

Exception and Governmentality in the Critique of Sovereignty

by

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B.A., University of Ottawa, 2012

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in the Department of Political Science

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## **Supervisory Committee**

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## Abstract

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This thesis investigates the relation between exception and governmentality in the critique of sovereignty. It considers exception and governmentality as an expression of the problem of sovereignty and argues that this problem is expressed both within the accounts of sovereignty that exception and governmentality articulate, as well as between them. Taking Michel Foucault and Carl Schmitt as the paradigmatic theorists of governmentality and exception, respectively, I engage in close readings of the texts in which these concepts are most thoroughly elaborated: *Security, Territory, Population* and *Political Theology*. These readings demonstrate that, despite their apparent differences, exception and governmentality cannot be differentiated from one another. The instability evident in Schmitt and Foucault's concepts show that the relation between them is best characterized as aporetic.

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## Dedication

*For David Jefferies*

## Introduction: Locating Sovereignty

“The problem of writing: in order to designate something exactly, an exact expressions are utterly unavoidable...an exactitude is in no way an approximation...it is the exact passage of that which is underway.”

– Gilles Deleuze and Felix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, 1987

“One cannot decide—and that’s the interesting thing.”

– Jacques Derrida, “Declarations of Independence,” 1986

Critical accounts of sovereignty are characterized by a puzzling duality. These accounts approach sovereignty in two related, yet oppositional ways. On the one hand, sovereignty is understood as the ability to decide the exception, the moment when ordinary law must be suspended; on the other, it is understood as the accumulated effect of governmental practices of population management. Sovereignty is either located at the borderline or limit of political order, producing its conditions of possibility even as it remains outside of them, or it takes place within that order, enacted through the myriad mundane activities of daily life. It either happens in the singular, exceptional moment of decision, or it works through commonplace bureaucratic processes and routinized activity. Sovereignty, it seems, is implicated both at the limits of our political experience, as well as in the banalities of everyday existence; in the most extreme violences, and the most subtle relations of power.

This thesis investigates the relation between exception and governmentality in the critique of sovereignty. It considers exception and governmentality as an expression of the problem of sovereignty and argues that this problem is expressed both within the accounts of sovereignty that exception and governmentality articulate, as well as between them. Taking Michel Foucault and Carl Schmitt as the paradigmatic theorists of

governmentality and exception, respectively, I engage in close readings of the texts in which these concepts are most thoroughly elaborated. These readings demonstrate that, despite their apparent differences, exception and governmentality cannot be differentiated from one another. The instability evident in Schmitt and Foucault's concepts show that the relation between them is best characterized as aporetic.

### **The Problem of Sovereignty**

Wendy Brown neatly captures the difficulty faced by contemporary theorists of sovereignty when she writes that “sovereignty is an unusually amorphous, elusive, and polysemic term of political life.”<sup>1</sup> Sovereignty has a way of confounding attempts to put it under the microscope. This difficulty is produced by what is frequently referred to as the problem of sovereignty, or the problem of founding—a problem centred around the origins of sovereign authority. As Walker writes,

sovereignty can be understood to be a problem, or rather a massive complexity of problems concerning the authorization of authority. Political theorists know this primarily as the problem of founding, the authorization of a discrimination between before and after that works as the ground on which to authorize all other discriminations.<sup>2</sup>

This problem has been expressed in numerous ways by a great range of political thinkers: as the distinction between constituent and constituted power in constitutional polities;<sup>3</sup> between everyday ‘politics’ and their organizing principle ‘the political’;<sup>4</sup> between the

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<sup>1</sup> Wendy Brown, *Walled States/Waning Sovereignty*, (New York: Zone Books, 2010), 48.

<sup>2</sup> R. B. J. Walker, *After the Globe/Before the World*, (New York: Routledge, 2010), 196.

<sup>3</sup> Some examples include: Hannah Arendt, *On Revolution*, (New York: The Viking Press, 1963); Jacques Derrida, “Declarations of Independence,” *New Political Science* 7, no. 1 (1986): 7-15; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, (New York: Cambridge University Press, 1995); and Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (New York: Oxford University Press, 2007).

<sup>4</sup> Claude Lefort, *Democracy and Political Theory*, (Cambridge: Polity Press, 1988).



norms expressed in rule and law and the exceptions to them; between law-producing violence and law-preserving violence;<sup>5</sup> between the founding of political order and its perpetuation;<sup>6</sup> and between the disciplines of political theory and international relations.<sup>7</sup> The problem of sovereignty reveals sovereignty's dual character—"both generated and generative."<sup>8</sup>

As both Schmitt and Foucault notice, the question of origins tends to be effaced in modern politics, whether because of the valorization of compromise and deliberation in parliamentary democracies (Schmitt) or the functionalist, technocratic bent of neoliberal governmentality (Foucault). Critiques of sovereignty are thus often oriented toward the origin of political order, an orientation that raises the spectre of an event characterized by the exercise of arbitrary, exceptional violence. If sovereign authority is the ground upon which particular forms of violence (for example, laws or wars) are deemed legitimate, the force or act that produces that authority is necessarily groundless, a contingent imposition. It thus seems as though political order must begin in an utterly singular moment, in which all previous law, norm, and routine is broken with. Sovereignty produces the conditions under which its authority will be retroactively apprehended as necessary, legitimate, and just; it produces the conceptual framework by which it is to be read and which serves to reinforce it. It is the relation between these two elements of sovereignty—its authority within political order and the force that produces that order—

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<sup>5</sup> Walter Benjamin, "Critique of Violence," in *Reflections*, Peter Demetz, ed. (U.S.A.: Schocken Books, 1978).

<sup>6</sup> Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" in *Acts of Religion*, Gil Anidjar, ed. (New York: Routledge, 2002).

<sup>7</sup> R.B.J. Walker, *Inside/Outside: International Relations as Political Theory*, (Cambridge: Cambridge University Press, 1993).

<sup>8</sup> Brown, *Walled States*, 52.

which makes it such an elusive concept in regard to its spatiotemporal conditions, and such a troubling one in regard to contemporary sovereign claims to authority.

The problem of sovereignty finds expression in the distinction between sovereign power understood as practices of governmentality and sovereign power understood as the capacity to decide the exception. As Sergei Prozorov explains, “the relation between order and its constitutive transgression...may be presented in terms of conceptual dyads such as governmentality/sovereignty [or] norm/exception.”<sup>9</sup> My analysis will focus in particular on the way in which exception and governmentality express the spatiotemporal dimensions of the problem of sovereignty. These spatiotemporal articulations—which consist of a spatial distinction between the inside and outside of political order and a temporal distinction between the foundation and preservation of political order—inform accounts of the limits and possibilities of contemporary political life and are organized around the principle of the sovereignty of the modern state. As Walker puts it, “the crucial modern political articulation of all spatiotemporal relations, is the principle of state sovereignty.”<sup>10</sup> The spatiotemporal locations attributed to governmentality—spatially inside and temporally routine—and exception—spatially outside and temporally in the singular moment—mirror the distinction between a constituted order and a constitutive power. Governmentality and exception, then, can be read as attempts to locate sovereignty in a particular place and time. My analysis suggests that sovereignty cannot be found in either of the spatiotemporal configurations that governmentality and

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<sup>9</sup> Sergei Prozorov, “X/Xs: Toward a General Theory of the Exception,” *Alternatives: Global, Local, Political* 30, (2005): 82.

<sup>10</sup> Walker, *Inside/Outside*, 6.

exception represent, and, moreover, that the distinction between such configurations is unsustainable.

### **Exception/Governmentality**

My focus in this essay is thus on a particular expression of the problem of sovereignty—the relation between exception and governmentality. This is for several reasons. First, exception and governmentality now enjoy widespread use among critical scholars in the social sciences and humanities and have entered the academic vernacular of a range of disciplines. They are employed to analyze a remarkable variety of contemporary social and political problems, from gender and sexuality to migration to sovereignty. Yet the popularity of these concepts has resulted in a sedimentation through which their defining characteristics and what they mean have become fixed and simply assumed. Exception and governmentality are increasingly brought to bear on political problems with a rote regularity that saps their critical potential. They have become concepts to be applied, slapped onto political phenomena as convenient explanatory frameworks. Both concepts challenge the notion that sovereignty is a known quantity that can be used to better comprehend world politics, yet are now often treated in much the same way—as internally coherent, unproblematic theoretical tools whose use is a simple matter of matching concept to world, theory to practice. An engagement with exception and governmentality and their relation to one another as the site of political *problems* can thus reinvigorate the contributions of Schmitt and Foucault to political theory and the critique of sovereignty.

Second, exception and governmentality are employed in some of the most fervent debates surrounding the most contentious political issues of the twenty-first century. They inform analyses of post-9/11 security discourses and practices, and their inscription in law; the management of transnational migration produced by upheavals from inter- and intra-state conflict, and, increasingly, climate; the policing of borders and the selective screening of goods, capital, and people that cross them; international organizations and their interventions in states, especially in the context of ‘human security’; ubiquitous digital surveillance by state and capital; the constellation of claims surrounding the resurgence and/or disappearance of state sovereignty; and the politics of scale, including the relation between the local and the global. Insofar as exception and governmentality express the problem of sovereignty, it is thus not surprising that questions surrounding sovereignty have enjoyed a resurgence in contemporary scholarly debate.

Third, exception and governmentality, when examined together, are effective concepts for demonstrating the nearly indemonstrable—*aporia*—and do so in a way that make it clear that the problem of founding is an intensely *political* problem. Given their relation to law, authority, and government, exploring the relation between exception and governmentality is particularly useful for showing the ways in which the indistinction between them animates a host of contemporary questions related to sovereignty, its relation to the state, and its spatiotemporal conditions of possibility. What is at stake in the relation between exception and governmentality is what and where ‘politics’ is, a question continually provoked by the global transformations and events mentioned above.

Finally, exception and governmentality are useful for the way they engage the intersection of state sovereignty and the international. While Foucault and Schmitt remain resolutely statist in their accounts of sovereignty, exception and governmentality lend themselves to analyses that problematize the boundary that separates state sovereignty from its outside. The way exception and governmentality have been employed in contemporary scholarship attests to this capacity. Analyses of the governmentality of security and war have led to reformulations of the relation between the inside and outside of the state,<sup>11</sup> while research that makes use of exception in relation to biopolitics has been used to emphasize the extent of sovereignty's reach beyond the borders of the state.<sup>12</sup>

### **Norm and Exception in the Study of Sovereignty**

While critiques of sovereignty have tended to coalesce around the governmentality/exception dichotomy, there is remarkably little agreement about how that dichotomy should be understood and employed, whether it should be avoided altogether, or, if so, how that could be done. Though there seems to be a general sense that neither term is sufficient for either ontological accounts of sovereign power or methodological approaches to its study, there remains a significant degree of perplexity among scholars as to the relation between the normal and exceptional and the exercise of sovereignty. While some scholars choose to privilege either exception or governmentality in their analyses, others acknowledge sovereignty's elusive character with terms like

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<sup>11</sup> Didier Bigo and R.B.J. Walker, "Political Sociology and the Problem of the International," *Millennium: Journal of International Studies* 35 (2007): 725-740; Vivienne Jabri, "War, Security and the Liberal State," *Security Dialogue* 37 (2006): 4-64.

<sup>12</sup> Miguel de Larrinaga and Marc G. Doucet, "Sovereign Power and the Biopolitics of Human Security," *Security Dialogue* 39, no. 5 (2008): 517-537.

‘catechresis’ or ‘paradox.’ Still others advocate a refusal of the norm/exception binary altogether, but in practice such a move is far easier said than done. I would like to give a brief sketch of some of the recent literature that has engaged with the relation between exception and governmentality to provide the context from which this essay springs and to elucidate some of the lines of thought that it works both with and against. In doing so, I aim to highlight the persistent inability of scholars to fix sovereignty in any particular spatiotemporal location and the way that the attempts to escape the norm/exception binary often result in its reproduction.

The difficulty of determining the relation between governmentality and exception can be read in concepts such as ‘catechresis’ and ‘paradox.’ These terms are indicative of the confusion that arises from attempts to pin down the precise location of sovereign power. Elizabeth Povinelli, in her study of indigenous communities in Australia, for example, argues that “a specific catechresis between the security state and the neoliberal market—between sovereign state and biopolitical state—animates contemporary late liberal attitudes toward various forms of living and dying.”<sup>13</sup> The word, which designates the “application of a term to a thing which it does not properly denote” or “the abuse or perversion of a trope or metaphor”<sup>14</sup> signals a realization that the current critical vocabularies employed to make sense of sovereignty are simply inadequate. Brown makes a similar claim when she outlines a series of problems that haunt critical investigations of sovereignty. “There is ambiguity in the term,” she writes, “and paradox

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<sup>13</sup> Elizabeth Povinelli, “The Child in the Broom Closet: States of Killing and Letting Die,” *South Atlantic Quarterly* 107, no. 3 (2008): 512.

<sup>14</sup> Oxford English Dictionary. “Catechresis.” Oxford: Clarendon Press, 1976.

in the phenomenon itself.”<sup>15</sup> While terms like exception or governmentality, paradox or catachresis may capture some element of its operation, they never seem able to encapsulate the entirety of the phenomenon; sovereignty eludes the bounds of even the most carefully-constructed concepts.

This is not for lack of trying. Sovereignty has become the site of a considerable amount of scholarly scrutiny, especially in regard to the concept of exception. This “minor cottage industry based on the work of Carl Schmitt,”<sup>16</sup> as Mark Neocleous calls it, has participated in what Andrew Neal describes as an “intense debate on the question of exceptionalism”<sup>17</sup> that emerged in the years following September 11<sup>th</sup>. Exception has become the preferred conceptual language for the critique of liberal governments’ use of extra-legal state power, especially in the realms of insecurity, borders, and counterterrorism.<sup>18</sup> The discipline of international relations is an especially fertile site of engagement with the topic, as “torture, indefinite detention, extraordinary renditions, deportation of foreign nationals suspected of being a threat, the invasion of Iraq, the flouting of international conventions, [and] increasingly restrictive immigration and asylum policies have all revived inquiries into the role of sovereignty [and]...exceptionalism.”<sup>19</sup> Exception has become the default critical conceptual category with respect to the ‘illiberal’ exercise of state power in the twenty-first century.

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<sup>15</sup> Brown, *Walled States*, 52.

<sup>16</sup> Mark Neocleous, “The Problem With Normality: Taking Exception to ‘Permanent Emergency,’” *Alternatives: Global, Local, Political* 13, no. 2 (2006): 192.

<sup>17</sup> Andrew Neal, “Normalization and Legislative Exceptionalism: Counterterrorist Lawmaking and the Changing Times of Security Emergencies,” *International Political Sociology* 6 (2012): 260.

<sup>18</sup> Jeff Huysmans, “The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society,” *International Political Sociology* 2 (2008): 165.

<sup>19</sup> Claudia Aradau and Rens Van Munster, “Exceptionalism and the ‘War on Terror’: Criminology Meets International Relations,” *British Journal of Criminology* 49 (2009): 686-7

Despite the currency this “hotly debated”<sup>20</sup> concept has gained in critical discourses on sovereignty, a number of scholars have expressed skepticism about its usefulness. These scholars argue that exception is a somewhat clumsy analytical tool that tends to obscure the subtleties and historically specific character of sovereign power.<sup>21</sup> Some avoid this pitfall by eschewing the concept altogether in favour of analyses that privilege governmentality as a theoretical framework. Didier Bigo, for example, explains how transnational migration is governed by a field of what he calls “professionals in the management of unease,”<sup>22</sup> a vast range of functionaries that spans private, public, and intergovernmental institutions who work to securitize migration in order to ensure their continued relevance and authority. This network produces “a convergence between the meaning of international and internal security,”<sup>23</sup> that results in the “globalization of domination.”<sup>24</sup> Claudia Aradau and Rens Van Munster similarly use a Foucauldian framework to understand the ‘War on Terror’ as an exercise in risk management and highlight the role of micropolitical practices such as insurance in processes of (in)security.<sup>25</sup>

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<sup>20</sup> Ibid, 687.

<sup>21</sup> See for example, Jeff Huysmans, “The Jargon of Exception—On Schmitt, Agamben and the Absence of Political Society,” *International Political Sociology* 2 (2008): 165-183; Jeff Huysmans, “Minding Exceptions: The Politics of Insecurity and Liberal Democracy,” *Contemporary Political Theory* 3 (2004): 321-341.

<sup>22</sup> Didier Bigo, “Security and Immigration: Toward a Critique of the Governmentality of Unease,” *Alternatives: Global, Local, Political* 27 (2002): 64.

<sup>23</sup> Ibid., 63.

<sup>24</sup> Didier Bigo, “Globalized (in)Security: The Field and the Banopticon,” in Didier Bigo and Anastassia Tsoukala, eds. *Terror, Insecurity, and Liberty: Illiberal Practices of Liberal Regimes After 9/11*, (New York: Routledge, 2008).

<sup>25</sup> Aradau and Van Muster, “Governing Terrorism Through Risk: Taking Precautions, Unknowing the Future,” *European Journal of International Relations* 13, no. 1 (2007): 89-115; and Claudia Aradau and Rens Van Munster, “Insuring Terrorism, Assuring Subjects, Ensuring Normality: The Politics of Risk After 9/11,” *Alternatives: Global, Local, Political* 33 (2008): 191-210.



Yet analyses that address phenomena related to sovereignty commonly recognize the need to study how governmentality and exception exist in configurations in which they intersect or reinforce one another as mutually constitutive forms of power. The c.a.s.e. collective, for example, argues that “the tension between exceptionalism and routinization within security studies should be taken seriously and should promote a critical research agenda dealing with the relationship or coexistence of risk and exceptionalism in all its different possible configurations”<sup>26</sup> and Aradau suggests that research should be done that “concern[s] the emergence of a form of governmentality that has exception at its core.”<sup>27</sup> This is a project Judith Butler has taken up, arguing in her book, *Precarious Life*, that the U.S. practice of indefinite detention signals a new configuration of power in which “sovereignty emerges within the field of governmentality.”<sup>28</sup>

The mutual interaction between practices of exception and governmentality has also been engaged in relation to borders and migration. Mark Salter, in his analysis of Canadian border regulations, claims that “governmental procedures of examination at the border institutionalize a continual state of exception.”<sup>29</sup> Security functionaries administer governmental procedures at the border, but with an almost unlimited discretion that is effectively extra-legal.<sup>30</sup> Governmentality and exception, in this case, work in concert to perform the sovereign inclusions and exclusions that constitute political community.

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<sup>26</sup> c.a.s.e. collective, “Critical Approaches to Security in Europe: A Networked Manifesto,” *Security Dialogue* 37, no. 4 (2006): 455.

<sup>27</sup> Aradau and Van Munster, “Exceptionalism and the War on Terror,” 695.

<sup>28</sup> Judith Butler, *Precarious Life*, New York: Verso (2004), 53.

<sup>29</sup> Mark Salter, “When the Exception Becomes the Rule: Borders, Sovereignty, and Citizenship,” *Citizenship Studies* 12, no. 4 (2008): 365.

<sup>30</sup> *Ibid.*, 368.

Didier Bigo, for his part, unites governmental management and exceptionalism through his conception of the ‘banopticon,’ strategies of surveillance and control that are “characterized by the exceptionalism of power (rules of emergency and their tendency to become permanent), by the way it excludes certain groups in the name of their future potential behaviour (profiling) and by the way it normalizes the non-excluded through its production of normative imperatives.”<sup>31</sup> Governmental security technologies produce exceptional populations that are excluded from particular political communities. This work on borders thus highlights how sovereign practices of inclusion/exclusion are enabled by governmental strategies and procedures.

The intersection of sovereign exceptionalism and governmentality has been of similar concern to scholars studying the relation between state sovereignty and neoliberal market forces. Povinelli, for example, examines the “intersection”<sup>32</sup> of exception and governmentality that results in the characterization of some kinds of lethality as ‘state killing’ and others as ‘letting die.’ This intersection, she argues, renders some ways of living legitimate, responsible, and reasonable, and others not. Aihwa Ong also engages the relation between exception and transnational capital by examining the ways neoliberal governmentality employs the exception to include as well as exclude marginalized populations in relation to a normative order. She aims to describe the “specific alignments of market rationality, sovereignty, and citizenship that mutually constitute distinctive milieus of labor and life.”<sup>33</sup> Jacqueline Best, meanwhile, argues that global financial governance is a site of “the blurring of the distinction between the rule

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<sup>31</sup> Didier Bigo, *Globalized (in)Security*, 35.

<sup>32</sup> Povinelli, “The Child in the Broom Closet,” 511-12.

<sup>33</sup> Aihwa Ong, *Neoliberalism as Exception: Mutations in Citizenship and Sovereignty*, (USA: Duke University Press, 2006), 4.

and the exception”<sup>34</sup> as governmental rules and standards for economic practices serve as justification for rendering certain states, economies, or regions exceptional cases, vulnerable to the whims of powerful states or international financial institutions. For these thinkers, governmental economic management and state sovereignty are characterized by overlapping and mutually reinforcing sites of governmental management and exceptional decision.

This phenomenon of the ‘blurring’ of the line between exception and governmentality has led others to challenge the distinction between an exceptional sovereignty that operates beyond the law and a normal sovereignty that operates within it. Moving beyond the well-known claims of Walter Benjamin, Giorgio Agamben, and Michael Hardt and Antonio Negri, who all claim in some way that ‘the exception has become the norm,’<sup>35</sup> scholars are increasingly refusing to accept the distinction between norm and exception by demonstrating the ways in which exceptional practices operate through the law rather than beyond it. This work recognizes the necessity of the distinction between norm and exception for liberal discourses on law and war, and seeks to avoid reproducing them by moving away from the norm/exception dichotomy itself.

Mark Neocleous, for example, shows how exceptional state practices do not take place in an extra-legal realm, but are rather written into legal statutes themselves. He places post-9/11 counterterrorism activities in the context of a long history of legally-enshrined emergency powers, describing them as simply new iterations of the ways in

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<sup>34</sup> Jacqueline Best, “Why the Economy is Often the Exception to Politics as Usual” *Theory, Culture & Society* 24 (2007): 87.

<sup>35</sup> Walter Benjamin, “Theses on the Philosophy of History,” in *Illuminations*, Hannah Arendt, ed., Harry Zohn, trans., (New York: Schocken Books, 1968), 257; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1995), 168-9; Michael Hardt and Antonio Negri, *Empire*, (Cambridge, MA: Harvard University Press, 2002), 17.

which states have always included provisions for exceptional action within law. Neocleous ties this commonplace formalization of emergency measures to the disciplinary tactics necessary to sustain the accumulation of capital, writing that “the use of emergency powers has been a regular feature of economic regulation in Western democracies for the last century.”<sup>36</sup> He claims that “no constitution exists that does not contain provisions for emergency rule”<sup>37</sup> and thus “it is through the law that violent actions conducted in ‘emergency conditions’ have been legitimated.”<sup>38</sup> For him, this means the distinction between exceptional and normal times is “the biggest political myth going.”<sup>39</sup> In Neocleous’ terms, the legality of exception renders meaningless the distinction between a normal politics in conformity with the law and exceptional measures that take place beyond it.

Echoing Neocleous’ claim that “extraordinary powers...very quickly and easily infiltrate the ordinary legal system,”<sup>40</sup> Andrew Neal draws on an analysis of counterterrorist lawmaking in the United Kingdom to argue that sovereign exceptionalism “does not make exceptions to the law, but rather enacts new laws in an exceptional way through a discourse of emergency.”<sup>41</sup> Over time, he explains, exceptional powers become normalized within legal discourse and practice, so that “the problem is no longer the binary distinction between normal times and exceptional times, but the political and legal processes entailed by exceptional and emergency powers over

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<sup>36</sup> Neocleous, “The Problem with Normality,” 197.

<sup>37</sup> *Ibid.*, 206.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, 204.

<sup>40</sup> *Ibid.*

<sup>41</sup> Neal, “Normalization and Legislative Exceptionalism,” 273.

time, which have blurred that distinction.”<sup>42</sup> For Neal, these processes represent a form of “normalization...[that] work[s] to constitute exceptionalism as norm over time.”<sup>43</sup> Neal, too, thus recognizes a certain difficulty in distinguishing between the legal and the extra-legal: ‘legislative exceptionalism,’ as he calls it, “blur[s] the possibility of recognizing clear instances of legal transgression.”<sup>44</sup> If normal is understood as legal and exceptional understood as the suspension of law, given the way emergency powers are enacted through law, the norm/exception binary appears inadequate to the task of apprehending the operation of sovereignty.

Fleur Johns comes to a similar conclusion in her analysis of the legal practices surrounding the Guantanamo Bay military prison. Johns challenges the common explanation of Guantanamo as a space of exception, claiming instead that “the plight of Guantanamo Bay detainees is less an outcome of law’s suspension or evisceration than of elaborate regulatory efforts by a range of legal authorities.”<sup>45</sup> This leads her to break the association between extra-legality and exception, as she advocates for “a renewed sense of the exception and the decision that ‘emanates from nothingness’ within law.”<sup>46</sup> In other words, the concept of exception is not necessarily antithetical to, nor excludes the kind of normalizing practices at work in Guantanamo Bay. Johns’ attempt to map the legal and procedural practices that saturate the supposedly exceptional space of the war prison aligns with Neal’s call for an ‘archaeology of the exception,’ a method that could

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<sup>42</sup> *Ibid.*, 267.

<sup>43</sup> Andrew Neal, “Goodbye War on Terror? Foucault and Butler on Discourses of Law, War and Exceptionalism,” in *Foucault on Politics, Security, and War*, Michael Dillon and Andrew W. Neal, eds., (London: Palgrave-MacMillan, 2008), 49.

<sup>44</sup> *Ibid.*, 50.

<sup>45</sup> Fleur Johns, “Guantanamo Bay and the Annihilation of the Exception,” *The European Journal of International Law* 16, no. 4 (2005), 614.

<sup>46</sup> *Ibid.*, 638.

avoid the tendency of discourses on exceptionalism to “reify a certain vision of sovereignty.”<sup>47</sup> Neal believes exceptions must be understood not as structural inevitabilities produced by necessary limits but as always contingent and historically constituted practices of legitimation. For him, the norm/exception dichotomy fails to capture the way that exceptionalism is produced by historically specific discursive constellations and thus cannot be reduced to a simple division or break.

This modest sample of the literature on sovereignty, exception, and governmentality contains a dizzying array of often contradictory claims. We hear that the line between legal and exceptional has become blurred, and that there never was such a line in the first place. We hear that Guantanamo is the site *par excellence* of exception, and that it is the purest expression of normal politics. We hear that the concept of exception is inadequate for understanding the complexities of sovereign practices of legitimation, and that exception contains the nuance necessary for that task. We hear that exception has become an element of governmentality, and that governmental practices work on populations in an exceptional manner. We hear that sovereignty takes place in times of emergency, but also that it operates through a diffusion of power that works in the everyday. The list could go on. Despite the numerous attempts to think exception and governmentality in relation to one another and problematize their conventional usage, the original duality between an exception that happens outside of political order in an anomalous moment and a governmentality that happens within it through routine normalization re-emerges within the literature. What this indicates is that the significant

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<sup>47</sup> Neal, “Foucault in Guantanamo,” 36.

uncertainty that surrounds the question of exception and governmentality is symptomatic of a problem.

For this reason, I want to insist on the continued understanding of the exception/governmentality pair as an expression of the problem of sovereignty. For critical theories of sovereignty, this insistence is vital for resistance to liberal claims to legitimacy that avoid the questions produced by a consideration of the relation between norm and exception by privileging the normal as the only possible site of politics and denying the role of exception in the constitution of political order. As Jens Bartelson explains, the relationship between the normal and the exceptional “has been closed to investigation by modern political science, which places its bet on the continuing subordination of the exceptional to the persistence of the regular.”<sup>48</sup> The privileging of one element of the duality over the other, however, is not the exclusive domain of conventional political science, but also occurs, however unwittingly, in critical accounts of sovereignty. In these cases, the impulse to move beyond the norm/exception dichotomy is attempted by way of choosing one element over the other. Yet the reduction of exception to processes of governmentality or the subsumption of governmental practices within an expanded definition of the exception still assumes the possibility of a differentiation of exception and norm, governmental process and exceptional declaration. Arguing that exception has become (or always was) governmental or that governmentality has become (or always was) exceptional only succeeds in reinscribing the norm/exception distinction. An acknowledgement that such a distinction is unsustainable need not entail an abandonment of the problem that it expresses.

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<sup>48</sup> Jens Bartelson, “Making Exceptions: Some Remarks on the Concept of Coup d’état and its History,” *Political Theory* 25, no. 3 (1997): 323.

As important as these problematizations of the norm/exception dichotomy are, they unwittingly reproduce the very distinction they critique. While they show that the extra-legality of the exception and the legality of the norm cannot be taken for granted, they continue to sustain the distinction between exceptional and governmental with respect to sovereignty. What Neocleous, Neal, Butler, and the rest assume is that, while exception may occur through the law, or through governmental practices, exceptional practices and governmental ones can still be easily identified. In other words, while the line between them may be blurred, they still assume a capacity to distinguish between exceptions that are produced by normalization, or normalization produced by exception. In this sense, their attempts to address the problem of the relation between exception and governmentality ends in a privileging of one over the other, which only succeeds in reinscribing the problem. These analyses overlook the way that the 'blurred' distinction between exception and norm occurs not only between legal norm and extra-legal exception but *within* the law and *within* exception. When the aporetic relation between norm and exception is recognized as a characteristic of governmentality itself and exception itself, the distinction between exceptional and governmental disappears.

### **Schmitt, Foucault, Aporia**

The move toward a consideration of exception and governmentality in relation to one another is therefore one I would like to follow. However, rather than assume that exception and governmentality exist as discrete concepts or forms of power, I aim to interrogate that distinction itself. While others have indeed questioned the distinction, they do so in ways that tend to reinforce it. In almost all of these analyses, exception and



governmentality are understood as discrete concepts or forms of power; their boundaries remain intact. What is overlooked is the aporetic character of the relation between exception and governmentality, the way in which attempts to differentiate one from the other inescapably collapse. Exception and governmentality thus represent an impasse; they are not identical, yet neither can they be differentiated from one another.

At first, or even second glance, Schmitt and Foucault may seem like very different figures. Their political convictions are divergent, their methodologies dissimilar, their conclusions (seemingly) oppositional. Yet what I aim to show here is that their respective theories of sovereignty are two elements of the same phenomenon: the problem of sovereignty. My readings of Michel Foucault and Carl Schmitt are intended to trouble the distinction between exception and governmentality by examining the points of convergence between their bodies of work, but also by demonstrating how their accounts give rise to an autocritique in which they reveal the shortcomings in their own theories. Taken together, their work expresses the aporetic relation that animates sovereign power.

Insofar as this essay puts Michel Foucault and Carl Schmitt into conversation with one another, it follows a relatively recent development in political theory in which Schmitt and Foucault are read together, as thinkers whose work is closely related. In Sergei Prozorov's words, Schmitt and Foucault are "two thinkers who have only recently come to be mentioned in the same sentence."<sup>49</sup> The pair, he writes, "are permanently at work in mutual deconstruction, the positively valorized concepts in one approach (sovereignty and governmentality, respectively) functioning as disavowed blind spots in

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<sup>49</sup> Prozorov, "A General Theory of the Exception," 82.

the other.”<sup>50</sup> Foucault and Schmitt certainly haunt one another’s work, but they also perform an autodeconstruction, dismantling their carefully elaborated claims almost as they make them. This is why each thinker seems to simultaneously undermine the claims of the other. The problem of sovereignty is represented in the relation between each of their conceptions of sovereignty, but is also expressed immanently within each of those conceptions. The collapse of the distinctions between sovereignty and governmentality, exception and norm that are expressed immanently in the work of Schmitt and Foucault means that the distinctions between them collapse as well. These readings thus aim to outline the fervour and precision with which both thinkers seek to delimit a specific realm in space and time in which sovereignty operates and thus where politics must exist, and the ways in which their texts perform an autodeconstruction, undermining their most fervent claims even as they are elaborated.

Exemplary in the nuance which they bring to the problems they address, neither Schmitt nor Foucault can be readily accused of being unaware of the difficulties that their own accounts of sovereignty present. Neither thinker’s understanding of sovereignty remains the same throughout their work, but rather moves between acknowledgements of sovereignty’s aporetic origins and a desire to reduce that aporia to a neat division, one side of which can then be chosen as the appropriate manner for apprehending sovereign power. Yet these attempts at ‘divide and conquer’ do not succeed. To demonstrate this uncertainty, my readings of these two figures will focus mainly on two texts: *Security, Territory, Population* and *Political Theology*. These are the texts in which Foucault and

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<sup>50</sup> Ibid.

Schmitt are simultaneously most and least certain of themselves; in which they draw the sharpest distinctions even as they erase them to near invisibility.

## Chapter I: Sovereignty, Modernity, Politics

The diagnoses of modern political life offered by Schmitt and Foucault are remarkably similar. Though their differing methods tend to obscure the commonalities in their accounts of modern political transformations, the two come to conclusions concerning the historical developments they attempt to parse—namely the development of modern sovereignty, its accompanying institutions, and its organizing logic—that are very much alike. Schmitt and Foucault are united in their concern with what Mika Ojakangas calls “the question of modernity—the form of politics that replaces the sovereign with an impersonal machine.”<sup>51</sup> Put simply, both thinkers trace the political consequences of the break with rule by natural or divine principles through the figures of God and monarch. Foucault does so through a genealogical analysis of the shift from sovereign to governmental power in Europe beginning in the seventeenth century, while Schmitt employs an examination of the political and legal categories of the modern liberal state. In doing so, both thinkers identify a form of political sovereignty that is self-justifying and claims neutrality. It is in response to this marginalization of the political that is a central feature of modern politics that Foucault and Schmitt develop theories of sovereignty that acknowledge the workings of power beyond the strictures of the law.

For Ojakangas, this is largely where the similarities end. While Foucault and Schmitt may offer comparable diagnoses, their “answers to the question of modern anonymous power are almost the exact opposite.”<sup>52</sup> While Foucault believes that “power can no longer be analyzed emanating from individuals, since what appears to be personal

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<sup>51</sup> Mika Ojakangas, “Sovereign and Plebs: Michel Foucault Meets Carl Schmitt,” *Telos* 119 (2001): 32.

<sup>52</sup> *Ibid.*, 35.

is the *result* of impersonal technologies of power,”<sup>53</sup> Schmitt personalizes power by locating it in the decision, in “who decides in the last analysis.”<sup>54</sup> Yet a close look at the attempts made by Schmitt and Foucault to rearticulate theories of sovereignty that retain their political dimension (chapters two and three) reveals not opposing solutions, but accounts that, while not identical, are impossible to distinguish from one another.

At stake in the work of Schmitt and Foucault is the relation between sovereignty and politics. Foucault famously claimed that political theory must “cut off the King’s head”<sup>55</sup> if it is to accurately map the workings of contemporary political power, an injunction that has been invoked in support of Foucault’s supposed belief in the irrelevance of sovereignty to the political problems produced by modern politics. While this view has not been completely displaced, readings of Foucault that highlight his engagement with sovereignty are now common enough that Andrew Neal can claim in 2004 that “Foucault’s concern with the problem of sovereignty has been known to his Anglo-American readership for some time.”<sup>56</sup> This line of thought suggests that Foucault does not forsake the problem of sovereignty altogether and recognizes its persistence in modern political formations. Foucault’s explicit attention to the problem of sovereignty in ‘*Society Must Be Defended*’ certainly bolsters this view, as does his assertion in the first lecture of *The Birth of Biopolitics* series, referring to his previous set of lectures, *Security, Territory, Population*, that he “only considered, and again this year will only consider the

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<sup>53</sup> Ojakangas, “Sovereign and Plebs,” 35.

<sup>54</sup> *Ibid.*, 36.

<sup>55</sup> Michel Foucault, “Truth and Power,” in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Colin Gordon, ed., Colin Gordon et al., trans., (New York: Pantheon Books, 1980), 121.

<sup>56</sup> Andrew Neal, “Cutting Off the King’s Head Foucault’s *Society Must Be Defended* and the Problem of Sovereignty,” *Alternatives: Global, Local, Political* 29 (2004): 373-398.

government of men insofar as it appears as the exercise of political sovereignty.”<sup>57</sup>

Indeed, Foucault’s appeal to methodological regicide can just as easily be read as evidence of a serious concern with questions regarding the status of sovereignty and its relation to politics, rather than as advice to forget them.

Foucault is thus aware that the introduction of governmental reason into the political modalities of the West does not displace the difficulties associated with the origin of sovereignty. Rather, he claims that “the notion of government of population renders all the more acute the problem of the foundation of sovereignty.”<sup>58</sup> While the unitary model of sovereignty prevalent during the Middle Ages was for Foucault no longer relevant, the problem of sovereignty remained for him an abiding concern. This connection between sovereignty and politics in Foucault’s work persists in his description of the relation between politics and governmentality. The problem he addresses through this genealogical inquiry into governmentality is the question of the location of the boundaries of the political. He is interested in how, by way of the deployment of governmental reason, a new realm of thought and action was brought into being—a realm called ‘politics.’ According to Foucault, governmentality does not simply produce a new understanding of politics, but in fact gives rise to the particular field of thought and action called politics, which concerns developing an effective art of government. It is the elaboration of “a particular way of positing, thinking, and programming the specificity of government in relation to sovereignty” that generates “the appearance of politics (*la*

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<sup>57</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, Michel Senellart, ed., Graham Burchell, trans., (New York: Picador, 2008), 2.

<sup>58</sup> Michel Foucault, “Governmentality,” in *The Foucault Effect: Studies in Governmentality*, Graham Burchell, Colin Gordon and Peter Miller, eds., (Chicago: University of Chicago Press, 1991), 102.

*politique*), of politics as understood as a domain or type of action.”<sup>59</sup> In other words, governmentality does not only produce a specific conception of what politics is, but politics itself as an object of study and set of interventions.

Yet the domain of politics does not arise strictly from governmental processes, but, according to Foucault, from becoming a domain that “is fully integrated at the level of institutions, practices, and ways of doing things within the system of sovereignty.”<sup>60</sup> Governmentality thus gives rise to politics not through an abandonment of sovereignty, but rather through a reworking of the relation between sovereign authority and the operation of government. Politics, then, is the result of particular conceptions of sovereignty and the way in which they can be reconciled with practices of governmentality. The question of the relation of sovereignty and governmentality is thus also the question of establishing the limits of the realm of the political, of what the scope and location of what we call politics might be. In Foucault’s view, modern politics is located not at the level of state and sovereignty, but in the disparate operations of power that span the length and breadth of society. Politics here does not principally consist of the relation between a sovereign and his subjects, but rather the diverse practices of discipline and management that work across various social and political institutions (religious, medical, educational, military), practices that produce political order through processes of routinization and normalization.

The form of governmentality Foucault describes in *Security, Territory, Population* works through the processes of normalization that accompany the shift from

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<sup>59</sup> Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978*, Michel Senellart, ed., Graham Burchell, trans., (New York: Picador, 2007), 246.

<sup>60</sup> Ibid.

disciplinary power to a governmental power that manages populations. Normalization, as Foucault explains it, does not divide normal and abnormal, but rather affects what Foucault calls “a distribution of normality” in which the aim is “to reduce the most unfavourable, deviant normalities in relation to the normal, general curve.”<sup>61</sup> This norm, which consists of “an interplay of normalities,” remains “fixed” and operates through the management of interactions between various modes and degrees of deviation. Foucault thus rejects the notion of a unified (Hobbesian, Schmittian) sovereign power in favour of a force that operates through the commonplace activity that sustains normal political order. Thus, in his view, the object of analysis should not be “sovereignty in its one edifice, but the multiple subjugations that take place and function within the social body.”<sup>62</sup>

For Schmitt, however, the essence of the political, and of sovereignty, is found in the decision. Contrary to a modern liberal politics concerned with the minutiae of formalistic legal and administrative procedures and rational calculation, Schmitt elaborates a conception of the political that relies on an initial, constitutive distinction—between friend and enemy. According to Schmitt, the domain of the political can trace its foundations to this originary decision on who is the enemy. Without it, the techniques, strategies, and organizing conceptual categories of politics become meaningless. The friend/enemy distinction is the original measure, the standard by which all other political judgements are made, the criterion by which all other political criteria determined. Schmitt compares the political distinction to others in the realms of morality (“good and

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<sup>61</sup> Foucault, *Security, Territory, Population*, 60-62.

<sup>62</sup> Michel Foucault, *‘Society Must Be Defended’: Lectures at the Collège de France, 1975-1976*, Mauro Bertani and Alessandro Fontana, eds., David Macey, trans., (New York: Picador, 2003), 27.



evil”), aesthetics (“beautiful and ugly”), and economics (“profitable and unprofitable”) to show that in each of these realms there exist divisions irreducible to more precise distinctions and irreplaceable by analogous ones.<sup>63</sup> In this sense, the domain of the political can be precisely delimited from other realms of human experience, be they social, economic, or religious: “the political has its own criteria which express themselves in a particular way.”<sup>64</sup> The realm of the political, then, is not simply the sum of various actions and decisions taken in the name of ‘politics,’ but in fact has its own unique organizing structure and logic.

Schmitt is clear about the necessary relation between sovereignty and the political. The founding decision of the political—deciding on the enemy—is a task only the sovereign can carry out, and it is through this ability that the sovereign is identified. A political entity “is sovereign in the sense that the decision about the critical situation, even if it is the exception, must always necessarily reside there.”<sup>65</sup> Sovereignty and the political domain are mutually constitutive; the sovereign inaugurates the sphere of politics—and the boundaries of a particular political order—by making the originary distinction between friend and enemy, an act by which he is designated the sovereign. As John McCormick notes, for Schmitt as for Hobbes, it is the fear of death that produces the sphere of the political by necessitating the sovereign decision on the enemy. Schmitt’s goal is to show that “only a state with a monopoly on decisions regarding what is

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<sup>63</sup> Carl Schmitt, *The Concept of the Political*, George Schwab, trans., (New Jersey: Rutgers University Press, 1976), 26.

<sup>64</sup> *Ibid.*, 25.

<sup>65</sup> *Ibid.*, 58.

‘political’ can guarantee peace and security.”<sup>66</sup> Without the sovereign to identify and neutralize the threat of the enemy, without the standard of sovereign authority with which to measure threats, individuals are reduced to a situation similar to Hobbes’ state of nature, in which all others represent a potential source of danger and death.<sup>67</sup> By deciding on the political, the sovereign fulfils its role as the authority that determines its own scene of action. For Schmitt, this capacity to make foundational decisions is the essence of sovereignty.

Unlike Foucault, then, Schmitt is not interested in the everyday machinations of the administration of government and the management of social institutions. While he admits that remnants of the friend/enemy distinction remain in these practices, these are “banal forms of politics...which assume parasite- and caricature-like configurations.”<sup>68</sup> The “tactics and practices, competitions and intrigues” of everyday politics are in no way connected to the essence of the political, but rather are part of “the most peculiar dealings and manipulations [that] are called politics.”<sup>69</sup> These commonplace activities, while not completely wiped clean of the residue of the political, are far removed from their source. For Schmitt, any inquiry into the specific character of the political cannot be successful unless the routinized practices and norms of ‘politics’ are ignored in favour of the motivating force of the originary distinction that animates them.

Thus, while Foucault is concerned with the way a historically specific rationality of government delimits a particular domain of practice called ‘politics,’ Schmitt derives

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<sup>66</sup> John McCormick, “Fear, Technology, and the State: Carl Schmitt, Leo Strauss, and the Revival of Hobbes in Weimar and National Socialist Germany,” *Political Theory* 22 (4): 1994, 623.

<sup>67</sup> Ibid.

<sup>68</sup> Schmitt, *Concept of the Political*, 30.

<sup>69</sup> Ibid.

his conception of sovereignty from what he believes to be the essence of the political. While their approaches to the link between sovereignty and politics differ in this sense, they share a concern not only with the sphere of the political, but also with the forces that produce it. This commonality is indicated by their respective methodologies, which can be illustrated by the way they approach the study of the modern state. Both Schmitt and Foucault conceive of the state as an effect of political power, rather than the source or privileged sphere of its occurrence. “Today,” writes Schmitt, “we can no longer define the political from the state; what we take to be the state must, on the contrary, be defended and understood from the political.”<sup>70</sup> Foucault elaborates a methodology that similarly begins from a point beyond the confines of state institutions. He explains that “to tackle the problem of the state and population” requires that researchers go “behind the institution...to discover in a wider and more overall perspective what we can broadly call a technology of power.”<sup>71</sup> In Foucault’s case, this move beyond the institution entails an analysis of the rationality of government that produces particular institutional structures and logics. In this sense, though their methodologies are significantly different, they both emphasize the operation of power beyond the formal institutions of law and state.

The advent of governmentality is nevertheless closely linked to the appearance of the modern state form, despite Foucault’s ready admission that he “must do without a theory of the state, as one...must forgo an indigestible meal.”<sup>72</sup> Rather, the state must be

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<sup>70</sup> Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, Michael Hoelzl and Graham Ward, trans., (Cambridge: Polity Press, 2008), 45.

<sup>71</sup> Foucault, *Security, Territory, Population*, 117.

<sup>72</sup> Foucault, *Birth of Biopolitics*, 76-7.

approached “sideways”<sup>73</sup> through an analysis of the governmental processes of which the state is an effect. In fact, the reason the “insubstantial and vague domain” of governmentality should be studied at all, according to Foucault, is “to tackle the problem of state and population.”<sup>74</sup> In historical terms, governmentality and the state emerge together, as “the establishment of the great territorial, administrative, and colonial states” beginning in the sixteenth century poses the problem of the art of government with a “peculiar intensity.”<sup>75</sup> The modern liberal state embodies the particular rationality of governmental reason. To take one example, “in its promotion of a certain kind of secularism,” Barry Hindess explains, early articulations of an art of government “can be seen as one of the precursors of the modern liberal state.”<sup>76</sup> Thus, though Foucault does not examine the modern liberal state as directly or as explicitly as Schmitt, it is nonetheless deeply implicated in the problem of governmentality itself.

### **‘A Huge Industrial Plant’: Modernity and the Machine**

Schmitt’s most sustained, explicit engagement with the transformations that characterize modernity comes in his meditation on Hobbes, in which he finds in the figure of the Leviathan the source of the modern movement toward rationalized, calculable administrative procedures as the sphere of politics. Foucault deals with this change in the most detail in his *Birth of Biopolitics* lectures, in which he charts the development of an art of government that takes political economy as its privileged form

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<sup>73</sup> Foucault, *Birth of Biopolitics*, 78.

<sup>74</sup> Foucault, *Security, Territory, Population*, 116.

<sup>75</sup> Foucault, “Governmentality,” 87-88.

<sup>76</sup> Barry Hindess, “Politics as Government: Michel Foucault’s Analysis of Political Reason,” *Alternatives: Global, Local, Political* 30 (2005): 393.

of knowledge. In this chapter, I will consider some similarities in Schmitt and Foucault's diagnoses of modern politics. This is not intended to be a comprehensive account of the vast political transformations that characterize modernity, but rather a brief sketch of the major aspects of these developments that both Foucault and Schmitt find to be important. An outline of the way they treat their shared object of study is useful in contextualizing the theories of sovereignty which they articulate in large part against the features of modernity that they identify in common. Emphasizing objects of study and points of concern that the two authors share reveals that while the gap between them is significant, it is not all that large. Both their approaches identify modernity with an elision of politics that happens through efforts at making government and sovereignty neutral, immanent, and administrative. Reading Schmitt and Foucault's accounts of modern political life together suggests their position as two elements of the same problem. While their approaches to the study of sovereignty and their understanding of sovereignty itself differ markedly, the effects of power that they measure are strikingly similar. Their accounts of modernity are important because they both outline the very problems upon which their accounts of sovereignty founder: the tension between effects and origins, law and power.

Schmitt and Foucault's analysis of sovereign power beyond the bounds of the state are attempts to resist the depoliticizing tendencies of modern political institutions and the rationalities that underlie them. While Schmitt traces the depoliticizing forces of the modern state system through Thomas Hobbes' theory of sovereignty, Foucault does so by tracing the advent of a governmental reason intent on the management of populations through principles of political economy. Both, however, identify Hobbes as the theorist who best represents the historical developments they attempt to navigate.

Hobbes is the source of the link between authority and law that produces modern political institutions and modern conceptions of politics. Foucault expresses this link as the establishment of a relation between the ‘art of government’ and sovereignty. The problematic of governmentality is, for Foucault, initiated by Hobbes, who “was aiming to discover...the ruling principles of an art of government.”<sup>77</sup> With the advent of governmental reason, the problem of the origin of sovereignty is replaced by “a way of...programming the specificity of government in relation to sovereignty.”<sup>78</sup> Hobbes’ account of the formation of the modern state puts to rest the question of the foundation of authority, instead allowing politics to concern itself with the relation between techniques of government and the authority of the sovereign. This is done, as Schmitt explains, through the concept of legality, which breaks the link between authority and natural or divine right and forges a new link between authority and law. As Schmitt puts it, “Hobbes conceptualized the transformation of right into a positive legal command.”<sup>79</sup>

For Schmitt, Hobbes is both the paradigmatic theorist of the modern liberal state but also a possible source for the critique of that state. As Walker explains, Hobbes’ concern is “what it means to authorize authority—to claim sovereignty over what it means to claim sovereignty.”<sup>80</sup> The problem, in Schmitt’s view, is that Hobbes’ account of the formation of the state is too effective. By telling such a convincing story about the authorization of authority it lays the groundwork for the technical-administrative proceduralism of the modern state. Though Hobbes recognizes the role of the sovereign

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<sup>77</sup> Michel Foucault, “Governmentality,” 98.

<sup>78</sup> Foucault, *Security, Territory, Population*, 246.

<sup>79</sup> Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, (USA: Greenwood Press, 1996), 67.

<sup>80</sup> R.B. J. Walker, “Hobbes, Origins, Limits,” in *International Political Theory After Hobbes*, Raia Prokhovnik and Gabriella Slomp, eds., (Palgrave-Macmillan, 2011), 18.

in determining what counts as sovereignty, the story he tells establishes a sovereignty that is already given. In Schmitt's view, this elision of the 'doubled' character of sovereignty obscures the genuinely political, the capacity of the sovereign to determine the character and sphere of the operation of sovereignty. Schmitt and Foucault thus locate Hobbes at the beginning of a process of political development determined to disregard origins in favour of the operations of the present.

Schmitt's critique of liberal democracy centres around the way that parliamentary political systems tend to ignore, mask, or gloss over the most difficult questions, problems, and decisions that are produced by their existence, problems and decisions that for Schmitt constitute the essence of the political. Parliaments forsake these constitutive difficulties in favour of the technical problems that arise during the course of the administration of government. In other words, liberal democracies abandon the political in favour of politics. The so-called politics of modern liberal democracies are in fact, for Schmitt, an antipolitics; fundamental existential questions are replaced by administrative problems that require technocratic solutions. Questions about how sovereignty works within a particular political order are asked to the exclusion of questions about the role of sovereignty in bringing that order about. Though "the differentiation between constitutive acts and constituted institutions is...generally well-known," Schmitt laments, "jurists of positive law...have been accustomed in all times to consider only the given order and the processes that obtain within it."<sup>81</sup> This is a symptom that characterizes the

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<sup>81</sup> Carl Schmitt, *The Nomos of the Earth in the Jus Publicum Europaeum*, G.L. Ulmen, trans., (New York: Telos Press, 2003), 82.

modern state, “which has no interest in the right of its own origin, but only in the law of its own functioning.”<sup>82</sup>

Foucault, too, marks the shift from political discourses concerned with questions about the relation between origins, right, and legitimacy to discourses that emphasize the efficient operation of existing governmental structures. These discourses accompany the development of an art of government organized around principles of political economy. This “is the essential issue in the establishment of the art of government: the introduction of economy into political practice.”<sup>83</sup> Like the legal positivism that is the target of Schmitt’s critique, “political economy reflects on governmental practices themselves, and it does not question them to determine whether or not they are legitimate in terms of right. It considers them in terms of their effects rather than their origins.”<sup>84</sup> Economic rationality is uniquely positioned to affect such a change because “the economic question is always to be posed *within* the field of governmental practice.”<sup>85</sup> It is a question posed in regard to “success or failure, rather than legitimacy or illegitimacy.”<sup>86</sup> The valorization by the modern state of the effective operation of the technical processes of government over all else is also noted by Schmitt: “The state machine either functions or does not function.”<sup>87</sup> Effects over origins, success over legitimacy, the law of its own functioning: Foucault and Schmitt chart a path that culminates in a political sovereignty that no longer looks to the outside or to the origin. Sovereignty’s sole concern becomes itself.

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<sup>82</sup> Ibid.

<sup>83</sup> Foucault, “Governmentality,” 92.

<sup>84</sup> Foucault, *The Birth of Biopolitics*, 15.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid., 16.

<sup>87</sup> Schmitt, *Leviathan*, 45.



The immanence of modern political sovereignty is rooted in Hobbes' reformulation of the relation between sovereignty, authority, and law. Hobbes breaks the link between authority and natural or divine right and forges a new link between authority and law. Thus, far from developing a conception of political order antithetical to liberal democratic norms because it locates ultimate authority in the person of the sovereign, Schmitt recognizes in Hobbes the beginning of the transformation of the state into a value-neutral, contentless, technical-administrative machine. Hobbes' famous dictum *auctoritas, non veritas, facit legem* is representative of this "value- and truth-neutral, positivist-technical thinking that separates the religious and metaphysical standards of truth from standards of command and function that renders them autonomous."<sup>88</sup> In other words, Hobbes oversees the change that freed law from the need for any external source of authority.

Thus, under the rubric of state-as-machine, any external source of power or authority must be rendered invisible, as it presents an element that is not reducible to the legal-administrative processes of the administration of government; it can neither be eliminated nor rendered calculable by grinding it through the technically efficient procedures of the value-neutral state apparatus. No subjective, external element can infect the sterile precision of a closed system of legality; even the slightest crack that admits an outside element undermines the calculability and neutrality on which its authority rests. The crux of Schmitt's critique of liberalism, and the significance of his theory of sovereignty lie in challenging the notion that such a 'closed' legal system is possible. In his book on *Leviathan*, he does so through a consideration of the subjective or

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<sup>88</sup> Ibid., 45.

‘personalistic’ element of politics that Hobbes cannot eliminate. This element is not only connected to the extra-legal aspect of decision that is emphasized in his later work, but is also relevant to Foucault’s analysis of a liberal politics concerned with developing an art of ‘least government.’

Schmitt identifies one of the main tensions in Hobbes’ effort to lay a new foundation for political order: between a non-transcendental authority and the technical-administrative state form. Schmitt’s critique undermines the ways that the modern liberal state attempts to navigate between a worldly state-machine of human construction and the need for neutrality that such a state engenders. When it comes to the modern state, “its material and maker, machine and engineer, are one and the same, namely, men.”<sup>89</sup> Without the assurance of right that accompanies a transcendent figure like the monarch or an external authority such as God, the injunctions of state authorities can no longer be trusted on their own terms. Now that rule is merely human, neutrality becomes the only defense for the state and its subjects against the subjective desires of those in power. This is the problem that causes legal-administrative technicalities to be confused with politics. Neutrality requires attention to the minutiae of administrative procedure, not consideration of the foundational divisions of modern political order.

This introduces what Schmitt calls a ‘closed’ legal system, one in which there is believed to be a direct correlation between law and its application and the law derives its authority from the law itself. Such a system represents a self-contained structure of legitimation, in which legal prescriptions gain validity solely by their status as law or through reference to prior law. The development of this circular form of legitimation that

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<sup>89</sup> Schmitt, *Leviathan*, 24.

sustains the modern state is also noticed by Foucault, who explains that *raison d'État* is founded on the belief that “the state is governed according to rational principles which are intrinsic to it and which cannot be derived solely from natural or divine laws.”<sup>90</sup> The guarantee of natural or divine right is replaced with the guarantee of a system of legality that claims no reference to external force or legitimation. The certainty of God and monarch is set aside in favour of the certainty of technical precision. Thus, even though claims to neutrality ignore the sovereign decision in favour of procedural calculation, Schmitt shows that the liberal democratic regimes said to act as an antidote to the sovereign as Leviathan rely precisely on this Hobbesian form of authority for their power.

Despite the denial by the technical-administrative machine that it is infused with authority, it requires the absolute authority of the Leviathan to function. There is, writes Schmitt, a “connection between the highest degree of technical neutrality and the highest authority.”<sup>91</sup> Neutrality is possible through a technical precision that can only be assured by an authority that authorizes no deviation from the norms of administrative calculability. Hobbes’ theory of sovereignty begins the transition of the state of divine or natural right into a state that functions as “a technically neutral instrument.”<sup>92</sup> It is Hobbes’ insistence on the immanence of the state form and of authority in general that produces this gradual transformation: “The decisive step occurred when the state was conceived as a product of human calculation.”<sup>93</sup> For the state to become perfectly neutral and rid itself of any subjective influence, technical efficiency is necessary. The autonomy of the state from the corruption of metaphysics and subjectivity can only be guaranteed

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<sup>90</sup> Foucault, “Governmentality,” 96.

<sup>91</sup> Schmitt, *Leviathan*, 45.

<sup>92</sup> *Ibid.*, 42.

<sup>93</sup> *Ibid.*, 37.

through “technically-represented neutrality” that can only “function” when “the laws of the state...become independent of subjective content...and [are] accorded validity only as the result of the positive determination of the state’s decision-making apparatus in the form of command norms.”<sup>94</sup>

This problem of achieving technical precision and neutrality, however, is not eliminated by the introduction of Hobbes’ sovereign because its authority is not quite absolute. In *Leviathan*, Hobbes makes a distinction between public and private reason, writing that while subjects must profess the same beliefs as the sovereign, privately they can hold their own divergent convictions. For Schmitt, this is “the seed of death that destroyed the mighty Leviathan from within,” because “at precisely the moment when the distinction between inner and outer is recognized, the superiority of the inner over the outer...is resolved.”<sup>95</sup> While an authority like Hobbes’ sovereign may have been capable of solving the crisis in authority with the decline of natural right, the introduction of a private, inner life off-limits to the sovereign provided the toe-hold necessary for the development of government that must check its authority in certain spheres, in other words, a liberal government. This acknowledgement also acted as even greater impetus for the refinement of a technically neutral state-machine. As Barry Hindess explains in his analysis of Foucault’s account of liberalism, “it is precisely because its promotion of individual autonomy is thought to foster conditions in which individuals are able to band together for their own purposes that liberalism is so fundamentally concerned to defend

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<sup>94</sup> Schmitt, *Leviathan*, 44.

<sup>95</sup> *Ibid.*, 61.

the government of the state from the impact of partisan politics.”<sup>96</sup> While Hobbes may have succeeded in detaching government from a transcendent source of right, he is unable to eliminate the element of subjectivity that escapes the authority of the law.

It is in this context that Foucault’s description of a governmental reason elaborated from principles of political economy becomes most prescient. While political economy and its focus on developing an art of ‘least government’ may appear to be the very antithesis of Hobbes’ mighty sovereign, according to Foucault’s description, the difference is not so great. “Political economy,” writes Foucault, “took up exactly the objectives of *raison d’État*...[it] lodges itself within the governmental reason of the sixteenth and seventeenth centuries”<sup>97</sup> and is thus an element in the changing relation between government and sovereignty of which Hobbes gives the paradigmatic account. It is not surprising, then, that Foucault’s examination of early European political-economic discourses reveal that “the first political economy...concluded that political power must be a power without external limitation...without any bounds other than those arising from itself” and thus “can appear to be in a direct line of descent from a *raison d’État* that gave the monarch total and absolute power.”<sup>98</sup> It is the immanence of the authority of the modern sovereign that produces the need for internal limitation, a limitation that political economy seeks in principles of ‘least government.’<sup>99</sup> Internal limitation is the exact correlative of an unlimited, self-justifying authority that pretends to neutrality.

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<sup>96</sup> Barry Hindess, “Politics as Government: Michel Foucault’s Analysis of Political Reason,” *Alternatives: Global, Local, Political* 30 (2005), 401.

<sup>97</sup> Foucault, *Birth of Biopolitics*, 14.

<sup>98</sup> *Ibid.*

<sup>99</sup> Foucault, *Birth of Biopolitics*, 7-21.

### **Modernity as Antipolitical**

According to Schmitt, all of these things—formal rule, a closed system of legality, value-neutrality—obscure the genuinely political: “Today nothing is more modern than the onslaught against the political...there must no longer be political problems, only organizational-technical and economic-sociological tasks.”<sup>100</sup> Political practice has been reduced to machine repair and those who practice politics to repairmen, tinkering with nuts and bolts as the machine itself runs amok. The consequence of this condition, in which “the modern state seems to have become what Max Weber envisioned: a huge industrial plant,”<sup>101</sup> is that “the core of the political idea, the decision, is evaded.”<sup>102</sup> Modern politics ignores the central lesson of Hobbes: “that sovereignty always requires authorization.”<sup>103</sup> It can no longer admit to its structure and is incapable of acknowledging its origins. Schmitt’s conception of the political and of sovereignty thus work to overturn the liberal emphasis on procedure, calculation, and rule by highlighting the element of decision that structures the realm of the political. The form of decision that Schmitt believes is relevant takes place beyond the law and produces the conditions under which normal politics can take place. The insistence on prioritizing a particular form of decision over another leads Schmitt to a conception of sovereignty based on the exceptional decision, one he believes is tied to the origins of political order itself.

For Foucault, the formal technical-administrative mechanisms of the modern state apparatus do not obscure an ontopolitical moment of founding like the division between

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<sup>100</sup> Schmitt, *Political Theology*, 65.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Walker, “Hobbes, Origins, Limits,” 20.

friend/enemy or the decision on the exception, but instead ignore the subtle manipulations of power beyond the scope of law and rule. The apprehension of politics requires one “to understand power by looking at its extremities, at where its exercise [becomes] less and less juridical.”<sup>104</sup> The model of the unified sovereign must be forsaken in favour of methods that “study power outside the model of Leviathan, outside the field delineated by juridical sovereignty and the institution of the state.”<sup>105</sup> In Foucault’s view, politics happens at the ‘micro’ level, law and the institutions of the state are produced and upheld by the normalizing force of a power that works within their interstices.

While Schmitt and Foucault thus share the view that the conception of politics advanced by modern political sovereignty is restrictive and deceptive, the alternatives they present in terms of where politics and sovereignty can actually be found appear quite different. This is what leads Ojakangas to recognize the similarity in the two thinkers’ diagnoses of modernity, but position their accounts of the operation of sovereignty as opposites. While both recognize the distinction between law and power, effects and origins, their conception of modern politics seem to fall to one side or the other of this divide. Nevertheless, in what follows, I aim to show that these accounts are opposite sides of the same coin—the two poles of the problem of sovereignty. By demonstrating how their attempts to locate sovereignty can be dismantled with their own words, I argue that exception and governmentality, despite their appearance as opposites, are impossible to distinguish from one another.

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<sup>104</sup> Foucault, *Society Must Be Defended*, 28.

<sup>105</sup> *Ibid.*, 34.

For all the ways that they represent the opposing elements of the problem of founding, Schmitt and Foucault, respectively, locate exception and governmentality within and beyond political order. This is something frequently forgotten by their interpreters, just as it seems to be forgotten at times by Schmitt and Foucault themselves. Insofar as neither of these concepts is limited to one side of the line that divides political order from its outside, they express one of the central tensions of the problem of founding. This tension can be found in the oscillation that occurs in the texts in which exception and governmentality are most thoroughly elaborated, an oscillation between the necessity of extra-legal power and of the norm that such power guarantees. Foucault and Schmitt at times try to eliminate this tension by drawing sharp distinctions—Foucault between sovereignty and governmentality and Schmitt between the exceptional and the normal decision. Neither distinction can be sustained.



## Chapter II: Foucault, Governmentality, Sovereignty

Governmentality, like exception, expresses the spatial dimensions of the problem of sovereignty—the inside and outside of political order—as well as its temporal dimensions—the routine and the exceptional. Foucault attempts to limit the conditions of possibility for governmentality to the inside of political order—law and norm—and to the routine—calculable practices of population management. This delimitation occurs through one of the central conceptual distinctions of Foucault’s *oeuvre*, between a unified juridical sovereign and dispersed practices of governmentality. An interrogation of the lectures in which this distinction is elaborated in the most detail, *Security, Territory, Population*, reveals a distinct uncertainty as to the spatiotemporal conditions of governmentality in its relation to sovereignty and political order. Not only does governmentality prove to escape the bounds of political order in a manner that could be described as exceptional, Foucault’s articulation of governmentality makes impossible any clear distinction between the spatiotemporal dimensions of the problem of sovereignty. The temporal dimensions of governmentality prove as indistinguishable from one another as their spatial articulation across the boundaries of political order.

### **Sovereignty and Governmentality**

Though Foucault’s first set of lectures at the Collège de France, ‘*Society Must Be Defended*,’ deals explicitly with the question of sovereignty, the following set, *Security, Territory, Population*, is concerned with elaborating the difference between two forms of power, one which is called sovereign, and the other governmental. This is not a function

of an abandonment of the problem of sovereignty on the part of Foucault, but rather a desire to understand what he believes is a changing relation between sovereign authority and the operation of government. Foucault wants to move away from a model of sovereign power that imagines a unified sovereign that operates through prohibition in direct relation to its subjects, in favour of a sovereignty imagined as a diffuse agglomeration of social and political effects produced through regularized procedures of government. He oscillates between an acknowledgement of the continued relevance of a sovereign authority to contemporary politics and an apparent desire to banish that form of sovereignty from the vocabulary of political theory in favour of governmentality. Nevertheless, his effort to differentiate between sovereign and governmental power fails even before the lectures come to an end. This failure is evidence of the difficulty of differentiating between a sovereign power that works juridically and one that operates beyond the confines of the law. Foucault's juridical sovereign can no more be relegated to law than can his governmentality be kept outside of it.

Particularly in the first half of the lectures, Foucault repeatedly insists on the need to distinguish between sovereign power and governmentality. He notes that "the more I have spoken about population, the more I have stopped saying 'sovereign.'"<sup>106</sup> Further on, he explains that "government is basically much more than sovereignty, much more than reigning or ruling"<sup>107</sup> and that "government is very clearly distinguished from sovereignty."<sup>108</sup> Governmentality constitutes a completely unique, completely distinct

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<sup>106</sup> Foucault, *Security, Territory, Population*, 76.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid., 98.

form of power that has become dominant to such an extent that it seems as though sovereignty is no longer a relevant or useful concept.

Just as quickly as sovereignty disappears, however, it reappears. Far from being eliminated, Foucault writes, the question of the legitimacy of the sovereign “is made more acute than ever”<sup>109</sup> with the advent of governmentality. Rather than deciding how to govern based on theories of sovereignty which justify and legitimate the sovereign, as governmentality develops the question becomes what form sovereignty should take, given governmental reason. Thus, Foucault claims that he is “not saying that sovereignty ceased to play a role when the art of government became a political science. Rather...the problem of sovereignty was never more acutely posed than at this moment.”<sup>110</sup> For Foucault, Rousseau exemplifies this reversal of the traditional problem of sovereignty in his attempt to identify a foundation for a legitimate sovereign that allows for and follows from procedures of governmentality through the theories of the social contract and general will.<sup>111</sup>

Despite the rigorous distinction Foucault is so invested in maintaining between them, he admits that the gradual transformation of sovereign power into governmental power does not take place in a strict temporal succession in which one form of power abruptly ends and the next begins. He advises that “we should not see things as the replacement of a society of sovereignty by a society of discipline, and then of a society of disciplines by a society, say, of government.”<sup>112</sup> Previous forms of power are not

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<sup>109</sup> Foucault, *Security, Territory, Population*, 107.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

eliminated with the emergence of governmental reason. Sovereignty remains even as governmentality extends its reach. Yet to the extent it remains, it remains distinct.

The details of this distinction are laid out quite clearly. Sovereignty and governmentality differ in terms of their style of governance, the objects upon which they exercise power, and the type of subjects that power produces. Whereas sovereign power exercises itself through a command-obedience relationship that entails proscription and the blocking of desire through juridical mechanisms, the style of government is management, which involves calculated interventions designed to manipulate the free flow of desire in order to produce an ideal distribution of effects. “‘Governing,’” says Foucault, “is different from ‘reigning or ruling,’ and not the same as ‘commanding’ or ‘laying down the law,’ or being a sovereign.”<sup>113</sup> While sovereignty attempts to eradicate undesirable phenomena through the law, “security... ‘lets things happen.’”<sup>114</sup> It regulates forces, objects, and events by intervening in ways that produce the “progressive self-cancellation of phenomena by the phenomena themselves” and thus “involves the delimitation of phenomena within acceptable limits, rather than the imposition of a law that says no to them.”<sup>115</sup> While sovereignty desires elimination by proscription, governmentality aims to cultivate the optimum equilibrium among a multiplicity of forces.

Just as the style of governance changes as governmentality emerges, so too does the object that this governance is exercised upon. In the case of sovereignty, power is exercised over territory and is deployed to maintain the integrity of state borders, while in

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<sup>113</sup> Foucault, *Security, Territory, Population*, 116.

<sup>114</sup> *Ibid.*, 45.

<sup>115</sup> *Ibid.*, 66.

the case of governmentality, the object of power is population. The concern of the sovereign for “the safety (*sureté*) of the Prince and his territory” becomes a concern for “the security (*sécurité*) of the population.”<sup>116</sup> Command over territory and management of populations produce different types of subject. The former produces the subject of right, the individual in possession of certain natural rights that must be recognized and protected by the sovereign, while the latter produces individuals as biological beings. As Foucault puts it, “man is to population what the subject of right was to the sovereign,”<sup>117</sup> while under governmentality, “the basic biological features of the human species become an object of political strategy.”<sup>118</sup> So on the one hand there is a sovereignty that operates by command to secure a territory and in doing so produces a subject of right; and on the other there is a governmentality that operates through calculated intervention to manage populations and in doing so produces a biological subject.

Beyond these differences, however, Foucault articulates two further distinctions that go to the essence of what sovereignty and governmentality are, in his view, and how they differ. The first of these has to do with the relation to law<sup>119</sup> that each form of power maintains and the second has to do with the mode of legitimation that each employs. Sovereignty, Foucault explains, is a form of power that is juridical in nature; it operates through legal institutions and apparatuses, its tools are laws. “To achieve its aim of obedience to the laws,” sovereignty has only one set of instruments at its disposal: “law

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<sup>116</sup> Foucault, *Security, Territory, Population*, 11.

<sup>117</sup> *Ibid.*, 79.

<sup>118</sup> *Ibid.*, 1.

<sup>119</sup> For an interesting account of how law figures in Foucault’s account of modernity, which won’t be taken up here, see Ben Golder and Peter Fitzpatrick, *Foucault’s Law*, (United Kingdom: Routledge, 2009).

itself; law and sovereignty [are] absolutely united.”<sup>120</sup> Governmentality, on the other hand, is not reducible to law, legality, the legal system, or any sort of juridical institution. Governmentality exceeds the law; it uses extra-legal instruments to achieve its ends. While it does not forsake law altogether, laws are just one set of tactics among many. When it comes to governmentality, “law recedes...or rather law is certainly not the major instrument in the perspective of what government should be.”<sup>121</sup> Governmentality extends beyond the reach of law and makes use of “diverse tactics” to achieve its ends.<sup>122</sup>

The second central difference between the two forms of power has to do with the way each produces its legitimacy. Foucault explores this difference by looking at the ends that each form of power pursues. The end of sovereignty, according to Foucault, is itself. The form of legitimation of sovereign power is circular and self-justifying; it continually reproduces its own power and legitimacy. This means that “the end of sovereignty is internal to itself and gets its instruments from itself in the form of law.”<sup>123</sup> Rather than referring to some external source of authority for its legitimacy, “the end of sovereignty is circular; it refers back to the exercise of sovereignty.”<sup>124</sup> As Foucault explains, in the era of sovereign power, sovereignty is required to achieve the common good, and the common good is defined as “obedience to the law, so that the good proposed by sovereignty is that people obey it.”<sup>125</sup> Despite having an end that is not self-identical, the end of sovereignty ultimately remains internal to itself; its sole aim is self-perpetuation.

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<sup>120</sup> Foucault, *Security, Territory, Population*, 99.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid., 98.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

Governmentality, meanwhile, aims to achieve an external end, and thus does not share sovereign power's circular form of legitimation. According to Foucault, "population will appear above all as the final end of government. What can the end of government be? Certainly not just to govern, but to improve the condition of the population, to increase its wealth, its longevity, and its health...population...appears as the end and instrument of government."<sup>126</sup> Unlike sovereignty, governmentality does not aim at self-reproduction or self-justification, but the welfare of the population, particularly at the level of biological health. Thus, while the sovereign form of power is not necessarily eliminated with the advent of governmentality, Foucault insists on a distinction between the unilateral exercise of authority that characterizes sovereign power and the subtle management of effects that governmentality employs. In short, Foucault describes two forms of power, each with a unique mode of legitimation and a unique relation to law. Sovereign power is circular and self-justifying—its object is itself—and at the same time is co-extensive with the law. Governmentality goes beyond the law and has an external object—the well-being of the population.

### **Governmentality and *Raison d'État***

Almost as soon as it is made, the distinction between a juridical, self-justifying sovereignty and an extra-legal governmentality with an external end is undone by *raison d'État* and *coup d'État*. These concepts—which Foucault describes as essential to governmentality—trouble the clearly delineated borders that distinguish sovereignty from governmentality. *Raison d'État* undermines Foucault's description of governmentality

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<sup>126</sup> Foucault, *Security, Territory, Population*, 105.

while *coup d'État* undermines his definition of sovereign power. When the changes that these two concepts bring to understandings of sovereignty and governmentality are acknowledged, the line separating one from the other is no longer discernible.

Governmentality and *raison d'État* are intimately associated with one another. According to Foucault, “the art of government finds its first form of crystallization, organized round the theme of reason of state [*raison d'État*].”<sup>127</sup> The development of governmentality marks a new concern with the government of the state as a whole, “what we would now call the political form of government,”<sup>128</sup> rather than with the person of the sovereign. It is a mode of reasoning that sets out the aims, ends, and principles of operation of the art of government; it is the animating logic of governmentality.

Foucault notes several important characteristics of this *raison d'État* that develops in the West in the 17<sup>th</sup> century. These characteristics indicate that, far from locating its object outside itself, *raison d'État* produces itself for itself; its legitimation is circular. First, *raison d'État* does not “[refer] to anything other than the state itself. There is no reference to a natural order...or even a divine order.”<sup>129</sup> *Raison d'État* trains its gaze inward. Second, Foucault describes it as “the very essence of the state” and the knowledge necessary to comply with this essence.<sup>130</sup> To perform its function as a form of reason that will allow the state to sustain itself and preserve its existence and its integrity, *raison d'État* replaces the question of the origin of sovereignty with the question of the self-justification of government. It is, as Foucault puts it, an attempt “to think the form of

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<sup>127</sup> Foucault, “Governmentality,” 96.

<sup>128</sup> *Ibid.*, 88.

<sup>129</sup> Foucault, *Security, Territory, Population*, 257.

<sup>130</sup> *Ibid.*



government rationality for itself.”<sup>131</sup> No longer content to focus on the sovereign himself as a political guide, *raison d'État* looks to the state for its own principles of operation.

This conclusion is not surprising given the ways in which Foucault's description of modern sovereignty echoes Schmitt's, yet it casts significant doubt on Foucault's description of a governmentality that looks outside itself for its end. The factor that emerges in the late 16<sup>th</sup> century that results in the development of *raison d'État* is the move away from a transcendent source of legitimation. As described in the previous chapter, sovereignty becomes detached from divinity and from nature and the sovereign is given a new function: “his task is absolutely specific: it consists in governing, and its model is found neither in God nor in nature.”<sup>132</sup> In the absence of a transcendent model, sovereign authority begins to require its own source of justification and a means of identifying the principles by which it will operate: this is *raison d'État*. In Foucault's words, *raison d'État* is “a type of rationality that will allow the maintenance and preservation of the state once it has been founded, in its daily functioning, in its everyday management.”<sup>133</sup> Thus, to the extent that *raison d'État* is an essential animating feature of the ‘art of government’ whose development Foucault traces, the concept poses a significant challenge to Foucault's earlier claim that governmentality has an external object. The way he describes it, *raison d'État* continually refers back to itself; it is the essence of the state and aims at nothing but its perpetuation. In other words, on the model of *raison d'État*, the end of the art of government is government.

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<sup>131</sup> Foucault, *Security, Territory, Population*, 246.

<sup>132</sup> *Ibid.*, 237.

<sup>133</sup> *Ibid.*, 238.

Foucault overlooks the tautological legitimation of *raison d'État* because he fails to consider the problem of authority. As Schmitt's reading of Hobbes indicates, it is precisely at the moment when an 'art of government' detaches itself from a natural or divine order that it is required to produce its own legitimation. Foucault claims that it is at the moment when government ceases to refer to an external source for its legitimation that its ends become external to itself. However, given *raison d'État*, the mode of legitimation of governmentality, while employing different logic and terms of reference, remains circular and self-justifying. The immanent, self-justificatory character of governmentality means that it cannot be limited to within an already-constituted political order—governmentality must also found. Like sovereignty, it must produce its own conditions of possibility and thus does not come into being 'once the state has been founded,' but works beyond the realm of constituted political order. The way it exceeds this realm is shown in Foucault's description of the *coup d'État*.

### **Sovereignty and the *Coup d'État***

Foucault's description of the *coup d'État* has a similarly destabilizing effect on his conception of sovereign power as his account of *raison d'État* does on governmentality. The discourses that he examines contain a particular definition of the concept that differs from its contemporary usage. Rather than the seizure of the state from one group of people by another, the *coup d'État* is an act carried out by the state that consists of "a suspension of, a temporary departure from, law and legality. The *coup d'État* goes beyond ordinary law...[it is] an action retaining no order or form of

justice.”<sup>134</sup> Such acts are undertaken by the sovereign in emergency situations when the very existence of the state is at stake. In Foucault’s words, “the *coup d’État* is the state acting of itself on itself, swiftly, immediately, without rule, with urgency and necessity, and dramatically...it is the self-manifestation of the state itself.”<sup>135</sup> Contrary to Foucault’s earlier claim, here is a sovereignty that does indeed go beyond the law. While this is in line with his description of a sovereign power whose legitimation is circular, this circularity requires a going beyond the law, and introduces a phenomenon not unlike exception.

It could still be reasonably claimed that while *raison d’État* and *coup d’État* undermine Foucault’s initial definitions of sovereignty and governmentality, they do nothing to show their aporetic relation, as *raison d’État* remains proper to governmentality, while *coup d’État* takes place under the rubric of sovereignty. Yet Foucault insists that the act of *coup d’État* is essential to the *raison d’État* that animates governmentality:

The *coup d’État* does not break with *raison d’État*. It is an element, an event, a way of doing things that, as something that breaches the laws, or at any rate does not submit to the laws, falls entirely within the general horizon, the general form of *raison d’État*.<sup>136</sup>

This is because governmentality, while employing laws as a set of tactics, does not limit itself to them. As Foucault puts it, *raison d’État* “yields to [laws] and respects them insofar as...it posits them as an element in its own game...however, there will be times when *raison d’État* can no longer make use of these laws and...must of necessity free

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<sup>134</sup> Foucault, *Security, Territory, Population*, 261.

<sup>135</sup> *Ibid.*, 262.

<sup>136</sup> *Ibid.*

itself from them.”<sup>137</sup> In short, “*raison d’État* is always *exceptional* in relation to public, particular, and fundamental laws.”<sup>138</sup> So at the heart of *raison d’État* lies a self-referential sovereign that acts beyond the law. Governmentality and sovereignty, then, as Foucault describes them, have an analogous relation to legal order. Both forms of power make use of the law, but also work outside it and can free themselves of its constraints when necessary. Not only that, the dramatic, extra-legal act of the sovereign state, the *coup d’État*, is not an expression of the sovereign form of power, but rather of the *raison d’État* that is the organizing logic of governmentality.

Given this reading of Foucault’s articulation of sovereignty and governmentality, the distinction between the two forms of power is difficult to sustain. While originally it appeared that on the one hand there was a self-justifying sovereignty coextensive with the law and on the other an extra-legal governmentality with an external source of legitimation, it now seems possible to uncover in Foucault’s lectures a self-justifying sovereignty that exists beyond (and within) the law and a self-justifying governmentality that exists beyond (and within) the law. Circular legitimation and extra-legality are no longer proper to one or the other, but belong to both. What a close reading of *Security, Territory, Population* reveals is the profound ambiguity that exists in the distinction between a governmental practice that exists beyond juridical sovereignty and a still-present sovereign capable of existing beyond the law.

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<sup>137</sup> Foucault, *Security, Territory, Population*, 262.

<sup>138</sup> *Ibid.* Emphasis mine.

### **The Temporality of Governmentality**

Foucault's lectures also engage with the temporal conditions of the operation of governmental power which, like its spatial conditions, are expressed through the concepts of *raison d'État* and *coup d'État*. These temporal conditions reveal the 'founding' function of governmentality, its capacity to produce the political conditions within which it operates. These temporal conditions express the aporia of the problem of founding, an aporia that is explored by Walter Benjamin and Jacques Derrida. I would like to begin with a brief explication of Benjamin's "Critique of Violence" and Derrida's "Force of Law" which demonstrate the aporia I aim to uncover in Foucault's text. The attempt by Benjamin to distinguish between an exceptional moment of founding and repeated acts of the preservation of what is founded and the failure of such a distinction is mirrored in the work of Foucault.

Walter Benjamin's examination of the productive character of political violence in "Critique of Violence" sets out to distinguish between the two elements of the problem of sovereignty in a way that prefigures the interventions by Schmitt and Foucault. Benjamin posits the type of event represented by exception and the *coup d'État* as an event of founding, by which a particular sovereign political order is produced and delimited. In this sense, exception can be understood as a beginning, an origin, or a source of the sovereign power which operates within an already-existing sovereign state. Yet, as Derrida demonstrates in his reading of Benjamin, the temporal distinction between an act of origin or of founding and an act of maintenance or preservation falls apart over the course of Benjamin's text. Insofar as exception and governmentality represent the temporal elements of the problem of sovereignty, Derrida's reading of "Critique of Violence" shows the impossibility of differentiating one from the other, an

impossibility that emerges from a close reading of Foucault's description of the temporality of governmentality.

Benjamin interrogates the distinction between legitimate and illegitimate violence; between legally sanctioned violence and violence condemned by law. As Derrida remarks, this distinction centres around the problem of sovereignty, of the legitimation of sovereign authority. He notes that in the original German, the title of Benjamin's text is "Zur Kritik der Gewalt" and that the word *gewalt* encompasses not just violence but "the dominance or the sovereignty of legal power, the authorizing or authorized authority: the force of law."<sup>139</sup> Benjamin's essay thus addresses the same problem as Schmitt's *Political Theology*: what grounds sovereign authority? The answer, for Benjamin, is a founding act of violence. Founding violence—the moment of exception—is the act that, according to Benjamin, produces the "mythical"<sup>140</sup> authority that serves as the legitimation for positive laws. "Positive law," writes Benjamin, "demands of all violence proof of its historical origin, which under certain conditions is considered legal, sanctioned."<sup>141</sup> The legitimacy of sovereign authority is thus determined by the historical conditions of its founding. The laws that are grounded by this authority represent what Benjamin calls instances of "law-preserving violence."<sup>142</sup> Their enforcement does not found a new political order but works within an existing one. This distinction between the two functions of sovereign authority—founding and preservation—does not survive the length of his essay.

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<sup>139</sup> Derrida, "Force of Law," 264-265.

<sup>140</sup> Benjamin, "Critique of Violence," 295.

<sup>141</sup> *Ibid.*, 280.

<sup>142</sup> *Ibid.*, 284.

In the institution of the police, writes Benjamin, founding and preservation become mixed: “in this authority the separation of law-making and law-preserving violence is suspended.”<sup>143</sup> This is because the police are never able to simply apply the generality of the law to the specificity of a particular case. In deciding on situations that do not fall completely under the legal code, the police participate not only in preservation, but also in founding. Police violence “is lawmaking, for its characteristic function is not the promulgation of laws but the assertion of legal claims for any decree, and law preserving, because it is at the disposal of these ends.”<sup>144</sup> In this sense, the lawmaking function of the police is exceptional, as it occurs in a situation where no direct application of the law is possible. It is this ability to decide in the face of the impossibility of the exact application of the law that constitutes sovereignty. The police, for example, “intervene ‘for security reasons’ in countless situations in which no clear legal situation exists.”<sup>145</sup> As Derrida describes it, the police “arrogate the law each time the law is indeterminate enough to open a possibility for them.”<sup>146</sup> The police thus contain, for Benjamin, the exceptional violence of foundation as well as the preserving violence of law-enforcement.

This mixing of founding and conservation that Benjamin identifies in the police is for Derrida a sign that Benjamin’s original distinction between the two is a false one. In this sense, Benjamin’s essay performs its own self-deconstruction: “‘Zur Kritik der Gewalt’ consists of this strange *ex-position*: before your eyes a demonstration ruins the

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<sup>143</sup> Benjamin, “Critique of Violence,” 286.

<sup>144</sup> Ibid., 286-287.

<sup>145</sup> Ibid., 287.

<sup>146</sup> Derrida, “Force of Law,” 277.

distinctions it proposes. It exhibits and archives the very movement of its implosion.”<sup>147</sup>

In other words, while Benjamin attempts to keep founding and preservation strictly separate, his example of their merging in the institution of the police indicates that such a division is impossible. Derrida explains:

there is no more pure foundation or pure position of law, and so a pure founding violence, than there is a purely preserving violence. Positing is already iterability, a call for self-preserving repetition. Preservation in its turn refounds, so that it can preserve what it claims to found. Thus there can be no rigorous opposition between positing and preserving, only what I will call (and Benjamin does not name it) a *differential contamination* between the two, with all the paradoxes that this may lead to.<sup>148</sup>

In Derrida’s view, Benjamin’s inability to keep independent the two functions of sovereignty is evidence of the aporia that exists between founding and preservation, exception and routine. The violent, exceptional moment that founds a political order cannot in the last analysis be distinguished from the enactment of sovereignty within that order.

### **Temporality and the *Coup d’État***

I would like to return to the concept of *coup d’État* to demonstrate how the problem of founding described above appears in Foucault’s lectures. The concept is particularly helpful in gaining critical purchase on the temporal dimensions of the problem of sovereignty because it encompasses its duality: both its extra-legal capacity to found, and its normalizing capacity to preserve. As Bartelson explains, “what makes the concept of Coup d’État intriguing yet so difficult to disentangle is the fact that the logic of its usage forces us to reconsider a more general problem in political philosophy, one

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<sup>147</sup> Derrida, “Force of Law,” 272.

<sup>148</sup> Ibid.



that concerns the regular and the exceptional in political theory and practice.”<sup>149</sup> In short, the act of *coup d’État* encompasses the relation between a moment of founding that occurs beyond the law and an act of preservation that occurs within it. An analysis of the temporality of the *coup d’État* reveals that this relation, like the one in Benjamin’s text, is aporetic.

Foucault’s description of *coup d’État* is analogous to Schmitt’s description of the exceptional decision. Exception and *coup d’État* share identical characteristics: they are carried out by the sovereign out of necessity, they involve a going-beyond the law, and they are instances in which the state acts upon itself. Just as the *coup d’État* is enacted out of “necessity, urgency, the need to save the state itself,”<sup>150</sup> the exception, Schmitt writes, is “characterized as a case of extreme peril, a danger to the existence of the state.”<sup>151</sup> Just as the *coup d’État* consists of a ‘suspension’ of the law, “what characterizes the exception is principally unlimited authority, which means the suspension of the entire existing order.”<sup>152</sup> And just as the *coup d’État* represents the state “acting of itself on itself”—that is, producing its own conditions of possibility—so the exception “appears in its abstract form when a situation in which legal prescriptions can be valid must first be brought about.”<sup>153</sup> The exception sets the bounds of the political order in which sovereignty can be enacted. In Bartelson’s terms,

a coup is a way to conquer the locus of sovereignty or to extend its scope with reference to exceptional circumstances...a coup constitutes an empirical instance

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<sup>149</sup> Bartelson, “Making Exceptions,” 323.

<sup>150</sup> Ibid.

<sup>151</sup> Schmitt, *Political Theology*, 6.

<sup>152</sup> Ibid., 12.

<sup>153</sup> Ibid., 13.

of the decisionist definition of sovereignty that equates it with the power to decide when an exception is beforehand and thus with an authority to suspend the law.<sup>154</sup>

The *coup d'État*, as Foucault describes it, is therefore a manifestation of sovereignty constituted by the ability to decide on the exception.

Exception and *coup d'État* are not unlike Benjamin's law-making violence. Like them, it is a source of self-justifying authority, represents a break with previous law, and institutes a new political order. Violence, writes Benjamin, "has a law-making character" and is thus able to "found and modify legal conditions."<sup>155</sup> Derrida considers this founding moment, the revolutionary instant in which an old legal order has been broken with and a new one yet to be instituted. In his view, because "the foundation of all states occurs in a situation that we can call...revolutionary," in the sense that it breaks with a previous legal order, "the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves."<sup>156</sup> In this way, Benjamin's conception of founding mirrors Schmitt's sovereign decision which "emanates from nothingness,"<sup>157</sup> as well as the self-justifying, extra-legal *coup d'État*. Furthermore, Derrida explains that it is this moment which "is, in law, what suspends law. It interrupts the established law to found another. This founding or revolutionary moment of law is, in law, an instance of nonlaw."<sup>158</sup> Like Schmitt's sovereign who, "although he stands outside the normally valid legal system...nevertheless belongs to it,"<sup>159</sup> the founding moment consists of a suspension of law by a force which is both within and beyond the

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<sup>154</sup> Bartelson, "Making Exceptions," 326.

<sup>155</sup> Walter Benjamin, "Critique of Violence," 283.

<sup>156</sup> Derrida, "Force of Law," 272.

<sup>157</sup> Schmitt, *Political Theology*, 32.

<sup>158</sup> Derrida, "Force of Law," 269.

<sup>159</sup> Schmitt, *Political Theology*, 7.

limits of the law. Like the exception, lawmaking violence sets the bounds of the political order in which it will act from outside that order. The *coup d'État* shares a final characteristic with Benjamin's lawmaking violence: "the nature of the *coup d'État* is to be violent."<sup>160</sup>

Derrida recognizes these affinities between founding and exception. He calls the moment of founding an "ungraspable revolutionary moment...[an] *exceptional decision* which belongs to no historical, temporal continuum."<sup>161</sup> And, lest his readers fail to make the connection between Schmitt's exception and Benjamin's law-making violence, Derrida notes in the prolegomenon to "Force of Law" that "Carl Schmitt, whom Benjamin admired and with whom he maintained a correspondence, congratulated him for ['Critique of Violence']."<sup>162</sup> Like Foucault after him, Benjamin distinguishes this sovereign act of founding from a different form of the exercise of sovereign power. And as in the case of Foucault, the division between them is far from clear.

Thus, squarely in the midst of Foucault's most detailed elaboration of governmentality appears a phenomenon identical to that of exception. Moreover, this phenomenon is not discontinuous with governmentality, but is, according to Foucault, integral to its operation. Like exception and governmentality themselves, the *coup d'État* maintains an ambiguous relationship to political order and acts both as the source and product of sovereign power. "The practice of *Coup d'État*," writes Bartelson, "is the technique of *making* exceptions from old rules and creating new rules out of these

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<sup>160</sup> Foucault, *Security, Territory, Population*, 263.

<sup>161</sup> Derrida, "Force of Law," 274. Italics mine.

<sup>162</sup> *Ibid.*, 259.

exceptions.”<sup>163</sup> *Coup d’État* is exceptional because it breaks with legal order, but maintains a link with that order because it is carried out by an already-constituted sovereignty. If the distinction between exception and governmentality depends on keeping them on either side of the borderline between political order and its outside, then a clear distinction between them cannot be made. Governmentality, Foucault writes, is ‘exceptional’ in relation to law, and exception never achieves total autonomy from the law it suspends.

**‘The Continuous Act of the Creation of the Republic’: Temporality and *Raison d’État***

The concept of *raison d’État* serves to further problematize the founding and preservation of political order by introducing the question of the temporal conditions by which governmentality operates. Foucault identifies a form of temporality specific to governmentality that mirrors Walter Benjamin’s analysis of the foundation and preservation of political order. In other words, Foucault’s description of the temporality of governmentality expresses the aporia that arises between founding and preservation. The oscillation in Foucault’s text between a temporality of preservation, of routine and repetition and a temporality of founding, of creation and production exemplifies this tension.

Governmentality introduces a new form of temporality into the realm of politics. According to Foucault, *raison d’État* has a particular temporal orientation; it is “conservative” or “protective”: “what is involved is essentially identifying what is

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<sup>163</sup> Bartelson, “Making Exceptions,” 323.

necessary and sufficient for the state to exist and maintain itself.”<sup>164</sup> *Raison d’État* is therefore an agent of preservation; it conserves the political order which has already been founded. Yet, as Foucault tells it, this governmentality grounded on *raison d’État* is not only conservative. In fact, *raison d’État* reflects “an indefinite temporality, the temporality of a government that is both never-ending and conservative.”<sup>165</sup> As such, it posits no specific point of origin and no specific *telos*. Rather, it consists of “the continuous act of the creation of the republic.”<sup>166</sup> The preservation carried out by *raison d’État*, in this sense, is done through continual refounding, the regular re-creation of its conditions of possibility.

This temporality, which preserves by founding and founds by preserving, is at once a temporality of both founding and preservation and neither founding nor preservation. In this sense, it aligns with the descriptions of the temporality of modern political sovereignty that Foucault describes elsewhere in his work. As modern political sovereignty was consolidated in the nineteenth century, a new temporal orientation emerged, one that centred around the present. There is, Foucault writes, an “inversion of the value of the present in historical and political discourse,” which means that “the fundamental moment is no longer the origin...it is, on the contrary, the present.”<sup>167</sup> This seems to suggest the type of temporality associated by Foucault with *raison d’État*, a temporality whose valorization of the present cannot distinguish an initial historical moment of founding from a later moment of preservation. A temporality of the present

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<sup>164</sup> Foucault, *Security, Territory, Population*, 258.

<sup>165</sup> *Ibid.*, 259.

<sup>166</sup> *Ibid.*

<sup>167</sup> Foucault, ‘*Society Must be Defended*’, 227.

expresses the indistinction between founding and preservation in the temporality of governmentality; a non-teleological, never-ending, continuous (re)production of itself.

The way in which the *coup d'État* and *raison d'État* express the temporal dimensions of the problem of sovereignty—and the impossibility of differentiating between those dimensions—reveals the impossibility of distinguishing governmentality from sovereignty, whether juridical or exceptional. In Foucault's lectures, like in Benjamin's text, the impossibility of these distinctions present themselves in the institution of the police. Police, writes Foucault, "is the direct governmentality of the sovereign qua sovereign. Or again, let's say that the police is the permanent *coup d'État*."<sup>168</sup> Here, exception no longer takes place in a singular moment. The dual temporality of *raison d'État*, its simultaneous task of preservation and re-creation demonstrate the impossibility of any precise distinction between exception and governmentality in the work of Foucault. The exceptional moment of founding, *coup d'État*, cannot be thought outside the governmental rationality of preservation that animates *raison d'État* as surely as that rationality cannot function without the exception. The temporal conditions that accompany exception and governmentality thus prove as indistinguishable from one another as the forms of power themselves.

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<sup>168</sup> Foucault, *Security, Territory, Population*, 339.

### Chapter III: Schmitt and the Decision

In *Political Theology*, Carl Schmitt argues that the source of sovereignty is the exceptional decision. While the text aims to give a definitive account of the location of modern political sovereignty in space and time, it is plagued by the same uncertainty and instability as Foucault's account of governmentality. Schmitt's conception of sovereignty represents the opposite element of the problem of sovereignty as governmentality—not politics as it occurs in the everyday, but the act upon which such activity is predicated. Schmitt's interest in determining the limits of the domain of the political implicates him in the problem of sovereignty. As Prozorov explains, "a theory of exception finds its locus as a discourse on the dynamics of oscillation between...the constituted order of governmentality and the constitutive sovereign decision that escapes it."<sup>169</sup> Schmitt, however, is unsuccessful in reducing the exceptional decision to solely a principle of constitution and confining sovereignty to a particular spatiotemporal realm.

The spatiotemporal configuration of exception is expressed—and undone—by two distinctions. Spatially, the distinction between the exceptional decision, which takes place outside the bounds of political order, and the juridical decision, which takes place within them. Temporally, the distinction between the element of novelty that inheres in decision and the calculable program to which decision must adhere. Not only is Schmitt unable to confine sovereignty to one side of either of these distinctions, the concept of exceptional decision demonstrates that the line that divides them cannot be located with

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<sup>169</sup> Prozorov, "A General Theory of the Exception." 83.

any certainty. Given this failure, the exceptional decision, as it is articulated by Schmitt, becomes indiscernible from governmental practices of population management.

### **Sovereignty at the Edge: the Exceptional Decision**

Like *Security, Territory, Population*, Schmitt's short tract on sovereignty, *Political Theology*, is the site of significant oscillation and ambiguity. This oscillation occurs between the first chapter, which proposes a strict division between the exceptional and the normal decision, and the second chapter, which renders such a distinction untenable through an analysis of juridical decision and the application of the law. Schmitt insists on locating sovereignty as a power that works outside the law through its suspension—and then almost immediately demonstrates the impossibility of an exceptional decision that is wholly extra-legal. He insists on locating sovereignty as a power that works in the anomalous moment—and then almost immediately demonstrates the impossibility of conceiving of a decision, even the most banal, that is not in some sense exceptional. *Political Theology* ultimately demonstrates the same ambiguity as the lectures that Foucault delivered at the Collège de France from 1977-78: the ambiguity that arises in attempts to distinguish between exception and governmentality.

In the chapter titled "Definition of Sovereignty," Schmitt claims that sovereignty is constituted by the exceptional decision. He begins with a one-phrase definition: "Sovereign is he who decides on the exception."<sup>170</sup> In this first chapter, Schmitt not only outlines his conception of what sovereignty is, but works to locate it at a particular place in space and time. The space: the borderline or edge of political order; the time: the

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<sup>170</sup> Schmitt, *Political Theology*, 5.



singular moment, the exceptional event. Sovereign power has the capacity to decide on which occasions it is necessary to suspend the rule of law, a necessity that is produced by an existential threat to the state: “the state suspends law in the exception on the basis of its right of self-preservation.”<sup>171</sup> The declaration of exception breaks with the norms that maintain political order and thus determines the limits of that order. In Schmitt’s words, “for a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists.”<sup>172</sup> The sovereign thus works at the boundary of political order, capable of determining those bounds from outside them. Exception exists as an anomalous temporal moment because at the instant of decision a rupture with the normal situation is declared and “the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”<sup>173</sup> This means that exception opposes itself to the normal operation of politics and law and “frees itself from all normative ties.”<sup>174</sup> The regularized mechanisms of law and state administration that sustain political order are halted and repetition is declared inadequate for the situation at hand.

For Schmitt, the sovereign has the capacity to determine the existence and extent of the boundaries of political order. In other words, through the exceptional decision the sovereign produces its own conditions of possibility, it produces the legal and political conditions in which it can operate. “The exception appears in its absolute form,” Schmitt explains, “when a situation in which legal prescriptions can be valid must first be brought

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<sup>171</sup> Schmitt, *Political Theology*, 12.

<sup>172</sup> *Ibid.*, 13.

<sup>173</sup> *Ibid.*, 15.

<sup>174</sup> *Ibid.*, 12.

about.”<sup>175</sup> The sovereign who decides on the exception is thus not bound by law or limited by the boundaries of political order; he produces those boundaries from without. For Schmitt, the exceptional decision is the “essence”<sup>176</sup> of the authority of the sovereign, the manifestation of sovereign power that best illustrates its structure and capability. So to start, sovereignty is constituted by the exceptional decision, an act that works beyond the boundaries of the law in the singular moment.

This particular spatiotemporal configuration of sovereignty is for Schmitt self-evident. “This definition of sovereignty,” he writes, “must be associated with a borderline case and not with routine.”<sup>177</sup> This statement contains a confounding comparison. Schmitt contrasts the borderline with the routine. Only *borderline* is a spatial category, it refers to topology; to divisions between discrete objects in space; borderlines are drawn on maps, between geographic zones, between here and there. While *routine* is a temporal category, it refers to acts or events regularly repeated in time; routine is common, reiterated, occurs and reoccurs. Schmitt can make such an incongruous comparison without elaboration because of the certainty with which he associates borderline and exception, inside the borderline and norm. For Schmitt, sovereignty—the exception—cannot occur but at the borderline or the limit that produces political order by way of the decision that takes place in a singular moment, just as the norm cannot occur anywhere but inside that borderline, enacted not in a declaratory instant but as a regularized constellation of practices.

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<sup>175</sup> Schmitt, *Political Theology*, 12.

<sup>176</sup> *Ibid.*, 13.

<sup>177</sup> *Ibid.*, 5.

Schmitt's conception of sovereignty is thus organized around the concept of decision, and implies a distinction between the exceptional decision, which constitutes sovereignty, and decision itself. What characterizes the exceptional decision of the sovereign are, as described above, its spatial position outside the bounds of political order and its temporal expression as a break from regularized practice. Despite how obvious Schmitt believes the 'where' and 'when' of exception to be, as his description of sovereignty progresses in *Political Theology*, this location becomes less and less assured. While Schmitt emphasizes the workings of sovereignty beyond legal order and its initial function of setting the bounds of that order, he effaces the manner in which sovereignty operates routinely, within the order that it produces for itself. He is clear about the centrality of the exceptional decision to the power of sovereignty, but is unable to make a satisfactory distinction between that particular form of decision and the act of decision in general. A consideration of the structural similarities between exception and decision reveals that the 'essence' of sovereignty cannot be kept static in the place where Schmitt believes it to be.

### **Relocation: the Structure of Decision**

For all the certitude of the opening chapter of *Political Theology*, in the following one, Schmitt immediately destabilizes the location of sovereignty in space through his account of the structure of the decision. Whereas initially Schmitt considers sovereignty as a product of the exceptional decision that breaks from the norm, his analysis of the structure of legal decision shows that the exceptional power of sovereignty is not limited to the singular moment. For the problem of sovereignty and its constitutive structure is

not simply a matter of the spectacular declaration of exception but in fact resides in the relation between law and its enforcement, and thus in the structure of decision itself. In other words, the relation between exception and decision is not simply that a state of exception is instituted by a decision, but rather that the structure of decision and of exception are identical. Schmitt says as much in the title of chapter two, “The Problem of Sovereignty as the Problem of the Legal Form of the Decision.” For Schmitt, the decisive question is the relation between law, or the highest authority, and what he calls ‘actual power,’ the force that animates such authority, but is not reducible to it. This problem, writes Schmitt, “lies precisely in...[the] act of ascertaining,”<sup>178</sup> that is, in the act of decision, decision that necessarily interprets and renders judgement. This is the function of exception—to decide on law.

While the exceptional decision is notable because it is not derived from law—it “emanates from nothingness,”<sup>179</sup> as Schmitt puts it—in his analysis of the juridical decision, Schmitt reveals this to be the case for every sovereign decision, no matter how banal. Schmitt claims that “*every concrete juristic decision* contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment.”<sup>180</sup> As Benjamin points out regarding the police, the enforcement of law requires decision because no two ‘legal situations’ are alike. At every moment, the same questions appear and reappear, to be determined: Should the law be applied? Why does it apply in this case? In what manner

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<sup>178</sup> Schmitt, *Political Theology*, 23.

<sup>179</sup> *Ibid.*, 32.

<sup>180</sup> *Ibid.*, 30. Emphasis mine.

should it be enforced? Decision is always necessary because “no norm...interprets and applies, protects or guards itself; nothing that is normatively valid enforces itself.”<sup>181</sup> Put simply, the question ‘Who decides?’ does not pose itself only in regard to emergency or existential threat, but at every instance of decision.

This is not at all to claim a generalized extra-legality in which sovereign actors make decisions completely independently of law, rule, and norm. Rather, it is to demonstrate the impossibility of deciding on the decision, of differentiating between the two inescapable elements of any decision: the incalculable autonomy from and simultaneous reliance on rule, law, or norm. When decision can neither ‘emanate from nothingness’ nor simply adhere to a calculable program, the grounds upon which exceptional and normal decisions are distinguished from one another disappears. Just as the decision on the state of exception is a decision on law, on when it will or will not apply and on how it will apply to a specific case, this is equally the case for every juristic decision, no matter how inconsequential. Just as every exceptional decision is in some way related to law or rule, so every juridical decision contains an exceptional element. It is in this structure of the relation between law and power, norm and exception, that exceptional decision and juridical decision unite.

Several scholars have pointed in this direction by noting that Schmitt’s definition of exception need not exclude a sovereignty that is more diffuse than the statist decisionism he advocates. Walker, for example, argues that “where Schmitt’s account focuses on the big exception, the declaration of war, exceptions are now made as a continual mode of action, and they can be made by bureaucratic machinery and

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<sup>181</sup> Schmitt, *Legality and Legitimacy*, Jeffrey Seitzer, trans., (London: Duke University Press, 2004), 54.

functionaries quite as easily as by grand sovereigns.”<sup>182</sup> This claim is borne out by recent investigations of the relation between the minor practices of citizens and bureaucrats and the production of sovereign exceptionalism.

Johns, for example, in her examination of the Guantanamo Bay military prison, explains that “decisionism is not necessarily contingent upon an insistence upon the state’s...monopolization of all political decisions.”<sup>183</sup> She attributes the excess of rule and regulation at the prison to an effort to ‘domesticate’ the exception, as regulatory attempts to eliminate the element of incalculability and unpredictability inherent in exception. In this sense, she explains, “one could identify the absence of precodification characteristic of the exception with immersion in the contingencies of the social and the ubiquity of power.”<sup>184</sup> When the ‘exceptional’ character of exception is taken seriously, the concept lends itself to an analysis of the ‘infinitesimal mechanisms,’ as Foucault calls them, of social and political life that constantly escape the ambit of pre-established rules. This allows the concept of exception access to the everyday practices most often understood as constituting the norm. She concludes: “it is almost impossible not to conceive—as both political and exceptional—a much broader range of decisions, approached by a much broader range of agents, aggregations or arrogations, than those which Schmitt entertained as such.”<sup>185</sup> Johns recognizes the element of autonomy that persists in every decision and that therefore every decision, not just the ‘exceptional’ one, has an extra-legal character.

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<sup>182</sup> R. B. J. Walker, “Lines of Insecurity: International, Imperial, Exceptional,” *Security Dialogue* 37, no. 1 (2006): 80.

<sup>183</sup> Johns, “Annihilation of the Exception,” 633.

<sup>184</sup> *Ibid.*, 632.

<sup>185</sup> *Ibid.*, 633.

Roxanne Lynn Doty's study of civilian border patrols along the US-Mexico border also serves to problematize Schmitt's distinction between the exceptional and the normal decision. Though "Schmitt...preclude[s] giving sufficient recognition to the possibility of multiple and dispersed decisions,"<sup>186</sup> Doty argues that the extra-legal character of vigilante activities aimed at preventing undocumented migrants from entering the United States can be understood using a more diffuse understanding of Schmittian decisionism. Civilian border patrols reveal that decisions on what counts as normal politics and on who is the enemy are not only taken 'from above' by a unified sovereign: "The decision...can arise in the remotest of places and by the seemingly most insignificant agents, at a lonely desert border crossing, at a city street corner where day labourers gather in the hope of finding work."<sup>187</sup> Doty thus argues that "border vigilantes...expose the gaping hole at the heart of the belief in a definitive locus of sovereignty...sovereignty is ethereal and hovers unsteadily around us, not firmly anchored, not solely public or private, legal or extra-legal."<sup>188</sup> Sovereignty, on her view, can only be understood as "indeterminate,"<sup>189</sup> a force that inevitably escapes codification and that cannot be located in any precise space or time.

Schmitt himself seems to employ his definition of sovereignty in a manner that acknowledges the potential for its diffusion in some of his later writings on the Weimar constitution. In *Legality and Legitimacy*, Schmitt's description of the extra-legal capacity of the sovereign is not limited to the exceptional declaration. Schmitt makes reference to

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<sup>186</sup> Roxanne Lynn Doty, "States of Exception on the Mexico-U.S. Border: Security, 'Decisions,' and Civilian Border Patrols," *International Political Sociology* 1 (2007): 129.

<sup>187</sup> *Ibid.*, 130.

<sup>188</sup> *Ibid.*, 132.

<sup>189</sup> *Ibid.*

the “additional political surplus apart from the power that is merely normative and legal”<sup>190</sup> that a state government enjoys. The neutrality of the legal apparatus of the state is corrupted by the advantage that the party in power has to make decisions not just through the law, but about the law. This “supralegal premium,” Schmitt explains, evoking his definition of sovereignty, “is relatively calculable in peaceful and normal times, but in abnormal times it is entirely incalculable and unpredictable.”<sup>191</sup> While the use of the premium may differ in intensity and predictability depending on the situation, the relation between authority and law that produces the premium remains the same: decision-makers in government have a power beyond that allotted to them by law, a power that cannot be reduced to calculable rule. While Schmitt claims that this ‘premium’ is “bound directly to the momentary situation,”<sup>192</sup> and is often used in times of emergency, he also attributes to it the advantage of “the presumption of legality” and of “directly executable” commands, which suggests that the extra-legal decisionist power of the dominant party works with the frequency of routine decision as well as the rarity of the exceptional case.

The problem of the decision, then, cannot be limited solely to the legal sphere, to the interpretation of the judge, but extends out to the furthest reaches of bureaucratic procedure, administrative process, and social life. While technical-administrative decisions may differ in degree from the type of extraordinary decisions made by the sovereign in a state of emergency, they do not differ in form from these decisions. The exceptional force of sovereignty thus cannot be contained at the borderline in the singular moment, but is revealed as being present at the innumerable points of decision-making

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<sup>190</sup> Schmitt, *Legality and Legitimacy*, 32.

<sup>191</sup> *Ibid.*

<sup>192</sup> *Ibid.*



that span the administrative apparatus of the state, and beyond. No longer is the 'outside-the-law' of sovereignty confined to the rare enactment of emergency measures but rather permeates the fabric of political order itself. No longer is the decision that exposes the extra-legal power of the sovereign limited to the exceptional declaration, but is present in the diffuse and variegated processes of interpretation and judgement that take place continually across the landscapes of legal and political order.

What gives Schmitt's critique of liberalism such force is thus not his observation that in times of emergency the sovereign is capable of breaking with law, but rather his insight that at every instance of law-enforcement or juridical decision the law is in some sense broken with. Once this is acknowledged, Schmitt's extra-legal sovereign is not only the grand declarer of emergency or the spectacle of fearsome might, but rather a diffuse and subtle power that is dispersed among the intricate, mobile spaces of the labyrinthine juridical-administrative systems of modern polities, a power that resides in the innumerable instances in which the understandings, interpretations, priorities, and beliefs of the vast network of functionaries that populate political and legal order are brought to bear on their everyday decisions. A sovereignty that works in this way becomes far more difficult to differentiate from the assemblage of practices that make up governmental regimes than a sovereignty manifested in the exceptional decision. If Schmitt is correct that sovereignty finds its force in the interstice between law and its enforcement, rule and its application, if it is from within that aporetic gap that exception draws its power, then exceptional sovereignty cannot be confined to the space beyond the borders of political order; it pervades the spaces within them.

Moreover, those very borders become impossible to discover. If political order is defined by adherence to certain programmatic systems of law, rule, or norm and the outside of political order determined by non-adherence—exceptions—to those norms, then Schmitt's demonstration of the inevitable non-adherence of decision to norm—whether exceptional or not—erases the distinction between the inside and outside of political order. Or, put another way, the lines separating inside from outside no longer appear where they are thought to be. Schmitt claims that sovereignty is associated with the borderline and not with routine. Given the preceding, a more apt formulation might be that routine is located at the borderlines, and borderlines—or the drawing of borderlines—routine.

### **Between Program and Novelty**

Exception engages the temporal dimensions of the problem of sovereignty through the distinction between a founding act of constitution and routine practices that preserve what has been constituted. In Schmitt's work, this distinction takes the form of the relation between novelty, or the new, and program, calculable rules or norms. Schmitt's preoccupation with novelty and program is unsurprising given his critique of the legal positivist notion of a 'closed' legal system. The tension between novelty and program, between the singularity of the decision and the calculability of the rule that animates Schmitt's theory of sovereignty shows that exception manifests its temporal dimensions. Identifying how the problem of founding animates the concept of exception in turn reveals the impossibility of a sovereignty that remains at the place where Schmitt attempts to locate it.

Schmitt raises the problem of novelty himself. He questions how any novel command could come about in a 'closed' legal system. In other words, he wonders how, in a system in which every law is supposedly derived from law, every rule from rule, how any new law or rule could come into existence. He writes: "if everything is strictly regulated by legal normativity...the question evidently arises of how that which is continually new could emerge within such a legal framework."<sup>193</sup> He points this out not only as a critique of legal positivism, but also seems to suggest such a problem as a potential area for further theoretical exploration. Pinpointing the aporia itself, he asks: "Is there any reason why what is really new should justify itself before the prevailing old, which stands in opposition to the new? Because the old is no longer significant?"<sup>194</sup> In attempting to justify sovereign exceptionalism, Schmitt encounters the tension between existent norm and the non-normative interpretive force of the decision.

Derrida considers the relation between program and novelty in relation to the decision in a way that illustrates the aporetic quality of Schmitt's conception of sovereignty. Derrida's consideration of the problem of founding happens by way of Walter Benjamin's essay on the relation between sovereignty and violence. Schmitt's distinction between exceptional decision and juridical decision parallels Benjamin's distinction between founding and preserving violence. While deciding on exception is a founding act because it determines the normal order from which it exits, the juridical decision takes place within this order by reproducing already-established legal norms. However, just as Benjamin fails to maintain the distinction between founding and

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<sup>193</sup> Carl Schmitt, *Political Theology II*, Translated by Michael Hoelzl and Graham Ward (Cambridge: Polity, 2008), 120.

<sup>194</sup> *Ibid.*, 121.

preserving violence, so Schmitt cannot properly differentiate between exceptional and juridical decision.

The act of exception is a capacity to found, to produce the new, to break with the norm. Schmitt makes several references to this element of his concept of exception. Exception does not just produce anew a particular law or rule, but the entirety of political order itself. Because a break with the norm must necessarily set the bounds of the normal situation, each instance of exception is an instance of boundary-drawing: by declaring what lies outside the norm, exception implicitly determines the contours of what counts as normally-functioning political order. In his discussion of the political ‘premium’ that those in power in a particular state enjoy, that is, the capacity for extra-legal action they obtain, Schmitt describes the exceptional moment as the moment “when the entire system of legality is thrown aside and when power is constituted on a new basis.”<sup>195</sup> When law is suspended, sovereignty is in the process of resetting the boundaries in which it can operate; exception is the sovereign deciding on the very jurisdiction of his sovereignty. Exception, then, is a founding moment, a moment of novelty, when “situations in which legal prescriptions can be valid must first be brought about.”<sup>196</sup> Yet, as a closer consideration of the concept reveals, this act of founding cannot be left to the exceptional moment, the sovereign must continually produce its own conditions of possibility; in other words, exception must also preserve through adherence to an already-established system of norms.

In “Force of Law,” Derrida considers several forms of the aporia of founding which are particularly instructive when considering the concept of exception and its

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<sup>195</sup> Schmitt, *Legality and Legitimacy*, 36.

<sup>196</sup> Schmitt, *Political Theology*, 13.

relation to decision. In essence, he explains how the problem of founding—the tension between program and novelty—is manifested in every act of decision. In this sense, the decision is never neither totally exceptional nor completely routine; the normality or exceptionality of decision is impossible to determine. Derrida uses the example of a judicial decision, writing that:

the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if ultimately nothing previously existed of the law, as if the judge himself invented the law in every case...a decision...must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it.<sup>197</sup>

The very existence and necessity of judges and lawyers are evidence of the autonomous interpretation that is involved in every application of the law, in every act of sovereign decision. Yet law, rule, and norm would not only be futile, but non-existent if these decisions were totally autonomous and referred to no calculable program for decision-making. Every moment of decision occupies this space between calculable rule and incalculable novelty, between norm and exception. Just as in the exceptional moment the sovereign is both inside and outside of the juridical order, Derrida shows that this is equally the case at every moment of sovereign decision, down to the least significant juridical decision. In every decision the norm is suspended; yet no sovereign decision is ever made completely independently from the norm.

The second version of the aporia that Derrida considers is what he calls the problem of the ‘undecidable.’ As he explains, “the undecidable is not merely the oscillation or the tension between two decisions, it is the experience of that which, though

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<sup>197</sup> Derrida, “Force of Law,” 251.

heterogeneous, foreign to the order of the calculable and the rule is still obliged...to give itself up to the impossible decision, while taking account of law and rules.”<sup>198</sup> The concept of the undecidable captures the importance of the space that separates law and command, rule and enforcement that occupies Schmitt in the second chapter of *Political Theology*. Like Schmitt, Derrida sees a structural quality in the act of decision that mirrors the problem of founding. The decision can never be wholly attributed to the correct application of a rule because decision “marks the interruption of the juridico- or ethico- or politico-cognitive deliberation that precedes it,”<sup>199</sup> yet the very fact that a decision is made means that to some degree calculation has occurred and the rule been taken into account. So, just as Schmitt considers the extralegal element of exception to be present in every decision, so Derrida attributes to the decision the aporetic relation between program and novelty, the necessity of decision based on rule in the face of something that cannot be captured by such a rule. The exceptional *and* the juridical decision, then, both express the problem of founding, an expression that undermines Schmitt’s attempt to distinguish between them; both remain caught between inevitable novelty and predictable program. Here again we see the moment of founding play out across the spatiotemporal sphere of political order. It is iterated and reiterated—that is, becomes routine—and thus is located not only at the edge, but extends itself across the sovereign domain.

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<sup>198</sup> Derrida, “Force of Law,” 252.

<sup>199</sup> Derrida, “Force of Law,” 255.

### **(Dis)Locating Sovereignty**

Exception and governmentality both express the ‘doubled’ character of modern political sovereignty—they operate both within and beyond legal and political order, they are there at the moment of founding and sustain what has been founded. More importantly, these concepts demonstrate the impossibility of locating that very border, between political order and its outside, that modern political sovereignty claims to delineate. Both thinkers acknowledge this dual character of sovereignty at various points in their work, an acknowledgement that contradicts some of their most persistent claims about governmentality and exception. This reveals the indistinction appears both within Schmitt and Foucault’s separate accounts of sovereignty, as well as between those accounts.

It is less in ignorance of the aporetic origins of sovereignty than in acute sensitivity to them that Schmitt elaborates his theory of sovereignty in the way that he does. This sensitivity manifests itself in his hesitance to locate sovereignty, or the decision on the exception, wholly outside of political order. Given that a state of exception is a complete suspension of the law, it would be easy for Schmitt to insist that the sovereign retains no connection whatsoever to the legal order that is broken with, that the sovereign acts utterly beyond the realm of law. For example, Schmitt asserts that “although [the sovereign] stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution must be suspended in its entirety.”<sup>200</sup> The exceptional decision, like juridical decision, never completely detaches itself from law, because it must refer itself to law, even if that reference is in the form of a suspension. While exception “is that which cannot be subsumed; it defies

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<sup>200</sup> Schmitt, *Political Theology*, 7.

general codification,” it also “simultaneously reveals a juristic element—the decision in absolute purity.”<sup>201</sup> While the ability of the sovereign to produce law that is not derived from law positions him outside the ordinary legal order, his attendant ability to suspend the law at will places him within it, as an actor implicated in the workings of the juridical system. Exception suspends the whole of the legal order, but cannot do so without referring to it, without using it as a foil against or outside of which it can operate. Exception thus does not ‘emanate from nothingness’ as Schmitt claims, a phrase that implies that exception attains complete autonomy from law, rule, and norm, but rather retains a relation to the legal order it has the capacity to institute and suspend. While the exceptional decision contains an extra-legal element, it never becomes entirely extra-legal; exception remains a dual phenomenon, one that operates both within and outside of normal political order.

Foucault, for his part, makes a similar claim about governmentality.

“Governmentality,” he writes, “is at once internal and external to the state, since it is the tactics of government which makes possible the continual definition and redefinition of what is within the competence of the state and what is not.”<sup>202</sup> Much like exception, governmentality sets the bounds of its own sphere of operation. This acknowledgement of the ‘doubled’ character of governmentality contradicts Foucault’s earlier claim that governmentality only comes into force ‘once the state has been founded.’ On this later account, governmental practices not only work within a given political order, but also work to determine the limits of that order. This aligns with Foucault’s understanding of governmentality as a form of rationality that produces the sphere of activity called

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<sup>201</sup> Ibid., 13.

<sup>202</sup> Foucault, “Governmentality,” 103.



‘politics.’ Like the sovereign form of power Foucault is so concerned to distance himself from, and like exception, governmentality produces the particular order within which it operates. If governmentality does not only function ‘once the state has been founded,’ but also works to found it, and if exception does not simply found the state, but also belongs to it, exception and governmentality cannot be kept on either side of the line dividing political order from its outside.

The confusion in Schmitt and Foucault’s work around the boundaries of political order and their relation to sovereignty can be illustrated by some of the similarities in their approach to the problem and the conclusions they reach from their consideration of it. Schmitt, the theorist of the exceptional case and Foucault, the theorist of routine, both measure much the same effects of modern political sovereignty, effects that express the aporia of the relation between exception and governmentality. First, both theorists attempt, through their conceptions of sovereignty, to detach the two terms of the phrase ‘legal order.’ Schmitt writes that when an exception is declared “the two elements of the concept *legal order* are then dissolved into independent notions and thereby testify to their conceptual independence.”<sup>203</sup> When law is suspended, political order is revealed to be sustained by a sovereignty that exists beyond the law. Similarly, Foucault makes an appeal to scholars to treat the terms separately, writing that “just as people say milk or lemon, we should say law *or* order.”<sup>204</sup> In both cases there is a recognition of a power that operates beyond the law, that law is not sufficient to sustain a political order. As Foucault

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<sup>203</sup> Schmitt, *Political Theology*,

<sup>204</sup> Michel Foucault, “Truth and Juridical Forms,” in *Essential Works of Foucault Vol. 3: Power*, James D. Faubion, ed., Robert Hurley et al., trans. (London: Penguin, 2002), 60.

puts it, “the conciliation of law and order...must remain a dream.”<sup>205</sup> Both Foucault and Schmitt are aware of these two elements of political order, and, at different points in their work, emphasize either one or the other.

The ways in which ‘law’ and ‘order’ are understood in these theorists’ work betray an ambivalence about the place of law in modernity, an ambivalence that expresses the aporias present within and between their conceptions of sovereignty. First, both Schmitt and Foucault insist that modern political sovereignty must be understood as a force that primarily works beyond the law, and they do so using the same phrase: ‘law recedes.’ Describing the ways in which governmentality diverges from juridical sovereignty, Foucault claims that as governmentality develops, “law recedes...or rather law is certainly not the major instrument in the perspective of what government should be.”<sup>206</sup> Schmitt, meanwhile, explains that in a state of exception, “it is clear that the state remains, while law recedes.”<sup>207</sup> Sovereignty as exception and sovereignty as governmentality both mark a retreat of the law from the operations of sovereign power.

Yet Schmitt and Foucault also mark the growth of the juridical-administrative apparatus of the modern state. In Schmitt, this is evident in both his description of the modern state as a technical-administrative calculating machine whose origins he finds in Hobbes, as well as in his analysis of the ‘legal form of the decision’ that occupies the second chapter of *Political Theology*. As much as Schmitt believes the essence of sovereignty to be an exceptional decision whose force comes from beyond the law, he is quick to recognize law and juridical decision as integral to the functioning of modern

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<sup>205</sup> Ibid., 5.

<sup>206</sup> Foucault, *Security, Territory, Population*, 99.

<sup>207</sup> Schmitt, *Political Theology*, 12.

political order. Foucault shares a similar sense of the increasing importance of juridical decision in modernity, attributing the multiplication of juridical decisions in modern states to the modern system of legality: “The more the law becomes formal, the more numerous juridical interventions. And to the extent that governmental interventions of the public authority are more and more formalized...then to the same extent justice tends to become, and must become, an omnipresent public service.”<sup>208</sup> Though ‘law recedes’ in accounts of governmentality and exception, Foucault and Schmitt simultaneously recognize the expansion of juridical decision across the political sphere.

Not only that, Foucault also acknowledges a characteristic of juridical decision integral to Schmitt’s account: autonomy. Foucault describes how, as political economy becomes a mode of government and the market becomes a sphere in which the government is expected to not intervene, not only is there a paradoxical explosion of juridical interventions, but a corresponding emphasis on interpretive novelty. In Foucault’s words, “if it is true that the law must be no more than the rules for a game [the market]...then the judicial, instead of being reduced to the simple function of applying the law, acquires a new autonomy and importance.”<sup>209</sup> Juridical decision, here, exceeds the simple application of the law or the adherence to a program, it constitutes an act of creation, the production of the sphere in which governmentality operates.

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<sup>208</sup> Foucault, *Birth of Biopolitics*, 176.

<sup>209</sup> Foucault, *Birth of Biopolitics*, 175.

## **Conclusion: Sovereignty and the Limits of Critique**

The oscillations and reversals that undermine the efforts of Schmitt and Foucault to produce stable accounts of political order are evidence of the difficulty of locating sovereignty in space and time, and with it the political order it produces and delimits, political order that is said to begin at a moment in the historical past, and end at a line in the topological present. The aporia that results from thinking Schmitt and Foucault together, as well as from within the accounts of sovereignty each provides, is representative of the problem that together they express—the problem of sovereignty. While Schmitt locates sovereignty beyond political order in the exceptional moment of decision and Foucault within political order in routinized practices of normalization, neither is able to elaborate their position without at least tacit accession to the other. Foucault admits of a sovereign capacity to work beyond the law and produce its own conditions of possibility through an exceptional decision even as he affirms the strict division that must be maintained between sovereignty and governmentality. Schmitt admits that the form of the exception reappears in decision itself and thus is implicated in the commonplace decisions that take place within political order even as he insists upon a sovereign whose power is exercised through an extra-legal, singular moment of decision. Exception and governmentality continually slide into one another—their boundaries cannot maintain their integrity.

This conclusion helps explain the disorienting assemblage of claims about exception and governmentality outlined in the Introduction. Further, it offers a way of understanding exception and governmentality, and the sovereignty whose operation they

seek to explain, that could help avoid the reinstatement of the problem that sovereignty presents. The diversity of oppositional claims about exception and governmentality is a symptom of their aporetic relation and an acknowledgement of this relation has the potential to turn critical theoretical work on sovereignty in more fruitful directions. I would like to sketch out some preliminary contributions that this analysis of the relation between exception and governmentality can provide to current debates on sovereignty, and then outline several even more preliminary directions that I think this analysis points toward.

One characteristic that the theoretical attempts to refigure the governmentality/exception dichotomy share is that they tend to work by locating sovereignty in a particular place or time.<sup>210</sup> This is particularly true of analyses that use the concept of exception to designate a particular ‘space’ or ‘state.’ The most well-known examples, Giorgio Agamben’s invocation of the ‘camp’ and Judith Butler’s analysis of the ‘war prison,’ are representative of the now-common rhetorical and analytical strategy of designating a particular spatiotemporal location where sovereignty reveals its true nature. Yet these attempts to locate sovereignty inevitably fall prey to the very spatiotemporal distinctions (norm/exception, inside/outside) they seek to escape. Claiming that somewhere or other (border, war prison, camp, reservation, etc.) is an ‘exceptional space’ or that someone or other (refugee, sex worker, migrant, detainee, etc.) exists in a ‘state of exception’ assumes too easily that a simple distinction can be made between exceptional and normal. If exception and governmentality indeed exist in a relation that is aporetic, they will not prove so readily identifiable, and the analytic

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<sup>210</sup> With the exception of Roxanne Lynn Doty who concludes that sovereignty is ‘indeterminate.’

division between exceptional spaces or states and others can only succeed in reinscribing the spatiotemporal distinctions produced by modern political sovereignty. Even if it is claimed, as Salter does, for example, that borders (he uses the Canadian border as an example) have become exceptional spaces produced through governmental practices, or, as Butler does, that sovereignty has re-emerged within the exercise of governmental power, such claims still assume that the difference between a space where exception is enacted and a space where it is not can be identified at a glance. If exceptional spaces exist that are enacted through governmentality, what differentiates exceptional spaces and normal ones? While the intensity with which sovereign power is exercised in a given place or on a given population may be distinct, it is not clear how the form of sovereignty differs in a 'space' or 'state' of exception.<sup>211</sup>

Even those who reject accounts of sovereignty or exception that relegate it to a discrete location fall prey to the problem they want to refigure. Although they recognize that sovereignty does not reside on one side or the other of the exception/governmentality dichotomy, the dichotomy itself is more often than not affirmed by the assumption that the line between legal and extralegal, governmental and exceptional can be located with certainty. This is the case for both Neocleous and Neal, who claim that the line between norm and exception has become blurred because of the way exceptions are produced through law, rather than despite it. Yet the norm/exception dichotomy is not a false one because exception is a tactic used by governmental regimes or a capacity written into legal norms, for such accounts still assume that the exceptional case can clearly be

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<sup>211</sup> The above argument is not meant as a denial of the differential effects of sovereign power on subjects marked by categories such as sex, race, citizen, class, or gender. The indistinguishability of exception and governmentality in no way indicates an equal or even distribution of the effects of sovereignty on various populations. In fact, the uncertainty and instability of aporia is what enables sovereignty to produce and act on subjects differentiated by the above categories.

distinguished from the normal one, and vice versa. While the distinction between legal and extra-legal may be blurred, a determination about whether exception takes place through law or beyond it requires a certainty regarding what counts as exceptional and what does not that the aporetic relation between exception and governmentality does not permit.

This is also the case in the interventions by Johns and Doty, in which they argue in a similar fashion for an expanded conception of the sovereign exception that exceeds the confines of a narrow Schmittian decisionism. While they both recognize that sovereignty cannot be contained in one location, be it the extra-legal realm of the exceptional event, or the legal realm of ordinary decision, their claims seem to indicate that sovereignty operates in both realms rather than the difficulty of distinguishing between the realms themselves. Their accounts seem to say: ‘sovereignty is exceptional *and* governmental’ rather than problematizing the apparent difference the ‘and’ represents. By highlighting the ways that ‘normal’ and ‘exceptional’ are discursively produced and legitimated by a range of actors, they provide an excellent critique of Schmitt’s notion of the exceptional decision that is made by a unified sovereign, but fail to challenge the distinction between exceptional and governmental itself.

Either it is argued (as Neal and Neocleous do) that the concept of normalization can be expanded to subsume exceptions or (as Johns and Doty do) that the concept of exception can be expanded to subsume normalization. Both interpretations are valid. But to the extent that both are valid, they act as a restatement of the problem: how does one differentiate between a normalization that exceptionalizes and an exceptionalism that normalizes? This work deftly undermines the spatiotemporal foundations on which the

distinction between exceptional and normal rests—between a normality produced through repetition and exception produced through an anomalous moment—but insists on maintaining the distinction itself. Recognition of the ways in which the aporetic relation between sovereignty and governmentality are expressed in the literature on sovereignty, whether between Schmitt and Foucault or among the plethora of contemporary scholars engaged with the same questions, can act as a reminder of the ease with which the desire to determine the ‘when’ and ‘where’ of sovereignty can result in the reproduction of the very categories that have previously proven unsustainable.

Many analyses of the problem of exceptionalism locate themselves in the context of post-9/11 sovereign violence, and thus treat the resurgence of the problem of sovereignty and the blurring of the exception/governmentality distinction as recent phenomena. However, the way exception and governmentality appear in Schmitt and Foucault’s work indicates that the boundary dividing exception and governmentality is indeterminable because of the structure of the concepts themselves rather than any recent political transformations. While a number of contemporary political developments have no doubt intensified or called greater attention to the aporetic character of sovereignty, attributing the unsustainability of the distinctions that modern political sovereignty attempts to enforce solely to contemporary political problems misses the ways in which the relation between the spatiotemporal conditions of modern political sovereignty are aporetic themselves. Mark Neocleous makes a similar point when he counters the idea that the modern state has only recently begun to act ‘exceptionally.’ By pointing out the historical and geographical ubiquity of provisions for exceptional sovereign acts in modern constitutions, he reveals ‘exceptionalism’ to be a feature of modern sovereign



states, rather than a recent phenomenon brought about by the post-9/11 obsession with security. If, as Neocleous puts it, the idea that exception is a recent phenomenon is ‘historically naive,’ equally so is the claim that the line dividing normal and exceptional has only recently become blurred. While recent global political transformations have no doubt intensified the tensions inherent in the modern political sovereignty, the aporetic relation expressed by exception and governmentality indicates that the antinomies and impasses that haunt sovereign power have a much longer history.

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While I have tried to problematize the distinction between exception and governmentality in a way that avoids reinstantiating it, the success of this attempt is far from certain. My account of these critical perspectives on sovereignty has emphasized the aporetic origins of the concept and the practice, and outlined several significant failures that important figures in the history of social and political thought have encountered in their efforts to escape the intractable difficulties that the problem of sovereignty presents. This makes it all the more difficult to propose with any certainty methodological techniques or theoretical orientations that promise to uncover a sovereignty that can be found in a particular location: knowable, calculable and fixed in the place it is expected to be found. Rather, the aporia that exists between exception and governmentality points more clearly toward cautions and hesitations that should infiltrate the work of critical engagement with sovereignty in the future.

Such engagement suggests a reconsideration of critique itself and of the relation between critical scholarship and the legitimation and reproduction of sovereign authority. If critical accounts of sovereignty end up reaffirming the very limits which they subject to

critique, it would appear that the relation between critique and sovereignty is perhaps cozier than one might imagine. This means that scholars must heed the ways in which their own attempts to parse the operation of sovereignty in contemporary politics is implicated in the exercise and legitimation of that sovereignty. Roxanne Doty puts it well when she writes that “where we decide to look for decisions and exceptionalism is also a political decision that implicates us in the processes we write about.”<sup>212</sup> Insisting on a fixed and certain spatiotemporal location of sovereign power is simultaneously to insist on a particular account of the limits of political possibility. When it comes to sovereignty, given its association with transcendent might and absolute authority, it is easy to forget the role of the scholar in the reproduction and legitimation of the authority that sovereignty authorizes. As Shaw and Walker explain, there is a danger in “underestimating the capacities of this discipline [international relations] to turn the outrageous into the normal and to justify the suspension of established norms under supposedly exceptional conditions.”<sup>213</sup> Further critical engagements with sovereignty cannot afford to ignore the ways in which even critical approaches affirm accounts of the location of sovereignty that act as the limits of modern political life.

If it is precisely the desire to locate, to ‘know’ sovereign power that leads to a reproduction of the sovereign distinctions that are subject to critique, it seems that what is at stake in the question of the relation between critique and sovereignty are the conditions under which critique is possible. In other words, if the critique of sovereignty uncovers a relation characterized by aporia, about which it has little to say, this suggests that critique

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<sup>212</sup> Doty, “States of Exception,” 133.

<sup>213</sup> Karena Shaw and R.B.J. Walker, “Situating Academic Practice: Pedagogy, Critique and Responsibility,” *Millennium* 35, no. 1 (2006): 160.

itself depends on the very distinctions constitutive of modern political sovereignty, distinctions which critiques of sovereignty have thoroughly undermined. In the face of this ambiguity, it remains to be seen what sort of critical engagement with sovereignty is possible. What bears investigation is whether current forms of critique are capable of turning their gaze back on themselves to examine the ways in which critique and sovereignty work in a relation that is mutually constitutive. The question that arises from these considerations is: is a critical *account* of sovereignty possible? Examinations of the relation between critique and sovereignty are no doubt necessary to work at and through the limits of modern political authority, and to perhaps discern modes of critical thought and practice which neither depend on nor legitimate these limits.

Admittedly, this reading of Schmitt and Foucault presents the reader (and the writer) with something of an impasse. The more thoroughly sovereign authority is interrogated, the less certain its location and mode of functioning appear to be; the more systematically critical theory undermines sovereign claims to authority, the less a critical account of sovereignty seems possible. Indeed, it is precisely this state in which attempts at explanation, resolution, or decision are utterly confounded that *aporia* designates. For me, there is a sense of being struck dumb before the collapse of the limits that modern sovereign authority insists upon, a feeling that invokes the theological dimensions of sovereign authority that Schmitt and others emphasize. Approaching the limits of modern political sovereignty does not produce an endless vista of alternative political possibilities, but rather mute incomprehension.

Attention to this methodological problem would be helpful in producing accounts of the operation of sovereignty that capture the ways that the indistinguishability of

exception and governmentality is the material that sovereignty works with. Research could be done that investigates the ways in which sovereignty makes use of the uncertainty that characterizes it in order to enforce its authority. As Derrida indicates, there seems to be a link between the violence or force that founds and preserves sovereign authority, and the very indiscernibility of the limits it sets out. Speaking of the aporias of popular sovereignty in the context of the signing of the US Declaration of Independence, Derrida explains that the “obscurity, this undecideability between, let’s say, a performative structure and a constative structure, is *required* in order to produce the sought-after effect.”<sup>214</sup> The aporetic relation of exception and governmentality, then, should not be treated as a methodological problem to be solved, but rather understood as a relation that *does* something, that produces certain effects. In regard to sovereignty, attention should be paid not only to the ways that sovereign authority denies the aporias it embodies through the drawing of sharp lines of discrimination, but also the way the instability and uncertainty of aporia is used as a strategic resource.

If the term ‘political order’ has been used throughout this paper in a somewhat ambiguous manner, it is because it represents precisely what is at stake in debates surrounding the relation between exception and governmentality. The spatiotemporal limits expressed by governmentality and exception engage the aporia that confronts any attempt to define the boundaries that separate political order from its outside. They also confront the question of the relation between sovereignty, order, and politics, particularly whether or how the latter can be conceived of or practiced absent either of the former. If Schmitt and Foucault make short work of the unity represented by the term ‘legal order,’

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<sup>214</sup> Derrida, “Declarations of Independence,” 9.

the relation between their accounts of sovereignty indicate that any similar scission of the term ‘political order’ will not be nearly so simple. The idea of a necessary relation between the location of sovereignty, the instantiation of order, and the limits of political life seems burned into the modern political imaginary. Schmitt and Foucault themselves organize their work on exception and governmentality around the link between sovereignty and ‘politics’ or ‘the political.’ An engagement with the aporia characteristic of modern political authority would therefore entail an exploration of the relation between sovereignty, order, and politics, and possibilities for their deunification. As Wendy Brown notes, this is a direction Derrida gestures toward in *Rogues*, when he questions whether democracy is a political concept.<sup>215</sup> The impasses encountered by the critique of modern political authority thus point toward a reconsideration of the conditions of possibility of ‘politics’ and ‘the political’ as a distinct realm of thought and action.

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I began this essay by framing the problem of critiques of sovereignty in terms of two competing claims: that sovereignty is manifested in an exceptional decision that takes place in a singular moment beyond the boundaries of political order; and that sovereignty is the effect of governmental practices of population management, practices that work within political order through everyday procedures of normalization. As particular accounts of the limits of the political, these claims appear strikingly opposed. Yet what they are in relation to sovereignty is the expression of its central problematic—the origins and legitimation of authority. Not only that, the concepts used to designate

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<sup>215</sup> Brown, *Walled States*, 52. See also Jacques Derrida, *Rogues: Two Essays on Reason*, trans. Pachale-Ann Brault and Michael Naas, (Stanford, CA: Stanford University Press, 2005), 39.

each of these constellations of claims—exception and governmentality—when examined in the texts in which they are originally elaborated, become indistinguishable from one another. Neither Schmitt nor Foucault can produce a stable account of the location of modern political sovereignty; the boundaries they draw between sovereignty and governmentality, norm and exception continually dissolve into aporetic uncertainty.

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