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GOVERNMENTAL ILLEGITIMACY AND NEOCOLONIALISM: RESPONSE TO REVIEW BY JAMES THUO GATHII

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INTRODUCTION

The essence of James Thuo Gathii's criticism of *Governmental Illegitimacy in International Law*[1] is that my study seeks to answer a doctrinal question rather than to challenge the "Eurocentric" assumptions that pervade doctrinal thinking. Although I (inevitably) take exception to some of Professor Gathii's characterizations of the book's details, an elaborate clarification and defense of these finer points would amount to an uninteresting response to an interesting essay. Indeed, since Gathii characterizes the book as "well written, well-argued, and well-researched,"[2] and since I am in sympathy with the considerations that prompt him to go beyond the scope of what I sought to accomplish, I am tempted to treat Gathii's essay as a complement (as well as, in many respects, a compliment) to my book, and therefore to leave well enough alone.

I nonetheless accept the *Michigan Law Review*'s invitation to respond, in order to confront directly the political challenge that Gathii, as a participant in the scholarly current of "critical" approaches to international law, poses to my more traditional brand of legal scholarship. Above all, I want to contest the relationship that Gathii posits between disciplinary methodology and political substance.

"Critical" scholars frequently seem to imagine that, in struggling against the methodological norms of their disciplines, they are struggling against the very structure of the power relations that exploit and repress the poor and weak — the metaphor being, in their minds, somehow transubstantiated into reality. The result is, all too often, an

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1. James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996, 2013 (2000) (reviewing BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW (1999)).

2. *Id.* at 2004.

illusory radicalism, rhetorically colorful but programmatically vacuous. The danger is that a fantasized radicalism will lead scholars to abandon the defense of the very devices that give the poor and weak a modicum of leverage, when defense of those devices is perhaps the only thing of practical value that scholars are in a position to contribute.[3]

My main problem with Gathii's critique, then, is not (as he might imagine) that it is political, but that it is politically dysfunctional. More specifically, for all of Gathii's anticolonial posturing, my book is, I insist, far more effectively anticolonial than is his critique of it.

I. THE LAW AND POLITICS OF GOVERNMENTAL ILLEGITIMACY

Professor Gathii is fully justified in subjecting *Governmental Illegitimacy in International Law* to an essentially political critique, for the book, like all legal scholarship, has political implications — in this case, designedly so.[4] This is not to say, as "critical" scholars sometimes seem to imply, that law or legal scholarship is reducible to ordinary politics. Law is a purposive project, and thus not exclusively an empirical phenomenon; "law as it is" cannot be wholly separated from "law as it ought to be."[5] The purposes that drive the project, however, must be demonstrably immanent in social reality, not merely superimposed according to the predilections of the jurist; the jurist's task, at once creative and bounded, is to render a persuasive account of how those immanent purposes bind powerful actors to worthy projects

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3. Bruno Simma and Andreas S. Paulus make a version of this point against Hilary Charlesworth in a recent *Symposium on Method in International Law*. Simma and Paulus express doubt that the emphasis on subjectivity that marks Charlesworth's feminist approach to method:

> will be helpful in the dialogue with decision makers because it does not appear compatible with the setting of general standards for human behavior — norms urgently needed to hold the perpetrators of crimes against women accountable under the rule of law. The impressive contribution of the feminist movement to the development of international criminal law during the last decade testifies to the transformative potential of the adaptation of positive law to meet women's concerns.

Bruno Simma & Andreas S. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 306 (1999).

4. And confessedly so:

> [I]t would be disingenuous to claim that the instant work (or any work of legal interpretation) is a neutral rendering. Wherever possible, it reads the source materials as coherent rather than chaotic, and it presents established legal doctrines, especially those emphasizing non-intervention in the internal affairs of states, in a light that suggests that they are not, as some have maintained, altogether lacking in moral vision. It is, in a sense, inherently a conservative project. The account of norms of international conduct developed in an ideologically plural environment is unquestionably colored by the author's concern to preserve space in the world for ideological pluralism and innovation.

P. 34 (footnote omitted).

5. *See* Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644-48 (1958).

(such as the self-determination of Third-World peoples) that they would not otherwise be inclined to undertake.[6] That legal scholarship impress those who are not natural political allies is the test, not only of its scholarly merit, but also of its *political* merit; that friends may be disappointed is of far lesser significance.

This task is not to everyone's taste, and some in the academy have devoted their considerable talents to discrediting the project of legal reasoning, as conventionally understood.[7] But their efforts, though often of great intellectual sophistication, are profoundly misguided. In their zeal to "unmask" law's legitimation of exercises of power, they fail to appreciate that law can legitimate such exercises only insofar as it simultaneously constrains them. Power holders seeking the imprimatur of legality can benefit only to the extent that they accept its limits, for violation of the limits necessarily reverses the process of legitimation.[8]

To deny such a relationship between legitimation and constraint is to assert that putative legal limits are a remarkably effective ruse — that legal rhetoric, rather improbably, fools most of the people all of the time. (Presumably, the power holders are not thought to be fooling themselves, since if the constraints, though objectively illusory, seem real enough to them, the rule of law would be a reality in political terms even if a chimera in philosophical terms.) On the other

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6. Thus, according to Ronald Dworkin:

> A naturalist judge might find, in some principle that has not yet been recognized in judicial argument, a brilliantly unifying account of past decisions that shows them in a better light than ever before.... Nevertheless the constraint, that the judge must continue the past and not invent a better past, will often have the consequence that a naturalist judge cannot reach decisions that he would otherwise, given his own political theory, want to reach.

Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 169 (1982).

7. Martti Koskenniemi characteristically notes that in his experience in international legal practice,

> competent lawyers routinely drew contradictory conclusions from the same norms, or found contradictory norms embedded in one and the same text or behavior.... As I learned from David Kennedy, the legal argument inexorably, and quite predictably, allowed the defense of whatever position while simultaneously being constrained by a rigorously formal language.

Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 354-55 (1999).

There are many grounds, however, for questioning the cynical lessons that Koskenniemi and Kennedy draw from such observations. Most straightforward among them is that the project of legal argumentation would not likely consume the time and attention of intelligent, well-informed, and savvy individuals if it were so barren of substance.

8. I have made this point more elaborately in Brad R. Roth, *What Ever Happened to Sovereignty? Reflections on International Law Methodology, in* TOWARD UNDERSTANDING GLOBAL GOVERNANCE: THE INTERNATIONAL LAW AND INTERNATIONAL RELATIONS TOOLBOX 69, 77-83 (Charlotte Ku & Thomas G. Weiss eds., 1998).

hand, if law does constrain as well as legitimate the exercise of power, to neglect that point is to miss an important political opportunity.[9]

Thus, *Governmental Illegitimacy in International Law*, in developing legal grounds for limiting the intervention of foreign powers in the internal affairs of weak states, is highly conventional in its method, except in one important respect. Because there has only recently come into being an international law of the internal character of domestic political systems, there is no tradition in international law scholarship of interpreting the relevant practices and pronouncements of states in light of the diversity of political principles and power arrangements that have been efficacious in the international community. The task of legal interpretation in this area implicates the fields of political theory and comparative politics; without an understanding of the political ideals and structures that have had a voice and a vote in the international system, one tends to read the source material in light of highly parochial assumptions about political life. Thus, Chapters Two, Three, and Four, as interdisciplinary aids to legal interpretation, distinguish the book from more standard international law scholarship.

For this limited interpretive purpose, however, one need understand only *empowered* approaches to political legitimacy — that is to say, approaches that have been influential among state actors (Western, Socialist, and Nonaligned) whose deeds and words are the source material of international law in the relevant periods. That other, disempowered approaches may more authentically represent cultural norms in much of the world (e.g., in postcolonial states ruled by unrepresentative, Western-influenced leaders) would be interesting to know, but unhelpful to this particular project.

The book does not purport to be a thoroughgoing examination of the question of political legitimacy in general; that would be a project so immense as to be imponderable. Rather, the book seeks to be a thoroughgoing examination of the international norm emerging to govern the exceptional case: the de facto government so manifestly unrepresentative as to be arguably without standing to resist, in the name of the sovereignty belonging to the underlying political community, external impositions.

The question, then, is what indication of representativeness is minimally required to deem a ruling apparatus the state's "government" for purposes of international law. The orthodox approach to this question has been the "effective control doctrine," the linchpin of

9. Even Koskenniemi seems recently to have endorsed this proposition. *See* Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations, in* THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW 17, 32 & n.96 (Michael Byers ed., 2000) ("[D]oing away with [the question of legal 'validity'] has definite social consequences. Not least of these is the liberation of the executive from whatever constraints (valid) legal rules might exert over them [sic].").

which is popular acquiescence in governance (pp. 137-42). A sharp break from orthodoxy is implicit in liberal-internationalist assertions of a "democratic entitlement," the linchpin of which is a liberal-democratic institutional structure.[10] The former approach is clearly giving way to a significant extent, and there are those who argue, on the basis of a fair amount of evidence, that the latter approach is emerging as the basis of a new norm that would open the door to "prodemocratic" intervention, perhaps including even the use of force, especially where a "freely and fairly elected" government has been overthrown.[11]

Governmental Illegitimacy in International Law elaborately argues two politically relevant propositions: (1) that the case for the democratic entitlement as the emerging norm in international law is weaker than is generally supposed; and (2) that liberal-democratic legitimism (i.e., the use of the democratic entitlement as the basis for disregarding a government's legal prerogatives) is dangerous both to self-determination and to peace. The book presents the second proposition as relevant to the first, inasmuch as one may appropriately amplify those aspects of the source material that stem from enlightened considerations.

The book thereby intends to strike a blow for anticolonialism. It denies the existence of, and opposes the establishment of, a broad-ranging legal license for external intervention in the affairs of weak states. It associates such a license with great-power initiatives of the past that have been misguided at best, oppressive and exploitative at worst. Confronting a dismal subject matter that admits only of bleak choices, the book maintains a presumption in favor of what I, none too facetiously, often refer to as "the right to be ruled by one's own thugs," though it concedes a limited range of blatant thuggery that overcomes this presumption.[12]

The book does not, as Gathii charges, "celebrate[] Haiti as the exemplary contemporary case of successful prodemocracy intervention,"[13] but merely accepts that in a certain class of cases, of which Haiti is archetypical, one can no longer, and should not want to, deny the existence of an exception to the nonintervention norm. What

10. The seminal works of the "democratic entitlement" school are: Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

11. For a wide-ranging compilation of scholarly approaches to the question of the democratic entitlement, see DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., forthcoming 2000).

12. The book is not a political manifesto, however, and supporters of the democratic entitlement will hopefully find much within it to be of scholarly value, even while regarding its grounding for verdicts of governmental illegitimacy as far too limited.

13. Gathii, *supra* note 2, at 2052.

Governmental Illegitimacy in International Law seeks to promote is a balanced norm, one that finds ample support in state practice and *opinio juris* and that serves, to the extent possible, the long-term interests of the inhabitants of weak states.

II. CONFESSIONS OF A "NEOCONSERVATIVE REALIST"

Gathii's characterization of my work as an exemplar of "neoconservative realism" presents several difficulties. There are certain aspects of the book that can fairly be characterized as "conservative" and as "realist," at least in counterposition to liberal internationalism, if special definitions of those terms are designated with sufficient care. The book is conservative in the limited sense that it seeks to rationalize and to bolster the conception of international legal order, premised on the twin principles of self-determination of peoples and nonintervention in internal affairs, that was dominant throughout the 1960s, 1970s, and 1980s, but that now faces significant challenges.[14] The book is realist to the extent that it takes states (*qua* political communities entitled to self-government) seriously as units of the international system, and that it treats skeptically efforts to superimpose idealist blueprints on complex and unruly realities.[15]

Gathii's own efforts to define the terms, however, lead only to confusion. The prefix "neo-" is especially troubling, because although Gathii at times seems to intend it in a more generic sense, the term "neoconservative" cannot be disassociated from a specific movement among right-wing American intellectuals that stands for propositions diametrically opposed to the book's central arguments. It is jarring to see the word used to characterize, for example, a discussion of U.S. intervention in Central America so overtly adverse to that emblematic neoconservative project of the 1980s (pp. 290-303, 347-61). Indeed, Gathii's accurate assertion that "[t]he neoconservative tradition . . . is embedded in American exports such as neoliberalism and democracy promotion programs"[16] goes far in explaining the book's chilly recep-

14. Gathii seems not to notice that the American Right has been a consistent opponent of that conception. For a colorfully harsh illustration, see Jeane J. Kirkpatrick & Allan Gerson, *The Reagan Doctrine, Human Rights, and International Law*, *in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 19 (Louis Henkin ed., 2d ed. 1991) (1989).

15. Edward Hallett Carr, certainly not a man of the Right, was frequently characterized (not quite fairly) as a realist for holding such views. *See generally* EDWARD HALLETT CARR, THE TWENTY YEARS CRISIS, 1919-39: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS (1939); CHARLES JONES, E.H. CARR AND INTERNATIONAL RELATIONS: A DUTY TO LIE (1998).

16. Gathii, *supra* note 2, at 2002. Of course, the very fact that liberalism and conservatism are not necessarily antonyms suggests the urgent need for care in defining terms. Neoconservatism represents the right wing of liberal internationalism, the left wing of which is represented by the human rights activist community. Embedded in my book is the judgment that human rights activists are making a mistake in embracing legal frameworks, such as the democratic entitlement, that will end up best serving the neoconservative agenda.

tion of the latter; but how, then, can the book conceivably be identified with neoconservatism? This glitch could be dismissed as a detail if it were not reflective of Gathii's broader misperception of the political spectrum.

Gathii complains of "binary thinking" as a " 'pathological' feature of Western knowledge systems,"[17] but ironically, it is his organization of the material, not mine, that suffers from this pathology. Thus, Gathii does not discern that my approach to the question of governmental illegitimacy charts a middle way between the effective control doctrine and the democratic entitlement, one that seeks to appreciate the vast diversity of legitimacy rationales without embracing an abject relativism. To the extent that the book seeks to categorize the elements of that diversity, it does so expressly for the sake of convenience alone, and in a tone of self-deprecation.[18] For all of his complaints about my neglect of non-Western approaches to legitimacy, Gathii nowhere explains how the book excludes that which it does not expressly discuss. Nonetheless, this either-or motif is the relentless theme of his essay.

According to Gathii's dichotomous reasoning, "Western" approaches to international relations amount to a dyad of liberal internationalist and neoconservative realist tendencies. Thus, the idea of "liberalism overextending itself" — which well captures my adverse characterization of the effort to exalt liberal-democratic institutional norms as legal criteria for governmental legitimacy — is, for Gathii, necessarily of a piece with Right-of-Center critiques of the New Deal welfare state.[19] Yet the considerations that underlie my critique of liberal internationalism cannot, on any careful reading, be imagined to emanate from the Right.

Gathii's reasoning turns on an assertion that my "examination of only the legitimacy or illegitimacy of *state* authority invariably endorses the inequalities inherent in the private order which overlays the authority of any government providing its public imprimatur in private ordering."[20] But given that my project concerned a very narrow (al-

17. *Id.* at 2005 n.21.

18. For example:

> Such legitimating visions are many and varied. A comprehensive listing and explication would consume many volumes, and would perhaps never be complete. These visions can, however, usefully be classified according to their relationship to the familiar (if frequently misunderstood) concepts of liberalism and democracy, the fusion of which is now fashionably proclaimed to offer a final resolution of the question of governmental legitimacy.

P. 70. It is only to this extent that, "*[t]o put it glibly*, the international community contains liberal democrats, non-liberal democrats, liberal non-democrats, and non-liberal non-democrats . . . ." Pp. 39-40 (emphasis added), *quoted in* Gathii, *supra* note 2, at 2005 n.21 (adding different emphasis).

19. *See* Gathii, *supra* note 2, at 2002 n.14.

20. *Id.* at 2003.

beit grandly complex) question — namely, when does a ruling apparatus in effective control lack standing to assert rights, incur obligations, and authorize acts on behalf of the state in the international system? — Gathii's assertion seems merely to reflect a methodological prejudice against treating *anything* as a discrete issue.[21] For Gathii, either one expressly discusses economic and social inequality in every context, or one is unconcerned with it.

Ironically, part of the book's criticism of the democratic entitlement thesis is precisely that the latter emphasizes institutional criteria at the expense of contextual factors such as economic and social conditions (pp. 104-06, 120, 424-26) — an aspect that would, I had supposed, be hard to miss if one were reading the book for its political implications. The book's defense of sovereign prerogative overtly reflects an interest in maintaining political space for the very resistance to private-sector predation that Gathii seeks to champion.[22] Moreover, Gathii's complaint that I "ignore" international economic domination[23] could not be more misplaced, since I not only discuss the various pronouncements of intergovernmental organizations against coercive economic measures, but seek to establish for those pronouncements a legal significance that, though modest, goes beyond what most Western international lawyers tend to admit.[24]

To make use of legal discourse, however, is to accept that its political worth — its credibility with influential actors who do not share one's interests and values — can be maintained only by resisting the temptation to assert as law one's entire political and moral wish list. I do not contend that the lending conditions imposed by international financial institutions are violations of international law, as Gathii

21. Gathii's predisposition is particularly distortive in his treatment of the "state necessity"/"implied mandate" doctrine. *See id.* at 2009 (citing pp. 155-59). That doctrine legally ascribes to a state the uncontroversial public acts and obligations undertaken by a de facto government notwithstanding that government's illegitimacy — postal and aeronautical conventions being my posited examples. For Gathii, these examples reproduce the "public/private distinction," and my approving invocation of them supposedly demonstrates that I have "almost blind faith in the idea that . . . the exclusivity of the private sphere from public power guarantees neutrality and therefore freedom." Gathii, *supra* note 2, at 2025, 2026. Such unjustified leaps highlight the dangers of metaphorical reasoning.

22. *Compare* pp. 424-26, *with* Gathii, *supra* note 2, at 2052. Since Gathii dismisses sovereign prerogative and private property as deriving from one and the same Eurocentrism, he inadvertently debilitates his own cause.

23. *See* Gathii, *supra* note 2, at 2027.

24. I suggest, albeit rather tepidly, that secondary boycotts and other extraterritorial pressures, even when adopted purportedly in response to a state's human rights violations, amount to unlawful coercion absent authorization by the United Nations Security Council under Article 41 of the Charter (pp. 167-71). The more standard view is to the contrary. *See, e.g.*, Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 46 (1989) (treating economic coercion as a nonissue, at least where human rights are at stake).

would like,[25] because the absence of any broadly accepted basis would render the contention useless and self-discrediting. Furthermore, I do not denounce the absence of a doctrinal basis for this contention as a failing of international law, because that body of law has never pretended to exhaust the question of international distributive justice. Like many "critical" theorists, Gathii, in so busily demonstrating the truism that law is political, fails to appreciate the distinctiveness of law's role in politics, and therefore curses its necessary limitations.

The supreme example of Gathii's binary thinking, however, and by far the most disturbing, is the neat division between "Eurocentric" and "Third-World" approaches. The irony of Gathii's condemnation of my "Eurocentrism" (apart from the difficulty of reconciling it with my copious quotations from Kwame Nkrumah, Julius Nyerere, Raul Castro, and the like) is that the reconstructed image of the contemporary sovereign state system that I present reflects the influences, direct and indirect, of the Nonaligned Bloc, quite as much as it does those of Westphalia or even of the drafters of the United Nations Charter. As the book details, the era of decolonization and its aftermath profoundly affected legal norms, as both Western and Socialist blocs purchased Third-World political support by, *inter alia*, affirming the inviolability of weak states (pp. 6, 113-18, 160-71). In repudiating conventional legal analysis as Eurocentric, Gathii dismisses both the significance of Third-World participation in shaping contemporary norms and the extent of the Third World's stake in the continued vitality of those norms — an attitude not, so far as I can tell, broadly shared among Third-World leaders, scholars, or peoples.

International law's basic categories do, of course, stem from European sources,[26] but then so, too, in large measure, do the ideologies of the postcolonial state governments. Gathii may see this as itself a corruption of authentic African, Asian, and Latin-American traditions,[27] but the struggle over authenticity is internal to those

25. *See* Gathii, *supra* note 2, at 2026-39.

26. Gathii's harshest complaint here is with the idea of the state itself as a doctrinal entity abstracted from the idea of the nation. *See id.* at 2041-48. But one looks in vain for an indication of what solution a reintroduction of the idea of the nation (which I consider to be, in terms of both legal doctrine and normative political theory, a good riddance) presents for the problems of postcolonial countries. Surely he is not suggesting disaggregating African political units and reconfiguring them in some more traditionally coherent way, since this could be accomplished, if at all, only through extraordinary violence.

Indeed, it is difficult to perceive how Gathii defines "nation" and "nationalism." Insofar as he means the "nationalism" represented by the anticolonial and antiimperialist struggles that he references, he is mistaken to regard my book's characterization of legal doctrine in the area of self-determination of peoples as anything less than a monument to those struggles.

27. Illustrative is his approving citation of Ngugi Wa Thiong'o's characterization of "the English language in former British colonies in Africa [as] a 'cultural time bomb' that continues a process of erasing memories of pre-colonial cultures and history as a way of installing the dominance of new, more insidious forms of colonialism." *Id.* at2020.

societies and cultures. If Gathii is intent on regarding Third-World authenticity as excluding Western political thought — Rousseau and Marx as much as Locke and Mill, and by extension all African, Asian, and Latin-American thinkers who have drawn inspiration from them — his notion of "Third-World approaches" cannot help but be a highly tendentious rendering.

Gathii is correct to assert that my analysis treats colonialism as a legal aberration rather than as "ingrained in international law as we know it today."[28] But he fails altogether to explain why it would be useful, in terms of his purported political goals, to do otherwise. Characterizing contemporary international law as essentially continuous with patterns of past Western domination (thereby belittling the hard-won achievements of anticolonialist struggles) scarcely promises a more effective defense to the phenomena — economic disempowerment, cultural imperialism, and proposals to subject "failed states" to trusteeship[29] — against which he inveighs. Gathii undoubtedly believes that *Governmental Illegitimacy in International Law*, in failing to attack the structure of international law itself, subtly reinforces these phenomena. But the first two exist despite, not because of, the conception of international law that the book embodies, and the last is most effectively opposed by invoking that conception.

CONCLUSION

Professor Gathii's substantive concerns about neocolonialism and neoliberalism are the very concerns that underlie *Governmental Illegitimacy in International Law*. It is thus ironic — though, in light of recent scholarly trends, not very surprising — that he should regard my book as part of the problem rather than as part of the solution. It would be different if the methodological radicalism of Gathii and others of his persuasion entailed a programmatic alternative. But it does not. Instead, it disdains to engage in the only consequential struggle in which its adherents are, by training and position, equipped to participate. It therefore reflects neither the interests nor, it is a sure bet, the views of those on whose behalf it purports to operate. Faced with the alternative that it presents to more traditional modes of scholarship, I much prefer to take the advice of an old mentor: "the more radical the message, the more conservative the suit."

28. *Id.* at 2020.

29. *Id.* at 2021.