Chapter 1

Fables of Sovereignty

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Much of the dominant anglophone literature on sovereignty is shaped by an historical discourse that posits an alleged concept and then invokes its history as a rhetorical strategy to impress the reader with the self-evidence of a specific view of the subject matter. What passes for the history of sovereignty in this arguably coercive mode is often a series of fables whereby authors invoke the historical record without consulting it at an archival level, or in the detail which any serious inquiry might be held to require. To be fair, there are outstanding exceptions to be noted and major revisionist historiography is well under way. However the field itself remains to be reconfigured, and many of the lessons of attempts to rethink the historical record have not as yet been universally or even generally received.

In this chapter, I relate the problematic nature of the history of sovereignty to its possible transformation. A contemporary approach to this matter, I suggest, needs to be informed by higher levels of philological caution and a much wider ambit of historical inquiry, so that differential features of the historical record can be recognised with more justice than is currently the case, and so that the social and legal experiences of humanity generally, and not merely to those of Western Europeans, can impact upon ways in which the problem of sovereignty is discussed. In the first section of this chapter, I outline a constructive realist approach to history with the capacity to impact on prospections of future institutional organisation. In the second section, I criticise the older cartographies of the history of sovereignty, which suggest that sovereignty emerged in the context of the wars of religion in sixteenth-century Europe in close proximity with the emergence of the modern state. I use as my example the dated, but still standard, work by F.H. Hinsley, *Sovereignty* (second edition, 1986). I conclude by suggesting that it may be possible to modify sovereignty in ways which retain its purchase as an institutional end point, while freeing this end point from political and cultural practices that now appear less useful, and in some contexts morally repugnant.

See, for example, the outstanding works of Cary J. Nederman especially (1993) *Medieval Political Theory: A Reader: The Quest for the Body Politic, 1100–1400* (London: Routledge), and (1996) *Difference and Dissent: Theories of Toleration in Medieval and Early Modern Europe* (Lanham, MD: Rowman and Littlefield). There are also exceptional studies published by Cambridge University Press.

Constructive realism

Today the future of history as a discipline is in question. Although history written in the nineteenth century realist vein still sells in paperback, there is disquiet at the selfreflexive core of the discipline. The challenges to history are partly technological, as a video-watching generation loses the literary skills to access remote primary sources or even the best secondary texts. The survival of historical consciousness will depend on finding better ways of relating historical thinking to the problems of advanced technological societies. If this is not done, then the current enthusiasm for history in subjects such as literary studies, sociology and social anthropology may prove misleading. One way to do this is to show that historical materials can be relevant to contemporary problems.

The notion that history should concern itself with policy concerns is still resisted by most historians, even though, under the influence of the work of the distinguished German conceptual historian Rheinhardt Koselleck, there is widespread appreciation of the need to study the emergence of new historical horizons and what are felicitously called 'futures past'. This is partly because of an understandable desire to avoid the allures of fool's gold, and partly because of a suspicion of epistemologically insecure enterprises. The fool's gold issue can be disposed of by clarifying a number of key arguments. After the fall of Marxism, there is a widespread consensus that attempts to foretell the future are radically unreliable, a conclusion reinforced by the failure of Marx's predictions about the collapse of capitalism and the inevitability of proletarian revolution. Given the contingency and undetermined character of human

affairs, as Sir Karl Popper famously argued in *The Poverty of Historicism* (1960), it is not possible to predict future events on the basis of alleged historical laws. Popper's critique, however, was directed only against theories which required such laws. It did not rule out all attempts to use history to think about the future, and more recently historical sociologists, such as Michael Mann and John Hall, have argued that it is possible to specify long term *patterns* of historical development, to speak of *tendencies*, and to make specific structure-related *predictions.*

Most history, of course, continues to be written in nineteenth-century modes, especially in the mode of biographical narration, in the mode of foreign correspondents' report, and in the mode of action-packed story of a hero, just as Romantic tropes still shape much historical writing and the Romantic figure of the unique landscape is still crucial to the history of many nation-states. Nonetheless, Braudel's emphasis on the absence of change over vast periods and his rejection of 'events' as so much foam on the sea of slow-moving geopolitical data have sensitised historians to the limitations of novelistic drama as a model for historical analysis and are new genres of historical writing emerging, including attempts to write long-term history in terms of engineering machines and chaos theory. See M.A. De Landa (1997) *A Thousand Years of Nonlinear History* (New York: Serve Editions).

The future as a history also has a history. See R. Koselleck (1985) *Futures Past: On the Semantics of Historical Time* (Cambridge, MA: MIT Press). For discussions of the alleged 'death of the future', see D. Wood (ed.) (1990) *Writing the Future* (London: Routledge).

See J. Hall (1985) *Powers and Liberties: The Causes and Consequences of the Rise of the West* (Oxford: Blackwell).

A more important reason why historians tend to underestimate our capacity to think about the future, however, is that they unconsciously accept the bias *towards epistemological enterprises* built into modern Western organisations of knowledges and knowledge-generating institutions. By 'epistemological enterprises' I mean enterprises which are justified and grounded by knowledge claims, not only by claims to know, but by claims about how what is alleged to be known is known to be knowledge. The epistemological cast which Descartes gave to Western intellectual culture, a cast vastly extended, in different ways, by British empiricism and neo-Kantianism, has tended to downgrade intellectual enterprises which are not primarily epistemological; hence, the decline in modern times of practices of self-appropriation, such as those involved in classical rhetoric and the relative neglect of invention within modern disciplines. Of course, this bias is more marked in some areas than others, and both the arts and commercial design have been more open to invention than, for example, education, sociology or, at least until very recently, medicine. It is not necessary, however, for work on historical materials to take an epistemological form. On the contrary, a constructive approach to historical materials is possible.

In the current literature, constructivism refers to a brace of tendencies which emphasise the 'making' of objects traditionally construed in realist terms. In recent years, constructivism has come to the fore in many disciplines. In psychology, sociology and international relations theory, constructivism is associated with how entities are discursively produced. In education, there has been a major reorientation of pedagogy and instructional design under the influence of theories which emphasise how students make or construct their objects of knowledge. The crucial move, exemplified in the work of theorists such as von Glasersfeld, is from an epistemological approach, in which students allegedly learn to know a pre-existing 'real' to an approach which emphasises the personal and the social 'making' of knowledge objects. A focus on the 'making' of knowledge objects characteristically involves tensions between an emphasis on the 'making' of entities, the claim that entities already made can be made differently, and an emphasis on the role social and economic conditions have in determining how entities are made. I submit that these tensions can be resolved, however, by opting for a form of constructivism which privileges a 'laying out' rather than recursive inquiries into how xs were produced.

See E. von Glasersfeld (1995) Radical Constructivism: A Way of Knowing and Learning (London: Falmer Press).

My approach here can be contrasted with various American forms of constructivism. John Rawls, for example, argues that political justice can be represented *as the outcome of a certain procedure of construction*. Rawls does not claim that this 'procedure of construction' *produces* the order of moral values or that the variation on eighteenth-century social contract theory with which his model begins ('the original position') is itself constructed. See J.

Rawls (1993) *Political Liberalism* (New York: Columbia University Press), 103. Compare the attempt by the Harvard legal theorist Roberto Unger to develop a constructive social theory that treats 'society' as a set of contingent assemblages which have been 'made'. See Roberto Unger (1987) *Politic: A Work in Constructive Social Theory* (New York: Cambridge University Press) and other books. The Harvard theologian Gordon Kaufman advocates an approach for which theological symbols are 'made' by emphasising human beings as socio-

A constructive approach of this kind challenges nineteenth-century European history's obsession with narratives, chronicles and stories, and expose the limitations of a conception of history which implies that truth can be produced by examining the testimony of eyewitnesses (*histor*, an eyewitness). Whereas nineteenth-century European history often sought to confirm the reader's belief in moral values already constitutive of the socio-legal order in which she or he lived, a constructive approach seeks to persuade the reader that socio-legal innovations are needed in light of historical materials. Work of this kind does not depend upon attempts to totalise an unlocatable present, or to predict actual historical futures in detail. In place of the aesthetic expressivism and nostalgia that played such an important part in the work of the great Basel cultural historian Jacob Burckhardt, and the later historians influenced by him, it emphasises the instauration of new frameworks which cannot be derived from the materials which suggest them. To this extent, it contributes to a non-historicist *Historik* that works *from* historical materials in order *to lay out* frameworks which can cast light on organisational possibilities. These frameworks can include prospections. Prospections are attempts to articulate *immanent organisational possibilities.* They are not prophecies that particular changes are going to happen, but thought experiments designed to enhance contemporary perceptions. Prospections can help to focus and reform current thinking about organisational possibilities, even though the constellations outlined in them may never come to pass, precisely because they do not depend on arguments about how things *will* turn out.

cultural animals evolving under bio-historical constraints. See Gordon Kaufman (1993) *In Face of Mystery: A Constructive Theology* (Cambridge: Harvard University Press).

Here much can be learnt from the work of Walter Benjamin and Michel de Certeau, both of whom attempted to make a path for history which transformed rather than repeated its sources. Benjamin's notion of *Wirkungsgeschichte*, however, easily falls into surrogate religious notions of history as a teleological temporal process. The same holds for demands to 'meet the demands of the age' or to discern 'the needs of the times', although, as Foucault's work shows, a certain emphasis upon the interrogation of the subjectively experienced 'present' can add motivation and edge born of suffering. For de Certeau's conception of historiography as 'operation', see J. Ahearne (1995) *Michel de Certeau: Interpretation and Its Other* (Cambridge: Polity Press).

J.G. Droysen (1808–1886) introduced the German tradition of *Historik*, the detailed study of the practices and procedures of the historical profession, with his *Grundriss der Historik* (1858) dealing with the methodological principles of historical research. For an excellent study, see J. Rüsen (1969) *Begriffene Geschichte Genesis und Begründung der J.G. Droysens* (Paderborn).

Here there is a link to the jurisprudential concerns of the Italian and French Renaissance humanists who contributed so much of the framework of modern historical thought. My approach can be usefully compared with the revised version of historicism advanced in recent years by the leading contemporary German theorist of history, Jörn Rüsen. Rüsen remains committed to the Enlightenment notion that the primary task of history is the detection of myth, and to a modernism with secularist implications. He understands history in terms derived from German Idealism, and speaks of 'historical consciousness' as a coherent set of mental operations which define the peculiarities of historical writing as an autonomous source

Cartographies of historical sovereignty

I now turn to the approach to the history of sovereignty that dominates much of the existing anglophone literature. Much of this literature refers almost exclusively to work in English and even references to French and German secondary literature are occasional rather than systematic. Little reference is made to Italian, Spanish, Russian, Chinese, Arabic or African sources. Similarly, many of these texts contain Latin words, although no reference is made to the meaning of those words in their different historical contexts, and ancient Greek terms (for example, *polis*) are given

modern senses, and medieval terms are discussed as if they had classical meanings. In the context of globalisation, however, it is possible and arguably necessary to historicise sovereignty as something that has taken very different forms across the millennia, in different parts of the world, and in indigenous as well as modern societies. Once sovereignty is historicised in this way, the anglophone discourse about sovereignty from 1600 on looks increasingly myopic. But even in its own terms this discourse is often problematic. Much of it is frankly presentist and finalist, as well as omissive and biased towards particular examples (England and France). It also sometimes tends to underwrite the goal of statist repression of religion. As a result, complex and many faceted historical processes are reduced to idealisations, and the nature of sovereignty is to this degree in some respects concealed. Often it is suggested that sovereignty is an abstraction or a practice, as if the historical reality that sovereignty has been many things on many sites was thereby disposed of. Similarly, complexities are noted, but not accounted. For example, the fact that sovereignty has been ascribed to God, the Prince, the people, the nation, Parliament, the law, reason and individuals is conceded, but the organisational implications of this fact are repressed. In much of the literature, this repression is facilitated by an endemic failure to clarify what sovereignty is. Indeed, much of the anglophone discourse about sovereignty oscillates between sovereignty in the sense that *there is a supreme power within a body politic*, sovereignty in the sense that *power coordinates with territoriality*, and sovereignty as *a way of regulating the relations between states*, without explaining why these were so hard to relate to each another.10 Often the implication is that absolute sovereignty is the correct approach to supremacy within a body politic, territorial sovereignty is the best way to conceive of statehood and a system of sovereign territorial states is the best way to regulate relations between states. This approach pushes the discussion to counterfactual levels since governments throughout history fail to attain the right form, statehood is often hard of historical meaning. See J. Rüsen (1993) *Konfigurationen des Historismus* (Frankfurt am Main: Suhrkamp).

10 Nor are these problems really solved by more sophisticated and theoretically driven approaches that construe sovereignty as a discursive practice, as a social construction, or as an objective logic of ideas best grasped by only weakly contextual 'conceptual history' or some variant on Carl Schmitt's legal sociology of ideas. Jens Bartleson (1995) *Genealogy of Sovereignty* (New York: Cambridge University Press), offers a relentlessly Foucauldian approach uninformed by research or multilingual sources for which the history of knowledges falls into epochs according to the master's plan without bothering to understand how precisely discourse proceeded in Byzantium or even Ottoman Istanbul.

to find or mythical, and interrelations refuse to stay on the right path. It also obstructs understanding since the three senses of sovereignty are not always coterminous, and one often declines for decades at a time.

The most influential, although admittedly dated, English-language account is F.H. Hinsley's *Sovereignty* (second edition, 1986). Accordingly to Hinsley, sovereignty is not a fact but a concept applied in certain circumstances. It originally expressed the idea that there must be a final and absolute authority in the political community.11 The concept of sovereignty will not be found, however, in societies in which there is no state.12 When a society is ruled by means of the state, the concept is sovereignty is sooner or later unavoidable.13 Far from arising at once with the emergence in a community of the forms of the state, the concept will not have appeared until a subsequent process of integration or reconciliation has taken place between a state and its community. It will infallibly have struggled to the surface, on the other hand, whenever and wherever that process has advanced to a certain point. Once the concept has emerged in any society, its further development will have been ultimately linked with further changes in the relations between the society and its government.14 Hinsley attributes this development to the re-discovery of classical culture, not to contemporary political conditions. In a strikingly finalist attitude, he speaks of the notion of sovereignty 'eluding' theorists from the twelfth century onwards.15 Sovereignty, it seems, goes with the rise of the state, which is a necessary but not a sufficient condition for the concept.16 Hinsley's account is grossly Eurocentric and presentist. It is also anti-religious and specifically anti-Catholic (Calvinists, Lutherans, Orthodox and Muslims are largely ignored). Religion as a

potential plague is what sovereignty is designed to control and Christian theocracy in particular is to be blamed for various delays in the emergence of sovereignty as the true form of the state in the West.

The historical record, however, is considerably more complex. Sovereignty is not a modern concept, the doctrine in sovereignty was not produced by the modern state, and there were no states in the modern sense at the time that the alleged theorists of modern sovereignty (Hobbes, Bodin and Locke) were writing, or even until the nineteenth century. Nor was sovereignty intrinsically secular, and the extensive reality of religious government, including actual territories in the German Empire and elsewhere, cannot be left out of account. Nor can sovereignty be explained in terms of modernity,17 a contested concept covertly which historians rightly point out is confuted by attempts to apply it, whether to fourteenth-century Europe, when it is counterfactual, or even to nineteenth-century Europe, where its application is muddy at best.

11 F.H. Hinsley (1986) *Sovereignty* (Cambridge: Cambridge University Press), 1.
12 Ibid.
13 Ibid., 17.
14 Ibid., 22.
15 Ibid., 72–77.
16 Ibid., 17–18.
17 Onuf associates sovereignty with modernity. See N. Onuf (1991) 'Sovereignty: Outline of a Conceptual History', *Alternatives* 16, 425–446.

I now offer a selective rereading of the history of sovereignty designed to alert the reader to the entitative diversity occluded by the standard cartography. Attempts to find sovereignty in ancient Greece or in the Persian empire are currently weakly supported, although the Persian case is more arguable. Sovereignty was first formulated the Roman Empire in the first century CCE. The *populus romanus* was the authority in whose name the magistrates enforced law. But the law still meant primarily what it had meant for Aristotle, not the will of the Roman people so much as the higher morality which it was Rome's duty to uphold. *Imperium* did not yet denote a political and territorial community. Under the principate there was a concept that the Emperor's *auctoritas* prevailed over other authorities with the increasing stress on the divinity of the Emperor. Early in the third century Ulpian advanced the principle that the *princeps* was above the law (*princeps legibus solutus est*) and what has pleased the *princeps* has the force of law (*quod principi placuit legis habet vigorem*), but the Senate maintained the republican tradition and insisted that the Emperor should be elected. There was no notion of completely absolute sovereignty and *imperium* meant the rule of rules, just as autocracy was delimited by the normative force of Roman traditions, the Stoic natural law, the Roman doctrine that every member of the *populus* was a bearer of public power and subjected only to the laws of the whole community to which they belonged, and the role of the *ius gentium*. Rome transmitted the concept of sovereignty to Byzantium, where the Emperor was Lord of the entire world, but the complexities of Byzantine doctrine and practice are little noted even though the empire lasted for over a thousand years and diffused notions of sovereign governance to Russia. In neither the Roman Empire nor in Byzantium was sovereignty ever applied to international affairs.

The medieval heritage can hardly be understood in terms of the anachronistic distinctions between secular and sacred in terms of which many modern scholars have attempted to write it. In the medieval period many forms of sovereignty were recognised, even if the realities differed from the Roman law terms in which they were couched. From the fifth to the fifteenth centuries the Pope was the *universalis monarchia* exercising the *universale regimen* and the popes considered princes to be auxiliaries to assist in their government. God was sovereign over the created world and the Pope as the vicar of Christ was sovereign over the church.18 Similarly, the Emperor was the supreme monarch of the single *societas* or *republic* of Christendom. However, the empire claimed to be a true *respublica* with a true public law and the Emperor claimed only a limited *potestas.* The supreme *auctoritas* remained with the papal monarchy. From the thirteenth century some writers claimed that the king had no superior in temporal matters within his realm. Hence, both the

French and Neapolitan kings claimed significant independence from the Emperor with the Church's support. The emergence of theocratic kingship based on *Rex Dei gratia*, a doctrine of fifth-century Oriental origin associated before that with the

18 See M. Wilks (1963) *The Problem of Sovereignty in the Late Middle Ages* (Cambridge: Cambridge University Press); G. Post (1964) *Studies in Medieval Legal Thought: Public Law and the State 1100–1322* (Princeton: Princeton University Press); J.M. Blythe (1992) *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton: Princeton University Press).

Council of Nicaea, was used to justify some strong claims for independence but not necessarily sovereignty in any modern sense. Kings were vice regents of God and vicars of Christ, the powers of the king were conferred on him by God alone, and the king conceded to his subject (*subditus)* rights. Nonetheless, the *superioritas* of the theocratic king manifest in the giving of law and in the role of protection still assumed a spiritual order above any human power.[19] By the end of the middle ages, however, classical doctrine was functioning less well in a transformed context. Indeed, it was often grossly fictitious, especially as Pope and Emperor came to have mainly supervisory and diplomatic roles in some contexts. The problem of how to theorise political authority within a body politic was not solved and there was also no effective regulation of relations between temporal powers. Natural law and the *ius gentium* were invoked as the resources for what would later be called international law, but actual power and theoretical authority were not well integrated. The growing independence of England and France as bodies politic in which rulers had become supreme and the emergence of autonomous cities in Italy and Flanders pointed to the need for new models. With the Reformation and the horrors of religious war, major changes were inevitable.

The word 'sovereignty' became current at the beginning of the sixteenth century, but it is important to resist anachronistic misreading. In Renaissance discourse, government territory and population remained the property of the Prince. Even in Machiavelli the state refers to 'the state of him', as Viroli has brilliantly argued.[20] Similarly, international conflict was not theorised in the sixteenth century in terms of sovereignty, but in terms of concentric resemblant laws. The first writer to state the theory behind the word was Jean Bodin in his *Six livres de la république* (1576). For him sovereignty was indivisible absolute and perpetual power over the republic and perhaps essential to any proper body politic, although this is more contested.[21] In the dominant accounts, it is suggested that Bodin marked a turning point because he correctly understood that the chaos of religious war could only be avoided if the ruler had the right to give laws unto to all and everyone and to receive more from them. But this is non-contextual and ignores the complex classical, medieval, Jewish and Islamic sources of Bodin's thought.

19 I deliberately omit here the crucial but overemphasised case of England, which alone in the sixteenth century experienced an interlude of internal peace, is exceptional and not exemplary. The Tudor Crown accepted the customary law and derived its prerogative and privileges from the positive law of the land as the representative of the community. The power the king received *Dei gratia* was restricted to the absolute prerogative to the dispensing with this law in the interest of equity and of an emergency action for the common weal, although once again actual practice was different. See J.W. McKenna (1979) 'The Myth of Parliamentary Sovereignty in Late-Medieval England', *The English Historical Review* 94 XCIV, 481–506.

20 See M. Viroli, (1992) *From Politics to Reason of State: The Acquisition and Transformation of the Language of Politics 1250–1600* (Cambridge: Cambridge University Press).

21 For recent discussion of Bodin's work, see D. Engster, (1996) 'Jean Bodin, Scepticism and Absolute Sovereignty' and J.H.M. Salmon (1996) 'The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism', *History of Political Thought* 17(4), 469–498 and 500–522.

Bodin asserted only a limited form of sovereignty, always accepted that the ruler was subject to God and the natural law, and made other concessions in various and inconsistent ways. The standard view that ignores the specificity of the contexts in which he held that strong sovereignty was appropriate. In fact, sovereignty did not characterise either law or government in France in the seventeenth century to

the degree that had been generally assumed, and medieval-type negotiations and adjustment of diverse rights prevailed.[22] Bodin was also perhaps the first to marry the internal and external dimensions of sovereignty and he reduced the *ius gentium* to the common elements of the civil law systems of separate communities. Human society was theorised as society of separate and sovereign states. Bodin had little influence on his contemporaries or his successors, however, and it was half a century before the *ius gentium* became the *droit des gens.* In the historical context, both Catholic and Protestant theorists were much more important. Catholic theorists emphasised continuing papal sovereignty. For the great Jesuit theorist Suarez, states were not sovereign, although the people were given significant inalienable rights. Protestant theorists differed among themselves, with Lutherans placing emphasis on the rights of princes to govern harshly the world of sin. Calvinist theory was very different and a huge resource for subsequent American developments up to the present. The Calvinist Althusius gave absolute primacy to the sovereignty of God and went on to theorise sovereignty in specific spheres. Sovereignty remained permanently with the people and all government was derived.[23]

The contributions of Grotius, Hobbes and Pufendorf were more substantial still and offer a tremendously rich terrain. I pass over them here because, unlike most of the field, they are well treated in excellent studies and the research is getting even better. Even in these magnificent cases, however, reservations to the standard accounts should be noted, including bothy a statist and an apostate Protestant bias in many of the books on the Protestant natural law tradition. Grotius in *De Jure Belli ac Pacis* (1625) insisted on the need of a body for a positive international law. He conceded that the supreme power was capable of division and made a huge contribution by attempting to develop a positive international law, but he did so in a still distinctly theological context as a Protestant thinker who hoped to reunify the Catholic Church. In Germany, the dominant theory was that of Samuel Pufendorf who argued against Hobbes that sovereignty signified merely supremacy, not absoluteness, and insisted on obligations under a universal moral order.[24] Once again the Lutheran context is crucial, not some kind of incipient secularism. Hobbes in his *Leviathan* (1651) developed a more absolute account of sovereignty than Bodin, but his ideas were not taken up for more than a generation. They are also qualified in ways little noted by passages in his Latin works and by his theological views

22 D. Parker (1989) 'Sovereignty, Absolutism and the Function of the Law in the Seventeenth-Century France' *Past and Present* 122, 36–74.

23 See H. Dooyeweerd (1996) *Essays in Legal, Social and Political Philosophy* (London: The Edwin Mellen Press).

24 See the *The Law of Nature and of Nations* (1672). For excellent discussion, see D. Boucher (2001) 'Resurrecting Pufendorf and Capturing the Westphalian Moment', *Review of International Studies* 27(4), 557–577.

which remain an extremely contested subject. Hobbes was not the secularist he is portrayed, and he is more European than British scholars often allow.

According to the dominant accounts, the modern approach to sovereignty was elaborated as a concept in sixteenth- and seventeenth-century Europe to explain and legitimise the rise of the centralised and absolute state. Indeed, it is widely assumed in English that sovereignty was linked with crucial aspects of state formation such as the integration of the political power; the growing coincidence of territorial boundaries with a uniform system of rule; the creation of new mechanisms of law-making and enforcement; the centralisation of administrative power; the alteration and extension of fiscal management; the formalisation of relations among states through the development of diplomacy and diplomatic institutions; and the introduction of a standing army. But the actual historical record is messy. The Treaty of Westphalia laid down laws for the Holy Empire, and after the Treaty, the Empire continued to be crucial for over another 150 years. Universal institutions, including a temporally active and territorial Catholic church, did not disappear. The Treaty (or rather treaties) did not create a state system, and they were signed by many signatories who were not representing states in any modern sense. Indeed, confederations, republics, principalities, duchies, imperial and free cities as well as ecclesiastical states continued in the Empire. There may have been sovereign 'states'

in a weak sense before Westphalia, but the importance and actuality of territorial states is easily exaggerated in this period, although some of them did pursue forms of independence long before the Treaty. On the other hand, it may be fair to see the Treaty as embodying an efficient approach to relations between states which did not depend on theological conceptions over which Europeans differed, and which pointed beyond the increasingly moribund orders of the Papacy and the Empire. It did not, however, create an actual system of sovereign states and even contained passages delimiting the powers of rulers.[25]

It is also crucial to recognise the strength of the popular sovereignty tradition stemming from classical antiquity, where, of course, it bore a very different sense. Here it is traditional to laud the work of Locke, who rejected Hobbes' 'war against all', prioritised natural rights and insisted that the political society always has the right to resume the sovereignty temporarily placed in the legislature. Locke's influence is well documented, but he was much less influential in England than in America and his European reception, like Newton's, was much delayed. Contrary to many American readings, he was far from secular and believed in orthodox Christianity. He also held that the whole universe was full of spirits.[26] As a result, it is crucial to emphasise that his well-known political doctrines had a place within a larger outlook which was much more theological than the older books suggest. At the end

25 See S. Beaulac, (2004) 'The Westphalian Model in Defining International Law: Challenging the Myth', *Australian Journal of Legal History* 8(2), 181–213. Beaulac denies that the agreements reached in Westphalia have anything to do withy the creation of a state system (p. 188) and argues that the traditional interpretation is refuted by the details of the agreements reached.

26 See J. Yolton, (2004) *The Two Intellectual Worlds of John Locke: Man, Person, and Spirit in the Essay* (Ithaca: Cornell University Press).

of the seventeenth century, sovereignty played a part in the internal understanding of power within some Western states, some of whom who applied it ruthlessly to non-Western peoples and forms of government, usually to their own advantage. It also was important in an emerging Western state system, although the wider picture was confused by a wide variety of regimes, many of which could hardly be dubbed 'states'.

In the eighteenth century, parts of Western Europe acquired characteristics widely ascribed to the fifteenth and sixteenth centuries. The tradition of popular sovereignty was reasserted in the work of Rousseau, who based the sovereignty of the people on natural rights. The modern conception of international law emerged with Christian Wolff's popularisation of Vattel's *le Droit des gens* (1758) for which the state, and not the Prince, was the subject of international law. According to Vattel, the first principle of the natural law was the sovereignty of the independent state. Nations were moral persons obliged to live with other states according to the laws of the natural society of the human race.

In the nineteenth century, there were major contradictions between the French, German and English doctrines of sovereignty. At the beginning of the century, the doctrine that God was the sovereign was accepted in Prussia, Russia and Austria under the Holy Alliance. Under Napoleon, the Holy Roman Empire was abolished and the sovereignty of states other than France was often problematic. Following the defeat of Napoleon, sovereignty was applied to the monarch and based on the historical rights of dynasties by conservative theorists such as De Maistre and Bonald, while French liberals developed a more rationalist alternative. According to Royer Collard the true sovereign was reason. Similarly, Victor Cousin argued that sovereignty was the same as absolute right.[27]

Developments in the German worlds were different again. Apart from the outstanding contributions of German idealism from Kant's *Rechtsstaat* to Hegel's attribution of personality to the state as an organism, there was much more sense of participation and pervasional acquirement than in England or France. The subject retained its sense of the active power and bearer of rights as it did not in France, and many theorists applied sovereignty to the state as whole, and not to the ruler or to the people. The Historical School (Hugo, Savigny, Otto Gierke) attacked natural law theories of sovereignty based on voluntary agreement just as they promoted a very

different model of law based on *Sozialrecht*.[28] Jellinek, Gerber and Labard recognised non-sovereign states, while Hugo Preusz rejected sovereignty entirely as an intrusion of Roman law into the German legal order. Other patrimonialists derived authority from property. Thus the Swiss theorist Ludwig von Haller refused to place the state

27 C.E. Merriam (1900) *History of the Theory of Sovereignty Since Rousseau* (New York: Columbia University Press), see in particular, Chapter 6 'The Sovereignty of Reason'.
28 Gierke argued that the Romans failed to develop any notion of association, except in a fictitious sense, and also lacked a proper account of personality. The German tradition, however, provided crucial alternatives both in its doctrine of associations and in its ability to thematise group personality. See O. Gierke (1868–1881) *The German Association Law*, (1874) *The Fundamental Concepts Of Public Law*, (1887) *The Theory of Association Law*.

above a private society, denied that the state could possess moral personality, and insisted that it was based on the natural God-given right to property.[29]

Crucial issues raised by European federalism also became central during the American Civil War, when arguments for divided sovereignty were invoked by the South, and by J.C. Calhoun in particular. More generally, conceptions of sovereignty were conflated with nationalist doctrines, which implied that every people had a right to its own state, doctrines which threatened the survival of the Austro-Hungarian Empire among others. In the twentieth century the First World War and the experiment of the League of Nations led to more and more attempts to allow international law and some muted form of natural law such as human rights to qualify claims to absolute sovereignty, although the sovereignty of the papacy survived and the actual situation in individual states was immensely complex, especially in fascist and communist states. Sovereignty was attributed to law in several versions – psychological (Krabbe), nomological (Kelsen) and legal sociological (Duguit, Gurvitch), the latter attributing sovereignty to the nation and to the international community of the peoples.

What follows even from this elementary and far from accurate reading? Firstly, monistic approaches to sovereignty arguably conceal the heterogeneous sites on which multiple *personae* and diverse capacities are exercised. Secondly, the flat spatialisation and partitional construction of boundaries which delimit many contemporary approaches to sovereignty can be qualified by both differential spatiality (familiar in the medieval world and probably in China as well) and by notions of participation, co-inclusion, multilocation and multipersonality. Thirdly, the association of sovereignty with secularism can be qualified in major ways. Western political theory has tended to minimise the importance of religion in political and legal contexts. Indeed, many writers on politics assume that religion has no legitimate role. In civilised societies, they assume, religion will either die out or become so emasculated that it can be ignored for most practical purposes. It may play a symbolic role in times of crisis and ornament public funerals, but it has nothing substantive to contribute to the management of the state. This is a very narrow and short-sighted view, and one that takes little account of the role of religion in the Islamic world, in India, in Russia or in Catholic countries such as the Philippines. Instead, it is important to recognise that religion is not declining worldwide, despite some Northern European trends,[30] and that the management of religious diversity is an important issue in many different parts of the world.[31] The whole issue of the relationship between sovereignty and religious governance may be able to be

29 See Ludwig von Haller (1816–1834) *The Restoration of Political Science, or the Theory of the Natural-Social Condition Opposed to the Chimaera of the Artificial Civil.*
30 For excellent discussion, see P. Berger (ed.) (1999) *The Desecularisation of the World: Resurgent Religion and World Politics* (Washington DC: Eerdmans) and P. Norris and R. Inglehart (2004) *Sacred and Secular Religion and Politics Worldwide* (Cambridge: Cambridge University Press).
31 For contemporary discussion see R. Audi (2000) *Religious Commitment and Secular Reason* (Cambridge: Cambridge University Press), and N.L. Rosenblum (ed.) (2000) *Obligations of Sovereignty and Demands of Faith. Religious Accommodation in Pluralist Democracies* (Princeton NJ: Princeton University Press).

rethought as discourse urging human beings to practice *social recognition of each other in their religious differences* becomes constitutive of future legal positivities.

Here the experience of China, India, Africa, Islam and Mezzo-America may be of considerable import,[32] especially once the governance practices of indigenous peoples worldwide is taken into account.

Fourthly, it may be possible to preserve Carl Schmitt's insight into the connection between sovereignty and the ability to decide the exception[33] with historically unprecedented notions of individual dominion and reflexivity since disaggregation of the elements modern writers associate with sovereignty is manifestly possible. In the longer term, a revised view of sovereignty may relate to the possibility of a reflexively articulated state. Granted that there will be contexts in which 'reasons of state' need to overrule the discursive option – taking of individuals, future statecraft may be able to make more of Mill's insistence on the sovereignty of the individual and take more account of the self-reflexivity of agents. It is controversial, of course, to suggest that the tough view of sovereignty deserves reassertion even as some practices of governance based on *absolute sovereignty* are modified in a dialogical direction. However, a constructive historical reading of the historical record strongly suggests that experimental practices may be able to be introduced that overcome current confusions of sovereignty with misinterpretations of the political theology of *monarchia.* Once we recognise that the historical record abounds in emergent institutional *personae*, it may be possible to conceive of new forms of sovereignty based on emergent institutional *personae.*

Conclusion

My strategy in this chapter has been to open up discussion by introducing 'thick' historical material in order to widen the debate. I have not provided the detailed world historical rewrite of the history of sovereignty that will be needed in the long run. Nothing in my argument implies that the nation-state will necessarily decline or disappear. In fact I envisage that some nation-states may grow stronger. Nor does anything in my argument imply that realist international relations perspectives are now obsolete or that it is possible to dispense with reference to actual political and legal centres of power. However, my argument does imply that it should be possible to re-theorise sovereignty in new ways, even though nation-states will continue to dominate the international system in the immediate term, despite the partial emergence of an international or global civil society.[34]

32 C. Gibson (1969) *The Inca Concept of Sovereignty and The Spanish Administration in Peru* (New York: Greenwood Press).

33 C. Schmitt (1985) (German 1922) *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: The MIT Press).

34 J.A Camilleri and J. Falk (1992) *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World* (Aldershot: Algar).

Sampford.

Sovereignty is not a modern concept, the doctrine in sovereignty was not produced by the modern state, and there were no states in the modern sense at the time that the alleged theorists of modern sovereignty were writing, or even until the nineteenth century. Nor were sovereignty intrinsically secular and the extensive reality of religious government, including actual territories in the German Empire and elsewhere, cannot be left out of account.