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**The limits of contestation: towards a radical democratic theory of emergency politics**

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# **The Limits of Contestation:**

Towards a Radical Democratic Theory of Emergency Politics

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PhD in Normative Political Theory

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## **Abstract**

The claim that the exception has become the norm dominates the discourse of emergency politics. Theories of emergency politics need not rely on norm/exception binary because it closes down possibilities for radical democratic political contestation. Attempts to define a situation as exceptional by powerful political elites are a claim that politics must be foreclosed until they decide that the exigency has been resolved and a 'normal' state of affairs has resumed. A theory which conceptualizes space for radical democratic contestation is essential because such contestation is crucial to preserving and enhancing liberal-democratic governance despite claims that they are facing an existential threat. This thesis lays the foundation for such a theory. First, it presents a criticism of the reliance of the norm/exception binary in the discourses of emergency politics. I argue that 'normal' and 'exceptional' are polemical concepts used to in the defense of particular articulations of hegemonic and political power not liberal-democracy as such. Second, I develop a radical democratic theory of emergency politics. This theory is based on an account of political contingency which conceives of the political realm as being unstable and continually evolving. Thus liberal-democratic regimes never exist in 'normal' states because they are constantly engaging with exigencies which that emanate from the political realm. Furthermore, this thesis contends that emergency politics should be inscribed within wider hegemonic practices. What I identify as a paradox of contestation at the heart of liberal-democratic regimes is the terrain on which emergency politics are contested. Liberal-democratic regimes can absorb situations sometimes defined as emergencies. The goal of this thesis is to demonstrate theoretically how liberal-democratic regimes can preserve the possibility of radical democratic politics in the face of claims on the part of powerful political elites that an emergency or exception exists, which must be met with unrestrained violence and by severely reducing the scope of legitimate political contestation.

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## Introduction - The Trouble with Normality and Exceptionality

*“In the first place it is evident that if we know the causes which destroy constitutions, we also know the causes which preserve them; for opposites produce opposites, and destruction is the opposite of preservation.”*

Aristotle, *The Politics*

In scholarly discourses of emergency politics it is all too common to hear the phrase ‘the state of emergency is permanent’ or ‘the exception has become the norm’. The claim that the emergency is permanent comes in various incarnations which will be discussed throughout the body of this dissertation. Theorists of constitutional dictatorship Giorgio Agamben, following Walter Benjamin, claims that the state of exception is the permanent paradigm of modern governance.<sup>1</sup> While legal scholars such as David Dyzenhaus, Oren Gross and Fionnuala Ni Aolain acknowledge that emergency governance is both increasingly utilized by liberal-democratic regimes and difficult if not impossible to separate from normal or ordinary law.<sup>2</sup> Nomi Lazar and Bonnie Honig attempt to remove the element of exceptionalism from emergency politics, but as I will show in chapter five both of their attempts are unsuccessful. Political theory is faced with “the problem of the politics of *exceptionalism*, particularly its discursive and socio-political processes and conditions of possibility.”<sup>3</sup> Exceptionalism is problematic because it severely curtails possibilities for radical democratic contestation of emergency politics.

The norm/exception binary is not analytically productive for theorizing emergency politics. On the contrary, it forecloses the possibility of radical

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<sup>1</sup> Agamben, *State of Exception*, 2005 and Benjamin, *Theses*, 1968

<sup>2</sup> Dyzenhaus, *Constitution of Law*, 2005 and Gross and Ni Aolain, *Law in Times of Crisis*, 2006

<sup>3</sup> Andrew Neal, ‘Giorgio Agamben’, p. 2, emphasis in original

democratic emergency politics which can resist attempts by powerful elites to declare a state of emergency. Additionally, it removes justifications for the use of emergency powers from critical scrutiny. This thesis breaks through the binary in order to expose the politics of emergency. Any claim by state officials or political elites that a situation is exceptional or constitutes a state of emergency is an attempt to remove politics and political contestation from that situation. More specifically, it is an attempt to eliminate any possibility of including democratic political contestation as an element of both deciding that the situation is an emergency as well as what types of responses should be considered appropriate. The notion of normality is equally as problematic as that of emergency or exceptionality. The norm/exception binary presumes an uncontested, shared understanding of normality. This is problematic because, as I will argue in this thesis, any claim by elites that a state of affairs is normal conceals the elements of political and hegemonic power involved in invoking such a definition.

What is at stake in discourses of emergency politics is the possibility of theorizing how liberal-democratic regimes can be defended in the face of claims that their existence is threatened and the only possible response is to eliminate or subvert the constraints they place on political contestation and violence. Theories of emergency politics which rely on the norm/exception binary severely reduce or eliminate our ability to negotiate this problematic by lessening the scope of democratic politics and contestation. Furthermore, we need to move away from the idea that the exception/emergency is now the norm because to accept that position is to give up the defense of liberal-democracy. “[M]ust a democracy leave free and in a position to exercise power those who risk mounting an assault on democratic freedoms and putting an end to democratic freedom in the name of democracy and of

the majority that they might be able to rally around their cause?”<sup>4</sup> Certainly not. Resisting attempts by state officials and political elites to exercise unrestrained power and violence requires a new approach to emergency politics, one that understands ‘emergencies’ and ‘exceptions’ as phenomena which are largely internal to the basic processes and paradoxes of liberal-democratic governance.

### **A Radical Democratic Theory of Emergency Politics**

In order to counteract the effect of the norm/exception binary I will put forth a critique of its deficiencies as they appear in various attempts to theorize and conceptualize emergency politics. In the face of the ever increasing use of emergency powers by liberal-democratic regimes as well as the conceptual grip the norm/exception binary has on the discourse of emergency politics what is needed is “a response that calls into question, at their most fundamental level, the most deep-seated conceptual presuppositions in philosophical discourse.”<sup>5</sup> Furthermore, “[w]e must also recognize here strategies and relations of force. The dominant power is the one that manages to impose and, thus, to legitimate, indeed to legalize (for it is always a question of law) on a national or world stage, the terminology and thus the interpretation that best suits it in a given situation.”<sup>6</sup> I examine those relations of force as they appear in the politics of defining states of affairs or events as normal or exceptional. Such strategies and relations of force are always part of larger hegemonic processes at work in liberal-democratic regimes. We need to unseat the norm/exception binary and develop a new approach to the problems associated with politically declared exceptions and emergency politics.

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<sup>4</sup> Derrida, *Rogues*, p. 34

<sup>5</sup> Derrida, ‘Autoimmunity’, p. 100

<sup>6</sup> Derrida, ‘Autoimmunity’, p. 105

I develop a theoretical and heuristic framework which demonstrates that the norm/exception binary is unhelpful because it closes down a radical democratic politics of emergency. We should inscribe situations politically defined as emergencies within the wider context of contestation over the articulation of the rule of law and extra-legal, democratic power in conditions of contingency. The necessity of a new theory of emergency politics is affirmed by Ernesto Laclau when he argues that “Society requires constant efforts at re-grounding... and if the plurality of demands requires a constant process of legal transformation and revision, the state of emergency ceases to be exceptional and becomes an integral part of the political construction of the social bond.”<sup>7</sup> This thesis does not develop a practical programmatic or blue-print for designing emergency powers. It exposes the conceptual limits of the current discourse of emergency politics then lays the foundation for a new approach that preserves space for radical democratic contestation of declarations of states of emergency as well as the use of emergency powers.

What is to be gained through my approach is a theorization of emergency politics that can preserve radical democratic contestation even in situations powerful political elites attempt to define as an emergency or as exceptional. I argue that the first step in building this theory is to break the grip the norm/exception binary has on the discourse of emergency politics. When theorizing emergency politics we need not make the “mistake of counterpoising normality and emergency...”<sup>8</sup> My approach conceptualizes emergencies not as exceptional or extraordinary circumstances which should not and cannot be contained via a legal order.

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<sup>7</sup> Ernesto Laclau, “Bare Life or Social Indeterminacy”, p. 16

<sup>8</sup> Neocleous, *Critique of Security*, p. 71

I contend that the situations defined as emergencies are part and parcel of ordinary, everyday political contingency and arise out of liberal-democratic governance. Furthermore, situations defined as emergencies or exceptions are entangled with both basic structures of liberal-democratic regimes as well as several paradoxes which inhabit those regimes. Any attempt to define a state of affairs as an emergency is a political tactic with the aim of securing an equally politically determined notion of normality. Following Machiavelli, my approach to emergency politics takes the perspective that emergencies need not always be seen as harmful to the regime. By understanding the conditions of possibility for declaring emergencies as well as the intricacies of the paradoxes which form the contours of emergency politics it is possible to utilize emergencies for radical democratic ends.

Subsuming emergencies within the larger category of political contingency does not mean that they can be considered normal occurrences either. We cannot only equate normality with “the separation of powers, entrenched civil liberties... public policy and the rule of law...”<sup>9</sup> Normality also names specific articulations of political and hegemonic power within liberal-democratic regimes. This thesis will demonstrate how ‘normality’ always refers to claims that a particular articulation of political power within a given liberal-democratic regime should be considered as normal.

A number of paradoxes exist in the foundations of liberal-democratic regimes. Four of which are central to emergency politics. They are the paradoxes of sovereignty, of politics, the democratic paradox and the paradox of contestation. These paradoxes are particularly evident during periods defined as acute political

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<sup>9</sup> Neocleous, *Critique of Security*, p. 71

crises by powerful elites. They are the terrain on which emergency politics play out. They occur at founding moments and continue to exist in a variety of political practices.

Paradoxes cannot be either solved or transcended. They also need not be conceptualized in such a way that “each term not only opposes the other but also props it up and between them the vast, complicated, and subtle terrain of politics is excluded.”<sup>10</sup> The paradoxes involved in emergency politics are not binaries which prop each other up. They involve distinct theories, ideologies, strategies, regimes, which have no necessary relation to one another but have been combined in discourses of emergency politics as well as actually existing regimes. They are not necessarily in binary opposition to one another; they simply have no necessary or determinate relation. A better way to view their relationship is one of contingency and irresolvable tension not of binary opposition. Irresolvable tension is not binary opposition. Some relation between the two can and does exist, but there will never be a complete harmonic fusion.

The paradox of sovereignty captures the idea that sovereign power is both external and internal to legal order. William Connolly notes that intellectuals such as Rousseau, Schmitt, Kafka, Ricoeur, Arendt, Derrida, Deleuze, and Agamben, while differing on many points, all agree that “a democratic state seeking to honor the rule of law is also one with a sovereign power uncertainly situated within and above the law. The rule of law in a state is enabled by a practice of sovereignty that rises above the law.”<sup>11</sup> In this dissertation I modify it through the work of Schmitt and Lindahl such that sovereign power is a reflexively oriented agency which must make

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<sup>10</sup> Honig, ‘Between Decision and Deliberation’, p. 15

<sup>11</sup> Connolly, ‘The ‘The Complexities of Sovereignty’’, p. 24

decisions concerning legal order as a whole. It is an inescapable aspect of liberal-democratic governance that legal order is legitimized by an extra-legal sovereign demos, ‘we, the people’. This paradox cannot be solved. Nor can it be transcended as Giorgio Agamben suggests. Sovereignty and law will always exist in an unstable relationship.

Bonnie Honig, following Rousseau and William Connolly, describes the “paradox of politics” as the fact that good laws require good citizens to make them, but good citizens are made by good laws.<sup>12</sup> Each is necessary for the other but neither can come first. It is one of the contours “of everyday political practice,” even though it may not be highly prominent or visible at all times.<sup>13</sup> Honig’s paradox of politics is important because it points to a problematic of conceptualizing political agency. However, it insufficiently theorized because it presupposes that ‘good citizens’ can be conceived as a plurality without antagonism. My claim that political antagonism is a constitutive element of emergency politics will be developed throughout this thesis, notably in chapters two, six and seven.

The third crucial paradox is identified by Mouffe, following Schmitt, as ‘the democratic paradox’.<sup>14</sup> This paradox is created by the very nature of ‘modern’ liberal-democratic regimes. Mouffe states:

“...with modern democracy, we are dealing with a new political form of society whose specificity comes from the articulation between two different traditions. On one side we have the liberal tradition constituted by the rule of law, the defense of human rights and the respect of individual liberty: on the other the democratic tradition whose main ideas are those of equality,

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<sup>12</sup> Honig, *Emergency Politics*, p. 3

<sup>13</sup> Honig, *Emergency Politics*, p. 3

<sup>14</sup> Mouffe, *The Democratic Paradox*, 2000

identity between governing and governed and popular sovereignty. There is no necessary relation between those two distinct traditions but only a contingent historical articulation.”<sup>15</sup>

These two traditions exist in irresolvable tension with one another. Liberalism calls for equality of all while democracy necessarily creates an inequality between those who constitute a demos and those excluded in the process of production of a demos. This thesis follows Mouffe in disagreeing with Schmitt that the tension between liberalism and democracy renders all liberal-democratic regimes fundamentally unviable. Rather this tension constitutes one of the fundamental paradoxes which can help clarify the conditions of possibility of emergency politics.

One of the ways this paradox manifests itself is through what this thesis will identify as ‘the paradox of contestation’. This paradox consists in the fact that a liberal-democratic regime must maintain itself as a coherent order and defend itself from existential threat yet, in order to be liberal-democratic it must leave its basic principles open to contestation. Not all contestation will be deemed legitimate by the regime. The decisions surrounding legitimate contestation are implicated in the declaration of emergencies because they label certain groups or forms of contestation as illegitimate threats to the regime itself. In this paradox of openness and closure the contingency of politics can take the form of an emergency. Schmitt was the first to identify this paradox though he did not label it a paradox as such.

The goal of my approach to emergency politics is to preserve the possibility of radical democratic politics in the face of claims on the part of powerful political elites that an emergency or exception exists, which must be met with unrestrained violence and by severely reducing the scope of legitimate political contestation. I take my cue for a notion of radical democracy comes from Laclau and Mouffe in

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<sup>15</sup> Mouffe, *The Democratic Paradox*, p. 2-3

*Hegemony and Socialist Strategy*. I contend that liberal-democratic regimes can be considered radical when they leave open to contestation their most fundamental principles as well as the methods by which they construct political exclusions and negotiate antagonisms. This is precisely the issue at hand in the paradox of contestation. The goal is to ensure “[t]he multiplication of political spaces and the preventing of the concentration of power in one point.”<sup>16</sup> This is all the more crucial when facing increasing attempts by political elites to foreclose politics and consolidate power via claims that an exceptional state of emergency exists.

### **Plan of the Work**

Chapter one criticizes the theory of constitutional dictatorship developed by Clinton Rossiter, Carl Friedrich and Frederick Watkins. It argues that they uncritically rely on the possibility of separating normal from exceptional circumstances. Such reliance leaves their theories unable to explain how or why ‘states of emergency’ seem to be ever-present aspects of liberal democratic regimes. This also leaves them unable to theorize a politics of emergency which includes scope for democratic contestation of the decision to declare an emergency, the methods used to respond to an ‘emergency’, or the best means for limiting abuses of emergency powers.

Chapter two argues that Schmitt’s Weimar work can be used to theorize emergency politics without the norm/exception binary. I read Schmitt against himself to show that his work contains what I call ‘the problematic of the exception’. This problematic consists in the fact that liberal-democratic regimes cannot banish extra-legal sovereign power which has the ability to make decisions on legal order as

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<sup>16</sup> Laclau and Mouffe, *Hegemony and Socialist Strategy*, p. 178

a whole. Sovereign power is particularly pronounced in situations defined as exceptional. This problematic is further compounded by the paradox of contestation outlined in Schmitt's work. The principle of justice on which liberal-democratic regimes rely consists in an equal chance.

Chapter three argues that Giorgio Agamben's work on states of exception is flawed because he posits the exception as an unchanging, ontological structure of Western politics. His conceptualization of sovereign power and the state of exception, characterized as a state of anomie between law and life, erase the political as well as any space for radical democratic politics which contest sovereign decisions that an exception must be declared. Furthermore, he offers no practical alternative to the permanence of the exception. His solution of a new metaphysics of law and violence is vague and cannot conceptualize real world tactics for combating the increasing use of emergency powers by liberal-democratic governments.

Chapter four critiques two attempts to subsume emergency politics within liberal legality. Both of these theories demonstrate the entrenchment of the norm/exception binary in legal discourses of emergency politics. Oren Gross contends that emergency measures always seep into 'normal' legal order and should thus never be used. David Dyzenhaus argues that normality and emergency measures can be kept separate but that state officials have little interest in doing so. Both are unsatisfactory because they contend that extra-legal sovereign power is unacceptable within liberal-democratic regimes. Thus, they remove any scope for theorizing emergency politics in a way that preserves scope for democratic contestation of sovereign decision-making processes, especially concerning crises.

Chapter five analyzes two attempts to theorize emergency politics without recourse to the norm/exception binary. Nomi Lazar's work attempts to show that emergency powers have always been a constituent element of liberal-democratic governance thus they are not exceptional. However, she recreates the norm/exception binary by transposing it into the realm of ethics while arguing that what she refers to as 'existential' and 'quotidian' ethics limit emergency powers. Bonnie Honig's work attempts to 'de-exceptionalize' emergency politics.<sup>17</sup> I agree with the aim of Honig's project. Yet, I disagree with the specific methods she uses for reaching that goal, notably her critique of Schmitt and her claim that the paradox of politics is the most fundamental paradox of liberal-democracy.

In chapter six I turn to Machiavelli in order to lay the foundations of my radical democratic approach to emergency politics. I contend that his concepts of *fortuna* and *accidenti* are useful because they show that situations that may be defined as emergencies are a constituent element of the political realm. Furthermore, as Clement Fatovic notes, for Machiavelli, "contingency is the single constant in politics."<sup>18</sup> Additionally, Machiavelli cautions against the use of extraordinary measures for dealing with crises. He contends that the best response to changes in *fortuna* and dangerous *accidenti* is the construction and maintenance of regimes based on the rule of law.

Finally, in chapter seven I argue that situations defined as emergencies or as exceptional are always in some sense entangled with the processes of constructing a reflexively oriented demos. The exclusions necessary to consolidate a demos create antagonisms and the presence of 'aliens' as they are understood in the work of

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<sup>17</sup> Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy*, 2009

<sup>18</sup> Clement Fatovic, *Outside the Law*, p. 11

Bernard Waldenfels. Additionally, I argue that declarations of emergency and exceptionality as well as normality are tactics of hegemonic power. They are polemical weapons used by dominant groups to limit contestations over the contingent foundations of their own polities, their collective selfhood.

## Chapter 1 - Against Dictatorship: Roman and Constitutional

### Introduction

It is crucial to begin a study of emergency politics in liberal-democratic regimes with the dictatorship of republican Rome. The dictatorship is the conceptual and theoretical as well as institutional model for emergency regimes in liberal-democratic states. Modern scholars hold the Roman dictatorship up as an example of successful emergency governance in which relaxed legal and constitutional restrictions on executive power enable an efficient and effective response to what is perceived to be an existential crisis for the state and society. Furthermore, the Roman dictatorship serves as an ideological and moral point of inspiration for theorizing emergency politics. Clinton Rossiter refers to the dictatorship as “a theoretical standard” and “moral yardstick” for contemporary forms of emergency governance.<sup>19</sup> He bases his assessments of emergency measures both theoretical and practical on how well they compare to what he understands as the successful implementation of dictatorships in republican Rome. Bruce Ackerman states that the Roman dictatorship was the “first great experiment with states of emergency,” as such he “heavily” relies on it for inspiration when theorizing about emergency politics.<sup>20</sup> Finally, Watkins considers the dictatorship as “perhaps the most strikingly successful of all known systems of emergency government.”<sup>21</sup> As such he, like many other scholars, considers it the best place to begin an investigation of emergency politics in liberal-democratic regimes. They claim that if liberal-democratic regimes can design and implement similar provisions for situations defined as existential threats to their existence they will be able to survive such crises.

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<sup>19</sup> Rossiter, *Constitutional Dictatorship*, p. 15

<sup>20</sup> Ackerman, *Before the Next Attack*, p. 78

<sup>21</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 332

Beyond providing inspiration for thinking through emergency politics scholars and politicians rely on the dictatorships institutional features for guidance when designing modern emergency measures. As Oren Gross aptly puts it, “The institution of the Roman dictatorship has been regarded as the prototype for modern-day constitutional emergency regimes.”<sup>22</sup> While there are vast differences between the Roman republic and modern liberal-democratic governments, Ackerman claims that the Romans were right to search for institutional restraints on abuse of emergency powers.<sup>23</sup> However, their model is neither “desirable nor practical under modern conditions”.<sup>24</sup> Simply transplanting the Roman dictatorship into liberal-democratic states is not an option. However, many scholars still argue that while the specific institutional provisions of the dictatorship cannot be recreated in current regimes similar provisions can be made to work within the scope liberal-democratic governance. As will be discussed below, Clinton Rossiter’s model of constitutional dictatorship is essentially the Roman dictatorship but modified slightly to fit liberal-democratic forms of governance.

This chapter argues that such reliance on the Roman dictatorship, both as theoretical and conceptual inspiration as well as institutional prototype, is misguided. Relying on the dictatorship embeds the norm/exception binary in liberal-democratic thought on emergency politics. Dictatorship necessary assumes that a duly appointed dictator can return exceptional times to normal times. Indeed, it is the entire premise of the justification of the office. However, as will be argued in chapter six, liberal-democratic regimes never exist in a static state. They are constantly being contested and renovated through such contestation. The norm/exception binary essential to any

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<sup>22</sup> Gross, ‘The Concept of ‘Crisis’’, p. 1

<sup>23</sup> Ackerman, *Before the Next Attack*, p. 79

<sup>24</sup> Ackerman, ‘The Emergency Constitution’, p. 1046

notion of Roman or constitutional dictatorship obscures the changeable and continuously evolving nature of liberal-democratic regimes. Theories of constitutional dictatorship take for granted the existence of exceptional circumstances thus eliminating any possibility of contesting the decision to declare a state of emergency or exception. Additionally, reliance on an uncritical notion of exceptional circumstances removes any scope for democratic participation in emergency politics.

Modern scholars have misappropriated the Roman dictatorship. The Roman dictatorship is not a suitable prototype because the ancient sources on which it is based are contradictory. The knowledge gained from ancient sources is biased, politically motivated and based more on myth and legend rather than historical fact. No modern scholar has adequately accounted for these factors in their account of Roman dictatorship. As Nomi Lazar states “the Roman dictatorship is a favorite trope of scholars of emergency government, widely cited but ill understood”.<sup>25</sup> They project their own concepts of legal order, constitutionalism, as well as emergency and normality back onto the dictatorship. Scholars focus on a few basic institutional factors of the dictatorship and tout them as the best way to enable a liberal-democratic regime to respond to what they perceive as a crisis while also preventing abuse of emergency powers. This highly selective reading of dictatorship cannot provide liberal-democratic regimes with an adequate model of emergency government because it has not accounted for the complexity and politics of emergency governance.

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<sup>25</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 113

The first section of this chapter takes the model of ‘constitutional dictatorship’ as developed in the work of Clinton Rossiter, as well as his colleagues Carl Friedrich and Frederick Watkins, as exemplary of the deficiencies of relying on the Roman dictatorship and the norm/exception binary for theorizing and conceptualizing emergency politics as well as justifying the use of similar measures in liberal-democratic regimes. It will provide exegesis and critique this model of emergency governance. The second section of this chapter will demonstrate how this model is based on a historical misappropriation of the Roman example. Roman dictatorship was not well understood by the ancient historians on which current scholars of constitutional dictatorship and emergency governance base their reasoning. I will argue that the idea Roman dictatorship has been misread and misappropriated such that its shortcomings have become embedded in current discussions on emergency politics. The ancient sources drawn upon are Cicero, Dionysius of Halicarnassus, Livy and Polybius.

### **Constitutional Dictatorship**

The model of constitutional dictatorship is trapped between an empirical assessment that emergency government is becoming permanent with no return to normality and a normative belief that dictatorship can and should be used to defend liberal-democratic states from crises. Rossiter is resolute in his assertion that “no free state has ever been without some method by which its leaders could take dictatorial action in its defense. If it lacked such a method or the will of its leaders to use it, it did not survive its first real crisis.”<sup>26</sup> He furthermore believes that constitutional dictatorships can be effectively used to defend liberal-democratic states without state

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<sup>26</sup> Rossiter, *Constitutional Dictatorship*, p. 13

officials abusing their enhanced powers or relaxed or suspended legal restrictions.<sup>27</sup>

However, Rossiter, Friedrich and Watkins present clear reservations about the possibility of regulation of dictatorial powers and a full return to normal times after a crisis. This is indicative of theorizing which relies on the Roman dictatorship for its conceptual and theoretical framework. Further analysis of constitutional dictatorship will further clarify this point.

Firstly, there are three criteria which, Rossiter argues, provide the rationale for constitutional dictatorship: 1) democratic governance is designed for “normal, peaceful conditions” and is therefore “unequal to the exigencies of a great national crisis” 2) because of this democratic governments must be ready and willing to be “temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions” and 3) “this strong government” can have no other function except “to end the crisis and restore normal times.”<sup>28</sup> The norm/exception binary is already clearly at work in Rossiter’s thought. He assumes that such a distinction can be made without critically examining what constitutes normal or emergency times. For Rossiter a state of emergency is an objective state of affairs not a situation which is determined politically. Indeed, these rationales and the model of constitutional dictatorship cannot function and are incoherent without simply assuming that it can be easily determined when times are normal and when they are exceptional. This assumption is problematic because it removes any chance of contesting the decision to resort to emergency measures. They also require a static notion of the state and society. In order to return ‘normal times’ after a crisis normality must be assumed as both an empirical and conceptual possibility. I will

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<sup>27</sup> Rossiter, *Constitutional Dictatorship*, p. 313-314

<sup>28</sup> Rossiter, *Constitutional Dictatorship*, p. 5-7

argue throughout this thesis that, contra the theorists of constitutional dictatorship, ‘emergency’ and ‘normality’ are politically determined concepts with no neutral or objective definition. These uncritical assumptions are also at work in the criteria put forth by Rossiter and Friedrich to ensure that dictatorship remains constitutional.

Rossiter delineates eleven criteria for judging whether or not modern dictatorships are used in accordance with constitutional standards. These criteria can be roughly divided into three categories, though some criterion overlap.<sup>29</sup> First are criterion to determine when and how to initiate a constitutional dictatorship. For instance, criteria one states that dictatorship should not be initiated unless it is absolutely necessary to preserve the state or constitution while criteria two states that whoever decides that a dictatorship is necessary should never be the one to wield dictatorial power.<sup>30</sup> The second category of criteria concern whether or not a dictatorship should be continued as well as how it should be implemented. In this case Rossiter states clearly that any use of dictatorial power must be exercised legitimately and “effected in pursuit of constitutional or legal requirements.”<sup>31</sup> Thirdly are criteria to specify when to terminate it.<sup>32</sup> These criteria consist of provisions which specify that no dictatorship should exist longer than absolutely necessary nor should one be instituted without determining a time limit in advance.

Criteria six, ten and eleven bear further analysis because they directly highlight the reliance on the norm/exception binary by constitutional dictatorship as well as the impossibility of ever definitively separating the two. Criteria six states: “The measures adopted in the prosecution of a constitutional dictatorship should

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<sup>29</sup> Rossiter, *Constitutional Dictatorship*, p. 298

<sup>30</sup> Rossiter, *Constitutional Dictatorship*, p. 298-299, 302

<sup>31</sup> Rossiter, *Constitutional Dictatorship*, p. 300

<sup>32</sup> Rossiter, *Constitutional Dictatorship*, p. 298.

never be permanent in character or effect.”<sup>33</sup> Criteria ten states: “No constitutional dictatorship should extend beyond the termination of the crisis for which it was instituted.”<sup>34</sup> Finally, criteria eleven states: “...the termination of the crisis must be followed by as complete a return as possible to the political and governmental conditions existing prior to the initiation of the constitutional dictatorship.”<sup>35</sup> These criteria are not formal legal restrictions on dictatorial governance. However, Rossiter recommends that they be built into a legal and constitutional order before they are needed. The most pressing question is who determines whether or not these criteria have been adequately fulfilled? Rossiter is attempting to create limitations which are as specific and as objective as possible. However, all of these criteria rely on subjective, and what will ultimately be, political decisions concerning the existence and scope of an alleged crisis, when the threat has passed and whether or not a return to a state of normality has been achieved. These criteria demonstrate that Rossiter is using the words crisis and emergency as neutral, objective determinations of a state of affairs. However, the criteria he puts forth to assess and respond to such situations are entirely subjective and politically determined. This makes the institution of constitutional dictatorship suspect. It relies on an uncritical and assumed distinction between normality and exceptionality which even the supporters of constitutional dictatorship worry cannot be maintained in practice. Their reliance on an uncritical notion of exceptionality leaves their theory blind to the politics of declaring, responding to and ending an emergency.

Rossiter, Friedrich and Watkins warn that constitutional dictatorship is vulnerable to four types of abuses. Firstly, state officials who are given enhanced

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<sup>33</sup> Rossiter, *Constitutional Dictatorship*, p. 303

<sup>34</sup> Rossiter, *Constitutional Dictatorship*, p. 306

<sup>35</sup> Rossiter, *Constitutional Dictatorship*, p. 306

may abuse that power for personal gain.<sup>36</sup> This is certainly a possibility but can be prevented by a trial of the offending individual. Rossiter recommends this in his eighth criteria of constitutional dictatorship. Secondly, there are emergency provisions enacted for a supposed “internal crisis, but [are] actually [initiated] for no other reason than the maintenance of some privileged group in power.”<sup>37</sup> This is a concern of particular importance if one assumes, as I do with agonistic democratic theory, that society is constitutively split. Rossiter states that dictatorial authority should never be used “to the advantage of one part of the population” however, “There is obviously no sure way to guarantee the observance of this...”<sup>38</sup> The depth of this issue is fully discussed in chapter seven. At the moment it is sufficient to note that because of antagonisms which are constitutive of liberal-democratic societies this issue can never be resolved. Not because there are no institutional guarantees as Rossiter suggests but because an ‘emergency’ is always politically determined by powerful elites and groups for the protection of their specific understanding of the state and normality. Any attempt to protect normality will have polemical consequences for groups who are on the opposite side of an antagonism from powerful elites.

The third warning against constitutional dictatorship is that measures enacted on a temporary basis may become permanent. Rossiter, Watkins and particularly Friedrich note that empirically and historically this has been the case at least to some extent. Rossiter warns that “No democracy ever went through a period of thoroughgoing constitutional dictatorship without some permanent and often unfavorable alteration in its governmental scheme, and in more than one instance an

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<sup>36</sup> Rossiter, *Constitutional Dictatorship*, p. 296-297

<sup>37</sup> Rossiter, *Constitutional Dictatorship*, p. 295

<sup>38</sup> Rossiter, *Constitutional Dictatorship*, p. 304

institution of constitutional dictatorship has been turned against the order it was established to defend.”<sup>39</sup> Rossiter even admits that an emergency measure may need to be made permanent.<sup>40</sup> For him, the problem of emergency measures becoming permanent is primarily empirical in nature. The problem is not a conceptual impossibility of separating normality from emergency. His position is simply that the reality of constitutional dictatorship has never fully lived up to the theory. Even though Rossiter claims that the entire goal and duty of constitutional dictatorship is to “end the crisis and restore normal times” his position provides no definitive answer to the question of whether or not exceptional crises can be separated from normal times with normality being the predominant state of affairs.<sup>41</sup> Neither does he recognize that normality may be a political concept such that powerful elites are able to define an emergency when they feel that their articulation of the state and society being is threatened.

Watkins, on the other hand, does argue that separating normal times from exceptional crisis and dictatorial governance is conceptually impossible. He argues that “In the strictest sense it is inconceivable... that a previous constitutional system should be restored in undiminished vigor after a period of emergency absolutism.”<sup>42</sup> He defends this position by arguing that perfection cannot be demanded of constitutional dictatorship. A return to normality on his account is an ideal goal, a limit case which should be strived toward even if it can never be attained in practice. On his account then normality and emergency become politically determined goals, flexible concepts determined by the groups and officials involved in emergency

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<sup>39</sup> Rossiter, *Constitutional Dictatorship*, p. 13

<sup>40</sup> Rossiter, *Constitutional Dictatorship*, p. 303

<sup>41</sup> Rossiter, *Constitutional Dictatorship*, p. 298

<sup>42</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 330

politics. However, Watkins does not recognize or draw out the implications of this position.

The final warning put for by Rossiter, Watkins and Friedrich is that modern constitutional limitations are not adequate.<sup>43</sup> The main problem with the criteria enumerated and discussed above arises precisely when they are to be tested and enforced. The criteria discussed above are the measures by which “the democratic and constitutional character of a democratic and constitutional dictatorship is to be tested”.<sup>44</sup> However, Friedrich argues that there “are no ultimate institutional safeguards” against the abuse of dictatorial power.<sup>45</sup> This is because any limitations whether they be legal and constitutional or not can only be as effective as the people who enforce them. All three defenders of constitutional dictatorship rely heavily on the ability of the people to enforce the necessary criteria and ensure that dictatorship does not become permanent. However, their reliance on the norm/exception binary excludes any possibility for theorizing a politics of deciding on and contesting the use and abuse of emergency powers. Rossiter argues that more than in strict legal regulation “the conditions of secure and workable constitutional dictatorship... exist first of all in the minds and hearts of the... people and only secondarily in the Constitution or any laws that we could ever work out”.<sup>46</sup> It is the people, not the institutions that will ensure that a constitutional dictator remains constitutional. Friedrich makes the argument more forcefully arguing that “behind all these procedural devices there must stand an alert people, *a real constituent power*,

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<sup>43</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 566

<sup>44</sup> Rossiter, *Constitutional Dictatorship*, p. 306

<sup>45</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 570

<sup>46</sup> Rossiter, ‘Constitutional Dictatorship in the Atomic Age’, p. 406.

determined to see to it that these limitations are effectively utilized...”<sup>47</sup> Yet, their theory cannot account for how a people can effectively restrain emergency powers when the very rights and laws necessary for public control of political officials may be suspended or curtailed by a dictator? Neither Rossiter nor Friedrich provide any formal or institutional mechanism for ensuring that the people will always have the power to end a dictatorship. Friedrich is aware of the problem, asking “how are the people to exercise their restraint, when the constitution does not contain effective working limitations?”<sup>48</sup> Again the defenders of constitutional dictatorship are in the ambiguous position of assuring us that constitutional dictatorship can be utilized and controlled while also raising strong, unchallenged criticisms that dictatorial power is ultimately uncontrollable and has a tendency to become permanent. The theories of constitutional dictatorship lack the element of democratic participation and contestation necessary to limit emergency powers enacted by state officials. Given their reservations concerning the ability of citizens and laws to restrain dictatorial power, where does their faith in normative argument that it can and should be implemented come from?

Friedrich claims that it is pointless to argue against some form of constitutional dictatorship whatever its dangers may be. Certainly dictatorial powers are suspicious and threatening but, he argues, they are not as threatening or as dangerous as the destruction of a constitutional order by invasion or civil war.<sup>49</sup>

Rossiter argues along similar lines that “[n]o sacrifice is too great for our democracy,

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<sup>47</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 581, emphasis added

<sup>48</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 570

<sup>49</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 581

least of all the temporary sacrifice of democracy itself.”<sup>50</sup> More than these generic assertions Rossiter, Friedrich and Watkins are committed to the idea that constitutional dictatorship can be successful and restrained because of the example they believe is set by the dictatorship of republican Rome. For each of these scholars the problem with modern forms of emergency governance is that they have not been properly created. The conceptual and theoretical framework of dictatorship is not at fault, they claim, simply because when we compare modern provisions for emergency governance with Rome “our present-day arrangements leave much to be desired.”<sup>51</sup> The Roman dictatorship on their account serves to prove that dictatorial power can not only be successful at resolving what they understand as exceptional crisis but it can also be restrained and limited to such a degree that it can only be used for the defense of a constitution, not against it.

### **The Historical ‘Record’ of the Ancient Sources**

On the account of Rossiter, Friedrich and Watkins the historical record of the Roman dictatorship proves that regimes of emergency dictatorship can be designed and implemented in the service of liberal-democracy. Watkins refers to the dictatorship as “the most strikingly successful of all known systems of emergency government.”<sup>52</sup> After an exegesis of what he reads as the basic features of the dictatorship he goes on to stress that “the experience of ancient Rome is important... as a demonstration of the fact that a reasonably effective solution can be found to the problem of constitutional dictatorship.”<sup>53</sup> Rossiter is equally sure that the Roman dictatorship is the historical example that proves the necessity of constitutional

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<sup>50</sup> Rossiter, *Constitutional Dictatorship*, p. 314

<sup>51</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 378

<sup>52</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 332

<sup>53</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 337

dictatorship. As already noted he considers it a ‘theoretical’ and ‘moral yardstick’ against which to measure modern emergency regimes. Indeed, he considers the example set by the dictatorship as the most important political lesson demonstrated by Republican Rome.<sup>54</sup> Friedrich is more circumspect in his assessment of the Roman dictatorship. He claims that while the actual institutions of the Roman dictatorship are not usable in the modern world, “its underlying conceptions are still valid”.<sup>55</sup> We must, however, interrogate these claims.

Roman dictatorship was not as successful as they claim. Their reading of the historical record is inaccurate in that it is not sensitive enough to the nuances and complexities of ancient Roman law and politics. The historical record of the Roman dictatorship does not bear out the claims made on it by Rossiter, Friedrich and Watkins. The ancient sources are inconsistent and in some cases contradictory. Additionally, their accounts of the institution may be politically biased and based more on myth and legend than precise historical fact. Furthermore, Rossiter, Friedrich and Watkins focus on only a few institutional details of the dictatorship reducing the complexity of Roman law and politics to what they consider the essential elements and limitations of dictatorial power. They uncritically project modern notions of law and constitutionalism back onto the Roman dictatorship thus blurring an already inconsistent historical record. Their reading cannot be relied on as proof that any form of constitutional dictatorship can be successfully implemented. I will first address the problems associated with relying on ancient sources then demonstrate how the modern defenders of constitutional dictatorship

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<sup>54</sup> Rossiter, *Constitutional Dictatorship*, p. 28

<sup>55</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 581

have presented a selective reading of Roman dictatorship which focuses too heavily on what they consider its essential institutional features.

### *Contradictory Ancient Sources*

Any study of the Roman dictatorship must admit that modern scholars do not know much for certain when it comes to the constitution and politics of the Roman republic. Lazar's criticism of the historical record of the dictatorship is worth quoting at some length because it highlights the problems associated with relying on the ancient sources:

“Classicists accept that the literary accounts we have are at least partly fictitious, or at least so politically motivated that it would be irresponsible to take them as plainly factual. Later thinkers madly embellished and selectively reproduced earlier accounts. But even Livy and Dionysius, our so-called primary sources, were up to those same tricks, at least to some extent.”<sup>56</sup>

For Lazar this is enough to demonstrate that the “trope [of the Roman dictatorship] is a late construction.”<sup>57</sup> These biases and ideological motivations result in blatant inconsistencies between ancient authors. As such it is intellectually suspect to rely on it to justify contemporary forms of emergency dictatorship.

Cicero, Livy and Dionysius all present different accounts of why the dictatorship was first used and what its main function was. From the earliest accounts “[t]he tradition about the invention of the dictatorship is confused”.<sup>58</sup> Cicero attributes it to the people desiring unified power and command in the hands of one person when the city was at war.<sup>59</sup> Livy's narrative on the early history of Rome suggests that the main functions of the dictatorship were to respond effectively to threats of invasion and military exigencies as well as to instill fear in the general

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<sup>56</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 119, footnote 12

<sup>57</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 119, footnote 12

<sup>58</sup> Lintott, *The Constitution of the Roman Republic*, p. 109.

<sup>59</sup> Cicero, *Of the Commonwealth*, 1.63 and 2.56

Roman population.<sup>60</sup> Finally, Dionysius is clear from his first mention of the dictator that it was primarily a weapon of class warfare used by the patricians against the plebeians.<sup>61</sup> The power to control the army outside the city in defense of the state was a secondary function. The truth of the matter is not important though. It will never be certain what the primary function of the dictatorship was, either repelling foreign invasion or suppressing insurrection and sedition. Neither will we know for sure how the different classes of Roman citizens felt about the dictator. What is crucial is that there is no agreement among the ancients on the initial justification of the dictatorship. The ancient record is forever inconsistent.

There are further inconsistencies surrounding the extent of the power wielded by Roman dictators. The extent of dictatorial authority is particularly ambiguous surrounding the right of *provocatio*. *Provocatio* was the right of appeal plebeians had against summary arrest, flogging and execution by magistrates. Dionysius holds that the dictator could violate this right with impunity.<sup>62</sup> However, Livy recounts a story in which a dictator did not execute a plebeian because of an appeal to *provocatio* and support of an assembly which gathered to back the plebeian.<sup>63</sup> This case presents an element of popular restraint on dictators which theories of constitutional dictatorship lack. The most that can be accepted with any certainty is that the power of the dictator was not absolute but open to contestation in some cases. Lazar notes that “the range of the dictator’s powers are a matter of continuing contention” due to the political motivation on the part of the ancient authors and the inconsistencies

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<sup>60</sup> Livy, *The Rise of Rome*, 2.18 and 3.26

<sup>61</sup> Dionysius of Halicarnassus, *Roman Antiquities*, 5.70-77

<sup>62</sup> Dionysius, *Roman Antiquities*, 5.70

<sup>63</sup> Livy, *Rome and Italy*, 8.32-35

between their accounts.<sup>64</sup> This ‘continuing contention’ casts serious doubts as to whether or not the Roman dictatorship can be relied on as a successful example of constitutional dictatorship which is both effective and limited.

Concerning political biases and motivations Kalyvas notes that Dionysius and Appian deliberately associated Roman dictatorship with the Greek notion of tyranny in their accounts in order to critique the dictatorship.<sup>65</sup> Indeed, he portrays them as the first real critics of the Roman dictatorship.<sup>66</sup> The effect of the close association drawn by the Greek historians had the effect of “blurring previous empirical, analytical, and normative distinctions” between dictatorship and tyranny.<sup>67</sup> The selective ideological manipulation of the historical record is clear in this instance. Furthermore it serves to confirm Lazar’s point that “historical accounts can be bent to political purposes”.<sup>68</sup> As such, any modern use of dictatorship needs to be wary of such motivations. However, as will be discussed below, Rossiter, Friedrich and Watkins pay little regard to the biases of the ancients.

There is one further point to raise concerning inaccuracies in the historical record of the ancients. That is the presence of legend and myth in their accounts. The case of the dictator Cincinnatus is exemplary of this trait. Cincinnatus was made dictator in order to rescue the Roman army whose camp had been surrounded by Sabine forces. A delegation from the senate found him working on his small farm just outside the city. Upon being told of the danger facing the Roman army Cincinnatus immediately took up the position of dictator. Within sixteen days he had

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<sup>64</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 120

<sup>65</sup> Kalyvas, ‘The Tyranny of Dictatorship’, p. 414

<sup>66</sup> Kalyvas, ‘The Tyranny of Dictatorship’, p. 412-442

<sup>67</sup> Kalyvas, ‘The Tyranny of Dictatorship’, p. 415

<sup>68</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 119

rescued the trapped army and abdicated his dictatorial powers.<sup>69</sup> Overtime this story has been held up as an example of how dictatorial power can and should be used by persons as different as Machiavelli and George Washington.<sup>70</sup> However, it is impossible to separate historical facts from embellishments and legend.<sup>71</sup> Any modern reliance on this story must account for this fact, however, most do not.

Embellishments and political motivations aside most ancient sources acknowledge that the dictator was appointed by the consuls, that his term lasted no more than six months, and that he wielded more authority with fewer restrictions than did the highest ranking magistrates. However, there existed many other means by which Romans responded to what they considered emergencies. They could nominate a dictator, pass a *tumultus* decree which was supposed to prepare the city for war and call all citizens to arms, the senate could pass a “*senates consultum de re publica defendenda*” which was an exhortation to the consuls to do everything in their power to save the republic, though it did not bind the consuls to any particular action.<sup>72</sup> None of these actions receives much analysis from Rossiter, Friedrich or Watkins. Rather they focus solely on the dictatorship, as will be discussed below. Emergency politics in republican Rome were complicated and nuanced, extending beyond the basic features of dictatorship.

This complexity also applies to the Roman understanding of constitutionalism. The Roman ‘constitution’ was nothing like what exists in contemporary liberal-democratic regimes. Polybius himself admits that his account

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<sup>69</sup> Livy, *The Rise of Rome*, 3.26-3.29

<sup>70</sup> Gross, ‘The Concept of Crisis’, p. 3

<sup>71</sup> Gross, ‘The Concept of Crisis’, p. 4 and Watkins, ‘The Problem of Constitutional Dictatorship’, p. 335

<sup>72</sup> Lintott, *The Constitution of the Roman Republic*, p. 89-90

of the Roman constitution may seem strange because he omits certain details.<sup>73</sup>

Following Polybius, Lintott argues that:

“The constitution of the Republic consisted of far more than statutes: it was based on traditional institutions defined by precedents and examples. These were above all embodied in stories, whether these related to more recent events and had good claims to historicity or were reconstructions of distant events with a strong sense of myth. Thus the constitution did not stand above politics like a law-code: it is what Romans thought to be right and did, and in more senses than one it was a product of history.”<sup>74</sup>

Two of the main elements of Roman ‘constitutionalism’ which functioned alongside one another were *lex* and *mos*. *Mos* can be roughly translated as “the way things happened to be done at the time” while *lex* refers to written Roman statutes.<sup>75</sup> These two elements intermixed and certainly did not function alone. As such, the Roman constitution simply cannot be referred to in the same manner as modern liberal-democratic constitutions. This is a mistake many modern scholars make, particularly Rossiter and Friedrich. Doing so imports connotations and assumptions from modern constitutionalism that simply do not fit with what can be ascertained from the ancient sources. Any attempt to do so betrays the political aims of modern scholars. Rather than relying on the Roman ‘constitution’ they are selectively describing in order to justify their preferred understanding of dictatorship in liberal-democratic regimes.

A further point needs to be made concerning political violence in the Roman republic. Lintott suggests, citing Sherwin-White, that in republican Rome there existed an underlying legality to political violence.<sup>76</sup> Neither the magistrates nor the senate had a monopoly on the legitimate use of force. Individuals were not legally restricted from using violence against personal opponents. Furthermore, violence

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<sup>73</sup> Polybius, *The Rise of the Roman Empire*, 6.11-18

<sup>74</sup> Lintott, *The Constitution of the Roman Republic*, p. 26.

<sup>75</sup> Lintott, *The Constitution of the Roman Republic*, p. 4-6

<sup>76</sup> Lintott, *Violence in Republican Rome*, p. 65-66

was a morally acceptable means of achieving a “certain political objective”.<sup>77</sup> Therefore, a dictator violating the plebeian right of *provocatio* was not necessarily seen as an act of legally unconstrained, absolute power. It may have instilled fear in the plebeians but the act of killing an individual was not necessarily viewed as being particularly brutal or extraordinary. It is only in modern states which forbid the use of violence by individuals and its regular use by government officials that the act of summarily executing citizens comes to be seen as exceptional. The culture of violence and legality may have even encouraged private individuals to use force against those men considered outlaws, either because they were attempting to gain tyrannical power or because they were attempting to manipulate the constitution with violent means.<sup>78</sup> A statute regulating political violence did not appear in Roman law until sometime around 78 BCE, long after the dictatorship in its constitutional form had fallen into disuse.<sup>79</sup> It will be shown below that Rossiter, Friedrich or Watkins take almost no note of the complexity as well as legal and moral ambiguities surrounding political violence, particularly as it relates to the dictatorship. Rather, they emphasize the institutional mechanisms that authorized and constrained dictatorial violence.

### *The Narrow Reading of Roman Dictatorship*

Rossiter, Friedrich and Watkins’ heavy reliance on Roman dictatorship as a successful empirical example of expanded and constrained emergency powers is unfounded. They focus on basic institutional features ignoring contradictory

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<sup>77</sup> Lintott, *Violence in Republican Rome*, p. 52

<sup>78</sup> <sup>78</sup> Lintott, *Violence in Republican Rome*, p. 66

<sup>79</sup> <sup>79</sup> Lintott, *Violence in Republican Rome*, p. 122

accounts among the ancients and other factors which complicate their conceptual understanding of Roman dictatorship. In contrast to the messy and inconsistent understanding of the Roman dictatorship presented above Rossiter, Friedrich and Watkins' readings of the institution are sparse, focusing on what they deem the essential institutional features of the office. Their presentations of dictatorship employ modern conceptualizations of law and constitutionalism ignoring Roman elements such as *mos*.

Rossiter is fully aware that the social, economic and political conditions of ancient Rome and contemporary liberal-democracies are so vastly different that any call for the Roman dictatorship to be used as a model of emergency government is immediately suspect. Nevertheless, he is positive that the Roman dictatorship can be used as an ideal type for his theory of 'constitutional dictatorship'. This is evident in his focus on the constitutional and institutional mechanisms of the dictatorship as well as his use of modern terminology to describe those mechanisms. Merely describing the Roman dictatorship as 'constitutional' does not do justice to the concept as the Romans knew it. Additionally, speaking of the constitution as a single entity or document, which Rossiter does throughout *Constitutional Dictatorship*, obscures the fact that it was composed more of a web of formal *lex* as well as well as informal stories, examples and ethics and *mos*.

According to Rossiter's account, when the republic was threatened the Senate would advise the consuls to select a dictator. The consuls were 'constitutionally' empowered to the select the dictator, though it was only one consul who made the final decision.<sup>80</sup> The constitutionality of the appointment was ensured by religious

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<sup>80</sup> Rossiter, *Constitutional Dictatorship*, p. 20

rites performed only by consuls and by the *lex curiata*, which gave a “stamp of legality.”<sup>81</sup> The dictatorship was primarily used to repel invading armies as well as to suppress insurrection amongst the plebian population.<sup>82</sup> To this extent the dictator was given nearly absolute power. Rossiter describes this power as a relic of the extinct Roman monarchy.<sup>83</sup> In order to resolve the crisis at hand the dictator could do almost anything he saw fit. There were though, important formal restrictions on his authority. Firstly, the dictator’s time in office was strictly limited. He could hold the office for no more than six months. Rossiter notes that this limit “was never transgressed, by law or by force.”<sup>84</sup> Secondly, he could not alter the constitution or subvert the fundamental structure of the republic in anyway. Third, the dictator was dependent on the state for finances. Fourth, he could not initiate offensive wars. Finally, the dictator had no jurisdiction in civil matters.<sup>85</sup> Aside from these limitations the dictator was not subject to any of the other restrictions placed on Roman magistrates. These are all formal restrictions on the power of the dictator that Rossiter asserts prove the constitutional nature of the office. For Rossiter the dictatorship is an office that exists primarily in the realm of Roman *ius*, the realm of the constitution and law. He does not even mention *mos*. Leaving aside *mos* highlights how Rossiter presents only a biased account of the Roman dictatorship which fits with his modern theoretical and political project of constitutional dictatorship. He does argue that the “sacred nature of the dictatorship” is responsible for the fact that no dictator violated these restrictions for the first three hundred years

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<sup>81</sup> Rossiter, *Constitutional Dictatorship*, p. 20-21

<sup>82</sup> Rossiter, *Constitutional Dictatorship*, p. 21-22

<sup>83</sup> Rossiter, *Constitutional Dictatorship*, p. 17

<sup>84</sup> Rossiter, *Constitutional Dictatorship*, p. 23

<sup>85</sup> Rossiter, *Constitutional Dictatorship*, p. 23-24

of the existence of the office.<sup>86</sup> However by giving the sacred nature of the office this role he relegates it to more of a support for the institutional limitations. The sacred nature of the office and the religious rites surrounding it are not restrictions on abuse of dictatorial power in their own right. According to Rossiter it is the formal, institutional restrictions that constrained Roman dictators from abusing their power.

If the limits on dictatorial power were primarily institutional in nature so were the powers granted according to Rossiter. The dictator had several powers of a political and legal nature which he could exercise. He could call assemblies and even the Senate into session, he had jurisdiction to decide any and all criminal cases pertaining to the crisis at hand, and he could arrest, judge and execute Roman citizens in violation of their right of *provocatio*.<sup>87</sup> Just like the restrictions these are all powers involving what Rossiter understands as legal and constitutional structures. Rossiter does not account for any inconsistencies evident in the ancient sources discussed above.

Friedrich and Watkins selectively narrow the historical record in order to fit their own understanding of constitutionalism as well as their defense of constitutional dictatorship. Friedrich's description of the dictatorship reduces the complexity of Roman emergency governance discussed above to four basic criteria: the appointment of the dictator followed constitutional norms, the dictator could not nominate or institute himself, the term as dictator was strictly limited to the resolution of the emergency for which he was nominated or six months, whichever came first, and finally the dictatorship was always used to protect the constitution

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<sup>86</sup> Rossiter, *Constitutional Dictatorship*, p. 24

<sup>87</sup> Rossiter, *Constitutional Dictatorship*, p. 25

and the republic, never against it.<sup>88</sup> These are the ‘underlying conceptions’ he considers to be still valid. However, their validity must be questioned because they are so sparsely described. Friedrich trusts that the accounts of the ancient sources are accurate enough that the four criteria can be definitively taken from their work. Given the analysis above Friedrich’s theory is too narrow because it cannot account for the inconsistencies surrounding the main function, purpose, and limitations of the Roman dictatorship. Furthermore, he makes no attempt to qualify what he understands by ‘constitutional norms’. Since he does not mention the complexities of Roman constitutionalism it must be assumed that he is relying on a modern notion of constitutionalism. Watkins’ account of the Roman example is equally sparse and focuses on constitutional and legal limits to dictatorial authority. He argues that though the power wielded by the dictator was analogous to monarchical powers it was still constrained by a six month term limit as well as appointment by consuls.<sup>89</sup> Furthermore, dictators had to rely on senatorial approval “for the withdrawal of funds from the public treasury.”<sup>90</sup> Projecting a modern concept back on to Roman dictatorship obscures the dilemmas and nuances of the office.

The contrast between Rossiter, Friedrich and Watkins’ account of Roman dictatorship and the inconsistencies and complexities of the historical record demonstrate that the dictatorship is not a suitable example of effective yet restrained emergency powers. Their reading of the dictatorship is biased by their contemporary notions of legality and constitutionalism. Roman dictatorship simply cannot be trusted as an example of emergency governance suitable for contemporary liberal-democratic regimes.

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<sup>88</sup> Friedrich, ‘Constitutional Dictatorship and Emergency Powers’, p. 559

<sup>89</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 334

<sup>90</sup> Watkins, ‘The Problem of Constitutional Dictatorship’, p. 335

## **Conclusion**

Theories of constitutional dictatorship are unable to explain why ‘states of emergency’ and the use of emergency powers were so prevalent liberal-democratic regimes. Their primary focus is developing institutional means for limiting or preventing abuses of emergency powers. Such a focus forces them to rely on an uncritical understanding of the norm/exception binary. They too easily assume that ‘states of emergency’ could be easily recognized and they could, at least in theory, be kept separate from ‘normal times’. In doing so they are unable to investigate and develop an argument as to why ‘states of emergency’ seem to occur so often. Rossiter, Friedrich and Watkins are extremely concerned about the presence of ‘states of emergency’ in liberal-democratic regimes yet their theory of constitutional dictatorship provides no means for investigating why this may be the case.

Reliance on Roman dictatorship as a prototype for emergency governance is misguided. Even as ideological inspiration it is suspect. The historical record is too complex and incoherent to be definitively relied upon as an example of a successful emergency measure. Any attempt to do so relies so heavily on modern understandings of law and constitutionalism that the Roman institution becomes bent to the political purposes of the author relying upon it.

It is important to move beyond Roman dictatorship and its modern incarnation elaborated and defended by Rossiter, Friedrich and Watkins. Their reliance on an assumption that normal and emergency times can be objectively separated from one another has problematic implications for theorizing emergency politics. It removes any scope for contesting the decision to declare an emergency. It is also blind to elements of potential democratic participation and contestation of attempts by elites to wield emergency powers. Their model of constitutional

dictatorship has been highly influential in contemporary debates concerning emergency politics. David Dyzenhaus refers to Rossiter's *Constitutional Dictatorship* as "one of the leading studies of the state of emergency..."<sup>91</sup> The impact of constitutional dictatorship and subsequent discussion of it has been to embed the problematic implications of the norm/exception binary in wider discussions of emergency politics and governance. As I will argue throughout the rest of this thesis such a dichotomy cannot and should not be utilized when theorizing and conceptualizing situations which liberal-democratic regimes regard as states of emergency.

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<sup>91</sup> Dyzenhaus, *Constitution of Law*, p. 35

## **Chapter 2: Problematic and Paradox: Carl Schmitt's Sovereign, Decision and Exception**

### **Introduction**

It is necessary to turn to the work of Carl Schmitt because he begins to answer the question at hand: namely, why situations defined as 'states of emergency' and the use and abuse of emergency measures seem to be ever present aspects of liberal-democratic regimes. In his work on what he calls 'the exception' we find what I will refer to as 'the problematic of the exception' and a paradox he implicitly identifies surrounding political contestation and the limits of pluralist contestation. The problematic of the exception is that liberal-democratic regimes, try as they might, cannot escape extra-legal power. This extra-legal power will act on the legal order, sometimes suspending it completely, when it decides that the system is facing an existential threat, what Schmitt refers to as an exception. This problematic leads to what I will call the paradox of contestation in Schmitt's work. Liberal-democratic regimes must allow all groups an equal chance to achieve political power. This is because equal chance functions as a substantive notion of justice on which liberal-democracy relies. However, they must also protect themselves from groups which would achieve power legally only to alter the system to their own advantage such that other groups no longer have any chance of achieving power. This paradox is at its most acute during 'exceptions' when an extra-legal, sovereign power is acting on and attempting to defend its own preferred articulation of a legal order as a whole.

Schmitt's work is important because he shows us that the problematic of the exception and paradox of contestation are fundamental to the structures of liberal-democratic governance. His work will help move us away from the norm/exception binary and, ironically, see 'exceptional' situations as 'normal' or 'ordinary'

occurrences in liberal-democracies. However, Schmitt argues that liberal-democratic regimes are doomed to fail because they cannot adequately cope with the ‘exception’ nor can they adequately solve the paradox. We need not agree with Schmitt’s dire prognosis of liberal-democratic regimes nor the solution he proposes to resolve the problematic of the exception. As Rasch notes “The value of Schmitt today lies more with the structure of conflict that he outlines than with any attempt to rehabilitate his particular carriers of that structure.”<sup>92</sup> This chapter will demonstrate that we can read Schmitt’s work against itself such that we can accept his diagnosis of the problematic without agreeing with him that liberal-democracy cannot defend itself or that the best resolution of the problematic paradox is a non-liberal, authoritarian democracy.

To accomplish this task I will re-read his dictum that “Sovereign is he who decides on the exception” in the broader context of his critique liberal-democracy.<sup>93</sup> I will also provide a critical exegesis of the paradox of contestation Schmitt describes but does not name directly as a fundamental paradox. In doing so we will find conceptual and theoretical resources for understanding sovereignty, decision and the exception in a way that can help us describe the problem of ‘states of emergency’ and emergency powers away from the norm/exception binary and embedded in the contingency and political contestation at the heart of liberal-democratic regimes.

### **Sovereign is *he*?**

Schmitt’s conceptualization of the sovereign can be read as a response to a question he poses: “who is competent to act when the legal system fails to answer

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<sup>92</sup> Rasch, *Sovereignty and its Discontents*, p.38

<sup>93</sup> Schmitt, *Political Theology*, p. 5

the question of competence?”<sup>94</sup> According to Schmitt the sovereign is responsible for acting in situations for which a legal system “makes no provision.”<sup>95</sup> Competency to decide ‘the exception’ may or may not be prescribed by a written constitution or legal statute. The sovereign, on his reading, fills an inevitable gap in the legal system. Schmitt argues that this characteristic defines both the sovereign as well as the concept of sovereignty generally. Thus his dictum: “Sovereign is he who decides on the exception.”<sup>96</sup>

How much power and authority the sovereign has or should have remains an ambiguity never definitively answered in Schmitt’s work. In *Political Theology*, he argues that sovereign authority is unlimited.<sup>97</sup> The sovereign suspends or silences the law, leaving only the state. The sovereign can do whatever they feel necessary to resolve what they have decided is an exception. Yet, in *Constitutional Theory*, he notes that the sovereign cannot make permanent changes to the legal order or constitution. Furthermore, they must give up their power after the crisis is resolved.<sup>98</sup> Balakrishnan does note that Schmitt “held an extreme view” in the debate among Weimar legal scholars as to the precise meaning and implication of Article 48.<sup>99</sup> However, that position only related to the specifics of Article 48, Schmitt does not make a definitive theoretical statement on the issue.

On a strict reading of his dictum, the sovereign is a single individual who acts effectively and unilaterally. The sovereign decides both that there is an exception as

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<sup>94</sup> Schmitt, *Political Theology*, p. 11.

<sup>95</sup> Schmitt, *Political Theology*, p. 11

<sup>96</sup> Schmitt, *Political Theology*, p. 5

<sup>97</sup> Schmitt, *Political Theology*, p. 12, 11

<sup>98</sup> Schmitt, *Constitutional Theory*, p. 157

<sup>99</sup> Balakrishnan, *The Enemy*, p. 44

well as what must be done to resolve it.<sup>100</sup> Schmitt's reference point for the person of the sovereign is Article 48 of the Weimar constitution. Article 48 gave the Reichspräsident the ability to suspend certain articles of the constitution in order to assure "public security and order" or to force a German Land to "fulfill its duties according to the Reich Constitution or Reich statutes."<sup>101</sup> While the Weimar constitution and Article 48 are referred to often in Schmitt's writings he never argues that the president or the executive *must* be the sovereign. Writing in support of the use of Article 48 in 1932 Schmitt goes so far as to argue that "in abnormal times... In a race between the executive and the judiciary, the judiciary will mostly arrive too late."<sup>102</sup> Clearly Schmitt preferred the executive to act as sovereign because of the premium on political power they hold, as well as their speed and efficiency when dealing with crises.<sup>103</sup> In the context of democratic regimes Schmitt supported the executive as sovereign because as a state official elected by the entirety of the masses, the executive was the most direct representative of the will of the people.<sup>104</sup> But he held back on arguing logically and theoretically that the sovereign must be the executive. This leaves open the possibility that the sovereign may be anyone. Each state must decide how they will choose the person to act as sovereign. It can be prescribed before an emergency via the constitution or a statute, or a state may make no mention at all of who should be given emergency powers. The sovereign is not a permanent office or position within a state. They do not exist at all times, waiting for

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<sup>100</sup> Schmitt, *Political Theology*, p. 7

<sup>101</sup> Schmitt, *Constitutional Theory*, p. 417, these quotes come from Seitzer's translation of the Weimar Constitution included as an appendix to Schmitt's text.

<sup>102</sup> Schmitt, *Legality and Legitimacy*, p. 32

<sup>103</sup> Schmitt, *Legality and Legitimacy*, p. 31-32

<sup>104</sup> Schmitt, *Constitutional Theory*, p. 294

a crisis that requires the suspension of law. The sovereign is created anew each and every time s/he decides on the exception.

This implies a performative aspect of the sovereign. The decision on the exception brings about the sovereign. Not all constitutions prescribe who shall act as sovereign. Many do but some do not. Until the decision on the exception is made whoever acts as the sovereign is not necessarily recognized as such. The constitution may specify an individual or a position, the person in which is to assume sovereign power. However, until that person actually makes the decision and the decision is supported by the rest of the state and acted upon accordingly, the sovereign does not actually exist. Schmitt was keenly aware of the ambiguity surrounding the sovereign. As noted above sovereignty is framed around the question of competency in situations for which none is prescribed by the legal order. We can use other aspects of Schmitt's work to develop an expanded notion of whom or what the sovereign is or could be.

The sovereign certainly need not be a single individual, let alone a 'he'. In *Political Theology* Schmitt characterizes the sovereign as a single person empowered to make the decision on the exception. However, the possibility that the sovereign is a group, or even the demos itself is not excluded from the problematic of the exception. As Rasch points out: "[t]he sovereign is figured as an autonomous entity, an agent, or at least agency, which has the authority to make decisions. That agent may be a monarch, a dictator, a ruling body, or any variety of other decision-making mechanisms."<sup>105</sup> The sovereign is an *agency*, not necessarily a single individual/agent. Though, as noted above, when it came to the situation of the

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<sup>105</sup> Rasch, *Sovereignty and its Discontents*, p. 27

Weimar Republic, Schmitt held the view that the executive was sovereign and Article 48 of the constitution gave the president unlimited power. Yet, the possibility that the sovereign is a group of people is not logically or conceptually excluded from Schmitt's formulation. Sovereignty can be understood as the term used to describe decisions regarding a legal order however they are arrived at. Thus sovereignty is not a quality of a person or an ability, it is the attribution of a decision to an agency.

To this we must add Schmitt's acknowledgement that in the modern world democracy is widely considered to be the only acceptable and legitimate form of government.<sup>106</sup> This is not a normative statement on Schmitt's part. He does not believe that liberal-democracy is viable as a form of governance. For Schmitt, democracy entails that the sovereign agency and sovereign decisions are legitimate only when they represent and act in the name of the demos. The label of 'sovereign' would then have to be retroactively applied to the form the agency took in the instance of a particular decision. Schmitt believes that the executive in a liberal-democratic state will most likely be able to act as sovereign though this need not logically be the case. Here we can modify Rasch's characterization of Schmitt's understanding of sovereignty. He argues that "When personified as an individual, an institution, or a general will, sovereignty appears as if it *precedes* the law, giving the law its force. Yet, sovereign is simply the name given to a logical effect."<sup>107</sup> Rasch furthermore argues that Schmitt's notion of sovereignty exposes liberal-democratic government and legal order as one particular state form. "Indeed, it seeks to explain it *as* an order, as one possible order among many – in short, as a political reality, and

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<sup>106</sup> Schmitt, *Crisis of Parliamentary Democracy*, p. 30

<sup>107</sup> Rasch, 'From Sovereign Ban to Banning Sovereignty', p. 94

not merely a legal or moral ideology.”<sup>108</sup> In addition to being a logical effect we can now see sovereignty as attributable to a demos, or a partial group of a demos, reflectively acting on its own legal order. Schmitt’s concept of sovereignty does not attempt to cover over or erase the fact that, in a liberal-democratic regime, any constitution and legal order must be legitimized by a source external to itself. Furthermore this external, extra-legal sovereign power does not disappear after the moment of founding. It remains to provide legitimacy to acts of state officials or political groups via attribution of those acts to the demos. This line of argument will be further developed in chapter seven.

Dyzenhaus argues that Schmitt’s defense of the necessity of extra-legal power and the superiority of the state is unacceptable. He argues that “one needs to maintain Hans Kelsen’s Identity Thesis: the thesis that the state is totally constituted by law. When a political entity acts outside of the law, its acts can no longer be attributed to the state and so they have no authority.”<sup>109</sup> For Dyzenhaus the crucial aspect of liberal legal order is that it fully contains any form of extra-legal, political power. For him, liberal legality cannot accept any power which is external to legal order or acts outside of law. He argues that for Schmitt: “The space beyond law is not so much produced by law as revealed when the mask of liberal legality is stripped away by the political.”<sup>110</sup> This argument, however, is unacceptable because in a democratic regime the legitimacy of legal order and the acts of state officials must be grounded outside of law. Legitimacy must be vested in ‘We, the people’, not in the legal order itself. As I will discuss further in chapter seven, Lindahl

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<sup>108</sup> Rasch, ‘From Sovereign Ban to Banning Sovereignty’, p. 96

<sup>109</sup> Dyzenhaus, *Constitution of Law*, p. 199

<sup>110</sup> Dyzenhaus, *Constitution of Law*, p. 39

demonstrates that Schmitt is right on this point.<sup>111</sup> Democratic governance requires that acts of the state are legal and legitimate but this legitimacy is derived not from the state ‘acting legally’, so to speak. The legitimacy of sovereign acts is derived from the possibility that such acts can be attributed to a reflexively oriented collective external to a legal order, i.e. to a demos. Extra-legal, sovereign power is an inexorable element of liberal-democratic governance.

Schmitt’s conceptualization of democracy and the demos is too simplistic, however, and needs to be expanded before we can fully develop a notion sovereignty in liberal-democracy which accounts for this dimension of the problematic of the exception. He defines democracy as a form of governing in which there is an “identity of ruler and ruled, governing and governed.”<sup>112</sup> This identity rests on a substantive equality between the people who constitute the demos. The homogeneity created by substantive equality is totalizing to the extent that those who are chosen to rule “may not deviate from the general identity and homogeneity of the people.”<sup>113</sup> Thus for Schmitt, extra-legal power is vested in a homogenous group of individuals unified by an ambiguous ‘substantive equality’ which guides the decisions of the rulers such that they never rule against the demos as a whole. However, it is easily objected that modern societies are not and cannot be made homogenous to the extent that Schmitt requires. Lindahl, concurring with Kelsen, points out that “even a cursory survey reveals that the alleged unity of a collective subject is deeply problematic...”<sup>114</sup> Any demos is split by a myriad of ethnic, religious, moral, economic, national, etc. divisions. Schmitt attempts to cover over these divisions

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<sup>111</sup> Lindahl, ‘Towards an Ontology of Collective Selfhood’, p. 16

<sup>112</sup> Schmitt, *Constitutional Theory*, p. 264

<sup>113</sup> Schmitt, *Constitutional Theory*, p. 264

<sup>114</sup> Lindahl, ‘Towards an Ontology of Collective Selfhood’, p. 12

because he prefers, politically, a type of conservative, authoritarian democracy which rules over the demos with a minimum of oversight and citizen involvement. However, I argue that given that sovereignty is the attribution of an agency and not the characteristic of an agent, a homogenous demos is not conceptually necessary for the problematic of the exception. At this point we can activate Schmitt's notion of 'the political' to open up his conception of the demos and democracy so that we can more fully account for the process of attributing sovereignty and sovereign acts to an extra-legal power.

Using Schmitt's notion of 'the political', we can develop an understanding of the demos which accounts for the problematic unity of a demos. Introducing the political will complicate the nature of sovereign power and sovereign decision making, demonstrating that it can be contested and is sometimes the result of antagonistic conflict. This division however does not render Schmitt's notion of sovereignty unusable. On the contrary, this expanded understanding of sovereignty within the problematic of the exception allows for contestation and conflict within the agency labeled as sovereign. It also opens the possibility for political contestation over sovereign decision making in situations which come to be defined as exceptional.

### *The Political Sovereign*

On Schmitt's account the political is a constitutive dimension of social existence. It is a constitutive split between two or more groups which arises in the process of forming an identity, a 'we'. It is an autonomous dimension which is characterized by a distinction "between friend and enemy" which consists of a

“degree of intensity of a union or separation, of an association or dissociation.”<sup>115</sup>

This ‘degree of intensity’ can be understood as a spectrum ranging from benign co-existence to outright war. What is crucial though is the “ever present possibility of combat” between groups in the realm of the political.<sup>116</sup> The political cannot be reduced to war itself. Rather, the political consists in a necessary split and antagonism of a society. Developing a ‘we’, a demos to which sovereign acts can be attributed and in which legitimacy can be grounded requires a politically determined exclusion. As Mouffe notes, Schmitt’s notion of the political “is an ever present possibility; the political belongs to our ontological condition.”<sup>117</sup> This means that a demos can never be unified or homogenous in the sense that Schmitt’s definition of democracy requires. However it does open an ineradicable element of contestation at the foundation of every liberal-democratic regime.

This element of contestation is crucial to account for because the political is the most basic element on which the state, Schmitt’s extra-legal, sovereign power, and legal order are constructed. In *The Concept of the Political* Schmitt writes, “The concept of the state presupposes the concept of the political.”<sup>118</sup> As Schmitt defines the state it “is the political status of an organized people in an enclosed territorial unit.”<sup>119</sup> It is the necessary extra-legal element which secures legal order and from which legal order gets its legitimacy. The relationship is a three level hierarchy, the political on the bottom, then the state, and finally law and legal norms on the top. Schmitt also claims that the political “remains alongside and above the

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<sup>115</sup> Schmitt, *Concept of the Political*, p. 26

<sup>116</sup> Schmitt, *Concept of the Political*, p. 32

<sup>117</sup> Mouffe, *On the Political*, p. 16

<sup>118</sup> Carl Schmitt, *The Concept of the Political*, p. 19

<sup>119</sup> Schmitt, *Concept of the Political*, p. 19

constitution.”<sup>120</sup> All three elements do not exist independently of one another. The political and state remain latent, ready to fill in the gaps of the legal order in situations for which competency has not been proscribed. The state cannot exist without the political; legal order necessarily relies on the political and the state for its legitimacy. “The political element cannot be separated from the state...”<sup>121</sup> The state then is a specific form that the political takes when it is stabilized to the point that the people can organize and regulate their processes of collective decision making. The state decides who is a friend and who is an enemy. But this by no means implies that such a decision is made without contestation and conflict.

Permanent political contestation of sovereign political decisions is a core aspect of the problematic of the exception and liberal-democratic governance generally. The political ensures that sovereign ‘decision-making mechanisms’ are subject to permanent contestation of decisions on exceptional situations. Such contestation is a necessary and positive aspect of the expanded notion of sovereignty I have developed with and through Schmitt’s work. As Rasch notes:

“The political does not exist to usher in the good life by eliminating social antagonism; rather, it exists to serve as the medium for an acceptably limited and therefore productive conflict in the inevitable absence of any final, universally accepted vision of the good life. The political, therefore, can only be defined by a structure that allows for the perpetual production as well as contingent resolution of dissent and opposition.”<sup>122</sup>

The sovereign is not an agent imbued with the authority or ability to make and enforce decisions on the exception. The sovereign, and sovereignty, are the attribution of an agency to an individual or group that is able to make such a decision in a context of political antagonism and contestation. Thus both the decision on the

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<sup>120</sup> Carl Schmitt, *Constitutional Theory*, p. 125-126

<sup>121</sup> Schmitt, *Constitutional Theory*, p. 169

<sup>122</sup> Rasch, *Sovereignty and its Discontents*, p. 17-18

exception as well as the extent of the powers wielded by the sovereign agency can never be fixed or assumed a priori. Furthermore, the legitimacy of sovereign decisions will always be contested. Legitimacy comes from attribution of the sovereign decision to a demos which is constitutively split by political antagonism. This means that the attribution of legitimacy can only be made to a part of a demos, not to it as a homogenous whole.

What is crucial is that Schmitt conceptualizes sovereignty as the nexus between legal order and extra-legal, political power. For him, the sovereign is the guardian of legal order. “The sovereign is the highest legislator, judge, and commander simultaneously. He is also the final source of legality and the ultimate foundation of legitimacy.”<sup>123</sup> On his account, the sovereign agency makes reflexive decisions concerning the safe guarding of legal order as a whole. But, because any demos is constitutively split which ever group is able to have their decisions and actions retroactively defined as sovereign can only represent a portion of the individuals and groups that make up a demos. Though liberal-democratic regimes attempt to do away with sovereign power it none the less emerges as a necessary feature. Legal order cannot be an entirely closed, fully self-referential system. It must be legitimized by extra-legal, sovereign, political power. This is Schmitt’s position: because it rests on a political decision to create and apply it in the first place legal order remains forever open and contingent on the maintenance of a ‘normal situation’ in which it can be valid. The rule of law is the rule of contested sovereign decisions to apply and enforce the law. As Rasch points out: “Sovereignty here emerges as a ‘supplement’, one might say, that attaches itself to the system as if

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<sup>123</sup> Schmitt, *Legality and Legitimacy*, p. 5-6

from outside to serve as a kind of communal bodyguard.”<sup>124</sup> Thus on Schmitt’s understanding, the state and sovereignty are not only external to legal order but also superior to it, such that when the state and ‘We, the people’ are threatened a legal order, “*must* appear as a hindrance to state self-defense.”<sup>125</sup> Schmitt is able to justify the suspension of legal order because the state and law are separate and unequal.

This position helps us to begin to break down the norm/exception binary as it operates in Schmitt’s work and the scholarly discourse on states of emergency. No one agent is every fully empowered to make sovereign decisions regarding the existence of an ‘exception’ without being subject to contestation. Thus ‘normal’ and ‘exceptional’ must be understood not as objective conditions or descriptions of states of affairs but as subjective, politically determined concepts. Furthermore, they are inherently conservative concepts. ‘Normal’ refers to a state of affairs in which a powerful political group is able to define its specific articulation of power as such. ‘Emergency’ refers to situations when a powerful political group feels that their ‘normal’ articulation is threatened to the extent that they must free themselves from self-imposed restraints on political action. This conceptualization of sovereignty ensures that the moment of decision on the exception and the content of the decision are all the more prescient. Decisions must be made but they will be the result of contestation between individuals and groups struggling to have their decision deemed sovereign. Rasch aptly formulates the problem: “When push comes to shove, who decides? Who is this he, she, or it?”<sup>126</sup> And push will, from time to time, come to shove when society is constitutively split by the political and no one individual or group is fully empowered to make sovereign decisions concerning the

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<sup>124</sup> Rasch, *Sovereignty and its Discontents*, p. 29

<sup>125</sup> Schmitt, *Constitutional Theory*, p. 156, italics added

<sup>126</sup> Rasch, ‘From Sovereign Ban to Banning Sovereignty’, p. 96

regime as a whole. We now turn to the moment of decision to further expand Schmitt's problematic of the exception.

### **Decision**

Given the contestation inherent in sovereign agency the moment of decision becomes all the more crucial. Legal order cannot decide on itself as a system, it cannot make reflective judgments on itself as a whole. Furthermore, the political ensures that within a society there is no third party, perspective, or adjudicator who can make politically neutral decisions on the legal order. For Schmitt, this means that the decision on the exception is a "decision in absolute purity".<sup>127</sup> By this he means that the decision is made without the guidance of the legal order. The decision is not legitimized by the legal order itself, but by power external to it. As noted in the previous section, the decision on the exception is a decision about the status and application of legal order for which legal order has made no provision and has not provided any strict determination of who should be competent to make the decision. However, to argue that the decision exists or is made from 'absolute purity' should be read as an overstatement by Schmitt.

An alternate reading suggests that his work exhibits a tension on this point. He argues that the decision is "within the framework of the juristic" even though it must be a decision concerning the legal order as a whole, as one order among other possibilities.<sup>128</sup> Rasch points out that on Schmitt's account: "Decisions are not... arbitrary, but once the ineluctability of decision is acknowledged, the question of what regulates decisions in the absence of logical necessity becomes pre-eminently

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<sup>127</sup> Schmitt, *Political Theology*, p. 13

<sup>128</sup> Schmitt, *Political Theology*, p. 13

political, contestable and arguable.”<sup>129</sup> This is certainly the case in moments which sovereign power decides are exceptional. We can read Schmitt against himself to show that decision exists in an ambiguous position between extra-legal, sovereign power and legal order all the while being subject to political contestation.

As noted above sovereign decisions concern legal order as a whole. Schmitt argues that sovereign decision is a determination as to whether not a “normal situation” exists in which norms and legal order can be applied.<sup>130</sup> Within the problematic of the exception this entails “the suspension of the entire existing order.”<sup>131</sup> The state, specifically the sovereign who acts in the name of the state, not only produces and guarantees this normal situation but decides when the situation is abnormal and that law should be suspended.<sup>132</sup> Furthermore, as Rasch points out: “Establishing norms does not precede politics and evade sovereignty; it *is* politics, sovereign politics.”<sup>133</sup> In the problematic of the exception the moment of decision is what marks the distinction between normality and exceptionality. Schmitt’s work can be read to demonstrate that the norm/exception binary is not a neutral, objective determination of a situation but rather the result of a contested political decision. Sovereign power establishes and applies norms when it has been able to decide that a ‘normal’ situation exists. I will further argue the point in chapters six and seven that it is actually through the process of making and applying norms that a ‘normal’ situation is created by sovereign political power.

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<sup>129</sup> Rasch, *Sovereignty and its Discontents*, p. 40

<sup>130</sup> Schmitt, *Political Theology*, p. 13

<sup>131</sup> Schmitt, *Political Theology*, p. 13

<sup>132</sup> Schmitt, *Political Theology*, p. 13

<sup>133</sup> Rasch, ‘From Sovereign Ban to Banning Sovereignty’, p. 97

We can now further expand Schmitt's notion of decision to further describe the problematic of the exception. Firstly, a decision that a state of exception exists does not necessarily lead to the suspension of the entire legal order. It could suspend certain rights or articles of a constitution, as Article 48 of the Weimar Constitution did. Or it could suspend rights for certain groups of people within a society. Honig points out that the decision on the exception need not necessarily entail all political power accruing to a single sovereign who makes a single decision to suspend law.<sup>134</sup> Modern governmental bureaucracies are large complex apparatuses of decision making and implementation. The notion that one person will be able to make a single decision that effects every bit of the apparatus is rather simplistic. Schmitt focuses on the suspension of the entire legal order because he considers it the most extreme and interesting case. But this does not exclude the possibility that the decision can affect smaller parts of the legal order, rather than the legal order in its entirety.

Schmitt is often interpreted as if he writes that decisions are simply made by the sovereign... 'the sovereign decides on the exception'. On this reading, for Schmitt the decision is simply made and its directives executed by the relevant state officials empowered to do so. I disagree with this interpretation of Schmitt's work on the moment of sovereign decision. There are two aspects of the nature of the decision and the decision-making process we can develop through and against Schmitt's work which undermine the possibility that decisions can simply be made. The first is that decisions are made by the sovereign agency, discussed above, which is subject to permanent political contestation. The presence of the political and antagonism will lead to contestation over the decision itself as well as the legitimacy of the decision *ex post facto*. The second concerns the performative aspect of

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<sup>134</sup> Honig, *Emergency Politics*, p. 67

sovereignty discussed above. Making a sovereign decision and the performative aspect that entails requires that, at least to some extent, the people over whom the decision is made are receptive to it.<sup>135</sup> Furthermore, the people must agree to the decision or at least not openly challenge it if it is to be effective. This performative element of sovereignty and decision means that decision can only function as a claim, not a command or a directive which must necessarily be followed. As with the attribution of sovereign agency, decision is subject to ineluctable contestation.

If this is the case then some form of consensus will be necessary in order for the performative decision to be successful and to take effect. In ‘Ethic of State and Pluralist State’, Schmitt argues that any form of consensus requires an element of power:

“For every consensus, even a ‘free’ one, is somehow motivated and brought into existence. Power produces consensus and often, to be sure, a rational and ethically justified consensus. Conversely, consensus produces power, and then often an irrational and – despite the consensus – ethically repugnant power. From a pragmatic and empirical perspective, the question arises of who controls the means of bringing about the ‘free’ consensus of the masses...”<sup>136</sup>

This question is all the more relevant given that sovereignty is an agency which is attributed to a group or individual after they have made their ‘decision’ in the form of a claim. Consensus involves the production of a unity, a ‘we’ opposed to a ‘them’ in the dimension of the political. He argues that, “The unity of the state has always been a unity of social multiplicity. In different times and in different states, it was always complex and, in a special sense, internally pluralist.”<sup>137</sup> Schmitt’s work demonstrates that power is a necessary element in the problematic of the exception at

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<sup>135</sup> Honig, *Emergency Politics*, p. 107-108

<sup>136</sup> Schmitt, ‘Ethic of State and Pluralistic State’, p. 202

<sup>137</sup> Schmitt, ‘Ethic of State and Pluralistic State’, p. 201

the moment of decision. Political power produces consensus which attributes sovereignty to an agent and is necessary if the decision is to be implemented.

My reading of Schmitt contends that we should focus on the moment of decision on the exception, as well as on what the sovereign agency has been able to determine constitutes an exception through a process of organizing consensus. I argued above that legal order can provide some guidance when such decisions are made. However that guidance is necessarily limited because legal order relies heavily on vague indeterminate concepts. Schmitt notes that closely linked to the notion of the exception are “undetermined and evaluative concepts, such as ‘public security and order,’ ‘danger,’ ‘emergency,’ ‘necessary measures,’ ‘hostility to the state and constitution,’ ‘peaceful disposition,’ ‘life and death issues,’ etc.”<sup>138</sup> These terms and their evaluative nature points to the indeterminacy of legal order generally. This indeterminacy renders the decisions on such terms all the more important. I argue that the decision on these terms, on the exception specifically, is more important than the concepts of exception or emergency themselves. A close reading of Schmitt’s conceptualization of the exception can help further describe the problematic of the exception.

### **Exception**

Schmitt’s conceptualization of the exception can be read to demonstrate that the decision on the exception is of greater significance than any definition of what constitutes an exception as such. We can initially see this in the way Schmitt differentiates the exception from the concept of emergency. Emergency situations do not always necessitate decisions on the exception. He writes: “The exception, which is not codified in the existing legal order, can at best be characterized as a case of

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<sup>138</sup> Schmitt, *Legality and Legitimacy*, p. 32

extreme peril, a danger to the existence of the state or the like. But it cannot be circumscribed factually and made to conform to a preformed law.”<sup>139</sup> In this passage he defines the exception in terms of the event which necessitates a defense of the state by any means necessary. This is similar to many other descriptions of states of emergency in both ancient and contemporary literature alike. George Schwab argues that for Schmitt the exception constitutes “any kind of severe economic or political disturbance that requires the application of extraordinary measures.”<sup>140</sup> Schwab’s interpretation of Schmitt’s exception focuses more on the events or situation that necessitate the application of extraordinary measures, rather than on the measures themselves. Tracy B. Strong adds that Schmitt is rather ambiguous with his word choice when speaking of the state of exception. He uses several different words to describe the same idea - Ausnahmezustand, Ausnahmefall, Notstand, and Notfall.<sup>141</sup> What Schwab and Strong do not point out is that the event which precipitates a decision on the exception is not as crucial as the decision itself.

Schmitt alludes to a narrower definition of the exception in a passage just a few pages later. He states that:

“...not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order.”<sup>142</sup>

Because Schmitt differentiates between emergencies and exceptions the sovereign may decide that even in an emergency a decision on the exception is not warranted.

The exception is the effect of a decision. He is highlighting the idea that an exception is more than an objectively verifiable emergency situation or the presence of a threat

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<sup>139</sup> Schmitt, *Political Theology*, p. 6

<sup>140</sup> Schmitt, *Political Theology*, p. 5, footnote

<sup>141</sup> Schmitt, *Political Theology*, p. xiii

<sup>142</sup> Schmitt, *Political Theology*, p. 12

to the state, what defines an exception is the subjective decision on the part of a sovereign agent to suspend law.

This does not mean the concept of the exception is not of central importance for Schmitt. On the contrary he claims that “the exception is to be understood to refer to a general concept in the theory of the state, and not merely applied to a construct applied to any emergency decree or state of siege.”<sup>143</sup> As Balakrishnan notes: “Schmitt claimed that looking at the legal system from the vantage point of the emergency situation was ‘more interesting’ because it was only from this perspective that one could understand the nature of the relationship between the norms of a legal system and the facts of political power.”<sup>144</sup> We can see Schmitt’s work on the exception as beginning to ‘de-exceptionalize’ the exception, so to speak. The exception is not external to the basic structures of liberal-democratic regimes. Against Schmitt, I claim that if a concept is built into the basic functioning of a regime then it can hardly be said to be exceptional.

Rather, it is the name for a gap in those regimes which demonstrates that they must be reflexively acted on as a whole by a political agency. Schmitt “is correct to assert that a state of exception is a latent possibility accompanying every imaginable polity...”<sup>145</sup> This is because there will always be moments when legal order must be acted on by the agency on which its legitimacy is grounded. As Rasch explains, “The exception makes itself known as the failure of subsumption – as the impossibility, one might say, of determinate judgment... The exception presents itself as the ineluctable necessity of choice precisely at the moment when none of the normal

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<sup>143</sup> Schmitt, *Political Theology*, p. 5

<sup>144</sup> Balakrishnan, *The Enemy*, p. 46

<sup>145</sup> Lindahl, ‘Jus Includendi et Excludendi,’ p. 247

criteria is available to guide selection.”<sup>146</sup> What is crucial about the exception is that the moment of failure is decided upon by the sovereign agent in a context of contingency, indeterminacy and political contestation. The exception demonstrates that the relationship between legal order and democratic, sovereign power is constitutively problematic and subject to political contestation. Furthermore, we should see decisions on the exception as points of periodic re-articulation of the relationship between legal order, extra-legal power, and the political.

It has been suggested that the exception and the political in Schmitt’s work are one and the same. Ellen Kennedy writes: “In this primary sense of an existential decision about friends and enemies, the political appears instead as the exception.”<sup>147</sup> Kennedy’s reasoning is based on Schmitt’s definition of the political and its relation to war. Alternatively, Rasch contends that: “As the ability to distinguish between friends and enemies, the political asserts itself fully not only as a constituted order, but as a constituent power that reveals itself in states of emergency. If the political system is normalcy, the political is the exception that establishes the norm.”<sup>148</sup> This conflation between the two concepts is unwarranted because the political is defined by the possibility of killing and war, when those possibilities become immanent then the political can appear as the exception. However, Schmitt argues that the political involves the *possibility* of war and killing the enemy, but the political is not entirely exhausted by war. The crucial element is the possibility of conflict, not the conflict itself. The exception is the most extreme form that conflict in the political may take.

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<sup>146</sup> Rasch, *Sovereignty and its Discontents*, p. 27

<sup>147</sup> Kennedy, ‘Hostis Not Inimicus’, p. 101

<sup>148</sup> Rasch, *Sovereignty and its Discontents*, p. 10

Certainly a sovereign agency is sometimes able to make decisions on who is friend and who is an enemy and also when to declare an exception and suspend law. But to collapse the two into one another could foreclose the possibility of politics within the state. Schmitt puts forth a theory of the political that lends itself more to a sliding scale between deciding on friend and enemy and declaring an exception. Violence is always a possibility and the closer it gets to becoming reality the closer the scale moves towards the exception. If the sovereign agency is able to decide that situation is dire and any means necessary must be taken then the exception can be understood as a form of the political. All exceptions are political, but not every political decision necessarily results in an exception. Finally, the exception is a decision, or more precisely a claim, regarding a legal system while the political refers to a constitutive dimension of social existence. As Rasch pointed out above the political functions to regulate conflict. Such regulation would not be possible if it was only expressed in and through the exception. For Schmitt the political and the exception are closely related. However, not every instance of political contestation and conflict will necessarily lead to a decision on an exception.

Finally it is necessary to stress that Schmitt's thought on the exception is not greatly influenced by his political theology. He does state that: "All significant concepts of the modern theory of the state are secularized theological concepts."<sup>149</sup> Specifically, he argues that the exception is analogous to the miracle.<sup>150</sup> However, Schmitt does not undertake a detailed defense of his claim that all modern concepts of state theory are directly analogous to Christian theological concepts. Nor does he

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<sup>149</sup> Schmitt, *Political Theology*, p. 36

<sup>150</sup> Schmitt, *Political Theology*, p. 36

present a detailed comparison between the miracle and the exception. He does argue however that:

“The idea of the modern constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world. This theology and metaphysics rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of the miracle, but also the sovereign’s direct intervention in a valid legal order.”<sup>151</sup>

Schmitt’s notion of the miracle does indeed come from Christian theology and is much indebted to chapter 37 of Hobbes’ *Leviathan*. In that chapter Hobbes defines a miracle as an act that “is the effect of the immediate hand of God.”<sup>152</sup> God violates the normal functioning of natural law. Schmitt’s sovereign, who “stands outside the normally valid legal system”, directly intervenes within that system.<sup>153</sup> The exception on this reading would be an intervention by an outside force on the general functioning of a system of laws just as in miracles God intervenes directly with earthly affairs thereby violating divinely created natural laws. It is clear that on a strict reading Schmitt’s theory of the exception shares many similarities with the miracle in Christian theology. On the other hand, as has been demonstrated throughout this chapter, in the wider context of Schmitt’s work on liberal-democracy the exception, the sovereign and the decision are concepts which describe a problematic. They are too contested to simply have been transferred from theology to political theory.

Schmitt uses the miracle as a metaphor to explain his understanding of the exception and how it functions. Honig argues that Schmitt uses the theological metaphor to “secure political sovereignty” and cut short debate on the status and

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<sup>151</sup> Schmitt, *Political Theology*, p. 36-37

<sup>152</sup> Hobbes, *Leviathan*, p. 293, Part 3, Chapter 37, Paragraph 8

<sup>153</sup> Schmitt, *Political Theology*, p. 7

function of exceptions in political theory.<sup>154</sup> She derides this move as Schmitt attempting to make a “miracle” of the metaphor he’s constructed.<sup>155</sup>

Schmitt’s theory of the exception is not definitively trapped by this metaphor, or by any other elements of what he refers to as political theology. Rather, Schmitt focuses on the necessity of secularization.<sup>156</sup> Rasch notes that, “...if the concepts of the modern theory of the state still carried the traces of their ethereal origin, they were nonetheless political concepts, and these traces had been thoroughly profaned.”<sup>157</sup> The analogy Schmitt draws between the miracle and the exception need not bind the problematic of the exception to that narrow understanding of miracles. We need not think of the sovereign only as personified as a godlike figure. As demonstrated above, the sovereign can be many people acting through a representative. Nor do we need to conceptualize the exception and sovereign power as breaking through a ‘normally’ operating system of law in the same way that God divinely intervenes in natural law.

Schmitt’s reputation as a Catholic scholar and depth and influence of political theology on his work are the subject of much debate. This text follows the convincing argument of Balakrishnan that Schmitt’s theological work generally does not have a dramatic effect on his legal and political theory. As Balakrishnan argues, Schmitt’s overtly theological works are confined to a small period of time in 1922.<sup>158</sup> Furthermore, his theological influences do not appear as a consistent system. *Roman Catholicism and Political Form*, written just after *Political Theology*, does not take

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<sup>154</sup> Honig, *Emergency Politics*, p. 89-90

<sup>155</sup> Honig, *Emergency Politics*, p. 90

<sup>156</sup> Rasch, *Sovereignty and its Discontents*, p. 4

<sup>157</sup> Rasch, *Sovereignty and its Discontents*, p. 4

<sup>158</sup> Balakrishnan, *The Enemy*, p. 47-48

up a defense of Schmitt's claim that modern state theory concepts are secularized theological concepts.<sup>159</sup> Rather it focuses on the political benefits of the Catholic Church as an institution. *Political Theology II* does not offer much guidance either. It is a theological polemic defending the idea of political theology in general, not a defense of a particular notion of secularization.<sup>160</sup>

The exception, then, in Schmitt's work points to situations in which an agency has been able to have sovereign power attributed to itself so that it can make decisions, which function as claims, concerning the articulation between legal order and extra-legal power in a wider context of political contestation. The focus should be on the moment of decision as well as on how and why a particular agency has secured for itself the ability to make such a decision. This is of particular importance because at the heart of the problematic of the exception in liberal-democratic regimes lies a paradox. Deciding on an exception and unleashing the use of emergency powers has profound and paradoxical implications for what Schmitt regards as the substantive notion of justice on which liberal-democratic regimes must be based. However, he does not believe that liberal-democracy is viable as a form of governance precisely because it cannot uphold this notion of justice in the face of the exception. This notion of justice is that all political groups have an equal chance of attaining state power. However, the effect of emergency powers usually severely restricts this equal chance by limiting or eliminating the rights necessary to contest for such power. I will refer to this effect as the paradox of contestation.

### **The Paradox of Contestation**

#### *Equal Chance*

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<sup>159</sup> Carl Schmitt, *Roman Catholicism and Political Form*

<sup>160</sup> Carl Schmitt, *Political Theology II*

It needs to be noted at this point that for Schmitt liberal-democracy is not viable as a form of governance because it cannot adequately respond to the problematic of the exception. He believes that liberal-democracy cannot cope with the problematic of the exception nor the paradox of contestation. Political parties, on his account, will not respect the need for liberal-democratic regimes to remain neutral to the aims of all political parties and ensure an equal chance of attaining state power for all minority groups. On the contrary, the first party to gain power will “close the door to legality” thus permanently enshrining itself as the dominant party.<sup>161</sup> However, we can read Schmitt’s paradox of contestation against this claim to demonstrate that neither it nor the problematic of the exception lead to an inevitable death sentence for liberal-democratic regimes.

The paradox of contestation is implied in Schmitt’s work though never directly stated as such. It is a paradox which liberal-democratic regimes must always negotiate but can never resolve. In order to be liberal-democracies they must allow any party and ideology the chance of attaining state power. That is the essence of liberal-democracy. However, being so open leaves the regime vulnerable to groups which seek to gain power legally then change the system permanently (via legal means) such that the principle of equal chance is eliminated. Thus liberal-democratic regimes must allow all contestation yet limit it so as to preserve the principle of equal chance. I call this the paradox of contestation. The paradox demands that some limits be imposed on the principle of equal chance but also that those limits will always be indeterminate and fiercely contested.

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<sup>161</sup> Schmitt, *Legality and Legitimacy*, p. 30

The first element of the paradox is the substantive notion of justice which, Schmitt argues, is necessary if a liberal-democratic regime is to maintain itself as such. This notion of justice required for legality in liberal-democratic states is an equal chance for all groups to achieve a majority and thus gain state power. He writes:

“...a substantive principle of justice will nevertheless always still have to be presupposed, if one wishes to keep the entire system of legality from collapsing immediately: the principle that there is an unconditional equal chance for all conceivable opinions, tendencies, and movements to achieve a majority.”<sup>162</sup>

The ‘unconditional’ nature of equal chance is problematic. Certainly an equal chance of attaining state power is a necessary condition for liberal-democratic regimes. It is also a defining characteristic of liberal-democracy. But it cannot be unconditionally so. Certain groups will need to be excluded because they refuse to struggle for power legally or because they wish to fundamentally alter the regime, thereby erasing the principle of equal chance.

Schmitt does not include minority rights within the purview of equal chance but they are absolutely necessary if the principle is to have any concrete meaning. This principle depends upon the protection of minority and individual rights to participate in politics. Without rights to free speech and association, at least, it would be impossible to engage in political struggle. Thus, minority rights to political participation are an essential component of the principle of equal chance. Liberal-democratic regimes vary on the extent to which they guarantee the rights of all ‘opinions, tendencies and movements’ to fight for political dominance. But, for the most part, the vast majority of political groups are allowed to participate.

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<sup>162</sup> Schmitt, *Legality and Legitimacy*, p. 28

The principle of equal chance and the rights that guarantee it generate within liberal-democratic regimes legal neutrality towards all political parties and their programs. Schmitt argues that “the parliamentary legislative state’s concept of law inherently has a wide-ranging neutrality regarding the most varied content.”<sup>163</sup> This neutrality, however, is not all encompassing. As Schmitt rightly points out a state “may not be neutral towards itself and its own presuppositions.”<sup>164</sup> Liberal-democratic regimes must defend this substantive notion of justice and fairness which underpins both legality as well as political contestation. This necessitates that liberal-democratic regimes must exclude certain groups. “All parties that are not partners of the pluralist system will be denied an equal chance,” writes Schmitt.<sup>165</sup> As well they should be. The question is then who makes the decision to exclude certain political groups? What criteria should be used? And what becomes of the rights of citizens and groups to participate in politics and advocate for their preferred regime type?

This is the crux of the paradox; how can a regime be neutral towards all parties while not neutral towards itself as a regime? Schmitt does not think that liberal-democratic states can survive such a situation. He argues that the principle of equal chance and subsequent state neutrality is necessary yet impossible.

“Preserving the availability of the principle of equal chance cannot be read out of the parliamentary legislative state. It remains the principle of justice and the existentially necessary maxim of self-preservation... But, with this system, the principle would also already come to an end after the first majority is achieved, because that majority would immediately establish itself as the permanent legal power.”<sup>166</sup>

Schmitt simply assumes that political parties have no interest in preserving equal chance and would thus dispense with it as soon as they came to power. Furthermore,

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<sup>163</sup> Schmitt, *Legality and Legitimacy*, p. 27

<sup>164</sup> Schmitt, *Legality and Legitimacy*, p. 27

<sup>165</sup> Schmitt, *Legality and Legitimacy*, p. 88

<sup>166</sup> Schmitt, *Legality and Legitimacy*, p. 28-29

deciding political struggle with a simple majority vote cannot protect equal chance. However, Schmitt is wrong to assert that the system collapses after the first majority is achieved.

He does argue that there is one possibility which could preserve equal chance and neutrality. If “an essential similarity among the entire people can be assumed” then a liberal-democratic state could survive.<sup>167</sup> If this cannot be assumed then, Schmitt argues, liberal-democracy cannot function and it becomes oppressive to minority groups which are not able to gain state power. In such a situation “The majority commands, and the minority must obey.”<sup>168</sup> Schmitt is overstating his case here. As demonstrated above, such homogeneity cannot be assumed. Nor can it be produced because of the divisions created by the political. In some cases the minority must obey, for instance when a law is passed allowing black citizens to vote in a segregated society, those who wanted to keep them from the franchise must obey the law and register black voters. Liberal-democratic legal order does not lose its substantive principle of justice because society is constitutively split; rather, legal order becomes a terrain on which substantive principles are contested. As long as the minority has some method of fighting back legally then the parliamentary legislative state and democracy remain functioning.

Because of the necessity of preserving the principle of equal chance and the assumed disregard political parties have for it, the liberal state, on Schmitt’s account, “lays itself open to the legal takeover of the state by forces expressly committed to destroying the existing legal order.”<sup>169</sup> Certainly this is a possibility

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<sup>167</sup> Schmitt, *Legality and Legitimacy*, p. 27

<sup>168</sup> Schmitt, *Legality and Legitimacy*, p. 28

<sup>169</sup> Rasch, *Sovereignty and its Discontents*, p. 29

but this situation is by no means inevitable. Nor does it render liberal-democracy unfeasible as a form of governance. Yes, the state must legally exclude groups from legitimate contestation which it feels are a threat to the regime as such. As Schmitt notes: "...it is self-evident that one can hold open an equal chance only for those whom one is certain would do the same. Any other use of such a principle would not only be suicide in practical terms, but also an offense against the principle itself."<sup>170</sup> Legal neutrality is more an ideal than a substantive requirement of liberal legal orders. Total neutrality would leave liberal-democratic regimes open to the type of hostile takeover Schmitt is concerned about. Exclusions must be made to protect regimes. In this case the question of who is able to decide and enforce the limits of political contestation is of central importance.

Schmitt argues that it will be whichever party happens to hold state power. For him, "the party in legal possession of power, by virtue of its hold on the means of state power, must determine and judge every concrete and politically important application and use of the concept of legality and legitimacy. That is its inalienable right."<sup>171</sup> Again Schmitt is overstating his case. Legal possession of state power in no way confers an 'inalienable right' to decide questions of the legality and legitimacy of political contestation by minority groups. Such decisions will be made by a sovereign agency, which as demonstrated above, is subject to political contestation. Possession of state power is not total and all encompassing. However, if one party is dominant within a state they will have an advantage in struggles over the limits of legitimate political contestation. This advantage Schmitt calls the 'supra-legal

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<sup>170</sup> Schmitt, *Legality and Legitimacy*, p. 33

<sup>171</sup> Schmitt, *Legality and Legitimacy*, p. 33

premium' on the possession of state power, and it is the second element in the paradox of contestation.

*Supra-Legal Premium on Legality and the Limits of Contestation*

Schmitt argues that what he calls the 'supra-legal premium' on state power is what grants the 'inalienable right' to decide questions concerning the legality and legitimacy of political contestation. He argues that "...the mere possession of state power produces an additional political surplus apart from the power that is merely normative and legal, a supralegal premium on the lawful possession of legal power... that lies beyond any normative consideration."<sup>172</sup> I agree that, to an extent, this is an effect of gaining a majority in a liberal-democratic regime. However, Schmitt overstates the effect of the supra-legal premium. Even with large majorities dominant parties do not wield a power which is 'beyond any normative consideration'. It is based on extra-legal power but that power enables a party to act on the legal order, to make reflexive judgments on it as a whole. Political power is never wholly removed from normative considerations.

This supralegal premium has three aspects: Firstly, "It emerges, first, from the concrete interpretation and use of undetermined and evaluative concepts, such as 'public security and order,' 'danger,' 'emergency,' 'necessary measures,' hostility to the state and constitution,' 'peaceful disposition,' 'life and death issues,' etc. [Concepts such as these] receive their specific content initially through concrete application [which is] decisive in all difficult and politically important times."<sup>173</sup> Notice that Schmitt refers to these as evaluative concepts which only live through

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<sup>172</sup> Schmitt, *Legality and Legitimacy*, p. 31-32

<sup>173</sup> Schmitt, *Legality and Legitimacy*, p. 32

their concrete application, that is only when a sovereign agency has been able to ‘decide’ that it is necessary or appropriate to use them and determine their meaning in a specific situation. Secondly, “the legal holder of state power has the presumption of legality on his side in hard cases, which, of course, with such indeterminate concepts one always encounters in difficult political circumstances.”<sup>174</sup> This means that, for Schmitt, the executive will not immediately be questioned by opposition groups in the moment the decision is made and the initial emergency measures undertaken. However, these concepts are hard to determine in situations defined as crises. And because they are made by a sovereign agency which is always contested, declarations of an exception are always going to be politically determined and subject to multiple interpretations. This indeterminacy is compounded by the third element of the supra-legal premium. This element consists in the fact that the executive is usually able to act faster than the legislature or the judiciary in a situation defined as a crisis. The executive can act and put forth a justification for those actions based on these concepts before any other branch of government or any political group has a chance to question the actions or the use of any evaluative concepts. Even if there is opposition to how a sovereign agency is able to define an exception and the way it acts to resolve that situation in all likelihood the opposition will come too late. The executive will act and the damage will have already been done.

Schmitt argues that the supra-legal premium grants the ruling party the ability to make and enforce any statutes they please such that they gain power over legality and legitimacy itself.<sup>175</sup> Furthermore, Schmitt believes that the ruling party and the

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<sup>174</sup> Schmitt, *Legality and Legitimacy*, p. 32

<sup>175</sup> Schmitt, *Legality and Legitimacy*, p. 31

state become synonymous with one another. For him the supra-legal premium is “a political power that extends far beyond that over the mere validity of norms... The majority is now suddenly no longer a party; it is the state itself.”<sup>176</sup> As such the ruling party, as soon as it is elected, would be able to “close the door to legality, through which they themselves entered, and to treat partisan opponents like common criminals, who are then perhaps reduced to kicking their boots against the locked door.”<sup>177</sup> Not only can it enshrine its place as the only legal ruling party, the ruling party can use the supra-legal premium to determine the limits of legal and legitimate contestation, if it decides to allow any at all. “On its own initiative, the ruling party determines what possibilities for action it permits domestic opponents. In this way, the ruling part decides when the illegality of competitors commences. Obviously, that is no longer equal competition and no longer an equal chance.”<sup>178</sup> The effect of such decision is to exclude opposition groups from the demos itself.<sup>179</sup> Obviously this cannot be accomplished as easily as he claims.

Schmitt is clearly overestimating the power conferred upon majority parties by the supra-legal premium in liberal-democratic states. A ruling party does not *become* the state when it attains a majority. Nor do they become the sole arbiter of legality and legitimacy. The ruling party cannot simply decide; all decisions will be contested. Yet, the majority does have some extra political influence, especially over issues of the validity of statutes as well as how statutes are to be applied and enforced. This is definitely the case when the issue is the legality, legitimacy, and

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<sup>176</sup> Schmitt, *Legality and Legitimacy*, p. 31

<sup>177</sup> Schmitt, *Legality and Legitimacy*, p. 30

<sup>178</sup> Schmitt, *Legality and Legitimacy*, p. 33

<sup>179</sup> Schmitt, *Legality and Legitimacy*, p. 30

limit of political contestation of domestic opposition groups. But they do not become the state itself.

Fundamental civil and political rights for minority groups ensure that the ruling party cannot simply trample on their opponents because they disagree with them and have gained a majority in government. These rights and laws also guarantee that a ruling party cannot arbitrarily close the door to legality thereby rendering its opponents illegal. The rule of law is stronger than the whims of the majority. Opposition parties will continue to exist thanks to the fundamental rights which ensure an equal chance of political participation. Even in a declared exception in which rights have been suspended the principle of equal chance will not necessarily be destroyed because the suspension of rights will be contested. Additionally, Schmitt's own work on sovereignty and the moment of decision demonstrate that decisions on the limits of legality and legitimacy will always be problematic and contested. As argued earlier sovereign power is not a characteristic of an individual or a group, it is thoroughly indeterminate until it has been able to act. Because any liberal-democratic society is constitutively split sovereign agency is forever contingent and contestable.

We can read Schmitt's work against itself to show that it points to a fundamental paradox and a politics of legality at the limits of equal chance and political contestation. He rightly points out that liberal-democratic regimes must allow an equal chance for attaining state power for all groups. He also convincingly argues that a ruling majority group will always try to use the supra-legal premium to entrench its power and status, though he overstates the advantages this supra-legal premium gives to the ruling party. Finally, he demonstrates that the state will need to protect itself as an order which ensures equal chance for all groups to attain power.

This will require that some parties be excluded from political participation. The state cannot allow violent revolutionary groups which seek to overthrow the liberal-democratic core of the state the possibility of attaining state power. When making decisions as to which groups are not allowed to participate the ruling party will have the advantages of the supra-legal premium on legality. However, such advantages will be checked, to an extent, by the requirement of equal chance as well as political rights to which all citizens are entitled. The paradox of contestation can never be finally resolved but only negotiated again and again. In situations which are declared to be exceptional the paradox becomes all the more prescient and problematic. Particularly so because it is in these times that Schmitt argues the equal chance is most under threat and the supra-legal premium can be used to its fullest effect.

*Problematic and Paradox in the State of Exception and the Right to Resistance*

The paradox of contestation is a fundamental problem which exists in the basic structures of liberal-democratic governance. The principle of equal chance itself provides no guidance for resolving the issues and crises it is implicated in. As Schmitt points out: “The problem stemming from the principle of equal chance would not be solved through the principle itself. It would, rather, only be acknowledged that the principle merely leads to irresolvable questions and critical situations.”<sup>180</sup> This is important because Schmitt is suggesting that ‘critical situations’ are caused by fundamental structures of liberal-democracy itself. Or, rather, that the basic structures of liberal-democratic regimes do not provide answers in critical situations. Far from providing answers, they actually complicate matters by engendering a politics of legality and legitimacy at the limits of contestation with

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<sup>180</sup> Schmitt, *Legality and Legitimacy*, p.34

no third party to adjudicate the conflict. It is in these situations, declared to be exceptional by a sovereign agent, that the principle of equal chance is most vulnerable.

It is also in these situations that the supra-legal premium on political power reaches its maximum effect. “This political premium is relatively calculable in peaceful and normal times; in abnormal times, it is entirely incalculable and unpredictable.”<sup>181</sup> Moreover, because Schmitt does not believe that liberal-democracy is a viable form of governance he argues that the supra-legal premium will easily overcome the principle of equal chance. This will occur during exceptions on Schmitt’s account, “Its entire, primary effect eliminates any thought of the equal chance and becomes manifest in the proper use of the extraordinary powers in the state of exception.”<sup>182</sup> I concur that, in situations which are defined as exceptional by a sovereign agency, the supralegal premium is most pronounced and the principle of equal chance most threatened. However, it must be remembered that, as Schmitt’s thought suggests, the state of exception is the result of a contested political decision.

Schmitt presents us with a tension which will be continually negotiated and renegotiated via highly contested political struggles over the right to act as a sovereign agency and render reflexive judgment on the boundaries of legal order as a whole. It is the principle of equal chance, along with the rights which guarantee it, on which liberal-democracy rests. Schmitt writes:

“Everything thus hinges on the principle of an equal chance to win domestic political power. If principle is no longer defended, then one gives up on the parliamentary legislative state itself, its justice and legality... Every critical moment endangers the principle of the equal chance because it

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<sup>181</sup> Schmitt, *Legality and Legitimacy*, p. 32

<sup>182</sup> Schmitt, *Legality and Legitimacy*, p. 35

reveals the inevitable option between the premium on the legal possession of power and the preservation of the availability of the equal chance for achievement of domestic political power.”<sup>183</sup>

This passage need not be read to imply a strict opposition between the principle of equal chance and the supra-legal premium on political power. Schmitt’s work suggests a politics of sovereign decision-making at the limits of legality and contestation. When a ruling party excludes an opposition group during a declared emergency, equal chance is not necessarily fully destroyed. Rather, equal chance is an ideal, a goal which cannot be perfectly or strictly adhered to. What Schmitt’s work demonstrates is that when a ruling party is able to declare an exception they will use the supra-legal premium against opposition groups, attempting to deny them the possibility of equal chance and the political rights which guarantee it. If successful, this has the effect of excluding the opposition group from the demos.

Liberal-democratic regimes need to avoid this scenario as much as possible. But because equal chance and the system of legality based on it contain no inner defensive mechanisms, liberal-democratic legal orders are not able to fully defend themselves. On Schmitt’s account, “legality, or the rule of law... can neither legitimize nor effectively defend itself against determined enemies in times of crisis.”<sup>184</sup> Schmitt’s argument needs to be tempered here. It is not that a legal order cannot defend itself during a declared crisis. Rather, such a defense cannot be based solely on the legal orders’ own structures. It will require the use of contested extra-legal, sovereign power.

Legality and the rule of law need to be defended. Liberal-democratic regimes cannot be neutral towards themselves. In order to provide a defense the rule of law

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<sup>183</sup> Schmitt, *Legality and Legitimacy*, p. 32-33

<sup>184</sup> Rasch, *Sovereignty and its Discontents*, p. 29

will have to give way to the sovereign agency, however contested it may be, which underpins it. As Rasch points out: “The rule of law inevitably reveals itself, precisely during moments of crisis, as the force of law, perhaps not every bit as violent and ‘irrational’ as the arbitrary tyrant, but nonetheless compelling and irresistible – indeed, necessarily so!”<sup>185</sup> This type of scenario is the clearest expression of sovereign decision-making. But as this chapter has argued, sovereign decisions are never made without political contestation and are always only contingently resolved.

When the principle of equal chance has been suspended or permanently removed for an opposition group that is not necessarily the end of the conflict. Schmitt demonstrates that far from being straight forward actions, decisions over the limits of contestation will be bitterly fought over. The legitimacy of sovereign actions will be highly indeterminate because of the political and the contestation it engenders. Both the ruling party as well as opposition group(s) will struggle to act as the sovereign agency.

“However, it is just as much an inalienable right of the minority seeking to gain possession of the state means of power, on the basis of its claim to an equal chance with full legal equality, to render judgment itself over not merely its own concrete legality or illegality, but also over that of the opposing party in control of the means of state power... in a case of conflict, who removes doubts and resolves differences of opinion?”<sup>186</sup>

Any resolution of ‘differences of opinion’ will be the result of extra-legal power. It will be the result of a struggle between a ruling party and an opposition group exercising a right to resistance.

Schmitt argues that in ‘critical situations’ when a ruling party is able to wield the supra-legal premium to maximum effect threatening both the principle of equal

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<sup>185</sup> Rasch, *Sovereignty and its Discontents*, p. 30

<sup>186</sup> Schmitt, *Legality and Legitimacy*, p. 33-34

chance and the existence of opposition groups, legality recedes into the background leaving exposed pure political struggle. He argues that “When things really have done that far, it ultimately comes down to who holds the reins of power at the moment when the entire system of legality is thrown aside and when power is constituted on a new basis.”<sup>187</sup> Here Schmitt can be read to suggest that using the supralegal premium to re-articulate the limits of contestation is a partisan tactic directed at maintaining the power of the ruling party not the safety and order of the state as such. The ruling party acts in the name of defending the state as well as itself as a political group. On the other hand, because the existence of opposition groups is threatened they must exercise their right of resistance.<sup>188</sup>

However, in situations deemed ‘normal’ liberal-legality attempts to eliminate the right to resistance. On the other hand though, “the ancient problem of ‘resistance against the tyrant’ remains, that is resistance against injustice and misuse of state power...”<sup>189</sup> And because legality has receded behind the political, minority groups have no other choice but to make use of that right. In such a situation legality will recede and political contestation will reach a ‘critical juncture’ in which “each denounces the other, with both playing the guardian of legality and the guardian of the constitution. The result is a condition without legality or a constitution.”<sup>190</sup>

According to Schmitt the result of such a situation would be the transformation of

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<sup>187</sup> Schmitt, *Legality and Legitimacy*, p. 36

<sup>188</sup> Schmitt, *Legality and Legitimacy*, p. 87

<sup>189</sup> Schmitt, *Legality and Legitimacy*, p. 29

<sup>190</sup> Schmitt, *Legality and Legitimacy*, p. 34

legality into a tactic of political power.<sup>191</sup> On his account, such a situation would be terminal for a liberal-democratic regime.

As mentioned above Schmitt believes that this type of situation will render liberal-democracy unviable as a form of governance. It simply will not be able to cope with conflict which exceeds the boundaries of legality, he argues. This is another element of his argument that Schmitt has overstated. Certainly the restrictions which legality places on political struggle are lessened in such situations. But legality and legal order are not necessarily destroyed. 'Critical junctures' or states of exception are not the final nail in the coffin for liberal- democracy as a regime and form of governance. These situations should be read as moments of intense contestation over their contingently articulated fundamental structures as well as the substantive notion of justice on which such regime rely. My reading of Schmitt' problematic of the exception and paradox of contestation demonstrate that the limits of legality and political contestation are always partisan tactics. They have the goal not of preserving 'normal situations' but specific articulations of political power. States of emergency and exception are tactics of political struggle.

Here it is necessary to pause and sum up the argument thus far. Schmitt's statement that 'Sovereign is he who decides on the exception' should be read in the wider context of his work. When this is done we see that, far from making concise statements about sovereign power and exceptional situations, Schmitt in fact opens up emergency politics as a fundamental problematic of liberal-democratic governance. Liberal-democratic regimes rely on extra-legal, sovereign power. It is this power, 'We, the people', that secures democratic legitimacy. Additionally, this

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<sup>191</sup> Schmitt, *Legality and Legitimacy*, p. 93

power will need to act on and make reflexive judgments on the legal order as a whole when that order and the substantive principles it is founded on are, from time to time, perceived to be threatened. However, sovereign power is not unified in a single individual, group or office. Some individuals, groups and offices may be able to act as a sovereign agency but they are labeled as such only after the fact. Furthermore, any attempt to wield sovereign power will be highly contested. Because society is constitutively split, any act of sovereign power will only represent a portion of society. This notion of sovereignty means that any moment of decision will also be contested. Decisions concerning a legal order are never simply made, nor do they have a priori legitimacy. Decisions are claims that are taken up and implemented by the state bureaucracy as well as the wider citizenry. Finally, the exception is highly problematic because what triggers a decision on an exception is never an objective situation. It is a subjective judgment that an individual or group is able to get recognized and acted up on as an exception.

Deciding on an exception, and the problematic of the exception generally, has profound implications for what Schmitt argues is the substantive notion of justice on which liberal-democracy must be based. That is the principle that all citizens and groups have an equal chance of attaining state power, no matter the content of their political program. They have a right to political participation. This leaves liberal-democratic regimes vulnerable to being taken over by groups which come to power legally, then alter the system to their advantage, destroying the possibility of equal chance. Schmitt believes that liberal-democracy is unable to defend itself from this possibility. The defense of equal chance is paradoxical because it requires eliminating equal chance for those groups who seek to destroy it. This paradox is compounded by the supra-legal premium on legality which gives the ruling party an

advantage when deciding questions of legality and legitimacy, particularly in cases of contestation by domestic opposition groups who enjoy rights to political participation. In some cases legality may give way to extra-legal power to such an extent that no one group can be said to be acting 'legitimately'. If that occurs, minority groups must utilize a right to resistance or face political exclusion. Schmitt is wrong to argue that liberal-democratic regimes will necessarily collapse because of the problematic of the exception and the paradox of contestation. Rather, liberal-democratic regimes are forever engaged in contestation over who is protected by equal chance and minority rights as well as how struggles over the substantive notion of justice are fought.

Schmitt's solution for the problematic and the paradox is both conceptually and empirically impossible as well as highly undesirable. Instead of attempting to defend liberal-democracy Schmitt argues for a non-liberal, authoritarian democracy. He wishes to avoid one partisan group gaining control of state power then closing the door to legality behind itself. Were that to occur "the name of the state serves only political suppression and deprivation of rights."<sup>192</sup> Certainly this is a concern which must be addressed. But Schmitt's solution is unacceptable. "Schmitt argues for a domestic, democratic despotism based on the indivisibility of sovereignty in order to construct an international republican order..."<sup>193</sup> This 'indivisible sovereign' will supersede the political and the possibility of partisan groups attaining state power all together. He believes that only a political unity, which can create and enforce homogeneity, can prevent a state from inevitably degenerating into civil war.<sup>194</sup> Schmitt attempts to displace the political to the international realm, thereby creating

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<sup>192</sup> Schmitt, 'Ethic of State and Pluralistic State', p. 205

<sup>193</sup> Rasch, *Sovereignty and its Discontents*, p. 37

<sup>194</sup> Schmitt, 'Ethic of State and Pluralistic State', p. 203

a unified, homogenous demos in the domestic sphere. Obviously, this argument cannot be supported or sustained. As demonstrated above it is conceptually impossible to expel 'the political' to the international realm. Political antagonisms are a constitutive element in every society. The possibility of antagonism at the level of the domestic must be retained. Additionally, sovereignty cannot be understood as indivisible, Schmitt's own work can be read to show that sovereignty is indeterminate and contested. It is not a characteristic which can be ascribed permanently to one group or even an individual. Finally, the creation of a homogenous demos leads to the most monstrous consequences. Genocide and ethnic cleansing are often the result of attempts to purify or homogenize a society. Obviously, these possibilities need to be avoided.

### **Conclusion**

The problematic of the exception and the paradox of contestation are fundamental to the structure of liberal-democratic regimes. They concern the substantive notion of justice on which liberal-democratic regimes rely as well as questions as to who is entitled to the protections of justice and who is excluded from the demos. We cannot ignore them, nor can they ever be finally solved. That would be an unacceptable act of power and would certainly be considered an 'ethically repugnant' consensus for some individuals and groups. Schmitt's resolution of the paradox and problematic - democratic despotism and enforced homogeneity - cannot be the answer. What is needed is to find ways to negotiate the problematic and the paradox in a way that preserves, yet regulates, antagonism and conflict in domestic politics. Equal chance to attain state power and minority rights must be preserved to the fullest extent possible while also recognizing that some groups are determined to undermine them. Those groups need to be prevented from doing so, even if they are

composed of citizens with constitutionally protected rights to political participation. Finally, it is necessary to both retain as well as restrain extra-legal, sovereign power. Without extra-legal power democratic legitimacy is not possible. The problematic of the exception and the paradox of contestation open the possibility that legality and legitimacy may become mere tactics of power utilized by partisan political groups for short-term gain. Schmitt rightly argued that social division leads to conflict over legality and legitimacy. What is crucial is to negotiate that division, as well as the problematic and the paradox, in ways that do not threaten or close down democratic politics, even in situations declared to be an ‘emergency’ or an ‘exception’.

The following three chapters turn to various attempts to resolve the problematic and the paradox. These attempts are found in the work of Giorgio Agamben, David Dyzenhaus & Oren Gross, and Nomi Lazar & Bonnie Honig. Each scholar seeks to find ways to limit the impact and possible negative consequences of sovereign declarations of an emergency or exception. Agamben looks for a solution in an ontology of the relationship between law and political power. Dyzenhaus and Gross attempt to build similar, yet divergent, understandings of law which can subsume extra-legal sovereign power and the exception. Finally, Lazar and Honig attempt to break down the norm/exception binary such that its negative effects are mitigated. Each attempt will be shown to be ultimately unsatisfactory. For various reasons which will be discussed in detail they do not resolve the problematic of the exception or the paradox of contestation in ways that encourage democratic contestation in situations defined as exceptional.



### **Chapter 3 - Without Significance: Giorgio Agamben's State of Exception**

#### **Agamben in Schmitt's Wake**

Agamben's work on states of exception is a response to his particular reading of Carl Schmitt's work on the exception. Agamben agrees with Schmitt that there exists an "essential contiguity between the state of exception and sovereignty."<sup>195</sup> Furthermore, he contends that this contiguity ensures that emergency politics are a fundamental problematic of politics for contemporary forms of governance. On this basic point Agamben's reading of Schmitt is compatible with my reading outlined in chapter two.

Agamben further agrees with Schmitt that state of exception is the result of a subjective decision. Arguing against the notion of necessity he claims that "the only circumstances that are necessary and objective are those that are declared to be so."<sup>196</sup> It will be shown below that Schmitt and Agamben differ greatly on the nature of subjective decisions on the exception. Agamben's understanding is not useful because it does not include any conceptualization of contestation over sovereign decision-making processes. Furthermore, his understanding of sovereign power is flawed in that it cannot account for sovereignty as a contested agency.

Agamben, in further agreement with Schmitt, argues that extra-legal power is an inextricable element of modern governance.<sup>197</sup> However, Agamben reads Schmitt in such a way that this element of concurrence between the two theories is obscured. His reading of Schmitt is too formal.<sup>198</sup> He makes no attempt to read Schmitt against himself in order to further understand the problematics of emergency politics. On the

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<sup>195</sup> Agamben, *State of Exception*, p. 1

<sup>196</sup> Agamben, *State of Exception*, p. 30

<sup>197</sup> Agamben, *State of Exception*, p. 11

<sup>198</sup> Agamben, *State of Exception*, p. 32-37

contrary, Agamben argues that Schmitt's work on the exception is "fallacious" because it "seek[s] to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of realization of law, between constituent and constituted power, between norm and decision."<sup>199</sup> For Agamben, the state of exception is a space which cannot in any way be reconciled with legal order. But, as chapter two demonstrated, Schmitt's theory of the exception acknowledges and relies on a notion of extra-legal power that exists outside of legal order and functions as a source of contested legitimacy for legal order in liberal-democratic regimes.

On the issue of extra-legal power Agamben comes close to identifying extra-legal power with Schmitt's concept of the political.<sup>200</sup> He argues that in a state of exception the "suspension of law freed a force or a mystical element, a sort of legal *mana*... that both the ruling power and its adversaries, the constituted power as well as the constituent power, seek to appropriate... [i]ndeed it is possible that what is at issue... is nothing less than what Schmitt calls 'the political'."<sup>201</sup> I argue throughout this thesis that this is precisely the case. Extra-legal power is exerted by groups struggling for power and control in a context of political antagonism and contestation. Conceptualizing extra-legal power as 'mystical' legal 'mana' only serves to complicate the problematic of the exception and remove the element of political contestation. However, Agamben does not pursue this line of inquiry.

As a response to Schmitt, Agamben builds an alternate theory of 'states of exception' based on his reading of Western political thought on sovereignty. He

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<sup>199</sup> Agamben, *State of Exception*, p. 50-51

<sup>200</sup> Agamben, *State of Exception*, p. 51

<sup>201</sup> Agamben, *State of Exception*, p. 51

attempts to expand the notion of the exception arguing that it is not just a problematic for liberal democracy but for the entire intellectual history and tradition of Western politics. Agamben's work on the 'state of exception' is 'without significance' because his re-conceptualization of the norm/exception binary obliterates the norm in favor of the exception. For him, the exception has become the rule and "has today reached its maximum worldwide deployment."<sup>202</sup> His work reifies the exception as the both "the constitutive paradigm of the juridical order" as well as the paradigm of modern governance.<sup>203</sup> The 'state of exception' then is both an ancient, ontological structure of politics as well as a thoroughly modern tactic of governance. Despite its widespread acceptance among many academics Agamben's two main claims regarding the state of exception are highly problematic. This chapter will demonstrate that neither of his arguments can be sustained. His reconceptualization of the 'state of exception' is counter-productive because it erases the political as well as any practical or conceptual possibilities for challenging the increasing use of emergency measures by contemporary governments. We will begin with a critique of Agamben's claim that the state of exception is the 'constitutive paradigm of juridical order'.

## **The Ontological and Paradigmatic Exception**

### *Exegesis*

We begin with a brief exegesis of Agamben's account of the state of exception. According to him, the state of exception is defined by two main characteristics. On the one hand, it is a "zone of anomie..." between law and life.<sup>204</sup>

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<sup>202</sup> Agamben, *Homo Sacer*, p. 9 and *State of Exception*, p. 87

<sup>203</sup> Agamben, *State of Exception*, p. 6-7

<sup>204</sup> Agamben, *State of Exception*, p. 23

On the other, it is a relation of sovereign abandonment.<sup>205</sup> The function of the state of exception, on his account, is to secure a relation and a boundary between legal order and reality.<sup>206</sup> This is accomplished by sovereign power presupposing a “nexus” between them in a space in which law and life are indistinguishable.

Firstly, for Agamben the state of exception is a ‘zone’ in which the boundary between legal and reality secured, though in the exceptional space itself they blur into one another. Thus, “The state of exception... defines law’s threshold or limit concept,”<sup>207</sup> “a threshold of undecidability”<sup>208</sup> between law and life; “a zone in which application is suspended, but the law [la legge] as such, remains in force...”<sup>209</sup> In this ontological formulation the state of exception should not be understood as a physical or topographical space. Rather, states of exception are a topological phenomenon which blur the boundaries between fact and law.<sup>210</sup>

Sovereign power must produce states of exception in order to secure the relation between legal order and reality. This is because “The state of exception is... the principle of every juridical localization, since only the state of exception opens the space in which the determination of a certain juridical order and a particular territory first becomes possible.”<sup>211</sup> Juridical order must differentiate itself from what Agamben calls ‘bare life’ in order to secure its own existence. There is a certain amount of ambivalence within Agamben’s texts as to the sequencing of the creation of sovereign power, the opening of states of exception and the production of bare

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<sup>205</sup> Agamben, *Homo Sacer*, p. 83

<sup>206</sup> Agamben, *State of Exception*, p. 40

<sup>207</sup> Agamben, *State of Exception*, 4

<sup>208</sup> Agamben, *State of Exception*, p. 29

<sup>209</sup> Agamben, *State of Exception*, p. 31

<sup>210</sup> Agamben, *State of Exception*, p. 23

<sup>211</sup> Agamben, *Homo Sacer*, p. 19

life. Sovereignty is only evident after it has opened a state of exception. For Agamben that ambivalence is precisely the point. States of exception are zones of anomic undecidability where it is difficult if not impossible to determine what law is and what life is, what is inside and what is outside.

Because the state of exception is characterized by anomie and undecidability it cannot be understood as analogous to dictatorship. It does not constitute a “pleromatic state”, a fullness of powers that supposedly existed before their separation into executive, legislative and judicial spheres.<sup>212</sup> On the contrary, Agamben characterizes the state of exception as “a kenomatic state, an emptiness of law.”<sup>213</sup> While a ‘fullness of powers’ or a dictatorship is one possible effect of the opening of a state of exception it “does not coincide with it.”<sup>214</sup> A state of exception is a space in which law and life blur into pure anomie. The analogy Agamben utilizes to describe the state of exception is the village below the castle in Kafka’s novel, *The Castle*.<sup>215</sup> In the novel the protagonist ‘K.’ is forced to negotiate a labyrinthine network of villagers and castle officials in an attempt to begin his tasks as a land surveyor.<sup>216</sup> K. seemingly exists at the whim of castle officials, subject to laws and regulations he has no knowledge of but which encompass and reference all of his actions, whether they are interacting with the castle messenger assigned to him or becoming engaged to a local barmaid.

On its second main characteristic, the state of exception is a relation between sovereign power and that which it excludes from its legal order. How then does

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<sup>212</sup> Agamben, *State of Exception*, p. 6

<sup>213</sup> Agamben, *State of Exception*, p. 6

<sup>214</sup> Agamben, *State of Exception*, p. 6

<sup>215</sup> Agamben, *Homo Sacer*, p. 53

<sup>216</sup> Franz Kafka, *The Castle*

Agamben characterize this relation? “The relation of the exception is a relation of ban.”<sup>217</sup> More precisely, it is abandonment of lives by the sovereign.<sup>218</sup> Agamben claims that what is banned is “taken outside, and not simply excluded.”<sup>219</sup> What is taken outside is life itself. Life still retains a relation to sovereign power but this relation consists solely in the fact of being abandoned. The exclusion of bare life is ‘inclusive’ in that it is included via its very exclusion, claims Agamben.

This abandonment by sovereign power and exclusion from legal order reduces life to the pure fact of living, what the Greeks called *zoē*, according to Agamben. The relation of the exception is an “inclusive exclusion of *zoē* in the polis.”<sup>220</sup> This ‘bare life’ is life which is stripped of all forms of identity and communal belonging. Such life exists at the whim of sovereign power against which it has no defense. It is excluded from both divine and human law.<sup>221</sup> Bare life can be killed by sovereign power and yet not sacrificed.<sup>222</sup> Agamben’s two most prominent examples of bare life are the “*loup garou*, the werewolf” and the “muselmann”, men in Nazi concentration camps who appeared to have lost all recognizable traces of their humanity.<sup>223</sup> Both are forms of ‘life’ which exist at the boundaries of humanity and are subject to death at any moment.

Bare life, according to Agamben, demonstrates that politics is always biopolitics. Sovereign power produces the biopolitical body.<sup>224</sup> Biopolitics, the

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<sup>217</sup> Agamben, *Homo Sacer*, p. 28

<sup>218</sup> Agamben, *Homo Sacer*, p. 29

<sup>219</sup> Agamben, *Homo Sacer*, p. 17-18

<sup>220</sup> Agamben, *Homo Sacer*, p. 7

<sup>221</sup> Agamben, *Homo Sacer*, p. 82

<sup>222</sup> Agamben, *Homo Sacer*, p. 83

<sup>223</sup> Agamben, *Homo Sacer*, p. 105 and *Remnants of Auschwitz*, p. 63

<sup>224</sup> Agamben, *Homo Sacer*, p. 6

politicization of life itself, then is “at least as old as the sovereign exception.”<sup>225</sup>

Because of this, Agamben claims that the very possibility of distinguishing law from life “coincides... in the biopolitical machine.”<sup>226</sup> This inclusive exclusion of bare life is the key moment and founding structure of all western politics for Agamben. He argues that the originary structure of politics is a sovereign ban, in the state of exception, through which life is included in law through its very abandonment by that law. Sovereign power produces a juridical localization via an exception in the same moment that it ‘inclusively’ excludes bare life.

Thus, for Agamben, the sovereign exception is the originary structure of Western politics and juridical order. Because he argues that “the production of bare life is the originary activity of sovereignty,” all politics must be biopolitics for Agamben.<sup>227</sup> States of exception serve as spaces in which sovereign power can produce a “biopolitical body.”<sup>228</sup> The state of exception is “the original structure in which law encompasses living beings by means of its own suspension.”<sup>229</sup> Furthermore, Agamben argues that this relation of ban is more originary than Schmitt’s friend/enemy distinction.<sup>230</sup> By making such a claim he removes any element of collective identification and action from the realm of the political. The political consists of sovereign power abandoning life to a ‘bare’ existence outside of any communal belonging. This abandoning takes places in states of exception where law and life blur with one another and in which bare life is subject to execution at any moment. Having outlined the main components of Agamben’s theory of the state

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<sup>225</sup> Agamben, *Homo Sacer*, p. 6

<sup>226</sup> Agamben, *State of Exception*, p. 82

<sup>227</sup> Agamben, *Homo Sacer*, p. 83

<sup>228</sup> Agamben, *Homo Sacer*, p. 6

<sup>229</sup> Agamben, *State of Exception*, p. 3

<sup>230</sup> Agamben, *Homo Sacer*, p. 8

of exception it can now be demonstrated how his theory cannot withstand critical scrutiny.

### *Flawed Methodology*

For Schmitt the exception is primarily a problem for liberal legality and liberal-democratic regimes. Agamben expands the problematic of the exception; he turns it into an ontological “structure [which] appears... to be consubstantial with Western politics.”<sup>231</sup> On his account, it is “the constitutive paradigm of the juridical order” arguing that “the relation of ban has constituted the essential structure of sovereign power from the beginning.”<sup>232</sup> Not only is the production of exceptions of central significance, according to Agamben the structure and function of the exception has remained unchanged at least as far back as ancient Roman law. Since then this structure has been functioning as a hidden, unchanging nucleus of Western politics. All politics then, is reducible to the production of the exception. Thus, the sovereign production of bare life in the state exception is the fundamental activity of Western politics. These claims highlight suspect elements of Agamben’s methodology.

It is unclear how the insights concerning Roman law which Agamben develops impact and exert influence over structures of contemporary emergency politics in liberal-democratic regimes. For example, he is unable to draw a definitive link between the Roman institution *iustitium* and liberal-democratic provisions such as Article 48 of the Weimar republic. As Laclau notes, Agamben “jumps too quickly from having established the *genealogy* of a term... to its actual working in a

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<sup>231</sup> Giorgio Agamben, *Homo Sacer*, p. 7

<sup>232</sup> Agamben, *Homo Sacer*, p. 111

contemporary context...”<sup>233</sup> The effect of such a move is that Agamben implies that somehow the original definition and use of a concept have some “determining priority” over its contemporary use.<sup>234</sup> Surely this cannot be the case. Political concepts, as Schmitt pointed out, are vague and ‘evaluative’ in nature. As such their definition, function, and use change over time. As I demonstrated in chapter one with the Roman dictatorship, ancient institutions and legal provisions cannot simply be transplanted from ancient to modern contexts. Though the genealogy of a concept is important it cannot have critical priority over a structural diagnostic of its contemporary manifestations.

By giving genealogy such priority in his analysis, Agamben demonstrates that his method adheres to a strict formalism. His method attempts to delineate a tightly controlled ‘logic’ of sovereignty and emergency politics. This ‘logic’, however, cannot account for the ambiguities and complexities of sovereign power which were discussed in chapter two. Connolly points out that Agamben encapsulates sovereign politics within “ironclad paradoxes”.<sup>235</sup> Paradoxes are a feature of emergency politics but they need not be conceptualized as binary structures which allow no scope for negotiating them through political contestation. Agamben is “captivated, captured by this model” in much the same way as he captured sovereignty within a rigidly defined logic and paradox.<sup>236</sup> Paradoxes are never ironclad and thus do not remain unchanged throughout time. It is only Agamben’s flawed methodology that allows him to arrive at the fallacious conclusion that Western politics has been defined by the sovereign production of

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<sup>233</sup> Laclau, ‘Bare Life or Social Indeterminacy’, p. 11

<sup>234</sup> Laclau, ‘Bare Life or Social Indeterminacy’, p. 11

<sup>235</sup> William Connolly, ‘The ‘The Complexities of Sovereignty’’, p. 30-31

<sup>236</sup> Honig, *Emergency Politics*, p. 89

bare life in states of exception. Nor can his claim that the exception is ‘consubstantial with Western politics’ be sustained. Political institutions and concepts evolve over time. Agamben’s account of sovereignty suffers from similar flaws. A closer investigation of it will demonstrate that sovereign power cannot be as strictly defined as Agamben argues, nor is its function limited only to producing bare life in states of exception.

### *A Mechanical Sovereign Power*

Agamben’s sovereign power, though trapped in an ‘ironclad’ paradox, functions as an agent whose actions are uncontested and unchallengeable. Whereas Schmitt’s sovereign is reactive, lying behind legal order until a dangerous lacuna is exposed by a situation defined as an emergency, Agamben’s sovereign is active. He argues that “the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation.”<sup>237</sup> Sovereign power must intentionally open up ‘fictitious lacunae’ in the legal order whenever it deems them necessary. Agamben’s sovereign is constantly on the defensive, it is forced by the paradoxes Agamben encases it in to create states of exception and bare life.

How is it that sovereign power appears in Agamben’s work as virtually unchallengeable? Though never stated explicitly, Agamben’s sovereign maintains a monopoly on the use of violence, to borrow a phrase from Weber. Furthermore, Agamben abides by Walter Benjamin’s assertion in his *Critique of Violence* of a necessary and constitutive link between law and violence.<sup>238</sup> Violence exists in one

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<sup>237</sup> Agamben, *State of Exception*, p. 31

<sup>238</sup> Benjamin, ‘On the Critique of Violence’, p. 1-28

of two types, law-making or law-preserving. Agamben's sovereign exception secures the possibility of both types by making them indistinguishable in a state of exception. There is no resistance to this nexus between law and violence because bare life is by definition, subject to execution by sovereign power at any moment. Additionally, Agamben asserts that sovereign power has such a command of law and violence that it can ensure their relation, even though it must make them indistinguishable from time to time in the state of exception.<sup>239</sup>

It is unclear however how Agamben's sovereign is able to accomplish this with such apparent ease. By reducing sovereign actions to an ontological structure at the unchanging heart of politics Agamben removes any possibility of accounting for the kind of contingency and contestation embedded within sovereignty that was demonstrated in chapter two. On Agamben's account the sovereign appears to act with "unconstrained efficacy" and an uncontested "finality."<sup>240</sup> He provides no defense for these claims of finality and efficacy aside from the definition of sovereignty as an originary structure of politics that creates bare life in a state of exception.<sup>241</sup> The paradox can be formulated thusly, "the state requires a final authority to resolve questions of law, while the final authority is insufficiently informed by any law that precedes it."<sup>242</sup> There is nothing objectionable to such a formulation. What is objectionable is the idea that this paradox is an originary structure which determines the functioning of sovereign power in its entirety.

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<sup>239</sup> Agamben, *Homo Sacer*, p. 64-65

<sup>240</sup> Fitzpatrick, 'Bare Sovereignty', paragraph 2; Connolly, 'The Complexities of Sovereignty', p. 31-32

<sup>241</sup> Agamben, *Homo Sacer*, p. 83

<sup>242</sup> Connolly, 'The Complexities of Sovereignty', p. 26

Agamben's analysis presents a paradox of sovereignty then promptly removes any scope for altering or it. Rather than presenting this paradox as a complex problem to be negotiated and resolved Agamben "acts as if an account of the 'logic of sovereignty' reveals ironclad paradoxes that could be resolved only by transcending that logic altogether."<sup>243</sup> Agamben confronts this paradox as being constituted by the logic of sovereignty which has a binding and unchanging character. As described above this logic of sovereignty produces bare life which is subject to execution by sovereign authority. Agamben can, therefore, only conceive of sovereignty as an unchanging structure. He is left in a position in which sovereign power becomes unstoppable and all life becomes bare life. His theory cannot entertain any ideas that would allow the paradox to be negotiated or articulated productively.<sup>244</sup>

There is a 'democratic deficit' within Agamben's account of sovereign power. Understanding sovereignty as the will of the people or the decision of a supreme court on the interpretation of a constitutional text is erased by positing sovereignty as 'originary structure' of Western politics. As Neal points out, Agamben "pays no attention to the constitution of modern sovereignty itself."<sup>245</sup> The sovereign, as an originary, ontological structure appears to have no need to legitimize its actions by reference to a sovereign demos. Furthermore, his analysis lacks any notion of "'democratic elements...'" of the state of exception.<sup>246</sup>

Agamben's sovereign simply acts. There is no scope for sovereignty to be contested and fought over. Nor can sovereignty be exercised by political groups struggling for

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<sup>243</sup> Connolly, 'The Complexities of Sovereignty', p. 30

<sup>244</sup> Connolly, 'The Complexities of Sovereignty', p. 27

<sup>245</sup> Neal, 'Giorgio Agamben', p. 22

<sup>246</sup> Neal, 'Giorgio Agamben', p. 22

power and hegemonic dominance. Thus his theory is not useful for understanding sovereign and emergency politics in contemporary liberal-democratic societies where sovereign power and decisions are enacted by political groups and/or state officials.

Agamben's vision of sovereignty is too mechanical to capture the nuance and complexity of contemporary emergency politics. Sovereign politics cannot be reduced to simple logics. At times politics and sovereignty may operate in irrational and illogical ways. This leaves Agamben's analysis blind to the idea, developed in chapter two, that sovereign decisions can only function as claims which must be taken up by the people and institutions over which they are made. The difference between the acting authority and the institutions which agree with the decision and implement it is foreign to Agamben's analysis. This deprives him of explanatory power when faced with real world examples of emergency regimes which rely on a massive and highly complex bureaucracy to implement the decisions of state officials. His framework offers no scope for analysis of the nuances and difficulties of opening a camp such as Guantanamo. In the next section this will be shown to betray a critical weakness. Agamben's analysis of the Guantanamo Bay detention facility is blind to the institutional forces which implement the decision of the Bush administration to operate a camp there.

As argued in chapter two sovereign power is merely the name given to those situations in which decisions about the boundaries of law must be made. Sovereign power can emerge from anywhere and cause a variety of effects on legal order. It is not tied to an ancient structure from which it cannot escape. This conception of sovereignty suggests that the state of exception is not a core articulating structure of an originary political relation. Rather, a politically decided 'exception' can be

created at any point, and there are many, where ever a decision of the nature and boundaries of law must be made yet legal order is not fully prepared to make the decision. The explanatory power of this understanding of sovereignty is far superior to Agamben's because it is sensitive to the plurality of instances in which law fails to provide an adequate course of action in the face of uncertain events.

Agamben's analysis of sovereignty is also unsustainable because of its narrow focus on the production of bare life in a state of exception. It is not attuned to the modern articulations of sovereign power and the contexts in which sovereign power operates. Sovereignty is a central concern embedded in issues of the limits of law and situations which have been politically defined as exceptional; however it is a larger and more nuanced problematic than Agamben's work can account for.

### *Not So Bare Life*

As sovereign power is always contested it cannot produce life which is bare to the extent that Agamben claims it is. Nor can it do so with uncontested efficacy and finality. Certainly forms of inclusion and exclusion are necessary and constitutive of politics.<sup>247</sup> And sovereign power is implicated in the construction of such exclusions. But all forms of political exclusion cannot be reduced to the relation of abandonment in a state of exception as Agamben conceives it. All political subjectivities require conditions of possibility in order to emerge. Sovereign power, however it is conceived, is only one of a myriad of conditions of possibility that act on subjects. Neal notes that "[e]ven without law, the subject remains within a web of constitutive relations with social forces, institutional discipline, custom, capital, belief, sexuality, memory, trauma, desire, and so on; ...even in the radical

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<sup>247</sup> Laclau, 'Bare Life or Social Indeterminacy', p. 13-14

deprivation of these things, the subject is forced into a relation with their absence...”<sup>248</sup> He goes on to suggest that perhaps Jews were considered bare life by the Nazis who imprisoned them but none the less they remained humans enmeshed in a number of social discourses.<sup>249</sup> Agamben selects one condition of possibility and reifies it as the core, original condition of possibility for the emergence of the subject of politics. There is no space for the plethora of other discourses that act on and influence the production and emergence of ‘life’.

Bare life is never fully bare. It is a project which may be attempted by sovereign power. Sovereign power may strip a subject of all legal identity; however, it can never strip away all forms of collective identification. Ziarek poignantly argues that bare life is not *zoe* but “rather it is the remainder of the destroyed political bios.”<sup>250</sup> Furthermore, she concurs with Neal’s perspective that bare life, as the remnants of collective identifications “cannot be regarded in complete isolation from all cultural and political characteristics.”<sup>251</sup> At the very least bare life maintains a relation to those lost identifications, specifically “as the remnant of a specific form of life that... is not yet or is no longer.”<sup>252</sup> Life can only be understood as ‘bare’ from the perspective of sovereign power. But there is no reason to accept the perspective that sovereign power creates bare life. Because Agamben presents sovereign power as both highly effective and uncontested he can also claim that bare life is simply produced by sovereign power. His work is not open to the possibility that the production of bare life is asymmetrical, that life is only considered bare

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<sup>248</sup> Neal, ‘Giorgio Agamben’, p. 19

<sup>249</sup> Neal, ‘Giorgio Agamben’, p. 20

<sup>250</sup> Ziarek, ‘Bare Life on Strike’, p. 90

<sup>251</sup> Ziarek, ‘Bare Life on Strike’, p. 103

<sup>252</sup> Ziarek, ‘Bare Life on Strike’, p. 103

from the perspective of sovereign power itself. Agamben does not see that life is still enmeshed in any number of communal relations even if sovereign power is attempting to strip those relations away. Agamben gives no justification for always inhabiting the perspective of sovereign power. His theory is trapped in that perspective because he posits sovereign power as an originary structure which can act with uncontested finality and efficacy.

A final problem with Agamben's conceptualization of sovereign power and 'bare' life is that the relation he describes between the two is ultimately apolitical. The dimension of the political is inhabited by groups that struggle for power, not individuals and stripped of communal belonging whose solitary political relation is one of abandonment from sovereign power. By positing the sovereign abandonment of life as the originary political relation, more fundamental than Schmitt's friend/enemy distinction, Agamben's theory erases the dimension of the political from his analysis of emergency politics.

#### *The Erasure of the Political and Politics*

In the introduction of this chapter I mentioned that Agamben comes close to identifying extra-legal power with what Schmitt calls 'the political'. I noted that Agamben does not develop a full analysis of the relationship between extra-legal power and the political. This is because his theory of sovereignty and the production of bare life removes the political from the purview of his theory.

The sovereign production of bare life cannot be the originary political relation. Stripping life from all forms of collective identification would radically erase any notion of politics or the political. The political requires mutual exclusion between groups which are each capable of political activity. "Agamben... has

presented as a political moment what actually amounts to a radical elimination of the political.”<sup>253</sup> Certainly the political entails “a moment of negativity that requires the construction of an inside/outside relation and requires that sovereignty is in an ambiguous position vis-à-vis the juridical order.”<sup>254</sup> However, Agamben has hypostatized one possible form of the inside/outside relation and given it the unique position of being the originary structure of Western politics.<sup>255</sup> Simply because someone is outside of a legal order does not mean they are outside of every existing legal order. Nor does it necessarily mean that they are wholly given over to possibility of execution by sovereign violence, against which they have no defense.

The sovereign ban as Agamben describes it is not a political relation but a relation that destroys the possibility of democratic politics. Laclau rightly argues that the relation of ban would have to be mutual for “a *political* relation” to exist.<sup>256</sup> Agamben’s understanding of the relation of sovereign power to society and individuals is so asymmetrical that it closes down any space for legitimate contestation between opposing groups with equally valid political goals. Nor is there any scope for ‘bare’ life to challenge its categorization as such by sovereign power. Politics would be impossible if the only two political actors are a sovereign wielding violence which may not be challenged and a bare life stripped of all relations with any form of collective identifications.

On Agamben’s account there exists only one subject that is capable of political action, the sovereign. And that political action consists in stripping away political existence from all other subjects. Agamben’s understanding of the political

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<sup>253</sup> Laclau, “Bare Life or Social Indeterminacy?”, p. 16

<sup>254</sup> Laclau, “Bare Life or Social Indeterminacy?”, p. 14

<sup>255</sup> Laclau, “Bare Life or Social Indeterminacy?”, p. 14

<sup>256</sup> Laclau, “Bare Life or Social Indeterminacy?”, p. 15

is simply the production of bare life. It has been shown that bare life cannot be constructed; life cannot be stripped of all collective identification. Agamben's account of the sovereign production of bare life in the state of exception effectively erases the political and all forms of collective political contestation. Therefore it is of no use for any theory of democratic politics which seeks to counteract the increasing use of emergency and exceptional tactics on the part of state officials.

Furthermore, Agamben's image of sovereign power creating bare life relies on "an increasing control by an over-powerful state."<sup>257</sup> Such an image of a unified state, acting with precision and efficacy cannot be maintained. Even the most cursory investigation of modern state forms reveals a massive bureaucracy, competing goals on the part of various officials, and large areas of contestation within the state as well as between the state and political opposition parties. It is doubtful that the state can be understood as unitary in any meaningful sense. Moreover for the political and politics to exist, there must also exist subjects with the capacity for political agency.

William Rasch rightly notes that "what Agamben calls the political, Hobbes calls the 'state of nature'."<sup>258</sup> Agamben's vision of politics and the political is characterized by what Hobbes would have called a war of all against all. If each person is bare life which can be killed with impunity then they are also each sovereign with respect to everyone else. Sovereign and bare life are interchangeable roles.<sup>259</sup> In direct opposition to Hobbes who argues that the state of nature necessitated legal order and the commonwealth, Agamben argues that the state of nature is in fact produced by the sovereign. The sovereign ban reduces all subjects to

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<sup>257</sup> Laclau, "Bare Life or Social Indeterminacy?," p. 18

<sup>258</sup> Rasch, 'From Sovereign Ban to Banning Sovereignty', p. 101

<sup>259</sup> Rasch, 'From Sovereign Ban to Banning Sovereignty', p. 101

bare life and thereby creates a state of nature within the political itself. When Agamben argues that the state of exception begins to become permanent he is also implicitly arguing that the political has ceased to exist and the state of nature is what replaces it. Rasch notes that if the state of nature is a product of a political relation then it is a problem of the political as such, and not merely a political problem.<sup>260</sup> Consequently any political action taken to counteract the effects of the state of exception will come to naught. Only transcending the logic of the permanent sovereign exception and its erasure of the political would be of any use. Rasch rightly condemns Agamben's erasure of the political as fatalistic and nihilistic.

The state of exception cannot exist and operate as an ontological structure of Western politics as Agamben's analysis suggests that it does. Sovereignty is more diverse a notion that he understands it to be. The sovereign ban cannot be the originary political relation of Western politics because it cannot produce its desired subject, bare life. And even if it could produce a perfect example of bare life, that life is by definition apolitical. Life stripped of all its capacity for communal belonging loses any potential for political agency. The ultimate consequence of Agamben's analysis of the exception is the total erasure of the political from Western societies.

Furthermore, Agamben's analysis displaces the norm and legal order in favor of the exception. Legal order is dependent on and subservient to the exception which plays a more fundamental and determining role in politics. Without the exception, in Agamben's work, the norm would be impossible. This ontological prioritization of the exception needs to be entirely dismissed. It is possible, as chapter two

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<sup>260</sup> Rasch, 'From Sovereign Ban to Banning Sovereignty', p. 102

demonstrated, to argue that sovereign power is extra-legal and that it does more than produce bare life in states of exception. Exceptions are sometimes produced by sovereign power but that production is always highly contested. Finally, it is possible to argue that current governments maybe be increasingly using exceptions as tactics of governance without concluding that it is an originary structure which is brought to the forefront of politics.

### **The ‘Exceptional’ Tactics of Contemporary Governance**

It is certainly the case that emergency measures are increasingly used by liberal-democratic states as a tactic of governance. However, the creation of states of exception, as Agamben understands them, is not one of those tactics. Thus his second main claim, that the state of exception can be considered the dominant paradigm of contemporary governance to the extent that the exception has “become the rule” is false.<sup>261</sup> If the state of exception on his understanding is implausible then the idea that the state of exception is a paradigm of government such that it eclipses the functioning of normal legal order is even more so.

Agamben’s claim that the state of exception is the paradigm of modern government requires not only the erasure of the political and politics but, it also requires that legal order could in no way be used to resist attempts by sovereign power to open states of exception and create bare life. This claim is utterly implausible. Legal order remains a crucial resource for those individuals and groups seeking to counteract the use of emergency powers by contemporary governments. A notable example of this is the case of *Rasul v Bush*. In that case the United States Supreme Court held that detainees held at Guantanamo Bay had a legal right to

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<sup>261</sup> Agamben, *Homo Sacer*, p. 20

challenge their detention in U.S. federal civilian courts.<sup>262</sup> This demonstrates that law is still a resource that can be utilized even by those who are supposedly bare life precisely to challenge that categorization. Agamben's claim that the state of exception has brought forth a permanent zone of anomie cannot explain how and why Guantanamo Bay detainees can challenge their detention in court. Agamben claims that the form of law is "being in force without significance."<sup>263</sup> This means that sovereign power acts but that the texts of laws have no meaning. Clearly this is not the case.

Agamben claims that permanent states of emergency are the product of voluntary creation by contemporary states.<sup>264</sup> This view wrongly gives the impression that it is easy for a sovereign to create a state of exception. In some cases it may be, however this misses the point made in chapter two, that sovereign claims of exceptional circumstances and attempts to wield emergency powers are always met with political contestation. 'States of emergency' and emergency measures are not 'voluntary' acts. They are the result of struggle and contestation.

The paradigmatic form the permanent exception takes is the concentration camp. Auschwitz, Omarska, and Guantanamo Bay are all physical localizations and materializations of Agamben's state of exception. He argues, "The camp is the space that is opened when the state of exception begins to become the rule."<sup>265</sup> It is in concentration camps that life is most exposed to the whims of sovereign power. At any moment a prisoner of the camp may be killed by any one and no crime will be committed, no sacrifice observed. In the camps "power confronts nothing but pure

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<sup>262</sup> *Rasul v Bush*, 2004 (figure out how to cite Sup. Ct. cases)

<sup>263</sup> Agamben, *Homo Sacer*, p. 51

<sup>264</sup> Agamben, *State of Exception*, p. 2

<sup>265</sup> Agamben, *Homo Sacer*, p. 168-169, emphasis in original

life, without any mediation.”<sup>266</sup> Though the camps are the extreme examples of the state of exception as the paradigm of government many other spaces exist according to Agamben. The body of Karen Quinlan, a comatose patient, *zones d’attente* at airports and the body of a researcher conducting experiments on himself are all sites of the exception and biopolitics. At its most benign the camp is a metaphor for how sovereign power operates in Western politics. At its most dangerous the camp is an actually existing locality in which sovereign power can operate on human bodies without any restraint. Agamben’s claim is that the camp is the nomos of the modern is overstated and unsustainable. To assimilate all of Western politics to the concentration camp is to be blind to the complexities, contingencies and struggles of contemporary liberal-democratic politics.

It was noted in the first section that Agamben’s analysis was blind to the complexities of sovereignty and the social forces that are required to make and enforce sovereign decisions. An example of this is his depiction of the US detention facility at Guantanamo Bay, Cuba. Agamben describes it as a space in which “bare life reaches its maximum indeterminacy.”<sup>267</sup> Detainees presumably then would be subject to a sovereign violence that could be wielded by any guard or even a janitor. If bare life reaches ‘maximum indeterminacy’ then pure anomie must exist, the rule of law would have to be entirely absent and no norms whatsoever could be operational. This however is certainly not the case. Fleur Johns has detailed the many forms of law that were and are operative within the Guantanamo Bay detention

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<sup>266</sup> Agamben, *Homo Sacer*, p. 171

<sup>267</sup> Agamben, *State of Exception*, p. 4

facility.<sup>268</sup> Her conclusion is that the detainees at Guantanamo Bay are not reduced to bare life. On the contrary,

“the plight of the Guantanamo bay detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities. The detention camps at Guantanamo Bay are above all works of legal representation and classification. They are spaces where law and liberal proceduralism speak and operate in *excess*.”<sup>269</sup>

Each detainee is subjected to interrogation, analysis and classification by a plethora of institutions and experts ranging from the Combatant Status Review Tribunal to visits from defense lawyers and the Red Cross. What is occurring at the detention facility is not the maintenance of a space without law. It is political contestation over forms of legality and how those laws are applied. The hyper-legalism of Guantanamo Bay presents sovereign power with a terrain of contestation, not an anomic space in which bare life can be executed at will.

Agamben’s analysis is utterly blind to this kind of hyper-legalism. He cannot account for the fact that in some cases ‘exceptional’ or ‘emergency’ situations result in the creation of new, multi-faceted layers of legality. Suspension of law in its entirety is one tactic that may be used when a state of exception is successfully declared. However it is not the only tactic. Because Agamben only envisages the state of exception as an emptiness of law in which apolitical bare life is produced he cannot account for the variety of emergency and exceptional tactics wielded by a contested sovereign agency.

One final claim Agamben makes must be dispensed with. He argues that “the state of exception appears as a threshold of indeterminacy between democracy and

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<sup>268</sup> Johns, ‘Guantanamo Bay and the Annihilation of the Exception’, p. 616-619

<sup>269</sup> Johns, ‘Guantanamo Bay and the Annihilation of the Exception’, p. 614

absolutism.<sup>270</sup> Certainly the increased use of emergency powers and the diminishing of legal protections can move a democratic state toward more authoritarian or dictatorial forms. However, the contemporary world is nowhere near the threshold of absolutism. Agamben argued that the state of exception has ‘today reached its maximum worldwide deployment.’ In such a scenario it would be impossible to differentiate between transgression and application of the law to the extent that “a person who goes for a walk during the curfew is not transgressing the law any more than the soldier who kills him is executing it.”<sup>271</sup> If that is the case democracy no longer exists and all of Western politics is reduced to sovereign absolutism. This is precisely what Agamben argues: “The normative aspect of law can thus be obliterated and contradicted with impunity by... governmental violence.”<sup>272</sup> Nowhere is this hyperbolic assessment true. It is not even the case in the Guantanamo Bay detention facility. Every attempt to create such a zone of anomie is met with opposition, political contestation and in many cases legal challenges.

### **The Metaphysics of Fatalism**

Agamben wholly agrees with Benjamin’s claim in his eighth thesis of history ““that the ‘state of emergency’ in which we live is not the exception but the rule.”<sup>273</sup> He also agrees with Benjamin that sovereignty is trapped in a nexus between law-making and law preserving violence. Until this nexus can be severed forever we are doomed to oscillate between the two in a permanent state of exception. Unfortunately, Agamben’s work leaves very little room for struggling against such a predicament.

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<sup>270</sup> Agamben, *State of Exception*, p. 3

<sup>271</sup> Agamben, *Homo Sacer*, p. 57

<sup>272</sup> Agamben, *State of Exception*, p. 87

<sup>273</sup> Walter Benjamin, ‘Theses on the philosophy of history’, p. 257

Agamben's work erases the realm of the political and replaces it with the state of exception and sovereign abandonment. In such a space "any political action... is undertaken in vain."<sup>274</sup> Bare lives would simply throw themselves at a sovereign violence which can execute them at its whim. Neither does he offer any practical responses to the 'voluntary' production of 'states of exception'. Politics, he says, is useless because it has been thoroughly contaminated by law and can thus only engage in law-making or law preserving violence.<sup>275</sup> The only possible solution is a new metaphysics of law and politics which is free from the nexus of law-making and law-preserving violence. What is needed is "pure" law, law disconnected from violence.<sup>276</sup> This "pure" law can only be the result of what Benjamin called "divine" violence.<sup>277</sup>

Waiting for a new metaphysics of law and violence is utter impractical and unrealistic. Because Agamben's work can offer no useful diagnostic account of the increasing use of emergency measures by liberal-democratic states, it is without significance and should be abandoned. What is needed is a theory of emergency politics which is sensitive to the dimension of the political and political contestation. Additionally, it is imperative that legal order not be made subservient to claims of exceptionality. The exception has not become the rule as Agamben claims. Rather, the opposite is true, 'normal' politics has always included claims of emergency and exceptionality. The main problem is how to respond to such claims without dissolving liberal-democratic governance into a zone of anomic violence, a task for which Agamben's work is unequipped.

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<sup>274</sup> Rasch, 'From Sovereign Ban to Banning Sovereignty', p. 102

<sup>275</sup> Agamben, *State of Exception*, p. 88

<sup>276</sup> Agamben, *State of Exception*, p. 88

<sup>277</sup> Benjamin, 'Critique of Violence', p. 24



## Chapter 4 – Liberal Legality Against Schmitt

### Introduction

Contemporary legal theory responds to Schmitt's problematic of the exception through a critique of his work as well as via prescriptive models of emergency powers. The debate between Oren Gross and David Dyzenhaus is emblematic of this strand of theorizing. For both authors law is a necessary but not sufficient restraint on emergency powers. They share the conviction that law does and should play a role in emergency politics. Both argue that law, on their individual readings of the role of legal order in liberal-democratic regimes, can limit abuses of emergency powers. Dyzenhaus emphatically argues that "States of emergency can be governed by the rule of law" to such an extent that "the exception can be banished from legal order."<sup>278</sup> Gross, for his part, attempts to banish the exception by upholding a stricter separation between normality and emergency measures.

Their individual prescriptive models of emergency powers are a direct response to Schmitt's work. However, they support the reading of Schmitt which was argued against in chapter two. For Gross and Dyzenhaus, Schmitt argues that law has no place in exceptional circumstances. The exception is outside law, so to speak. Their prescriptive models attempt to bring the exception and any form of emergency powers within the ambit legal order. In doing so they both strenuously argue against the existence and role of extra-legal, sovereign power. This produces a democratic deficit in both their models. By attempting to bring the exception within the scope of legal order they actually end up further entrenching the norm/exception binary within liberal legalism. That entrenchment leaves their prescriptive models squarely within Schmitt's problematic of the exception. Therefore, an alternative

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<sup>278</sup> Dyzenhaus, *Constitution of Law*, p. 53

approach to emergency politics will need to seek a beginning outside of liberal legality as Gross and Dyzenhaus theorize it.

### **Gross & Dyzenhaus on Schmitt**

Both Gross and Dyzenhaus claim that Schmitt's work, lamentably, has analytical relevance for emergency politics. On their accounts, his work fairly accurately describes the way in which many liberal-democratic regimes are currently responding to emergencies. Gross argues that Schmitt's work is "highly significant and instructive today."<sup>279</sup> Dyzenhaus claims that "the judicial record largely supports Schmitt's claims" that "a formal or wholly procedural conception of the rule of law is appropriate for emergencies."<sup>280</sup> On their accounts, contemporary liberal-democratic regimes are acting in 'Schmittian' ways, removing questions of legality from emergency politics. On the other hand, Gross and Dyzenhaus reject what they read as the normative implications of Schmitt's work. Gross criticizes the normative aspects of Schmitt's theory calling them "indefensible."<sup>281</sup> Dyzenhaus reads Schmitt's work as a challenging the idea the rule of law has any place in emergency politics.<sup>282</sup> Schmitt's work can be considered accurate in this sense only if one accepts a narrow reading of Schmitt's work, precisely the reading I argued against in chapter two of this thesis. I argue that both authors misread Schmitt because the prescriptive models of emergency powers they develop are not incompatible with the reading of Schmitt I put forth in chapter two. I will demonstrate in sections two and three of this chapter that both models remain within the problematic of the exception

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<sup>279</sup> Gross, 'The Normless and 'Exceptionless Exception'', p. 1827-1828

<sup>280</sup> Dyzenhaus, *Law in Times of Crisis*, p. 35

<sup>281</sup> Gross, 'The Normless and 'Exceptionless Exception'', p. 1828

<sup>282</sup> Dyzenhaus, *Constitution of Law*, p. 34

and they do not go far enough in diminishing the role of the norm/exception binary in emergency politics.

Gross's main objection to Schmitt's work, as he reads it, is that Schmitt displaces the norm in favor of the exception. He does this to such an extent that all politics and indeed all human activity must become focused on exceptional situations.<sup>283</sup> By arguing that the sovereign should have unlimited powers to decide that an exception exists as well as unlimited powers to respond to an exception Schmitt creates an "exceptionless exception."<sup>284</sup> The exception is exceptionless because of the presence of the "recognition of a sovereign extra-constitutional authority that stands outside, indeed above, the constitution and the legal order."<sup>285</sup> Any decision the sovereign makes is automatically considered legitimate because the normal means of assessing legitimacy have been suspended. Thus, the sovereign is able to use exceptional powers even under 'normal' conditions.<sup>286</sup> Additionally, just the possibility that an exception may be declared is enough to remove any notion of normality from Schmitt's work.

Gross further contends that extra-legality cannot even factor into Schmitt's thinking. Whatever the sovereign does is legitimate because the legal system ultimately rests on the decision of the sovereign.<sup>287</sup> Accountability for actions taken while the legal system is suspended is impossible. If everything the sovereign does is by definition legal then the sovereign is free to abuse emergency powers with no accountability.

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<sup>283</sup> Gross, *Law in Times of Crisis*, p. 163

<sup>284</sup> Gross, 'Exceptionless Exception', p. 1829

<sup>285</sup> Gross, *Law in Times of Crisis*, p. 169

<sup>286</sup> Gross, *Law in Times of Crisis*, p. 166

<sup>287</sup> Gross, *Law in Times of Crisis*, p. 169

This is a misreading of Schmitt by Gross. Schmitt maintained that the exception was not a permanent state of affairs. While the possibility of an emergency or exception exists it had not done away with the normal situation entirely. As I argued in chapter two, it would be incorrect to conflate the political with the exception in Schmitt's work. The realm of the political, on my reading of Schmitt, is a sliding scale between benign neglect between opposing groups to all out war. On my reading of Schmitt the sovereign certainly could not be accused of being "paranoid" about the presence of exceptional situations.<sup>288</sup> Sovereign power is not continuously focusing on exceptional situations or exceptional powers.

Furthermore, as I argued in chapter two, the sovereign as a decision-making agency and the decision on the exception are always subject to political contestation. The mere presence of a sovereign, extra-constitutional authority does not mean that they are necessarily endowed with unlimited exceptional powers. Gross reads Schmitt's sovereign as a single individual. As I demonstrated in chapter two sovereign power should be read in Schmitt's work as a contested decision-making agency which can be an individual but can also be a political party or any political group. Finally, the recognition of extra-legal political authority is essential to democracy. The people must be understood as sovereign, though they may not always have the capacity to act as such.

Dyzenhaus' primary critique of Schmitt is that he allows for an extra-legal space of sovereign power and decision-making. Dyzenhaus' objects to Schmitt's claim that the "space beyond law [is] a space which is revealed when law recedes

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<sup>288</sup> Gross, *Law in Times of Crisis*, p. 165

leaving the legally unconstrained state, represented by the sovereign, to act.”<sup>289</sup>

Dyzenhaus continues, “nearly all liberal legal theorists find the idea of a space beyond law antithetical, even if they suppose that law can be used to produce a legal void.”<sup>290</sup> Dyzenhaus objects not to legally uncontrolled spaces but rather a space beyond legal order as a whole. As will be discussed below, Dyzenhaus is less critical of what he calls legal black holes, legal voids produced by law ‘within’ legal order. As argued in chapter two this space beyond law is necessary for democratic governance and legitimacy. It is a constitutive element of any liberal-democratic regime which allows the sovereign people to make reflective decisions and judgments on legal order as a whole.

The core problem posed by a space beyond law, Dyzenhaus argues, is that it places emergency measures outside of any legal regulation. Dyzenhaus reads Schmitt’s work on the exception as arguing that once an exception is declared the rule of law must no longer apply. He reads this claim as Schmitt’s challenge “that the rule of law has no place in an emergency.”<sup>291</sup> The lack of any legal order leaves a sovereign agent free to wield unlimited power when confronting an exception.<sup>292</sup> Dyzenhaus accuses Schmitt of making an unsupportable logical leap between normal and exceptional legal order; “it does not follow from the fact that a problem is ungovernable by rules, that is by highly determinate legal norms, that it necessarily takes place in a legal void.”<sup>293</sup> As I argued in chapter two, Schmitt’s work can be read in a way that does necessarily support such a stark contrast between legal

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<sup>289</sup> Dyzenhaus, *Constitution of Law*, p. 39

<sup>290</sup> Dyzenhaus, *Constitution of Law*, p. 39

<sup>291</sup> Dyzenhaus, *Constitution of Law*, p. 34

<sup>292</sup> Dyzenhaus, ‘Permanence of the Temporary’, p. 22

<sup>293</sup> Dyzenhaus, *Constitution of Law*, p. 61

regulation and legal voids. Schmitt did argue that declaring an exception granted a sovereign agent unlimited power but in the larger context of his work this can be seen as an overstatement. Even without any specific legal regulation sovereign decisions and sovereign actions are subject to political contestation which can function as a form of constraint.

Dyzenhaus argues that for Schmitt the distinction between ‘normal’ legal order and an exceptional space beyond law resides at the level of the ontological. He argues the Schmitt covers over a political decision by assuming an ontology. The distinction between normal times when it is possible for law to function and exceptional times when it is impossible for law to apply has a “foundational status” for Schmitt’s theory of the exception.<sup>294</sup> This is because, as Schmitt puts it, “there exists no norm that is applicable to chaos.”<sup>295</sup> This is one way to read Schmitt but such a reading seriously downplays Schmitt’s claim that the sovereign ‘decides on the exception.’ Dyzenhaus seeks to displace this assumption, as he reads it, by showing that whether or not law applies during an exception is the result of a “genuine” political choice which Schmitt conceals.<sup>296</sup> However Dyzenhaus incorrectly reads Schmitt to be asserting that just because a demarcation *can* be made that it *must* be made. A ‘genuine political choice’ is not excluded by Schmitt’s work. Dyzenhaus agrees that it is for the government, or sovereign, to decide that an emergency exists and the government must also decide whether or not the rule of law should apply. As I demonstrated in chapter two, Schmitt’s theory of emergency powers posits the moment of decision as more important than any characteristics of

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<sup>294</sup> Dyzenhaus, *Constitution of Law*, p. 213

<sup>295</sup> Schmitt, ‘, p. 13

<sup>296</sup> Dyzenhaus, *Intimations of Legality Amid the Clash of Arms*, p. 249

situation deemed exceptional. The relationship between normality and exceptionality is political, not ontological.

Dyzenhaus' position is not contradiction with the reading of Schmitt I advanced in chapter two. Schmitt's work displays a tension between his argument that law necessarily recedes during an exception and his claim that the sovereign decides both that there is an exception as well as what must be done to counter it. I argue that it is more productive to focus on the moment of decision on an exception because the decision is always subject to contestation. Without the moment of decision there can be no exceptions. Schmitt's work emphasizes the role of the decisions regarding exceptions. Nor does it ontologize the distinction between normality and exceptionality. As I argued in chapter two that decision is always subject to political contestation.

The scope of the validity of Schmitt's is wider than Dyzenhaus or Gross allows. Reading Schmitt against himself opens conceptual space for an analysis of emergency politics which is more productive than a narrow reading which pigeon holes Schmitt only as a fascist theorist of unlimited sovereign power. A wider reading opens conceptual and theoretical space to move beyond the norm/exception binary. Neither Gross nor Dyzenhaus makes an attempt to disentangle that binary from the theorization of emergency politics. On the contrary, their prescriptive models of emergency measures embed it even further.

### **Prescriptive Models of Legality in Emergency Politics**

#### *Gross – Extra-Legal Measures Model*

Gross's critique of Schmitt notwithstanding he develops a prescriptive model of emergency powers which attempts to mitigate the effects of the exception

becoming the norm. On his account it is impossible to prevent emergency measures of any sort from seeping into the normal legal system. However, instead of moving beyond the norm/exception binary he argues that they should be more strictly separated. The best solution according to Gross is to force state officials to break the law when they feel it is absolutely necessary to respond to an emergency. Rather than rely on emergency legislation or constitutional provisions which grant extraordinary powers to an executive his 'Extra-Legal Measures' (ELM) model eliminates any extraordinary powers in favor of a process of ex post facto ratification of illegal acts by state officials.

Gross contends that most scholarly work on emergency politics is underpinned by an "*assumption of separation*" between normal and emergency times.<sup>297</sup> However, such "bright line distinctions between normalcy and emergency are frequently untenable."<sup>298</sup> He presents a wealth of convincing empirical evidence that the distinction between norm and exception has not been maintained empirically in a variety of areas such as: temporal – emergency times are not short and followed by a return to normal times, spatial – emergencies cannot be contained within demarcated zones such as Northern Ireland or French Algeria, domestic and international emergencies tend to blend together, national security does not and cannot remain a separate sphere of legislative and executive policy making and application, and finally communal – emergencies cannot be applied to certain populations within a society and not others.<sup>299</sup> The empirical record tends to support Gross' claim. Sooner or later any emergency measure will tend to become 'normalized'. It will seep into the regular legal system and become a base line for

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<sup>297</sup> Gross, *Law in Times of Crisis*, p. 171, emphasis in original

<sup>298</sup> Gross, *Law in Times of Crisis*, p. 171.

<sup>299</sup> Gross, *Law in Times of Crisis*, p. 174-227

further emergency measures. Over time constitutional principles such as individual liberty will be eroded.

Gross is also very critical of the enactment of emergency legislation as a response to declared emergencies. He contends that while the legal order should not be suspended or altered in the face of an emergency, special emergency legislation should not be enacted to resolve the crisis. He argues: “In the haste to defend the state, governmental authorities may be all too willing to forego safeguards against abuse of power... All too frequently they may over-react against the terrorist threat.”<sup>300</sup> During an emergency or in the direct aftermath of one is not a time for rational deliberation which protects core constitutional principles such as individual liberty and limited government. Furthermore, emergency legislation that is originally intended to be temporary has a tendency to remain on the books. Gross contends that finding emergency laws that outlasted their original intentions to be “commonplace.”<sup>301</sup> Emergency measures seep into the ordinary legal system over time. To avoid this problem the best strategy is not to enact them in the first place. Emergency legislation, according to Gross, should be avoided in the same way and for the same reasons that other emergency alterations such as suspension of legal order and ex ante emergency provisions should be avoided. In order to protect a legal order and a constitution both must be kept as separate from emergency measures as possible.

I agree with Gross that we cannot and should not rely on an “assumption of separation” between normal and exceptional times. Nor should we assume that emergency measures can be kept separate or distinct from ‘normal’ legal order.

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<sup>300</sup> Gross, ‘Cutting Down Trees’, p. 43

<sup>301</sup> Gross, ‘What ‘Emergency Regime?’’, p. 79

However, I strongly disagree with Gross's assertion that this lack of separation forces us to concede that "the exception has merged with the rule..."<sup>302</sup> Empirically it may be the case that emergency measures are fast becoming ordinary tactics of governance. But that does not mean that the trend must continue. Nor does it mean that, conceptually speaking, the exception has replaced the norm. Even while decrying the empirical record, Gross relies on the conceptual distinction between norm and emergency. His ELM model seeks to uphold it by removing any forms of emergency powers in practice, legal or otherwise. This is particularly evident in his work on the arguments for and against the use of torture to prevent crises.

Despite arguing that the exception has become the norm, Gross relies on the distinction when justifying the use of torture. In his work on torture Gross argues that a categorical prohibition on the use of torture is "compelling".<sup>303</sup> However, in a 'catastrophic case' state officials may violate the ban on torture so long as it is "preventative interrogational torture", which is aimed at gaining information that will save innocent lives.<sup>304</sup> 'Catastrophic cases' are described by Gross as being "truly exceptional".<sup>305</sup> The example Gross gives of a 'catastrophic case' is the familiar ticking time bomb scenario. Furthermore, Gross claims, "In the catastrophic case, when the underlying normal state of affairs is fundamentally interrupted, the relevant legal norm may no longer be applicable as is and cannot fulfill its ordinary regulatory function. 'For a legal order to make sense, a normal situation must exist.'"<sup>306</sup> In this quote not only is Gross relying on the dichotomous distinction

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<sup>302</sup> Gross, *Law in Times of Crisis*, p. 171

<sup>303</sup> Gross, 'Are Torture Warrants Warranted?', p. 1491

<sup>304</sup> Gross, 'The Prohibition on Torture', p. 232, emphasis in original

<sup>305</sup> Gross, 'The Prohibition on Torture', p. 231

<sup>306</sup> Gross, 'The Prohibition on Torture', p. 239, citing Schmitt, *Political Theology*, 2005

between norm and exception he refutes elsewhere but he directly quotes Schmitt, whose work he is trying to overcome. Gross cannot have it both ways. Either the separation between norm and exception is untenable or it is possible to distinguish ‘normality’ the ‘catastrophic case’ which justifies disobedience from the rule of law. Gross undermines his own project by relying on the notion of ‘truly exceptional’ ‘catastrophic cases’. The norm/exception dichotomy sits ambiguously in Gross’ work. He still attempts to define and utilize it, relying on Schmitt in the process, while at the same time attempting but not succeeding in minimizing its effects.

Gross argues that liberal democratic regimes can respond to violent crisis while maintaining a strong commitment to the rule of law. He develops what he calls the ‘Extra-Legal Measures’ (ELM) model of emergency powers to elaborate this argument. ELM is a response to his reading of Schmitt as well as two other categories of emergency regimes, the ‘business-as-usual’ and ‘accommodation’ models.<sup>307</sup> In ‘business-as-usual’ type regimes the state makes no changes to the application of the rule of law after it declares a state of emergency. Neither the constitution nor any specific statutes may be suspended or altered. It is assumed that ordinary criminal law covers all the actions terrorists take hence there is no need to suspend existing laws or to introduce new emergency legislation. In accommodation type regimes the rule of law is bent, manipulated and/or suspended in order to respond to the particular exigencies presented by declared emergencies.<sup>308</sup> Ordinary law is deemed inadequate hence adjustments must be made so that the state and its officials may fully and adequately respond to emergencies. Gross finds fault with both of these types of emergency regimes. Neither type adequately responds to

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<sup>307</sup> Oren Gross, *Law in Times of Crisis*, Chapters 1-2

<sup>308</sup> Oren Gross, ‘Chaos and Rules’, p. 1097

emergency situations. The ‘Business-as-usual’ model fails because ‘ordinary’ laws and law enforcement mechanisms are not strong enough to withstand the threat posed by ‘catastrophic cases’. Accommodation type regimes fail because they allow emergency measures to seep into the normal, ordinary functioning of liberal-democratic governance.

The ELM model relies on the notion that normal and emergency times cannot be definitively separated in advance or in practice. The ELM model is designed to keep the normal legal system as separate and distinct from emergency measures as possible. It attempts to enforce the distinction by forcing state officials to break the law when they feel it necessary. It then asks society to determine, *ex post facto*, whether or not a crisis was dire enough to warrant official disobedience to entrenched legal and constitutional rules. Gross acknowledges that his work relies on the norm/exception dichotomy even while he tries to minimize its effects.<sup>309</sup> Gross contends that emergency legislation and measures have a tendency to seep into the normal legal system thereby contaminating it and normalizing emergency government to the detriment of fundamental principles of liberal democratic government. “Emergency regimes tend to perpetuate themselves” he argues.<sup>310</sup> For Gross the best way to protect the legal system is to ensure that it is never suspended or altered in response to an emergency. However the ELM model is not a workable response to Schmitt’s problematic of the exception, or a better alternative to Dyzenhaus’ ‘Legality model’, or the models of accommodation and business-as-usual. The ELM model is internally flawed and does not overcome the problematic of the exception set forth by Schmitt.

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<sup>309</sup> Gross, ‘Chaos and Rules’, p. 1133

<sup>310</sup> Gross, ‘What “Emergency” Regime?’, p. 75

What makes the ELM model different and superior, Gross claims, is that it does not allow for any extra-constitutional sovereign authority.<sup>311</sup> There exists no possibility for state officials to legitimately suspend or violate legal order. All official disobedience must be understood as “a violation of the relevant legal rule.”<sup>312</sup> He claims that this leaves open the possibility for accountability and punishment for disobedience that Schmitt’s theory does not. The problem with this view is that it is anti-democratic. Extra-legal, sovereign authority is necessary as it is what legitimizes the legal order.

When Gross argues that Schmitt’s theory is dangerous because it allows for sovereign, extra-constitutional authority, he supports a version of Kelsen’s identity thesis in which the law and the state are one and the same. Elsewhere he approvingly cites Roberto Unger’s notion that “the rule of law [is] ‘the soul of the modern state.’”<sup>313</sup> Gross never goes into detail regarding this position. He brushes past this issue which is of central concern for questions regarding emergency politics. It makes his reliance on the analytical elements of Schmitt’s theory for the ELM model all the more confusing. If certain norms cannot apply to catastrophic or exceptional cases and state officials are unlimited in their actions when responding to those situations and the process of ex post ratification ‘legalizes the illegality’ of extra-legal actions how can Gross maintain that there is no power outside of the rule of law. Ex post ratification would seem to grant the façade of legality to actions that would fall outside the scope of the rule of law simply because it was decided that no norm could apply to the situation that necessitated extra-legal action in the first place. Extra-legal power is necessary for processes of ex post ratification to have any

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<sup>311</sup> Gross, *Law in Times of Crisis*, p. 170

<sup>312</sup> Gross, *Law in Times of Crisis*, p. 170

<sup>313</sup> Gross, ‘Stability and Flexibility’, p. 90

legitimacy. Certainly the possibility of ex post punishment exists but as discussed below it has never provided any substantive limit to the actions of state officials.

The ELM is also an attempt to overcome what Gross understands as the tragic aspects of emergencies. He writes: “Democratic nations faced with serious threats must maintain and protect life and the liberties necessary to a vibrant democracy. Yet, emergencies challenge the most fundamental concepts of constitutional democracy.”<sup>314</sup> This tragic tension is resolvable according to Gross. His ELM model attempts to resolve the tension between the two “antithetical vectors” of limited government and *raison d’état*.<sup>315</sup> This tension is resolved, paradoxically, by forcing state officials to violate the laws and constitutional principles they are attempting to save. Here Gross seems to be relying on an objective conception of what constitutes an ‘emergency’. This is misguided because, as argued in chapter two, emergencies are decided upon by political agents acting as sovereign powers. Gross’s assumption that emergencies always pose existential threats is blind to the political and contested nature of decisions on states of emergency.

Positing unchallengeable assumptions in emergency politics is a way to remove certain aspects of the discourse from debate. This move should always be resisted given the highly contested nature of emergency politics. Yet, the ELM model presupposes that everyone can agree on three points: “(1) that emergencies call for extraordinary governmental responses, (2) constitutional arguments have not greatly constrained any government faced with the need to respond to such emergencies, and (3) there is a strong probability that measures used by the

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<sup>314</sup> Gross, ‘Chaos and Rules’, p. 1096

<sup>315</sup> Gross, ‘Cutting Down Trees’, p. 41

government in emergencies will eventually seep into the legal system even after the crisis has ended.”<sup>316</sup> Gross contends that these three assumptions taken together validate the notion that there may be situations in which it will be necessary to violate the legal order as well as “accepted constitutional principles” so that a state can defend its citizens as well as core constitutional principles.<sup>317</sup> These assumptions are based on Gross’ empirical and comparative analysis of actually existing emergency regimes. While the empirical record may confirm that the second and the third assumptions are generally true, that does not provide sufficient grounds for drawing unalterable rules based on them. The first assumption is highly problematic because, as Gross points out, “it is not at all clear that even if a working definition of ‘emergency’ could be formulated, it would stand the test of actual exigencies.”<sup>318</sup> If ‘emergencies’ are virtually impossible to define it becomes unclear how it is that they necessitate extraordinary responses from the state.

Gross elaborates his model via a ‘ticking time bomb’ scenario in which a terrorist attack is imminent but may be prevented because the authorities have a suspected terrorist in custody who can reveal the location and nature of the attack. In order to extract the relevant information it will be necessary to torture the suspected terrorist. The ‘ticking time bomb’ scenario is a problematic starting point for real world emergency politics. It is a trite construction which has never actually occurred. Honig points out that the ticking time bomb scenario, aside from being unrealistic, presents the dilemmas of emergency politics as a stark choice between two untenable

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<sup>316</sup> Gross, ‘Chaos and Rules’, p. 1097

<sup>317</sup> Gross, ‘Chaos and Rules’, p. 1097

<sup>318</sup> Gross, ‘Providing for the Unexpected’, p. 8

options.<sup>319</sup> Real world politics never presents such oppositions. Furthermore, the notion of a ticking time bomb is used to cut short debate on how a government acts or if it should act at all. The time bomb scenario posits a situation in which governments have no choice, they must act. However, governments always have a choice, even the declaration of an emergency is a choice and a decision. Deliberation of whether or not to act should not be excluded from emergency politics.

The ELM is based on “three essential components: official disobedience, disclosure and *ex post* ratification.”<sup>320</sup> These three conceptual components of the model operate on the rule of law which Gross understands as categorical rules and norms which state officials must obey in all normal circumstances. These categorical rules and norms are supplemented with “highly circumscribed, but effective, escape mechanisms.”<sup>321</sup> According to the ELM if a state official feels it necessary to violate a law or constitutional principle in order to effectively respond to a violent threat to the nation she may do so. When she acts the state official is acting extra-legally without any prior sanctioning of her actions. After the actions are complete she must openly acknowledge her actions and wait for *ex post* ratification or rejection of her actions. Rejection of her actions may involve a range of consequences from full criminal prosecution to social and moral condemnation entailing no official punishment. Society may determine that the official acted justly and does not deserve any form of punishment or even that she deserves a reward of some kind.

The first conceptual component of the ELM model is official disobedience. The ELM model does not allow for any alteration to a legal order so that an

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<sup>319</sup> Honig, *Emergency Politics*, p. 5

<sup>320</sup> Gross, ‘Stability and Flexibility’, p. 92

<sup>321</sup> Gross, ‘Chaos and Rules’, p. 1097

emergency may be resolved. No measures, statutes or constitutional provisions or principles may be suspended or manipulated in any way that would give state officials more discretion when dealing with an emergency. Gross states forcefully that, “[t]he model rejects the possibility of ex ante lawful override of concrete legal rule and principles or, indeed of rule obedience itself...”<sup>322</sup> State officials, like everyone else in society, should obey all laws at all times even if they happen to disagree with a specific statute.<sup>323</sup> However, the ELM also acknowledges and expects that there will be times of crisis when state officials “regard strict obedience to legal authority as irrational or immoral.”<sup>324</sup> These are situations in which following the strict letter of the law would lead to consequences which are far worse than the violation of a specific statute or constitutional principle.

According to Gross, the “ticking time-bomb” scenario is a clear example of such a situation in which through violating a law against torture a state official is able to obtain information that will allow for the diffusing of the bomb and saving of hundreds if not thousands of lives. In that situation, Gross contends it would be immoral and irrational to obey the legal command against torture. The moral good of saving innocent lives outweighs the moral evil of violating the ban on torture. Because the ELM does not allow for ex ante suspension of the rule of law, in all cases in which a state official violates a law in the name of a higher moral good that official will be, in no uncertain terms, breaking the law. Gross stresses forcefully that “[r]ule departure constitutes, under all circumstances and all conditions, a violation

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<sup>322</sup> Gross, *Law in Times of Crisis*, p. 136

<sup>323</sup> Gross, *Law in Times of Crisis*, p. 134

<sup>324</sup> Gross, *Law in Times of Crisis*, p. 134

of the relevant legal rule.”<sup>325</sup> Gross always refers to these types of actions by state officials as ‘extra-legal’, never illegal. This terminological quirk does not diminish the fact that the ELM forces state officials to commit acts which should be considered criminal and subject to punishment. Whether the official will be considered a criminal and punished accordingly depends entirely upon the process of ex post ratification, discussed below.

The ELM model does not pose any limits on the type or scope of actions a state official may take when acting extra-legally. Once they break the law they can do whatever they feel is necessary, so long as they openly acknowledge what they did and ask for ratification after the fact. This means that “Extra-legal power can only mean an unlimited power, constrained neither by any legal norms nor by principles and rules of the constitutional order.”<sup>326</sup> Gross rejects even basic restrictions on extra-legal state violence. Instead, he hopes that state officials will embody Max Weber’s ‘ethic of political responsibility.’<sup>327</sup> These officials recognize that politics is a vocation which may force them to violate the laws and principles they wish to save. Because they adhere to an ethic of political responsibility, Gross claims, they will be extremely cautious when violating those laws and principles. Ethical politicians would be less likely to abuse extra-legal activity, thus removing the need for ex ante limits on extra legal action to respond to an emergency. Gross also relies on the processes of public disclosure and ex post ratification to prevent state officials from committing truly heinous acts or from moving the state toward dictatorship and tyranny, to which we now turn.

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<sup>325</sup> Gross, *Law in Times of Crisis*, p. 136

<sup>326</sup> Gross, *Law in Times of Crisis*, p. 143

<sup>327</sup> Gross, ‘Extra-Legality and the Ethic of Political Responsibility’, p. 132-133

Official disobedience forces individual state officials to make their own determinations as to whether or not a state of emergency exists. It privatizes the decision on the exception, in a sense, suspending contestation over the decision until after the official has already acted. Gross essentially turns all state officials or any individual acting extra-legally into a sovereign political actor. The problem with this move is that he removes the element of political contestation which can be found in the problematic of the exception. Political contestation over extra-legal actions is necessary because it can help prevent abuse of emergency powers and also provide some measure of accountability for state officials, even if the accountability is politically determined.

The ELM re-introduces a reduced form of political contestation only after the official has acted extra-legally. It demands that those state officials who take extra-legal actions publicly and candidly disclose those actions. Gross states: “public officials who act extra-legally in extreme cases need to acknowledge openly the nature of their actions and attempt to justify both their actions and their undertaking of those actions.”<sup>328</sup> This public disclosure of extra-legal actions is “a critical ingredient of the ELM model.”<sup>329</sup> He argues that it is in the best interests of a state official who acted extra-legally to admit their actions and seek ex post ratification from society at large. Gross uses a romantic image of an official “boldly” acknowledging their actions, giving reasons for their violation of the law and selflessly throwing themselves “on the justice of [their] country.”<sup>330</sup> In the immediate aftermath of a national emergency society at large will be more likely to justify any

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<sup>328</sup> Gross, ‘Extra-Legality and the Ethic of Political Responsibility’, p. 81-82

<sup>329</sup> Gross, ‘Chaos and Rules’, p. 1123

<sup>330</sup> Gross, *Law in Times of Crisis*, citing Wilmerding and Lobel, p. 127

actions that normally would have been judged solely as criminal.<sup>331</sup> Additionally, the extra-legal nature of the actions themselves would push a state official towards disclosure. Presumably the official would be scared that if they did not admit their actions but the actions were exposed at a later time society would be less likely to ratify them.

However, while Gross claims that disclosure is essential he never explains how state officials could ever be compelled to do it. The ELM model contains no institutional guarantee that officials would have to disclose their extra-legal actions. Rather than admit what they did state officials may find it in their best interests to cover up their actions behind state secrecy. Thompson notes that in the United States “almost 10,000 new secrets a day” are created and that “a massive ‘culture of secrecy’ has spread with little oversight throughout the government.”<sup>332</sup> Sagar claims that any disclosure of official conduct is ironically flawed because the public must rely on the “faithfulness of officials” for their information.<sup>333</sup> And there is a good chance that officials will attempt to justify their actions based on suppressed evidence which cannot be revealed for national security reasons. Finally Weaver and Pallito argue that in the US the state secrecy privilege has been used to cover up a variety of criminal acts by state officials. These include illegal surveillance of telephone conversations, money laundering by the Central Intelligence Agency and evidence in the Iran/Contra scandal which led to the case against the key defendant being dropped.<sup>334</sup> These three brief examples directly challenge Gross’ claim that officials will, of their own accord, disclose their extra-legal actions. Gross does not

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<sup>331</sup> Gross, ‘Extra-Legality and the Ethic of Political Responsibility’, p. 83

<sup>332</sup> Thompson, ‘Democratic Secrecy’, p. 181

<sup>333</sup> Sagar, ‘Combating the Abuse of State Secrecy’, p. 408

<sup>334</sup> Weaver and Pallito, ‘State Secrets and Executive Power’, p. 90-91

give any current examples of state officials disclosing their actions immediately after committing them. He describes Cicero's actions during the Catiline conspiracy but, as noted in chapter one, using Roman history for contemporary theory is fraught with difficulty.<sup>335</sup> Without a guarantee that state officials will be forced to disclose the full nature of extra-legal actions this conceptual component of Gross' ELM is impractical. Sometimes information and evidence is brought to light, either through investigative journalism, whistleblowers, or declassification of secret documents. When and if information becomes available a process of ex post ratification can take place. Unfortunately, the damage of the extra-legal action will already have been done.

Ex post ratification of extra-legal action is the third and final conceptual component of the ELM model. It is a process of public debate, deliberation and judgment. After a state official has committed and disclosed their extra-legal actions "[i]t is up to society as a whole, 'the people', to decide how to respond *ex post* to extra-legal actions taken by government officials in response to extreme exigencies."<sup>336</sup> Furthermore, in the process of public deliberation the entire society becomes "morally and politically responsible for the decision" of whether or not to punish the state official for their extra-legal actions.<sup>337</sup> Involving all of society is a means of reaffirming the laws and constitutional principles which were violated. Gross hopes that through a variety of information technologies a great number of citizens would be able to participate in the deliberation. Certainly some would have more influence than others but everyone, in their own way, should have their voice heard. Presumably, this would be a highly politicized process. In that case, it makes

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<sup>335</sup> Gross, *Law in Times of Crisis*, p. 147-149

<sup>336</sup> Gross, 'Extra-Legality and the Ethic of Political Responsibility', p. 64

<sup>337</sup> Gross, 'Extra-Legality and the Ethic of Political Responsibility', p. 67

no sense to leave such political contestation until after the extra-legal acts have been committed.

The final outcome of the deliberation can take many forms. The official could be praised for their actions and willingness to do what was necessary to protect the nation as a whole. Alternatively they may be put on trial and if found guilty face full legal punishment. Gross notes two main categories of ratification or rejection. One is legal; the other is political and social.<sup>338</sup> Legal forms of ratification include discretion on the part of prosecutors who could decide not to bring charges against the state official, executive clemency, or an Act of Indemnity by parliament which would either shelter the official from legal punishment or legalize the illegal act committed by the official.<sup>339</sup> Political and social ratification can take a variety of forms. The offending official could be awarded a medal for their conduct. Alternatively they could be ostracized by society for violating fundamental principles of the society. Gross cites the case of British Air Marshal Arthur Harris as an example of political and social ostracizing of an offending official. Harris was responsible for the saturation bombing of Germany during WW2. While his actions were deemed necessary they were also seen as morally reprehensible and hence not to be celebrated.<sup>340</sup>

Gross claims that the process of ex post deliberation and ratification or rejection of an official's action poses significant limitations on the potential abuse of extra-legality. So much so that officials may even be over-encumbered by the burden. The process of ex post deliberation curtails abuse of extra-legality because

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<sup>338</sup> Gross, 'Extra-Legality and the Ethic of Political Responsibility', p. 65-66

<sup>339</sup> Gross, 'Stability and Flexibility', p. 98-99

<sup>340</sup> Gross, *Law in Times of Crisis*, p. 139

the ratification it can bestow on an official is ‘prospective and uncertain.’ Ensuring that possible “ratification follows rather than precedes, [extra-legal] action,” the ELM “raises both the individual and national costs of pursuing an extra-legal course of action...”<sup>341</sup> Gross presumes that officials will be so worried about not their actions not being ratified that they will be far less likely to resort to extra-legal action in the first place. And if they feel they must they will use the minimum amount possible, thereby minimizing the severity of any future punishments, be they legal, social or political. However, without a guarantee that officials will publicly disclose their actions the process of ex post ratification rings hollow.

Additionally, A.V. Dicey, who Gross draws on for his model of prospective and uncertain ex post ratification, notes that empirically speaking, “the expectation... that parliament will pass an Act of Indemnity ‘has not been disappointed.’”<sup>342</sup> Even so ex post ratification poses significant limitations on state officials, Gross claims. Officials will be uncertain as to the scope of the indemnification or ratification of their actions. Perhaps they will be spared criminal prosecution but not civil suits. Or perhaps their own nation will not prosecute them but international courts might.<sup>343</sup> The point of ex post ratification is to generate uncertainty on the part of the state official before they act. Even if their actions are usually excused Gross hopes that the uncertainty of ex post ratification will be enough to limit the use and abuse of extra-legal action.

The ELM model does not fully move beyond Schmitt’s problematic of the exception. It removes any form of democratic, political contestation from sovereign

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<sup>341</sup> Gross, *Law in Times of Crisis*, p. 147

<sup>342</sup> Gross, ‘Stability and Flexibility’, p. 102

<sup>343</sup> Gross, *Law in Times of Crisis*, p. 152

decisions regarding the declaration of an emergency or what should be done in response to it. Gross believes that officials can be trusted to act as moral individual sovereigns. This individual responsibility is further complicated by the fact that Gross grants state officials unlimited power when acting extra-legally. This renders extra-legal action very close to the reading of Schmitt's sovereign that Gross is trying to argue against.

The most profound flaw with the ELM is its lack of democratic contestation over sovereign decision-making. Gross's model places sovereign decision-making in the hands of individuals even more than Schmitt's theory. Sovereign, extra-legal constituent power is a fundamental aspect of liberal-democratic regimes. As such it should not be removed from the process of deciding whether or not a state of emergency should be declared. Relying on state officials to act without democratic oversight is just as harmful to democratic governance as the enactment of emergency laws which have a tendency to become normalized. In both cases the 'normal' legal order, as Gross understands it, is violated by an uncontested political decision that law has no place in an emergency.

#### *Dyzenhaus – The Legality Model*

Dyzenhaus argues that a substantive conception of the rule of law can help prevent attempts by the executive and legislature to govern outside of law via the creation of spaces in which the rule of law does not apply. For Dyzenhaus these legal voids come in to two forms: grey holes and black holes.<sup>344</sup> A black hole is a legally produced void which explicitly excludes the rule of law. In a grey hole the rule of law is also absent however a thin façade of legality has been put in place. In a grey

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<sup>344</sup> Dyzenhaus, *Constitution of Law*, p. 3

hole it appears as though the state is acting legally even though substantive legal protections are not in place.<sup>345</sup> Since Dyzenhaus acknowledges that the rule of law is a genuine choice during an emergency he does not argue that grey or black holes cannot be created. He even goes so far as to argue that “it is quite consistent with such an aspirational conception [of the rule of law] to hold that there can be a zone of illegality, a space where arbitrary power and not law rules.”<sup>346</sup> A zone of illegality is consistent with Dyzenhaus’ conception of the rule of law so long as whoever is attempting to create the black hole, be it the executive or the legislature, provides a rationale which is compatible with the fundamental principles of the rule of law. In a situation such as that the judiciary should defer to executive judgment.<sup>347</sup>

Dyzenhaus’ conception of the rule of law in liberal democratic regimes is highly normative, especially when the issue is whether or not to respond to emergencies with the rule of law. His understanding of the rule of law is that “the idea of legal order, government in accordance with the rule of law, is an aspirational ideal, an attempt to make law serve justice.”<sup>348</sup> The rule of law is an ongoing and always incomplete project in which all branches of government productively cooperate.<sup>349</sup> I agree with the principle behind this claim. We should understand the rule of law as always in a process of renovation. However, I disagree with Dyzenhaus that a substantive conception of law, as he understands it, can be useful for regulating attempts by state officials to wield emergency powers. I will develop this point below. Liberal democratic governments, whether they are based on a

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<sup>345</sup> Dyzenhaus, *Constitution of Law*, p. 3

<sup>346</sup> Dyzenhaus, *Constitution of Law*, p. 3p. 207

<sup>347</sup> Dyzenhaus, *Constitution of Law*, p. 3p. 209

<sup>348</sup> Dyzenhaus, *Constitution of Law*, p. 3p. 8

<sup>349</sup> Dyzenhaus, *Constitution of Law*, p. 3p. 3

written constitution or not, should always attempt to ensure that all state action is regulated by law. Whether or not governments will always govern through law is another matter.

The “Legality model... insists that the values of the rule of law are not to be compromised. It also preserves the separation between the exceptional and the normal. It holds that to the extent that political power can be successfully subjected to the discipline of the rule of law, it should be.”<sup>350</sup> These ideas “function not as an assumption but as an ideal; at most... a regulative assumption... one adopts for political reasons.”<sup>351</sup> The idea that state power should be subject to the rule of law is certainly worth considering but it may be the case that Dyzenhaus’ account is too prescriptive. Indeed he states that the empirical record largely supports Schmitt’s theory rather than his own. While Dyzenhaus’ theory cannot be discounted purely because reality has not lived up to its ideal there are serious theoretical points which need to be addressed.

The Legality model is based on the normative assumption that “a substantive conception of the rule of law that is appropriate at all times.”<sup>352</sup> Whether or not a state acts in accordance with the rule of law is a matter of politics. However, there are no situations in which the rule of law is not or should not be able to function. This is true even when the texts of emergency legislation, if they exist, do not say anything specifically useful for a situation or even when the legislation is “obviously unhelpful.”<sup>353</sup> On this account, it is possible for all branches of government to respond to a time of crisis through the rule of law. This is because the rule of law

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<sup>350</sup> Dyzenhaus, ‘The State of Emergency in Legal Theory’, p. 83-84

<sup>351</sup> Dyzenhaus, ‘The State of Emergency in Legal Theory’, p. 84

<sup>352</sup> Dyzenhaus, *Constitution of Law*, p. 58

<sup>353</sup> Dyzenhaus, *Constitution of Law*, p. 8

contains fundamental principles and values which judges and other state officials can draw upon. Even if their actions do not meet the letter of the law, they can conform to those substantive principles.

Dyzenhaus' "conception of the rule of law is substantive: the rule of law is the rule of fundamental constitutional principles which protect individuals from arbitrary action by the state."<sup>354</sup> The most important of the principles are the liberty and equality of all citizens. He argues that these fundamental principles of the rule of law pose genuine constraints on "those who wield public power in a way that protects the interests of the individuals subject to those decisions."<sup>355</sup> These principles of the rule of law are more important than the legislation based on them. They form an "interpretive backdrop" for judges and officials.<sup>356</sup> In tough cases when the rule of law is under stress and the texts of law may or may not be helpful these fundamental principles act as a guide for the actions of state officials and particularly to judges if and when they are given the opportunity to assess the legality of state responses to declared emergencies.

The Legality model presents two strategies for ensuring that a government can uphold a substantive notion of the rule of law even while responding to a situation it has declared to be an emergency. They are the assumption of constitutionality and maintaining a version of Kelsen's Identity Thesis. Both strategies are prescriptive in nature. Dyzenhaus contends that "One must... hold in place the assumption that the government is bound to govern in accordance with the rule of law, what we might

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<sup>354</sup> Dyzenhaus, *Constitution of Law*, p. 2

<sup>355</sup> Dyzenhaus, *Constitution of Law*, p. 2-3

<sup>356</sup> Dyzenhaus, 'Constituting the Rule of Law', p. 500

think of as the assumption of constitutionality.”<sup>357</sup> Here Dyzenhaus is not making an ontological claim regarding the relationship between the state and law; he is arguing that we should treat the state as bound by law even though that is not necessarily the case. While this assumption appears to function positively it is unclear why officials would abide by it when it would serve to limit their actions during times when they feel that a state is facing an existential crisis.

The assumption of constitutionality is supported in Dyzenhaus work by the normative claim that “one needs to maintain Hans Kelsen’s Identity Thesis: the thesis that the state is totally constituted by law.”<sup>358</sup> Notice again that Dyzenhaus does not rest his argument on an ontological foundation. Maintaining the identity thesis is a choice which must be made by state officials. Following A.V. Dicey, Dyzenhaus further claims that “when a political entity acts outside the law, its acts can no longer be attributed to the state and so they have no authority.”<sup>359</sup> Here Dyzenhaus’ argument is both prescriptive and ontological or rather he has a preferred ontology of the relationship between the state and law but he does not claim that his vision must be true. The state *should* only be recognized as such when its actions conform to the rule of law. And here the rule of law must be understood as the rule of fundamental substantive principles of legality and not as a set of norms created by a pre-given set of procedures regardless of substantive content, as in Kelsen’s work. Authority and truth make law but if a political entity wishes to be an authority it must subject itself to the rule of law.<sup>360</sup> Dyzenhaus contends that if there

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<sup>357</sup> Dyzenhaus, *Constitution of Law*, p. 213

<sup>358</sup> Dyzenhaus, *Constitution of Law*, p. 199

<sup>359</sup> Dyzenhaus, *Constitution of Law*, p. 199

<sup>360</sup> Dyzenhaus, *Constitution of Law*, p. 12

is no authority to legitimately act outside of law the problems created by the prerogative and extra-legal power can be avoided.

Yet he also concedes that the legislature or the executive may create black holes within the rule of law and further that judges may or may not have the ability to resist the creation of such legal voids.<sup>361</sup> Dyzenhaus argues that judges are bound by a duty to uphold the rule of law project even if they are not legally capable of doing so. They should use whatever means they have at their disposal which may be as minimal as making public statements that the state is attempting to act outside of law. Judges should always treat the state as entirely constituted by law, especially when adjudicating the legality of practices during a crisis. On the one hand, Dyzenhaus accepts the ontological claim that the state and law are separate and, on the other, to argue that we must treat them as mutually constitutive of one another.

Judges play an important though by no means central role in Dyzenhaus' model. Judges have "a constitutional duty to uphold the rule of law even, perhaps especially, in the face of indications from the legislature or the executive that they are trying to withdraw from the rule-of-law project."<sup>362</sup> Dyzenhaus devotes considerable space within his *The Constitution of Legality* to studies of cases in which judges either upheld the rule of law in a time of stress or to the dissents from cases in which the rule of law was not upheld, when the possibility that it could have been taken up was not taken up. Judges however do not necessarily play the central role in the rule of law project. In common law countries where parliament is supreme and can make any law it likes and where judges may not have the ability to

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<sup>361</sup> Dyzenhaus, *Constitution of Law*, p. 200-201

<sup>362</sup> Dyzenhaus, *Constitution of Law*, p. 4

review legislation judges may be reduced to the role of “weatherman.”<sup>363</sup> As weathermen, judges are reduced to merely alerting the public that the government wishes to free itself from rule of law constraints and that their liberty may be in jeopardy. Dyzenhaus’ legality model takes a minimal stake in regulating the abuse of emergency powers. His focus on the ability of judges to simply alert the general populace that the state or state officials are governing outside of law does little to develop genuine constraints on abuse of powers.

The Legality model holds that a space beyond law should not be postulated by liberal legal theory. Indeed the Legality model is premised on the idea that a space beyond law need not and should not exist. Furthermore Dyzenhaus goes so far as to deny that constituent power is a fundamental element of liberal-democratic governance that liberal legal theory needs to address. He claims that for liberal legal theory “the question of constituent power simply does not arise.”<sup>364</sup> The political then, does not exist outside the boundaries of law as it does in Schmitt’s thought. Only those who seek to undermine the liberal rule of law postulate the existence of a space beyond law according to Dyzenhaus.<sup>365</sup> This version of liberal legal theory has a self imposed blindness to even the question of what may lie outside the boundaries of law. This blindness is not based on an ontological account of the relationship between law and what lies outside it. Dyzenhaus is making a prescriptive claim that liberal legal theory should treat law as all encompassing in order to ensure that all state actions are governed by law. As shown in chapter two such blindness is unacceptable. Decisions regarding states of emergency are made in a context of political contestation. Denial of a space of constituent power and politics betrays a

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<sup>363</sup> Dyzenhaus, *Constitution of Law*, p. 201

<sup>364</sup> Dyzenhaus, ‘The Question of Constituent Power’, p. 129-130

<sup>365</sup> Dyzenhaus, ‘The Question of Constituent Power’, p. 130

lack of democratic thinking in Dyzenhaus' approach. This is particularly problematic because the fundamental and substantive values on which Dyzenhaus' conception of the rule of law is based are 'evaluative concepts' which are equally subject to disagreement and political contestation.

It is unclear in Dyzenhaus' work how a set substantive fundamental values and principles which "are not to be compromised," can function as an 'interpretive backdrop' for judges and state officials engaged in a rule of law project.<sup>366</sup> Concepts like security, order, liberty and equality are ambiguous. As Schmitt's work makes clear such concepts are empty of content until they are decided upon during specific instances of their application. As such they are subject to political contestation. Any interpretation by a judge would be an act of politics.

By presenting certain values as fundamental principles the Legality model attempts to remove them from political contestation. In a state committed to an agonistic and radical notion of democracy these principles as well as their interpretation and application should be open to debate. The Legality model then attempts to limit political contestation. However, it cannot account for which principles are to be marked off as fundamental and which are open to legitimate contestation. It creates a conceptual opposition between using fundamental principles and values of law as a basis for ensuring order and legality during a time of declared emergency and the democratic necessity of open and legitimate contestation of those values and principles.

Dyzenhaus does not make it clear how a liberal-democratic regime can allow for these values and principles to be openly contested and at the same time serve as

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<sup>366</sup> Dyzenhaus, 'The State of Emergency in Legal Theory', p. 83

the foundation of legality and legitimate authority. When those values and principles are contested the state must make a determination as to what is considered a legitimate object of contestation. It must also determine what means of contestation are considered legitimate. Such decisions concern legal order as a whole. Thus, neither the legal order itself nor any values and principles which can be considered fundamental can serve as the entire basis for making those decisions.

Quarantining or prioritizing certain values and principles at the expense of others and political contestation would be a political act. There is no way to utilize substantive values and principles without making decisions about how far legitimate contestation can be pursued. A political decision will have to be made as to how far contestation may proceed. And further decisions will be made and remade as judges attempt to utilize those values and principles as they adjudicate state responses to times of declared crisis. It is only through the process of adjudication that those values and principles will be concretized within the legal order. Judges, in the Legality model, will partake in the politics of law whereas they are presented as bringing to light an inner morality of law. This inner morality of law can only exist in and through political contestation over its content, definition and characteristics.

The Legality model does not escape the problematic of the exception set forth by Schmitt. It acknowledges that “power may triumph over law.”<sup>367</sup> However, it excludes the possibility of theorizing how power accomplishes this by its denial of sovereign, constituent power. While the Legality model attempts to eradicate the political its influence is still present. In acknowledging that power may triumph over law Dyzenhaus is contradicting his claim that the question of constituent power is

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<sup>367</sup> Dyzenhaus, *Constitution of Law*, p. 213

one that liberal legal theory does not need to address. The political sits just outside the Legality model threatening to disrupt it at any moment. Rather than merely trying to dismiss the question of constituent power the legality model needs to confront it head on. It is anti-democratic to assume that constituent power is not a question of legal theory. The Legality model is overly liberal in its denial of the existence and influence of constituent power. Without the consent and approval derived from ‘we the people’ it is hard to see how any state can be legitimate even if it is constrained by the rule of law.

### **The Gross-Dyzenhaus Debate**

The prescriptive models elaborated by Gross and Dyzenhaus share a bias towards liberal legality at the expense of democratic participation in sovereign decision-making practices. The lack of any theorization of the ability of citizens and political groups to have an impact on emergency politics is a severe deficiency in both their theories. Focus on elites and paying only lip service to democratic participation creates problematic lack of attention to democratic theory in their work.<sup>368</sup> Dyzenhaus simply denies that liberal legal theory needs to pay any attention to the question of constituent power. However, as I argued in chapter two, constituent power is a fundamental element of liberal-democratic regimes. Furthermore, that constituent power is split and engages in political contestation over sovereign decisions. The lack of democratic theory is just as stark in Gross’s ELM model, especially since it relies so heavily on public and democratic deliberation for ex post ratification of extra-legal acts. The legitimacy of any ex post facto judgment rests in the fact that it is made by a sovereign people in whose name the act was committed.

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<sup>368</sup> T. Campbell, ‘Emergency Strategies’, p. 228

Both theorists focus on the role of elites in emergency politics, Dyzenhaus on the role of judges, Gross on state officials. They address the issue of emergency powers from a “top-down view of the law.”<sup>369</sup> Both are concerned with the actions of state officials, whether they are responding to emergencies in a spirit of legality or acting extra-legally. The effect of this perspective according to Campbell is to “diminish the importance of legal claims-making” by those affected by emergency powers.<sup>370</sup> Campbell’s point reminds Gross and Dyzenhaus that law is a double edged sword and further that ordinary citizens and social groups may play a large role in how emergency regimes are carried out in practice. Gross and Dyzenhaus’ work is not thereby invalid, but its scope is limited. Gross’s ELM model in particular especially because it depends so heavily on participation from society at large. Certainly he acknowledges and defends participation on the part of society but he does not elaborate enough the ways in which average citizens could engage with emergency regimes aside from participating in the process of ex post ratification. Campbell’s criticism also holds for Dyzenhaus’ work. Dyzenhaus is so concerned with the role of judges and legislators that he largely ignores political actors outside the state. A broader perspective could enrich both scholars work.

Both scholars do make brief remarks to the effect that institutional safeguards can never fully protect society from abuse of emergency powers by state officials. A citizenry that is on guard and ready to fight for their liberties is the best defense against the widening scope of emergency regimes. However neither scholar lends much conceptual or theoretical weight to such statements. Those comments have more polemical and rhetorical significance than anything else. Both Gross and

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<sup>369</sup> C. Campbell, Law, ‘Terror and Social Movements’, p. 174

<sup>370</sup> C. Campbell, Law, ‘Terror and Social Movements’, p. 174

Dyzenhaus “start from a conceptual framework in which only law has value that is simultaneously normative and institutional.”<sup>371</sup> As noted above, they rely on Kelsen’s Identity Thesis, that the state is entirely constituted by law. This means that both consider law as the only legitimate means for limiting the scope and potential abuses of emergency powers. They disagree merely “over how law should regulate the exercise of emergency powers...”<sup>372</sup> The idea that law may not be the only or the best means for regulating emergency regimes is excluded from their theories. Indeed, their work excludes the possibility of extra-legal political contestation over sovereign decision-making.

## **Conclusion**

Both models uphold the norm/exception binary. Gross’s reliance on his assumption that emergencies call for extraordinary government responses and his use of the notion of a catastrophic case replay the approach to emergency politics taken by theorists of dictatorship. However, his ‘Extra-Legal Measures’ model provides even less constraint on actions taken by state officials than Rossiter’s model of constitutional dictatorship. Dyzenhaus acknowledges that the distinction between normal and exceptional times is politically determined. *Unfortunately* his theory excludes any possibility of theorizing how those determinations are made or contested. In order to move past the norm/exception binary liberal legalism will have to accept the notion of sovereign, extra-legal, political power in order to theorize emergency politics in a way that opens space for democratic practices.

The prescriptive models developed by Gross and Dyzenhaus to limit emergency powers are ultimately not practical responses to Schmitt’s problematic of

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<sup>371</sup> Tushnet, ‘The political constitution of emergency powers’, p. 145

<sup>372</sup> Tushnet, ‘The political constitution of emergency powers’, p. 145

the exception. We need to move beyond their work because it inadequately theorizes the democratic aspects of emergency politics. Their works largely exclude the possibility of popular participation and contestation in sovereign decision-making processes by attempting to eliminate the possibility of any legitimate extra-legal power. Democratic contestation cannot be properly theorized without accepting the idea that there is a sphere of political contestation and sovereign decision making that takes place outside of law. Emergency politics cannot and should not be trapped within legal order.

Ironically, Dyzenhaus argues that at the end of the day the best resource for preventing the abuse of emergency powers and the slide into legal black holes is a vigilant populace.<sup>373</sup> However, his focus on substantive values underlying legality and judges as weatherman makes this possibility more difficult. As does his position that sovereign power cannot and should not exist outside of legal order. Extra-legal sovereign power is essential for democratic control over emergency powers because it is a space in which political contestation over sovereign and emergency decisions can take place. Liberal-democracy requires a notion of the people as an extra-legal sovereign and implies the possibility that they, as well as elected officials and institutional elites, have a stake in processes of emergency decision-making. This is the case even though ‘the people’ are constitutively split with various groups engaged in continuous political struggles against one another. Dyzenhaus’ and Gross’ theories do not adequately account for this possibility. They deny the extra-legal, political space of contestation over sovereign decisions.

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<sup>373</sup> Dyzenhaus, *Constitution of Law*, p. 233

## **Chapter 5 – Against Exceptionalism in Emergency Politics**

### **Introduction**

The previous chapters of this thesis have demonstrated that theories of emergency politics which rely on any version of the norm/exception binary are ill-suited to opening spaces for democratic practices in emergency politics. A new approach will need to be developed. This chapter evaluates two attempts to move beyond the norm/exception binary in emergency politics. Nomi Lazar attempts to show that the ethical norms of governance are the same in emergency as well as ordinary times. Bonnie Honig argues that agency, decisions, and emergencies are in fact deeply embedded within various paradoxes at the heart of liberal-democratic regimes. She also argues that emergencies should be understood as manifestations of political contingency. I strongly agree with the general aim of their approaches. While both theorists work is useful for beginning the move away from exceptionalism each project has major flaws which need to be averted in order to continue. Lazar's work does not remove the norm/exception binary but rather transposes it to the realm of ethics. Bonnie Honig's work does not fully succeed because she attempts to place Rousseau's paradox of politics as *the* fundamental paradox of liberal-democracy. The paradox of politics however cannot account for the political and the forms of contestation it generates.

### **Ethics Against Exceptionalism**

Lazar begins her argument by pointing out that “[o]verwhelmingly, emergencies and emergency powers are treated with reference to this dichotomy between norms and exceptions...”<sup>374</sup> She claims that “a theoretical framework for thinking about emergencies grounded in the norm/exception dichotomy is

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<sup>374</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 3

empirically and ethically suspect. This is true regardless of whether one accepts or rejects exceptions to norms.<sup>375</sup> This is because the norm/exception dichotomy and the general discourse of exceptionalism dominant in literature on states of emergency hinder attempts to theorize emergency politics by creating a false dichotomy where none exists. I would add that such a theoretical framework cannot hope to account for the ways in which states of emergency are deeply embedded within liberal-democratic regimes.

The scope of Lazar's project is modest as she only aims to investigate "...how could emergency powers, which impose order through constraint of these features [division of powers, and the preservation of rights and freedoms], *ever* be justly constituted and exercised?"<sup>376</sup> On her account emergency powers are not antithetical to liberal norms and values; on the contrary, they can and must be reconciled. She argues that emergencies do not need to be characterized as exceptions and that emergency powers are also not exceptional. Furthermore, she contends that rights derogations, an all too common feature of emergency governance, occur all the time in order to maintain the regime.<sup>377</sup> For instance a person convicted of a crime is stripped of their civil rights then they are incarcerated and put in prison.

I concur with Lazar that the norm/exception dichotomy and the discourse of exceptionalism severely limit any understanding of emergency politics and specifically the deep connections between the processes of declaring an emergency, political contingency and liberal-democracy. My criticisms of Agamben, Dyzenhaus,

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<sup>375</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 4

<sup>376</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 2

<sup>377</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 100-101

Gross and modern usages of the roman dictatorship have shown how the norm/exception dichotomy confuses attempts to theorize emergency politics. Therefore it is necessary to undermine and remove exceptionalism from our understanding of emergency politics. However, Lazar's critique of exceptionalism is emergency politics and her attempt to develop an alternative do not succeed. Rather than remove the norm/exception binary she transposes it from the realm of politics and law to the realm of ethics.

*Against Exceptionalism – Decisionist and Republican*

According to Lazar, “[e]xceptionalism is grounded in the claim that the usual norms cease to apply in emergencies.”<sup>378</sup> It “is a doctrine fundamentally incompatible with democratic accountability,” because it exempts individuals from the norms and accountability of democratic governance.<sup>379</sup> This is a familiar claim. The notion of unaccountable individuals is clearly present though in early modern political thought. However, it must be added that the necessary association of exceptionalism with one individual is not a necessary feature of emergency politics. Individuals need not be the only agents associated with emergency powers. Schmitt's work demonstrates that any decision-making processes can be wielded by a variety of agents be they individuals, groups or formal institutions.

Exceptionalism can be divided into two distinct categories according to Lazar, decisionist and republican. Machiavelli and Rousseau are classified as republican while Schmitt and Hobbes are labeled decisionist. What is common to both types of exceptionalism is that they “exempt government from accountability”

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<sup>378</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 20

<sup>379</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 19

during emergencies.<sup>380</sup> Accountability of political leaders is a central feature of liberal-democracy and as such cannot be sacrificed in times of emergency. For this reason both types of exceptionalism must be rejected. There is, however, a crucial difference between them. Republican exceptionalism “exhibits a bifurcated ethics of emergency whose parts I term ‘existential’ and ‘quotidian.’ Existential ethics relate to founding or preserving a state while quotidian ethics govern life within a state... It is not a question of when existential ethics apply but of who may apply them.”<sup>381</sup> In contrast, “Decisionist exceptionalism... is of a more fundamental kind insofar as existential conditions are not governed by existential ethics.”<sup>382</sup> Republican exceptionalism, on Lazar’s account, allows an individual to switch between ‘existential’ and ‘quotidian’ sets of norms when confronted with an emergency. Even during a declared emergency some norms are in operation, they are just not ordinary, everyday norms. Decisionist exceptionalism, by contrast, frees the individual from all legal, ethical and moral forms of restraint and accountability.

### *Decisionist*

There are a number of problems with Lazar’s account of exceptionalism. The categorizations are based on specific readings of those thinkers which are by no means uncontroversial or widely accepted. As shown in chapter two, Schmitt’s work provides resources for theorizing emergency politics without the norm/exception binary, provided we read Schmitt against himself. Categorizing Machiavelli as a republican who subscribes to an exceptionalist notion of emergency politics is also problematic. As I will show in the next chapter, Machiavelli’s work is useful for

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<sup>380</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 20

<sup>381</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 20-21

<sup>382</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 24

conceptualizing emergency politics without exceptionalism. He argues that emergencies are manifestations of political contingency and should be governed by ethics which serve the end of creating regimes based on justice.

Lazar's reading of Schmitt is similar to that of Agamben, Gross and Dyzenhaus. She focuses on a narrow reading of Schmitt which necessitates "[a]n absolute sovereign [who] is the antidote to the liberal democratic incapacity to confront the political as the fundamental distinction between friend and enemy, the incapacity to decide who the enemy is."<sup>383</sup> Furthermore:

"The political decision, whose protagonist is the sovereign dictator, cannot be made in accordance with any further norms, or else it ceases to be a political decision. The nature of the decision is and must be existential. Hence, the Schmittian sovereign dictator cannot be understood as a figure who weighs and balances competing norms or as someone who acts with the aim of preserving some ideal of furthering some beautiful goal."<sup>384</sup>

It is definitely not the case that the sovereign has no goal towards which s/he is striving. Sovereign decisions are always politically determined having as their goal the preservation of a specific formation of political and legal power. Lazar herself notes this when she argues that the sovereign's "central task is the preservation of the state."<sup>385</sup> Sovereign decision-making processes are necessary because liberal-democratic legal norms are not always able to provide enough guidance.

Additionally, extra-legal sovereign power is needed to make reflective decisions on legal order as a whole.

Schmitt's sovereign is not necessarily unrestrained primarily by legal norms. He is elusive on this point when he says "the exception is different from anarchy and

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<sup>383</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 41

<sup>384</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 42

<sup>385</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 41

chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.”<sup>386</sup> On my reading, Schmitt’s sovereign has the option of whether or not to operate in a legal void. The dictator decides that there is an exception but also what must be done about it. Schmitt did hold the view that the sovereign was unconstrained by law, but his theory leaves open the possibility that this need not be the case. Furthermore, Schmitt makes no specific mention of moral or ethical norms. He contrasts the exception specifically to legal norms. To claim then, as Lazar does, that Schmitt’s account of the exception and emergency powers can be reduced to a godlike sovereign is not attentive enough to the tensions and ambiguities within Schmitt’s own texts.

### *Republican*

Lazar rejects republican exceptionalism but argues that Rousseau’s distinction between existential and quotidian ethics should be retained. Her rejection of Rousseau is based on her reading of his concept of the Legislator. As Lazar reads him the legislator is “outside the normal order, is given powers of creation, and is charged with the preservation and happiness of his people. This Legislator is extraordinary in another, related sense. He is permitted to engage in sketchy activities by virtue of his capacity as founder.”<sup>387</sup> This reading of the legislator is one-sided and misses a crucial aspect characteristic; the legislator may be an imposter.<sup>388</sup> Thus, ‘his people’ should be circumspect about trusting him and his actions. Furthermore, any actions will be subject to popular consent. Lazar’s reading of Rousseau emphasizes only one aspect of the Legislator. It renders him very close

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<sup>386</sup> Schmitt, *Political Theology*, p. 12

<sup>387</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 31

<sup>388</sup> Rousseau, *The Social Contract*, Bk. 2, Ch. 7

to her reading of Schmitt's sovereign. Both exist outside the normal order and both are allowed to commit 'sketchy' acts in order to save the regime. Her take on Schmitt's and Rousseau's position on individuals who exist at the boundaries of or just outside of the legal order are not so different.

I agree with Lazar that exceptionalism needs to be removed from the way we understand emergencies and emergency politics. However, her account of exceptionalism is incoherent. Her categorization of thinkers as decisionist or republican is not attentive enough to alternate readings of their work. Additionally, she misses resources within Schmitt's texts which I argue aid in the project of removing exceptionalism from emergency politics.

### **A Bifurcated Ethics of Emergency Governance**

Political ethics are and should be operational in all circumstances, even emergencies, on Lazar's account. She claims that exceptionalism can be removed from emergency politics by retaining Rousseau's distinction between quotidian and existential ethics. Exceptionalism can be removed from emergency politics "by not allowing existential ethics to suspend the moral weight of quotidian liberal ethics."<sup>389</sup> "Existential ethics are concerned with the existence of a functional regime. They concern conditions such as those at the moment of a state's creation, or moments at which its continuation is in question. Quotidian ethics constitute the substance of the structure and apply to the everyday tug of war of policy and politics."<sup>390</sup> The difference between the two is that "...existential ethics invoke different and possibly higher order criteria to create or preserve the order."<sup>391</sup> On this account, existential

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<sup>389</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 88

<sup>390</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 23

<sup>391</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 23

ethics and quotidian ethics are both equally constitutive of liberal-democratic regimes and both are worth preserving.

If both types of ethics and the values they help secure are of equal weight they will inevitably conflict.<sup>392</sup> Recognition of conflict caused by the equal weight does not lead to moral and political relativism. Rather, it leads to “a descriptive kind of pluralism.”<sup>393</sup> Liberal-democracy can be characterized by interplay between principles and values which liberal rights and institutions attempt to secure. Emergency powers are one means to secure those fundamental principles and values which may or may not be the best option depending on the situation. Securing the state as well as liberal rights are processes which happen simultaneously on a day-to-day basis. She argues that “[i]f enforcing and upholding order can coexist with rights every day, these varying kinds of values can coexist in emergencies too.”<sup>394</sup> This sets up a situation in which “preserving the state in no way eclipses liberal political obligations.”<sup>395</sup> The interplay between the principles and values of order and liberal rights generates pluralist contestation over which principle or values are more important in any given situation.

Both sets of ethics “are concerned with political order.”<sup>396</sup> Political order embodies, or is constituted by the quotidian ethics of its respective regime type.<sup>397</sup> Order also refers to the ability of a state to maintain order, regardless of its content. She asserts that “[w]hen a state is threatened its capacity to maintain order is

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<sup>392</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 90

<sup>393</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 92

<sup>394</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 82

<sup>395</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 82

<sup>396</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 23

<sup>397</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 23

threatened also, but because this ordering function has a moral character intrinsically connected to the rights and civil liberties it derogates, we have a second order obligation to preserve the state's capacity to fulfill its function."<sup>398</sup> For Lazar this means that order and the ethics that safeguard it are necessary in any situation, not just emergencies. As such it does not make sense to differentiate between normal and exceptional situations. The same ethics should be considered in all cases.<sup>399</sup> However, the existential ethics which preserve order as such take priority over quotidian ethics.

The concrete difference between existential and quotidian ethics confuses Lazar's work. It would be very difficult to make a definitive or even a useful distinction between them. Also, any distinction would be politically determined. Thus, contestation over whether a situation required the application existential or quotidian ethics would be a core element of emergency politics. As such, the distinction cannot be relied upon as a resource for constraining emergency powers.

This is particularly evident in the case of rights derogations. Lazar attempts to reconcile liberalism and emergency powers by demonstrating that rights derogations are compatible with liberal values. For Lazar "liberal principles... are not coextensive with the political ethics that animate liberal democracies in general."<sup>400</sup> Thus, derogating rights privileges existential ethics concerned with maintaining a state's ability to preserve rights over quotidian ethics which concern the rights themselves. As mentioned above, rights derogations occur all the time in liberal-democratic regimes. Convicted criminals lose a plethora of rights when they

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<sup>398</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 81

<sup>399</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 81

<sup>400</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 6

are sentenced to a prison term. This would suggest that in cases of criminal law derogations embody quotidian ethics. However, if a state were to change the way rights are derogated or stop derogating certain rights this could be argued to concern existential ethics. For instance, whether or not a state uses capital punishment concerns both day to day criminal cases as well as an existential core value of a liberal-democratic regime. A strict separation between existential and quotidian ethics cannot be maintained.

The differentiation between existential and quotidian ethics transposes the norm/exception binary from the realm of political and legal order to that of ethics. The move to ethics does not remove the binary. Nor does Lazar's work push beyond exceptionalism. Rather it contends that when state officials determine that they are threatened by a 'genuine emergency' they should turn to a set of ethics which allow them to derogate the rights of citizens and use emergency powers which may not be entirely controllable. Officials are forced to choose between a set of ethics in a manner very similar to the way the norm/exception binary forces them to choose between the application or suspension of legal order. Why attempt to distinguish between them when each has equal weight, particularly in times of emergency? I agree with Lazar that liberal rights and the principle of order will conflict. However, there is no need to attempt to bifurcate the ethics of governance which guide the actions of state officials depending on the situation they think they face. Forcing that choice re-installs the norm/exception binary at the heart of emergency politics.

Relying on order as an underlying political value which can be secured via different sets of ethics is dubious. Any attempt to define a situation as requiring existential over quotidian ethics will be politically determined. Order is an 'evaluative' concept, in Schmitt's sense of the term. As such it has no content on its

own. Political actors determine what constitutes order through sovereign decision-making processes which involve competing ethical obligations as well as political contestation. Determining which set of ethics is appropriate will also be subject to fierce political struggle. This problem cannot be resolved by tying order to justice. Lazar contends that order and justice are values can be furthered by “a variety of formal and informal means.”<sup>401</sup> But this formulation simply adds another evaluative concept, justice, which must be politically determined by sovereign decision-making mechanisms. Thus, Lazar’s work remains somewhat trapped in Schmitt’s problematic of the exception. Her attempt to differentiate ethics which apply more in emergencies than everyday situations relies on differentiations which are necessarily politically determined.

### **A Topography of Emergency Powers**

Theorizing on emergency politics desperately needs an understanding of “emergency powers in terms of their continuities with everyday institutions...”<sup>402</sup> Though Lazar’s attempt to remove exceptionalism from emergency politics does not succeed she does use another concept which is much more useful. She posits a “topography of emergency power,” “a landscape of formal and informal power and constraint which officials inhabit.”<sup>403</sup> Formal power is made up of institutions, laws, offices and procedural norms while informal power is mainly characterized by the agency of those people who activate those institutions and offices while animating laws and procedures. A topography of emergency powers blend the rule of law and rule of humans, highlighting how each is embedded in the other. If governance is always a combination of law and agency, formal and informal power then nothing

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<sup>401</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 136

<sup>402</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 4

<sup>403</sup> Lazar, ‘A Topography of Emergency Power,’ p. 156

much can change in the event of an emergency. Such a position disconnects agency from its usual association “with arbitrariness... [as] opposed to the rule of law.”<sup>404</sup> Such a topography eliminates the norm/exception dichotomy with respect to responses to emergencies. It also focuses attention on the intricacies of governance and the politics of governance at the core of liberal-democratic regimes. As such, a topography of emergency powers should be retained as an analytical concept. Ultimately it could allow for a deep investigation of the connection between emergency and liberal-democracy. Lazar sees the potential when she argues that “the whole political context is relevant, not just the emergency itself. How do a particular jurisdiction’s everyday institutions make an emergency more or less likely?”<sup>405</sup> Unfortunately, those are the crucial questions which Lazar’s text does not adequately answer. A better approach to this topography can be developed in part through the work of Bonnie Honig. Though her attempt to move beyond exceptionalism, as well as Schmitt’s problematic of the exception, is unsatisfactory.

### **Towards A De-Exceptionalized Emergency Politics**

Honig shares my critique of top-down theories of emergency politics exemplified by Gross and Dyzenhaus. States of emergency cannot be reduced to the tactics of a small group or even one high ranking state official. Additionally, focusing on the rule of law closes down possibilities for democratic participation and contestation during declared emergencies. She also finds those theories which reinforce the extraordinariness of emergency situations and powers useful to an extent but also insufficient for diagnosing and analyzing the problems surrounding states of emergency and liberal-democracy. Equally, abuse of emergency powers

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<sup>404</sup> Lazar, ‘A Topography of Emergency Power,’ p. 156

<sup>405</sup> Lazar, *States of Emergency in Liberal Democracies*, p. 157

cannot be fully contained or counter-acted by individuals demanding that their human and constitutional rights be upheld. This does not mean for Honig that such work is to be discarded, far from it. She writes,

“Human rights lawyers win victories too valuable to dismiss on behalf of clients caught in the security net of the American war on terror. But these victories, won against executive power, reaffirm the central identification of the executive branch with sovereign political power even while they also attenuate some of its strength. That view of sovereignty tends to immobilize popular political action, accents a sense of dependency by ordinary people on the prowess of professionals, and hides from view the many capillaries of sovereign power that run through the regime and on which executive branch power is deeply dependent. Also hidden: the paradoxical dependence of the rule of law on the rule of man, the law’s dependence on administrative and judicial discretion as well as on forms of popular political action that engage in agonistic struggle with legal structures and institutions.”<sup>406</sup>

Honig is not in total opposition to those theories, such as Dyzenhaus’ and Gross’, which focus on legal restraints on emergency powers. But she is keen to stress that a focus on executive emergency powers, legal constraints of those powers, and demands for upholding rights do not exhaust the problem presented by emergency politics. Other elements and actors are at involved and Honig’s work seeks to demonstrate the importance of these less visible aspects of emergency politics.

In order to shed light on these less visible aspects of emergency power Honig argues that it is necessary to remove emergency politics from the exceptional and extraordinary contexts in which it has been trapped. In essence, she argues, we need to “de-exceptionalize the exception.”<sup>407</sup> Honig develops two lines of argument in support of such a de-exceptionalization. One is to counter Schmitt’s work on emergencies or the exception as he named them. To this end she unconvincingly argues for an alternate understanding of the miracle as metaphor for the exception. She presents an alternate reading of the metaphor of miracle in political theology but does not sufficiently explain why the metaphor is needed at all. Next, Honig

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<sup>406</sup> Honig, *Emergency Politics*, p. 66

<sup>407</sup> Honig, *Emergency Politics*, p. xv

demonstrates that the ‘decision on the exception’ which Schmitt argues is central to the declaration of emergencies and the functioning of legal order is in fact more akin to ordinary administrative discretion which is enacted by a plethora of state officials in very everyday situations, not simply in declared emergencies. The second line of argumentation places the exception and emergency politics in the larger contexts of administrative governance, the paradox of politics (as described by Rousseau and Connolly), and “ordinary democratic politics.”<sup>408</sup> For Honig emergency politics do not constitute extraordinary situations distinct from normal, everyday politics. The norm/exception binary which guides so much work on states of emergency is flawed in that it de-contextualizes emergency politics and removes them from those contexts in which they are only one moment or form. Furthermore, emergency politics can only be understood when seen as moments of larger struggles over governance. Honig argues that, “[e]mergency settings only aggravate and accentuate the ways in which we retrench from the more life of democracy to the ‘mereness’ of mere life. Thus, the standpoint of emergency casts into sharp relief issues of long-standing concern to democratic theory and action.”<sup>409</sup> A more complete understanding of emergency politics can only be developed once it is re-inserted into the contexts it inhabits, particularly the paradox of politics.

I agree with the general point that the understanding of states of emergency has been removed from its ordinary contexts and been forced into an artificial realm of extraordinariness and exceptionalism. I further agree that what is needed is a full de-exceptionalization of the exception, or rather a de-exceptionalization of emergency politics. However, I disagree with Honig over how such a de-

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<sup>408</sup> Honig, *Emergency Politics*, p. xvi

<sup>409</sup> Honig, *Emergency Politics*, p. 140

exceptionalization can be accomplished and which arguments should be deployed. The remainder of this chapter will demonstrate that an alternate conception of the metaphor of the exception as miracle is unnecessary because any recourse to political theology and miracles is unnecessary when attempting to understand the exception. Honig's criticism moves too far away from Schmitt. It relies on the narrow reading of Schmitt argued against in chapter two and does not contextualize his work on the exception within the larger scope of his late Weimar work. Finally, this chapter will take issue with Honig's privileging of Rousseau's paradox of politics as the fundamental paradox of democratic politics and emergency politics. The paradox of politics is useful but cannot explain with enough detail precisely how liberal-democratic regimes are deeply implicated in situations which can be defined and responded to as states of emergency.

#### *The Miracle of Metaphor?*

Against Schmitt's analogy of the exception to the miracle in Christian, particularly Catholic, theology, Honig presents Franz Rosenzweig's conception of miracle, which is based on Judaism. She argues that Rosenzweig's miracle offers a better 'orientation' to emergency events. Furthermore, the perspective it opens up allows citizens to be more receptive to the dependence of sovereign powers on the people. However, Honig's presentation of Rosenzweig's miracle can have only possible prescriptive value. It is one understanding of the exception as miracle among many and is ultimately unnecessary. Honig does not argue why any recourse to political theology is necessary for emergency politics.

Honig claims that Schmitt uses the metaphor of the miracle to ground his theory of the exception. Political theology she argues is the method Schmitt used "to

secure political sovereignty, something he thinks modern constitutionalism fails to do.”<sup>410</sup> By presenting the exception as analogous to the miracle Honig claims that Schmitt was trying to naturalize his understanding of the exception against other possible interpretations. She writes, “In Schmitt’s political theology... theology’s concepts are treated as if they possess clear and univocal meanings - we *know* what miracle is - such that they can serve as the ground for unclear or contested political concepts we are unclear about: the state of exception.”<sup>411</sup> Schmitt was not always so clear and unambiguous when analyzing the miracle in politics and theology. In chapter five of *The Leviathan in the State Theory of Thomas Hobbes*, a text Honig does not discuss, Schmitt faults Hobbes for allowing a differentiation between private belief in miracles and public confession that one believes.<sup>412</sup> He is well aware that there is intense debate in both political and theological circles over the meaning and status of miracle and the exception. Honig acknowledges this point as well, using the miracle as a metaphor for the exception allows Schmitt to comment on two debates at once.<sup>413</sup> However, his comments and position on the matter are very underdeveloped. He even notes that “[a] detailed presentation of the meaning of the concept of the miracle in this context will have to be left to another time.”<sup>414</sup> His rhetorical strategy is weak at best and off-handed at worst.

The function of the miracle in Schmitt’s work is not to ground or secure political sovereignty. It does not rely, as Honig claims, on the miracle that the metaphor performs in securing a solid foundation for political sovereignty. It is an

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<sup>410</sup> Honig, *Emergency Politics*, p. 89

<sup>411</sup> Honig, *Emergency Politics*, p. 90

<sup>412</sup> Carl Schmitt, *Leviathan*, p. 53-64

<sup>413</sup> Honig, *Emergency Politics*, p. 90

<sup>414</sup> Schmitt, *Political Theology*, p. 37

explanatory metaphor. As argued in chapter two of this thesis, Schmitt's theory of the exception does not rely greatly on political theology or the miracle as metaphor for the exception. Schmitt's political concepts are thoroughly secularized, this-worldly concepts. There is no miracle of metaphor in Schmitt's work.

Nonetheless, Honig posits an alternate metaphor for the exception. She turns to Rosenzweig's account of miracles in Jewish theology to "pluralize the particular political theology on which Schmitt's account is based and from which it draws sustenance."<sup>415</sup> On Rosenzweig's account, as presented by Honig,

"[t]he miracle is not, pace Hume, about contravention of everyday patterns of existence or laws of nature. It is a sign of divine providence that is experienced as such and that opens us up, both to providence and to the everyday. It allows or solicits us to experience the everyday as miracle... it calls us to experience the apparently steadfast as contingent and as could have been otherwise."<sup>416</sup>

This conception of miracles is, according to Honig, far more productive than Schmitt's for seeking out democratic potentialities which occur during moments when sovereign power is active and confronts the people as such. It is easy to see how Rosenzweig's account could be mobilized to demonstrate "the dependence of the so-called state of exception upon democratic energies and to mark its vulnerability to democratic action and resistance."<sup>417</sup> Indeed, Honig's position is that we can accept the miracle as metaphor for the exception but come to very different conclusions when we understand miracles differently from Schmitt.<sup>418</sup> Yet, while Rosenzweig's miracle may provide a better orientation to sovereignty in emergency situations, Honig does not explain why it is necessary that we turn to Rosenzweig or any conception of the miracle. Indeed, this line of argumentation takes up

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<sup>415</sup> Honig, *Emergency Politics*, p. 87

<sup>416</sup> Honig, *Emergency Politics*, p. 97

<sup>417</sup> Honig, *Emergency Politics*, p. 87

<sup>418</sup> Honig, *Emergency Politics*, p. 87

prescriptive political theory. Her turn to Rosenzweig is a polemical move designed to loosen the grip the narrow reading of Schmitt's work. Honig is arguing that we can turn to this new metaphor, this new orientation towards emergency, not that we must.

Honig does demonstrate that Rosenzweig's version of the miracle can provide resources for democratic participation within emergency politics.<sup>419</sup> From Rosenzweig's vantage point, "the decision testifies to an unsettling encounter with that which disrupts the binary of ordinary –extraordinary. Sovereignty looks more contestable than in Schmitt and Agamben, more democratic, more fraught, more fragile."<sup>420</sup> Certainly that is a very appealing understanding of miracles. However she makes essentially the same argument earlier in *Emergency Politics* with her presentation of Rousseau's paradox of politics and the lawgiver/charlatan's reliance on popular receptivity, which is discussed below.

The question still remains of why any recourse to miracles or political theology is necessary at all for theorizing emergency politics. As I have argued, miracles and political theology are unnecessary for Schmitt. Honig does not provide a convincing explanation as to why they are necessary in the form of Rosenzweig presents them in. Certainly Honig's reading of Rosenzweig on miracles could be taken up during struggles over emergency powers but it can only be one option among many. However, without a justification for why the miracle as metaphor for the exception is essential to the understanding of emergency politics Rosenzweig's miracle holds only prescriptive rather than diagnostic value. The miracle as a metaphor for the exception is unnecessary. Honig never explains precisely why we

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<sup>419</sup> Honig, *Emergency Politics*, p. 106

<sup>420</sup> Honig, *Emergency Politics*, p. 106-107

need any metaphor of the miracle or any political theology when diagnosing and analyzing emergency politics. The theory of the exception or emergency politics in general does not need any sort of relation to political theology or the miracle, Schmitt's or Rosenzweig's. Schmitt's theory of the exception does not rely on it and Honig's turn to Rosenzweig can only offer a possible alternative conception of the miracle as a resource for re-orienting our perspective on the exception.

### *Discretion and Decision in the Administrative State*

The second critique Honig develops of Schmitt work concerns his understanding of decision. She charges that Schmitt collapses all forms of human interpretation and application of law into the moment of a decision on the exception. Schmitt, on her reading, presents decision as a moment when law is suspended in favor of an unconstrained sovereign. She argues that “within the rule-of-law settings that Schmitt *contrasts* with decisionism, something like the decisionism that Schmitt approvingly identified with a dictator goes by the name of discretion and is identified (approvingly or disapprovingly) with administrators and with administrative governance.”<sup>421</sup> Furthermore, “This way of thinking about decisionism takes emergency politics out of its exceptionalist context and sets it in the context of larger struggles over governance...”<sup>422</sup> Her critical strategy is “to recontextualize the decision, to demote the ‘decision’ from the extraordinary sovereign prerogative to more ordinary forms of administrative discretion upon which the rule of law is in any case dependent.”<sup>423</sup> She does not deny that in some instances an emergency situation

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<sup>421</sup> Honig, *Emergency Politics*, p. 67

<sup>422</sup> Honig, *Emergency Politics*, p. 67

<sup>423</sup> Honig, *Emergency Politics*, p. 94

may be decided upon and responded to by a sole individual wielding effectively unconstrained power.

However, this is not always the case, especially when decision is simply one form administrative discretion may take. “To say that the state of exception privileges decision need not mean that all powers redound to a single unaccountable sovereign dictator... Nor... need it necessarily mean that sovereignty is unified in and by way of the singular decision.”<sup>424</sup> Honig folds decision into the larger concept of administrative discretion. Decision is present at all times in legal order, not only in those moments when legal order must be suspended in the name self-defense. This means that emergency politics are in no way extraordinary. They are bound up in everyday administrative governance. The circumstances that can generate emergency responses may have an element of the extraordinary about them but the politics they engender are simply moments in or articulations of everyday struggles over administrative governance.

Decision as discretion is not antithetical to administrative governance nor, Honig argues, is it in opposition to the rule of law as such. Law requires people to interpret, implement and apply it. Honig reads Schmitt’s presentation of decision as a moment of sovereignty breaking through the static crust of law, whereas she views decisions and discretion as the human element that animates law and which law cannot do without. However, law does not implement or apply itself. It is up to those state officials, lawyers and activists to apply and implement the law, and to contest those applications and even the meaning of laws themselves. Honig notes that the

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<sup>424</sup> Honig, *Emergency Politics*, p. 67

methods used to animate, preserve and apply the law may also be used to “undo the law.”<sup>425</sup> All of these methods require actors to interpret the law.

The rule of law is not a machine that runs itself. Attempts to deny the human elements of law actually end up threatening it. The rule of law in liberal-democratic regimes grounds its legitimacy in the fact that the rule of law a form of democratic self-rule. Prioritizing the regularity, generality and predictability of the rule of law minimizes its democratic underpinnings, closing down prospects for democratic participation and politics in times of crisis.<sup>426</sup> Just as decisions are not antithetical to administration - the rule of law and decisionism are not separated by a strict dichotomy. Indeed, without decision and discretion the rule of law would cease to function and lose legitimacy as an instrument of democratic self-rule.

Honig’s argument that decision is an element of wider processes of discretion does not contradict Schmitt if his later Weimar work is taken into account. Her critique is based primarily on *Political Theology*. However, *Legality and Legitimacy* does contain a notion of discretion as an element of legal order, particularly in situations defined as emergencies. His notion of the supra-legal premium on legality necessarily involves elements of discretion. As discussed in chapter two he argues that “...the mere possession of state power produces an additional political surplus apart from the power that is merely normative and legal, a supralegal premium on the lawful possession of legal power... that lies beyond any normative consideration.”<sup>427</sup> This supra-legal premium is most clearly evident when evaluative concepts such as ‘emergency’, ‘security’ and ‘order’ are in need of concrete

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<sup>425</sup> Honig, *Emergency Politics*, p. 77

<sup>426</sup> Honig, *Emergency Politics*, p. 85-86, emphasis in original

<sup>427</sup> Schmitt, *Legality and Legitimacy*, p. 31-32

interpretation and application. Such terms are underdetermined and cannot be simply applied by state officials or a sovereign agent. Discretion is necessarily implied because the decisions on how such concepts are to be applied lie outside ‘normative considerations’. This implies a human element of the rule of law. Discretion is also evident in the decision on the exception. Schmitt contends that “...not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception.”<sup>428</sup> A sovereign agent must choose between the concepts of emergency and exception. They must interpret a given situation and decide which concept to apply. The rule of law cannot make such a distinction in advance.

Thus Honig’s critique of Schmitt’s concept of decision is not incompatible with his work. On the contrary it adds more depth to his analysis. My reading of Schmitt presented in chapter two also argues that the element of decision/discretion within the rule of law need not imply that ‘all powers redound to a single unaccountable sovereign dictator’ or that ‘sovereignty is unified in and by way of the singular decision’. I argued precisely the opposite position. Schmitt’s work on the moment decision needs to be understood in the context of wider struggles of individuals and groups to act as sovereign agents. This line of argumentation can be furthered by countering Honig’s critique of Schmitt’s account of sovereignty.

#### *A New Notion of Sovereignty?*

Honig’s alternative conception of sovereignty is compatible with Schmitt’s as I read him. On her reading, Schmitt “identifies sovereignty with the power to legally suspend law for a time by declaring a state of exception. For Schmitt... the state of exception is that paradoxical situation in which the law is legally suspended by

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<sup>428</sup> Schmitt, *Political Theology*, p. 12

sovereign power.”<sup>429</sup> As opposed to this narrow reading she argues for a conceptualization of popular sovereignty that “is always haunted by heteronomy, that the people are always undecidably also a ‘multitude.’”<sup>430</sup> Furthermore, Honig argues:

“What if instead of the sovereign as ‘he who decides on the exception’ we thought about sovereignty as a set of circuits, contingent arrays of diverse forces and powers...? From such a vantage point... sovereignty is not simply that which decides the exception. It is a contingent formation that might get relocated or redistributed in contests over whether a state of exception should be instituted, in what such a state of exception should consist, and about when it should end. When the people... resist or reaffirm or call in all their plurality for the institution or end of a state of exception, they reenter the paradox of politics and act as sovereign in order to become who they already need to be in order to act as they are.”<sup>431</sup>

Finally, she stresses that even a unitary sovereign, such as Rousseau’s lawgiver relies on the popular subscription of the masses for their power.<sup>432</sup> Honig’s sovereignty is plural and contested.

Honig’s correction of Schmitt, that the sovereign is not necessarily the head of state or even one person within the state bureaucracy, is right only if one accepts a narrow reading of his work. The entirety of Schmitt’s work does not need to be discarded in order to develop a more nuanced conception of sovereignty. As described in chapter two, within Schmitt’s own work are resources for thinking sovereignty differently.

Schmitt was aware that there is a performative aspect to sovereign. Sovereignty is an *agency* in Schmitt’s work, not a specific agent. Neither is it a permanent characteristic of any given individual or group. The sovereign is not acting as such until they are able make and enact a decision. Therefore, sovereign

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<sup>429</sup> Honig, *Emergency Politics*, p. 87

<sup>430</sup> Honig, *Emergency Politics*, p. 20

<sup>431</sup> Honig, *Emergency Politics*, p. 88

<sup>432</sup> Honig, *Emergency Politics*, p. 21

power can be enacted by anyone. From this perspective, the sovereign is whichever group, institution or individual who is able to have their actions declared sovereign during struggles over emergency politics. Political contestation over sovereign decision-making renders the concept of discretion all the more relevant. Because any state official can attempt to act as a sovereign agent they are able potentially to use their discretion to make sovereign decisions regarding legal order. Thus his conceptualization includes a notion of sovereignty as ‘a contingent formation that might get relocated or redistributed in contests over whether a state of exception should be instituted’.

Schmitt’s understanding of sovereignty is more useful for conceptualizing emergency politics than Honig’s because it can more fully account for democratic contestation over decisions regarding declaration of an exception. On Honig’s account contestation over sovereign decision-making practices involves citizens who are both ‘a people’ and ‘a multitude’; that is, a unified group of political actors and a collection of individuals and sub-groups with differing interests. The nexus between ‘a people’ and ‘a multitude’ is plurality. A multitude attempts to make itself a people continuously but, it is always ‘haunted by heteronomy’. This account is insufficient because it does not include any notion of the political. What prevents ‘a multitude’ from becoming ‘a people’ are the effects of the political. By focusing on plurality Honig’s conceptualization of sovereignty cannot account for the political contestation over sovereign decision-making processes described in chapter two.

Including the political also helps explain how sovereign decisions appear, at least initially, as claims. Any claim by an agency that it is making a sovereign decision will have to be taken up by those to whom it is addressed. Not every person or group will necessarily agree with attempts to make sovereign decisions.

Contestation is thus assured. Schmitt's work accounts for Honig's argument that sovereignty involves resisting, reaffirming or calling for decisions regarding states of emergency. It also accounts for the 'democratic energies' on which sovereign decisions rely.

Honig's critiques of Schmitt as well as the alternatives she proposes do not undermine his work. On the contrary, they add to his analysis as I have read him. It is important to recognize that sovereign decisions can sometimes take the form of administrative discretion. Sovereign decisions must also be understood as occurring in a context of contestation between political agents vying to have their actions recognized as sovereign. Honig's critique of Schmitt de-exceptionalizes the exception no more than the reading of his work presented in chapter two.

### **The Paradox of Politics**

Honig's second line of argumentation places emergency politics at the heart of what she, following Rousseau, refers to as the paradox of politics.<sup>433</sup> This move attempts to de-exceptionalize emergency politics by placing them in continuous struggle of the people to make and re-make themselves as well as 'good law.' Additionally, Honig links emergencies to emergence and a 'politics of becoming', as developed by Connolly.<sup>434</sup> On this view emergency politics play out on a terrain of radical contingency and concern efforts to sustain a regime even as it is constantly (re)shaped. While Honig is right to situate emergency politics as embedded in a paradox of democracy, the paradox of politics does not provide sufficient explanatory power. It focuses attention on how the multitude struggles to make itself

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<sup>433</sup> Rousseau, *The Social Contract*, 1997

<sup>434</sup> Connolly, *A World of Becoming*, 2010

a people but it does not explain why and how such struggles come to be experienced as threat or emergency.

Honig proposes that, when diagnosing and analyzing emergencies, we shift our attention from the paradox of sovereignty (the unitary sovereign which sits both inside and outside the legal order and retains the ability to suspend the order in its entirety) to the paradox of politics. This paradox is “a fundamental problem of democracy” and consists in the fact that “power must rest with the people but the people are never so fully who they need to be (unified, democratic) that they can be counted upon to exercise their power democratically. As Rousseau put it, you need good men to make good law, but you need good law to make good men. How do you break this vicious circle?”<sup>435</sup> There are other paradoxes at work in liberal-democracy as well, such as: the paradox of new rights, the *paradoxical dependence of the rule of law on the rule of man*, and the paradox of bounded communities.<sup>436</sup> Honig claims that these paradoxes are of use for analyzing emergency politics but essentially they are all proxies or variations of the more fundamental paradox of politics. All can aid in explicating emergency politics. However, the paradox of sovereignty tends to be reified in much of the current literature. In opposition to such unwarranted reification Honig argues that we need to “decenter the paradox of the state of exception and see it in connection with other paradoxes addressed here...”<sup>437</sup> On Honig’s account the paradox of politics is the most fundamental problem facing the people in liberal-democratic regimes.

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<sup>435</sup> Bonnie Honig, *Emergency Politics*, p. xvi

<sup>436</sup> Bonnie Honig, *Emergency Politics*, p. xvii, emphasis in original

<sup>437</sup> Bonnie Honig, *Emergency Politics*, p.xvii

Emergency politics re-enact and re-activate the paradox of politics. Crucially, this move allows for a dramatic re-interpretation of emergency. Within the paradox of politics emergency is more akin to everyday contingency rather than extraordinary circumstance. Honig phrases the shift as such: “The paradox of politics posits democracy as always embedded in the problem of origins and survival: how to (re)shape a multitude into a people, daily. From the perspective of this paradox, we see democracy as a form of politics that is always in emergence in response to everyday emergencies of maintenance.”<sup>438</sup> This phrase, ‘the everyday emergencies of maintenance’ collapses the concept of emergency into the broader categories of contingency and indeterminacy which pervade contemporary liberal-democratic politics. Everyday ‘emergencies of maintenance’ posit democracy and democratic regimes as fundamentally unstable yet always attempting to survive in a condition of pervasive contingency. Honig directly acknowledges this move. She writes that “the assumed antagonism between democracy and emergency is to some extent undone from this angle of vision...”<sup>439</sup> I agree with Honig’s point on emergency as contingency. States of emergency should, indeed, be understood not as a rupture with ordinary politics but as one form or aspect of ordinary politics in liberal-democratic societies. And Honig is right to argue that embedding emergency in the paradoxes of democracy subsume the concept of emergency within the notion of contingency. This is a very productive move as it shows emergency politics in relation to similar types of conflict in liberal-democratic regimes. I agree with Honig’s attempt to place emergencies within the wider context of political contingency. This argument will be further developed by turning to the work of Machiavelli in chapter six.

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<sup>438</sup> Bonnie Honig, *Emergency Politics*, p. xvii

<sup>439</sup> Bonnie Honig, *Emergency Politics*, p. xvii

However, it is not necessary to posit the paradox of politics as *the* foundational paradox of democracy. Honig specifically contrasts the paradox of politics with the paradox of constitutional democracy, and criticizes the latter for attempting to mitigate or restage the former in an unproductive way. She argues that those who attempt to restage the paradox of politics as the paradox of constitutional democracy are eliding the problem of the people/multitudes daily engagement with the lawgiver/charlatan.<sup>440</sup> She contends, “This new paradox of constitutional democracy is not a conflict that goes to the very heart of democratic politics, which impossibly promises both (self-) sovereignty *and* freedom or, as Emilio Christodoulidis puts it, both self-rule and law-rule. Instead, the tense elements of the paradox are split into two distinct objects: the constitution represents law-rule and the people represent self-rule and these are seen as at odds.”<sup>441</sup> Honig claims that the paradox of constitutional democracy posits an unnecessary temporal dimension. The paradox of politics when transposed into the paradox of constitutional democracy, she claims, is thereby recast “as a generational divide.”<sup>442</sup> But this argument is unconvincing. Constitutions are not only “limits from the past on popular sovereignty in the present” or an “unwilled, constraining element of rule” as Honig argues.<sup>443</sup> The paradox can only be restaged as a generational divide if the constitution were not the object of intense political debate, contestation and struggle. Certainly Honig would not argue that constitutions are uncontested documents that ‘rule’ without any input from the people under their jurisdiction. Her argument that

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<sup>440</sup> Honig, ‘Between Decision and Deliberation’, p. 8-9

<sup>441</sup> Honig, ‘Between Decision and Deliberation’, p. 9

<sup>442</sup> Honig, ‘Between Decision and Deliberation’, p. 9

<sup>443</sup> Honig, ‘Between Decision and Deliberation’, p. 9

the rule of law requires the rule of man as well as administrative discretion to apply law confirm this position.

What the paradox of constitutional democracy does do is place Rousseau's paradox of politics in the context of contemporary liberal-democratic regimes. The paradox of constitutional democracy is just useful than Rousseau's paradox of politics. While Rousseau's paradox addresses 'the people's relation to itself as both ruler and ruled,' the paradox of constitutional democracy addresses the exact same question but in the context of modern democracy which is characterized by the unstable combination and articulation of liberalism and democracy, law and the people, liberty and equality, self-rule and law-rule. Emergency politics are embedded in paradoxes of liberal-democracy but the paradox of politics should play a central role.

Honig makes a further connection between democracy and emergency by linking emergency to the emergence of new rights claims in Connolly's politics of becoming. She argues that "*Each new emergent claim can be experienced as an emergency by the existing order, by the identities challenged yet again to undergo redistribution or revision or to re-experience the contingency at their heart.*"<sup>444</sup> During such situations "neither conservatism nor submission is sought. Instead a certain reluctance and panic are expected, even hoped for."<sup>445</sup> And finally, "Each new right inaugurates a new world. It transforms the entire economy of rights and identities, and establishes new relations and new realities, new promises and potentially new cruelties."<sup>446</sup> Connolly's politics of becoming, which Honig follows,

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<sup>444</sup> Bonnie Honig, *Emergency Politics*, p. 49-50, emphasis added

<sup>445</sup> Honig, 'The Time of Rights', p. 105

<sup>446</sup> Bonnie Honig, *Emergency Politics*, p. 53

embeds emergencies within the identity politics at the heart of liberal-democracy. From this vantage point emergencies are merely specific instances of contingency which someone has successfully declared to be emergencies and a large proportion of the general population has agreed. Indeed, liberal-democracy can be understood as a series of emergencies. But only if we conceive of emergencies as situations in which the heterogeneous identities and groups which make up 'the people/multitude' are challenged and re-articulated. We must also add that the people/multitude are split by antagonism.

It is certainly possible for new rights claims to be experienced as emergencies by an existing legal order or political regime. But Honig's account of the paradox of politics and new rights claims in a politics of becoming does not explain precisely why new rights claims are sometimes experienced as emergency. It is fairly mundane to claim that "...popular sovereignty is always haunted by heteronomy, that the people are always undecidably also a 'multitude.'"<sup>447</sup> But to definitely link such a claim to emergency situations more is needed than to assert that the people are always a multitude. What is needed is a theory of how and why the people are always a multitude and how that unstable position is intertwined with emergency politics, or even aids in the creation emergency situations.

In order to make such a case Honig would have to develop a theory of collective identification which explained why the presence of new rights claims directly threaten existing identities or the political, social and legal order itself. She does note that "although we... sometimes persecute people because they are foreign, the deeper truth is that we almost always make foreign those whom we persecute.

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<sup>447</sup> Honig, 'Between Decision and Deliberation', p. 5

Foreignness is a symbolic marker that the nation attaches to the people we want to disavow, deport, or detain because we experience them as a threat.<sup>448</sup> This is a prescient diagnosis of contemporary nativist politics prevalent in many liberal democratic regimes however; Honig does not develop this point and link it to the paradox of politics. Yet what is still missing is the element of threat and crisis as experienced by identities within the political order.

The element of threat and crisis can be accounted for when we include both the political and the paradox of contestation as developed in my reading of Schmitt. The paradox of politics cannot conceptualize the antagonism implied by the political and the paradox because it sees the people as also a multitude. It does not see the people as being constitutively split into opposed political groups striving for hegemonic dominance. As such it misses the key element of political contestation involved in emergency politics. Emergency politics are always also hegemonic practices. This point will be developed in chapter seven.

## **Conclusion**

This thesis is in agreement with Honig and Lazar that emergency politics should be understood in the context of the paradoxes at the heart of liberal democratic regimes. It further agrees that emergency should not be understood as an independent and distinct concept. Emergency is one form or moment of the contingency and indeterminacy which permeate and de-stabilize liberal-democratic regimes. It is claimed here that while the paradox of politics is certainly at play in emergency politics it does not provide enough explanatory power. New rights claims may or may not fundamentally challenge any particular identity within the system. But if new identities, or even the re-articulation of old identities, is understood as

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<sup>448</sup> Honig, 'A Legacy of Xenophobia', <http://www.bostonreview.net/BR27.6/honig.html>

subverting established identities and relations, (as Honig and Connolly understand that they do as demonstrated in their discussion of how homosexuals re-scripting themselves as gay upsets heterosexuals as much as it does homosexuals), in order for that to become an emergency what is needed is a theory of collective identification and politics which can account for the presence of mutual antagonism, subversion and threat between established identities and emerging rights claims.

Such a theory of emergency politics will be developed in chapter seven by turning to Laclau and Mouffe's theory of identification in *Hegemony and Socialist Strategy* as well as Hans Lindahl on the paradox of constituent-constituted power. These works help to identify one component of the paradox of constitutional democracy/constituent-constituted power that arises in liberal-democratic regimes which is the paradox of contestation or the fundamental instability and contestability of the limits of legitimate contestation. It is this paradox which Honig's focus on the paradox of politics does not see. The paradox of politics does not provide the precision and focus needed to address how the limits of legitimate contestation are set and struggled over. This paradox, in conjunction with the paradox of constitutional democracy, is necessary because they explain how it is that new rights claims and the politics surrounding the people and the multitude can be experienced as a threat and as implicated in, perhaps the cause of emergency situations.

Before turning to Laclau, Mouffe and Lindahl I will begin to lay the foundations for a new approach to emergency politics using the work of Machiavelli. He furthers the argument that emergencies are an element of political contingency. He also argues that it is possible respond to emergencies while preserving both the liberal and democratic aspects of a state. For this to occur though state officials and any groups acting as sovereign will need to impose laws on themselves and not be

tempted by temporary measures which will likely be more harmful to a regime than the crisis that prompted them.

## Chapter 6 – Machiavelli: Political Contingency and ‘Ordinary Means’

### Introduction

The previous three chapters demonstrated deficiencies in the current theoretical approaches to emergency politics. What is needed is a new approach to emergency politics One which can ‘de-exceptionalize’ ‘emergencies’ and highlight points of democratic contestation within emergency politics by contextualizing them within larger political structures and processes in liberal-democratic regimes. I argue that the best place to begin constructing the foundations of such an approach can be found in the work on Niccolo Machiavelli.

I take my cue for such an approach from the current re-evaluation of Machiavelli’s works.<sup>449</sup> Machiavelli is not a teacher of political realism and amorality who argued that ‘the ends justify the means’. Nor can he be confined to the “Cambridge School” interpretation, associated with Skinner and Pocock, which emphasizes the republican elements of his thought.<sup>450</sup> Rather, his work advocates for strong moral, ethical, legal and democratic controls over political actors and actions. The controls are especially pertinent to events Machiavelli referred to as *accidenti*. *Accidenti* are not strictly analogous to contemporary understandings of ‘emergencies’ but there are strong similarities which ensure the relevance of Machiavelli’s work for emergency politics.

Machiavelli’s work is useful and relevant to contemporary emergency politics in two ways. First, he provides an analysis of the instability and the unpredictability of events which he convincingly argues are constitutive elements of the political realm. As such, his work can be read as a precursor to modern

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<sup>449</sup> The two most notable examples of this re-evaluation are Benner’s *Machiavelli’s Ethics* and McCormick’s *Machiavellian Democracy*.

<sup>450</sup> McCormick, ‘Machiavelli Against Republicanism’, p. 615-643

conceptions of political contingency. Machiavelli presages modern notions of contingency through his discussions of two concepts, *fortuna* and *accidenti*. *Fortuna* refers to general condition of instability and chance inherent in politics. I will argue that *fortuna* functions at the level of the ontological, the same level as ‘the political’ in Schmitt’s work. Thus, *fortuna* complicates the ‘problematic of the exception’.

Machiavelli uses the term *accidenti* to refer to specific events. They can be the result anything from changes in *fortuna* to political antagonism, poor laws or corruption. *Accidenti* will occur; Machiavelli argues that if handled properly they can be used to strengthen a constitutional regime, rather than necessitate its suspension.

Machiavelli’s foreshadowing of contingency helps sidestep the norm/exception dichotomy by demonstrating that situations which are considered to be emergencies or exceptional circumstances are part and parcel of everyday politics. As such they need not and should not be treated as anything out of the ‘ordinary’, a term which has strong normative connotations in Machiavelli’s work.

The second contribution Machiavelli’s work makes to the analysis of contemporary emergency politics is his advice concerning the best methods for handling changes in *fortuna* and threatening *accidenti*. His work evaluates various responses within the larger context of creating a just and stable regime in a world which is fundamentally unstable, forever changing and occasionally threatening. Pocock argues that this is ‘the Machiavellian Moment’, “the moment in conceptualized time in which the republic was seen as confronting its own temporal finitude, as attempting to remain morally and politically stable in a stream of irrational events conceived as essentially destructive of all systems of secular

stability.”<sup>451</sup> Such moments present no easy solutions. Machiavelli presents them as dilemmas that regimes must periodically negotiate. His advice acknowledges that the use of force and violence devoid of normative constraints is a possible response. However, Machiavelli always contends that the best responses are advanced preparation and virtuous actions guided by ethical considerations and laws.

The goal of politics, on his account, is to create stable, just, ethical, self-authored regimes based on law that can withstand the threatening events which will always arise from a fundamentally unstable political realm. The methods best suited to that goal are those which are bound by legal as well as ethical and moral restraints. Such methods are inherently bound to the ends they serve. Thus using extraordinary, unjust or evil means will spoil and corrupt the ends for which they are striving.<sup>452</sup> This argument is still relevant to contemporary liberal-democratic regimes. By heeding Machiavelli’s work we can work towards a new approach to emergency politics which understands emergencies as an intrinsic element of the realm of politics which must be treated as such.

Before proceeding to the discussion of the function of *fortuna* and *accidenti* I must identify an important aspect of Machiavelli’s terminology. He uses the words ‘ordinary’ and ‘extraordinary’ as indicators of his political judgments. Ordinary is associated with orders and laws, extraordinary with extra-legal, extra-ethical methods. As Benner argues out, “The word *ordinario* has extremely important normative connotations in Machiavelli’s lexicon. He consistently uses it for modes and conditions of action that support stable human orders.”<sup>453</sup> Human orders or

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<sup>451</sup> Pocock, *The Machiavellian Moment*, 9. viii

<sup>452</sup> Benner, *Machiavelli’s Ethics*, p. 343-347

<sup>453</sup> Benner, *Machiavelli’s Ethics*, p. 368

*ordini* have “the sense of constitutional arrangements or devices” and is “closely linked to *leggi*, but differentiated...”<sup>454</sup> *Ordini* has constitutional connotations; it is often used in close proximity to words such as *leggi*, *ordinare*, and *vivere civile*. Such proximity signifies both their close relationship as well as their importance. On the other hand the word extraordinary is used to condemn actions taken illegally and/or outside the bounds of ethical and moral standards conducive to creating and maintaining just *ordini*. Whitfield argues that “...outside the *ordini* we have... *lo straordinario*,”<sup>455</sup> which means that “What is *ordinario* is what is according to the *ordini*; and what is *straordinario* is the recourse to violence and arms.”<sup>456</sup> Benner notes that “[t]his antithetical usage implies that whereas *ordinario* actions can be considered as legitimate, the legitimacy of any modes that Machiavelli describes as *estraordinario* is doubtful.”<sup>457</sup> Machiavelli predominantly favors ‘ordinary’ to ‘extraordinary’ methods. He argues that extraordinary methods should only be used when a regime is corrupt beyond salvation or when a new regime has not established itself, i.e. it is in the midst of a revolution. Even in such cases the legitimacy of ‘extraordinary’ methods is doubtful and some ethical standards should still apply. The normative and ethical implications of Machiavelli’s usage of ‘ordinary’ and ‘extraordinary’ are key to understanding his overall argument that ordinary orders and methods are superior to extraordinary ones.

Machiavelli does not elaborate a philosophical or theoretical argument concerning the difference between ordinary and extraordinary. Rather he argues that a prince or a people may *choose* to act in either ordinary or extraordinary ways.

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<sup>454</sup> Whitfield, *Discourses on Machiavelli*, p. 145

<sup>455</sup> Whitfield, *Discourses on Machiavelli*, p. 146

<sup>456</sup> Whitfield, *Discourses on Machiavelli*, p. 147

<sup>457</sup> Benner, *Machiavelli’s Ethics*, p. 368

Therefore he is not arguing that there is a strict separation between the two which requires difference actions. He is arguing that ordinary and extraordinary actions are two ways of responding to *accidenti* and drastic changes in *fortuna*. He favors ordinary modes but acknowledges that extraordinary modes might be used, but such use is unwise and usually leads to failure or to a corruption of the good ends one was fighting for. I will adhere to Machiavelli's lexicon throughout this chapter as much as possible and show that his reflections on ordinary and extraordinary actions are still pertinent to emergency politics in liberal-democratic regimes.

### **Contingency**

Machiavelli's account of instability and change in politics is important for conceptualizing emergency politics without recourse to the norm/exception binary. Writing in the early 16<sup>th</sup> century he obviously does not explicitly use the term contingency. His remarks on political contingency are a precursor to contemporary understandings of the concept. There are two specific terms which he deploys when speaking about contingency in politics: *fortuna* and *accidenti*. What is important about Machiavelli's understanding of political contingency is not the concept itself but that he treats drastic changes in *fortuna* and *accidenti* which threaten the existence of a regime as constitutive of political existence and of action itself. Changes in *fortuna* and grave *accidenti* will inevitably happen from time to time because we live in a world which is fundamentally unstable. Machiavelli treats as regular those types of events which are currently defined as exceptional or as emergencies. Thus he avoids becoming trapped in the norm/exception binary altogether. His work should be read as a deconstruction any notion of normality or exceptionality in politics. If everything is constantly changing then nothing can truly be said to be 'normal' or 'exceptional'. Rather, politics is a practice which is

constantly struggling to create regimes based on normative, ethical and legal principles in a context of constant instability and unpredictability.

### *Fortuna*

We begin with Machiavelli's notion of *fortuna* because it challenges the idea of normality or normal states of affairs in politics. Without a conception of normality the notion of exceptionality must be seen as highly problematic. The place and function of *fortuna* in the realm of politics, according to Machiavelli, prevents regimes from existing in a state of stability in which unexpected events rarely occur or do not drastically alter the day to day functioning of a state. Regimes are constantly in flux, developing, evolving, and periodically renovating themselves to the extent that they cannot be said to exist in a normal state of affairs. Without a definitive conception of normality the transition between normal situations and exceptional ones becomes all the more problematic, even if the distinction is determined politically and/or legally.

*Fortuna* is the element of chance in all political affairs. It is also the acknowledgement that circumstances will change, sometimes for the better but inevitably also for the worse. For Machiavelli politics is a never ending engagement with a world that is fundamentally unstable, continuously changing and occasionally threatening to the existence of regimes. The realm of the political "is characterized by the utmost variability and unpredictability."<sup>458</sup> This variability and unpredictability do not consist only in the occurrence of unexpected events. Rather, Machiavelli uses *fortuna* to describe "continual, unstable motion, subject to an

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<sup>458</sup> McCormick, 'Addressing the Political Exception', p. 888

unpredictable necessity” of “all human affairs.”<sup>459</sup> The political realm cannot be characterized as stable or motionless aside from the sudden intervention of changes in circumstances. A fundamental characteristic of the political realm is unstable motion, not stability periodically interrupted by ‘exceptions’.

*Fortuna* in Machiavelli’s work functions at the level of the ontological. The same level as does ‘the political’ in Schmitt’s work. *Fortuna* is thus another constitutive element of liberal-democracy as well as the problematic of the exception which must always be acknowledged and reckoned with. “The underlying idea here is that the ‘matter’ of the body politic is subject to the ravages of time, which... is controlled by *Fortuna*.”<sup>460</sup> Thus Machiavelli complicates and deepens the problematic of the exception through his argument that any regime is constantly changing and that any political action takes places in a realm defined by uncertainty and unpredictability. Such conditions make it very difficult to accurately predict the outcome of political actions. Machiavelli’s work suggests that this ambiguity should mollify any confidence political actors may have when resorting to extraordinary measures.

Machiavelli does not argue that the impact of *fortuna* leaves regimes and political actors powerless to its vicissitudes. On the contrary, “*fortuna* is the arbiter of half of our actions, but also that she leaves the other half, or close to it, for us to govern...”<sup>461</sup> The other half is a space open to the preparations and actions of humanity. Obviously, the exact measurement of how much of human action *fortuna* controls is irrelevant. The key, Machiavelli, argues is that humanity accepts *fortuna*

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<sup>459</sup> Althusser, *Machiavelli and Us*, p. 35

<sup>460</sup> Parel, *Machiavellian Cosmos*, p. 74

<sup>461</sup> Machiavelli, *The Prince*, ch. 25, p. 98

as a permanent condition in which politics takes place. “The major implication of this idea is that humans can never fully control or permanently master events because unforeseen and uncontrollable *accidenti* are bound to arise.”<sup>462</sup> *Fortuna* functions in the background of politics, constantly reminding actors that no matter what they do, circumstances will change and they will not be able to fully control those changes.

*Fortuna* is not a neutral concept for Machiavelli. It can have positive effects, but any period of good *fortuna* will always run out. “The nature of the *Fortuna* of countries is such that it will necessarily affect them adversely from time to time.”<sup>463</sup> In the *Florentine Histories* he asserts that *fortuna* is “the friend of our discords.”<sup>464</sup> It is these inevitably downturns that Machiavelli instructs his readers to prepare for by constructing, maintaining and renovating just, ethical, and legal *ordini*.

In Machiavelli’s estimation political actors should not adopt a passive attitude towards the influence of *fortuna*. *Fortuna* may be ‘the arbiter of half of our actions’ but neither it, nor *accidenti*, exerts total control over politics. In Machiavelli’s thought “there are no intimations of an irrevocably determined flow of events; neither *fortuna* nor *necessità* dominate the flow of existence; there are no absolute values which men ignore or deny to their inevitable doom.”<sup>465</sup> Machiavelli uses the concept *fortuna* to instruct readers that while they cannot completely alleviate the effects caused by it, they can and should do their utmost to prepare for its inevitable fluctuations. Machiavelli argues that “it is not as if men, when times are

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<sup>462</sup> Fatovic, *Outside the Law*, p. 11-12

<sup>463</sup> Parel, *Machiavellian Cosmos*, p. 68

<sup>464</sup> Machiavelli, *Florentine Histories*, IV.28, p. 176

<sup>465</sup> Berlin, ‘The Originality of Machiavelli,’ p. 162

quiet, could not provide for them with dikes and dams.”<sup>466</sup> Preparations can and should be made. The best preparations are strong *ordini*, meaning laws and constitutional orders, which are able to withstand changes in *fortuna* without compromising their ethical and legal foundations.

Machiavelli warns that even the best preparations will not be enough to fully secure a state from all ill effects. As Parel notes, Machiavelli wishes “that humans should be active rather than passive. This is not to say that success is guaranteed.”<sup>467</sup> But on the other hand, “often things arise and *accidenti* come about that the heavens have not altogether wished to be provided against.”<sup>468</sup> Political actors are left to do their best to prepare for changes in *fortuna*. They may succeed in the long term but eventually even their best preparations will fail. In preparing for and responding to drastic changes in *fortuna* political actors must exercise as much *virtú* as they are able to. The struggle between *fortuna* and *virtú* may cause frustration for some political actors. “They can, however, at least attempt to escape this frustration by looking upon political life as a constant struggle against the unforeseen and the fortuitous.”<sup>469</sup> Exactly what that *virtú* consists of and how it should be exercised will be elaborated in part two of this chapter. For now we need to note that Machiavelli thinks in the long-term when it comes to *fortuna*. When it comes to analyzing the effect of *fortuna* and how preparations for changes in it should be made, Machiavelli always looks to the long-term. This perspective emphasizes that politics for Machiavelli is a never ending struggle with change.

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<sup>466</sup> Machiavelli, *The Prince*, ch. 25, p. 98

<sup>467</sup> Parel, *Machiavellian Cosmos*, p. 83

<sup>468</sup> Machiavelli, *Discourses*, bk. II, Ch. 29, p. 197

<sup>469</sup> Parel, *Machiavellian Cosmos*, p. 66

In Machiavelli's lexicon *fortuna* functions as an indicator that a city or political actor is not acting with enough *virtú*. *Fortuna* may help for a brief period but one's fortunes will inevitably change sooner or later. Machiavelli states that "he who has relied less on *fortuna* has maintained himself more"<sup>470</sup> and that "the prince who leans entirely on his *fortuna* comes to ruin as it varies."<sup>471</sup> Furthermore, Machiavelli's perspective is that "[w]henver he describes an individual or city as 'fortunate,' Machiavelli implies that it relies too much on something other than its own virtue."<sup>472</sup> For example, in chapter seven of *The Prince* Machiavelli attributes Cesare Borgia's precipitous rise and fall to "the *fortuna* of his father."<sup>473</sup> Though he acquired his principality mostly through *fortuna*, Borgia did all he could to create secure foundations for his principality. However the rhetoric of this passage suggests that Machiavelli is being rather sarcastic in his assessment of Borgia. In the end, he did not act with enough *virtú* to alleviate the inevitable risks posed by changes in *fortuna*. In the end Borgia lost his principality. By stressing the negative effects of *fortuna* Machiavelli urges political actors to always be vigilant.

*Fortuna* is one of the two concepts that comprise Machiavelli's understanding of what is now referred to as political contingency. Changes in *fortuna* are not the only aspects of contingency that political actors must contend with according to Machiavelli. Machiavelli argues that *accidenti* warrant equal concern. Whereas *fortuna* is an ontological condition, *accidenti* are defined as concrete events in his work. This does not mean however that there is a simple

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<sup>470</sup> Machiavelli, *The Prince*, Ch. VI, p. 22

<sup>471</sup> Machiavelli, *The Prince*, Ch. XXV, p. 99

<sup>472</sup> Benner, *Machiavelli's Ethics*, p. 167

<sup>473</sup> Machiavelli, *The Prince*, Ch. VII, p. 26-27

causal relation between negative fluctuations in *fortuna* and the occurrence of *accidenti*.

### *Accidenti*

In addition to *fortuna*, Machiavelli places great emphasis on the impact of what he calls *accidenti* on a political regime. Together both concepts form the basis of Machiavelli's thoughts on what is now understood as contingency but, as noted above, his notion of instability and unpredictability in politics is only a precursor to the contemporary understanding of the term. Unlike *Fortuna*, which is a characteristic of the political realm, *accidenti* in Machiavelli's thinking are concrete events. *Accidenti* are specific occurrences to which he ascribes very important normative, ethical, and legal implications. McCormick claims that "*accidenti* are... fellow phenomenological manifestations of chance or contingency."<sup>474</sup> I argue however that McCormick's formulation should be modified. The two concepts exist and operate at different levels within the political realm. *Fortuna* should not be understood as a phenomenological manifestation. It is rather an existential condition in which politics take place, it functions ontologically. *Accidenti* occur and impact politics at the level of the ontic, not the ontological. Nor are *accidenti* always causally related to *fortuna*. As such, they are not necessarily "more useful manifestation for students of political science to examine" as McCormick claims.<sup>475</sup> Rather, *accidenti* occur amidst the conditions described as *fortuna*.

The occurrence of *accidenti* does not always correspond to changes in *fortuna*. One may be experiencing a period of good *fortuna* only to be besieged by a

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<sup>474</sup> McCormick, 'Addressing the Political Exception', footnote 13, p. 899

<sup>475</sup> McCormick, 'Addressing the Political Exception', footnote 13, p. 899

terrible and grave accident. One example of this is Cosimo De' Medici's rise to power described in the *Florentine Histories*. After the death of his father Cosimo became a prominent citizen in Florence. He made "many citizens into his partisans,"<sup>476</sup> thus increasing his status and power. Shortly thereafter however, his enemies lead by Rinaldo degli Albizzi conspired against him succeeding in having him arrested and exiled.<sup>477</sup>

I argued above that the notion of continual change described by Machiavelli as *fortuna* challenges the notion of normality or a normal state of affairs in which politics takes place. His use of the term *accidenti* to describe specific, unpredictable events is in some ways *unfortunate*. An accident can only be defined in relation to an idea of regular, normal situation. The notion of '*accidenti*' presupposes normal functioning. For an event to be defined as an accident it must be counter posed to a conception of a normal functioning of a political regime. As argued above, Machiavelli's work on *fortuna* challenges this possibility. The presupposition of normality can be removed without dampening the critical force of Machiavelli's thoughts on *accidenti*. I will retain the term for the purposes of clarity in this chapter with the caveat that *accidenti* need not imply a prior notion of normality.

Machiavelli includes within the category of *accidenti* a plethora of occurrences which are similar to events which are sometimes currently labeled as states of emergency or exception. *Accidenti* "refer to various irregular (if not unpredictable) occurrences that threaten to destabilize the political order."<sup>478</sup> Examples of *accidenti* include: natural phenomenon such as plagues, floods and

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<sup>476</sup> Machiavelli, *Florentine Histories*, IV.27, p. 173

<sup>477</sup> Machiavelli, *Florentine Histories*, IV.27-29

<sup>478</sup> Fatovic, *Outside the Law*, p. 11-12

famine;<sup>479</sup> wars and foreign invasions;<sup>480</sup> “plots and conspiracies”<sup>481</sup> against princes; disunion between the plebs and the Senate; prominent citizens becoming too powerful;<sup>482</sup> and even attempted reform of the Roman Agrarian law.<sup>483</sup> In a sense, *accidenti* is a catch-all term for any unforeseen event. *Accidenti* are hard to predict, can take various forms, and they are inevitable. The common characteristic of *accidenti* is that they pose a threat of some kind to the existence of the state. Indeed, *accidenti* threaten to destabilize, even bring down, a regime.

There is a strong similarity between occurrences which Machiavelli describes as *accidenti* those types of events which are currently sometimes defined as emergencies or exceptions. McCormick argues that *accidenti* are equivalent to what are currently called exceptions. However, I argue that we should not posit a direct equivalence between the two. In instances when Machiavelli ascribes an extraordinary quality to events, extraordinary connotes supernatural occurrences.<sup>484</sup> In the last chapter of *The Prince* Machiavelli speaks of “extraordinary things without example, brought about by God” such as the raining of manna from the sky and water spilling out of a rock.<sup>485</sup> In one instance he does refer to “extraordinary *accidenti*” in a discussion of the Roman dictatorship but he does not argue that all *accidenti* are extraordinary.<sup>486</sup> Indeed the phrase never recurs anywhere else in his work. Machiavelli may have used the phrase extraordinary *accidenti* once in the

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<sup>479</sup> Machiavelli, *Discourses*, bk. II, ch. 5, p. 139

<sup>480</sup> Machiavelli, *The Prince*, ch. 3, p. 11

<sup>481</sup> Machiavelli, *Discourses*, I.2, p. 12

<sup>482</sup> Machiavelli, *Discourses*, I.33, p. 71

<sup>483</sup> Machiavelli, *Discourses*, I.37, p. 78-79

<sup>484</sup> Benner, *Machiavelli's Ethics*, p. 371

<sup>485</sup> Machiavelli, *The Prince*, ch. 26, p. 103

<sup>486</sup> Machiavelli, *Discourses*, I.34, p. 74

*Discourses* and the word extraordinary may have extra-legal connotations in his lexicon but it would be going too far to equate his concept of *accidenti* with what are currently understood as exceptions.

Equating *accidenti* with exceptions or extraordinary situations burdens the concept with normative implications Machiavelli argues against. The key difference is that while Machiavelli may understand some *accidenti* as being extraordinary he does not argue that they require extraordinary or exceptional responses, rather he argues just the opposite. As McCormick points out “By describing political phenomena often exclusively in terms of *accidenti* and by expanding the use of the term..., Machiavelli made what was by definition external, extrinsic, and insubstantial into the very core of politics and hence the central focus of political thought.”<sup>487</sup> If Machiavelli places *accidenti* at the very core of politics then they cannot be understood as exceptions. By treating *accidenti* as inevitable and regular occurrences Machiavelli removed their exceptional quality.

Machiavelli’s notion of *accidenti* undermines the idea of exceptionality in another way. Specifically he argues that *accidenti* can and inevitably will arise from both essential divisions between social groups within a society and from the institutional core of the regime itself. He asserts that it is the structure of social divisions and the regimes themselves which can and inevitably will be implicated in the occurrence of *accidenti*. I argue that contemporary liberal-democratic societies and states are similarly implicated in the occurrence of situations defined as emergencies or exceptions. Indeed, they are always implicated to some extent because emergencies do not exist prior to being named as such through processes of

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<sup>487</sup> McCormick, ‘Addressing the Political Exception’, p. 889

contestation over sovereign decisions, as discussed in chapter two. Contemporary societies must deal with the effects of antagonisms in much the same way as Machiavelli's Florence. Additionally, I will demonstrate that Machiavelli's suggestion that legal and constitutional regimes create *accidenti* is as true for current liberal-democratic regimes as it was for the Roman constitution and Florence.

McCormick argues that for Machiavelli "*accidenti* are generally external (or at least, if internal, then internally nonessential) phenomena and hence, paradoxically, both less reliable and more controllable."<sup>488</sup> I do not disagree with McCormick that Machiavelli usually discusses *accidenti* which are the result of either external or internally non-essential causes. However, I strongly agree with Machiavelli's argument that social division/antagonism and the specifics of a political regime itself are the terrain on which *accidenti* emerge and are dealt with. This suggestion is more important to take from Machiavelli, not his suggestion that *accidenti* are usually caused by external or internally non-essential forces.

Machiavelli is the first theorist of modern politics to realize that social antagonisms can and inevitably will be deeply implicated in the occurrence of *accidenti*. He observes that "in every republic are two diverse humors, that of the people and that of the great," whether that republic be Rome or Florence.<sup>489</sup> They are divided because "the people desire neither to be commanded nor oppressed by the great, and the great desire to command and oppress the people."<sup>490</sup> Machiavelli recognizes that these divisions are constitutive for societies, the people and the great are at irreconcilable odds with one another. These conflicting desires inevitably

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<sup>488</sup> McCormick, 'Addressing the Political Exception', p. 892-893

<sup>489</sup> Machiavelli, *Discourses*, I.4, p. 16

<sup>490</sup> Machiavelli, *The Prince*, Ch. IX, p. 39

generate frequent *accidenti*. He writes, “many *accidenti* arose in [Rome] through the disunion between the plebs and the Senate...”<sup>491</sup> And as McCormick acknowledges, Machiavelli contends that “Domestic discord means greater susceptibility to *accidenti* internally...”<sup>492</sup> This predicament is unavoidable.

The first accident which occurred in Rome as a result of this disunion happened just after the Tarquin kings were expelled. The *grandi* feared the Tarquins and wanted the support of the plebs should the Tarquins act against them. So while the Tarquins ruled Rome the nobility acted humanely towards the plebs. Once the Tarquins were expelled however the great no longer had use for the plebs and because they wish ‘to command and oppress the people’ they turned on the plebs and “began to spit out that poison against the plebs that they had held in their breasts, and they offended it in all the modes they could.”<sup>493</sup> Thus disunion caused violence and civil strife. Another accident which occurred because of the disunion between the plebs and the *grandi* was the result of attempted reform of the Agrarian Law. The *grandi* were able to take a much larger share of conquered lands than the plebs. When the brothers Gracchi attempted to reform this law “it inflamed so much the hatred between the plebs and the Senate that they came to arms and to bloodshed, beyond every civil mode and custom.”<sup>494</sup>

Machiavelli does not argue that the disunion between the people and the great should be fixed or overcome. On the contrary, the disunion is an existential fact which must be continuously negotiated and the tensions it generates allowed to vent

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<sup>491</sup> Machiavelli, *Discourses*, I.2, p. 14

<sup>492</sup> McCormick, ‘Addressing the Political Exception’, p. 895

<sup>493</sup> Machiavelli, *Discourses*, I.3, p. 15

<sup>494</sup> Machiavelli, *Discourses*, I.37, p. 80

through properly instituted laws.<sup>495</sup> In this he is a precursor to theories of antagonism which posit societies as being constitutive split by various political groups. Machiavelli's work is the beginning of a genealogy of antagonism in political thought which includes theorists such as Marx, Gramsci, Schmitt and Laclau and Mouffe. Machiavelli's position on antagonism is very similar to Schmitt's notion of 'the political'. Both posit irreconcilable political conflict as an essential feature of any society. For Machiavelli it is inevitable that these divisions will lead to *accidenti* which may threaten the existence of the state. Indeed, he argues that the conflict over the Agrarian Law ultimately lead to the downfall of the Roman Republic.<sup>496</sup> On Machiavelli's account, "Society is... a battlefield in which there are conflicts between and within groups."<sup>497</sup> As chapter two pointed out, conflicts created by social antagonism are an issue contemporary liberal-democratic regimes must face just as Rome or Renaissance Florence. To sum up Machiavelli's position in current terminology, situations which may be defined as exceptional or as emergencies can occur on the terrain of social antagonism. It is the substance of the relationship itself which can sometimes lead to the type of events which are currently labeled as states of emergency.

Machiavelli uses an ancient analogy to describe the disunion between the people and the great. He describes antagonism as "diverse humors," referencing the ancient technique of describing society as a human body.<sup>498</sup> Parel argues that Machiavelli's use of 'humors' to describe social divisions is incompatible with

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<sup>495</sup> Machiavelli, *Discourses*, I.5, p. 17

<sup>496</sup> Machiavelli, *Discourses*, I.37, p. 78-79

<sup>497</sup> Berlin, 'The Originality of Machiavelli', p. 165

<sup>498</sup> Machiavelli, *Discourses*, I.4, p. 16

modern political studies.<sup>499</sup> He also contends that humoral divisions cannot be translated into class conflict. Class conflict functions dialectically while humoral divisions are natural and cannot and should not be overcome.<sup>500</sup> Thus he denies the attempts by Lefort and Gramsci to assimilate Machiavelli's writing on the great and people to the discourse of Marxism and class struggle. Parel however misses the point. Machiavelli's key contribution is not that he conceptualized social divisions as necessarily humoral in nature. Machiavelli also rightly argues that disunion cannot and should not be overcome. It is that he recognizes that social antagonisms are constitutive of societies and that these antagonisms are a key terrain on which *accidenti* occur. How we conceptualize and understand these antagonisms will vary throughout the centuries. Additionally, Machiavelli's analysis of antagonism does not need to be assimilated to class struggle to have any relevance for theorizing emergency politics in liberal-democratic regimes. To trap Machiavelli's insights on social antagonism within the ancient metaphor of bodily humors would unnecessarily remove any contemporary relevance of his work. But if we take the initial insight but allow for changes to the conceptualization of antagonism we see that Machiavelli is still very relevant. Social antagonisms exist in every society and they will inevitably have an impact on existential crises from time to time, however we conceptualize them. What is important is to take from Machiavelli these insights not the metaphors he uses to conceptualize them.

Machiavelli's second crucial claim regarding *accidenti* is that they can be generated by the regime itself. He argues that "in everything some evil is concealed

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<sup>499</sup> Parel, *The Machiavellian Cosmos*, p. 109

<sup>500</sup> Parel, *The Machiavellian Cosmos*, p. 110

that makes new *accidenti* emerge.”<sup>501</sup> His suggestion is that “*accidenti* are generated by the very core of a regime, spawned by its very essence.”<sup>502</sup> One example of this phenomenon are the “accidents [that] arose through the creation of the Decemvirate.”<sup>503</sup> The Decemvirate were created to devise laws which would temper disputes between the people and the nobility they soon began abusing their power by holding “the state with violence” and to favor certain noble youths, turning them into partisans.<sup>504</sup> Obviously current liberal-democratic regimes are not subject to historically similar types of *accidenti*. But, as Schmitt well knew, and as I argue in this thesis, the institutional structures of liberal-democratic regimes are a terrain on which *accidenti* can occur. In the case of Schmitt’s work it was conflict over sovereign decisions and decision-making processes as well as the tension between equal chance and the supra-legal premium on legality. What we need to retain from Machiavelli is that these *accidenti* are not extraordinary happenings. They stem from the core of the regime itself, just as antagonisms are a constitutive aspect of societies. That means that they are not exceptional, rather they are everyday events.

Machiavelli makes a further point regarding *accidenti* which needs to be retained. He argues that *accidenti*, whether they be caused by an invading army, a flood, social antagonism or ill-formed state institutions, can be good for a republic. They can be put to productive use if responded to and managed correctly. *Accidenti* can be even more helpful when they cause a regime to return to its beginnings and renew itself.<sup>505</sup> The expulsion of the Tarquin kings mentioned above, for instance, is

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<sup>501</sup> Machiavelli, *Discourses*, III.11, p. 244

<sup>502</sup> McCormick, ‘Addressing the Political Exception’, p. 891

<sup>503</sup> Machiavelli, *Discourses*, I.40, p. 85

<sup>504</sup> Machiavelli, *Discourses*, I.40, p. 87

<sup>505</sup> Machiavelli, *Discourses*, III.1, p. 210

evaluated by Machiavelli as an accident “which made the republic more perfect.”<sup>506</sup> Disorder ensued after the departure of the Tarquins but was soon quelled by the creation of the Tribune of the plebs. The Roman citizens used the accident in order to repair their regime. Without the Tarquins there was no means for the plebs to check the insolence of the great. The Tribunes provided that buffer. Limiting the threatening and dangerous effects of an *accidenti* while putting it to good use at the same time is by no means guaranteed.

Machiavelli’s concepts of *fortuna* and *accidenti* challenge the idea that political situations can be definitively categorized either as normal or exceptional. His work on political contingency collapses the notion of exceptional or extraordinary events into the idea of normality and ‘normal’ politics such that both terms lose their conceptual coherence. For Machiavelli *fortuna* and *accidenti* are fundamental components of the political realm. Contrary to the predominant discourse of emergency politics, normality and exceptionality are not discrete categories. As McCormick argues, “In a very simple way, Machiavelli is quite radical. He speaks of politics extensively-almost exclusively-in terms of that which is conventionally considered remote. And he speaks of preventing, forestalling, or putting to good use that which is normally thought to be unpredictable or uncontrollable.”<sup>507</sup> Furthermore, he advises that it would be foolish to believe that a state or an individual, even one given exceptional powers, could ever fully control *fortuna* or the negative effects it can have on regimes. Harboring the belief that *fortuna* can be fully managed is one aspect of the belief that extraordinary measures can control extraordinary circumstances. This is a drastically different understanding

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<sup>506</sup> Machiavelli, *Discourses*, I.3, p. 15

<sup>507</sup> McCormick, ‘Addressing the Political Exception’, p. 891

of emergency politics and politics in general from those theories that assume or rely on a notion that there exist normal and exceptional times.

I argue that it is necessary to adopt Machiavelli's position when confronting emergency politics. In those theories which rely in one way or another on the norm/exception binary the assumption is that normality is the predominant state of affairs. 'Normality' is only periodically interrupted by brief occurrences which are defined as crisis or emergencies by powerful political elites. The assumption that such occurrences are brief plays a large role in justifying extraordinary and exceptional measures that are supposedly temporary in duration. But in what can a 'normal' state consist if the political realm and political regimes are constantly in flux? The distinction between normal and exceptional breaks down when regimes are understood as continuously engaging with changes in *fortuna*. Normality is a highly problematic concept when it is imposed on a political realm which views continuous fluctuations of *fortuna* as a fundamental, ontological characteristic. Contrary to many contemporary thinkers, this does not mean that the norm is becoming the exception or that it always has been. In those theories contingent events occur, but contingency is not all encompassing. In normal times contingency is assumed to have minimal effect on a regime. On the other hand, for Machiavelli, *fortuna* and *accidenti* are always acting on regimes and influencing the outcomes of political actions. Those situations which are today sometimes characterized as exceptional are on Machiavelli's account part and parcel of regular, everyday political engagement.

Managing changes in *fortuna* as well as the inevitable occurrence of *accidenti* is no easy feat according to Machiavelli. On his account, the best approach is to create, maintain and periodically renovate good *ordini*. Acceptable

constitutional and legal regimes can only be built and maintained with ‘ordinary’, lawful methods. Indeed, Machiavelli argues in favor of methods for creating just regimes which are decidedly un-‘Machiavellian.’ He does not unambiguously advocate extraordinary measures. Rather he presents the best methods for governing *ordini* through problems which will arise in the process of constructing, maintaining and renovating them.

### **The Ends and Means of Emergency Politics**

In the face of continuous changes in *fortuna* and the inevitability of *accidenti* Machiavelli advocates an approach based on ethics and laws. The contingency and unpredictability of the political realm itself calls for varied, nuanced responses. Indeed, Machiavelli argues that extraordinary or exceptional means never need to be used, even if the accident which requires them may be defined by political elites as extraordinary. The use of *ordini* and ordinary means is a far superior strategy for confronting *fortuna* and *accidenti*. He contends that political actors should always act with *virtú*. *Virtú*, an ambiguous and notoriously difficult concept to translate into English, “refers to specifically human capacities to respond in appropriate ways to natural, supernatural, or man-made constraints.”<sup>508</sup> Machiavelli’s main concern is to instruct political actors on the ways to act virtuously even in the face of *accidenti*. This section will first establish that Machiavelli’s work does stress the ethical aspects of all political action. Secondly, it will discuss in detail Machiavelli’s preference for ordinary as opposed to extraordinary forms of political action.

### *Machiavelli’s ‘Political’ Ethics*

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<sup>508</sup> Benner, *Machiavelli’s Ethics*, p. 135

Machiavelli is often accused of separating politics from morality and ethics such that politics is a fully autonomous realm of human action. Additionally, he is often cited as an early, if not the first, theorist of what is today known as *realpolitik*.<sup>509</sup> On this reading of his work, political action can only be judged by the extent to which it efficiently and effectively secures power. Moral and ethical considerations must, and should, be left aside. This is not the case however, and a growing body of literature demonstrates that a closer reading of his work reveals Machiavelli to argue in support of just, ethical and legal methods for creating and maintaining a state, especially in when confronting *accidenti*.<sup>510</sup>

Morality and ethics are not autonomous from politics in Machiavelli's thought. On the contrary, politics is given an ethics and morality all its own. Isaiah Berlin argues that Machiavelli does not separate politics from morality; rather he makes an even more fundamental separation. "What Machiavelli distinguishes is not specifically moral, from specifically political values..."<sup>511</sup> Rather, Machiavelli separates Christian from secular, pagan values. Political ethics and morality fall into the latter category. His conception of pagan ethics and morality that is distinctly this-worldly. "Ethics so conceived – the code of conduct, or the ideal to be pursued by the individual – cannot be known save by understanding the purpose and character of his *polis*: still less be capable of being divorced from it, even in thought."<sup>512</sup> Machiavelli argues that this separation is necessary because Christian ethics are incompatible with the types of political actions needed to found, secure and renew an

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<sup>509</sup> Leo Strauss's *Thoughts on Machiavelli* is representative of this school of interpretation of Machiavelli's oeuvre.

<sup>510</sup> On this perspective see Benner's *Machiavelli's Ethics* and McCormick's *Machiavellian Democracy*.

<sup>511</sup> Berlin, 'The Originality of Machiavelli,' p. 169

<sup>512</sup> Berlin, 'The Originality of Machiavelli,' p. 178

earthly regime. He argues that “Our religion has glorified humble and contemplative more than active men. It has placed the highest good in humility, abjectness, and contempt of things human...”<sup>513</sup> Recall that Machiavelli advocates an active rather than a passive approach to changes in *fortuna*. Christian ethics simply do not teach one an ethics which will allow them to act with *virtú*. *Virtú* is a this-worldly trait. Machiavelli does not argue that Christian morality and virtue and ethics are bad in and of themselves, he just does not believe you can build a well-ordered regime based on them. And it is “impossible to combine Christian virtues... with a satisfactory, stable, vigorous, strong society on earth.”<sup>514</sup> He opts for pagan virtues because he wants virtuous individuals to build, maintain and periodically renovate well-ordered regimes. For Machiavelli there is an ethics and morality of politics, that can only be understood and practiced in relation to politics, and that indeed depends on politics. But they are not separate from one another and certainly not autonomous domains which are at odds with one another.

Violence is an integral element of Machiavelli’s political ethics. However, Machiavelli never unambiguously praises its use. On the contrary, he almost always advises that any use of violence for political ends will do more harm than good in the long term. On the issue of violence Berlin reads Machiavelli as a hard-nosed realist, ready to use whatever means necessary to effectively secure power and stability in a regime. Rulers must be prepared to be ruthless just as “to be a physician is to be professional, ready to burn, to cauterize, to amputate; if that is what the disease requires.”<sup>515</sup> Berlin, following Sheldon Wolin, contends that Machiavelli believes in a permanent ‘economy of violence’ – the need for a consistent reserve of force

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<sup>513</sup> Machiavelli, *Discourses*, II.2, p. 131

<sup>514</sup> Berlin, ‘The Originality of Machiavelli,’ p. 171

<sup>515</sup> Berlin, ‘The Originality of Machiavelli,’ p. 184

always in the background to keep things going...”<sup>516</sup> This ‘economy of violence’ allows for the use of violence and ruthlessness whenever the Prince or renovator of a regime finds it necessary. Crucially, Berlin argues that for Machiavelli the use of such methods is not exceptional or extraordinary at all. “The pagan world that Machiavelli prefers is built on recognition of the need for systematic guile and force by rulers, and he seems to think it natural and not at all exceptional or morally agonizing that they should employ these weapons whenever they are needed.”<sup>517</sup> Granted such methods “are called for only by extreme need; yet political life tends to generate a good many such needs, of varying degrees of ‘extremity.’”<sup>518</sup> I agree that political life is characterized by the ever-presence of dangerous and potentially existential threats to a regime but Berlin is mistaken that Machiavelli condones the use of violence as a normal course of political action. If Machiavelli believed that the constant use of force was necessary he would have referred to its application as ordinary. He does not however. Indeed he describes such the use of violence, fraud and guile unregulated by ethics and law as extraordinary. Given the normative connotations of the word extraordinary in Machiavelli’s lexicon it can hardly be argued that he fully endorses its use as a normal and ordinary tactic of governance.

On the other hand, Berlin does acknowledge some limitations on the use of violence. He argues that on Machiavelli’s account “Where a society is relatively sound... it would be quite wrong to practice violence for violence’s sake, since its results would be destructive of social order, when *the purpose of government is to*

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<sup>516</sup> Berlin, ‘The Originality of Machiavelli,’ p. 192

<sup>517</sup> Berlin, ‘The Originality of Machiavelli,’ p. 180

<sup>518</sup> Berlin, ‘The Originality of Machiavelli,’ p. 191

*create order...*”<sup>519</sup> What Berlin fails to see is that because the use of violence is regularly spoken of by Machiavelli as an extraordinary action, he does not conceive of it as a normal aspect of political action. For most regimes violence, fraud and guile are definitely extraordinary means which contravene *ordini* and are therefore to be discouraged. Violence is not a normal aspect of pagan, this-worldly ethics. Furthermore, Berlin acknowledges that law plays a role in limiting the use of violence. “You may be violent and use your power to overawe, but you must not break your own laws, for that destroys confidence and disintegrates the social texture.”<sup>520</sup> Exactly how a ruler may use violence without breaking their own laws is not explained by Berlin. Nor does he provide textual support for this position. As I will demonstrate below the relationship between force and law in Machiavelli’s thought is more nuanced than this. Force and law are bound up with one another.

Berlin’s reading of the scope of what Machiavelli’s ethics allow is broad. Violence is not a normal or ‘ordinary’ aspect of political ethics for Machiavelli. Usually it is referred to as an extraordinary method. He certainly never advocates the use of extraordinary methods for responding to *accidenti*. Berlin argues that for Machiavelli we all live “under the perpetual shadow of carefully regulated violence.”<sup>521</sup> I agree that violence has a presence in Machiavelli’s thought and in his conception of ethics, law and society. But Berlin’s reading of ‘carefully regulated’ in Machiavelli is mistaken. He does not acknowledge the full extent of the regulation that Machiavelli proposes.

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<sup>519</sup> Berlin, ‘The Originality of Machiavelli,’ p. 176, emphasis added

<sup>520</sup> Berlin, ‘The Originality of Machiavelli,’ p. 187

<sup>521</sup> Berlin, ‘The Originality of Machiavelli,’ p. 200

Only in certain times is recourse to violence ever justified, and even then Machiavelli is cautious about its use. Those are times when *ordini* and *leggi* effectively do not exist: the founding of a regime before laws are made or when a regime is so corrupt that the laws are not enforced and do not function. During the founding of a regime Machiavelli advocates the use of extraordinary violence.<sup>522</sup> He states that Romulus was right to kill Remus. But Machiavelli also notes that he immediately set up the Senate and sought council from them. This suggests that extraordinary violence is only justified when it is used outside the confines of *ordini*. If that is the case then the violence loses its extraordinary character altogether. Machiavelli does endure its use though. Althusser rightly notes that Machiavelli “speaks the language of the armed force indispensable to the constitution of any state...”<sup>523</sup> But such violence is inappropriate once the regime is constituted. Once regime is in place, its *ordini* and *legge* established, extraordinary and violent methods must be avoided at all costs.

### **The Superiority of Ordinary Means: Against Extraordinary Methods**

Machiavelli problematizes the use of extraordinary methods, arguing that they rarely work, we don't know in advance if they'll work, and it's hard if not downright impossible to find someone who can use them for only good purposes without abusing them in any way. He contends that “In a republic, one would not wish anything ever to happen that has to be governed with extraordinary modes. For although the extraordinary mode may do good then, nonetheless the example does ill; for if one sets up a habit of breaking the orders for the sake of good, then later,

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<sup>522</sup> Machiavelli, *Discourses*, I.9, p. 29-30

<sup>523</sup> Althusser, ‘Machiavelli’s Solitude’, p. 125

under that coloring, they are broken for ill.”<sup>524</sup> Machiavelli describes dictatorship as an ordinary institution which can allow a regime to avoid the use of extraordinary methods.

### *Against Dictatorship*

Machiavelli describes dictatorship as an ordinary institution compatible with mixed regimes. Recourse to a dictator is by no means an extraordinary mode. However, Machiavelli is circumspect when recommending its use. On the one hand, he writes that dictators “always did good to the city” and that “without such an order cities escape from extraordinary *accidenti* with difficulty.”<sup>525</sup> The role of the dictator is to respond to *accidenti* for which even the ordinary laws of the city are felt to be inadequate. “Those [*accidenti*] that cannot [be met with legal responses] may be dealt with by the institution of a dictator. Only as a last alternative does Machiavelli introduce the extra-constitutional ‘prudent man.’”<sup>526</sup> Furthermore, Machiavelli argues that “it was impossible for him to escape his limits and to hurt the city.”<sup>527</sup> These limits, similar to those discussed in chapter two, were appointment by the public order, strict time limits on his term, authority to resolve an accident but not to change the state, and finally the non-corrupt nature of the people which could effectively check his power. On the other hand, Machiavelli, at least implicitly, recognizes some problems with dictators. He knows that Caesar caused the downfall of the Roman republic from the office of dictator. And he argues that the office is not dangerous to a republic while dictators are publicly appointed. But he never discusses how it may be possible to ensure that all dictators are properly appointed.

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<sup>524</sup> Machiavelli, *Discourses*, I.34, p. 75

<sup>525</sup> Machiavelli, *Discourses*, I.34, p. 74

<sup>526</sup> McCormick, ‘Addressing the Political Exception’, p. 897-898

<sup>527</sup> Machiavelli, *Discourses*, I.34, p. 74

I part ways with Machiavelli on the issue of the ordinary and praiseworthy nature of the dictatorship. While dictatorship may have made sense and worked in the Roman republic and a similar institution may have functioned well in Venice during Machiavelli's time I argue that it is inappropriate for contemporary liberal-democratic regimes. While there are many analogies between Machiavelli's mixed regime and liberal-democratic regimes the compatibility of dictatorship is not one. As argued in chapter one of this thesis, the dictatorship is incompatible with liberal-democracy because it is impossible to create institutional restraints which will prevent abuses of the office. Also, the notion of dictatorship itself relies on an uncritical understanding of the norm/exception binary. Furthermore, it is difficult if not impossible to know for certain the dictator appointed is truly virtuous and will use the powers of the office only for the good of society. Machiavelli "has... admitted that the appearance of great leaders is always a matter of pure good *Fortuna*..."<sup>528</sup> Given the unpredictability implied by *fortuna*, it is highly improbable that a regime will be able to find a virtuous dictator at the moment a grave *accidenti* occurs. The regime would be left in the predicament of appointing less than virtuous citizen as dictator, relying only on the institutional limitations of the office to prevent abuses. Because institutional limitations are unreliable, the larger lesson to take from Machiavelli's work suggests that the best response to *accidenti* are ordinary legal and constitutional institutions. Liberal-democratic regimes, similarly to Machiavelli's mixed regimes, should not to have recourse to dictators but rather to find resources within the regime to 'absorb' situations defined as emergencies or exceptions.

*Necessary Virtú and Ordinary Politics*

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<sup>528</sup> Skinner, Machiavelli, p. 69

Machiavelli does not advise the use of extraordinary modes for dealing with *accidenti*. Indeed, he takes the exact opposite position emphasizing “the legal over the extra- or supralegal means of defending a regime.”<sup>529</sup> He argues that “when these ordinary modes are not there, one has recourse to extraordinary ones, and without doubt these produce much worse effects than the former.”<sup>530</sup> One example of this is the rise and fall of Francesco Valori in Florence.<sup>531</sup> Valori was extremely ambitious and soon enough became “like a prince of the city.”<sup>532</sup> There were no ordinary modes at that time for restraining his power so the people could not vent their frustration against him peacefully. Valori had nothing to fear except extraordinary modes such as armed insurrection. To defend against this he gathered supporters to his faction which would defend him. Machiavelli laments that this situation was allowed to reach a boiling point until violence ensued. “If one had been able to oppose him ordinarily, his authority would have been eliminated with harm to him alone; but since he had to be eliminated extraordinarily, there followed harm not only to him but to many other noble citizens.”<sup>533</sup> In this example we see the constitutive divisions of the city not being able to be vented because there were no laws in place which would allow it to do so. The accident could have resulted in harm to only Valori but, because extraordinary methods had to be used, it resulted in harm to many people. Planning ahead by putting in place a law which would have allowed for public accusations against prominent citizens such as Valori would have allowed the conflict to vent itself ‘ordinarily’.

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<sup>529</sup> McCormick, ‘Addressing the Political Exception’, p. 898

<sup>530</sup> Machiavelli, *Discourses*, I.7, p. 24

<sup>531</sup> Machiavelli, *Discourses*, I.7, p. 24-25

<sup>532</sup> Machiavelli, *Discourses*, I.7, p. 25

<sup>533</sup> Machiavelli, *Discourses*, I.7, p. 25

A second reason Machiavelli does not advise the use of extraordinary methods is because it is very difficult to accurately foresee their effects. He writes that “many times things well advised do not have a good outcome and things ill advised have a good one; and if wicked advice is praised for a good outcome, one does nothing but inspire men to err, which results in great harm to republics because bad advice is not always successful.”<sup>534</sup> A good example of this is the Pazzi conspiracy detailed in Book VIII of the *Florentine Histories*. The Pazzi wanted to check the rise to power of Lorenzo de’ Medici. Francesco Pazzi argues that the best course of action would be the assassination of both Lorenzo and Giuliano de’ Medici. His advice is followed and the Pazzi along with their conspirators attempt to kill the Medici brothers in church. This is a case of bad advice producing bad effects. The assassination fails and in the aftermath the entire city breaks out into partisan violence.<sup>535</sup> Extraordinary modes for removing powerful citizens immediately resulted in more violence, death and harm than was created by Lorenzo de’ Medici. Francesco Pazzi himself is actually wounded in the assassination attempt. Machiavelli’s point could not be clearer. As Benner notes “Extraordinary modes are unregulated by laws and invariably produce disorder, even if they sometimes appear to be a necessary evil.”<sup>536</sup> Ordinary methods are superior to extraordinary ones when confronting *accidenti* such as a conflict generated by the antagonism between conflicting groups within a society.

Machiavelli’s preferred approach to confronting *accidenti* and managing fluctuations in *fortuna* is for political actors to impose further constraints on their actions. These constraints are ethical, legal and amenable to the larger goal of

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<sup>534</sup> Machiavelli, *Florentine Histories*, Book IV, Ch. 7, p. 152

<sup>535</sup> Machiavelli, *Florentine Histories*, Book VIII, Ch. 9, p. 326

<sup>536</sup> Benner, *Machiavelli’s Ethics*, p. 372-373

creating just regimes. Machiavelli's account of situational necessities runs counter that traditionally found in political theory.

Necessity is often invoked in discourses of emergency politics to explain the conditions which actors resort to exceptional or extraordinary methods. The most famous expression of this idea is the phrase 'necessity has no law.' For instance, torture is often justified on the grounds that the situation, such as a ticking time-bomb scenario left the torturer with no other choice as we saw in chapter four. Without resorting to torture, the suspect would not have given up information which allowed for the bomb to be diffused. In this line of thinking necessity is a device used to circumvent criticism and discussion of the appropriate methods for responding to a given situation.

Machiavelli uses the term *necessità* to describe constraints imposed on political actors by a given situation. He too recognizes that necessity can function as an external constraint on action. While necessity is usually associated with emergency or exceptional situations, Machiavelli understands necessity as operating in all circumstances, emergency or otherwise. Benner notes that "Machiavelli's reflections suggest that adequate conceptions of *necessità* do not focus only on extraordinary constraints. On the contrary, prudent agents should take the ordinary and natural or reasonable constraints that confront them every day as seriously as necessities that arise *in extremis*."<sup>537</sup> Thus necessities form another element of contingency in Machiavelli's thought. They operate at all levels of politics and political action. They are certainly not restricted to extraordinary situations. Benner notes that "the conditions that Machiavelli describes as *estraordinario* are never

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<sup>537</sup> Benner, *Machiavelli's Ethics*, p. 150

natural or reasonable, nor does he speak of ‘extraordinary necessities.’<sup>538</sup> As discussed above, the word extraordinary has normative connotations for Machiavelli. As such, he does not classify any necessities, violent or otherwise as extraordinary. They are ordinary constraints which must be attended to but, one always has a choice of how to respond to them, regardless of the character of the necessity which happens to occur.

Crucially, necessities never fully determine the responses of political actors. Though the Machiavelli’s conception of necessities may include violent events he never argues that violence imposes ultimate or exceptional necessities on political actors. Virtuous political action when responding to *accidenti*, according to Machiavelli, is to plan ahead for such events by building, maintaining and periodically renovating just orders. Virtú is dealing with *accidenti* ‘ordinarily’ by imposing self-authored laws and orders. “His most *virtuoso* agents are not those who seize the occasion given by *necessità* to justify ‘extraordinary’ actions, but those who labor even in ‘quiet times’ to found and maintain quite ordinary, regulative orders.”<sup>539</sup> Machiavelli commends the founders and builders of states when they create a strong set of laws to order the new regime. He argues that virtue can be recognized in “the ordering of laws.”<sup>540</sup> Even if such laws are not perfect they can be enough to make good use of *accidenti* such that “by the occurrence of *accidenti* [they] become perfect.”<sup>541</sup>

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<sup>538</sup> Benner, *Machiavelli’s Ethics*, p. 370

<sup>539</sup> Benner, *Machiavelli’s Ethics*, p. 151-152

<sup>540</sup> Machiavelli, *Discourses*, I.1, p. 8

<sup>541</sup> Machiavelli, *Discourses*, I.2, p. 11

Laws are a form of self-imposed and self-authored *necessità* which actors use to constrain themselves. When they are more constrained they are less vulnerable to the threats of grave crises. As Benner argues “[s]elf-imposed necessities are the best guarantee of human orders and the optimal expression of *virtù*; and self-imposed necessities in the form of *leggi e ordini* involve ethical constraints or obligations, not the arbitrary or lawless use of force.”<sup>542</sup> Self-imposed necessities in the form of laws should always regulate the use of force on Machiavelli’s account. McCormick points out that, “The complexities of the mixed regime itself are such that it may absorb many of the kinds of *accidenti* that the political realm will thrust upon it.”<sup>543</sup> Actors which show *virtù* are not the ones who eschew law in times of crisis like Francesco Pazzi Francesco Valori. A virtuous actor is one who always supports ordinary, legal methods of dealing with *accidenti*, such as Niccolo da Uzzano “to whom extraordinary ways were distasteful.”<sup>544</sup>

Laws and *ordini* are two forms of *necessità* which are particularly suited to absorbing or venting *accidenti* which arise from political antagonism. Machiavelli argues that “every city ought to have its modes with which the people can vent its ambition, and especially those that wish to avail themselves of the people in important things.”<sup>545</sup> The lesson to take from this is that democratic states also need legal order. Without legal constraints on political action antagonisms can get out of control and turn violent. “Irresponsible agents may think that the only way to deal

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<sup>542</sup> Benner, *Machiavelli’s Ethics*, p. 164-165

<sup>543</sup> McCormick, ‘Addressing the Political Exception’, p. 898

<sup>544</sup> Machiavelli, *Florentine Histories*, Book IV, Ch. 27, p. 173

<sup>545</sup> Machiavelli, *Discourses*, I.4, p. 17

with enemies is to eliminate them with violence.”<sup>546</sup> The surest way to prevent violence emanating from antagonisms is to regulate it with ‘ordinary’ laws.

Machiavelli always advises the use of legal means of dealing with *accidenti* instead of the unrestrained use of force and violence because for him law and force are intricately bound up with one another. Though this is not initially apparent in his most famous remark on the subject. He writes “you must know that there are two kinds of combat: one with laws, the other with force. The first is proper to man, the second to beasts; but because the first is often not enough, one must have recourse to the second.”<sup>547</sup> But Machiavelli goes on to say that “the one without the other is not lasting.”<sup>548</sup> This seems to suggest that force and law, man and beast are not completely separate. Rather they are mutually entwined. Machiavelli does not argue that one must use either force or law. As Benner puts it “[t]he opposition between force and law is classic sophistry: the necessity to use force in no way reduces the necessity to use laws to regulate it. Readers who fall in to the sophistical trap and unreflectively identify force with bestial ways fail to see that force can and should be regulated by human laws.”<sup>549</sup> And as Machiavelli’s examples of extraordinary modes have shown, use of force unregulated by law leads to more harm and disaster than was threatened by the crisis.

## **Conclusion**

Machiavelli’s work on contingency conceptualized as *Fortuna* and *accidenti* help us re-imagine emergency politics as part and parcel of everyday politics. The political realm is one in which new and unplanned for events are always and

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<sup>546</sup> Benner, *Machiavelli’s Ethics*, p. 148

<sup>547</sup> Machiavelli, *The Prince*, XVIII, p. 69

<sup>548</sup> Machiavelli, *The Prince*, XVIII, p. 69

<sup>549</sup> Benner, *Machiavelli’s Ethics*, p. 201

inevitably will always occur. “The most important implication of his approach is that one need not adhere to authoritarian or neoabsolutist positions...” to respond to such exigencies.<sup>550</sup> Political life then is the creation of regimes based on *ordini* and *leggi* which are just. Order and justice are one concept for Machiavelli. Regimes cannot be well ordered if they are unjust. “For Machiavelli, laws and institutions that lack *giustizia* are always disordered. Order and justice are not two discrete values that sometimes come into conflict so that one must choose which to put first. Since order depends on justice, justice must always come first, even when this seems to some observers to threaten what they take to be order.”<sup>551</sup> As such security and justice do not constitute a binary. Security means more than physical security. In a sense Machiavelli is a precursor to Honig’s call for defending the ‘more life’ of democracy, not just the ‘mere life’ of democratic citizens. It is because Machiavelli conceptualizes politics in a way that undermines the notions of both normality and exceptionality that he can build a case for constructing regimes which, as an ‘ordinary’ part of their functioning can ‘absorb’ events defined and acted upon as states of emergency without needing to break their own laws and orders.

Nowhere does Machiavelli use the word politics as a noun.<sup>552</sup> In all but one usage the word *politico* appears as an adjective for the word *vivere*, the verb ‘to live’. This suggests that for Machiavelli political life is a constant engagement with *fortuna* and *accidenti*. At the center of a *vivere politico* in his opinion are *ordini*, just orders based on law.<sup>553</sup> The conclusion we can draw from the close association of *accidenti*, *fortuna*, *ordini*, and *vivere politico* is that for Machiavelli the goal of

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<sup>550</sup> McCormick, ‘Addressing the Political Exception’, p. 898

<sup>551</sup> Benner, *Machiavelli’s Ethics*, p. 297-298

<sup>552</sup> Whitfield, *Discourses on Machiavelli*, p. 169-170

<sup>553</sup> Whitfield, *Discourses on Machiavelli*, p. 172

political life is the creation of *ordini* in a world characterized by drastic changes in *Fortuna* and the inevitability of possibly threatening *accidenti*. As Whitfield argues, “*vivere politico*, it will be found that this, which was the opposite of a *potestà assoluta* or *tirannide*, is no other than a *vivere civile e libero*, based on *ordini* and *leggi*.<sup>554</sup> Political life is the struggle to create regimes based on justice in a continually changing world. The next chapter will analyze how the problems of contingency, antagonism, and managing *accidenti* manifest themselves in liberal-democratic regimes as well as suggest ways to encourage politics to focus on *vivere politico*.

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<sup>554</sup> Whitfield, *Discourses on Machiavelli*, p. 174

## Chapter 7 - The Aliens Within

*“Physically speaking, we cannot separate. We cannot remove our respective sections from each other nor build an impassable wall between them. A husband and wife may be divorced and go out of the presence and beyond the reach of each other, but the different parts of our country cannot do this. They cannot but remain face to face, and intercourse, either amicable or hostile, must continue between them.”*

*Abraham Lincoln, First Inaugural Address,  
March 4, 1861*

### Introduction

The previous chapter demonstrated Machiavelli's argument that political regimes and conflicting 'humours' in society are deeply implicated in what he called 'accidenti', which I argued were very similar to situations that are today referred to as 'states of emergency'. Machiavelli, however, was analyzing what he called 'mixed regimes', which are similar to liberal-democratic regimes but obviously the differences must be accounted for. This chapter takes up Machiavelli's suggestions and contends that his insights are applicable to liberal-democratic regimes. The processes and structures involved in constructing and maintaining a democratic polity also implicate that polity in situations which are sometimes defined as 'states of emergency'.

The thesis of this chapter is that situations presented or defined as 'states of emergency' are a constitutive aspect of any democratic polity and politico-legal regime. They are an 'ordinary' aspect of constructing, maintaining and even renovating a regime. As such the concepts of emergency and normality lose their coherence, or at least must be understood differently. They are better understood as contestations over fundamental values, principles and contingently constructed

foundations; not extraordinary and temporary events. Liberal-democratic legal orders and the political communities that legitimize them are deeply implicated in the occurrence of ‘states of emergency’. This does not mean that they are in a permanent ‘state of emergency’. Rather the opposite is true. Liberal-democratic regimes are always engaged in struggles over fundamental values and interests as well as how groups are included and articulated within a given society. As such a ‘state of emergency’ should be understood as a type or form of the contingency that liberal-democratic regimes must constantly engage with. Ernesto Laclau argues that “states of emergency are an integral part of the political construction of the social bond.”<sup>555</sup> Liberal-democratic regimes are at least partially responsible for creating the elements which may threaten them and cause a situation which the regime defines as a ‘state of emergency’. This chapter details how and why this is the case.

These claims are defended via the work of Hans Lindahl, Bert van Roermund, Bernhard Waldenfels, Ernesto Laclau and Chantal Mouffe. In similar and overlapping ways these scholars investigate the problem of constructing and maintaining liberal-democratic regimes. The work of Lindahl/van Roermund/Waldenfels and Laclau/Mouffe are two different yet theoretically compatible ways of understanding one problem - the effects of social division on liberal-democratic regimes. Lindahl/van Roermund/Waldenfels approach the problem from a legal perspective while Laclau and Mouffe theorize it from the point of view of the political and hegemony. The work of Lindahl, van Roermund and Waldenfels is broadly compatible with that of Laclau and Mouffe. They are addressing the same problem, how to constitute political and legal unity in

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<sup>555</sup> Ernesto Laclau, ‘Bare Life or Social Indeterminacy’, p. 16

democratic societies. Both approaches focus on power in processes of inclusion and exclusion which are necessary for the constitution of any political regime.

The work of Laclau and Mouffe is crucial because they understand constitutive divisions and exclusions not as internal or external to society but as the limit of a social space such that society does not exist with any sense of full positivity or finality.<sup>556</sup> This demonstrates why political contestation and conflict are a permanent feature of liberal-democratic regimes. Their work is also useful in understanding why some excluded elements remain innocuous but others may become virulent and challenge the politico-legal regime that they inhabit. Mouffe is also useful for conceptualizing the limits of pluralism and pluralism contestation. I will argue that the limits of pluralist contestation are the terrain on which situations which are sometimes labeled ‘states of emergency’ occur.

Lindahl and van Roermund, following Waldenfels, demonstrate that the process of constructing and maintaining a politico-legal regime necessarily excludes certain values, interests and groups from the democratic polity. These values, interests and groups are not completely removed from the social space. They remain, sometimes peacefully but sometimes they can be or are perceived to be threatening. These scholars also demonstrate that the processes of constructing and maintaining a liberal-democratic regime are never finalized. A regime is never fully or finally constructed, it is always forced to continuously engage with contingency. Lindahl, van Roermund and Waldenfels do not say much specifically on ‘states of emergency’. Lindahl, however, does provide one clue for re-thinking them. He states in a footnote that “a more complete analysis of the structure of the state of exception

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<sup>556</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

would need to deal with the problem of political reflexivity.”<sup>557</sup> Accounting for the reflexive nature of democratic polities highlights the exclusions necessary for constructing a democratic regime and helps to comprehend why a regime may come to see some excluded elements as a threat to its existence which requires the use of emergency measures.

## **Unity – Hegemonic and Normative**

### *Hegemonic*

Machiavelli argued that conflicts between the *grandi* and the *popolo* were one of the main causes of *accidenti* in Florence. These conflicts were constitutive; they could only be regulated and vented, never fully extinguished. The same is true in liberal-democratic regimes, though the *grandi* and the *plebs* are no longer the main antagonists. The theory of Laclau and Mouffe provides a useful perspective for analyzing and conceptualizing why conflicts are constitutive of, as well as how they continually undermine liberal-democratic regimes. They develop several concepts which are particularly useful in this task.

For Laclau and Mouffe political unity is conceptualized as hegemonic unity. Hegemony on their understanding is “a political *type of relation, a form... of politics*”.<sup>558</sup> Hegemonic formations are constructed via articulatory practices.<sup>559</sup> Articulatory practices attempt to structure, or suture, elements within a social space, converting them to moments. Elements are political groups, fundamental principles, values and interests which exist within a social space. When they are sutured to a

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<sup>557</sup> Lindahl, ‘Breaking Promises to Keep Them,’ p. 20, footnote 40

<sup>558</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 139

<sup>559</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 105

hegemonic formation they are referred to as moments.<sup>560</sup> The process of constructing and maintaining a hegemonic formation begins with plurality or an excess of possibilities and meaning.<sup>561</sup> From this plurality certain elements are selected and sutured together to compose the hegemonic formation. However this process cannot be conceptualized as merely the combing of elements which exist in a social space. Certain elements must be excluded from the hegemonic formation in order for it to have any coherence and unity. For Laclau and Mouffe this process is necessarily ongoing and can never be finally completed.<sup>562</sup>

Laclau and Mouffe postulate constitutive divisions within society as necessary for the construction of unity. They argue that “Every ‘society’ constitutes its own forms of rationality and intelligibility by dividing itself; that is, by expelling outside itself and surplus of meaning subverting it.”<sup>563</sup> The exclusions necessary to give coherence to a hegemonic formation also ensure that any formation will always be contingently articulated, open to contestation and alteration over time. As such, negativity is essential to any form of political unity.<sup>564</sup> They note that “A hegemonic formation... embraces what opposes it, insofar as the opposing force accepts the system of basic articulations of that formation as something it negates, but the *place of negation* is defined by the internal parameters of the formation itself.”<sup>565</sup> Some elements must remain as elements without being sutured within the hegemonic formation. The decision as to which elements will be articulated as moments and which will be left as elements is made by powerful actors *within* the hegemonic

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<sup>560</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 105

<sup>561</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 140

<sup>562</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 139

<sup>563</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 137

<sup>564</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 145

<sup>565</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 139, emphasis in original

formation. Certain groups, values, principles and interests are excluded because they are seen as subversive from the perspective of the hegemonic formation. As such, exclusion and division are necessary because “it is on the basis of its own limits that a formation is shaped as a totality”.<sup>566</sup> They describe these constitutive divisions as antagonisms.

Antagonism is a constitutive divide created by at least two groups opposing one another as they attempt to construct and maintain their own political identity and regime. Antagonisms postulate the limits of a given social space, “antagonism, as a witness of the impossibility of a final suture, is the ‘experience’ of the limit of the social. Strictly speaking, antagonisms are not *internal* but *external* to society; or rather, they constitute the limits of society, the latter’s impossibility of fully constituting itself.”<sup>567</sup> As Laclau formulates it “A notion of constitutive antagonism, of a radical frontier, requires... a *broken space*.”<sup>568</sup> Hegemonic formations cannot be defined permanently in a state of crisis of emergency because they are necessarily incomplete and contingently articulated.

Hegemonic formations in many western, liberal-democratic countries are relatively stable. Even the financial crisis of 2008-2011 did little to remove neo-liberal capitalism from its position of dominance. Additionally, there are very few political movements that advocate overthrowing liberal-democracy as a legitimate form of government. On the other hand, hegemonic formations are constantly evolving and sometimes the relations between moments weaken. If the structure becomes too weak it may begin to fall apart. Laclau and Mouffe describe such a

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<sup>566</sup> Laclau & Mouffe, ‘, p. 133

<sup>567</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

<sup>568</sup> Laclau, *On Populist Reason*, p. 85

situation, following Gramsci, as an organic crisis.<sup>569</sup> In an organic crisis excluded elements are able to subvert the relations between moments to the point that they collapse. I argue that such a situation could be experienced and defined as a state of emergency by powerful actors within the hegemonic formation. Because they initially decided which groups, values and principles were to be excluded in order to construct the hegemonic formation in the first place they would experience the weakening of relational bonds as an existential crisis. As such, an organic crisis is a crisis *from their perspective*. It is not a neutral determination of states of affairs which all groups or individuals within a society would agree with, particularly if they belonged to excluded groups or identified with excluded values and principles. A ‘state of emergency’ can only be described as an emergency from the vantage point of those invested in the maintenance of a hegemonic formation as it existed before the articulation began to break down. If this is the case then any declaration of emergency needs to be understood not as an objective assessment, but as a political tactic on the part of powerful elites within a hegemonic formation. Since hegemonic formations are contingently articulated an organic crisis is an ever present possibility. It need not necessarily be defined as or experienced as a ‘state of emergency’.

### *Normative*

This analysis is further supported by the work of Waldenfels, Lindahl and van Roermund. They describe a similar process of inclusion and exclusion at work in the construction and maintenance of liberal-democratic regimes. Their initial problematic is how a plurality of individuals and social groups can be welded

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<sup>569</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 136

together into a unified polity which rules over and governs itself. The first step is revising a widely accepted definition of democracy as the identity of the rulers and the ruled. This means that the rulers and the ruled in a democratic society are the same people, the terms ‘rulers’ and ‘ruled’ are co-referential.<sup>570</sup> Recall that Schmitt defends this definition of democracy. Lindahl and van Roermund contend, on the other hand, that a polity is unified around a notion of collective selfhood.<sup>571</sup> The former notion of unity understands identity as sameness, what Paul Ricoeur called idem-identity. The latter notion understands identity as ipse-identity, identity as selfhood in which a people rules over itself. This understanding of collective selfhood entails that the unity will understand itself, speak and act in the first person plural perspective. It also means that it can reflect on itself as an actor. Lindahl and van Roermund refer to this as a reflexive notion of unity and identity for a democratic polity.

Two implications follow from this formulation of a democratic polity as a collective self. The first is that the members of the group understand themselves to be a unity that will act collectively. Secondly, any actions taken from the first person plural perspective are done for the sake of the collective as a collective self.<sup>572</sup> Collective selves engage in what Bratman calls ‘shared intentional activity’.<sup>573</sup> It follows that if in a democratic regime a collective self is acting by and for itself then any conceptualization of democracy must include a notion of constituent power. It is this constituent power which legitimizes and acts through the state, the constituted

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<sup>570</sup> Van Roermund, ‘Sovereignty: Popular and Unpopular’, p. 42

<sup>571</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 14

<sup>572</sup> Van Roermund, ‘First Person Plural Legislature’, p. 244, Lindahl, ‘Constituent Power and Reflexive Identity’, p. 16

<sup>573</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 15

power. This point raises two important questions: how is a constituent power unified initially and maintained over time? And how exactly does it speak and act as a collective subject through a constituted power, a legal order?

Schmitt maintained that a constituent power needed to be homogenous in order to constitute and maintain itself. The people themselves needed to have something essential in common on which they could base their unity and on which to enact a constitution via a political decision. Lindahl and van Roermund accept the need for ‘a people’ to share something in common but they disagree with Schmitt over what this common interest is. For them it certainly need not be any essential characteristic like racial, ethnic or national similarity. Rather, Lindahl argues that a constituent power begins “as the constitution *of* a political unity through a legal order... Someone must seize the initiative to determine what interests are shared by the collective and who belongs to it.”<sup>574</sup> This act of seizing the initiative, positing the boundaries of who is and is not included in the community, and defining the shared fundamental interests and values cannot be *ex ante* legitimated by the democratic polity. The act of positing initial core values and boundaries must always come first.

On their understanding democracy is a political system in which all acts done in the name of the collective must be legitimated by constituent power. This means that the act which creates a democracy can never be legitimate or ‘legal’ from the perspective of the legal system it posited. Sovereign power is indispensable.<sup>575</sup> Yet the requirement for legitimacy derived from constituent power remains. On Lindahl’s reading a constituent power is formed by an individual or a small group seizing the initiative and acting as a legitimate constituted power. The first act of

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<sup>574</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 22

<sup>575</sup> Van Roermund, ‘Sovereignty: Popular and Unpopular’, p. 34

instituting a constituent power must present itself as acting with legitimacy grounded in the constituent power it creates through its seizing of the initiative. However, seizing the initiative does not necessarily succeed. It can only be retroactively legitimated if individuals identify with the polity, its boundaries, interests and core values. Because constituted power comes first, a constituent power can only react to individuals and groups attempting to speak and act in its name and from a first person plural perspective. As such, there exists “a fundamental *passivity* at the heart of political unity.”<sup>576</sup> Constituent power can only respond to and retroactively legitimize (or not) the actions of individuals and small groups claiming to act in its name. Constituted power acts in the name of the constituent power then must wait to see if that action is taken up and retroactively legitimized. This means that when someone seizes the initiative they “can only *originate* a community by *representing* its origin.”<sup>577</sup>

We now see how Lindahl and van Roermund understand the paradox of politics. Honig, following Rousseau, understood the paradox as a question of which comes first, good law which makes good people or good people who make good law? In other words, which must come first constituent or constituted power? Lindahl and van Roermund’s reading of the paradox is that constituted power comes first but only if it successfully creates the constituent power on which it legitimizes its initial action.

Before addressing the structure of representation and attribution of individual acts to the collective it is necessary to establish that law is the symbolic form of the unity of a collective self in a democratic polity. Constituted power can be primarily

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<sup>576</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 18

<sup>577</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 19

understood as legal order. Following Kelsen Lindahl argues that "... democracy functionalizes political unity by making of it the unity of a legal order. More precisely, *the functional unity of the people is the unity of a legal order, a normative unity.*<sup>578</sup> This is necessary because any society is rife with division, conflict, and antagonism as Machiavelli argued. There is no common ground or experience which can function as a substantial basis for unity. Modern liberal-democratic states solve this problem by making legal order function as point of symbolic and institutional unity of divided societies. Moreover, "On the other hand, law conditions the political world of democracy in the sense that legal or state order is also the unity wherein *division*, thus political majorities and minorities, can ensue. In other words, a legal order not only determines the (normative) unity of a people, but constitutes the locus of political conflict and division."<sup>579</sup> Legal order sits uncomfortably between attempting to fix political unity and allowing for and even encouraging contestation and conflict. This means that division and contestation are internal to liberal-democratic regimes. Such internal division and contestation which can emerge from liberal-democratic legal orders are one of the terrains from which crisis situations sometimes labeled as 'states of emergency' can arise. Here Lindahl and van Roermund are in agreement with Machiavelli's suggestion that *accidenti* can emanate from within a political regime itself.

The ability of legal order to unify a divided society is further complicated by the logic of representation. A logic of representation is essential to a democratic polity understood as a reflexively oriented collective self. Certainly the collective self, the ipse-identity cannot actually act itself. "As Waldenfels put it: '(...) it is

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<sup>578</sup> Lindahl, 'Democracy and the Symbolic Constitution of Society,' p. 31

<sup>579</sup> Lindahl, 'Democracy and the Symbolic Constitution of Society,' p. 33

impossible for a we to say 'we'. Saying 'we' is done by spokesmen, who are more or less directly authorized to speak...<sup>580</sup> In other words, "each particular act, as a *legal* act, 'represents' or symbolizes the political unity to which it belongs..."<sup>581</sup> The unity necessary for constituent power only exists through its representations. Lindahl argues that the collective self only exists in the form of self-attributive acts by individuals.<sup>582</sup> Essentially, an act is an action of the collective self if it can be attributed to the collective self, i.e. if everyone who constitutes the collective self would have acted in the same way or agrees that the action was legitimately carried out. As Lindahl argues, "The common good remains forever absent... an empty normative signifier that provides no normative orientation whatsoever. And as the common good is the way of conceiving of the people as a *unity*, to argue that the common good is only accessible through its particularizations is to assert that unity is necessarily a represented unity."<sup>583</sup> These representations rely on attributing the acts of individuals to the collective. The consequence of this is that constituent and constituted power do not have direct access to one another.<sup>584</sup>

This structure of representation creates contestation in two ways. First, because any legal act which claims to be done in the name of the collective must be retroactively legitimized all such claims are contestable.<sup>585</sup> The democratic unity, or sections of it, could in some way refuse, or attempt to refuse, to legitimate any given action made on its behalf by a particular individual or even a state official. For

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<sup>580</sup> Van Roermund, 'First Person Plural Legislature', p. 241, citing Waldenfels, *Verfremdung der Moderne. Phänomenologische Grenzgänge*, p. 139

<sup>581</sup> Lindahl, 'Democracy and the Symbolic Constitution of Society,' p. 32

<sup>582</sup> Lindahl, 'Constituent Power and Reflexive Identity', p. 20

<sup>583</sup> Lindahl, 'Sovereignty and Representation in the EU,' p. 98-99

<sup>584</sup> Lindahl, 'Acquiring a Community,' p. 439

<sup>585</sup> Lindahl, 'Sovereignty and Representation in the EU', p. 100

instance, anti-gay marriage activists in California recently tried to force a high court judge to recuse himself in a case determining the legality of gay marriage because he was gay. The activists felt that his lifestyle choice and hence his particular legal actions could not represent and act in the name of what they claimed was the common good – banning gay marriage in the state. Secondly, this contestability of acts of political representation is complicated by the fact that modern liberal-democratic regimes delay indefinitely final decisions on self-attribution. As Lindahl notes, “the democratic *Rechtsstaat* is the form of political organization that *suspends*, up to a point, the initial and subsequent closures in view of determining anew what interests are shared by a community and who is an interested party thereto.”<sup>586</sup> Liberal democratic regimes institutionalize conflict and contestation. A democratic polity always exists in a mode of questionability because it forever delays final decisions on whether and how particular actions represent the reflexively oriented constituent power necessary to legitimize democratic governance. This means that liberal-democratic regimes are constantly engaging with their own contingent and contestable foundation. A final decision on whether or not a particular statute or action of a state official represents and actualizes fundamental values and interests is always delayed. As such those fundamental values and interests are forever contestable but, as Lindahl argued, only up to a point.

Certainly most actions of a state are legitimized by at least a portion of the population. The legitimacy of a police officer issuing a citation for speeding on the motorway is not usually questioned. The process of constructing and maintaining a democratic political community, mediated by the representational relationship between constituent and constituted power, does generate and concretize what are

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<sup>586</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 23

considered to be fundamental values, interests and a normative orientation by a large portion of the polity. This obviously entails the construction of a specific normative viewpoint with boundaries. As Lindahl points out, “constituent power—refers to the capacity to institute legal meaning, and this means to generate a normative point of view from which individuals can understand and identify themselves as members of a legal community.”<sup>587</sup> In order to establish this normative viewpoint and posit boundaries a democratic polity, because it is reflexively structured, must choose to include certain values and exclude others. Unity requires closure and closure is dependent on exclusion. “Closure is indispensable for normative orientation by the members of a community; in its absence, they would not know how they ought to behave.”<sup>588</sup> Alternately, a unity which allowed for infinite possibilities would be no unity at all.

“For to assert that representation concretises political unity is to acknowledge that every representation of the common good includes and excludes values. Ineluctably, representation is an ambiguous achievement. On the one hand, exclusion is a positive feature of representation: closure is a necessary condition for the disclosure of a common or public space. On the other hand, the operation of normative inclusion and exclusion implies that representation always brings about a normative reduction: the disclosure of the common good as concretised in ‘this’ or ‘that’ value necessarily involves a normative closure of the good.”<sup>589</sup>

According to Lindahl there is no escape from this dynamic, some exclusions will be necessary. In order to effect closure a democratic polity must posit a normative viewpoint against which representational acts can be judged. On this point Lindahl and van Roermund agree with Laclau and Mouffe. Closure brought about through a process of inclusion and exclusion must take place to give a liberal-democratic regime unity and coherence.

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<sup>587</sup> Lindahl, ‘Acquiring a Community,’ p. 436

<sup>588</sup> Lindahl, ‘Dialectic and Revolution,’ p. 777

<sup>589</sup> Lindahl, ‘Acquiring a Community,’ p. 447-448

Furthermore, the democratic polity will understand the values it includes as its own values, which are on its side of the boundary it has posited. As Lindahl argues, “any and every legal order embodies a *particular* set of values,” what it considers to be its own values.<sup>590</sup> A democratic polity is constantly engaged in a process of constructing and maintaining its own social and representational space which actualizes its own values and notion of the common good. Hence, a collective self must always look out over the boundaries of the political and legal order it sets for itself. As Waldenfels notes, “When a collective self is drawing a boundary in order to constitute itself it places itself inside the boundary. It becomes “an *inside which separates itself from an outside* and thus produces a *preference in the difference.*”<sup>591</sup> This preference in the difference is crucial because it helps to explain why a democratic regime or polity would feel threatened by the presence of values, interests and groups which are not its own. Any interest, value or group which does not fully belong to the collective self, the constituent power, is potentially a threat simply because it implies that the regime could be ordered differently.

Lindahl and van Roermund, following Waldenfels, develop a detailed analysis of the elements excluded by the process of constructing a reflexive democratic polity. The following section will analyze what they term, following Waldenfels, the ‘alien’ as well as what Lindahl refers to as a-legality. The alien is any excluded group, value or normative principle excluded from the viewpoint of a constituent power. A-legality is a possibility for subverting legal order and making visible its contingent foundations. Turning to a closer analysis of these two concepts will further the argument that liberal-democratic regimes and polities are always

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<sup>590</sup> Lindahl, ‘Authority and Representation,’ p. 4

<sup>591</sup> Waldenfels, *Phenomenology of the Alien*, p. 15

engaged in contestation and struggle over their most fundamental values, interests and normative principles.

### **Exclusion, A-Legality, the Alien and Antagonism**

Before discussing how the presence of excluded elements implicates liberal-democratic states in situations which could be defined as ‘states of emergency’ I need to stress that a-legality and alienness or the presence of alien elements within a liberal-democratic legal order do necessarily cause ‘states of emergency’. My argument is that they are generated structurally. They are the site and perhaps the form of situations and events which may be defined as ‘states of emergency’ by state officials but do not in and of themselves produce a crisis. They may however challenge the existence of the regime. This challenge need not necessarily have to manifest as a crisis which requires emergency measures. The elements excluded from a polity can exist benignly, become virulent or exist in any state between the two. Which excluded elements result in the declaration of an emergency must be determined historically and contextually.

#### *A-Legality*

Because law is the symbolic form of unity in a democratic regime “the unity of a collective self manifests itself in an interlocking web of *legal* behavior.”<sup>592</sup> But human behavior cannot always be categorized definitively as either legal or illegal. Lindahl argues that “human behaviour does not only fall snugly on either side of the divide between legality and illegality...”<sup>593</sup> Behavior which does not fit neatly into the legal binary demands a response from a legal order. “...lawmaking is responsive to something that demands a normative, no less than a factual, qualification...”

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<sup>592</sup> Lindahl, ‘A-Legality,’ p. 40

<sup>593</sup> Lindahl, ‘A-Legality,’ p. 41

Something demands legal qualification, in the broad sense of a determination of who ought to do what, where and when. As such, legislation responds to a question about legal boundaries, hence to a question about the unity of a legal order.”<sup>594</sup>

Accordingly, any new or ambiguous behavior forces a legal order decide if it is legal or illegal. Lindahl argues that a third form of behavior exists. Human behavior, he argues, “can call into question the ways in which legal orders draw the distinction between legality and illegality. This political manifestation of plurality... is a-legality.”<sup>595</sup> Illegal acts violate a norm; a-legal acts show how the norm could be set and applied differently, or how the legal order could exist without that particular norm. A-legal acts are “acts [that] contest a legal order by intimating a possible *legality of illegality*, and a possible *illegality of legality*.”<sup>596</sup> There is no strict line of demarcation between the two. Sit-ins at white only lunch counters by black activists during the American Civil Rights movements were il-legal *and* a-legal in that they violated segregation laws while at the same time demonstrating how society could be differently ordered. As such, a-legality is an ever present aspect of legal contestation. Additionally, the acts which seize the initiative to found a constituent and constituted power are always a-legal. As they precede the distinction between illegality and illegality as drawn by the democratic polity they must remain a-legal.

Anyone in a democratic polity can enact a-legal behavior. Even immigrants illegally crossing a border show how membership of a polity could be differently decided. A-legality is manifested in any act that challenges the distinction between legality and illegality as drawn by the polity from its preferential normative

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<sup>594</sup> Lindahl, ‘A-Legality,’ p. 45

<sup>595</sup> Lindahl, ‘A-Legality,’ p. 41

<sup>596</sup> Lindahl, ‘Border Crossings by Immigrants,’ p. 125

viewpoint.<sup>597</sup> “A-legality reveals possibilities that are, to a lesser or greater extent, possibilities as a legal collective’s own possibilities; but this is also to say that a-legality confronts a collective with possibilities that escape it to a greater or lesser extent - possibilities that are not its own.”<sup>598</sup> These possibilities are generated in part by the exclusions made and remade during the process of constructing and maintaining the democratic polity with its specific normative viewpoint. Those values, interests and norms which were and are excluded yet remained become manifested, embodied and enacted in acts of a-legal behavior. The inclusions and exclusions carried out by a polity are never finally settled. As such, they remain contingent and precarious. “A-legal acts lay bare the contingency of a polity.”<sup>599</sup> I argue that a-legal acts are also manifestations of that contingency upon which all democratic polities are founded. Finally, it should be noted that the difference between illegal and a-legal acts is not objectively determinable.<sup>600</sup> “[c]hallenges to legal order are, qua *challenges*, variable combinations of *threats* to and *possibilities* of collective selfhood.”<sup>601</sup> This means that a polity always has a choice in how to frame and understand a challenge as well as how it should be best responded to. Classifying an action or behavior as a-legal is always determined politically.

Because a-legality is in part the product of exclusions made by the polity, the responses a polity can make to a-legality are not limitless. As noted above, a polity cannot remain open to infinite possibilities. “[L]egislative acts display a finite responsiveness to what challenges legal boundaries, which means that they frame

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<sup>597</sup> Lindahl, ‘Border Crossings by Immigrants,’ p. 117

<sup>598</sup> Lindahl, ‘A-Legality,’ p. 49

<sup>599</sup> Lindahl, ‘Border Crossings by Immigrants,’ p. 128-129

<sup>600</sup> Lindahl, ‘Border Crossings by Immigrants,’ p.131

<sup>601</sup> Lindahl, ‘Border Crossings by Immigrants,’ p. 131

human behavior in such a way that it provokes the collective self with a finite questionability.”<sup>602</sup> The limits of questionability must always be politically determined. Law and legality are usually responsive to demands made on them. When someone questions the boundaries of a legal order by sitting in at a white only lunch counter the legal order decides whether it will continue to deem such an activity illegal or whether it can be incorporated within the legal order as legal. As Lindahl notes “legislation is responsive because it establishes retroactively *whether and how* behavior is a-legal.”<sup>603</sup> Yet legal responsivity is finite. The options are not unlimited but neither are they fixed *ex ante*. Indeed, “the responsiveness of legislative acts is never merely subordinate to what calls for legal qualification, never a fixed reaction to a pre-coded stimulus.”<sup>604</sup> This means that arguments concerning the necessity of using emergency measures in certain situations are false. A democratic regime can respond in any number of ways to a-legal acts which demand legal response. It never need necessarily turn directly to emergency measures. This position effectively counters the notion of a ‘law of necessity’ and the notion that necessity knows no law. As such making a decision between illegality and a-legality may induce or provoke large scale political struggle, depending on how legal and political elites choose to respond to it. Lindahl notes that although a-legality is ever present “there is no all-encompassing measure of (il)legality that could guarantee an orderly encounter between what calls for legal qualification and the legal qualification thereof.”<sup>605</sup> This is partially due to the fact that liberal-democratic regimes allow for and foster contestation of their most basic values and

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<sup>602</sup> Lindahl, ‘A-Legality,’ p. 48

<sup>603</sup> Lindahl, ‘A-Legality,’ p. 46

<sup>604</sup> Lindahl, ‘The Opening’, p. 62

<sup>605</sup> Lindahl, ‘A-Legality,’ p. 56

processes, the rules of the game, so to speak. On the other hand, while a democratic polity has options, it must also set limits on how it can respond.

How are those limits determined given that they are the product of a specific normative viewpoint which has no access to an external, objective standpoint? For Lindahl, “*the commitment to a common purpose that determines whether a collective can be ‘taken seriously’ also determines which contestations of that commitment can be ‘taken seriously’ by the collective.* Every reflexively structured legal order hides a blind spot which bursts the reciprocity of the hoary principle of (constitutional) dialogue: *audi alteram partem.*”<sup>606</sup> Essentially, Lindahl is arguing that limits must be determined politically; specifically by the amount of support a given a-legal behavior can muster taking account of the specific normative viewpoint of a polity and limits its responsiveness. “The interpretation of behavior as a-legal is bound up with an authoritative assessment about what normative possibilities are the collective’s *own* possibilities.”<sup>607</sup> I contend that ‘states of emergency’ can arise from a-legal acts which are beyond the polity’s own limits and possibilities, rather they may induce situations which can be defined as ‘states of emergency’ if they are determined to pose a significant threat. However, the key point is that they present a legal order with a behavior or action which is beyond its scope to incorporate either as legal or illegal behavior. One such situation would be an act which is defined as ‘terrorist’ a polity.

While it is impossible to objectively determine the limits of a legal order’s response to a-legality, Lindahl argues that we can recognize behavior that a polity has determined is beyond its possibilities for legal response. Lindahl argues that

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<sup>606</sup> Lindahl, ‘A-Legality,’ p. 47, translation of the Latin “hear the other side too”

<sup>607</sup> Lindahl, ‘The Opening’, p. 63

terrorism is the name given to acts which a legal order cannot respond to by categorizing as either legal or illegal. “By qualifying an act as terrorist, legal authorities deny that it can be the index of another legality, claiming, instead, that it is the expression of sheer illegality.”<sup>608</sup> In other words, the limit of a-legality is called terrorism. Acts of terrorism are deemed by the legal order as behavior or action which fall outside the scope of legitimate and acceptable response. As such legal order does not acknowledge that the terrorists or the act committed can have any normative claim on itself whatsoever. Waldenfels argues that “When a word such as ‘terrorism’ is used, as though it were merely an innocent descriptive term, what is often at stake is demonizing delinquents or – less spectacularly, but no less effectively – raising the own ‘way of life’ to the status of a general standard for all. Justice thus transforms itself into a hidden instrument of combat.”<sup>609</sup> ‘Terrorist’ acts are responded to with emergency measures in many circumstances. The definition of an act as ‘terrorist’ and any subsequent declaration of a ‘state of emergency’ are tactics of political combat. At this point a tension arises because liberal-democratic regimes are open to conflict over the boundaries of the legal order and the polity, as well as the contingent foundations of both. However, a polity must defend its distinction between legal and illegal by defining certain acts as outside that distinction, as acts that can’t be accounted for and responded to from within the system itself. Not doing so would jeopardize the unity and coherence of the system as such.

There is another aspect of terrorism which adds to its inability to be responded to. It “reaches a polity from without... even when those whom a legal-

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<sup>608</sup> Lindahl, ‘The Opening’, p. 63

<sup>609</sup> Waldenfels, ‘Inside and Outside the Order’, p. 366

political order qualifies as terrorists are its own citizens.”<sup>610</sup> Terrorism is always in some sense understood as an external threat. Terrorist acts are alegal acts which a democratic politico-legal regime deems beyond comprehension and certainly beyond integration within the society in any way. The preceding analysis, on the other hand, suggests that ‘terrorist’ acts are always also internal to the regime they are committed against. ‘Terrorism’ is an effect of a political and legal regime defining its own boundaries and setting limits to what it considers legitimate tactics of political contestation. Every democratic regime must define for itself what is outside. Lindahl and van Roermund conceptualize this outside of society as alienness.

### *The Aliens Within*

Lindahl and van Roermund, building on Waldenfels’ phenomenology of the alien, develop a structural analysis of the excluded elements and how they relate to the precariously unified political community. Waldenfels labeled these elements *Fremden*, the alien or strange depending on the translation. The alien is not “simply what is different.”<sup>611</sup> It is distinguished from a polity from the perspective of that polity. As Waldenfels notes: “In the final analysis, the alien concerns *me*. The division into own and alien... stems from a process of *self-differentiation*.”<sup>612</sup> This point is in agreement with Laclau and Mouffe’s argument that a hegemonic formation must exclude elements which it views as subversive. The alien is that which is intentionally excluded in the process of constructing a reflexive political unity. That The alien is the product of the necessary closure required for any form of political unity. The alien is “‘at odds’ with the vantage point, i.e., the basic truth

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<sup>610</sup> Lindahl, ‘Jus Includendi et Excludendi,’ p. 245

<sup>611</sup> Van Roermund, ‘The Order and the Alien’, p. 334

<sup>612</sup> Waldenfels, ‘Experience of the Alien’, p. 24, emphasis in original

(principle, value, act) that grounds the order.”<sup>613</sup> The alien is created by a democratic polity yet it remains as that which challenges the polity and exposes its contingent foundations.

We can further define the alien by distinguishing it from what is foreign. A foreigner or a foreign object is someone or something which is out of place. It fits within a known legal or political category yet it happens not to be there at that very moment. It can be returned to its proper place at any point in the future.<sup>614</sup> Alienness, on the other hand, is inaccessible to the political and legal categories of a given democratic polity. Not only is the alien out of place, it has no rightful or legal place. The alien is “literally extra-ordinary” because the politico-legal regime has no access to it other than through its exclusion.<sup>615</sup> In this sense, ‘terrorists’ are alien, though not all aliens need be defined as ‘terrorist’.

This exclusion is not necessarily a physical or even final exclusion. Van Roermund notes that the alien arises “at the edges” and in the “fissures” of the order.<sup>616</sup> Because they are not necessarily physically removed, the alien are elements which are excluded from the collective self, the ipseity, yet they are not necessarily excluded from the legal order. Indeed, they may be subject to the legal order, politically excluded while legally ‘included’. To use Laclau and Mouffe’s terms the alien is not included in the hegemonic formation though it remains within a given social space. As van Roermund notes, that which is excluded by a legal order, the alien, “lingers on as a factual network of political states of affairs, in which some

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<sup>613</sup> Van Roermund, ‘The Order and the Alien’, p. 336

<sup>614</sup> Van Roermund, ‘The Order and the Alien’, p. 335

<sup>615</sup> Van Roermund, ‘The Order and the Alien’, p. 334

<sup>616</sup> Van Roermund, ‘The Order and the Alien’, p. 334

knots are more dominant than others, while still others do not even register.”<sup>617</sup> I argue that groups such as a communist party are alien to liberal-democratic regimes yet they are still subject to the legal orders of those regimes.

The boundary between the own and the alien is not clearly demarcated. As Waldenfels argues, “The boundaries between that which is governed by rules, that which remains open, and that which is against rules are more or less indeterminate.”<sup>618</sup> There is no binary distinction between inside and outside. The reflexive democratic polity acting by and for itself “does not enter the world as a light in the darkness; rather, it responds to a twilight zone of meaning in which it finds itself.”<sup>619</sup> On the other hand, the alien does not necessarily speak clearly. The alien makes a demand which the democratic polity must respond to. Such a demand challenges the polity “to explore (thus to revise) the twilight zone marked by predicates like ‘ordinary’, ‘disorderly’ and ‘extraordinary’.”<sup>620</sup> The boundaries between the own and the alien are porous.

How does a polity decide which groups, interests, values and normative principles will be placed on the outside of a porous boundary? van Roermund contends that the act of self-inclusion [of a polity] excludes those parts of the world that would in any way challenge, threaten, or question the collective self.<sup>621</sup> This means that the alien is not simply what is different. It is distinguished from the vantage point of the normative viewpoint that makes the distinction and decides to exclude the alien in the first place. The alien is that which the polity decides is

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<sup>617</sup> Van Roermund, ‘The Order and the Alien’, p. 342

<sup>618</sup> Waldenfels, ‘The Ruled and the Unruly’, p. 185

<sup>619</sup> Van Roermund, ‘The Order and the Alien’, p. 337

<sup>620</sup> Van Roermund, ‘The Order and the Alien’, p. 345

<sup>621</sup> Van Roermund, ‘The Order and the Alien’, p. 336

against the fundamental interests of its collective selfhood. Waldenfels argues that it is possible for an alien element to crack the ground of legitimation and force a democratic regime to confront its contingent foundations.<sup>622</sup> It is this structure that Lindahl has in mind when he argues that any democratic polity is always in a constant ‘state of emergency’ because it is challenged by values, interests and groups it has marginalized in order to create and maintain its own identity.<sup>623</sup> I contend that challenges by alien elements can produce situations which a politico-legal regime defines as a ‘state of emergency’.

Waldenfels encapsulates why the alien is experienced as a threat to the existence of a regime.

“The alien can inspire curiosity and imagination, it can even enlighten us about ourselves – all this must be granted. Yet as soon as the alien breaks into the Arcanum of freedom and reason, it trips the ‘chaos’ alarm. Freedom and reason take up their arms. They fight because otherwise they would need to give up on themselves. But, inevitably, alienness leads to hostility, which only escalates, with each involved party becoming more and more committed to their belief that they alone have right on their side... Assumed to be coming from the outside, the alien is expected to carry its identification at all times as if it were an intruder.”<sup>624</sup>

Alienness is hostile because it reaches into and challenges the core elements of any democratic polity. Although this hostility seems almost unintentional, the result of curiosity rather than malevolent intent. Yet Waldenfels still insists that alienness is “always also *marked by insecurity, threat, and incomprehension*. These very factors are distributed in unequal fashion, depending on who determines the social and linguistic rules of the game, i.e., who ‘has the say’.”<sup>625</sup> Alienness, then, is marked by insecurity and threat. But it is the collective self, the democratic polity which does the marking. This point speaks to the deep implication of liberal-democratic regimes

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<sup>622</sup> Waldenfels, ‘Limits of Legitimation’, p. 103

<sup>623</sup> Lindahl, ‘Sovereignty and Representation,’ p. 101

<sup>624</sup> Waldenfels, *Phenomenology of the Alien*, p. 3

<sup>625</sup> Waldenfels, *Phenomenology of the Alien*, p. 80, emphasis added

in events they define as ‘states of emergency’. In order to constitute themselves, regimes mark off an outside and exclude elements they deem to be contrary to their core values, principles, interests and groups. Then, as Waldenfels suggests, the regimes experience that which they excluded as a threat to their own existence. Furthermore, “Every attempt at mastering the alien leads to a violent rationalization which attempts in vain to rid the self and rationality of their contingency and genesis.”<sup>626</sup> But such a goal is impossible. As convincing as Waldenfels account of the alien is, there still appears to be something missing. He does not fully account for the possibility that the alien actually is hostile to the democratic polity and its politico-legal regime. He acknowledges that the alien may remain “virulent in its exclusion”.<sup>627</sup> Here we can re-introduce Laclau and Mouffe’s concept of antagonism to further explain why some alien elements can be experienced as threatening to a regime.

Antagonisms, as understood on Laclau and Mouffe’s account, are very similar to alienness when Waldenfels states that “Alienness does not proceed from a division, but consists in a division.”<sup>628</sup> Recall that Laclau states that an antagonism can be characterized as “a *broken space*.”<sup>629</sup> What is crucial about antagonism, that the concept of alienness does not fully account for, is the relationship the polities on either side of the divide. Though structurally similar to alienness antagonisms have a characteristic which alienness does not. An antagonistic relationship is not characterized, like alienness, purely as exclusion and inclusion over a threshold. Antagonism “must be conceived not as an objective relation of frontiers, but as

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<sup>626</sup> Waldenfels, *Phenomenology of the Alien*, p. 81

<sup>627</sup> Waldenfels, *Order in the Twilight*, p. 111

<sup>628</sup> Waldenfels, ‘Experience of the Alien’, p. 31

<sup>629</sup> Laclau, *On Populist Reason*, p. 85

reciprocal subversion of their contents.”<sup>630</sup> Reciprocal subversion assists in explaining why a democratic polity could experience the alien as threat, hostility and the onset of chaos. The alien is not just what has been politically excluded. The alien is actively trying to undermine the polity so that it can create its own politico-legal regime. A polity views the alien as threatening because “in the case of antagonism... the presence of the ‘Other’ prevents me from being totally myself. The relation arises not from full totalities, but from the impossibility of their constitution.”<sup>631</sup> There will be groups, values and interests that are outside the polity, the hegemonic formation, which do not share the normative viewpoint, the ‘preference in the difference’ as Waldenfels calls it, but that are subject to the legal order. Furthermore, they may be either attempting to dominate a current legal order as it is or to overthrow the order and create a new one from scratch.

Such a condition does not necessarily lead to those situations which may be defined as ‘states of emergency’. “This does not mean of course that such a relation is necessarily one of friend/enemy, i.e. an antagonistic one. But we should acknowledge that, in certain conditions, there is always the possibility that this we/they relation can *become* antagonistic, i.e. that it can turn into a relation of friend/enemy. This happens when the ‘they’ is perceived as putting into question the identity of the ‘we’ and as threatening its existence.”<sup>632</sup> Alienness and antagonism may lead to an existential threat for a hegemonic formation, but not necessarily so. It depends on how political and legal elites decide to respond. However, the notion of antagonism is still essential because it posits mutual subversion between a polity and what it excludes, not simply the exclusion. This is what ensures the permanent

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<sup>630</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 129

<sup>631</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

<sup>632</sup> Mouffe, *On the Political*, p. 15-16

contestation of the contingent and precarious foundations of a polity as well as the legal order which is in turn grounded on the polity. It also ensures that some situations or actions will be defined as ‘states of emergency’ by state officials. The very process of constructing a liberal-democratic polity creates the groups, interests, and values that will always challenge it.

I contend that the presence of alienness and antagonism supports Machiavelli’s claim that conflicting social humours are implicated in situations which are defined by powerful political elites as ‘states of emergency’. Machiavelli, Waldenfels, van Roermund, Lindahl, Laclau and Mouffe conceptualize the divisions present in any society. All recognize that those divisions cause friction and strife within a society. As will be discussed below van Roermund, Lindahl, Laclau and Mouffe share the insight that when conflicts are properly regulated violence can be contained and conflict can actually be beneficial for society and not necessarily lead to crisis which can be defined as ‘states of emergency’.

### **The Excluded Elements Remain Within**

What becomes of the values, interests and groups that are excluded from the normative point of view, and hence the reflexively oriented constituent power? Lindahl argues that “the values excluded by political representation do not simply vanish into thin air. They are *marginalized*, that is to say, they remain at the fringes of a polity, embodied in forms of behavior that retain the potential of subverting the representations of the common good positivised in the legal order.”<sup>633</sup> The presence of these excluded elements means that political community exists in a mode of

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<sup>633</sup> Lindahl, ‘Sovereignty and Representation in the EU,’ p. 101

questionability, innovation, rupture and responsiveness.<sup>634</sup> We could also say that the presence of alien elements ensures constant engagement with contingent foundations. As noted above, marginalized groups and values do not disappear; they remain with the potential to subvert politico-legal order. Additionally, the process of inclusion and exclusion is by no means peaceful or orderly. As Waldenfels argues “This process of marginalization does not take place in peaceful agreement. Margins, of whatever kind, whether marginal phenomena, marginal groups, or ‘marginal nations’ arise by something being *forced* to the edge where the light no longer reaches it. This exclusion is not done without disturbance and danger.”<sup>635</sup> What does it mean to marginalize certain values, interests, interests or groups? These excluded and marginalized values, interests and groups do not simply disappear from the consciousness of the polity or fade into obscurity. As Lincoln stated in his first inaugural address, “intercourse, either amicable or hostile, must continue.”<sup>636</sup> Excluded values, interest and groups remain within a given social space even though they are excluded from the political community. Communist literature and a communist party may and do exist in countries which have enshrined individual property rights at the core of their legal system. Thus the unity is always contingently and precariously established. It is always challenged by excluded elements, which, just by their presence, challenge the existence of the polity in some way. As Lindahl notes, “the operation of inclusion and exclusion condemns legal order to an irredeemable *contingency*.”<sup>637</sup> The contingency of a regime is made visible and contested by excluded elements, in Laclau and Mouffe’s sense of the

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<sup>634</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 21

<sup>635</sup> Waldenfels, *Order in the Twilight*, p. 35

<sup>636</sup> Lincoln, ‘First Inaugural Address’,

<sup>637</sup> Lindahl, ‘Dialectic and Revolution’, p. 777, emphasis in original

term. Furthermore, these excluded elements and the challenge they may pose are created by and therefore intrinsic to liberal-democratic regimes. Contestation of contingent foundations by excluded elements are a terrain on which situations arise which could be defined as a ‘state of emergency’ by political and legal elites.

Lindahl argues that because of the presence of these excluded values, interests and groups that:

“with varying degrees of intensity, *a polity always finds itself in a ‘state of emergency’*; a ‘state of normality’ is a borderline case that a polity can only approach, without ever attaining... the representational act that gives birth to a polity inevitably creates the conditions for its possible revolutionary overthrow and replacement by a new polity. The contingency of a polity and its contestability are two sides of the same coin.”<sup>638</sup>

I concur that normality and emergency are in some sense borderline cases for any liberal-democratic regime and polity. Any liberal-democratic regime is attempting to reach a state of what it defines as normality. However, because the process of constructing normality necessarily involves excluding elements, and those elements do not disappear but remain to challenge the precariously constructed ‘normality’, normality as such can never be achieved. It is clear that ‘normal’ is conceptually impossible. We must also add to this the fact that what is called normal is actually the process of concretizing, sedimenting and maintaining a specific normative viewpoint which embodies particular values, interests and groups. Because of the particularity of the normative viewpoint we can conclude with Waldenfels that “normal itself is a polemical term...<sup>639</sup> Normal is never neutrally or objectively determined. Rather, normality is always informed by particular groups, values, interests and fundamental normative principles. If the initial act of positing a democratic polity necessitates positing the fundamental values of a normative

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<sup>638</sup> Lindahl, ‘Sovereignty and Representation,’ p. 101, emphasis added

<sup>639</sup> Waldenfels, *Order in the Twilight*, p. 120

viewpoint then normal is always politically determined. Further, it means that any defense of a 'normal' situation is a defense of what powerful political and legal actors claim is normal. As such any attempt to define a situation as an emergency and to mobilize emergency measures is political and should be responded to as such. Contestation of such claims is built into the structure of creating and maintaining a reflexive democratic regime. This seems to uphold Machiavelli's suggestion that political regimes and conflicting groups within society, humours as he called them, play a key role in situations which are sometimes defined as 'states of emergency'.

If the permanent situation of a liberal-democratic society is that the existence of the community and the politico-legal order is always challenged because that which it excludes in the process of unification always remains to show that the order could be differently constructed, the term emergency begins to lose its coherence. In contrast to traditional and mainstream theories of emergency which understand the concept as a temporary occurrence, emergency must be understood constitutive feature of any liberal-democratic polity. But this does not mean the 'the exception has become the norm' or that the 'state of emergency' is permanent. It means just the opposite, that 'normality' includes elements which continually threaten its existence simply through their mere presence. 'Normal' politics always involves contestation over the identity of the polity as well as the norms it sets for itself. As such 'states of emergency' are better conceptualized as contestation of contingent and precariously constructed politico-legal orders. The situations from which 'states of emergency' are declared are no different from 'ordinary' contestation over contingent foundations and hegemonic articulations. Lindahl is right to assert that contingency and contestation are two sides of the same coin. Emergency and normality are not states in which a regime can exist in. Rather they are better understood as polemical,

political notions used to conceptualize engagements with contingency. It is all the more crucial to take this position given that emergency measures are increasingly used by liberal-democratic regimes. Rather than engaging in legitimate, ‘ordinary’ political contestation, powerful elites are turning to emergency measures as a political tactic for conserving their own regimes, their own contingent hegemonic formations which institutionalize their preferred groups, interests, values and principles.

### **Institutionalizing conflict – Antagonism, Agonism and Law**

Liberal-democratic legal orders foster and institutionalize a-legality as well as contestation emanating from aliens which they experience as antagonistic. Lindahl argues

“that democracy links legitimacy to a certain *interruption* of attribution, an interruption that suspends, up to a point, the inaugural act of attribution, in view of determining anew who is a party to the community and what are the interests that join its members... democracy is the political form that seeks to renew – *up to a point* – this genetic condition of political community, institutionalizing the possibility of novel acts of bringing about the constitution of a collective self. Democracy does not abolish the ambiguity of ‘self-attribution’; it preserves this ambiguity, elevating it to the principle of political action.”<sup>640</sup>

Lindahl’s point is that the form of the politico-legal order always allows contestation over the boundaries as well as the fundamental values, principles, and interests of a democratic polity. By interrupting attribution liberal-democracy postpones forever the final decision on who ‘we’ are, what ‘our’ fundamental values and interests are, and who is allowed to challenge us and how they may carry out that challenge.

Contestation is understood as a positive element of society. As such, liberal-democratic regimes are careful not to completely stifle conflict. On the contrary, Lindahl argues that “innovation and rupture are... positively elicited by democratic

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<sup>640</sup> Lindahl, ‘Paradox of Constituent Power,’ p. 14

states under the rule of law.”<sup>641</sup> He further argues that “the rule of law does not neutralize democratic politics: it spells out the institutional conditions for ‘political action of a *subject*’, of a people as a unit in action.”<sup>642</sup> And as Waldenfels points out, “Beyond all actual conflicts, the possibility of conflict itself requires regulation.”<sup>643</sup> It is important for conflict to be regulated by institutions such as law so that basic ground rules for legitimate contestation can be set.

Mouffe takes a similar position when discussing the limits of pluralism. She argues that “a pluralist liberal democratic society does not deny the existence of conflicts but provides institutions allowing them to be expressed in an adversarial form.”<sup>644</sup> The goal of an agonistic model of democracy is to allow for contestation but also to limit and contain it so that it does not violent and corrosive. Indeed, Mouffe argues that “modern pluralist democracy – even a well ordered one – does not reside in the absence of domination and of violence but in the establishment of a set of institutions through which they can be limited and contested.”<sup>645</sup> Mouffe’s position is similar to Machiavelli who argued that a healthy society allowed confrontations between conflicting humors to play out within well constructed and maintained orders. Contestation is a good thing, but it must have its limits. Agonism, understood as healthy regulated conflict in which opponents recognize one another as adversaries and not as enemies, is preferred to antagonism since “antagonistic conflicts are less likely to emerge as long as agonistic legitimate political channels

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<sup>641</sup> Lindahl, ‘‘Constituent Power and Reflexive Identity’’, p. 23

<sup>642</sup> Lindahl, ‘‘Constituent Power and Reflexive Identity’’, p. 23

<sup>643</sup> Waldenfels, ‘Inside and Outside the Order’, p. 364

<sup>644</sup> Mouffe, *On the Political*, p. 30

<sup>645</sup> Mouffe, *The Democratic Paradox*, p. 22

for dissenting voices exist. Otherwise dissent tends to take violent forms...<sup>646</sup> When contestation is adversarial and both sides agree on the rules of the game “conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism.”<sup>647</sup>

Similarly, van Roermund argues that the quality of liberal-democracy “is dependent on how convincingly the irrepresentability of the people is institutionalised in political, socio-economic and cultural forms.”<sup>648</sup> I agree with these formulations. Liberal-democracy institutionalizes the conflict created by the structure of representation and the creation of aliens which necessarily occurs during the process of constituting a political unity. All political unities constitute themselves by excluding some interests, values, groups from the ‘we’ they create. Liberal-democracy is unique in that it recognizes those exclusions and institutionalizes contestation over how they were made, what they mean, how they function and whether or not they should continue. It is certainly advantageous but the drawback is the continuous presence of groups that want society to be organized differently and have a legally guaranteed right to fight to make it so.

*The limits of pluralism – Renewal up to a point*

Liberal-democratic regimes attempt to allow for legitimate conflict over fundamental values, interests and normative viewpoints and protect themselves from what they define as ‘states of emergency’ at the same time. Legitimate contestation and contestation deemed illegitimate which may lead to the declaration of a ‘state of emergency’ are generated by the same processes and structures within a liberal-

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<sup>646</sup> Mouffe, *On the Political*, p. 21

<sup>647</sup> Mouffe, *The Democratic Paradox*, p. 34

<sup>648</sup> Van Roermund, ‘Law, Narrative and Reality,’ p. 161

democratic regime. The difference between legitimate and illegitimate is a decision from the normative, hegemonic viewpoint. Such a decision may well need to be made, but it is always informed by particular political groups, values and normative principles.

Lindahl is careful to note though that democratic regimes only allow contestation ‘up to a point’. As noted above, ‘terrorism’ was a limit case for a-legal acts. Additionally, Mouffe argues that:

“The pluralism that I [Mouffe] advocate requires discriminating between demands which are to be accepted as part of the agonistic debate and those which are to be excluded. A democratic society cannot treat those who put its basic institutions into question as legitimate adversaries. The agonistic approach does not pretend to encompass all differences and to overcome all forms of exclusions... Some demands are excluded, not because they are declared to be ‘evil’, but because they challenge the institutions constitutive of the democratic political association. To be sure, the very nature of those institutions is also part of the agonistic debate, but, for such a debate to take place, the existence of a shared symbolic space is necessary.”<sup>649</sup>

The main question then is, ‘how do we decide when that point is reached? How do we know which demands, values and/or interests are to be excluded? Recall that these decisions are always taken from a normative viewpoint which is not shared by all those who are subject to the legal order. From this perspective events that are deemed ‘states of emergency’ are situations in which the dominant powers in a society decide that the polity, as they have constructed it, is under too much threat, too much of a challenge. The problem is sometimes those individuals and groups who are challenging the polity have a legal and constitutionally protected right to do so. Essentially determinations of normality and emergency concern situations in which dominant groups or state officials decide that the ‘point’ has been reached and

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<sup>649</sup> Mouffe, *On the Political*, p. 120-121

their opponents are no longer playing the game fairly. Such determinations are political as much as legal, moral and ethical.<sup>650</sup>

If we agree that “Rivalry and violence, far from being the exterior of exchange, are therefore its ever-present possibility. Reciprocity and hostility cannot be dissociated and *we have to realize that the social order will always be threatened by violence,*” we need not also agree that the ‘state of emergency’ is permanent.<sup>651</sup> Rather such a position recognizes that politics is a struggle to limit violence while respecting the rights of everyone to struggle for the type of society they want. If we also agree that liberal-democratic regimes and societies are implicated in and even help to foster and encourage contestation of their most fundamental values and principles, it becomes clear that declarations of a ‘state of emergency’ are a political tactic of hegemonic elites in liberal-democratic regimes.

## **Conclusion**

I argue that it is more analytically useful to understand situations defined as ‘states of emergency’ as embedded in the larger context of the limits of pluralism. The limits of pluralist contestation are heavily influenced, even decided, by the dominant polity from their particular normative viewpoint. Decisions concerning normality and emergency are polemical weapons used by dominant groups to limit contestations over the contingent foundations of their own polities, their collective selfhood. As such, normality and emergency or exceptionality have no neutral or objective conceptual value. By allowing for the distinction and even agreeing that a situation is normal or in crisis is already to take the position of one group in the conflict. Such a move should be resisted. The first step to countering the increased

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<sup>650</sup> Mouffe, *On the Political*, p. 121

<sup>651</sup> Mouffe, *The Democratic Paradox*, p. 131, emphasis added

use of emergency measures in liberal-democratic regimes is to refuse to take the position of those who declare that a 'state of emergency' is in existence.

## Conclusion

The problematic of the exception can never be finally solved or resolved. It can however be continuously renegotiated through radical democratic political contestation. I have argued that emergency politics should be inscribed within the wider context of hegemonic practices at the limits of contestation. Such a politics must be aware that any attempt to declare a state of affairs as exceptional or normal is a hegemonic tactic. When inscribed with wider hegemonic politics we no longer need to rely on the norm/exception binary. Indeed, exceptionalism can be eliminated from emergency politics such that it can be referred to as a problematic of the limits of contestation.

The norm/exception binary needs to be removed from theorizations of emergency politics because it closes down possibilities for radical democratic political contestation. Attempts to define a situation as exceptional by powerful political elites are also a claim that politics must be foreclosed until they decide that the exigency has been resolved and a 'normal' state of affairs has resumed. Such claims halt projects aimed at radical democratic politics in liberal-democratic regimes. They also lead to what Derrida calls "self-destructive, quasi-suicidal, autoimmunitary processes"<sup>652</sup> The increasing reliance of liberal-democratic regimes on claims of exceptionality and emergency powers are harming those regimes as much as the exigencies which political elites claim demand exceptional responses.

I argued that reading Schmitt's Weimar work against itself allows us to theorize sovereign exceptions and decisions as politically contested concepts. Additionally, sovereignty must be understood as the attribution of sovereign power

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<sup>652</sup> Derrida, 'Autoimmunity', p. 115

to agents who have been able to make sovereign decisions. Schmitt's work also points to a paradox of contestation inherent in liberal-democratic regimes. This paradox is crucial for theorizing emergency politics because emergency powers limit the scope of legitimate contestation in liberal-democratic regimes. The paradox of contestation as well as a politicized notion of decisions on exceptionality are the contours of emergency politics.

A new approach to emergency politics is needed in order to prevent liberal-democratic regimes from succumbing to suicidal autoimmune practices. I laid the foundation for this approach by deploying the work of Machiavelli, Lindahl and Laclau & Mouffe. Machiavelli's work demonstrates that we cannot rely on a notion of normality when theorizing emergency politics. The political realm is characterized by continual change and unexpected exigencies. There is no need to resort to extraordinary measures when engaging with the political realm. Rather, we should seek to build regimes which can absorb *accidenti* and changes in *fortuna*.

Liberal-democratic regimes will be better able to absorb the effects of contingency when they conceptualize emergency politics as hegemonic politics. Political contestation will need to be limited. The construction of exclusions needed to limit contestation will produce the antagonisms and 'aliens' which can be experienced as the presence of existential threats to a regime. The politics of those exclusions and limitations should not be eliminated by trapping them within the norm/exception binary. Rather, liberal-democratic regimes should approach them as instances of radical democratic contestation.

Liberal-democratic regimes are permanently exposed to the possibility of political violence and existential threats. There is no method to permanently protect

them from “what comes or happens.”<sup>653</sup> Derrida, in agreement with Machiavelli, reminds us that situations defined as exceptional their effects seem to come from the inside.<sup>654</sup> And as I have shown emergency politics are embedded within the basic structures and fundamental paradoxes of liberal-democratic governance. Confining such openness within a discourse of exceptionalism leaves political theory blind to the possibility of a radical democratic politics of emergency.

Without a radical democratic theory of emergency politics liberal-democratic regimes are more likely to continue to rely on practices of “suicidal autoimmunity.”<sup>655</sup> Autoimmune practices are tactics of emergency governance such the suspension of legal order, the curtailment of civil liberties, and the use of unregulated state violence. Autoimmune practices always do more harm than good. They always “end up producing, reproducing, and regenerating the very thing [they] seeks to disarm.”<sup>656</sup> The best way to deal with events or groups defined as existential threats is to strengthen those elements of a regime that we wish to protect – political freedoms, the rule of law, separation of powers, and political contestation which is aware of its exclusionary effects. This is the danger of approaching emergency politics from the perspective of the norm/exception binary. It is used to justify ‘exceptional’ or extralegal measures that only serve to reproduce the violence they are trying to counteract. Emergency measures exceptional powers always destroy the liberal-democratic regimes they are trying to protect.

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<sup>653</sup> Derrida, ‘Autoimmunity’, p. 120

<sup>654</sup> Derrida, ‘Autoimmunity’, p. 95

<sup>655</sup> Derrida, ‘Autoimmunity’, p. 95

<sup>656</sup> Derrida, ‘Autoimmunity’, p. 99

Theorizations of emergency politics should be under no illusions that openness to the antagonism and allowing democracy to flourish while it perceives itself as being under attack may be dangerous. "...it's ultimately true that suspending or suppressing the immunity that protects me from the other might be nothing short of life-threatening."<sup>657</sup> However, the alternative is worse. What is at stake in emergency politics and what we are in danger of losing through suicidal, autoimmune responses to emergencies is "the inherited concept of democracy... [that democracy] welcomes the possibility of being contested, of contesting itself, of criticizing and indefinitely improving itself."<sup>658</sup> We are also in danger of losing a notion of self-reflexive political agency required for radical democratic politics. Autoimmunity "consists not only in compromising oneself [s'auto-entamer] but in compromising the self, the auto – and thus ipseity."<sup>659</sup> The possibilities for self critique and self improvement are severely curtailed when a regime defines itself as enveloped by exceptional circumstances. Such a determination only serves to limit legitimate contestation and put self improvement on hold, indefinitely, until the politically determined 'emergency' has passed.

This scenario can be avoided by further developing a radical democratic theory of emergency politics. The structures of liberal-democratic governance can absorb the effects of political contingency as well as encourage hegemonic contestation of their most fundamental values and principles. Developing this approach will be no mean feat. Yet, it is necessary if liberal-democratic regimes are to flourish.

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<sup>657</sup> Derrida, 'Autoimmunity', p. 129

<sup>658</sup> Derrida, *Autoimmunity*, p. 121

<sup>659</sup> Derrida, *Rogues*, p. 45

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## **Publication**

### **The Aliens Within: Antagonism, Radical Democracy and ‘States of Emergency’**

Under revision for *Contemporary Political Theory*

## **Introduction**

Against the prevailing view in political and legal theory today that the exception has become the norm, this paper contends that the exception has not become the norm and that the state of emergency is not permanent. It defends this position, ironically, by agreeing in part with the analysis that leads Hans Lindahl to claim that democratic polities are always in a state of emergency. I agree with the analysis but contend that it leads us to the conclusion that the notions of normality and exception/emergency lose their conceptual coherence. I claim that emergencies are better conceptualized not as aberrations but as ‘ordinary’ struggles with contingency and indeterminacy at the limits of pluralism. The exception has not become the norm; rather the norm has always included elements of the exception.

According to Lindahl, democratic polities are constantly engaged in contestation over their founding and fundamental values, principles and core identity. Such contestation is generated in part by the process of creating and maintaining a democratic political community, ‘We the people’. During the process of self constitution democratic polities exclude values, principles, and identities which do not go away or stay outside but remain to challenge the existence of the polity. These excluded elements are ‘alien’ and can be antagonistic, in Laclau and Mouffe’s sense of the term, to the regime. The alien is a constant reminder that the polity could be constructed differently. Every polity prefers what is its own, as opposed to what it has excluded as alien. Thus democracies are always engaging in struggles over the nature of their contingently constituted and precariously maintained existence. Liberal-democratic regimes go a step further by institutionalizing procedural rules for such contestation. Liberal-democratic regimes attempt to remain neutral to the goals of any political party so long as they follow the rules of contestation.

However, they can only allow political contestation of contingent foundations and fundamental values up to a point. There are and must be limits of contestation.

These limits will be determined politically from the perspective of the democratic polity which founds the regime. As such, all democratic regimes are radical in the sense that they are constantly attuned to and struggling over their contingent nature and the limits they set to contestation and struggle. But because they set limits to such contestation while attempting to remain neutral, radical democracy is a false promise of liberal-democracy.

This paper defends these claims via the work of Hans Lindahl, Bert van Roermund, Bernhard Waldenfels, Ernesto Laclau and Chantal Mouffe. In similar ways these scholars investigate the problem of constructing and maintaining liberal-democratic regimes. Lindahl and van Roermund, following Waldenfels, demonstrate that the process of constructing and maintaining a regime necessarily excludes certain values, interests and groups from the democratic polity which they create. The work of Laclau and Mouffe is useful in understanding why some excluded elements remain innocuous but others may become virulent and challenge the politico-legal regime that they inhabit.

### **Constructing a democratic polity**

Lindahl and van Roermund's initial problematic is how a plurality of individuals and social groups can be welded together into a unified polity which rules over and governs itself. The first step is revising a widely accepted definition of democracy as the identity of the rulers and the ruled. This means that the rulers and the ruled in a democratic society are the same people, the terms 'rulers' and 'ruled' are co-referential.<sup>660</sup> Lindahl and van Roermund contend, on the other hand, that a polity is unified around a notion of collective selfhood.<sup>661</sup> The former notion of unity understands identity as sameness, what Paul Ricoeur called *idem-identity*. The latter notion understands identity as *ipse-identity*, identity as selfhood in which the people rules over itself. This understanding of collective selfhood entails that the unity will understand itself, speak and act in the first person plural perspective. It also means that it can reflect on itself as an actor. Lindahl and van Roermund refer to this as a reflexive notion of unity and identity for a democratic polity.

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<sup>660</sup> Van Roermund, 'Sovereignty: Popular and Unpopular', p. 42

<sup>661</sup> Lindahl, 'Constituent Power and Reflexive Identity', p. 14

There are two implications of this formulation of a democratic polity as a collective self. The first is that the members of the group understand themselves to be the unity that can and will act collectively. Secondly, any actions taken from the first person plural perspective are done for the sake of the collective as a collective self.<sup>662</sup> Collective selves engage in what Bratman calls ‘shared intentional activity’.<sup>663</sup> It follows that if in a democratic regime a collective self is acting by and for itself then any conceptualization of democracy must include a notion of constituent power. It is this constituent power which legitimizes and acts through the state, the constituted power. This point raises two important questions: how is a constituent power unified in the first place and maintained over time? And how exactly does it speak and act as a collective subject through a constituted power, a legal order?

Schmitt maintained that a constituent power needed to be homogenous in order to constitute and maintain itself. The people themselves needed to have something essential in common on which they could base their unity and on which to enact a constitution via a political decision. Lindahl and van Roermund accept the need for ‘a people’ to share something in common but they disagree with Schmitt over what this common interest is. For them it certainly need not be any essential characteristic like racial, ethnic or national similarity. Rather, Lindahl argues that a constituent power begins “as the constitution *of* a political unity through a legal order... Someone must seize the initiative to determine what interests are shared by the collective and who belongs to it.”<sup>664</sup> This act of seizing the initiative, positing the boundaries of who is and is not included in the community, and defining the shared fundamental interests and values cannot be *ex ante* legitimated by the democratic polity. The act of positing initial boundaries and core values must always come first.

Democracy is a political system in which all acts done in the name of the collective must be legitimated by constituent power. This means that the act which creates a democracy can never be democratic or ‘legal’ from the perspective of the

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<sup>662</sup> Van Roermund, ‘First Person Plural Legislature’, p. 244, Lindahl, ‘Constituent Power and Reflexive Identity’, p. 16

<sup>663</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 15

<sup>664</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 22

legal system it posited. Sovereign power is indispensable.<sup>665</sup> Yet the requirement for legitimacy derived from constituent power remains. The first act of instituting a constituent power must present itself as acting with legitimacy grounded in the constituent power. On Lindahl's reading a constituent power is formed by an individual seizing the initiative and acting as a legitimate constituted power. However, seizing the initiative does not necessarily succeed. It can only be retroactively legitimated if individuals identify with the polity, its boundaries, interests and core values. Because constituted power comes first a constituent power can only react to individuals and groups attempting to speak and act in its name and from a first person plural perspective. As such, there exists "a fundamental *passivity* at the heart of political unity."<sup>666</sup> Constituent power can only respond to and retroactively legitimize (or not) the actions of individuals and small groups claiming to act in its name. Constituted power acts in the name of the constituent power then must wait to see if that action is taken up and retroactively legitimized. This means that when someone seizes the initiative they "can only *originate* a community by *representing* its origin."<sup>667</sup> In other words, constituent power cannot come before constituted power. On Lindahl and van Roermund's reading, constituted power comes first but only if it successfully creates the constituent power on which it legitimizes its initial action.

Before addressing the structure of representation and attribution of individual acts to the collective it is necessary to point out that law is the symbolic form of the unity of a collective self in a democratic polity. Constituted power can be primarily understood as legal order. Following Kelsen, Lindahl argues that "...democracy functionalizes political unity by making of it the unity of a legal order. More precisely, *the functional unity of the people is the unity of a legal order, a normative unity.*"<sup>668</sup> This is necessary because any society is rife with division, conflict, and antagonism. There is no common ground or experience which can function as a substantial basis for unity. Modern liberal-democratic states solve this problem by making legal order function as point of symbolic and institutional unity of divided

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<sup>665</sup> Van Roermund, 'Sovereignty: Popular and Unpopular', p. 34

<sup>666</sup> Lindahl, 'Constituent Power and Reflexive Identity', p. 18

<sup>667</sup> Lindahl, 'Constituent Power and Reflexive Identity', p. 19

<sup>668</sup> Lindahl, 'Democracy and the Symbolic Constitution of Society,' p. 31

societies. Moreover, “law conditions the political world of democracy in the sense that legal or state order is also the unity wherein *division*, thus political majorities and minorities, can ensue. In other words, a legal order not only determines the (normative) unity of a people, but constitutes the locus of political conflict and division.”<sup>669</sup> Legal order sits uncomfortably between attempting to fix political unity and allowing for and even encouraging contestation and conflict.

The ability of legal order to unify a divided society is further complicated by the logic of representation. A logic of representation is essential to a democratic polity understood as a reflexively oriented collective self. As noted above, constituted power constitutes a collective self by acting in its name and representing its origin. Certainly the collective self, the ipse-identity cannot actually act itself. “As Waldenfels put it: ‘(...) it is impossible for a we to say ‘we’. Saying ‘we’ is done by spokesmen, who are more or less directly authorized to speak...’”<sup>670</sup> In other words, “each particular act, as a *legal* act, ‘represents’ or symbolizes the political unity to which it belongs...”<sup>671</sup> The unity necessary for constituent power only exists through its representations. Lindahl argues that the collective self only exists in the form of self-attributive acts by individuals.<sup>672</sup> Essentially, an act is an action of the collective self if it can be attributed to the collective self, i.e. if everyone who constitutes the collective self would have acted in the same way or agrees that the action was legitimately carried out. As Lindahl argues, “The common good remains forever absent... an empty normative signifier that provides no normative orientation whatsoever. And as the common good is the way of conceiving of the people as a *unity*, to argue that the common good is only accessible through its particularizations is to assert that unity is necessarily a represented unity.”<sup>673</sup> These representations rely on attributing the acts of individuals to the collective. The consequence of this is that constituent and constituted power do not have direct access to one another.<sup>674</sup>

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<sup>669</sup> Lindahl, ‘Democracy and the Symbolic Constitution of Society,’ p. 33

<sup>670</sup> Van Roermund, ‘First Person Plural Legislature’, p. 241, citing Waldenfels, *Verfremdung der Moderne. Phänomenologische Grenzgänge*, p. 139

<sup>671</sup> Lindahl, ‘Democracy and the Symbolic Constitution of Society,’ p. 32

<sup>672</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 20

<sup>673</sup> Lindahl, ‘Sovereignty and Representation in the EU,’ p. 98-99

<sup>674</sup> Lindahl, ‘Acquiring a Community,’ p. 439

This structure of representation creates contestation in two ways. First, because any legal act which claims to be done in the name of the collective must be retroactively legitimized all such claims are contestable.<sup>675</sup> The democratic unity, or sections of it, could in some way refuse, or attempt to refuse, to legitimate any given action made on its behalf by a particular individual or even a state official. For instance, anti-gay marriage activists in California recently tried to force a high court judge to recuse himself in a case determining the legality of gay marriage because he was gay. The activists felt that his lifestyle choice and hence his particular legal actions could not represent and act in the name of what they claimed was the common good – banning gay marriage in the state. The second form of contestation stems from the fact that modern liberal-democratic regimes delay indefinitely final decisions on self-attribution. A democratic polity always exists in a mode of questionability because it forever delays final decisions on whether and how particular actions represent the reflexively oriented constituent power necessary to legitimize democratic governance. This means that liberal-democratic regimes are constantly engaging with their own contingent and contestable foundation. As Lindahl notes, “the democratic *Rechtsstaat* is the form of political organization that *suspends*, up to a point, the initial and subsequent closures in view of determining anew what interests are shared by a community and who is an interested party thereto.”<sup>676</sup> A final decision on whether or not a particular statute or action of a state official represents and actualizes fundamental values and interests is forever delayed. As such those fundamental values and interests are forever contestable but, as Lindahl argued, only up to a point.

Certainly most actions of a state are legitimized by at least a portion of the population. The legitimacy of a police officer issuing a citation for speeding on the motorway is rarely questioned. The process of constructing and maintaining a democratic political community, mediated by the representational relationship between constituent and constituted power, does generate and concretize what are considered to be fundamental values, interests and a normative orientation. This entails the construction of a specific normative viewpoint with boundaries. As Lindahl points out, “constituent power—refers to the capacity to institute legal

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<sup>675</sup> Lindahl, ‘Sovereignty and Representation in the EU’, p. 100

<sup>676</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 23

meaning, and this means to generate a normative point of view from which individuals can understand and identify themselves as members of a legal community.”<sup>677</sup> In order to establish this normative viewpoint and posit boundaries the democratic polity, because it is reflexively structured, must choose to include certain values and exclude others. Unity requires closure and closure is dependent on exclusion. “Closure is indispensable for normative orientation by the members of a community; in its absence, they would not know how they ought to behave.”<sup>678</sup> Alternately, a unity which allowed for infinite possibilities would be no unity at all.

“For to assert that representation concretises political unity is to acknowledge that every representation of the common good includes and excludes values. Ineluctably, representation is an ambiguous achievement. On the one hand, exclusion is a positive feature of representation: closure is a necessary condition for the disclosure of a common or public space. On the other hand, the operation of normative inclusion and exclusion implies that representation always brings about a normative reduction: the disclosure of the common good as concretised in ‘this’ or ‘that’ value necessarily involves a normative closure of the good.”<sup>679</sup>

According to Lindahl there is no escape from this dynamic, some exclusions will be necessary. In order to affect a closure of the democratic polity it must posit a normative viewpoint against which representational acts can be judged.

Furthermore, the democratic polity will understand the values it includes as its own values, which are on its side of the boundary it has posited. A democratic polity is constantly engaged in a process of constructing and maintaining its own social and representational space which actualizes its own values and notion of the common good. As Lindahl argues, “any and every legal order embodies a *particular* set of values,” what it considers to be its own values.<sup>680</sup> Hence, a collective self must always look out over the boundaries of the political and legal order it sets for itself. As Waldenfels notes, “When a collective self is drawing a boundary in order to constitute itself it places itself inside the boundary. It becomes “an *inside which*

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<sup>677</sup> Lindahl, ‘Acquiring a Community,’ p. 436

<sup>678</sup> Lindahl, ‘Dialectic and Revolution,’ p. 777

<sup>679</sup> Lindahl, ‘Acquiring a Community,’ p. 447-448

<sup>680</sup> Lindahl, ‘Authority and Representation,’ p. 4

*separates itself from an outside and thus produces a preference in the difference.*”<sup>681</sup>

This preference in the difference is crucial because it helps to explain why a democratic regime or polity would feel threatened by the presence of values, interests and groups which are not its own. Any interest, value or group which does not fully belong to the collective self, the constituent power, is potentially a threat simply because they imply that the regime could be ordered differently.

But what becomes of the values, interests and groups that are excluded from the normative point of view, and hence the legal order as well as the reflexively oriented constituent power? Lindahl argues that “the values excluded by political representation do not simply vanish into thin air. They are *marginalized*, that is to say, they remain at the fringes of a polity, embodied in forms of behavior that retain the potential of subverting the representations of the common good positivised in the legal order.”<sup>682</sup> Additionally, the process of inclusion and exclusion is by no means peaceful or orderly. As Waldenfels argues “This process of marginalization does not take place in peaceful agreement. Margins, of whatever kind, whether marginal phenomena, marginal groups, or ‘marginal nations’ arise by something being *forced* to the edge where the light no longer reaches it. This exclusion is not done without disturbance and danger.”<sup>683</sup> What does it mean to marginalize certain values, interests, interests or groups? These excluded and marginalized values, interests and groups do not simply go away the consciousness of the polity or fade into obscurity. Excluded values, interest and groups remain within a given social space even though they are excluded from the political community. Communist literature and a communist party may and do exist in countries which have enshrined individual property rights at the core of their legal system. The polity is always challenged by excluded elements, which, just by their presence, challenge the existence of the polity in some way. As Lindahl notes, “the operation of inclusion and exclusion condemns legal order to an irredeemable *contingency*.”<sup>684</sup> Furthermore, as argued by Lindahl above, the democratic *Rechtstaat* is an institutional form which allows for contestation of fundamental values and interests.

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<sup>681</sup> Waldenfels, *Phenomenology of the Alien*, p. 15

<sup>682</sup> Lindahl, ‘Sovereignty and Representation in the EU,’ p. 101

<sup>683</sup> Waldenfels, *Order in the Twilight*, p. 35

<sup>684</sup> Lindahl, *Dialectic and Revolution*, p. 777, emphasis in original

Lindahl argues that because of the presence of these excluded values, interests and groups that

“with varying degrees of intensity, *a polity always finds itself in a ‘state of emergency’*; a ‘state of normality’ is a borderline case that a polity can only approach, without ever attaining. Waxing pathetic, the representational act that gives birth to a polity inevitably creates the conditions for its possible revolutionary overthrow and replacement by a new polity. The contingency of a polity and its contestability are two sides of the same coin.”<sup>685</sup>

I agree that normality and emergency are in some sense borderline cases for any liberal-democratic regime and polity. Any liberal-democratic regime is attempting to reach a state of what it defines as normality. However, because the process of constructing normality necessarily involves excluding elements, and those elements do not disappear but remain to challenge the precariously constructed ‘normality’, normality as such can never be achieved. It is clear that ‘normal’ is conceptually impossible. We must also add to this that what is called ‘normal’ is actually the process of concretizing, sedimenting and maintaining a specific normative viewpoint which embodies particular values, interests and groups. Because of the particularity of the normative viewpoint we can conclude with Waldenfels that “normal itself is a polemical term...”<sup>686</sup> ‘Normal’ is never neutrally or objectively determined. If the initial act of positing a democratic polity necessitates positing the fundamental values of a normative viewpoint then ‘normal’ is always politically determined. Further, it means that any defense of a ‘normal’ situation is a defense of what powerful political and legal actors claim is ‘normal’. As such any attempt to define a situation as an emergency and to mobilize emergency measures is political and should be responded to as such. Luckily, contestation of such claims is built into the structure of creating and maintaining a reflexive democratic regime.

If the permanent situation of a liberal-democratic society is that the existence of the community and the politico-legal order is always challenged because that which it excludes in the process of unification always remains to show that the order could be differently constructed, the term emergency begins to lose its coherence. In contrast to traditional and mainstream theories of emergency which understand the concept as a temporary occurrence, emergency must be understood constitutive

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<sup>685</sup> Lindahl, ‘Sovereignty and Representation,’ p. 101, emphasis added

<sup>686</sup> Waldenfels, *Order in the Twilight*, p. 120

feature of any liberal-democratic polity. But this does not mean the ‘the exception has become the norm’ or that the state of emergency is permanent. It means just the opposite, that ‘normality’ includes elements which continually threaten its existence simply through their mere presence. ‘Normal’ politics always involves contestation over the identity of the polity as well as the norms it sets for itself. As such ‘states of emergency’ are better conceptualized as contestation of contingent and precariously constructed politico-legal orders. Lindahl is right to assert that contingency and contestation are two sides of the same coin. ‘Emergency’ and ‘normality’ are not states in which a regime can exist in. Rather they are better understood as polemical, political notions used to conceptualize engagements with contingency.

Lindahl and van Roermund, following Waldenfels, develop a more detailed analysis of the values, interests, and groups excluded by the process of constructing a reflexive democratic polity. They refer to the form excluded elements take as they remain to challenge a regime as alienness or the alien. Turning to a closer analysis of their concept of the alien will further the argument that liberal-democratic regimes and polities are always engaged in contestation and struggle over their most fundamental values, interests and normative principles.

### **The Aliens Within**

Lindahl and van Roermund, building on Waldenfels, develop a structural analysis of the excluded elements and how they relate to the precariously unified political community. Waldenfels labeled these elements *Fremden*, the alien or strange depending on the translation. The alien is not “simply what is different.”<sup>687</sup> It is distinguished from a polity from the perspective of that polity. As Waldenfels notes: “In the final analysis, the alien concerns *me*. The division into own and alien... stems from a process of *self-differentiation*.”<sup>688</sup> The alien is that which is intentionally excluded in the process of constructing a reflexive political unity. That which is alien is the product of the necessary closure required for any form of political unity. The alien is “‘at odds’ with the vantage point, i.e., the basic truth (principle, value, act) that grounds the order.”<sup>689</sup> The alien is created by a democratic

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<sup>687</sup> Van Roermund, ‘The Order and the Alien’, p. 334

<sup>688</sup> Waldenfels, ‘Experience of the Alien’, p. 24, emphasis in original

<sup>689</sup> Van Roermund, ‘The Order and the Alien’, p. 36

polity yet it remains as that which challenges the polity and exposes its contingent foundations.

This exclusion is not necessarily a physical or even final exclusion. Van Roermund notes that the alien arises “at the edges” and in the “fissures” of the order.<sup>690</sup> Because they are not necessarily physically removed, the alien are elements which are excluded from the collective self, the ipseity, yet they are not necessarily excluded from the legal order. Indeed, they may be subject to the legal order, politically excluded while legally ‘included’. As van Roermund notes, that which is excluded by a legal order, the alien, “lingers on as a factual network of political states of affairs, in which some knots are more dominant than others, while still others do not even register.”<sup>691</sup> I argue that groups such as a communist party are alien to liberal-democratic regimes yet they are still subject to the legal orders of those regimes.

The boundary between the own and the alien is not clearly demarcated. As Waldenfels argues, “The boundaries between that which is governed by rules, that which remains open, and that which is against rules are more or less indeterminate.”<sup>692</sup> There is not binary distinction between inside and outside. The reflexive democratic polity acting by and for itself “does not enter the world as a light in the darkness; rather, it responds to a twilight zone of meaning in which it finds itself.”<sup>693</sup> Additionally, the alien does not necessarily speak clearly. The alien makes a demand which the democratic polity must respond to. Such a demand challenges the polity “to explore (thus to revise) the twilight zone marked by predicates like ‘ordinary’, ‘disorderly’ and ‘extraordinary’.”<sup>694</sup> The boundaries between the own and the alien are porous. This means that a strict dichotomy between norm and exception, ordinary and extraordinary, on which so much contemporary work on states of emergency relies, cannot be conceptually maintained. Theories that do rely on a strict dichotomy are using an oversimplified notion of boundaries.

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<sup>690</sup> Van Roermund, ‘The Order and the Alien’, p. 334

<sup>691</sup> Van Roermund, ‘The Order and the Alien’, p. 342

<sup>692</sup> Waldenfels, ‘The Ruled and the Unruly’, p. 185

<sup>693</sup> Van Roermund, ‘The Order and the Alien’, p. 337

<sup>694</sup> Van Roermund, ‘The Order and the Alien’, p. 345

The presence of these excluded elements means that political community exists in a mode of questionability, innovation, rupture and responsiveness.<sup>695</sup> We could also say that the presence of alien elements ensures constant engagement with contingent foundations. As noted above, marginalized groups and values do not disappear; they remain with the potential to subvert politico-legal order. The reflexively oriented democratic polity needs the alien because any identity needs closure in order to define itself. Van Roermund contends that the act of self-inclusion [of a polity] excludes those parts of the world that would in any way challenge, threaten, or question the collective self.<sup>696</sup> This means that the alien is not simply what is different. It is distinguished from the vantage point of the normative viewpoint that makes the distinction and decides to exclude the alien in the first place. The alien is that which the polity decides is against the fundamental interests of its collective selfhood. Waldenfels argues that it is possible for an alien element to crack the ground of legitimation and force a democratic regime to confront its contingent foundations.<sup>697</sup> It is this structure that Lindahl has in mind when he argues that any democratic polity is always in a constant ‘state of emergency’ because it is challenged by values, interests and groups it has marginalized in order to create and maintain its own identity. I contend that challenges by alien elements can produce situations which a politico-legal regime defines as a ‘state of emergency’.

Waldenfels neatly encapsulates why the alien is experienced as a threat to the existence of a regime.

“The alien can inspire curiosity and imagination, it can even enlighten us about ourselves – all this must be granted. Yet as soon as the alien breaks into the Arcanum of freedom and reason, it trips the ‘chaos’ alarm. Freedom and reason take up their arms. They fight because otherwise they would need to give up on themselves. But, inevitably, alienness leads to hostility, which only escalates, with each involved party becoming more and more committed to their belief that they alone have right on their side... Assumed to be coming from the outside, the alien is expected to carry its identification at all times as if it were an intruder.”<sup>698</sup>

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<sup>695</sup> Lindahl, ‘Constituent Power and Reflexive Identity’, p. 21

<sup>696</sup> Van Roermund, ‘The Order and the Alien’, p. 336

<sup>697</sup> Waldenfels, ‘Limits of Legitimation’, p. 103

<sup>698</sup> Waldenfels, *Phenomenology of the Alien*, p. 3

Alienness is hostile because it reaches into and challenges the core elements of any democratic polity. Though this hostility seems almost unintentional, the result of curiosity rather than malevolent intent. Yet Waldenfels still insists that alienness is “always also *marked by insecurity, threat, and incomprehension*. These very factors are distributed in unequal fashion, depending on who determines the social and linguistic rules of the game, i.e., who ‘has the say’.”<sup>699</sup> Alienness, then, is marked by insecurity and threat. But it is the collective self, the democratic polity which does the marking. This point speaks to the deep implication of liberal-democratic regimes in events they define as ‘states of emergency’. In order to constitute themselves regimes mark off an outside and exclude elements they deem to be contrary to their core values, principles, interests and groups. Then, as Waldenfels suggests, the regimes experience that which they excluded as a threat to their own existence. Furthermore, “Every attempt at mastering the alien leads to a violent rationalization which attempts in vain to rid the self and rationality of their contingency and genesis.”<sup>700</sup> But such a goal is impossible. As convincing as Waldenfels account of the alien is, there still appears to be something missing. He does not fully account for the possibility that the alien actually is hostile to the democratic polity and its politico-legal regime. He acknowledges that the alien may remain “virulent in its exclusion” but does not say enough as to why this must be the case.<sup>701</sup> This possibility is raised and accounted for in the work of Laclau and Mouffe on antagonism.

The work of Laclau and Mouffe is crucial because they understand divisions and exclusions not as internal or external to society but as the limit of a social space such that society does not exist with any sense of full positivity or finality.<sup>702</sup> I contend that alienness is more fully understood when placed with their concept of antagonism. Though structurally similar to alienness antagonisms have a characteristic which alienness does not, mutual subversion. This characteristic explains why a democratic polity would necessarily experience the alien as threat, hostility and the onset of chaos.

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<sup>699</sup> Waldenfels, *Phenomenology of the Alien*, p. 80, emphasis added

<sup>700</sup> Waldenfels, *Phenomenology of the Alien*, p. 81

<sup>701</sup> Waldenfels, *Order in the Twilight*, p. 111

<sup>702</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

Antagonism is a constitutive divide created by at least two groups opposing one another as they attempt to construct and maintain their own political identity and regime. Antagonisms postulate the limits of a given social space, “antagonism, as a witness of the impossibility of a final suture, is the ‘experience’ of the limit of the social. Strictly speaking, antagonisms are not *internal* but *external* to society; or rather, they constitute the limits of society, the latter’s impossibility of fully constituting itself.”<sup>703</sup> In this sense antagonisms are very similar to alienness when Waldenfels states that “Alienness does not proceed from a division, but consists in a division.”<sup>704</sup> As Laclau formulates it “A notion of constitutive antagonism, of a radical frontier, requires... a *broken space*.”<sup>705</sup> While there are strong similarities between the two, antagonism adds a necessary element.

What is crucial about antagonism, that the concept of alienness does not fully account for, is the relationship the polities on either side of an antagonism. An antagonistic relationship is not characterized, like alienness, purely as exclusion and inclusion over a threshold. Antagonism “must be conceived not as an objective relation of frontiers, but as reciprocal subversion of their contents.”<sup>706</sup> It is this reciprocal subversion which alienness misses. And it is this reciprocal subversion which explains why a polity would experience the alien as hostile and threatening. The alien is not just what has been politically excluded. The alien is actively trying to undermine the polity so that it can create its own politico-legal regime. A polity views the alien as threatening because “in the case of antagonism... the presence of the ‘Other’ prevents me from being totally myself. The relation arises not from full totalities, but from the impossibility of their constitution.”<sup>707</sup> The presence of antagonisms means that there will be groups, values and interests which are outside the polity, that do not share the normative viewpoint, the ‘preference in the difference’ as Waldenfels calls it, but that are subject to the legal order. Furthermore, they may be either attempting to dominate the politico-legal order as it is or to overthrow the order and create a new one.

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<sup>703</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

<sup>704</sup> Waldenfels, ‘Experience of the Alien’, p. 31

<sup>705</sup> Laclau, *On Populist Reason*, p. 85

<sup>706</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 129

<sup>707</sup> Laclau & Mouffe, *Hegemony and Socialist Strategy*, p. 125

Such a condition does not necessarily lead to those situations which are sometimes defined as ‘states of emergency’. A Laclau and Mouffe note, “this does not mean of course that such a relation is necessarily one of friend/enemy, i.e. an antagonistic one. But we should acknowledge that, in certain conditions, there is always the possibility that this we/they relation can *become* antagonistic, i.e. that it can turn into a relation of friend/enemy. This happens when the ‘they’ is perceived as putting into question the identity of the ‘we’ and as threatening its existence.”<sup>708</sup> Alienness and antagonism may lead to an existential threat but not necessarily so. However the notion of antagonism is still key because it posits mutual subversion between a polity and what it excludes, not simply the exclusion. This is what ensures the permanent contestation of the contingent and precarious foundations of a polity as well as the legal order which is in turn grounded on the polity. It also ensures that some situations or actions will be defined as states of emergency by state officials. The very process of constructing a liberal-democratic polity creates the groups, interests, and values that will always challenge it.

### **Institutionalizing conflict – Antagonism, agonism and law**

Liberal-democratic legal orders foster and institutionalize contestation emanating from ‘antagonistic aliens’, if you’ll pardon the expression. Lindahl argues

“that democracy links legitimacy to a certain *interruption* of attribution, an interruption that suspends, up to a point, the inaugural act of attribution, in view of determining anew who is a party to the community and what are the interests that join its members... democracy is the political form that seeks to renew – *up to a point* – this genetic condition of political community, institutionalizing the possibility of novel acts of bringing about the constitution of a collective self. Democracy does not abolish the ambiguity of ‘self-attribution’; it preserves this ambiguity, elevating it to the principle of political action.”<sup>709</sup>

Lindahl’s point is that the form of the politico-legal order always allows contestation over the boundaries as well as the fundamental values, principles, and interests of a democratic polity. By interrupting attribution liberal-democracy postpones forever the final decision on who ‘we’ are, what ‘our’ fundamental values and interests are, and who is allowed to challenge us and how they may carry out that challenge. This

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<sup>708</sup> Mouffe, *On the Political*, p. 15-16

<sup>709</sup> Lindahl, ‘Paradox of Constituent Power,’ p. 14

means that alien values, interests and groups which are politically excluded yet legally included are able to contest the fundamental normative viewpoint of the polity and the boundaries it sets for itself. Furthermore, alien elements may have a legal right to such contestation depending on the structure of civil and political rights enshrined by a regime.

Such contestation is understood as a positive element of society. As such, liberal-democratic regimes are careful not to completely stifle conflict. On the contrary, Lindahl argues that “innovation and rupture are... positively elicited by democratic states under the rule of law.”<sup>710</sup> He further argues that “the rule of law does not neutralize democratic politics: it spells out the institutional conditions for ‘political action of a *subject*’, of a people as a unit in action.”<sup>711</sup> It is important for conflict to be regulated by institutions such as law so that basic ground rules for legitimate contestation can be set. And as Waldenfels points out, “Beyond all actual conflicts, the possibility of conflict itself requires regulation.”<sup>712</sup>

Mouffe takes a similar position when discussing the limits of pluralism. She argues that “a pluralist liberal democratic society does not deny the existence of conflicts but provides institutions allowing them to be expressed in an adversarial form.”<sup>713</sup> The goal of an agonistic model of democracy is to allow for contestation but also to limit and contain it so that it does not become violent and corrosive. Indeed, Mouffe argues that “modern pluralist democracy – even a well ordered one – does not reside in the absence of domination and of violence but in the establishment of a set of institutions through which they can be limited and contested.”<sup>714</sup> Contestation is a good thing, but it must have its limits. Agonism, understood as healthy regulated conflict in which opponents recognize one another as adversaries and not as enemies, is preferred to antagonism since “antagonistic conflicts are less likely to emerge as long as agonistic legitimate political channels for dissenting voices exist. Otherwise dissent tends to take violent forms...”<sup>715</sup> When contestation

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<sup>710</sup> Lindahl, ‘‘Constituent Power and Reflexive Identity’’, p. 23

<sup>711</sup> Lindahl, ‘‘Constituent Power and Reflexive Identity’’, p. 23

<sup>712</sup> Waldenfels, ‘Inside and Outside the Order’, p. 364

<sup>713</sup> Mouffe, *On the Political*, p. 30

<sup>714</sup> Mouffe, *The Democratic Paradox*, p. 22

<sup>715</sup> Mouffe, *On the Political*, p. 21

is adversarial and both sides agree on the rules of the game “conflicts and confrontations, far from being a sign of imperfection, indicate that democracy is alive and inhabited by pluralism.”<sup>716</sup>

Similarly, van Roermund argues that the quality of liberal-democracy “is dependent on how convincingly the irrepresentability of the people is institutionalised in political, socio-economic and cultural forms.”<sup>717</sup> I agree with this assessment. Liberal-democracy institutionalizes the conflict created by the structure of representation and the creation of aliens which necessarily occurs during the process of constituting a political unity. All political unities/communities constitute themselves by excluding some interests, values, groups from the ‘we’ they create. Liberal-democracy is unique in that it recognizes those exclusions and institutionalizes contestation over how they were made, what they mean, how they function and whether or not they should continue. It is certainly advantageous but the drawback is the continuous presence of groups that want society to be organized differently and have a legally guaranteed right to fight to make it so.

#### *The limits of contestation – Renewal up to a point*

Lindahl is careful to note though that the democratic regimes and democratic polities only allow contestation ‘up to a point’. Additionally, Mouffe argues that

“the pluralism that I advocate requires discriminating between demands which are to be accepted as part of the agonistic debate and those which are to be excluded. A democratic society cannot treat those who put its basic institutions into question as legitimate adversaries. The agonistic approach does not pretend to encompass all differences and to overcome all forms of exclusions... Some demands are excluded, not because they are declared to be ‘evil’, but because they challenge the institutions constitutive of the democratic political association. To be sure, the very nature of those institutions is also part of the agonistic debate, but, for such a debate to take place, the existence of a shared symbolic space is necessary.”<sup>718</sup>

The main question then is, ‘how do we decide when that point is reached? How do we know which demands, values and/or interests are to be excluded? Recall that

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<sup>716</sup> Mouffe, *The Democratic Paradox*, p. 34

<sup>717</sup> Van Roermund, ‘Law, Narrative and Reality,’ p. 161

<sup>718</sup> Mouffe, *On the Political*, p. 120-121

these decisions are always taken from a normative viewpoint which is not shared by all those who are subject to the legal order. From this perspective events that are deemed ‘states of emergency’ are situations in which the dominant powers in a society decide that the polity, as they have constructed it, is under too much threat, too much of a challenge. The problem is compounded by the fact mentioned above that sometimes those individuals and groups who are challenging the polity have a legal and constitutionally protected right to do so. Essentially determinations of normality and emergency concern situations in which dominant groups or state officials decide that the ‘point’ has been reached and their opponents are no longer playing the game fairly. It is a decision states that the opponents of the regime have reached or breached the limits of acceptable contestation. Since they have done so they cannot be responded to via the normal rules of contestation. The state must also release itself from the limits of contestation in order to protect itself, or so it claims. Such determinations are political as much as legal, moral and ethical.<sup>719</sup>

If we agree with Mouffe that “rivalry and violence, far from being the exterior of exchange, are therefore its ever-present possibility. Reciprocity and hostility cannot be dissociated and *we have to realize that the social order will always be threatened by violence,*” we need not also agree that the state of emergency is permanent.<sup>720</sup> Rather such a position recognizes that politics is a struggle to limit violence while respecting the rights of everyone to struggle and advocate for the type of society they want. If we also agree that liberal-democratic regimes and societies are implicated in and even help to foster and encourage contestation of their most fundamental values and principles, then we must conclude that situations defined by political and legal elites as ‘states of emergency’ are an integral aspect of the functioning of liberal-democratic regimes. Yet, because they are integral to liberal-democratic regimes they cannot be understood as emergencies. They are better conceptualized as political struggle at the limits of contestation.

## **Conclusion**

It is more analytically useful to see ‘states of emergency’ as an issue embedded in the larger context of the limits of pluralism. The limits of contestation

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<sup>719</sup> Mouffe, *On the Political*, p. 121

<sup>720</sup> Mouffe, *The Democratic Paradox*, p. 131, emphasis added

are heavily influenced, even decided, by the dominant polity from their particular normative viewpoint. Decisions concerning normality and emergency are polemical weapons used by dominant groups to limit contestations over the contingent foundations of their own polities, their collective selfhood. As such, normality and emergency or exceptionality have no neutral or objective conceptual value. By allowing for the distinction and even agreeing that a situation is normal or in crisis is already to take the position of one group in the conflict.

Such a move should be resisted. I argue that the first step to fostering democratic empowerment from within emergency politics is to refuse to take the position of those who declare that a 'state of emergency' is in existence. That declaration may be made out of genuine concern for a democratic polity but it is never made from a politically neutral viewpoint. Given the presence of antagonisms a declaration of emergency is never made from a point of view shared by all groups within a society. Declarations of a 'state of emergency' in liberal-democratic regimes must always be met with suspicion because they always limit contestation in a regime which generates, institutionalizes and attempts to regulate, yet also encourages such contestation.

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