

# The Future of Political Institutions - Foucault, Genealogical Critique, and the Normative Implications of His Analysis of the State



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## 1. Introduction

The political and normative entailments of Michel Foucault's theory and his philosophical method have remained an issue for interpreting the meaning of his work. This is partly because Foucault himself is somewhat reluctant to define his own political orientation (Foucault 1994g, 593). However, more relevant is his explicit refusal to develop a normative framework for his method of analyzing the rationalities and practices of power. According to Foucault, his critical research is supposed to be immanent rather than transcendental, and its main concern is making visible the rationalities and conceptualizations operating in power relations and practices that seem to us as if they were self-evident or invisible (Foucault 1994d, 180). In this context, a normative critique is inappropriate as it would have to begin with principles that transcend the objects of analysis. Furthermore, normative criteria would also contradict Foucault's basic idea that there are no universal structures or immutable conditions – an idea that is the hypothesis behind his analyzes as their objective is to reveal the radically historically determined and politically changeable aspects of our present (Foucault 1994h, 574).

However, many have argued that Foucault's genealogical method is in fact contradictory as it both seeks to refrain from passing moral judgement, and yet it seems to imply that there is something about the objects of analysis that need to be struggled against. For example, in his explicit remarks re-

gards regarding genealogy, Foucault claims that genealogy is meant to support struggles against specific practices of power (Foucault 1997, 11–12). For this reason, political philosophers like Nancy Fraser, Jürgen Habermas, and Charles Taylor, argue that Foucault is either not being open about his normative stance, making his method contradictory, or his lack of a normative framework makes his method unfit for supporting struggles against domination (Fraser 1981; 1985; Habermas 1985; Taylor 1984). Furthermore, Mitchell Dean and Daniel Zamora claim that Foucault’s methodology is normative as it focuses on the practices of governing rather than state power because it therefore serves to redirect political struggle from the state to the non-state practices of power (Dean and Zamora, 2021, 5). While they are critical of this shift of focus, others argue that this is an important development, as Foucault makes visible the sites of struggle that are not state-centered (see de Lagasnerie 2020, 74; Laval 2015, 30; cf. Brunila 2023).

In this article, I seek to re-evaluate Foucault’s normative standpoint to assess the usefulness of “genealogical critique,” as Martin Saar calls it (Saar 2007). In order to develop a normative reading of Foucault’s genealogical critique, I focus on its relevance for the critique of political institutions. While many, Saar included, underscore genealogy’s capacity to critically examine the production of subjectivity (see Oksala 2016), genealogy has been applied to institutions as well (e.g. Lichtenstein 2020). Furthermore, scholars such as Karsten Schubert have argued that Foucault’s methodological anti-universalism and its thesis that politics are inherently contingent lay the foundation for radical democratic institutions (Schubert 2021, 55). As I have argued elsewhere, such “post-foundational” political theories are normative in so far as they defend plural and open democratic institutions (Brunila 2022a; see Marchart 2018a). However, in order for post-foundationalist attempts to harness Foucault’s methodological insight for normative reasons, the problem regarding his genealogical method’s normativity will have to be answered.

While Schubert and others have developed their own Foucauldian universalist notions of freedom (Schubert 2019, see Mascaretti 2019), thus defending a universalist position that would create the basis for distinguishing between good and bad forms of governing, I focus on the way Foucault ana-

lyzes political institutions and what normative ideas can be inferred from it. This way, one does not have to connect Foucault's work with a universalist position but, instead, I develop an approach to critiquing political institutions with normative entailments. I illuminate Foucault's critical method as one that underlines that political institutions are historically contingent, as they can be transformed for the means of various political rationalities and accommodate different practices of power. In this way, Foucault's idea is not to negate or dismiss these institutions, but simply to understand them as being inherently historically contingent. I argue that this is because Foucault's genealogy is meant to excavate rationalities and practices rather than institutions. Unlike Dean and Zamora argue, I claim that genealogy's ability to disclose the contingent nature of political institutions is what makes it possible to understand these institutions as being transformable and therefore a site of political struggle. In contrast, if one were to approach political institutions as having an immutable essence, the normative outcome would be to either affirm them as such or overthrow them.

A good counterexample for the kind of attitude that essentializes political institutions is Giorgio Agamben's political theory, which used Foucault's work to examine sovereign power (Agamben 1998), and whose main idea has been that the state and law are principally institutions of foundational sovereign violence. Recently, Agamben's work has become relevant both because of the states of exceptions and the alleged use of sovereign power throughout the world during the COVID-19 pandemic (cf. Lehtinen and Brunila 2021) and because of his own comments on these events (Agamben 2021). Relying on his unique Foucauldian reading of sovereignty and biopolitics, he has made controversial statements regarding pandemic governance by making comparisons between the Italian pandemic governance and National socialist rule (Agamben 2021, 36-37). Furthermore, Agamben claims that the pandemic makes us aware of the worrying issue of whether "some of the words that we keep on using – such as democracy, legislative power, elections, constitution – actually lost their original meaning a long time ago" (*ibid.*, 65). For Agamben, all these institutions have ultimately lost their original purpose due to the government's constant use

of exceptional measures, a practice that ultimately makes the state of exception the normal situation indistinguishable.

Agamben's theory seeks to interpret political institutions as having a core essence that transcends historical changes, meaning that these institutions are either good or bad, and they are politically useful only if they still retain this original essence. My argument is that this is contrary to Foucault's own method. The genealogist opens up possibilities for the future by trying to understand the struggles and developments taking place within specific institutions and how different practices of power can operate through them.

I develop my normative reading of genealogy by emphasizing its temporal nature. Instead of negating the past in a grand critical gesture by deeming it as something inherently corrupted, Foucault's analyzes can be seen as a way to interpret the past's transformative potential. This is because Foucault sees political institutions as being the result of historical processes, rather than the locus of universal essences, which one needs to either condemn or accept as such. Furthermore, the genealogical approach to institutions is normatively relevant as it seeks to change the way we understand how we would seek to transform the present.<sup>1</sup> In order to develop a normative reading of a critique of this kind, I focus on the principles of genealogical critique as a manner or attitude that approaches power from a very specific standpoint, which is temporal by nature. Genealogical critique brings together the past, the present, and the future for transformative reasons. It is interested in the past for the sake of present political struggles, the conditions of which have been shaped by past practices, power relations, and rationalities. By means of making present power relations transparent, the genealogist takes part in their own political context and for the sake of opening up new possibilities.<sup>2</sup>

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<sup>1</sup> For Martin Saar, genealogical critique is mainly a manner of criticizing the present by means of analyzing its historical roots in the past. By making the historical origins of our political present intelligible, genealogical critique "opens up a space of possibilities for other attitudes, actions and identities" (Saar 2007, 294).

<sup>2</sup> This means that genealogy wants, as Johanna Oksala puts it, to "open our eyes to the need for a political criticism" (Oksala 2007, 88; Saar 2007, 318; see Tiisala 2017, 14).

## 2. Normative principles of genealogical critique

In this section, I discuss how Foucault understands genealogy. Instead of focusing on a methodological discussion regarding the details and possible inconsistencies of Foucault's method in analyzing the rationalizations of power (see Biebricher 2008), I want to clarify the central principles of genealogy to elaborate its normative entailments for critique of the political institutions. However, one should always keep in mind that genealogy is not a master-key to understanding Foucault's methodology. First of all, some scholars argue that Foucault is in fact not very concise with his method of analysis, even when it comes to genealogy itself (see Rehmann 2016). Second, Foucault distinguishes between "archeology", a method common in Foucault's early work, and genealogy. The former is meant as an excavation of discourses and their rules, practices, conjunctures, and ruptures (Foucault 1969, 188-190). While archeology is about making discourses and their principles explicit in order to re-discover the struggles and exclusions that take place in them, genealogy is a "tactic" to take part in these struggles (Foucault 1997, 11-12). Genealogy, therefore, means re-evaluating and participating in the struggles that are inherent knowledge production and practices of power.

In descriptive statements regarding genealogy, Foucault indeed understands genealogy as a normative endeavor. As Foucault puts it, archeology analyzes "the discourses that articulate how we think, talk and act," and genealogy "discloses the contingency of that which constitutes what we are *in order to not be like that anymore*" (Foucault 1994h, 574; emphasis added). There are two important ideas presented in this quote. Both are temporal, as they underline the role of genealogy for the present and the future. First, that genealogy reveals the *contingency* of those practices that constitute our subjectivity, that is, the way we currently exist and act. Our determinate existence is historical as it has been produced by various power-effects and discourses, which in themselves are not universal but local and particular to a specific time. Second, the discovery of this contingency leads to the possibility of transforming the way we exist and the powers that

format our present. This section focuses on elaborating these two ideas for the sake of critiquing political institutions.

However, some scholars have not been convinced about the normative side of Foucault's genealogical method. A notable example is Habermas, who accuses Foucault of "cryptonormativity", that is, of the fact that genealogical analysis smuggles its normative entailments into the analysis implicitly (Habermas 1985, 331). What Habermas means by this claim is that Foucault's method is contradictory. He makes this accusation by pointing out that, first, Foucault claims both that his analysis does not make normative statements regarding his object of analysis and that it does not constitute a scientific discourse capable of being objective (*ibid.*, 327). Genealogy, detached from normativity and objectivity, neither seeks to judge historical processes from a moral standpoint nor establish a science that would dominate over other forms of knowledge. Such a standpoint, for Habermas, is relativist as it cannot evaluate or disqualify normative and scientific claims (*ibid.*, 330–331). Foucault's standpoint is therefore incapable of giving reasons whether one should resist the practices and rationalities that he has made intelligible.

However, Foucault's analyzes seem to at least suggest that the effects of these practices are something to be struggled against.<sup>3</sup> In fact, he claims that the motives behind his research are political in so far as its objective is to emancipate us from the prevailing forms of exercising power (Foucault 1994d, 180). Therefore, it seems that Foucault simply masks his normative stance behind the veil of his explicit notions regarding his genealogical method. For Habermas, this shows that Foucault's method is contradictory and therefore useless for a critique of power.

Fraser argues that, because Foucault's theory of power makes it impossible to pass moral judgment, his work ends up "inviting questions which it is structurally unequipped to answer" (Fraser 1981, 281). Namely, it cannot establish a normative framework, which could distinguish between the good and bad practices of power. Similarly, Taylor argues that "Foucault's analyzes seem to bring evils to light; and yet

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<sup>3</sup> Todd May describes this as a "genealogical ethos" that is apparent to Foucault's style of writing (May 2017, 170–171).

he wants to distance himself from the suggestion that would seem inescapably to follow that the negation or overcoming of these evils promotes a good" (Taylor 1984, 152). For both of them, Foucault cannot openly state what is wrong with the various practices of power that have been illuminated.

These critiques have resulted in numerous rebuttals. For example, Giovanni Maria Mascaretti and Daniele Lorenzini both argue that neither Habermas nor Fraser appreciate the specific way Foucault understands critique (Mascaretti 2019, 30; Lorenzini 2020).<sup>4</sup> However, unlike Mascaretti, I do not focus on Foucault's own ethical project of self-transformation (see Mascaretti 2019, 41–42), – a project that has to do with developing a universalist position regarding freedom (see Schuber 2021).<sup>5</sup> While I agree that Foucault indeed sees self-transformation as a way of realizing one's freedom,<sup>6</sup> I emphasize that, in the context of political institutions,<sup>7</sup> Foucault's notion of genealogy itself entails a normative manner of analyzing as it makes institutions intelligible in a way that directs political action.

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<sup>4</sup> As Raymond Geuss points out, Foucauldian critique is not meant to be a manner of either affirming or negating in the sense of "X is bad," but a method for emphasizing the inherent dangers in X (Geuss 2002, 279).

<sup>5</sup> Here, I find Mattias Lehtinen's position regarding democratic institutions more plausible, as he develops an explicit normative framework from the ground up (see Lehtinen 2023). In contrast, Foucault's principles are too weak to be developed into a full-grown democratic theory.

<sup>6</sup> In this context, I Fraser points out that Foucault's understanding of freedom is too vague as it does not offer any idea what emancipation would actually mean. Rather, Foucault's lack of normative theory of freedom means that all he can offer is rejecting the current situation for "an unknown X", which he refuses to elaborate as a matter of principle (Fraser 1985, 180). Others, more sympathetic, have argued that Foucault's understanding of freedom is negative in so far as Foucault values freedom from being governed, rather than freedom to govern (see Brännström 2011, 124).

<sup>7</sup> In this way, I intend to evade Sandrine Rui's correct observation that it is rather peculiar that Foucault's concepts, which were originally meant to serve the purposes of critical inquiry, have been appropriated for a positive democratic programme (Rui 2013, 66). It seems to me that such a programme would need a more explicit notion of democracy, one that would go beyond Foucault's genealogical method.

I will discuss genealogy and political institutions in the next section and focus here on the two main temporal principles that are relevant regarding genealogy's normativity. These principles establish that genealogy is a method of revealing the contingency of our present and a participant in transforming it. Both derive from Nietzsche. He defines genealogy as a way of analyzing the past for the sake of understanding our present values and the powers that shape us in order to re-evaluate them. This task, according to Nietzsche, is only possible by means of looking at the historical conditions and their development (Nietzsche 2014, 253). *On the Genealogy of Morals* analyzes how the practices of punishment have produced the present moral values of his time (*ibid.*, 294–297).<sup>8</sup> The underlying hypothesis of this type of genealogy is that the history of our present is the history of struggle for power, and that all re-interpretation and transformation are the continuation of this struggle for power (*ibid.*, 313–314).

The basic principle regarding contingency, operative in Foucault's genealogy, is that the present is wholly contingent as there is nothing that transcends history. Institutions, identities, and practices of the present all have a historical origin. Contingency means that nothing in the present has risen out of necessity and therefore things could radically be otherwise. This type of research, as Thomas Marttila puts it, is based on "the ontological premise that social norms, values, beliefs, and rationales cannot reflect any external necessities such as the teleological course of history, objective material constraints, the inherent nature of human being, or the like" (Marttila 2015, 33). Ultimately, contingency entails that the foundation of our social relations and political order is indeterminate in the sense that it excludes other possibilities. This exclusion requires power to bring about and uphold this order against contestations.<sup>9</sup>

Contingency, therefore, implies the ever-present possibility of conflict in our present circumstances and the capacity to

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<sup>8</sup> Similarly, Foucault argues that his motivation behind analyzing the prison system was a genealogy of morality (Foucault 1994i, 21).

<sup>9</sup> For Nietzsche, history does not progress towards a specific end but, instead, the movement of history is simply a series of struggles for greater power (Nietzsche 2014, 314)

contest it (see Marchart 2018b, 33). For Foucault, contingency refers to the fact that our social and political situation is born out of struggle. The task of genealogy is to bring about the decisions and exclusions that are part of the history of our own situation. Genealogy re-discovers the “discontinued, disqualified, non-legitimized” aspects that have been forcefully excluded in the past to make way for the specific practices and production of knowledge (Foucault 1997, 10).

Because our present social and political world is historically contingent, it means that the prevailing order is contestable. For genealogy, therefore, the task is to emancipate the subjugated (Foucault 1997, 11). This emancipatory potential is inherent to genealogy as it is meant to open up possibilities for change. “I do not conduct analyzes to say: here is how things are, you are trapped. I talk about these things only because I consider them to be transformable” (Foucault 1994c, 93). This means that the genealogist is not above the analysis, as if the motivations and methodological decisions would transcend the analysis of the past. Instead, Foucault sees the genealogy as tied to the present and enmeshed in power relations, meaning that it is not possible to remain in an objective position from which to evaluate various political systems (Biebricher 2008, 366; see Marchart, 2007, 4).

However, does this mean that Foucault is tied to the Nietzschean idea that genealogy, too, strives for power and that Foucault seeks to re-interpret the past to advance his own will to power? For Nietzsche, everything that takes place in history is simply striving for power, “and all seizing and rising to power is re-interpretation” (Nietzsche 2014, 314). To be sure, others inspired by Nietzsche argue that all politics is simply about striving for exerting one’s will over others. For example, according to Max Weber, “who is taking part in politics, strives for power” (Weber 1992, 158–159). However, Foucault’s point is not to replace one regime with another. Rather, the task of critique is to challenge, limit, transform, escape and displace present forms of governing for the sake of emancipation from extensive forms of governing. As Foucault puts it, such a task can be characterized as “the art of not being governed so much” (Foucault 2015, 37). While power itself might be something ineradicable, the way we are being governed can be made less forceful and total by means

of criticizing practices and opening up sites of resistance.<sup>10</sup> As I pointed out above, Foucault's idea is that genealogy would help us with emancipating ourselves from the prevailing practices of power.

When it comes to emancipation, which is made possible by the genealogical method, however, it does not entail an outright dismissal of past practices. As Foucault puts it in an interview, the point of genealogy is not to portray all power as bad but to understand the dangerousness inherent to its practices. This means that, rather succumbing to apathy, "if everything is dangerous, we can always do something" (Foucault 1994a, 386). Instead of diagnosing all endeavors to transform power-relations as doomed to fail, since all power is bad anyway, Foucault wants to show that the prevailing practices that we face currently are dangerous and that they should be resisted and transformed. However, this also means that change for the mere sake of change can be dangerous. As Foucault puts it, some of the most dangerous political traditions originate with the idea that everything in our social world needs to be transformed (Foucault 1994h, 575).

Based on Foucault's explicit remarks, genealogy is explicitly normative, as it is meant to take part in the struggle for the sake of opening up possibilities. This is evident in the temporal nature of genealogy, as it seeks to uncover the past for transforming the present and opening up future possibilities. Specifically, genealogy does not seek to negate the past but, instead, interpret it as dangerous and therefore transformable. In the next section, I argue that this insight is tied to Foucault's genealogical method as it is meant to excavate the various powers that affect us in the present rather than the history of various institutions and their origin. Instead of looking for Foucault's political convictions or values, like Dean and Zamora have done (2021), the method itself is normative<sup>11</sup> as it uncovers political institutions in a way that sees

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<sup>10</sup> As Joonas Martikainen puts it, "the role of critical theory is to identify the ways the current social arrangements are oppressive towards a large majority of mankind" (Martikainen 2021, 13).

<sup>11</sup> Or according to Porcher, it is normative rather than normativist (Porcher, 2023).

them as transformable rather than as things to be overthrown.

### **3. Genealogical method in analyzing the state**

I have now established the central principles of genealogical critique, which is a strategy to uncover the contingent and contestable historical basis of our present. According to Laura Jenkins, genealogy therefore analyzes the processes of “forming necessities, permanence, immobility, closure, and fatalism and concealing/negating or removing contingency” (Jenkins 2011, 160). In this section, I develop the normative entailments in Foucault’s method by focusing on political institutions, specifically the state and law. I argue that, since the temporal character of genealogy is present here, as Foucault seeks to argue that the state and law are historically contingent and therefore transformable, this means that the way Foucault analyzes political institutions is also normative. The way Foucault approaches these institutions is by pointing out that throughout history they have been appropriated by various political rationalities and practices of power. These forms of rationalizing power, such as biopolitics, and the practices that they entail, such as biopower, are distinct from the institutions through which they operate. The state, instead of forming its own distinct essence, is a historically contingent conglomerate of various prevalent rationalities and practices. I argue that it is this approach to political institutions that makes Foucault’s genealogy normative.

In the context of state and law, Foucault was very open about the normative entailments of his work. For him, political theory is stuck on analyzing power as sovereign power. “We are still attached to a specific image of power as law, power as sovereignty, of which analyzes of legal theory and monarchical institutions draw upon. It is especially from this image, that is, privileging the theory of law and sovereignty, from which we have to free ourselves in order to analyze power in its concrete workings and historical processes.” (Foucault 1976 118–119.) Here, Foucault’s temporal and therefore normative ethos is fairly visible as he argues that the way we understand power is tied to emancipation.

Foucault claims that the state is “heartless” (Foucault 2004a, 79). By this, he simply means that the state should not be analyzed as having its own essence but rather as a target of various discourses and the collection of multiple practices (Foucault, 2004a 5–6; Foucault 1994b, 150). This is directly tied to his methodological principles regarding analysis: instead of beginning with universals such as the state, Foucault wants to study various powers that expand throughout society (Foucault 2004a, 5). Instead of assuming the state as the centralisation of power, Foucauldian genealogy begins with the practices of power in order to understand the historical nature of state power and its process of centralizing various capacities. Multiple practices become colonized by the state to serve certain interests, such as bourgeoisie ones (Foucault 1997, 29–30). In his lecture series on liberalism, *The Birth of Biopolitics*, Foucault describes this process of colonization as “statification” (*étatisation*), which namely means bringing various practices and powers under state control (Foucault, 2004a, 79). The state is a superstructure that is a historically contingent collection of various practices and powers, or, the site of meta-power (Foucault 1994b, 150).

Foucault’s main methodological idea regarding why the state should not be the starting point for political theory and analysis is that this will lose sight of powers and its practices that operate throughout social relations. For this reason, Foucault did not find fruitful the distinction between state and society, that is, the distinction between power and the social. We are not simply being influenced from above or by the state. Instead, “it should rather be assumed that multiple relations of forces operate in the apparatuses of production, family, minor groups and institutions are the basis for large divisions that traverse throughout the social body” (Foucault 1976, 124). All social relations implicate power relations; and they cannot be reduced to the top-down power of the state.

In order to analyze how power succeeds in permeating the individual and social relations, one must forgo the idea of power as mere repression and prohibition (Foucault, 1976, 20). Power as repression, Foucault claims, is based on a juridical notion of power as simply establishing external limits to the citizen’s conduct. In this way, power-relation is simply a negative relation that establishes a rule that prohibits (Fou-

cault 1976, 110–111). Furthermore, such a conception understands power as a unity, which means that power functions always in the same way by means of law and prohibition “from the state to the family, from prince to the father, from the tribunal to quotidian small punishment, from the social domination to the constructive structures of the subject itself” (Foucault 1976, 112). Such a notion of power is incapable of genealogically revealing the different and multifaceted nature of these various power relations. Specifically, Foucault warns against beginning an analysis of modern power relations with an abstract idea of law or the state, as that will simply serve to obfuscate power.

In order to argue that the sovereign model has become obsolete, Foucault analyzes the medieval model of state power, or the “royal model”, which identifies the state with the wielder of sovereign power. Ever since the medieval times, western societies have understood power by means of law (Foucault 1976, 115). This royal model understands power as being centralized and legitimated by means of law and subjection through citizenship. Here, power is strictly understood as prohibition, which is the will of the sovereign king exerting power over subjects (Foucault 1994b, 150).

Sovereign power is based on the idea that power is unified to the sovereign for the state to be capable of establishing subjection by means of overpowering its citizens (Foucault 1997, 38–39). This means, above all, coercion. Theories of sovereign power seek to make this coercion legitimate by means of arguing why such domination is in fact justified. Here, Hobbes is the paradigmatic example. Power must be unified to the sovereign in order to make sure that subjects limit their actions in fear of punishment (Hobbes 2018 XIII, § 62–63).<sup>12</sup> Without coercive power, Hobbes claims, peace within a society would be lost as “covenants, without the Sword, are but Words, of no strength to secure a man at all” (Hobbes 2018 XVII, § 85). The only way to uphold order, is to confer all

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<sup>12</sup> Similarly, Rousseau claims in *The Social Contract* that “the sole means that they still have of preserving themselves is to create, by combination, a totality of forces sufficient to overcome the obstacles resisting them, to direct their operation by a single impulse, and make them act in unison” (2008 I, vi; emphasis added).

power to the sovereign who will “reduce all their Wills, by plurality of voices, unto one Will”, that is, to form the sovereign is to submit will and judgment to the sovereign (Hobbes 2018 XVII, § 87; see Foucault 2013, 29).

Foucault understands the royal model as a theory that reduced power to law and law to coercion, so that the royal model thinks that “law is always referred to as a sword” (Foucault 1976, 189). Ultimately, it is simply the subject’s preference to live rather than be killed that establishes legitimate subjection and absolute centralized coercive power (Foucault 1997, 82). Violence therefore defines the sovereign use of power since the fear of violence will make sure that citizens obey laws and limit their actions for the sake of civil order (Foucault 2013, 12).

Foucault’s genealogies make analyzing the state in the old medieval model of equating it with sovereign power obsolete for various reasons. For example, the development of modern life sciences makes it possible for those who govern to target populations and individuals based rather than simply by means sovereign coercion (Foucault 1994e, 192–193). Foucault calls this kind of power “biopower,” the power targeting the population as an object of medical and biological practices. It is distinct from the state’s sovereign power as it seeks to maximize the health of the population or the individual by means of healthcare, statistics and other such practices (Foucault 1976, 181; Foucault 1997, 214; Oksala 2010, 36; Erlenbusch-Anderson 2020, 8). Similarly, in *Discipline and Punish*, Foucault analyzes how modern disciplinary practices and supervision target the individual’s body to produce desired conduct (Foucault 2011, 161–163).

The development of these powers targeting the body and the population alter and transform the practices that states have available. For example, Foucault describes how punishment in the royal model has a juridical-political function to remind the citizens of the power of the monarch. For this reason, punishment was always public and was meant to restore the king’s authority in the minds of subjects (Foucault, 2011 59–60). In contrast, new disciplinary methods target the individual’s body to direct behavior (Foucault, 2011, 353). Similarly, in the *History of Sexuality*, Foucault argues that during early modernity governing shifts dealing with legitimate sub-

jection of citizens into focusing on populations to influence the population's birth-rate, life expectancy, fertility, health, and other aspects central to upholding vitality (Foucault 1976, 36).

For this reason, Foucault argues that neither the state nor law can be analyzed as historically transcendental categories. While the royal model understood law as the sovereign power's instrument for prohibition, the disciplinary methods transform law into a tool for the normalization and production of normal behavior (Foucault 2011, 355). Therefore, Foucault does not argue that law has become obsolete but that as a practice it has been transformed for new purposes and applications (Foucault 1976, 116). Instead of equating the state with sovereign power, Foucault argues that the state is a "meta-power" that appropriates various powers and practices that are available to it. As a meta-power, the state is a historical entity that takes over or "stratifies" historically determined powers. This centralization of powers is distinct from sovereign power as the latter is merely one way the state exerts its power. While Foucault agrees that sovereign power is still relevant - as powers targeting citizens, populations, and bodies *complement* one another rather than replace - the state is an altogether different entity from its medieval equivalent (Foucault 2004b, 109-110).

Inherent to these analyzes of various rationalizations and practices of powers is that law and state as institutions are historically contingent and are not defined by a specific essence. The critique regarding law in the *History of Sexuality* is not targeted against analyzes of law as such but against the royal model's interpretation of law as being outdated. Furthermore, in contrast to Dean and Zamora's argument that Foucault shifts our focus from the state, the critique of the royal model is not a critique of analyzes of the state. Instead, Foucault's genealogical analysis shows that identifying the state with sovereign power is not enough. What is needed is a conception of political institutions that is not based on establishing fixed essences, one that would understand the relationship between law and coercion, and state and sovereignty, as historically contingent.

I will now move onto further developing the normative aspect of the genealogical approach to political institutions.

As I mentioned in the introduction, others, too, have emphasized this. For example, Christian Laval argues that Foucault's notion of the multiplicity of power achieves multiplying the sites of resistance to non-legal and other social spheres (Laval 2015, 41–42; see Foucault 1976, 126–127). Similarly, Geoffroy de Lagesnerie has argued that a critique that “exalts the law, the political, or sovereignty is not only unsatisfactory but, on the contrary, potentially regressive and reactionary” (de Lagesnerie 2020, 74). However, I do not agree with these claims that Foucault's theory necessitates a complete dismissal of law as a site of struggle (see Laval 2015, 30). To be sure, in the royal model resistance to power takes place solely by means of law (Foucault 1976, 116). This meant specifically legal struggles to limit and restrict sovereign power and bind it to law (Foucault 1997, 31), so that law is the way in which the excessiveness and absoluteness of sovereign power is countered (Foucault 2004a, 8–10). Instead, as I have argued in this section, Foucault does not establish a general conception of law but understands it as an instrument that changes according to the practices of power and its relations (see Brännström, 2014; cf. Mazères 2017). It is this aspect that I want to underline in the next section.

#### **4. Genealogy and the future after the pandemic**

So far, I have established that genealogical critique is meant to analyze the past for the sake of understanding the political possibilities of the present. As Martin Saar puts it, genealogical critique is a method that approaches the present political situation through the analysis of its historical origins (Saar 2007, 9). Genealogical analysis clarifies the way in which power constitutes our own identity and political practices. In this sense, it is always an immanent critique of the political reality that we inhabit (Saar 2007, 21, 69, 222). By showing how these origins are in fact contingent, a genealogist opens up opportunities to transform our political future (Saar 2007, 294; Oksala, 2016, 7; Marchart, 2018b, 31–33; Lemke 2019, 374). I will elaborate why this approach, in the context of political institutions, is in fact normative as it entails a specific analysis of our political present.

Here, I seek to problematize Agamben's reading of what can be inferred from Foucault's genealogical analyzes of state power. In contrast to Agamben, Foucault wanted to counter reproducing what he called the "royal model," that is, the monarchist image of power as being centralized to the king. For this reason, Foucault engaged in the genealogy of the state as the history of various practices that are more or less centralized to the state. This historical account is not about a temporary succession of exclusionary forms of power, but simply their correlation and the way in which they function together. New forms of power do not simply replace sovereignty and judicial practices. Instead, as Oksala puts it, sovereign power is complemented by practices such as disciplinary and biopolitical practices (Oksala 2012, 94).

For Foucault, political theory seemed to be stuck on sovereign power, so much so that one of his main motivations was to "cut short the recurring summoning of the master and the monotone affirmation of such power" (Foucault 2004b, 56). By this, he meant that the fact that political theory was still stuck on the royal model was not only descriptively false, but also normatively problematic, as it tends to affirm the existence and justification of such power as the sole form of political power. Foucault did not mince words when he stated that "we need a political philosophy that does not base itself on the problem of sovereignty, [...], the head of the king needs to be cut, and this has not yet been done in political theory" (Foucault 1994b, 150). In analyzing political institutions, such as the state or law, Foucault's methodology amounts to a specific approach, one that underscores their historically contingent nature, rendering them dangerous rather than evil.

The main take-away is the critique of identifying the state with sovereign power. The main issue for Foucault is analytical: political theorists are incapable of recognizing the multifaceted and productive nature of power. In order to illuminate what is normative about this, I contrast it to a branch of political theory that is first of all still tied to the royal model of power and, second, has become problematic for our present purposes after the pandemic. I refer to theories of the state of exception, that is, both descriptive and normative theories regarding the state's emergency measures during abnormal situations. By means of this discussion, I

intend to flesh out what is normatively unique to genealogical critique.

Like genealogists, I will begin with a short discussion about the past theories of the state of exception by discussing Carl Schmitt's influential theory. For Schmitt sovereign power is the power capable of making decisions and upholding order. Schmitt infamously defines the sovereign as the one who decides on a state of exception (Schmitt 2015a, 13). The exceptional situation is a grave threat to the political order and must be countered with power capable of acting without legal limits.<sup>13</sup> Similar to Hobbes, Schmitt argues that such a power that can act extra-legally has to have the highest authority and a centralized power structure (Schmitt 2015a, 18). Furthermore, like Hobbes, this kind of coercive power is necessary for law to exist, because power creates order in which norms and laws can become valid as "there is no norm that would be valid in chaos" (Schmitt 2015a, 19). This means that, because the law is only valid insofar as there is an authority capable of upholding, enacting and interpreting it, sovereign decision is the foundation of law (Schmitt 2015a, 15).

Schmitt develops a constitutional theory of exceptional situations to authorize legally unbound coercive power. Since the decision a sovereign must make is an exception to the norm, this decision is not legal but political and therefore derives its legitimacy from pre-legal political legitimacy (Schmitt 2015b, 41). This political legitimacy is therefore the essence of state constitution rather than specific constitutional laws (Schmitt 1993 3–5, 148–149). In emergencies, the sovereign is not bound by laws but is authorized by the political order (Schmitt 1993, 26–27). It is for this reason that sovereign power can legitimately put the entirety of the constitution aside.

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<sup>13</sup> According to Kim Lane Scheppele, the main principle of Schmitt's theory of exceptional measures is that "the sovereign must have all of the lesser-included powers—for example, the power to decide when the situation has ceased to be 'normal,' thereby justifying the declaration of emergency, the power to determine when the emergency is over so that the rule of law may be safely restored, and the power to specify which political actors normally protected by the rule of law lose their protection in the interim" (Scheppele 2004, 1010).

Schmitt's theory has been appropriated both for normative and descriptive reasons. A well-known normative appropriation is Eric A. Posner and Adrian Vermeule's defense of Schmittian principles after the September 11 attacks. In line with Schmitt, they argue that "ex ante legal rules cannot regulate crises in advance, because unanticipated events will invariably arise" (Posner and Vermeule 2011, 42). An emergency requires an exception to law, as the general nature of law is by definition incapable of anticipating exceptional events, meaning that there must be a sovereign authority capable of interpreting specific events as warranting emergency measures. In descriptive context, Agamben has argued that Schmitt is right that law cannot account for the exception and therefore sovereign power is a necessary aspect of any legal order (Agamben 1998, 21; Agamben 2005, 1-2). For this reason, Agamben argues, the legal order itself normalizes the exceptional measures, as its very validity is dependent on sovereign power.

During the pandemic, both of these perspectives have become relevant as political forces have sought to unbind sovereign power. These theories might be useful for understanding the dangers inherent in emergency measures. To a greater or a lesser extent, Hungary and France legislated during the pandemic in order to authorize the executive power with far-reaching extra-legal powers. Both enacted legislation that enabled the state of exception practically to continue for an indefinite amount of time (Basilien-Gainche 2022, 441-444; Kovács 2022, 262-263). Furthermore, one could argue in line with Agamben's idea that, at least in these countries, the exception has indeed become the norm (Agamben, 2021, 84), as both countries have also upheld a state of exception since 2015. In Hungary, the government decided on a "migration emergency" (Halmi, 2021, 304; Kovács 2022, 260). France declared a state of exception due to the November 2015 Paris terrorist attacks. Both of these states of exceptions are still in place (Basilien-Gainche 2022, 434).

While referring to Schmitt's understanding about exceptional measures is indeed relevant, it matters how we approach these measures. In contrast to Foucault, Agamben's analysis generalizes Schmitt's theory to concern all state measures in a way that seems to give ground to the worri-

some normative aspects of Schmitt's theory. This is especially the case in recent theories of exceptional measures before the pandemic. For example, Gian Giacomo Fusco argues that all exceptions are by nature Schmittian (Fusco 2020, 33). Like Posner and Vermeule, he seems to ascribe to the royal model of power arguing that the state is identical with sovereign power. On the one hand, if an analysis of exceptional measures starts with the royal model, exceptional measures seem necessarily Schmittian and therefore must be rejected outright. On the other hand, if exceptional measures were seen as necessary during the pandemic (see Pozen and Scheppele 2020), then this kind of theory has to accept Schmitt's normative theory.

Agamben is a notorious example here as his theory identifies sovereign power with political institutions (Agamben 1998, 6). He fails to underscore the contingent and historical aspects of Foucault's theory of the state. Instead of arguing that law and the state are contingent institutions that change over time, Agamben confounds them with sovereign power in a way that critics have described as transcendental. As Sergei Prozorov puts it, "to diagnose the present or any other state of affairs as a global state of exception, itself indistinct from the normal state and hence not really exceptional, is hardly a valuable insight, even when it might be accepted as a logical implication of the definition of the 'original activity' of sovereign power" (Prozorov 2021, 10). By identifying the law and the state with sovereign power, Agamben loses the sight of Foucault's ideas regarding the role of the critique and possibilities of resistance. If law is fundamentally bad, a mere instrument for sovereign violence, then the only outcome is the dismissal of law altogether. According to Leila Brännström, Agamben's "assumptions are built on a perception of law as a machine whose workings, effects, and possibilities are given beforehand – once and for all" (Brännström 2008, 23). In the context of the pandemic, one might argue against Agamben that he overlooks the fact that in many countries the law was able to limit sovereign power and uphold the rule of law.

Foucauldian genealogy does not deny the possibility that sovereign power could take over. As I pointed out above, for Foucault the role of critique is to underline the dangerousness

of various practices. However, simply because a political institution is dangerous does not mean that it should be dismissed categorically. Rather, genealogy opens up possibilities for resistance that might take forms that appropriate legal or state measures. For example, in contrast to Posner and Vermeule, who argue that the executive is *de facto* legally unbound (Posner and Vermeule 2011, 207–208), both judicial and legislative branch were vital to upholding the rule of law and administering legal limits to executive power (see Farzamfar and Salminen 2020; Scheinin and Molbæk-Steensig 2021). Similarly, in his political activism, Foucault himself argued for the rights of the governed against excessive governing (Foucault 1994j, 362; Foucault 1994f, 390). Furthermore, we should analyze exceptional measures without ascribing to the royal model in order to see that during the pandemic, the state operated on multiple levels as a meta-power. For example, the state distributed vaccinations, administered quarantines and controlled border-crossing. For Foucault, such pandemic measures are all distinct and cannot be reduced to sovereign power (Foucault 2004b, 61–63; Foucault 2011, 232–233). In this sense, the state needs to be analyzed as a meta-power that is contingent and therefore a possible object of future transformations.

## 5. Conclusions

In this article, I have argued that the principles operative in Foucault's genealogical analysis are normative as they affect the way in which genealogy approaches political institutions. I did this by identifying the temporality of Foucault's genealogy. Genealogy seeks to understand the political struggles of the present by means of understanding their historical roots in the past in order to open up new political possibilities in the future. I clarified that the basic principles of genealogical critique are contingency and emancipation. First, genealogy establishes the contingency of the present practices of power and its relations. Second, genealogists engage in these studies to take part in emancipating the present from domination. After discussing these principles, I presented Foucault's genealogical approach to political institutions. I argued that for Foucault, instead of being universal and ahistorical, political

institutions are historically contingent and accommodate various forms of political rationalities and practices of power. For example, the genealogy of the state sees the state as a form of meta-power, which varies over time according to the power relations and practices of its time. From this discussion of the state as meta-power, I elaborated on how Foucault's approach to political institutions differs from contemporary political theories that instead seek to understand the state solely as wielder of sovereign power. I argued that, from the genealogist's perspective, such theorists are both descriptively and normatively problematic, especially after the pandemic, as they lose sight of other forms of power at play during exceptional situations such as a pandemic, but also because they present us with scant normative possibilities for transformation.

However, this does not necessarily mean that Foucauldian genealogy is the right approach to political institutions. According to Johanna Oksala, Foucault's approach to the state was meant to counter analyzes of the state as "the root of all political problems" by emphasizing that the state encompassed multiple various practices and rationalities (Oksala, 2012, 30). While this was indeed his intention, as I have pointed out above, perhaps the state is still something more than just meta-power. As some Marxists have argued, state power is an important factor in understanding the reproduction of the capitalist means of production (Bonefeld 2019; see Brunila 2022). This ties in with Fraser's critique that Foucault's refusal to discuss ideologies, economic domination, and state interests, coupled with his focus on micro-powers and the capillary character of modern power, simply serves to hide domination and the workings of the ruling classes (Fraser 1985, 280–281).<sup>14</sup> Similarly, because Foucault's analysis of governmentalities did not begin with analyzing the state (Foucault, 2004a, 4–5; Brännström, 2014, 42; Behrent,

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<sup>14</sup> While Foucault does indeed point out that the bourgeoisie have indeed colonized various practices for their own interests (Foucault 1997, 29–30), he denies the idea that power is something that power could be seen as serving some subject's specific interests. Power is intentional as it serves specific goals and objectives, but these goals and interests are not the outcome of a decision (Foucault 1976, 124–125).

2019, 10), Dean and Zamora argue that it is specifically Foucault's method that has redirected contemporary political in the wrong direction with its disregard of the state and sovereign power (Dean and Zamora, 2021, 201).

My contribution elaborates the normatively specific way Foucault's genealogical method indeed discloses political institutions – and it therefore has a determinate scope with its limits. By separating the practices of power and political institutions, genealogy ultimately refuses to discuss state power as such. The state and other political institutions are a conglomerate of various practices. It becomes unclear if the state indeed can be anything whatsoever. Obviously the law and the state can function as instruments, but as instruments they might serve some interests and objectives better than others. Furthermore, when it comes to transforming the state, even if it is a historically contingent phenomenon, its possibilities aren't limitless.

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