

INTRODUCTION TO THE MEADOR SERIES 2007–2008: EMPIRE

EMPIRE[†]

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Empire is a tricky concept. Providing a few examples is relatively easy but articulating its scope and contours proves difficult. Even providing examples starts to get difficult as we move from core cases to the periphery. Now, add to this the fact that, because of the practices of colonialism, “empire” is a politically charged term, frequently used pejoratively. Anyone writing generally on empire thus faces two separate but interacting problems: First, what exactly is one talking about when one says that something is an empire? We might call this the problem of reference (or denotation). Second, what does one mean to be saying about something by calling it an empire? We might call this the problem of implication (or connotation). Empire is tricky because both problems are significant.

Thus faced with these problems, and with the task of writing a general introduction for the Meador Lectures on Empire,¹ I turned to two unsailable sources: the Oxford English Dictionary and Wikipedia.² The OED provides the following note at the beginning of its entries on “empire”:

[†] *Editor’s Note:* This Essay will run as the introduction to MEADOR LECTURES ON EMPIRE (forthcoming 2009), published by the University of Alabama School of Law, in which all the 2007–2008 Meador Lectures on Empire will be reprinted. The lectures were originally printed in this volume of the *Alabama Law Review* or are printed in this issue. See José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALA. L. REV. 943 (2009); Michele Goodwin, *Empires of the Flesh: Tissue and Organ Taboos*, 60 ALA. L. REV. 1211 (2009); Herbert Hovenkamp, *Innovation and the Domain of Competition Policy*, 60 ALA. L. REV. 103 (2008); Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377 (2009).

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1. The Meador Lectures are named in honor of Daniel J. Meador, a graduate of and the former Dean of the University of Alabama School of Law as well as the James Monroe Professor of Law Emeritus at the University of Virginia School of Law.

2. These are, perhaps, two empires in their own right.

Owing partly to historical circumstances, and partly to the sense of the etymological connexion between the two words, *empire* has always had the specific sense “rule or territory of an EMPEROR” as well as the wider meaning which it derives from its etymology.³

So, initially we have two issues to explore: etymology and history. The word “empire” derives from the Latin *imperium*—which means “command,” “authority,” “absolute power,” “dominion,” “sovereignty.”⁴ You get the idea. From this etymology we get the narrow and wide senses of empire. With regard to history, a few examples come to mind readily: the Athenian Empire, the (Holy) Roman Empire, the Ottoman Empire, the British Empire. Wikipedia provides an impressive list of many more historical examples of empires.⁵ These examples suggest further content to the concept of empire by detailing how empires conquered others and expanded over new territory.⁶

Imperialism is thus closely linked with the project of colonialism—“a practice of domination, which involves the subjugation of one people to another”⁷—however, the two concepts are not synonymous. As Margaret Kohn explains, colonialism “usually involved the transfer of population to a new territory, where the new arrivals lived as permanent settlers while maintaining political allegiance to their country of origin.”⁸ Imperialism, by contrast, typically refers to one political group’s exercise of power and control over another group more generally, regardless of whether it is through settlement or by other means. Because of the close connection between the two concepts, however, and because of the “material and psychological depredations, ethical evasions, and intellectual obscenities” associated with colonialism,⁹ “empire” sometimes operates as an epithet. Someone using “empire” or “imperial” to describe the United States’ invasion of Iraq, for example, probably did not vote for George W. Bush in 2004.

3. 5 OXFORD ENGLISH DICTIONARY 187 (2d ed. 1991).

4. *Id.* at 713.

5. See Wikipedia, List of Empires, http://en.wikipedia.org/wiki/List_of_empires (last visited June 28, 2009).

6. For a fictional account in which the act of giving away, as opposed to taking over, territory may be a form of empire, see DAVID FOSTER WALLACE, *INFINITE JEST* 93, 283, 385, 402–06 (1996) (coining the term “experialism”—as opposed to “imperialism”—to describe this practice). In the novel, a future United States forces Canada to accept (as a “gift”) heavily polluted areas in the northeastern United States while still allowing the U.S. to send its waste there.

7. Margaret Kohn, *Colonialism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://plato.stanford.edu/entries/colonialism>.

8. See *id.*

9. Jedediah Purdy, *The Ethics of Empire, Again*, 93 CAL. L. REV. 1773, 1774 (2005) (reviewing NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING* (2004)).

From this narrow content, however, the concept of empire expands to a wider sense. And with this expansion, problems of reference and implication become more significant. While maintaining connections to command, power, and authority, the wide sense of empire sheds other aspects of its narrow, historically-derived content. Empires need not be bounded by territory.¹⁰ They need not be ruled by emperors or supreme leaders. Empires may be *conceptual*. Empires may be *abstract*. The Empire of Liberty.¹¹ The Empire of Morality.¹² The Empire of Law.¹³ So, then, how do we identify empires in the wide sense? And when referents change as we move from the narrow to the wide sense, how, if at all, do the implications change? When, if at all, does “empire” mean something *good*? In short: In the wide sense, empires are . . . well . . . what exactly?

IS LAW AN EMPIRE?

Law, according to one prominent source, is itself an empire.¹⁴ Exploring law’s empire may shed some light on the wide sense of empire, as well as on the relationship between the concepts of law and empire. To begin this exploration, let’s take a short journey into the thicket of modern analytic jurisprudence.¹⁵ More specifically, how and to what extent do views about what law *is* (the problem of reference) affect what it means to say that law is an empire (the problem of implication)?

For the early legal positivist John Austin, the connection between law and the narrow sense of empire was a close one. Like the concept of empire itself, Austin’s positivism was tied to the notion of “command.”¹⁶ Under the command theory, law consists of commands (or general imperatives) from the sovereign backed by a threat of sanctions for disobedience.¹⁷ In this account, the sovereign is conceived as “a person or a group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others.”¹⁸ In H.L.A. Hart’s terse

10. See, e.g., MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* xi (2000) (using “empire” to refer to the system and regulation of “a global market and global circuits of production”).

11. See Letter from Thomas Jefferson to George Rogers Clark (Dec. 25, 1780), in 4 *THE PAPERS OF THOMAS JEFFERSON* 233, 237 (Julian P. Boyd ed., 1951) (referring to an “Empire of liberty”).

12. Larry Alexander & Frederick Schauer, *Law’s Limited Domain Confronts Morality’s Universal Empire*, 48 *WM. & MARY L. REV.* 1579 (2007).

13. RONALD DWORKIN, *LAW’S EMPIRE* (1986).

14. *Id.*

15. The brief discussion will of necessity have to gloss over many of the important jurisprudential questions and disagreements raised by the issues discussed. It will also have to—with apologies to the theorists—sometimes oversimplify their complex views.

16. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 21 (Wilfred E. Rumble ed., 1995).

17. For a recent discussion of this aspect of Austin’s theory, see Frederick Schauer, *Was Austin Right After All?: On the Role of Sanctions in a Theory of Law*, 22 *RATIO JURIS* (forthcoming 2009), available at <http://ssrn.com/abstract=1403269>.

18. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 603

description, law under this theory is “the command of the uncommanded commanders of society.”¹⁹ In associating law with the absolute power and will of an unconstrained ruler, the command theory suggests that law is an empire in a way that betrays little of that term’s etymology and history.

Hart, however, pointed out a number of important deficiencies with the command theory in presenting his own masterful account of the concept of law.²⁰ Much of law in modern municipal legal systems, Hart illuminated, cannot be accounted for by the notion of imperial command. For one thing, the command theory cannot distinguish law from a gunman demanding “your wallet or your life.” Similar to the gunman situation, the command theory explains why citizens are obliged to obey (a psychological point), but not why they have an obligation to (a normative point), which they (sometimes) appear to have.²¹ For another, many legal rules do not command citizens to act or refrain from acting in certain ways (“primary rules”)—they are power-conferring.²² These power-conferring (“secondary”) rules provide ways for citizens to create duties and obligations vis-à-vis each other, and they provide rules for officials to identify and change primary rules and to adjudicate disputes.²³ Within Hart’s theory of law as the union of these primary and secondary rules,²⁴ law still commands. But it does so in ways that are more constrained and limited than historical empires, and these constraints and limits help to provide law with both its power and authority. Is law still an empire under this account? If so, we have now begun to widen the concept.

As this brief sketch suggests thus far, the notion of authority is close to the heart of both law and empire. A brief reflection on law’s authority suggests further points of continuity and departure between law as an empire in the wide sense and traditional empires in the narrow sense. Law and empires wield power over whom they govern, and they claim the legitimate authority to do so.²⁵ With historical empires, the claims to authority often appealed to either divine or natural right, on one hand, or to the fact that the authority benefited those governed, on the other.²⁶ Claims to law’s authority have followed both paths. Many claims on behalf of natural law have followed the first path. Positivist theories of law and authority—most prominently, the “service conception” articulated by Joseph Raz—have

(1958).

19. *Id.*

20. *See* H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

21. *Id.* at 82–91.

22. *Id.* at 79–99.

23. *Id.*

24. Key to the theory is the additional notion that the rules are accepted, to a significant degree, from an internal point of view by citizens and officials. *Id.*

25. Whether they claim it and whether they in fact have it are, of course, two different issues.

26. For a discussion of historical attempts to justify imperial practices, see Kohn, *supra* note 7.

followed the second.²⁷ Under Raz's account, law claims legitimate authority by purporting to provide citizens, through legal rules, with guidance on the right way to act in certain situations.²⁸ By providing this service, law alleviates difficulties and uncertainties that may attend to citizens' own moral- and practical-reasoning processes about how to act in these situations—law preempts these processes by providing citizens with a content-independent reason for acting (i.e., the legitimate authority said this is the right way to act).²⁹ Thus, if law is a (constrained and limited) empire, it also *purports* to be a benevolent one.

Law's claim to legitimate authority takes us back to where we began this sketch: law's empire and *Law's Empire*. Under Dworkin's theory, both law in general and the law on specific legal questions depend upon the best "constructive interpretation" of—that is, whatever best fits and morally justifies³⁰—our past legal practices. The demands of fit and justification create additional limits and constraints on law. Its empire, however, is one that is "defined by attitude, not territory or power or process."³¹ This imperial attitude is "interpretive," "self-reflective," and "constructive"—it "aims . . . to lay principle over practice to show the best route to a better future, keeping the right faith with the past."³² In this empire, "each citizen [is] responsible for imagining what his society's public commitments to principle are,"³³ and although judges typically have the final say in what these commitments are, "their word is not for that reason the best word."³⁴ Dworkin's empire of attitude appears to further widen the concept of "empire."

This brief sketch of the empire of law—through jurisprudential theories of the concept of law—reveals a transformation of "empire." Under the command theory, the empire of law is not much different from most historical empires: law rules absolutely and at will over those within its dominion, wielding its power unconstrained by other authority. Law's empire changes under pressure from more developed accounts of law by theorists such as Hart and Raz. If law remains an empire, it is an empire in a wider sense. Its power, authority, and legitimacy are constrained and limited, making it a constrained and limited empire. With this widening of the concept, the implications of "empire" change as well. The constraints and limits on law make empire potentially a good thing—for example, if

27. For his most recent articulation of this conception, see JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 134–42 (2009).

28. *Id.*

29. *Id.*; see also Scott Shapiro, *Authority*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 382, 382–439 (Jules Coleman & Scott Shapiro eds., 2002).

30. DWORKIN, *supra* note 13, at 52–53, 223–75.

31. *Id.* at 413.

32. *Id.*

33. *Id.*

34. *Id.*

law's claim to legitimate authority under Raz's service conception is well-founded. With Dworkin, the concept widens even further and the transformation is complete—for him, "empire" is undoubtedly a good thing "for the people we want to be and the community we aim to have."³⁵

Where the actual (as opposed to, say, ideal) law resides among this thicket is, of course, a matter of much jurisprudential contention. Whether the law is simply what our imperial judges "do in fact,"³⁶ or is what Dworkin's imperial Judge Hercules would do,³⁷ or is somewhere in between, one thing seems clear. Reflections on the empire of law teach us not only about law but also about empire.

THE MEADOR LECTURES ON EMPIRE

In the 2007–2008 Meador Lectures on Empire, four prominent legal scholars—Daniel Hulsebosch,³⁸ José Alvarez,³⁹ Herbert Hovenkamp,⁴⁰ and Michele Goodwin⁴¹—offer insights into the concept of empire. Their lectures widen our understanding of the scope and contours of this tricky concept and its relationship to law.

Professor Hulsebosch provides an historical account of the empire of law through the lens of Chancellor Kent.⁴² Central to this account is the role played by books in fostering the development of "a new kind of empire: an empire of law in which law was conceived as a set of legal principles that should operate everywhere in the Union."⁴³ Professor Hulsebosch traces the historical conditions that made the emergence of this empire possible and illustrates the key role Kent played in bringing it into existence. The historical conditions had to do with the rise of Dublin booksellers in the late eighteenth century. Due to a combination of extant copyright law and the American Revolution, for a period ranging from 1778 to 1801, English law books printed in Ireland were cheap and readily available in the United States.⁴⁴ With a library containing many of these books,⁴⁵ Kent emerges in Hulsebosch's account as a proto-Dworkinian

35. *Id.*

36. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

37. See DWORKIN, *supra* note 13, at 239–40.

38. Professor Hulsebosch is Professor of Law & History at New York University School of Law.

39. Professor Alvarez is the Hamilton Fish Professor of International Law & Diplomacy at Columbia Law School.

40. Professor Hovenkamp is the Ben V. & Dorothy Willie Professor of Law at the University of Iowa College of Law.

41. Professor Goodwin is the Everett Fraser Professor of Law and Professor of Medicine at the University of Minnesota.

42. Hulsebosch, *supra* note †.

43. *Id.* at 378.

44. *Id.* at 396–98.

45. The appendix to Hulsebosch's article provides a table of Kent's law library from 1785 to 1815. See *id.* at 409–24.

Judge Hercules. Kent pioneers a notion of law by taking the massive quantity of legal materials at his disposal as inputs from which to craft a territory-transcendent rule of law based on general principles.⁴⁶ He also helps to forge “classic” norms of opinion writing: weighing both sides of issues, canvassing authorities, and explaining decisions by “elaborating underlying legal principles.”⁴⁷

Focusing on modern international investment law, Professor Alvarez likewise describes an empire of law characterized and ruled by principles.⁴⁸ In examining the relationship between international economics and empire, his subtitle asks whether the law in this area ought to be considered an “empire of law” or the “law of empire.”⁴⁹ The latter refers to laws imposed by imperial powers (read: the United States and U.S. investors) to serve their own interests; the former, by contrast, refers to control by general principles and rule-of-law values and not simply “a tool of apology for state power.”⁵⁰ Professor Alvarez—conceding that the law in this area is not a “utopian constraint on the powerful”⁵¹—nevertheless comes down on the side of the former: that is, an *empire of law* for foreign investment law. He discusses the emergence of an “international investment jurisprudence,”⁵² based on “general principles of law,”⁵³ in which both the flow of capital and concomitant duties and obligations reach both the putative imperial powers and those putatively under their dominion. Along the way, Alvarez notes many differences between ancient empires and modern international investment law, however, he concludes with one important commonality: aspirations of universality. Like ancient empires, the modern investment regime presents itself as having no clear alternative: “the investment regime is no longer an imposition by the West but a requirement of contemporary civilization, morally and politically justified.”⁵⁴

While Professors Hulsebosch and Alvarez offer accounts in which general principles ascend to power, Professors Hovenkamp and Goodwin provide less sanguine accounts of law’s empire.

Professor Hovenkamp explores areas of law regulating innovation and competition policy.⁵⁵ By “innovation” he means “the act of developing and promulgating some new idea, expression, process, or thing, in many cases

46. *Id.* at 387.

47. *Id.* at 406.

48. Alvarez, *supra* note †.

49. *Id.*

50. *Id.* at 952.

51. *Id.*

52. *Id.* at 959.

53. *Id.* at 962.

54. *Id.* at 972–73.

55. Hovenkamp, *supra* note †.

for profit,”⁵⁶ and the areas of law include antitrust, patents, and copyright. Hovenkamp’s exploration reveals a problematic empire ruled by a robust and expanding law of intellectual property, which appears to overdeter potential innovators and to stifle competition and innovation. Considering patent law, he traces general trends toward excessive and unclear patents, leading to frequent and expensive litigation, and resulting ultimately in “weak net incentives to innovate, and even then only in a small number of markets.”⁵⁷ Considering copyright law, he describes the situations as even “bleaker” and without “very much hope on the horizon.”⁵⁸ The primary source of the problem is the capture of copyright law by special-interest groups (primarily, the movie, music, publishing, and software industries). The current low point of this bleak situation is the Copyright Term Extension Act of 1998, which “cannot be squared with any sensible rationale of IP law as creating incentives to innovate.”⁵⁹ In examining antitrust, Hovenkamp finds a different landscape: unlike IP law, antitrust doctrine generally “can no longer be accused of being overdeterrent,” has “well-behaved doctrine,” and is “reasonably free of special interest pressure.”⁶⁰ But, he explains, antitrust can only do so much to alleviate problems with innovation and competition because it takes IP law as a given and must “further competition consistent with [its] mandates.”⁶¹ Hovenkamp concludes by offering some suggestions, however, for ways in which antitrust policy can foster better innovation and competition consistent with the empire of IP law.

Finally, Professor Goodwin examines law’s empire with regard to the donation and sale of human tissues and organs.⁶² She begins with the problem of the persistent and expanding gap between the tremendous demand for tissues and organs and the low supply. She argues that creating additional “incentives [is] the best solution for increasing the supply of human tissues and organs and decreasing black markets and exploitation.”⁶³ She proposes a hybrid system that continues to promote donations but that, in addition, allows potential donors to sell their tissues and organs and that compensates relatives of donors. Such a system, Goodwin contends, will not only increase supply, it is likely to lead to: a more reliable transfer system; “promote better health outcomes for potential sharers and recipients”; and perhaps provide “economically disadvantaged individuals”

56. *Id.* at 104.

57. *Id.* at 122.

58. *Id.* at 125, 126.

59. *Id.* at 126.

60. *Id.* at 117.

61. *Id.* at 123.

62. Goodwin, *supra* note †.

63. *Id.* at 1210.

with “better screening for illnesses.”⁶⁴ The primary impediment to her proposal is the National Organ Transplant Act, which prohibits the buying and selling of, or other financial compensation for, organs and tissues. Goodwin explains that through this Act the federal government “operates in many ways like an ‘empire’”: “power, influence, monopolistic hold, veiling, a lack of accountability—or the need to be accountable—and imperviousness to human suffering.”⁶⁵ She calls for the overthrow of this empire and for states to be free to experiment with different systems (such as her proposed one). Unless this empire falls, she argues, “thousands of Americans will die each year.”⁶⁶

Each of these four lectures pushes us to think about what we are talking about when we talk about empire and also what it means to call law an empire.

64. *Id.* at 1234.

65. *Id.* at 1235.

66. *Id.* at 1237.