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ON 'DIVINE DEMOCRACY' AND 'CORPORATE BODIES' *

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ABSTRACT
This essay seeks to draw from Miguel Vatter's *Divine Democracy: Political Theology after Carl Schmitt* some implications for thinking about the legitimacy of corporate power. It takes up the trajectory of Vatter's argument about the significance of the theory of representation for political theology and his placing of Carl Schmitt in relation to the pluralist thinkers of corporate bodies on the one hand, and the centrality of corporate personhood to Ernst Kantorowicz's genealogy of liberal governmentality on the other. In doing so, I hope to highlight some of Vatter's novel contributions to the field of political theology, whilst also drawing out the usefulness of his work for thinking critically about corporate power and its legitimacy as parallel questions to the concerns with contemporary state power.

KEYWORDS
Political Theology, Corporations, Schmitt, Kantorowicz

INTRODUCTION

In his book *Divine Democracy: Political Theology after Carl Schmitt*, Miguel Vatter highlights the way that the two contemporary approaches to the work of the infamous jurist go in opposite directions.[1] The first attempts to separate Schmitt's "political theology" discourse from what is considered to be his main contributions to jurisprudence and political science—his constitutional theory and theorisation of "the political."[2] From this perspective the "bad Schmitt" of political theology—with his conservative absolutism and decisionism—is distanced from the good jurisprudent and theorist upon whom it is still useful and legitimate to draw. The

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[1] Miguel Vatter, *Divine Democracy: Political Theology after Carl Schmitt* (Oxford University Press, 2021).

[2] Vatter, 22.

second approach argues that these "two Schmitts" cannot be separated and that his jurisprudence is fundamentally tainted and run-through *because of* the polemical nature of political theology that is anti-liberal and anti-Judaic.[3] However, as Vatter points out, part of the problem with both of these approaches is that they fail to acknowledge the explicitly double approach of Schmitt's *Political Theology* itself—encompassing a "scientific" meaning to the term "political theology," which refers to a method of the sociology of political ideas, as well as a "polemical" discourse.[4] Vatter's proposed way of "travers[ing] and join[ing] together" the two meanings of political theology in Schmitt gives rise to one of the fundamental contributions of Vatter's book as a whole: understanding the nature of representation as central to the field of political theology.[5] His hypothesis is that both aspects of political theology—the "scientific" and "polemic"—"arise from what Schmitt calls the problem of 'political unity and its presence or representation.'"[6]

In placing representation at the centre of the field, the question that Vatter attempts to answer is: given political theology's concern with the mechanism of legitimising power, is it possible to have a democratic political theology?[7] The stakes in this enquiry are high, because if "political theology cannot be democratic...then raising the question of the legitimacy of liberal democracy risks the conclusion that liberal democracy is in a permanent crisis or is caught up in a performative contradiction."[8] Political theology, therefore, is not only about the concerns of legitimacy but it is also the device through which the contradictions of the legitimate exercise of power are mediated or reconciled. Vatter's argument is that, after Schmitt, several significant 20th century political philosophers attempted to work through a democratic political theology by disentangling it from sovereignty. Whilst aspects of this rejection of sovereignty could be accounted for on religious grounds, Vatter's more important point is to show "how the transposition of certain theological concepts and teachings into the sphere of law and politics leads to the kind of concrete institutions and practices that make up modern democracy."[9] The 'after Schmitt' component of the book (Chapters 2 to 5) demonstrates this in relation to representation (following Eric Voegelin), universal human rights (following Jacques Maritain), secular liberal government (following Ernst Kantorowicz) and public reason (following Jurgen Habermas). In doing so, Vatter seeks to highlight

[3] Vatter, 22.

[4] Vatter, 22; Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: University of Chicago Press, 2005).

[5] Vatter, 23-24. Vatter contrasts his approach to those who focus on Schmitt's concept of "constituent power," such as Antoni Negri, Chantal Mouffe, Andreas Kalyvas and Hans Lindahl.

[6] Vatter, 23 quoting Carl Schmitt, *Political Theology II: The Myth of the Closure of any Political Theology* (Polity, 2008), 72.

[7] Vatter, 4-5.

[8] Vatter, 4-5.

[9] Vatter, 5.

the continued and "overdetermined role" of Christian theology in contemporary political and legal theory.[10]

My aim in this review essay is not to navigate the various aspects of these articulations of a democratic political theology without sovereignty. Rather, as someone engaged in a critical thinking of *corporate* power, I seek to take up a particular trajectory of Vatter's argument about the significance of the theory of representation for political theology and his placing of Schmitt in relation to the pluralist thinkers of corporate bodies on the one hand, and the centrality of corporate personhood to Kantorowicz's genealogy of liberal governmentality on the other. In doing so, I hope to highlight some of Vatter's novel contributions to the field of political theology, whilst also drawing out the usefulness of his work for thinking critically about corporate power and its legitimacy as parallel questions to the concerns with contemporary state power.

DIVERGENT THEORIES OF REPRESENTATION: FROM SCHMITT'S SOVEREIGNTY TO THE ENGLISH PLURALISTS

As Vatter argues, for Schmitt political theology involves an analysis of the analogies between theology and jurisprudence. However, rather than seeing political theology as a religious or theological discourse, Vatter argues that it is fundamentally a jurisprudential one. Such a claim not only highlights the significance and relevance of the field for contemporary political and legal theory, but also repositions the critiques of the provincial nature of political theology as being embedded specifically in a Christian/western tradition. Vatter's work, itself, challenges this provincialism by highlighting the significance of Jewish political theology, which he takes up in the partner book *Living Law: Jewish Political Theology from Hermann Cohen to Hannah Arendt*.[11] At the same time, placing political theology as a jurisprudential discourse means that the pluralising critique needs to function not simply at the level of religion or theology, but at the level of law and politics. This is why, for Vatter, Schmitt was concerned with the arguments of Otto von Gierke and the English pluralists, who mounted such a critique.

Vatter highlights that for Schmitt "[t]he politico-theological representation of political unity...becomes the ground of legal order: it explains the possibility of jurisprudence."[12] This claim is premised on a distinction between two modes of representation: first, a substantive notion of representation that Schmitt traces from the Catholic Church to Thomas Hobbes, whereby the representative makes visible the invisible and 'stands for' those who are represented; second, an agentic form of

[10] Vatter, 5-6.

[11] Miguel Vatter, *Living Law: Jewish Political Theology from Hermann Cohen to Hannah Arendt* (New York: Oxford University Press, 2021).

[12] Vatter, *Divine Democracy*, 24.

representation that he associates with a democratic notion of advocacy for the represented, whereby the representative is bound to those they represent. Vatter places the distinguishing of these two modes of representation—and the privileging of the former over the latter—in the context of Schmitt's reaction against both the legal positivism of Hans Kelsen and the emerging notion of representation developed by the English pluralists, each of which attempt to present visions of "jurisprudence without sovereignty" that call into question the famous parallel between God and state that is the key analogy of *Political Theology*.[13] For the English pluralists, the critique was of the centralising absolutist state as the necessary foundation or source of legitimacy for social groups. For Kelsen, it was the need for law to arise from an immanent system of norms rather than a transcendent sovereign.

That Schmitt's *Political Theology* is a response to Kelsen's positivism is well known. However, Vatter's reconstruction of this trajectory of Schmitt's work highlights the centrality of the concept of legal personhood to the structural parallels between Schmitt's and Kelsen's jurisprudence. As Vatter points out, Kelsen anticipates the themes of political theology with his articulation of legal personhood as simply an anthropomorphic hypostatisation that enables the ascription of legal acts to particular bodies and, when applied to the state, finds its analogue in the hypostatisation of God as a being who acts and wills. Kelsen's arguments thus produce a negative or inverse form of political theology: the idea of the state as both above and subject to the law is seen as an "ideological" rather than a "scientific" concept; the problem with personifying the state for the purpose of ascribing human acts to it is that this ascription is only *internal* to law (and thus cannot situate human acts before or above the law); and placing a sovereign figure above and below the law is a form of "legal miracle."[14]

Schmitt's response in *Political Theology* seeks first to provide an account of sovereignty that links "the abstract complex of norms" to "a concrete complex of power."[15] As Vatter summarises, "[a]ccording to Schmitt, the link to a real person *who must also be a legal person* is a necessary condition for any legal system to acquire a 'political form' and cease being a powerless, apolitical abstraction...the connection between law and life unavoidably leads back to the problem of legal personality and its 'reality.'"[16] This leads to Schmitt's second defence, which is to note that Kelsen's articulation of juristic persons as neither real nor fictious persons but "only points of ascription" is premised on the argument that "the basis for the

[13] Schmitt, *Political Theology*.

[14] Vatter, *Divine Democracy*, 28-29; Hans Kelsen, "God and the State," in *Essays in Legal and Moral Philosophy*, ed. Hans Kelsen (Springer Dordrecht, 1973).

[15] Vatter, *Divine Democracy*, 30.

[16] Vatter, 30-31. Emphasis in original.

validity of a norm can only be a norm."[17] Schmitt questions the idea that there can be a "unity" of a legal system without "the unity of a positive-valid order," and highlights the importance of the state as encompassing the mechanism of applying the law, giving it the actual "force of law," "decid[ing] on its interpretation" and "issu[ing] a judgment on its basis."[18] Laws cannot apply themselves and, therefore, require someone to apply them, whether a natural or artificial person.[19] This grounds, for Schmitt, the necessity of sovereignty as a mechanism of "decision" that must be performed by real bodies and separates the state or sovereign from the law.

In this way, Vatter argues, Schmitt's turn to representation is of central importance because he sees it as "the only viable solution to the problem of linking law to life and politics, other than the one offered by Otto von Gierke and his English pluralist followers."[20] For Gierke, the question of the mutual relation between law and state is answered by "asserting that both are independent factors of human communal life."[21] Gierke and the pluralists' account of associational life calls into question the need for a "centralised authoritarian state": "the will of the state or sovereign is not the final source of law but is the organ of the people convoked to express legal consciousness as it emerges from the life of the people."[22] In Gierke's theory, the state is merely a "community of communities" and only "makes" law as a function of "ascertain[ing] the legal value of interests as it springs from the people's feeling or sense of right."[23] Vatter argues, therefore, that the "most important task" that Schmitt attempts in *Political Theology* is to "show that the problem of law as a substantial form lies precisely in this act of ascertaining" the legal value of the people's interests.[24] The substantial "making" of law encompasses the connection between law and the reality of social life, because in "every ascertainment and decision" there is "a constitutive element, an intrinsic value of form."[25] What is, for Schmitt, more important than the norm (as with Kelsen) is the *form,* which "gives life" to the law through its realisation.

At this point, Schmitt's particular vision of representation draws upon the notion of *auctoritas interpositio*, the Roman law tutor who acts on behalf of, and in the place of, their ward.[26] As Vatter highlights, "his idea of representation ultimately flows from this Roman legal conception of acting-in-the-place-of-another, which is reworked in the medieval theory of corporate law in relation to the theological idea

[17] Schmitt, *Political Theology*, 19.
[18] Vatter, *Divine Democracy*, 31.
[19] Schmitt, *Political Theology*, 22; Vatter, *Divine Democracy*, 31-32.
[20] Vatter, *Divine Democracy*, 32.
[21] Schmitt, *Political Theology*, 24.
[22] Gierke, as cited by Schmitt, *Political Theology*, 24.
[23] Schmitt, *Political Theology*, 23; Vatter, *Divine Democracy*, 32.
[24] Schmitt, 23; Vatter, *Divine Democracy*, 32-33.
[25] Schmitt, 26.
[26] Vatter, *Divine Democracy*, 34; Schmitt, *Political Theology*, 30.

of the corporate Church (later of the state) as a *corpus mysticum* of Christ."[27] This question of corporate representation is one that continues to have significance in contemporary corporate theory and debates as to whether the board of directors is a representative body that "stands for" and "acts as" the corporation, or whether directors are akin to agents of shareholders and (should be) subject to their wishes. One of the most significant cases in the Anglo-American history of directors duties, attempts to traverse this by describing directors as encompassing a "mixed office"—a public office, arising from the corporate charter, but also a private office because directors are in a relation of "private trust" or "agents" of shareholders.[28] Whilst at times this case is seen to ground the idea of directors as trustees or agents, the authority cited in the case was a French civil law text that categorised directors alongside the Roman law tutor and curator that Schmitt draws upon.[29] The ongoing debates in corporate theory about the characterisation of directors are concerned with the legitimacy of the exercise of corporate power. What Vatter's reconstruction of Schmitt's position highlights is the constitutive element of legal *form* and the need for a legal personality to decide, interpret or apply the law.[30] Schmitt's concern with the pluralists is that they provide an alternative attempt to ground representation *neither* in an autonomous legal norm (Kelsen) nor purely in the will of a sovereign (Hobbes) but in terms of an organic emergence of institutional forms. Whereas the pluralists provided an account of the connection between life and law that arose from forms of life that produce norms and practices of rule following, Schmitt's critique relied on his reading of Hobbes and the fundamental question of "who decides?" In the extreme circumstances of threat, crisis or the potential for war, it is the body that is able to make the determination of who is friend and who is enemy that is "political" and, as such, bears sovereignty.[31] This is the question that, for Schmitt, a pluralist account could not answer.

At this point Vatter marks a crucial shift, which forms part of his larger argument about Schmitt. If, at first, Schmitt's focus was on the study of the transfer of theological concepts into politics and jurisprudence, after his work on Hobbes and critique of the English pluralists, he begins to look at the transfer of political and juridical concepts into theological ones. This involves a reinterpretation of Hobbes by "moving *backwards* from the problem of the political representation of the

[27] Vatter, *Divine Democracy*, 34.

[28] *Charitable Corporation v Sutton.* 1742. 26 ER 642; 2 Atk 404. For discussion, see Steve Kourabas, Nick Sinanis, and Timothy D Peters, "A Historical Perspective on Corporate Officer Accountability," *The ECGI Blog*, 21 February 2024, https://www.ecgi.global/blog/historical-perspective-corporate-officer-accountability.

[29] Domat *The Civil Law in its Natural Order: Together with the Publick Law: Volume 1*, trans. William Strahan (1722), Book II, Title 3, Section 2.

[30] Vatter, *Divine Democracy*, 34.

[31] See Carl Schmitt, *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1932 / 2007).

people in the state to the problem of the political representation of God in the Trinity."[32] In doing so, Schmitt begins to articulate political theology in a more democratic and less authoritarian form. This arises out of Schmitt's response to Erik Peterson's "Monotheism as a Political Problem," which argued that Christian theology could not be "secularised" in the form of a political theology because the essence of Christian theology was trinitarian.[33] Peterson argues that the analogy of "One God – One King" arose from Judeo-Hellenistic conceptions of divine monarchy and that it was "smuggled" into Christian theology by Eusebius in the fourth century "in order to legitimize Emperor Constantine's foundation of a *Christian* Roman Empire."[34] Peterson takes-up Saint Augustine's rejection of "Eusebius' attempt to place Christianity at the service of the Roman Empire by giving an anti-imperial meaning to the Gospel's injunction to leave to Caesar what belongs to Caesar and give to God what belongs to God."[35] For Peterson, "Augustine rids Christian monotheism of its monarchical violence, and, on the basis of its Trinitarian doctrine, places the Christian Church in a permanent, but productive tension with the state."[36]

Schmitt's response to Peterson is to dispute the claim that a Christian people cannot group themselves around a sovereign representative by shifting the fundamental analogy from "One God – One King" to "One God, composed of Three Persons, and one People."[37] Schmitt therefore articulates Christian Trinitarianism as "representative" in that it provides the "divine representation" of the One God in the person of Jesus around which a multitude of individuals can become 'one people' and attain the "*unity of a political or sovereign entity*."[38] The challenge of this move, for Schmitt, is that Peterson's source for the analogy of One God to One People is not Christian but the Jewish Hellenistic philosopher Philo. As Vatter highlights, Schmitt's anti-Judaism overshadows his theoretical analysis and he dismisses Philo's deployment as a "Jewish slogan" and a failure to take up the idea of "divine democracy."[39] Whilst in *Divine Democracy* Vatter works through 'Christian' political theology that follows in the wake of Schmitt, attempting to articulate it in democratic terms that provide legitimacy to liberalism, his partner book *Living Law* takes up the form of Jewish political theology disavowed here by Schmitt. Schmitt's solution is (again) to take recourse to Hobbes' notion of

[32] Vatter, *Divine Democracy*, 54.

[33] Erik Peterson, "Monotheism as a Political Problem," in *Theological Tractates*, ed. Erik Peterson (Stanford, CT: Stanford University Press, 2011).

[34] Vatter, *Divine Democracy*, 54.

[35] Vatter, 55. See Matthew 22:15-22, Mark 12: 13-17 and Luke 20:20-26.

[36] Vatter, *Divine Democracy*, 55-56.

[37] Vatter, 57.

[38] Vatter, 57; Schmitt, *Political Theology II: The Myth of the Closure of any Political Theology*, 72. Emphasis in original.

[39] Vatter, *Divine Democracy*, 57; Schmitt, *Political Theology II*, 72.

representation, focusing on the personations of God in historical representatives—Moses, Jesus, the Holy Ghost—as each producing three sovereign peoples. He argues that Hobbes' appeal to the Christian notion of the Trinity reflects a shift from the divinisation of human kings to a divinisation of the political body—the latter requiring an underlying "assumption that this political Body is somehow 'eternal' by virtue of the sacraments that tie it to the salvational acts of its Head or King, Jesus the Christ."[40]

Vatter concludes his chapter on Schmitt by highlighting the way in which his turn towards a more democratic articulation of political theology in response to both the pluralists and Peterson underlies the seemingly paradoxical connection between Schmitt's defence of a "strong state" and the theorists of ordo-liberalism and neoliberalism. In addition, he notes that this shift also provides the grounds for Giorgio Agamben's articulation of liberal democracy not as "neutral" with respect to religion, but rather as a realisation of the "democratic" character of Christ's Kingdom based on the category of glorification.[41] The result is a trajectory that shifts from political theology as being about the legitimation of sovereignty to the legitimation of liberal governmentality—which Vatter examines throughout the rest of the book.

ON BODIES: CORPORATE AND FICTIONAL

My interest in Vatter's argument, however, is with the way in which this turn to a "democratic political theology" is grounded in specific notions of the corporate body and whether this provides insight not only into the legitimisation of state power, but also contemporary concerns over the (il)legitimacy of corporate power. This becomes clearest in the trajectory of Vatter's book that maps the connections between Schmitt's notion of 'eternal life' granted to the political Body (referred to above) and Kantorowicz's genealogy in *The King's Two Bodies* that places the thinking of corporate bodies as central to the emergence of Western constitutionalism and contemporary liberal governmentality.[42] This trajectory can be seen as reversing Schmitt's distinction between the concept of the Church as a "juridical person" and the legal personhood granted to a joint-stock company.[43] The latter he views as simply a form of economic accounting and its form of representation relates to a functionary or agent. The former, however, involves the

[40] Vatter, *Divine Democracy*, 58.

[41] Vatter, 64-65; Giorgio Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, trans. Lorenzo Chiesa (with Matteo Mandarini) (Stanford: Stanford University Press, 2011).

[42] Ernst Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton : Princeton University Press, 1997).

[43] Carl Schmitt, *Roman Catholicism and Political Form*, ed. George Schwab, trans. G. L. Ulmen, (London: Greenwood Press, 1996), 18.

concrete representation of a juridical form that was achieved in the process of "turning the priesthood into an office" whereby "the priest upholds a position that appears to be completely apart from his concrete personality" and yet is linked to the concrete person of Christ.[44] Kantorowicz, by contrast, traces the significance of the corporational form—which he locates in the conjunction of the theological concept of the *corpus mysticum*, with the Roman law conception of *persona ficta*—over and above the Roman law concept of office that Schmitt refers to.

One of Vatter's significant contributions to the discourse on political theology is the way he articulates the connections between Schmitt and Kantorowicz. A growing literature has positioned Kantorowicz's *The King's Two Bodies* not only in contrast to his earlier work on Frederick II, but as an anti-Schmittian recuperation of political theology that takes up aspects of Schmitt's methods and themes in order to produce an account of the emergence and legitimacy of secular liberalism.[45] For Vatter, rather than seeing Kantorowicz as critical or dismissive of Schmitt, he sees him as continuing Schmitt's project and the underlying concern with representation.[46]

The hypothesis of Vatter's chapter on Kantorowicz—the longest chapter in the book—is that his contribution to the discourse on democratic political theology consists in showing how sovereignty and constitutionalism both became instruments of liberal governmentality. He summarises *The King's Two Bodies* as offering "a politico-theological interpretation" of the medieval transition from a notion of jurisdiction that presupposed the priority of law (divine/natural law as given and requiring interpretation) to a later sense in which jurisdiction is the power to rule through legislation wielded by secular princes (and thus giving rise to modern conceptions of the state). To highlight the *connection* between Schmitt's project and Kantorowicz's, Vatter points to three basic problems that are raised, but unanswered, by Schmitt in *Political Theology II*, arguing that they "provide the backbone" of *The King's Two Bodies*.[47] The first asks how the understanding of the Church as the "mystical body of Christ" (the only concrete medieval exemplar of Schmitt's analogy between God and "the People") transitioned to "the idea of the modern state as an immortal body whose existence transcendends any one

[44] Schmitt, 14. On the link between corporation and office, see: Timothy D Peters, "Corporate Office, Corporate Irresponsibility and the Constitutive Vicariousness of Corporate Power" in *Evil Corporations: Law, Culpability and Regulation*, ed. Penny Crofts (London: Routledge, 2025).

[45] See, for example, Victoria Kahn, "Political Theology and Fiction in *The King's Two Bodies*," *Representations* 106 (2009); Karl Shoemaker, "*The King's Two Bodies* as Lamentation," *Law, Culture and the Humanities* 13, no. 1 (2017); Jennifer Rust, "Political Theologies of the *Corpus Mysticum*: Schmitt, Kantorowicz, and de Lubac," in *Political Theology and Early Modernity*, ed. Graham Hammill and Julia Reinhard Lupton (Chicago and London: The University of Chicago Press, 2012).

[46] Vatter, *Divine Democracy*, 58, n 77.

[47] Vatter, 136; Schmitt, *Political Theology II: The Myth of the Closure of any Political Theology*; Kantorowicz, *King's Two Bodies*.

individual ruler or officeholder."[48] The second asks how the medieval deployment of the Pauline figure of the "spiritual man" who judges all but cannot in turn be judged can, comes to be applied to the secular sovereign.[49] The third looks to the way Schmitt's claim that all modern political concepts are secularised theological concepts begs the question as to why modernity could not develop its own "secular" political theology. That is, if the Church tried to preserve its supremacy by transposing its theological concepts into secular law, was it not possible for secular princes to assert their sovereignty by transposing Roman legal concepts into Christian theological form? For Vatter, the latter is precisely Kantorowicz's central hypothesis, tracing "how the judges who were to pronounce matters of *iurisdictio* came to understand themselves as the 'priests' of the new *religio iuris* [religion of law] that turned around the 'mystical body' of the People with an absolute emperor at its head."[50] The first "prince" who worked out this "secular" political theology was Frederick II.

Instead of seeing the secularisation of the idea of the *corpus mysticum* in the modern concept of the nation as problematic and totalising (as, for example, Voegelin and Maritain do), Kantorowicz "defends the political use of the idea of *corpus mysticum* as the central route through which the western political tradition recovered the idea of an immortal sovereignty that could provide humankind with the conditions for its worldly salvation in and through history."[51] Central to Kantoworicz's argument is the work of the medieval civilian lawyers who took up and deployed Roman law concepts in order to give juridical personality to a variety of associations that went beyond simply the consent of members.[52] But Kantorowicz's working through of the idea of the *corpus mysticum* and fictional personality is aimed at that which concerned Schmitt: determining "the ultimate ground of unity of a People."[53] This occurs through the mediating not only of the medieval opposition between "descending" claims of power and authority (from the divine representative) and "ascending" claims arising from the consent of the people, but also liberal government's unification of the "rights of the People" with "a hierarchical construction of the mystical body of the State."[54]

Here Vatter shows the way Kantorowicz engages with Schmitt's arguments. First, Kantorowicz goal is to show, like Schmitt, that a Gelasian separation of Church and

[48] Vatter, *Divine Democracy*, 136.

[49] See 1 Corinthians 2:15-16.

[50] Vatter, *Divine Democracy*, 137.

[51] Vatter, 137-38.

[52] Vatter, 138. For a working through of the "origins" of corporate law in the work of Pope Innocent IV, see Giancarlo Anello, Mohamed Arafa, and Sergio Alberto Gramitto Ricci, "Sacred Corporate Law," *Seattle University Law Review* 45, no. 1 (2022).

[53] Vatter, 138.

[54] Vatter, *Divine Democracy*, 138.

Empire, spiritual and temporal power, is untenable.[55] Second, however, Kantorowicz works through Schmitt's own shift towards a democratic political theology in a more radical fashion.[56] *The King's Two Bodies* starts by looking at the trajectory of theology to law. It unpacks the development of absolute monarchy in medieval English legal and political thought as a "Royal Christology" in which the "King's two bodies" was derivative of the doctrine of the "two natures" of Christ. Kantorowicz therefore *rejects* that the idea of the 'dual' person of the sovereign arises from the Roman law concept of office that Schmitt (amongst others) emphasises.[57] As the book progresses, however, Kantorowicz inverts the method of political theology by examining how English jurists employed the structures of Trinitarian theology for secular purposes—thus performing a (re)turn to (neo)Hellenistic and (neo)Roman paradigms.[58] There is a question here as to whether what Vatter is highlighting is really a reversal of trajectory (from theology to law, to law to theology), or whether the attempt to 'use' Trinitarian concepts, when 'secularised,' involves their transformation in ways that deviate from their original theological position. Vatter's summary of political theology as being about the *transference* of concepts *between* theology and jurisprudence (thus functioning in both directions) is more methodologically apposite.

For Vatter, what is significant in Kantorowicz is the secularisation of Trinitarian doctrine that arose *not* from the religious sphere, but from the juridical one. One aspect of this involves tracing the reception of Roman law concepts into canon law, their subsequent take up by civilian lawyers and later reception into English common law by Bracton. On this basis, modern absolutism is articulated as a form of "Pontificialism" and would align with Schmit's claims that the origins of modern absolute sovereignty can be found in canon law. At the same time, Kantorowicz also traces the development of a "religion of law" as a "secular theology" that "unpins the early modern construction of sovereignty."[59] This is not the result of a replacement of Trinitarian theology (which Peterson argues makes a Christian political theology impossible) with Hellenistic, Judaic or Roman notions of sacral kingship. Rather it is through a *secularisation* of Trinitarian theology via which secular monarchism produces a "religion of law" independent from the Church and Pope. This reverses Schmitt's secularisation thesis, because it understands secular monarchism as the jurisprudential inheritor of legal Trinitarianism not hierocratic Papalism.[60]

[55] Vatter, 141.
[56] Vatter, 141.
[57] Vatter, 154-55.
[58] Vatter, 142.
[59] Vatter, 148.
[60] Vatter, 154.

The secularised Trinitarianism of Frederick II understood the Emperor to "be at once the Father and the Son of Justice, her Lord and her minister."[61] On this basis, God the Father stands as the origin of the king's power of jurisdiction (thus 'above' the law), but the administration of Justice is given over to "the Son," whereby the king is "under" the law in terms of "the establishment of the legal order as government."[62] Vatter summarises this into the following formula: "there is no legal order without the possibility of the sovereign to take exception from that legality and establish its legitimacy."[63] Kantorowicz's unique reading of Bracton's articulation of the king as both "above and below the law" is premised on "the hypothesis that Bracton worked with the same jurisprudence as Frederick II's jurists."[64] Bracton, like Frederick II, deploys a "Trinitarian motif within a scheme of Hellenistic sacral monarchy."[65] As Vatter argues, Kantorowicz interprets the king as 'above and below the law' not to construct a conception of sovereignty but to show that "a constitutionally articulated sovereignty is itself functional to government through law or administration."[66] That is, the "rule of law...needs to be limited (by placing the sovereign 'above the law'...) in order to allow the 'orderly functioning of government.'"[67] In this way, Kantorowicz's interpretation of secularised Trinitarianism does not appeal to a transcendent outside (a la Schmitt), but rather appeals "to an immanent interior finality, that of governing a population."[68] Vatter therefore positions Kantorowicz against Agamben's genealogy of government as a providential scheme of economic theology.[69] Rather, he sees the modern state as thoroughly juridical: "The mystery of salvation is about 'ministering' to the law, not to the economy. The rule of law, not the free market, lies at the heart of political theology in the West."[70] This builds on the agreeance between Kantorowicz and Schmitt that political theology is a *juridical* discourse and not a theological or economic one.[71]

Vatter's final argument on Kantorowicz seeks to show that *The King's Two Bodies* is a "monumental refutation" of the origin story of western constitutionalism

[61] Kantorowicz, *King's Two Bodies*, 99.

[62] Vatter, *Divine Democracy*, 160.

[63] Vatter, 160.

[64] Vatter, 169.

[65] Vatter, 169.

[66] Vatter, 170.

[67] Vatter, 170.

[68] Vatter, 172.

[69] Agamben, *Kingdom and the Glory*.

[70] Vatter, *Divine Democracy*, 172.

[71] Vatter, 160. On a claim for juridical theology and corporate bodies that also engages the Islamic tradition, see Riccardo Baldissone, "Mystical bodies and bodies of law: On juridical theology and the (re)foundations of the West," in *Fables of the Law : Fairy Tales in a Legal Context*, ed. Daniela Carpi and Marett Leiboff (De Gruyter, 2016).

told by recent sociologists of revolution—in particular, Eugen Rossenstock-Huessy, Harold Berman and Hauke Brunkhorst. The latter see modern constitutionalism as arising from the "Papal legal revolution" whereby Pope Gregory VII asserted independence from the Holy Roman Emperor in the 11th century. For Kantorowicz, however, it was not the Papacy's internal self-assertion of the rule of law, but rather the "Pontificialism" of Norman kingship by Frederick II's legitimisation of sovereign power as a "living law" that is the origin of modern constitutionalism. As Vatter argues, "it was the Emperor, rather than the Pope, who is ultimately responsible for setting up a truly autonomous, self-producing system of positive law, completely emancipated from belief in natural and divine legal orders, that today is associated with the idea of the rule of law."[72]

A key component of the distinction between the sociologists of constitutionalism and Kantorowicz turns, again, on the notion of the corporational body.[73] Vatter notes the way Harold Berman and Hauke Bruckhorst argue that a working through of the Christian dogma of Incarnation produced a "split" of "the legal from the spiritual" that required the Church to present itself as being *both* the "concrete mystical *and the abstract legal body* of Christ."[74] For Kantorowicz, however, this was only possible as a result of merging "the Christian idea of the mystical body with the Roman idea of a legal corpus" in the form of the "King's Two Bodies."[75] He saw this not as an *internal* result of the Church's "legal revolution," but an outcome of the Empire's struggle "*against* the pretensions of universal spiritual authority of the Church."[76] The "true inheritor" of Trinitarianism is, therefore, not the "sacred government of the Church" but the "profane government of the State."[77] The significance of this outcome is that "modern public law" then "appears as a device that makes it possible for the modern state to govern its citizens from within an entirely 'immanent frame.'"[78] This sees a key shift of the locus of interpretation of law from priests and theologians to lawyers and jurists, but from there to today's

[72] Vatter, *Divine Democracy*, 184.

[73] Certain accounts of the history of corporate law take-up and follow the narrative of the sociology of constitutionalism. Stephen Bottomley, for examples, notes the way in which a long history of constitutionalising corporations can be traced, following Berman, to the Papal legal revolution: Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Aldershot: Ashgate Publishing, 2007). For a different account of the origins of modern corporate law from medieval canon law, see Anello, Arafa, and Ricci, "Sacred Corporate Law."

[74] Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), 78; Vatter, *Divine Democracy*, 185; Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (New York: Bloomsbury, 2014), 100 quoted by Vatter, *Divine Democracy*, 185.

[75] Vatter, 185.

[76] Vatter, 185.

[77] Vatter, 186.

[78] Vatter, 186.

economists and managers under "a neoliberal economic rule of law."[79] Vatter's argument, following Kantorowicz, is that the solution to modern neoliberalism is *not* a reassertion of constituent power and sovereignty *against* the economism of liberalism—in part, because such Schmittian moves forget the alignment between Schmitt's account of the "strong state" and the neoliberal concept of *nomos* that underpins Hayek's notion of 'right ordering' that is produced by free markets and 'spontaneous orders.'[80] This is because "[i]t is not state sovereignty that employs constitutionalism in order to limit government, but conversely, government employs constitutionalism...in order to limit the state and embed it in self-steering, autopoietic normative orders that it cannot possibly hope to control."[81] Neoliberal governmentality has not eliminated constitutionalism but rather made "sovereign constitution-making an intrinsic part of liberal governmentality" and it is to this which we need to respond.[82]

CONCLUSION

What can be drawn from Vatter's excellent work is not only the continued presence and salience of political theology—understood as a juridical discourse that goes to legitimate public (and private) power—but an intellectual framework for critically engaging those mechanisms of legitimation. Whilst, almost of necessity, this is a Western and, thereby, provincial story, the emphasis on the juridical nature of political theology is key to opening up more pluralist accounts. This is because it provides a critical interrogation of the way in which the exercise of power and authority is justified and legitimated in terms of presumed modes of representation and democracy. In an era where global economic and political power is performed by corporations as well as states, critically understanding the deployment of the very idea of the corporational body that undergirds both—fusing the notions of immortal mystical entities, fictional legal persons and real bodies—is crucial.

[79] Vatter, 186. This would raise the question as to whether Agamben's genealogical emphasis on "economic" rather than political theology, does not have more purchase than Vatter allows. For an account of the corporation that takes up Agamben's genealogy of economic theology, see Timothy D Peters, "Corporations, Sovereignty and the Religion of Neoliberalism," *Law and Critique* 29, no. 3 (2018).

[80] Vatter, *Divine Democracy*, 187.

[81] Vatter, 187.

[82] Vatter, 187. This point aligns with the work that understands neoliberalism not as an erosion of the state and legality but rather the producing of a particular form of institutional ordering aimed at securing the rights of capital. See, for example, Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA and London: Harvard University Press, 2018).

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