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INTRODUCTION

Making a World of States

THE PROLIFERATION of internationally recognized, independent nation-states is one of the most striking features of modern history. Their conquest of the world map—and our political imaginaries—may be extensive, but it is also remarkably recent.[1] We only need to travel back a century and a half to grasp the magnitude of this transformation. Wildly heterogeneous political forms populated the world picture of the mid-nineteenth century, stretching from globe-spanning industrialized empires to polycentric sultanates, autonomous enclaves (in Europe as much as elsewhere), and Indigenous communities living according to their own laws. Never before, in fact—at least according to some—had the spectrum of polities ranged so widely.[2] Today, by contrast, we survey a globe almost entirely segmented into sovereign states: modular, clearly demarcated, theoretically equal under international law. The calendrical ledger of the last century kept score of this creeping transmutation of the world: in 1920, the League of Nations counted 42 member states; the United Nations had 60 in 1950, 99 in 1960, and 159 in 1990. Today there are around 200. If the state's capacity, virtue, and significance are ceaselessly in flux and up for debate, especially under the uneven integration of global capitalism, its grip on political life remains tenacious, as the populist nationalism of our own day documents all too well.

What do we know about this epochal change? "The story of how the world came to be so thickly populated with states," David Armitage wrote in 2007, "has hardly begun to be told."[3] International relations scholars, first on the scene, described it as the "expansion of international society"—as though it resembled a door slowly swung open, smoothly, benevolently, to a gradual procession of newcomers.[4] Such framing elided violent wars of national liberation and decolonization, and even the category of empire itself.[5] A new generation of research in diplomatic, international, and legal history is slowly filling in the picture.[6] Scholars have focused on the emergence of international bodies like the League of Nations and the United Nations that facilitated the

state-ification of the world, and on the Anglo-American imperial order of which they formed a complex part. With the partial exception of some historians of international law, they have had less to say about its origins outside the Anglo-American world. And we have barely begun to look beneath the surface of international politics to the substratum of assumptions and preconditions that underpinned this juridical transformation. "Statehood" and "sovereignty" lock into some of the most elemental human questions about our communal life: questions about the nature and arrangement of power, and about the ultimate source of legitimate authority. Their history must also be a history of ideas—of arguments and emotions, sense and meaning, aspirations and fears. It involves—as we will see—whole philosophies of law and knowledge, visions of time and history, cosmologies of the politically possible. No part of this conversion was mechanical. Neither "state" nor "sovereignty" can be taken as fixed, pregiven things seized by premade nations.

This book uncovers a crucial piece of the larger international story in a seemingly unlikely place: the Habsburg Empire. As a result, it approaches the empire from an unaccustomed angle. A sprawling polity that dominated the heartlands of Europe for hundreds of years—extending by the nineteenth century from today's northern Italy to western Ukraine, and from southern Poland all the way to Croatia via the Czech lands, Transylvania, Hungary, Slovakia, and Slovenia—the empire lingers like a ghost over the map of Europe. Since its dissolution in 1918, historians of the Habsburg Empire have focused largely on two related issues: first, the reasons for its collapse (with shifting appraisals of its weakness and strength, modernity and backwardness); and second, the nature of the nationalisms that ostensibly brought it down (from ancient ethnic enmity to "national indifference"). This book sets both themes to one side. If it is concerned with Habsburg modernity, it is via its key role as a laboratory for juridical innovation; if it touches on questions of nationalism, it does so because these were spurs to critical questions of sovereignty. It returns to Central European history with a series of more outward-facing questions about the legal and intellectual history of empire, sovereignty, and statehood. Tying Central European history into a story of the emergence of twentieth-century international order, it also shows just how much international historians can learn from paying closer attention to a region that they have neglected.

This book uses the remaking and interwar unmaking of the Habsburg Empire to track the emergence of a world of states along three central avenues. It begins in the aftermath of the European revolutions of 1848, as the Habsburg Empire was convulsed by decades of constitutional experimentation in the face of rising provincial demands for political rights. I show, first, how these structural experiments directly confronted a set of transitions customarily deemed constitutive of the modern state: from "private" patrimonial rule

to abstract "public" authority, and from pluralist, differentiated legal orders to singular, uniform, unified ones. Unlike in France, no revolution had swept away all the old rights and legalities of the ancien régime: the full complex of dynastic, patrimonial law needed to be argued over and converted manually into "modern" equivalents. Unlike in Britain, the Habsburg government had been forced into a written constitution, meaning these adaptations could not unfold backstage, gradually, fuzzily, absentmindedly: the empire's legal order had to be publicly articulated. And, unlike in Germany, the empire's rulers and thinkers could not appeal to the ostensibly organic national unity of *das Volk* to ground the unity of the state, as the dominant historical school of law did there: the Habsburg lands comprised intermixed peoples speaking some twelve different languages. Combined, these characteristics turned the Habsburg lands into a remarkably explicit workshop for the attempted production of abstract, singular sovereignty out of multinational dynastic empire. The case allows us to eavesdrop on the refashioning of the body of king into the body politic—as live, ever-unfinished history rather than static, retrospective theory—replete with its unresolved problems and inconsistencies, its myths and imaginative leaps, and its many significant consequences.

Second, I recover the place of the Habsburg Empire in that other foundational process underpinning the emergence of a world of states: the demise of (formal) empire and the rise of the nation-state in its wake. We rightly associate this story with the decolonization of Asia and Africa in the decades following World War II. Yet certain parts of the story crystallized at the end of the *previous* world war, with the dissolution of Habsburg rule in Central Europe. Under the watchful eye of the international community, assembled first at the Paris Peace Conference and then as the League of Nations, a string of newborn sovereign powers appeared in the empire's place, including Czechoslovakia, Hungary, Austria, and Yugoslavia. Important substantive differences distinguish this chapter of imperial dissolution from the one that followed the next world war—not least regarding race and economy. But the end of the Habsburg Empire raised *legal* questions about the nature of postimperial sovereignty that would remain persistent features of the subsequent global history of decolonization. Here, too, the Habsburg Monarchy occupied a distinct place in the cohort of empires—Ottoman, Russian, and German—that collapsed at the war's end, as the whole of its former territory was converted into independent, postimperial states.[7] Legal conundrums surrounding the messy end of empire and the creation of new states—especially discontinuous sovereignty and the succession of rights, obligations, and territories—were thrown onto the main stage of twentieth-century international order—in one of its most formative moments—largely by the implosion of Habsburg rule.[8] The legal stories and theories developed to make sense of that transition would echo in the subsequent decades through South Asia, Africa, and beyond.

Third, legal thinkers from this corner of the world exercised a radically outsized influence on the evolution of modern legal thought in general and theories of the state in particular. To a startling degree, the ideas that shape discourses about sovereignty to this day were born in the Habsburg lands in the decades before and after the empire's collapse. A state, according to international law's standard codification, comprises four things: an effective government, a clearly defined territory, a stable population, and the capacity to enter into relations with other states. The original architect of this (then tripartite) test was Georg Jellinek (1851–1911), son of Vienna's most famous rabbi.[9] Across a prolific career—which culminated in a chair in Heidelberg, where he was a close interlocutor of Max Weber after anti-Semitism drove him from Vienna—Jellinek forged many of the disciplinary building blocks of public and international law.[10] He also inaugurated a methodological revolution that would bear spectacular fruit in the work of his student Hans Kelsen (1881–1973). One of the twentieth century's most important legal philosophers, Kelsen was also a product of the Habsburg experience. He studied when the empire was at its apogee and taught at the University of Vienna as it came crashing down. He masterminded Austria's postwar constitution and served as judge on its constitutional court before anti-Semitism caught up with him, too. The political storms of interwar Europe tossed him first to Cologne—and a legendary confrontation with Nazi jurist Carl Schmitt—then to Geneva, and eventually to Berkeley: he escaped Europe aboard the SS *Washington* as Hitler's armies marched on Paris. Along the way, he developed an extraordinarily complete philosophy of law. Known as the pure theory of law, its analytical insight, explanatory power, and global influence are matched only by its degree of difficulty and the controversy it generated. Integral to its architecture was a radical new account of what the state *was*. It explained how law could turn a messy, contradictory material reality into a singular, unified legal entity, and it recast the relationship between sovereignty and international law. Like so many of his legendary Viennese contemporaries and interlocutors—Sigmund Freud among them—Kelsen sought a *total* theory, one that could make sense of the whole. If the logical astringency and formalism of the pure theory is now foreign to us, so is its staggering intellectual ambition.

This book explains those ideas and their significance and shows why it was not an accident that they emerged in the Habsburg lands in German-language jurisprudence.[11] The empire became such a hothouse of legal innovation—in both academic theory and constitutional practice—precisely because existing theories could not make sense of it. To confront questions of state and sovereignty in this intricately layered, prodigiously complex empire was to confront the radical limits of legal concepts *and* to be propelled toward new ones. It might be ironic that an empire saturated with historical rights and traditional law birthed the most strident apostles of legal modernism,

but it is not inexplicable. On the contrary. This book shows how orders of thought evolved in dynamic tension with orders of rule, and why innovation and "anachronism" proved such intimate associates rather than each other's opposites. With imperial politics hamstrung by constitutional conflict, law and lawyers wielded an authority and significance in public life that might surprise us today. This standing persisted well into the 1920s, that heady period of state founding and constitution writing in which "the jurist was king."[12] If this book places a spotlight on Jellinek and Kelsen—both mainstays of law school histories and textbooks, but conspicuously neglected by historians—it also offers a broader contextual explanation for the many other thinkers from the Habsburg Empire who shaped twentieth-century legal history, including Eugen Ehrlich, a pioneering scholar of legal pluralism, and Hersch Lauterpacht, a giant of midcentury international law.[13] Even in this milieu, Jellinek and Kelsen stand out not just because of their fame and influence. Plugged into the main philosophical currents of the age, they shared an acute methodological self-consciousness that opens our eyes to law's place in the broader history of knowledge and epistemology. We come to understand how the challenge of making sense of statehood and sovereignty drove that history forward.

Together, these three strands—the empire's constitutional challenges, its international dissolution, and the thinkers who grappled with both—reveal a hidden story about the relationship between sovereignty and time. Foundational early modern political and legal theories of sovereignty had asserted the necessity of the state's juridical immortality. Unless the state persisted as an unchanging legal entity despite the death of a monarch or the fall of a government, it could not guarantee the intergenerational continuity of public order, rights, and duties. Some called it the doctrine of the king's "two bodies": one fleshed and mortal, the other understood as abstract and perpetual. The state's juridical agelessness—the stable continuity of its legal self within the ceaseless flow of time—remains a crucial enabling fiction for our systems of law. But that legal fiction came under extraordinary pressure in the Habsburg lands. Constitutional jurisprudence grappled with whether the empire's constituent polities like Hungary and Bohemia were still-living states, or whether their legal life had been extinguished by centuries of imperial rule; one wondered, too, about the continuity of the empire's own legal personality. The problem of how states endured and how they expired only became more charged and consequential when the empire collapsed, and representatives of the "new" states argued that, legally, they were resurrected versions of their preimperial selves. The many lives and purported deaths of these Central European states expose the visions of time and history built into sovereignty's structure. In so doing, they shed new light on the "long century of modern statehood" that, as Charles Maier has argued, began around 1850 and so integrally shaped political modernity.[14]

A Many-Bodied Problem

In 1882, Georg Jellinek—then a young adjunct lecturer at the University of Vienna angling for a permanent job—opened his new book with a provocative observation. All the major theorists of sovereignty, whether Hobbes or Bodin or Rousseau, placed the singularity of sovereignty—the notion of a single, supreme, undivided power—at the core of their definitions. Their theories, he claimed, could not make sense of sovereignty in Central Europe. Across the whole German-speaking domain—whether one looked at his home country, Austria-Hungary, or Germany or Switzerland—the "life course" of states was not leading to unitary forms. Instead, one saw different sorts of compound polities: states joined and bundled together, marked by varieties of amalgamation or disaggregation.

This discrepancy between the dominant theories and regional realities had dire consequences, he argued. Scholars manhandled such polities into these ill-fitting frames by interpreting them as "incomplete" realizations of the norm—a "transitional phase of states in a process of unification or de-unification"—and thus provisional by definition. Or they described them as "irregular" formations that were, ultimately, "juridically incomprehensible." Labels like "provisional" or "irregular" rendered them irrelevant for doctrine, so the classical definitions marched on, untroubled by the chasm between states in theory and states in fact. Scholarship suffered; the consequences for politics proved no less lamentable. These conceptions had penetrated so deeply that they structured political objectives and debate, sending state makers scurrying off to "correct" their deviant polities. "With the interpretation of a state formation as an irregular one," Jellinek observed, "politics is immediately given the task of clearing away the irregularity."[15] The dominant model had turned conglomerate states into *problems* that needed to be *solved*.

Jellinek offered his diagnosis: all these thinkers came from England and France. They reasoned from Western European experiences and presumed them universal norms. But what if the theory—not the "irregular" state—was to blame for the resulting incongruity? Why could some sorts of states generate models and be abstracted into theories, and not others? What might happen if one instead theorized *from here*, if one devised conceptions of sovereignty at home in this more complex world? Jellinek himself sensed the potential: scanning across a world of tangled empires, he concluded that nonsingular, conglomerate sovereignty in fact represented the global norm. If legal theory could find the right concepts to capture it, it might just unlock the secrets of sovereignty all around the world.[16]

The Habsburg Empire was a time capsule of European history in which different phases of state formation remained alive in the present. Its formal legal architecture preserved the logic of its medieval and early modern formation through a series of dynastic unions. On paper, it remained a

concatenation of myriad distinct polities. In the era of enlightened absolutism, this legal structure had been overlaid (but not dissolved) with robust organs of centralized government, based in Vienna. The nineteenth century added yet another layer, as national movements emerged among the empire's dozen or so language communities and demanded a place of some sort in the empire's political architecture. The empire was many versions of itself at once, a layer cake of sovereign history. What was a state? *Here* was the place to find out. Or, at least—to ask.

Of course, all political orders contain inconsistencies and curiosities, traces of past political struggles and half-abandoned systems of thought. What turned this bricolage into an acute problem for politics and for thought was the revolutions of 1848. Yes, the empire survived the crisis—but only just, and only with a major concession. The emperor gave in to the liberals and nationalists barricading the burning streets and consented to an imperial constitution, that is, a constitution in the "modern" sense: a single written document, a systematic codification. Here a different sort of strife began. What is the first thing a constitution requires? It requires a legal description of the polity in question—of the name and nature of its component parts, the hierarchy and relationship of jurisdictions, the basis and logic of powers. In the Habsburg lands, no element of that description proved uncontroversial. The project of writing down, or "writing up," the empire into a single document left all the conceptual problems exposed to the cold light of day. Or, rather, it records for us the way "modern" law *produced* sovereign plurality *as* a problem.

When one tried to square the empire with the category "state," numerous plausible interpretations emerged, all of them contradictory. Only two things were certain, reflected one law professor. First, it truly was a monarchy. Second, it was "not a simple, unified polity but rather a *plural*, compound one." "Everything else," he wrote, "is doubtful or at least contested, in particular: how many states does it consist of? what are they called? what is their legal relationship to one another? do they together form a state-of-states [*Staatenstaat*] or a federal state [*Bundesstaat*]? or is their union to be considered merely as a state confederation [*Staatenbund*], so that together they don't form a state at all, but rather merely hang together in international law?"[17] Was the Habsburg Monarchy one state, two states, three states, four? In recent decades, a stream of important scholarship by Tara Zahra, Pieter Judson, Kate Brown, and others has shown how Central and Eastern Europe was gradually sorted into national communities out of a welter of more fluid, overlapping identities.[18] But this is not true only of *nations*: it had to be sorted into *states*, too.

How could the sovereign situation be so opaque? The answer lies in the nature of the empire's original legal stitching. It came into being through a series of dynastic "personal unions" in the fifteenth, sixteenth, and seventeenth centuries, in which various small polities were united through the body of a shared monarch only. The monarch acquired an additional title or

ruling identity—*Herrscherpersönlichkeit*—so that the Archduke of Austria, the king of Bohemia, the Margravate of Moravia, and the king of Hungary (and so on) were one and the same physical person. But the various polities otherwise retained independent legal identities and broad autonomy, with their own provincial diets and customary laws. The most significant of these unions occurred in 1526, when a skillfully knotted net of dynastic marriages drew the crowns of Bohemia and Hungary into Habsburg hands, dramatically enlarging the latter's hitherto modest alpine holdings. Composite monarchies (as historians would later call them) were entirely unremarkable in medieval and early modern Europe.[19] But by the mid-nineteenth century, such promiscuous, sovereign-sharing state formations had lost their self-evidence: they no longer made sense in the categories and worldview of nineteenth-century European legal science and government, which saw states as clearly demarcated, singular things and distinguished sharply between domestic and international law.[20] A many-crowned emperor-king, as a literal embodiment of the distinctness *and* the unity of multiple polities, may have been natural within the frame of medieval and early modern statecraft, but how should that dynastic cosmology be transcribed into coherent, workable, respectable legal form in 1848, or 1867, or 1908? Did the king of Bohemia, for example, have international standing and international legal personality? If not—if, internationally, he disappeared into his alter ego, the emperor of Austria—then did the emperor step in and out of international law, and in and out of constitutional law, as he symbolically took off the imperial crown and put on a royal one?

The many crowns were only the most eye-catching imprints of a very different legal world. The original dynastic unions reflected a horizon of practices and imaginaries with none of the same coordinates as "modern" law. This patrimonial understanding of rule and right knew no fundamental distinction between "public" and "private," between (personal) property and (state) territory. Emperors and princes, lords and vassals, landowners and peasant laborers were all bound together in reciprocal and cascading bonds, privileges, and responsibilities, in which "juridical principles of 'scalar' or conditional property" had their correlate in "parcellized sovereignty."[21] Annunciated and renewed through oaths, coronations, and other rituals, these relationships were personal, based on tradition, and far from equal or uniform. Rule often took the shape of cyclic consensual agreements between monarchs and estates (i.e., "groups of persons who enjoyed the same rights, shared the same political obligations, and pursued their common interests in an organized manner"), often convened in territorial assemblies and diets.[22] Law, economy, and society were not distinct domains. Noble lords and large landowners administered justice and collected taxes; there was no unmediated relationship between monarchs and subjects. "Constitutions" were not written but physically enacted and performed; law was not abstract or homogeneous.[23] And,

crucially, there was no expectation that law and sovereignty be logically consistent or "rational."[24] Powers and jurisdiction did not follow clear, sequential, logical chains of derivation; like rights and norms, they could overlap, coexist, cross, contradict, and reverse. Take, for example, Charles the Bold, the ambitious fifteenth-century Duke of Burgundy, who could be the vassal of the French king in some of his lands and of the (Habsburg) Holy Roman Emperor in others; while, in others still, the French king was *his* vassal.[25] If we cannot help but understand descriptions like "irrational" or "incoherent" in unambiguously pejorative terms, it is a sign of the modern valuations we all too easily take as given, as well as the inaptitude of our vocabulary for the phenomena in question.

Across the early modern period, Habsburg statecraft gradually moved out of this world. The dynasty won decisive victories over the estates that reduced the latter's power and slowly condensed governing prerogatives in Vienna, like the Battle of the White Mountain (1620) that fatally undercut the Bohemian nobility. Fundamental laws from 1713 and 1723, known as the Pragmatic Sanction, asserted the inseparability of the Habsburg lands and established a common law of succession operative across them all. The late eighteenth century witnessed the most dramatic transformation. Through wide-ranging administrative and fiscal reforms at the vanguard of European developments, Maria Theresa and her son Joseph II drew significant power away from various mediatory corporations and structures like the church and the nobility. Estate owners largely lost control of taxation and peasant labor; tariff regimes were consolidated, territories mapped, and populations counted; and new, robust organs of central government became a presence felt in the lives of ordinary people.[26]

Yet the structures, forms, and imaginaries of this older, traditional legal world did not simply wither away under the "light" of absolutism and the self-consciously modern project of centralization. Habsburg rule still differed significantly across their lands, from Tyrol to Croatia, Moravia to Galicia, bearing the marks of each one's particular (legal) history. Nowhere was this more true than in Hungary, where the nobility had resisted almost all incursions and staunchly defended its traditional rights, laws, and privileges. No one really spoke of a Habsburg "state" prior to the early nineteenth century.[27] After all, until that point, the Habsburgs also wore the crown of the Holy Roman Empire of the German Nation: a loose, patchwork polity that sprawled across the thick middle of the continent, and which encompassed some of the Habsburg hereditary lands, but not all, with Hungary and Croatia lying beyond its borders. Only in 1804, in response to Napoleon's declaration of himself as emperor of the French, and with the dissolution of the Holy Roman Empire on the horizon, did Francis I create a comparable title—emperor of Austria—that pertained to all *his* "own" lands—that is, lands he presided over not as Holy Roman Emperor but as king and archduke and all his myriad other selves.[28]

Law's Truth under Pressure

When the 1848 revolutions propelled the project of an imperial constitution to the center of political life, it immediately confronted a many-sided impasse. At the level of actual administration, the monarchy functioned as a relatively centralized state. Yet, legally, an older landscape of sovereignty persisted. Traditional rights, privileges, and obligations had in fact been continually reaffirmed through coronations and other rituals of dynastic-aristocratic rule. They all lay waiting, half lapsed but still technically legitimate, still "on the books," when representatives from across the empire gathered in a new constituent assembly tasked with thrashing out an imperial constitution. Delegates from the various kingdoms and lands were quick to insist that their traditional rights were still live, valid law, now to be enshrined in the new constitution. The first impasse, then, involved an eerie disjuncture between the factual-material reality of imperial rule—manifest in a centralized, "modern" state—and its formal legal architecture, which preserved a collage of disparate medieval and early modern polities. What did it mean if law said one thing but a world of material "facts" said something else? Had the Kingdom of Bohemia become a mere "fantasy," as one parliamentary delegate contended?[29] Either way, how could one tell? Did law have its own "reality" or truth, distinct from other sorts? How should these different genres of the real be stacked against one another?

Questions of constitutional order thus rapidly spiraled into questions about the nature of legal truth and knowledge. There was an inexorable pull toward an epistemological register: again and again, protagonists needed to make arguments about the relationship between the real and the fictional, the lapsed and the living, form and content, law and fact. That pull only gathered strength through the constitutional reconfigurations of 1849, 1860, 1861, and 1867 and the vociferous constitutional debate that continued unabated for the remainder of the empire's existence. In shifting iterations, assessments of the nature of imperial sovereignty, its underlying logic as well as its plurality or singularity, turned on accounts of the legal real.

Small wonder that as a new scholarly field emerged over the same period, it too gravitated toward problems of method and epistemology. When revolution broke out across the Danube Monarchy in 1848, the empire's constitutional law and history were not part of university curricula; there were no professorships or standard works. That lacuna makes subsequent developments all the more striking. By the early twentieth century, the empire's universities were hothouses of research in public law. The history and theory of constitutional law emerged alongside the practical task of constitutionalization. Scholars ran into the same problems as politicians. To grapple with the state "from here" was to grapple with the nature of law itself. It drove some to a radical new empiricism. Eugen Ehrlich (1862–1922), for example—a pioneering legal sociologist writing from rural, polyethnic Bukovina on the easternmost edge of the

empire—was clear that the notion of a singular, encompassing state legal order could explain little about the way law actually functioned amid this tangle of traditions and practices. He developed his influential notion of "living law" from the "direct observation of life."[30] But the situation drove others in the opposite direction, pushing them toward a radical new abstraction. Faced with the jurisdictional chaos of the empire, Hans Kelsen concluded that one could only establish the coherence of sovereignty, and the formal unity of the state, by definitively cleaving off law as a material, empirical *fact*—messy, plural, riddled with inconsistencies—from law as a formal, abstract *norm*. The state's unity simply could not be established in an empirical fashion: it existed as a normative proposition only. Kelsen salvaged (or, rather, created) a logical, singular sovereignty, but only by tracking back to the deep foundations of knowing and judging, and only by abandoning the empirical world. Seen from here, it seemed, a theory of sovereignty must be a theory of knowledge, too. Across both the public sphere and the academy, arguments about *what* imperial sovereignty was or how it worked became questions of *how* one could *tell* in the first place.

Sleeping States

A disjuncture between sorts of truth was not the only impasse confronted by the constitutional project. When representatives of the kingdoms and lands invoked their traditional rights and prerogatives, looking to have them recognized in the new constitutional order(s), they were resummoning that older legal world into one that had changed materially and conceptually. They needed to convert the forms of medieval and early modern sociopolitical-legal life into "law" recognizable as such in the nineteenth century and adapted to the needs of modern constitutionalism. They scouted for terminology and ideas that could digest dynastic-feudal legal formations into those of "modern" statecraft. Their work allows us to watch a range of figures suturing the framework of modern sovereignty out of the material of orders past.

In this context, invocations of "historical rights" assumed a new importance.[31] The traditional rights and privileges of (say) Bohemian or Hungarian elites, assembled as estates in the Bohemian or Hungarian diets, were spheres of noble autonomy from princely power. They had been cyclically reaffirmed through rituals like coronations in which the monarch pledged to uphold them. Now, these traditional prerogatives were gradually reinterpreted as a form of historical *Staatsrecht*—that is, a body of public law governing a state. *Staatsrecht* has no easy English equivalent. More specific than "public law" and more general than "constitutional law" (though often used as a loose synonym for the latter), it is the law that regulates the fundamental legitimacy and nature of the state. To assert the ongoing force of one's historical *Staatsrecht* was to make a claim about the survival of old rights and also about the nature of the entity that possessed them.[32] Put succinctly, the "historical

rights" of the estates became the historical rights of states. Traditional feudal prerogatives became the public law and constitution of these former polities. The Habsburg acquisition of the Holy Crown of Saint Stephen or the Crown of Saint Wenceslas in the early sixteenth century became Hungary's and Bohemia's respective loss of sovereignty, a sovereignty they had never formally renounced. "Historical rights" came to signal a genre of latent or suspended sovereignty, still normatively valid and simply awaiting renewal. To dismiss such claims as anachronisms or unserious fantasies is to overlook the fact that the anachronisms are themselves a signal feature of the story.[33] For both political actors and scholars, making sense of the empire's legal order entailed a filtering of historical formations through the paradigms of the present—a search for equivalents or matches between then and now. History, too, was "codified" into categories of state and sovereignty. These "category mistakes" mark the collision of different cosmologies of rule.

Arguments about imperial order thus contained a series of epochal transformations. They document the conceptual labor, the difficulties, and the legacies of spinning the rights of estates into the rights of states, property into territory, "private" into "public," a kaleidoscope of jurisdictions into homogeneous legal space, embodied law into abstraction, divine right into positive law and "nonderived" power. Just as "the economy," in Karl Polanyi's famous formulation, needed to become "disembedded" from a more reciprocal, integrated social order, so too did the law require active fashioning into a self-contained, coherent object.[34] As the dynastic state par excellence, the Habsburg Empire affords special visibility to the (imperfect) depersonalization of rights and rule underpinning the historical construction of public power. If there is ever-new attention to the erosion of public prerogatives and the privatization of the state in our own age, this history reminds us how recent and how fragile that construction is.[35]

In the decades after 1848, the Habsburg Empire tried out different versions of that translation in a series of constitutional orders. After a skittish cycle of short-lived constitutions between 1848 and 1851, Emperor Francis Joseph reinstated absolutism for the best part of a decade. When new fundamental laws in 1860 and 1861 reintroduced constitutional rule, the historic kingdoms and lands were affirmed as the basis of imperial order and granted robust autonomy, including wide lawmaking jurisdiction and administrative organs that ran parallel to imperial ones in an unusual dual-track structure. The most dramatic experiment, though, unfolded through the *Ausgleich*, or Settlement, of 1867, which transformed the empire into two, separate, and *equally sovereign* halves: Hungary, on one side, and the remaining "Austrian" lands, on the other. It converted the logic of composite monarchy into a new bifurcated sovereignty—a hyphenated state formation called the Austro-Hungarian Empire. Had sovereignty been doubled, or divided? How could a state be two, and somehow also always one? "The Dualist theory," historian R. W. Seton-Watson later quipped, "is almost as theological as the doctrine of the Trinity."[36]

If some class it as the last gasp of composite monarchy, the 1867 Settlement was for that reason (and not despite it) something genuinely experimental.[37] What would composite monarchy look like updated for the nineteenth-century present—a sovereignty that was aggregated and disaggregated, plural and singular at the same time? The unity, once resident exclusively in the king's body, now resided in three "common" ministries: one for war, another for foreign affairs, and a third for the finances for war and foreign affairs—that is, exclusively the outward-facing dimensions of sovereignty. Otherwise Hungary and Cisleithania, as the nameless other imperial half was sometimes known,[38] constituted separate states, with their own legislatures, their own territories, and even their own citizenship. In the subsequent unrelenting controversy over this dual structure, Hungarian politicians went so far as to claim that no overarching, "third" state—no empire—existed at all. Viennese jurists found it maddeningly hard to prove otherwise.

How *could* one prove a state existed? Where, or in what, did its "reality" reside? The right test and criteria preoccupied university seminars and parliamentary committees alike. The dual monarchy could hardly be a state, Hungarian politicians like Albert Apponyi (1846–1933) asserted, if it had no legislature or citizenship of its own. But if the empire arguably lacked the requisite features, its component polities certainly did, too. This drove political actors from Bohemia and Hungary to particular arguments about why and how their polities still counted as (quasi-sovereign) states despite the material reality of a relatively centralized empire. Valid law, they argued, could not be overridden by mere "facts." Polities could persist as legal norms—pieces of suspended legitimacy awaiting renewed recognition and the restoration of full factual life. "For centuries, Hungary has led a double existence: one in reality, another in its laws," wrote the historian Louis Eisenmann in a classic 1904 study. These laws had preserved the "legal fiction of its sovereignty. It is . . . this legal fiction which the laws of 1867 have turned into a reality."[39] In some senses, these contentions echoed and extended older arguments about the Holy Roman Empire as a mere shadow or legal fiction.[40] Only the problem of sovereignty's infirm reality now unfolded, as we will see, in a very different political and philosophical context: a late modern world of radically expanded state prerogatives; of a rapacious European imperialism trading on ideologies of stadial, graded sovereignty; of the triumph of positivist knowledge; and of intense new scholarly attention, under the sign of neo-Kantianism, to problems of the real and the true.

Sorting Self and Globe: Austria-Hungary in a World of Empires

Through the attempt to convert premodern pluralisms into modern ones, Habsburg constitutional law generated forms of quasi sovereignty. Clearly, these differed significantly from the quasi sovereignties and legal pluralisms

produced by European imperialism in Africa, Asia, and the Middle East.[41] For one, their underlying logic was temporal more than spatial: they turned on the survival of rights, law, jurisdictions through time rather than the extension of rights, law, and jurisdiction through space—on history more than geography.[42] At the same time, the constitutional reformulation of the Habsburg Empire formed part of a much broader story of sovereign self-consciousness and imperial codification. A number of material and philosophical developments combined to make sovereignty a keyword of the nineteenth century. The dramatic extension of European imperialism across the globe both relied on and produced sovereignty as a central legitimating device: notions of perfect or complete European sovereignty took shape through a constitutive contrast to a nonsovereign (or imperfectly sovereign) non-European other, by definition available for conquest, occupation, and exploitation.[43] A thickening self-consciousness about sovereign status and interimperial competition, as well as the increasing complexity of imperial rule and desire for its rationalization, spurred a range of codification projects.[44] These imperatives did not affect only the blue water empires. On the contrary: with noteworthy simultaneity in the 1860s, projects of constitutional reorganization and codification seized not only the Habsburg Empire but also the Ottoman, Russian, and Japanese Empires. All these empire-states, located to a greater or lesser degree on the ambiguous peripheries of the European imperial system and "international community," felt similar pressures toward modernization, rationalization, and centralization—pressures to codify, articulate, and assert their sovereignty in mutually recognizable ways.[45]

Philosophical changes, too—and not just geopolitical ones—contributed to sovereignty's swollen nineteenth-century importance. The decline of natural law and divine right and the hydraulic rise of (legal) positivism recast the state—rather than nature, or reason, or God—as the source of law. Many jurists sought to set their discipline on new scientific, objective, empirical foundations by rejecting any metaphysical grounding and recognizing only state-made, man-made, positive law as law. Domestically, this shift heightened the significance of identifying the precise location of sovereignty and ensuring its singularity. Without recourse to a higher, transcendental principle or framework, only that singularity—as origin and end point of authority and legitimacy—could ground the unity of the legal order and prevent conflicts of law. Internationally, meanwhile, the shift went hand in hand with the rise of modern international law as a distinct discipline in the nineteenth century. Indeed, the pivot to positivism underpinned the newly sharp divide between domestic and international law, between the insides and outsides of a state, no longer both subsumed within an encompassing natural or divine order. International law was now understood as law made by sovereign states: dependent on their consent, it could not precede or exceed them. Nineteenth-century jurists, in Antony Anghie's words, "sought to reconstruct the entire system of international law as a creation of sovereign will."[46]

Sovereignty became, in short, the lens for new maps of the world—a prism for understanding, demarcating, and comparing self and other, and for constituting, analyzing, and regulating the interstate community. In their (re)articulations of Habsburg sovereignty, Central European actors located themselves on these new world maps, coding themselves into global typologies of sovereignty. Unsatisfied with the available terminology, Georg Jellinek coined the concept of "state fragments" (*Staatsfragmente*) to capture an "in-between level" between "state" and "province." Some political formations, he argued, were subordinated under a state government but not entirely "merged" with that state: "not states themselves," they presented "the rudiments of a state." This genre of quasi sovereignty captured the ambiguous status of the Austrian lands, which preserved key markers of statehood like their own, non-derived lawmaking power. It also arranged the international landscape along unfamiliar lines, grouping the Austrian lands together with the settler colonies of Australia and Canada, which likewise possessed state organs though not full independence.[47] The idiosyncrasies of Habsburg sovereignty rendered it a compelling provocation for new global taxonomies of this sort. The desire to "box states into species and types like one does with plants and animals," remarked one skeptical jurist, made Austria-Hungary an "adored object of such academic speculation."[48]

To dwell on the peculiarity and plurality of Habsburg sovereignty might seem to fly in the face of decades of Central European historiography. For at least a generation, historians have worked to overturn earlier portrayals of the Habsburg Empire as an "anachronism" on the European stage—a backward, rickety medieval relic destined to collapse. The older portrayals had their roots in polemical nationalist narratives from the interwar period that sought to shore up the legitimacy of the successor states by depicting the empire as an oppressive "prison of nationalities." In rejecting this blinkered nationalist historiography, scholars have instead asserted the fundamental modernity and robustness of the empire, tellingly taken to involve its centralization, unity, functionality, and liberalism. Thanks to this pathbreaking research, we build today from a portrait of a dynamic, participatory, progressive, and creatively multinational polity.[49] At the same time, in affirming the symbiotic connection between modernity, centralization, progress, and unity (rather than studying it as a historically situated, normative viewpoint), and in emphasizing the ways the Habsburg Empire resembled Western European states, this historiography has foreclosed an exploration of the empire's legal disaggregation as a point of connection to larger imperial and international histories. The perspectives and questions of global history bring new interpretive oxygen to continental European history. After all, rather than an automatic sign of fragility or reason for shame, legally differentiated rule remained the global norm.[50]

Moreover, a singular, linear timeline of modernity proves ill-equipped to capture the sovereign transformations at the heart of this book. As I have

suggested, the "survival" of old rights and legal formations required great creativity: we can understand the persistence of historical rights and debates about residual sovereignty as movement as much as stasis.[51] Persistence is no simple phenomenon. The German historian Reinhart Koselleck was fascinated by the longer, elongated durations of legal history: as he showed in his habilitation on Prussia, the survival or stasis of law could become a dynamic historical force as it fell out of step with changing social needs and began producing new injustices, triggering new reforms and social movements.[52] History is not propelled exclusively by the arrival of "new" phenomena, though historians' eyes tend to be drawn there, as Arno Mayer observed.[53]

Just like many other dimensions of the fabled cultural and intellectual ferment of the late Habsburg Empire, it is precisely the hybridity of legal forms and ideas—eclectic and volatile compounds of the "archaic" and the hypermodern, liberal and illiberal, rational and sensual—that characterizes their power, interest, and significance.[54] Nothing about the empire's legal nature was self-evident, which conversely made so much possible or thinkable. One experimented with sovereignties stacked vertically and with dual sovereignty joined horizontally, with rights guarantees and curias for language groups and with nonterritorial jurisdictions. Small wonder this gallery of experiments echoed and traveled, especially for those dissatisfied with the unitary state and restlessly searching for wider horizons of sovereign possibility. Austro-Marxist proposals for the legal personality of national communities had afterlives in the Soviet Union as well as the League of Nations' interwar minorities regime and, later, the political theory of multiculturalism.[55] Habsburg layered sovereignty and dual-track administration shaped the thought of Austrian economists like Ludwig von Mises and Friedrich von Hayek, who transposed that schema upward when they conceived of international economic governance as a stratum lying atop and bracketed from state sovereignty.[56] The model of the 1867 Settlement, in which two states might be fully sovereign and independent yet still looped together, was discussed by Ottoman intellectuals as a model for Egypt, by Irish nationalists as a template for their autonomy, and on the subcontinent as the partition of India and Pakistan loomed.[57] Today, in the wake of new chaotic jurisdictional tangles in business and internet law, lawyers have resurrected the "living law" of Eugen Ehrlich, tellingly figured under the sign "Global Bukovina" in a nod to the far eastern reaches of the Habsburg Empire that he called home.[58] And the Habsburg Empire itself is now routinely invoked as a precedent, model, or warning for the European Union.[59]

If this book sets aside a simple modernity-backwardness dichotomy, it also offers an altered perspective on that other major theme of Central European historiography, namely, nationalism. To turn from the history of ethnic-linguistic nations to that of states is not to discount the significance of rich national histories—on the contrary. But if we now know so much about the former, the history of Habsburg sovereignty remains comparatively neglected.[60]

Sovereignty, as James Sheehan argued memorably, is not a thing but a problem and a practice, a set of claims and counterclaims "made by those seeking and wielding power, claims about the superiority and autonomy of their authority."[61] Nationalists entered into this political arena, presenting one competing vision of imperial order, but they largely failed to leave an imprint on the empire's legal structure. Despite some creative national settlements at the regional level in the last two decades of Habsburg rule, the empire remained a union of historical kingdoms and lands, not a federation of nations. These historical lands were not national entities and did not correspond to patterns of ethnolinguistic settlement. Bohemia comprised both Czech and German speakers, while Magyar speakers scarcely made out a majority in the Kingdom of Hungary, sharing space with (those who came to identify as) Slovaks, Ruthenians, Slovenes, Germans, Ukrainians, Romanians, Croats, and Serbs.

The distinction between *lands* and *nations* was fundamental to Habsburg constitutional debate and to Central and Eastern European political discourse more broadly. The historic lands—long-standing legal-political entities with a history of independence—stood in stark opposition to communities defined by common ethnicity and/or language. Nationalism in that ethnic-linguistic sense was emerging as a framework for identity and politics only over the course of the nineteenth century.[62] The significance of these contrasts transgressed political divides. Within the framework of Habsburg constitutional debate, the rights of the lands stemmed from old aristocratic privileges and estates-based law and carried that traditional-conservative imprint. But the juxtaposition of peoples who had "a history" of their own with "nonhistoric peoples" who ostensibly did not also featured in the writings of Karl Marx and Friedrich Engels, among many others. Amid the heat of the 1848 revolutions, Engels lambasted the "Southern Slavs" of the Habsburg Empire as "ethnographic relics" and "nothing but the residual fragments of peoples."[63] "Peoples which have never had a history of their own, which from the time when they achieved the first, most elementary stage of civilization already came under foreign sway," he wrote in 1849, "are not viable and will never be able to achieve any kind of independence."[64] (Half a century later, it was the Austro-Marxists who brokered a reconciliation between the Marxist tradition and ethnic nationalism.)[65] Contorted echoes of this way of categorizing the region's peoples, and judging their present rights, lingers into the twenty-first century, as we see in Vladimir Putin's assertions about the historical baselessness of Ukrainian sovereignty.[66]

This book tracks a conversation about the distribution of sovereignty between the *lands* and the empire, though chapter 3 also treats attempts to fashion ethnic nations into legal entities that could bear rights in the imperial constitutional structure. Its subject is an empire-scale contest over sovereignty that unfolded in German. Other important "internal" discussions in Czech and Hungarian and the empire's many other languages have been analyzed within

particular national histories. My interest lies in arguments *directed to* the imperial government or that aimed to alter the imperial structure: rights claims that sought constitutional recognition and were articulated in German for that reason. Drawing the picture together in this way allows us to see how the imperial context shaped the nature of those claims, which often employed the same styles of historical-legal reasoning. It also allows us to see how nationalism tried to find its place within an existing landscape of legal ideas and institutions.

1919 in the History of the Austro-Hungarian Empire

The difficulties of distinguishing juridically alive states from juridically dead ones acquired new significance when the empire collapsed in 1918, exhausted from four long years of total war. The same questions of the survival, continuity, and identity of states now lurched dramatically to the center of international politics. The year 1918 was once portrayed as a Central European year zero: "Austria-Hungary sued for Peace and then vanished from history," in Margaret MacMillan's nutshell.[67] In this view, the dissolved Habsburg Monarchy became a blank terrain for a new order of nation-states.[68] This emplotment owes much to the self-presentation of nationalist state makers, who were keen to assert the naturalness of their liberation from an ostensibly unnatural imperial "prison." Tracing the history of *states* rather than *nations* reminds us just how convulsive and complicated this transition was. The wholesale rupture of sovereignty meant a rupture of the legal order itself. It raised challenging questions about the transfer of rights and obligations from old states to new ones—questions that would become key battlefields in the decolonization struggles that seized the global order after World War II. These questions arrived early to Central Europe, though the stories have not been connected before.[69] This is not to suggest that the transformation of Central Europe in 1918–19 can be meaningfully understood as "decolonization." The postimperial, as Peter Holquist reminds us, is not the same as the postcolonial.[70] Rather, I show how we can trace particular international legal problems raised by the eclipse of Habsburg rule, problems connected to the birth and death of states, along a global trajectory in the second half of the twentieth century.

Looking for ways of managing this crisis of legal legitimacy, representatives of the successor states turned to the languages of legal title they had long honed within the frame of imperial constitutional law. So much of the conceptual work had already been done. The state-ification of the empire had left them well stocked with arguments about the preexisting statehood of many of the empire's component parts. At the Paris Peace Conference and beyond, claim makers redeployed the rhetorical arsenal of imperial constitutional debate on the world stage, arguing for the survival of historic polities and their historical rights through the centuries of imperial rule and out the other side.

Legal concepts and methodologies developed to capture the particularities of imperial sovereignty ironically came to serve as intellectual tools for managing its absence—a way of sorting through the landscape of broken states, making the region legally legible to outsiders, and establishing international standing and legitimacy. The empire had died, but in a strange way, its constitution lived on: an empire turned inside out.[71]

Arguments about slumbering or residual sovereignty moved across the cusp of 1918, along with the evidentiary scaffolds—the configurations of law and fact—that supported them. Repeating old constitutional arguments almost verbatim, Czech submissions to the peace conference explained to the peacemakers that, "theoretically," the Habsburgs had always recognized, "at least implicitly, in their (official) acts, the legal existence of the Czech State and the independence of the Crown of Bohemia, the latter being considered as forming a separate State." Thus, if the Bohemian state no longer existed "practically," it still "existed legally."[72] The state had preserved its "theoretical" existence—its platonic, abstract, juridical life. Composite monarchy was a miraculous technology of state preservation. Neither the old-new Czechoslovak state nor the old-new Hungarian one needed to rely on some general justification for new states loosened from the clutches of empire, or the fraught legal logic of self-determination whereby a new international entity was conjured into being out of nothingness. According to these arguments, they only had to be reactivated, *de*-archived out of the imperial constitution and *re*introduced to the international community. Imperial rule was presented as a mere interregnum, now overturned through reversion to a preimperial status quo.

The ensuing debates over whether Czechoslovakia, Hungary, republican Austria, and Yugoslavia constituted "old" or "new" states had widespread political-legal consequences for both the succession of rights (especially to territory) and debts (especially reparations). Representatives of the new rump Austrian state used imperial constitutional law in the same way, but they used it to argue the opposite proposition: that they were *not* an old state but in fact a *new* one. The Allies' draft treaty wanted to make peace with "Austria," but a state of that name had never existed, they explained unblinkingly to the Allies, and certainly did not wage the war. Only the dualist "Austro-Hungarian" Monarchy had the legal capacity for international dealings: "De jure, an 'Austria' has never existed—thus we cannot succeed such [a state] nor represent it here."[73] Besides, the Austrian delegation continued, with its territory and population changed unrecognizably, and a revolution in the form of government, on what basis could their small republic be deemed the legal successor of the Habsburg Monarchy? The republic, they insisted, was a *new* state and could not be automatically saddled with the war debts and obligations of the former empire. The Treaty of Saint-Germain was still drafted as if a continuous Austrian legal identity could be presumed, but, behind the scenes at the conference, the Austrian arguments provoked doubt and consternation.

How could one determine if a state was legally continuous, or if it had died? What was the measure or rule? The heated memoranda war that followed in the back rooms of the peace conference revealed that no one really knew.

In the decades of decolonization that followed World War II, these same sorts of legal stories—about sovereignty suspended and resurrected, about the particular ways sovereignty worked in time—morphed into scripts for international legal politics around the globe. Jurists from India, Indonesia, Algeria, and elsewhere rejected the idea that their states were "new," with its connotations of contingency and conditionality. They too argued that their polities reverted to a sovereignty they had held prior to colonial rule. In the formulation of the prominent Indian jurist Ram Prakash Anand, colonization had "*eclipsed* rather than *extinguished* the international legal personality of the colonized countries." With suspended sovereignty now revived, postcolonial states rejoined the international legal community not as juvenile newcomers but as equals.[74]

Edges of the Knowable: States in Time

"Sovereignty" has long functioned as a limit concept. A marker of the highest and the supreme, of final things and first things, the foundation of law and yet above or before the law, sovereignty is "political theology," in Carl Schmitt's famous formulation, covered with the fingerprints of the creator God with whom it was originally associated.[75] To be "nonderived" and thus paramount—to be an original fount of law rather than something delegated from another source—relied on an ultimately mystical origin, a derivation "from nothingness."[76] "This moment of suspense," as Jacques Derrida parsed it, "this founding or revolutionary moment of law is, in law, an instance of non-law. But it is also the whole history of law. . . . It is the moment in which the foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone."[77] By pointing to origins, foundations, and sources, to the "presupposed and a priori," sovereignty represents a threshold not only for law and politics but also for knowledge.[78]

In an age dazzled by the achievements and methodological self-consciousness of the natural sciences, nineteenth-century jurists sought to modernize legal scholarship by setting it on new empirical, "scientific" foundations. Forsaking natural law and divine right in favor of legal positivism, they designated the earthbound, sovereign state as the source of law. Indeed, lawmaking power counted among its constitutive features. In so doing, they ushered in an alternate set of difficulties through the back door. If the state constituted the source of law, then anything behind or before the state became juridically invisible or incomprehensible: to be prior to the state was, by definition, to be prior to the law. The shift to positivism thus meant that there could be no such thing as legal knowledge about the creation of states

(or their demise) because law could hardly regulate its own coming into being; it could not be prior to itself, there to witness and regulate its own birth. If law was grounded in the state, then the state's identity, its legal existence, was not something that could be analyzed within that same legal framework. Jellinek referred blankly to the "untenability of all attempts . . . to construe the creation of states juridically."[79] The birth and death of states was thus categorized a matter of *fact* and not *law*—made extraneous to the law and placed beyond legal cognition. It marked the vanishing point of positivist legal knowledge. Within positivist legal frameworks, dominant by the late nineteenth century, the state—as the premise of law itself—always already existed.

These formal propositions dovetailed with some much older ideas about the nature of the sovereign state. Integral to its modern incarnation was the notion of juridical immortality. Ernst Kantorowicz famously traced the medieval genealogy of this doctrine in *The King's Two Bodies*. The state did not just fasten a plurality of people into a singular legal entity: that legal entity remained the same, ageless and unchanging, despite the coming and going of a plurality of persons over time.[80] The idea also lay at the center of Thomas Hobbes's canonical account of the state as a *persona ficta*. The state, he argued, required an "artificial eternity of life." Unless it was an abstract, undying entity, it could not incur public debt or keep treaty commitments or guarantee many other facets of public order that involved time spans beyond the scale of a single generation.[81] "One reason why states are likely to remain powerful actors in the contemporary world," Quentin Skinner has written more recently, "is that they will outlive us all."[82] Undying and perpetual, states arose, Kelsen reflected a little ruefully in the 1920s, "with the claim to be valid *forever*."[83]

The end of imperial sovereignty exposed the gaping black hole surrounding the legal birth and death of states. For Central European jurists writing through and after the collapse of the Habsburg Empire, the temporal edges of sovereignty suddenly loomed out of those disciplinary shadows and bore down on the present with an existential urgency. In the early 1920s, Kelsen puzzled that legal scholars possessed endless exhaustive treatments of the state's territorial frontiers and virtually none of its temporal ones. Perhaps because the outer rim of territorial jurisdiction seemed perceptible, tangible (he used the word *fühlbar*) while any temporal limit seemed completely *im*perceptible, occluded by the doctrine of the state's *Ewigkeit*—its perpetuity, its eternity. No longer. It was now clear that states existed in time, too, and not only in space.[84] The eclipse of imperial sovereignty sensitized Kelsen and his colleagues to the fiction, the contrivance, of state immortality: the cultivated timelessness of the state's legal order, its insensibility to time, had been violently jolted into the domain of the sensible. They began to fashion states-in-time into an object of legal analysis.

For these jurists, to confront the chronological edges of sovereignty was like staring over the edge of a cliff into a terrifying zone beyond law—a legal void or vacuum completely abhorrent to modern belief in the necessary gaplessness of

legal order. Some felt a colonial chill: a chronological gap between sovereignties, in the revealing analogy of Kelsen student Josef Kunz, threatened to leave Austria momentarily in the same international legal position as "so-called 'savages.'"[85] Kelsen and his circle developed a number of philosophical strategies to seal over this abyss. Strikingly, it was the conceptual innovations they had developed in response to the impasse of Habsburg sovereign plurality that now suggested ways of overcoming the impasse of sovereign mortality. They projected the "pure theory of law" upward and outward, transposing it from the jurisdictional scale of the state to that of the international legal system as a whole.

The question of time or priority had been integral to the empire's jurisdictional chaos. It had proved so hard to foreclose the stateness of the lands and establish the completeness of imperial sovereignty precisely because the lands *preceded* the empire. The original dynastic unions unfolded on the basis of *their* law: Ferdinand of Habsburg was crowned king of Bohemia on the basis of Bohemian law, and he ruled Bohemia on the basis of Bohemian law. Once divine right gave way to the notion of states as the origin of law's legitimacy, it was not easy to construe imperial sovereignty as original or nonderived—*because it was not*: the original authority to rule had been bestowed by the lands. It lingered in the lawmaking power of the lands, which was not jurisdictionally subordinate to imperial law: a law passed by the Bohemian diet was not automatically trumped by one made in the "Austrian" parliament, opening the door to chaotic legal contradictions.

In this context, it had become clear to a young Kelsen that the legal unity of the state depended on a single origin point for law, a single point of "ascription," and that that point could not be understood as a factual or historical or sociological proposition. That left one stuck in an endless mess of constitutional disputes. That singular origin point could only be *presumed* as a *logical* one. The legal order must *posit* what he came to call a *Grundnorm*—a "basic norm," or foundational norm—from which all subsequent legal norms derived. The basic norm essentially established how other norms could be made: it was a rule about rules, occupying the apex of the "pyramid of legal order."[86] In a series of exchanges through the war and in its aftermath, Vienna school jurists developed the argument that the basic norm at the apex of state sovereignty could not in fact be the final point of legal ascription. Rather, it must itself be derived from a still-higher basic norm—the basic norm at the apex of the *international* legal order. The problem of the identity and continuity of states was crucial evidence for the logical necessity of this construction. The creation and demise of states could become legally understandable only if there was a "higher" legal order outside and above the state, in existence before it and after it. That overarching order banished any legal vacuums between sovereignties. The argument constituted a radical attack on the absoluteness of state sovereignty, now construed as subordinate to international law.

Confronted with the ghostly impasse of state birth and state death, Central European jurists responded with a fit of philosophical rigor—as though it was simply a matter of thinking hard enough, of pursuing logic with enough discipline, of achieving sufficient epistemic purity. They transposed the theologically inflected problem of the origins of sovereignty into a problem of the premise of reasoning, the "point of departure" for thought and law. The argument was not that international law "came first" in a historical sense but that it came first in a logical one: as the problem of discontinuous sovereignty revealed, the world's legal order could only have theoretical coherence if international law's priority was a normative-philosophical presupposition.[87] The Viennese jurists digested the problem of sovereignty's *historical sequence* into one of *philosophical sequence*. Legal reasoning needed to begin on the premise of international law, not state sovereignty. International law—higher and prior, always already before and after—provided the continuity that breakable states could not. In making sense of the mortality of sovereignty, the jurists gifted the glow of its erstwhile immortality to international law instead.

As the geographic locus of emergent postimperial sovereignties shifted southward in the decades after World War II, jurisdictional priority remained a key thread, but with the narrative signs reversed. For many jurists from the Global South, the continuity and priority of international law were precisely the problem—and not the solution. In committing them to honor the concessions, liabilities, and obligations adopted by former imperial rulers, the postulate of legal continuity bound postimperial states into structures of economic subordination and stripped self-determination of its emancipatory potential. As they theorized and contested the law of state succession, jurists like the Algerian Mohammed Bedjaoui sought not to stitch together time to preserve order: the existing order *was* the problem. Where Kunz and his colleagues wrote transfixed by the experience and threat of state extinction, Bedjaoui and his wrote seized by the project of state birth.

Sovereignty as a Knowledge Problem (for Them and Us)

Priorness, priority, the a priori: this book probes the affinity between *jurisdictional* questions and *epistemological* ones. It is about the premises of rule, and of reasoning—about the foundations of law and ideas. It does more than explore their structural parallels: it studies their entangled history, as historical actors sought to ground and explain sovereignty after the eclipse of divine right. They had to fashion new sorts of coherence, sense, and unity if those things were no longer simply provided by God or nature. Remaking the legitimacy of sovereignty involved both styles of reasoning and styles of politics, and they evolved woven closely together. Rather than the straightforward slide from theology to law posited by Carl Schmitt, the argument structure here

has more in common with the German philosopher Hans Blumenberg's book *The Legitimacy of the Modern Age*. Blumenberg depicted modern doctrines of progress "reoccupying" positions once held by religion, forced to try to answer questions about the meaning and purpose of history "left over" from Christianity.[88] This book shows what happened when positivist understandings of law tried to "answer" the "questions" left over from the divine right and many-bodied glory of kings and emperors. They were large shoes to fill, heavy crowns to wear. Ill-equipped to play that role, modern legal thought found itself in a tangle of ideas and interpretations as it tried to reground sovereignty's a priori legitimacy, its nonderivation, its singularity, and its immortality. Kelsen's pure theory of law was only the most dramatic and revealing response to a broader problem: post-God, post-emperor, logical consistency was the only form of guarantee, the only form of truth, the only proof of validity, to which law had access. The legitimacy of law and the unity of state sovereignty could only be epistemological propositions now. Legal reasoning stepped in to suffuse the whole with logic, like grace; logic *made* the whole, ordering norms harmoniously into consistent chains of norms, providing a rational unity rather than a natural one, a holism of form rather than substance. The jurist, a mini-god, conjured order out of a profoundly disordered world.

This book presents the history of modern sovereignty as an attempt to *make sense*—as a form of sense seeking.[89] It is about the *search* for coherence, rather than any fixed or finished arrival points. It approaches sovereignty as a history not only of ideas but also of knowledge and method—a history of the *reach* for ideas (and often for ideas about ideas, just as sovereignty is law about law). The method, I argue, *is* the story: one of modern law seeking to make itself rational, seeking to reconcile contradiction, seeking formal logical coherence.

In his "Prospect for a Theory of Nonconceptuality" and other essays, Blumenberg suggested that metaphors granted access to that which could not be translated back (or forward) into pure conceptuality, that which could not be reduced into abstract language—those aspects of the human lifeworld that were "conceptually irredeemable." Through them, one might excavate that buried stratum of stimulations and needs that *generated* theoretical curiosity—the lifeworld and "catalytic sphere" that sparked metaphors, the "perplexity" for which they stepped in.[90] My path here is parallel: rather than take sovereignty as a particular *idea* or *thing*, I present it as a *problem*, a stimulus, eliciting ever-new attempts to solve, to theorize, to understand, and to order. Each constitutional configuration, like each academic theory, struggled to contain or tame its object, never quite finding coherence or fixing meaning, never quite achieving political or intellectual stability. In recovering that history, I am attentive to the affective *desire* for order and logical coherence, and the *experience* of its elusiveness, treating these things not as a kind of

incidental backstage to a "real" history of law or ideas but as the main stage of the story itself.[91] Precisely the "nonarrival" of the concepts gifted them their historical dynamism. *The Life and Death of States* is an intellectual history of theory *not* working, an intellectual history of an impasse—an intellectual history of not having the words.

If images of sovereignty were symptoms of perplexity, and that perplexity is my subject, *The Life and Death of States* suggests ways of reconfiguring methodological debates in intellectual and legal history. Neither an opposition between autonomous representations and social worlds nor one between theory and practice, or intellectuals and others, maps meaningfully onto the history here recovered.[92] This search, this grasping, spanned the academic and political domains: sovereignty as sense making was a shared project. The conjugation of intellectual and political order has a variety of modalities at different points of the story, but it is rarely a simple matter of one serving as the "context" for the other. The shared logics and themes across these domains—arrangements of law and fact, of priority and sequence, and of the real and the fictional—invite the language of reversibility, or multidirectionality: constitutions were modes of theory making, and, in reverse, concepts were order making. What is a constitution save a living theory of the state in question—the state distilled into abstract form, propositional form, the state on paper? Especially the iterative nature of the Habsburg constitutions (and the relentless debate about them) invites us to see them as the trying out of ideas, as rolling attempts to fix complex, shifting realities into stable forms that had a higher-order regulative and explanatory power than any individual moment (i.e., like theory!)—projects that worked to lift "the truth" out of the endless arc of historical becoming. At the same time, and confronted with the same dilemmas, legal scholars were propelled toward *constitutions for thought*, drafting and codifying rules of right knowing and right reasoning.

I thus present law as a form of what we can call public reasoning: a mode of reasoning about the public but also of reasoning publicly—of giving reasons, of laying bare the basis of a norm, of a decision, of the state; a form of argumentation in which the supporting chain of rationalization is pivotal. That image of law as public reason is internal to the history told. After the legitimacy of the state became untethered from older genres of right, reasoning itself—in the form of logical consistency and coherence—was asked to shoulder much of that burden. The longing to purify logic of contradictions and mystical leaps, and to purify jurisdiction of contradictions and gaps, came folded together and shared a common pathos in their limitations. This book, then, is a history of the "temporal life" of states in more than one sense: a history of sovereignty on this side of God, seeking legitimacy through the fallible endeavors of the human mind; of notions of sovereignty shifting in time, between a world of many-bodied emperor-kings and the advent of global

decolonization; and of states-in-time as a problem, for legal epistemology and for international order. For all these stories, Central Europe has many secrets to share.

Chapter 1 opens at the dawn of the constitutional era in the Habsburg lands. It shows how the elected delegates of the empire's first parliament became the first modern theorists of its sovereignty. They debated the legal status of the empire's historical lands and weighed it against new visions of the empire restructured into a federation of nations. The chapter follows juridical argument about the lands through the constitutions of the early 1860s, before chapter 2 turns to the dramatic restructuring of the empire in the Settlement of 1867. The Settlement pioneered a new form of dual sovereignty, straining the line between constitutional and international law. In the face of heated public controversy about the location and meaning of sovereignty, a new scholarly field—Austrian constitutional law—emerged at the universities to study and teach the same questions. The codification of states tangled together with the codification of disciplines. Here we meet Georg Jellinek—young, passionate, persecuted, and certain that theories of sovereignty needed to be completely rethought. Chapter 3 tracks debate about the legal status of both lands and nations through to the empire's collapse. As Czech-speaking politicians like Karel Kramář argued that the Kingdom of Bohemia had retained its sovereignty in suspended form, others proposed turning ethnic nations into legal collectives and granting them autonomy on a nonterritorial basis. Both visions of partial and dimmed sovereignty outlived the empire that spawned them.

Chapter 4 returns to Jellinek at the century's turn and places him at the center of epochal transformations in the history of legal thought. I show how Jellinek introduced neo-Kantian philosophy into legal science and recast its epistemological foundations, shaping the departures of his student, Hans Kelsen. In conversation with Freud and others, Kelsen pursued a "pure" legal science that dissolved the state into an abstract system of norms. While he worked, states began dissolving in an all-too-concrete sense: chapter 5 analyzes the legal ends of Habsburg sovereignty and the construction of a new order in Central Europe. Ideas forged in the fight over imperial sovereignty now became resources for international claim making, with Czechs and Hungarians depicting their states as the legal heirs of their historical kingdoms. As peacemakers struggled to determine which states were new and which were old, Kelsen and his Viennese circle of collaborators thrashed out a legal theory capable of grasping the birth and death of states on a philosophical level—the subject of chapter 6. Their system, the pure theory of law, offered an explanation for the ultimate origin of law and reconfigured the relationship between sovereignty and international law. If chapters 5 and 6 explore how political actors and scholars made sense of the end of empire in Central Europe, chapter 7 follows these ideas and arguments into the era of global decolonization

after World War II. A new round of claims about the resurrection of pre-imperial sovereignty echoed through the postwar international order. Again, one questioned how states live and how they die in international law. The chapter's final section shows how these problems "returned" from the Global South to Europe at the end of the Cold War, with the implosion of the USSR and a new wave of old-new states across Central, Eastern, and Southern Europe.

Readers wishing to trace the story of modern legal thought can move from the second half of chapter 2 to chapter 4 and to then chapter 6. But the book's structure, swinging back and forth between scholarly and political domains, is integral to its argument, showing how states and the ideas designed to capture them were reconfigured in parallel. Each wing reflects new light on the other: we see the worldly strains of sovereignty rippling through systems of philosophy, and we see searching questions about the real and the true playing out in public life. In smudging the line between making states and making knowledge, this book suggests new ways of writing the intellectual history of international order.

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