the criticisms of Western law through the critical legal studies movement and its various offshoots.

B. *Legal Hierarchies Limited by the Great Principles of International Behavior Norms*

The creation of "higher law" restraints on government finds parallel development in the efforts to create a higher law of nations after 1945. These efforts bore fruit in the great exercises in constitution making after the Second World War, from the German and Japanese post-war constitutions to South Africa's post-apartheid constitution at the close of the twentieth century. These constitutions still adhere to the hierarchies of the traditional constitutions. Each acknowledges that there are some choices that the state cannot write into law. And some provide that certain restraints may not be erased from the domestic constitutional order.[170] But these restraints are derived from a different normative legal order. This set of boundaries beyond the law making power of the state are not found in some law that is separate from, but at the same level as the state law of constitutions. Instead, the boundaries are impermeable because they derive from consensus at a level higher than the state—as part of a consensus among the community of nations.[171] This new transnational or post-national constitutionalism is the hallmark not only

167. *Id.* at 62.
168. *Id.*
169. *Id.* at 63.
170. For the provision in the German Basic Law, *see* GG art. 79.
171. *See, e.g.*, S. AFR. CONST. 1996, art. 39, pmbl.

global stage. At this level, higher law, as global consensus, can exist without challenge from states. But this is a more deliberative law system than that conceived by Coke. As Jill Frank nicely expressed in her consideration of Aristotle on constitutionalism, "[d]eliberative democrats tend to treat the constitution as a rule of right reason and to reify and freeze it by locating it out of time, in an invariable realm that transcends human affairs."[175]

But this reification of law as autonomous is itself a positivist exercise. In this context, law is reified in a different sense, as an instrument—serving to provide the framework within which political communities may authoritatively act through law while permitting states to retain a monopoly of legislative power within their territories. Thus, law retains its positivist and instrumental character within a state, even as it loses that character in the construction and interpretation of the "higher law" of the state—its constitution. With respect to this higher law, law understood in its global context as a common higher law, stands separate from and beyond the authority of any state legislature, and even the sovereign authority of the people. Thus, the limiting framework was external to any individual state constitutional system. It was secular. It could be changed but only by the consensus of the community of nations.

That separateness is not guarded by a cohort of common law lawyers, as on Coke's world, but by a group of what Peter Fitzpatrick calls "deific substitutes"[176] who reify global constitution limits "by treating it as a 'dead' rule for the future, a fact of social acceptance."[177] Thus, global common law acquires form only through positive acts expressing a deliberate consensus among the community of states. Law in this sense is a self-immanent expression of the members of the global common law community, and thus authoritative as an aggregate expression of that unity.[178]

C. *Legal Hierarchies Subordinate to a Higher Law Represented by the Pronouncements of One or Another Organized Religion*

These are the great theocratic states, from Iran to Iraq and Afghanistan. Law stands apart from the state, but is merely the instrumental form of higher law. It takes a middle place between human power and divine command. Law is reified, to be sure. But it is both

175. Jill Frank, *Aristotle on Constitutionalism and the Rule of Law*, 8 THEORETICAL INQUIRIES IN LAW 37, 49 (2007).

176. Peter Fitzpatrick, *What Are the Gods to Us Now?: Secular Theology and the Modernity of Law*, 8 THEORETICAL INQUIRIES IN LAW 161, 178 (2007).

177. Frank, *supra* note 175, at 49.

178. Fitzpatrick, *supra* note 176, at 178.

Using the legal systems language of the present we come back to a time before Coke. We can take Kant literally now in this context when he suggested the connection between the genius of human striving for perfection and a higher law "so holy (inviolable) that it is already a crime even to call it in doubt [which must be thought] as if it must have arisen not from human beings but from some highest, flawless lawgiver; and that is what the saying 'All authority is from God' means."[183] Kant meant to celebrate the divine essence of collective humanity. But in place of a perfectible Enlightenment humanity this system understands perfectibility literally as God, understood as *Logos*.[184] Law is reified as an emanation of the divine presence in human affairs. The separation of human *gubernaculum* and *jurisdictio* is a necessary requirement in a world in which God and law are one which is served by humanity through its governance apparatus.

In the West, this form of legal reification takes a distinctly Christological form—as Logos and Church.[185] And in this sense law is again reified, as against the state, in the sense Bracton understood that reification, not as Coke and Locke later understood it. In Islam, the reification follows a different path—through the Qu'ran and the ummah.[186] In either case, Law is reified as both standing as a thing apart from people and their social organizations (Law is God, or God is Law), and constituting the divine source within humanity (Logos as reason)[187] and the ummah as Law in Islam.[188]

These systems appear as assertions of complete power through legal

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Kaufmann trans., New York, Viking Press 1968) (1888).

183. EMMANUEL KANT, THE METAPHYSICS OF MORALS 6:319 (Mary Gregor trans., Cambridge U. Press 1996) (1797).

184. *See* Larry Catá Backer, *The Mechanics of Perfection: Philosophy, Theology and the Perfection of American Law*, in ON PHILOSOPHY IN AMERICAN LAW (Francis J. Mootz, Jr., ed., Cambridge: Cambridge University Press, forthcoming 2009).

185. For a fine but controversial exposition, *see* Benedict XVI, *Faith, Reason And The University*, Apostolic Journey Of His Holiness Benedict XVI, To München, Altötting And Regensburg (Sept. 9-14, 2006), Meeting With The Representatives Of Science, Lecture Of The Holy Father, Aula Magna Of The University Of Regensburg, Tues., Sept. 12, 2006, *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html (provisional text, Sept. 16, 2006) (last visited Dec. 28, 2007).

186. Christopher Stewart, *From "Mother of the World" to the "Third World" and Back Again: The Harmonization Cycle Between Islam and the Global Economy, in* HARMONIZING LAW IN AN ERA OF GLOBALIZATION: CONVERGENCE, DIVERGENCE, AND RESISTANCE 279, 282-85 (Larry Catá Backer ed., Carolina Academic Press 2007).

187. *See* Benedict XVI, "Faith Reason and the University: Memories and Reflections," Address Delivered at the University of Regensburg, Germany, Sept. 12, 2006, *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html.

188. *See* RODOLPHE J.A. DE SEIFE, THE SHAR'IA: AN INTRODUCTION TO THE LAW OF ISLAM 34 (Austin & Winfield 1994).

years of debate seems to confirm is only this: law is a powerful totem for belief systems. Control of the meaning of law is among the greatest techniques of power. On one side are those who would resist invasion of ancient or traditional rights by increasingly powerful and aggressive institutional bodies—government, religion, corporation, and society. The source of resistance is the sure belief in the power of an autonomous reified complex of law. On the other side are those institutions, which conceive themselves as representatives of the whole or complete parts of the power of those they represent. Convinced of the perfection of the authority derived from such representation, these institutions resist the imposition of checks and restraints applied in new and more restrictive ways. The source of this resistance is the sure knowledge that law is separately constituted but is passive and instrumental, to be used by legitimate authority in the construction and articulation of normative standards that exist apart from law and subordinate to the genius of the political community. And perhaps, both the struggle and its inevitable frustration, more than anything else, illuminates the autonomy, the distinct personalities, of law reified, as the great insight for the twenty-first century.

Ironically, while Foucault is immeasurably important in helping understand the dynamics of this relationship, Foucault himself was too much in the contest for control. As a consequence, his analysis may suffer from the same partial quality as the law systems he critiques. But his insights are sound. Foucault is right to assert that power is both partial and fractured among all actors among whom power is deployed. Power can be reified as law, or can use law as an instrument of naturalizing power. The partial nature of power is reflected in law to the extent that law itself is connected with power. But law itself can exist in all areas in which power is deployed. It is independent of the state, at least in the sense that as the state cannot contain power, even within its borders, neither can it contain law. And the nature of law, like the nature of power, is bounded. But the bindings are constructed. They reflect the willingness of actors affected within networks of power, to believe in the limits of power/law, and to act within those limits.

Thus, one ends where modernity began—with faith as the basic ordering principle of power.[193] Law must be "more than the positive law derived from statutes and any rules able to be discovered in judicial decisions."[194] The fundamental relationship of power comes around

193. *See* Larry Catá Backer, *The Mechanics of Perfection: Philosophy, Theology and the Perfection of American Law, in* ON PHILOSOPHY IN AMERICAN LAW (Francis J. Mootz, Jr. ed., Cambridge, Cambridge U. Press forthcoming 2009).

194. Sian Elias, Address, *reprinted in The American Law Institute, Remarks and Addresses at the 84th Annual Meeting*, 84 A.L.I. PROC. 67, 78 (May 16, 2007) ("Law

broadened and freed of the artificial boundaries between public and private law, reproduces itself on a global level in the twenty-first century. On the one hand are the difficulties of applying law to states themselves. When states seek to engage in activities as private actors, law assumes a different character. The traditional boundaries between public and private law are weakened and its instrumental character might require redefinition.[200] On the other is the rise of governance systems in which law, as a formally constituted expression of political power, is absent.[201]

Struggles for control of law as a normative construct will be the great battleground for theory and practice in this century. None will win. All will attempt to work within networks of private and public power that emerges as institutions and political communities come to terms with the fracturing of power that is with the diminution of political communities to assert anything approaching a monopoly power over the control of behavior. How that happens will set the course for the coming era. And perhaps both the struggle and its inevitable frustration, more than anything else, illuminate the autonomy, the distinct personality, of law. The permanence of the resulting constitutional deadlock, derived from great differences in the characterization of law reified, is the great insight for the twenty-first century.

200. *See* Larry Catá Backer, *The Private Law of Public Law: Public Authorities As Shareholders, Golden Shares, Sovereign Wealth Funds, And The Public Law Element In Private Choice of Law*, 82 TULANE LAW REVIEW (forthcoming 2008).

201. *See* Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW (forthcoming 2007-2008).