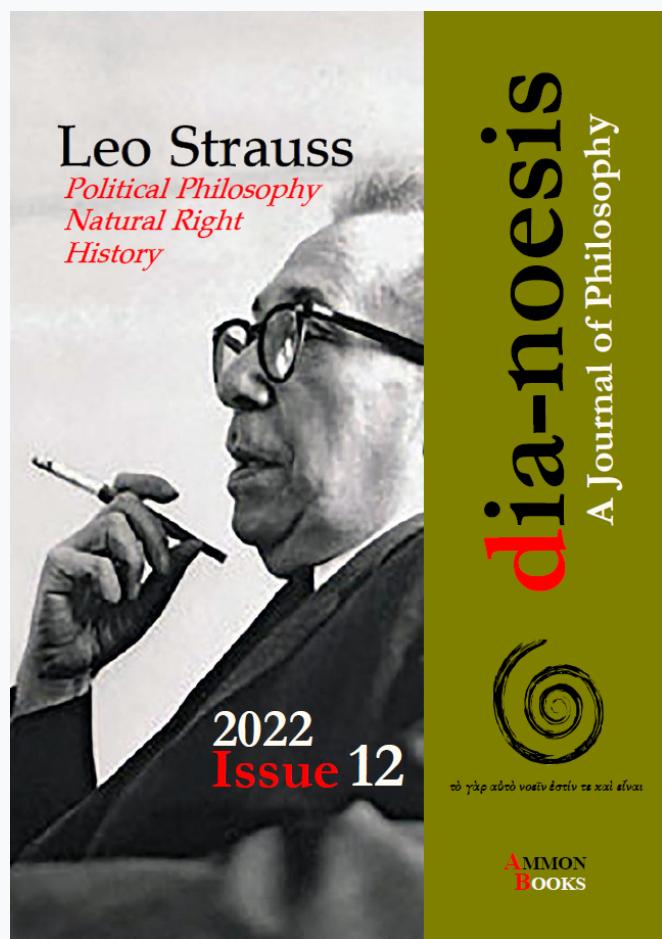


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Jerusalem and Athens against Rome Leo Strauss' critique of Edmund Burke's political logic

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Abstract: Leo Strauss never stopped questioning the three great Western traditions. The first was Judaism and the paradox of understanding it in the orthodox way in the modern era. His writings on Moses Maimonides are an attempt to present a coherent version of what he called “moderate Enlightenment”, an intellectual world where Moses and the prophets could be heard and understood for their reason. The second was an immoderate attachment to Plato and Platonism. In *Philosophie und Gesetz* (1935) he asserts that all great medieval philosophers of Judaism and Islam were platonicians. Strauss establishes a kind of alliance between the Ancients and the Medieval, forged around the profound harmony between Plato and Moses. The third tradition concerns his critique on “radical Enlightenment” and historicism, whose existential translation would be the assimilation of the Jewish people to the West (*Die Religionskritik Spinozas*, 1930). In his *Natural Law and History* (1950), he considers Edmund Burke to be the true father of the “historical school”, that lead to Hegelian radical historicism. He sides then with Plato and the Ancients forming an alliance against Cicero, Burke, and Modern political philosophy that defended the historical provenance of the Law. Athens and Jerusalem against Rome is the battle around the fundamental understanding of the Law, its origin and structure.

Keywords: Historical school, Platonism, Edmund Burke, historicism, Leo Strauss, Law, tradition, French Revolution

Leo Strauss never stopped questioning the essence of the three Western traditions, Jerusalem, Athens and Rome, although without ascribing to the latter the importance it merited. His questions were expressed in three axes of thought. The first was Judaism and the paradox of understanding it in the orthodox way in the modern era. His writings on Moses Maimonides were an attempt to present a coherent version of what he called “moderate Enlightenment”, an intellectual world where Moses and the prophets could be heard and understood for their reason. The second was a certain attachment to Plato and Platonism. In his early book *Philosophie und Gesetz* (Berlin, 1935) he even asserts that all great medieval philosophers of Judaism and Islam were platonicians. Thus, Strauss establishes a kind of alliance between the Ancients and the Medieval, an alliance forged around the profound harmony between Plato and Moses. The third pole of Strauss’ reflection is his critique on the “radical Enlightenment” and historicism, whose existential translation would be the assimilation of the Jewish people to the West (*Die Religionskritik Spinozas*, Berlin, 1930).

In his *Natural Law and History* (Chicago, 1950), he considers Edmund Burke to be the true father of the “historical school”, that lead to Hegelian radical historicism. He sides then with Plato and the Ancients forming an alliance around the rational origin of the Law against Cicero, Burke, and the Modern political philosophy that defended the historical provenance of the law. Athens and Jerusalem against Rome is the battle around the fundamental understanding of the Law, its origin and structure. It is only through this alliance that both Athens and Jerusalem could survive the farouche attack of Rome and modern historicism. Concerning Burke’s political science, Leo Strauss asserts that Burke is the real founding father of the German *historical school* because Edmund Burke’s political philosophy is based on the desire to infer political theory out of political practice.

i. The dilemma of the historical school

During the nineteenth and early twentieth centuries, the methodological problems evolved around the question to know how institutions were created, and more importantly, how the state was created. The politician and philosopher who raised this fundamental concern was Edmund Burke, an Irish member of the House of Commons. In 1792, he answered a question about the value and significance of the French Revolution. This answer, *Reflections on the Revolution in France*, was to become a work of immense importance to political and ideological developments in the European continent. Burke was known for his progressive views. As a Whig, he belonged to what we would call today the liberal parliamentary tradition¹. Until the writing of his major work on the French Revolution, Burke was known not only to the English but also to the general European and American public for two major struggles. His first battle was his firm opposition to English policy in the American colonies. Burke's second major battle was against the Crown's appointment of Lord Warren Hastings as governor of Calcutta, which had effectively turned the population of that part of India into slaves of the East India Company. He initiated the impeachment of Hastings. In both cases, Burke was a progressive politician and political thinker. But in 1792, with his *Reflections on the French Revolution*, he changed sides, at least in appearance. Not only did he caution the positions of the revolutionaries, but he was firmly opposed to the new constitutional framework implemented by the Revolution. He opposed both

¹ Carl Schmitt considers him among the founding liberals of the parliamentary system in the 1926 preface to his critique against liberal parliamentarism: "Like every great institution, parliament presupposes certain characteristic ideas. Whoever wants to find out what these are will be forced to return to Burke, Bentham, Guizot, and John Stuart Mill". Also: "Gentz – in this matter still instructed by the liberal Burke – puts it well: The characteristic of all representative constitutions (he meant modern parliament in contrast to corporative representation or the estates) is that laws arise out of a conflict of opinions (not out of a struggle of interests)". Cf. Carl Schmitt, *The crisis of parliamentary democracy* (1923, 1926), Cambridge, Massachusetts, London, England, The MIT Press, 1985.

the constitutional outcome of the Revolution and the underlying logic and principle of social and political institutions. He abhors the rationalist principle that the state is a product of theoretical reason.

Worse still was the revolutionaries' demand for a new beginning, the result of the application of a radical new principle: to start the state and society anew from scratch, to erase the operating principles the French society had known up to the Revolution to apply other principles and implement other beliefs, mentalities, and behaviors. Burke said to his French interlocutors: *you want to create a state out of nothing, you want to create a legal culture out of nothing, you want to create a society out of nothing, you want to act as if your people had no history, no tradition, no religion, no rules, no customs, no habits.* According to Burke, this enterprise is doomed to fail. Even the absence of a written constitution is compensated by the historical experience of the French people, who recognize in customary law their constitutional order. We are at the heart of the problem that the Historical School will pose.

Edmund Burke is thus, as Leo Strauss asserts, the true father of the German historical school. In his book *Natural Right and History*² Strauss writes: "Thus Burke paves the way for 'the historical school'" (Strauss, 1953, 316). Specifically, Strauss analyzes:

That moment was the emergence of the historical school. The thoughts that guided the historical school were very far from being of a purely theoretical character. The historical school emerged in reaction to the French Revolution and to the natural right doctrines that had prepared that cataclysm. In opposing the violent break with the past, the historical school insisted on the wisdom and on the need of preserving or continuing the traditional order (Strauss, 1953, 13).

² Leo Strauss, *Natural Right and History*, Chicago, The University of Chicago Press, 1953. Trad. franç., *Droit naturel et histoire*, Paris, Flammarion, 1986.

Edmund Burke is one of the thinkers whose work Strauss comments on in the second part of the last chapter of his book on “The Crisis of Modern Natural Right” – the first part on Rousseau, the second on Edmund Burke. Strauss notes that for Edmund Burke, political order is produced in the same way as economical order:

Accordingly, the sound political order for him, in the last analysis, is the unintended outcome of accidental causation. He applied to the production of the sound political order what modern political economy had taught about the production of public prosperity: the common good is the product of activities which are not by themselves ordered toward the common good (Strauss, 1953, 314-315).

The common good, and in this case the political order, if not the constitutional order of the state, is produced by activities that do not in themselves have as their purpose what they achieve. This is what Panajotis Kondylis, in his analysis of the philosophy of history, calls the “heterogony of purposes” (*Heterogenie der Zwecke*³). If this term seems obscure, there is a very popular manifestation of it that can be found in the metaphysics of the liberal economic order in the political economy of the 18th century. I am referring to the "invisible hand". That is, just as one invisible hand creates the higher economic order out of the selfish instincts and accidents of everyday life, another invisible hand creates the political order in a similar way. Just as no economist has created the economic order, no legislator has created the political order. I will return after examining a second sentence of Strauss's that concerns

³ Cf. Panajotis Kondylis, *Die Aufklärung im Rahmen des neuzeitlichen Rationalismus*, Klett-Cotta-Verlag, Stuttgart, 1981, p. 435-444 (sur Vico), 459-463 (sur Turgot) *et passim*. For example, I quote : “Turgot now counters them with the concept of heterogony of purposes, according to which even the ‘*sottise*’ unintentionally serves progress, and with a remarkable rehabilitation of positive Christianity, which cannot be omitted from the ‘Middle Ages’” (p. 459, my translation).

the tradition of political thought and philosophy to which Burke belongs and with which he enters in dialogue:

Burke sided with Cicero and with Suarez against Hobbes and against Rousseau. “We continue, as in the last two ages, to read, more generally than I believe is now done on the Continent, the authors of sound antiquity. These occupy our minds.” Burke sided with “the authors of sound antiquity” against “the Parisian philosophers” and especially against Rousseau, the originators of a “new morality” or “the bold experimenters in morality.” He repudiated with scorn “that philosophy which pretends to have made discoveries in the *terra australis* of morality”. His political activity was indeed guided by devotion to the British constitution, but he conceived of the British constitution in a spirit akin to that in which Cicero had conceived of the Roman polity (Strauss, 1953, 295).

To understand this difference between the two schools of thought, I will compare Cicero’s vision with Plato’s, which is not unlike that of Moses⁴, Moses being the one Strauss really had in mind, but without mentioning him, and to whom

⁴ What do these two have in common? A contemporary Israeli thinker, Nir Kedar, has written an excellent article on the study of Plato by David Ben-Gurion (1886-1973), the founder of the Israeli state in 1948. See Nir Kedar (2007), “Jewish Republicanism”, *Journal of Israeli History*, 26:2, 179-199. See also David Ben-Gourion, *Mi-ma'amad le-am* (From class to nation), Tel Aviv, Davar, 1933. According to the author, Ben-Gurion followed Plato and Moses in his political practice, summarizing what he claimed to be, in his writings, their common political principles: “the existence of just and efficient laws and political institutions and procedures”, “basic economic equality” et “the demand for the development of civic virtues and of civic-republican consciousness and responsibility” (Kedar, 2007, 182-183). I could summarize these principles in three words: justice, unity, “voice” (following A. Hirschman, *voice* summarizes the critical attitude and the public opposition to bad social practices). These three points are common to the thought, discourse and political position of Plato, Moses and the prophets.

special attention must be paid. What is the act of Moses that established the moral and political order of Israel? He took the commandments from God, then presented them to his people and applied them to their human society. That is, the Law and institutions were created once and for all by the hand of God through Moses, who had the authority and power to implement them and incorporate them into a pre-political group or community. Plato follows a similar approach. It is not, of course, revelation, but reason that is the true founder of the city, that is, its political and institutional order. Nevertheless, the institutional order is created once and for all by the philosopher legislator who consults reason to produce not just any order, but the only order that is inherent to theoretical reason and therefore optimal for human beings. This punctual creation of the State by a gesture of the divine or philosophic legislator is opposed by Cicero, Burke and the historical school. Rome was not built in a day nor by a single man, says the first. National societies have followed a long historical path until they discover and implement the institutional order that best suits them, which they by no means consider perfect or definitive, says the latter. Which of the two orders, the practical-historical or the theoretical-philosophical, produces the better institutional result? This is the source of the conflict of methods that has pitted the German historical school against its critics.

The first problem that will be analyzed is the theory of institutions, their mode of production and functioning. Specifically, I will examine whether institutions are produced and function in an intelligent and conscious way or whether their production and functioning are unconscious and favored by some superior spirit as the hidden God (Pascal), the invisible hand (Smith), divine providence (Vico), nature (Kant), or reason (Hegel), according to the principle of the heterogeneity of purposes. The second problem that will be dealt with is the relationship between scientific theory and the corresponding practices of professional fields, which is also the subject of the *Methodenstreit*. Max Weber's theory of ideal types will provide a solution to this controversy by proposing a reasonable mixture of the theoretical school and of the

historical school. The two problems are not unrelated. In order to be able to propose institutions of law, politics or economics, one must rely on a very good theoretical knowledge of these fields. Otherwise, all knowledge will be empirical-historical, which obviously does not exclude a historical process of production of knowledge and theories. If, on the other hand, collective action is based on non-conscious mechanisms, any theory is impossible and professional activities in the various fields of law, politics and economics will simply be based on empirically tested practices.

The question is about something very common to the relationship between the production of theory (political, legal, economic, sociological) and the practice of government and power, of law and economics. To refer to law and its practices: how did judges rule before the creation of civil codes? How much freedom did they have in assigning justice? What law did they apply? Was it by virtue of a common law, in a culturally determined sense of law, consecrated by custom, common sense? This thread of questioning could also concern other practices: political government, economy, social policy. Do we need similar codes for these practices? How is government exercised? Is there a political code equivalent to the civil code? How does one govern? Invoking the political genius, equivalent or identical to the military genius, is not a solution. War is not the normal condition of a civil society, just as not all decisions are taken in exceptional situations. The legal-political order is ultimately a matter of peace. People want to live in a just and peaceful state. We cannot assume that war manuals and the lives of great men are the norms and rules for the exercise of power. In politics, we are still in the age of practice, we have political theory, but it has by no means the role that jurisprudence has in the courts or that economic theory has in our advanced monetary economy.

ii. *Nani gigantum humeris insidentes: mosaic against roman law*

The jurisprudential and conscious production of the institutional order is expressed by the founder of the historical school after Gustav von Hugo (1764-1844), the jurist Carl von Savigny (1779-1861), a defender of Roman law. In his fundamental work *System des heutigen römischen Recht* (1840-1849), in eight volumes, Savigny expresses his basic methodological principle, which is none other than that of Cicero and Burke: institutional political and social completeness is not created overnight from nothing. Institutions are a living organism, with a specific origin and a historical trajectory, developing, changing, mutating as institutional solutions to new problems are added. It is important to note here that Cicero does not speak of history. The concept of history as understood by the Enlightenment, that is, as a heterogeneous principle of production of civilization (Kondylis), is modern. Cicero speaks of time, habit, usage and antiquity (*usu ac vestutate*). This is exactly what Savigny suggests, that law, and in particular Roman law, is produced by history. It is a living organism which, like the English system according to Burke, grows, develops, evolves. What we call Roman law, what is taught as Roman law, is in fact the *Corpus Juris Civilis* of Justinian (529-534), which had at least a millennium of development behind it before the Byzantine emperor completed its codification and imposed its teaching at the law schools of the Empire. I will further examine this connection between law and the political system, between Savigny and Burke.

In his chapter on Edmund Burke, Leo Strauss states that there is neither political philosophy nor political theory in Burke. What is Burke's political philosophy? It may be true that Burke has no philosophy of his own, but that is because he follows neither Plato nor Moses, but Cicero. In *De republica*, Cicero does not speak of his own political philosophy, nor of Plato's ideal state. He even refuses to enter into the Platonic political logic. The protagonist of the dialogue is Aemilius Scipio, the "first citizen" of Rome (*princeps republicæ*) and not

the philosopher. Scipio announces that he will not present the ideal state, but the best real state known to him, that is Rome: how it was born, how it grew and matured, where it is the moment he speaks. The political philosophy of Cicero and Emilio Scipio is the same, it is the political philosophy of Rome. Scipio and Cicero do not say what should be done, but what has been done. The same is true of Burke, of whom Leo Strauss rightly writes: “Burke’s political theory is, or tends to become, identical with a theory of the British constitution, that is to say, an attempt to “discover the latent wisdom that prevails” in the real” (Strauss, 1953, 319). Burke responds to the French revolutionaries that the social order that will result from the new political order they proclaim will be worse than before. Their logic is the opposite of the fundamental lessons of the political history of the English nation. The English system, the one that Montesquieu praised in the *Spirit of Laws* as the best, was born out of the history of the English people for the English people. Burke’s political philosophy is thus his reflection on the fundamental political principles on which the British constitutional order was founded. The Irish thinker’s scathing critique of the rationalist natural law principles of the new order heralded by the French Revolution follows in the wake of English political philosophy.

Similarly, Savigny opposed the natural law school, which considers reason as the foundation of law and believes that universal principles of law can be logically derived without taking into account other historical, political or social factors. He thus founded the historical school of law, which considers all law to be positive and, without opposing the need for logical consistency, defends the fundamental importance of the historicity of institutions. As a professor of Roman law in Marburg, Landshut (1808) and Berlin (1810), Savigny was one of the most important jurists of his time and was highly regarded in German legal circles. In response to the proposal of Anton Friedrich Justus Thibaut (1772-1840) to create a uniform legal code for Germany, he wrote the polemical article *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (*On the Vocation of our Time for Legislation and Legal Science*, 1814). The danger for Savigny

was that the enormous contribution of older jurists and legal scholars would be ignored, which would be an irreparable harm. In a similar situation, in arguing against the creation of a new, novel constitutional⁵ law that ignored the common law, Burke warned of the greatest danger of all, that of losing the body of jurisprudence established by usage:

And first of all, the science of jurisprudence, the pride of the human intellect, which, with all its defects, redundancies, and errors, is the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns, as a heap of old exploded errors, would be no longer studied (Burke, 119).

Like Burke, Savigny saw a real danger that the new code would be imbued with the “superficial”, “haughty”, and “abstract” spirit of the *jusnaturalists*, exemplified by the *Institutiones juris naturae et gentium* (1750) of the eminent German philosopher and pioneer of the Enlightenment, Christian Wolff (1679-1754). But there was also a more serious danger for Savigny: that the Germans would adopt the French civil code. For Savigny, however, it is absolutely clear that it is not a question of creating a code, but of continuing the tradition of Roman law, that is to say, of letting the law progress, and not of fixing it in a particular phase of its development that is considered definitive. His argument parallels that of Burke. To adopt a new political system or a logically organized legal code would signal the loss of jurisprudence, which is the discourse and the collective historical consciousness and wisdom of a nation. This is precisely the work of the *Volksgeist*. Returning to Roman law, Savigny admits that it needs to be updated. It contains unnecessary repetitions, it is not uniform, there are contradictions. However, the task of the specialists of Roman

⁵ Cf. Joachim Rückert, *Friedrich Carl von Savigny, the Legal Method, and the Modernity of the Law*, Juridica International XI/2006, Tallinn, University of Tartu, “The Constitutional dimension of Savigny’s legal method”, p. 61-62.

law, of *romanists*, is precisely to modernize it so that the continuity of the historical tradition fits in with the modern spirit. The necessary reforms will preserve the coherence, continuity and cohesion of the whole. But who is the author of this whole? Who produces law and political institutions over time in a cumulative manner? The prophet or the mythical legislator, an oligarchy of wise or powerful men or the multitude? By “multitude”, I mean above all what we commonly call “the people” (*Volk*).

Concerning the origin of law, Savigny writes⁶ :

If we now look for the subject within which positive law has its reality, we find that this subject is the people. It is in the common consciousness of the people that positive law lives; hence it can be called the law of the people. Nevertheless, it should not be imagined that the various individuals of whom the people is composed have created law arbitrarily; for these individual wills could undoubtedly have given birth to the same law, but it is much more likely that they would have produced a host of different rights. Positive law emerges from this general spirit that animates all the members of a nation; thus, the unity of law necessarily reveals itself to their consciences and is no longer the effect of chance. To attribute to positive law an invisible origin is therefore to renounce the testimony of documents (Savigny, 1855, 14, my translation).

Law is thus “people’s law” (*Volksrecht*) and derives from the “general spirit” that gives life to individual consciences. This is the fundamental proposition of the historical school, as opposed to the theoretical school. I personally consider that, as mentioned, the ancestor of the historical school is none other than Cicero, whose example Burke also follows. In his work *De re publica* (II, 1, 2, 4-10), Cicero notes that if Cretans’

⁶ Friedrich Carl von Savigny, *Traité de Droit Romain*, trad. Guénoux, vol. 1, Paris, Librairie de Firmin - Didot frères, 1855, Livre I, I, VII.

legislator was Minos, Lacedemonians' Lycurgus, and Athenians' Theseus, Draco, Solo, Clisthenes and many more until Demetrius of Phaleron,

[...] in our country, the state has been constituted not by the genius of a single person, but by a kind of genius common to many citizens; and it is not in the course of a man's life, but by a work that generations have pursued for several centuries. There has never been a genius so vast that nothing escaped him, and all the geniuses together cannot in one moment provide for everything, embrace all eventualities without the help of experience and time (*my translation*).

Moreover, Cicero continues, "I shall more easily attain the goal I have in view by showing you our republic in its birth (*nascentem*), in its growth (*crescentem*), in its adulthood (*adultam*), and finally in its full vigor (*firmam atque robustam*), than if, like Socrates in Plato, I were to forge an ideal state" (*ibid.*). Cicero does not, of course, mention the *Volksgeist*, but he does refer to another collective subject, which is self-created through its historical journey, Rome. The concept of *Volksgeist* has already been accused of being metaphysical, indeterminate, empty. What Savigny argues is that the existence of law points to its producer, who is not a Moses or a Plato, but a never-ending collectivity, which, faithful to a particular spirit or character, continues its work historically, constantly improving and updating its result.

Cicero spoke of the way Rome was constructed by the Romans themselves, thus positing Rome as both subject (or producer of law) and object (or constitutional-legal system). Burke spoke similarly of the English, who, over time, create the English system that shapes them as moral and political beings. In both cases, then, there is a production of the subject through the process of narrating the genesis of the constitutional order. For Cicero and Burke to narrate the political philosophy of Rome and England, they have to assume a philosopher-legislator, just as when we read Homer

or Moses, we assume their existence for the exclusive purpose of understanding. They thus first confer on the notion of collective subject the status of narrative subjectivity, which is nothing other than the requirement of logical coherence and continuity in the signifying whole of a text.

As Ludwig Lachmann⁷ comments on Weber's adoption of the comprehensive method (*Verstehen*):

Firstly, Weber was strongly opposed to all forms of 'emanationism' as methods of social science. Secondly, the method of interpretation (*Verstehen*) is one the origins of which have nothing whatever to do with any philosophy. It is nothing less than the traditional method of scholarship which scholars have used throughout the ages whenever they were concerned with the interpretation of texts. Whenever one is in doubt about the meaning of a passage one tries to establish what the author meant by it, i.e. to what ideas he attempted to give expression when he wrote it. This, and not an axiom of the philosophy of idealism, is the true origin of the method of interpretation. It is evidently possible to extend this classical method of scholarship to human acts other than writings. This is what all historians, whether philosophically minded or not, have always done. It is this "positive" method of the German Historical School that Weber took over and adapted to his purpose (Lachmann, 1971, 9-10).

But both Cicero's "Rome" and Burke's "English", as well as the Savigny's *Volksgeist*, the "spirit pf the people" of the

⁷ Ludwig Lachmann, *The Legacy of Max Weber. Three Essays*, Berkeley, California, The Glendessary Press, 1971. Also, Panagiotis Christias, *Méthode et vérité : aspects de l'analyse historique chez Foucault* in Francis Farrugia et Antigone Mouchtouris (dir.), *La pensée des sociologues. Catégorisation, classification, identification, différenciation et reconnaissance*, Paris, L'Harmattan, 2018, p. 67-82.

Historical School are more than a narrative subjectivity, since they are invested with the authority to legislate and determine the political fate of their respective nations. The most appropriate term to understand this historical collectivity is “legal fiction” (*fictio legis*), based on Hans Vaihinger’s⁸ “philosophy of as if (als ob)” (1919). If the *Volksgeist* can only be understood as a “creature of law” (*legal fiction*), if we want to avoid entering a new era of metaphysical or legal theology, then the highest form of the legal entity, the “legislator”, must be understood as a fiction invested with the validity and the authority of its own construction, the state. By reading Savigny’s introduction to his treatise on Roman law, we can better understand what he means by “historicity” or “historical community”. The Historical School, he says, is called “historical” not so much because it ignores theory or is not interested in the theoretical approach, but because it wants to reintegrate the historical element into legal research. Thus, its goal is not to eliminate theory in favor of the historical element, but to restore the latter to its rightful place within theoretical constructs:

Taking law as its object, human activity is susceptible of two different directions. It can deal with the whole scientific system, which embraces science, treatises, intelligence, or it can make the particular application of the rules to the events of real life; the distinction of these two elements, the one theoretical, the other practical, is thus founded on the very nature of law. The development of modern civilization has separated these two directions, and assigned one or the other to certain classes of society: thus, all those who deal with law, with a few exceptions, make theory or practice their special vocation, if not their exclusive one. This fact, considered in itself, is neither to be praised nor blamed, for it results from the natural course of things, not from an

⁸ Cf., *Les fictions du droit. Kelsen, lecteur de Vaihinger*, Textes traduits et présentés par Christophe Bouriau, Paris, ENS Éditions, 2013.

arbitrary will. But this division, good and legitimate in principle, could degenerate into a disastrous isolation, and this is what must be clearly distinguished. The division is good, if each one does not lose sight of the primitive unity, if the theorist preserves and cultivates the intelligence of the practice, the practitioner the intelligence of the theory. Where this harmony is destroyed, where the separation of theory and practice is an absolute separation, theory runs a great risk of becoming a futile exercise for the mind, practice a purely mechanical craft (Savigny, 1855, XX-XXI, *my translation*).

The “historicity” of the Historical School thus lies not in the promotion of a purely empirical practice in law and, later, in political economy and sociology, but in the production of a theory based on historical experience. Moreover, the ancient Roman jurists, in contact with Greek philosophy, also proceeded to an important theoretical upgrading of the Roman law⁹.

In the same way, Christian theory will instill its values in the Theodosian and then Justinian form of the *Corpus Juris Civilis*, which is the final form of what Europe knows and studies as Roman law. Savigny calls upon the German jurists of his time to revive Roman law by instilling in it the principles of the Enlightenment. In other words, we observe that in the three important moments of reform of Roman law, the Greek philosophical moment, the Christian moment and the Enlightenment moment, the “general spirit” evolves following the progress of the consciousness of the Nations, as Hegel would say. Although Savigny does not refer to these three moments, this construction is in fact mine, I believe he would agree that Greek philosophy, Christian teaching, and the Enlightenment enriched, renewed, and evolved the ancient ritual-practical rules that constituted the ancient Roman law. The essentially empirical orientation that expressed the

⁹ Cf. Michel Villey, *Le droit romain*, Paris, PUF, 1946 (PUF Quadrige, 2012).

predominant spirit of the ancient Romans, while remaining constant in its political-legal mission, was refined by the incorporation of theoretical trends over time¹⁰. Moreover, the attempt to systematize Roman law on the logical basis of theoretical principles of consistency and legal certainty is not new. Gaius (ca. 120-180 AD), with the rationalist approach of his *Institutes*, and Ulpian (ca. 170-223 AD), with his systematic memoirs, had already shown the way in antiquity. The influence of Greek philosophy led Roman law to a systematic and philosophical form¹¹. Like them, Savigny called for the application of a theoretical framework to the practical principles of law. In other words, the Romans began to base their law on principles rather than on simple optimal solutions. Similarly, the practical science of sociology was theorized by thinkers such as Weber and Pareto, who were called upon to invent and apply a conceptual framework of general sociology to the practical interventions of the various councils of sages of their time on the economy and society.

Savigny therefore does not deny the need for theory, but considers that for disciplines such as law, the historical roots and tradition of a people constitute an inescapable institutional heritage and guarantee. This is also the case for Germany. And it is however true that the general spirit of German law also and especially exists in Roman law. After the fall of the Western Roman Empire, Savigny explains, all the peoples of Europe were essentially mixed, and the result was that the German populations were half Romanic and half Germanic. The Romans continued to use Roman law while the Germanic peoples continued to use Paleo-Germanic law. There were also bodies of law, which were used by some Germanic peoples, which were in fact mixtures between the two laws. It is, for example, now widely accepted that the Salic law was written by Roman generals and was based on Roman law. Thus, Savigny concludes, Roman law is also the law of the German people. All the Germanic states that constitute the German nation are steeped in and apply mixtures of Roman and

¹⁰ Cf., Aldo Schiavone, *Ius. L'invention du droit en Occident*, Paris, Belin, 2008, second part: « Comment naît une technique », p. 55-141.

¹¹ *Idem*, Third part: « La science, les formes, le pouvoir », p. 145-320.

German law. When Germans study Roman law, Savigny explains, they do not study it as a foreign law or out of archaeological interest. They study it as something living, something that still lives in them and that has contributed to the structuring of the German people as it is today. Therefore, Savigny suggests that Germans are no strangers to Roman law and that Roman law is not foreign to Germany. Roman law is part of the German national identity, it belongs to the historical Germanic community and has shaped the German moral character and national consciousness. *When I read Roman law, I read the history of the German nation*, he said, and “I pity those who will not have the chance to study Roman law”.

If Roman law expresses the general German spirit, the “theorist” of Roman law must embrace the whole “life” of the German nation. The theorist must be the link between the life of the nation and its general spirit:

The perfect theorist would be the one who would have a complete experience of real life to enliven his theory, and who would embrace at a glance all the combinations of relationships between morals, religion, politics and political economy. Need I say that I do not require the combination of so many qualities? He who, in order to judge others, would take this type of perfection, should first recognize how little it applies to him. Nevertheless, this type must remain present to our eyes as the final goal of humanity, as a guide for our efforts and as a safeguard against those illusions from which our self-esteem has so much difficulty in defending itself (Savigny, 1855, XXII, *my translation*).

Savigny explains here the kind of virtues the perfect legislator should have, while recognizing that the concentration of all these virtues in one person is simply impossible. This embodiment of the *Volksgeist* may be impossible in a single individual, but a collectivity could synthesize all these virtues to a much higher degree than a single individual. For Savigny,

this collectivity is the community of sages, romanists and other jurists, even when their views are in conflict:

The individual nature of minds and the variety of their directions will always create enough difference; the simultaneous action of so many diverse forces constitutes the life of science, and those to whom they have fallen should consider themselves as workers, all working on the same building (Savigny, 1855, XVIII, *my translation*).

The common edifice is that of the law. Savigny expresses here a vision familiar to Burke, that of the synergy of individuals between generations in a project that structures them as a community. For Burke, the representatives of the spirit of the English political system were the natural aristocracy, the wise statesmen; for Savigny, they are the wise jurists of Roman law. Roman law was not unknown to Burke, just as the empiricist spirit of the British common law was not unknown to Savigny. In both cases, a timeless collectivity of sages is created, which we can only equate with Bernard of Chartres' (ca. 1070/1080-1124/1130) medieval image of the dwarf standing on the shoulders of a giant (*nani gigantum humeris incidentes*⁴²), in a way that the dwarf who can see further than the giant. A typical use of this epistemological model is made by Pascal¹³ :

⁴² Cf., Rémi Brague, *Europe, la voie romaine*, Paris, Critérion / folio essais, 1992, « Nanisme et nostalgie », p. 129-132.

¹³ Blaise Pascal, *Oeuvres Complètes*, II, *Oeuvres diverses (1623-1654)*, Paris, Desclée de Brouwer, 1970, *Fragment de préface pour un traité du vide* (1651). However, Kant associates this logic with heterogeneity in the third proposition of his *Idea for a Universal History from a cosmopolitan point of view* (1784): “It always remains strange here: that the older generations only seem to do their laborious business for the sake of the later ones, namely to prepare a step for them, from which they could bring the building, which nature has intended, higher; and that nevertheless only the latest ones should have the luck to live in the building, on which a long series of their ancestors had worked (admittedly without their intention), without being able to take part in the luck, which they prepared” (*my translation*). Immanuel Kant, *Politische Schriften*, Wiesbaden, Springer

It is in this way that we can today take on other sentiments and new opinions without contempt and [...] without ingratitude, since the first knowledge they gave us served as degrees to ours, and in these advantages, we are indebted to them for the ascendancy we have over them; because, having risen to a certain degree to which they have brought us, the least effort makes us rise higher, and with less trouble and less glory we find ourselves above them. It is from there that we can discover things that were impossible for them to see. Our sight is more extensive, and, although they knew as well as we do all that they could observe of nature, they did not know as much about it, and we see more than they did (Pascal, 1970, 781, *my translation*).

In his introduction to the treatise on vacuum, Pascal distinguishes the sciences based on authority from those based on experimental research. In the former, ancient knowledge such as theology and morality are the most complete, because they are related to the word of the prophets and Moses. In the latter, as in the case of the study of the nature of the vacuum, individual intelligence is sufficient to invalidate all the ancient voices of authority that contradict the results of experimentation. Pascal applies the epistemological model of the continuity of generations of sages to the second category of sciences, those in which the younger ones know more than the older ones thanks to the work of the latter. It is obvious that for the Historical School, positive law is among the natural sciences. Thus, if the *Volksgeist* is a mysterious “creature of law”, its work is that of a community of wise men who consciously build up the political and legal edifice of a nation over several generations, serving as links to the same chain. Beyond the differences in approach to law, all those who

Fachmedien, 1965, “*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*”, p. 12-13.

participate in this dialogue in the service of their own positions are in fact the subject that produces positive law.

Savigny mentions neither Cicero nor Burke as the ancestor and founder of the Historical School. But both Cicero and Burke, emblematic thinkers of antiquity and modernity respectively, clearly expressed the idea that political order was the product of the historical collectivity of scholars and prudent men, not of one. Also quoting Cicero, Leo Strauss accuses Burke of this conception of political order. Cicero's accusation against Plato, which Burke takes up in his argument against the "philosophers of Paris", is already well known. Socrates, the great Athenian philosopher, walking in Piraeus, suddenly found himself in a house of friends who were discussing justice, and on the basis of the *logos*, he presented them with the ideal political regime. This is not the way states are constituted, argues Cicero. The best possible constitutions are made only by the cooperation of many wise and prudent men who draw from the historical experience of their people and their city the practical rules of organization and the principles of law best suited to their political society.

In another book, Plato presents yet another model for the creation of laws: in the first sentence of his eponymous work, he argues that the gods gave the laws to human cities (*Laws*, 624a1-5), and that laws are therefore of divine origin. Strauss commented on the relationship between the prophet and the philosopher-king of Plato in a 1935 work of his relating Law to philosophy¹⁴. For him, the relationship between the prophet and the philosopher, and even the affinities between the greatest prophet of all, Moses, and the greatest philosopher of all, Plato, is obvious¹⁵: "*Der Prophet als Philosoph-Staatsmann-Seher(-Wundertäter) in einem ist der Stifter des idealen Staates*" (Strauss, 1935, 117). Thus, when Strauss attacks Burke and Cicero, he in fact turns Mosaic law against

¹⁴ Leo Strauss, *Philosophie und Gesetz*, Berlin, Schocken, 1935, p. 117-122.

¹⁵ On the differences between the Mosaic and Platonic approaches to the spirit of legislation, see, Panagiotis Christias, *Platon et Paul au bord de l'abîme. Pour une politique katéchontique*, Paris, Librairie Philosophique J. Vrin, 2014, « Orthodoxie, orthodoxie, procédure », p. 297-341.

Roman law, revealed law against historically founded law. In Strauss's words, Jerusalem and Athens rise up against Rome. Reason and revelation form an alliance against the voice of history, the historically founded prudence. According to Strauss' line of defense, law is born independently of historical experience, either from divine revelation or from philosophical reason. It is in both cases eternal and unhistorical, based on universal principles. Peoples and nations are only passive receivers and are shaped according to the law they have accepted and adopted.

A similar theory of the legislator is developed by Jean-Jacques Rousseau in the *Social Contract*⁴⁶ (II, 7). In the paragraph entitled "Of the legislator", Rousseau consciously and clearly differentiates the wisdom of the legislator from the prejudices and ignorance of his people:

In order to discover the best and most convenient social rules for nations, it would be necessary to have a superior intelligence that would see all the passions of men, and that would not experience any of them; that would have no connection with our nature, and that would know it thoroughly; whose happiness would be independent of us, and yet would be willing to take care of ours; finally, that, in the progress of time, would be able to work in one century and enjoy in another. It would take gods to give laws to men (Rousseau, 1964, *ibid.*, *my translation*).

Rousseau realizes that a single person is unable to carry out the legislative task because he would need to have the experience of hundreds of individuals and several generations. That is to say, his experience would have to extend to the consciences of other individuals as well as of other historic periods. As such an individual does not exist, the conclusion that gods are necessary to give laws to humans cannot be excluded as long as Rousseau does not pose any timeless

⁴⁶ Jean-Jacques Rousseau, *Œuvres complètes*, Tome III, *Du Contrat social – Écrits politiques*, Paris, Gallimard – Bibliothèque de la Pléiade, 1964.

collective subject. But Rousseau supposes that this kind of legislator actually existed in the person of Lycurgus, Solon and Numa. He thus joins the theory of Machiavelli's *Prince*, of the extraordinary statesman and founder of empires, which will be taken up by Max Weber in his theory of "charismatic power":

The legislator is in every respect an extraordinary man in the State. If he must be so by his genius, he is no less so by his job. It is not magistracy; it is not sovereignty. This office, which constitutes the republic, is not part of its constitution; it is a particular and superior function which has nothing in common with human empire; for if he who commands men must not command laws, he who commands laws must not command men either: otherwise, these laws, ministers of his passions, would often only perpetuate his injustices; he could never prevent particular views from altering the sanctity of his work (Rousseau, 1964, *ibid.*, *my translation*).

The legislator must therefore be either outside the law or outside the people. This is essentially the meaning of the separation between the legislator, who is "the mechanic, the inventor of the machine", and the ruler, who is "the craftsman who assembles it and puts it into operation". I should note that neither Cicero nor Burke and Savigny would agree with this distinction. The "machine of government" is built by political practice, which adapts it to concrete circumstances, makes it evolve, and perfects it. To escape the dilemma of the godlike legislator, Rousseau argues that the value of great legislators, like Moses and Mohammed, is demonstrated by the success of their mission:

This sublime reason, which rises above the reach of vulgar men, is the one whose decisions the legislator puts in the mouths of the immortals, to lead by divine authority those whom human prudence could not shake. But it does not belong

to every man to make the gods speak, nor to be believed when he announces himself to be their interpreter. The great soul of the legislator is the true miracle that must prove his mission. Any man can engrave stone tablets, or buy an oracle, or pretend to have a secret deal with some deity, or train a bird to speak in his ear, or find other crude ways to impose on the people. He who knows only this may even assemble by chance a company of fools: but he will never found an empire, and his extravagant work will soon perish with him. Vain prestiges form a temporary bond; only wisdom can make it durable. The Judaic law, which is still in existence, and that of Ishmael's child, which for ten centuries has governed half the world, still announce the great men who dictated them; and while the proud philosophy or the blind spirit of party sees in them only happy impostors, the true politician admires in their institutions that great and powerful genius which presides over lasting establishments (Rousseau, 1964, *ibid.*, *my translation*).

It is thus evident that Rousseau, although he understands the superhuman difficulty of the legislative act, and although he accepts no other legislative body than the people, denying specifically representation, he understands the constituent act as the act of an individual. A people can give itself neither laws nor political machinery, but an intelligent and skillful legislator can transmit his legislation to the people. According to Rousseau, Moses invented the laws for the Jewish people, but for the Jews to believe in them, he would have told them that these laws had been given to them by God. Moses is thus for Rousseau a successful Plato. However, Rousseau, unlike Plato, recognizes that not all laws are accepted by all people. He accepts, in other words, the need for historical differentiation of legislative systems, even if his own constitutional designs for different peoples such as Corsica or Poland do not conform to Corsican or Polish mores, but to the

inviolable transcendental principles that govern the social contract. We do not need to have the historical experience of generations behind us, we only need to consider and legislate according to natural reason.

We can see to what extent this position of Rousseau, which expresses here the hard rationalist line of the Enlightenment, is opposed to the logic of Savigny, and that of “dwarfs on the shoulders of giants”. The logic underlying the epistemological paradigm of jurisprudence (*juris prudentia*), which Edmund Burke elevates to the epistemological model of political philosophy, is illustrated by Savigny in the last paragraph of his work on the Roman legal system:

A reflection must reassure us against the feeling of our weakness. It is not imposed on man to know and to show the truth in all its purity: it is still serving his cause to prepare the ways for it, to enlighten the essential points, to point out the absolute conditions of its triumph, and to make accessible to our successors the goal that we have not been able to reach. I also assure myself in conscience that I have deposited in my book fertile seeds of truth that others will one day bring to fruition, and it does not matter that the richness of this development hides the principle and makes it forgotten. The individual work of man is perishable like man himself under his visible appearance; but the thought will not perish: it is it which, transmitted from generation to generation, unites the servants of science in a vast community, where the smallest part of the individual finds an immortal duration. September 1839 (Savigny, 1855, XLVI-XLVII, *my translation*).

I call this model of social synergy for the production of the institutional whole “jurisprudential” and contrast it with the “heterogonic” model of “heterogony of purposes”.

iii. Heterogeneity of purposes: History, politics, Law, economy

However, as I mentioned before, Leo Strauss does not simply criticize Burke for preferring a historical, timeless and collective subject as legislator. He criticizes him mainly because he would argue that the legislative function is not the result of a conscious act or a combination of conscious acts, but the product of contingency. Indeed, when Strauss speaks of a “Historical” School, he is thinking of Hegel, to whom he refers, rather than Savigny. The mechanism of collective action that he invokes, wrongly in my opinion, is not that of the collective caution of dwarfs on the shoulders of giants (*nani gigantum humeris insidentes*), but that of the heterogeneity of purposes (*Heterogenie der Zwecke*):

Accordingly, the sound political order for him, in the last analysis, is the unintended outcome of accidental causation. He applied to the production of the sound political order what modern political economy had taught about the production of public prosperity: the common good is the product of activities which are not by themselves ordered toward the common good (Strauss, 1953, 314-315).

Strauss refers here to the most famous principle of Adam Smith’s liberal political economy, the *invisible hand*, which is cited in two different works by the Scottish philosopher. Here are the relevant excerpts:

The produce of the soil maintains at all times nearly that number of inhabitants which it is capable of maintaining. The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own convenience, though the sole end which they propose from the

labours of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. They are *led by an invisible hand* to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and *thus without intending it, without knowing it, advance the interest of the society*, and afford means to the multiplication of the species¹⁷ (*my emphasis*).

But the annual revenue of every society is always precisely equal to the exchangeable value of the whole annual produce of its industry, or rather is precisely the same thing with that exchangeable value. As every individual, therefore, endeavours as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. By preferring the support of domestic to that of foreign industry, he intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, *led by an invisible hand* to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. *By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.* I have never known much good done by those who affected to trade

¹⁷ Adam Smith, *Theory of Moral Sentiments* (1759), IV, I.

for the public good. It is an affectation, indeed, not very common among merchants, and very few words need be employed in dissuading them from it¹⁸ (*my emphasis*).

In the two passages where he refers to the “invisible hand”, Smith emphasizes two essential features: (a) the “interest of society” is most effectively promoted when the economic and social partners are concerned with their own individual interest rather than the collective one, and (b) the promotion of the common good, the social interest, is done not only without their intention, but also without their knowledge. Strauss writes about another formulation of this principle, in the “cunning of reason” (*List der Vernunft*) in Hegel’s *Philosophy of History*.

The good order or the rational is the result of forces which do not themselves tend toward the good order or the rational. This principle was first applied to the planetary system and thereafter to “the system of wants”, i.e., to economics (Strauss, 1953, 315).

Strauss thus refers to the Hegelian “historical school” rather than that of Savigny’s: “What is needed is not ‘metaphysical jurisprudence’ but ‘historical jurisprudence’. Thus, Burke paves the way for “the historical school” (Strauss, 1953, 316). Indeed, he does not refer to Savigny’s *romanist* School of law, as the reference to “historical jurisprudence” suggests, but explicitly to paragraph 189 of Hegel’s *Philosophy of Law* (Strauss, 1953, 315, n. 100). Hegel incorporates the two features underlying Smith’s moral-economic principle of the “invisible hand” into his system of world history and thus into that of the evolutionary progression of law towards the complete implementation of the principle of individual freedom, which is none other than the French

¹⁸ Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776), Book IV, Ch. II.

Revolution's *Declaration of the Human Rights*. Thus, paradoxically, Strauss implicitly but clearly accuses Burke of a logical contradiction: the "historical" (heterogonic) method he favors is incompatible with the results he wishes to obtain, namely the condemnation of the spirit of the revolution of 1789. The reason is simple. Hegel, following the same "historical" (heterogonic) method, correctly demonstrates that the law of liberty promoted in 1789 is the natural conclusion of all reasoning based on the "historical" method. Of course, this accusation of theoretical inconsistency and logical inconsequence in Burke's method rests on Strauss's rejection of the true epistemological paradigm that Burke follows, namely the jurisprudential paradigm of the "dwarf on the shoulders of giants", which happens to be the theoretical basis of the historical method of the Romanists. In contrast, Strauss interprets Burke in accordance with the heterogeneity of purposes paradigm. If the first paradigm is based on the Aristotelian logic of prudence as a practical philosophy, the second is based on the secularized notion of Divine Providence and its origin reflects Pascal's fragment on the misery and greatness of Man.

As Albert Hirschman¹⁹ has shown, the principle of heterogeneity has its origins in the theological thought of Pascal and in the circles of the Jansenists of Port Royal, notably Pierre

¹⁹ Albert O. Hirschman, *The Passions and the Interests. Political Arguments for Capitalism before its Triumph*, Princeton, Princeton University Press, 1977, "Repressing and Harnessing the Passions", p. 14-20. Hirschman also mentions Giambattista Vico and Bernard of Mandeville as precursors of destructive passions turning into beneficial contributions to civil happiness. See Hirshman's quote from Vico's *Scienza nuova* (par. 132-133): "Out of ferocity, avarice, and ambition, the three vices which lead all mankind astray, [society] makes national defense, commerce, and politics, and thereby causes the strength, the wealth, and the wisdom of the republics; out of these three great vices which would certainly destroy man on earth, society thus causes the civil happiness to emerge. This principle proves the existence of divine providence: through its intelligent laws the passions of men who are entirely occupied by the pursuit of their private utility are transformed into a civil order which permits men to live in human society".

Nicole. Pascal's «hidden God» is also linked to the principle of liberal economic thought by another researcher, Jean-Claude Perrot²⁰, who refers to all the formulations of this principle from the 17th to the 18th century. Thus, Adam Smith's “invisible hand” can be traced back to Bernard de Mandeville's innkeeper, Pierre Nicole's lodger and Pierre de Boisguilbert's barkeeper. Pascal's original idea of the greatness and misery of Man, the «incomprehensible monster», is not just about individual human beings. This expression does not mean that some individuals of the human race are good and others are bad. It does not even mean that the same individual can behave like a saint today and like a beast tomorrow. The human being is structurally an incomprehensible in a monstrous way because, through his actions in the service of his monstrous passions, he manages to form a socio-economic order in which he can find at least earthly happiness. This quotation from Pierre Nicole's lodger is characteristic²¹ :

There is no one, therefore, who does not have very great obligations to the political order, and to understand this better, it is necessary to consider that men, being empty of charity through the derangement of sin, are nevertheless full of needs, and are dependent on one another in an infinite number of things. *Greed has therefore taken the place of charity* to fill these needs, and it does so in a way that is not sufficiently admired, and where common charity cannot reach. For example, almost everywhere you go in the country, you find people who are

²⁰ Jean-Claude Perrot, *La Main invisible et le Dieu caché* in J. C. Galey, *Differences, valeurs, hiérarchie. Textes offerts à Louis Dumont*, Paris, Éditions de l'EHESS, 1984, p. 157-181 ; Reedited in Jean-Claude Parrot, *Une histoire intellectuelle de l'économie politique. XVII^e-XVIII^e siècle*, Paris, Éditions de l'EHESS, 1992, « La Main invisible et le Dieu caché », p. 333-349.

²¹ Pierre Nicole, *Essais de morale*, Paris, PUF, 1999, « De la grandeur », ch. VI, p. 213. See also, E. D. James, *Pierre Nicole, Jansenist and Humanist. A Study of his thought*, The Hague, Netherlands, Martinus Nijhoff, 1972, Part five: “Social and political theory”, p. 137-162.

ready to serve those who pass by, and who have lodgings all prepared to receive them. They are disposed of as they please. One orders them, and they obey. They believe that they are pleased to accept their service. They never apologize for rendering the assistance they are asked for. What would be more admirable than these people, if they were animated by the spirit of charity? It is greed that makes them act, and they do it with such good grace that they want us to attribute to them the favor of having used them to render us these services (Nicole, 1999, 213, *my translation, my emphasis*).

This is the very definition of the heterogeneity of purposes: each one following his own desires, needs and inclinations and his own objectives ends up producing the common order. If one did not know the institution of money, if one did not know the institution of the economy, the system of needs", the unspoken law of give and take, if one did not know self-interest, the interest of money and profit, he would think that people in the countryside offering their services to passers-by do all this out of Christian charity. Pierre Nicole's conclusion is the definition of heterogeneity: by doing what people do out of self-interest, they end up doing what they should do out of charity. When each individual serves his own need, his actions create a higher order in which he ultimately promotes the common interest and the good of all. The two opposing tendencies of classical political thought, self-interest and common interest, are now reconciled in the order of modernity, and not only are they not mutually exclusive, but they help each other: the common good cannot be produced without the help of private and selfish interest. This is what the following quote from Pierre Nicole says²²:

²² *Idem*, "De la charité et de l'amour propre", p. 381-415, ch. 2, « Comment l'amour-propre a pu unir les hommes dans une même société », p. 383-386.

Some try to make themselves useful to the interests of the one they need, others use flattery to win him over. One gives to obtain. This is the source and the foundation of all the trade that is practiced between men, and which diversifies in a thousand ways. For one does not only trade in goods which one gives for other goods or for money, but one also trades in work, services, assiduity, and civility; and all this is exchanged, either for things of the same nature, or for more real goods, as when by vain indulgences one obtains effective conveniences.

Thus, by means of this trade, all the needs of life are in some way met, without charity interfering. So that in states where it has no entrance, because true religion is banished, one does not fail to live with as much peace, safety and comfort, as if one were in a republic of saints (Nicole, 1999, 384-385, *my translation*).

The tone of the discourse of the above-mentioned thinkers could be described as theological or political-theological. This is quite clear in Vico and Pascal. Regarding the others, it is descriptive, they simply observe human affairs. On the contrary, according to Burke and Savigny, there is a definite class of people who consciously produce the law and the legal order. What is the subject that produces the political order in England? It is the class that Burke calls “the gentlemen of prudence”, a term that refers to the English nobility who, bound by the unwritten constitution and tradition, ensure the prudent and consistent continuity of the English legal-political order. The same applies to Savigny. The subject of the production of law is the community of wise “Romanists”, that is, jurists specializing in Roman law, and jurists in general. This is in sharp contrast to the principle that law is produced by the “general will” (Rousseau) or the people. How would general will produce law? Following what process? According to Strauss’s interpretation of Burke, as I have suggested, just as an invisible principle produces equilibrium in markets, so

the *general intellect* of a people produces positive law. Strauss' view is an application of heterogeneity to politics and law. And he bases his conviction on Hegel's philosophy of History, which is also found in Kant. The following passage from the opening of the *Idea for a Universal History from a Cosmopolitan Perspective*²³ (*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*) clearly shows the German philosopher's attempt to make history a field for the unconscious unfolding of the institutions of freedom, expressing in his own way the principle of heterogeneity of ends:

Individual human beings and even entire peoples give little thought to the fact that they, by pursuing their own ends, each in his own way and often in opposition to others, unwittingly, as if guided along, work to promote the intent of nature, which is unknown to them, and which, even if it were known to them, they would hardly care about. [...] The only option for the philosopher here, since he cannot presuppose that human beings pursue any rational end of their own in their endeavors, is that he attempts to discover an end of nature behind this absurd course of human activity, an end on the basis of which a history could be given of beings that proceed without a plan of their own, but nevertheless according to a definite plan of nature (Kant, 2006, 3-4).

This passage contains the principle of Hegel's philosophy of history, which Strauss identifies with the German Historical School. But where Kant hypostasizes Nature, speaking of a "concrete plan of Nature" that men follow without their

²³ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Edited and with an Introduction by Pauline Kleingeld. Translated by David L. Colclasure with essays by Jeremy Waldron Michael, W. Doyle, Allen W. Wood, New Haven and London, Yale University Press, 2006. For the German text, see, Immanuel Kant, *Politische Schriften, op. cit.*, p. 9-24.

knowledge, Hegel hypostasizes Reason²⁴. According to Hegel's philosophy of History, the passions are the means that reason uses to create free human societies. In this lies the "cunning of Reason" (*List der Vernunft*), "which lets the passions act on its own behalf" (Hegel, 2006, 141). Reason, or "the universal idea", "does not engage in conflicts and battles, is not exposed to dangers, but remains unassailable and untouched at the back" (Hegel, 2006, 141). To do this, it uses the stormy human passions, especially those of "historical" individuals, the great Men who have marked the universal history of humanity, such as Alexander the Great, Julius Caesar or Napoleon (Hegel, 2006, 139), to promote freedom in History. History is understood as the field of the deployment of political freedom, individual and collective, conceived by Reason itself. This project consists in diverting the torrent of passions towards the river of freedom. In other words, while one might think that the passions express the senseless purposes of the acting subjects, in fact their work serves, without the knowledge or intention of the subjects of the passions, the purpose of Reason. Hegel's "cunning of Reason" is thus also an expression of the heterogeneity of purposes, applied to the production of the institutions of political freedom through the deployment of the unbridled passions of the protagonists of history. It concerns "the fact that these historical individuals and peoples, by their vitality, by demanding and satisfying something of their own, are at the same time the means and instruments of a higher and ultimate purpose, which they ignore and unconsciously realize" (Hegel, 2006, 133).

iv. Conclusion

Leo Strauss lends Burke this Hegelian expression of heterogeneity as an example of the historical-empirical collective production of political institutions. This correlation between

²⁴ Hegel, *Ο Λόγος στην ιστορία* [Reason in History], Introduction, Translation and Commentaries by Panagiotis Thanassas, Μεταίχμιο, Αθήνα, 2006, «Τα μέσα της πραγμάτωσης: τα πάθη» [“The means of realisation: the passions”], p. 128-146.

Hegel and Burke, as I have already shown, is not valid. On the contrary, Burke can rightly be considered the founder of Savigny's Historical. Savigny characteristically writes:

The individual work of Man is perishable like Man himself in his visible appearance; but thought will not perish: it is thought which, transmitted from generation to generation, unites the servants of thought in a large community, where the smallest part of the individual finds an immortal duration (Savigny, 1855, XLVII, *my translation*).

The work of individuals is lost, as well as individuals themselves, but not their thought, which is inherited from generation to generation and unites all scientists in a vast scientific community. This community is the *subject* that produces positive law, codifying reality. This is Burke's view, and it is an expression of the jurisprudential paradigm, not of the heterogeneity of purposes. In conclusion, if there is a collective production of law, there does not necessarily follow the principle of heterogeneity of purposes. Those who produce law, although they are unknown members of a great scientific community, of a community of sage and prudent men, do so consciously: they aim at the general good. They are, of course, in constant interaction with the society in which they live and whose law they shape, but this is not enough to believe in an accidental production of law. Both Burke and Savigny prefer the historical method because there is no end to the great minds and lawmakers of humanity, no end to the needs of humanity, no end to the new problems that are created by the technical and cultural progress of humanity. Therefore, law must not be a closed system, it must remain open so that it can grow, develop, mutate, and change.

One could also wonder if there is not yet another preoccupation in Strauss' mind: could Burke turn Aristotle against Plato? Aristotle wrote textbooks like the constitution of Athens and his school, the Lyceum, was known for its research on constitutions of cities and kingdoms of his time and he did speak the first of "prudence of the city" (φρόνησις πόλεως) in

his *Politics*. Given the importance of *the* philosopher for Maimonides and for the Medieval thinkers, one could wonder if Strauss' real problem is not the forging of an alliance between Burke, Aristotle and Cicero against Plato and Moses. This would have given a new perspective on another kind of historicism, based on the paradigm of the “dwarfs on giants’ shoulder”.

