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Published in:
Pólemos - Journal of Law, Literature and Culture

DOI:
10.1515/pol-2015-0028

Publication date:
2015

Document Version
Peer reviewed version

Siliquini-Cinelli, L 2015, 'Legal Systemology and the Geopolitics of Roman Law: A Response to Stuart Elden's Critique of Carl Schmitt's Spatial Ontology' Pólemos - Journal of Law, Literature and Culture, vol. 9, no. 2, pp. 411-439. https://doi.org/10.1515/pol-2015-0028

DRAFT – FORTHCOMING IN Pólemos
Journal of Law, Literature and Culture 2015 9(2) 411-439

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Legal Systemology and the Geopolitics of Roman Law: A Response to Stuart Elden's Critique of Carl Schmitt's Spatial Ontology

'[t]here are neither spaceless political ideas nor, reciprocally, spaces without ideas or principles of space without ideas'

Carl Schmitt, The *Großraum* Order, [1939] 2013, 87

Abstract: This paper explores the production, destruction, and reproduction of the geopolitical spaces of Roman law in order to offer an understanding of Schmitt's selective notion of *Jus Publicum Europaeum* and its relevance to the current 'depoliticization' and 'dejuridification' of the world. In particular, by adopting a historical and geopolitical approach that reaches the boundaries of legal systemology and political theology, the present contribution investigates the instrumentalist use of the material object of Rome's universalist competence, namely the 'territory' as *dominium* of its political intervention, which was idealistically aimed at avoiding the natural destiny of any living being: birth, maturity, and death. Attention is therefore paid to the Romans' strategy of administration and regulation of their geographical spaces in terms of (non-)cultural signification. Through the analysis of such concepts as '*nomos*', '*Großraum*', '*Ortung*', and '*Ordnung*', it is claimed that Schmitt voluntarily chose to identify the *Jus Publicum Europaeum* with the geopolitical order produced during the Age of Discovery and not with the 'comprehensive' Roman spatial order. The reason for this choice may be identified in the distortive use of Rome's social relations and political allegiances that lay at the core of its genealogical experience since the conquest of Veius in 396 BC and the historical compromise between patrician nobility and plebeians in 367 BC.

Introduction

Carl Schmitt is *à la mode*. In recent decades, socio and geopolitical, legal, and economic scholarship has paid increased attention to the genealogy, aims, challenges, and flaws of Schmitt's thought.

This is not surprising. Schmitt was a (if not 'the') leading jurist and political theorist in Germany following World War I. Yet he will always be remembered for his association with the National Socialists (he joined the party in 1933), whose prelude was the publication, in 1921, of *Die Diktatur*, in which he argued in favor of commissarial forms of dictatorship to deal with exceptional circumstances.[1]

Aside from his controversial attitude towards the Nazi Party, and the incessant attacks from both the academic and press worlds since 1934, there are two reasons for the current growing interest in reading

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∗∗The author would like to thank Pier Giuseppe Monateri for his constructive comments on the first draft of this paper and Daniela Carpi for her valuable assistance throughout the review and editing process. The usual disclaimer applies.
[1]For a compelling inquiry into the ambiguous relationship Schmitt had with the Nazi party, see Guy Oakes's *Introduction* to Schmitt's *Political Romanticism* [1919, 1925], tr. Guy Oakes (Cambridge, MA: The MITT Press, 1986): ix-xxxv. See also Joseph W. Bendersky's *Introduction* to Schmitt's *On the Three Types of Jurist Thought* [1934], tr. Joseph W. Bendersky (Westport, CT: Praeger 2004): 1-39. Finally, see Tracy B. Strong's *Foreword* to Schmitt's *The Leviathan in the State Theory of Thomas Hobbes. Meaning and Failure of a Political Symbol* [1938], tr. George Schwab and Erna Hilfstein (Chicago, IL: Univ. of Chicago Press 2008): vii-xxviii.

Schmitt's work: (*i*) the recent translation into English of his major works,[2] which must be analyzed in conjunction with the translations of Giorgio Agamben's works, whose theories owe their provenance to Schmitt; (*ii*) the features of the project aimed at creating an 'a-spatial', unlimited, and unbounded global order on which the World Trade Organization (WTO), together with the International Monetary Fund (IMF) and the World Bank, have been actively working since the late 1990s and which is based on a scheme of intelligibility that transcends the legal, socio and geopolitical, and ontological presentification of the modern nation-state.

Elsewhere[3] I have explained why, through what Legendre defined as the 'logic of assembling'[4] (which inevitably implies an *a priori* deconstruction), the global order project is imposing the sterile, instrumentalist, administrative *ufficium* of world governance on us which, notwithstanding its political and legal effects, appears to transcend the idea and form(s) of power through which the 'politicization' and 'juridification' of modernity was achieved in the seventeenth and eighteenth centuries.

In addition, I have argued that what I have labeled the 'Europeanization of Europe' and its (tragic) statelessness fantasy, are nothing more than its continental paradigm. Lastly, I have explained that the current threat to the rule of law (which is a doctrine not a principle[5]) posed by the formal 'depoliticization' and 'dejuridification' of the world is evident: seeing that the *Oikoumene* is characterized by the uniformity of politics, culture, and legislation, it may not be considered a territory in spatial terms and, consequently, there is no need in it for a *nomos* in terms of 'division', 'allocation', and 'appropriation' (*Nahme*) of rights, interests, obligations, and duties.[6] This means that there is no space for the Schmittian 'exception' and therefore no need for either a sovereign or political relationship between the law and those it tries to protect

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[2] As Michael Hoelzl and Graham Ward correctly write in their *Introduction* to Schmitt's *Political Theology II*, it was Norberto Bobbio who in his book Right and Left, after a conference in Turin, rightly stated "that Schmitt's ideas were first discovered by left-wing theorists during the crisis of the Left after 1989". *Political Theology II* [1970], tr. Michael Hoelzl and Graham Ward (Cambridge: Polity Press, 2012): 20.
For an introduction, see Stephen Legg, ed., *Spatiality, Sovereignty and Carl Schmitt. Geographies of the nomos* (London: Routledge, 2012); Ellen Kennedy, *Constitutional Failure. Carl Schmitt in Weimar* (Durham: Duke University Press, 2004); Mika Ojakangas, *A Philosophy of Concrete Life: Carl Schmitt and the Political Thought of Modernity* (Sophi: Jyväskylä, 2004); William Rasch, "Human Rights as Geopolitics: Carl Schmitt and the Legal Form of American Supremacy," *Cultural Critique* 54 (2003): 120-147; Id., *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford, CA: Stanford Univ. Press 2000); Jeffrey Seitzer, *Comparative History and Legal Theory: Carl Schmitt in the First German Democracy* (Westport, CT: Praeger, 2001); David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Clarendon, 1991); John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge Univ. Press, 1997); Gottfried, Paul E. *Carl Schmitt: Politics and Theory* (Westport, CT: Greenwood Press, 1990); George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt Between 1921 and 1936* (Westport, CT: Greenwood Press, 1989); Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, NJ: Princeton Univ. Press, 1985).
[3]*Europe and Its (Tragic) Statelessness Fantasy. The Lure of European Private Law, Post-National Governance and Political Order* (Lake Mary, FL: Vandeplas Publishing, 2014).
[4]*L'Occidente invisibile* (*Ce que L'Occident ne voit pas de l'Occident*) [2004] P. Héritier tr., (Milan : Edizioni Medusa, 2009): 41.
[5]Pier Giuseppe Monateri, *Geopolitica del Diritto. Genesi, Governo e Dissoluzione dei Corpi Politici* (Rome: Laterza, 2013): 94-98.
[6] Luca Siliquini-Cinelli, The Age of 'Depoliticization' and 'Dejuridification' and Its 'Logic of Assembling: An Essay Against the Instrumentalist Use of Comparative Law's Geopolitics', (2015) 37(2) *Loyola of Los Angeles Comparative and Law Review*, forthcoming. According to Derrida, "No justice is exercised, no justice is rendered, no justice becomes effective nor does it determine itself in the form of law, without a decision that cuts and divides". See Force of Law, in *Acts of Religion* [1990], ed. Gil Anidjar (London: Routledge, 2010): 252. To understand the implications of the manipulative semantic and ontological distortion of the term *oikonomia* on the history of Western philosophy, see Giorgio Agamben, *The Kingdom and the Glory* [2007], tr. Lorenzo Chiesa and Matteo Mandarini (Stanford, CA: Stanford Univ. Press, 2011).

by imposing its respect. This explains why Schmitt's thinking has been given an incredible amount of critical attention, especially in the English-speaking world.

The foregoing reveals that in this current period, (the) law is being profoundly transformed by internal and external forces simultaneously,[7] and the definition of the space(s) by which it makes itself ontologically representable and tangible through its signification is continuously manipulated for practical purposes. This is not surprising: the West as we know it today is itself the product of an instrumentalist use of its logic of memory, historicity of politics and sociology of law.[8]

It is therefore of peculiar interest that, since the birth of Savigny's *Legal Historicism* which, as Monateri noted, "was intended to replace a universalistic theory of Natural Law as a basis for a rational purposive discourse on the law",[9] an incredible amount of (comparative) legal scholarship has been discussing the origins of Western law, and in particular, what Peter Stein has recently defined as the 'very technical superiority' of Roman law reasoning[10] and, more importantly, Rome's cultural legacy and impact on the formation of the Western Legal Tradition. The merits and flaws of this scholarship have been deeply discussed since the monumental investigation into the Afroasiatic roots of the Western civilization conducted by Martin Bernal in his *Black Athena* book series.[11]

Both discourses are, as this paper tries to demonstrate, somehow interconnected. Placing itself quite far from conventional (at times opportunistic) lines of inquiry into Roman law, the present contribution is indeed concerned with its geopolitics in Schmittian, and hence politico-theological, terms. In particular, my intent is to narrow the trajectory of the current academic debate on Schmitt's thought and deal with a specific question concerning his spatial and geopolitical ontology.

In a recent essay, Stuart Elden presents a profound critique on Schmitt's spatial thinking by arguing that "it is striking how little attention he pays to the theological arguments about the division between secular and temporal powers". In addition, building on Hooker's claim that "the invocation of Schmitt is dangerous, seductive and destructive",[12] Elden further maintains that "[n]or, surprisingly for a legal theorist, does Schmitt pay attention to the impact of the rediscovery and reinterpretation of Roman law on political theory, especially for the relation between territory and jurisdiction, in the fourteenth century. He takes up the story with the more familiar sixteenth- and seventeenth-century figures of the Vitoria, Grotius and Pufendorf, rather than returning to Bartolus and Baldus". Finally, in concluding his critical account on Schmitt's spatial thinking, Elden vehemently argues that "[w]hile Schmitt's work does have little to offer, it is precisely because he appears to be useful that he is so dangerous. The seductiveness is that he seems to transcend his

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[7] Pier Giuseppe Monateri, *I Confini della Legge. Sovranità e Governo del Mondo* (Turin: Bollati Boringhieri, 2014).
[8] See above at note 6.
[9] "Methods in comparative law: an intellectual overview" in *Methods of Comparative Law*, ed. Pier Giuseppe Monateri (Edward Elgar, 2012): 7-24, 11.
[10] Peter Stein, *Roman Law in European History* (Cambridge: Cambridge Univ. Press, 2013): 1. See also Aldo Schiavone *The Invention of Law in the West* [2005], tr. Jeremy Carden and Anthony Shugaar (Cambridge MA: Harvard University Press, 2012).
[11] Martin Bernal, *Black Athena*. *The Afroasiatic Roots of Classical Civilization* Vol. I-III [1987, 1991] (London: Rutgers, 2003, 2002 and 2001). See also, Mary L. Lefkowits – Guy MacLean Rogers, eds., *Black Athena Revisited* (Chapel Hill, NC: Univ. of North Carolina Press, 1996); Martin Bernal – David Chioni Moore, ed., *Black Athena Writes Back. Martin Bernal Responds to His Critics* (Durham, NC: Duke Univ. Press, 2006). See also Pier Giuseppe Monateri, "Black Gaius. A Quest for the Multicultural Origins of the 'Western Legal Tradition'" *Hastings Law Journal* 51 (2000): 1-72; Pier Giuseppe Monateri – Alessandro Somma – Tomasz Giaro, *Le radici comuni del diritto europeo* (Rome: Carrocci Editore, 2005).
[12] *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge Univ. Press, 2009).

circumstances and political views, when remaining deeply rooted in them. The anointing of Schmitt as a geopolitical theorist with contemporary relevance is thus a serious error, intellectually and politically."[13]

Elden's criticism may well be summarized by the following question: why, in *The* Nomos *of the Earth*,[14] the *Jus Publicum Europaeum* (JPE), as first global *nomos* of the earth, is only that of the structured European continental law of the sixteenth and seventeenth centuries? Yet it seems to me that this question is rooted in another, more delicate one: given the geopolitical dimension of the Latin motto '*Roma caput mundi*', and that at that time space was both politically imagined and produced for practical purposes, why did Schmitt not consider either the geopolitics of Roman law, or its rediscovery, as possible expressions of JPE?

This paper offers a possible answer to both these questions by examining Schmitt's spatial ontology from a politico-theological and historical perspective. The opportunity for this inquiry emerges from the (confusing) circumstance that, as Schmitt himself admits, the new jurists of international law of the New World (which began in the fifteenth century) legitimized the Age of Discovery's land-appropriation practice through the use of the Roman concept of '*occupatio*' (NE, [130]). More importantly, while explaining the features of the humanized concept of war and of *justus hostis*,[15] and thus why "the analogy between states and human persons in international law […] became predominant in all international consideration" (NE, [146]), Schmitt further maintains that the appearance of the new European international law as 'interstate structure'[16] found a valuable ally in the jurisprudence of Roman law. In his words, "[a]t that time, jurisprudence meant the science of Roman law. The science of the new international law thus could not be separated from Roman law [because] Roman civil law […] found a point of reference for juridical thinking in the *persona publica* […] of European states [and] fulfilled the task in that it construed the contiguity and coexistence of these persons" (NE, [146]). Nonetheless, far from providing the reader with a clear understanding of his view, Schmitt seems to contradict himself by highlighting that "[t]his great accomplishment can be explained neither in terms of medieval formulas of just war nor in terms of Roman legal concept" (NE, [140]).

If we unite the foregoing with the essence of the current age of 'depoliticization' and 'dejuridication' and its sterile, administrative governance of the world which poses an end to comprehensive Eurocentric spatial order, it emerges that the relationship between the geopolitics of Roman law and Schmitt's understanding of the geopolitical essence of JPE cannot be taken for granted. It follows that there is a need for a multi-disciplinary investigation on Schmitt's notion of '*nomic* order' and spatial ontology capable of revealing the true essence of concepts such as '*Großraum*', '*Ortung*', and '*Ordnung*'.

The suggested roadmap will lead us to the manipulative and instrumentalist use of the material objective of Rome's (universalist) geopolitics, namely the 'territory' as *dominium* of its political intervention, whose essence was ultimately (and idealistically) used to confront the possibility of its own death. Schmitt deliberatively chose not to include Rome's geopolitics within his notion of JPE for two specific reasons: (*i*) the (territorially) distortive use of both social relations and political allegiances which were at the core of Rome's genealogical expansionism (and subsequent inevitable dissolution) since the

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[13] All quotes are from "Reading Schmitt geopolitically. Nomos, territory and *Großraum*" in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, above at note 2: 91-105, 97 and 102.

[14] *The* Nomos *of the Earth in the International Law of the* Jus Publicum Europaeum [1950], tr. Gary L Ulmen (New York, NY: Telos Publishing Press, 2006).

[15] According to which, sovereign states confront each other in the state of nature as equals. The same cannot be said for the so-called 'private war' which Schmitt, building on Ayala and Gentili, considers to be non-war.

[16] Which lasted from the sixteenth to the end of the nineteenth century and was precisely the structure that sustained (and was itself reciprocally sustained by) the *Jus Publicum Europaeum*.

conquest of Veius in 396 BC and the historical compromise between patrician nobility and plebeians in 367 BC; (*ii*) the geopolitical lacking of the concept of a *unique* Roman 'identity' in Schmittian terms as a fundamental component of the *Großraum*.

This paper is structured as follows: Section 1 introduces Schmitt's spatial ontology; Section 2 investigates the geopolitics of Roman law and the distortive use of Rome's (non-)identity; Section 3 expounds conclusive remarks.

1. Introducing Schmitt's Spatial Thinking

Schmitt is an obscure thinker and writer. Both his personal and professional lives are the reflection of Germany's (and, thus, Europe's) traumatic experience over the last centuries. To fully understand his spatial thinking would require extended treatment, certainly more than can be provided here. My intention is thus to merely introduce its main features to then investigate the geopolitics of Roman law through its lenses.

According to Michael Heffernan,[17] Schmitt's 'indifference' to geography ought not to be taken for granted. This claim may shed some light on understanding Schmitt's notion of the *nomos* of earth only if we bear in mind that the spatial dimensions of his thought have recently received the deserved attention. In particular, although some authors deny the possibility of an autonomous spatial (and thus geographical) ontology in Schmittian terms (Elden, Chandler, Legg, and Vaseduvan), others (Hooker, Rasch, Levinson, Odysseos, Petito, and, in part, Galli) accept its tangible existence and then delve into it through a critical approach. Lastly, other scholars (among whom is Rowan) think instead that radical indeterminacy is a constant feature in all Schmitt's works.

The truth is that, after completing his works on Hobbes, Schmitt turned to international law and relations to develop his political theology[18] from the broader perspective of spatial ontology.[19] This is why in *The* Nomos *of the Earth*, which Schmitt began sometime between 1942 and 1945 after the Operation Barbarossa and the US joining the war, Schmitt investigates the concepts of 'law', '*nomos*', and 'geopolitics' to consider how the earth has been apportioned by, first, what he calls the Age of Discovery and its land-appropriation (and distribution and protection) practice, and then the global order project whose roots are to be found in the 1884-1885 Congo Conference.

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[17] "Mapping Schmitt" in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, above at note 2: 234-243, 238.

[18] As Harold J. Berman noted, the word 'theology' "was applied for the first time by Abelard to the systematic study of the evidence of the nature of the divinity". See *Law and Revolution. The Formation of the Western Legal Tradition*, (Cambridge, MA: Harvard Univ. Press, 1983): 174-179.
The term 'political theology' has multiple meanings. Building on Schmitt's claim that "all significant concepts of the modern theory of the state are secularized theological concepts", here political theology is meant, as Paul W. Kahn has persuasively done, as that social science which "understands politics as an organization of everyday life founded on an imagination of the sacred". That is to say, "political theology traces the genealogy of political concepts and explores analogies between the political and the religious in the social imaginary". See, respectively, *Political Theology. Four Chapters on the Concept of Sovereign* [1922], tr. George Schwab (Chicago, IL: Univ. of Chicago Press., 2005): 36; *Political Theology. Four New Chapters on the Concept of Sovereign* (New York, NY: Columbia Univ. Press, 2012): 23. See also the definition of political theology offered by Jürgen Moltmann in his *The Crucified God* [1974] (London: SCM Press 2003): 62-72.

[19] Mika Ojakangas divides Schmitt's thinking into three phases: decisionism (Weimar), movement (Nazism), concrete order thinking (*nomos*). See *A Philosophy of Concrete Life*, above at note 2. Yet Schmitt was interested on the essence of the concrete order thinking since 1934, as it clearly emerges from the content of his *On the Three Types of Juristic Thought*, above at note 1. See also Jean-François Kervégan. "Carl Schmitt and World Unity", "Methods in comparative law: an intellectual overview" in *The Challenge of Carl Schmitt*, ed. Chantall Mouffe (New York: Verso, 2009): 54-74.

The fact that, as Tracy B. Strong has correctly noted,[20] "Schmitt sought to strengthen and recover the possibility of a true, unified *Volk*", should thus be investigated within this perspective. In 1923, Schmitt began claiming that sovereignty necessarily presupposes the need for homogeneity (*Gleichartigkeit*). The second, aforementioned doctrinal approach which accepts the possibility of a Schmittian spatial ontology should therefore be given preference simply because, even indirectly, Schmitt's political theology and inquiry into the *nomos* of the earth has had (and still has) a great geographical effect on the study of the relationship between the concepts of sovereignty, exception, and current (even geographical) forms of global (non-)biopolitics. This is due to the fact that, since the claims expounded in *Political Theology*,[21] Schmitt's geographical critique of both liberal and positivistic theoretical notions and practical implications of the land-appropriation practice is ultimately rooted in his strong belief in the necessity of a geopolitical and topographical (rather than topological) understanding of the deliberative birth, evolution, and death of the *geographies* of the *nomos*. In this sense, it seems to me that the tangible geographical consistence of this political view lies at the core of his claim that "there are neither spaceless political ideas nor, reciprocally, spaces without ideas or principles of space without ideas"[22] and consequently that "[e]very ontonomous and ontological judgment derives from the land" (NE, [45]). It is in this sharp consideration that the true essence of what today is usually regarded as 'biopower' lies, which, as Andrea Cavaletti summarizes well,[23] functions according to the double implication that renders every political concept a spatial one and vice versa.

So the question arises: Why is the Schmittian anti-Sophist and anti-positivistic concept of the *nomos* that of "an expression and a component of a spatially conceived, concrete *measure*" (NE, [68])[24] that involves (and inevitably affects) the relation between 'order' and 'orientation'?

For us to comprehend Schmitt's approach to the *nomos*, we must first understand that in *The* Nomos *of the Earth*, Schmitt "reinterpreted nomos, drawing upon its Greek etymology, as referring to something both more concrete, and transcendental, than the law [and which is] constituted by three processes: of appropriation, distribution and production".[25] In particular, Schmitt decided to develop a selective form of spatial thinking rooted in the essential role played in any legal order by the interaction of the spatial component (*Ortung*) and the juridical one (*Ordnung*). This preliminary choice has allowed him to argue that, in the modern age (that is, since the sixteenth century), the *nomos* has stopped being imagined as the legal objectification of the *polis* or the *Respublica Christiana*, and has instead begun to be theoretically thought of

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[20] See her Foreword to Schmitt's *The Leviathan in the State Theory of Thomas Hobbes*, above at note 1: vii-xxviii, xviii.
[21] I refer particularly to the passage in which Schmitt claims that "[a]ll law is 'situational law'. The sovereign produced and guarantees the situation in its *totality*. He has the monopoly of this last decision […] Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree". *Political Theology*, above at note 18: 16, 13, 15. [My italics].
[22] The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Power: A Contribution to the Concept of Reich in International Law (1939-1941) in *Writings on War*, tr. and ed. Timothy Nunan (New York, NY: Polity Press, 2011): 87.
[23] *La Città Biopolitica*, above at note 6: 219. [My translation].
[24] As Schmitt himself notes, the Greek term *nomos* is derived from the other Greek term *nemein* which, depending on the context, means 'to divide', 'to pasture', ' to distribute', or 'to posses'. The noun *nomos* is therefore a *nomen actionis* whose action and process is that of *nemein*. See also Hannah Arendt, *The Human Condition* [1958] (Chicago, IL: University of Chicago Press 1998): 63; *id. On Revolution* [1963] (London: Penguin 2006): 176-86. See also Georgy Kantor "Ideas of Law in Hellenistic and Roman Legal Practice", in *Legalism. Anthropology and History*, ed. Paul Dresch and Hannah Skoda (Oxford Univ. Press, 2012): 55-83.
[25] Stephen Legg and Alexander Vasudevan "Introduction. Geographies of the nomos" in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, above at note 2: 1-23, 2.

and practically signified as the result of the structured combination of *Ordnung* and *Ortung* (Agamben would agree with this).

Importantly, Schmitt was well aware that the true meaning of the word '*nomos*' had suffered several contaminations which, figuratively, have paved the way for the subsequent modern transformation. Five of these contaminations are given particular attention in *The* Nomos *of the Earth*, namely the sophistic, normativistic, theological, socialist, and liberal ones. Within this historical perspective, Schmitt also carefully investigates the numerous semantic combinations with *nomos* from Homer to Schaefer, whilst also describing the instrumentalist shift operated by Cicero, who translated *nomos* as *lex*.

Schmitt needs this purely historical *modus investigandi* to ultimately claim that, notwithstanding the fact that there always has been 'some kind of *nomos*', before the age of great discovery "men had no global concept of the planet on which they lived" (NE, [351]) and, consequently, that the first global order (which is later defined as the second *nomos* of the earth in absolute terms) is only that of the Eurocentric *nomos* of the earth. What matters here is that, in contrast with the mythical image of the world on which the first *nomos* was based, this second type of *nomos* encompasses the oceans. This is what makes it 'global'. Its balance does indeed have a dualist structure: that of the land and sea (and England alone dominated the oceans), and that of land power in the European continent. The religious wars that took place throughout the continent from the late sixteenth century, and their essence in terms of non-discriminatory, personified 'state wars'[26] is the maximum expression of this second component of the global balance.

According to Schmitt, the first global order lasted until World War I (1914-18). Yet the spark of its collapse has to be found in the 1884-1885 Congo Conference, which Schmitt describes as the 'last pan-European' land-appropriation practice which was, in part, affected by Asiatic countries (Japan most prominently) coming on the scene between 1870 and 1900. What intrigues Schmitt is how (and why) the Congo Conference, whose aim was to state the rules of the European land-appropriation of African soil, has led the 'relativization of Europe' as brought about by the US's participation in its works and, in particular, by the American recognition of the flag of the International Congo Society. This revolutionary passage, according to Schmitt, has to be seen in relation to the drawing of the amity line which was agreed by the Conference's participants and which "was meant both to guarantee free trade and to prevent Europeans from engaging in war with each other on the soil of Central Africa with Africans' consent and complicity" (NE, [219]). It was, in other words, an amity line based upon a sign of intensified solidarity which sought "to limit European war to European soil and to keep colonial space free of the vexations of a struggle among Europeans" (NE, [219]). Unfortunately, as Schmitt correctly notes, "the relativization of Europe from the West (America) had not been matched by an equally recognizable challenge from the East" (NE, [217]).

The next step in the dissolution of the Eurocentric global order was taken by the shift from the US Monroe Doctrine (1823) to the policies imposed by the League of Nations. This passage, according to Schmitt, allowed the US to develop a series of (political, economic, and legal) methods to secure its influence around the globe. This posed the ultimate threat to the answer of the decisive question '*quis judicabit?*' (and led to the collapse, almost one hundred years later, of the Eurocentric global order.

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[26] As Mathew Coleman notes, Schmitt claims several times over that "the dissolution of the *Jus Publicum Europaeum* enables a first-time war-law hybrid and ushers in the transformation of war from *justus hostis*—where war between states cannot be rationalized as either legitimate or illegitimate—to a form of quasi 'just war' where questions of legitimacy and culpability reign supreme". See Colonial War. Carl Schmitt's Deterritorialization of Enmity, in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, above at note 2: 127-142, 134. See also Schmitt's *Theory of the Partisan* [1975], tr. Gary L. Ulmen (New York: Telos Publishing Press, 2007).

More precisely, the Monroe Doctrine was invented by the US (and approved by UK) to reserve the right to intervene in the domestic affairs of Central and South American states. Avowedly, this (socio and geopolitical, legal, and economic) doctrine was based upon a triple-sided innovative essence: (*i*) the independence of the states in the Americas; (*ii*) the subsequent prohibition to colonize those lands; (*iii*) the non-interference of extra-American powers in this space or of the US in extra-American space. Yet, as Ulmen writes in his *Introduction* to *The* Nomos *of the Earth*, the most important element of the Monroe Doctrine is that the US "has compelled the entire world to subscribe to it, even though its content was obscure, ambiguous, and often contradictory, and the US had reserved the right to interpret its meaning" (NE, [17]).

In this sense, although the Monroe Doctrine prompted the first non-European *Reich* (the second being the Japanese one), it should be noted that it never promoted the ideology of liberal imperialism and universalism. This is why Schmitt never despised it and claimed that it offered the first most successful model of *Großraum* power. The *Großraum* should be understood as a large-scale unit of *territorial* unity (literally 'Big/Great space') that could replace the state[27] and whose pillars are the people, land, and idea. Extra-regional (*raumfremde*) powers may not interfere with the administration of the *Großraum*. Hence, the Monroe Doctrine model was not that of (anti-Schmittian) universalism, but rather one of (multipolar) 'competing spheres' based upon the (calculative) concepts of population and identity as determined.

It was only President Woodrow Wilson's decision to promote the union of dollar diplomacy with liberal internationalism that turned the picture upside down. Wilson's strategy, which was rooted in the economic-imperialist policy of President Theodore Roosevelt, represented a turning point in the history of the Monroe Doctrine. In particular, as is well-known, although the US did not join the League of Nations, Wilson, who announced on January 22nd, 1917 that the Monroe Doctrine had to become a doctrine for the world, was capable of 'forcing' the signing states to incorporate article 21 of the Monroe Doctrine into the League Charter and thus putting an end of Europe's political dominium of the earth. From that moment, which, as Schmitt argues, represented the triumph of the superiority of American principles of (a-)spatial order, European questions stopped being answered by (and within) Europe. What is worse is that this was done confusingly by creating a League which was anything but a federally united *Großraum* because it "lacked jurisdiction or authority to deal with relations between Western Hemisphere states or even between a European state and one in the American spatial sphere" (NE, [254]). Strictly speaking, this means that the League "was [neither] in a position to create a spatial order, [nor to] have a clear concept of a definite *status quo*" (NE, [258]).

Hence, through the distortive incorporation of American libero-imperialist policies into the geopolitical practices of Europe, the League became an incongruous organization of states which was 'international' in completely new terms and formed the basis for an age (that is, ours) in which indeterminacy is an inescapable ontological condition. The League posed an end to the European 'in/out' antithesis as informed by the democratic 'friend/enemy' dichotomy by neutralizing what Schmitt thought to be the essential tension between 'us' and 'them', 'order', and 'disorder'. The annihilation of the geopolitical essence of the concept of spatial order could not be more evident: while the spatial perspective of the *nomos* involves a practice of delimitation, appropriation, and distribution with the aim of constructing a legal

[27] Carl Schmitt [1933] Forms of Modern Imperialism in International Law, in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, tr. Matthew Hannah, above at note 2: 29-45; Id. [1939] *Großraum* versus universalism, in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg, tr. Matthew Hannah, above at note 2: 46-54;Id. The *Großraum* Order of International Law, above at note 22. For a compelling reconstruction of the debate between Schmitt and Popitz over the concept of *Großraum*, see Kennedy, above at note 2: 28-29.

ordering principle (*ordnendes Rechtsprinzip*), the universalist claim promoted by the League as influenced by American imperialism leads to a world of complete interference of everyone in everything as it was in the pre-Hobbesian state of nature. Europe's subjection to the idea of aspatial and economic global order emanating from the US was thus achieved through the sterile, instrumentalist, spaceless universalism prompted by the League. And what is worse is that, whilst imposing this totalizing trend, the US claimed to be the 'exception' to it and did not accept any extra-regional intromission into its internal affairs. The ongoing exceptional reluctance of the Americans towards international law is testament to this.[28]

2. An Overview of Rome's (Instrumentalist) Geopolitics and (Non-)Identity

Timothy W. Luke is surely right when he claims that "Schmitt gave tremendous weight to the richness of 'the *nomos*' [by asserting] that the idea simultaneously implied a taking, a dividing, and a making power that all rest within the embedded performative appropriation, distribution, and production of legal-political order".[29] It might seem, then, at least at first glance, that Schmitt's spatial thinking and notion of global *nomos*, and hence of JPE, may perfectly coincide with Rome's normative geopolitics. This first, approximate opinion could be rooted in a triple-sided circumstance: (*i*) Schmitt himself opens the door to the possibility of other previous forms of JPE while claiming, with accurate wording, that "[t]he interstate of international law of the *jus publicum Europaeum* is but *one of many* legal-historical possibilities of international law" (NE, [210]);[30] (*ii*) the fact that the long domination of Rome accustomed men to the idea of a *single*, and hence *global*, 'civilization'[31] under a single centralized government (as Hannah Arendt noted in *Between Past and Future*, the Romans were particularly bound to the founding of the city of Rome, which is why they conceived it as the *caput mundi*); (*iii*) Rome having learnt from the mistakes made after the conquest of Veius in 396 BC, its geopolitical *dominium* was the result of a particular way of thinking of the 'constituent power' in relation to the deliberative 'production', 'possess', 'distribution', and 'protection' of space. In particular, it might seem that all articulations of the meanings of the term '*nomos*', which simultaneously implies a taking, a dividing, and a making (and thus a destroying) which rests within the performative signification of the legal and political order, are somehow compatible with the fact that in all phases of Rome's genealogical existence (that is, during the republican period, the Principate and the Dominate) the 'Roman' space was politically 'produced' and 'administered'.[32]

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[28] Kahn labels this critical attitude 'American exceptionalism'. See *Political Theology*, above at note 18: 8-17.

[29] "Appropriating, distributing and producing space after 9/11" in *Spatiality, Sovereignty and Carl Schmitt*, ed. Stephen Legg above at note 2: 57-73, 57.

[30] [My italics].

[31] The term 'civilization' is voluntarily used in an unsatisfactory way here. As it is well-known, the historian Lucien Febvre dates its birth in 1766. See "Civilisation. Évolution d'un mot et d'un groupe d'idée" in *Civilisation. Le mot et l'idée*, Lucien Febvre et al. (Paris: Centre International de Synthèse, 1930): 15-16. See also Andrea Cavaletti, *La Città Biopolitica*, above at note 6: 181-201.

[32] The process of incorporation of lands into 'polities' was well known to the Romans. Practical as they were, the Romans thought of 'space' as a geopolitical device to be instrumentally used (and protected) in order to represent their (alleged) superiority in tangible, concrete terms. This is why Norman Davies defines the 'Roman phenomenon' as characterized by the 'territorial imperative'. See *Europe. A History* (Oxford: Oxford University Press, 1996): 150. For a multi-disciplinary overview, see, in addition to Mommsen's monumental *The History of Rome*, see Edward Gibbon, *The Decline and Fall of the Roman Empire* [1776-1778] (London: Wordsworth Classics, 1998); Franz V.M. Cumont, *Oriental Religions in Roman Paganism* [1911] (Teddington: Echo Library, 2008); Francis M Cornford, *From Religion to Philosoph*. [1912] (Mineola, NY: Dover Publications, 2004); Samuel Angus, *The Mystery-Religions* [1928] (Mienola, NY: Dover Publications, 1986); Barry Nicholas, *An Introduction to Roman Law* [1962] (Oxford: Oxford Univ. Press, 2010); Schiavone, above at note 10.

Paradoxically, a superficial approach to Rome's geopolitics may also lead to the suggestion that Schmitt did not think of Roman law in terms of the first global *nomos* because Rome's geopolitical *dominium* was in fact not 'Eurocentric'—as it is demonstrated by the incredible territorial extension that the empire reached under Trajan, who brought Roman troops to the doors of today's Iran.

Although fascinating, both approaches are, I would suggest, incorrect. The reason why Schmitt's decision to define only the global *nomos* of the earth that structured European international law from the sixteenth to the nineteenth centuries as JPE, and thus to take out from this notion the geopolitics of Roman law, is not in fact casual, and is due to two reasons.

First of all, Schmitt's notion of the state of exception is ill suited to Rome's normative and geopolitical signification. More precisely, despite what was argued by Peterson,[33] the essence of exceptional legal institutes (such as the *senatus consultum ultimatum et imperium*, the *interregnum*, the *prorogatio imperii*, and the *auctoritas principis*) is of little help in political theology,[34] and thus, cannot be considered a useful device to (try to) understand the question of spatial ontology in terms of Schmitt's geopolitics of law.

Secondly, Rome, in all its phases was not, and could not be, what Schmitt had in mind while describing the essence of the *Großraum*. Rome was not only the representation of its myth but, more importantly, this representation has been politically, legally, and religiously contaminated since the end of sixth century BC when, as Dionysius of Halicarnassus tells us, Rome's *dominium* grew rapidly almost tenfold by absorbing all the minor communities surrounding the first small territory at the time of the expulsion of Tarquinius Superbus. As discussed in due course, this is further demonstrated by the antithesis between the Roman civil notion of 'effective occupation' and the concept of 'discovery' which arose in the fifteenth century and which lies at the core of the inquiry developed in *The* Nomos *of the Earth*. Schmitt himself highlights the theoretical and topological difference between the two. In particular, while describing how the new jurists of the Age of Discovery wrongly justified the appropriation of the territories of the New World by referring to the Roman occupation in terms of essential legal title, Schmitt argues that they failed to recognize what he calls the 'true European legal title: discovery' (NE, [130]).

In truth, what Schmitt defines as a 'failure' should not surprise anyone. Since when jurists at the beginning of the sixteenth century carried questions of international law further through their terrestrial thinking, the using of Roman law concepts and ways of legitimation was 'required' both by analytical jurisprudence and legal practice.

If we unite the foregoing to the instrumentalist ability that the Romans had to control 'disorder' for practical purposes, the relevance of the question of Rome's ontological signification of its myth in the study of Schmitt's spatiality becomes evident. To try to answer it requires us to analyze why Schmitt voluntarily delimitated the framework of his investigation on the land-appropriation practice and geographies of the *nomos* and believed that, as Carlo Galli noted,[35] "disorder, the lack of substance, is the inescapable origin of *modern* political order, which goes on marking it even once the order is established".

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[33] In his 1935 *Der Monotheismus als Politisches Problem*, Peterson developed a critique of Schmitt's thought by arguing that political theology "is only possible on the basis of Judaism or paganism". This claim was the final claim of the inquiry Peterson had developed to demonstrate that the *katechon* (what holds back the *eschaton*, which is the Second Coming of God and the advent of His Kingdom) is in truth the Jews' refusal to believe in Christ. Schmitt responded with his *Political Theology II*, above at note 2. See also Carl Schmitt, *The* Nomos *of the Earth*, above at note 14: 59-62; Giorgio Agamben, *The Kingdom and the Glory*, above at note 6: 6-11.

[34] Giorgio Agamben, *State of Exception* [2003], tr. Kevin Attell (Chicago, IL: Univ. of Chicago Press, 2005).

[35] "The Critic of Liberalism: Carl Schmitt's Antiliberalism; Its Theoretical and Historical Sources and Its Political Meaning" *Cardozo Law Review* 21(5) (2000): 1597-1617.

Rome's contaminated (non-)identity is therefore the key to understanding the impossibility of thinking of the Roman geopolitical order as a *Großraum* in Schmittian terms and, consequently, the key to understanding why Schmitt did not believe in Roman law as the first global *nomos* of the earth.

2.1. Schmitt's Geopolitical Neutrality Over the Rediscovery of Roman Law

As Cristina Costantini has persuasively argued, "legal systemology can be viewed as the study of the historical ways in which the presentification of Law has been achieved".[36] That is to say, legal systemology may shed some light on the understanding of how the ontological, socio and geopolitical tendency to capture law's sublimity has shaped and influenced the formation of legal traditions.[37]

The comparative study of the forms of control, mastery, and government of law's uncanny presence[38] in the European continent since the rediscovery of the *Corpus Juris Civilis* is of particular relevance here. In particular, two reasons seem to justify the deliberative choice not to pay attention to the rediscovery and reinterpretation of Roman law in the twelfth century: (*i*) the 'non-territoriality' of the empire, which was more a military and spiritual entity than a geographical one; (*ii*) the process of ex-carnation by which law's ideal ontological essence was 'grabbed' and then 'encapsulated' in a tangible '*corpus*' (the *Corpus Juris*) of social recognition and consciousness.[39]

Regarding the former, it is well-known that, from the fall of the Roman Empire up to the Papal Revolution of 1075 and the discovery of the authority of the *Corpus Juris*, the empire was not a 'geographical' entity as we understand it today, but a military and spiritual authority embodied by the dual nature (human and divine) of the emperor. This is further confirmed by the fact that the empire was not politically and ontologically defined as 'Roman' until 1034, and was only called the 'Holy Roman Empire' in 1254.

Harold J. Berman described this well when he pointed out that the empires of Charlemagne and Henry IV are not to be confused with the earlier Roman empires of Caesar Augustus or Constantine, because "although an illusion of continuity with ancient Rome was maintained, the Carolingian term 'empire' referred not to a territory or a federation of peoples but rather to the nature of the emperor's authority" (LR, [89]). Even though we may superficially represent the boundaries of the empire on a map, it was neither territorially nor politically defined as the modern nation-state. There was no imperial capital, and Charlemagne, unlike Caesar, travelled constantly in France, Burgundy, Italy, and Hungary, as well as in his Frankish-German homeland, to show his dual essence and accomplish his dual function.

To understand both the empire's and the emperor's dynamism fully, we should bear in mind that, until, through the discovery of Justinian's *Corpus Juris*, the law began to be conceived of as a science and

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[36] "The Iconicity of Space: Comparative Law and the Geopolitics of Jurisdictions" in *Methods of Comparative Law*, ed. Pier Giuseppe Monateri, above at note 9: 230-240, 235.

[37] I explained the utility of having an ontological approach to law at the *Workshop on the Use of Comparative Law in Postgraduate Programmes*, organized by the *British Association of Comparative Law* and hosted by The University of Nottingham's School of Law in July 2011. See William W.O. Quine *Word and Object* Cambridge, MA: The MIT Press, 1964); John L Austin, *How We Do Things With Words* (Cambridge, MA: Harvard Univ. Press, 1975); Maurizio Ferrari, *Documentalità. Perchè È Necessario Lasciare Tracce* (Rome-Bari: Laterza, 2009).

[38] Pier Giuseppe Monateri, *Legge, Linguaggio e Costume.* (Naples 2013); Id. above at note 5: 61; Id. above at note 7.

[39] Cristina Costantini, *La Legge e il Tempio. Storia Comparata della Giustizia Inglese* (Rome: Carocci Editore, 2007): 220-237. See also Pier Giuseppe Monateri, *I Confini della Legge*, above at note 7; Id. *Geopolitica del Diritto*, above at note 5: 59-110; Antonio Padoa Schioppa *Storia del Diritto in Europa. Dal Medioevo All'Età Contemporanea* (Bologne: il Mulino, 2007).

not as the political instrument of the ruler, the king represented, in Pietro de Blois' words,[40] the *Christomimetes*—that is, the living and terrestrial image of Christ—and hence he was the only man on earth entitled to administer justice. Ernst H. Kantorowicz's John H. Baker's studies are of pivotal interest here.[41]

The eruption of the glossators' *imperio rations* represented in this sense a revolution. Notably, it was the discovery of the *Digest* that made it possible for the law to be taught and studied in the West as a separate science in the 1000s and 1100s. As Berman correctly writes, "[t]he law that was first taught and studied systematically […] was not the prevailing law; it was the law contained in an ancient manuscript which had come to light in an Italian library toward the end of the eleventh century. The manuscript reproduced the *Digest* […]" (LR, [121-122]). This is why, while commenting on Maitland's considerations, Berman writes that the twelfth century was not *a* legal century but *the* legal century, that is the century in which the Western legal tradition was formed" (LR, [120]). Andrea da Isernia's Latin locution '*raro princeps iurista invenitur*'[42] proves that it was in those crucial years, and not before, that the idea emerged that (the) law was 'holy' and those dealing with it had to be scientists whose *dominium* over the law allowed them to gather together and constitute a new, separated 'holy *corpus*', namely the *militia legum* (or *militia literata* or, as Baldus defined it, *militia doctoralis*), to be ontologically compared to the *militia coelestis* of the church and the armed aristocratic *militia* of the nobles.

2.2. The Instrumentalist (and Imaginatively anti-Schmittian) Essence of Rome's Geopolitics

The main claim of this study is that Schmitt did not commit any mistake in developing his spatial ontology. Schmitt chose to identify the JPE with the geopolitical order produced through the Age of Discovery and not with the 'comprehensive' Roman spatial order because of the distortive use of both social relations and political allegiances which lay at the core of Rome's genealogical expansionism (and subsequent inevitable dissolution) since the conquest of Veius in 396 BC and the historical compromise between patrician nobility and plebeians in 367 BC.

To justify and explain this claim, a historical approach to Rome's geopolitics is essential. Yet the origins and millenarian development of this particular type of geopolitics are rooted in various delicate legal and sociopolitical circumstances that merit further attention, certainly more than can be provided here. The Romans, scared as they were of a possible death of the myth of Rome, were masters in shaping its auto-representation through various measures for practical purposes. In the following pages attention is only paid to a few historical examples of geopolitical normativism whose relevance makes it easier to understand this paper's argument.

Historically, Rome acted as a 'sponge' and improved its sociopolitical, legal, economic, and ontological sensibility (and structures) only when it conquered new territories.[43] We have enough data to argue that it was only the expansion of the Roman *dominium*, especially after the end of the republic, that led to drastic transformations of Rome's (non-)identity in unexpected ways – I think primarily the extent to which Hellenistic customs and attitudes influenced Roman thought and sensibility. Bertrand Russell notes

[40]*Patrologia Latina*, CCVII: 40D.
[41]Respectively, *The King's Two Bodies. A Study in Medieval Political Theology* [1957] (Princeton, NJ: Princeton Univ. Press, 1997); *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford Univ. Press, 2001).
[42]*In usus feudorum commentaria*, Feu, I, 3, No 216, folio 2IV.
[43] Monateri, above at note 11.

this when he writes that Greece and the East profoundly affected the Western half of the empire because of Rome's military expansion, rendering it the conduit through which Hellenistic civilization (and hence Christianity) was transmitted to the region.[44]

Since Rome started becoming acquainted with Hellenistic culture in 281 BC, the Romans absorbed several religious views[45] as well as legal principles, rules, terms, and concepts that where further used to make new (and better) laws rooted in the foreign forms of civilization. This is why what we have come to regard as the 'magnificent' Roman law, was not the one in force during the archaic and pre-classical periods, but rather that of the *Principate* (initiated by Augustus in 27 BC[46]) and the Empire of Diocletian (commonly called second empire or Dominate). During the *Principate*, Roman society also evolved and brought about the needed structural reforms: Joel Mokyr correctly noted that "the Rome of 100 AD had better paved streets, sewage disposal, water supply, and fire protection than the capitals of civilized Europe in 1800".[47] A century later, Rome stopped growing and went through a period of crisis (the murder of Alexander Severus in 235 AD led to the collapse of imperial authority) which was only overcome by Diocletian (284-305 AD). It was because of Diocletian's influence that Roman law evolved to 'modern standards' by transplanting several legal principles, concepts, and rules from the Hellenistic culture into its normative dimension, and in particular from Eastern Egyptian law.[48] The introduction of the institute of the '*cognitio*' into the civil procedure, which until the third century was only applied in the Empire's provinces, is testament to that. Further proof is provided by the end of the distinction between '*juscivili*' and '*juris gentium*' as a consequence of the promulgation of Caracalla's *Constitutio Antoniniana* in 212 AD, which extended Roman citizenship to foreign peoples, allowing the Romans to transplant the acquired legal culture into the inner circles of their society.[49] The Antonine Constitution was promulgated not with any liberal intention (which was simply inconceivable at that time), but rather for fiscal reasons.

Turning now to the manipulative use of the institute of citizenship, what is relevant for our purposes is that there were several ways to be considered a Roman citizen. Citizenship could be obtained, as Gaius explains in his *Institutiones*, in relation to the citizenship of one's parents, or for political reasons, or through other ways, such as the *manumissio* according to both the *Lex Aelia Sentia* of 4 AD and *Iunia Norbana* of 19 AD. The rule, however, was never established once and for all. Several changes took place and exceptions applied.

For instance, one of the first instruments by which Rome's (non-)identity and geopolitics began to be 'contaminated' was the instrumental concession, as of the fifth century BC, of hospitality to one or more strangers coming from another city or region without informing the respective municipalities. Given that this type of private *hospitium* soon acquired the features of a social custom, the Romans developed its public counterpart, which eventually led to the formation of the first international treaties. These *foedera* were conceived in terms of legal agreements between two or more parties and were successfully used to

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[44] *History of Western Philosophy* [1946] (London: Routledge, 2004): 257.

[45] Also, it is not a mystery that, since the founding of the Capitoline temple in 509 BC and the drafting of the first collection of the Sibylline Oracles in 496 BC, Roman animism was soon displaced by Greek anthropomorphism and the *ritus graecus* supplemented the *ritus romanus*.

[46] Augustus ruled for four decades (27 BC to 14 AD) of prosperous expansion and technological sophistication that set the stage for the well-known two centuries of *Pax Romana*.

[47] *The Lever of Riches: Technological Creativity and Economic Progress* (Oxford: Oxford Univ. Press, 1992): 20.

[48] While analyzing the influence that the Egyptian conquest of 30 AD had on Roman culture, it should be remembered that Augustus found a country profoundly influenced by Macedonian thought. Alexander the Great's conquest of Egypt in 332 BC was the most important resource for the diffusion and promotion of the Hellenistic civilization in the region.

[49] Olivia F. Robinson – Thomas D. Fergus – William M. Gordon, *European Legal History* (London: Butterworths, 1994).

manipulate Rome's geopolitics for instrumental purposes. In particular, when Rome began to control the whole Mediterranean during the second half of the second century BC, the Romans saw the possibility of confining the power of all Asiatic reigns by transplanting the same logic into international agreements. The most remarkable political activity of the Romans of that time (200-167 BC) was to obtain the systematic division of those reigns by recognizing their local legitimation and then embracing allegiances with them to then defeat them (examples are the agreements signed with Macedonia and Syria, whose reign Rome brought to an end in 188 and 169 BC). However, while all these strategies implied the mix of ethnicities and cultures not only at the peripheries of the republic, it contrarily led to the hegemony of the *Nomen Latinum* in the Italic region. The introduction of the pagan cult of Diana on the Aventine in 539 BC is testament to this.

Very soon afterwards, the Romans began to divide the Italic cities into those conceived of as 'subjected' to the Roman *dominium* and those which were not. And whilst this distinction served to impose certain measures over the former groups, Rome nonetheless regarded all of them as allies and guaranteed full protection to all Italics against the threats made by Cartages (with whom, according to Polybius, Rome signed the first treaty in 508 BC after the expulsion of Tarquinius Superbus).

It is worth mentioning the *Foedus Cassianum*, which was named after Spurius Cassius, and which established a league between Rome and the Latin region (today's Lazio) between 493 and 338 BC. The *Foedus* was specifically aimed at establishing a form of juridical similarity between the Romans and those labeled *Prisci Latini* by stating that every Latin plebeian who was found within Rome's inner territory was to be treated as a *cives Romanus*, or allowing marriage between a Roman citizen and a Latin plebeian. Importantly, the *Foedus* also permitted, under the seal (and political protection) of Rome's Senate, the creation of new Roman colonies by members of the league throughout the Italic region. When the Latin league collapsed in 338 BC, Rome defeated all rebels and unilaterally acquired (through the *concilia commerciaque inter se ademerunt*) the definitive control of all the cities that had previously belonged to it. It was also decided to give full (*cum suffragio*) or limited (*sine suffragio*) Roman citizenship to several cities of the Latin region. As a result, Rome's geopolitical (non-)identity was once again contaminated for practical purposes.

This geopolitical trend continued for centuries, at least until the political intervention of Livius Drusus, which may only be fully understood if we bear in mind the situation he had to deal with. Whilst, in 125 BC, the nobles stopped Fulvius Flaccus's idea of conceding the Roman citizenship to all *socii Italici* beyond the boundaries of the Latin region, the Tribunate of Gaius Gracchus (which began in 123 BC) was entirely aimed at transforming the Republic from both the outside and within. Examples are Gracchus' tendency to reorganize the administration of the territory subjected to the Roman *dominium* by favoring the plebeians and limiting the power of both the Senate and nobility to then shaping Rome's geopolitics freely.[50] The Senate reacted by completely reorganizing the geopolitical and normative signification of Rome's territory in anti-Gracchian terms through the *Lex Agraria Epigraphica* (111 BC) and then by electing to the Tribunate Livius Drusus in 91 BC. This last move was very unfortunate because Drusus, who wanted to set himself apart from the anti-plebeian politics of his father, proposed to concede citizenship to all Italic allies and, through a complex *Lex Livia Agraria*, eventually tried to finalize Gracchus' plans to achieve a 'modernized' form of democracy. The Senate and the consul Lucius Marcius Philupphus made it impossible for the reforms to pass and decided on the assassination of Drusus. From this murder erupted the well-known

[50]Cf. *Lex Sempronia*, *Lex Sempronia de Provincia Asia*, *Lex Sempronia de Provinciis Consolaribus*, *Lex Sempronia Iudiciaria*, *Lex Sempronia Militaris*, *Lex Sempronia de Popilio Lenate*, *Lex Sempronia de Sicariis et Veneficiis*, *Lex Sempronia Viaria*, *Lex Sempronia de Coloniis Tarentum Deducendum*, *Lex Rubia de Colonia Carthaginem Deducenda*, *Lex Sempronia de Novis Portoris*, *Lex Papiria de Tresviri Capitalibus*

social revolts of 91-88 BC, which came to an end only when the *Lex Iulia de Civitate Latinis ed Sociis Danda* conceded citizenship to all Italic regions.[51]

It seems to me therefore evident that Roman law was theoretically conceived and practically used as the device (or medium) to allow the complex cultural and social circulation and contamination of Rome's geopolitics. Within this perspective, as Flaccus, Gracchus, and Drusus' tragic experiences demonstrate, the Romans used their law specifically to preserve their juridical status and 'purity' as long as they could. For example, the cities with limited Roman citizenship were only allowed to use a form of property which was not that of the dominium *ex iure Quiritum*, which was only permitted within Rome's boundaries (6,000 kmq^2 around 330 BC). In the same 'protective' vein, the Romans also prohibited Latin being spoken outside Rome and imposed instead the use of autochthonous languages.

Even before the eruption of the Punic Wars (265 BC), the Romans did their best to spread the myth of their superiority all over the Mediterranean whilst also using what the conquered regions had to offer for practical purposes. What they did not understand, however, was the paradoxical essence of this socio and geopolitical trend. Not only did further conquests (such as that of Taranto in 272 BC) and other wars (like those against the Etruscans, Umbri, Sanniti, and Galli in 298-290 BC, the Galli Boi in 285-283 BC, and others) lead Rome to contaminate its geopolitical identity, but also internal policies led to important shifts that revealed the change (or confusion?) that Rome was undergoing. Two instances are of interest here. First, the compromise on the *Leges Licinae Sextiae* made between patrician nobility and plebeians in 367 BC that allowed the latter access to the superior levels of the judiciary. Second, the conceding of public lands (*ager publicus*) by the administration to private entrepreneurs who were asked only to pay a service fee to Rome, but whose total freedom led them to abuse their role. Instead of allocating the land directly to the farmers who needed it, the private entrepreneurs subcontracted it to other investors who then sold them to the farmers.

These policies of formation, destruction, and reformation of the geographies of the Roman order continued throughout Rome's legacy, as is demonstrated not only by the political expansion towards Greece of Appius Claudius (who was elected censor in 312, and then consul twice in 307 and 296 BC), but also by the political decision (made immediately after the first Punic War) to divide the administration of the provinces outside Italy into *civitates foederate* (with no autonomous sovereignty), *sine foedere liberae* (with a form of semi sovereignty), and *liberae et immunes* (with full sovereignty and also allowed to not pay taxes to Rome because of their strategies and relations with broader regions).

The same geopolitical trend occurred even during the period of the civil wars, which officially began when the Senate did not approve the project of reorganization of the Oriental provinces proposed by Pompeius, to whom, through the *Lex Gabinia de Piratis Persequandis* of 67 BC, was granted the exceptional power of the *imperium* to defeat the pirates in the eastern part of the republic. Having ended the first Triumvirate in 53 BC, Caesar extended Roman citizenship to the whole of Cisalpine Gaul and then completely reconceived the political structure of the peninsula through an empowerment of the smallest urban centers (cf. *Lex Mamilia, Roscia, Peducaea* of 59 BC).

Needless to say, Rome did not renounce the manipulative essence of its geopolitical normativism during the Principate either. Also during this period, the three pillars of Rome's legacy were its (non-)identity, instrumentalist use of its citizenship, and a peculiar administration of its provinces. A

[51] However, it was only Silla who, through the dictatorial powers given to him by the *Lex Valeria de Sulla Dictatore*, was eventually capable of re-establishing (at least for a while) the old customs of the early republic and the aristocratic essence of its inner structure.

powerful example is the regenerative plan pursued by Augustus, who tried to reestablish the old republican policies whilst also creating the basis for a new politico-institutional model. Quite paradoxically, the reference to the ideological structure of the Roman-Italic *respublica*, which was the core part of the political program of Octavian against Antony, became the trajectory through which Augustus reached the final destination of his reformative plans after the fight of Actium. In doing so, Augustus defined the specifity of his constitutional powers not in the certain terms of a *potestas*, but in the ambiguous ones of an *auctoritas*, which belonged to the Senate together with the magistrates (*auctoritas patrum* and *patres auctores fiunt*) in the republican period.[52] Notwithstanding Augustus' paradoxical claims, this stratagem eventually allowed him to profoundly modify the old republican assets (think of the effects of his monetary policy, developed in 15 AD, which made the Senate lose control of the circulation of gold and silver coins) whilst also having an impact on Rome's geopolitics by Romanizing the provincial and local elites even more.

It is also worth mentioning the policies put forward by Claudius, who was emperor from 41 to 54 AD and who not only made it possible for the provincials to become senators, but also promoted the concession of Roman citizenship to several provinces through systematic politics. This was then continued by the Flavian dynasty (69-96 AD), whose first member, Vespasian, was also the first emperor not born in Rome. The instrumental creation, destruction, and recreation of colonies and *municipia* throughout the Empire meant its habitants, although considered Roman citizens, were sometimes free to live according to their customs. This allowed the Romans to disguise the juridical physiognomy and social values of entire populations whilst also favoring a general orientation towards the adoption of Rome's municipal scheme in any region of the Empire. In this way, the profound dichotomy between the *civitas romana* and that of the *peregrini*, began the (now unavoidable) process of the neutralization of its essence.

The culmination of this instrumental use of Rome's geopolitics through the normative manipulation of its (non-)identity was ultimately reached in 212 AD, with the total concession of its citizenship to the whole territory of the empire through the promulgation of the aforementioned *Constitutio Antoniniana*. Although the fact that this event has not been studied with enough interest by contemporary historians may suggest the opposite, this measure had an incredible impact on the government of territory and identities subject to Rome's political *dominium*. In particular, it concerned millions of people with hundreds of various socio-biopolitical and anthropological backgrounds, cultures, customs, and local sensibilities whose juridical statuses could not be more different.

Moreover, by assimilating the provincial world with that of what was considered as belonging to the *peregrini nullius civitatis*, Caracalla's decision weakened the original position of privilege of the Roman-Italic society as expressed by the imperativeness of the *Jus Italicum* and Latin language, and consequently represented the geopolitical beginning of Rome's slow death. It was on this basis that Diocletian and Constantine decided to divide the empire into an eastern and western half corresponding, approximately, to the division of the Greek and Latin languages.

This passage may be only understood if we bear in mind that, while the second century had been a period of unusual peace and stability,[53] the third century was characterized by the considerable social disorder and confusion which led to what was to happen in the following two-hundred years. Notwithstanding the centralization and bureaucratization of the empire which began under the Severans and followed the crisis of Hadrian's model of government, it soon became evident that the empire was socio-

[52] André Magdelain, *Auctoritas principis* (Paris: Belles Letters, 1947); Augusto Fraschetti, *Roma e il Principe* (Rome-Bari: Laterza, 1990). For an introduction, see Giorgio Agamben, *State of Exception*, above at note 34: 74-88.
[53] Gibbon defines it as "the period in the history of the world during which the condition of human race was most happy and prosperous". See *The Decline and Fall of the Roman Empire*, above at note 32: 65.

politically and ontologically divided from within. Knowing this, Diocletian, who became emperor in 284 AD, undertook a thorough reorganization of the imperial government. In this sense, the fact that Rome's sociopolitical (non-)identity reached incredible levels of contamination, is also demonstrated by Diocletian's personal experience, as he was a Dalmatian by origins, and only visited Rome for the first time when he had been emperor for twenty years. He took his first step in dividing the empire and, having taken the East, only ruled from its capital at Nicomedia in northwestern Asia Minor. From that region, Diocletian further split the provinces into smaller units and then grouped them into thirteen dioceses, which were eventually united into four great prefectures. The governors of the dioceses became the representatives (*vicarii*) of the prefects of the empire. In pursuing Diocletian's roadmap, Constantine, who became emperor in 306 AD, built a new capital for the East in Byzantium (commonly known as Constantinople), and decided to base the western half of imperial government in Milan. As Barry Nicholas correctly noted, it was specifically Constantine's administration of Rome's political dominium that turned the Roman Empire into the Byzantine Empire.[54] Once again, Rome's socio and geopolitical identity was anything but 'Roman'.

The instrumentalist manipulation of Rome's (non-)identity became even more evident when, knowing that the defense of the empire's frontiers required an army of more than half a million men and friendly tribes, many (so-called) barbarians were recruited into the Roman army. As Stein correctly noted, "[u]nlike the provincials of the first century, these Goths, Franks and Vandals of the fourth century retained their Germanic identity and were not completely romanised".[55] It is anything but a coincidence then that was during those years that, as Stein further writes, the Greek speakers of the eastern empire, which had been less affected by barbarian infiltration than the western empire, began to think of themselves as the prime upholders of the Roman traditions.[56]

It was probably also because of this confusion and impossibility of protecting Rome's (non-)identity in efficient terms that the barbarians soon decided that it was more profitable to fight for themselves than for a 'Roman' master. As a result, the Visigoths easily entered Thrace and defeated the eastern imperial army at Adrianople in 376 AD. It was only Theodosius I who overcame the geopolitical gridlock in 382 AD by promulgating a treaty allowing the Visigoths to settle south of the Danube. Gibbon describes Theodosius I as the last great emperor to have personally led his troops into battle and claims that it was after his death, in 395 AD, that the socio and geopolitical, legal, economic, and ontological disintegration of the empire formally took place through the development of feuds between the East and West.

3. Conclusion

Schmitt was particulaly interested in the genealogy, development, and death of the Greek *nomos* rather than in the completely different ontological essence of the Roman *lex* and the distortive use of its geopolitics. This is what, in my opinion, Stuart Elden's critique of Schmitt's spatial ontology has misunderstood. This is also the reason why any comparison between Schmitt's spatial thinking and the manipulative use that Rome made of its universalist spatiality is anything but easy and needs to be conducted carefully. At times, they seem to coincide while, actually, they do not.

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[54] *An Introduction to Roman Law*, above at note 32: 13.
[55] *Roman Law in European History*, above at note 10: 22.
[56] Stein, *Roman Law*, 22.

The foregoing discussion reveals that Rome's geopolitical normativism cannot be overlapped with Schmitt's claim that any political form depends on the realization of the principles of 'identity' and 'representation'[57]. Rome lacked both principles throughout the socio and geopolitical, legal, and ontological presentification of its myth. Hence, if Schmitt's understanding of politico-spatial concepts such as '*nomos*', '*Großraum*', '*Ortung*', and '*Ordnung*' is tributary to an *a priori* ontological turn in the fundamental 'elements' of life (such as that of 'identity' and 'representation'), it becomes evident that the combination of his spatial thinking with the democratic 'friend/enemy' dichotomy which makes politics possible, seems to be ill-suited for the geopolitics of Roman law.[58] On the contrary, Schmitt's suggestion that "[e]very spatial order contains a bracketing for all its agents and participants – a spatial guarantee of its soil" (NE, [185]), may shed some light for the understanding of Rome's legacy as well. That is to say, although Rome was the presentification of its own myth, it was so through the formation of a spatial order in geopolitical and ontological terms.

Yet, in Tracy B. Strong's words,[59] according to Schmitt, a "*Volk* is not just 'people' but people unified by having common history, language, and destiny". This is correct and Schmitt voluntarily chose to identify the JPE with the geopolitical order produced through the Age of Discovery and not with the 'comprehensive' Roman spatial order because of the distortive use of both social relations and political allegiances which lay at the core of Rome's genealogical process (and subsequent inevitable dissolution). The Roman order was thus anything but 'global' in modern and Schmittian terms simply because the Roman Empire did not constitute a "spatial ordering of the earth as a whole, [or] *nomos* of the earth in the true sense" (NE, [50-51]).[60]

In order to provide this claim with a theoretically and historically grounded justification, attention has not only been paid to Schmitt's notion of concepts such as '*nomos*', '*Großraum*', '*Ortung*', and '*Ordnung*', but also to the manipulative genealogy of Rome's geopolitical normativism. As a result, it emerged that the reason for Schmitt not seeing Roman law as the first global *nomos* also lies behind his interest in the ways through which, in his words, the "state was conceived of juridically as the vehicle of a new spatial order [which] was able to displace the remnants of the medieval unity of a *respublica Christiana* […]" (NE, [145]). The two reasons which seem to justify Schmitt's choice not to pay attention to the rediscovery and reinterpretation of Roman law in the twelfth century are therefore: (*i*) the 'non-territoriality' of the Empire; (*ii*) the process of ex-carnation by which law's ideal ontological essence was 'grabbed' and then 'encapsulated' through the rediscovery of *Corpus Juris*.

Schmitt was indeed particularly interested in the secularization of European life as a whole and its socio-geo-politico-theological emergence and dissolution. Schmitt has voluntarily chosen to deal with the 'detheologization of public life' which took place through the emergence of the Hobbesian decisionism as encapsulated in the artificial, exceptional birth of the modern nation-state. Schmitt understood this exceptional moment in human history in terms of a *decisive* metaphysical step which, in Ulmen's words,

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[57]*Constitutional Theory* [1928], tr. Jeffrey Seitzer (Durham, NC: Duke Univ. Press, 2008): 239-252.

[58]The political division which inevitably flows from this perspective is precisely what liberalism (with its promotion of endless negotiations) and romanticism (with its metaphysics of absolutist individualism rooted in aesthetic and subjectified occasionalism) have denied by denying the place of the decision.

[59] See her Foreword to Schmitt's *The Leviathan in the State Theory of Thomas Hobbes*, above at note 1: xviii.

[60] See also the distinction between (Roman) *imperium* and (*Deutsches*) *Reich* as a *Großraum* order that Schmitt drew in The *Großraum* Order of International Law, above at note 22: 101-124,

provided mankind with a "conceptually systematic and politically consistent alternative to the Catholic Church's monopoly of decision".[61]

Schmitt's selective attraction to Hobbes is further demonstrated by the decisionist trajectory which he has drawn not only in works such as *Political Romanticism*, *Political Theology* (I and II), *The Concept of the Political*, *The Leviathan in the State Theory of Thomas Hobbes*, but also in the aforementioned *On The Three Types of Jurist Thought* in which Schmitt developed a major adjustment to Hobbes' political and legal theory through the elaboration of what is probably his most sophisticated critique of normativism and legal positivism. It was on that occasion that Schmitt defined the Hobbesian decisionism as "the most consequential legal-historical jurisprudential expression of the new thinking on sovereignty".[62]

It is indeed through the promotion of decisionism that Schmitt joined the debate on the so-called *Methodenstreit*, that is the 'conflict of methods', which kept European analytical jurisprudence busy throughout the nineteenth century. Whilst arguing against the dominant form of legal theory in the pre-war era, that is 'statutory legal positivism' as promoted by Gerber, Laband, and Anschütz, and thus against the utopic neo-Kantian concept of a pure theory of law which conceives of the norm as the perfect device capable of dealing with any concrete situation, Schmitt claimed that the judge should arrive at his/her decision on the basis of his/her personal understanding of the law and customs.

[61]See his *Introduction* to Schmitt's *Roman Catholicism and Political Form* [1923] (Westport, CT: Greenwood Press, 1996): ix-xxxvi, xvi.
[62]*On the Three Types of Juristic Thought*, above at note 1: 74.