

Constituting Modernity

The Epic Horizons of Constitutional Narratives

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THE ROMANCE OF THE CONSTITUTIONAL SELF

The cultural dilemma for a constitutional self predicated on Kantian principles dramatically emerged in the period between the wars. Perhaps it has been best described by Georg Lukacs who saw in it the apotheosis of a "power-protected inwardness" rendering null and void whatever lucidity remained in Kant's notion of public enlightenment. This newly formed juridical self provides the foundation for a "decisionist" ontology whose romantic nationalism replaces theology with secularized state law. The sovereign nation thereby does away with its theological-political pantheon (monarch, church, and estates), while continuing to buttress its claims to legitimacy on a simulacrum of the mythical framework political theology provided. The constitution of self-enlightened modern states therefore depends both on the juridical constitution of public selves (through which certainties of class, status, and ethnicity give way to a purely formal calculation of rights), as well as on a certain mythical residue thanks to which this merely formal incorporation may continue to lay claim to critical substance and historical legitimacy.

Constitutions are now the *lingua franca* of written law, the public documents by means of which nations will themselves into being. The functional task they face is one of producing a differentiated or pluralistic identity out of distinct peoples, religions, and traditions, as well as providing the medium by means of which newcomers, literate and illiterate alike, are integrated into the body politic. Within this framework, that creolization of cultures which goes by the name of multiculturalism does not so much contest the authority of the *Rechtsstaat* as service it. Typically, the constitutional nation creates a bureaucratic class whose task it is to implement liberal modernity's peculiar version of republican values, even as it raises its symbolic authority monarchically above federalist

principles. However, the universalization of human rights, whose guarantor the nation-state takes itself to be, can only take place within an evolving collective identity. This identity eliminates – “sacrifices” in a Hegelian sense – particularist communities to the social whole, while maintaining an idealistic posture toward a national culture. Insofar as this idealism contains a welfare-orientation toward property rights and ownership, taxation, and equality for women, children, labouring adolescents, and the aged, it acts as an instrument that contains a social charter without explicitly naming it as such.

The historic debate on the Canadian constitutional referendum (Charlottetown Accord, 1992) provided an unprecedented opportunity for a deepening of a modern human rights discourse in the public sphere – particularly insofar as such rights find themselves inflected by the conditions described above. On 13 January 1992 the Canadian national newspaper, *The Globe and Mail*, published “A Constitutional Primer,” an eight-page supplement on constitutional reforms in Canada. Pierre Elliott Trudeau’s repatriation of the constitution was there archly scorned as a “magical mystery tour,” and the proposed amendments similarly described as an exercise in mystification. This is not surprising when we consider that the separation of the question of aboriginal rights (as well as the social charter) from the question of “distinct society” status for Quebec guaranteed the banality of the civics lessons these amendments invited. The segmentation of rights, laws, and culture that surrounded discussion of both the Meech and Charlottetown accords ensured that the logic of Canada’s particular historical development would be perceived as an irrational legacy of an aberrant, unfinished past. It was assumed that the only impediment to Canada’s taking its place on the world-historical stage was its inability to produce technocratic-consumerist solutions to that resistance to integration evinced by interests at once traditional and particularist. This is the late-capitalist message of bread first and rights later – an ideologically coloured worldview that passes as progress. Any discussion that included attention to Canada’s history of institutionally sanctioned racism was neatly jettisoned: Francophobia, immigration policies toward Jews, the internment of Japanese Canadians and confiscation of their property, street violence against dark-skinned peoples, the treatment of native peoples, all this was absent from the debate.

Another historical example of nation-building tied to constitutional authority is at hand if we examine the debates over the establishment of the Basic Law of Germany in 1948–49. The issue of a federal system and a democratically secure and culturally integrated Germany was mediated through the question of whether Germany should be considered a protectorate or an ally. The debate was resolved (or rather effaced) in favour of a culture of stable consumerism, just as today questions of unification (whether in Germany,

Canada, or the former Soviet Union) are treated in terms of how satisfied “the people” are with their standard of living, and how much they are willing to forget the issues of the past in order to maintain a culture of welfare and affluence.

The logic of building a constitutional self depends upon the integration of culture (civilization in its particularistic historical forms) with society in both its economic and communal forms, and morality in its atomized or absolute forms. As a consequence of the erosion of the self in modernity, customary-experiential norms (Kant’s *Sittlichkeit-Erfahrung*) are represented by the trials of the power-protected individual. It falls to civilly administered society to “work through” these problems.¹ The economic and technocratic solutions to the problem of community formation arising from such a “society” reveal the failure of the constitutive power of Enlightenment ideals to transcend the pathogenesis of its own origins. Seen from this perspective, the struggle over who controls and makes legitimate the historical narratives that enable us to imagine, write, and apply constitutions is not only a political question that becomes theoretical when viewed in terms of the finality of the question of judge-made law, it is also a question of how to understand a fully participatory activity of social legitimation and self-adequation that would not allow itself to atrophy in a process of *étatisation*. Here it is instructive to recall that the law of “state of emergency” deployed by the Nazis – a law resulting in the disappearance of even a semblance of a free public sphere – was enacted precisely in order *to protect the nation and state* against the threat of anarchization. The history of official collaboration of legal professionals and intellectuals in the establishment of the one-party state in prewar Germany is a well-known object lesson in modern tyranny. However, it has been less readily perceived that the underlying reality was the accomplishment of a dictatorship over everyday life achieved by means of a “revolutionary” elimination of federalism and the establishment of a state whose legal sovereignty was – in principle at least – global.

Canadian history offers a useful counterpoint to this state of affairs, instructive both for its similarities and its differences. Trudeau is famous for having accused of intellectual treason those who put nationalism (whether of Anglo or of French separatist vintage) above the rights of particular historical actors. This stance was itself grounded in a cultural ideology that took shape between the wars, “a transitional period in world history.” Trudeau’s view that the nation is the “guardian of certain very positive qualities . . . [such as] cultural heritage, common traditions, a community awareness, historical continuity, a set of mores” is based on the subjective culture of the inward-looking person who is “more private than public.”² This inwardness is a refuge for instinct and primitive self-centredness – according to Trudeau, pretty much all we have left. In 1971, Trudeau chose

to invoke the War Measures Act to defend a federalist concept of a constitution. However misguided this move might have been (and we are entitled to ask what sort of “inwardness” would remain in the face of such measures), it is nevertheless clear that the emergency act was invoked in the name of federalism as the guarantor of a polyethnic culture, and not in the name of the reactionary ideology of national sovereignty. That said, the question which Trudeau’s functionalist solutions beg is as follows: Do the very mechanisms by means of which Canadian federalism guarantees the integration of cultural and ethnic diversity not at the same time guarantee the political inconsequentiality of ethnicity? That is, does the formal equality guaranteed to diverse cultures by the state not empty those cultures of their historically elaborated social and political functions, leaving them with nothing but a purely imaginary or specular significance?

THE CONSTITUTION AS A GATEWAY GENRE

The romance at the heart of the utopian realization of constitutions allows that constitutions are not symbolic acts of governments but are virtual forms of reality. They are forms of participation in which citizens judge governments. As such, they can be considered as forms of participatory epic. They are perhaps best described in literary-linguistic terms as threshold documents that show where the limits of power lie. They reveal the border separating the public agora (in which constituted public selves can become active in protecting their individual and collective rights) from a consensus-forming private sphere whose borders cannot be reached constitutionally. The partitioning of the self into separate categories of private and public selves can be visibly recognized in the compacts and agreements that are offered up in the name of official consensus.

There is an important reality-forming aspect here, one which contains Kantian essentials: a condition of dialogue. Kant’s emphasis is not on officially constituted selves, but on the constitution of public selves, and the embodiment of these selves in dialogical self-governing activities.

It is the apparent impossibility of preserving these same activities in juridical and political institutions that informs the critique of the administrative-order state that can be discerned in any number of thinkers working in Germany between the wars, Hannah Arendt and Theodor Adorno being but two examples. But it is Carl Schmitt who best fits Lukacs’s and Thomas Mann’s image of an imperial self who cannot make the transition from law to emancipation from the state without giving in to sublime resignation about the collapse of Eurocentric values.³ Schmitt’s cast of mind was critical, destabilizing, and

disenchanted – he was, in short, a perfect modernist who surrendered to an unquenchable desire to interpret the law. The despair lurking just beneath this positivist legalism manifests itself as a crisis regarding the masses: “The crisis of the modern state arises from the fact that no state can realise a mass democracy, a democracy of mankind, not even a democratic state. Bolshevism and Fascism by contrast are, like all dictatorships, certainly anti-liberal but not necessarily antidemocratic.”⁴

In German, Schmitt’s book is entitled *The Intellectual-Historical Plight of Contemporary Parliamentarism*, and as a cultural critique of democracy it is an attempt to provide a high-minded, trans-moral critique of Weimar politics.⁵ In his critique of the openness of Weimar, he looked at the modern age as a dead montage of specious democratic impulses and enfeebled legalisms. According to Schmitt, modernity after World War I maintained an image of legality and republicanism by substituting information for knowledge, and by creating the techniques to publicize the deeds of the politically active agents. Schmitt sees through the myth of public opinion, but in doing so he equates the public sphere, or sociality, with the intellectual consequences of liberal publicity, that is, the perils of party power and voting. Schmitt saw the bourgeois public sphere as inimical to his belief in the charismatic power endowed in legal guardians of the law (a politicized judiciary that could determine who was friend and who was enemy, and a sovereign authority elected by “the people” and who could dissolve parliament in an emergency). Any concept of the self grounded in human rights is therefore absent from his work.⁶

Schmitt’s arguments notwithstanding, a language of human rights is emblematic of the constitutive acts of autonomy, and cannot be limited to official discourses about emergency powers.⁷ The Kantian Wall that guards the public sphere from institutional co-optation stands at the juncture of melancholy and freedom where the critical spirit cannot comply with the rule of bad laws. The notion of a public self capable of self-constituting acts of rebellion against the legalistic-technocratic “manufacture of consent” cannot exist in Schmitt’s world of legally steered reason. Of course, the critique of a manipulated public opinion existed on the left and the right, but Schmitt’s scorn for liberal parliamentarianism requires the weakening of the right to publicity enshrined in the at once normative and polyvalent potentialities built into language itself. His positivism cannot account for the process of inner colonization required of those who must internalize the charismatic power that teaches obedience to the state.

The specific engagement with the plight of human rights in the extraparliamentary documents of our times is a legacy of Enlightenment philosophy’s confrontation with the status of persons. Those documents open the officially constituted democratic social forms

to scrutiny by showing how social formations have become asocial and have been internalized as normality – that is, as officially constituted imaginary legal selves inclined to justify authority and states. Within this “genre” of juridically engaged literatures it would be necessary to include taboo-breaking essayistic novels like Robert Musil’s *The Man without Qualities*, as well as seditious works like James Joyce’s *Ulysses* or Jaroslav Hašek’s *The Good Soldier Schweik*. The genre arguably comes to fruition in Franz Kafka’s stories and novels, where the law is actually the subject of almost every work. Bertolt Brecht’s direct attacks on bourgeois law and its notion of the imposition of emergency measures as the basis of both capitalist and fascist ideologies provide one of the clearest aesthetic examples of an examination of the transformation of politics into state-sanctioned law. Finally, we would have to include postwar works like Hannah Arendt’s *Eichmann in Jerusalem* or Bruno Bettelheim’s *The Informed Heart*. All these works can be described as anti-epics whose political kernel is revealed in their concern to preserve the human character of rights claims against technocratic legalism.

If epics are the record of a struggle of memory to retain its connection to the speakable past, then we should recognize the modern epical-social impulse: a desire to dislocate historical time (with its unbroken, seamless connection to the authority of the victors) in order to introduce situations that affirm particularity, illegality, and the illegitimacy of means. In this intervention, the efficacy of abstract justice is denied and the connection of natural rights to natural history is broken.⁸

Historically, we are describing a genre that isolates objects in order to show their internal laws: everything has a history of its own. The interrelationship of many histories and many cultures is disclosed in the epic impulse to be a storyteller who tells the truth in times of emergency, and who stands outside of the law, not within it. The storyteller finds ways to relocate his or her audience, to reposition their perspective in such a way as to displace the self-evidence of the present. In that atmosphere of forgetting in which modern listeners bathe, the storyteller’s narrative cannot fail to take on the lawful – rather than legal – tonality of parable. Such narratives represent a kind of parody of customary forms of knowledge wherein canonic laws and traditions are distanced but not extinguished, even as their deterioration into positive law is revealed.⁹

FORENSIC THERAPY AND MASTERING THE PAST

Carl Schmitt’s work and its relevance to understanding the historical plight of European civilization in the inter-war and postwar periods should be placed within the context of

a larger counter-republican conservatism that lasts well into the twentieth century. It surfaces in a variety of antiromantic forms in the struggle of conservatism to separate itself from either a Nietzschean or Spenglerian pessimism. This restless hostility toward modern democracy takes many forms, for example Weber's historical sociology or the post-Frankfurt School critique of modernity as advanced by Jürgen Habermas, Claus Offe, or Oskar Negt and Alexander Kluge. The authority of the critique derives from a rereading of Marx, Freud, and Hegel, and is, as in the case of T.W. Adorno, worked through a profound affinity with Kant. The inner core of this critique of modernity is informed by the dialectic of the secularized Enlightenment in its post-Kantian attempts to establish the Rule of Law and the government by men as substantially identical projects, namely, to establish Kant's utopian "Universal Peace with Cosmopolitan Intent."

Schmitt's jurisprudential, cultural role is significant, if only in the extent to which it provokes a recognition of an intellectual type expressive of romantic ideology. It is precisely this romantic ideal that is portrayed in Thomas Mann's *Dr. Faustus*. Mann's work describes the subject who longs to leave subjectivism and theology behind in order to glimpse their "beyond" in the world of objects.

Schmitt's hostility to democracy (particularly in its parliamentary forms) is too complex for any exhaustive treatment here, but his struggle for a definition of a jurisprudential European identity required more enemies and adversaries than either the unequal struggle between Germans and their internal foes, the Jews, or between Germans and their external enemies, the rest of Europe, could affect. Schmitt's real enemies were none other than those who could not meet the ideals of Romanized-Christianized Europe. They were the cultural Bolsheviks, the liberal parliamentarians, the positivist lawyers, and all the compensatory mechanisms in bourgeois democracy that compromised the superlegality of legal revolutions (the Reich) and the granting of emergency powers to sovereigns.

Speaking in the aftermath of the genocidal fury of the Nazis' final solution, Schmitt comments on how the "enlightened revolutionaries" of 24 June 1973 protected against *pouvoir constituant* becoming *pouvoir constitué* (Article 28 protects the constitutional order of the Federal Republic).¹⁰ Schmitt is apparently more concerned with the potential triumphalism of constitutional laws that will "subjugate future generations" than with whatever problems might arise for human rights interests by reason of the German Basic Law of 1948. He fatalistically remarks that the concept of world patriotism lurking behind such a triumphalism is beyond the capacity of mankind because it can only be incorporated by means of a concept of legal revolution. His apologia for his own "existential"

position in regard to the deadly capacity of humanity to eradicate oppositions is that our dependence on the model of the French Revolution for both legal and illegal revolutions – and the impediment to the establishment of postrevolutionary models of legality that that dependency presented – reveals a weakness in humankind for asymmetrical structures of legality where adversaries are excommunicated from the very humanity that is defended on the basis of a “patriotism of the species.” The irony of the analysis lies in what it reveals about his own Gnostic attitude toward the libertarian-constitutional roots of participatory processes.

Schmitt, along with other believers in the hegemonic state in the twentieth century, abandons any hope of reviving the Kantian legacy of the autonomous ethical individual. He is left with astute, worrisome theorizing about just and unjust wars, about the absence of a concept of the just enemy, and with vague Spartan lamentations about the end of the epoch of states.¹¹ By grounding his worldview in a Eurocentric view of the decline of civilization – his theories are marked by the strong explanatory power of arguments of historical decline – we can easily see that his immanent analysis of legal doctrines leaves behind any sense of the progressive enlightenment of historical peoples.

Schmitt’s work, and the recent revival of interest in him in the United States and in Germany, can be understood by placing him within the debates about understanding the experience of a “loss of reality” since World War I. Schmitt continues to trace the loss of legality as synonymous with the loss of our ability to trace reality back to the *jus publicum Europaeum* which is his imaginary juridical meta-state. However, his own “plight” does not lie so much in disappointment over not realizing the meta-state, as in wanting to equate the legal state with “the cultural edifices built by the European spirit” whose “significance is no less than that of those great works of art and literature usually identified as the sole representatives of the European spirit.”¹² His method of analysis reduces historical-cultural works to documents, thus extinguishing their dialogical and interactive reality. In particular, it excludes consideration of the possibility that the “cultural edifices” may not adhere to the spirit of the age, but speak against it. It is important, however, to accept Schmitt’s stricture that law cannot stand apart from cultural creation.

But here we are not focusing on art, or aesthetics, but on law and federalism, and how modern societies interpret and decide rights and law. Schmitt’s inability to provide us with a culturally sensitive context for the Basic Law of 1949 is instructive in its absence. Let us see why.

The rebuilding of the German state after the two wars reshaped thinking about democracy, but in doing so it also situated constitutional debates and the crises of federal-

ism within the cultural contexts of historical decline. Thus it is imperative to understand how the politics of historical decline obscure the dialogical conditions that form the basis for the reception of law. It is only by doing so that we can render problematic how the state can claim to speak for the future.

The Leviathan modernist state produces wealth but also disinherited orphans of the Enlightenment. The German student of state power Reinhart Koselleck describes in his 1959 book, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*, the structures of circularity and barbarism mediated by bourgeois "utopian self-assurance." In their Enlightenment phases, nations that emerged from feudalism into the forensic utopia of Roman law obliterated the dissonances and asymmetries of premodern European cultures by means of the juridical formulas of equality.¹³ Koselleck's description of a postwar period of European reconstruction, a period under whose shadow we are still living, might be used as a norm for a "post-theological age" where we can neither "reconcile nor justify politics and morals." We are, he writes, "sucked into an open and unknown future, the pace of which has kept us in a constant state of breathlessness ever since the dissolution of the traditional *ständische* [estate] societies."¹⁴

At the same time that Germany finds moral reconciliation and economic recovery in the Basic Law, the utopian search for a nonalienated "ethics" whose political dimension would be irreducible to Soviet-style communism or consumerist economies was expressed by Ernst Bloch in his *Natural Law and Human Dignity*. Bloch's text, which places social law against the loss of natural law, offers an interesting counterpoise to Schmitt's work. Bloch remarks that whereas "social utopian thought directed its efforts toward human happiness, natural law was directed toward human dignity."¹⁵ His question of questions is: Can there be both an art of ruling and an art of culture-making that together form an expression of hope during epochs when revolutions are betrayed and when the weak have no will to resist?

The Blochian-Kantian ideal wants us to walk with an "upright stance" – to go beyond Luther and toward Thomas Münster. Is there a nonalienated, critical standpoint that accompanies this stance? Bloch's answer was to distance himself from a war-created self that turned the "ought" of Kant's moral imperative into a legal Reich or into Stalinism. Art had always distanced itself from barbarism, but in modern times it must likewise distance itself from the rationalizing impulse in order that it might rescue the self from the barbarity of what Weber termed the charisma of instrumental ends.¹⁶

It is therefore from the perspective of a literature committed to illuminating natural rights that Bloch viewed the separate horizons of law and political power (the ultimate

conflict of wills residing in the “drive toward calculability” of modern law). He recognizes that the closer the two horizons come to one another, the more distant, as with all ideal forms, they become. Thus, the more the Kantian question of “hope” recedes from our historical standpoint, the more legalistic does the horizon appear. The question, unresolved in the postwar period of judicial and ultimately incomplete de-Nazification, was whether the war really brought an end to the culture that produced this false self-system.¹⁷

DR. FAUSTUS AND THE LAW OF MUSICAL REGRESSION

In Thomas Mann’s *Dr. Faustus*, which appeared virtually in the same year as the establishment of the Basic Law, the artist Adrian Leverkühn boldly creates a false-self system constructed from his insatiable need to redeem art from its isolation from community and the people. His quest is to build “an art without anguish.” His inability to master his aesthetic impulses illuminates how Mann indicts his own generation’s nasty habit of forgetting the past; it is also a statement that defines his art as a personal project of constructing a modernist text that would never allow him to forget his own past. Mann’s modern epic was completed at the end of the war, and in retrospect it asked much the same question that the Israeli court asked itself in its refusal to convict the simulacrum of Ivan the Terrible, John Demjanjuk: What will be put in place of culture if the institutions of culture have been compromised and purged of all human connections and humane responsibilities? Here the implication is clearly that subjectively depoliticized artistic texts are not human utterances. The “community-forming belief” that subscribes to the notion of the end of history is bitterly described:

A jurisprudence that wished to rest on popular feeling and not to isolate itself from the community could not venture to espouse the point of view of theoretic, anti-communal, so-called truth; it had to prove itself modern as well as patriotic, patriotic in the most modern sense, by respecting the fruitful *falsum*, acquitting its apostles, and dismissing science with a flea in its ear.¹⁸

A clearer statement about the role played by the Rule of Law in modernity could not be found: Mann’s work refuses to defend the autonomous self; his epic does not produce an image of a self that has mastered the past, but shows how both the naively epic voice of the narrator and the cynical voices of the musicians of the soul are rooted in a *jurisprudential logic* that has penetrated into intimate human emotions with a ruthlessness hitherto unknown. Aesthetic self-consciousness-in-the-making masters its own pathogenic irresponsibility while producing from second nature dissonances that are harmonized by the presumed unity of the work of art as a cultural artefact.

Mann's epic not only comes to terms with the author's own history, it also bears witness to the reality of the collective myths of his times. At the same time, *Dr. Faustus* bears witness to the loss of artistic powers of representation when freedom of expression has itself become a self-justifying abstraction insulated from "really existing reality." Mann's work, however, does not only document aesthetic estrangement from the subject matter of art, but it also documents the feelings of the world-historical strangers who have been left unprotected from the law. The loss of home, the dispersion of peoples, disenfranchisement, expulsion, expatriation, exile, resettlement, asylum: Mann gives us an image of the nomad as an emblem of modern consciousness. In a manner that parallels those idioms of abstraction characteristic of prewar art (Cubism, collage, etc.), Mann represents the new culture of homelessness throughout Europe by mediating exile through the musical inwardness that longed for a release of political energies.

Art, the law, and modern institutions all face a reality that speaks like ideology, and ideologies that look like reality; this becomes the normative context for the unequal relationship between art and reality, what is often called the loss of art's representational capacities. Thus the continuing tendency on the part of post-Enlightenment attempts to "master the past" without an ethical norm or standpoint to make of the epical traversal of time and space something closely resembling a museum tour. In like manner, the search for an adequate human rights discourse is condemned to find its historical models locked, in the words of Ernst Bloch, in a "museum of antiquities."

A bifurcated, power-protected legality gave us reason to suppose the entire world was "totalitarian." The postwar fascination with totalitarianism, whether in Orwell, Arendt, or wishful thinking about the end of ideology, failed to constitute an imaginary constitution of the human-and-natural-rights nexus. Roman law provided the juridical constitution of bourgeois society with a functional *imaginaire* which, pruned of symbolism and ritual, would allow transactions to take place on the basis of the one-sided rationality of legal institutions, but this did not provide an acceptable politics of human rights that would allow people to create self-reflective, self-critical, and historically comprehensible judgements of the past. The pervasive and almost aphasic loss of meaning in Mann's *Dr. Faustus* becomes, then, the "democratic deficit," when individuals cannot overcome the guilt over their estrangement from the cultural objects in their own history. Mann counters an archetypal "Schmittian" world order by submitting it to the test of human understanding, but he does not argue the case for a different future.

A historical-intellectual context for federalism and a constitution-embedded human rights can be conceptualized through the Kantian dialogical framework that underlies the German Basic Law, a constitution that became the model for other nations in the modern age (Spain and Japan, for example). However, we risk naïveté if we ignore the extent to which the complementary logics of the market and the constitutionally protected state compromise that framework.

In modernity the social contract that would assure us of more than recipe-oriented positive law requires that we imagine law as more than authority, power, instrumentality, and domination. It has been characteristic of post-Enlightenment literature not only to question law, and take up a libertarian-insubordinate attitude to states (freedom from authority) but also to *particularize* the law as an obstacle to understanding. What is, on one side of the equation, law, is, on the other side, the broken identification with law. Dostoevsky, whose works are the deepest fractures in any monolithic utopia of natural rights based on the present, declares: two plus two does not equal four, but equals minus one – the elimination of the person.

In sketching certain historical-philosophical attitudes that take law as the high road to partisanship at a time, 1949, when the establishment of the German Basic Law literally brought Germany into a new federation with Western constitutionalism, I have claimed that this is one of the epical events of our time. But it is not epical in the heroic sense that Kant abjured. It is epical because today, even though it is a “monument” of cultural creation, it is already lost in time and space: for epics – that is, the recordings of experiential norms, taboos, and myths by means of which the law maintains its relationship to collective memory – cannot exist in any credible aesthetic form that represents the public sphere. The lawmaking power of myths and epics are superseded by the ravages of political struggles carried out in the name of a legalism to which real persons are subjected. Insofar as modernity transforms the epic sojourn into Kafka’s law of process without end, Kafka is our modern Homer.

Seen from the perspective of the works of Weber or Mann, Freud or Kafka, the Basic Law is certainly a kind of coda placed at the end of two world wars. The companion work to the Basic Law is Thomas Mann’s *Dr. Faustus*. Insofar as this novel reminds us of the unreliability of historical memory, it recalls to us the incapacity of modern discursive arts to create a structure in which a formal literate document, law, can communicate the shape of the collective destiny of a people.

Mann's target is the very idea of an Enlightenment self that believes in the ideals of diversity, polyphony, and individuation in the arts, but is unable to imagine or connect this polyphony to a pluralism touched by human rights. For when legality without law is transformed into a jurisprudence whose sole guarantor is the State, then legitimacy (*Gesetzmässigkeit*) becomes righteousness without right, natural law without civility.

To be sure, we live in a world where codes and constitutions shelter the principles of modernity along with the rights of private and separate individuals: constitutions built in the name of an evolving federalism maintain the bourgeois individual as an ideal type for this kind of reality building, while at the same time undermining the reliability of this person as a model for peace or coexistence. In addition to pointing to the dangers of idealizing this New Person as the adequate bearer of law, I have argued that constitution-building, which is primarily an attempt to fulfil the promise of Enlightenment – progressive historical consciousness – is also an attempt to stop time. When law abandons responsibility to its past, it works in collusion with the state and its economic steering mechanisms to deny such continuities that organize our experience of collectivity.

We might go so far as to say that constitutions are those myths – peculiar to our modernity – which enshrine irreversibility as a principle of historical movement. As such, they display a tendency – constitutive rather than contingent – to remain indifferent to the plight of those peoples who live outside of history, whose destinies remain, as yet and perhaps always, unnarratable.

We can end on one of Mann's dissonantly utopian references to his age's inability to find a political form that is suitable to a people's particular needs. The narrator of the life of Adrian Leverkühn notes that he has stopped writing on 25 April 1945 while still arguing for the credibility of some kind of patriotism, but *not* of this kind: "Ah it is no longer in question that this beaten people now standing wild-eyed in face of the void stand there just because they have failed, failed horribly in their last and uttermost attempt to find the political form suited to their particular needs."¹⁹ Seen in retrospect we might say that the American federalist experiment, and the example of the German constitution, both of which are based on republican principles steeped in Rousseau, Paine, and Kant, are all that we have for a human rights-based politics. Yet the "particular needs" that underlie participatory democratic forms remain as vulnerable as ever.

For Mann, along with other intellectuals of his generation (in particular those who saw the continuities of German history through the lens of the aestheticized politics of the National Socialist regime), there could be no positive answer to the question of how legal continuity with the past can be constitutionally realized. Mann's critical cynicism is a

more accurate measure of the future than views which assumed that by simply constructing a constitution, problems of the past – both political and cultural – would cease. At the same time that the cultural-experiential abyss was opened by the failure of Cold War negotiations to establish a peaceful sovereign state system, Mann reopened the Kantian question of the positive law's excommunicated moral dimension. Perhaps his was a surer indication of the future than assumptions that economic order would cure the past and redeem the present.

NOTES

1. See Hans Mommsen, "Social Democracy on the Defense," *From Weimar to Auschwitz* (Princeton, NJ: Princeton University Press, 1991).
2. Pierre Elliott Trudeau, "New Treason of the Intellectuals," *Federalism and the French Canadians* (Toronto: Macmillan, 1968), 117. Trudeau cites the Catholic humanist Jacques Maritain, as well as Julien Benda and Lord Acton, to buttress his functionalist, rationalist, existential approach to power. The pragmatic modernism in Trudeau's view of power lies in his belief that the enemies of reason are superstition, magic, and nationalism. Bureaucratic centralism can serve as a buffer against provincial narrowness.
3. During the Weimar and Nazi periods, and well into the postwar period, Schmitt discussed the nature of constitutional authority. The recent revival of his work in the face of the republican spirit of the Basic Law is interesting not only for intellectual historians of law and the legitimacy of power, but seems to take on a strange urgency because of the collapse of sovereign states and the rise of nationalism. His work has an appeal that goes beyond the archives. See the following issues of *Telos*: no. 71 (Spring 1987); no. 72 (Summer 1987); no. 83 (Spring 1990); no. 85 (Fall 1990). In his attempts to characterize the "plight" of jurisprudence, Schmitt bemoans the lack of a European jurisprudence or state law that would enable sovereignty to be strengthened through the rationality of law. This attempt to create in written law a trans-ideological documentation of the human spirit is a continuation of Schmitt's antagonism toward parliamentary politics. For a study sympathetic to Schmitt's attempt to provide a super-constitutional authority to the German Reich, see Joseph Bendersky, *Carl Schmitt, Theorist for the Reich* (Princeton, NJ: Princeton University Press, 1983).
4. Carl Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge, Mass.: MIT Press, 1985), 16 [from the 1926 second preface].
5. See the introduction by Ellen Kennedy.
6. Bendersky, 107-12.
7. See Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, Mass.: MIT Press, 1989). This study appeared in German in 1961 and is therefore directly relevant to the historical contexts of the creation and reception of the Basic Law, the subject of this essay.

8. See Robert Hullot-Kentor, "Introduction to Adorno's 'Idea of Natural History,'" *Telos*, no. 60 (1984).
9. See Walter Benjamin, "The Storyteller," *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York: Harcourt, Brace and World, 1968).
10. Carl Schmitt, "The Legal World Revolution," *Telos*, no. 72 (Summer 1987), 84ff.
11. See the discussion in G.L. Ulmen, "American Imperialism and International Law: Carl Schmitt on the US in World Affairs," *Telos*, no. 72 (1987).
12. Carl Schmitt, "The Plight of European Jurisprudence," *Telos*, no. 72 (1987), 43.
13. Reinhart Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, Mass.: MIT Press, 1988) 184-85.
14. *Ibid.*, 3.
15. Ernst Bloch, *Natural Law and Human Dignity* (Cambridge, Mass.: MIT Press, 1986), xxix. Also see the arguments against Schmitt made in Hans Blumenberg, *The Legitimacy of the Modern Age*, trans. Robert M. Wallace (Cambridge, Mass.: MIT Press, 1983). The original was published in 1966 while Schmitt (1888-1978) was still alive.
16. Bloch, 248.
17. *Ibid.*, 183-85.
18. Thomas Mann, *Dr. Faustus* (New York: Random House, 1948), 367.
19. *Ibid.*, 482.