

A Genealogy of State Sovereignty

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A genealogical account of state sovereignty explores the ways in which the concept has emerged, evolved, and is in decline today. Sovereignty has a theological foundation, and is deeply bound up with the idea of God, in particular a voluntarist God, presented as being capable of intervening directly in the world. Religious conflicts in the sixteenth and seventeenth centuries forced the separation between religion and politics, and opened the space for the emergence of a national state endowed with sovereignty which has dominated the world until now. Today's rise of international and transnational obligations challenges the conventional understanding of state sovereignty, which cannot account for the normative density of the global order and the corresponding decline of state-based political authority. In order to explain that, I contrast two competing understandings of state sovereignty: a static one and a dynamic one. The static understanding regards sovereignty as absolute within the state territory. The dynamic understanding regards sovereignty as evolutionary: according to this account, the state is just one possible form that sovereignty can take. I conclude by suggesting that the dynamic understanding of state sovereignty is better suited to explaining the decline of state sovereignty.

INTRODUCTION

In the beginning there was no national state. Perhaps we need not go so far back for the proposition to be true. In the middle ages, there was no national state. Instead, there was competition between the Empire and the Church, both vying for political authority. Needless to say, the protagonist of this conflict is God; what is at stake is not its existence, but its willingness to interfere in world matters. According to the Divine Command Theory — widespread in Medieval Europe — God is the source of all moral and legal obligations.¹

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1 PHILIP QUINN, DIVINE COMMANDS AND MORAL REQUIREMENTS (1978).

The God of the Hebrew Bible is a sovereign lawgiver, who punishes disobedience and rewards obedience. In the middle ages, sovereign authority took different *forms*: the universal ambition of Empire, the universal realm of the Catholic Church, or the narrow confines of city-states. These political authorities were competing to fill a political vacuum. It is in this vacuum that the modern state appeared, developed, and conquered the world.

Today's world faces a vacuum of political authority that sovereign states are increasingly at greater pains to address. To understand the crisis of political authority, I propose to engage in a genealogical explanation of state sovereignty. The goal is to understand the evolution of state sovereignty by exploring its roots and examining how the idea emerged and developed. This may give us a glimpse at why it is declining today and how that decline is coming about. There are two dimensions to state sovereignty here: a philosophical dimension that focuses on the *ground* of the concept of sovereign authority, and a political dimension that engages with the *form* that that authority takes, namely the state. At this point, I need to make a few cautionary points about the methodology. The narrative I am offering here is not exhaustive. Instead it begins with three ideal models of sovereign authority and tracks the way in which they have shaped the political space and ultimately crystallized into the state. There is a tension between ideal models and political practice that I want to explore here: is the state sovereign because it is blessed with moral or theological justification, or has it emerged as the ultimate authority because of historical and practical necessity? I will make a case for the latter hypothesis.

The first ideal model of sovereignty grounds authority on revelation — let us call it Jerusalem. Here the *ground* of sovereign authority is clear; however, this ideal model of sovereign authority is unclear as to which *form* should represent godly authority in the world. The second ideal model grounds authority on reason — let us call it Athens. Human beings are thought to be capable of understanding the world as it is through the use of natural reason. This changes the *ground* of political authority, since humans are no longer required to interpret the will of the sovereign religious authority, but instead they can rely on their natural reason to understand the order that was created and that rules our societies.

The third model is the expression of a purely political and purely secular mindset. Let us call it Rome. It is secular in opposition to Jerusalem in an obvious way. It is also secular in opposition to Athens in the sense that it rejects a quasi-religious belief in reason. It is political in the sense that it does not aim to provide a ground for authority. Instead, Rome dissociates the political form from the ground of authority and prioritizes the former above the latter: the political form of the sovereign state emerged as a practical solution and not as the embodiment of reason or revelation. However, Athens and Jerusalem

claimed the victory and shared the glory: the realm of reason is officially separated from the realm of revelation, but in practice one legitimizes the other and together they claim to ground the practice of politics. Rome rejects theology and freestanding normative thinking; instead, it attempts to build a realistic account of political authority that explains the emergence of the state as a political necessity.

This Article is divided into three parts: the emergence, consolidation and decline of state sovereignty. Part I examines the emergence of state sovereignty, where I contrast the theological concept of sovereignty with the political emergence of the state. In Part II, I suggest that the consolidation of state sovereignty depends on the separation between politics and religion: the modern state is a response to the religious conflicts. A dualism between Athens and Jerusalem is introduced, only to guarantee reciprocal legitimation. The triumph of state sovereignty in the seventeenth century is in reality a victory for Rome: power is the precondition of justice. However, it is possible to distinguish two competing accounts of Rome. On the one hand, we have the conventional Hobbesian account, which presents political authority as static: once sovereignty is posited, it is absolute and exclusive. Either the state is sovereign and there is no other authority beyond it, or it is not sovereign and therefore it is not a state. On the other hand, there is an evolutionary account of state sovereignty that understands political authority from a biological viewpoint: political authorities emerge, consolidate and decline on the basis of how well they do their job and secure the interests of the community in a way that is open to contestation. In Part III, I contrast the evolutionary understanding of sovereignty to the static one in order to explain the decline of the state and the rise of international institutions.

I. TWO VIEWS OF SOVEREIGNTY AND THE EMERGENCE OF THE STATE

A. Medieval Origins: Political Authorities and Political Vacuum in Medieval Europe

In the fourteenth century, there is a standoff between political authorities: neither the Church nor the Empire *de facto* exercises full political authority over the world; but they do so to a limited extent. There is a political vacuum that is perceived all over Europe, and it is part and parcel of a looming political crisis that will be transformed into an epochal change of the world order during the seventeenth century. In this vacuum, city-states exercise growing power. They are the paradigm of political authority even if the internal struggle between factions is often more a matter of private interests than a question

of public good. An egregious example of a city-state that struggles between competing factions is Medieval Florence where pro-papist and pro-emperor factions cannot find ground of agreement.

In November 1301, Dante — the famous poet — goes to Rome as a diplomatic envoy of Florence to negotiate a peace deal with Pope Boniface. The peace talks fail miserably, since the Pope has little interest in a truce. A few months later, he marches into Florence with his troops in order to reinstate the pro-papal faction (*Guelfi Neri*). Dante is tried and convicted *in absentia* on January 27, 1302. He's condemned for graft and misuse of public funds. He will have to live in exile for the rest of his life. Dante is one of the most astute political commentators of this period. His writings and life experience testify to a deep interest in political authority and justice.²

During his life, Dante was scarred by unfair and ungrounded accusations. The trial in which he stood accused did not rely on factual evidence, but on the opinion of the people. Dante would be ever after an advocate of strong retributive justice — to every person it is due. Dante's *Divine Comedy*³ is the journey of a living man through Inferno, Purgatory and Paradise where God's justice rules arithmetically and relies on objective evidence, as opposed to the ways in which justice works in the world. The afterworld of the *Divine Comedy* is based on that very principle. Each individual is sent to the correct emplacement that corresponds to the actual wrong committed on earth. Divine justice is imparted by God's judges that live at the gates of Inferno, Purgatory or Paradise.

In Dante's worldview, political authority has a theological ground: Jerusalem or revelation. God reveals to us the true goal of political societies: to be ordered according to the principles of divine justice. Of course, human beings are imperfect, so they frequently stray from the path of divine justice. But at the same time, human beings are endowed with natural reason and so they are capable of ascertaining the goal that has been set by God. In this way, reason becomes an ally of revelation; Athens comes in aid of Jerusalem. This is the gist of the Thomistic tradition embraced by Dante in his political treatise *De Monarchia*, which argues in favor of a new Emperor capable of bringing justice to the world through the enforcement of the law.⁴ Dante has a preference for a political authority on earth that has universal aspirations. He wishes that a

2 See DANTE ALIGHIERI, *DE MONARCHIA* [THE MONARCHY] (Prue Shaw ed., Cambridge Univ. Press 1996) (1312).

3 DANTE ALIGHIERI, *THE DIVINE COMEDY* (David H. Higgins ed., C.H. Sisson trans., Oxford Univ. Press 2008).

4 *Id.*

new Emperor could appear and exercise the necessary universal authority to bring back order to a deeply fragmented Europe.

Dante bemoans the lack of a reliable system of legal enforcement in the real world. The law is there to be applied, but there is no authority that is strong enough for this job. Dante is committed to the *ius commune* — the system of law inherited from the Romans and reenacted in the *corpus juris*. The *ius commune* is regarded as the product of natural reason, reflecting the real order of the world. Dante's political faction (*White Guelphs*) is decided to wage a war against the *Black Guelphs* for not respecting the law (*ius commune*).

The *Black Guelphs*, who run city-states like Florence, do not want to be in charge of the application of the *ius commune*; rather, they want to have full jurisdictional autonomy to produce the norms they want and to apply them accordingly. In other words, cities like Florence are already claiming the superiority of *lex* over *ius*. Dante is opposed to such a view of law (*lex*), which he regards as particularistic and producing injustices, as it is merely the product of factional majority interests, rather than a well-established body of legal principles (*ius*), which has a clear universal appeal. Instead, Dante advocates a model in which local authorities are free to the extent that they apply the existing law (*ius commune*).

The relation between law and political authority is a very important issue in Medieval Europe. The problem is between bounded and unbounded political authority. The debate at that point in time is encapsulated in the legal concept of *arbitrium*. *Liberum Arbitrium* does not mean to exercise completely unfettered sovereign power. Instead, it means to exercise weak discretion in a legal sense. Legal principles (*ius*) are there to be applied, but the interpreter has weak discretion to decide how best to apply them. This excludes the idea of a political authority that creates standards *ex nihilo*. No political authority could do that according to the medieval understanding of law. For medieval lawyers, law could never be reduced to the legislation of a centralized sovereign power, since there was no such power. In other words, *ius* could never be reduced to *lex*. In fact, the deepest sense of law refers to universally binding norms that are superior to the political authority of the Pope and the Emperor. No sovereign power is purely unbounded at the normative level for Dante. Machiavelli would challenge precisely that medieval conjecture: what matters is not the normative justification of authority, but the actual exercise of authority.

B. The Sovereign and the City-State

Two centuries later, it was Machiavelli's turn to be thrown out of the Florentine government.⁵ In 1512, the Republic of Florence is overturned by the Medici's army aided by the Spaniards. Machiavelli is imprisoned and tortured. He then takes up residence outside the walls of Florence. His reaction is very different from Dante's: Machiavelli desperately tries to convince the ruling power that he is fit to work for the Prince of the city, Lorenzo de' Medici. Machiavelli's understanding of politics and political authority is informed by a deep realism: politics needs to be separated from ethics.⁶ Rome is independent from Athens.

Machiavelli is an *ante litteram* empirical political scientist, who is concerned with experience and historical facts and rejects the centrality of freestanding normative thinking.⁷ Machiavelli also rejects the influence of theology, in particular revelation as a ground of political authority. He is the first secular political thinker, who really believes that political authority should free itself from the shackles of religious and moralizing influences.⁸ To continue the metaphor, Jerusalem has no place in the understanding of politics. Machiavelli focuses on how political authority really works, not how it should be justified.

Christianity is the object of various political critiques expressed by Machiavelli. In particular, the central problem connected with a Christian understanding of politics is its hopeless insistence on vague and lofty ideals that inevitably are flouted by political rulers. Christian values and Aristotelian teleology join forces to justify the increasing political role of the Catholic Church on the basis of imaginary ideals. This leaves the people the prey of Fortuna, or God's providence. Instead, Machiavelli advocates a naturalistic understanding of human abilities. People, and rulers in particular, have to rely on their natural inclinations to constantly maximize their control over the external world; being fettered by unnatural moral constraints only makes them weak. They should be strong and dominate their fortune, rather than be dominated by it.

5 QUENTIN SKINNER, *MACHIAVELLI: A VERY SHORT INTRODUCTION* (2001).

6 This is one way of introducing the normative-naturalist dichotomy.

7 But he does not deny altogether the force of normative standards; he simply insists that they are not crucial in determining the effectiveness of political authority.

8 To be precise, secular liberation can only happen at the level of the ruling class. The masses, on the other hand, are better controlled if they believe in religion, which instills in them the feeling of piety. See J.G.A. POCKOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

Machiavelli is the first student of politics that conceives of the state in a modern way: it is neither the rule of god on earth (Jerusalem), nor the institutional embodiment of reason (Athens). Rather, it stands for an *impersonal* rule that has the monopoly of coercion over a boundary-defined territory. The idea of *Stato* captures the actual ability to rule of a political authority rather than its moral or theological fitness to do so. Any political institution that can acquire, enforce and maintain coercive authority deserves the name of state.⁹ The political vacuum bemoaned by Dante can now be filled by the actual practice of politics. While Dante aspired to a universalist form of political authority, namely the Empire (backed by the Church), and despised the City for its parochial particularism, Machiavelli would have been very happy to see the city-state model flourish. Machiavelli's political preferences — just like Dante's — were doomed to fail in the attempt to secure a stable form of government. Both the universal aspirations of the Church and the particular ambition of the city-state are incapable of bringing order to the world. There is a space for a new entity to emerge: it is the rule of absolute monarchy with its state sovereignty.

The lesson of Machiavelli can be summarized as follows: Rome is superior because it exercises authority effectively, not because it is blessed by gods or justified by morals. The sovereign that mismanages the state runs a very high risk of losing its *status* as a coercive authority. The sovereign has to have a sharp understanding of, and should be ready to act upon, the interests of the state. If this is not the case, then political authority crumbles. This is a non-moralistic, non-theological account of the rise and fall of political authorities. The sovereign's ultimate goal is to maintain itself in power by whatever means and to preserve the territorial integrity of its state. This would also come to be a realistic account of political authority within and beyond the state that has in fact dominated most accounts of international relations.¹⁰

Rome's greatness, and the greatness of its laws, is to be explained by reference to an important distinction that we should not overlook. Machiavelli believes that to live safely (*vivere sicuro*) is one thing and to live freely (*vivere libero*) another.¹¹ To live safely implies the existence of a political authority that applies the laws robustly and instils fear and obedience in the citizens. An example of such a political authority is the French kingdom that applies the law swiftly through the hard work of the parliaments (regional institutions

9 This goes against the grain of the etymology: *status* means something that preserves its own essence unchanged.

10 See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (4th ed. 1967).

11 NICCOLO MACHIAVELLI, *DISCOURSES ON LIVY* (Oxford Univ. Press 2003) (1531).

of law's implementation). At the same time, the French kingdom disarmed its citizens, preventing them from taking the protection of the country into their hands.

Vivere libero is an altogether different thing and it is the crux of the Roman Republic. Rome empowered its citizens by arming them and giving them the responsibility to actively protect the republic from external aggression and from internal mismanagement. Machiavelli goes against the grain: many have argued that the decline of Rome was to be explained by reference to its internecine conflicts. Instead, Machiavelli argues that class conflict within the republic is what maintains the polity alive and well and free from the accumulation of power in the hands of bad rulers. Conflict and pluralism are the source of a healthy republic that exercises political authority while maintaining a great degree of freedom. Rome is great because it refuses to embrace one religion or one set of moral values. Instead, it embraces social conflict as the source of its political vitality, as well as the check against arbitrary use of power.

Conflict is at the core of Machiavelli's political thinking.¹² A state is free when the ruler and the ruled are constantly checking each other. Machiavelli does not believe in high moral standards to guide the Prince. Not that this leaves the Prince standard-less. But there is something more important than moral standards: it is effective governance. Effective governance may even include actions that are in principle wrong, but are geared to achieving important goals for the sake of the state's interest.

Machiavelli rejects philosophical and theological moralism. He's nearly on his own on that. A plethora of philosophers have stepped in to defend theology and normative political thinking. Machiavelli's name is bound up with a vision of politics that is highly despised because of its association with wrongdoing.¹³ However, the important insight that is often overlooked is that philosophers create an unrealistic image of human nature and would like to see political regimes reflect that image, only to despair when humanity exhibits all its faults in the realization of political order. Machiavelli is a realist and a naturalist in the sense that he wants to explain political authority beginning with how human society really works in practice, rather than by focusing on how it ought to work in theory.

Dante's conception of political authority was heavily reliant on the supremacy of divine revelation. The sovereign on earth, the Emperor, should aspire to be guided by divine light. The Emperor's authority is universal and knows

12 FILIPPO DEL LUCCHESI, *CONFLICT, POWER AND MULTITUDE IN MACHIAVELLI AND SPINOZA* (2010).

13 LEO STRAUSS, *THOUGHTS ON MACHIAVELLI* (1995).

no bounds as long as its goal is to bring to earth the principles inscribed in divine justice. Jerusalem is the ultimate horizon of political authority. Contrast that picture with that of Machiavelli: Rome's political greatness has nothing to do with religious or moral standards. Its body politic is healthy because it allows for disagreement and conflict rather than rigidity and moralism. The sovereign authority is he who rules efficiently over the body politic. Machiavelli formulated for the first time the concept of the state as an impersonal form of rule that has authority over a bounded territory.¹⁴

II. THE CONSOLIDATION OF STATE SOVEREIGNTY

A. Religious Wars and the Rise of State Sovereignty

The last obstacle that needed to be overcome in order to seal the supremacy of the state over its territory was the secular power of the Catholic Church. In 1517, ten years prior to Machiavelli's death, Martin Luther published his *95 Theses* criticizing the terrestrial power of the Church.¹⁵ His voice and aspiration are extraterritorial and his political aim is to influence politics globally, if not to exercise it directly. Through the Holy Roman Empire, and a myriad other political posts occupied by the clergy, the Church rules and attempts to maintain socio-cultural homogeneity. For centuries, the Church had levied taxes, administered cities and delivered justice, among many other things. This multiplied the opportunities for corruption and worsened the image of the Church. Martin Luther argued that the Church should be stripped of all its temporal and ecclesiastical powers. It should be brought back to an image of spiritual purity. Its involvement in the exercise of temporal power only tarnished the image of religion, which needed to revert to its original greatness. The devastating attack on the morality of the Church left an even bigger hole in the political landscape. Once the extraterritorial reach of the Church had been swept aside, the political vacuum could be more easily filled by local princes exercising territorial authority, with no extraterritorial mission.

Luther introduced a fundamental dualism between the duties of spiritual and temporal leaders. The dualism was sharp and clear: on one hand there is a spiritual domain, which involves specific spiritual duties, and on the other there is a temporal domain, with its own specific duties. The two domains foster the good of Christians in different non-overlapping ways. This dualism

14 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, VOLUME I: THE RENAISSANCE* (1978).

15 ERWIN ISERLOH, *THE THESES WERE NOT POSTED: LUTHER BETWEEN REFORM AND REFORMATION* (Jared Wicks, S.J., trans., 1968).

frees the rule of local princes from the interference of the Pope and the Catholic Church.¹⁶ In theory, this is an attempt to moralize the political life of the whole of Europe. The idea was to separate the domain of Jerusalem from those of Athens and Rome. It is an attempt to define away the theological-political conflict by positing completely independent domains of action. In practice, it sets the stage for the most brutal religious conflict the world has ever witnessed. Protestants and Catholics waged war on one another for over a hundred years with a phenomenal degree of violence that peaked during the Thirty Years War (1618-1648).

Religious wars in Europe threatened the relative order of the world as organized in the name of God's decrees. God is no longer a source of order and union, but becomes a reason to fight and divide the political realm occupied by the Empire and the Church. In order to bring order to a divided world, legal and political thinkers attempt to argue for an alternative *ground* of authority, where the will of God is less central in dictating the moral and legal laws. Religious wars usher in the modern world where the divine command theory of authority is challenged on the basis of the understanding of human nature.

Grotius, for example, suggests that moral and legal obligations upon public and private actors would exist objectively even if we were to concede that God does not exist. This move introduces a distinction between voluntary and non-voluntary divine law. From this perspective, international law is the son of mutual consent between states. Mutual consent between states is the son of natural law. "But the mother of municipal law (and international law) is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law (and international law)."¹⁷ Binding obligations at the international level depend on non-voluntary divine law. In this way, Grotius attempts to reconcile Jerusalem and Athens in order to shape international relations; but reality is far removed from Grotius's aspirations: the world of international relations in the seventeenth century is ruled by brute power.

On February 25, 1603, a Dutch ship seized a Portuguese merchant boat in the Straits of Singapore. Grotius, then still a young Dutch lawyer, wrote a Memorandum for the defense. The Memorandum's central argument contained a radical argument: a *private* company could engage in lawful acts of war

16 It is also important to stress that Luther's political theology makes no room for extra-territorial communities and paves the way for the fundamental unity and territoriality of the state.

17 HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 5 (Cambridge Univ. Press 2012) (1625).

against other merchants with the aim of protecting the natural law that mandated freedom of trade and navigation. The central idea was that Dutch private companies had a natural right to resist the constant aggression of Portuguese and Spanish forces that wanted to prevent safe trade with Asian princes. In those cases, private actors would qualify as fully-fledged international actors. The Memorandum was put aside and forgotten: it was found many centuries later and published under the title *De Jure Praedae*.¹⁸ The manuscript could not be published when it was written, as it would have fueled even more hatred between Catholic Portugal and Protestant Holland. It is a world not ruled by morality or religion, but by the sheer use of power. The United Provinces of Holland are a small actor on this global stage. They obviously have an interest in the existence of an overarching law of nations that is dependent on neither the will of God nor the will of nations, but merely on objective moral principles.

Grotius's project is not so much focused on human law, as it is interested in divine law of the non-voluntary type, otherwise known as natural law. He attempts to ground natural law's normativity on some objective aspects of human nature. He looked into human nature to discern an independent ability to determine one's behavior on the basis of right reason. In the preamble to the *Law of War and Peace*, he puts forward the thesis that became very famous: "*etiamsi daremus, quod sine summo scelere dari nequit, Deum non esse.*"¹⁹ Stephen Darwall has suggested that Grotius is the founder of modern moral philosophy because he models the moral law after central aspects of human law.²⁰ More precisely, moral law is explained by reference to "quasi juridical" features such as obligation and blame. Ancient moral philosophy does not put obligations at its center, but focuses instead on virtues and more generally on the appraisal of human beings.²¹

Modern moral philosophy, by contrast, focuses on the direction of behavior. The way it does so is by engaging the human capacity of self-determination.²² This capacity is distinctively human, as it is to be found only in human animals and is what distinguishes them from other nonhuman animals. It seems correct

18 HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY (Liberty Fund 2006) (1603).

19 GROTIUS, *supra* note 17 ("[E]ven if we should assume the impossible, that there is no God or that he does not care for human affairs.").

20 STEPHEN DARWALL, *Grotius at the Creation of Modern Moral Philosophy, in HONOR, HISTORY AND RELATIONSHIP, ESSAYS IN SECOND PERSONAL ETHICS II* 157 (2013).

21 Thomas Pink, *Law and the Normativity of Obligation*, 5 JURISPRUDENCE 1 (2014).

22 G.E.M. Anscombe, *Modern Moral Philosophy, in VIRTUE ETHICS* 26 (Roger Crisp & Michael Slote eds., 1998).

to say that Grotius is the forerunner of the moral law as modeled after “quasi-judicial notions.” But this leaves the door open to many vexing questions. First of all, it is unclear what makes a notion juridical or quasi-judicial. More importantly, this kind of project must address the challenge formulated by Gertrude Elizabeth Margaret Anscombe.²³ The challenge is the following: moral law, like any other law, requires a legislator that issues the directives to be followed. God is the legislator of the moral law. Once morality (the moral law) is thought to have force independently, it comes apart in our hands.

By trying to provide an alternative to the theory of divine command, Grotius and all those who followed him brought out the enormous question of normativity, along with the problem of political motivation: how can people be motivated to obey a set of rules if not out of fear of punishment? The divine command theory had an easy job in instilling obedience: God commanded and subjects obeyed; disobedience would be met with divine punishment, so subjects would obey out of fear of punishment: fear motivated obedience. The distinction between voluntary and non-voluntary divine law — between God’s command and God’s establishment of an objective order of principles — attempts to make room for both Jerusalem and Athens: revelation would play a part in understanding voluntary divine law, while reason would play a part in understanding the objective order of principles.

Human laws are themselves both voluntary and non-voluntary: the meeting of human wills produces some laws, while others track existing objective principles. To the extent that they rely on the meeting of human wills, human laws are locally produced and legitimized. But there is a set of human laws that are not produced by humans, but simply reflect objective moral principles. The same applies to international law. Some treaties depend on the will of nations, but more importantly some international laws encapsulate objective principles that are universally valid. Jerusalem and Athens each has its place. However, peace did not come from the recognition of an international political authority capable of imposing obligations on warring factions. Instead, peace came with the official recognition of the supreme authority of territorially bounded entities.

International law that grounds obligations for state and non-state actors is ultimately based on the non-voluntary law of nature, according to Grotius. *Ius* is superior to *lex*. Here *ius* is to be understood as objective right — it is the overarching moral standard that guides the action of states and individuals. Objective right is not dependent on the exercise of will — it is antecedent to human will and independent of divine will. To this extent, embryonic nation-states were under obligations ascertained by the pure use of natural reason.

23 *Id.*

The problem is that obligations imposed by natural reason on state and non-state actors are not backed up by coercive force. Religious wars eliminated any possibility of rational agreement between warring religions. Hence the pragmatic solution brought about by the Augsburg and the Westphalia peace treaties is to parcel out the European political space into discrete territories where religious homogeneity can be engineered through the application of the principle: one kingdom, one religion (*ejus regio et ejus religio*).

B. The Triumph of Territorially Bounded Sovereigns

Once God is demoted as the legislator of the global order, there is a rush to find alternative ways to ground the normativity of morality and law. The two come apart. Grotius proposes his idea of the moral law inscribed in the nature of human beings in the form of natural sociability.²⁴ This imposes only very thin obligations at the international level — essentially similar to what we now call *ius cogens*.

Hobbes instead brings back God to justify the exercise of absolute authority within the frame of the national state alone (and also explains the lack of authority behind the state): the Leviathan is a personified authority on earth that looks like the estranged God.²⁵ It is the sole authority that can really motivate people to obey human laws out of fear. The state is the only locus of legal obligation — outside the state there is no justice.²⁶ And anything goes. International law has remained since then a very thin window dressing for the exploitation of the earth. The road that runs from Grotius to Hobbes is the road that has characterized the Westphalian story of the world.²⁷ The lack of political authority of international law can be explained in terms of political motivation. There is very little that motivates states to comply with international legal norms. Fear of punishment is largely hypothetical.

For Hobbes, it is not possible to ascertain an objective moral standard (*ius*) above and beyond the state. *Lex*, the law that is produced by the sovereign body, is the only law that can be ascertained, understood and applied; *lex* is the only law that matters. *Ius* loses its importance in Hobbes's account because it

24 DARWALL, *supra* note 20.

25 See THOMAS HOBBS, LEVIATHAN 11 (BiblioBazaar 2008) (1651).

26 THOMAS NAGEL, *The Problem of Global Justice*, in SECULAR PHILOSOPHY AND THE RELIGIOUS TEMPERAMENT 61 (2012); Joshua Cohen & Charles Sabel, *Extra Rempublicam Nulla Justitia?*, 34 PHIL. & PUB. AFF. 147 (2006).

27 Grotius's idea of *ius* is much broader than Hobbes's idea of *lex*. Following in the footsteps of Hobbes means to reduce the idea of law to a very bare minimum. The state also will be endowed with a sense of normativity.

cannot be ascertained nor does it come with an appropriate threat that would motivate people to obey it. So if we contrast Grotius and Hobbes in terms of state sovereignty, the former believes that there are objective principles (*ius*) that bind political authorities, whereas the latter believes that there is no law beyond the sovereign power of the state. For Hobbes, the international order is akin to the state of nature in which all states exercise bare power against one another. Stability can only be created by the constitution of sovereign authority over a defined territory. For Grotius, the world order's stability can be promoted through ascertaining a moral order that is distinguished from God's will.

Needless to say, the account that has turned out to be more popular is the Hobbesian one. We are still very much in the spell of that account of state sovereignty, which implies two ingredients. First, state sovereignty means full responsibility on the part of the ruler to run the internal business of the state by wielding its own normative powers. Second, state sovereignty means freedom from external interference in the way national business is run. It matters little if the sovereign power is acting rightly or wrongly from the viewpoint of international moral standards. State sovereignty creates a protective buffer that screens the sovereign authority from criticism and interference.

Hobbes's account certainly captured something important about political authority in the seventeenth century.²⁸ The national state is the main political framework capable of bringing stability and security. Other frameworks had proved incapable of doing so. The subsequent story of the global order tells us that the most important obligation for each national state is indeed to maintain stability and security internally. That is the chief legal and moral obligation that is tied in with the creation of the Westphalian international order. In fact, the international order depends on the respect of state sovereignty on the part of every player: respect of state sovereignty is by definition the highest — and the only — obligation of states. Hobbes presents national states as the necessary instrument to accomplish a number of desirable political goals.²⁹

28 But are they really necessary or purely contingent? To understand this, we have to observe that the world in which we live is no longer Hobbes's world. There is a web of political authorities beyond the state that create obligations on the state and question the fundamental nature of the national state's sovereign authority.

29 Hobbes's image of the Leviathan as the sovereign political authority provided a justification for a new form of political authority: the nation-state; and the preferred regime was absolute monarchy, where the sovereign king represented the ultimate and unbounded source of political authority. The will of the sovereign king is the ultimate source of law, above which there is nothing. Human law became the most important form of human regulation.

Let me summarize the journey so far: we moved from a conception of sovereignty that was transcendental, where God was the supreme sovereign whose command had ultimate authority, to Hobbes's conception of political authority which is immanent and rooted in the political reality, even if it merely transposes the idea of supreme commander to the state.

III. THE DECLINE OF STATE SOVEREIGNTY

Hobbes's understanding of state sovereignty is static and binary. Once posited, sovereignty cannot evolve. It is a given of the political system and it discriminates between the orderly modern state and the chaotic international sphere that resembles the state of nature where conflict with one another is the norm. With such a static and binary view of state sovereignty, it was possible to justify absolute monarchies in Europe. It is not as easy to explain the slow decline of modern nation-states today and their struggle to cope with the global crisis the world faces. In this Part, I want to contrast Hobbes's theory of political authority with Spinoza's. Both develop a secular and immanent explanation of politics. However, Spinoza's view is dynamic and unitary as opposed to Hobbes's.

Spinoza approves of Hobbes's naturalistic credentials only to a point. Spinoza points out that Hobbes abandons his commitment to naturalism when he grounds the political legitimacy of the sovereign on the transferability of the natural right of people.³⁰ Hobbes places on consent a normative force that has nothing to do with the reality of political power. Consent merely creates out of thin air the justification for the exercise of power: it vests power with legitimacy and respectability, but the cloak of consent is fictional and presupposes the existence of a normative power that has no real basis. Moreover, to conceive of natural rights as an entitlement — something that someone owns and can transfer, rather than something inherent to one's persona and not transferable — is further proof of a non-naturalistic viewpoint. The idea that we can transfer our natural rights makes them look artificial and detachable from human nature. It is this artificial device that Hobbes uses to distinguish between actual power and a legitimate right to rule. To this extent at least, Hobbes still represents the tradition of natural law theory that Spinoza is trying to overcome with a genuinely naturalistic approach that makes no space for theological notions. Spinoza is following in Machiavelli's footsteps, while at the same time offering a naturalistic ethical system that

30 BARUCH SPINOZA, *Letter 50*, in *COMPLETE WORKS* 891 (Michael L. Morgan ed., 2002).

provides guidance to individuals and states. He is bringing Athens and Rome back together, while leaving aside Jerusalem.

More generally, Spinoza's account regards political communities as comparable to biological entities. Power evolves constantly and so does the relation between the ruler and the ruled. There is neither original nor ongoing consent, but rather a constant assessment of the political community's ability to protect and promote vital interests. If the political community ceases to deliver on its promise, then its decay begins, and can be more or less slow; more or less brutal. By contrast, Hobbes thinks like a physicist. Once state sovereignty is posited through the fiction of consent, then it is justified to do whatever it takes to protect the community from internal or external aggression. Consent works as an all or nothing device: as a result, it does not admit of decline and decay. Either it is there or it is not, but it does not evolve. By making consent so central to his theory, Hobbes subjects his views of political authority to an external moral standard, rather than providing a full-blown naturalistic explanation. Spinoza on the contrary provides a full-blown evolutionary theory of state sovereignty.

A. Spinoza's Naturalism

Spinoza's record must be set straight. One of the most promising students of the *Torah* in Amsterdam, Spinoza quickly becomes more knowledgeable than his masters, to the point of challenging their authority and that of the *Old Testament*. Spinoza is attempting to give a new meaning to divine law. He believes that what the Hebrew people regard as divine law is nothing other than human law, presented as divine to motivate people into obedience. Moses provided a people with a set of laws that they would regard as mirroring their identity and motivating regular behavior of obedience. These laws were not universal, but very much specific to the history of one given people. When Spinoza talks about divine law, he does not refer to those laws that have been handed down to men through revelation. Rather, divine laws are those laws that are part and parcel of the natural world and are universal for that reason.

Spinoza does not want to introduce an artificial dualism between God and Nature. Spinoza develops an immanent metaphysical monism (IMM) according to which reality can be explained by reference to a single principle from which everything flows. Spinoza calls it "*Deus sive Natura*," God or Nature.³¹ There is no dualism between the two, no distinction to be drawn:

31 BARUCH SPINOZA, *Ethics*, in COMPLETE WORKS, *supra* note 30, at 213. Spinoza abandons altogether the Judeo-Christian image of God as an anthropomorphic God who is capable of willing good and bad. What has prevented ethics from

the two are one and the same thing. One can contrast it with Grotius's motto: *Etiam si Daremus* (even if we were to concede that there is no God).³² Grotius upheld dualism between divine laws and human laws in order to create the false idea of a normativity springing from nature, in particular from the distinctive nature of human beings. There is no need to declare the godlike nature of men.³³ Spinoza's God or Nature is present in the world in which we live. Spinoza's IMM asks us to think of the world as the sole single reality that human beings can make sense of. The afterlife or a transcendent dimension do not belong to this world and cannot be explained, nor can they provide meaningful information as to what ethical or political standards should look like. To this extent at least, Hobbes and Spinoza have a similar starting point: their account is firmly rooted in this world and inspired by a scientific outlook.

Secondly, IMM is the background for Spinoza's immanent ethical monism (IEM): we live in a world ordered by virtue of natural laws; human beings, like any other living beings, are part of this world and subject to natural laws. So in order to make sense of ethical requirements, we have to know what are the natural laws that regulate the place of human beings in the world, rather than postulate an independent domain of moral values that exercises its gravitational pull on human beings independently of natural laws. The normative domain (the domain of values), if it exists at all, is subject to all the natural laws that apply to all living beings. Ultimately, in fact, all moral laws could be explained by reference to natural laws. The problem lies in the fact

flourishing is not religion, but a very precise picture of deity that is monotheistic and anthropomorphic. Spinoza presents God instead not as a faraway, transcendental being who resembles man, but as an immanent presence on earth that inspires awe and admiration in the same way that nature inspires awe and admiration. God is Nature. Spinoza's position grounds the most ambitious and all-encompassing understanding of naturalism. Of course, Spinoza's claim is metaphysical — here again the first piece of secular metaphysics. His naturalism is hardly matched by contemporary naturalistic accounts that are scarcely convincing, and often simply ideological.

32 *Id.*

33 I hope the irony is clear: men create a God in their own image, only to say that they are the only divine creatures on earth because human beings alone resemble God — that is, they are divine because they resemble themselves. Spinoza does not suggest that human beings are unique or distinctive because of a special capacity for self-determination, as suggested by Grotius and the natural lawyers. Human beings are just another form of life on earth with finite motion and finite understanding. There is no dualism between mind and body: the two are of exactly the same matter and they are completely integrated.

that human beings have no easy way in which they can uncover the natural order (and causality) of the world because their cognitive faculties are limited.

Finally, Spinoza's account develops an immanent political monism (IPM). IPM explains the way in which people come together to organize a life in common and set up political institutions to maintain a certain degree of order and stability despite human irrationality. Human beings come together and form political communities as a matter of necessity: they instinctively know that to form bonds is much more likely to serve their interest in survival, and it is also likely to enhance one's own control over the external world. Political institutions are thus created to protect those basic human interests and as long as they are capable of serving those interests, they protect their existence. If political institutions start behaving in a way that undermines those basic human interests, then they become exposed to failure and ultimately to extinction.

Thus, to establish peace and stability, any political authority has to rely on a double account. On the one hand, one needs a metaphysical account of reality that frees human beings from a transcendental dimension. On the other, one needs a practical psychological account that is capable of motivating human beings. Spinoza's naturalism imagines a world of causal relations that are at bottom all ordered in a monistic immanent frame. Human beings can have glimpses of this order, but can never achieve a full picture that takes them back to the single original cause. This is what I call an evolutionary naturalism, because it opens a wide space for scientific explanations of the world and firmly resituates human beings within nature and not as endowed with special godly features. When Hobbes regards rights as being alienable, he is betraying his own naturalism and attributing normative properties to human beings that can only be explained by a theological account that regards human beings as being endowed by God with special moral powers. Spinoza resists that normative move and insists on a purely naturalistic ethics.

B. The Natural and the Normative

In Spinoza, the connection between the natural and the normative is made through his very peculiar conception of law, which is itself dual.³⁴ There are two types of laws: descriptive and prescriptive. Laws of nature are descriptive: they are the only true laws, because they are the only ones that depend on the real order of the world. They are metaphysically basic, since everything in this world happens in accordance with strict laws of nature. Divine laws, for example, are descriptive: they are the basic laws of nature, since God is

34 BARUCH SPINOZA, *Theological-Political Treatise*, in COMPLETE WORKS, *supra* note 30, at 426.

Nature. This allows Spinoza to offer a deep reinterpretation of *ius* and *lex*. For Spinoza, *lex* reflects primarily the understanding of an eternal order. *Ius*, on the contrary, is the expression of human will and forms the basis of the second type of laws — prescriptive laws — which is parasitic upon the first type. Human beings need prescriptive laws because they are limited by their own very nature, and have no cognitive ability to know the real order of the world. Thus, in order to orient themselves and find guidance, they have to impose rules on themselves to make sure that their existence gives at least the impression of order.

It is common to define human laws as quintessentially prescriptive, and ultimately independent of descriptive laws, the laws of nature, which include the laws of human psychology. Spinoza believes, on the contrary, that we should unveil the deep connection between descriptive and prescriptive laws.³⁵ Effective prescriptive human laws are those that grasp the existence of descriptive laws of nature: human beings are driven to form communities in order to strengthen their own position. Political institutions are responsive to the immediate needs of human communities: to the extent that they preserve stable human relations, they are successful. Human communities need prescriptive laws in order to make sure that they do not fall prey to their negative emotional reactions. Effective human laws have an important psychological component in motivating human beings to act together towards the preservation of stability and peace.

It is important to stress that the link between the natural and the normative is not straightforward. A few points are in order: First, the connection is not direct; human beings have no access to the knowledge of all the causes; they only have a very fragmentary knowledge of nature and its own causal laws. Second, the impossibility of knowledge of descriptive laws points to the inherent limits of human rationality, which can at best work under less-than-ideal conditions of limited knowledge. Third, limited rationality means that human beings reach practical decisions on the basis of emotional reactions to the natural world. Prescriptive human laws have to engage with psychological motivations and provide appropriate answers to them. Fourth, the success of a rule-maker will be measured by its ability to grasp the overarching interest of the community, while at the same time motivating people to strive together in that direction. When the sovereign authority gives to their community an appropriate set of rules, the community is likely to persevere in its existence and flourish. The ruler shows on this occasion that he understands both the

35 This is an insight present both in Spinoza's *Theological-Political Treatise*, *id.*, and later in MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds., Cambridge Univ. Press 1989) (1748).

real interest that lies in the exercise of power and the necessity to motivate the people to comply with the rules in order to further their own interest. Conversely, a sovereign authority that does not understand the higher interest of the commonwealth, or that is incapable of motivating people to pursue that interest, is bound to fail. Spinoza's understanding of sovereign authority is dynamic and evolutionary. Political authority is sovereign when it understands the interests of the community. It thrives when those interests are protected and promoted; it declines when it is no longer capable of efficiently maintaining those interests.

C. An Evolutionary Account of State Sovereignty

Human laws are there to secure the existence of the state. As long as the state is capable of understanding what it takes to motivate the people to obey, human laws will assist in making the state stronger and more stable. Spinoza must be contrasted with Hobbes on this crucial point. Hobbes insists that political stability depends on the subject; each individual is a potential source of endless conflicts and violence. If human beings want to live in a peaceful and secure environment, they have to give up their natural right through consent. The commonwealth will promote those goods in the name of the people. Spinoza disagrees: political stability depends on the commonwealth in the first place. When the people do not comply with the rules and obligations of the community, they are not to be blamed. It is the responsibility of the commonwealth to create a political community where compliance is possible and largely respected.³⁶ A sovereign state must govern wisely and promulgate wise norms, if it cares about peace and security, and if it wants to maintain its rule. If it is not capable of doing so, the sovereign will simply incur growing unrest and ultimately rebellion. To be sure, the responsibility for that has to be placed on the ruler and not on the subjects.³⁷

The contrast between Spinoza and Hobbes is particularly interesting when it comes to understanding the place and role of the state today. The Hobbesian insists that the state is the basic framework of justice; outside of which there is no order.³⁸ But this assumes that no order can be achieved in any other

36 BARUCH SPINOZA, *Political Treaty (5/3)*, in COMPLETE WORKS, *supra* note 30, at 699.

37 This Spinozistic point is central in MONTESQUIEU, *supra* note 35.

38 NAGEL, *supra* note 26. For a critical reply showing the limits of the Hobbesian account, see Cohen & Sabel, *supra* note 26. Nagel now accepts the force of Cohen and Sabel's argument which shows that we no longer live in a Hobbesian world.

way.³⁹ Such a static account also fails to explain the fact that the state may not be capable of solving present global challenges. The problem begins when the state is no longer capable of providing the adequate responses to global problems of coordination. An evolutionary account points out the contingency of the state: it will last as long as it works. Perhaps, at one point, it will be supplanted, just as the nation-state supplanted the Church, the Empire and the cities as temporal authorities. The state itself has been, and remains, a highly malleable and variable form of association, so it is likely to evolve so as to cope with new challenges. Hitherto, it has been remarkably resilient. As Wolfgang Friedmann observed, “[f]rom the sixteenth to the early twentieth century, the national state, in many cases coalescing from the older and smaller entities of dukedoms, principalities, and city republics, became the sole source of legal power and the exclusive focus of political allegiance.”⁴⁰

D. Obligations Beyond the Sovereign State

Today, the emergence of international institutions and transnational forms of regulation is helping to solve problems that escape the state’s centrality in the global arena. They also lead to rethinking the static character of sovereignty. The state still performs valuable functions in screening the people from unwanted internal and external forces. When the state works, it prevents the imposition of worldviews that are not shared by the people as a whole or as a minority. For example, it prevents the imposition of a religion over others. But when it does not work, its survival and flourishing are at stake, because people do not feel protected by the state and other forces exercise pressure on citizens. When the state is not capable of performing vital protective tasks through its municipal laws, then other interested groups push forward their agenda through forms of coordination that are not state-made. Today’s global crisis cannot be met by the state alone; the state is also struggling to create international cooperation in order to tackle common problems. It is true that for the moment there is no alternative political framework to the nation-state; even supranational institutions such as the European Union are there to sustain rather than undermine the nation-state.⁴¹ In order to explain the reality of actual obligations that states have at the global level, I have distinguished between the Hobbesian view, which I deem a static understanding of state sovereignty, and an evolutionary naturalistic account of state sovereignty that posits the

39 NAGEL, *supra* note 26.

40 JOEL TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW* 11 (2013).

41 ALAN MILWARD, *THE EUROPEAN RESCUE OF THE NATION STATE* (2d ed. 2000).

contingency of the national state and its power. Its power is justified only to the extent that it fulfils its job better than any other political framework.

An evolutionary explanation of the state presents obligations towards other actors as being grounded not on moral concerns, but on the self-interest in the preservation and flourishing of the state itself. A state has power insofar that it is capable of surviving, but loses that power as soon as it is no longer capable of doing that. Its right to rule is co-extensive with its power. An evolutionary account also attempts to move away from an explanation of the obligations of the state grounded on respect for God's moral law, or on the abstract moral truths discovered through reason. However, to deny that there is any transcendental standard of justice is not to deny that there is any standard by which action can be evaluated. The actions of the state, in particular those actions that contribute to the promotion of global stability, can be evaluated in the light of whether the action preserves and promotes one's existence and power of action. In a world where global relations are increasingly more important, a state that is regarded as a strong collaborative player will increase its power of action. To this extent, the obligations of states can be grounded on the state's very interest rather than on more or less vague moral notions. For example, the obligations that European states have decided to impose on themselves through the creation of the European Union are there to strengthen the system of states rather than weaken it.

As far as obligations between states are concerned, an evolutionary approach will deny that there are any independent normative constraints on the actions of states. It suggests instead that the survival of states relies on their ability to provide answers to transnational problems. For example, the way in which Italy deals with the problem of immigration from North Africa will have an impact on the whole country. Italy has to make sure that immigration can be regulated so as to avoid the breakdown of its system of assistance. Other European states have an interest in the success of immigration policies. The existence of international obligations is not a matter of morality, but a matter of survival. This may in turn create new regional institutions with the actual authority to deal with immigration, since states on their own are struggling. In the end, whatever institutions which are capable of offering a stable solution to the problem will be vested with power that is independent from the state. This may happen in an increasing number of areas of life and state sovereignty will proportionately decrease, perhaps to the point of disappearing.

CONCLUSION

Any genealogical study of state sovereignty attempts to uncover the origins of an idea in order to understand its trajectory. I have tried to show that sovereignty has a theological root, Jerusalem; the idea of the state came about as a practical and effective response to the vacuum of political authority in Europe. Philosophers have tended to engage with the theological issue, and dismissed Machiavelli's insights on the reality of power. Instead, they relied on reason — Athens — to advocate allegedly objective normative standards binding the state morally. But this naïve understanding of political authority and international obligations (Grotius) was quickly replaced by a more ruthless conception of state sovereignty as the guarantee for the safety and security of the community. In Hobbes's secular account, Jerusalem and Athens are both to be subjected to the sovereign authority of the state. However, Hobbes's position preserves fundamental elements of both Jerusalem and Athens, which end up corrupting his Roman understanding of state sovereignty. Even if Hobbes's view is still extremely appealing to all those who regard the international sphere as hopelessly devoid of order, the truth of the matter is that modern states are increasingly at greater pains to exercise their authority effectively to respond to global problems. At the same time, international and transnational obligations are flourishing despite the existence of the state, and this calls for an explanation of both the decline of the state and the emergence of new forms of regulation. To do so, I developed an evolutionary explanation of state sovereignty that departs from Hobbes's and claims to be true to the original Roman insight of Machiavelli, while being completely free of Jerusalem. In particular, I offered Spinoza's account of state sovereignty as being capable of explaining how and why political authorities appear, flourish and decline.

In times of political vacuum at the global level, what matters is not what best justifies the actions of political institutions; rather, what matters is how effective new political institutions are in delivering on their promises. The national state may be here to stay, and it is perhaps the main political framework to guarantee a relative degree of peace and stability. If that is the case, it is not because the state is morally better than other political frameworks, but because it can exercise its authority more expediently. In this picture, Rome has completely erased Jerusalem, and has put Athens in its place: as a separate source of criticism and observation of political authority, rather than the ultimate justification thereof. The practice of power provides the most fundamental reasons as to how to exercise power. A sovereign state that does not understand its interest in collaborating with other states to provide answers to pressing global problems is first and foremost undermining its chances of future survival.

There is something odd about believing that the state provides a necessary framework of justified ultimate political authority in a territorially bounded space. Other political frameworks existed before, and others will emerge and compete with the national state. Indeed, the fact that there is increasing competition means that the state is less than fully capable of exercising its own authority effectively; it points to an increasing political vacuum that needs to be filled somehow. However, we are unlikely to see a quick demise of the state because of three practical reasons singled out by Joel Trachtman⁴²: (1) the state continues to provide solutions to many coordination problems that fit well within its borders; (2) path dependence makes it difficult to shift to another system; and (3) network externalities support isomorphism among states. The first is the most important force.

It may be early days to conclude that the political framework of the sovereign state is nearing its end. But it is high time to start explaining state sovereignty, and examining the nature and scope of obligations upon the state, from an evolutionary viewpoint rather than a moralistic or theological one. When Rome is interpreted in purely political and secular terms, it points to the strongest form of authority, one capable of responding to global challenges. Athens and Jerusalem will wait to see which authority emerges to cast their judgment on it.

42 TRACHTMAN, *supra* note 40, at 10.