

## “Other Worlds are Actual”: Tully on the Imperial Roles of Modern Constitutional Democracy

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The globalization of modern legal and economic practices has not ushered in a state of perpetual peace as Kantians have famously predicted. Rather, it has reinforced the perpetual crises and violence that is today's realm of the political. This article examines James Tully's claim that the formalization of diverse legal traditions into the modular confines of modern constitutions, as nation-states and international law, is a project of today's imperial hegemony. The global imperialism of modern constitutionalism is one that suppresses the vast multiplicity of existing legal pluralities and, consequently, fuels war and aggression, not perpetual peace. Tully's important analysis of the imperial roles of modern law is understood in the broader contexts of his work on constitutionalism and contemporary debates in the disciplines of legal and political theory. The author provides support for Tully's optimism that law and politics can potentially be decolonized by opening up to the worlds and legal pluralities that are constantly being re-created in the everyday practices, interactions, and relationships of people situated in their own unique localities worldwide. Numerous examples of where these "other worlds" can be seen are offered.

La mondialisation des usages juridiques et économiques modernes n'a pas ouvert la voie à un état de paix perpétuelle, comme les kantiens l'ont notoirement prédit. Loin de là: elle a accentué les crises et la violence perpétuelles qui constituent aujourd'hui la sphère de la politique. Cet article examine l'affirmation de James Tully, selon laquelle la formalisation de traditions juridiques diverses dans les confins modulaires des constitutions modernes, comme les États-nations et le droit international, est un projet de l'hégémonie impérialiste contemporaine. L'impérialisme mondial du constitutionalisme moderne supprime la vaste multiplicité des pluralités juridiques existantes et par conséquent attise les guerres et provoque les agressions, plutôt que d'engendrer la paix perpétuelle. L'analyse importante que fait Tully des rôles impérialistes du droit moderne se comprend dans le contexte plus large premièrement de son travail sur le constitutionalisme, deuxièmement des débats contemporains dans la discipline de la théorie juridique et de la théorie politique. L'auteur conforte l'optimisme de Tully selon lequel le droit et la politique peuvent potentiellement être décolonisés en s'ouvrant aux mondes et aux pluralités juridiques quotidiennement recréés dans les usages, interactions et relations de personnes situées dans leurs propres

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localités uniques du monde entier. De nombreux exemples d'endroits où on peut voir ces « autres mondes » sont donnés.

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THE STORY OF MODERNITY in the twenty-first century may still be in its opening scenes, yet it seems clear that this is not just another repackaged 1990s tale set at the end of history or in a harmonious stage of non-history. Following closely on the heels of a century noted for its devastating brands of warfare, rationalized violence, and systematized destruction, modernity's triumph over its colonial underside does not look likely. If anything, the global imperial project is intensifying and gaining steam in the midst of a perpetual War on Terror, staggering global inequalities, global corporate hegemony, the steady rollback of established civil liberties, and looming threats of ecological catastrophe. After fuelling some 500 years of colonial violence, the project of modernity remains unfinished and now scuttles frantically towards its self-proclaimed *telos*.<sup>1</sup>

Rather than politely avoiding the ongoing problems of violence and destruction in our times, James Tully's "Modern Constitutional Democracy and Imperialism" offers important and timely reflections that drive straight to the seriousness of these matters.<sup>2</sup> Tully casts a critical perspective on the

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1. Philosophers in the modern tradition from Immanuel Kant and Georg Wilhelm Friedrich Hegel through to Jürgen Habermas and Francis Fukuyama have long theorized the coming of a final stage towards which the evolutionary history of human societal development is headed. This *telos* of the modern project—variously deemed "perpetual peace," *Geist*, or the "end of history"—is generally depicted as a global age characterized by the rule of liberal democratic states and international law. Others in the Marxist tradition ranging from Karl Marx and Friedrich Engels through to Michael Hardt and Antonio Negri have envisioned this *telos* as communism or a classless society. What these narratives share as modern philosophies is the underlying consensus that human history is progressing toward some future world historical end-state that can be theoretically deduced and empirically demonstrated in advance.
  2. James Tully, "Modern Constitutional Democracy and Imperialism" (2008) 46 Osgoode Hall L.J. 461 [Tully, "Democracy & Imperialism"].

modern western tradition's most cherished and least questioned institutions by asking what role modern constitutional democracy has played, and continues to play, in perpetuating longstanding patterns of imperialism and violence.

These are potentially very destabilizing and unsettling questions. Yet Tully's peek beneath the veil of the modern tradition's foundations uncovers a stunning multiplicity of beautiful worlds, each exhibiting their own unique strengths and limitations. Tully embraces a spirit of trust rather than distrust towards these worlds. His approach seeks and affirms plurality, rather than denying it. His optimism is inspired by the wealth of diversity that he observes in the world and makes a powerful call for us to open our thoughts and hearts to these many alternatives and traditions from which we all can learn.

My intention in this article is to explicate some of the underlying themes and implications of Tully's approach to constitutionalism and imperialism. I will carefully explore the arguments made in "Modern Constitutional Democracy and Imperialism" and locate these arguments in the broader contexts of Tully's work, as well as in legal and political theory. The first section focuses on two key features of his argument: first, that modern law is premised on a degree of formality or disembeddedness between itself and its subjects; and second, that it is founded on the concept of unformed constituent power. These characteristics of modern constitutional law not only give rise to a paradox in its philosophical foundations, but rely upon imperialism to overcome this paradox, particularly when modern constitutional law's theoretical form is applied to the existing world. Consequently, the foundational paradox of modern constitutional democracy is its imperial paradox.

The second section draws out some implications of this argument by situating it in relation to the broader questions of freedom in western political philosophy. In contrast to modern conceptions that place the sphere of democratic freedom within universal and unquestionable limits or foundations, Tully puts forward an account of freedom inspired by Wittgenstein.<sup>3</sup> On this account, the limits of freedom emerge immanently through the ongoing practice of the rules and customs themselves, and are thus always open to contestation and modification by practising these rules creatively or "acting otherwise." This

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3. James Tully, "Wittgenstein and Political Philosophy" in Cressida Heyes, ed., *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003) [Tully, "Wittgenstein and Political Philosophy"].

is the approach to democracy and freedom that Tully has developed since *Strange Multiplicity*,<sup>4</sup> which he terms democratic constitutionalism.

The final section demonstrates that Tully's view of freedom reveals an underlying tapestry of fluidly changing relational fabrics that lies beneath the surface upon which the project of modern constitutionalism is inscribed. This world is embedded in the everyday practices of people interacting in relations unmediated by the relational forms offered by modern constitutions and legal institutions. Viewed from this perspective, the modern constitutional project seeks to contain this fluid world within fixed and stable limits, but can never fully emulate or capture its amorphous form. This world constantly erupts through the fissures and points of rupture in the modern project, and must be constantly harnessed and restrained in order to retain the semblance of structural integrity. Consequently, the project of democratic constitutionalism is one of strengthening and expanding existing pockets of creative possibility where these "other worlds" of non-imperial, democratic relations are being practised and are always emerging. In closing, I indicate where such worlds can be found.

## I. THE IMPERIAL PARADOX OF MODERN CONSTITUTIONAL DEMOCRACY

The idea that the institutions and structures commonly recognized as those of constitutional democracy might perpetuate global imperialism may seem counterintuitive, given that these very institutions are often heralded as the necessary alternative to colonial injustice.<sup>5</sup> Tully's approach in making a case for this relationship is both hermeneutical and historical. First, he excavates a series of underlying assumptions that make the modern constitutional project philosophically possible. Next, he demonstrates that historically, where this philosophical project has been applied to real world contexts, it has relied on imperial technologies of governance that persist up to the present day. The combination of these critical hermeneutic and historical approaches provides an

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4. James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully, *Strange Multiplicity*].

5. See e.g. Jürgen Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in Jürgen Habermas, *The Divided West* (Cambridge: Polity Press, 2006) 115 [Habermas, "Still Have a Chance?"].

opportunity to reassess the philosophical basis of constitutionalism in such a way that could render it non-imperial.<sup>6</sup>

As a place to begin exploring the particular characteristics that ground the modern project of constitutional democracy, Tully addresses an oft-noted paradox that has pestered this tradition since its early origins. Roughly stated, this paradox holds that: (1) modern constitutional forms are said to gain legitimacy from the consent of a pre-constitutional people; while at the same time (2) such a “people” require a constitutional form through which to exercise their constituent power legitimately. The modern constitutional tradition is born from this tension of wanting to maintain an equal foundational commitment to the fundamental principles of the rule of law and democracy—what has been described as the law’s facticity and its normativity.<sup>7</sup>

Yet, the two fundamental principles of the modern constitutional tradition have proven difficult to maintain simultaneously, especially in the many cases where a people do not freely choose to subject themselves to modern western-style constitutions and institutions of representative democracy in some foundational moment. Ultimately, if institutions of representative government do not arise from a pre-civil people, there are two possibilities. Modern constitutions and legal structures may be forcefully imposed on the “crooked timber” of the people in order to grant them the constituent powers of democracy.<sup>8</sup> Alternatively, the people are destined to remain outside of the

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6. Aspects of this approach are detailed in James Tully, “Political Philosophy as a Critical Activity” (2002) 30 *Pol. Theory* 533 [Tully, “Political Philosophy”]; James Tully, “The Pen is a Mighty Sword” in James Tully, ed., *Meaning and Context: Quentin Skinner and his Critics* (Cambridge: Polity Press, 1988) 7.
  7. For instance, see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996) [Habermas, *Between Facts and Norms*]; Jürgen Habermas, “Reconciliation through the Public Use of Reason” in Ciaran Cronin & Pablo de Greiff, eds., *The Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998) 49; and John Rawls, “Lecture IX: Reply to Habermas” in *Political Liberalism* (New York: Columbia University Press, 1996) 372. For a helpful summary and critical analysis of this exchange between Rawls and Habermas as well as an earlier formulation of the paradox that emerges from this exchange, see James Tully, “The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy” (2002) 65 *Mod. L. Rev.* 204 at 205 [Tully, “Unfreedom of the Moderns”].
  8. See e.g. Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch (1795)” in Ted Humphrey, ed., *Perpetual Peace and Other Essays* (Indianapolis: Hackett Publishing

formal structures of law, thereby discrediting their collective will as uncivilized, pre-modern, or undeveloped and ultimately illegitimate. This paradox of people requiring modern democratic structures of law prior to being able to exercise their democratic will collectively is precisely what renders the tradition of modern constitutional democracy imperial. The paradox of modern constitutional democracy is thus the colonial paradox of its philosophical foundations.

Legal philosophers have grappled with this problem since the dawn of modern constitutional theory, spanning the efforts of Thomas Hobbes, John Locke, and Jean-Jacques Rousseau through to those of John Rawls and Jürgen Habermas. Numerous philosophical and rhetorical devices have been employed in the various efforts to escape this paradox, including ahistorical accounts of the “laws of nature,” historical stages theories of development or modernization, and hypothetical concepts such as a “general will,” “original position,” “ideal speech situation,” or the “inherent *telos*” of language use. Yet, despite these many storied attempts, the paradox of modern constitutional democracy still lingers at large.

Rather than furthering the endless efforts to solve this paradox, Tully’s hermeneutic approach draws out the assumptions and conditions that make this very paradox possible. Indeed, if the project of modern constitutional democracy rests on paradoxical foundations, then it is not unreasonable to ask whether there might be an inconsistency internal to its philosophical underpinnings. Accordingly, Tully’s approach is to dissolve the paradox of modern constitutional democracy by carefully describing the key features that distinguish this tradition as only one possible way of imagining how constituent powers and constitutional forms can be arranged.

For instance, Tully reminds us that the modern conception of a constitutional form is particular insofar as it refers to a formally enshrined set of laws that stands over and apart from the everyday interaction of those who are subject to it—what Tully terms the “formality or autonomy condition” of civil law.<sup>9</sup> The law is conceived of as disembedded or separated from those subject to it insofar as it remains unchanged by their everyday rule-following practices or patterns of interaction. Modern law is thought to constitute the underlying basis of

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Company, 1983) 107 [Kant, “Perpetual Peace”]; Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Intent (1784)” in Ted Humphrey, 29.

9. Tully, “Democracy & Imperialism,” *supra* note 2 at 466.

everyday interactions and relations between citizens rather than emerging immanently from these practices. Modification of the law requires an appeal to formally institutionalized spheres such as a court or legislature, which again stand apart, separated from everyday fields of practice. The constitutional laws to which the modern citizen is subject are effectively alienated from the citizen in a manner reminiscent of Marx's description of the modern worker's alienation from the product of their labour under the formal property and wage labour regimes of capitalism.<sup>10</sup>

This disembedded conception of the law is foundational to the modern tradition of constitutional democracy. The tradition of modern law actually refers to this feature to distinguish itself from all other legal traditions that lack such formality and are thereby deemed customary law. However, as Tully demonstrates, if modern conceptions of law "did not have this degree of autonomy or formality there would not be the 'paradoxical' relationship between the rule of law and constituent powers at its centre."<sup>11</sup> Indeed, if law were conceptualized as being grounded in practices, it would be impossible to conceptualize the paradox of a people living in the absence of a constitutional form. Even where the particular features of modern constitutionalism are not found, the constitutional form is understood as existing in ever-changing and emerging practices and situated interactions.

A second philosophical feature of modern constitutionalism that makes this paradox possible is the "distinctly modern idea of constituent power as a capacity or potentiality, prior to taking on a concrete form."<sup>12</sup> The modern narrative of sovereignty relies on this idea of the people being able to stand back from any established constitutional form and, acting in unison, impose a constitutional form upon themselves in a founding contractual moment. As Tully notes, "[t]his modern concept of unformed constituent power is, of course, the condition of possibility of the modern idea of popular sovereignty"<sup>13</sup> without which we would not have the paradoxical relationship between popular sovereignty and the rule of law.<sup>14</sup>

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10. See James Tully, *Public Philosophy in a New Key: Volume 2, Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008) 243 [Tully, *Public Philosophy*].

11. Tully, "Democracy & Imperialism," *supra* note 2 at 466.

12. *Ibid.* at 469.

13. *Ibid.*

14. *Ibid.*

Again, however, Tully coaxes us to move away from thinking of the forms in which people organize themselves as something abstracted from the everyday forms of individuals' interactions. It then becomes clear that we are already within a framework of rules (*e.g.* Wittgenstein's language games, which taken together could be said to comprise a constitutional form). As Tully notes, "[e]ven the concept of constituent power as popular sovereignty already recognizes these powers under a concept and thus presupposes a form and is one step away from the distinctly modern idea."<sup>15</sup> Consequently, the idea of a people exercising constituent power without that power taking any actual form becomes nonsensical since "the constitutional form *is* the form that the constituent powers take."<sup>16</sup>

The combination of these features—the formality condition and the concept of unformed constituent powers (buttressed by the six subsequent features described by Tully)—sets the philosophical conditions that give rise to the foundational paradox of modern constitutional democracy. The philosophical project of modern constitutional democracy subsequently requires imperialism to overcome its basic paradox when applied to the everyday interactions of the social world.<sup>17</sup> On this account, when peoples choose not to subject themselves

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15. *Ibid.* at 468-69.

16. *Ibid.* at 468 [emphasis in original]. Indeed, the idea of people collectively exercising constituent powers without those powers constituting any actual form is so difficult to conceptualize that even within the modern tradition it has remained largely ambiguous. Early social contract theorists referred to this original condition in which people were said to exist in the absence of any constitutional form or constituent powers—*i.e.* in the absence of any coherent social structure—as a “state of nature.” However, more recent theorists of this tradition seem to have conceded that, at best, such a situation of a people acting collectively without any existing constitutional form could only ever be considered as a hypothetical situation. For instance, Rawls's neo-Lockean theory of justice invites us to consider such an “original position” as a thought experiment in abstraction from our existing social localities. See Rawls, *supra* note 7. Similarly, Habermas concedes that his abstract conception of an “ideal speech situation,” where communicative action can occur unhindered by any social impediments aside from the “unforced force” of the better argument and the inherent laws of language, can only be practically employed as a regulative ideal with which to evaluate existing practices. See Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Cambridge: MIT Press, 1993) at 51. Of course, these hypothetical exercises are fraught with their own conceptual difficulties.

17. As Tully's third feature states, modern constitutional democracy “requires some kind of master or legislator to impose law on the crooked timber of the people and to act without

to these disembodied structures of modern constitutional law and western-style institutions of modern nation-states, they are seen to exist without any coherent constitutional form. Such peoples are thus assumed to be incapable of exercising their constituent powers of self-determination until modern legal structures are granted to them by others who have already been civilized by the rule of law.<sup>18</sup> The long histories of colonization and decolonization during the modern age attest to the fact that formal legal structures of constitutional democracy must be imposed on people throughout the world (by formal or informal means) before international law will legitimately consider them self-determining nations.<sup>19</sup> As nicely captured by Tully, constitutionalism precedes democracy within the modern tradition.

Consequently, the foundations of modern constitutional democracy are undemocratic and imperial insofar as they attempt to constitute the social field of interactive practices rather than being constituted by (or emerging from) this field itself. It is thought that self-determination can literally be “granted to” indigenous peoples by imposing “formal” constitutional law and institutions on top of and in the place of established indigenous forms of governance.<sup>20</sup> The

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their consent and independent of law in exceptional circumstances until they are ‘civilized’ by centuries of subjection to civil law.” See Tully, “Democracy & Imperialism,” *supra* note 2 at 472.

18. See *e.g.* Kant, “Perpetual Peace,” *supra* note 8. For a more recent formulation, see Habermas, “Still Have a Chance?,” *supra* note 5.
19. Just as earlier laws of empire (such as *lex mercatoria* or merchant law) only recognized other competing empires as legitimately sovereign nations, the current institutions of global governance recognize only those belonging to a world system of nation-states as legitimately self-determining nations under international law. They constitute modern states insofar as they recognize (or fail to recognize) their legitimacy as actors in the international sphere. Thus, we can see that the constitutions of modern nation-states and the constitutions of these systems of international law beyond the state arose together in this way, or are equiprimordial. For further elaboration on this point, see R.B.J. Walker, *Inside/Outside: International Relations as Political Theory* (Cambridge: Cambridge University Press, 1992); Walter D. Mignolo, *Local Histories/Global Designs: Coloniality, Subaltern Knowledges and Border Thinking* (Princeton: Princeton University Press, 2000). An excellent overview of the colonial history of international law can be found in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001). See also James Tully, *Understanding Imperialism Today* (Cambridge: Cambridge University Press) [forthcoming in 2009].
20. This is justified within the tradition by discursive narratives of historical development or modernization which contend that indigenous forms of customary law were merely at an earlier stage in their progress towards eventually becoming modern legal structures in any

paradoxical foundations of modern constitutionalism are thus shown to be precisely those that also render this specific constitutional form imperial. The paradox of modern constitutional democracy is the imperial paradox. As such, any political philosophy that overlooks, downplays, or takes for granted its own paradoxical foundations can only do so at the cost of failing to engage seriously with the violence characteristic of modern constitutional democracies—not only throughout their histories but at present as well.

## II. "ACTING OTHERWISE": THE AGONISTIC ARTS OF FREEDOM

At base, this becomes a conceptual question about freedom for Tully, who demonstrates that the freedom offered by colonial modernity is a foundational form of freedom, permitted within the fixed boundaries of an underlying framework that remains largely concealed and shielded from critical reflection or contestation.<sup>21</sup> As Wittgenstein would say, such freedom is "closed by a frontier."<sup>22</sup> Hence Tully begins with a significant discussion of Ronald Robison and John Gallagher's insights into the imperialism of free trade.<sup>23</sup> By considering how free trade permits freedom within the dominant structures of the global capitalist marketplace, Tully seeks to establish a parallel with the freedom of self-determination offered by formal decolonization. This freedom is only permitted to occur within the narrow institutional confines of self-determining nation states and the established bodies of international law (themselves derived

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case (Tully's seventh feature). See Tully, "Democracy & Imperialism," *supra* note 2. Even once subjected to a set of modern legal structures, only some peoples are ever recognized as legitimately sovereign nations under international law. Consider, for example, the Indigenous peoples of Canada who, in most instances, are granted access to the institutions of international law only via the representative of their broader geographical riding in the government of Canada.

21. See *e.g.* James Tully, "To Think and Act Differently: Foucault's Four Reciprocal Objections to Habermas' Theory" in Samantha Ashenden & David Owen, eds., *Foucault contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory* (London: Sage, 1999) 90 [Tully, "To Think and Act Differently"]; Tully, "Wittgenstein and Political Philosophy," *supra* note 3 at 17; and James Tully, "The Agonic Freedom of Citizens" (1999) 28 *Econ. & Soc'y* 161 [Tully, "The Agonic Freedom"].
22. Ludwig Wittgenstein, *Philosophical Investigations*, trans. by G.E.M. Anscombe (Oxford: Basil Blackwell, 1978) at 28.
23. Ronald Robison & John Gallagher, "The Imperialism of Free Trade" (1953) 6 *Econ. Hist. Rev.* 1.

from colonial law) that govern the global system of states. In both cases, freedom exists within the predetermined, non-negotiable, and purportedly universal structures of capitalist markets and the modern nation-state system (each of which presents strict institutional limitations on how this freedom can be legally enacted). In both cases, imperialism persists.

As early as 1953, Robinson and Gallagher recognized what many have come to intuitively understand today—that free trade offers only a very restricted and galling freedom that perpetuates imperial economic relations (freedom within a structure of domination).<sup>24</sup> Yet political scientists seldom recognize that the same can be said about the formal legal and political structures of modern western-style constitutional nation-states and international law. These structures, characteristic of formal decolonization, establish a new set of unquestionable and militarily enforced institutional conditions within which the foundational freedom of self-government is permitted. These modular institutions are largely modelled after the colonial forms that they are intended to replace. The constitutional form shifted in the transition from colonial to post-colonial institutional structures or from monopoly capitalism to free trade. Each nevertheless offers a restricted foundational freedom and allows imperialism to persist in the absence of colonialism and in the name of freedom or democracy.<sup>25</sup>

From here, one could contend that such foundational conceptions of freedom are actually reflective of a deep-seated metaphysical tendency towards foundationalism in western philosophy. Tracing the history of western philosophy and metaphysics, one could attempt to understand the origins and history of the transcendental search to uncover abstract, idealized forms (whether this be forms of freedom, truth, being, or morality) and the subsequent attempts to structure the world in accord with these abstractions by imprinting them back upon the world itself. While this metaphysical project has taken an array of different forms throughout the history of western philosophy, the modern period can be characterized as being driven by an exceptionally hyper-rationalized drive to discover the indisputable universal limits of science

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24. *Ibid.*

25. See James Tully, “On Law, Democracy and Imperialism” in Emiliios Christodoulidis & Stephen Tierney, eds., *Public Law and Politics: The Scope and Limits of Constitutionalism* (London: Ashgate, 2008) 69 [Tully, “Law, Democracy and Imperialism”].

or reason. Once established philosophically, however, these limits must be imposed back upon the world coercively and then forcefully policed wherever the world does not quite adhere. Seeking to remake the world in their own image, these abstracted philosophical forms are inscribed onto the physical landscape and enforced with violence, as with the examples of property lines or the territorial borders of modern constitutional democracies.<sup>26</sup>

One could argue that the problem with the freedom of modern constitutional democracy may be a reflection of an underlying shortcoming with the philosophical outlook and cultural experience of modernity itself, expressed as a question of constitutional democracy only insofar as it adheres to this modernist worldview. However, Tully is less interested in engaging in an esoteric debate over whether or not modernity can be salvaged than he is concerned with the concrete question of whether constitutional democracy is imperial at its core or whether it can be de-imperialized. This question has been central to much of Tully's work on constitutionalism since his Seeley Lectures at Cambridge in 1994, which later formed the basis of *Strange Multiplicity*.<sup>27</sup>

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26. Granted, each specific constitutional project is characterized by unique features that distinguish it from others, just as each conceals its own unique history explaining how that constitutional project came to take the specific form that it has in any given locality. One cannot deny the importance of these features. For the purpose of the argument presented here, what renders any one of these diverse projects a particular instantiation of the broader modular form that we call "modern constitutional democracy" is its general adherence to the eight characteristics outlined by Tully. Such projects may be deemed imperial insofar as this abstract theoretical model of constitutionalism has been forcefully imposed upon a pre-existing social fabric, either by way of formal (colonial) or informal (post-colonial imperial) means. For an excellent example of this type of argument, see Mignolo, *supra* note 19. For particularly disastrous examples of how these modernist efforts to remake the world according to their own abstract schemes have repeatedly failed, see James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).
27. Tully, *Strange Multiplicity*, *supra* note 4 at 5. Tully describes the modern western constitutional tradition as an "imperialist yoke galling the necks of the culturally diverse citizenry" and proceeds to develop a non-imperial approach to "contemporary constitutionalism." For other examples of Tully's approach to democratic constitutionalism, see Tully, "Unfreedom of the Moderns," *supra* note 7; James Tully, *The Unattained yet Attainable Democracy: Canada and Quebec Face the New Century* (Montreal: McGill University, Programme d'études sur le Québec, 2000) [Tully, "The Unattained Yet Attainable Democracy"]; James Tully, "Introduction" in Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001) 1; James

Tully's response is to save constitutional democracy from its modern variant. He does so by demonstrating that the narrow meaning that has come to be associated strictly with the term is just one way of imagining the specific form that constitutional democracy might possibly take if considered broadly. His careful description of the particular features of modern constitutional democracy serves not only to demonstrate that the tradition rests on a particular set of (paradoxical) philosophical assumptions, but to also deflate the often unquestioned claim that this particular conjuncture of constituent power and constitutional form is a universal configuration according to which all examples of constitutional democracy must adhere by their very definition.

If a constitution is not to be conceived of as something abstracted that stands above an unformed constituent group of people, then perhaps it can be conceived in broader terms as the wide-ranging fields of interaction, understood as rules and customs that emerge, are established, are contended with, and change through the very practices of everyday interactive rule-following itself. Indeed, the idea that we are always already within language games (or rule-guided social relations) was precisely Wittgenstein's important hermeneutic point (at which he arrived only after rejecting his own ambitious Augustinian efforts to generate an overarching, abstract theory that could account for all aspects of language use like a calculus operating according to definitive rules).<sup>28</sup> In addition, Tully points to the insights of twentieth-century practice-based philosophy to help explain how we are always situated in an interactive and overlapping tapestry of everchanging practices that guide and make sense of social interaction in the absence of a closed frontier or foundation.<sup>29</sup>

Conceiving of constitutionalism in this broad manner avoids having to adhere to the problematic philosophical conceptions of modern constitutional

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Tully, "The Challenge of Reimagining Citizenship and Belonging in Multicultural and Multinational Societies" in Catriona McKinnon & Iain Hampsher-Monk, eds., *The Demands of Citizenship* (London: Continuum, 2000) 212; and James Tully, "Recognition and Dialogue: The Emergence of a New Field" (2004) 7 *Crit. Rev. Int'l Soc. Pol. Phil.* 84 [Tully, "Recognition and Dialogue"].

28. Wittgenstein, *supra* note 22.

29. Tully associates this tradition of practice-based western philosophy with a lineage ranging from Heidegger to Pierre Bourdieu and Charles Taylor. For other important works within this tradition, see *e.g.* Michel de Certeau, *The Practices of Everyday Life* (Berkeley: University of California Press, 1984); Theodore R. Schatzki, *Social Practices: A Wittgensteinian Approach to Human Activity and the Social* (Cambridge: Cambridge University Press, 1996).

democracy. For instance, it avoids succumbing to the formality condition's conception of disembodied law that is separated off from its practitioners. Instead, the rule of law can be seen as emerging from everyday interactions and practices. Effectively, the constitutional rule of law *is* the changing background horizon of customs and rules or language games that both emerge from and make sense of these practices and interactions: in Tully's words, the "countless normative relationships of interaction (non-formal customary laws) that humans and non-humans both bear and transform *en passant*."<sup>30</sup>

This practice-based approach also avoids the problem of accounting for the paradox of an unconstituted people exercising constituent powers. If a people are always situated within interactive relations of shared meaning, then they are thereby already interacting and understanding on the rough ground of customs and rules that guide and make sense of these practices. These established customs and patterns of interaction, which both arise from and make sense of our everyday practices, are our ever-changing ontological condition. They make sense of who we are in the world, thereby constituting us as a people. They can never be abstracted from the world, nor can we step outside of them.<sup>31</sup>

Widening our conceptions of constitutional democracy not only avoids falling prey to the imperial paradox of modern constitutional democracy, but also has sweeping implications for how constitutional democracy is to be understood in practice. Broadly conceived, "constitutional democracy" refers to "any legal and political order that has some kind of constitution and democracy."<sup>32</sup> This includes the world's diverse, indigenous traditions that have historically been disregarded by the modernist project as less-advanced forms of customary law and have—in the name of civilization, development, and freedom—been made subject to the formal legal structures and institutions of modern constitutional democracy through the ongoing processes and technologies of colonization and imperialism.

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30. Tully, "Democracy & Imperialism," *supra* note 2 at 469 [emphasis in original].

31. Endorsing the rules and customs that emerge through everyday interaction of practitioners does not deny that a normative order is posited. Rather it democratizes the normative order that is being posited by opening its background horizon to critical contestation. Similarly, consider that Wittgenstein does not deny that words have meaning even if that meaning emerges from language use itself rather than being posited objectively prior to the actual conduct of language games.

32. Tully, "Democracy & Imperialism," *supra* note 2 at 465, n.7.

Modern constitutionalists might oppose relinquishing the concept of constitutional democracy to such a wide-ranging array of indeterminate practices and traditions. Doing so would remove the solid ground of a fixed and determined foundation from the formal institutional spaces of freedom and democracy. It is claimed that these institutional foundations have already been universally legitimated by the “prior learning processes” and “advances” of the world’s existing liberal democracies.<sup>33</sup> Opening these foundations of freedom and democracy to critique could be understood as unleashing the spectre of relativism, thereby creating an opening for any dubious form of social order, including fascism, to stand on an equal ground with liberal democracy.

In response, it is important to clarify that while the freedom described by Tully may not hinge on any transcendental or unquestionable foundation, neither is it a completely uninhibited or groundless liberty. Rather, Tully’s is an embodied and embedded freedom, situated and grounded in the background tapestry of conventions, rules, and customs that are established and modified through the very practice of freedom itself, just as language derives meaning from its use as practised within language games. As in Wittgenstein’s account, any established guiding norm may sit in the background unquestioned one moment, only to be drawn to the foreground and contested from the background horizon of other established norms the next.<sup>34</sup> Although no one aspect of the background framework of conduct and understanding withstands critique and acts as a permanent indisputable ground or foundation, this anti-foundationalist approach cannot be equated with a brand of relativism where anything goes.

Tully’s non-foundational concept of civic freedom leads not to relativism, but to a democratic and participatory freedom cradled within the security of ongoing and always-open situated practices. Indeed, if the experience of violence in the twentieth century has taught us anything, it is that the so-called customary traditions of indigenous people of the world have not created the greatest and harshest modes of violence. Rather, as an earlier generation of Frankfurt School philosophers understood, the most refined and horrendous examples of violence have been those systematic acts perpetrated by hyper-militant forms of foundationalism and modernism that have employed relentless force to impose

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33. Habermas, “Still Have a Chance?”, *supra* note 5 at 140-41.

34. See Tully, “Wittgenstein and Political Philosophy,” *supra* note 3.

their philosophically derived and rationalized limits and categories back upon a world that never quite seems to fit.<sup>35</sup>

This conception of freedom is characteristic of the distinct approach to constitutionalism that Tully has developed since *Strange Multiplicity*.<sup>36</sup> Termed “democratic constitutionalism,” as opposed to constitutional democracy, this approach leaves no constitutional foundation immune from democratic dialogue or critical contestation. This includes the structures and procedures of negotiation, dialogue, and contestation themselves. Where the institutional form through which citizens exercise their freedom is not open to democratic contestation, the structures remain undemocratic and citizens remain subjects who are not free. In contrast, Tully describes a non-imperial relation as follows:

A democratic answer is to work to bring the basic constitutional and constituent structures that are employed in these three roles under the shared participatory authority of those who are subject to them. This is the basic idea of democratic freedom and democratic constitutionalism: the laws must always be open to the criticism, negotiation and modification of those who are the subjects of them as they follow them... [T]his participatory and reflexive freedom of negotiating the norms to which we are subject *en passant* is at the heart of non-modern, customary constitutional forms and immanent constituent powers. The formalisation and disembedding of modern constitutionalism and constituent powers displaced this freedom to representative institutions.<sup>37</sup>

This concept of freedom and democracy has also informed other aspects of Tully’s work, from his approach to questions of recognition, his critique of Habermas and deliberative democracy,<sup>38</sup> his conception of philosophy as a

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35. While all foundationalist manners of thought conceal inherent violence and must therefore be approached cautiously and skeptically, those foundationalist tendencies that become equipped with the modern machinery capable of advanced, systematic destruction are the most dangerous and have proven capable of wielding the most widespread devastation.

36. Tully, *Strange Multiplicity*, *supra* note 4.

37. Tully, “Democracy & Imperialism,” *supra* note 2 at 488. For further elaboration on Tully’s distinction between constitutional democracy and democratic constitutionalism see Tully, *Strange Multiplicity*, *ibid.*; Tully, “Unfreedom of the Moderns,” *supra* note 7; and Tully, *The Unattained yet Attainable Democracy*, *supra* note 27.

38. Tully’s democratic constitutionalism can be broadly distinguished from Habermas’s theory of deliberative democracy insofar as the latter approach is to establish idealized (*i.e.* philosophically prescribed) conditions or limits within which communication is permitted to take place that are closed off to democratic dialogue. See *e.g.* Tully, “To Think and Act Differently,” *supra* note 21; Tully, “Wittgenstein and Political Philosophy,” *supra* note 3.

critical and public activity, and his more recent focus on bringing the imperial present into view as a “mode of problematisation.”<sup>39</sup>

### III. OTHER WORLDS ARE ACTUAL

In “The Imperial Roles of Modern Constitutional Democracy,” Tully expands beyond his previous work on some of the most striking implications of his Wittgensteinian approach to freedom and constitutionalism. For instance, once constitutions are broadly understood as the fluidly changing relational fabrics in which we are always engaged, it becomes clear that the modern constitutional project is one that strives to place these ever-shifting forms into the closed structures of an abstracted model. In other words, the theoretically-abstracted moulds of modernity are imposed upon the fluid world of customary practices that they seek to juridically contain but can never fully capture. A world of embedded practices thus always already exists beneath the surface upon which the modern project is inscribed.<sup>40</sup>

This is the interactive quality of Tully’s sixth feature of modern constitutional democracy.<sup>41</sup> As Tully notes, the modern state and informal imperial order maintain a wide assemblage of strategies of juridical containment that they employ in “re-naming and responding to the irruptions of popular sovereignty,

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Additionally, Tully’s pluralism allows for a wide-ranging multiplicity of public spheres or localities in which democratic deliberation may occur, as opposed to the singular and uniform public sphere that Habermas’s approach seeks to construct. See Habermas, *Between Facts and Norms*, *supra* note 7 at 8. Tully’s public philosophy remains compatible enough to establish a working relationship with deliberative democrats. See *e.g.* Tully, *Public Philosophy*, *supra* note 10 at section five, feature two. However, his philosophy does not restrict public spheres to deliberation divorced from civic action.

39. See *e.g.* Tully, “Recognition and Dialogue,” *supra* note 27; Tully, “To Think and Act Differently,” *supra* note 21; Tully, “Political Philosophy,” *supra* note 6; and Tully, “Law, Democracy and Imperialism,” *supra* note 25.

40. These existing *nomoi* are not different in kind, but only in degree, from more formalized legal orders. As Tully has argued since *Strange Multiplicity*, constitutions are seen as an ongoing dialogue with the democratic practices of their subjects, and not as categorically prior to them. For recent scholarly work in legal pluralism, see Boaventura de Sousa Santos & César A. Rodríguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005); Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall L.J.* 167.

41. Tully develops this feature in “Law, Democracy and Imperialism,” *supra* note 25.

radical sovereignty and agonistic irresolution domestically and internationally, and of bringing them in line."<sup>42</sup> These are strategies of what was referred to as recuperation by followers of the Situationist International. However, just as no abstract theory can ever perfectly emulate the world that it describes, the best that the static structures of modernity can do is to chase an ever-changing world of practices. It can only ever remain one step behind. Refusing to remain constricted or confined, the fluid world of everyday practices constantly slips through the cracks and crevices of a modernity that is constantly falling apart and having to mend itself. The project of modernity is destined to remain unfinished.

It might be useful here to consider the city as the archetypal symbol of modernity. Cities are almost by definition concentrations of people that are larger than that which the local ecosystems upon which they are situated could support on their own without the diversion of resources from other areas. Consequently, cities require sustained efforts to reorder the existing ecosystems in accordance with their own requirements. Today's major metropolitan areas rely on massive and elaborate engineering systems sprawling vast distances in order to divert resources such as food, energy, and water into the city and to provide for the basic needs of urban dwellers. However, maintaining this kind of imposed and structured order in an ecosystem proves a perpetually exhausting task because ecosystems always seek to find and create their own structure of equilibrium.<sup>43</sup>

Still, regardless of the extent of our efforts to reshape the earth by placing a human-derived structural order upon the tapestry of immanently emerging and returning ecosystems, the world upon which these structures are imposed can never be perfectly captured, fully contained, or made to strictly obey. At best, the diversity of life from the underlying ecosystem can only ever be kept temporarily at bay. If the city is to maintain its stable structural form and prevent itself from returning to the earth, the encroaching ecosystem of life has to be continuously recaptured, recuperated, and contained.

Even the human inhabitants of cities do not navigate through the city's space or use it in a way that can ever be foreseen or planned. While high modernists believed that a city could be designed down to the function of every block and neighbourhood, such great schemes to improve the human condition

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42. Tully, "Democracy & Imperialism," *supra* note 2 at 478.

43. Mike Davis, *Dead Cities and Other Tales* (New York: The New Press, 2003) at 361.

are bound to fail. Immanent life never follows a predestined order and a city can only ever take the shape of the people who use it. As Wittgenstein remarked, ancient cities, like languages, are built as “a maze of little streets and squares, of old and new houses, and of houses with additions from various periods”; built around this and surrounding it can be found “a multitude of new boroughs with straight regular streets and uniform houses.”<sup>44</sup>

The stunning and optimistic conclusion that Tully takes from these insights is that another world is not only possible (as often quipped by proponents of the World Social Forum<sup>45</sup>), but other worlds are in fact already actual. These worlds, suppressed below modern constitutional law, exist, despite imperialism, within what Tully refers to as the interstices of power and *Speilraum* (“room to manoeuvre”).<sup>46</sup> As he succinctly explains, “there are subjugated and overlooked ‘alternative worlds’ or ‘alternative modernities’ of law and governance that exist in the day-to-day practices of millions of people, despite the overarching

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44. Wittgenstein, *supra* note 22 at 28.

45. See Boaventura de Sousa Santos, “The World Social Forum: A User's Manual,” online: Centro de Estudos Sociais <[http://www.ces.uc.pt/bss/documentos/fsm\\_eng.pdf](http://www.ces.uc.pt/bss/documentos/fsm_eng.pdf)> [de Sousa Santos, “A User's Manual”]; Boaventura de Sousa Santos, “The World Social Forum: Toward a Counter-Hegemonic Globalization” in Jai Sen *et al.*, eds., *The World Social Forum: Challenging Empires* (New Delhi: Viveka Foundation, 2004) 235, online: <[http://www.choike.org/nuevo\\_eng/informes/1557.html](http://www.choike.org/nuevo_eng/informes/1557.html)>; and Janet Conway, “Citizenship in a Time of Empire: The World Social Forum as a New Public Space” (2004) 8 *Citizenship Stud.* 367 [Conway, “Citizenship in a Time of Empire”].

46. To see the development of these concepts in Tully's work, see “The Agonic Freedom,” *supra* note 21; “The Struggles of Indigenous Peoples for and of Freedom” in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 36; “An Ecological Ethics for the Present” in Brenden Gleeson & Nicholas Low, eds., *Governing for the Environment: Global Problems, Ethics and Democracy* (London: Macmillan, 2000) 147; and “Democracy and Globalization: A Defeasible Sketch” in Ronald Beiner & Wayne Norman, eds., *Canadian Political Philosophy: Contemporary Reflections* (Toronto: Oxford University Press, 2001) 36. Tully refers to “interstitial locations” for the first time in “Unfreedom of the Moderns,” *supra* note 7. He refers to *Speilraum* for the first time in “Recognition and Dialogue,” *supra* note 27. See also his more recent treatments of these ideas in Tully, “Law, Democracy and Imperialism,” *supra* note 25; “A New Kind of Europe? Democratic Integration in the European Union” (2007) 10 *Crit. Rev. of Intl. Soc. Polit. Philos.* 71 [Tully, “A New Kind of Europe”]. For the most complete treatment to date, see Tully, *Public Philosophy*, *supra* note 10. For an interesting comparison with Tully's early work, see “Complex Issues: E.P. Thompson and the Peace Movement” (1983) 16 *Our Generation* 60.

hegemony and seeming inescapability of the particular western form of constitutional democracy.<sup>47</sup> If it is the case that these alternative worlds are already being practised beneath the radar of the modern gaze, then the project of democratic constitutionalism is not the project of recuperation—finding an even more universal or all encompassing theory that will account for the transcendental limits or forms of interaction that preceding theories have missed. Rather, democratic constitutionalism is a project of *detournement*—proliferating and strengthening the restricted pockets where non-imperial democratic relations are already being practised, and exploiting the creative possibilities of “acting otherwise” that exist all around us everyday, “within and against the constitutional forms to which the governed are now subject.”<sup>48</sup> In each situated locale and together in their wondrous array of emergent forms, these creative practices of democratic freedom hold the power to rebuild the world like Wittgenstein’s ancient city—one neighbourhood at a time.

It is not only Wittgenstein, or Tully, or the philosophers of practice who have spoken to the importance of locally-situated practices. Indeed, many of the world’s 370 million Indigenous peoples, speaking in countless different ways and languages, have long attested to the importance of living intimately with the earth and all the other creatures who share the land, air, and water where we find ourselves situated as earthly creatures.<sup>49</sup> Many have continued to practise the ancient arts of living closely with the earth, despite the colonial forms of abstract knowledge and formal institutions that are imposed upon their people and their lands.

Nor is this only the message of the world’s Indigenous peoples. Indigenous and non-Indigenous peoples throughout the globe are quietly at work every day

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47. Tully, “Democracy & Imperialism,” *supra* note 2 at 491.

48. *Ibid.* at 489.

49. For an example of this message in writing, see E. Richard Atleo, *Tsawalk: A Nuu-chahmuth Worldview* (Vancouver: University of British Columbia Press, 2005). For another example from the perspective of a Buddhist worldview, see Thich Nhat Hanh, *The Heart of Understanding* (Berkeley: Parallax Press, 1988). These are just two examples of the countless voices of people who largely remain unheard within the prevailing structural forms of political philosophy and modern constitutional democracy. Although these voices remain on the periphery of the dominant debates, because these particular exemplars have been recorded in writing and published, their voices are one step closer to being noticed by the predominant paradigms, which tend to place less validity on oral or other non-written traditions or perspectives.

remaking the world from the bottom up in their own situated locations. Theirs are the voices least heard by the prevailing modern imperial worldviews. Nevertheless, once we begin looking, examples of these practices reveal themselves all around us in our own situated localities and beyond. To illustrate the existence of such practices, I will offer five broad examples and will discuss how each engages creatively with the modern constitutional legal order. By no means is this list intended to provide a complete account of these activities. It cannot, simply by virtue of the vast landscape of these diversely situated practices that is being described.

The first broad type of creative practice is those of people who act otherwise within and against existing modern legal and political institutions. This includes the creative use of court systems to circumvent or exploit existing loopholes in modern imperial law, or the creative engagement with electoral politics as exemplified by Ejército Zapatista de Liberación Nacional (EZLN)'s *otra campaña*—a campaign intended to encourage Mexicans to boycott the 2006 Mexican presidential elections in favour of building a parallel campaign of social forces outside of the political system and emerging from the grassroots activism of Mexican society.<sup>50</sup> This broad type of practice can also include the creation of locally-supported farms or co-operatives, and the creative use of mainstream media, as the Yes Men<sup>51</sup> have famously exemplified. Another excellent example is Community Land Trusts (inspired by the Gandhian Bhoodan movement of India) that seek to conserve land by encouraging proprietors to voluntarily place their land holdings within strict legal covenants that are intended to remove the land from the free market proprietary economy in perpetuity.<sup>52</sup> Although these examples all work within or with the predominant legal institutions of the modern state, they do so using creative rule-following practices with the intent of exposing the limitations of these institutions and of thereby subverting them. Though this approach conceals well known limitations, there is the potential for people to democratize institutions by employing them creatively in unconventional and previously unexplored ways.

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50. Subcomandante Marcos, *The Other Campaign = La Otra Campaña* (San Francisco: City Lights, 2006).

51. The Yes Men, online: <<http://www.theyesmen.org>>.

52. See e.g. The Land Conservancy, online: <<http://conservancy.bc.ca>>; The E.F. Schumacher Society, "Community Land Trusts," online: <<http://smallisbeautiful.org/clts.html>>.

The second broad type of acting otherwise is the creation of parallel institutions within the realm of civil society from where people then place demands upon the prevailing legal structures. Certain non-governmental organizations (NGOs) might come to mind here, as might the tactics of non-violent civil disobedience employed by “anti-globalization” movements since the successful shutdown of the World Trade Organization (WTO) summit held in Seattle in 1999.<sup>53</sup> The World Social Forum<sup>54</sup> might be yet another example of this, as might independent media centres and independent and internet radio broadcasts such as Democracy Now!,<sup>55</sup> or musicians who make use of mainstream media as a means through which to express their dissent.<sup>56</sup> As with the previous set of examples, these practices do not fall outside of the law. However, they do not work directly within the specific institutions of politics or the economy either. Instead, they work creatively within the legally-constructed institution called civil society with the intention of exposing the limits of hegemonic institutions. Many examples of these efforts might be found in what Paul Hawken and the Wiser Earth Project call the “largest and fastest growing movement in the world.”<sup>57</sup>

The third and fourth types of creative practices are both examples where people practise non-participation and non-compliance with the modern institutions of colonial hegemony. These examples attempt to create cultures, communities, or institutions of grassroots participatory democracy which are

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53. See Janet Thomas, *The Battle in Seattle: The Story Behind the WTO Demonstrations* (Golden, CO: Fulcrum, 2000).
  54. See Jai Sen *et al.*, eds., *The World Social Forum: Challenging Empires* (New Delhi: Viveka Foundation, 2004); de Sousa Santos, “A User’s Manual,” *supra* note 45; and Conway, “Citizenship in a Time of Empire,” *supra* note 45.
  55. Democracy Now! “The War and Peace Report,” online: <<http://www.democracynow.org>>.
  56. One example of this last group might be the public concert performed by the rock group Rage Against the Machine outside the Democratic National Convention in Los Angeles, calling on people to reject both of the major political parties in the 2000 U.S. Presidential elections.
  57. See Paul Hawken, *Blessed Unrest: How the Largest Movement in the World Came into Being And Why No one Saw it Coming* (London: Viking, 2007). For a “directory” of this movement, see Wiser Earth, online: <<http://www.wiserearth.org>>. Still, Hawken’s taxonomy of this “movement” remains largely biased towards those participating within the frameworks of NGOs and non-profits. This consequently misses the even larger array of people engaged in resistance movements in their everyday life or communities that do not assume such a formal structure and can thereby be even harder to see.

intended to stand in parallel with the prevailing institutions. The third type can include those examples where people have occupied interstitial spaces and created autonomous, grassroots, democratic institutions.<sup>58</sup> These spaces are then defended with civil disobedience if confronted with hostility. This is the insurgent tendency within this broad group of practices. Early examples might include the Diggers movements of seventeenth-century England, or the maroon societies in Jamaica which successfully managed to escape and evade the legal institutions of modern slavery and live autonomously from colonial society. More contemporary examples might include the autonomous *municipios* and *caracoles* of the Zapatistas in Chiapas; the defence of the Radio Universidad in Oaxaca;<sup>59</sup> landless peasants movements seeking to reoccupy abandoned farmlands in Brazil and elsewhere throughout the world;<sup>60</sup> the reoccupation of abandoned factories in Argentina in the wake of the economic crash in 2002 as well as other examples of syndicalism internationally;<sup>61</sup> the blockades by Indigenous peoples in North America attempting to defend their lands such as those of the Grassy Narrows First Nation and Six Nations in Ontario; tree-sit occupations to protect threatened ecosystems throughout North America; the creation of community gardens in the abandoned spaces of urban environments such as the People's Park in Berkeley; and urban squats in vacant and abandoned buildings or villages found worldwide.

Although many communities have succeeded in sustaining autonomous spaces of participatory community democracy for substantial lengths of time,

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58. This is the approach being advocated and adopted by many contemporary anarchist communities and writers. See e.g. Richard J.F. Day, *Gramsci is Dead: Anarchist Currents in the Newest Social Movements* (Toronto: Pluto Press, 2005); George Katsiaficas, *The Subversion of Politics: European Autonomous Social Movements And The Decolonization Of Everyday Life* (Oakland: AK Press, 2006); and Gustav Landauer, *For Socialism* (St. Louis: Telos Press, 1978). For an "anarcho-indigenous" perspective that advocates this approach, see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999); Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Toronto: Broadview Press, 2005).
59. *Un Poquito de Tanta Verdad = A Little Bit of So Much Truth*, 2007, DVD (Seattle: Corrugated Films, 2007).
60. See Brazil's Movimento dos Trabalhadores Rurais Sem Terra (MST), online: <<http://www.mstbrazil.org/?q=about>>.
61. Marina Sitrin, ed., *Horizontalism: Voice of Popular Power in Argentina* (Oakland: AK Press, 2006).

one disadvantage of this approach is that once these movements begin to visibly occupy a territorial space, they reveal themselves and are exposed to the potential use of force by the prevailing hegemonic institutions. Consequently, much of the energy and creative possibility of these movements is diverted to defending their efforts rather than to acts of creating something new. Ultimately they are often quashed by the superior force of the state, as attested to by the recent examples of the Southcentral Community Farm in Los Angeles and Copenhagen's Ungdomshuset squat.

The fourth set of approaches to creating democratic communities that exist in parallel to modern-colonial legal institutions are those which adopt non-territorial forms of cultural subversion.<sup>62</sup> Unlike the examples above that attempt to occupy and confront hegemonic structures, this set of engaged non-violent examples tends to subvert and evade those structures. This could include such broad counter-cultural and artistic practices as underground spoken word and hip-hop communities, political puppeteering, culture jamming, and the creation of underground publications or "zines."<sup>63</sup> Guerrilla gardeners, urban gleaners, and other communities attempting to live outside of the monetary economy provide further examples. "Temporary-autonomous" actions such as Food Not Bombs servings,<sup>64</sup> Critical Mass bicycle rides,<sup>65</sup> Reclaim the Streets festivities, and the creation of pirate radio stations<sup>66</sup> could also be included here. These broad cultural practices of subversion are much harder to restrain than their territorially bounded counterparts. The non-territorial character of these resistances allow them to temporarily dissolve in any one location, only to spontaneously and unpredictably re-emerge again in a new context and with a new form. On the other hand, because these movements are transient and nomadic, they risk sacrificing a degree of continuity and cohesiveness.

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62. For proponents of this approach, see Hakiem Bey, *T.A.Z.: The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism* (Brooklyn, Autonomedia: 1985); Etienne de la Boétie, *The Politics of Obedience: The Discourse of Voluntary Servitude* (Montreal: Black Rose Books, 1974).

63. Amy Spencer, *DIY: The Rise of Lo-Fi Culture* (London: Marion Boyars, 2005).

64. C.T. Lawrence Butler & Keith McHenry, *Food Not Bombs* (Tuscon: See Sharp Press, 2000).

65. Chris Carlsson, ed., *Critical Mass: Bicycling's Defiant Celebration* (Oakland: AK Press, 2002).

66. For information about pirate radio stations, see Stephen Dunifer & Ron Sakolsky, *Seizing the Airwaves: A Free Radio Handbook* (Oakland: AK Press, 2002).

The fifth set of examples might be broadly defined as spiritual practices—the non-violent practices of millions of people around the world who go about their daily life cultivating an entirely new ethos that simply does not fit into the dominant modular form described in the above sections. These types of transformative practices of the self, including transformative acts of artistic expression, are often so radically different from the established frameworks of understanding that they prove either unseen by, or incomprehensible to, the modern hegemonic culture and institutions.<sup>67</sup> Nevertheless, their transformative potential should not be discounted or underestimated.

This merely comprises a short list intended to encourage us to look beyond the disciplinary limits of what we usually conceive of as “the political” or “the juridical.”<sup>68</sup> By no means is this list exhaustive. Granted, there are many other types of worlds and approaches, although many of these practices remain far beneath the radar of the modern imperial gaze.<sup>69</sup> Each unique approach holds its potential for democratizing and de-imperializing the relations in its own vicinity, just as each holds its own limitations. However, with each diverse community working side by side in its own unique locality, these practices comprise existing worlds of diverse and exciting potentiality.

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67. This is what James C. Scott might call the “hidden transcripts” of the arts of resistance. See James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990).

68. On this topic see Chantal Mouffe, *On the Political* (New York: Routledge, 2005); Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000); Wendy Brown, “At the Edge” (2002) 30 *Political Theory* 556; and Tully, *Public Philosophy*, *supra* note 10.

69. For a discussion of some of the types of alternative worlds that already exist beneath the gaze of the European constitutional project, see Tully, “A New Kind of Europe,” *supra* note 46. For more on the voices, stories, and bodies of knowledge that remain unheard by or incomprehensible to the imperial gaze, see Mignolo, *supra* note 19.