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# Magnum Latrocinium and private avengers: Carl Schmitt and Hugo Grotius on piracy

Eric Wilson

*There are enemies, who declare war against us, or against whom we publicly declare war; others are robbers or brigands.* –Pomponius

Not for nothing has Carl Schmitt (1888-1985) been called the Martin Heidegger of political theory.<sup>1</sup> The central text of his later career, *The Nomos of the Earth* (1950), undertakes a neo-Heideggerian exercise in constitutional foundationalism: both the political ‘being’ of the state (political ontology) and the heuristic apparatus of law are grounded on the terrestrial, or telluric, reality of the polity. ‘In mythical language, the *earth* became known as the mother of law. This signifies a threefold root of law and justice’:<sup>2</sup> the planet (‘Gaia’),<sup>3</sup> the land, and most interestingly, walls.

Soil that is cleared and worked by human hands manifests firm lines, whereby definite divisions become apparent. Through the demarcation of fields, pastures, and forests, these lines are engraved and embedded... the solid ground of the earth is delineated by fences, enclosures, boundaries, walls, houses, and other constructs. Then, the orders and orientations of human social life become apparent. Then, obviously, families, clans, tribes, estates, forms of ownership and human proximity, also forms of power and domination, become visible.<sup>4</sup>

I argue that it is precisely this uncommon emphasis upon the impermeability of borders, both legal and political, that distinguishes Schmitt from the rest of the pantheon of international lawyers, most

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<sup>1</sup> T. Strong, ‘Foreword’ in: C. Schmitt, *The Concept of the Political*. Expanded Edition, G. Schwab trans. (Chicago 2007) ix-xxxi: xii.

<sup>2</sup> C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, G. L. Ulmen trans. (New York 2003) 42.

<sup>3</sup> ‘First, the fertile earth contains within herself, within the womb of fecundity, an inner measure, because human toil and trouble, human planting and cultivation of the fruitful earth is rewarded justly by her with growth and harvest. Every farmer knows the inner measure of this justice.’ Schmitt, *Nomos*, 42.

<sup>4</sup> Ibidem.

particularly the ‘seminal’ figure of Hugo Grotius (1583-1645). Whereas most international lawyers are, by definition, ‘internationalist’ to some degree, Schmitt authors a model of international public order premised upon a radically homogenous notion of the state that: (i) eternally exists in a condition of potential enmity with all other states; and (ii) unconditionally withholds recognition of the legal identity of any actor or agency that does not strictly conform to his model of the state. This places Schmitt at odds with the entirety of the modern international legal tradition which is conventionally understood to begin with Grotius, who views international public order as a radical heterogeneity of actors and personalities that regularly cross both legal and political boundaries. This is no more evident than with their respective treatment of the figure of the pirate.

### Schmitt and legal positivism

According to Schmitt:

In this way, the earth is bound to law in three ways. She contains law within herself, as a reward for labor; she manifests law upon herself, as fixed boundaries; and she sustains law above herself, as a public sign of order. Law is bound to the earth and related to the earth. This what the poet means when he speaks of the infinitely just earth: *justissima telus*.<sup>5</sup>

This eccentric re-presentation of the telluric as judicial foundationalism makes more sense when we situate it within the context of Schmitt’s over-arching project: the identification of European legal order (the *ius publicum Europaeum*) with the demarcation, or ‘bracketing’, of war and inter-state violence.

The essence of European international law was the bracketing of war. The essence of such wars was a regulated contest of forces gauged by witnesses in a bracketed space. Such wars are the opposite of disorder. They represent the highest form of order within the scope of human power. They are the only protection against a circle of increasing reprisals, i.e., against nihilistic hatreds and reactions whose meaningless goal lies in mutual destruction. The removal and

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<sup>5</sup> Schmitt, *Nomos*, 42.

avoidance of wars of destruction is possible only when a form for the gauging of forces is found. This is possible only when the opponent is recognized as an enemy on equal grounds – as a *justus hostis*. This is the given foundation for a bracketing of war.<sup>6</sup>

Two rhetorical maneuvers are central to this strategy. Firstly, modern European law must be thoroughly secularized, making it the exclusive possession of ‘profane’ states that are governed by an exclusively positivist legal rationality.

The justice of war no longer is based on conformity with the content of theological, moral, or juridical norms, but rather on the institutional and structural quality of political forms. States pursued war against each other on one and the same level, and each side viewed the other not as traitors and criminals, but as *justi hostes*. In other words, the right of war was based exclusively on the quality of the belligerent agents of *jus belli*, and this quality was based on the fact that equal sovereigns pursued war against each other.<sup>7</sup>

Secondly, both the political and legal relationships between states must governed by a strict reciprocity; now that the domain of international legal personality is exhausted by the secular state, the neutrality and the objectivity of the law of war can be secured through the exclusionary identification of the ‘violent’ party with the statist form.

The sovereign territorial state initiated war ‘in form’ – not through norms, but through the fact that it bracketed war on the basis of mutual territoriality, and made war on European soil into a relation between specific, spatially concrete, and organized orders, i.e., into a military action of state-organized armies against similarly-organized armies on the opposing side.<sup>8</sup>

This explains Schmitt’s obsession with the telluric: the reduction of the state to terrestrial ‘walls’ secures onto-political and judicial certainty by precluding the existence of both non-state political actors and legal personalities.

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<sup>6</sup> Schmitt, *Nomos*, 187.

<sup>7</sup> *Ibidem*, 143.

<sup>8</sup> *Ibidem*, 157-8.

The binding character of a comprehensive spatial order immediately is recognizable if the spatial order is conceived of as a *balance*<sup>9</sup> [...] Only armed struggle between state sovereigns was war in the sense of international law, and only this type of struggle fulfilled the requirements of the concept of *justus hostis*. Everything else was criminal prosecution and suppression of robbers, rebels, and pirates [...] To the essence of *hostis* belongs the *aequalitas*. Robbers, pirates, and rebels are not enemies, not *justi hostes*, but objects to be rendered harmless and prosecuted as criminals.<sup>10</sup>

And this, in turn, explains the title of the text: *nomos* is the wall that signifies not only the establishment of borders (both material and epistemological) but the onto-political foundation of the polity itself.<sup>11</sup>

*Nomos* is the *measure* by which the land in a particular order is divided and situated; it is also the form of the political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity. The *nomos* by which a tribe, a retinue, or a people becomes settled, i.e., by which it becomes historically situated and turns part of the earth's surface into a force-field of a particular order, becomes visible in the appropriation of land and in the founding of a city or a colony.<sup>12</sup>

According to Schmitt, 'the term land-appropriation is better than land-division, because land-appropriation, both externally and internally, points clearly to the constitution of a radical title.'<sup>13</sup> The originary act of the appropriation of radical title is foundational in two ways: it secures the homogeneity, both political and ontological, of the resulting polity and it guarantees the epistemic regime of the juridical order; every 'state regime, in the specific and historical sense of the word "state", is based on a separation

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<sup>9</sup> Schmitt, *Nomos*, 188.

<sup>10</sup> Ibidem, 153.

<sup>11</sup> 'In particular, *nomos* can be described as a wall, because, like a wall, it, too, is based on sacred orientations. The *nomos* can grow and multiply like land and property: all human *nomoi* are "nourished" by a single divine *nomos*.' Ibidem, 70-1.

<sup>12</sup> Ibidem, 70.

<sup>13</sup> Ibidem, 81.

of public centralization and private economy.’<sup>14</sup> The importance of the telluric for the coherence of *ius publicum Europaeum*, therefore, cannot be over-estimated. It is the primary appropriation and secondary division/demarcation that infuses the *nomos* that validates both the objective legal identities of the actors within the order and the epistemic unity of the juridical system governing their actions – the ‘bracketing’ of war.

This fundamental process of land-appropriation preceded the distinction between public and private law, public authority and private property, *imperium* and *dominium*. Land-appropriation thus is the archetype of a constitutive legal process externally (*vis-à-vis* other peoples) and internally (for the ordering of land and property within a country). It creates the most radical title, in the full and comprehensive sense of the term *radical title*.<sup>15</sup>

Thus, Schmitt is able to conclude that land-appropriation ‘precedes the distinction between private and public law; in general, it creates the conditions for this distinction. To this extent, from a legal perspective, one might say that land-appropriation has a categorical character.’<sup>16</sup>

As an historian of public international law, I find two items of outstanding interest in Schmitt’s text. The first is the radical incommensurability that he posits for land and sea, not only as juro-political space but as epistemic regime. The physical impossibility of the appropriation of the sea relegates oceanic space to legal indeterminacy.

The *sea* knows no such apparent unity of space and law, of order and orientation. Certainly, the riches of the sea – fishes, pearls, and other things – likewise are won by the hard work of human labor, but not, like the fruits of the soil, according to an inner measure of sowing and reaping. On the sea, fields cannot be planted and firm lines cannot be engraved. Ships that sail across the sea leave no trace... The sea has no *character*, in the original sense of the word, which

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<sup>14</sup> Schmitt, *Nomos*, 210. For Schmitt’s insistence, both normative and descriptive, on the homogeneity of the properly constituted State, see C. Mouffe, ‘Carl Schmitt and the Paradox of Liberal Democracy’ in: C. Mouffe ed., *The Challenge of Carl Schmitt* (London 1999) 38-53.

<sup>15</sup> Schmitt, *Nomos*, 46-7.

<sup>16</sup> *Ibidem*, 46.

comes from the Greek *charassein*, meaning to engrave, to scratch, to imprint. The sea is free.<sup>17</sup>

The second is that Schmitt identifies England, the hegemon of the modern world-system that evolved in the eighteenth century, as the true author of the internal public order because of its singular geo-spatial negotiation of land and sea; ‘what is to be kept in mind is the great balance of land and sea that the *nomos* of the Europe-dominated earth sustained.’<sup>18</sup> The balance of power that is grounded on the originary appropriation of land is effectively mediated through England’s world-historical role as maritime hegemon.

The separation of firm land and free sea was the basic principle of the *jus publicum Europaeum*. This spatial order did not derive essentially from internal European land-appropriations and territorial changes, but rather from the European land-appropriation of a new non-European world in conjunction with England’s sea-appropriation of the free sea. Vast, seemingly endless free space made possible and viable the internal law of an interstate European order.<sup>19</sup>

The Anglo-centric nature of Schmitt’s work yields a misleading analysis of the hegemony of The United Provinces in the seventeenth century period of the world-system and a thorough under-theorization of the contribution of Dutch jurists – Hugo Grotius in particular – to the formation of the European *nomos*;<sup>20</sup> Schmitt mentions Grotius’ seminal text *De iure praedae* (1604-1606) only once<sup>21</sup> and openly identifies as the ‘true founders of European international law’ the civic humanists (‘primitive’ positivists) Alberico Gentile and Richard Zouche,<sup>22</sup> marginalizing Grotius and the entire late scholastic tradition.

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<sup>17</sup> Schmitt, *Nomos*, 42-3.

<sup>18</sup> Ibidem, 173.

<sup>19</sup> Ibidem, 183. See also, idem, Part Three, Chapter Three, 172-84, passim.

<sup>20</sup> Ibidem, 179-80.

<sup>21</sup> Ibidem, 179.

<sup>22</sup> Ibidem, 309.



## Grotius and natural law

As I have sought to demonstrate in my own text on the Grotian juvenilia, *The Savage Republic*, the development of neo-naturalist ‘primitive legal scholarship’ in the pivotal sixteenth and seventeenth centuries can only be rendered fully intelligible when placed within the contours of Dutch, not English, hegemony.<sup>23</sup> Although I did not use Schmitt in my own work, his views on the relationship between *nomos* and the *jus publicum Europaeum* are not unlike my own. Where we differ is in our approach to historical materialism (or, more accurately, ‘materialist historicism’); where Schmitt deploys the discourse of geo-politics, I undertake a ‘critical translation’ of geo-spatial concepts into the terms of world-systems analysis: regional and global world-systems for *nomos*.<sup>24</sup> Like Schmitt, my central concern is with the ‘bracketing’ of war by *jus publicum Europaeum*; the primary task of *De iure praedae* is ‘to show that private trading companies were as entitled to make war as were the traditional sovereigns of Europe.’<sup>25</sup> The doctrinal problem confronting Grotius at the time of authorship was the dramatic alteration of Dutch privateering policy, the seizure of the Portuguese carrack the *Santa Catarina* in 1603<sup>26</sup> marking an irrevocable shift away from orthodox – and legitimate – self-defence to more legally and morally ambivalent forms of armed aggression;<sup>27</sup> invariably ‘privateering wars prolonged the functional

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<sup>23</sup> E. Wilson, *The Savage Republic: De Indis of Hugo Grotius, Republicanism, and Dutch Hegemony in the Early Modern World-System (c.1600-1619)* (Leiden 2008).

<sup>24</sup> Wilson, *The Savage Republic*, 57-135.

<sup>25</sup> R. Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant* (Oxford 1999) 85.

<sup>26</sup> P. Borschberg, ‘The *Santa Catarina* Incident of 1603; Dutch Freebooting, the Portuguese *Estado da India* and Inter-Asian Trade at the Dawn of the 17<sup>th</sup> Century’, *Review of Cultures* 11 (2004) 13-25.

<sup>27</sup> In economic terms, the policy shift towards aggressive maritime predation may have constituted an effort by the Dutch to secure a new source of ‘protection rent’ even if only negatively through the displacement of higher protection costs to the Portuguese. ‘There are some protection costs which are obviously defensive– such as the cost of convoys to ward off pirates; others – such as the cost of capturing ships of other nations engaged in competing enterprises – might be called offensive protection costs.’ F. C. Lane, *Profits from Power: Readings in Protection Rent and Violence-Controlling Enterprises* (Albany, NY 1979) 27.

association between war and commerce.’<sup>28</sup> *De iure praedae* is, therefore, governed by two signature rhetorical stratagems. The first is the attribution of an international normative/holistic order to international politics, derived from competing variants of natural law (*ius naturale*),<sup>29</sup> the only form of jurisprudence that could effectively bind actors operating across numerous ‘walls’. The second is the replication of the radically heterogeneous political logic of both the modern world-system and the capitalist world-economy – the trans-border economic ‘composite of strikingly different trends of the component sectors’<sup>30</sup> – as the juridical foundation of seventeenth century international public order, the *nomos* of European hegemony. Simply put, the text ‘translates’ the operational requirements of the world-economy into the terms of naturalist jurisprudence.

By positing the United Provinces as the first ‘true’ hegemon<sup>31</sup> and locating *jus publicum Europaeum* within both Dutch republicanism and jurisprudence,<sup>32</sup> I am forced to come to very different conclusions from Schmitt as to the historical nature of the early modern *nomos*. Nowhere is this more apparent than in our respective attitudes towards both the sea and to piracy. Schmitt’s entire project is premised upon the homogeneity of a juridically indivisible sovereign.<sup>33</sup> By contrast, I hold that the European *nomos* is governed by an irreducible heterogeneity; the sea is not the signifier of the absence of a unifying presence (‘land-appropriation’), but rather the signifier of the presence of a radical reversibility, or iterability, of all fixed juro-political demarcations, or ‘walls’.<sup>34</sup> The inversion of the state itself is the logical outcome: the iterability of the high seas creates a space for the absolute de-bracketing of war which enables the wholesale substitution of the lawful combatant for the unlawful. Maritime predation is not the ‘enemy’ of the early modern state, it is its apotheosis.

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<sup>28</sup> A. Perotin-Dumon, ‘The Pirate and the Emperor: Power and the Law on the Seas, 1450-1850’ in: J. D. Tracy ed., *The Political Economy of Merchant Empires* (Cambridge 1991) 196-227: 221.

<sup>29</sup> Civic Humanism and Late Scholasticism, respectively; see Wilson, *The Savage Republic*.

<sup>30</sup> I. Wallerstein, ‘The Inter-State Structure of the Modern World-System’ in: S. Smith et al. ed., *International Theory: Positivism and Beyond* (Cambridge 1996) 87-107: 89.

<sup>31</sup> Wilson, *The Savage Republic*, 137-87.

<sup>32</sup> Ibidem, 189-260.

<sup>33</sup> C. Schmitt, *The Concept of the Political*. G. Schwab trans. (Chicago 2007).

<sup>34</sup> Wilson, *The Savage Republic*, 235-47.

This brings us to piracy and Schmitt's failure to come to terms with Grotius.

### **Piracy as Liminality**

*The pirate destroys all government and all order, by breaking all those ties and bonds that unite people in a civil society under any government.* –Daniel Defoe

For Schmitt the material impossibility of a foundational (primeval) and demarcating act of maritime-appropriation renders the juro-political identity of the marine actor radically in-determinate.

Originally, before the birth of great sea powers, the axiom 'freedom of the sea' meant something very simple, that the sea was a free zone of booty. Here, the pirate could ply his wicked trade with a clear conscience... On the open sea, there were no limits, no boundaries, no consecrated sites, no sacred orientations, no law, and no property.<sup>35</sup>

Historically, pirates, as with other 'pariah entrepreneurs',<sup>36</sup> bear the sign of what anthropologists call 'liminality', the traversing of cultural frontiers.

The attribute of liminality, or of liminal *personae* (threshold people) are necessarily ambiguous, since this condition and these persons elide or slip through the network of classifications that normally locate states and positions in cultural space. Liminal entities are neither here nor there; they are betwixt and between the positions assigned and arranged by law, custom, convention and ceremonial.<sup>37</sup>

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<sup>35</sup> Schmitt, *Nomos*, 43.

<sup>36</sup> M. Castells, *End of the Millenium. The Information Age: Economy, Society and Culture. Volume Three* (Oxford 1998) 166-205; 'a private agent who manages to achieve monopoly over violence in a specific territory [who] eventually becomes a public actor.' R. Catanzaro, 'Violent Social Regulation: Organized Crime in the Italian South', *Social and Legal Studies* 3 (1994) 267-79: 270.

<sup>37</sup> V. Turner, *The Ritual Process: Structure and Anti-Structure* (Ithaca NY, 1969) 95; idem, 94-130, 166-203; V. Turner, *Drama, Fields and Metaphors: Symbolic Action in*

The pirate's archetypal 'anti-social' status as 'enemy of all mankind' – the pirate as one who takes up arms against both his natural and political family (the state) – is a dominant motif within piratical literature and jurisprudence. The 'first cousin' to the pirate, the bandit/brigand, also exhibits similar liminal qualities.

The crucial fact about the bandit's social situation is its ambiguity. He is an outsider and rebel, a poor man who refuses to accept the normal rules of poverty... This draws him close to the poor; he is one of them. It sets him in opposition to the hierarchy of power, wealth and influence; he is not one of them... At the same time the bandit is, inevitably, drawn into the web of wealth and power, because, unlike other peasants, he acquires wealth and exerts power. He is 'one of us' who is constantly in the process of becoming associated with 'them'.<sup>38</sup>

The liminal pirate/brigand constitutes an exquisitely material embodiment of the principle of iterability, 'rhetorical reversibility'.<sup>39</sup> In addition to blurring the orthodox demarcations between religious (i.e. the *renagadoes* of the Barbary Coast<sup>40</sup>), racial<sup>41</sup> and gender<sup>42</sup> (i.e. trans-sexuality<sup>43</sup>

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*Human Society* (Ithaca, NY 1974) 231-70; A. Van Gennep, *The Rites of Passage*, M. B. Vizedom and G. L. Caffee trans. (London 1960) 1-8, 20-5, 144-5, 191-4.

<sup>38</sup> E. Hobsbawm, *Bandits* (London 1969) 87-8.

<sup>39</sup> R. Gasche, *The Tain of the Mirror* (Cambridge, MA 1986) 212-17.

<sup>40</sup> P. L. Wilson, *Pirate Utopias: Moorish Corsairs, & European Renegadoes* (Brooklyn, NY 1995) 39-69.

<sup>41</sup> K. J. Kinkor, 'Black Men Under the Black Flag' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 195-210.

<sup>42</sup> 'Attributes of sexlessness and anonymity are highly characteristic of liminality. In many kinds of initiation where the neophytes are both sexes, males and females are dressed alike and referred to by the same name.' Turner, *Ritual Process*, 102-3.

<sup>43</sup> J. C. Appleby, 'Women and Piracy in Ireland: from Graine O'Malley to Anne Bonny' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 283-98; D. Murray, 'Cheng I Sao in Fact and Fiction' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 253-82; M. Rediker, 'Liberty Beneath the Jolly Roger: the Lives of Anne Bonney and Mary Read, Pirates' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 299-320.

and homosexuality<sup>44</sup>) identities, the pirate was the quintessential 'juridical nomad' who frequently traversed the porous juridical spaces separating the unlawful maritime 'pariah entrepreneur' and the ostensibly 'lawful' privateer. In parallel fashion, the high seas as juridically 'empty' space *res nullius* signify a liminal cultural zone, subverting all taxonomic classifications of established juridical hierarchies. In more prosaic terms, 'if you stuck to the [Schmittean] territoriality principle, the high seas [were] nothing but a huge expanse of lawlessness.'<sup>45</sup>

In narrower legal terms, the subversive liminality of piracy was virtually guaranteed through the inherently ambivalent juridical status of the practice: 'a legalistic approach runs into the fact that there is not, and never has been an authoritative definition of piracy in international law.'<sup>46</sup> Privateers/pirates, operating as 'juridical nomads', constituted an irreducibly chaotic element within the primitive world-system of the seventeenth century; any strategy of maritime predation, 'however and whenever it was performed, was valid, provided it worked and was profitable. What we are talking about is not a choice between merchant and corsairs, but men [and women] who were sometimes one, sometimes the other, sometimes both simultaneously.'<sup>47</sup> Ironically, the attempt to clearly demarcate between piracy and privateering was historically governed by extra-judicial forces: the abolition of privateering and the subsequent universal criminalisation of piracy were both ultimately dependent upon states de-legitimising privatised armed forces.

'Privateering generated organized Piracy. Mercenaries threatened to drag their home states into other state's wars. Mercantile companies turned their guns on each other and even on their home states. The

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<sup>44</sup> B. R. Burg, *Sodomy and the Pirate Tradition: English Sea Rovers in the Seventeenth Century Caribbean* (New York 1983); D. Murray, 'The Practice of Homosexuality among the Pirates of Late-Eighteenth and Early Nineteenth-Century China' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 244-52.

<sup>45</sup> J. W. F. Sundberg, 'Piracy: Air and Sea', *De Paul Law Review* 20 (1993) 337-435: 393.

<sup>46</sup> B. H. Dubner, *The Law of International Sea-Piracy* (The Hague 1980) 39.

<sup>47</sup> G. L. Nadal, 'Corsairing as a Commercial System: the Edges of Legitimate Trade' in: C. R. Pennell ed., *Bandits at Sea: A Pirate Reader* (New York 2001) 125-36: 132.

result was probably the closest the modern system has ever come to experiencing real anarchy.<sup>48</sup>

At the same time, the universal de-legitimation of privatised armies as illuminated at great length by Schmitt<sup>49</sup> was economically viable only after the states had found alternative ways of generating for themselves an adequately profitable rate of 'protection rent'.

Tribute-paying empires yielded diminishing returns as they drew more manpower into the maintenance and extension of such conquests. The protection rents stimulated oceanic commerce and industries which found new markets from wider trade. In... the period of the expansion of Europe, those fields of enterprise yielded increasing return.<sup>50</sup>

As we should expect, irregularities of legal taxonomy parallel vicissitudes of state praxis.

Technically, pirates were clearly distinguishable from privateers. Privateers possessed a state's authority to commit violence. They targeted only the enemies of the authorizing state... [Yet] at the end of every war, large numbers of privateers turned pirates only to be granted new privateering commissions on the outbreak of the next war. So long as states insisted to exploit individual violence, piracy could not even be defined, much less suppressed.<sup>51</sup>

Piracy had to be proscribed so as to maintain the 'correct' hierarchical relationship between lawful and unlawful forms of maritime violence, such as privateering, juridically signified by the letter of marque. However, the absence of any self-regulating form of juridical classification, coupled with the inherent parallels between the twin forms of predation, rendered a self-grounding taxonomy impossible; the

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<sup>48</sup> J. E. Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton 1994) 43.

<sup>49</sup> Schmitt, *Nomos*, 152-4, 157-8.

<sup>50</sup> Lane, *Profits from Power*, 36.

<sup>51</sup> Thomson, *Mercenaries*, 140.

‘lack of a legal definition of international piracy shows the relativity that has always characterised the identity of the pirate [in] the terms employed... pirate, privateer, corsair, freebooter... When all was said and done, the pirate was the “other”; he was a problem because he was culturally different’.<sup>52</sup>

On closer examination, piracy appears to be an inherently composite or ‘fragmentary’ concept.

The word ‘piracy’ is being used in certain treaties only because of its historical connotations, even though the context of the treaties demonstrates that the types of ‘piracy’ included therein are usually nothing more than separate domestic crimes of terrorism (which knows no boundary demarcation) joined together under the word piracy... If this is so, then there really is no uniform offence or crime of piracy. Rather, the word piracy could constitute one or many different crimes and acts of terrorism according to the dictates of the State which is affected by the incident(s).<sup>53</sup>

According to Alfred P. Rubin, the

word “piracy” entered modern English usage in a vernacular sense to cover almost any interference with property rights, whether licensed or not, and was applied as a pejorative with political implications, but no clear legal meaning.<sup>54</sup>

The minimally adequate ‘classical’ definition of piracy appears to be ‘acts of depredation committed by a private ship against another ship on the high seas for private, commercial gain’;<sup>55</sup> the only comprehensive definition

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<sup>52</sup> Perotin-Dumon, ‘The Pirate and the Emperor’, 202, 210.

<sup>53</sup> Dubner, *The Law*, 39.

<sup>54</sup> A. P. Rubin, *The Law of Piracy*. Second Edition. (New York 1998) 42.

<sup>55</sup> J. E. Noyes, ‘An Introduction to the International Law of Piracy’, *California Western International Law Journal* 21 (1991) 105-21: 105; Perotin-Dumon, ‘The Pirate and the Emperor’, 198. For a comprehensive review of contemporary jurisprudence see Sundberg who takes a refreshingly nominalist approach to the entire issue: ‘Many contemporary problems arise from the belief that words generally, and legal terms particularly, must have an inner meaning, just like children must have parents. Legal terms have no meaning except in relation to their practical context. The

of piracy are provided by municipal authorities exercising territorial jurisdiction.<sup>56</sup>

Schmitt, therefore, creates a grievous error when he writes that Grotius distinguishes 'between *jus gentium* and *jus civile* [civil law]; [emphasizing] the difference between public authority (*imperium* or *jurisdictio*) and private or civil ownership (*dominium*).'<sup>57</sup> From Grotius' perspective, the problem was that the Portuguese regarded the Dutch privateers as pirates; juridically, they were both brigands in unlawful rebellion against Spain and 'outlaws' within the exclusionary terms of the Treaty of Tordesillas (1494).<sup>58</sup> Similarly, the Spanish regarded all foreign vessels entering the West Indies as 'piratical', in terms of *mare clausum*.<sup>59</sup> Natives of Malabar who attempted to trade outside the Portuguese control system, and anyone else in the area who opposed them, were described by the Portuguese as *cossarios* or *Malavares*; the terms were usually interchangeable. A *cossario* (in modern Portuguese *corsario*) is, strictly, a corsair.<sup>60</sup> 'Corsair', in turn, was a generic term for maritime predator that frequently proved inseparable from 'privateer' and 'pirate'.<sup>61</sup> The textual stratagem of Grotius therefore turned on the discursive invalidation of Portuguese imperialism while simultaneously symbolically validating Dutch maritime predation as a lawful activity cognisable within oceanic spaces that supersede national jurisdiction: *res extra commercium*.

A signature, and supremely 'anti-Schmittian', characteristic of *De iure praedae* is the recurrence of competing notions of sovereignty, both divisible and indivisible; the binary opposition between the homogenous (Schmittian) and heterogeneous (anti-Schmittian) state is a defining characteristic of both *De iure praedae* in particular and of the Grotian corpus as a whole. This is self-evident in even such an early, or 'juvenile', text as the *Commentarius in*

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understanding of a legal term means only that one realizes how to use it in communication with others.' Sundberg, 'Piracy', 337.

<sup>56</sup> Rubin, *The Law of Piracy*, 393.

<sup>57</sup> Schmitt, *Nomos*, 137.

<sup>58</sup> Wilson, *The Savage Republic*, 170-7.

<sup>59</sup> N. Zahedich, "'A Frugal and Prudential and Hopeful Trade': Privateering in Jamaica, 1655-89", *Journal of Imperial and Commonwealth History* 18.2 (1990) 145-168: 146, 156, 160.

<sup>60</sup> M. N. Pearson, 'Corruption and Corsairs in Western India' in: P. Emmer and F. Gaastra ed., *The Organization of Interoceanic Trade in European Expansion, 1450-1800* (Aldershot, UK 1996), 365-391: 373.

<sup>61</sup> Pearson, 'Corruption and Corsairs in Western India', 373-384.



*Theses XI* (c.1600) a wide-ranging defence of the ‘Dutch Revolt’ as a just war (*ius belli*).<sup>62</sup> Orthodox sixteenth century theories of resistance, or lawful rebellion, were founded on two cardinal premises, ‘natural liberty’ and the notion of the ‘inferior magistrate’. Under the first, ‘the People’ (*publicae*) are the true bearers of that legal identity and personality which historically pre-dates any particular social formation; consequently, any subsequent act of lawful political incorporation rests upon the voluntary transfer of inalienable rights from the People to the polity. Under the second, the People possess an inalienable right to exercise lawful armed force against an otherwise legitimate public authority that has violated the conditions of the foundational act of conveyance through acts of tyranny. Broadly associated with the politically more moderate Protestant sect the Huguenots,<sup>63</sup> the concept of the ‘inferior magistrate’ was subjected to a more subversive doctrinal alteration by the more radically egalitarian Calvinists,<sup>64</sup> who expressly inferred an inalienable right to take up arms on the basis of ‘natural liberty’ alone.

Committed to a Venetian-style oligarchy,<sup>65</sup> the *Commentarius*<sup>66</sup> rejects radical resistance theory,<sup>67</sup> postulating instead a *via media* derived from that multi-purpose free-floating Grotian signifier, divisible sovereignty, here reformulated as ‘residual sovereignty’, one that is inherent within the secular political order, but capable of indefinite sub-division. Article 16 provides a generic definition of sovereignty:

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<sup>62</sup> Wilson, *The Savage Republic*, 318-334.

<sup>63</sup> Q. Skinner, *The Foundations of Modern Political Thought. Volume II* (Cambridge 1978) 335; M. Van Gelderen, *The Political Thought of the Dutch Revolt 1555-1590* (Cambridge 1985) 275-276.

<sup>64</sup> R. M. Kingdon, ‘Calvinism and Resistance Theory, 1550-1580’ in: J. H. Burns and M. Goldie ed., *The Cambridge History of Political Thought 1450-1700* (Cambridge 2001) 193-218.

<sup>65</sup> R. Tuck, *Philosophy and Government 1572-1651* (Cambridge 1993) 159. During his ‘juvenile’, or republican phase, Grotius operated wholly in the shadow of his patron Johannes van Oldenbarnevelt (1547-1619), who experimented with a number of contending republican constitutional models. The example of Venice was a constant in early republican political theory. E. Wilson, ‘Author and Title: On Heterogeneity and the Naming of *De iure praedae* of Hugo Grotius’, *The Journal of the Philosophy of International Law* 1 (2006) 77-122.

<sup>66</sup> H. Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, P. Borschberg ed. (New York 1994) 229.

<sup>67</sup> Grotius, *Commentarius*, 206-213.

That supreme right to govern the state which recognizes no supreme authority among humans, such that no person(s) may, through any right [*ius*] of his own, rescind what has been enacted thereby.<sup>68</sup>

The text then moves to a more detailed empirical consideration of *actus summae potestatis*, those necessary ‘marks’ or signs of sovereignty; intriguingly, ‘right’ is clearly associated with ‘power’.

Those that no one may rescind by virtue of any higher right, for example, the supreme right to introduce legislation and to withdraw it, the right to pass judgement and to grant pardon, the right to appoint magistrates and to relieve them of their office, the right to impose taxes on the people, etc.<sup>69</sup>

Accordingly,

If some marks [*acti*] rest with the prince, and others with the senate, or rather with the prince and the senate, one cannot claim that full sovereignty is either with the prince or with the senate, but [only] with the prince and the senate [together]. The prince and the senate, however, are not one but several.<sup>70</sup>

The *Commentarius* then provides a ‘primitive’ theory of constitutional checks and balances, which is inseparable from a residual sovereignty that is identified with *libertas*;

There are many benefits arising from dividing the marks of sovereignty and for this reason it is held to be prudent to keep some separate. Not least of these is that it seems to be the most convenient way of preventing tyranny.<sup>71</sup>

In other words, there is a conditional right of resistance, dependent in turn upon issues of historical evidence and political identity. The *Commentarius* asserts<sup>72</sup> that there is persuasive historical evidence of a continuing presence of residual sovereignty within the Dutch ‘People’ (i.e.

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<sup>68</sup> Grotius, *Commentarius*, 215.

<sup>69</sup> Ibidem, 225.

<sup>70</sup> Ibidem, 229.

<sup>71</sup> Ibidem, 249.

<sup>72</sup> Ibidem, 219, 281-283.

the Batavians), institutionally expressed through the *Ordines*.<sup>73</sup> As the Dutch Estates never expressly conveyed to ‘the Prince’ (i.e. Spain) the power to tax, *libertas* can be legally classified as a ‘legitimate spoil’ of *bellum iustum*, a lawful armed struggle between rival public authorities waged in pursuit of the enforcement of *ius*. ‘Batavian private persons’ (i.e. the Dutch), in both their particular and universal aspects, are co-sovereigns with the Spanish Crown, and constitute their own form of legitimate –and self-legitimising– public authority, that greatest of all republican conceits.

The war against Philip was at its inception a just war both in respect of its cause and with regard to [the Batavian’s] defence of their marks of sovereignty... We have demonstrated briefly that it was legitimate for the States of Holland to convene against Philip; that the war was both just and public that was undertaken by them either unanimously or on the basis of majority decision; and that all the marks of sovereignty that once rested with Philip were [subsequently] acquired by the States [of Holland].<sup>74</sup>

Divisible Sovereignty and *bellum iustum* receive even more radically republican expression in *De iure praedae* which provides a crucial textual/discursive linkage between the just war waged by the Dutch East India Company (the VOC) and the republican precepts of the lawful war of national liberation: ‘The power that has been bestowed upon a prince can be revoked, particularly when the prince exceeds the bounds defining his office, since in such circumstances he ceases *ipso facto* to be regarded as a prince.’<sup>75</sup> Herein, residual sovereignty and republicanism are neatly fused with the self-grounding legitimization of Dutch national independence;

Since the State has no superior, it is necessarily the judge even of its own cause. Thus the assertion made by Tacitus... was true, namely

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<sup>73</sup> For Grotius, every society, ‘including States, is regarded as deriving its existence, in the last resort, from the Individual; and [no society] rises above the level of a system of relations established by agreement between the owners of individual rights’. O. Gierke, *Natural Law and the Theory of Society 1500 to 1800, With a Lecture on the Ideas of Natural Law and Humanity by Ernst Troeltsch*, E. Baker ed. (Cambridge 1958) 78.

<sup>74</sup> Grotius, *Commentarius*, 283.

<sup>75</sup> H. Grotius, *De Iure Praedae Commentarius. Commentary on the Law of Prize and Booty*, G. L. Williams and W. H. Zeydel trans. (London 1964) 289.

that by a provision emanating from the Divine Will, the people were to brook no other judge than themselves.<sup>76</sup>

A more ‘anti-Schmittian’ constitutional theory is difficult to imagine. The iterability, or radical reversibility, of the ‘mark’ of sovereignty as itself constitutive of sovereignty, unintentionally belies the wholly constructivist – and, therefore, contingent – nature of the alleged ‘sovereign’. The *actus* is radically ambiguous, not identical with either *potestatis* or *ius*, but a signifier of the highly *liminal* nature of sovereignty itself;<sup>77</sup>

the term *actus* suggests not a diagnostic criterion which serves to indicate who possesses sovereign power, but the active exercise of some part of that power; the rendering function might be equally important.<sup>78</sup>

The radically contextualist nature of the *acti* highlights the extreme iterability that governs the Grotian negotiation of the relationships between ‘public’ and ‘private’ actors. Within this discursive frame, both states and persons, including corporations,<sup>79</sup> are fully able to exercise the ‘sovereignty function’ and, thereby, acquire the signature ‘mark’. In other words, sovereignty (*libertas*) – through its radical divisibility – can become the ‘property’ of anyone.

## The Sovereignty of the Private Avenger

*[A] transformation may take place, not merely in the case of individuals, as when Jephthes, Arsaces, and Viriathus instead of being leaders of brigands, became lawful chiefs, but also in the case of groups, so that those who have been robbers embracing another mode of life became a state.* –Hugo Grotius

The Grotian privatisation of sovereignty and the resultant juridical blurring of ‘public’ and ‘private’ identity create an element of cognitive dissonance in

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<sup>76</sup> Grotius, *De Iure Praedae Commentarius*, 24–25.

<sup>77</sup> P. Borschberg, ‘Critical Introduction’, in Grotius, *Commentarius*, 55.

<sup>78</sup> P. H. Burton, ‘Foreword’ in: H. Grotius, *Commentarius in Theses XI. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*, P. Borschberg ed. (New York 1994) 205.

<sup>79</sup> Gierke, *Natural Law*, 70–78.

the modern reader. The late scholastic doctrine of *bellum iustum* is a juro-theological expression of feudal dispute resolution,<sup>80</sup> predicated upon public warfare and lawful retaliation;<sup>81</sup> ‘the legality of reprisals is conditioned upon two requirements: the authority of a superior and a just cause.’<sup>82</sup> A crucial consideration introduced by Grotius is that the authorizing entity merely possesses the minimally requisite mark of sovereignty. ‘It was not necessary that the war be conducted by this highest authority itself; subordinate princes and authorities could be delegated to conduct a *bellum iusticale*.’<sup>83</sup> In other words, it is the legal identity of the actor that determines the justness of the conflict.

It is not the power to punish essentially a power that pertains to the state [*res publica*]? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals, and similarly, the power of the state is the result of collective agreement... *Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.* The following argument, to, has great force in this connection; the state inflicts punishment for wrongs against itself, not only upon its own subjects, but also upon foreigners; yet it denies no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of the nation, is the source from which the state receives the power in question.<sup>84</sup>

Notice how Grotius subtly conflates positive state law with natural law; the ‘loose’ association among rights-holders, which is civil society, is then re-configured as a ‘society of vigilantes’, subject to the transferential legitimacy of public authority. The net result is a remarkable display of

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<sup>80</sup> ‘Medieval legal thought was still rooted firmly in the archaic concepts [sic] of revenge. Each legal injury required revenge.’ W. G. Grewe, *The Epochs of International Law* (New York 2000) 70.

<sup>81</sup> Grewe, *The Epochs of International Law*, 105-118, 210-218.

<sup>82</sup> J. von Elbe, ‘The Evolution of the Concept of the Just War in International Law’, *American Journal of International Law* 33 (1939) 665-688: 671.

<sup>83</sup> Grewe, *The Epochs*, 109.

<sup>84</sup> Grotius, *De Iure Praedae*, 91-92. Emphasis added.

iterability between contending notions of collective/public and individual/private sovereignties.

The power of execution [is] conferred upon private individuals by a special law... For the wars that result when arms are taken up in such circumstances should perhaps be called public rather than private, since the state undertakes these wars, *in a sense*, and gives the command for them to be waged by said individuals. Yet it is true that, in the majority of cases, *the national origins of such conflicts is the same as that of private wars*. To take one example, certain laws grant the power of direct self-defence and vengeance<sup>85</sup> to private individuals, precisely on the ground that it is not easy to resist soldiers and collectors of public revenue through the medium of the courts; and these particular precepts accordingly represent what we retain of natural law – the vestiges of that law, so to speak – in regard to punishment. If the state is involved, what just end can be sought by the private avenger? The answer to this question is readily found in the teachings of Seneca, the philosopher *who maintains that there are two kinds of commonwealth, the world state and the municipal state*. In other words, the private avenger has in mind *the good of the whole human race*, just as when he slays a serpent; and this goal corresponds exactly to that common good towards which, as we have said, all punishment's are directed in nature's plan.<sup>86</sup>

The enigmatic figure of 'the private avenger' is arguably the most alien, and the most 'un-Schmittean', juridical construct within the Grotian Heritage.<sup>87</sup> Martine van Ittersum has persuasively shown that the rhetorical figure was modelled on no other than Admiral Van Heemskerck, the prize-taker of the *Santa Catarina* and first cousin to Hugo Grotius.<sup>88</sup> She situates the historical genesis of *De iure praedae* in Grotius' efforts to 'disentangle' the conflicting rhetoric employed by the Dutch admiralty board in adjudicating the prize. Whereas Van Heemskerck justified his actions through private

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<sup>85</sup> *Se vindicandi potestas*; here, vengeance is punishment.

<sup>86</sup> Grotius, *De Iure Praedae*, 91-92. Emphasis added.

<sup>87</sup> John Locke himself, with classic understatement, proclaimed it 'a very strange doctrine'. J. Locke, *Two Treatises of Government*, P. Laslett ed. (Cambridge 1988) 272.

<sup>88</sup> M. van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Iure Praedae* (1604-1606)' *Asian Journal of the Social Sciences* 31.3 (2003) 511-548.

reliance upon *ius naturale*, the admiralty legitimised the seizure in terms of lawful revenge, or reprisal;

what had been revenge pure and simple in the resolution of [the privateers] became punishment for transgression of the natural law in *De Jure Praedae* [sic], meted out by private individuals exercising their natural rights.<sup>89</sup>

For the world-system, lawful maritime predation constituted a legitimate enforcement of a naturalist form of private authority.

In terms of international legal discourse, however, lawful privateering at once signified the inversion of the hierarchy between private and public authority marking a sub-textual conflation of privateering with piracy. Privateering renders iterable public/private dichotomies through the state's adoption of private agency, the legitimacy of which may be effectively invalidated through non-recognition by a rival state. The privateer is inherently 'dangerous' precisely because of the self-same iterability; the radical contingency of the legal identity of the privateer constantly invokes the 'lurking presence' of the unlawful maritime predator, the pirate. Whatever Grotius' authorial intent, whether to doctrinally clarify the verdict of the admiralty or to legitimise the privateering actions of the VOC, his seminal creation of the private avenger unquestionably violates that most foundational of modern constitutional precepts – the homogenous state as monopoliser of organised violence. Grotian iterability and juridical inversion reach their zenith at precisely this juncture, reducing interstate relations to a collective aggregate of 'private' transactions through the assignment of international legitimacy to *any* entity that is capable of exercising lawful violence as a 'strong' right, or *ius*.

All of which is anathema to Schmitt as he freely admits: 'The irregularity of the pirate lacks any relation to regularity.'<sup>90</sup> The historical role played by piracy in the formation of the early modern state and world-

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<sup>89</sup> Van Ittersum, 'Hugo Grotius in Context', 526. Compare the position of the Dutch Admiralty Board with the speech attributed to the Pirate Captain Bellamy by Defoe: 'I am a free Prince, and I have as much Authority to make war on the whole world, as he who has a hundred sails of ships at sea, and an army of 100,000 men in the field; and this my conscience [i.e., natural reason] tells me.' D. Defoe, *A General History of the Pyrates*, M. Schonhorn ed. (New York 1999) 587.

<sup>90</sup> C. Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, G. L. Ulmen trans. (New York 2007) 70.

system and the naturalist judicial account of it offered by Grotius is the antithesis of Schmitt's views on both the historical development of the European *nomos* and the political foundation of the homogenous and indivisible state. 'The exception confounds the unity and order of the rationalist scheme'<sup>91</sup> and the unlawful combatant – or 'partisan' in Schmitt's terminology – threatens the unity of legal discourse; 'Law is the unity of order and orientation, and the problem of the partisan is the problem of relations between regular and irregular struggle.'<sup>92</sup> Even in his comparatively late work *Theory of the Partisan* (1963), Schmitt refuses to relinquish the land/sea dichotomy as the geo-spatial basis for the demarcation between unlawful and unlawful combatants within the neo-colonial era of the world *nomos*; it is 'political recognition that the irregular fighter needs in order not to be considered in the un-political sense of a thief or a pirate, which here means: not to sink into the criminal realm.'<sup>93</sup> As we should expect, Schmitt is able to conclude that the irregular forces of the Developing World are 'lawful' in some primal way because they signify telluric forces – which is precisely what 'separates' them from the ocean-bound pariah entrepreneur.

The partisan is and remains distinct, not only from the pirate, but likewise the corsair, even as land and sea, as different elemental spaces of human labor and military struggle between nations, remain distinct. Land and sea have developed not only different means of pursuing war, and different theaters of war, but also different concepts of war, enemy, and booty. For at least as long as anti-colonial wars are possible on our planet, the partisan will represent a specifically terrestrial type of active fighter.<sup>94</sup>

The one thing that must never be conceded is the iterability between the partisan and the pirate, for to do so would imperil the entirety of Schmitt's political ontology.

The intense political [public] character of the partisan must be kept in mind, because he must be distinguished from the ordinary thief and violent criminal, whose motives are directed towards private enrichment. This conceptual criterion of the *political* character [of the

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<sup>91</sup> C. Schmitt, *Political Theology* (Chicago 2005) 14.

<sup>92</sup> Schmitt, *Theory of the Partisan*, 69.

<sup>93</sup> Ibidem, 75.

<sup>94</sup> Ibidem, 21.



partisan] has the *un-political* character of his evil deeds, which are focused on private robbery and theft. The pirate has, as the jurists say, *animus furandi* [evil intent]. The partisan fights at front, and precisely the political character of his acts restores the original meaning of the word *partisan*. The word derives from *party*, and refers to the tie to a fighting, belligerent, or politically active party or group. These ties to a party become especially strong in revolutionary times.<sup>95</sup>

If the boundaries between public and private, polity and property, *imperium* and *dominium* are shown to be liminal then both the intelligibility (epistemic) and the legitimacy (normative) of the state dissolve: the true source of sovereignty can be crime. And it is Schmitt himself who sows the seeds for his own ‘deconstruction’.

Thus, in some form, the constitutive process of a land-appropriation is found at the beginning of the history of every settled people, every commonwealth, every empire. This is true as well for the beginning of every historical epoch. Not only logically, but also historically, land-appropriation precedes the order that follows from it. It constitutes the original spatial order, the source of all further concrete order and all further law. It is the reproductive root in the normative order of history. All further property relations – communal or individual, public or private property, and all forms of possession and use in society and in international law – are derived from this radical title. All subsequent law and everything promulgated and enacted thereafter as decrees and commands are *nourished*, to use Heraclitus’ word, by this source.<sup>96</sup>

Heraclitus said that ‘War is the Father of all things’; so too, in their own ways, did both Schmitt and Grotius. And it is the utter impossibility of achieving the self-grounding validation of the bracketing of war and violence that is the source of so much legal peril. Schmitt seeks certainty by restricting the state to space; yet, the actual history of the *jus publicum Europaeum* as revealed by Grotius is that the early state was a being of ‘right’ governed by the naturalist political ontology that made possible the lawful authority of the private avenger. We are left, then with the disturbing possibility that the king is a pirate.

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<sup>95</sup> Schmitt, *Theory of the Partisan*, 14-15.

<sup>96</sup> Schmitt, *Nomos*, 48.