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Shipwrecked Sovereignty: Neoliberalism and a Disputed Sunken Treasure

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Abstract

In 2007, a private corporation specializing in deep-sea salvage retrieved a treasure-laden shipwreck in international waters southwest of the Iberian Peninsula. The wreck was that of a Spanish warship that sunk during the Napoleonic wars. Following the discovery, a legal dispute arose in U.S. federal courts, between the corporate salvors, the Kingdom of Spain, and other litigants. At issue in the legal proceedings was the status of the shipwreck and whether it was protected by sovereign immunity. At the heart of this case are differing political imaginations concerning the authority of states and the role of corporations in the contemporary global order. Through a close reading of court documents and the narratives in which the courts' rulings are embedded, we demonstrate that the case is symptomatic of the tension in neoliberal sovereignty between two overlapping and at times competing political rationalities: the neoliberal logic of capital and commerce and the logic of sovereign prerogative.

Keywords

neoliberalism, sovereignty, globalization, shipwreck, privatization

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In March 2007, Odyssey Marine Exploration Inc., a Florida-based shipwreck salvage company, discovered a shipwreck in international waters off the Straits of Gibraltar, at a depth of 1,100 meters. Odyssey conducted a survey of the site and proceeded to recover what is believed to be the most valuable treasure ever excavated from a shipwreck: nearly 600,000 silver coins, hundreds of gold coins, and other precious artifacts, together valued at approximately half a billion U.S. dollars. Shortly after the discovery, Odyssey filed a claim in a U.S. Federal Court against the "Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo."[1] As is customary in such cases, Odyssey demanded possessory rights over the treasure it recovered or, alternatively, a salvage award for its services. For the purposes of establishing jurisdiction, Odyssey deposited with the court a small bronze block recovered from the site. The bronze block is central to the legal fiction of what is known as constructive *in rem* jurisdiction—constructive, because the object over which the court exercises its authority is not physically in its possession.

In response to Odyssey's legal action, two states and twenty-five individuals followed with their own claims against the Unidentified Shipwrecked Vessel. The Kingdom of Spain filed a motion to dismiss. Spain argued that the vessel was the *Nuestra Señora de las Mercedes*, a Spanish Royal Navy frigate that sank in combat in 1804. Not having abandoned its sovereign claim to the vessel, Spain insisted that the ship was entitled to sovereign immunity from all claims in the United States.[2]

The case, which was recently decided in favor of Spain after being on the docket of U.S. courts for five years, raises a number of important questions about sovereignty. We propose to think about this case not only as a legal event but as a performance that sustains, articulates, and authorizes particular forms and discourses of sovereignty in the current historical moment. At the heart of this case are differing political imaginations that offer contending normative visions concerning the authority of states and the role of corporations in the contemporary legal and political global order. In this article, we theorize two key issues: First, we interpret Odyssey's quest for ownership over the treasure as a manifestation of the contradictions inherent in the contemporary international order. More specifically, we argue that the case is symptomatic of the friction between two overlapping and at times conflicting political rationalities: the neoliberal logic of capital and commerce, and the logic of sovereign prerogative. Second, we read the case as a performance of sovereignty by the U.S. courts. We understand this performance as demonstrating the state's anxiety about its ability to claim and manage traditional emblems of sovereignty (warships, sailors, coins, sea battles) and their representation against the challenge of a corporation like Odyssey. At issue in the

case is how sovereignty is represented and performed, and who is authorized to control a state's means of historical representation.

Neoliberalism is a notoriously vague term; yet despite its ambiguous and contested character, it captures a distinctive dimension of the normative orders that structure the debate about the roles and authorities of states and corporations. Rather than conceptualizing neoliberalism as an ideology of market fundamentalism or as a deregulatory economic policy driven by accumulation strategies, we understand neoliberalism as what Michel Foucault called a *political rationality*.[3] For Foucault, political rationalities reorganize social relations, norms, and orders along specific logics while establishing discursive fields that make particular types of subjects as well as forms of individual and collective conduct intelligible, calculable, and rational. They generate principles of intelligibility that reorganize the norms and meanings of the political order as well as legitimate domains of intervention.

We use the term "neoliberal sovereignty" to indicate the configuration sovereignty takes under conditions of neoliberal political rationality. In employing this term, we explicitly reject the common view, according to which neoliberalism is an anti-statist project that regards markets as natural, spontaneous, and self-regulatory mechanisms. Most neoliberal thinkers see states as crucial loci of power and authority; they accord states significant regulatory and law-enforcing roles, and many see them as key players for the planning and management of institutional reform.[4] Yet the role of sovereignty remains paradoxical for neoliberalism. The neoliberal state's role is not only to guarantee the operation of markets by enforcing contracts and protecting private property but to establish the very conditions that limit its political autonomy. In terms of economic policy, this involves low tax regimes, fiscal austerity, de-regulation, liberalization of industry, and privatization of publicly owned industries, assets, and infrastructure. As a political rationality, it also means reorganizing citizenship along market norms, constructing citizens as customers and/or as independent entrepreneurs, governments as service providers, election campaigns as marketing spectacles, public schools as incubators for human capital, and welfare as incentive programs for small-business-owners-to-be.

Internationally, neoliberalism as a political rationality reimagines the world as a site of competitive economic struggle, with states functioning as custodians of national industries that secure agreements on free trade and the free mobility of capital and thus promote the outsourcing and offshoring of manufacturing and other business processes. Under neoliberal sovereignty, the state takes on the roles of enterprise, schoolmaster, and huckster in relation to its citizens; it performs the part of industry association, deputy, and mercenary for its national businesses in relation to other states. While all

these forms rely on powers traditionally associated with sovereignty, neither is entirely compatible with conventional concepts of sovereignty. Moreover, as states reinvent themselves along neoliberal lines, they pursue policies that have the effect of significantly restraining the military, constitutional, fiscal, monetary, and regulatory autonomies typically understood as defining sovereignty. As a political form, neoliberal sovereignty thus denotes a contradictory and internally unstable constellation of state powers that chip away at their own foundations, undermining the very claims to autonomy that their representational and performative practices are designed to sustain. Neoliberalism both relies on the state and its sovereign powers yet undermines the material conditions that allow these powers to operate and be reproduced.

The Odyssey case provides an opportunity to discern how contemporary states negotiate the antinomies produced by neoliberal sovereignty. The confrontations between governments and corporations, between state and market rationalities, and between terrestrial and maritime modes of organization, are symptomatic of the contradictory nature of neoliberal sovereignty. The case exposes some of the key problems that emerge from these frictions: given that states play a central role in facilitating the expansion of markets and the subsumption of new domains to the logics of capital accumulation, what does it mean for states to reassert traditional sovereign prerogatives against market principles? How do courts, qua state apparatuses, sustain and subvert states' simultaneous investment in advancing neoliberal policies while defending vestiges of sovereign prerogative that continue to maintain the interstate system?

To address these questions, our analysis draws on interpretive methods. We focus primarily on the opinions by the district and appeals courts as well as on court filings by the various parties involved in the case. Through a close reading of these documents, we examine the narratives in which the courts' authoritative pronouncements and performative legal acts are embedded. While these narratives may at first sight seem peripheral to the courts' final decisions, we argue that they provide a glimpse of how sovereignty is reproduced as legal doctrine and juridico-political practice. This argument is based on the methodological premise that rhetorical, literary, and narrative forms are constitutive of rather than incidental to the meaning of legal texts. Attending to the rhetorical and dramatic aspects of the court opinions, we argue that (1) the courts betray a profound *anxiety* about the transformations of neoliberal sovereignty; and (2) the opinions melodramatically *stage* sovereignty as a heritage of the imperial interstate order and display a melancholy attachment to a time when the traditional notion of sovereignty was intact. We interpret the courts' anxiety as a symptom of the increasingly conspicuous gap between the theatrically instantiated affirmations of sovereignty and

the diminished and "afflicted" condition of state power and autonomy under neoliberalism.[5] The current financial and economic crisis—which has approximately overlapped with the period in which this case was adjudicated—has made this gap even more apparent. It is in this gap, between sovereign affectation and failure, that we locate the significance of the courts' staging and performance of sovereignty. If state performances that assert the coherence of sovereignty are an effect of the contradictory nature of neoliberalism, what do they signify and who is the audience they are intended to reach?

We submit that sovereignty is performative in two senses. It functions as a norm of political life that, like any norm, requires continuous reaffirmation through rituals and theatricality in order to sustain its prescriptive force. But sovereignty is also performative to the extent that it relies on recognition; sovereignty presupposes a felicitous claim, on behalf of an agent or a polity, to supreme political authority. By referring to the *Mercedes* case as a performance of sovereignty, we draw upon a performance studies tradition that broadly defines performance as both an event as well as an analytic through which we can read and understand social phenomena.[6] In both rulings, the district court and Eleventh Circuit narrate the case with recourse to the legendary symbols of sovereignty from the golden age of the European interstate order. We interpret the nostalgic staging, rehearsal, and circulation of these symbols as symptoms of the ongoing crisis of the neoliberal order and as stunted attempts to performatively shore up traditional modes of sovereignty.

The Case and the Question of Sovereign Immunity

On February 24, 2012, seventeen tons of silver coins as well as other artifacts from the *Mercedes* made their way from Florida to Spain aboard two Spanish military cargo planes.[7] Following five years of legal wrangling, Spain won the case not on substantive but jurisdictional grounds. By determining that they lack jurisdiction, U.S. federal courts avoided ruling on the merits of any of the claimants' arguments. Spain's successful legal strategy appealed to the principle of sovereign immunity, which holds that the public acts of foreign sovereigns are largely exempt from one another's territorial jurisdiction. In the United States, that principle is codified in the Foreign Sovereign Immunities Act (FSIA) of 1976. All Spain had to prove in order for U.S. courts to drop the case was that the wreck found by Odyssey was that of a Spanish warship travelling in an official capacity.

In its court filings, Odyssey contested Spain's position point by point: it argued that there was insufficient evidence to determine that the treasure

discovered came from a shipwreck; that it could have originated from various shipwrecks none of which was the *Mercedes*; that even if the wreck was the *Mercedes*, it was not covered by the FSIA because the wreck was not located in the United States, and because the ship had been engaged in commercial rather than government activities; that even if the vessel were protected by sovereign immunity, most of the cargo was privately owned and should therefore not fall under sovereign immunity; and finally, should the courts find that they lack jurisdiction, the treasure should be returned to Odyssey, because a court without jurisdiction would be acting *ultra vires* in ordering a transfer of the goods to Spain and should therefore return the parties to their *status quo ante* positions.[8]

The district and appeals courts ruled in favor of Spain on all of these counts, leaving Odyssey without any compensation for the salvage work it performed. Yet the case raises important political issues: how can a U.S. court be asked to adjudicate the fate of a shipwreck found in international waters thousands of miles beyond U.S. shores? What is the role of the court in settling a historical controversy? What are the boundaries between "commercial" or "economic" and properly "sovereign" or "political" spheres?

Odyssey Marine Exploration is one of the most successful of a new breed of private treasure-hunters in what has become a multi-billion-dollar industry. Such corporations leverage sophisticated new technologies and high-risk financial capital to salvage underwater treasures from shipwrecks.[9] Odyssey's mission is to recover the treasures and valuable cargo crammed in the estimated three million shipwrecks dispersed across the ocean floors.[10] The company pursues this objective by using robotic technology and submersible crafts, by maintaining an in-house research team and a library about shipwrecks, and by retaining academic historians, geographers, and archaeologists as expert consultants. Tapping directly into financial markets rather than applying for bank loans or grants allows the company to raise significant capital from high-risk investors looking for speculative opportunities. To invest in Odyssey stock (NASDAQ: OMEX) is to take a bet on the future prospects of Odyssey finding and salvaging profitable shipwrecks.

Odyssey's business model is based on two related principles: the first is the proposition, generally accepted in international maritime law, that those who recover shipwrecks should be materially rewarded for their service; the second is that recovery has to be commercially viable. Admiralty Law provides two avenues for compensating salvors, the "law of finds" and the "law of salvage." According to the maritime *law of finds*—part of customary international law—abandoning a shipwreck implies a loss of title such that a claimant who finds the wreck can make legal property claims against a ship's original owners. Courts have typically justified the law of finds by recourse

to the fiction of a state of nature to which abandoned property ostensibly returns.[11] The *law of salvage*, meanwhile, treats treasure-hunters not as discoverers but as first responders who provide vital assistance to a vessel in maritime peril. It remunerates salvors for the "often dangerous and costly efforts" in assisting those whose lives or property are in maritime distress.[12] Even though salvage awards do not vest the salvor with title, they tend to be generous, typically ranging up to 90 percent of a wreck's value. Critical for commercial salvors is that neither of these compensation schemes require the original owners' consent. Owners and salvors are in no contractual relationship; and indeed there are no legal remedies for owners (not even sovereigns) to oppose or prevent salvage operations.

Odyssey's business strategy exemplifies what critics have called the "new enclosures," the processes whereby, over the past thirty or forty years, neoliberal policies have promoted the privatization, commercialization, and monetization of resources previously held in common.[13] From land-grabs and dispossession as strategies to displace subsistence farmers from agricultural lands in the global South, the sell-off of publicly held utilities and infrastructure, the privatization of parks, forests, and wetlands, the creation of new intellectual property regimes that give rise to the patenting of organisms and DNA sequences, to the emergence of new digital forms of enclosure, we have seen the opening of ever new frontiers for markets, and capitalist commodification and accumulation strategies. The business model of companies like Odyssey is embedded in these processes, extending market values, profit motives, and cost–benefit calculations to a field—archaeology, preservation, and stewardship of the historical patrimony—previously governed by non-market norms, in this case the professional, bureaucratic, and educational norms of the state-archaeological apparatus. By rejecting the demand for special treatment of state vessels, corporate salvors like Odyssey undermine the idea that states can claim prerogatives in the treatment of their assets and their cultural heritage. Such prerogatives are rejected as arbitrary interventions and restrictions on free enterprise and artificial distortions of the global market in salvage services.

Odyssey's demands align with the conventional neoliberal credo that the expansion of markets into new domains will boost efficiency and productivity. Yet whereas states (including the courts as states' juridical organs) have largely promoted these new enclosures as necessary for economic growth and productivity gains, they have been far more hostile to the development of a private market in shipwreck salvage. States are especially disturbed by the refusal of commercial salvors to recognize sovereign claims to special protections for state-owned vessels and have taken various measures to limit salvors' access to state vessels.[14] This case thus manifests the attempt by

states to resist the encroachment of markets in the name of sovereignty. It exposes a contradiction at the heart of neoliberal sovereignty, a point where the different rationalities of sovereign prerogative and neoliberal market imperatives threaten to come apart. But why here? What makes the privatization of shipwreck recovery different from the privatization of public education systems, prisons, or parks? What is the sovereign investment in historic shipwrecks?

Sovereignty and Sovereign Immunity

At the surface of this case, the issue of sovereignty arises as a legal category: there are sovereign and nonsovereign shipwrecks, and in the case of the former, special rules apply concerning jurisdiction. Had the *Mercedes* been classified as a commercial ship by U.S. courts, Odyssey would have been awarded the lion's share of the ship's treasure. Hence, Odyssey's legal strategy was to convince the court that the *Mercedes*, even though technically a warship, was on a commercial journey when it sunk and should therefore be denied sovereign immunity. Odyssey pointed to the fact that three-quarters of the ship's cargo was privately owned and that merchants were charged a freight rate to ship their goods. But the Eleventh Circuit balked at this argument. Relying on precedent, the appeals court determined that even though the *Mercedes* carried private cargo and mail, it was not a commercial vessel, because it was not acting "like an ordinary person in the marketplace."[15]

Under U.S. law, sovereign vessels "must be treated differently from privately owned ones" and can be considered abandoned only following an express declaration or act of the owner.[16] That sovereign privilege is extended to foreign sovereigns under the precept of sovereign immunity. The privilege of sovereign immunity is a juridical norm that rests on the principle of sovereign equality, which in turn presupposes the mutual recognition of sovereigns as formal equals. It is described by the Supreme Court as a doctrine "of implied consent by the territorial sovereign to exempt the foreign sovereign from its "exclusive and absolute" jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the "power and dignity" of the foreign sovereign."[17] Sovereign immunity thus consists in a waiver, granted to foreign sovereigns, from the jurisdiction of U.S. courts. Foreign sovereigns are afforded a unique exemption from the law and a singular privilege to act outside the law, based on the principle of the "perfect equality and absolute independence of sovereigns," a principle that, in the Supreme Court's language, "promotes the comity and dignity interests" of nations.[18]

By anchoring the privileged status of sovereigns in ideas such as "absolute independence," "perfect equality," and "absolute jurisdiction," the courts

appeal to sovereignty not merely as a principle of political and legal order but as a mythic prerogative power rooted in a doctrine of political legitimacy of an earlier era. While sovereign equality is an inherent component of sovereignty to the extent that the latter entails the coexistence of multiple sovereigns that recognize the territorial limits of their juridical authority, the courts' terminology highlights the degree to which these concepts are relics of an absolutist period. The categories of absolute independence, perfect equality, and absolute jurisdiction are borrowed from a theological lexicon, specifically from a political order based on the divine rights of kings. Sovereignty emerges here as transcendence, as the artifact of kingship, and the "absent sovereign" stands for the absent yet sacred and inviolable figure of the king.[19] The court thus treats this transatlantic dispute in terms of a folklore of sovereignty, painting a tableau of states that are nominally equal and of social, economic, and political forms that can be subject to state authority rather than to the neoliberal political rationality with its construal of states in market terms; its criteria of efficiency, competition, and profitability for governance; and its redefinition of citizenship in terms of consumption and individual entrepreneurship.

The folkloric subtext is not coincidental. While mutual recognition is abstractly implied in the principle of sovereignty as a territorially bounded political form, in actuality sovereignty relies on ritual practices that stage and reciprocally confirm states' sovereign statuses. This sets salvage cases apart from other domains in which states are ceding control to private enterprise. The Odyssey case is not merely a conflict between a state and a private actor; it involves two states (the United States and Spain) whose privileges and prerogatives *qua* sovereign states are at stake. To the extent that legal speech acts are part of the recognition rituals that states perform for each other, the case must be read as addressing an international audience of states, affirming and animating the political fantasies that sustain the notion of sovereign equality.

The mythic formulations of sovereignty performed by the court invoke the idea of supreme power and authority, or in Jean Bodin's famous words, "the absolute and perpetual power of a commonwealth."[20] Thomas Hobbes augments the idea of the sovereign's absolute power, rendering the sovereign judge and interpreter not only of civil and natural law but also of scripture, divine prophecy, and miracle.[21] Both Bodin and Hobbes help us see that sovereignty is not merely a legal category but involves claims to authority over specific domains of social life. As Etienne Balibar observes, both theorists stipulate a set of essential features and practices of sovereignty (Bodin calls these features "marks" and Hobbes "rights").[22] By defining sovereignty in terms of "marks," Bodin and Hobbes articulate a vision of the state as

autonomous with regard to private forces and interests, including religious and economic powers.[23] Thus, sovereignty denotes not merely the claim to final political or legal authority over a territorially defined political space but implies a constitutive division between public and private domains.

Commercial salvage operations, such as Odyssey's, threaten states' interests in managing one such public domain, namely the means of historical representation. Such means include national archives, archeological records, military artifacts, coins, and other pecuniary and cultural treasures. States aspire to control these archival resources, because they constitute the modern infrastructure for establishing narratives of political legitimacy and cultural continuity. They form the contemporary emblems and rituals of power through which states become recognizable to each other and to their populations as sovereigns, just as liturgical acclamations and regal ceremonies guaranteed the symbolic order of medieval and early modern states.

These are precisely the stakes in the dispute over the *Mercedes*. As the deputy director of Spain's National Museum of Archaeology put it, "These coins are not money. They are archaeological pieces."[24] Over the past two hundred years, professional archaeologists, historians, folklorists, curators, and preservationists have learnt well how to position themselves vis-à-vis states and public institutions such as museums, national repositories, archives, and public universities. In turn, state-sponsored sites for the preservation and display of a shared cultural past, such as museums and other tourist destinations, have become spaces in which states perform heritage. As Barbara Kirshenblatt-Gimblett argues, the exhibition of heritage is largely a "new mode of cultural production in the present that has recourse to the past" whereby heritage organizations affirm the continuity and legitimacy of the state by linking the present to its constitutive past—even if that past is a fiction.[25]

As became clear in the *Odyssey* case, the protection of cultural heritage through application of the FSIA also protects the representational interests of an imperial military during a period of seemingly endless war. Following the lead of the Department of Justice (DOJ), the court rulings emphasize the dead sailors on the *Mercedes*, highlighting the important fact that this is a wartime case. In the DOJ's motion to file an amicus brief to the district court, lawyers for the government argued:

> The United States owns thousands of warships that have been lost. . . . The sites of these sunken warships . . . *may also serve as the final resting place for individuals lost in service to their country*. . . . By supporting Spain, the United States seeks to ensure that *its own sunken warships and lost crews are treated as sovereign ships and honored graves*, and are not subject to unauthorized exploration or exploitation.[26]

Thus, the symbolic imperative to protect "cultural heritage" becomes tangled up in the practices of a wartime state. The brief first identifies "cargo and equipment of real significance to the United States" as the subject for protection before reminding the court of "the final resting place for individuals lost in service to their country." Cultural heritage and the social and organizational imperatives of the U.S. military become blurry at this point, tied up in the necropolitical stipulation that states be the solemn stewards of maritime sepulchers.[27]

Throughout the case's various instantiations, the DOJ consistently linked the protection of cultural heritage to national security and the stability of interstate sovereignty. Federal attorneys warned that operations such as Odyssey's "threaten the cultural heritage and maritime graves associates with sovereign vessels and, in the case of warships, may also threaten . . . national security interests."[28] Tying cultural heritage to national security, the government thus painted a picture of states as troubled and precarious powers and urged the courts to defend the state against the cultural–military peril represented by corporate treasure hunters. Doing so would protect and affirm the state's monopoly on the regulation and representation of cultural heritage (including military symbols such as dead soldiers) and sustain the interstate order.

Odyssey v. Unidentified Shipwrecked Vessel as a Performance of Sovereignty

One significant peculiarity of the rulings is the palpable hostility the courts express toward Odyssey. Neither of the opinions mentions the considerable expense Odyssey incurred for its salvage operations, and the district court in particular chides Odyssey repeatedly for the alleged inconsistencies and "logical fallac[ies]" of its "scattershot argument," for its supposed ignorance of "applicable standards of proof," for advancing "metaphysical doubt," and for disturbing the "place of rest" of "those who perished" with the *Mercedes*.[29] The hostile tone and unsympathetic attitude toward Odyssey contrast distinctly with the dignified respect the court accords to other claimants. How do we account for this hostility?

For the courts, the question whether the *Mercedes* counts as a sovereign vessel is a question of historical fact. If the wreck salvaged by Odyssey is covered by sovereign immunity, then U.S. courts have no jurisdiction and the case is over. Yet the indignant mood toward Odyssey is an indication that there is more at stake in this case than merely a question of jurisdiction. By treating Odyssey as a kind of hustler, a plunderer trespassing on the fiefs formerly controlled by states, the courts construct the impression of an epic

struggle between states and corporations, between governments and markets, between public and private, and between the universal and the particular. Positioning itself as the *katechon* that curbs the insatiable appetite of capital to desacralize and to profane, the courts characterize Odyssey's claims as frivolous and even blasphemous. Taking on the role of guardian of the public, the courts produce a heroic drama in which the emblems and honor of states must be defended against corporate assault.

Yet in the context of neoliberal sovereignty, we must surely understand this ostensible clash between states and corporations as a politically motivated myth. After all, far from serving as impartial custodians of the commons, neoliberal states actively participate in liquidating public infrastructure, industries, forests, parks, universities, and so on. States have been instrumental in hollowing out democratic citizenship, transforming the conventions of governance, and reorganizing the norms of political conduct. To represent states as the stalwart protectors of the commons is thus to reproduce a false opposition between the interests of corporations and of states. By mobilizing a hallowed ideal of sovereignty without acknowledging the discrepancy between that ideal and the conditions of contemporary states, the courts stage a mythic political world; they give material affirmation to a nineteenth-century ideal of sovereignty that asserts itself in the present in the form of fantasy.

The courts that are tasked with adjudicating this case are arbiters of sovereignty. To the extent that they settle the question of whether the last voyage of the *Mercedes* was of a "sovereign nature," they are vested with the authority to regulate sovereignty. Yet the courts are not neutral arbiters: they are state organs and thus stakeholders in a dispute about sovereignty. As such, it may be unsurprising that courts—qua juridical organs of the state—would resolve the case in favor of the state parties, defending state authority in an attempt to restore the "marks" of sovereignty. Predictable as the juridical outcome may seem in hindsight, it was by no means obvious that the courts would rule in Spain's favor. Legal experts consider the law governing shipwrecks to be murky and unstable, making this case an important precedent that settles some of the open questions about sovereign immunity.[30] Furthermore, states are not governed by a monolithic will; they are sites of struggle between various actors and institutions with competing interests in defining what states are and what they should do. Thus, even though the U.S. Department of Justice supported Spain, a group of seven members of U.S. Congress submitted a separate *amicus* brief that challenged the DOJ's position. That brief criticized the "expansive" interpretation "that a 'warship' may be engaged in substantial commercial activities—and still be entitled to sovereign immunity and protection."[31] Another member of Congress intervened

with the State Department after the disclosure by WikiLeaks of a 2008 U.S. embassy cable that suggests that the State Department had been in secret negotiations with Spain, offering to trade U.S. government support in the *Mercedes* case in exchange for the Spanish government's assistance in an unrelated matter.[32] These various interventions and backroom dealings suggest that the verdict was by no means inevitable.

In this context, the courts' solemn disavowals of neoliberal rationality and pious reaffirmations of traditional conceptions of sovereignty are not just the predictable expressions of official state discourse. Nor can they be explained in terms of an ostensible resistance by state agencies against neoliberal political rationality. Having rejected the binary opposition between neoliberalism and the state, we propose to interpret the courts' incantation of sovereignty less as a repudiation of neoliberalism than as an *address* to other states. In a case like this one, the courts' verdict is likely to be scrutinized closely by an international audience of nominally sovereign states concerned about the ruling's impact on sovereign immunity and its potential to erode prerogative. The courts' conjuration of sovereignty as sound, unscathed, and perpetual must therefore be read as an attempt to soothe the anxieties of afflicted sovereigns. From this perspective, sovereignty is not only the decisive category in the legal case but also something that is manifested and performed in the courts' rulings. We might thus read the rulings as not just *about* sovereignty but as theatrically mobilizing the "marks" of sovereignty for an audience of troubled sovereigns, public officials, and members of the legal community (for all of whom sovereignty is the constitutive and authorizing source of the law).

The "marks" of sovereignty manifest themselves in the judges' nostalgic turn to the emblems of the high era of maritime imperialism. Both rulings spectacularly stage the assertion of sovereignty's inviolability in the contemporary moment with the props of the golden age of the European interstate order: warships, swashbuckling on the high seas, sunken treasure, colonial bounty, and other legendary emblems of Atlantic maritime cultural heritage. Conspicuously absent from these emblems is the historical context in which they emerged, namely conquest, colonization, and the trans-Atlantic slave trade.[33] But how can we explain the turn to these marks of sovereignty, which might otherwise seem like extraneous details with regard to the legal questions at hand?

The court rulings fall within a long tradition of deploying theater and ritual in order to stage, project, and animate state power. As historical and anthropological studies of power have frequently noted, ceremonial and liturgical elements are crucial to the political apparatuses of states, ancient as well as modern.[34] As Clifford Geertz once observed, elites require "a set of symbolic

forms expressing the fact that [they are] in truth governing. [They] justify their existence and order their actions in terms of a collection of stories, ceremonies, insignia, formalities, and appurtenances that they have either inherited or, in more revolutionary situations, invented."[35] In the context of the current configurations of neoliberal sovereignty, Wendy Brown has observed a shift in the role of sovereign performances. Rather than staging powers that they actually exercise, contemporary states perform power nostalgically. That is to say, they stage forms of power precisely at the moment at which the social and political orders that sustain these powers are manifesting their fragility.[36] As sovereignty is realigned, states respond with the theatricalization of sovereignty, in particular through the erection of border walls:

> This theatricalized and spectacularized performance of sovereign power at aspirational or actual national borders brings into relief nation-state sovereignty's theological remainder. If walls do not actually accomplish the interdiction fueling and legitimating them,. . . they nevertheless stage both sovereign jurisdiction and an aura of sovereign power and awe.[37]

The wall thus stages the concept of the territorially bounded nation-state central to the post-Westphalian order and does so by taking on the costume of an antiquated form of political space: the walled city state. As a result, walls stand in as symbols of states' anxieties about the degradation of the spatial logic of the interstate order or what Carl Schmitt described as the *nomos* of the earth.[38]

Nostalgic performances of power become a means for states to project powers that they increasingly do not exercise and/or do not have the capacity to exercise. Facing challenges to territorially bounded sovereignty, states respond by donning the costume of a premodern political *nomos*, the walled city-state or the medieval fortress. Dressed in the garb of the past, this performance of sovereignty becomes a means of fortifying the present against an uncertain future. Such nostalgic revivals may take the form of an enduring architectural set piece, as in a wall. Or, as is the case with the Odyssey rulings, the theatricalization of power may surface through the restaging of narrative tropes drawn from the high era of Euro-American maritime imperialism (adventures on the high seas) in official/legal discourse.[39]

The fragility of the "marks" of sovereignty comes into stark view against the background of the global economic and political crisis that started in 2007–2008 and has overlapped with the years this case was on the docket. Spain was particularly hard hit by the crisis and has seen its capacities significantly diminish. The downgrade of its credit ranking, severe austerity measures, and calls by the European Central Bank for a structural adjustment plan

have undermined Spain's fiscal autonomy. Moreover, like all member states, Spain has ceded some of its political and legal autonomy to the European Union. In this context, the theologico-political language with its references to "absolute independence," "perfect equality," and "absolute jurisdiction" is not without some irony. Under a regime of austerity, even if Spain *wanted* to expend the significant resources put forward by Odyssey for the salvage operation, it likely would not have had the means to do so. The economic crisis highlights the extent to which contemporary states lack the "marks" of sovereignty and the extent to which "sovereignty," even as formal category, conjures a phantasmic liturgy of power.

Staging a type of power that states increasingly will not or cannot exercise perhaps serves to suture over the fragmentary, uneven, and diminished character of contemporary state capacities, or perhaps it allows for the preservation of a constitutive fantasy. Both possibilities point to the importance of the nostalgic form that such performances of power take, insofar as they revive the symbols of sovereignty when it was arguably more total, contained, and untroubled by the destabilizing effect of the crisis in neoliberalism and waning of traditional sovereignty. This performance helps produce the fantasy of state autonomy under conditions of diminished state capacities. In order to demonstrate this claim, let us return to the court rulings in the case at hand.

An Explosive Ending: Staging the Symbols of Shipwrecked Sovereignty

The case begins with a symbolic gesture. Early in its initial salvage operation, Odyssey recovered a small bronze block and "symbolically deposited that item with the court" in order to file an *in rem* action against the ship.[40] Constructive *in rem* jurisdiction proceedings generally allow a court to exercise power over an object that is not physically within the court's jurisdiction through the "presentation of a recovered artifact as the fictional equivalent" of the *res*.[41] By depositing the bronze block, performatively transformed into a material synecdoche for the *Mercedes*, Odyssey asked the court to award the company custody of the shipwreck, or a salvage award for the discovery.

The clash between Odyssey, Spain, and the U.S. court system resulted in a ruling that emphasizes procedural rather than substantive concerns. But in order to get to the procedural finding, the court was forced to work through the substantive historical claims behind the various parties' positions. As District Court Judge Mark A. Pizzo wrote in his report, "From this brew, two core questions surface: is the *res* the *Mercedes* and, if so, is Spain entitled to sovereign immunity?"[42] By symbolically depositing the bronze block in a U.S. court, Odyssey set into motion a complex juridical apparatus that requires the

judges involved to perform a role more familiar to theater artists than to officers of the law. Just as the theater troupe asks an audience to accept an acknowledged fiction (for example that we are in Scotland, and not in New York's Public Theater and that the woman onstage is Lady Macbeth, though we know she is an actress named Angela Bassett), the judge asks the people (on whose behalf the law functions) to believe that a block is in fact a ship in the court's possession.

To answer the procedural question, Pizzo and subsequently Susan H. Black, the judge responsible for the Eleventh Circuit's ruling, took on the costumes of naval chroniclers and historians. Both judges seemed to relish the roles, turning to colorful language in their effort to narrate what Pizzo described as the "historical prelude to the *Mercedes*'s *fateful*, October 5, 1804, encounter with a British squadron."[43] They also both reconstructed a series of treaties and betrayals between three warring imperial monarchies: Spain, France, and Britain. This history is provided as an overture to the central scene of the case: the "fateful" destruction of the ship.

The district court cites lengthy royal dispatches, mobilizing textual resources for a potent clash of kingdoms.[44] In turn, the Eleventh Circuit celebrates the *Mercedes*'s "distinguished naval career [including] multiple military missions . . . [and] fighting against the British."[45] Black's opinion provides her audience with a lush description that reconstructs and restages the events of the *Mercedes*'s destruction. She describes a ship loaded with "extensive amount of specie and other cargo, including copper and tin ingots of the Royal Treasury, products of the Royal Revenue of Mails, proceeds of patriot loans, ecclesiastic funds, military payroll and tree husks . . . [as well as] specie of Spanish citizens." While the remains on the ocean floor do not resemble a recognizable ship, Black allows her reader to reconstruct the wreckage by attending to the "evidence of an actual vessel at the site, including copper plates like those used to sheath a hull."[46] Emphasis is placed on "two obsolete bronze cannons, commonly called culverins . . . [that] were being returned to Spain [from colonial operations in the Americas] for reuse of the bronze for other military purposes."[47] This description builds upon Pizzo's attention to "the dolphin handles seen on the culverins."[48] Filling out the description, both rulings populate the ship with a teeming cast of crew members, as when Black cites an official registry, which placed "a crew of 337" on the ship, including "eight Spanish naval officers, 63 marines, 69 artillerymen and gunners, 51 sailors, 103 sailors-in-training, and various other men performing different jobs aboard the ship."[49]

Having dressed the set thus, the rulings then turn to a seemingly legally irrelevant, personal perspective from which to view the tragedy. Pizzo cites at length a section of *The Naval Chronicle for 1804* that describes the *Mercedes*'s

encounter with the British squadron, replete with the sounds of orders being screamed by commanding officers and cannon fire aplenty. Finally, "In less than ten minutes, *la Mercedes* . . . blew up . . . with a tremendous explosion."[50] Pizzo then remarks that over "250 perished, including [the *Mercedes*'s] Captain (José Manuel Goycoa) and the family of Squadron Leader Diego de Alvear."[51] Black takes her description one step further by introducing a second warship, the *Medea*, into the plot: "The day before the squadron left Montevideo, the second in command of the squadron fell ill and had to be replaced. Captain Diego de Alvear, who was aboard the *Mercedes* and was returning to Spain with his family, was moved from the *Mercedes* to the *Medea* to replace the second in command. Captain Alvear's family, including his wife, four daughters, three sons, and one nephew, stayed aboard the *Mercedes*."[52] Establishing Alvear as the point of view for her story, Black takes us into the battle: "Only a few minutes after the battle began, the *Mercedes* exploded. Captain Alvear, whose family was aboard the *Mercedes*, later wrote 'The *Mercedes* jumped through the air making a horrible racket, covering us [on the *Medea*] with a thick rain of debris and smoke.' Except for fifty sailors, everyone aboard the *Mercedes* was killed, including Captain Alvear's entire family."[53]

What are we to make of the gratuitous description of this scene—what Pizzo described as the ship's "explosive ending"? And how are we to situate Pizzo's and especially Black's emphases on the loss of Alvear's family? Certainly, both courts were charged with assessing the factual record in order to determine whether or not the small bronze block, as the fictional equivalent of an entire ship, is the *Mercedes*. But ships jumping "through the air making a horrible racket" and captains watching their families die an explosive death do little to bring us closer to such a determination. There is a dramatic and epic aura to the rulings, as readers are invited to imagine sweeping scenes of cannons firing, sailors screaming, and miraculous explosions. By asking the readers to view the explosion of the *Mercedes* from Alvear's perspective, Black adds an affective dimension to the case that is irrelevant to the legal questions at hand. The melodramatic conclusion of the district court's opinion further testifies to the anxieties about disrupting the serenity of the colonial panorama. Referring to the ship's "place of rest [where] all those who perished with her that fateful day remained undisturbed for centuries," the Court recognizes the necropolitical investment of states and insists on the need to protect the "solemnity of their memorial."[54] The anxiety about the sailors' (and especially the Alvear family's) mortal remains is not entirely altruistic, for the decision in Spain's favor "promotes reciprocal respect for our nation's dead at sea."[55] That a wartime U.S. court would pay tribute to the dignity of fallen soldiers is not altogether surprising given the position taken

by the DOJ in its amicus brief supporting Spain. Yet the fabrication of this melodramatic scene nonetheless raises questions.

The death of Alvear's family conjures a family romance: an intact family, moving across the oceans, rent apart by the forces of war, and entombed on the high seas. Is it possible that the court's mourning of the destruction of the traditional family order is a symptom of its deeper anxiety about the destruction of a traditional political order? After all, the colonial order that regulated and made possible the "fateful" confrontation between the *Mercedes* and the British squadron in 1804 was profoundly implicated in the organization and codification of kinship, race, and sexuality.[56] Through the courts' indulgent attention to the Alvear family, this nuclear family is constituted as a metonym for a traditional social order, for the national family as a whole. By mourning the Alvear family's demise and by soliciting outrage for the defilement of their maritime graves, these opinions appear to lament not the—from today's perspective rather trivial—death of a marine captain's family but the disappearance of the social and political conditions that made these deaths meaningful. The anxiety about sovereignty manifest in the court documents thus appears linked to a melancholy attachment to the colonial era. The turn *towards* the traditionally constituted heterosexual family seems to be allied, then, with broader anxieties about the shifting composition of the "national family." The eulogizing of Alvear's family allows the Court to establish the United States and Spain as the defenders of the national and the nuclear family as well as the international family of states that mutually respects each other's warships. In turn, Odyssey is positioned as a threat not only to traditional sovereignty but to the social order (including the family of nations) per se.

In both rulings, the courts rehearse the symbols of a world populated by massive crews of sailors, seafaring nations at war, dolphin-handled cannons, silver and copper coins, and large, unified heterosexual families. They reference these symbols to stage and perform a narrative that is as much about the factual questions in the case as it is about constituting the emblems or "marks" of sovereignty that make up the shared heritage of the imperial interstate order. In short, both paint a picture of the world when the empires of the European interstate order had integrity and the traditional notion of sovereignty was intact. The production and staging of this heritage is a central concern in the district court case.

As Pizzo observed, it is precisely because the case ventures into the world of classical admiralty that it is able to establish a defense of traditional forms of sovereignty. Bolstering the integrity of such a notion of sovereignty, Pizzo describes this tradition as having its roots in *jus gentium* and in "the traditional notion of comity" that reach beyond the nineteenth century and back into antiquity:

> Since our nation's founding, federal courts sitting in admiralty, and particularly when adjudicating salvage claims, have applied the *jus gentium*, or the customary law of the sea, the origins of which date back to the ancients. . . . This common heritage of seafaring nations . . . underpins a federal court's exercise of subject matter jurisdiction irrespective of "the nationality of ships, or sailors or seas involved."[57]

Pizzo's ruling thus emphasizes the importance of "heritage" in the constitution of interstate forms of sovereignty. The reference to the ancient roots of the law of the sea is likely a gesture to Roman traditions, generally traced to Justinian's *Digest* in which the jurist Marcianus declared the ocean to be *res communis omnium*, or the property of all.[58] Conjoining the appeal to "our nation's founding" with origins dating back to "the ancients," the district court construes the United States as a direct heir of Western antiquity. The court thus establishes its role as nothing less than the defense and maintenance of a cultural heritage assumed to be intact for two millennia. Read in this light, the gratuitous narrative turn to symbols that include dolphin handles, exploding families, and the *mare liberum* has to be understood as more than simply a nostalgic complaint. The courts' rulings stand as performative interventions into this declining world order as a means of staging and symbolically affirming the notion of traditional sovereignty and by extension the institutions of maritime imperialism.

Conclusion: Taming Odyssey and Affirming Sovereign Prerogative

When Odyssey deposited the "small bronze block" as a stand-in for the ship, the company was in *de facto*, if not *de jure*, possession of the *Mercedes*. If Odyssey's unauthorized salvage of the ship is an affront to Spain's sovereign prerogative, the Eleventh Circuit compensates Spain with a legal reasoning that also chides Odyssey for its impertinence. Having established that the *res* is the *Mercedes*, the court needed to release the ship to Spain. In doing so, Judge Black issues a juridical rationale that ultimately tames Odyssey's challenge to state authority by transforming Odyssey into little more than a representative functionary of the state:

> Releasing the *res* to the custody of Spain is not, as Odyssey attempts to characterize it, a "transfer." Odyssey holds the *res* as a substitute custodian of the district court; the *res* remains *in custodia legis*. . . . By ordering Odyssey as substitute custodian, to release the *res* into Spain's custody, the court is relinquishing its control of the *res* and releasing it to the party that has a sovereign interest in it. Further, Spain's sovereign interest in the *res* existed

> before Odyssey initiated this action and deposited the parts of the *res* it had salvaged from the wreck.[59]

Through this complicated network of speech acts, Odyssey's de facto possession of the *Mercedes* is nullified. Extraordinarily, the court argues that Odyssey cannot "transfer" the *res* back to Spain because Odyssey never had it to begin with. The very entity that posed a challenge to the integrity of the traditional interstate order (Odyssey) is tamed, contained, and incorporated *by* the state as it becomes a "substitute" for a federal court by virtue of its custodial role. The ostensible challenge posed by Odyssey to the state order is thus dismissed by cutting the company out of the exchange altogether. Once the court contains Odyssey by casting it as a substitute custodian, the case can be properly situated as no longer a dispute between a state and a commercial entity. Odyssey does not transfer the *res*; it releases it on behalf of the United States. As a result of this determination, it is retrospectively determined that that this was only ever a dispute between two sovereigns (Spain and the United States), a simple exchange governed by the law of the prevailing interstate order. Sovereignty is affirmed and Odyssey's challenge to sovereign prerogative is dissolved.

In this essay, we traced how the dispute over the *Mercedes* is symptomatic of contradictions and tensions that exist within neoliberal sovereignty and that have been amplified by the neoliberalism' crisis over the past half decade. If traditional notions of sovereignty have been transformed by the incorporation of neoliberal logics into the global political order, this same process has raised questions about states' assertions of exclusive claims to retrieve, preserve, harness, and display heritage objects. In both rulings, the courts perform and affirm a traditional form of sovereignty through nostalgic recourse to the symbolically charged emblems of the high era of the European interstate order. This nostalgic turn is deployed in the service of affirming a phantasmic notion of sovereignty against the ostensible challenge embodied by neoliberal tomb-raiders like Odyssey. By taming Odyssey's interruption of the traditional logics of imperial sovereignty, the right of states to stage and represent heritage in the process of legitimizing claims to power is reaffirmed. This performance is accomplished not as a repudiation of neoliberal practices in and of themselves. Instead, it is mobilized in defense of a sovereign fantasy that continues to animate both the interstate order and its purported neoliberal challenge. Its fictive nature notwithstanding, the epic struggle of sovereignty against corporate power is a politically useful drama, one that requires that certain folklores be maintained. Chief among them is the illusion that sovereign power offers an alternative conception of social organization to neoliberalism and an effective bulwark against the excesses and encroachments of corporate power.

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Notes

1. *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1166 (2011). We will draw on both the Eleventh Circuit appeals court ruling (cited above) and the district court ruling, *Odyssey Marine Exploration v. The Unidentified Shipwrecked Vessel*, 22 Fla. L. Weekly Fed. D (2009). For clarity, we distinguish the cases by citing the district court ruling as *Odyssey (Dist.)* and the Eleventh Circuit ruling as *Odyssey (11th Ct.)*.
2. Following Spain's identification of the ship, additional claimants emerged. The Republic of Peru asserted an entitlement to the recovered treasure on patrimonial grounds insofar as the recovered coins were mined and minted in the colonial Viceroyalty of Peru. In a separate action, twenty-five alleged descendants of individuals who owned cargo aboard the ship claimed an interest in the recovered treasure. We cannot address the importance of Peru's claim here, but it will be the subject of a separate publication.
3. Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*. Translated by Graham Burchell (New York: Palgrave Macmillan, 2008). See also Wendy Brown, "American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization." *Political Theory* 34, no. 6 (2006), 693–694.
4. See Raymond Plant, *The Neo-Liberal State* (Oxford: Oxford University Press, 2010); Thomas Biebricher, "Sovereignty, Norms and Exception in Neoliberalism," *Qui Parle* 23, no. 1 (2004), 77–107.
5. Retort, *Afflicted Powers: Capital and Spectacle in a New Age of War* (London: Verso, 2005).
6. See for example D. Soyini Madison and Judith Hamera, *The Sage Handbook of Performance Studies* (Thousand Oaks: Sage, 2006).

7. Mitch Stacy, "17 Tons of Shipwrecked Silver Head for Spain on Two Planes," *NBCNews.com* February 24, 2012, http://www.nbcnews.com/id/46514441/ns/us_news-life/t/tons-shipwrecked-silver-head-spain-two-planes/ (accessed July 18, 2012).
8. *Brief for Appellant in Odyssey Marine Exploration, Inc. v. The Kingdom of Spain*, No. 10-10269J United States Court of Appeals for the 11th Circuit (2010).
9. David J. Bederman, "Historic Salvage and the Law of the Sea," *The University of Miami Inter-American Law Review* 30 (1998).
10. UNESCO, "The Protection of the Underwater Cultural Heritage," 2006, http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-underwater-heritage/wrecks/ (accessed October 15, 2012).
11. Mark A. Wilder, "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries," *Defense Counsel Journal* 67 (2000): 93. See also, *Hener v. United States*, 525 F. Supp. 350, 354 (1981).
12. *R.M.S. Titanic, Inc., v. Wrecked & Abandoned Vessel*, 435 F.3d 521, 531–32 (2006).
13. Midnight Notes Collective, "The New Enclosures," *The Commoner* 2 (2001); Werner Bonefeld, "The Permanence of Primitive Accumulation: Commodity Fetishism and Social Constitution," *The Commoner* 2 (2001).
14. Since the 1970s, the U.S. Department of Justice has been hostile to private salvors' attempts to claim wrecked warships, revealing the apprehension of states vis-à-vis the commercial exploration and recovery of sovereign vessels. See *Treasure Salvors, Inc. v. Nuestra Señora de Atocha*, 408 F. Supp. 907 (1976); *Florida Department of State v. Treasure Salvors, Inc*., 458 U.S. 670 (1982).
15. *Odyssey (11th Ct.)*, 1177. The criterion of acting "like an ordinary person" is the test previously defined by the Supreme Court whereby states are protected by sovereign immunity when they as market "regulators" but not when they are market "players". *Republic of Argentina and Banco Central de la Republica Argentina v. Weltover, Inc*., 504 U.S. 607, 614 (1992).
16. *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 638 (2000).
17. *National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955). Cited in *Odyssey (11th Ct.)*, 1140.
18. *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 137 (1812); *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 128 (2008).
19. *Republic of the Philippines v. Pimentel*, 867. See also: Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, NJ: Princeton University Press, 1997).
20. Jean Bodin, *On Sovereignty*, trans. Julian H. Franklin (Cambridge, UK: Cambridge University Press, 1992), 1.
21. Thomas Hobbes, *Leviathan* (Cambridge, UK: Cambridge University Press, 1996).
22. Étienne Balibar, *We, the People of Europe? Reflections on Transnational Citizenship*, trans. James Swenson (Princeton, NJ: Princeton University Press, 2004), 143.
23. Ibid.

24. Associated Press, "Spain Rejects Peruvian Claim to Shipwreck Treasure," *The Telegraph*, February 27, 2012, http://www.telegraph.co.uk/news/worldnews/europe/spain/9108879/Spain-rejects-Peruvian-claim-to-shipwreck-treasure.html (accessed June 9, 2013).
25. Barbara Kirshenblatt-Gimblett, *Destination Culture: Tourism, Museums, and Heritage* (Berkeley, CA: University of California Press, 1998), 149. Their concern for preserving the past means that many archaeologists are dismayed by the expanding role of commercial salvors, even if these salvors like to tout their commitment to conservation. For commercial salvors, conservation simply does not have the same priority as it does for the archeological state apparatus: Peter Tyson, "Who Owns Lost Ships?" (2000), http://www.pbs.org/wgbh/nova/lasalle/owners.html. See also: Lawrence J. Kahn, "Comment: Sunken Treasures: Conflicts Between Historical Preservation Law and the Maritime Law of Finds," *Tulane Environmental Law Journal* 7 (1994); D. K. Abbass, "A Marine Archaeologist Looks at Treasure Salvage," *Journal of Maritime Law and Commerce* 30 (1999).
26. *Motion of United States for Authorization to File Statement of Interest and Amicus Curiae Brief in Support of Kingdom of Spain*, No. 8:07-CV-614-SDM-MAP, 2 (2009), emphasis added, hereafter *Motion*.
27. Achille Mbembe, "Necropolitics." *Public Culture* 15, no. 1 (2003).
28. *Brief of the Untied States as Amicus Curiae in Partial Support of Claimant-Appellee Kingdom of Spain*, No. 10-10269J United States Court of Appeals for the 11th Circuit, 2 (2010).
29. *Odyssey (Dist.)*, 7, 9n5, 14, 17, 59.
30. David Curfman, "Thar be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime," *Washington University Law Review* 86 (2008): 181; Jie Huang, "Legal Battles Over Underwater Historic Shipwrecks in High Seas: The Case of Odyssey," *Law of the Sea Reports* 3, no. 1 (2012).
31. The U.S. sought Spanish support on behalf of a U.S. citizen who demanded the release from a Spanish museum of a painting that had been seized by the Nazis from his grandmother. Brief *Amicus Curiae* of Members of Congress on the Proper Construction of the Sunken Military Craft Act, No. 10-10269J United States Court of Appeals for the 11the Circuit, 3 (2010).
32. United States Embassy Madrid to Secretary of State, "Ambassador's Meeting With Minister of Culture," July 2, 2008. WikiLeaks Public Library of U.S. Diplomacy (PlusD), https://search.wikileaks.org/plusd/cables/08MADRID724_a.html (accessed May 14, 2014).
33. This is an absence we will take up in our larger address to Peru's claim to the treasure.
34. Ernst H. Kantorowicz, *Laudes Regiae. A Study in Liturgical Acclamations and Medieval Ruler Worship* (Berkeley: University of California Press, 1946); Ernst Percy Schramm, *Herrschaftszeichen und Staatssymbolik. Beiträge zu ihrer Geschichte vom dritten bis zum sechzehnten Jahrhundert* (Stuttgart: Hiersemann, 1954–); Giorgio Agamben, *The Kingdom and the Glory: For a Theological*

Genealogy of Economy and Government, trans. Lorenzo Chiesa (with Matteo Mandarini) (Stanford: Stanford University Press, 2011).

35. Clifford Geertz, "Centers, Kings, and Charisma: Reflections on the Symbolics of Power," in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic, 1983), 124.
36. Wendy Brown, *Walled States, Waning Sovereignty* (New York: Zone, 2010).
37. Ibid., 25.
38. Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (New York: Telos Press, 2003).
39. This nostalgia for the era of maritime Empire is an important facet of this case, most spectacularly highlighted by the Peruvian countersuit. This raises a set of questions that we must, for moment, bracket to be taken up in a separate publication.
40. *Odyssey (Dist.)*, 4.
41. Ibid., 24.
42. Ibid., 7.
43. Ibid., 9.
44. Ibid., 10.
45. *Odyssey (11th Ct.)*, 1172.
46. Ibid., 1174.
47. Ibid., 1172–73.
48. *Odyssey (Dist.)*, 19.
49. *Odyssey (11th Ct.)*, 1173.
50. *Odyssey (Dist.)*, 12.
51. Ibid., 13.
52. *Odyssey (11th Ct.)*, 1173.
53. Ibid.
54. *Odyssey (Dist.)*, 59.
55. Ibid.
56. Anne McClintock, *Imperial Leather: Race, Gender, and Sexuality in the Colonial Context* (New York: Routledge, 1995); Ann Laura Stoler, *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule* (Berkeley: University of California Press, 2002).
57. *Odyssey (Dist.)*, 22.
58. Justinian, *Digest*, trans. Alan Watson, 4 vols., vol. 1 (Philadelphia: University of Pennsylvania Press, 1985), 24.
59. *Odyssey (11th Ct.)*, 1183.

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