# After the Rule of Law: The State and the State of Exception in an Age of Globalization

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Carl Schmitt was the great theorist of the state of exception, of the constitutive role extra-legal power played in the theory and practice of politics. But the idea of extra-legality that Schmitt discusses is not a timeless one, as his most famous aphorism makes clear: "sovereign is he who decides on the exception."[1] The state of exception founds *sovereign* power and, as Schmitt's contrast with Roman law in *Die Diktatur* makes clear, he recognizes that modern sovereignty is a historically specific political arrangement. Furthermore, it is an arrangement which may be nearing the end of its history. Although nation states show no sign of disappearing, processes of economic and political globalization are redistributing the powers traditionally held by states and altering the way in which they rule. So we might expect to see Schmitt rendered irrelevant, the state of exception consigned to history. Instead, the opposite is true; contemporary global politics is characterized

by continual appeals to exceptionality. This is most starkly true of politics after 9/11, but it would be a mistake to think that the terrorist attacks *caused* this appeal to the exception. The opposition of exception to law was visible in, for example, humanitarian intervention in Kosovo or economic intervention in response to Latin American debt crises. So, as the state of exception was integral to Schmitt's analysis of the sovereign state, new forms of exceptionality may help us understand changing post-state forms of politics.

Giorgio Agamben puts forward an alternative account of the state of exception, based on Walter Benjamin's suggestion that a state of emergency functions in a kind of suspended time.[2] This idea of a new state of exception arising with globalization, and supporting a different ontology than that of the sovereign state, is similar to the concept of empire put forward by Michael Hardt and Antonio Negri. They argue that states with particular locations and a particular temporal justification are being replaced by an empire that is unconstrained in time or space.[3] In what follows, I will largely work within the schema of Hardt and Negri, attempting to show how alternative theoretical perspectives (concentrating on the state of exception) and historical analogies (drawing on the early-modern Spanish, rather than the ancient Roman, empire) can clarify some of their ideas and emphasize their practical relevance to contemporary politics.

To begin with the theoretical, Benjamin introduces the concept of messianic time to explain how a state of emergency can represent a rupture with a previous, historically determined political system. In this way, rather than being organized around the future, messianic time is centered on the messiah's existence in the present. The political upshot of this is an attempt to create a justification for the political system immanent in the political sphere. This is another element that Hardt and Negri associate with their concept of empire. They contrast the justification given for the rule of empire, which refers to immediate necessities (for example, the need to stop a presently occurring humanitarian catastrophe), with the historical scheme of rights which tied the

justification of a state to a particular time and place. Both cases, however, share an approach to politics which can be contrasted with the medieval approach, in which the goals of political action were considered as part of an explanatory framework for a politics that was literally God-given, and so in no need of justification. Both the modern state and the postmodern empire are responses to an emphasis on the contingency of politics, on the weakness of any political action in the face of chance or opposition. The intellectual-historical significance of this idea is emphasized by Pocock, who places it at the beginning of a tradition running throughout modern politics. Hardt and Negri go further, seeing in this contingency an alternative political tradition, which they connect with renaissance republicanism and, in particular, the idea of politics as the common self-direction of citizens. This is why the idea of messianic time is politically significant: in its complete rejection of a temporal ground for politics, it rules out the contingency which, for Hardt and Negri, is an essential feature of worthwhile politics.

The archetype of atemporal theory, against which renaissance republicanism was a reaction, and which we can use to think about contemporary atemporal politics, is medieval scholastic political philosophy. I shall draw in particular on the late Spanish scholastic Francisco de Vitoria, who applied this framework to early Spanish imperialism, but the preliminary points apply to scholasticism in general. The Aristotelian metaphysics, which is central to scholasticism, understands change in terms of purposes that are immanent in the world. This leads to a teleological account of politics, in which particular political circumstances are explained not by their historical causes, but rather by their adherence to the inherent purposes of political communities. This method of explanation by justification, as I shall attempt to show, also applies to contemporary politics, where considerations of policy can only be understood using an ethical vocabulary. The way such ethical vocabulary can be explanatory can be made clearer by looking at Vitoria's discussion of sixteenth century Spanish imperialism, and in particular the reason he gives for

rejecting juridical arguments which would separate the justification of empire from the nature of its practice. This juridical style of argumentation was to become the dominant mode of political theorizing with the rise of natural rights theories which supported the transition from the essentially medieval political communities countenanced by Vitoria to the modern sovereign state. For that reason, it is worth looking at Vitoria's criticism of this style of theory in a period when the sovereign state increasingly seems to be an inadequate limit of political analysis. Arguments such as Vitoria's remind us of the historical specificity of sovereignty, and this can be emphasized by considering the very particular political problems sovereignty was designed to overcome. We can see this in Hobbes, where the institution of the sovereign is put forward as a solution to the contingency of the political.

This history of political theory provides a background against which to think about contemporary political practice. These abstract political ontologies are manifested by concrete social and political arrangements. Foucault describes the particular social arrangements which reproduce a sovereign political system, both in its absolutist and later liberal-democratic forms. This disciplinary society described by Foucault is being transformed by changes both in the organization of everyday life and in the high politics of international relations, as we would expect if a general ontological reorganization of politics is taking place. We can see this in the mirror image relationship between two contemporary phenomena: humanitarian intervention, justified in terms of just war theory, and increasingly fine-grained and diffuse control in the domestic sphere. As Agamben says, both display the form of a "right of the police," or, we might say, of a generalization of the state of exception, so that it is no longer contrasted with a state of normality, but is construed as permanent and immanent in every part of political and social life. This, then, is the political significance of messianic time, which creates a direct political confrontation around the attempt to maintain a permanent state of emergency.

## I. Central theoretical concepts: messianic time, immanence and contingency

The particular idea of permanence associated with the state of exception is that which Benjamin associates with messianic time. In the religious conception, the arrival of a messiah represents the achievement of perfection and the culmination of the movement of history. Because of this, any change or development after the arrival of the messiah is impossible. This has taken a particularly paradoxical form in Christianity, which stipulates that the time we are living in *now* is this post-messiah period. Christian eschatology posits a period between the arrival of the messiah and the apocalypse, a period of waiting in which time is suspended, and any change is impossible. Messianic time represents, for Benjamin, a rupture with history and in this lies its analogy with the state of exception. Agamben draws some more concrete political conclusions. A state of emergency founded on messianic time would be an intrinsically permanent state of emergency, one which was not, even in theory, intended as a movement towards a state of normality, because such a radical change (exception to normality) is not possible in messianic time. This is why Agamben emphasizes that the state of emergency discussed by Benjamin is very different from the state of exception central to Schmitt's theory. For Schmitt, the state of exception is what stands behind the law. Its aim, Agamben says, "is to make the norm applicable by a temporary suspension of its exercise."[4] Benjamin suggests that the state of emergency has become an end in itself. "Once the possibility of a state of exception, in which the exception and the norm are temporally and spatially distinct, has fallen away, what becomes effective is the state of exception in which we are living."[5] This is the importance of messianic time which, in its reference to a permanent, inescapable state neither requires nor allows any dependence on any prior or external justification.

In this way, then, messianic time deals in a certain sort of immanence. Messianic time is defined by reference to a messiah who has arrived, i.e. to an ordering principle that exists entirely *within* the messianic state. Politically, this immanence depends on establishing purposes or structuring principles within the political system itself. This can take two forms. The first is metaphysical, depending on an understanding of purpose as a fundamental constituent of the world. On this view, politics and political institutions are natural, part of a very general system of purposes which pre-condition (by providing the immanent purposes for) all purposive actions. The other form of immanent political theory, on the other hand, is entirely political, seeing purpose not as natural, but as entirely the creation of political activity. Both cases, however, can be distinguished from a political theory which sees the political sphere as ordered by something quite external to it. Within modern political theory, this distinction arises as that between constituent and constituted power. Negri discusses the relationship between the two, with constituent power, immanent in the population, constructing a constituted order which constrains but is not itself amenable to change by political processes.[6] This process of constructing a transcendent political order is described by Hardt and Negri as the dual character of modernity,[7] a tension between immanence, connected with republican forms of self-government, and the transcendence inherent in the idea of a sovereign state.

The justification of the state is historical in form; the social contract has the form of an event (although all contractarians agree that it was not really a single historical event), and it is this genesis of the state out of temporal disorder (the state of nature) which gives it its stability. This historical process necessarily takes place in a particular location, and so juridical sovereignty requires a specific territory for its application. The Westphalian rights which constituted sovereignty for 300 years, defined by Keohane as "the exclusion of external authority structures from the decision-making process of a state,"[8] requires a boundary where this exclusion can take place. This is not merely a legal

formalism; the cultural and economic processes which supported Westphalian sovereignty also depend on this division.[9] This division constrained the ways in which sovereignty could act—the rule of law at home, war and colonialism abroad.

The specific location of sovereignty is related to the *contingency* of the political. A particular space and time give rise to a political authority, which then relies on this spatial and temporal genesis in order to stabilize itself. Foucault analyzes the development in the operation of sovereignty from the centralization of the absolutist monarch to the dispersal to particular locations throughout society.[10] In both cases, however, sovereignty functions by being applied at specific, definable locations.

In contrast to this understanding of politics in terms of control and management of difference and chance, an alternative political tradition sees this very diversity and contingency as the defining feature of the political. This includes renaissance republicanism and contemporary neo-republicanism (for example, the work of Quentin Skinner), and contemporary political theories of constituent power (as put forward by Negri, for example). This embrace of the contingency of the political is in marked contrast to the modern political system, which appeals to the state of emergency precisely as a way of controlling contingency.

## II. The historical forms of these concepts: republicanism and scholasticism

Schmitt's theory of the state of exception is centered around this kind of control of contingency. The key feature of Schmitt's use of the state of exception is that the emergency is always potential, always a possibility, and this possibility licenses the law laid down by the sovereign. This nearness of crisis, on which the sovereign's power depends, is a general feature of modern systems of government. Pocock calls this moment of crisis in which modern politics takes place the "Machiavellian moment," which he describes as "the moment in conceptualized time in which the

republic was seen as confronting its own temporal finitude, as attempting to remain morally and politically stable in a stream of irrational events seen as essentially destructive of all systems of secular stability."[11] He uses the same term for the *historical* moment when, with authors such as Machiavelli and Guiciardini, this idea entered our political tradition. Pocock distinguishes the medieval concept of the political, which tended to see the political community as something ordained by God and so contrasted with the disorder of the secular (temporal) world, and the republican conception of politics, which considered the republic as fundamentally a human creation and a part of the secular world. This is why *fortune* is particularly important in post-Machiavellian political theory: the characteristic feature of secular time is its meaninglessness, its arbitrariness; if politics is an entirely secular matter, it too will be subject to arbitrary chance, to fortune. The characteristic humanist opposition of virtue to fortune is a humanist response to this situation, an attempt to ground the republic politically rather than metaphysically, politics arising from human action (the action of the *vir*) rather than the eternal order of things.

The republican conception of politics is distinguished from its teleological predecessors and liberal successors by its insistence that this contingency is an essential part of politics. This conditions, in particular, the republican account of political *action*. In contrast to the liberal idea of the citizen as the bearer of rights, i.e. as essentially passive (or at least, not as essentially active), republican citizens are defined by taking an active part in the political life of the community. Skinner emphasizes that this does not depend on some teleological conception of the proper ends of human nature, as the positive conceptions of liberty favored by communitarians do.[12] The republican conception does not privilege any particular outcome of the political process, but does insist on the constitutive importance of involvement in that process; in Aristotelian terms, it emphasizes the efficient cause over the final or formal causes of human social action.[13] This image of citizenship leads to a very different vision of

politics, and arises from a very different account of the social nature of human beings than the accounts of politics depending on control over the state of emergency, which we see in both sovereign states and today's permanent state of emergency.

The independence of the citizen prized by republicans can be articulated in two forms in contemporary politics. One is opposition to dependence on the political system, to a mediated form of political organization which might fail to respect the citizen's own desires. The target here is the classical theory of sovereignty, whether in its absolutist or constitutional forms. The denial of the unmediated power of the multitude which we see in Bodin and Hobbes is the fundamental feature of this theory, which then proceeds by constructing an external political power, setting the order of the historically legitimated sovereign against the present desires of the disordered multitude. If the state mechanism which transforms this ideology into a concrete power structure loses its force, this particular form of sovereignty will decline; the possibility of alternative political arrangements is therefore opened up. These alternatives include republican politics, but also reconfigured forms of control which continue to defer the citizen's self-determination through the management of the state of emergency, using different techniques. Contemporary republicanism therefore ought to be opposed also to the state of emergency, the society of control, and certain conceptions of democracy and human rights which function by subordinating politics to ethical demands located outside time and so outside political debate.

The emphasis on contingency, which is characteristic of republican political theory, leads to a very definite grounding of politics in the temporal, in historical circumstances. This remained the dominant approach throughout the modern period, seen most clearly in realist international relations theory, which specifically rejects explanations in terms of anything other than the prevailing arrangement of power between states. Contemporary international relations theory, however, is increasingly characterized by the recognition that a discourse

concentrating on juridical relations between sovereign states is insufficient.[14] Instead, the practice of international relations is increasingly being described in moral terms, with law subordinate to these normative demands.[15] Hardt and Negri identify this as the central structuring principle of a new global political order:

> Now supranational subjects that are legitimated not by right but by consensus intervene in the name of any type of emergency and superior ethical principles. What stands behind this intervention is not just a permanent state of emergency and exception, but a permanent state of emergency and exception justified by *the appeal to essential values of justice*.[16]

It is in this dual principle that contemporary politics approaches the state of messianic time described by Benjamin. The *permanent* state of emergency provides an alternative source for politics, which rejects the historical justification of the sovereign state and replaces it with an appeal to atemporal values.

To understand this shift in global politics and its theorization, we need a general theoretical framework which will make clear the essential structure of a political system grounded on an appeal to atemporal values. Scholastic political theorists in the medieval and early modern periods saw no need to deal with crisis in their political theory, because their metaphysics did not construe the temporal as destabilizing in the way it has become for modern writers. There are two principal reasons for this. Pocock emphasizes the way in which Christian eschatology and prophecy make the fundamental dimension of change sacred, not secular. Secular events are meaningful only to the extent that they are analogically related to eschatological events; but because the sacred and the secular are radically different, these analogical secular events cannot be construed as marking any progress in the sacred sphere. Instead, these events are the intersections of sacred progress with the essentially circular secular time of waiting for eschaton. History is only comprehensible to the extent that it can be reinterpreted in terms of this eternal ground; hence the

importance of the way the pseudo-temporal sequence of eschatology begins and ends in union with the eternal, so providing a key through which secular history can be understood.

This understanding is emphasized by the Aristotelian basis of scholastic political theory, which understands change in terms of necessity. This derives from Aristotle's (and, indeed, the general Greek) belief that the "appropriate way" of knowing anything was through the universal rather than the particular.[17] Aristotle's argument that being is substance[18] is intended to ensure that the sciences study only that which persists through change, i.e. is itself eternal and unchanging. This kind of permanence is not contrasted just with the impermanent, but also with the accidental. For Aristotle, the eternal is necessary and purposive. Aristotle specifically excludes the accidental from being proper,[19] and indeed has great difficulty accounting for it at all.[20] Aristotle understands all change in terms of its end, and can therefore cast time as something comprehensible in relation to these ends, to the nature of things which remains unchanged throughout time. This is reinforced in the scholastic appropriation of Aristotle, because these immanent ends are God's purposes, and so are ultimate, both in the sense of being morally most important and ontologically fundamental.

This is politically important because of the central role it gives to morality in political theory. The scholastic-Aristotelian tradition sees the world as fundamentally imbued with teleologies which have to be understood in order to think about the political. Furthermore, this moral structure precedes human existence in the world, and so politics is constrained to run along lines laid down by this moral reality, and the moral considerations which structure politics are not amenable to human change. The nature of the constitutive role they play in scholastic and Aristotelian ontologies depends on their eternity and immutability. Pocock describes the consequent political system: "Within the limits of that [scholastic] framework, the individual employed reason, which disclosed to him the eternal hierarchies of unchanging nature and enjoined him to maintain the cosmic order by

maintaining his place in that social and spiritual category to which his individual nature assigned him."[21] An interesting example of how this works can be seen in the scholastic theory of tyranny. For Hobbes the absolutist, tyranny is merely monarchy "misliked."[22] For scholastics, however, tyranny requires greater explanation. If power arises from the ethical needs of the community, what is the nature of the tyrant's (by definition, immoral) power? The early modern Spanish scholastic Vitoria deals with this question by recourse to Aristotle's four-fold account of causation.[23] Civil power, for Vitoria, has a purpose (final cause), an agent (efficient cause) and a source (material cause). In the absence of any of these, civil power will not function, or not function correctly. The tyrant relies on the obedience of the commonwealth (the material cause)[24] but is not ethically legitimate, i.e. not serving the interests of the community (the final cause).[25] Vitoria's solution is that the tyrant rules only to the extent that he fulfils a necessary role, acting in the natural role of ruler of a community. However, to the extent he rules immorally he will have difficulty relying on the obedience of the commonwealth.[26] Here, then, Vitoria produces a framework in which tyranny can be criticized as a defective form of power – its immorality makes it function less well. For scholastic political theory ethics is not merely evaluatory or explanatory, but regulative. Teleology is completely immanent, and determines the functioning of the political system. On this view, the political is a realm of necessity, with morality (God's will) placing constraints on the kind of political arrangements that are possible.

Vitoria's moralized account of power distinguishes between those immoral activities which are merely wrong, and those whose immorality prevents a commonwealth from properly exercising power. The place of power in the world is given by its purposes; where those purposes are not being fulfilled power, properly speaking, will be absent. Thus, to the extent that a commonwealth fails to defend innocents, it loses its power and, further, this power is acquired by another prince who defends those innocents who are injured: "it follows that, if there is no

other method of ensuring safety except by setting up Christian princes over them, this too will be lawful, as far as necessary to secure that end,"[27] and, later, "it is not sufficient for a prince to give the barbarians good laws; he must also set ministers over them to ensure observance of the laws."[28] Moral debate and what we would now call the study of international relations are here completely continuous, in a way that seems very foreign to the discourses of legality or policy we find in analysis (as opposed to rhetoric or propaganda) concerned with modern international relations.

## III. Historical examples of non-sovereign political systems

Processes of economic, cultural and political globalization combine to make the sovereign state increasingly irrelevant as a political actor, and if there is no sovereign, there can be no one to decide on the exception in Schmitt's sense. Yet, as various political trends of the 1990s (humanitarian and economic intervention by supranational bodies such as NATO and the IMF, respectively) suggested, and the response to 9/11 made abundantly clear, appeals to the state of emergency have not declined at all. The lack of a global sovereign capable of proclaiming this state of emergency makes it precisely the kind of messianic state identified by Benjamin. The globalized state of emergency presents itself as permanent and inescapable (in contrast to Schmitt's state of exception, which was always directed towards a return to normality), in just the way Benjamin suggests a politics based on messianic time would.

The sovereign state arose as a response to a particular temporal problem that arose in the early modern period, the problem of the contingency of the political, or (to put it in Schmitt's terms), of the always potential state of exception. If globalization is producing a political system in which sovereignty is less important, then the apparatus of rule will increasingly be in the hands of transnational organizations operating according to technocratic teleologies (most notoriously IMF structural adjustment programs

tying the hands of elected governments), while the idea of an international legal system is increasingly being repudiated in the face of direct moral appeals and calls for humanitarian intervention. Both tactics require that the crisis not be something held at arm's length (and so negatively justifying the sovereign, for fear of dire consequences) but be equally distributed throughout global society (and so positively justifying intervention to remedy the actually existing emergencies). Like the political system described by the scholastics, this involves a system of local administrations subordinated to a wider logic (God in the medieval case, the generalized emergency today). The ongoing state of emergency provides the *telos*, the motivation and justification that is distributed throughout the "empire" of globalization. Therefore, the scholastic theory of empire, developed in the context of nascent new-world empires in the sixteenth century, can suggest an alternative way of thinking about global politics from the state-based models of international relations which are prevalent today.

Vitoria, because purpose is immanent everywhere, and so morality operates everywhere, specifically defends the prince's right and duty to take any action that improves the well-being of his people. This can similarly be seen in the way moral discourse shapes political proposals surrounding humanitarian intervention. For example, many responses to the problem of "failed states" do not attempt to replace them with successful states (at least, not if we take the Westphalian model as our paradigm of success), but instead argue for the production and, if necessary, the imposition of institutions on a state level which can play a part in the overall humanitarian project for the country or region.[29] This is not a simple cession of power to some supranational sovereign entity or to a universal imperialist power,[30] because power here is not based on the juridical authority of the "top-level" institution, but on the configuration of the whole apparatus of rule along ethical lines. This is part of what Hardt and Negri mean by their terminology of the "non-place" of contemporary sovereignty: "in this smooth space of Empire, there is no *place* of power – it is

both everywhere and nowhere."[31] The distinctive feature of ethical sovereignty cannot be located in one place, but rather can be seen in the way the whole structure is shaped by ethical demands. This form of rule is therefore appropriate to a global scale; it does not require the creation of a single, global, common power, but instead a system which at all levels operates according to one logic.

If Hardt and Negri are right that a new form of global rule is being constructed *before our eyes*, it may be difficult to analyze that developing form. A historical analogy may be useful, and one can be found in the discussions which took place in the sixteenth century on Spanish claims to empire. The claims Vitoria believes to be just depend on elements of natural law which are in principle universal. This universalism is a characteristic of Vitoria's theory as an ethical account, because the justice or otherwise of Spanish power depends on an ethical/political structure which is supposed to hold universally, rather than an argument that recognizes special rights for those in privileged positions (in this case, the Spanish). Vitoria's use of ethics is not a mere fig-leaf or exercise in casuistry; he is not just attempting to find a justification for a policy, but rather the moral terminology is an integral part of an analysis (indeed, a description) of the policy. While Vitoria's account gives the Spanish certain powers, it limits these powers and connects them with specific duties. The first just title he mentions is that "of natural partnership and communication," which seems a fairly minimal right for the Spanish. However, it has the (potential) backing of force, because "it is an act of war to bar those considered as enemies from entering a city or a country, or to expel them if they are already in it."[32] Vitoria goes on to characterize "conquering their communities and subjecting them [the barbarians]," and even "plunder, enslavement, deposition of their former masters and institution of new ones," as legitimate self-defense,[33] because "the aim of war and peace is security,"[34] and such measures may be necessary for security if "the barbarians persist in their wickedness."[35] What lies behind this reasoning is the way in

which security and peace are used both as analytical and as normative terms. A situation in which the Spanish are barred from South America, although not necessarily one of open warfare, is nevertheless not genuine peace, because the Spanish are being unjustly treated as enemies. This unjust hostility, therefore, is evidence of some deficiency on the part of the Indians – either ignorance of the intentions of the Spanish[36] or ignorance of the moral precepts which govern political conduct. In either case, such deficiencies prevent the Indians from genuinely ruling themselves.[37] Thus, Vitoria presents his moral case for intervention as explaining how Spanish power to act in South America arises.

Vitoria's moral justification of Spanish imperialism was not the only one attempted at the time. Various juridical justifications, more similar to modern realist arguments, were also put forward, and Vitoria's reasons for rejecting them clarify the structure of his argument. Attempts to justify Spanish conquests in South America in the sixteenth century generally took one of two forms.[38] Defenders of empire either denied that the American Indians could have any political rights at all (being subhuman, heathen, or natural slaves),[39] or they asserted that the Spanish had some special title to rule in South America which overrode the local political structures of the Indians. Vitoria argued against both of these positions. He rejected the idea that the Indians had no political rights on the grounds that political rights came from human nature, and so were enjoyed by all humans.[40] He then considered the potential grounds for special rights of *dominium* over South America. These claims were fundamentally historical and concerned with legitimacy, particularly in the case of the claim that the Spanish monarch, as the Holy Roman Emperor, was ruler of the whole world. This depended on a title being passed to the Spanish monarch giving him authority, rather than an analysis of the political system showing how it gave him *power*. This is a potential point of contact with the universalized state of emergency, which likewise rejects historical justification in favor of appealing to an unchanging (eternal) state of emergency.

This leads to a very different account of law from that described by Schmitt, and this can be seen in Vitoria's discussion of juridical arguments for Spanish imperialism in terms of the three modes of law recognized by the scholastics: human, natural and divine. For Vitoria, it is obvious that human law is irrelevant here, first because history shows us no positive enactments making any monarch ruler of the whole world,[41] but secondly and more importantly because human law is not self-subsistent, but requires some pre-existing law in order to create the jurisdiction of the law-maker: "[an enactment of human law] would have no force since an enactment presupposes the necessary jurisdiction; if, therefore, the emperor did not have universal jurisdiction before the law, the enactment could not be binding on those who were not his subjects."[42] This backing is given by natural law, God's purposes manifest to reason in nature. According to scholastic theory, natural law gives humans the power to set up rulers; human activity is not *excluded* from politics by the scholastics, but it is only important to the extent allowed by the overall ethical structure. Rather than founding law on human activity, as the system of sovereignty does, the scholastic system makes human law subordinate to a further set of moral demands.

There is a further set of moral commands that might be relevant, those specific laws made by God and known through revelation. However, Vitoria denies that this divine law has any *political* relevance. He objects to the attempt to derive a divine imperial mandate *specifically* for the Spanish monarch, objecting to the idea of a "special gift of imperial power from God,"[43] in the cases of Nebuchadnezzar and the Roman emperors. Neither does he have any sympathy for the idea that the Holy Roman Emperor might have inherited authority over the world from Christ.[44] The role played by God in political systems is not via his specific interventions[45] but by the distribution of natural law throughout the political sphere. The key feature of Vitoria's account is that political power arises not from some external force imposing these ethical demands on politics, but on the fact that the world is structured along inherently normative lines. The key feature

of the law that Vitoria appeals to is its universality. Unlike modern systems based around sovereignty, where the areas of application of law are specifically constrained, the scholastic system makes the whole of human life subject to natural law. This is similar to the permanent state of emergency we see today, where the rule of law is increasingly subordinated to the demands of humanitarian intervention or national security.

## IV. Sovereign politics from Hobbes to the present

For Hobbes, writing in opposition to the republican revolutionaries of the Civil War, a politics which depends on the instability of the political sphere appeared disastrous. Hobbes dramatizes the ongoing, generalized conflict of the Civil War as the "warre of every man against every man," the natural condition of mankind.[46] Because he recognized the existence of this state of instability, Hobbes could not make use of the medieval metaphysical solution which located politics outside of the realm of fortune. Instead, he proposed a political solution which can exclude this instability. This method is the institution of the sovereign. The sovereign's function is to replace the damaging disorder of the multitude with the single will of the sovereign. Because the sovereign is a single person (in Hobbes's sense, that is, it has one will, although it may be made up of many human beings),[47] it is not subject to the instability of politics, that instability which attends *collective* action. Hobbes's solution to the instability of politics is to make the citizen's only political act a renunciation of politics; the state is founded when the citizens give up their rights of self-direction.[48] The key feature of sovereignty, then, is the solution of the problem of instability in politics through the alienation of power from the community to something separate from it. Hobbes theorizes the specifically absolutist form of this alienation of power, which works by creating a sovereign who "by this Authority, given him by every particular man in the Common-Wealth, he hath the use of so much Power and Strength conferred on him, that by terror

thereof, he is inabled to conforme the wills of them all."[49] Later constitutional and democratic forms of sovereignty function differently, but they continue to confront the problem of stability by requiring that citizens alienate their power in order to produce something outside the political community with the power to structure and stabilize that community.[50]

This is the sovereign's genetic connection with the state of exception, as noted by Schmitt. The whole of the political system based around the sovereign depends, on the one hand, on the exclusion of crisis from the political realm, and, on the other, in the ever present *threat* of crisis lurking just outside the constitutional order. Again, this can be seen very clearly in Hobbes. It is essential to Hobbes's account that the sovereign remain in a state of war with respect to his subjects, being the only person not subject to the original covenant.[51] To subject himself to the law would destroy the sovereignty, and so destroy the very grounds for those laws. This need for the peculiar status of the sovereign (and with it, the need for the state of exception) comes from Hobbes's account of power. The natural condition of mankind, according to Hobbes, is characterized by diffidence or mistrust.[52] This diffidence undermines any attempt at cooperation. Without a sovereign, we can have no assurance that anything we might achieve will not be taken from us by force, and so the only way to secure our livelihoods is for each person to extract as much as *they* can by force. As Hobbes puts it, from equality proceeds diffidence, and from diffidence, war.[53] In this way, Hobbes atomizes power – in the state of nature, we can only rely on our own individual abilities for our protection.

Further, Hobbes precludes any possibility of self-organization. The multitude are directionless and hence impotent:

> And be their never so great a Multitude; yet if their actions be directed according to their particular judgments and particular appetites, they can expect thereby no defense . . . For being distracted in opinions concerning the best use and application of their strength, they do not help, but hinder one another; and reduce their strength by mutual opposition to nothing.[54]

This conclusion is deeply rooted in Hobbes's philosophical anthropology. In Hobbes's reductively materialist account of agency, to act is simply to be caused to move by a will, defined as "the last Appetite in Deliberation."[55] A multitude is by its nature heterogeneous, and so has no single last appetite of the required sort. A multitude therefore cannot be an agent, and so for Hobbes a group of autonomous, self-directing individuals has no collective power.[56] The common power of the commonwealth therefore has to be constructed as something separate from the multitude that makes it up. This account of the nature of pre-political man is used by Hobbes to ground the necessity of the sovereign. The multitude are constitutively incapable of acting, and so politics depends on the construction of "a common power." Hobbes asserts that the only way for such a power to exist is for each person to "conferre all their power and strength upon one Man, or upon one Assembaly of men,"[57] that is, to give up their power of self-direction. This applies even in a democracy. Hobbes insists that a popular assembly of all the people is, as a representative, a different thing from the unrepresented multitude that preceded the covenant.[58] The only way a group can act is by creating a representative, by transferring its (potential) power to something strictly separate from the group. On Hobbes's account, political power is only possible when alienated from the political community. Thus, because of the specific way in which Hobbes constructs political stability, he is able to present the sovereign as the only way of dealing with this instability, by excluding it altogether.

The political theory which emphasizes the isolation of individuals corresponds to a particular political organization which operates on these individuals. The defining feature of the nineteenth century system Foucault analyses in particular detail in *Discipline and Punish* is its employment of specific locations, which Foucault calls "disciplines," where subjects' activities can be controlled in minute detail (the school and the barracks are two of Foucault's most detailed examples). These procedures shape society in such a way as to allow its very precise regulation:

"generally speaking, it might be said that the disciplines are techniques for assuring the ordering of human multiplicities."[59] Foucault goes on to explain that this is the concrete method by which the ontology of traditional sovereignty is constructed, describing the growing employment of disciplinary power by the state as "a complex function since it linked the absolute power of the monarch to the lowest levels of power disseminated in society."[60] Foucault uses Bentham's idea of the panopticon as a metaphor for this relation (or, as he puts it, "a diagram of a mechanism of power reduced to its ideal form")[61]. The central observer orders the disciplinary practices taking place throughout the panopticon.[62] This, then, is the concrete machinery by which the sovereign system identified by Schmitt at the level of abstract political theory operates. Schmitt's theory was that the sovereign power depends on control over the state of exception, the ability to exclude it while maintaining its possibility. Foucault's analysis shows how this exclusion of disorder functions via the central control of individual subjectivities.

## V. The growing similarity of foreign and domestic policy: just war theory and the society of control

This feature of specific location which corresponds to modern politics and modernist political theory will no longer apply if the underlying structure of politics is changing. One change, consistent with a decline in sovereignty, is a decline in the distinction between foreign and domestic politics. Agamben describes the increasing analogy between government and police powers.[63] We can see this in the way in which foreign and domestic policy, which for the modern and sovereign state functioned along entirely separate lines, are increasingly coming to resemble one or another sort of police action: intervention or surveillance. This ability to ground a political order without reference to bounded states is the point of contact between scholastic moral intervention and the global state of emergency, and explains the utility of each in periods of nascent imperialism

and ongoing globalization, respectively. The global state of emergency, in other words, does not institute a police state so much as *replace* the state with a kind of globalized police.

The political privileging of morality allows the permanent state of emergency to function without location, and also without borders. Sovereignty is related to space in a way analogous to its relation to time: juridical sovereignty requires a specific territory for its application. The Westphalian system of rights, to return to Keohane, is defined by "the exclusion of external authority structures from the decision-making process of a state,"[64] and as such requires a boundary where this exclusion can take place. We can see how this relates to the political theory of Vitoria by considering its connection to the ethical/political philosophy of Michael Walzer. Walzer extends his endorsement of an idea of defensive war (depending on an internal idea of sovereignty) to include a wide ranging right (and indeed duty) of humanitarian intervention.[65] As Hardt and Negri write, "the traditional conception of the just war involves the banalization of war and the celebration of it as an ethical instrument."[66] By justifying war by making it an element of an ethical system, Walzer licenses the *systematic* use of force (as Vitoria did before him in a similar ethical treatment of just war). This philosophical possibility is made actual by contemporary politics. A permanent state of emergency on a global scale is a permanent state of war, in Hobbes's sense that "WARRE consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known."[67] A permanent state of emergency is not just a state of time in which intervention is a possibility, but an organization of the global political system in which a tendency to intervention is "sufficiently known," i.e. a fundamental part of the system.

An analogous reconfiguration is taking place below the level of the nation-state, where the permanent state of emergency manifests itself as an increasingly diffuse surveillance and control distributed throughout society. As at the transnational level,

permanent emergency replaces a notion of rule which depends on restriction (characterized by specific laws with constrained domains of application) with one which is essentially unconstrained. Acting however is required to achieve its goals, rather than obeying any definite rules. This, as Hardt and Negri say, is legitimated by its *effectiveness*,[68] and so like the scholastic account of politics, power in the permanent state of emergency operates according to a moral, rather than a juridical, logic. In such a logic, power is not easily identified with the state or governmental apparatuses. Instead, to study the system of rule in the contemporary state of emergency, we need what Foucault calls a "microphysics of power"[69] by which he means a study of the overall effect of many individual applications of power, rather than a general overarching thesis about some essence of power. Foucault's primary claim here is that power is not something that can be isolated from the social activity of human beings, but rather is produced through that activity: "relations of power are not in a position of externality with respect to other types of relationships . . . they have a directly productive role, wherever they come into play."[70] Power is the result of particular social arrangements and operates via the structuring of human social existence.

*Discipline and Punish* is centered around the change from an absolutist to a disciplinary form of sovereignty. The later stages of this development provide the background for further changes in politics connected to processes of globalization. Gilles Deleuze, taking Foucault's analysis of the disciplinary society as his starting point, identifies a new set of arrangements, the "societies of control," which are in the process of replacing disciplinary society.[71] The societies of control replace the specifically located apparatuses that produce power with "ultrarapid forms of free-floating control,"[72] distributed throughout society. The societies of control are pre-figured in Foucault's analysis of delinquency,[73] an extension of the disciplinary mechanism based on the prison to those who are not (yet) in custody. "For the observation that

prison fails to eliminate crime," Foucault writes, "one should perhaps substitute the hypothesis that prison has succeeded extremely well in producing delinquency."[74] These delinquents are then always subject to surveillance and control, whether they happen to be in prison or not. Rather than specific moments of the construction of power and the deferral of corruption, there is constant modification and redirection of power, what Deleuze calls "*endless postponement* in (constantly changing) control societies."[75] This feature of the increasing distribution of control throughout society, in both organs of the state, for example welfare provision or police surveillance, and in the private sector (corporations and the media), corresponds to the messianic temporality of the permanent state of emergency. In the societies of control, sovereignty does not function through specifically (temporally and geographically) located disciplines. The disciplines operated according to a temporal logic exemplified by a specific period of schooling or the detailed timetable of the factory day. Instead, the society of control is omnipresent and unconstrained, operating according to an eternal logic which allows it to intervene in any place and at any time. The paradigm here is the omnipresence of the media or the "flexitime" of increasingly proletarianized white-collar employment.[76]

## VI. The contemporary crisis as an immanent, direct confrontation

The key to this increased distribution of political control to every sphere of life is a distribution of the idea of crisis which underpins politics. Recourse to an ethical standard outside the temporal can therefore offer a solution to something that was simply not a problem for Vitoria: the stability of the commonwealth in time. Connecting politics to ethics in this way presents a new form of the strategy for which Hobbes employed the overarching power of the absolutist sovereign. The sovereign unites the previously disordered multitude and allows it to act; thus, the only way we can employ our creative political energies

is to cede them to the sovereign. The permanent state of emergency works similarly: the subordination of contingent human political creativity is supposed to ensure the stability of the commonwealth. In this way, the permanent state of emergency remains within the modern problematic of temporality (and so is not a simple reactionary return to the middle ages; rather, it retains the modern emphasis on crisis), but immediately limits the dangerous instability of the modern world by subordinating it to an eternal order of value. In its operation, therefore, contemporary politics will have a certain resemblance to pre-modern rule. The society of control functions by referring every social interaction to an eternal standard; by thus distributing the ethical throughout the temporal world, the permanent state of emergency replaces the concentrated power of the mortal God with the unlimited influence of an artificial nature.

This, then, is how a permanent state of emergency can function as a globalized political system. This, of course, raises a further question – what political action is possible in this state? Perhaps we can turn to another remark of Benjamin's: "our task to bring about a real state of emergency."[77] Now that the state of emergency exists everywhere, what would this mean? Possibly, we can take something from the analogy I have been drawing between the permanent state of emergency and the medieval political system. The radical early-modern challenge to static accounts of politics came from republican political theories which secularized politics, rejecting any transcendent foundation. A similar response is possible today, by rejecting the stage-managed "crisis" of the permanent state of emergency, and embracing the genuine instability of human self-direction that has always constituted republican politics.

Certain features of the global state of emergency we can see developing, then, are similar to the globalized ethical rule described by Vitoria. The unlimited scope, both geographically and conceptually, of globalized power structures, as well as their lack of definite locations, resembles the nascent European empires as described by Vitoria. They also share a common ontological

feature in their reliance on an atemporal and teleological organizing principle: God for Vitoria, modern ideologies of human rights and economic efficiency in the contemporary case. This is the other target of republicanism, which refuses to countenance the dependence of human social and political arrangements on something prior to human action. This idea of republican self-creation is radically democratic in that it places no restrictions on the will of the population exercised in common. It is opposed equally to the teleological essentialism of Aristotelian political theories (taken up today by communitarians) in which politics is constrained by a pre-existing human good, and the rights-based essentialism of liberals (seen today most strongly in Rawls' conception of political liberalism) in which ethical (rights-based) constraints are not up for political debate. To both these limited views of democracy, republicanism opposes a view which makes both means and ends subject to politics, a view based on the notion of the self-creation of the political community. On an ontological level, the republican location of politics entirely within the human and contingent sets it against the transcendence at the core of the use of morality by the contemporary state of emergency. On a political level, republicanism must seek to raise questions about the fundamentally apolitical and anti-democratic nature of contemporary conceptions of human rights and humanitarian intervention.

Contemporary politics is rapidly changing, a new globalized form of rule developing in the wake of the slow decline of the post-war liberal democratic consensus, and the even slower decline of the enlightenment idea of the nation state. Some old ideas can be helpful in understanding this change; the state of exception, which Schmitt used to analyze the crisis of liberal democracy, can be seen to be still functioning, if in a very different way, in post liberal-democratic politics, and political theorists such as Vitoria, who preceded the enlightenment, can be seen to have a surprising relevance to post nation state politics. The state depends on, and supports, a very specific sort of politics; historical study can remind us that there are other politics. In this

way, we can see how a generalization of the state of emergency produces a political system in which old categories and forms, such as the rule of law or the distinction between aggressive and defensive wars, are no longer relevant. Historical analogies can also expose some of the weak points in a system, and so some of the tactics by which we may provoke change; in this case, the generalization of the state of emergency means that the liberatory state of crisis, in which the political order is purely a human creation, is always close at hand. Schmitt contended that the exception was more important than the rule in understanding politics; now that there is nothing *but* a state of exception, his advice is even more vital.

## Notes

[1] Carl Schmitt, *Political Theology* (Cambridge: MIT Press, 1985), 5.
[2] Giorgio Agamben, "The Messiah and the Sovereign: The Problem of Law in Walter Benjamin," *Potentialities: Collected Essays in Philosophy* (Stanford: Stanford University Press, 1999), 160.
[3] Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000), xiv.
[4] Giorgio Agamben. "The State of Exception," in *Øyes makeworldspaper #3* (makeworlds, 2003), 10-11.
[5] *Ibid.*
[6] Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizia Boscagli (Minneapolis: University of Minnesota Press, 1999).
[7] Hardt and Negri, *Empire*, ch. 2.1.
[8] Robert O. Keohane, "Political Authority after Intervention: Gradations of Sovereignty," *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, J. L. Holzgreffe and Robert O. Keohane, eds., (Cambridge: Cambridge University Press, 2003), 275.
[9] For the former, see Edward Said, *Orientalism* (New York: Penguin, 1978), ch. 2. For the latter, see Paul Gilroy, *The Black Atlantic: Modernity and Double Consciousness* (London: Verso, 1993).

[10] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Penguin, 1979), *passim*.
[11] J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975), ch. 2.
[12] Quentin Skinner, "The Idea of Negative Liberty: Machiavellian and Modern Perspectives," *Visions of Politics*, vol. 2 (Cambridge: Cambridge University Press, 2001), 190.
[13] The use of this terminology in this context comes from Hardt, who produces a theory with interesting similarities to Skinner's from the very different background of poststructuralist theory rather than early-modern history. See Michael Hardt, *Gilles Deleuze: An Apprenticeship in Philosophy* (London: UCL Press, 1993), especially ch. 4.
[14] See, for example, Tamle Barbani and Mark Luggey, "Retrieving the Imperial: Empire and International Relations," *Millennium* 31(2002), 109.
[15] See, for example, discussions of intervention in Kosovo that draw on the idea of "illegal legal reform," such as Allan Buchanan, "Reforming the International Law of Humanitarian Intervention," *Humanitarian Intervention*, Holzgreffe and Keohane, eds., 30.
[16] Hardt and Negri, *Empire*, 18, emphasis in original.
[17] Aristotle, *Metaphysics*, trans. Hugh Lawson-Tancred (New York: Penguin, 1998), 982a.
[18] *Ibid.*, 1028a, b.
[19] *Ibid.*, bk. E, ch. 2.
[20] Aristotle, *The Physics*, trans. Philip H. Wicksteed and Francis M. Cornford (London: Heinemann, 1952), 197a.
[21] Pocock, *Machiavellian Moment*, 49.
[22] Hobbes, *Leviathan*, 130.
[23] Which is the very point where Hobbes attacks Aristotelian ontologies, see Thomas A. Spragens, *The Politics of Motion: The World of Thomas Hobbes* (London: Croom Helm, 1973).
[24] Francisco de Vitoria, *Political Writings*, ed. and trans. Anthony Pagden and Jeremy Lawrence (Cambridge: Cambridge University Press, 1991), 42.
[25] *Ibid.*, 10.
[26] As can be seen from *ibid.*, 11.
[27] *Ibid.*, 226.
[28] *Ibid.*, 228.

[29] For example, Michael Ignatieff, "State Failure and Nation Building," *Humanitarian Intervention*, Holzgreffe and Keohane, eds., 299.
[30] As suggested by Barbani and Luggey, "Retrieving the Imperial," 109.
[31] Hardt and Negri, 90. The idea of a "non-place" is used in various senses in *Empire*, not all clearly reducible to the sense I am talking about here.
[32] Vitoria, *Political Writings*, 278.
[33] *Ibid.*, 283.
[34] *Ibid.*
[35] *Ibid.*
[36] Which is an "innocent" fault, see *ibid.*, 282.
[37] Vitoria is adamant that they have *dominium* in principle, see *On the American Indians*, q. 1. Nevertheless, if they have *dominium* and fail to exercise it, or to exercise it correctly, their power is weakened, see Vitoria, *Political writings*, 251.
[38] Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500-c.1800* (New Haven, CT: Yale University Press, 1995), ch. 2.
[39] The most famous example of this view can be seen in the arguments put forward by Juan Ginés de Sepúlveda in his debate with Bartolomé de las Casas, which is examined in detail in Lewis Hanke, *All Mankind is One: A Study of the Disputation between Bartolomé de Las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (DeKalb: Northern Illinois University Press, 1974).
[40] See Vitoria, *On the American Indians*, q. 1, in *Political Writings*.
[41] Vitoria, *Political Writings*, 257.
[42] *Ibid.*
[43] *Ibid.*
[44] *Ibid.*, 256.
[45] Which is dangerously close to the heretical view that political power comes from God's grace, which Vitoria attacks (*On the American Indians*, q. 1, art. 2).
[46] *Ibid.*, 90.
[47] *Ibid.*, 111.
[48] *Ibid.*, 120.
[49] *Ibid.*
[50] A brief discussion of the development of post-absolutist forms of sovereignty in these terms is given in Hardt and Negri, *Empire*, 78-90.

[51] Hobbes, *Leviathan*, 122.
[52] *Ibid.*, 87.
[53] *Ibid.*
[54] *Ibid.*, 118.
[55] *Ibid.*, 47.
[56] *Ibid.*, 62.
[57] *Ibid.*, 120.
[58] *Ibid.*, 129.
[59] Foucault, *Discipline and punish*, 218.
[60] *Ibid.*, 215.
[61] *Ibid.*, 205.
[62] *Ibid.*, 206.
[63] Giorgio Agamben, "Sovereign Police," in *Means Without Ends: Notes on Politics* (Minneapolis, MN: University of Minnesota Press, 2000), 103.
[64] Keohane, "Political Authority," in Holzgreffe and Keohane, 275.
[65] Michael Walzer, *Just and Unjust Wars* (New York, NY: Basic Books, 2000), ch. 6.
[66] Hardt and Negri, *Empire*, 12.
[67] Hobbes, *Leviathan*, 88.
[68] Hardt and Negri, *Empire*, 34.
[69] Foucault, *Discipline and punish*, 26.
[70] Michel Foucault, *The History of Sexuality, vol. 1*, trans. R. Hurley (London: Allen Lane, 1979), 94.
[71] Gilles Deleuze, "Postscript on Control Societies," trans. Martin Joughtin, *Negotiations* (New York, NY: Columbia University Press, 1995), 177.
[72] *Ibid.*
[73] Foucault, *Discipline and punish*, pt. 4, ch. 2.
[74] *Ibid.*, 277.
[75] Deleuze,"Postscript on Control Societies," 179.
[76] For the relation between the changing nature of working conditions and forms of control, see Maurizio Lazzarato, "Immaterial Labor," in Paolo Virno and Michael Hardt, eds., *Radical Thought in Italy: A Potential Politics* (Minneapolis, MN: University of Minnesota Press, 1996), 133.
[77] Walter Benjamin, "Theses on the Philosophy of History," *Illuminations* (New York, NY: Schocken Books, 1969), 253.