Response to Lev and Bonilla: The One and the Many

By Paul W. Kahn*

A discipline that compares legal cultures has difficulty grounding itself. Comparison requires some sort of common measure, whether of functions, norms, or beliefs. The turn from traditional jurisprudence to the study of legal culture, however, rests on an interest in particularity and contingency. Yet, if we resist comparison in the name of particularity, we may find that the very idea of culture begins to fall apart as we discover endless differences within any form of practice and belief. We seem to confront a choice between empty abstraction and endless particularity.

This problem of choice between two unattractive possibilities is especially true in the study of constitutional cultures. There is no common agreement on what a constitution is, let alone what it should do. We can make no assumption that constitutions figure in different political cultures in similar ways. It is not simply that we may find ourselves comparing apples to oranges. In law, we have trouble identifying the apple even before we move on to oranges. Within a national discourse, there are already disagreements about the fundamental concepts of the constitution. Is the American constitution a text, a common-law practice, a set of institutions and procedures, an on-going discourse, or a national myth? Is it a creed or a set of legal doctrines? Is it something we inherit or something that we create? Is it best approached in terms of power or legitimacy, substance or procedure? Does it belong to the general field of morality or that of history? Is it a privilege of citizenship or a structure of coercion? Pick any vector and others will argue with the choice.

Constitutional concepts are essentially contested, which is to say that constitutionalism is an interpretive practice. Constitutional practices cannot be cabined. They are as broad or as narrow as the claims made in the name of the constitution. In these contests, we cannot pick out the winners in advance; we cannot assume that those who have won in the past will continue to win in the future. Constitutionalism is a cacophony of claims, with major and minor themes that change over time. These arguments, moreover, go forward under the pressure of the decision; participants always have an eye on the outcome.

The project of comparing legal cultures seems, then, paradoxical, for it begins with an intervention that does violence to its subject. Scholars who take up this project inevitably bring with them categories formed elsewhere. I, for example, think all too quickly of constitutional law as the object of comparison, but that is because of the American privileging of the Constitution over other forms of legal practice. I think of the Supreme Court, rather than trial courts, because of the nature and role of hierarchy in American practice. My interlocutors similarly bring with them patterns of inquiry with which they are familiar.

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We pursue comparative work in a manner similar to the way in which we learn another language. We ask 'how does one say x?' This is not the way children learn language. They do not learn elements – words and rules – and then construct sentences. Rather, they learn how to be with others in language. Their approach is holistic. They speak sentences from the beginning; sentences that are just one word long. To have a language is to occupy an entire world. There is no part of the world that is beyond the edge of language, as if we must learn additional words in order to get to it. The whole world becomes linguistically mediated immediately with the child's first few words: it is a world of 'that' and 'who?'

The truly bilingual person moves between two languages without exercising any translation function. He does not compare; he simply has the capacity to live in both. Translation is never a costless process, for every sentence gains its meaning from an entire world of language use. We can give functional equivalents, of course, but that is not quite the same thing. We can try to approximate what a work 'feels like' in its original language, but to do so is to engage in a creative act that will stand independently of its source text.

Something similar is true of law: when we compare, we are acting the role of latecomers who never really occupy the second world. Translating, we inevitably misrepresent. Law is like a language in that it creates an entire world. We can ask about every action whether it is legal, about everything who is its owner, and of every person what are her rights. The first two categories of legality and property refer to actions and objects (verbs and nouns); the third, to persons with a single identity through time, for rights link past to future (the actual to the possible). To imagine that we can compare these elements across cultures, however, is like thinking that we can compare colors across paintings. We are missing the way in which legality expresses political meaning.

Law exists in the relationships among the terms; it exists in knowing how to use the terms to construct arguments. Claiming a legal right, I try to persuade others. A legal culture is sustained by these narratives of legitimation. These are phenomena in the world; they are objective in the same way that literature, art, and science are in the world. When we study culture, we are not studying the internal or subjective beliefs of particular subjects. Rather, we are interpreting symbolic productions.[1]

If there is no agreement on the nature, site, substance, and practice of constitutionalism, what exactly are we to compare when we take up a comparative project. There are no innocent choices here. We cannot compare until and unless we commit. When we commit, we simultaneously do violence to the object of our study and reveal our own position. Comparative work, therefore, puts a demand on the author to make transparent the conditions under

1 Bonilla takes 'internal' – as in the internal point of view – to refer to particular beliefs of individual subjects. That is the attitude of social psychology. When I speak of the internal point of view, I mean to draw a contrast between reasons and causes, that is, I mean to reject material accounts of law. The distinction parallels that drawn by Carl Schmitt between 'sociology' and 'sociology of concepts'. See *C. Schmitt,* Political Theology: Four Chapters on the Concept of Sovereignty, trans. George Schwab, Chicago 2005, pp. 43 - 45; *P.W. Kahn*, *Political Theology: Four New Chapters on the Concept of Sovereignty,* New York 2011, pp. 92 – 101.

which his own work goes forward. We have no reason to think that scholars trained in the tradition of legal scholarship have any interest in or skill at this sort of self-reflection.

My own approach to these problems of incommensurability has been generally to avoid comparative work in the formal sense. I try to make clear that I speak as an interpreter of American constitutionalism. This is the only constitutional culture upon which I am prepared to set forth my own views. Jurisprudence, philosophy, and theology intersect in an autobiographical project as I interpret a set of practices and beliefs that do not just happen to be my own, but must be my own for the analysis to succeed.

From within this familiar world, I issue an invitation to those who are in a position to speak of other legal cultures. The invitation sets forth an interpretation of the shape of American constitutional culture. It models a form of inquiry, and invites others to take up a similar project with respect to their own legal culture. I issue the invitation with a certain confidence that there will be useful synergies, interesting similarities and differences, among nations that share a common genealogy. American constitutional culture is one species within a genus of political-theological practices that trace back through Enlightenment political and moral theory, to Christian theology, and then to the earliest formations of thought among the Greeks. Oher constitutional cultures are members of this same genus, putting common resources to different uses. I think this to be the case not because I am an expert in the range of western constitutionalisms, but because I have studied the contingent character of the American use of these resources. My work often explores these contingencies, showing how the elements have been arranged differently over the course of American history.

I want to illustrate the risks and possibilities of comparative work by engaging with two of the essays presented at an international symposium on my book, *Making the Case*, both of which are printed in this volume. The first, by a Latin American scholar, Daniel Bonilla; the second by a Danish scholar, Amnon Lev. Both are thoughtful efforts to engage my work. I appreciate that effort. Just as with comparing cultures, I am sure I will do violence to their work in comparing them with my own.

A. External Critique: The Southern View

I. Contesting Culture

Some 25 years ago, I used the term ‘culture’ as a way of signaling the direction in which I was trying to turn American legal scholarship – particularly constitutional law scholarship. *The Cultural Study of Law* was a manifesto: part critique of the typical from of American legal scholarship; part a plan of study. Law, I argued, was too important a part of our lives to leave its study to the ethos of professional schools. Existing scholarship was not a discipline of study but an aspect of the practice of law.

I used the term 'culture' to signal the forms of scholarship with which I meant to associate myself. My work is, first of all, philosophical. It develops an idea of the historical a priori – a contradiction for Kant, but precisely the point at which post-modern thought has made its most exciting contributions.[2] The *historical* points toward the need for genealogical inquiry; the *a priori*, toward inquiry into the architecture of belief.[3] This is the method of exploring the social imaginary. Approaching philosophy in this way, my work makes contact with cultural anthropology. It makes contact as well with a contemporary project of political theology. Indeed, in offering a two-volume political theology,[4] I was responding to a challenge from Clifford Geertz to undertake this task, while also acknowledging the influence of that earlier constitutional theorist, Carl Schmitt.[5]

The term 'culture' is deeply contested. Some scholars, including some anthropologists, have turned away from the term, finding it to be more confusing than illuminating.[6] They fear that it leads to a suppression of difference. Bonilla is clearly sympathetic to these concerns and replicates some of the debate in his critique. Running through his essay is a challenge to the implicit assertion of power contained in any description of culture. He rightly worries about the academic imperialism of Northern scholars. In his essay, he brings this critique to bear on the 'home turf' of the American scholar.

In these academic 'culture wars,' I have no stake. Nevertheless, apart from my early manifesto and occasional responses to commentators, I have mostly avoided use of the term. 'Culture' is useful as a signal, but does not, in itself, suggest a particular method or even a place within an intellectual tradition. There are many ways to study culture, even within the field of anthropology. I have never hidden the authors/traditions within which I place myself. The vocabulary I adopt suggests the connections.[7]

These sources are interdisciplinary – philosophical, anthropological, theological, and jurisprudential. I certainly do not expect my readers to have mastered all these fields. I do not make any such claim for myself. Moreover, I have always intended each work to stand on its own. Each illustrates a way of thinking about interpretive practices. Together, they

2 *P.W. Kahn,* The Cultural Study of Law: Reconstructing Legal Scholarship, Chicago 1999, pp. 35 – 36. I take the concept of the historical a priori from Foucault. See *M. Foucault*, The Order of Things: An Archaeology of Human Sciences, New York 1970, pp. xx-xxii.

3 *Kahn*, note 2, pp. 41 – 43.

4 *P.W. Kahn,* Putting Liberalism in its Place, Princeton 2005; *P.W. Kahn*, Out of Eden: Adam and Eve and the Problem of Evil, Princeton 2007.

5 *C. Geertz*, Local Knowledge: Further Essays in Interpretive Anthropology, New York 1983, p. 143.

6 *J. Clifford and G. Marcus* (eds.), Writing Culture: The Poetics and Politics of Ethnography*,* Berkeley 1986.

7 Arguing that law is an interpretive practice, I am positioning myself in relation to Ronald Dworkin, whose work, *Law's Empire*, appeared just as I began publishing. Invoking the historical a priori, I placed myself in the neo-Kantian tradition that includes Ernst Cassirer but also Michel Foucault. Writing of the social imaginary, I was placing myself alongside of Charles Taylor. Speaking of culture as a practice of interpretation, I claimed a relationship to Clifford Geertz. And, writing of political theology, I placed myself in relation to Carl Schmitt.

present a corpus characterized by a similar set of concerns, but they are not all doing the same work. *Making the Case*, for example, addresses legal pedagogy. *The Cultural Study of Law* is the prolegomena to a field of legal study. *Putting Liberalism in its Place* interrogates the limits of liberal political theory. *Sacred Violence* examines the meaning of political violence beyond law. All of these works – and others – are concerned with the relationship of the rule of law to popular sovereignty – the master problem of the modern democratic state – but they come at it differently.

Bonilla tends to ignore these differences in subject matter and genre. There is nothing wrong with focusing on just one or two texts, but the argument should reflect the particular problems to which those texts are addressed. For example, one theme of his critique is that I give too much attention to written texts produced by or for courts. This is the focus of *Making the Case*, but that is a book about how to read opinions. More generally, I have argued that opinions have the virtue of ease of access to a deliberate effort at legal justification. I have never argued that they are an exclusive or even the most important source. Here is what I actually say about my most sustained engagement with a judicial opinion:

> *'The focus on courts – and, even more narrowly, on the public law function of the courts – remains a limitation of this book. The legal imagination operates across all our political institutions. Within each of these institutions, the contest of meaning appears somewhat different, and the place of law within that contest is different. Nevertheless, because the courts have achieved a unique role in expressing the rule of law, they are the place to begin the account.'*[8]

Bonilla's focus is primarily on my early manifesto, *The Cultural Study of Law*. Even there, I argued for a broad and eclectic approach to texts that extends well beyond the products of the courts and the law schools: a study of law that would include legislative reports, presidential statements, fiction, sermons, and public addresses.[9] I wrote of the need for a broad inquiry:

> *'[A] cultural study of law cannot narrowly limit itself to "legal" phenomena. If we want to study what it means to live under the rule of law, then we must be prepared to examine the entire reach of our experience in the modern state. The study of sexuality and the body is as important as the study of legislation. We need to know as much about the appearance of God under the rule of law as about the use of precedents. We need to study the microdynamics of the family, as well as the practice of dissent on the Supreme Court. We need to study the prison, but also the circulation of ideas. The cultural study of law investigates a way of life in all its diversity, not just those objects and practices positively labeled "law"'.*[10]

8 *P.W. Kahn*, The Reign of Law: Marbury v. Madison and the Construction of America, New Haven 1997, p. 5.

9 *Kahn*, note 2, p. 126.

10 *Kahn,* note 2, p. 125.

Some of this work I have carried out in other studies in which issues of the sacred, sexuality, violence, family, and master narratives are prominent themes. Indeed, if I had to give a name to my entire corpus, it would not be 'the cultural study of law.' It would be 'the political theology of modernity.'

In general, I do not agree with Bonilla's claims about the implicit view of culture in my work. That does not mean he is wrong. As I will explain below, an author does not control the meaning of his work. Bonilla may be a better interpreter of my own work than I am. Nevertheless, I cannot help but notice that in a long critique, there are virtually no quotations from my work. Many citations are to sections – often many pages – of works in their Spanish translations. That means that the references do not provide direct support for his claims; they are instead further interpretive claims.

II. Pluralism is What we Make of It

Bonilla projects an idea of unity and difference upon my work. My work, he charges, implicitly assumes that legal culture is homogeneous in its form and universal in its reception. According to Bonilla, I assume that all citizens imagine law in the same way. To counter my alleged views on homogeneity, he will point out differences in understanding among different individuals and groups that make legal claims or find themselves subject to the coercive authority of law. I do not know exactly what Bonilla means by 'culture,' but it is clear that we use it differently. His idea seems grounded in sociology and social psychology. This makes sense if one's concern is the distribution of power among groups. Indeed, there is much to explore in the United States from this perspective. Little of it, however, makes contact with my project.

To begin, difference is not in itself a mark of pluralism as against monism. Difference is neither the end nor the beginning of law. It is, rather, the ordinary state of law. A legal order does not eliminate difference. Rather, it is a way of living with difference. This is just where Dworkin begins, and I agree with him.[11] Individuals equally committed to the law will disagree on what the law is: they interpret it differently. I do not believe that I have ever described a univocal source of law, but even if there were such sources, there are always multiple sources available at law. The interesting question is what sort of differences mark boundaries, and boundaries of what sort.

Someone who believed that moral principles are, by virtue of that status alone, legal rules would not be operating with a different view of American law, but with an incorrect view. This, however, is not the way in which citizens bring moral principles to bear. Rather, they argue for the intersection of their moral principles and legal rules. These arguments are endless; they are often the focus of our political attention. They continue even after a party loses in court. Were they to become unavailable, then we would face a situation rather like that of Antigone. Someone, somewhere, is probably facing that dilemma all the time.

11 *R. Dworkin*, Law's Empire, Cambridge 1986, pp. 3 – 6.

There is nothing particularly unique about moral claims. Individuals with distinctly different interests will find the legal resources to make claims reflecting their interests. Law enables this diversity; it does not insist on homogeneity. Citizenship under law is a process of expressing interests and principles in legal terms. This is not an alien imposition, but an affirmation of membership. Indeed, there is a danger in emphasizing the social fact of pluralism. It may effectively diminish the standing of these groups to pursue their own interpretation of a common political project.

Of course, this does not mean that everyone thinks the same thing or that there are not marginal communities that resist the dominant narrative. Difference is always present whenever we interpret a culture. Not all Victorians thought the same way; not all those on the frontier agreed; not all Christians share the same horizon. Yet these differences should not keep us from exploring Victorian literature, the frontier ethic, or the Christian imagination. The issue is not whether we can identify exceptions, but when it is useful to take those views into account.

When Bonilla refers to pluralism, he often seems to have in mind dissenters, particularly Christian conservatives. They certainly disagree with liberals about particular legal controversies, but I have no idea of how deep the disagreement goes with respect to the basic structures of the legal imagination. In the late 19th century, there was no legal problem identifying this as a Christian nation. There was a general view – a master narrative – that civilization, Christianity, and the rule of law all coincided in American political life.[12] *The* boundary between religion and public life is always contested. To join the contest is to participate in the life of the law.

Consider Bonilla's own example of religious practice. Many different groups make claims about what the free exercise of religion means. We could study those claims as a matter of social facts. We might look to the positions of Jews versus Christians, or fundamentalists versus mainstream believers. When the Jew goes to the Catholic Church, he does not 'bridge the gap' or translate his beliefs into theirs. He is an alien who does not speak the language. But when these groups come into court to make a claim, they do not think to rely on the authority of the Pope or of the Bible. Rather, they argue about the meaning of the First Amendment. They are making claims about what the First Amendment means: claims that they believe should persuade others who do not share their religious beliefs. The important differences are no longer between religious sects but between interpretations of law. We argue about legal method, not about God's revelation.

No one could reasonably claim that everyone who occupies the territory or even all citizens limit their claims and methods to those of law. Some people take up arms to advance their point of view. Universality in law is not a fact of homogeneous belief, but a claim from within law to represent the popular sovereign. Law constructs an idea of everyone: We the People. That idea is contested, but that contest is not won by polling data.

12 *Church of the Holy Trinity v. United States,* 143 U.S. 457 (1892).

Some abolitionists rejected the Constitution and the courts. William Lloyd Garrison argued for morality over law; he described the American constitution as 'a covenant with death, and an agreement with hell.' But this was hardly a position of alienation from the legal imaginary. He was following the path of resistance, revolution, and constitution that lies at the heart of the legal culture.

If one were to seek out resistant communities today – perhaps extreme religious fundamentalists – I don't know what one might find. It would be quite fascinating to explore the way in which they interpret their relationship to the legal order, but we should make no assumptions in advance of the inquiry. In *Educated: A Memoir*, Tara Westover describes her upbringing in a radically isolationist Mormon household.[13] She was not allowed to go to school, to see a doctor, or to interact with non-Mormons. Her father believed that the end of the world was rapidly approaching and that a conspiracy among the Illuminati controlled America. Yet, there is a striking description of her family's living room, in which the only text mentioned by name is a framed copy of the Constitution. I suspect that similar copies would be found in many households estranged from the mainstream. How are they imagining that text?

Just as Bonilla identifies difference with pluralism, he tends to displace philosophy with psychology. He lets a few judges talk for themselves as if this gives us access to 'the internal point of view.' Self-reporting is not the interpretive practice at issue. Most people have experienced the disappointing character of self-reporting by artists. They are frequently not the best interpreters of their own work. The artist says what she has to say in the painting, not in commentary on it. The humanities are founded on this idea that interpretation is not the discovery of subjective intent. Culture, legal or otherwise, is not a private belief; it is a public world.

Judges are like artists in this respect. There is no reason to think that judges are particularly good at interpretation, even when the work to be interpreted is their own. Indeed, there is every reason to think that they are bad at self-reflection, since they are trained to displace themselves from view. Their self-reporting is often little more than hackneyed appeals to politically popular ideas of judging.

Judges most often say that they 'apply the law.' Asked to explain that, they may say that they are originalists, textualists, or even pragmatists. If asked to explain these beliefs, they are likely to be at a loss. Everyone within the practice, however, knows not to take such claims too seriously. Judicial practice is rampant with exceptions to any such claims. The originalist will generally keep current with developing doctrine. He will argue from precedents, just as the nonoriginalist will easily cite original meanings when it helps her to make her case. These are moves within the practice that must themselves be interpreted.

When judges say they 'apply the precedents,' they are not interpreting the nature of a precedent. They are not confronting the almost metaphysical difficulty that attaches to ev-

13 *T. Westover*, Educated: A Memoir, New York 2018.

ery claim of precedent: the problem of identity through difference.[14] They are not exploring the temporality of the decision, the relationship between a text and its interpretation, the nature of analogy, the role of narrative, or the relationship between a text and its authoritative interpretation. The same is true of the judge who says he has 'a hunch.' Every decision represents a sort of leap – a commitment – among possibilities.[15] To describe that crossing as a hunch is only the beginning of an interpretation.

Dworkin remarks that every judge requires a jurisprudence, but he surely does not mean that each is capable of setting out his jurisprudence.[16] The study of an interpretive practice is not a matter of self-reporting by those whose practice it is. Their interpretations are not irrelevant, but neither are they privileged.

III. Pluralism's Legal Appearance

Bonilla's home is in a system of legality sensitive to indigenous rights; one that struggles with a colonial legacy of hegemony and in which the central government does not have full control of the territorial jurisdiction. He is a leading theorist of pluralism in southern-cone legal orders. He investigates difference within the artificial structure of unity that is the state – a structure that comes late and incompletely to the diverse communities operating within the territorial borders. Pluralism has a normative valence for him: a failure to recognize pluralism is an erasure of difference.

I have no reason to think that pluralism is not an important organizing concept in an account of the legal topography of Colombia. It would surely be a mistake for me to approach the work of the Colombian Constitutional Court as if it were doing the same thing – and imagining itself in the same way – as the American Supreme Court. I have no idea how its opinions are received among different groups. I know nothing about the distribution of jurisdiction or the forms of legal argument among these groups, let alone how they speak to each other. I am confident, however, that pluralism versus monism is not a useful frame for understanding the constitutional culture of the United States. Indeed, the American narrative is quite the opposite, for it builds an idea of unity through difference.

To understand why pluralism misses the mark, we have to look at the way in which differences among communities actually appear within the constitutional framework. We cannot simply start from the fact of pluralism, for there is no such fact. There are only ways of perceiving, arguing, and acting. There is no escaping the task of interpretation. The questions, then, are how difference appears and how it is put to use. When we turn to American constitutionalism, community differences raise issues of federalism. The contrast of monism and pluralism does not help us to understand this idea. Our monism is pluralistic;

14 *P.W. Kahn,* Political Theology: Four New Chapters on the Concept of Sovereignty, New York 2011, pp. 112 – 114.

15 *Schmitt*, note 1, pp. 30 – 32.

16 Dworkin, note 11, p. 90.

our pluralism is monistic. The terms collapse into each other, rendering them as puzzling as the original American puzzle of an imperium in imperio.

To understand American federalism is a lifetime's work, for it is one of the resources – structural, doctrinal, historical, and mythical – through which American history has been constructed and contested. The concept has no single, settled meaning. Rather, it gains meaning from the multiple narratives within which it has been used in order to negotiate relationships of unity and difference. It reaches back to the colonial era and the relationship of the colonies to the crown. It is negotiated through the project of constitutional construction joined by multiple states that share a revolutionary past. It explodes into Civil War as the original project of unity in difference breaks down. The courts use it to reverse the meaning of military victory in that war. It is bound up with race, first in defense of slavery and then in opposition to the Civil Rights movement. It is part of the westward expansion and the configuration of the frontier. It is linked to capitalism and resistance to the emergence of a regulatory regime. It remains the leading edge of a conservative reaction to the emergence of the welfare state. It is bound up with the reconfiguration of political parties in the post-War era. The list could go on, expanding without limit into practices across the entire range of American experience. Each deployment of the concept resonates with this entire history.

No one operating in this legal order ignores federalism; no one fails to orient themselves along the many vectors loosely grouped under this idea. Americans maintain a memory bred in the bone that over these differences they went to war in the 19th century. This is not just a once contested ground; it remains dangerous ground. That danger was reenacted in the 20th century, first in resistance to the New Deal and then to the Civil Rights movement. Today, the danger is in the potential disabling of a national health insurance scheme.

Historically, federalism has appeared as both the leading principle of constitutional organization and as an empty tautology. It has been everything and nothing. Even when the Supreme Court declared the 10th Amendment a tautology, the patterns of belief and action that had arisen around federalism did not disappear.[17] Nothing ever disappears from the legal order, for no one has the authority to declare any decision or argument banished from the corpus. To study federalism, then, we cannot parse a single authoritative text or look only to an original meaning. We cannot do public opinion surveys or study abstract political theory. We must look to the practice.

Interpretation must begin with a text.[18] This is characteristic of all studies in the humanities. We cannot study art in general; we need to look at particular paintings. The same is true of law. Even a good example will not interpret itself. It is, however, very difficult to know what sorts of questions to ask without being deeply embedded in the culture. Interpretive practice is a kind of conversation: one has to know what we are talking about. We

17 *United States v. Darby*, 312 U.S. 100, 124 (1941).

18 Of course, the text that is the object of interpretation need not be a written text.

are talking about federalism, not pluralism. A productive interpretation must pursue the genealogy and the architecture of the concept.

I would begin with the way in which the idea of multiple sovereigns within the same territory makes contact with ideas of Church and state. The problem of plural sovereigns began in the pulpit, not the statehouse. Federalism, along with other major political concepts, has gone through a process of secularization.[19] Multiple sovereigns became multiple communities as the idea of sovereignty was itself diffused among a people. This movement linked ideas of representation and to those of geography. Hobbes explored the role of representation at the beginning of modern political theory. He already sees that the many can become one – the Leviathan – through representation. American constitutionalism offers multiple forms of representation, which allows for its constant theme of unity in difference. Federalism thus comes in contact with other ideas of difference: separation of powers, disestablishment, and markets. To trace how each of these ideas relates to the others – the conceptual architecture – is trace the history of American constitutionalism.

American federalism has roots as well in common-law ideas of property that were used to give legal form to complex relationships of power. There is always a puzzle of how a bounded geographical region can be both a national territory and private property. What is the relationship between sovereignty and ownership? What exactly is the sovereign's claim to the land? These puzzles were particularly compelling in the American colonies in which there were simultaneously claims of sovereignty over the land, grants of land to private parties, and recognition of Native Americans as users of the land. Different parties had different claims of ownership. Native Americans right to use the land was a sort of tenancy; the sovereign was a sort of ultimate owner with a residual power to dispossess. Here, too, we find the problem of imagining a relationship of many to one.

We are not so far from the King's two bodies. The geography of the state is imagined simultaneously within a narrative of territorial relationships to other states and a narrative of tracing title; land is mapped and plotted. In the age of popular sovereignty, all citizens have this quality of the double body: they bear the body of the state and they are private actors in civil society. To this, American federalism adds another sort of double: to be a citizen of a local community and of the nation. Alongside of Lincoln's nationalism, the country maintains a memory of Robert E. Lee, who thought of his country as Virginia, when he had to make a choice.

By the end of the 19th century, volumes were written trying to sort out these relationships among nation, territories, states, Native American reservations, and colonies of various types. Property relationships aligned with something like 'degrees' of citizenship. These were complicated and contested concepts put to use for multiple purposes. They also guided the way in which arguments developed, for they offered the tools for imaginative

19 Here, too, the classic expression of the idea is Schmitt's: 'All significant concepts of the modern theory of the state are secularized theological concepts.' See *Schmitt*, note 1, p. 35.

construction. Participants had to construct arguments that 'felt right' and that was a matter of fitting into existing webs of meaning. Interpretations are diverse but not without limits.

While I disagree with much that Bonilla attributes to me, there is one point that sounds a particularly important note today. Many of Bonilla's examples of difference come from elements within the right-wing populist movement that Trump represents. Their beliefs and actions do raise a serious challenge to the American culture of law. Because Bonilla takes a sociological approach, he can only note the difference as a matter of pluralism: all contribute to the totality of American legal practices. I do not hesitate to condemn that movement as anti-democratic and anti-constitutional.

The threat of populism to the legal culture is real. The nature of that threat might become evident to Bonilla were he to broaden his inquiry into the legal order to include its connection to democratic self-government. Bonilla is wary of approaching issues of legitimacy, but the connection of law to popular sovereignty has been at the center of my work. Fundamentally, Trump has the populist's urge to identify the state with himself; he claims to instantiate the people. While the politics of personal instantiation has a long history, it is profoundly discordant with the rule of law. This challenge to law is real and it is undemocratic. To condemn this assertion of power is an entirely different matter from taking a position with respect to cases and controversies within the law. To confuse the two is to be still when the fascists are at the gate.

B. Internal Critique: The Northern View

Bonilla approaches culture as a legal sociologist concerned about inclusion of minority groups who bring with them different understandings, expectations, and imaginings. Who, he asks, is ignored and at what cost? A failure to include amounts to a failure of recognition, and that is an act of subordination. Even when Bonilla focuses on differences of interpretation, his point is not to study the nature of interpretation but to dismantle the hegemony of the monist's cultural claims. Lev's concerns lie elsewhere.

Lev is not concerned with who is left out, but with how it all fits together. His concerns are philosophical, not sociological. Responding to Bonilla, I defended the philosophical nature of the enterprise. That makes Lev's comments particularly relevant. Of course, they do not come from nowhere. Just as Bonilla reflected a constitutionalism of the southern hemisphere, Lev reflects his European orientation. Running through his comments is a European's sensitivity to the puzzling persistence of American constitutional practices and beliefs.

Lev is reluctant to accept what he correctly identifies as my insistence that a cultural study must be specific to *a* culture, and that mine is an interpretation of American political practices and beliefs. If the issues are of philosophical import, he suggests, they cannot be cabined within national boundaries. He fears that my response may operate as an excuse not to confront the aporetic quality – the 'jagged edges' – of the analysis. The warning is appropriate, but neither does Lev operate in a contextless, philosophical domain.

Lev worries that the exploration of the grounds of the political and the limits of liberal theory are all too reminiscent of a project that led only to disaster. The jurisprudential face of that warning is Carl Schmitt, who also explored the connections of law to the political, through the idea of the sovereignty. Lev is concerned about a theory of political liberty that generates a life world that is distinctly not liberal. In my description of a charismatic court, he sees a normalization of the *decision* that brings the explosive potential of the political – the exception – into the ordinary workings of legality. All these worries are appropriately directed at a theory that argues that the foundation of the political is not contract but sacrifice. Is sacrifice the beginning or end of liberty?

Yet, to the American theorist, what Lev identifies as problematic sounds like an accurate description of the political world in which we find ourselves. His worries are not really about the theory of the political, but about the nature of the political. My complaint about liberal political theory has been that it never reaches the phenomenon of the political that most needs explanation: its claim upon the life of the citizen. When we confront that claim, we are indeed forced to a measure beyond good and evil. That is my point in linking torture to sacrifice, or killing to being killed.

American theorists of my generation grew up within a political order in which the threat of Mutual Assured Destruction was as ordinary as drills in elementary school: seek shelter under the desk; do not look at the blast. The background condition of ordinary politics included an exceptional claim: The possibility of a world-ending cataclysm. We might not have understood why, but we did understand that the stakes of politics were matters of ultimate importance.

We lived our lives like the child under the desk, imagining that the extraordinary could break into the most ordinary of activities. Cincinnatus was our hero in the figure of Washington, who leaves the farm temporarily to lead a revolutionary movement. These patterns of life are not just classical; they are deeply religious as the ordinary touches the sacred through the rituals of communion. In a democratic order, the priestly function is universalized: all can be called to serve at any moment.

This was the ‘sense of blind urgency in political life’ that Lev recognizes as a ‘cost.’ It is, as he notes, the same cost ‘we are called to make for love.’ It is also the same cost posed by traditional religious beliefs and practices when the ordinary becomes the site of divine concern. But is this a cost at all? To explore that question requires a political-theological inquiry into the manner in which the appearance of a transcendent value is equally an act of destruction of the finite. Such an inquiry into cost might begin, for example, with an examination of the war memorials that occupy town centers throughout the nation.

These traditional patterns of belief were substantially challenged first with the failures of Vietnam and then with the waning of the Cold War. The political receded, as politics became governance. Europe and the United States seemed on equal trajectories. That was, however, a false appearance. The post-war European project sought a non-sacrificial politics. It aimed to create a bourgeois order in which politics was to be no more than the bu-

reaucratic management of a liberal economy. For decades, the European Union seemed to be succeeding at this project.

This was never the project of the United States – although, of course, it was attractive to some legal elites. Just as this country remained more religious than Europe, it remained more deeply enthralled to its civil religion. While Europe largely disarmed – practically and imaginatively – the United States remained deeply invested in political violence. It remained in a state of preparedness for war; it found itself fighting proxy wars in one region after another; it maintained a world-destroying nuclear force. There was little 'peace dividend' from the end of the Cold War. Older patterns of belief in sacrifice never disappeared and returned with dramatic power after 9/11.

Our politics offers a double perspective: security for property and family, on the one hand, and threats of killing and being killed, on the other. It spans the banal and the extraordinary. It promises individual well-being just until the point at which it demands a life. To my description of an American politics of ultimate meaning, Lev reacts with some dismay. Properly so, in light of the European past. No one can really know whether America is an anachronism or a warning about the persistence of the political. That is not just a European uncertainty; it is an American one as well.

Law like love has been critical for mediation of the double character of politics. As Lev notes, the judicial opinion occupies the space between the ordinary and the extraordinary, between the norm and the exception. In American history, this is the space of self-creation between Revolution and Constitution. The authority of law is always located there, as the Court points beyond the text to a source of law in the authorship of the people.[20] From this space in-between, the people reign, but do not govern.

That the people occupy this space is the American myth. Like other myths, it is sustained through multiple signs, symbols, and narratives. Critical among them is not just the work of the Court, but the Court itself as national symbol. The Court embodies the whole of the nation as an historical project of ultimate significance. It reaches directly back to the founding, making the past a living presence. It claims the future as well, for its role is to preserve the authority of the founding as the destiny of the nation. It speaks for the nation's ideals, not as a moral matter, but as a political project. The individual Justices are to be as impersonal as priests; their power is not their own. They speak in the first-person plural – a *we* that moves from a judicial majority, to the Court, to the nation. They make present the nation in a concentrated act of decision.[21]

The strength of the judicial decision lies just here in the willingness to defend the decision as if the very existence of the nation is at stake. When their decisions are not defended,

20 Originalism as an interpretive practice is a very formal and thin expression of this movement toward a foundation in self-authorship.

21 This world of legal meanings is not unique to the Court in American experience. Nor is it necessary as a matter of logic that a court occupy this particular role. Goldoni, in this same symposium, makes the interesting claim that the European Central Bank plays the critical role of what I have described as 'institutionalized charisma.'.

there is a political crisis with uncertain outcome. *Dred Scott* was such a moment. For many, *Roe v. Wade* was another such moment. Such moments show us that a legitimacy crisis for the Court is a legitimacy crisis for the political order more generally. Not surprisingly, all of our national political institutions are in a state of crisis: a President facing threats of impeachment; a Congress that cannot pass legislation. Much as I appreciate Lev as an interpreter of Hobbes, practice has something to teach theory here. Hobbes's theory of an uncertain sovereign locus may look like political chaos once the stabilizing effects of *a* constitutional culture disappear. Our cultural wars today are a sort of civil war.

Lev's focus on an embodied politics – on the role of sacrifice – offers an important response to Bonilla's focus on pluralism. Citizens of this state do not have the option of excusing themselves from sacrificial violence. The symbol of this inclusion is conscription: all can be called upon to serve. Today, the dynamic of sacrifice has been truly universalized in the image of the terrorist: anyone can find him or herself on the front line of the war on terror. At that moment, the private person is effectively conscripted. This is the symbolic meaning of the World Trade Center attack: participation in the banal activities of the market becomes a site of sacrifice. The exceptional power of the political cannot be cabined in a story of the founding; it is not limited to the regular rhythms of high and low politics.[22] The political can enter our lives like an unpredictable god, who may take an interest in any act or event.

The work of the Court puts off the direct appearance of the popular sovereign by claiming to speak in its voice. This is the representative function of the Court. Its task is not just to settle disputes, but to make the dispute an occasion for reminding us that law is the work of the popular sovereign. Living in the law, we are living in the world that the popular sovereign creates and maintains. It is a world that is an objectification of our own freedom – or so we are to believe. Lev remarks that self-authorship is the 'royal road' of legitimacy in modern political philosophy, but it has the same status in modern, Western political practice. As a practice of legitimation, the judicial opinion must present an account of self-authorship. This 'must' is a condition of its own legitimacy; there are no available alternatives in a secularized world. When Bonilla suggests this is just one view in a pluralist world, one wants to know about competing theories of democratic legitimacy.

Every modern, political community faces the problem of legitimacy; each must make the connection of the rule of law to popular sovereignty. There is no single right way to make that connection. Moreover, the connection cannot be made from within the terms of legal argument alone, for the relationship is not analytic. Legal arguments always exhaust themselves before the grounds of legitimacy are reached. They gesture beyond themselves to the source of authority. To understand law, then, we have to understand more than law. We have to understand how legal propositions fit within an entire world of political belief. For this reason, law can be only semi-autonomous.

22 Bruce Ackerman offers the most influential theory of the rhythmic quality of high and low politics. See *B.* Ackerman, We the People: Foundations, Cambridge 1991.

Lev and Bonilla both recognize that *Making the Case* works at two different levels, corresponding to this distinction between law and the grounds of law. Most of the book examines uncontroversial elements of the judicial opinion: facts, doctrine, and narrative. At the center of the book, however, is a claim that operates in a different dimension. The judicial voice, I argue, aims to be the voice of the sovereign people. On that turns the possibility of belief in the rule of law as an expression of self-authorship.

By including this chapter, I do precisely what Lev suggests: I raise the stakes for the student. The student must not only be convinced, he must be persuaded to read as a citizen. Either we read the opinion this way or we are lost in Lev's description of a Hobbesian world in which the rule of law can never quite make contact with an indeterminate popular sovereign. While Lev sees the attractions of Hobbes's theory in the bourgeoisie life it is intended to protect, the reality today may be that it enables a populist alternative to the rule of law.

The gesture toward the people beyond law makes contact with the sacrificial or embodied order of the state. To describe the way in which this connection of law to popular sovereignty is imagined and maintained requires examination of the multiple forms of political representation in circulation, including fiction, history, and other forms of political address. Today, the most important sources of myth are in popular culture. It is also the case, however, that the most serious challenges to these beliefs come from the changing character of popular culture. The culture of social media is not sacrificial.

Lev is right to note that we cannot reach any conclusions with respect to the locus and appearance of the popular sovereign in the abstract. It is all a matter of belief, not logic. The scarred veteran and the constitution are our founding texts: each bears witness to the presence of the popular sovereign. The movement from body to text is a strange presence in political theory, but it is not at all strange in the Christian tradition out of which our politics emerges. Puritan communities brought to their sacrificial religion a renewed concern for the law of the Old Testament. Americans have long inscribed the law on the sacrificial body. This is the movement from revolution to constitution. This reading of the body, I argued in the chapters of *Putting Liberalism in its Place* to which Lev refers, is an act of love, for in love the finite body bears an infinite meaning. We might describe the EU as a loveless political community. It is one for which its citizens will not sacrifice. This is a different 'democracy deficit' than with which we are familiar, but it may be no less important.

Lev's warnings about the path of Carl Schmitt, at the very end of his comments, should be taken seriously as a warning not so much about the danger to the theorist, but about the danger of politics. The line between sacrifice and murder is neither strong nor stable. When faith fails, we see only the carpenter on the cross. We see the veteran who kills and is killed; we do not see a sacrifice. Whether this is progress or failure is an open question. As in all things political, it depends upon what we make of it.

What I can say is that absent the imagination of sacrifice as an act that concentrates the entirety of the political in the individual body, the task of the Court to persuade us to see ourselves as authors of the law would be impossible. Lev speaks to this in his remarks

about the need for a persona – a point of embodied representation – for the political community to be present to itself. In American political mythology, that point is each of us imagining ourselves at the moment of sacrifice. We are each of us an Isaac in our own imaginations. Isaac represents the unfulfilled demand as a continual possibility. As Lev notes but does not fully explore, there is no miraculous substitute in politics; there is no moment of grace in which we are relieved of the political burden. We have no god to save us from ourselves.

Absent this belief in sacrifice, the single corpus of the state would fall to the forces of difference that Bonilla identifies. We would ask whom the Justices represent; we would think of the origins of law as the dead hand of the past, and of the future as an open field for our own projects. This may be the world into which we are entering, for the new populists are strikingly uninterested in the rhetoric of sacrifice. Not surprisingly, they also lack any concern for law as something apart from, and deeper than, ordinary politics. Courts become only another institution through which to advance partisan interests. That may indeed be our future; it has not been our past.