

Schmitt, Locke, and the Limits of Liberalism

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This article brings Carl Schmitt's Political Theology into conversation with John Locke's Second Treatise of Government. Two fundamental issues are considered: the relationship between Locke's theory of prerogative power and Schmitt's sovereign/commissarial distinction, and the place of the theological—in particular the “miraculous” nature of the exception. While some have claimed that Locke's theory of prerogative fits the model of “commissarial dictatorship” I argue that Locke actually complicates the sovereign/commissarial distinction by maintaining the tensions between prerogative, law and popular judgment. Schmitt, on the other hand, dissolves the tension by absorbing popular sovereignty into sovereign exceptionalism. Concerning the miraculous nature of the exception, I argue that Schmitt's claim should be understood as part of a broader effort to render politics serious and so I situate his remarks in light of the complex relationship between the political and the moral in his Concept of the Political. Because Locke's politics is “already” serious in the sense of being firmly situated within natural law, exceptional circumstances do not perform the same redemptive function.

Introduction

This article comes to Carl Schmitt's *Political Theology* through the work of John Locke, and it begins with something of a puzzle. Schmitt is critical and dismissive of Locke. For Schmitt, Locke is the exemplar of liberal legalism and its evasion of the political. In *Political Theology* he declares, “The exception was something incommensurable to John Locke's doctrine of the constitutional state and the rationalist eighteenth century.”¹ Curiously, what Schmitt does not discuss in *Political Theology* is Locke's own theory of prerogative power, the power to act outside of law, and even against it, in response to what Locke calls “accidents and necessities.”

The contemporary debate over emergency powers in the U.S. deepens the puzzle. In the post-9/11 context, several legal theorists have explored a revised version of Lockean prerogative. This approach is called the “extra-legal measures” model by Oren Gross. It remains liberal in its logic as it is aimed at preserving the rule of law, but it seeks to defend an approach to emergency powers that resists both naïve legalism *and* forms of constitutionally or legislatively incorporating a state of exception: Gross writes, “Going completely outside the law in appropriate cases preserves, rather than undermines, the rule of law in a way that bending the law to accommodate for catastrophes does not.”² Many historical precedents are invoked—including Thomas Jefferson—but the theoretical touchstone is Locke's discussion of prerogative in the *Second Treatise*.³ While explicitly inspired by Locke, the extra-legal measures model has been criticized as bearing the trace of Carl Schmitt's own viewpoint, in particular his description of the sovereign power to decide on the exception, and the ubiquity of existential

crises and emergencies that require action outside of normal law.⁴ Contemporary “extra-legalists” then, are inspired by Locke’s theory of prerogative but are often accused of crypto-Schmittianism. They can be linked to *both* Schmitt and Locke despite the fact that Schmitt himself viewed Locke as a liberal legalist with no account of extra-legal power. This oddity illustrates, on one level, simply Schmitt’s inadequate reading of Locke in *Political Theology* and his mistaken linking of Locke to certain forms of 19th century liberalism.⁵ But there is a deeper level to the puzzle as well: the possibility that Locke’s approach to prerogative actually complicates some of the oppositions and categories that tend to circulate in the debate over emergency powers, categories that Schmitt played a key role in developing: norm/exception, sovereign dictatorship vs. commissarial dictatorship, constitutional/extra-constitutional.

Indeed it is striking how the debates over emergency powers tend to circulate around a series of all too rigid oppositions: *either* courts *or* legislatures as the appropriate constraint on executive prerogative; either the exception is marginal or the exceptional is the new normal; either the exception is constitutional or the exception is extra-constitutional. These binary oppositions tend to stack on top of each other, so we get an argument that legislatures and constitutional provisions for managing the exception are a dangerous kind of accommodation and a sure way to make the exceptional normal and the exact reverse argument that judicial evaluation of emergency powers is a sure way to make the exceptional normal.⁶

In one respect, the work of Schmitt contests these boundaries and rigid oppositions. His account of the sovereign decision on the exception makes the case that such a sovereign decision can never be confined to the legal order, even while such a sovereign must be named by that legal order.⁷ Schmitt problematizes any attempt to confine the exceptional to some pure outside. On the other hand, Schmitt’s own thought seems relentlessly binary. Two of his most important contributions to political theory take the form of binary oppositions: the friend/enemy distinction, and the idea of a fundamental contradiction between liberalism and democracy.

In this article I begin by asking to what extent Locke’s theory of prerogative can be successfully slotted into some of the conceptual frameworks and oppositions presented by Schmitt, and to what extent Locke’s theory of prerogative power actually complicates and contests Schmitt’s arguments. If this is the case, then Schmitt’s own avoidance of a serious

engagement with Locke might hint at richer resources within liberal political thought for coping with “the exception.”

I claim that Locke does not conform to Schmitt’s caricatured gloss as someone whose thought evades the issue of the exception entirely. Rather I argue that by developing a tensional relationship between three poles—legality, executive discretion, and popular judgment—Lockean prerogative avoids easy placement in the available categories of dictatorship presented by Schmitt. Nevertheless, in my reading Locke’s “tri-polar” vision renders his conception of popular judgment of prerogative resonant with a neglected concept of the Schmittian corpus—the idea of the people as existing “next to” the constitution. Finally, it is in terms of what Schmitt calls the “miraculous” nature of the exception that Locke’s prerogative and Schmitt’s sovereign part ways most fully. They do so not because Locke is more secular but because the Lockean political context is more religious.

I. Sovereign vs. Commissarial Dictatorship in Schmitt’s Thought

John McCormick describes the place of the concepts of commissarial and sovereign dictatorship in the evolution of Carl Schmitt’s work. Schmitt distinguishes between commissarial and sovereign dictatorship in his 1921 (untranslated) work, *Die Diktatur*, a text that is read by McCormick “as ... a call for the revival of the institution of commissarial dictatorship to preserve a republican political order.”⁸ “Commissarial dictatorship” is inspired by the Roman model and is limited by its decision-making power, its duration, its purpose and its source. As McCormick summarizes, “‘commissarial dictatorship,’ ... is bound by allotted time, specified task, and the fact that it must restore a previously standing order.” By contrast, McCormick writes, a ‘sovereign dictatorship,’ a historically modern phenomenon, ... is unlimited in any way and may proceed to establish a completely new order.”⁹ The purpose of commissarial dictatorship is the ultimate preservation of the existing legal order. A sovereign dictator is not limited in such a way.

In terms of decision-making power, the commissarial dictator does not decide on the exception in the sense of deciding that an emergency exists. In a political system with a commissarial dictator, a different body such as the legislature decides that an exceptional situation exists and appoints a dictator to handle it. In other words, the commissarial model separates two kinds of decision: the decision that an exceptional situation exists (to be

undertaken by a political body like the Senate), and the decision on what emergency measures to implement to respond to the crisis (to be undertaken by the dictator, appointed by the Senate to deal with it).¹⁰

Most fundamentally, the distinction between sovereign dictator and commissarial dictator comes down in large part to the source of its authority. In *Die Diktatur* Schmitt writes, “While the commissarial dictatorship is authorized by a constituted organ and maintains a title in the standing constitution, the sovereign dictator is derived only *quoad executium* and directly out of the formless *pouvoir constituant*.”¹¹ Whereas the commissarial dictator is rooted in the constitutional order, the sovereign dictator has a more complex relationship to the legal order: “Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety.”¹² The sovereign may be named by the constitution but he is not thereby limited by it. Indeed, McCormick argues that the sovereign’s authority is rooted rather in his status as “the personal embodiment of the popular will which cannot be procedurally ascertained in a time of crisis.”¹³

A year after *Die Diktatur*, the distinction between sovereign and commissarial dictatorship disappears in his work *Political Theology*. There, Schmitt embraces sovereign dictatorship and appears dismissive of any attempt to limit or manage the sovereign decision on the exception. Indeed, as McCormick demonstrates,¹⁴ in *Political Theology* Schmitt merges together those two decisions whose separation were a defining feature of the commissarial model—the decision that an “existential crisis” exists and the decision on suspending law and implementing specific emergency measures as both defining features of sovereignty. Schmitt writes that the sovereign “decides whether there is an extreme emergency as well as what must be done to eliminate it.”¹⁵ Furthermore, in *Political Theology*, Schmitt endorses sovereign dictatorship and dismisses attempts to constitutionally limit the dictator: Schmitt writes, “If measures undertaken in an exception could be circumscribed by mutual control, by imposing a time limit, or finally, as in the liberal constitutional procedure governing a state of siege, by enumerating extraordinary powers, the question of sovereignty would then be considered less significant but would certainly not be eliminated.”¹⁶ Schmitt seems to suggest here that such efforts to limit emergency powers are either pointless (the state will do what it needs to do) or potentially dangerous (tying the hands of the sovereign).

2. Is Lockean Prerogative Sovereign or Commissarial?

The distinction Schmitt makes in *Die Diktatur* and then abandons (or blurs) in *Political Theology* between sovereign and commissarial dictatorship is worth exploring in relation to Locke's account of prerogative power in the *Second Treatise of Government*. Locke, that famous theorist of liberal legalism, presents in his chapter "Of Prerogative" (and in two significant paragraphs in the preceding chapter) an account of the limits of law:

Many things there are, which the law can by no means provide for, and those must necessarily be left to the discretion of him, that has the Executive Power in his hands (§159).

Sometimes, official action is needed where the law is silent. Furthermore, "'tis fit that the Laws themselves should in some Cases give way to the Executive Power" (§159). Thus, "doing good without a rule" also means pursuing the public good against existing laws when extraordinary circumstances require it. This is justified because of the unpredictable nature of social life; "all Accidents and Necessities" (§160) require the exercise of prerogative.

So Locke defines prerogative as "The Power to act according to discretion, for the publick good, without the prescription of Law, and even against it" (§160). In the language of Schmitt's *Political Theology*, this exercise of discretionary power is the eruption of sovereignty (though notably Locke never uses the language of sovereignty). Here are some examples of prerogative power according to Locke:

- Tearing down a man's house when his neighbor's house is on fire, to stop the spread of the fire.
- The power to pardon someone convicted of a crime.
- The power to convene and dismiss the legislative body.
- The power to redistrict when there are "rotten boroughs"—districts with no people in them.

Locke argues that an unwavering adherence to the letter of the law may end up violating a higher law—the law of nature—the preservation of the community. Indeed, Locke himself criticizes the sort of rigid legalism that Schmitt accuses him of embracing.

Given that Locke never uses the language of sovereignty, one might well ask whether Locke's prerogative power is a version of the commissarial dictator. One way to answer this question is to explore the *purpose* of prerogative power, and its *extent*. Lockean prerogative

follows Schmitt's "commissarial" model to the degree that it privileges the existing legal order and its preservation. Lockean prerogative is not oriented towards the goal of creating new law¹⁷ but rather acting outside of existing law in circumstances of necessity until normal law can be reasserted in times of normalcy. Thus, in terms of its purpose, Locke's prerogative appears to follow the commissarial, as opposed to sovereign model. On the other hand, in terms of the extent of prerogative power, Locke's executive who exercises the power of prerogative follows Schmitt's sovereign model in the sense that he decides both on the existence of a crisis and on the necessary steps to meet it. Locke does not articulate (neo-Roman) procedures whereby the legislature appoints a person to manage to the crisis. Rather, prerogative falls to the one who holds the executive power.

In addition to the purpose and extent of prerogative, it is helpful to examine its source. Indeed, it is on the issue of the source of the dictator's power that Locke's theory complicates the sovereign/commissarial distinction most fully. To recapitulate, a commissarial dictator, in addition to being oriented towards the preservation or re-establishment of normal law, is also constitutional in the sense that he is *authorized* by the existing constitution and/or established by the decision of a constituted power (such as the legislature).

So what is the source of prerogative power? The Locke secondary literature is actually divided on this issue. On one view, extra-legal action has a constitutional basis. If prerogative is rooted in the legal order, then it is not sovereign. McCormick makes this case in an explicit comparison with Schmitt: "Locke does then contradict Schmitt's interpretation [of liberalism and Lockean constitutionalism], for he has a notion of acting above or against the law in times of unforeseen occurrences, *that is compatible with—nay, is embedded within—his constitutionalism.*"¹⁸ Similarly, Vicente Medina likens Locke's theory of prerogative to Schmitt's category of commissarial dictatorship: "Lockean prerogative resembles the concept of commissarial dictatorship ... one commissioned to act according to a constituted power (an existing constitutional order) to preserve and/or to restore such an order." Furthermore, Medina writes, "Lockean prerogative resembles the concept of commissarial dictatorship, whose authority is limited by the consent and trust of the majority and by natural law."¹⁹

Others disagree, however, and argue that while prerogative may be limited by natural law, it is only an extra-constitutional force of popular resistance that gives effect to natural law and checks the extra-constitutional force that is prerogative. On this view, prerogative is not a

grant of the people to the executive in the “second stage” of the social contract, embedded in a constitutional structure, but a pre-political power that remains in a constitutional order precisely because that order is insufficient.²⁰ As a natural power, prerogative on this view is in essence sovereign: it is not bound by or rooted in any constituted power or positive law. In other words, on this view Lockean prerogative is much closer to Schmitt’s model of sovereign dictatorship than to his model of commissarial dictatorship, since it is a power that is neither rooted in nor limited by the laws of a constituted political order.

But even this view recognizes that Locke’s prerogative is fundamentally limited by natural law. Prerogative is lawless on the extra-constitutional view, but nevertheless accords with (and derives from) natural law because it is a power oriented towards the public good. Prerogative, in other words, is not tyranny. But how is the distinction between prerogative and tyranny made, and who makes it? Locke introduces a third dimension to the practice of prerogative: the persistence of popular judgment. Prerogative is fundamentally limited not by a constituted power, such as the legislature (and certainly not the courts, since Locke did not theorize an independent judiciary). The role of popular judgment is significant in making prerogative something unlike either sovereign or commissarial dictatorship.

As I argue in greater detail elsewhere,²¹ by emphasizing the centrality of popular judgment, Locke describes a tri-polar world in which law (including a society’s basic law), executive discretion (including prerogative) and popular judgment (including the right to resist tyranny) exist in permanent constitutive tension with each other. In making this argument I follow Jef Huysmans’ description of liberal democracy as constituted by three tensions between the poles of rule of law, political leadership and popular will.²² This framework might be more easily assimilated to the *contemporary* liberal democratic separation of powers, in which executive, legislature and judiciary embody the three poles Huysmans describes. It might seem to less accurately characterize Locke’s approach, since Locke does not establish an independent judiciary—interpreting the law is a subsidiary power to the law-making (legislative) power. But a tensional relationship between legality, executive discretion, and public judgment need not be fixed to the specific institutional forms of American constitutional democracy. As I will argue, Locke develops something similar in his account of popular judgment and its tensional relationship with legislative (law-making power) and prerogative power. Locke neither collapses the people’s judgment into the legislative power (the legislature representing the people) nor

collapses the people into the executive (the prince as embodiment of the people's will). When it comes to judging (misuse of) prerogative, sovereign exceptionalism and popular sovereignty coexist in tension.

The people's power to judge the use and misuse of prerogative is neither legally established nor legally proscribed. It is neither established as a standard, constitutional procedure—as in elections—nor rendered illicit—as in illegal rebellion.²³ Ultimately, Locke gives the people natural-law authorization to judge abuse of prerogative (misuse which renders it not prerogative at all, but rather tyranny):

Tho' the *People* cannot be *Judge*, so as to have, by the Constitution of that Society, any Superior power, to determine and give effective Sentence in the case; yet they have, by a Law antecedent and paramount to all positive Laws of men, reserv'd that ultimate determination to themselves which belongs to all Mankind, where there lies no Appeal on Earth, viz. to judge, whether they have just Cause to make their Appeal to Heaven (§168).

Popular judgment is thus neither subordinate to law nor fully outside of law. Rather, the people judge at the threshold of the constitutional order. If the people judge an executive action to be legitimate prerogative, they remain inside the constitutional order. On the other hand, if the people decide that that abuse of prerogative has occurred, they render themselves something like a constituent power, outside the constituted order. The people judge at a threshold—their position is liminal with respect to the constitutional order and it is their judgment itself, which retroactively determines their political-legal status.

Whereas Locke seeks to maintain the tension between popular judgment, law, and executive prerogative, Schmitt, by contrast, collapses two of these poles together in his account of sovereign dictatorship: popular judgment is rendered as an originary popular sovereignty that authorizes a sovereign dictatorship and its exercise of emergency powers. Analysts of Schmitt tend to agree on the collapsing of the poles but differ on exactly how they merge in Schmitt's thought. There is both an authoritarian and a democratic reading here, and the difference hinges upon how one understands what Kalyvas describes as “the elective affinity between the constituent act and the exception.”²⁴ In one interpretation the former is really subordinate to the latter, as Schmitt is primarily concerned to defend a sovereign dictatorship.²⁵ An opposing interpretation makes the constituent power—popular sovereignty—the core of Schmitt's

theory of sovereignty and marginalizing Schmitt's more famous account of sovereignty as fundamentally linked to the exception and emergency powers.²⁶ But this "democratic" interpretation is vulnerable to the charge that Schmitt's invocation of constituent power is less as a real mechanism of accountability and more as a rhetorical veneer of legitimation to encourage a mute populace to identify with an elite.²⁷ Indeed, to the extent that the relationship between constituent power and the holder of sovereignty is one of authorization and/or embodiment, the relationship is similar to the one between Hobbes's parties to the social contract and the Hobbesian sovereign. What is important for my purposes is the merging together of two poles—sovereignty as a democratic constituent power and sovereignty as a quasi-monarchical decision on the exception. This merger can occur once Schmitt has conceptualized the demos in terms of a *unified will*, "one identity that is embodied in a sovereign" and not in terms of intersubjective practices of judgment.²⁸ The "democratic" interpretation of Schmitt fails precisely because the two poles collapse into each other. As Jean Cohen writes, "This flawed theory of representation as a form of incarnation leads Schmitt to construe the will of the people as that which is embodied by the successful political actor (the sovereign representative) who manages to get the people to 'identify' (their will and their very identity as a people) with him."²⁹

Locke, unlike Hobbes or Schmitt, lacks such a notion of executive embodiment of the people's will. However, my account of the people's place at the threshold of the constitutional order *does* bring Locke closer to one counter-theme in Schmitt's work on constitutionalism, a counter-theme that runs against the predominant theme of the collapse of popular will into a monarchical sovereignty: a conception of the people that does not collapse the poles of executive decision and popular sovereignty together. This is what Kalyvas describes as Schmitt's account in a post-*Political Theology* work, *Verfassungslehre* (forthcoming in an English translation as *Constitutional Theory*)³⁰ of one way in which the people might relate to the constitution, the people being "next to" the constitution and neither fully inside (as a constituted power in normal politics) nor fully outside (as a founding constituent power in extraordinary politics). Agonistic public spheres, animated by norms of popular constitutionalism, work by "encircling the constitution with multiple, active public assemblies."³¹ Something like this conception of the people as "next to" the constitution makes a very brief appearance in *Political Theology* when Schmitt describes the American political experience: "Tocqueville in his account of American

democracy observed that in democratic thought the people hover above the entire political life of the state, just as God does above the world, as the cause and end of all things, as the point from which everything emanates and to which everything returns.”³² This “being above” sounds like a constituent power outside of normal politics. However, it is not restricted to some revolutionary moment of constitution in the distant past or in a longed-for future but rather persists in tension with the constituted political order.

Locke manages to hold a similar insight, I argue, and he develops it in relation to his version of the exception—prerogative, whereas Schmitt fails to develop this idea when he explores (and defends) sovereignty and the exception in *Political Theology*. If Locke’s people act “next to” the constitution, as a partially constitutional, partially extra-constitutional judging public, then prerogative power is “next to” the constitution as well; it is partially imbued with law because it is exercised in anticipation of the judgment of people who are themselves using in part the categories of law and constitutionalism. Understanding this dynamic, Locke describes a “weak and ill prince” (§164) who not only over-uses prerogative but also justifies it in explicitly constitutional language. This does not render prerogative lawful; rather, its contested status presses the prince to invoke legal discourse and prompts the people “to claim their right, and limit that power” (§164). In other words, the triangle constituted by the three poles-- executive discretion, rule of law, and popular judgment--shape prerogative power, complicating Schmitt’s distinction between sovereign and commissarial dictatorship.

3. Is the Exception Miraculous?

Locke’s model of prerogative fits neither the commissarial dictatorship discussed by Schmitt in 1921 nor the sovereign dictatorship to which he turns in 1922. But given the significance of natural law in Locke’s account of prerogative and the people’s power to judge it, another area of apparent overlap needs consideration: the relationship between the political and the theological in Locke and Schmitt. The political and the religious are certainly entwined for both Locke and Schmitt, but the nature of the entanglement is quite different in each.

Schmitt emphasizes the entwining of the theological and the political in *Political Theology*, in contrast to his argument for the autonomy of the political in *The Concept of the Political*. However, Leo Strauss’s brilliant close reading of the latter text presents a convincing case that Schmitt does not maintain the autonomy of the political, that Schmitt’s defense of the

political is ultimately moral in nature, an effort to preserve the seriousness of human existence from its trivialization and degradation into mere “entertainment.”³³ Indeed, Strauss seizes on Schmitt’s mention of “entertainment” as key to his underlying normative agenda:

Politics and the state are the only *guarantee* against the world’s becoming a world of entertainment; therefore, what the opponents of the political want is ultimately tantamount to the establishment of a world of entertainment, a world of amusement, a world without *seriousness*. ... [Schmitt] affirms the political because he sees in the threatened status of the political a threat to the seriousness of human life. The affirmation of the political is ultimately nothing other than the affirmation of the moral.³⁴

Schmitt’s theological-political connection in *Political Theology* might, then, best be read alongside his “crypto-normative”³⁵ claims in *Concept of the Political* as an attempt to preserve the moral status of the political in the face of depoliticization, bureaucracy, and what Strauss emphasizes as the expanding banality of modern life.

More specific in *Political Theology* is the claim that the concept of the exception derives from the miracle. Schmitt writes, “All significant concepts of the modern theory of the state are secularized theological concepts. ... The exception in jurisprudence is analogous to the miracle in theology.”³⁶ What is less remarked upon is how Schmitt proceeds to identify a plethora of state actors (sovereigns, petty sovereigns, and even bureaucracies) who wield the sort of discretionary power that exceeds law: “The state intervenes everywhere,” Schmitt writes, including through prerogative,

as the graceful and merciful lord who proves by pardons and amnesties his supremacy over his own laws. There always exists the same inexplicable identity: lawgiver, executive power, police, pardoner, welfare institution The state acts in many disguises but always as the same invisible person. The ‘omnipotence’ of the modern lawgiver ... is not only linguistically derived from theology.³⁷

Why is the sovereign decision on the exception likened to a miracle by Schmitt? To answer this question it is helpful to look at two different things Schmitt says about the exception. On the one hand, Schmitt writes that the exception “cannot be circumscribed factually and made to conform to a preformed law.”³⁸ This claim reflects the idea that the exception does not have an ontological status that is obviously distinct from a condition of normalcy. Rather than outline

the contours of an exceptional situation, Schmitt views the exception as something that is *brought about* by a decision.³⁹ (We might therefore liken the exception to a performative speech act.) The decision on the exception is determinative. On the other hand, at the same time as denying the ontological status of the exception, Schmitt also grants an independent status to the danger which prompts sovereign action: Schmitt does acknowledge some factual basis for the decision: “a case of extreme peril, a danger to the existence of the state, or the like.”⁴⁰ Indeed, developing further the ontological status of the exception, Schmitt also claims that the exception is the rupturing of the legal bureaucratic order, and the intrusion into that order of “real life.” “In the exception”, Schmitt writes, “the power of real life breaks through the crust of a mechanism that has become torpid by repetition.”⁴¹ This account of the exception emphasizes not the decision, but rather *that which compels* a decision. It also emphasizes the constative, as opposed to performative, aspects of the “decision”.

It seems to me that the “miraculous” nature of the exception corresponds in different ways to these formulations. The miraculous nature of the exception in the first formulation lies in what Schmitt describes as the 17th-18th century analogy between the sovereign and God: “To the conception of God in the seventeenth and eighteenth centuries belongs the idea of his transcendence vis-à-vis the world, just as to that period’s philosophy of state belongs the notion of the transcendence of the sovereign vis-à-vis the state.”⁴² Just as an omnipotent God performs miracles by suspending the laws of nature, the political sovereign suspends positive laws.

The miraculous nature of the exception is different in the second interpretation of the exception’s meaning. Here, the political exception is not understood as a divine intervention from above but an eruption of the real—of life itself—into a “machine” that has become lifeless. This version of the exception corresponds to what Schmitt views as the 19th century conflation of the state with popular sovereignty and the rise of “conceptions of immanence.”⁴³ The sovereign has been “radically pushed aside,” Schmitt writes, and “the machine now runs by itself.”⁴⁴ Whereas in the 17th and 18th centuries one finds both the idea of a transcendent God and the idea of a sovereign who exceeds law and the state, the 19th century witnesses the rise of immanence: “the democratic thesis of the identity of the ruler and the ruled, the organic theory of the state with the identity of the state and sovereignty.”⁴⁵ Perhaps then, the miraculous nature of the exception consists for Schmitt (in his contemporary moment) in a revivification—when sovereign power and “real life” jointly (as I have said before, emphatically

not in tension with each other) break through the crust of bureaucratic legalism. The exception in its 18th century form was the intervention of a sovereign to suspend regular law; the 19th century exception, by contrast, involves the eruption of real life into the machine of the modern state, which has become nothing more than “a huge industrial plant.”⁴⁶ The exception becomes here a form of redemption. The state of exception redeems a corrupt liberal constitutional political order.⁴⁷

If the exception is “miraculous” for Schmitt, it most certainly is not for Locke. The Lockean system is already religious: a political order bound by natural law. For Locke, prerogative power is clearly not miraculous—it compensates for certain deficiencies in positive law. Furthermore, prerogative power is already nested in a theological framework, constrained as it is by natural law. But when we turn to ask what mechanisms enforce this natural law constraint, the answer, I believe, is popular judgment, a vigilant citizenry acting at the threshold of the constitutional order. Thus, while Schmitt’s “redemptive” exception is *grounded* upon an idea of the constituent power, Locke’s natural law authorized prerogative is *limited* by (something like) constituent power. Another way to put this might be to say that Lockean prerogative is not “miraculous” because Lockean politics is *already serious*—built in to its natural law framework is the ever-present possibility of “trial by combat,” popular resistance to tyranny. Schmitt, in the final analysis might be said to agree—insofar as he mourns the loss of political theology in nineteenth century scientism he would claim that Locke’s natural law infused political world, and the people who “hover” over that political order, are a relic of a lost time.

¹ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* trans. by George Schwab (Chicago: University of Chicago Press, 2005), pp. 13-14.

² Oren Gross, "Prohibition on Torture," *Torture: A Collection*, Sanford Levinson, ed. (Oxford: Oxford University Press, 2004) p. 240.

³ Gross says Locke’s theory of prerogative is a “prototype” of his model, but that it requires modification by building in the requirement of “an explicit, particular, ex post ratification (or rejection)” of extra-legal power by the general public. But Gross has an expansive account of what counts as ex post ratification, including re-election of a leader who declares the extra-legal nature of his actions, and I believe Gross overdraws the difference between his account of public review and Locke’s account of the people’s role in judging prerogative. See Oren Gross, “Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?” *Yale Law Journal* 112 [2003], pp. 1011-1134

⁴ William Scheuerrman, "Survey Article: Emergency Powers And the Rule of Law After 9/11," *Journal of Political Philosophy* 14:1 (2006), pp. 70-71.

⁵ See John P. McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," in *Law as Politics: Carl Schmitt's Critique of Liberalism* Ed by David Dyzenhaus, (Durham NC: Duke University Press, 1998), p. 238.

⁶ For versions of this "exception becomes the norm" argument see: Oren Gross, "Chaos and Rules" and Ian Zuckerman, "One Law for War and Peace? Judicial Review and Emergency Powers between the Norm and the Exception," *Constellations* 13, 4 (2006), pp. 522-545

⁷ On this point see Scheuerman, "Survey," p. 63.

⁸ John P. McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," in *Law as Politics: Carl Schmitt's Critique of Liberalism* Ed by David Dyzenhaus, (Durham NC: Duke University Press, 1998), p. 225.

⁹ McCormick, "Dilemmas," p. 220.

¹⁰ McCormick, "Dilemmas," p. 223. A contemporary model of emergency powers, also inspired by the Roman model is Bruce Ackerman's "Emergency Constitution." While it is true that Ackerman grants the power of declaring a state of emergency to the President, who also wields emergency power, Ackerman follows this tradition in requiring legislative reauthorization of the emergency after a week or two and then re-authorization by ever-increasing legislative majorities otherwise the state of emergency would expire. See Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (New Haven, CT: Yale University Press, 2006).

¹¹ Carl Schmitt, *Die Diktatur Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf* (Berlin: Duncker & Humblot, 1989), p. 145, as translated and quoted by McCormick, "Dilemmas," p. 227.

¹² Schmitt, *Political Theology*, p. 7.

¹³ McCormick, "Dilemmas," p. 229.

¹⁴ McCormick, "Dilemmas," p. 223.

¹⁵ Schmitt, *Political Theology*, p. 7.

¹⁶ Schmitt, *Political Theology*, p. 12.

¹⁷ Except, as Ross Corbett notes, in one case: redistricting—the creation of an electoral law to fix "rotten boroughs." See: Ross J. Corbett, "The Extraconstitutionality of Lockean Prerogative," *Review of Politics* 68 (2006), p. 439.

¹⁸ McCormick, "Dilemmas," 238, emphasis added

¹⁹ Vicente Medina, "Locke's Militant Liberalism: A Reply to Carl Schmitt's State of Exception," *History of Philosophy Quarterly* 19:4 (October 2002), pp. 348, 355.

²⁰ For this interpretation see Ross J. Corbett, "The Extraconstitutionality of Lockean Prerogative," *The Review of Politics* 68 (2006), p. 430.

²¹ The following two paragraphs are a summary of my argument in "Judging Necessity: Democracy and Extra-legalism," forthcoming in *Political Theory*.

²² Jef Huysmans, "Minding Exceptions: The Politics of Insecurity and Liberal Democracy," *Contemporary Political Theory*, vol. 3 (2004), pp. 321-341.

²³ As Locke tells us, tyrants (those who abuse prerogative) are the true rebels.

²⁴ Andreas Kalyvas, "Popular Sovereignty, Democracy, and the Constituent Power," *Constellations* 12, 2 (2005), p. 228.

²⁵ For instance, McCormick ("Dilemmas," p. 229) writes, "The president, as the personal embodiment of the popular will which cannot be procedurally ascertained in a time of crisis, has the authority to act—unconstitutionally or even anticonstitutionally—with all the force and legitimacy of that originary popular will."

²⁶ In Kalyvas's interpretation, the sovereign dictator has its power delegated from the constituent power of the people (Andreas Kalyvas, "Carl Schmitt and the Three Moments of Democracy," *Cardozo Law Review* 21 [2000], p. 1538). See also Jean Cohen's response (Jean Cohen, "Beyond Political Theology: Comment On Kalyvas On Carl Schmitt," *Cardozo Law Review* 21 [2000], p. 1590), describing the contribution of Kalyvas' interpretation. Kalyvas marginalizes *Political Theology* in all this, which he calls an "obscure" and "ambivalent" text ("Three Moments," p. 1534), turning to Schmitt's writings on constitutionalism in order to make "democratic" interpretation of Schmitt, that "rather than seeking an executive dictatorship, Schmitt was looking for a mediation between a substantive and a procedural democracy" ("Three Moments," p. 1552).

²⁷ McCormick emphasizes the rhetorical dimension, arguing that Schmitt in his political writings after *Political Theology* embraces a “strategy of justifying presidential dictatorial action on the basis of the preconstitutional sovereign will of the people” (“Dilemmas,” p. 232). By contrast, Kalyvas writes, “Sovereign dictatorship (either a person or collective entity) refers precisely to this single and extraordinary creative moment of the self-institution of society. Sovereign dictatorship embodies the constituent power of the community that decides explicitly and consciously to alter the form of its political existence.” (“Three Moments,” p. 1533) The indifference to the subject of sovereignty here—“either a person or collective”—seems telling, as does the language of embodiment—a kind of re-presentation that does not require mechanisms of accountability. Taken together, they weaken Kalyvas’s claim that “when joined with the idea of the people, this notion of sovereignty provides Schmitt with the normative resources for a robust theory of democratic legitimacy” (“Three Moments,” p.1536).

²⁸ Jean Cohen, “Comment,” p. 1593. Kalyvas acknowledges this problem in his conclusion, describing the necessary supplementation of Schmitt’s account with a recognition of the role of discussion and debate. However such a supplementation would directly undermine the core of Schmitt’s conception of democratic constituent power in terms of a unified will that can be embodied by leaders.

²⁹ Cohen, “Comment,” pp. 1592-1593.

³⁰ Carl Schmitt, *Verfassungslehre* (Munich and Leipzig, Duncker & Humblot, 1928). Forthcoming translation: *Constitutional Theory* trans. by Jeffrey Seitzer (Durham NC: Duke University Press).

³¹ Kalyvas writes, “In Schmitt’s ‘popular assemblies,’ the people recover their sovereign position, break from the privatization and depoliticization to which liberalism has attempted to relegate them, and reclaim their constituent power from the legal structure...” (“Three Moments,” pp.1561-62)

³² Schmitt, *Political Theology*, p. 49.

³³ Leo Strauss, “Notes on Carl Schmitt, *The Concept of the Political*” in *The Concept of the Political* trans. George Schwab (Chicago: University of Chicago Press, 1996), pp. 81-108. See also McCormick, “Irrational Choice and Mortal Combat as Political Destiny: The Essential Carl Schmitt,” *American Review of Political Science* 2007, p. 334, on *Political Theology*’s “affiliating the moral, the theological, and the political” and the subsequent “crypto-normative agenda” of *Concept of the Political*.

³⁴ Leo Strauss, “Notes on Carl Schmitt,” p. 101.

³⁵ The term is McCormick’s. “Irrational Choice and Mortal Combat,” p. 334.

³⁶ Schmitt, *Political Theology*, p. 36.

³⁷ Schmitt, *Political Theology*, p. 38.

³⁸ Schmitt, *Political Theology*, p. 6.

³⁹ In the view of Ferejohn and Pasquino this makes Schmitt a believer in the “epistemological” dimension of the exception while skeptical about the “ontological” dimension. Because the exception does not have an obvious or objective status, there is a “need to attribute to some agency (organ or institution) the epistemic authority to declare the exception.” John Ferejohn and Pasquale Pasquino *The Law of the Exception: A Typology of Emergency Powers*,” *International Journal of Constitutional Law*, 2, 2 (2004)p. 226.

⁴⁰ Schmitt, *Political Theology*, p. 6.

⁴¹ Schmitt, *Political Theology*, p. 15.

⁴² Schmitt, *Political Theology*, p. 49.

⁴³ Schmitt, *Political Theology*, p. 49.

⁴⁴ Schmitt, *Political Theology*, p. 48.

⁴⁵ Schmitt, *Political Theology*, p. 50.

⁴⁶ Schmitt, *Political Theology*, p. 65.

⁴⁷ On this point see McCormick, “Dilemmas,” p. 225.