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## Democratic States of Unexceptionion

### *Toward a New Genealogy of the American Political*

William J. Novak, Stephen W. Sawyer, and  
James T. Sparrow

Extemporize all government.

Ralph Waldo Emerson

Post-1989, social commentary on the arc of modern American history trumpeted the end of the Cold War with paeans to American exceptionalism, neoliberalism, and the end of history. Post-9/11, such assessments lost none of their audacity, but shifted attention to a darker, more dangerous national trajectory: from exceptionalism to exception; from civil society to executive decision; from economic and political liberty to necessity, emergency, security, and empire. Both discourses are one with their present rather than histories of the present.

But exceptionalism and exception also share another common denominator: both modes of analysis turn on deceptively conventional renderings of American law and statecraft within an essentially liberal tradition. Despite the huge differences that separate the exceptionalism and state of exception frameworks, in the American context, the interpretive baseline remains largely the same. The concept of law in most such renderings is abstract, doctrinal, and “formal,” featuring a stark separation of law from politics, legislative from executive power, and the rule of law from democracy. Similarly, the concept of the state as it figures in both exceptionalism and exception modes remains ineluctably “bureaucratic” – in a word, “Weberian.” The prevailing rendering of the state “brought back in”<sup>1</sup> through such interpretations depicts the kind of state predominant in nineteenth-century continental Europe – centralized, administered, rational, official, and monopolistic vis-à-vis the “legitimate use of force within a given territory.”<sup>2</sup> In both exceptionalist and exception

literatures, administration remains something of the “sine qua non of modernity,”<sup>3</sup> and Max Weber’s “legal authority with a bureaucratic administrative staff” the archetype of a modern state transcending democracy.<sup>4</sup> Finally, such a formal concept of the state and law meshes only too well with a narrowly conceived liberal understanding of the American political tradition. In both its 1950s consensus and 1980s neoliberal manifestations, an emaciated reading of liberalism valorizing individual rights, negative liberty, constitutional limitations, and laissez-faire economics undergirds both exceptionalist and exception paradigms. What Louis Hartz dubbed “the master assumption of American political thought,” namely, the “reality of atomistic social freedom,” continues to frustrate efforts to come to terms with the actual nature of collective social power in modern American democracy.<sup>5</sup> Together, the concepts of formal law, bureaucratic state, and classical liberalism make for a formidable synthesis of the modern political imaginary. But it is a synthesis that consistently insulates the American political tradition from the more robust and comparative history and theory of the state that is one of the collective goals of this volume.

Indeed, reigning interpretations of American exceptionalism and exception have often had more in common with ideology than historical sociology. On the right, of course, new legal formalism and market fundamentalism cut their teeth on opposition to bureaucratic state planning and interventionism, resuscitating the optimistic and orthodox dream of a classical and minimalist liberal state as simply a “neutral site” or night watchman.<sup>6</sup> On the left, deployment of some of the same tropes yields an equally powerful portrait of imperial administrative bureaucracy and executive emergency power underpinning everything from new social and cultural policing at home and abroad to the mechanics of the modern carceral state. Here the conception of governance and statecraft is much in sync with the liberal state’s pessimistic alternative – what Michel Foucault talked about as Friedrich Nietzsche’s “negative idealization” of the state as a “cold monster.”<sup>7</sup> In his final lectures, *On the State*, Pierre Bourdieu notably rejected both the classical liberal theory of a neutral or beneficent state and what he called the “pessimistic functionalism” of the Marxist tradition’s mirror image of a “diabolical state.”<sup>8</sup> In the end, economic, political, and legal renderings of the American liberal tradition – both for and against – rely on overly simplistic visions of the state emphasizing bureaucracy, police, and an extractive central state apparatus.

Despite the surface attractiveness of such figurations, the problem with these conventional portraits of law, statecraft, and liberalism is that they

simply do not represent anything that ever really existed in the American past. They are and always have been essentially ideological rather than historical constructs – bolstered by national myths rather than rooted in historical investigations or empirical reality. And surely, at the end of the day, the basis for judgment must remain grounded in experience. Following Ralph Waldo Emerson, Oliver Wendell Holmes Jr., John Dewey, and Charles Merriam, the critical tradition of American pragmatism, broadly construed, recommends an assessment of exceptionalism and exception in sync with actual historical experience. This essay begins that reassessment by insisting upon a more realistic history and theory of the democratic state.<sup>9</sup>

In contrast to such a realistic approach, prevailing ideas of exceptionalism and exception are primarily products of theory rather than history. Two of the most well-known theorists of exception, Carl Schmitt and Giorgio Agamben, did attempt to ground their theories in actual historical events. But those histories consisted primarily of highly stylized, generalized, episodic – and mostly conventional – historical renderings of very specific constitutional moments. For Schmitt's *Political Theology*, the historical *locus classicus* was 1919, both in terms of the significance of Article 48 of the German Constitution and in terms of the more general “crisis in parliamentary democracy” that he dated from the very same year.<sup>10</sup> In the era of Bush and Cheney, Agamben profitably Americanized this essentially continental European focus without flagging the friction between Anglo-American common law/constitutional experience and his own Roman law analytical vocabulary. Jumping from Lincoln's Civil War to Wilson's World War I to Franklin Roosevelt's “National Recovery Act” (sic) to September 11, 2001, and its aftermath, Agamben tacitly underscored the degree to which the state of exception was a creative theoretical construct rather than a useful historical referent. In line with too much theorization of the American past, such renderings of exception (as well as exceptionalism) rest on an inadequate conceptualization of the American state – in particular: an overly formal theory of law, an overly bureaucratic theory of the state, and an overly liberal theory of politics.

The rest of this chapter takes issue with the history and theory of exception along these three lines. The first section offers a critique of the idea of law at the heart of the theory of exception. By taking a closer look at the history and theory of law in early nineteenth-century America, it offers an alternative reading of the role of exception in Emerson's America – a place and time in which the exception in law was anything but exceptional. The second section offers a critique of the idea of state

and sovereignty at the heart of the theory of exception in the early twentieth century. In place of Schmitt's concept of the political, it offers a reconsideration of John Dewey's more democratic conception of "the public" and its problems, where again the exception is an unexceptional part of an everyday and agonistic democratic politics. The third section moves us further into the twentieth century, challenging the suzerainty of both liberal and neoliberal characterizations of exception and totalitarianism in that ideologically charged period. Here, Charles Merriam's ideas about new democracy and new despotism provide an alternative reference point for thinking about the exception, its antidemocratic dangers, and its democratic possibilities.

In the context of a revitalized theory of the nature of power in democratic states, the exception does not appear so exceptional. Indeed, when viewed from the perspective of democratic state history, the exception may be one of the most common ways that democratic states exercise power every day. Evaluating the state of exception from the critical perspective of the modern democratic state exposes the limits of the notions of formal law, bureaucratic statecraft, and liberal politics that so frequently preoccupy discussions of exception and emergency governance. Those rather profound limitations suggest the need for an alternative genealogy of the political. In the theories of law, state, and politics in the writings of Emerson, Dewey, and Merriam, this essay proposes a tentative new genealogy of the modern American political – where democracy is not a problem but a solution and where the exception is not exceptional but one of the most quotidian ways of exercising power in agonistic modes of self-government.

#### EMERSON, POLICE POWER, AND THE ROOTS OF AMERICAN ANTIFORMALISM

The epigraph in Giorgio Agamben's *State of Exception* bespeaks the centrality of the role of law in his theory of exception: *Quare siletis juristae in munere vestro?* (Why are you jurists silent about that which concerns you?) But, of course, jurists and political theorists have hardly been silent about the exception. Rather, in the actual treatises and texts of Western jurisprudence, Agamben's exception is actually quite the norm in law – the thing always discussed, whether explicitly or implicitly – the question always in play, constantly deliberated, frequently contested. To borrow Richard Rorty's resonant phrase, exception might indeed be the legal "conversation of mankind."<sup>11</sup>

This basic disconnect is a product of Agamben's highly formalist conception of law. Agamben's short theory of exception is built directly upon the fundamental, baseline distinction between "law" and "politics" – placing "the state of necessity, on which the exception is founded" precisely at the "limit" or "intersection" or "border" or "no man's land" between the legal and the political. That is, Agamben's conception of the un-commented-upon exception takes coherent form only through his own deployment of a rigid separation of "public law" from "political fact" and "juridical order" from "life." That foundational bifurcation then opens the interpretive and textual space for the placement of necessity and exception in the jural universe as that "point of imbalance" or that "ambiguous, uncertain, borderline fringe" between the rule of law and the world of the political.<sup>12</sup> And while Agamben would have us believe that this space, this no man's land, reflects something like real world circumstance, it is mainly a product of his aesthetic and highly formal rendering of the rule of law – a bit out of sync with the actual history of Western legal experience.<sup>13</sup>

Indeed, the last century and a half of work in law and social science has taken special issue with just such formalist separations of law and politics, juridical order and life. Whether taking the form of historical and sociological jurisprudence, legal pragmatism, legal realism, legal instrumentalism, legal functionalism, law and society, critical legal studies, or socio-legal history, the verdict is essentially the same – that a modern, antiformalist, nonfoundational, postmetaphysical understanding of law confounds the very idea of separating law from politics and/or society. Oliver Wendell Holmes's brilliant deployment of the perspective of the "bad man" in his critical realist "Path of the Law" turned as early as 1897 on confounding the formalist inside/outside or law/outlaw distinction.<sup>14</sup> John Dewey, too, viewed law as "through and through a social phenomenon; social in origin, in purpose or end, and in application." Without investigating law in society as an irreducibly social and political activity, there were "scraps of paper or voices in the air but nothing that can be called law."<sup>15</sup> Dewey's antiformalist critique was echoed by Karl Llewellyn's legal realist indictment of the "myth, folderol, and claptrap" that permeated so many formalist discussions of law and jurisprudence. Llewellyn's *Bramble Bush* exploded the law/politics, legislative/executive distinction: "The doing of something about disputes is the business of law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself. And rules

through all of this are important so far as they help you see or predict what officials will do. That is all their importance, except as pretty plaything.”<sup>16</sup> In short, the American legal pragmatic and legal realist tradition was born in fundamental revolt against exactly the kind of abstract legal formalism that haunts Agamben’s exceptional categories of law and exception.<sup>17</sup>

But, of course, coming to terms with Agamben’s theory also requires a return to Schmitt’s authoritative account in *Political Theology*, which opens with the memorable sentence: “Sovereign is he who decides on the exception.”<sup>18</sup> Schmitt’s theory too was predicated on a rather idiosyncratic conception of the political<sup>19</sup> as well as a construction of state and sovereignty at odds with liberal constitutionalism: for example, “the old liberal negation of the state vis-à-vis law” where it “is not the state but law that is sovereign” and where “the state is confined exclusively to producing law.”<sup>20</sup> Consequently, Schmitt’s rendering of exception and emergency stands outside and apart from law:

What is argued about is the concrete application, and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on. The exception, which is not codified in the existing *legal order*, can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it *cannot be circumscribed factually and made to conform to a preformed law*.<sup>21</sup>

While Agamben’s and Schmitt’s theories of exception and emergency have a certain appeal for the critical leverage they appear to give one on highly abstracted understandings of the liberal rule of law, the fact of the matter is that those abstracted and ideological renderings of legalism and liberalism do not reflect what is actually going on in law. And here the American experience is especially instructive.

A classic case in point concerns the American doctrine of “police power” – defined by one commentator as “the inherent plenary power of a State. . . to prescribe regulations to preserve and promote the public safety, health, and morals, and to prohibit all things hurtful to the comfort and welfare of society.”<sup>22</sup> The police power is perhaps the closest American approximation to Schmitt’s notion of deciding who decides “what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on.” The police power was distinctly bound up in determining exactly those things in American public law. Moreover, it had something of the “illimitable-ness” and “open-endedness” associated with Schmitt’s notion of “a borderline concept” – “pertaining to the outermost sphere.”<sup>23</sup> As Justice Hugo Black once put

it, “We deal in other words with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless.”<sup>24</sup> In sync with Schmitt’s notion of *le salut public* (and thereby his gesture to the French Revolution, the Committee of Public Safety, and the Terror), the common law maxim that undergirds the police power is *salus populi suprema lex est* – the people’s welfare (or the safety of the people) is the highest law. The links between the police power and necessity and emergency and exception run deep. William Packer Prentice’s *Police Powers: The Law of Overruling Necessity* (1894) drew an explicit connection between police power and emergency and defense: “For the commonwealth a man shall suffer damage as for the saving of a city or a town . . . when we raise bulwarks for the defense of the realm . . . Such bulwarks are raised by the police laws, but often the line of their defenses is met before the subject is aware of them, or recognizes the dangers to be faced.”<sup>25</sup>

The point here – opposite Agamben, Schmitt, and conventional renderings of exception – is that the police power decidedly does not stand outside or apart from law in some borderland intersection of law and politics or some “no man’s land between public law and fact” or “juridical order and life.” Contra Schmitt, the police power is indeed “codified in the existing legal order,” originating in and conforming to a “preformed law.” Contra Agamben, the jurists have been anything but silent about police power in the United States. To the contrary, the history of the police power (in its broadest manifestations) encompasses almost the entirety of early American law – the subject of endless pages of cases and commentary. It is thus emblematic of the operation of power and law in a democratic state – where the separation of the political and the jural, police and law, the exception and the norm is anything but a clear-cut matter of formal definitions.

But it is precisely a reliance on overly formalist renderings of law that leads many to separate out police, policy, administration, necessity, emergency, and executive power as somehow distinct from the general operations of law. In their work on police and *Polizei* in American law, both Christopher Tomlins and Markus Dubber underscore just such separate spheres.<sup>26</sup> For Dubber, especially, police is always linked to exceptional sovereign coercive power – overruling necessity – the inherently unlimited, extraconstitutional, discretionary prerogative of the sovereign to act quickly and expediently to eliminate threats to the public health, safety, and security.<sup>27</sup> Philip Hamburger similarly uses formalist conception of the “rule of law” so as to posit much of executive



administration as somehow beyond the pale of legality per se.<sup>28</sup> Such ideas draw on a deeply rooted juristic mythology that falsely sees law (or *recht* or *ius*) as the antithesis of power, sovereignty, coercion, violence, and police.

Contrary to the general trend of theorizing police, administration, and exception as transconstitutional or extralegal decisionist and political forces that know no law, they are better understood as part and parcel of the legal history of democratic states. Indeed, far from being strange bedfellows, law and police, constitutionalism and sovereignty, and the juridical and the administrative have been frequent fellow travelers in the history of American law and statecraft. Police power originated and was legitimated in law – in the formal delegations of state prerogative in the charters of the municipalities, villages, corporations, and subsidiary associations that reflected the intimate interrelationships of the state, the law, and the legitimate power to regulate, expropriate, and punish. The official development of police power as a legal doctrine was inseparable from the story of the rise of the judiciary and the common law and American constitutionalism. Indeed, the original phrase “police power” comes from none other than the Chief Justice of the U.S. Supreme Court John Marshall. And the concept was most fully worked out by the equally influential Massachusetts Supreme Court Chief Justice Lemuel Shaw.<sup>29</sup> In short, though it is common to separate the jural state and the police state, the norm and the exception, the actual legal history of the American version of the modern democratic state suggests a close interconnection and interpenetration of sovereignty, necessity, police, and the rule of law.

Ralph Waldo Emerson was among those nineteenth-century Americans especially attuned to the ever volatile, fluid, antiformal, and open-ended character of lawmaking in nascent democratic states. And indeed, the bond linking norm and exception, freedom and necessity in the everyday agonistic experience of democracy was one of the great themes of the “American Renaissance” in general.<sup>30</sup> Though Emerson did not write much on the rule of law per se, the constant interplay of law/politics in democracy was one of his eternal tropes. As he mused rather profoundly in his *Journals*:

America is the idea of emancipation. Abolish kingcraft, Slavery, feudalism, black-letter monopoly, pull down gallows, explode priestcraft, tariff, open the door of the seas to all emigrants. Extemporize all government, California, Texas, Lynch Law. All this covers self government. All proceeds on the belief that as the people have made a govt. they can make another, that their Union & law is not in their memory but in their blood. If they unmake the law they can easily make it again.<sup>31</sup>

Here Emerson captured the degree to which the norm is not a no man's land between law and life, legal and political fact, but is rather bound to the exceptional in democratic states. The exceptional becomes imminent in everyone's claim and impulse to self-rule and self-govern in a democracy, for better or worse. It opens up a limitless horizon of political projects that can range from the abolition of slavery to the reimposition of Jim Crow's "Lynch Law."

In his critique of Daniel Webster and the Fugitive Slave Act of 1850, Emerson's essential democratic antiformalism resonated most fully. There, Emerson decried the law's effects whereby "the learning of the universities, the culture of elegant society, the acumen of lawyers, the majesty of the Bench, the eloquence of the Christian pulpit, the stoutness of Democracy, the respectability of the Whig party are all combined to kidnap [runaway slaves]." Laws were instruments and tools – distinctly subordinate to and drawing their obligation from the larger spirit of the "substantiality of life." Like his friend Henry David Thoreau, Emerson recommended civil disobedience to this "immoral" and "contravened" statute that "enacts the crime of kidnapping." "The law," he claimed, "was suicidal, and cannot be obeyed." Holding the United States to be "a real and *not a statute union*," Emerson criticized a textual adherence to the letter of the law and a formal adherence to law in the books, asking: "What is the use of courts, if judges only quote authorities, and no judge exerts original jurisdiction, or recurs to first principles." Here is the life rather than the logic of the law: "The gravid old Universe goes spawning on; the womb conceives and the breasts give suck to thousands and millions of hairy babes formed *not in the image of your statute*, but in the image of the Universe."

For Emerson, the life of the law was life – experience – and it was a life that belonged to the living and to the future. He reserved his harshest words for a man like Webster, "a man who lives by his memory" and who clung to old law with the dead hand of the past:

He believes, in so many words, that government exists for the protection of property. He looks at the Union as an estate, a large farm, and is excellent in the completeness of his defence of it so far. *He adheres to the letter*. Happily he was born late, after the independence had been declared, the Union agreed to, and the constitution settled. What is already written, he will defend. Lucky that so much had got well written when he came. For he has no faith in the power of self-government; none whatever in *extemporizing a government*.

Emerson's law was a law in action. It was thoroughly democratic and unexceptionally exceptional: "Power ceases in the instant of repose; it resides in the moment of transition from a past to a new state, in the

shooting of the gulf, in the darting to an aim.”<sup>32</sup> In contrast to this exceptional and exuberant democratic power of a self-governing people, Daniel Webster’s formalist legal arguments in support of the “filthy law” made no more impression than “the spray of a child’s squirt against a granite wall.”<sup>33</sup>

Emerson’s spirited critique of formal law shared some key characteristics with Karl Marx’s similarly timed (and equally spirited) critique of Hegel’s formal and bureaucratic notion of the State. For the early Marx, democracy was “the solution to the riddle of every constitution,” for “in it we find the constitution founded on its true ground: real human beings and the real people.” The constitution was thus posited as the people’s own creation – “the free creation of man.” Hegel’s error was that he proceeded “from the state,” whereas democracy proceeded “from man.” For Marx (as for Emerson), “Man does not exist for the sake of the law, but the law exists for the sake of man, it is human existence” rather than “legal existence.” Marx concluded, “Democracy relates to all other forms of state as its Old Testament.”<sup>34</sup>

Emerson’s work suggests that the interpretation of texts and the rule of law in early America refused to conform to the kind of formal separations of law and politics, constitution and democracy, that frequently populate literatures on necessity, emergency, and states of exception. It underscores the reality that some considerations of American law in the first years of the democratic republic insisted on its antiformalism – as bold, experimental, rebellious, and unpredictable as the people making up the continent. From this perspective, the jurists were far from silent on the question of exception. Rather, they were too busy noisily implementing it all the time – from the laws of necessity that allowed mayors to pull down houses in times of great fire calamity to the local legal traditions of the *posse comitatus* in the policing of crime, emergency, and epidemic. Outside the law? Only by envisioning law through a highly intellectual, formalist, and antidemocratic lens that does not reflect actual legal experience.

#### CARL SCHMITT MEETS JOHN DEWEY

As suggested earlier, coming to terms with the complex articulation between state and exception requires a reckoning with Carl Schmitt’s authoritative account of the political and the problem of the decision – as well as with some of Schmitt’s most important interlocutors.<sup>35</sup> While Emerson early on challenged some reigning notions of the relationship between norm and exception, he was hardly alone in the American

tradition. In the early twentieth century, Dewey continued in this mode, specifically building on ideas of antiformalism and experience in his effort to devise a more democratic theory of state power. Through his move beyond pluralism, his rejection of a singular source of power, and his emphasis on effect over essence, Dewey's theory of the state embraced the exceptional capacities of democracy while providing a profound alternative to Schmitt's formalistic decisionism. Thus, Dewey's political philosophy can still be read as an effective response to what Chantal Mouffe dubbed "the challenge of Carl Schmitt," embracing a fundamental critique of liberalism while providing a profoundly different response.<sup>36</sup> He therefore deserves to be read as part of an important line of thinkers, along with Emerson, Merriam, and many others, who sought to establish the foundations of a democratic state by embracing the exceptional capacities of popular rule.

While Schmitt's theory of the state of exception reached its most canonical form in his *Political Theology*, almost a decade later he further elaborated his theory in "State Ethics and the Pluralist State."<sup>37</sup> Schmitt opened this essay with what might be referred to as *the challenge of pluralism*, citing Ernest Barker's 1915 essay "The Discredited State" (an essay that also influenced Dewey's writings on the state in the years to follow). Pluralists such as Barker and Harold Laski, Schmitt insisted, had summarily dismissed the state of the early twentieth century. Defining the state as one power among many, such pluralists also revealed the contradictions involved in the predominant liberal conception of the state. In Schmitt's view, the pluralist dissolution of the state into its constitutive parts revealed that there were no metaphysical grounds for sovereign authority. Thus, he insisted, sovereign authority could only be made by a sovereign decision.

Within this critique of the pluralist state was a larger Schmittian attack on pragmatism more generally. "If pluralist social theorists such as Cole and Laski adhere mainly to the empirical," Schmitt argued, "they do so as pragmatists and thereby remain consistent with their pragmatic philosophy . . . [transposing] the pluralist world view of the philosophy of William James to the state."<sup>38</sup> "In the system of 'political theology,'" Schmitt contended, "the pluralism of James's world view corresponds to the age of today's democratic national states, with their pluralism of peoples who are disposed towards the state on the basis of their nationhood."<sup>39</sup> For Schmitt, James – and pragmatism more generally – was guilty of invoking a political theology because his pluralism was rooted in the nation or the political unity of the people without considering the foundations of this unity or the national state's legitimacy.

What is surprising in his critique, however, is that Schmitt did not criticize the pluralist perspective as such, but rather argued that pluralists did not fully recognize the consequences of this position.

The state really does appear to be largely dependent on various social groups, sometimes as a victim, sometimes as the outcome of their agreements, an object of compromise between social and economic power groups, a conglomerate of heterogeneous factors, parties, interest groups, combines, unions, churches, etc. reaching understandings with one another. In the compromise of social powers, the state is weakened and relativized, and even becomes problematic, as it is difficult to determine what independent significance it retains.<sup>40</sup>

The state in this pluralist theory, Schmitt argued, is relativized, weakened, and possibly dead. The Schmittian challenge to pluralism, then, may be understood in the following terms: if the state is one among many powers and yet it legitimately governs, then either one explains the foundation of such legitimacy or one does not. If the latter, then one may rightly be accused of a “theology” because one is merely assuming that nation-states are unified and governed by some natural, godly purpose. In short, pluralism pushes the moment to its crisis by showing that there is no absolute transcendent foundation for political action at the level of the state. If, therefore, one examines the “concrete” foundations of state unity, instead of taking them for granted, one comes to the conclusion that this unity may only be established by a specific act or decision – for Schmitt, this is why the state of exception is permanent in a context of popular sovereignty.

Central to this claim is that the stuff of the state – the political – unlike the stuff of other social associations, does not have a substance. “Among pluralist theorists of the state as nearly everywhere, an error prevails that generally persists in uncritical unconsciousness – that the political signifies a specific substance, next to the substance of other ‘social associations.’” For Schmitt, however, a political association differed from all others because unlike a union, for example, it has no specific purpose. For this reason Schmitt insists that “The political more accurately describes the degree of intensity of a unity”<sup>41</sup> because “the political has no specific substance, the point of the political can be derived from any terrain, and any social group, church, union, business, or nation becomes political, and thus related to the state.”<sup>42</sup> A study of the political in this theory becomes then the search for the concrete moment when unity may be established in order to overcome the fissiparous tendencies of pluralism.

Thus, Schmitt’s challenge to pluralism contained three essential elements. First, it was radically relativist to the extent that it embraced the fact

of the social and political pluralism of modern states. Second, it was rooted in the “concrete” to the extent that it insisted that any attempt to resurrect the authority of the state in such a context without theorizing the decision was a pure theology. And third, since the thing or activity binding the sovereign community – the political – lacked a consistency of its own, it must instead be understood on a spectrum of intensity in which the sovereign decision established unity for the whole.

In *The Public and Its Problems*, Dewey also built his theory of the state on a critical embrace of liberal pluralism as a radical relativism, a response to concrete problems, and a nonsubstantial vision of the political. Moreover, opening with his own critique of a kind of political theology, Dewey wrote: “That the state should be to some a deity and to others a devil is another evidence of the defects of the premises from which discussion sets out.”<sup>43</sup> Dewey’s refusal to establish a stable foundation for the state, therefore, led to a pursuit that paralleled Schmitt’s critique of pluralism until the final moment – the moment when Schmitt sought to establish unity through decision. Dewey looked in another direction in search of the overlapping, direct, and indirect interests and consequences that empirically brought any public into existence, one that built on the antiformalist tradition introduced by Emerson and continued by Charles Merriam.

Like Schmitt, Dewey embraced the plurality of social groupings and the social individuals who inhabited them. Furthermore, he concurred that the plurality of interests and associations did generate an organization that superseded them, but he understood this larger interest as “the public” and not “the people.” The public was a product of those interests that spread beyond any one private group, yet it was distinct from other associations. Similarly to Schmitt, Dewey argued it did not have an essence because it was formed through consequences. The public therefore could not act in itself but needed a third party – the political state – to manage the consequences emerging from the conflicts and problems of its common interests. “This public is organized and made effective,” Dewey argued, “by means of representatives who as guardians of custom, as legislators, as executives, judges, etc., care for its especial interests by methods intended to regulate the conjoint actions of individuals and groups. Then and in so far, association adds to itself political organization, and something which may be government comes into being: the public is a political state.”<sup>44</sup>

Like Schmitt, then, Dewey also argued that the unity of the political state was generated instead of being a natural preexisting condition, but

instead of being the product of a decision, it emerged in a given moment out of a given public. The radical nature of Dewey's theory resided in his claim that even the state itself was the product of the public's problems and only existed as long as the problem existed: "Special agencies and measures must be formed if they are to be attended to; or else some existing group must take on new functions."<sup>45</sup> The state as organized public could, of course, act to preserve the public interest: "From this point of view there is nothing extraordinary in the preeminence of the claims of the organized public over other interests when once they are called into play."<sup>46</sup> The state could therefore hypertrophy and atrophy in keeping with the specific needs of the people. In other words, unity was a problem and a consequence, not the state's principle of existence. In this way, Dewey overcame "the temptation to generalize from these instances" and also refuted the pluralist conclusion that "the state generically is of no significance," removing any essence of or substance to the state while maintaining its power to act. "There is no a priori rule which can be laid down and by which when it is followed a good state will be brought into existence. In no two ages or places is there the same public. . . The formation of states must be an experimental process."<sup>47</sup> Problems emerged and the public organized itself, and thus formed a state, to manage these problems.

The similarities with Schmitt's framing of the problem of state power are striking. The state – the political, overarching, preeminent power transcending any particular institutions – did not have an essence: "The State must always be rediscovered. Except, once more, in a formal statement of conditions to be met, we have no idea what history may still bring forth. It is not the business of political philosophy and science to determine what the state in general should or must be."<sup>48</sup> At the same time, states were all-inclusive of all the smaller associations that make them up. Moreover, when problems emerged, from sewage to civil war, the public organized itself in order to act. In this sense, both Schmitt and Dewey embraced the decision as the foundation of the political.

But Dewey disagreed rather profoundly with Schmitt about the conclusions to be drawn from this assessment of the modern political. Schmitt insisted that "the issue itself, [was] the problem of a people's political unity"<sup>49</sup> and, in this way, surmised that the only way to reestablish a coherent theory of sovereignty within the pluralist paradigm was to ground the political in the "who decides on the exception." Dewey turned in a decidedly different direction – from "the people" to "the public." Dewey refused to build his state out of a presupposed unity of the people.

Rather, he embraced an even more radical position, jettisoning sovereignty and the people as a principle of political unity. Dewey turned to the quotidian, singular, and often-exceptional problems confronted in the process of self-rule. Thus, instead of the sovereign deciding the exception, Dewey reversed the proposition: “General theory might indeed be helpful; but it would serve intelligent decision only if it were used as an aid to foreseeing factual consequences, not directly per se.”<sup>50</sup>

Schmitt established the decision in exceptional circumstances as the only legitimate foundation for the polity. This position was seductive and powerful both for its intellectual coherence and for its political applicability in a moment of crisis. However, this theory also signed the death warrant of democratic life by shutting down the possibility of a democratic state and arguing that any mode of organization outside of the decision of a singular unifying will was a mere shell game of self-deception. So how might we understand attempts during the same moment to build a theory of the democratic state on the political that did not undermine the possibility of maintaining democratic politics? In other words, Dewey asked the question: what would a regime look like that placed the inherent conflict of modern democratic society and the institutional processes of politics necessary for managing those conflicts at the center of its understanding?

Through his critical response to pluralism, Dewey provided at least a partial response to questions like these. Pushing quotidian problems to the fore while denying the power of the unique decision, Dewey’s “search for the public” was a search to bring politics and the political together while avoiding the Schmittian trap of fetishizing sovereignty and *the* decision. Weaving politics and the political together as a foundation for the democratic state meant multiplying the moments and wills that served as arbiters for negotiating the serial challenges that emerged in popular rule. From this perspective, Dewey challenged assumptions that found their ways back into our histories and theories of the state, especially those informed by Weber since the 1970s.

First, elections and bureaucratic institutions are a notable absence in Dewey’s theory of the democratic state. By placing the public at the heart of the modern democratic polity, Dewey placed a “problem” – a disagreement, a conflict, an impediment – as the defining feature of democratic life. In other words, the political – those elements of the polity such as plurality, debate, and the dissensus that structured the very possibility of a state – took center stage in his analysis. By invoking the public’s everyday problems as the root of the democratic state, Dewey diluted the political



from those high-intensity moments that Schmitt considered essential for determining the foundation of the polity. Such an approach blurred the distinction between politics and the political. One might suggest that he quotidianized the exceptional nature of democratic life so as to make the exceptional relativism of every particular decision and institutional solution the source of legitimacy without establishing the personal decision as the only legitimate form of rule. The democratic state, then, was the means of responding (however temporarily) to dissensus at various levels of intensity.<sup>51</sup>

Second, Dewey shunned bureaucracy as the quintessential response to the dangers of mass politics that had been formulated just a decade and a half earlier by Max Weber. Indeed, Dewey's theory of a democratic state involved a rather deep critique of the reigning theories of Weber and Robert Michels. Dewey's focus on the public and the state-as-consequence made office-holders an epiphenomenon of the state as process. Bureaucracy was no longer the state's essence but a sign of the state's emergence: "The obvious external mark of the organization of a public or of a state is thus the existence of officials."<sup>52</sup> In this sense, there is a profoundly anthropological quality to Dewey's interpretation of the state. In this view, the state does not acquire its essential characteristic of a monopoly over legitimate force by establishing a core of officials who serve the state. Instead, the state forms around a set of specific problems as the sign that a public exists and has problems that must be settled. The bureaucratic structure is no longer inherent in the state, making it the thing that must be studied; rather, it is a mere indicator or indexical marker that says *something statelike is happening here*. Half a century before Foucault, Dewey urged critical theorists of politics to look for state effects rather than "the state."

Similarly, and consequently, the oligarchic tendencies of democracy, as Michels put it, are not inherent in the democratic state, even if they may obviously emerge within it. Dewey argued that this tendency could be consistently challenged through an understanding of the state as organized public:

The new public which is generated remains long inchoate, unorganized, because it cannot use inherited political agencies. The latter, if elaborate and well institutionalized, obstruct the organization of the new public. They prevent that development of new forms of the state which might grow up rapidly were social life more fluid, less precipitated into set political and legal molds. To form itself, the public has to break existing political forms.<sup>53</sup>

The state then can only hug the social terrain by consistently breaking with the previous modes of state development instead of creating a

“ruling class.” Dewey suggests that what happens through revolution would happen as an almost natural development if “the power and lust of possession” did not prevent constantly new state formations. The state, Dewey insists, “is ever something to be scrutinized, investigated, searched for. Almost as soon as its form is stabilized, it needs to be re-made.”<sup>54</sup> A generation before Schumpeter celebrated his narrowly framed “creative destruction” – restricted to the liberal domain of economics, and conceived to restrain any competitive creativity by the state within that sacrosanct realm – Dewey recognized that the fluidity and creativity at the center of the modern project were inseparable from the dynamism necessary to sustain the ongoing experiment in self-government.<sup>55</sup>

Dewey’s anthropology of the state found an echo in Pierre Clastres’s observation almost a half-century later that if the political “can be conceived apart from violence; the social cannot be conceived without the political.” As a result, Clastres concludes, “it is not evident to me that coercion and subordination constitute the essence of political power at all times and in all places.”<sup>56</sup> Such observations are useful for gaining perspective on Dewey’s critique of Schmitt, Weber, and Michels. Dewey refused the idea of independent officials who would be constituted as a distinct group with their own individual interests because his theory of the democratic state was organized precisely against the idea of state autonomy. Conflict created the state and, in turn, in some cases it employed coercion and subordination, but power was generated from the bottom up. As a result, a monopoly of coercion on the part of specific officeholders was antithetical to the state’s very origins. Dewey dissolved the essence of the state to such a degree that it became possible to consider moments in which the state was not by some inherent essence a coercive power but might emerge as a coercive power acting on society at specific moments when such power is necessary. In Dewey’s theory, *democratic states do not put an end to power relations or coercion, but they do initiate the process of challenging the autonomy of those who have it.*

#### CHARLES MERRIAM: DEMOCRACY, DECISION, AND DIFFERENTIAL EXCEPTION

The high stakes of the positions articulated by Schmitt and Dewey in the aftermath of the Great War grew even more dire over the course of the 1930s, as the economic crisis of the Great Depression and the geopolitical upheavals it spawned highlighted the need for decisive action. By the late 1930s a new term, “totalitarianism,” had been coined to classify together

the authoritarian regimes whose embrace of unbridled decisiveness and unlimited political will had placed democracies around the world on the defensive. In American intellectual life, what might be called a “totalitarian synthesis” conflated mortal enemies such as Nazi Germany and the Soviet Union by positing their underlying similarities in the “total” domination of society by an unlimited state whose modernity allowed excesses exceeding those of even the worst despotisms of old. As intellectuals shrank back in horror from purges, outrages, and brutal repressions that rapidly remade the face of politics, they also retreated from the radical relativism on which pragmatic thought had rested. Many simultaneously took refuge in a chastened liberal repudiation of the democratic state – particularly as it mobilized mass constituencies for large-scale social engineering projects. The Colloque Lippmann, Hayek’s *Road to Serfdom*, and the Chicago School’s early postwar search for an “American road” out of Hayek’s dismal highway to hell – these were just some of the many efforts to rethink liberalism beneath the clouds of total war, genocide, and totalitarianism.<sup>57</sup>

Against these headwinds Charles Merriam, a disciple of Dewey’s, dispatched the goblins of mass politics and tyrannical majorities, decisionism and authoritarianism, that sent most of his contemporaries running into the arms of a chastened liberalism. Merriam’s long education and leadership within progressive politics and political thought largely built on the tradition of antiformalism and democracy that had animated Emerson and Dewey. Facing the fascist assault on democracy head-on, he continued their charge against an emaciated liberalism, even as liberal theorists began to gain ground in their attempts to evacuate the state of democratic accountability. Merriam was one of the central figures associated with the progressive formulation of democratic emergency in the age of “exception.” Where Dewey had articulated his theory of the democratic state from outside public office, and in opposition to the poisonous disillusionment with democracy articulated by Walter Lippmann, Merriam advanced his influence and honed his ideas a decade later from within the New Deal, still doing battle with Lippmann’s caustic skepticism that was newly amplified by the crisis of democracy in Europe.<sup>58</sup>

In *The New Democracy and the New Despotism* (1939), his major contribution to political theory, Merriam nonetheless confronted the problem of totalitarianism head-on.<sup>59</sup> Rather than opposing state and society, as Lippmann and his followers did, Merriam structured his argument around an opposition between democracy and its historical antagonist, “mastery and slavery” – which had a tendency to “disappear”

once “consent of the governed” gained a footing in politics.<sup>60</sup> Divided into discrete sections devoted to the two kinds of politics, the treatise articulated their opposition by working outward from their organizing principles: the “dignity” and “perfectibility of mankind,” “consent of the governed,” and “consciously directed and peaceful social change” assumed by the “new democracy”; and the “economic inequality,” the nobility of “the few,” and the heroic charisma of “the Superman” (which was nothing more than a new “Caesarism”) on which “the new despotism” fed.

Merriam anatomized the new despotism in a pithy fifty-page section organized around its elitist, antidemocratic principles. These he traced back to the death of absolutism and the transition from *Machtstaat* to *Rechtstaat*, which over the course of the nineteenth century inspired an organized “antidemocratic movement” that was grounded in the ideas of Nietzsche, Spengler, Mosca, and Pareto, and was driven by the actions of modern autocracies. Although his quarry included some obvious targets, he devoted special attention to seemingly undespotic liberal types such as Pareto, who on closer inspection proved hostile to the very possibility of democratic self-government, as reflected in his claim that “We need not linger on the fiction of ‘popular representation’ – poppycock grinds no flour.”<sup>61</sup> Decisionists and other critics of self-government made a straw man of democracy’s putative dissipation, fractiousness, slowness, and irresolution, while cultivating a fetish of political will and decision. Indulging fantasies of the man on horseback, they overlooked the vulnerabilities of his singular military genius while wrongly discounting the strengths of a democratic structure of power that harnessed many strengths flexibly. “The jurists may call this ‘authoritarian,’” he observed dryly, “but the historian may say ‘futilitarian.’”<sup>62</sup>

The jest reflected a conviction that for all its martial glory, the new despotism was at root weaker than the new democracy. The bulk of Merriam’s treatise drew out the philosophical and political implications of this position, devoting a full (and fulsome) 180 pages to outlining the full breadth of the democratic prospect in the modern world. Contrary to the caricature of corruption, decadence, and enervation applied to it by its despotic enemies, democracy was quite competent to meet the demands of the modern world, whether characterized by emergency or not. Contrasting the failure of the Kaiserreich with the success of the democracies in the previous world war – particularly the rapid and effective U.S. mobilization – he observed that decisiveness was not a quality reserved only for exceptional individuals. Indeed, in the case of Napoleon, it could

be seen as a liability. (This certainly would prove equally true of Hitler, whose military “genius” lost its luster in its logical culmination in Operation Barbarossa – a revealing repeat of Napoleon’s tragic folly.) Rather, true decisiveness depended on the precise features of social organization, and so was as much “a matter of special social tension and unity of community purpose at a particular time, as it is of particular forms of organization.”<sup>63</sup>

At the heart of the problem, and in the crosshairs of Merriam’s critique, was the simplistic conceptualization of “exception” and its relationship to emergency. The Continental notion of exception, Merriam recognized, was simply a modern updating of a very old metaphysic of divine right that did not in fact implicate genuine democracy of any variety, whether driven by parliamentary or mass politics.<sup>64</sup> Although the fascists draped themselves in demagogic vestments that seemed to invoke the general will, in fact both their words and their actions revealed their determination to shut down democracy in order to create a new ruling class of Supermen that repudiated the very notion of equality at all levels, from the racial to the ideological and spiritual.

Rather than shrinking from democratic power, as the emerging totalitarian synthesis demanded, Merriam embraced it, arguing that only an amplified demos could meet the challenge of the day. This was apparent in how he situated the problem of “decision,” which fell not within the “new despotism” at all, as one might expect, but rather at the very heart of his democratic theory. Indeed, he took up the problem of “Democracy and Decisionism” in a chapter titled “Validation of Democratic Assumptions,” which itself was the crux of the “New Democracy” section’s central concern, “The Consent of the Governed.” Far from representing the outer limit of democratic self-government or its Achilles heel, emergency and exception were at its heart – in the ever-unsettled, evolving, open field of contestation within which citizens resolved their plural and unlimited differences. If citizens could overcome the prospect of civil war then they could face any emergency without suspending the terms of their self-government.

There was nothing special about emergency in the democratic state. It certainly was not the fountainhead of politics, nor was it the negative specter haunting the very prospect of democracy. In this sense, Merriam shared Dewey’s critical embrace of pluralism. Precisely because it was not bound to a monolithic conception of the state, he recognized the power of a democracy to act in situations of emergency. A democratic state did not require the cabining of executive power, either. Indeed, all of Merriam’s

thought and experience had taught him that executive power was absolutely “necessary to make democracy work under modern conditions.”<sup>65</sup> The real danger lay in the invitation emergency provided to an “anti-democratic politics” indulged by elites determined to reinvigorate aristocratic politics for Nietzschean Supermen by way of one-party politics. In other words, the threat lay not in some totalitarian *state* but rather, as Franz Neumann would argue in his classic study of the Nazi state, in an overflowing of the political through polarization and one-party domination of society.<sup>66</sup>

If one properly recognized the nature of the threat posed by totalitarianism, all the techniques of democratic problem-solving were available to ensure the survival of democratic self-government and secure the conditions under which its distinctive mode of social power thrived. This explains Merriam’s decision to place his treatment of “Democracy and Decisionism” immediately after a crucial section on public administration (which crystallized the larger practice and philosophy of public utility)<sup>67</sup> and right before a crucial section on “plan-making” (centering on the ideas of Laski and Merriam’s beloved National Resource Council) and its critics (Hayek, Pigou, and Burns). His approach was in contrast to the totalitarian synthesis, which followed the Austrians and the realists in positing the axiomatic impossibility of social planning. His discussion of public administration, the essence of modern democratic statecraft, presented an extended argument for delegation and the science of administration, which together allowed the “unified and intelligent action” so necessary to meet the challenges of the modern world. Indeed, a refusal to plan or even neglect of planning placed democracy at a disadvantage relative to totalitarianism, since planning was so crucial to institutional efficacy in the modern world.<sup>68</sup> Perhaps the democracies could not afford to plan their societies, as Hayek argued, but their enemies certainly could, and had already demonstrated the effectiveness of their planning with devastating logic.<sup>69</sup>

Like Dewey, Merriam’s critique of decisionism and the concept of exception from which it flowed were rooted in his abiding skepticism of sovereignty. Since the beginning of his career, Merriam had argued that the very notion of sovereignty itself was the supreme antidemocratic *geist* whose final exorcism from the state was necessary to complete the banishment of arbitrary, hierarchical, categorical authority from modern society.<sup>70</sup> This skepticism of any arguments positing even the momentary necessity of absolute power, or of a pure monopoly on its exercise through violence, made him immune to the elisions of the totalitarian

synthesis. Seen from the pragmatic point of view, it was Merriam who was the realist. Indeed, one could argue that antitotalitarian thinkers from reformed progressives such as Walter Lippmann to reformed radicals such as James Burnham were themselves captured by the totalizing and mystifying move made by Schmitt and the theorists of total war. They were, in a sense, terrorized into accepting the awesome, Leviathan-like image of unlimited sovereign force and all-penetrating social control that the Nazis, Fascists, and Communists projected. Consequently, they presumed that only its opposite – the “limited states” – could be its antidote.<sup>71</sup>

Such a view ultimately rested on an inverted, monstrous fantasy of popular sovereignty, rather than a historical, measured, discerning understanding of how self-rule had actually operated within American society. The fantasy rested on reifications of political violence that were themselves the mirror image of liberal order grounded in “timeless” human nature. “Both Marx and Mussolini overemphasize the role of violence as a contributory factor in modern advancement,” Merriam concluded, and proceeded to develop a democratic response to their violent overflowing of the political. Yet the solution he devised was emphatically *not* to place the state in a liberal or even utilitarian straight-jacket. If politics need not flow from the arbitrary decision, neither did it have to be neutered. In the long run far more power *and* liberty could be generated through a graduated, nonviolent, provisional adjustment of policy to societal requirements as directed by the hurly-burly of popular rule and mixed government within equal freedom.

If, as Neumann would observe a few years later, the Nazis had seized power by *hollowing out* the German state and supplanting it with a parallel party structure that progressively infused German society with principles of domination and decisionism, then the United States could only respond by *suffusing* the state with democratic social power and collaborative problem-solving, much as Merriam’s beloved Tennessee Valley Authority summoned all the hydraulic force of an entire watershed by harnessing even the remotest and most capillary tributaries at the headwaters of the Appalachians.<sup>72</sup> Of course, precisely *how* this exercise in social engineering was accomplished would be of great consequence to the nature of the victory over fascism. But not only was it possible within a democratic framework, it was essential to the survival of democracy within America and throughout the “free world.”

The core question for Merriam was not whether a democratic state could respond successfully to emergency but rather how effectively the

“organization of violence” could be balanced against the “organization of consent.”<sup>73</sup> Violence in itself did not generate power. Quite the contrary: a society operating on the principle of unlimited aggression or domination would remain quite feeble, as the constant conflict among myriad warring parties would prevent any combinations of a scope sufficient to canalize social power very far beyond the clan. “Violence,” he observed, is “most useful . . . in a world where some operate on the principle of violence and others on that of persuasion and reason.” This was just as true of a society characterized by law and order, which implemented its physical coercions judiciously and with unwavering regularity, as it was of a fascist world in which even the total application of violence could not coerce everyone all the time.<sup>74</sup> But where fascist political theory posited a total foundation of exception for state power that fit perfectly with its monistic conception of political will, a democratic political theory required a suppler understanding of the place of violence and decision within the production of political power. “Violence in this sense is not a rule of uniform action,” Merriam observed, “but a rule of *differential exception*” (emphasis added).<sup>75</sup>

The solution to the crisis of democracy was more, not less, democracy. The “reign of violence” could only end through the effective use of the democratic stand-by, counterforce. Unlike liberals who were even then fleeing from the demos out of fear of the totalitarian state, Merriam did not abandon the general will. Only the “full development of the popular machinery,” not its curtailment, could guarantee a decisive response to the new despotism.<sup>76</sup> That required acting on the recognition that “democracy is prior in importance to [any] particular mechanism of government,” rather than reifying, fetishizing, or prioritizing particular democratic institutions such as the legislature or the judiciary, or democratic practices such as the rule of law. All of these techniques, not just a liberal subset, were needed to summon democratic social power safely and with fullest force.<sup>77</sup>

If the great threat to democracy was not emergency or exception, but rather an imbalance of coercion and consent within the democratic state, how could the essential equipoise be guaranteed? What was crucial, according to Merriam, was the existence of “clearly defined channels” where executive and popular will could meet and communicate, as Lincoln and Wilson had done, and flexible, multiply reinforcing, even competitive sources of review and insight – such as from businessmen and labor, multiple branches of the military and civilian administration, and policy-oriented politicians. The history of democratic governance suggested this was eminently possible. The American Civil War, Merriam



noted, provided a powerful example of how a “democratic army” could be organized that was equal to the direst emergency.<sup>78</sup> Indeed, the long history of democracy itself could not be separated out from the history of constitutionalizing executive power and demarcating with ever-greater precision the boundaries between civilian and military authority.

It was this underlying principle of expanding the conditions for self-government that explained why the democratic state’s resemblance to other, antidemocratic governments was ultimately superficial. The crucial difference lay in the principles operating to balance coercion and consent, with democracies always seeking ways to minimize violent conflict and maximize techniques of cooperation or bounded competition in service of equal freedom, while the new despotisms did the reverse. Categorical inequality and hierarchy provided the first principle for fascism, which relied entirely on violence to articulate an extrinsic racial order and an intrinsic party hierarchy to structure its power. Categorical equality and collective obeisance provided the first principle for Communism, but an equally axiomatic adherence to terror made everyone (except, perhaps, Stalin) equally unfree as sacrificial candidates for the strategic and even tactical needs of the Party. If a balance between liberty and equality could be established, however, the counterpoint of coercion and consent could proceed with a muscular efficacy limited only by the degree of its democratization, and would be perfectly equal to the necessity of any emergency.<sup>79</sup>

#### CONCLUSION

Merriam was right; the democratic state did prove, in the end, to be more powerful than its competitors who grounded their political principles in the notion of exception. Decisionism provided no advantage in the long run. Yet his differential exception did not provide all the answers any more than Emerson’s antiformalist conception of law or Dewey’s critique of popular sovereignty, the state, and bureaucracy. They did, however, open a door to reconsidering the nature of power in modern democratic states. To date, such a history and theory remains largely underdeveloped as scholars and theorists continue to run almost instinctively to reigning interpretations highlighting formal law, bureaucratic statecraft, and liberal politics. An alternative genealogy of the political that takes American legal and political theory seriously is necessary. And despite some of their own limitations, Emerson on law, Dewey on the state, and Merriam on politics at least point in the direction of a new and more realistic

interpretive horizon. Indeed, we have tried to suggest here the way in which each of their insights into the nature of democratic power improves upon reigning theories of exception and emergency, while excising the rather unrealistic assumptions about law, state, and politics that so frequently animated them.

All of this is not to say that the contemporary obsession with exception and emergency is misguided. To the contrary, these might be the definitive intellectual and political challenges of our time. But such obsessions remain misconceived and disoriented insofar as they posit the state as inherently despotic, a tendency fed by a largely mythological vision of the American political tradition and amplified by an equally mystifying fascination with old Continental theories of the state and the political, most notably Schmitt's. Such perspectives simply cannot account for the real democratic pressures that have been able to mobilize within these developments. The problem ultimately lies in a failure to recognize the democratic components of the state and to articulate a conception of emergency that can do justice to the distinctive promise and perils of democratic social power. So long as we continue to think of the state as a cold monster, quintessentially bureaucratic, an authoritarian leviathan, or the product of an unending state of exception, we will misunderstand the nature of our greatest threats, which lie within our democratic politics – not beyond them – and yet can only be solved by them.

#### Notes

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- 27 Markus D. Dubber, "Criminal Police and Criminal Law in the Rechtsstaat," in Markus D. Dubber and Mariana Valverde, eds., *Police and the Liberal State* (Palo Alto: Stanford University Press, 2008), 92–109; Novak, "Police Power and the Hidden Transformation of the American State," in Dubber and Valverde, 54–73.
- 28 Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014). For a blistering critique of this law/nonlaw perspective, see Adrian Vermeule, "No," *Texas Law Review*, 93 (2015), 1547–66.
- 29 *Brown v. Maryland*, 12 Wheat. 419 (U.S., 1827); *Commonwealth v. Alger*, 7 Cush. 53 (Mass., 1851); Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge: Harvard University Press, 1957).
- 30 F.O. Matthiessen, *American Renaissance: Art and Expression in the Age of Emerson and Whitman* (New York: Oxford University Press, 1941); Robert D. Richardson, Jr., *Emerson: The Mind on Fire* (Berkeley: University of California Press, 1955).
- 31 Ralph Waldo Emerson, *Journals of Ralph Waldo Emerson, 1820–1872* (Cambridge: Riverside Press, 1912), 8: 232.
- 32 Emerson, "Self-Reliance," 217.
- 33 Emerson, "The Fugitive Slave Law," in *The Complete Works of Ralph Waldo Emerson*, vol. 11.
- 34 Karl Marx, "Critique of Hegel's Doctrine of State," in *Karl Marx: Early Writings*, trans. Rodney Livingstone and Gregor Benton (New York: Vintage, 1975), 87–88.
- 35 Julia Adams and George Steinmetz, for example, have recently sent us back to Schmitt to look for a renewal of sociological approaches to the state and politics. In their account, Schmitt's decisionism provides a way forward beyond the Weberian sociologies of the state that were spawned in 1970s. As this section articulates, Dewey offered an equally potent and radical transition out of Weberian autonomous state-centeredness, but one that also overcame the pitfalls and dangers in the Schmittian response. Instead of rooting decision in sovereignty, Dewey rooted decision in a deeply sociological conception of the public. In this sense, not only was Dewey's conception of the state more sociological, it was also more democratic. Adams and Steinmetz adopt Schmitt's position that returning to a form of agency or decisionism requires a return to thinking about sovereignty. However, Dewey's response to Schmitt (and Weber) suggests not only that this is not necessarily the case, but that a more productive response may be found by jettisoning sovereignty as the foundation for decision. Adams and Steinmetz, "Sovereignty and Sociology: From State Theory to Theories of Empire," *Political Power and Social Theory* 28 (2015): 269–85.

- 36 Chantal Mouffe, ed., *The Challenge of Carl Schmitt* (London: Verso, 1999)
- 37 Originally published in *Kant-Studien*, 1930. All references to this article are from Arthur Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000).
- 38 Jacobson and Schlink, *Weimar*, 302.
- 39 *Ibid.*, 311.
- 40 *Ibid.*, 303.
- 41 *Ibid.*, 307.
- 42 *Ibid.*, 308.
- 43 John Dewey, *The Public and Its Problems* (New York: Henry Holt and Company, 1927), 24.
- 44 *Ibid.*, 33.
- 45 *Ibid.*, 25.
- 46 *Ibid.*, 26.
- 47 *Ibid.*, 31.
- 48 *Ibid.*, 32.
- 49 Schmitt, "Ethics," 307.
- 50 Dewey, *Public and Its Problems*, 225.
- 51 On this point, see Vincent Azoulay's critique of Schmitt's conception of the political in the Greek polis. "Repolitiser la cité grecque, trente ans après," *Annales. Histoire, Sciences Sociales* 3 (2014): 689–719.
- 52 Dewey, *Public and Its Problems*, 25.
- 53 *Ibid.*, 29.
- 54 *Ibid.*, 30.
- 55 Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper & Brothers, 1942), 83.
- 56 Pierre Clastres, *Society against the State: Essays in Political Anthropology*, trans. Robert Hurley and Abe Stein (New York: Zone Books, 1989), 13.
- 57 On the retreat from pragmatism and rediscovery of the democratic faith, see Edward Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (Lexington: University of Kentucky Press, 1973). On totalitarianism, see Ben Alpers, *Dictators, Democracy, and American Public Culture: Envisioning the Totalitarian Enemy, 1920s–1950s* (Chapel Hill: University of North Carolina Press, 2003); David Ciepley, *Liberalism in the Shadow of Totalitarianism* (Cambridge: Harvard University Press, 2006). On the (neo)liberal revival, see Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (Cambridge: Harvard University Press, 2012).
- 58 Robert Westbrook, *John Dewey and American Democracy* (Ithaca: Cornell University Press, 1991); Barry Karl, *Charles E. Merriam: An Introduction to the Man and His Papers* (Chicago: University of Chicago Library, 1975); Barry Karl, Charles E. Merriam and the *Study of Politics* (Chicago: University of Chicago Press, 1974); Walter Lippmann, *An Inquiry into the Principles of the Good Society* (Boston: Little, Brown, 1937); Ronald Steel, *Walter Lippmann and the American Century* (Boston: Little, Brown, 1980).
- 59 Charles Merriam, *The New Democracy and the New Despotism* (New York: McGraw-Hill, 1939).

- 60 Merriam, *New Democracy*, 6.
- 61 Quoted in *Ibid.*, 210.
- 62 *Ibid.*, 136.
- 63 *Ibid.*, 137; 132–45 *passim*.
- 64 *Ibid.*, 191–242.
- 65 *Ibid.*, 127.
- 66 Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Oxford University Press, 1942).
- 67 William Novak, “The Public Utility Idea and the Origins of Modern Business Regulation,” in *Corporations and American Democracy*, ed. Novak and Naomi Lamoreaux (forthcoming, 2017).
- 68 Merriam, *New Democracy*, 127, 132–35.
- 69 Merriam, *New Democracy*, 179.
- 70 This was the topic of his dissertation: Charles E. Merriam, *History of the Theory of Sovereignty since Rousseau* (New York: Columbia Studies in the Social Sciences, 1900).
- 71 Walter Lippmann, *The Good Society* (Boston: Little, Brown and Company, 1937); James Burnham, *The Managerial Revolution* (New York: John Day, 1941).
- 72 Neumann, *Behemoth*, esp. part I, ch. 1.
- 73 Merriam, *New Democracy*, 340–45.
- 74 It is here that we see the advantages of the pragmatic/democratic approach over that of Foucault, for it accounts for coercion without reducing it always to domination, discipline, or governmentality, thus opening conceptual room for citizenship, agency, and self-possession. On the biographical origins of Foucault’s totalized (and totalizing) power scheme in his boyhood experience of Vichy France, see Mark Mazower, “Foucault, Agamben: Theory and the Nazis,” *Boundary 2* 35, no. 1 (Spring 2008): 23–34.
- 75 Merriam, *New Democracy*, 345.
- 76 *Ibid.*, 179.
- 77 *Ibid.*, 181.
- 78 *Ibid.*, 140; 133.
- 79 *Ibid.*, 183–86.