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Is Carl Schmitt Still Relevant to Contemporary Public Law?

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INTRODUCTION:

IS CARL SCHMITT STILL RELEVANT TO CONTEMPORARY PUBLIC LAW?

By Mattias Kumm,[*] Anna-Bettina Kaiser,[†] & Joseph H.H. Weiler[‡]

Carl Schmitt has had a surprising posthumous global career. Schmitt was a major legal thinker of the Weimar period, a leading legal voice of the German National Socialist regime and an influential behind the scenes intellectual presence in the West German public law scene after 1945 until his death in 1985. But unlike his interlocutors in Weimar debates, luminaries such as Hans Kelsen, Hermann Heller or Rudolf Smend and unlike any other legal scholar who was a prominent Nazi and an avowed antisemite, Schmitt is a much read and cited author in the world of global and comparative public law today. He is a prominent influence on thinking about public law and international law in China. And in the United States, where he had a moderate influence on the left in the last decades of the 20th century, his posthumous career really took off in the 21st century after September 11 2001[1] and never abated, as themes of democratic backsliding and the rise of populist authoritarianism rose to the foreground of academic interest.

The essays that follow are an attempt to make sense of this phenomenon. We wanted to address this issue not primarily as a puzzle of academic sociology. Instead we wanted to focus on the question what concepts, ideas, arguments or insights Schmitt has contributed that might justify such interest. That is, we wanted to take Schmitt seriously as a legal thinker.[2] Yes, he was personally and politically deeply compromised and few who are familiar with his biography would describe him as a man of integrity (to put it mildly). If cancellation – refusing to engage the writings of morally discredited persons- were an intellectually plausible scholarly response to moral failure, then surely Schmitt

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[1] Many of Schmitt's writings, among them his most important ones, were translated into English for the first time after 2000. Examples include his 1928 book on "Constitutional Theory" (Duke 2008) and his 1950 monograph on the history and theory of international law, "The Nomos of the Earth" (Telos 2003).
[2] Schmitt insisted that that was all he ever was or aspired to be was a jurist of the *Jus Publicum Europeaum*.

would deserve to be cancelled.[3] Furthermore the majority of his writings are deeply focused on historical contexts and events 75 or even 100 years ago. Schmitt is not a thinker who conceived of his writings as part of a *philosophia perennis*, but as interventions in concrete debates in a particular situation and historical context. In his view the very point of concepts is to justify particular positions in concrete historical political struggles. Yet neither the moral character of the man nor the historical situatedness and orientation of his writings preclude the possibility that engaging Schmitt as a legal thinker remains worthwhile. But it does raise the question, whether and why exactly that is in fact the case.

Against this backdrop, our workshop at NYU Law School, on which the collection of essays in this Working Paper is based, explored to what extent Schmitt is relevant to contemporary public law and theory. Are there good reasons to read Schmitt today? Which of his texts still have something to say to us today? Can we better understand today's crises by reading Schmitt, the classic critic of liberalism? Or is the reception of Schmitt merely a fad, coupled with the thrill of referencing a "dangerous mind"[4]—or even a sign of an increasingly illiberal attitude on the part of our scholarship? Reading the following essays was unlikely to resolve these questions, but they provide contributions and insights that are likely to make any judgment about these issues better informed.

[3] Joseph Weiler, *Cancelling Carl Schmitt?*, EJIL:Talk!, August 13, 2021, available at: https://www.ejiltalk.org/cancelling-carl-schmitt/. Weiler argues against cancelling.
[4] JAN-WERNER MÜLLER, A DANGEROUS MIND: CARL SCHMITT IN POST-WAR EUROPEAN THOUGHT (2003).

1.

CARL SCHMITT'S MOMENT?

By Ewa Atanassow*

Abstract

Carl Schmitt is often invoked as an astute diagnostician of constitutional crises past and present. This essay argues that he should also be regarded as an ideological catalyst of those crises; and that it is necessary to grapple with Schmitt's ideas in order to address the current travails of the liberal order. Probing the intellectual foundations of Schmitt's constitutional vision, I reexamine his account of the tensions between liberalism and democracy, and the relationship between public law and democratic sovereignty in his Weimar works. I conclude by suggesting what – and how – defenders of liberal constitutionalism can learn from Carl Schmitt today.

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CARL SCHMITT'S MOMENT?

Liberal constitutionalism, which has defined the political West for the past two and a half centuries, is at risk today. Arguably the greatest challenge to its normative vision comes from political movements that invoke democratic equality and popular sovereignty to erode institutional checks on the exercise of power. Staying within formal electoral rules, parties and charismatic leaders seek to consolidate authority by contesting not merely specific policies but the very foundations of the constitutional order. Behind them stand large publics that condone the assault on constitutional norms and welcome the possibility of a democratic regime that is illiberal or expressly anti-liberal. Though newly urgent, the rise of what Hungary's Victor Orban branded as "illiberal democracy" is not in itself new. What has been called the "Orbanization of America" and the global resurgence of authoritarian populist movements draw on century-old ideas.[1] Triggered by the very successes as much as the failures of the liberal order, this resurgence reflects constitutive tensions of modern society. Few thinkers have offered a more suggestive and influential diagnosis of these tensions than Carl Schmitt (1888-1985).

A German jurist whose long life spanned four regimes and two world wars, Carl Schmitt's political vision was forged in circumstances of existential crisis, personal as well as political. Written in the context of interwar Germany and its deeply contested Weimar constitution, Schmitt's most influential works offer a penetrating analysis of democratic society and the dilemmas of modern public law. Key among those dilemmas is the relationship between law and politics, and what Schmitt viewed as irreconcilable contradictions between liberal norms and democratic sovereignty. Schmitt's radical polemics against liberal constitutionalism turned him into a natural ally and, eventually, an enthusiastic supporter of Germany's National Socialist regime.

Today Carl Schmitt's reputation as liberalism's "most brilliant critic" has made him into a global celebrity and the patron saint of radicalisms on the left as well as the right. Alongside growing interest in Europe, recent decades have witnessed a "Schmitt fever" in China, Hungary, Russia, and everywhere Western-style liberal democracy is feared and vilified.[2] To quote David Dyzenhaus, many are "Schmitten in the USA" as

[1] https://ecfr.eu/publication/the-orbanisation-of-america-hungarys-lessons-for-donald-trump/.
[2] John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997); Jan Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War*

well.[3] Not only do Schmitt's arguments, as Lars Vinx has argued, serve as "a blueprint for the populist-authoritarian subversion of democracy."[4] Debates about Schmitt's work have spread beyond the academy into policy circles and the popular media, at once reflecting and feeding a growing popular demand.[5] From a persona non grata whose name could no sooner be mentioned than denounced, Schmitt has become, as the MAGA columnist N. S. Lyons put it, the vernacular of the present moment, indeed the "crown jurist" of our time.[6]

Schmitt, then, is relevant to contemporary public law not merely as a diagnostician of liberal crises past and present but as their ideological catalyst as well. Grappling with his ideas is indispensable for understanding - and addressing - the current travails of the liberal order. Grappling, however, is not the same as celebrating. Nor must one agree with Schmitt in order to scrutinize and learn from his analysis. In what follows, I distill the pessimistic vision of modernity that underpins Schmitt's critique of liberal constitutionalism. Engaging with Schmitt's Weimar works on their own terms, my aim is not to validate but to probe their intellectual foundations and enduring appeal.

I proceed in three steps: I first recapitulate Schmitt's analysis of the tensions between liberalism and democracy, which grounds his constitutional vision. I then revisit Schmitt's account of the relationship between public law and democratic sovereignty. In conclusion, I suggest how grappling with Schmitt can enhance liberal self-understanding and revitalize liberal constitutionalism for the twenty first century.

European Thought (Yale: Yale University Press, 2003); Bohdana Kurylo, "Russia and Carl Schmitt: the hybridity of resistance in the globalised world." *Palgrave Communications* **2,** 16096 (2016), https://doi.org/10.1057/palcomms.2016.96; Chang Che, The Nazi Inspiring China's Communists, *The Atlantic*, December 1, 2020, https://www.theatlantic.com/international/archive/2020/12/nazi-china-communists-carl-schmitt/617237/; Attila Gyulai & Kálmán Pócza, "From depoliticization to politicization: three periods of thinking politically with Carl Schmitt in Hungary," *Journal of Political Ideologies*, March 2024, 1–20. https://doi.org/10.1080/13569317.2024.2331498.

[3] See also David Dyzenhaus, "Carl Schmitt in America," In: G. Gerstle and J. Isaac, *State of Exception in American History,* (Chicago: University of Chicago Press, 2020); and Jeremy Rabkin's "Springtime for Schmitt," *Law and Liberty blog*, November 2, 2015.

[4] Lars Vinx, "Carl Schmitt and the authoritarian subversion of democracy," *Philosophy and Social Criticism* (2021) vol. 47 (2), 173-177.

[5] https://democracyjournal.org/magazine/77/its-carl-schmitts-moment/; https://www.telospress.com/telos-208-fall-2024-carl-schmitt-and-the-crisis-of-liberal-democracy/; https://theupheaval.substack.com/p/the-temptations-of-carl-schmitt; https://libertiesjournal.com/articles/the-cult-of-carl-schmitt/; https://www.nytimes.com/2024/07/13/books/review/carl-schmitt-jd-vance.html

[6] https://theupheaval.substack.com/p/the-temptations-of-carl-schmitt.

1. Democracy vs. Liberalism

Distinguishing democracy from liberalism underpins both Schmitt's constitutional theory and his political aims. Theoretically, it sheds light on the nature of what Schmitt termed "the political," and on the fundamental stakes of modern politics. Politically, this distinction allows Schmitt to advocate dictatorship as a legitimate democratic form: an advocacy that culminated in his pledging allegiance to the National Socialist regime.[7]

In *The Crisis of Parliamentary Democracy* Schmitt declares: "The history of political and state theory of the nineteenth century could be summarized with a single phrase: the triumphal march of democracy." While democracy, for Schmitt, forms the intellectual and normative horizon of modern public law, there is an ongoing debate about what democracy is and about the direction of its "triumphal march." Schmitt intervenes in that debate by elaborating his own definition – a definition that, as he claims, though new in its applications is "ancient, one can even say classical."[8]

Schmitt defines democracy as a political formation that requires the substantive identity of rulers and ruled. Unlike premodern regimes that locate sovereignty in one family or class elevated above the social body by virtue of divine right, democratic government draws its legitimacy from being elected by the governed and representative of the people understood as the whole of society. Yet for democratic government to be a true expression of popular will, Schmitt claims that government and people must share an existential orientation and a far-reaching identity in values and ways of life. The normative requirement for such an identity is one reason why empires have lost their legitimacy in the modern world. The identity between governing and governed is the "precise and substantial concept of equality." For Schmitt democratic equality consists in similarity, "in particular similarity among the people."[9]

Schmitt's crucial point is that democratic equality is political; and political equality entails inequality. In order to define the "we" of a particular community, the concept of equality necessarily implies the "they" of those who do not belong. Equality

[7] For a useful overview of Schmitt's credentials as an enabler of Nazi takeover and a loyal and unrepenting member of the National Socialist regime, see Rabkin's "Springtime for Schmitt," op. cit.
[8] CPD 14, CT 264 cf. CP 31, note 23.
[9] CT 264, CPD 14.

so understood is a principle of exclusion as much as inclusion: it marks the border between *us* and *them*. Just as democratic equality presupposes inequality, so too the existence of a political community – a people – is premised on the plurality of peoples, and on substantive differences in ways of life that constitute and help articulate political identities. These constitutive differences, according to Schmitt, are cultural constructs. Made rather than born, they consist in "myths" (or what we today often call "narratives") conditioned by historical conjuncture and political development. More than their specific content, what matters to Schmitt is that historic differences exist and can be mobilized to form a collectivity -- a "we" – characterized by "politically distinctive consciousness."[10]

Schmitt famously defines the political as the distinction between friend and enemy. The enemy, he claims, need not be evil: "it is enough that he is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible."[11] Nor is the enemy necessarily hateful: a serious adversary is worthy of respect. By exemplifying who "we" are not, the enemy is indispensable for defining who "we" are. Not only is political identity formed through contrast and juxtaposition to outsiders. For Schmitt, this negative moment more than any positive content serves as a unifying force that holds the polity together.[12] Although the "political" so understood applies to all kinds of groupings, including parties and associations, Schmitt claims that the modern state "encompasses and relativizes all these antitheses." Internal disagreements pale – or should pale – in comparison to differences between nations and political systems. For Schmitt, then, the political *par excellence* is embodied in national unity, which crystallizes in the antagonism between peoples, i.e., in international relations.[13]

In sum, democracy in Schmitt's understanding depends on a broadly shared view of what defines the body politic and differentiates its way of life from other polities. Although the differences that define the political have varied historically,

[10] CT, 262; also CPD 68-73.
[11] CP 27. As a male noun *Feind* in German takes a gendered pronoun. This does not mean that the enemy is necessarily a single person or a male.
[12] In Mouffe's words, democracy involves "a moment of closure required by the process of constituting a people." Chantal Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy," in: David Dyzenhaus, Ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Duke University Press, 1998), 164. Also Ioannis Evrigenis, "The Politics of Enmity, "in *Fear of Enemies and Collective Action* (Cambridge: Cambridge University Press, 2009), Ch. 4.
[13] CP 29-30.

Schmitt points to "national homogeneity" as the prevalent definition of political membership in the modern world.[14] Viewing national cohesion as the moral substance of democratic equality, he predicates national identity on the presence of, and potential antagonism with, existential others.

While democracy rests on equality *politically* understood, Schmitt defines liberalism as an "individualistic-humanitarian ethic and *Weltanschauung*." Championing universal rights and "general human equality," liberalism glosses over existential differences and aspires, or pretends to aspire, to a "democracy of mankind."[15] Schmitt critiques the notion of human equality as a vague ethic devoid of political substance. At the same time, he claims that the Enlightenment's universalist idea of humanity was itself polemical. Its aim was to attack premodern institutions by dislodging the particularist assumptions of feudal society. A critical tool more than a juridical concept, for Schmitt human equality has no content that could inform public law and ground the legal framework of a democratic people.[16]

In other words, liberalism according to Schmitt cannot sustain a democratic polity because it cannot define its boundaries. In extending its principles to all of humanity, it undermines the political by robbing democratic equality of its constitutive distinctions, hence of its political meaning and value.[17] In glossing over the reality of human difference and the exclusionary dimension of politics, liberal universalism is theoretically naïve. It is also imperialist in practice. Much like his modern-day admirers, Schmitt debunks the concept of human rights as an "ideological instrument of imperialist expansion and … vehicle of economic imperialism." Pointing out liberalism's Anglo-American origins, he suggests that, behind the universalism of liberal norms hide particular cultural assumptions and economic interests that strive for global domination. Liberalism's pretended universality militates against national particularity and, therewith, against the diversity of political cultures. Paradoxically,

[14] "In the democracy of English sects during the seventeenth century equality was based on a consensus of religious convictions. Since the nineteenth century it has existed above all in membership in a particular nation, in national homogeneity." (CPD 9)
[15] CPD 13
[16] CP 55, CT 257-258; also CPD 11.
[17] CPD 13, 11. In CT 257, Schmitt critiques "[l]iberals like L.T. Hobhouse who define democracy as the application of ethical principles to politics. In fact, this is simply liberal."

it also leads to dehumanization. By seeking to "confiscate" and "monopolize" what it means to be human, liberalism denies the humanity of those who beg to differ.[18]

In short, by calling into question political identities and borders, liberalism undermines the legitimacy of the political and the very pluralism it pretends to espouse. It thus leads to what Schmitt diagnoses as the triple crisis of modernity: "first of all to a crisis of democracy itself, because the problem of substantial equality and homogeneity, which is necessary for democracy, cannot be resolved by the general equality of mankind;" next, the crisis of the modern state that rests on democratic legitimation; finally, the crisis of parliamentary institutions "constructed on the English model" that Schmitt was keen to see abolished.[19]

2. Liberal Constitutionalism vs. Democratic Sovereignty

As we have seen, for Schmitt the modern state depends on two conditions: shared identity within the body politic and a plurality of political bodies; homogeneity at home and heterogeneity (and potential antagonism) abroad. Liberal ideology, in Schmitt's view, undermines both. By defining equality in universal terms, it glosses over substantive differences and actively erodes the deep pluralism of human orders. At the same time, by pluralizing and constraining the exercise of political power, liberal constitutionalism occludes the true meaning of sovereignty and hamstrings its exercise.

Schmitt's Weimar works take as its special target the tradition of legal positivism that, viewing jurisprudence as a science, seeks to ground public law in universal principles. Questioning the very possibility of legal science, Schmitt denies that law can be politically neutral or independent of culture and context. He finds it ludicrous that "such a well-known legal and political philosopher of the state as Kelsen can conceive of democracy as the expression of relativistic and impersonal scientism."[20] In a much-quoted passage from his 1922 book *Political Theology*,

[18] CP 54 and the footnote which recalls how North American Indians were exterminated in the name of humanity and civilization. For related critiques of the contemporary human rights regime and its legal politics see Samuel Moyn, Not Enough: *Human Rights in an Unequal World* (Cambridge, MA: Harvard University Press, 2018); Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014); Aaron Rhodes, *Debasement of Human Rights: How Politics Sabotage the Ideal of Freedom* (Encounter books, 2018).
[19] CPD 4, 15; CP 61.
[20] PT 49.

Schmitt states (echoing Hobbes) that authority, not truth, is the source of law.[21] While by authority he implies the state, which alone has the power to declare and enforce the law, the key question – for Schmitt as well as Hobbes – is what makes the power of the modern state? And how is this power legitimized?

In the same book, Schmitt canvases the historic rise of modern democracy as the transition from monarchical sovereignty grounded in a vision of a transcendent Creator to popular sovereignty that "centers on ideas of immanence."[22] If, in the premodern world, public law and the institutional and social structure governed by it were believed to be divinely ordained, modern constitutionalism is grounded in a vision of the people and viewed as the expression of popular will.[23] Henceforth, all legitimate claims to authority must rest on broad-based consent and be seen as representing the democratic people. Yet if all modern states are democratic in the sense of relying on popular approval, not all define democracy or the people in the same way. As Schmitt observes, "[t]he belief that all power comes from the people takes on a meaning similar to the belief that all authoritative power comes from God. Both maxims permit various governmental forms and juristic consequences in political reality."[24] Put differently, while every modern government depends on popular authorization and claims to be the legitimate expression of its people's will, governments differ according to the way the "people" and "sovereignty" are construed and institutionalized, and also in how they elicit popular approval.

In *Political Theology*, Schmitt famously defines the sovereign as "he who decides on the state of exception."[25] In his account, the moment of existential crisis, which demands decisive action outside legal norms and procedures, effectively reveals the locus and meaning of sovereignty. The exception also makes plain that public law is not self-sufficient but requires a decision and a social context – a "homogenous medium" – to uphold it. The decision brings this medium to light not least by drawing

[21] "Auctoritas, non veritas facit legem," PT 52.
[22] PT 50, CT 266.
[23] "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 the end of all things as the point from which everything emanates and to which everything returns" PT 49. For the original see Tocqueville, *Democracy in America*, vol. 1 part 1 ch. 4, concluding sentence.
[24] CPD 30-31.
[25] PT 5. "Souverän ist, wer über den Ausnahmezustand entscheidet." As a male noun "sovereign" in German takes a gendered relative pronoun. This need not mean that the sovereign is a single male person.

a bright line between friend and enemy. In doing so, it specifies the content of democratic equality and unifies the people.[26]

As Lars Vinx has pointed out, Schmitt's rhetoric notwithstanding, it would be wrong to view the sovereign decision simply as a top-down imposition of authority. For it to be accepted as legitimate, the decision has to be perceived as representative: it "must express some widely shared substantive identity which is prior to the law and to the state as a legal expression of community." This identity becomes political in Schmitt's sense when – and only when – a critical mass of the people agrees to "fight and die" in its defense. Sovereign, in the final account, is not "he who decides" but the "we" who embrace and authorize that decision.[27]

And so, if law is grounded not in truth but in sovereign authority, that authority, in turn, depends on how the people's identity is defined, and on the capacity to achieve a shared identity. While democratic sovereignty requires a broadly shared "we," Schmitt emphatically denies that such unified identity can be attained through parliamentary politics or practices of self-rule, due to the fragmentation these entail.[28] Reeling from the political impasse of the Weimar Republic, he points to factionalism as the main threat to democratic politics – a threat that parliamentary institutions both reflect and aggravate. Schmitt further claims that the success and global prestige of these institutions in the nineteenth century was due to particular circumstances and social conditions that are no longer present.

Following Marx, Schmitt portrays liberalism as the ideology of the bourgeoisie and its self-understanding as a meritocracy of wealth and education. Although the bourgeoisie's historic ascent was propelled by its alliance with democratic forces that lent popular legitimacy to its struggle against monarchical absolutism, "since about 1848" liberalism, has found itself in an intensifying opposition to democracy.[29] At the

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[26] PT 6, 13. In the *Concept of the Political*, Schmitt quotes at length Cromwell's speech to Parliament, which weaponized "enmity towards papist Spain" as a way to both define and unite the English. CP 67-68.

[27] Lars Vinx, "Carl Schmitt's Defense of Sovereignty," In: *Law Liberty, and State: Oakeshott, Hayek, and Schmitt on the Rule of Law*, edited by David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2015), 110.

[28] "Self-government in the sense of local, provincial, cantonal self-government is often equated with democratic administration … Such a way of thinking is in fact liberal and not democratic. Democracy is a political concept and as such leads to the decisive political unity and sovereignty." CT 298.

[29] CPD, 2, 27, 51; see also CT, §12, 169 ff, which presents the rule of law and basic rights as "bourgeois." For a related analysis of the class character of American and French constitutionalism, see Marx, "On the Jewish Question," in *The Marx-Engels Reader*, ed. Robert C. Tucker (New York: W. W. Norton &

heart of this opposition is a crisis of representation. While claiming to represent the rational faculties and self-governing capacity of the political community, Schmitt claims that parliamentary institutions "on the English model" were de facto based on domination. Not only were colonies and overseas dependencies – and so, the vast majority of British subjects – not represented in Parliament. Schmitt maintains that the culture of robust deliberation that characterized liberal parliamentarism at its nineteenth-century zenith was made possible by a tacit consensus based on narrow class interests, and achieved through the systematic exclusion of views and policy areas from political representation.[30]

In Schmitt's account, the proper functioning of parliamentary democracy and competitive party politics presuppose a broad-based consensus about, and commitment to, a shared political identity and constitutional vision. If in the nineteenth century, an era of limited suffrage, such a consensus could be sustained by restricting political rights to the few and excluding the many from political participation, under the conditions of mass democracy this solution is no longer feasible. Absent such underlying consensus, parliamentary debate deteriorates into "an empty formality" or a polarizing polemics of the kind Schmitt himself engaged in. Open and rational deliberation about what the common good is, and how best to attain it, is reduced to bargaining behind closed doors. Parties and sectional interests weaponize the public law as an instrument in a political powerplay, and deploy a "propaganda apparatus" and emotional appeals to win public support. Reviewing the intellectual justifications of parliamentary democracy, first among them its capacity to deliver rational policymaking and broad-based political education, Schmitt judges "the arguments of Burke, Bentham, Guizot and John Stuart Mill [as] antiquated today." Relying on concepts that are "entirely dependent on prior situations," liberal constitutional theory has become historically "outmoded."[31]

For Schmitt, then, as a result of democratization and the extension of the franchise to all classes and political opinions, liberalism and democracy have come to

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Co., 1978), 26-51. See also, Jorge E. Dotti, "From Karl to Carl: Schmitt as a reader of Marx." In *The Challenge of Carl Schmitt*, edited by Chantal Mouffe (London/New York: Verso, 1999), 92-117.

[30] For a nuanced history of nineteenth-century liberalism and its relationship to democracy, see David A. Bateman, "The Sovereign People and the Liberal Democratic State," in: Ewa Atanassow, Thomas Bartscherer, and David Bateman (Eds), *When The People Rule: Popular Sovereignty in Theory and Practice*, (Cambridge: Cambridge University Press, 2023), 139-157.

[31] CT 54; CPD 4,6- 7.

an irreconcilable contradiction. Historicising liberalism's relationship to democracy, Schmitt advises that, henceforth, the way to popular legitimation and democratic sovereignty must be sought not in parliamentary deliberations or rational discourse but in culture wars that, by dividing friend from foe, polarize the public sphere and prepare the way for the acceptance of dictatorial unity.[32]

In 1926 Schmitt claimed that the rise of Bolshevism and Fascism was but a symptom of a deeper crisis, whose root cause is the "confused combination" of liberalism and democracy. And he predicted that "even if Bolshevism is suppressed and Fascism held at bay," the crisis of liberal constitutionalism was bound to recur. For it springs "from the contradiction of a liberal individualism burdened by moral pathos and a democratic sentiment governed essentially by political ideals."[33] Driving a conceptual wedge between liberal norms and democratic politics allowed Schmitt to advocate dictatorship as a legitimate democratic form and urge the need for fostering homogeneous peoplehood through "the elimination [Vernichtung] and eradication of heterogeneity." Rooted in a pessimistic vision of modern politics, Schmitt's anti-liberal polemics prepared the way for, and lent intellectual and juridical justification to, the crimes and depredations of the National Socialist regime.

3. Learning from Carl Schmitt

Carl Schmitt's surging popularity in the West and beyond is a sure sign of his relevance. Resonating with anti-capitalist and postcolonial critiques on the one hand, and with resurgent nationalisms on the other, Schmitt's indictment of liberal constitutionalism as hypocritical and anti-democratic, and as "outmoded" or unable to meet the challenges of the present day is catalyzing "post-liberal" proposals on the left as well as the right. Once limited to academic or radical circles, today Schmitt's ideas have gone mainstream. Their currency reflects a growing sense that liberal democracies are struggling to find answers to urgent questions and dilemmas. Skeptical about ready-to-hand partisan justifications, many people across the political spectrum are drawn to Schmitt's works as a reaction against a perceived democratic decline and loss of political agency. Schmitt persuades them that "liberalism" is the

[32] CT 275. In Dyzenhaus' words, "the struggle for sovereignty, the struggle to be the one who decides, is won not in the reasoned debates of parliamentary politics but in the battles of the politics of identity."; Dyzenhaus, *Legality and Legitimacy*, 45. See also Dyzenhaus, "Austin, Hobbes and Dicey," *Canadian Journal of Laws and Jurisprudence* 24 no. 2 (2011): 409–30.
[33] CPD 17, 13.

root cause of that decline, and opens them (as he once opened his countrymen) to the idea of dictatorship and the need to decouple democratic politics from liberal constitutional norms. Even those who defend liberal constitutionalism seem forced to acknowledge that recent developments give credence to Schmitt's analysis. A vast and growing literature bears witness to the fragility of Western democracies vis-à-vis deepening political fragmentation on the one hand, and a growing authoritarian alliance on the other.[34] After decades of triumphalism and blind confidence in a global liberal future, there is a creeping recognition that liberalism and democracy are distinct logics, whose not-always-happy marriage was a historic and fragile achievement rather than inexorable fate.[35]

Schmitt, in short, is widely read because of the surface plausibility of his diagnosis of liberalism's crisis and the deeper truths to which it points**.** Not simply diagnostic, Schmitt's works also offer tools for those who want to turn this crisis to their ideological and geostrategic advantage. Entrenching narratives about the source of present challenges, and supplying conceptual arms to current and would-be dictators, Schmitt's popularity is not only a symptom but an effectual cause of our present discontents. This is why it is urgent for defenders of liberal constitutionalism to grapple with Schmitt's historical and analytical arguments, not only in academic fora but in public debates as well.

If grappling with Schmitt's works is indispensable for scrutinizing the intellectual foundations and rhetorical tactics of liberalism's current enemies, it can also help liberals learn about themselves. To learn from Schmitt, however, we need to recognize how he operates, and to distinguish his diagnostic insights from the polemical distortions and antiliberal solutions to which they lead. Calling into question the possibility of a neutral legal science, Schmitt signals that his own interpretations pursue a political project. His aim is not merely to *understand* public law but to *reshape* it. One powerful way Schmitt pursues this is by redefining concepts

[34] https://www.journalofdemocracy.org/articles/the-age-of-political-fragmentation/; https://www.journalofdemocracy.org/news-and-updates/the-growing-authoritarian-alliance/.
[35] Marc Plattner, "Democracy Without Liberalism?" *Journal of Democracy* July 2025 https://www.journalofdemocracy.org/online-exclusive/democracy-without-liberalism/; Alan S. Kahan, *Freedom from Fear: An incomplete history of liberalism* (Princeton, NJ: Princeton University Press, 2023), ch. 11.

and conjuring up narratives designed to hone plausible arguments into ideological weapons.

Schmitt's definition of liberalism in sharp contradistinction to democracy is a case in point. In the preface to the 1926 edition of CPD, Schmitt states that "[t]he equality of all persons as persons is not democracy but *a certain kind of* liberalism."[36] The qualification indicates Schmitt's own awareness that liberalism comes in different kinds, not all of which may answer to his description or be liable to his critique. It also suggests that Schmitt's reduction of liberalism to moral universalism and humanitarian ethics is one-sided and polemical, as is his unmasking of international law as an instrument of Anglo-American imperialism. Schmitt's critique glosses over the particularist dimensions of the liberal constitutional tradition as well as the great diversity of liberal approaches that emerged over the past two centuries in nearly every corner of the world. Conversely, by equating democratic equality with national homogeneity, Schmitt's "classical" definition deliberately abstracts from the universalist aspirations of both egalitarian ideals and national creeds, and passes over in silence the essentially contested nature of democratic sovereignty.[37]

Echoing Marx and Lenin, Schmitt's historicising assertions that the Bouregois Rechtsstaat could only work under nineteenth century conditions, and that liberal constitutionalism is altogether incompatible with modern mass democracy are calculated to undermine public confidence in the enduring validity of constitutional norms.[38] The claim that liberal democracies alone are plagued by contradictions between constitutional norms and democratic sovereignty, or that dictatorship is *the* democratic way to resolve these contradictions are hardly credible given the totalitarian experience of the past century, and the extraordinary violence needed to sustain dictatorial regimes. Elaborated in the 1920ies and 1930ies, Schmitt's

[36] CPD 13, italics added.
[37] For a concise history of the concept sovereignty, see Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, trans. Belinda Cooper (New York: Columbia University Press, 2017). See also, Jan Werner Müller, *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, CT: Yale University Press, 2013).
[38] CPD 15. That Schmitt's historicizing forays are in the service of political combat rather than analysis is made evident by his own insistence on reviving a "classical definition" of democracy, whose historical conditions - including the institution of slavery - have become (in no small part thanks to the spread of liberal ideas) "outmoded" in deed. For a probing account of the classical approach to democracy, see Thomas Bartscherer, "Plato and the Problems of Modern Politics," in: E. Atanassow, T. Bartscherer, D. Bateman (eds.), *When the People Rule*, 23-39.

pessimistic vision of modernity was disproved by the success of the postwar liberal order. It can be disproved again.

And yet, beneath the historical mythmaking and polemical broadsides, Schmitt's Weimar writings also seem to make a profound analytical point, perhaps best synthesized by the German constitutional justice and Schmitt's student Ernst-Wolfgang Böckenförde: i.e., that parliamentary democracies rest on presuppositions they cannot themselves guarantee.[39] This raises pertinent questions about what these preconditions are; and whether a broadly shared national identity, and a degree of social and cultural cohesion number among them. Is the nation-state over, as many (though certainly not all) liberal theorists of the past decades seem to have hoped; or is it the only practicable embodiment of both liberal norms and democratic sovereignty, as some of the same theorists have come to recognize?[40] And is national sovereignty and international law antithetical, or are they -- in part, for the very reasons Schmitt articulates -- mutually constitutive and interdependent?

In short, learning from Schmitt requires separating the wheat from the chaff: the analytical content from the polemical attacks, and the legal thinker from the activist. This is possible not least because much if not all of Schmitt's diagnostic insights are derived from the liberal tradition, which he knew very well. Schmitt's Weimar works make a point of demonstrating his intimate familiarity with, even admiration for, the great thinkers of classical liberalism. *Dictatorship* celebrates Locke as a radical who first distinguished sovereignty from government – a distinction that lies at the heart of Schmitt's thinking about states of exception. First theorized by Locke, a liberal approach to the problem of exception – the alleged Achilles' heel of constitutional regimes – was institutionalized by the American framers and exemplified in practice by Lincoln's civil war presidency.[41] Likewise, Schmitt's

[39] Ernst-Wolfgang Böckenförde, "Die Entstehung des Staates als Vorgang der Säkularisation" [1967], reprinted in: *Der säkularisierte Staat. Sein Charakter, seine Rechtfertigung und seine Probleme im 21. Jahrhundert* (München: Carl-Friedrich-von-Siemens-Stiftung, 2007). Also, *The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory*, in: in: D. Dyzenhaus, Ed., *Law as Politics*, 37-55.

[40] Compare Francis Fukuyama, *The End of History and the Last Man: With a New Afterword*, (Free Press 2006 [1992]); and; and *Liberalism and Its Discontents* (New York: Farrar, Straus and Giroux, 2022), esp. ch. 9.

[41] Carl Schmitt, *Dictatorship* (Polity Press, 2014), chs. 1 and 4; Ewa Atanassow and Ira Katznelson "State of Exception in the Anglo-American Liberal Tradition," *Zeitschrift für Politikwissenschaft* 28 (2018): 385–394; and "Negotiating the Rule of Law: Dilemmas of Security and Liberty Revisited," In: Gary Gerstle and Joel Isaac, *State of Exception in American History* (Chicago: University of Chicago Press, 2020), ch. 2.

insistence that public law is not self-sustaining but is grounded in a broadly shared identity and political culture is a fundamental precept and starting point for classical liberalism. Conceptualized by Hobbes and Locke, and systematized by Montesquieu and Tocqueville, the need for popular authorization, hence for tailoring public law to particular cultures and histories was an integral aspect of liberal constitutional thinking from its foundation.

In *Crisis of Parliamentary Democracy*, Schmitt pays homage to French constitutional thought and openly accepts its vision of democracy as the "unavoidable destiny" of the modern world. Not only is this vision, in his words, "most profoundly … expressed by Tocqueville." As I have argued, Schmitt took more than one page from Tocqueville's comprehensive analysis of the tensions between liberalism and democracy.[42] Schmitt's damning rebukes of individualism and the danger of depoliticization, of "pantheism" (or "immanentism"), and of the unprecedented dehumanization that modern society may give rise to were powerfully anticipated by Tocqueville. Schmitt's political-theological approach too has Tocquevillean resonances. For all of its antiliberal sensationalism, Schmitt's account remains – to echo Leo Strauss – locked within the horizon of liberalism.[43]

Acknowledging the derivative character of Schmitt's critique takes away from its pretended originality. It also points to a heuristic for how to recognize and parry its distortions. If Schmitt's constitutional theory is little more than a polemical misreading of the liberal tradition, to push back against it, defenders of liberal constitutionalism today should revisit this tradition and develop better readings thus refuting Schmitt-informed claims that "liberalism has become obsolete."[44] As I have shown with the example of Tocqueville, classical liberals offer a strikingly current understanding of democratic sovereignty and the relationship between constitutional norms and political culture. Explaining why nationhood is a crucial source of democratic legitimacy, they remind us that liberalism can be supportive of national identity not least by conceptualizing this identity in liberal ways. Classical liberalism

[42] CPD 23. Ewa Atanassow, "Popular sovereignty on Trial: Tocqueville versus Schmitt," In: E. Atanassow, T. Bartscherer, D. Bateman (eds.), *When The People Rule*, 91-109. As Jan Werner Müller observes, "Schmitt wanted to be seen as the Tocqueville of the twentieth century who had to witness Tocqueville's nineteenth century predictions come true," *A Dangerous Mind*, 56.
[43] Leo Strauss, "Notes on Carl Schmitt, the Concept of the Political," in: CP 81-107.
[44] https://www.ft.com/content/670039ec-98f3-11e9-9573-ee5cbb98ed36.

also invites us to reflect critically on the dilemmas of globalization and the challenges of sustaining pluralism in the modern world.[45] In its sheer breath and variety, it puts on display not only analytical accounts but also institutional imagination from which we stand to learn.

To conclude, Western democracies are increasingly susceptible to Schmitt's anti-liberal myth-making because they have grown ignorant of the liberal tradition he distorts. When properly understood, this tradition can provide resources for renewing liberal constitutionalism for the twenty first century. The best way to counter Schmitt is to revisit the long liberal tradition. By forcing us to rethink the normative and epistemic assumptions on which our liberal democratic world was built, and to engage anew – intellectually as well as politically – in the battle for the hearts and minds, grappling with Schmitt's challenge can help us turn (as John Stuart Mill once put it) dead dogmas into a living truth.

[45] Ewa Atanassow, *Tocqueville's Dilemmas and Ours: Sovereignty, Nationalism, Globalization* (Princeton, NJ: Princeton University Press, 2022).

2.

THE MANY „STATES OF EXCEPTION" IN THE WORK OF CARL SCHMITT

By Anna-Bettina Kaiser*

Abstract

It is undeniable that Schmitt holds a strong presence in today's debate on the state of exception. His Political Theology (1922) especially remains a constant reference point not just for the US debate. I argue that these constant references, however, share two crucial flaws. First, they fail to notice that Schmitt's position on the state of exception shifted constantly throughout his life. Of all his different stances, Political Theology represents the least lawyerly, and the most radical. This, second, points to the central problem with today's use of Schmitt, both in the state of exception debate and beyond. By employing his most destructive tendencies, we make it unnecessarily hard for ourselves to find productive legal solutions to our current considerable problems.

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THE MANY „STATES OF EXCEPTION" IN THE WORK OF CARL SCHMITT

I. State of exception, Carl Schmitt's life's work

If we consider what relevance Carl Schmitt still has in public law today, many of us will think of the state of exception. Rightly so. In fact, the topic of the state of exception was the life's work of Carl Schmitt, and it is precisely on this topic that he has left a lasting impression. His ideas on the state of exception have been widely received, not only in Germany, but, one might almost say, primarily in the international debate.

One of the most famous examples is *Giorgio Agamben*, who, in his widely read and influential monograph "State of Exception" (2003), gave Schmitt's thought ample space, even though he himself claimed to differ significantly from Schmitt in terms of content.[1] Another example are the authors *Eric Posner and Adrian Vermeule*, who also draw on Schmitt in their monograph "Executive Unbound" and make him useful for the current constitutional debate in the US.[2] These two monographs are just examples from the now extensive literature that refers to Schmitt. Particularly when the state of exception is discussed, no text fails to mention Schmitt. His relevance in this area, which is currently experiencing a major boom, is therefore undisputed. The fact that he is referred to so often is in itself enough to prove his relevance in this area.

But if I now say that his ideas on the state of exception have been widely received, an unexpected question arises: which ones exactly? It is this question that I want to explore in my paper. My first thesis is that Carl Schmitt did indeed publish on the state of exception throughout his life, but that at the same time he advocated a different approach in each phase of his life. Therefore, we cannot speak of *one* theory of the state of exception in his work at all. Rather, he proves to be a chameleon that takes on a different colour, a different position on the state of exception, depending on the point of reference.

In my paper, I would like to briefly recapitulate Schmitt's central texts on the state of exception and show which position we are dealing with in each case (III.). These include the central writings "The Dictatorship", the first chapter of his "Political

[1] GIORGIO AGAMBEN, STATE OF EXCEPTION (K. Attell trans., 2005), *Italian version:* STATO DI ECCEZIONE (2003).
[2] ERIC A. POSNER AND ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2011).

Theology", his *Staatsrechtslehrerreferat* from 1924, selected writings of the beginning of the so-called Third Reich, and, finally, his thinking in the context of the young Federal Republic of Germany. I would like to show that Schmitt pursues the problem of the state of exception with a different method in each of his different phases of life. We will get to know him as a historian of concepts, as a political-legal theorist, as a doctrinal lawyer, as an opportunistic Nazi writer, and, finally, as a distant observer of the newly founded Federal Republic.

My second thesis, which builds on the first, is that the dangerous thing about our reception of Schmitt today is that we are, of all things, reading Schmitt, the Political Theologian (IV.). This one-sided reception is dangerous, first, because we are reading Schmitt, the political theorist, but often use him for doctrinal contexts. Second, this one-sided reception is dangerous because Schmitt deliberately kept his Political Theology obscure, which makes it all the more difficult to extract clear statements about the state of exception from it. Finally, the danger lies in the fact that the first chapter of Schmitt's Political Theology is a response to the contemporary Weimar debate, but as this debate is largely unknown, Schmitt's theory is often read out of context and thereby misunderstood.

I want to start, however, by contextualizing the debate on the state of exception in Weimar Germany (II.)

II. Contextualizing the concept: What is a state of exception and what do contemporary literature, including Schmitt, mean when they speak of a state of exception?

Before I turn to Schmitt's theories on the state of exception, I want to start with a conceptual clarification and at the same time contextualize Schmitt's writings.

Schmitt wrote his major works on the state of exception almost exactly 100 years ago and participated in an ongoing German debate. The term "state of exception" was a common term at the time and referred to a constitutional provision that authorized the executive branch to take the necessary measures in the event of a serious crisis (traditionally war and internal unrest) and, if necessary, to suspend fundamental rights. The idea of such a constitutional norm stemmed from French constitutional law, where it was called *état de siege* (state of siege). It can only be properly understood if it is seen as a problem of the (new) constitutional state and an answer to the

following question: What should happen to the rights granted in the constitution and the organisational regulations when war or uprising breaks out? In the 19th century, the concept travelled from France to Prussia and from Prussia to the German Reich (1871–1918); at that time, it was still common to speak of a "state of siege" (*Belagerungszustand*). But since "state of siege" or the German literal translation "Belagerungszustand" sounded old-fashioned and no longer appropriate for modern situations of crisis, the new concept "Ausnahmezustand" (state of exception) came into use and was the common German term for the very same idea during the democratic Weimar Republic (1918–1933).[3]

This debate centred on the infamous Article 48 of the Weimar Constitution (WC). So, when there was talk of a state of exception in Germany in the 1920s, it really meant the use of Article 48 of the WRV. This norm authorized the President of the Reich to take the necessary measures to restore public safety and order if they were seriously disturbed or endangered in the German Reich.[4] To the same end, he was also entitled to suspend specifically defined fundamental rights. In fact, the first President of the Reich, the Social Democrat Friedrich Ebert (1919-25), invoked Article 48 of the Weimar Constitution more than a hundred times between 1918 and 1923.[5] To be fair, it must be mentioned that Article 48 of the WC did in fact contribute significantly to the preservation of the Republic in this early phase, and that without the special powers of the President of the Reich, the unstable Republic might have collapsed in its early years – even if the article was used in the last phase of the Republic by then-President Paul von Hindenburg (1925-34) to destroy the Republic and finally misused by the Chancellor of the Reich Adolf Hitler in 1933 to transition to a dictatorship within weeks. It is therefore easy to see why the state of exception was *the* big topic in German constitutional scholarship at the time. The most famous US contribution to this discussion can be found about thirty years later in Clinton Rossiter's "Constitutional Dictatorship" from 1948.[6]

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[3] *See for details* ANNA-BETTINA KAISER, AUSNAHMEVERFASSUNGSRECHT 49 et seq. (2020).
[4] *See on the Weimar framework* CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 49 et seq. (2010).
[5] *See* WALTER MÜHLHAUSEN, FRIEDRICH EBERT 1871–1925: A SOCIAL DEMOCRATIC STATESMAN 82 et seq. (2015).
[6] CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP. CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (1948).

As is quickly apparent from reading Article 48, the so-called state of exception, here in its German instantiation, has nothing to do with a legal void,[7] as it is so often imagined today, especially by Giorgio Agamben and his followers. Rather, Article 48 was a constitutional rule that, after all, only relaxed the strict rules of normal times. "State of exception" must therefore be understood as a legal technical term, stemming from French constitutional law.

III. Schmitt's central works relating to the state of exception

1. "The Dictatorship" of 1921

Schmitt's first important contribution to the subject matter is his monograph "The Dictatorship" of 1921.[8] It is important to note that the concept "dictatorship" had a different connotation back then. It was often used as a synonym for a state of exception; this is precisely the understanding of the term that Clinton Rossiter draws on in his aforementioned monograph. In the same vein, the powers conferred on the President were often referred to as "dictatorial" in a certain 'innocent' way, not anticipating which kind of dictatorship was to come a few years later. This is why Schmitt's work can without further ado be understood as a contribution to the starting discussion on the state of exception.

Interestingly, Schmitt approaches the topic from a conceptual history perspective – from Roman law to the Weimar Constitution. His monograph became famous for his distinction between a sovereign and a "commissarial" (kommissarisch), that is, temporary dictator that he extracted from his material. While the commissarial dictator exercises his office provisional only and takes measures during the crisis in order to restore the normal state, the state ex ante, the sovereign dictator uses the crisis to transition to a new order. The restoration of the old order is not what matters to him.

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[7] DAVID DYZENHAUS, *States of Emergency, in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 451 et seq. (M. Rosenfeld, A. Sajó eds., 2012), KIM LANE SCHEPPELE, *Legal and Extralegal Emergencies, in* THE OXFORD HANDBOOK OF LAW AND POLITICS 165 et seq. (G. Caldeira, D. Kelemen, K. Whittington eds., 2009).

[8] CARL SCHMITT, DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTSGEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF (2nd edn. 1928 [1921]). *English translation*: DICTATORSHIP. FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE (M. Hoelzl, G. Ward trans., 2014).

It is surprising that, as mentioned, the work also contains concluding considerations on Article 48 of the Weimar Constitution; it is also very interesting that Schmitt warns (!) against Article 48 of the Weimar Constitution at this point. He ends with the demand to interpret the article restrictively. In fact, Schmitt is one of the first to recognize presciently the dangers of this article. The rest of the story is well known. Schmitt was right, Article 48 WRV was to play a central role in the dissolution of the Weimar Republic (albeit in conjunction with Article 25 WRV, the ability of the President of the Reich to dissolve Parliament in the very moment that Parliament demanded the lifting of the measures taken by the President of the Reich according to Article 48). But Schmitt would change his mind several more times before it came to that.

In sum, Schmitt appears as a constitutional scholar who is concerned about the constitution and warns not only against a broad concept of dictatorship, but also against a broad interpretation of Article 48 WRV. In fact, Schmitt proved to be particularly far-sighted compared to his contemporaries. He recognized exactly what danger lied in Article 48 of the WRV. And that is perhaps one of the reasons why Schmitt continues to fascinate many readers to this day, namely that he foresaw developments that others did not anticipate.[9]

2. Political Theology, Chapter 1, 1922

Just one year later, Schmitt's "Political Theology" was published.[10] In the first chapter, Schmitt once again dealt with the state of exception, which he now presents as the secular equivalent of the "miracle". This time, we as readers find another Schmitt. This time, he neither works historically nor doctrinally. His work rather belongs to the category of speculative legal philosophy.

The reason for Schmitt's writing was, however, very concrete and stemmed from legal scholarship: The occasion was a famous constitutional conflict in 19th-century Prussia, namely the so-called Prussian constitutional conflict, in which king and parliament argued about who had the 'last word' in the Prussian state between 1859

[9] Cf. Mattias Kumm, *in this colloquium*.
[10] CARL SCHMITT, POLITISCHE THEOLOGIE. VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT (2nd edn. 1934 [1922]). *English translation*: POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (G. Schwab trans., 1985).

and 1866. While the Prussian king wanted to, inter alia, increase the army, the second chamber of Parliament, the House of Representatives, which was mostly liberal, did not want to provide the funds for this military reform. The legal problem arose from the fact that, according to the Prussian constitution of 1850, the budget had to be determined by law, and for the law to pass the agreement of the king and both chambers was necessary.

Schmitt takes issue with the opinions of his contemporaries on this conflict. Above all, Schmitt is bothered, as he makes clear in the brief introduction to the second edition, by Hans Kelsen's legal positivism, but also by the two famous commentators of the Weimar constitution, Georg Meyer and Gerhard Anschütz. In their commentary, Meyer and Anschütz had written on this constitutional conflict with the famous words: "Constitutional law stops here."[11] According to them, there was no legal solution for the Prussian constitutional conflict, but only a political one; the conflict was seen as a mere power struggle, whereas the legal system (as we would say today) had reached its end.

Schmitt took this sentence as an opportunity to criticize the prevailing doctrine. Tohim, it was exactly the other way around. Precisely when there are constitutional crises or states of exception, it becomes exciting for the doctrine of constitutional law. According to Schmitt, these questions were the important questions and this is why the doctrine of constitutional law had to take a position.

It is precisely at this point that Schmitt enters the debate, answering the problem of the Prussian constitutional conflict in his own way. His answer is well known: "Sovereign is he who decides on the state of exception." Schmitt's student Ernst Rudolf Huber rightly points out that the sentence can be rearranged in order to understand it even better as an answer to the Prussian constitutional conflict:[12] He, who decides on the state of exception, is the sovereign. Of course, one could argue that this famous first sentence of Schmitt's Political Theology is, again, nothing else than an elegant way of saying that in the end the conflict resolution is only a question of power. Schmitt is aware of this, which is why he then attempts to strengthen the link between the

[11] GERHARD ANSCHÜTZ, LEHRBUCH DES DEUTSCHEN STAATSRECHTS 906 (G. Meyer, G. Anschütz eds., 7th eds. 1919).
[12] ERNST RUDOLF HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE VOL. 3 341 et seq. (3rd edn. 1988 [1963]).

concept of the state of exception and the legal system. To this end, he comes up with a completely new definition of the state of exception: For Schmitt, it is the state in which the normal state must first be restored. The legal order is suspended in such a state of crisis; a mere "order" (*Ordnung*) prevails – instead of the *legal* order that reigned before. It is then the task of the sovereign to restore the conditions for the reinstatement of the legal order.

It is clear that these ideas had nothing to do with applicable law. What was already referred to as a state of exception in those days, the 1920s, was exactly *not* characterized by the suspension of the entire legal system, but only by the suspension of individual fundamental rights that were listed in Article 48 of the Weimar Constitution. What Schmitt is doing here is radicalizing the concept of the state of exception, distorting it thereby to the point of unrecognizability. Perhaps one could also say: he searches the total state of exception *behind* the state of exception in the traditional sense, a total catastrophe in which all law is indeed suspended. Today, one might think, for example, of the total destruction of a country after a nuclear attack. In this case, Schmitt would be right, the whole order would be suspended under these conditions. But this kind of total catastrophe was exactly *not* what the traditional *legal* concept of the state of exception wanted to capture. A more recent example that illustrates well what a state of exception in the traditional legal sense would have denoted at that time is the Covid crisis: a (partly legal, partly factual) suspension of many fundamental rights (e.g. freedom of assembly, freedom of movement), but by no means a suspension of the entire legal order!

Schmitt's text thus loses any touch with applicable law. At the same time, his previous warnings about the sovereign dictator have now disappeared. Instead, Schmitt declares the state of exception unrulable by law – which, as mentioned before, makes sense (only) if you *redefine* the traditional state of exception as *total* disaster. Here, too, Schmitt is aware of the fact that he is fundamentally changing the traditional legal concept. This also explains to me why he suddenly speaks in his Political Theology of the genuine and the non-genuine state of exception – a fact that is overlooked in the Schmitt literature: the state of exception as a legal term becomes a non-genuine state of exception for him, the 'state of exception behind the state of exception' becomes the genuine one. At the same time, this reveals a central contradiction between "The Dictatorship" and the "Political Theology": While Schmitt had just warned against an

interpretation of Article 48 of the Weimar Constitution that could lead to a suspension of the entire constitution, he now claims that a state of exception is characterized precisely by such a suspension.

3. The 1924 Staatsrechtslehrerreferat

Just two years later, Schmitt was invited by the German Association of Constitutional Scholars, founded two years earlier, to give a lecture on Article 48 of the WRV to all of his colleagues teaching public law at German-speaking universities. In this lecture, Schmitt works as a doctrinal legal scholar; he had to present a paper without philosophical fabulation. And indeed, he analyses the practice of Art. 48 WRV and points out numerous ambiguities of this provision.

His presentation focused on the question whether, in a state of exception and thus within the scope of Article 48 of the WC, only the fundamental rights mentioned in Article 48 are suspended or whether many other provisions of the constitution are in fact also suspended (*durchbrochen*). While the majority of his colleagues held the catalogue of suspendible rights to be comprehensive (so-called doctrine of inviolability), Schmitt advocated the so-called "breach doctrine" (*Durchbrechungslehre*), thereby calling for the opposite of what he had demanded in "The Dictatorship"; instead of warning against Article 48 WRV, he instead advocates a broad interpretation. It does not come as a surprise that Schmitt's lecture was very critically received by his colleagues. To this day, Schmitt is criticized for ultimately having applied his highly idiosyncratic ideas of a provisional dictatorship, distilled from the history of ideas, to his interpretation of Article 48.[13]

4. Nazi writings during the Third Reich

After the so-called seizure of power (*Machtergreifung*) by Hitler in 1933 – who in the meantime had suspended basic rights permanently according to Article 48 of the WRV, and had thus elevated himself to the position of a sovereign dictator – Schmitt defended the *Führer*. "The Führer protects the law" is one of Schmitt's best-known essays,[14] which he wrote after Hitler had his internal party rivals killed in the so-called

[13] VOLKER NEUMANN, CARL SCHMITT ALS JURIST 176 et seq. (2015).
[14] Carl Schmitt, *Der Führer schützt das Recht: Zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934*, DJZ 945 et seq. (1934).

Röhm murders. Schmitt, who had warned against a sovereign dictatorship before, now no longer sees a problem in the face of the sovereign dictator.

5. Short comments during the Federal Republic of Germany

But Schmitt's last statements on the state of exception, which date from the time of the Federal Republic, are truly surprising: "The time of the state of exception is outdated", he writes laconically.[15] This, of course, does not prevent him from secretly celebrating Article 16 of the new French constitution from 1958, similar in many respects to Article 48 of the WRV.[16] According to Schmitt, the French had understood how to regulate the state of exception – in contrast to Germany's Basic Law that did and does not contain a similar provision after the Weimar experience.[17]

IV. The worst of all receptions

What follows from this cursory overview of Schmitt's ideas on the state of exception? First of all, we can see that Schmitt repeatedly dealt with the state of exception, using different methods each time, which accordingly led to very different results. This causes various consequential problems:

First of all, Schmitt's various writings cannot be reconciled with each other. To be sure, every thinker is allowed to evolve and we are all constantly working on rethinking, revising and reformulating our views. That is why we chose to become scholars. But with Schmitt, the changes go beyond mere evolution. In part, the changes are due to his political opportunism – but in part also to his desire to provoke, to take terms such as the state of exception to the absolute extreme, as happened in his Political Theology, or, conversely, to declare the term to be an outdated concept, as happened almost in passing in his writings on the Federal Republic of Germany.

The second problem that arises seems to me to be that, of the numerous stages of Schmitt's thinking with regard to the state of exception, we read, of all things, the Political Theology that we then consider to be the "true Schmitt" on the state of exception. Of course, we as readers are free to read those works more intensively that

[15] CARL SCHMITT, [remarks from the year 1958 on:] *Die staatsrechtliche Bedeutung der Notverordnung (1931), in* VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924 – 1954 261 (1958).
[16] *See on the comparability* SKACH, *supra* note 4, at 94 et seq.
[17] *See for background* KAISER, *supra* note 3, at 185 et seq.

give us the most, from which we expect the most. But wouldn't we then at least have to deal with the context of Schmitt's first chapter of his Political Theology? Many people are unaware that a hundred years ago, a state of exception was a clearly defined legal concept that large parts of German constitutional law scholarship were reflecting about. Schmitt, however, destroyed this legal concept by dissolving its boundaries. For him, the suspension of selected fundamental rights became the suspension of the entire legal order. That sounds incredibly exciting, but does not have much to do with the legal concept of a state of exception. Unfortunately, however, it is precisely this new conceptualization of the state of exception that has become established. Think of Agamben's interpretation. His state of exception, again, is the void.[18]

But what seems most dangerous to me is the technique that Schmitt himself employs and which also affects his reception: he fabulates and speculates at a level of legal theory, only to then transfer his thoughts into his doctrinal work in a next step. And that is precisely what seems to be happening again in the current debate: at the latest with Agamben, Schmitt's thinking of the alleged void in the state of exception found its way back into general thinking and from there to statements on the current legal order.[19] Such an approach is highly dangerous because this kind of Schmitt interpretation *decontextualizes* the Weimar thinker and reads him in a literal, abstract sense without taking into account how much Schmitt was a time-bound author who always reacted to changes in his environment, regularly in an opportunistic way. This is exactly why he was not able present a stable theory of the state of exception

V. Schmitt's relevance today

Schmitt's relevance for contemporary constitutional theory in the area of the state of exception is undisputed. This is clear from the fact that he is continuously referred to. This article sought to show that it is dangerous to refer to Schmitt's understanding of the state of exception from his Political Theology of all things. It is Schmitt's most obscure work, which turned the doctrine of the state of exception at the time on its head. While other works by Schmitt, such as his "Dictatorship", would still have something to say to us, it is precisely the fabulating, murmuring, dark, speculative Schmitt of Political Theology that is being revived, all while stripping it of its context.

[18] AGAMBEN, *supra* note 1, at 50 et seq.
[19] *Cf.* POSNER AND VERMEULE, *supra* note 2, at 91.

Therefore, I would like to conclude with the answer: This Schmitt is indeed relevant, but shouldn’t be.

3.

THE STRUGGLE OVER A NEW NOMOS OF THE EARTH: SOME SCHMITTIAN OBSERVATIONS ON THE RECENT HISTORY, PRESENT CHALLENGES AND FUTURE OF INTERNATIONAL LAW

By Mattias Kumm*

"Right now there are changes – the likes of which we haven't seen for 100 years – and we are the ones driving these changes together."

Xi Jinping to Vladimir Putin on March 22, 2023

„For purposes of National Security and Freedom throughout the World, the United States of America feels that the ownership and control of Greenland is an absolute necessity"

President Trump on December 22, 2024

1. Introduction

The Appendix of the "Nomos of the Earth", Carl Schmitt's magisterial work on the history and theory of international law published in 1950,[1] contains three corollaries. The last corollary – written in 1954 – is entitled "The New Nomos of the Earth". In it, Schmitt envisages three possible alternatives to what the Nomos of the earth might look like after the Cold War is over.[2] They are:

1. World unity under the hegemony of the US.
2. The US as a global balancer, dominating the western hemisphere and preventing any state from playing a dominant regional role anywhere else.
3. A multipolar world divided up into regional spaces (Großräume) each dominated by its own hegemon.

Schmitt's thinking is useful for grappling with the recent history and contemporary struggles in international law in two ways. First, the idea of a "Nomos of the Earth" connects the notion of a global legal order to its animating basic principles,

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[1] Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (2006).
[2] *Id.* at 354–5.

institutional commitments and core problems. It provides an interesting jurisprudential approach to understanding the idea of a legal order, that deserves more attention from legal theorists, than it has received, or so I will argue (2.). The idea of international law's Nomos is of relevance not only to the interpretation and progressive development of international law, but also for writing its history. On a more concrete level, the three alternatives Schmitt puts forward are helpful ideal-typical jurisprudential frames for analyzing the most recent history of international law as well as contemporary positions, shifts and struggles relating to the future of the global order. I will show how the world of international law for at least a quarter century after the end of the Cold War (1989-2014) can be plausibly described as fitting the "world unity under US hegemony" model and what this meant for the "Nomos" of that order (3.). Even though it is not possible to put a specific date to the end of that order, by 2025 it has ended (4.1). Contemporary struggles can be understood as part of a shift towards a new order, which may well reflect some version of either the second or third option that Schmitt sketches, even though it is also possible that no such order may emerge (4.2). A genuine new and transformed liberal order – a genuine law of humanity for the Anthropocene – robust enough to secure humanity´s survival, may not be on the political horizon. But, reading Schmitt against Schmitt, there are good reasons for scholars to make that the focus of their work, given the alternatives (5.). I conclude that Schmitt's jurisprudential conceptualizations are original and his more concrete claims are productive to engage. His work on the history of theory of international law his work remains of great interest (6.).

2. Law's Nomos according to Schmitt: Situating a jurisprudential idea

Lawyers, Schmitt claims, either think of law in terms of a decision, a legal norm or a concrete order.[3] Schmitt's early writing in the constitutional context has tended to emphasize the decisionistic nature of law.[4] Yet it is wrong to think of Schmitt primarily as a decisionistic legal thinker. The mature Schmitt[5], and certainly the Schmitt that

[3] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 2 (2005).
[4] The early Schmitt tends to think of law in terms of decisions, *see id.* at 5–35.
[5] As Schmitt states in the preface to the second edition for "Political Theology", the institutionalist thinking of the French public lawyer and sociologist Maurice Hauriou has opened his eyes to thinking about law in terms of a concrete order, *supra* note 3 at 2.

writes about the history and theory of international law, best fits the third category. He thinks of law as a concrete legal order.[6]

His understanding of what it means to think of law as a concrete order is distinct, however, from positivist legal thinkers, such as Hans Kelsen or H.L.A. Hart, who also think of law in terms of a legal order. Both of the them conceptualize a legal order as a system of positive norms held together by a *Grundnorm* or rule of recognition, respectively. Schmitt derides such positivist thinkers as nihilistic. What makes these accounts nihilistic and legally deficient in Schmitt's eyes is that they do not include an account of the grounds for law's claim to legitimacy.[7] Schmitt's idea of order, on the other hand, is connected to basic normative ideas, principles and understandings, that legitimate, ground and orient the law. He calls these the Nomos of a legal order. It is law's Nomos that provides both grounded coherence (*Ordnung)* and orientation *(Ortung).*[8]

The idea of a Nomos in Schmitt's writing is not defended as an analytically well-developed jurisprudential thesis. In chapters analyzing the idea, he combines loose genealogical analysis with historical observations, interspersed with apodictic formulations.[9] Yet notwithstanding his stylistic idiosyncrasies, the idea of Nomos is both central to Schmitt's legal thinking and can be made sense of in jurisprudential terms. It is a concept that helps explain and justify Schmitt's distinctive style of legal analysis and legal history. His writings combine an analysis of concepts, doctrines and institutions with excursions on intellectual history as well as a political sensitivity to the interests and projects of major powers.

In insisting that a legal order needs to be grounded in that way Schmitt's views share a core feature with Ronald Dworkin's jurisprudence. Besides also being holistic or system oriented, Dworkin like Schmitt insists that the law includes the grounds of law that seek to justify its coercive enforcement. But whereas for Dworkin those grounds

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[6] Whereas in the domestic realm Schmitt emphasizes the central role of the sovereign, the domain of international law has more communitarian grounds. Thus, the *Jus Publicum Europeaum*, even though shaped by specific major European powers at different times in a way aligned with their interests, is ultimately grounded not just in common interests, but in a common European culture and civilization.
[7] See Carl Schmitt, Legality and Legitimacy (2004). In insisting that law's claim to authority goes together with a claim to legitimacy Schmitt's position mirrors that of Joseph Raz, The Authority of Law: Essays on law and morality (1979).
[8] Schmitt, *supra* note 1, at 75.
[9] The closest thing to such an account can be found in the fourth chapter of Nomos of the Earth (Schmitt, *supra* note 1, at 67–79) and the three chapters that make up the concluding corollaries (*id.* at 323–55).

are ultimately principles that are developed as a sub-branch of universal political morality,[10] Schmitt's account of the legitimizing principles underpinning a legal order remains firmly historical and descriptive. Identifying it requires careful analysis of concepts, doctrines and institutions in light of their intellectual history and their use by powerful actors to further particular projects. Even though establishing its more concrete contours may require interpretative effort, it can be ascertained by a sufficiently historically informed and sociologically discerning jurist.

To illustrate the point: The Nomos of the international law between approximately 1600–1918 as Schmitt describes it – the *Jus Publicum Europaeum* – is defined by recognizing European sovereign states as the central actors, whose core challenge is to define the terms on which the newly discovered and mapped world gets competitively appropriated by European powers while wars between European sovereigns is "bracketed" (eingehegt). Whereas the conventional narrative has it that the peace of Westphalia and the emergence of the idea of sovereignty lies at the heart of the modern project of international law, Schmitt insists that such an account needs to be complemented by the idea that the "age of discovery" and the mapping of the world created the conditions for the most advanced and powerful European states to expand their horizon and sphere of action, creating the preconditions for the emergence of a Europe centered genuinely global perspective on order. The question what justified the European appropriation of the newly discovered world and to deny full standing to other non-European peoples and civilizations was of central importance for understanding that order's legitimacy and so Schmitt takes great interest in it. Describing the shift from the theological thinking of Francisco to Vitoria to more secular writers such as Ayala, Gentili, Zouch and then Grotius and Pufendorf,[11] Schmitt's own position combines a social Darwinian approach[12] with a claim of civilizational, intellectual and scientific superiority.[13] What matters from a juristic point of view is that such justification was the normative premise that was needed to

[10] See Ronald Dworkin, Justice for Hedgehogs 400 (2011).
[11] Schmitt, *supra* note 1, at 101–30.
[12] "The meaning of the legal title of 'discovery' lay in an appeal to the historically higher position of the discoverer vis-à-vis the discovered … a discoverer is one who knows his prey better than the prey knows himself, and is able to subjugate him by means of superior education and knowledge." See *id.* at 132–3.
[13] "European discovery of a new world in the 15th and 16th centuries … was an achievement of newly awakened Occidental rationalism, the product of an intellectual and scientific culture that arose in the Middle Ages, with the necessary assistance of systems of thought that had reconstituted classical European and Arabic thinking in Christian terms, and had molded it into a great historical power." See *id.* at 133.

legitimate the legal and political project of the *Jus Publicum Europeaum*. It helped define who the relevant actors were – European sovereigns – and its distinctive problems: organizing competitive land acquisition in the non-European world while bracketing war.[14]

Note how such a historical, sociological jurisprudential understanding of law's Nomos also allows for critical distancing from it. The idea that a legal order is grounded and oriented by a Nomos that seeks and implicitly claims to legitimize it, does not mean that it *is* actually legitimate, from a moral point of view.[15] Schmitt's appeal as a scholar writing on the history and theory of international law lies in part in his overt recognition of the Eurocentric and imperial nature of international law. Schmitt himself embraced and indeed celebrated the *Jus Publicum Europeaum* as a major European civilizational achievement. But most contemporary readers who have read Schmitt sympathetically embrace his writings as a persuasive reconstructive historical account of what international law actually was in that period, in order to take a critical stance towards it, exactly because Schmitt accurately revealed it to be an Eurocentric imperialist project at its core. Law's Nomos is susceptible to explication by jurists (and historians of law), whether or not they embrace it as a matter of political morality. Law makes a claim to legitimacy and also includes the grounds that seek to validate its claims and give an account of the nature of normative project that it is. Schmitt calls that its Nomos. But whether a legal order's Nomos does in fact successfully justify it – whether it actually has moral legitimacy – remains an open moral question.

3. The post–1990 Nomos of the Earth: World unity under the hegemony of the US

The idea of a Nomos of the Earth is helpful for identifying and giving account of the defining orientations of different periods in the history of international law. According to Schmitt, the old *Jus Publicum Europaeum*, already in decay since the late 19th century, was delivered a death blow by the Treaty of Versailles, which was, however, unable to ground a new Nomos of the Earth. Arguably a new Nomos had been

[14] In that way the Nomos provides for what contemporary social scientists might call law's script, defining the core actors (here: European states), the core plot (here: organizing the European appropriation and control of non-European newly discovered territories) and core problems ("bracketing" war). The doctrinal concretization of these ideas and their shifts in time can be understood as the unfolding of a narrative in which the plot unfolds through the actions taken of its core subjects.
[15] Whereas normative legitimacy is not required, empirical legitimacy – the de facto acceptance of law's claims by relevant powers – is a precondition for its recognition as valid law.

successfully established by 1945, with the UN and a whole panoply of international institutions aimed at managing the global economy. But the realities of the onset of the Cold War interrupted and/or shaped the development of that new order in distinct ways which differentiated it both from the vision of those who created it between 1941 and 1945 and from what that order would evolve into after the end of the Cold War. Even though Schmitt had some interesting observations and conceptualizations to make regarding the international order during the Cold War,[16] his death in 1985 precluded him from being able to describe a fully developed new Nomos of the Earth after the end of the Cold War. The following will attempt to describe the order after 1989 until approximately 2014 as one that best fits the first option Schmitt laid out in his corollary: World unity under hegemony of the US. Here it must suffice to paint only a very rough picture, focusing on some core features. The description succeeds if it captures its core moral features, as they were understood by its core participants. As will become clear, that order had little in common with the *Jus Publicum Europaeum*.

In a simplified shorthand form the post–Cold War international order can be described as a project to maintain and progressively realize a world of liberal states integrated into a global economy, in which the use of force is heavily circumscribed and the acquisition of territory by force is prohibited. The hegemonic role of the US is reflected not only in the fact that this order mirrored core preoccupations, self-understandings and interests of the US. The US also possessed the only military with global reach and ambition. It exercised prerogative power as a last resort upholding the international order and securing its dominant position in it.

More specifically, that order's Nomos is defined by three structural features.

3.1. A world of liberal states

Notwithstanding the rise of a host of other subjects of international law, states remain the primary actors of the new order. But states are no longer paradigmatically European states (or Christian or civilized states), like in the *Jus Publicum Europaeum*. Nor are states mere power configurations in the form of a government over a bounded

[16] His most important writings on international law beyond his book on the Nomos of the Earth are available in German, see Günter Maschke ed., Staat, Großraum, Nomos 225–642 (1995). Perhaps his most developed account of the Cold War World of international law is his 1962 essay Carl Schmitt, *Die Ordnung der Welt nach dem Zweiten Weltkrieg [The order of the world after World War II], in* Staat, Großraum, Nomos 592 (Günter Maschke ed., 1995).

territory and a permanent population with the capacity to enter into international relations, as was the standard positivist view in the inter-war period.[17] The paradigmatic subjects of international law were now liberal states.[18]

Compared to the inter-war positivist picture of statehood, the idea of the state was now structurally subjected to two kinds of normative requirements as a matter of international law.

On the one hand, the principle of self-determination, recognized by the UN Charter, meant that the old European Empires were delegitimized[19] and subjected to pressures relating to decolonization. The process of decolonization already unfolded during the Cold War, since it was generally supported by both the United States and the Soviet Union, with both Lenin[20] and President Wilson[21] having advocated for it in the early 20th century. This was a process that had largely run its course by the end of the Cold War.

On the other hand, human rights began to play a central role in reshaping the requirements of the legitimate structure and orientation of state public authority. The idea of human rights had already been taken up by the UN Charter and the UN Declaration of Human Rights dates back to 1948. But the deeper institutionalization of human rights in widely ratified Treaties and regional organizations, and, at least as importantly, its wider uptake in international diplomacy, domestic constitutional practice and global civil society only occurred in the last decades of the 20th century, after Communism and related ideologies had lost much of their appeal.[22] As a global *lingua franca* to guide, restrain and criticize states in the last quarter of the 20th century, it led to the understanding that a truly rights respecting state would effectively have to be a liberal democracy.[23]

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[17] Convention on the Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention), Dec. 26, 1933, 165 L.N.T.S. 19.
[18] *See* for example Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EJIL 503 (1995).
[19] Schmitt called anti-colonial norms and attitudes "anti-European propaganda", Schmitt, *supra* note 14, at 594.
[20] Vladimir I. Lenin, The Right of Nations to Self-Determination (1914).
[21] Woodrow Wilson championed the principle of national self-determination as a cornerstone of his Fourteen Points for peace after World War I.
[22] This is the core of the claim made by Samual Moyn, The Last Utopia: Human Rights in History (2010).
[23] Interestingly international scholars, sensitive to issues of pluralism and cultural difference and well familiar with postmodernist critiques of universalism, perhaps fearing the critique of postcolonial

The requirement that states be liberal was, of course, not constitutive of statehood. At any point during this period there were plenty of states that did not qualify as liberal democracies. But the requirement that states be liberal democracies was nonetheless a regulative ideal that structured doctrines and guided international practices. The recognition of new states[24] and membership in supranational institutions like the EU was in part tied to requirements of endorsing and institutionalizing commitments to human rights and democracy.[25] The ideas of humanitarian intervention and the "responsibility to protect"[26] were discussed and invoked as grounds to use force, either authorized by the UN Security Council[27] or, if necessary, without it.[28] Furthermore international institutions and international civil society were engaged in democracy promotion and human rights issues, fostering revolutions and regime change, often with the support of US intelligence agencies. Unless a state was a reliably compliant partner of the US, irrelevant to western global supply chains or geostrategic interests, or possessed nuclear power, dictatorial or authoritarian regimes existed precariously.[29]

3.2. A globally integrated economy

Liberal states were imagined as part of a relatively open legally integrated interdependent global economy, which, in descending order of degrees of realization,

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scholars, embraced such a position only tentatively, if at all. This notwithstanding human rights provisions found in all major human rights documents which make such skepticism questionable as a matter of positive law. For the spectrum of positions see, for example, Thomas M. Franck, *The emerging right to democratic governance*, 86 AJIL 46 (1992), and Susan Marks, The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology (2000).

[24] See Declaration on the "Guidelines on the Recognition of new states in Eastern Europe and in the Soviet Union", European Community, Dec. 16, 1991, 31 I.L.M. 1486 (1992). A similar declaration was made by President George H.W. Bush, see President Bush Welcomes Commonwealth of Independent States, Dec. 25, 1991, 2 Foreign Policy Bulletin 12 (1992).

[25] Conclusions of the Presidency – Copenhagen, European Council, June 21–22, 1993, SN 180/1/93 REV 1.

[26] See Implementing the Responsibility to Protect: Report of the Secretary General, UN General Assembly, Jan. 12, 2009, UN Doc. A/63/677.

[27] UN Security Council Resolution 1973, UN Doc. S/RES/1973 (2011), authorizing "taking all necessary measures" to prevent "gross and systemic violations of human rights".

[28] On March 24, 1999, NATO began a bombing campaign against Serbia, with the objective of protecting Kosovar Albanians against attacks by Serbian forces.

[29] The US as an agent that fostered revolutions and regime change dated back to the Cold War, of course. What was new after the end of the Cold War was that such actions were targeting regimes that were clearly not democratic (think of Afghanistan, Iraq, Libya and Syria). Compare that to the interventions of the US in Guatemala in 1954, Iran in 1956, or Chile in 1973, where US intervention cemented the power of authoritarian leaders against democratic challengers. One could argue that US covert activities in Ukraine surrounding the Maidan demonstrations in 2013 are an exception, because a democratically elected President was effectively replaced. But even this intervention did not replace a democratic regime with an authoritarian one but merely helped bring about an extraconstitutional change of government.

ensured the free movement of capital, goods, services, and – to a much more limited extent – persons. That global economy is institutionalized by way of a thick web of mutually complementing multilateral and bilateral institutions and practices (WTO, BITS, IMF, World Bank, standard setting bodies etc.). More generally international institutions and other bodies and organizations provide an infrastructure for addressing global policy challenges (global governance).[30] For that purpose multilateral Treaties, international institutions and more informal governance practices that fuse the private and the public are established and maintained by and through experts, state representatives and connected to a global civil society.

Of course, the global economy was only partially open and integrated, with core players continuing to insist on selective sectoral protectionism. And more generally global governance practices are not equally developed across policy domains, as the international community struggles, for example, to define and establish processes and standards by which climate change can be adequately addressed. But the basic idea of a world of liberal states ensconced in a deep web of institutionalized normative practices that structure a globally integrated economy and address collective policy challenges is nonetheless one that the central and most powerful actors purported to be committed to. Institutions and multilateral practices were established reflecting these commitments and the orientation of international law is generally conceived by its practitioners as directed towards progressively realizing some version of these ideals, even as these ideals were only partially realized and the details remain disputed.

3.3. The use of force and the liberal peace under US prerogative power

Finally, the use of force is outlawed as a means either to acquire territory or to enforce rights, unless a state is defending itself against an armed attack. More generally security issues do not feature prominently as a concern in this era. When security issues become a major concern, they tend not to be connected to great power competition, which is mostly absent (think "liberal peace"[31]). Instead debates about the use of force were more likely to be concerned with non-state actors (think "global

[30] Global Governance practices (*see* Michael Zürn, A Theory of Global Governance (2018)) gave rise to the field of Global Administrative Law, *see* Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 Law and Contemporary Problems 15 (2015).
[31] Michael W. Doyle, *Liberalism and World Politics*, 80 Am. Polit. Sci. Rev. 1151 (1986).

war on terrorism" after Sept. 11, 2001)[32] or humanitarian intervention and regime change operations in favor of replacing authoritarian regimes with democratic ones (Kosovo, Afghanistan, Iraq, Libya, Syria etc.), and often both kind of justifications overlapped.

Notwithstanding the end of the Cold War there were no serious attempts to revitalize the idea of a genuine system of collective security as originally imagined by the drafters of the UN Charter. There were, for example, no successful attempts at reforming the UN Security Council, regardless of its widely acknowledged inadequacies. There was no resuscitation of the UN provisions suggesting that states should make available to the UN its own military forces, as foreseen by Art. 43–47 UN Charter. Nor was there a successful movement towards a world freed of nuclear weapons, even if Treaties between the United States and Russia address some specific issues relating to nuclear armaments,[33] and the ICJ was brought into play to advise on the problem.[34]

Instead, the US as an anchor and guarantor of this order intervenes and/or organizes coalitions of the willing as a world police power and would be democracy promotor, either with or without UN Security Council authorization. Strategy papers produced by the Pentagon or the State Department during this period carried titles such as "Achieving Full Spectrum Dominance"[35] and worked out what would need to be done to ensure that US military forces were so dominant, that any potential competitor would be discouraged from even attempting to rival US military might. The goal was to encourage states to acquiesce to the status quo and find their place within the US guaranteed order. Although invested in and subject to international law and even using international law to further national foreign policies, the US exercises effective *prerogative power*[36]: When it used force, it could not effectively be held legally

[32] The "Global War on Terror" was declared by President George Bush on September 20, 2001, in the wake of the September 11th terrorist attacks. The terrorist as a figure in the post–9/11 international order is related, although also distinct from, the partisan that Schmitt describes as a central character in the Cold War order. *See* Carl Schmitt, Theory of the Partisan (2007).

[33] From the Intermediate-Range Nuclear Forces Treaty (1987) to the Strategic Arms Reduction Treaty I (1991), the Strategic Arms Reduction Treaty II (1993), the Strategic Offensive Reductions Treaty (2002) and the New Strategic Arms Reduction Treaty (2010).

[34] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, 226.

[35] The concept was articulated in a 1992 Pentagon document called the Defense Planning Guidance (DPG), outlining a post–Cold War strategy for maintaining American global primacy, including the need for unrivalled military power and the prevention of potential competitors.

[36] See Mattias Kumm, *Great power competition, prerogative power and international law, in* Philosophy of International Law: Contestations and Extension (Andreas Follesdal and David Lefkowitz eds., forthcoming 2026).

accountable for its interventions and police actions, be they covert or open regime change operations, antiterrorism operations or other forms of the use of force. The non-participation in the newly established International Criminal Court, the refusal to grant jurisdiction to the ICJ, the veto in the UN Security Council as well as its unique global military, technological and economic position worked together to consolidate its unchallenged global prerogative power. Although the exercise of prerogative power by the United States was generally accompanied by legal justifications ultimately linked to human rights, democracy and the rule of law, the modalities of the exercise of that power were largely a function of domestic political sensibilities and agendas, economic interests and geo-strategical considerations. On the one hand, this led to a US interventionism that fostered suspicion and resentment in countries that deemed their interests to be adversely affected by these interventions and who plausibly believed the provided justifications to be legally unpersuasive and pretextual. On the other hand, even severe and persistent human rights atrocities or major wars between countries in Sub-Saharan Africa, such as the Great African War between 1998–2005 with estimated five million casualties, did not trigger serious engagement, absent such interests. In practice the "liberal peace" took the form of one power effectively monopolizing the exercise of prerogative power, whose exercise remained very much focused on zones of economic and geostrategic interest.

Territorial disputes played a relatively peripheral role in this world and the rule against the acquisition of territory through conquest was rarely challenged and when challenged successfully rebuked. When Iraq under Saddam Hussein invaded Kuwait in 1990 and annexed it, the response was swift. The status quo ante was restored through UN authorized collective military action. The principle of *uti possideti iuris* generally governed boundary drawing in postcolonial contexts as well as contexts of post–Cold War disintegration of Empires (the Soviet Union and Yugoslavia), as a way to guide and constrain the principle of self-determination. After decolonization, self-determination claims were largely focused on contexts such as Scotland, Quebec or Catalonia. Notwithstanding debates about whether there is a remedial right to secession as a matter of international law, struggles for independence were generally deemed to be only of domestic constitutional significance, leaving international law to ratify whatever the political outcome of struggles for self-determination are. Postcolonial debates – and debates insisting on the centrality of the distinction

between the "global north" and the "global south" – tend to focus on asymmetries of power and benefits reflected in doctrines and institutional structures relating to economics and cross border exchanges, not territory.

4. A new Nomos of the Earth? On contemporary challenges

It is this order which is coming to an end (4.1.) and morphing into something else (4.2.).

4.1. The end of the post–Cold War legal order

Like the end of the *Jus Publicum Europaeum*, the end of the post–Cold War legal order did not occur all at once but happened gradually over more than a decade. It is defined not by one event, be it the more resolutely authoritarian orientation of China under Xi Jinping and its further gradual economic and military rise after 2012, the invasion of Ukraine by Russia either in 2014 or, more far reaching, in February 2021 or the hapless withdrawal of the US from Afghanistan in August 2021 or the wrecking ball of a foreign policy that is the 2nd Trump Administration. But by 2025 that order appears to have come to an end. There are three core features that, taken together, justify such a judgment.

First, there is a reemergence of the practice of land acquisition and claim to title connected to conquest and the threat or use of force. Take Russia's annexation of Crimea in 2014, which, though widely condemned, did not trigger major efforts by the international community to restore the status quo ante. Russia's more brazen invasion of February 2021 leading to the annexation of four Oblasts in Eastern Ukraine did meet more of a concerted effort to resist, with NATO along with other western powers financing and arming Ukraine while also imposing significant economic sanctions. Yet large parts of the international community never participated in either the economic sanctions or the efforts to arm Ukraine. At the time of writing these efforts appear to be insufficient to prevent what for all practical purposes will be regarded as a defeat of the Ukraine. Furthermore, China is occupying and militarizing islands and rocks in the South China Sea while making extensive territorial claims grounded in an idea of historical legitimacy unmoored from considerations of international law (the "nine-dash line", including Paracel Islands, Spratly Islands, Scarborough Shoal etc.), while also taking an increasingly threatening posture with regard to the de facto

independent democratic Taiwan. Furthermore, such aggressive postures and attempts at land acquisition are not limited to authoritarian regimes. Israel, too, has a government that seeks the incorporation and settlement of all or parts of the West Bank, while it has already claimed to exercise sovereignty over East Jerusalem and the Golan Heights, a position supported by the current US government. The US President has challenged the independence of Canada as a sovereign state, suggesting it should integrate itself into the United States. The President has also repeatedly insisted that for reasons of international peace and security the Danish territory of Greenland must become US territory, "one way or another". If claims to territory based on threat or use of force were accepted as part of a negotiated settlement between major powers, it would be the clearest possible indication of the end of the post–1990 order.

The forceful appropriation of territory unmoored from plausible claims to title under international law takes place in a context of renewed great power competition. The claimed monopoly of the United States to exercise prerogative power is challenged, most directly by Russia and China. These powers, too, want to have the discretion to intervene and shape the "near abroad" and defend what they take to be their core national interests without interference by others, including the United States. In other words, the global hegemony of the United States is being challenged by other great powers, who also insist on exercising prerogative power with regard to their sphere of interest.

Second, the idea of an open globally integrated economic order has largely been given up. The WTO Doha Round and the DSB have largely been abandoned and with it a universal framework within which to develop rules for free trade. Attempts to establish Mega-Regionals (think TTIP and TPP) as substitutes have generally failed. Protectionist policies, tariffs, de-risking and "friendsourcing" as a corollary to new geostrategic competition and the weaponization of economic dependence are on the rise. More generally the re-emergence of a transactional approach to international relations appears to be substituting global governance orientations.

All these developments happen as economic power shifts away from the West: The G7 format has a competitor in the BRICS format, while today only the more inclusive G20 can plausibly function as a forum for discussion of issues of global relevance. Note the surprising ineffectiveness of the unified western sanction regime against Russia:

Russia's economic growth has outpaced that of western countries since the economic sanctions were imposed. Furthermore, there is much chatter about upending the supremacy of the Dollar or the impact of the Chinese Belt and Road Initiative as China seeks to fill any power vacuum left by the United States and articulates its own vision of a "community of shared future for mankind".

Third, the world is increasingly not a world of liberal states. "Backsliding" and the rise of authoritarianism is a widespread phenomenon and the dominant theme of contemporary comparative politics and comparative constitutional law. Many states, including states that used to be described as well-established liberal democracies, whether in Europe or the United States itself are struggling to maintain that status. Perhaps President Bidens audacious framing of his foreign policy, featuring democracies in alliance against autocracies must count as the last hurray of the old post–Cold War order, as well as a symptom of its demise. The very acknowledgment of such a struggle already suggests largescale divides of a systemic nature. Compare it to G.W. Bush's identification of an "axis of evil" 20 years earlier, which targeted not serious systemic competitors, but identified mere systemic outliers and outlaws as the core challenge. Yet even though Biden did succeed in uniting the West, the alliance he built would not succeed to force Russia into submission. He is replaced by a President who is the head of a movement whose commitment to democracy is questionable. At the same time many of those who recognized themselves as part of that alliance, whether the UK, France or Germany, are facing serious domestic political challenges by parties and candidates, who, in one way or another, want to replace liberal constitutional democracy with something else.

4.2. Beyond US hegemony: What kind of new Nomos?

What then might the contours of a new Nomos of the Earth be? If we take Schmitt as our starting point, the choice is between two options: either the United States as a global balancer, dominating the western hemisphere and preventing any state from playing a dominant regional role anywhere else; or a multipolar world divided up into regional spaces (Großräume) each dominated by its own hegemon. The latter option is one Schmitt had described more elaborately in 1938[37] as a way to legitimate

[37] Carl Schmitt, *Völkerrechtliche Großraumordnung mit Interventionsverbot für Raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht [The Großraum Order of International Law*

Germany's ambitions to dominate Europe, leaving Japan to dominate East Asia and the United States to dominate the Western Hemisphere. In today's world this option would substitute Russia for Germany and China for Japan. The basic idea would be that each of the great powers would not just exercise sovereignty over their territory, but also dominate the near abroad, with their legitimate influence grounded in "cultural appeal and economic-industrial-organizational capacity"[38].

Given the ambitions of Russia and China respectively, who are happy to see the US withdraw into the western hemisphere, the choice between the two is a question of the will and relative capacity of the United States. It can either successfully insist on the role of a balancer. Or it can pull back or be pushed back, leaving each of the major powers to dominate their respective regions and control their respective spheres of influence.

As a preliminary matter, there are significant tendencies in US foreign policy that suggest that the administration is not invested in playing a role as a global balancer. The US has largely seized to play a productive high-profile role in multilateral institutions, in part withdrawing from them, thereby indicating at least that it is not interested to channel its global ambitions as a balancer through institutionalized multilateral channels. Also, and notwithstanding significant engagement in the Middle East, the foreign policy focus of the administration has been on the western hemisphere. Besides the territorial ambitions to the North (Canada and Greenland), there are threats against Panama and more recently Venezuela and the sinking of Venezuelan boats deemed to target drug smugglers that have been classified as "terrorists". These orientations suggest a preference for the sphere of influence model and against the global balancer model.

But perhaps the most important testing grounds of the orientation of the US administration are its positions with regard to Russia and China.

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with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law], in Staat, Großraum, Nomos 269 (Günter Maschke ed., 1995).

[38] The Großraum as the space of the "kulturellen und wirtschaftlich-industriell-organisatorischen Ausstrahlung", *see id.* at 309. The connection to what Samuel P. Huntington would later call a "civilization state" and the idea of a "clash of civilizations" is obvious, even if it remains unacknowledged. See Samuel P. Huntington, *The Clash of Civilizations*, Foreign Affairs, June 1, 1993, at 22; and in a full book version, see Samuel P. Huntington, The Clash of Civilizations (1996).

We see the current Trump administration oscillating between balancing ambitions and *Großraum* deference in the case of Russia: On the one hand, the President seems to be happy to give Russia a free hand in Europe. He humiliates the Ukrainian President in the Oval Office and tells him to accept a deal with Russia, given his weak hand. He alienates two NATO allies (Denmark and Canada) with threats to incorporate parts of their territory. And he raises doubts about whether the US would defend NATO allies in case of an armed attack by Russia. On the other hand, the flow of weapons to Ukraine, now mostly financed by the EU, continues with new and even more potent long-distance weapons being brought to the Ukraine. And Putin is threatened with further sanctions, given his lack of interest in a settlement whose center of gravity would oscillate around the military status quo.

The situation with regard to China is not entirely different, with the current US Administration also displaying considerable ambivalence. Rather than repeating Bidens position that the US would help Taiwan defend itself in the case of an attack by China, the administration appears to have resumed a position of strategic ambiguity. Meanwhile important assets in Taiwan, such as TSMC, a company that is a central player in the high-end microchip industry, is encouraged to shift part of their know-how and production capacity to the United States.

The current moment is best understood as the early part of an interim period, where, as Gramsci put it, the old order has died, but the new one is not yet ready to be born. In the broadest of strokes Schmitt in 1954 painted two options for what a new order might look like. For the moment, the two alternatives Schmitt sketches are useful prisms to study policy choices. One can see the current US administration oscillating between both of these, without showing the kind of consistency that would suggest that it has settled on either.

One can question whether either of these ideas of order will be helpful to define a relatively stable era of global relations and international law in the future. Indeed, it is unclear whether there will be any kind of stable settlement. The situation relating to technological developments is likely to remain highly dynamic over the next years. The internal political situation in the United States, China and Russia is also volatile and relatively unpredictable. And the fact that there are three great powers with transformative ambitions makes it more unlikely that there is going to be an

equilibrium of the kind that could be found after the Cuban missile Crisis in the Cold War. The future may see all kinds of issues specific flexible ad hoc coalitions and alignments, along with a higher degree of volatility and disorder, punctuated by violence and military interventions. All of this will occur under the shadow of the real possibility of major escalations, possibly leading to great power conflagrations, and potentially nuclear war and civilizational collapse.

5. Transcending Schmitt with the help of Schmitt: Scholarship and the future of international law

But of course, neither apocalyptic scenarios, disorder or collapse nor the options Schmitt outlined in 1954 exhaust the field of possible futures. One conceptually obvious, even if seemingly politically distant option is the emergence of a transformed liberal order, a genuine law of humanity for the Anthropocene, robust enough to secure humanity´s survival, just enough to count as a form of collective self-government and effective enough to steer the world towards prosperity. Schmitt was, of course, anti-liberal. But there are ways in which Schmitt indirectly inspires efforts in that direction. Let me explain.

From a liberal perspective a Schmittian account of the post–1990 order along the lines suggested above – a liberal world order under the hegemony of the US – appears to be a critical account. It sharpens a sense of what, from a genuinely liberal perspective, was wrong with that order. Furthermore, it highlights structural features that are arguably directly connected to its demise: An order that fails to provide the structural conditions that provide genuine collective security and instead leaves the task of global policing to a hegemon contains within it the seeds of its own destruction. The actions of the hegemon, inevitably epistemically limited by a nationally situated perspective, guided and constrained by the need to be responsive to domestic constituencies, will often be or appear to be (from the perspective of others) misinformed, self-interested or hypocritical. At worst, the hegemon, unable or unwilling to continue playing its role as the guarantor of international order, gives up on the idea of using its power to uphold order altogether and marshals its considerable clout to pursue more narrowly defined national interests. Either way its actions create resentment and backlash, ultimately leading to the rise of a new great power competition, whose dynamic threatens to subvert and overwhelm any kind of international order. If this is a plausible account of at least a part the dynamic that has led to the contemporary

situation, Schmitt's critical perspective would allow us to see that it is not a genuinely liberal order that has failed and that it is not what was liberal within it that has caused its failure. In the concrete form that international law took after 1990 it was a hegemonic order, that notwithstanding its liberal elements, effectively authorized a new form of Empire and concomitant forms of domination. Those forms of domination might have been considerably lighter to bear for many subjected to it than those exercised by the Empires of the *Jus Publicum Europeaum*. But their existence nonetheless meant that the post–Cold War order remained removed from the kind of genuinely liberal order that Kant might have a described as establishing a "condition of right". The challenge one might contend against Schmitt (and with Kant), is to do better. The relevant question may well be: What might that better new order, one that takes the idea of establishing a condition of right serious, look like? And how might it be brought about?

Schmitt, of course, would have rejected these questions. The project of a legally constituted unified humanity would not have been a plausible project for him. It lacks an enemy against which to mobilize, a necessary ingredient for Schmitt of any political order.[39] Humanity might constitute itself as a unity to defend against space aliens, or, perhaps more realistically, against rogue general artificial intelligence that sought to dominate the world or eradicate humanity. Unity could also be achieved if humanity subjected itself to an artificial superintelligence. But if it did, it would have ceased to exist as a political subject, or, as Schmitt would say, it would cease to exist on the level of the political. Humanity would have become a mere object of super-intelligent regulation, whatever form that might take.

But even if one does not share Schmitt's skepticism towards a legally unified humanity as a matter of principle, the idea of a legally unified humanity, or even meaningful reforms in that direction, seems far removed from anything that is likely to be feasible in the near future. It may be something of a consolation that there are no reasons to believe that current dynamics will settle into a stable long-term order along any of the lines discussed above. But the dark side of that condition is the considerable danger of

[39] See Carl Schmitt, The Concept of the Political (1996).

complete collapse and catastrophe. What then does that mean for the kind of scholarly engagement that such a moment calls for (if any)?[40]

Notwithstanding Schmitt's warped moral horizon, his approach is one that encourages transcending the bleak horizons of the immediate future. His large historical sweep encourages thinking about possible futures, beyond the pressures of the day or even the immediate years to come. It is worthwhile to think about ambitious new beginnings and transformations. What direction and concrete forms might the next constitutional moments in international law take, if we imagine it to be of a comparable transformative depth and ambition as the one between 1941 and 1945?

Here then are more inspiring practical and scholarly approaches, dating from just that time: In January 1941, as Hitler rallied from one triumph to another in Europe, Roosevelt in his State of the Union address not only rallied the American people to war. He audaciously outlined the Nomos of the post–War order to be achieved: A world in which "Four Freedoms" – freedom of religion, freedom of speech, freedom from want and freedom from fear – would be achieved everywhere in the world for everyone. When he died, just before the war ended in April 1945, the UN Charter was being negotiated in San Francisco, while the Bretton Wood agreements had already been concluded and a new order was about to come into being. Think also of Hersch Lauterpacht, who wrote a pathbreaking Treaties on international Human Rights[41] in the early 1940s, as World War II was raging and it was by no means clear who would win.

This kind of audacious in many ways counterculturally forward-looking perspective is fitting also for our time. It is characterized by three features. First, a deeply critical humility about what had been previously achieved. There should be no return to the status quo ante, which is partially responsible for having brought about the current situation. The project can not plausibly be to make international law great again.

[40] Here is a repertoire of scholarly approaches that legal academics could opt for, once Realpolitik turns dark, all of which already discernable in the present: 1. The careful scholarly disciplined chronicling of events as the old order crumbles. 2. The more engaged critical commentary, allowing for the mildly contained expression of exasperation and outrage on blogs, podcasts and talks at the spectacle of events that until very recently would have seemed to be unthinkable. When fear of retribution rises and options 1 and 2 seem too dangerous 3. the scholarly flight into technical highly specialized areas, or 4. the scholarly flight into a distant historical past (e.g., time to understand the arcana of 18th century admiralty law).

[41] Hersch Lauterpacht, An International Bill of the Rights of Man (1945).

Second, a studied capacity to ignore the fire and fury of the present The parade of current events must not define the scholarly horizon. And third, notwithstanding the distance between anything that is to be achieved and the present, a firm commitment to a transformed better future, drawing on the best that has been achieved, but imaginatively transcending it. There is value in making the contours of a possible better future visible behind the furor and nihilistic nonsense of contemporary public affairs. So, what might that better new order, one that takes seriously the idea of establishing a condition of right, look like? And how might it be brought about? These are hard questions. But there are no good reasons to shirk away from engaging with them.

6. Conclusion

The idea of the Nomos of a legal order, in the concrete form that it takes in Schmitt's writing, is a productive idea that carves out a distinctive jurisprudential position, that is neither positivist nor moralistic. It takes seriously ideas and ideals but situates them in concrete historical struggles and projects. And it is the foundation for an integrative conception of law and legal scholarship. It grounds a legal perspective that takes seriously legal concepts, institutions and doctrines, while integrating on its own terms questions of power and principle. Law provides a distinctive perspective on social relations, that integrates formal legal rules, institutions and doctrines in a way that connects them to underlying basic ideas and principles (the ideal dimension) and the projects and purposes of powerful actors (the realist dimension).

An account of international law of this kind helps accentuate blind spots of descriptions of international law that are informed by either misguided idealizations or reductive cynicisms. These misguided idealizations can either take the form of emphasizing the autonomous nature of a set or a system of valid positive rules. Or they can take the form of a jurisprudentially more ambitious principled reconstruction. At the same time such an account is not one that cedes the grounds to "realists" who insist that there is or that there can be no real international law, rather than a kind of positivized morality that may at best have a useful signaling and weak coordinating function to play. Indeed, it insists that the proper study of law connects the study of law to the core ideas that animate its norms, institutions and doctrines.

Finally, such an account provides a useful conceptual framework for thinking about fundamental constitutional moments in the history of international law, as well as the evolution of international law more generally. More specifically, it questions the idea of a meaningful continuity between the *Jus Publicum Europaeum* that ended in 1918 and the legal order that emerged after 1945, while also allowing to more subtly differentiate between the Cold War and the post–Cold War legal order. And, if the analysis provided in this essay is right, it can be productively employed for thinking about contemporary struggles and the future of international law.

4.

REVISITING SCHMITTIAN ARGUMENTS IN INTERNATIONAL LAW

By Christian Neumeier*

Abstract

The paper asks whether Carl Schmitt's work has epistemic, rather than merely historical, relevance for contemporary public international law. Epistemic relevance is understood as the capacity to offer conceptually clear, truth-oriented tools for understanding current problems. The paper examines three possible bases for such relevance: the sharpness of Schmitt's diagnosis of international law as a hypocritical universalist ideology, the appeal of his normative vision of a plural *Großraum* order, and the analytical force of his core arguments. It argues that, on closer inspection, each of these bases proves less robust than is often assumed. Schmitt's critique of international law does not provide a workable account of when universal norms might be justified rather than merely instrumental. His *Großraum* model and his notion of *nomos* offer powerful images, but only limited additional conceptual tools. And his influential claims about the colonial genealogy of sovereignty and the brutalizing effects of outlawing war turn out to be normatively narrow or empirically uncertain. The paper concludes that Schmitt's international legal thought, despite its rhetorical force and historical interest, has only very limited epistemic value for contemporary international law.

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REVISITING SCHMITTIAN ARGUMENTS IN INTERNATIONAL LAW

Before addressing the question of whether Carl Schmitt remains relevant to contemporary public international law, I should first clarify, at least in broad terms, what I take scholarly relevance to mean in this context, particularly since it tends to be the exception rather than the norm. Most scholars swiftly fade into obscurity. Their work is no longer read, their names are quickly forgotten, and perhaps justifiably so. Yet the few past thinkers still considered relevant today are valued for a variety of reasons. Some occupy a prominent place in the history of the discipline and thus primarily attract the attention of intellectual historians. Others may still be stimulating, provocative, or even pleasurable to read, but offer little in the way of useful analytical resources for understanding the present. In still other cases, scholarly attention appears to follow patterns of intellectual fashion. Certain figures suddenly receive widespread attention or acclaim, and we might be left wondering why – people seem to have curious interests.

These are all instances of what we might call *descriptive* or *historical* relevance. Yet there is also a more demanding, *epistemic* sense of relevance. A scholar is relevant in this sense if their analysis bears on the questions we are asking and helps us see the world more clearly. For that to be the case, the work need not, of course, be flawless (what work ever is?), but its core ideas and central concepts must be rational, grounded in reality, and oriented toward truth. In short, it must be epistemically viable. Unquestionably, Carl Schmitt is an intriguing and unsettling figure for intellectual historians and as a matter of descriptive relevance, he certainly retains a significant international presence. The vast body of literature on his work, including this collection, bears witness to that. The more pointed question, however, is whether he remains epistemically relevant for contemporary public international law. Are there good reasons for the sustained attention he receives, beyond the fact that he continues to fascinate intellectual historians?

In principle, there are at least three possible reasons why Schmitt's body of work might be considered epistemically relevant in the field of international law today, each of which deserves independent scrutiny. His relevance could lie in the continuing acuity of his diagnoses, the appeal of his normative proposals, or the analytical value of his arguments. His work might offer valuable insights into the current state of

international law and its tensions, it might point toward promising solutions, or we might learn from his arguments even if we deploy them for entirely different normative ends. But it may also be the case that none of these reasons hold. In that case, he would no longer be epistemically relevant, and we should be willing to acknowledge that possibility as well. In what follows, I will briefly outline what I take to be Schmitt's core diagnostic (I.) and normative (II.) claims about international law. This necessarily entails a stark simplification of a complex and heterogeneous body of work. I will then have a little bit more to say about Schmitt's mode of argumentation (III.), focusing in particular on two arguments that, in my view, have exerted considerable influence in contemporary international legal thought (IV.).

I.

The first possible reason for Schmitt's continuing relevance is that he may have been particularly clear-eyed about the body of law that we call international law. While his normative intuitions may have been flawed, his diagnoses might still offer valuable insights into what our current problems are. Some may find that the fracturing of the so-called liberal international order before our eyes makes Schmitt's critique seem almost prophetic. Are we not witnessing the return of multiple regional hegemons, dividing the world into spheres of influence as he predicted? Yet, we should be cautious about hastily assuming his relevance based solely on this outward resemblance. To draw an analogy: Just because Schmitt diagnosed a crisis in parliamentary government does not necessarily mean he accurately identified its causes. The same might be true for international law.

Schmitt's main diagnostic claim is that there really is no such thing as international law and that it is a potentially catastrophic mistake to believe otherwise. At its core, international law for Schmitt is nothing more than a hypocritical legal ideology. He first articulated this idea during the interwar period and, although defeated politically, he believed himself intellectually validated after World War II.[1] What we refer to as 'international law' originally amounted to little more than a careless extension of laws governing the conduct of European Christian nations. Schmitt argues that this extension began as an innocent misstep by European lawyers

[1] *Schmitt*, Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1928–1939, 4th edn, 2013; Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum (1950), 5th edn. 2011.

and politicians at the close of the 19th century, who, in his view, had lost awareness of the spatial premises of their own thinking and overgeneralized their legal framework. Over time, this conceptual misstep evolved into an ideology, particularly during the interwar period and after World War II, serving to obscure American expansion and hegemony.

In Schmitt's view, this was not merely a contingent abuse of otherwise valid principles, but rather a necessary, almost conceptual feature of universalist claims. Facially universal norms tend to favour the existing distribution of power and are therefore disingenuous or ideological. This is one of his constant objections to liberalism, and he extends it to modern (liberal) international law. At one point he writes, and this sums up his view quite succinctly: "whoever invokes the term humanity is out to deceive you".[2] To sketch out his claim a little bit for the sake of argument: If international law prohibits the use of force but includes an exception for something called humanitarian intervention, Schmitt would be quick to point out that such a norm is bound to become an ideological tool for justifying intervention whenever it is politically expedient – while being oblivious to egregious violation of human rights when it is not. To him, cloaking such inconsistency in a self-congratulatory, moralized legal justification is not just hypocritical, it is an insult to serious legal discourse. To give a second example of this kind of Schmittian diagnosis, isn't it interesting, one might say, that the legal campaign to prohibit the use of force coincided with the increasing justification of economic sanctions?[3] Who stood to benefit from this shift? Perhaps the international actor with the most powerful economy? And was it truly moral progress to outlaw physical violence while permitting states to deprive entire populations of economic development?

These might be some of the questions that reading Schmitt could push us toward. Some scholars of international law have adopted aspects of this analysis, though usually in less sharp terms than Schmitt and more as a general caution against the ideological (ab)uses of universal norms. Most notably, Martti Koskenniemi has argued

[2] *Schmitt*, Der Begriff des Poltischen (1932), 3rd edn. 1963, 65: „ ‚Menschheit' ist ein besonders brauchbares ideologisches Instrument imperialistischer Expansionen und in ihrer ethisch-humanitären Form ein spezifisches Vehikel des ökonomischen Imperialismus. Hierfür gilt mit einer naheliegenden Modifikation, ein von Proudhon geprägtes Wort: Wer Menschheit sagt, will betrügen".
[3] For an accurate historical account, s. *Mulder*, The Economic Weapon, 2022; *Hathaway/Shapiro*, The Internationalists, 2017.

that we should take Schmitt's warning against the false pretences of universalist claims seriously.[4] So, Schmitt is certainly not alone in his diagnosis that modern international law serves particularistic interests. Many would likely agree with that assessment, even if Schmitt's reasoning is arguably more sophisticated. But does this alone provide sufficient reason to consider him epistemically relevant? While there is much to be said for being sensitive to the politics behind normative claims in international law or for being wary of ideology more broadly, I am not convinced we need Carl Schmitt to remind us of this.

More importantly, what is the basis for Schmitt's diagnosis? Do his conceptual tools offer a sharper lens through which to identify ideology in international law? Personally, I doubt it. He lacks a conceptual framework or criteria for identifying ideology, other than the sweeping claim that universal norms are inherently ideological which seems implausibly broad. While Schmitt is certainly adept at identifying the interests and ideologies behind certain legal norms, his framework for doing so is underdeveloped and his claims overbroad. He offers no space for the idea that, while universal norms can sometimes be instrumentalized, they can also serve to hold accountable those who do so. In other words, Schmitt provides no real basis for distinguishing between ideological claims and normative claims. And that, in turn, makes for a poor foundation in diagnosing our current problems.

II.

A second possible reason for Schmitt's continued relevance might lie in his normative suggestions. One might be hesitant even to raise this possibility, but a fair assessment should at consider whether any of his suggestions capture something meaningful about the current trajectory of the international order. Does Schmitt offer a normative vision of international law that resonates, however uneasily, with the shape of today's world? His core normative idea was to divide the world into distinct spheres (*Großräume*) – each defined by its own cultural values and economic systems, governed by regional hegemons, and shielded from external interference through a curtailed prohibition on the use of force.[5] Something like the Monroe Doctrine writ

[4] *Koskenniemi*, International law as political theology: how to read Nomos der Erde?, Constellations 11 (2004), 492.
[5] *Schmitt*, Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte (1941), 4th edn. 2022.

large, applied on a global scale. Schmitt first developed this idea before the war, arguably to justify Nazi control over Europe. After the war, he gave the idea a more descriptive spin, recasting it to make sense of the emerging geopolitical division between East and West during the Cold War. In the most charitable reading, one might describe this as a multipolar vision of international law.

I suspect that this view has always had adherents independent of Schmitt and may well attract new followers in today's world. But it is not clear to me why we would need Schmitt to understand this vision, its appeal, and, above all, its shortcomings and dangers. While he offers a distinctive terminology to describe it, I am not convinced that he provides meaningful criteria to assess or critique it. The only compelling reason to turn to Schmitt, it seems, would be if one accepts his deeper premise: that law must be rooted in the conjunction of cultural identity, territorial order, and economic structure – what he calls the *nomos*.

III.

A third and final possible reason to consider Schmitt relevant in the context of international law is that he developed certain kinds of arguments that may still prove illuminating. Both his scathing critique of the pathologies of international law and his normative suggestions rest on the same two core arguments. Both arguments have found surprising contemporary resonance even if they are not always explicitly traced back to Schmitt. The first is a historical argument about the emergence of international law. The second concerns the paradoxical or even perverse effects of its central normative commitment: the outlawing of war. For ease of reference, we might call the first the genealogical argument, and the second the dialectical one. While Schmitt had already developed both arguments in earlier works, they are most clearly articulated in his last major contribution to international law, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (NdE).

The book is rather convoluted. Jan-Werner Müller called it Schmitt's "most idiosyncratic work".[6] It is filled with speculative and at times spurious historical assertions, yet it is also remarkably rich in ideas and analytical perspectives. Though it presents itself as a work of legal history, it is at least as much a verdict on the

[6] *Müller*, A Dangerous Mind, 2003, 88.

emerging post-war order and an implicit act of self-exoneration. Schmitt admits as much in the preface, when he writes, "I tried to avoid all contemporary questions and at times have halted my argument".[7] This, of course, is a thinly veiled rhetorical gesture designed to signal precisely the opposite: that the book speaks directly to the present.

It is also one of Schmitt's more insidious works. In its most distilled form, the claim that runs through the book is this: The European and American lawyers who invented 'international law' should bear responsibility for the catastrophe of two world wars – not the great German jurist who had valiantly resisted their universalist delusions. Even 74 years later, it is hard not to be struck by the sheer audacity of that claim. To advance this revisionist narrative, Schmitt weaves together the genealogical and the dialectical argument in an interesting way. He offers an unorthodox history of 'international law' as the destructive successor to the Eurocentric Westphalian order, which, in his telling, had successfully tamed war. He then goes on to argue that the new internationalism brought devastation to Europe and unleashed unprecedented brutality. I will set aside the complex notion of nomos, which seeks to link economic-distributional arrangements with spatial ordering and instead focus on the two arguments. My aim is to briefly reconstruct these arguments and ask what might be problematic about them.

The genealogical argument proceeds in two steps, following the familiar narrative arc of rise and decline. Beginning in the 16th century, European jurists developed a normative order in which European states mutually recognized one another as sovereign Christian nations. Within this order, war remained a legitimate form of politics but became increasingly regulated. Its conduct was subjected to legal rules. Schmitt identifies two surprising conditions for the emergence and effectiveness of such *ius in bello* norms: (1) They became effective only because the legal question of just war had been muted. (2) At the same time, Europeans colonized the New World, drew a spatial boundary, and created a legal space in which European public law did not apply. In this extra-European zone, brutal violence could flourish under the guise of civilizing missions. According to Schmitt, the intra-European order was only possible because of this colonial expansion. In Freudian terms, one might say that Europe externalized its violence, displacing it onto the New World.

[7] NdE, 6.

In the second act of this drama, unfolding in the late nineteenth and early twentieth century, European politicians and jurists began to redefine their Eurocentric public law as 'international law'. In Schmitt's ominous telling, this marked the beginning of the end of its pacifying effect. What may have started as a conceptual misstep soon became the foundation for American expansion and, ultimately, American hegemony. The outlawing of war, Schmitt argues, was the logical culmination of the liberal rationale the United States had invoked to enter the war. For Schmitt, this prohibition not only came to define the new international legal order but had devastating consequences. Why? This is where the second argument, the dialectical one, enters. Schmitt claims that the outlawing of war had two paradoxical effects. First, it made conflicts more brutal and uncompromising. Once war was deemed illegal in principle, belligerents could no longer regard one another as lawful adversaries but only as moral outlaws or criminals. Second, it fostered asymmetrical warfare: weaker actors, denied the status of legitimate belligerents, turned to irregular or terrorist methods. In Schmitt's account, a legal regime that sought to humanize war had, in practice, intensified its cruelty.

IV.

What are we to make of these two arguments? I conclude with four observations:

(1) The first thing to note is that both arguments have found considerable resonance. Schmitt's observation that the Westphalian order and its legal categories centred on sovereign statehood emerged as a byproduct of colonization has become widely accepted in one form or another, even if it is usually not traced back to Schmitt by those who hold this view.[8] A contemporary echo of the second Schmittian argument can be found in Samuel Moyn's recent work. In *Humane*, he argues that the attempt to humanize war has not curbed it, but rather helped to normalize and perpetuate it. While Moyn's account is far more nuanced, it reflects the same dialectical intuition that Schmitt advanced: namely, that efforts to outlaw or tame war may paradoxically make it more enduring.

[8] S. only *Anghie*, Imperialism, Sovereignty, and the Making of International Law, 2005 for a whole body of scholarship.

(2) As a historical matter, the literature tracing the co-evolution of modern sovereignty and colonialism offers fascinating insights. Much could be said about whether Schmitt's own even broader agenealogy of international law is historically accurate – I believe it is not. His account of 19th-century developments is riddled with internal contradictions and marred by antisemitic tropes.[9] But that is a separate concern and should not detract from the significant body of scholarship that has explored the entanglement between colonial expansion and the rise of modern public international law.

The important thing to note here is that the normative reach of this kind of genealogical argument is limited, more limited than Schmitt (and some of his unwitting contemporary followers) would have us believe. In both cases, the genealogical argument carries considerable weight. While modern historians typically see their genealogical account of sovereignty as a reason to question or reject those categories, Schmitt draws the opposite conclusion. In his telling, international law was a good and coherent legal system, so long as it remained a spatially bounded order among European nations, grounded in shared religion and permitting war. Even if Schmitt's grand narrative were historically accurate, it would at most expose the politically and economically motivated origins of modern international law. But it would say little, if anything, about the validity of the normative claims embedded in that law. To show that a norm has emerged from power interests, ideological struggle, or even outright injustice does not suffice to demonstrate that the norm itself is normatively unjustified. Just because something came into being for the wrong reasons does not mean that it is therefore wrong. It is certainly possible to make this additional claim.[10] But that would require much more argumentative work than historical genealogies usually offer. That may seem like a trivial point, and it is, but it is precisely for that reason that we should not lose sight of it when confronted with a Schmittian argument of argument of this sort.

(3) The dialectical argument suffers from a different, though related, problem. It is, again, an intriguing claim. Its dialectical structure – an actor aims to achieve something morally good but thereby produces something morally bad – gives it a certain intellectual appeal. Yet there is little empirical support for its first thesis that

[9] *Neumeier*, Der Nomos des Kapitals, AVR 61 (2023), 223.
[10] Cf. *Bevir*, What is Genealogy?, Journal of the Philosophy of History 2 (2008), 263.

outlawing war made it more brutal. And the evidence for the second claim that it caused the rise of asymmetric forms of warfare is at best debatable. While there has certainly been a rise in asymmetric warfare, it remains unclear how exactly this development is causally linked to the transformation of the ius ad bellum. In a similar vein, it is, of course, true that wars did not end once they were outlawed. But it is difficult to argue that they have, as a structural matter, become more brutal *because* of their legal prohibition. Take the war in Ukraine. The brutality there stems not from any legal constraint but from a side that acts squarely within a Schmittian framework. If anything, war crimes and atrocities seem more closely linked to dehumanizing conceptions of the enemy than to the legal status of war itself. I fail to see a plausible mechanism by which the illegality of war leads actors to fight less fairly. We can regard an action as illegal without therefore necessarily or even typically dehumanize the actor. It was not the Allied forces who committed systematic atrocities in World War II, but the German army whose leadership largely operated under older conceptions of war as a legitimate extension of politics and never embraced the legal transformation marked by the Kellogg-Briand Pact.

Similarly, I am not convinced that Samuel Moyn ultimately demonstrates what he sets out to prove: not merely that the effort to humanize war coincided with its continuation, but that this very effort in fact caused war to persist. That is a much stronger causal claim, and one that remains unproven. It may well be true that drone warfare, by virtue of its low visibility and minimal domestic cost, can persist longer and with less public scrutiny than traditional warfare. But if that is the case, the causal link to extended periods of warfare lies in the structural invisibility and technocratic nature of drone operation, not in the legal or moral attempt to humanize war.

The dialectical argument is, we might say, sophisticated, but not particularly persuasive one upon closer inspection. If that is correct, we should be cautious not to mistake Schmittian arguments for critical insights when they may in fact amount to little more than elegant and alluring fallacies. There is, perhaps, a broader point to be made here: just because Schmitt anticipated or perceptively described certain phenomena, such as the rise of asymmetric warfare or the crisis of liberalism, does not mean that he offered a compelling explanatory framework for them. That he saw something does not entail that he understood it in a way that is analytically helpful today.

(4) A final observation brings me back to my initial question. If Schmitt's critique of international law rests on two arguments – one of which is empirically flawed, and the other does not support his conclusion regardless of whether it is right or wrong – can his work still help us assess his claim that modern international law is merely ideological? I believe the answer is no. Schmitt, as I read him, seems to have believed that universal norms necessarily serve existing power structures and are therefore disingenuous. But this is not ideology in the conventional sense. Ideology typically refers to a system of thought designed to obscure underlying realities. Most universal norms, by contrast, while they can certainly be instrumentalized, are not inherently incapable of recognizing or disclosing the conditions under which they are misused. One can acknowledge the bias or partiality of international law from within a liberal framework. More importantly, a sound account of international law's failings should also be capable of distinguishing where it is not ideological but well-founded. Schmitt's critique, for all its rhetorical force, lacks the conceptual tools to draw these distinctions between ideology, disparate impact, and instrumentalized application. These are different pathologies, and without a framework for distinguishing them from justified universalism, his diagnosis, however clear-eyed it may seem in retrospect, is of little epistemic relevance today.

5.

FORM OF STATE AND FORM OF GOVERNMENT IN CARL SCHMITT'S *CONSTITUTIONAL THEORY*

By Vlad Perju*

Abstract

In *Constitutional Theory*, Schmitt notes that "[t]he German Reich cannot be transformed into absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag." Schmitt explains why through a distinction between form of state and form of government, which becomes central to his constitutional thought. This paper starts from Schmitt's contrast between the "relative" constitution, understood as a multitude of individual constitutional laws, and the political conception of the ontologically prior constitution. The ensuing distinction between fundamental political decisions from individual constitutional norms is introduced through Schmitt's analysis of how the Weimar regime characterizes itself with "full political consciousness" as a constitutional democracy. I argue that, while Schmitt theorizes the downward connections between Rechtsstaat as a form of government and its myriad institutional forms, he fails to theorize upward connections, also through constitutional norms, between the form of government and the forms of state. I identify a subset of (peremptory) constitutional norms that incorporate command through norm – power through law, sovereignty through government –. These norms explain the Weimar sovereign's decision in favor of both democracy and constitutionalism, in which Schmitt mistakenly sees "hopeless confusion."

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FORM OF STATE AND FORM OF GOVERNMENT IN CARL SCHMITT'S *CONSTITUTIONAL THEORY*

> "The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization."
>
> Schmitt, *Political Theology*[1]

For much of the last century, since at least the end of World War I, constitutional democracy has been in the ascendancy as the only legitimate form of political organization. But developments since the turn of our millennium have started to challenge that status quo. Constitutional theory is struggling to respond to these developments, which are reopening fundamental questions in political and legal theory. So long as it remains immersed in the details of existing practices and doctrines, unable to zoom out and conceptualize democracy alongside other forms of political organization, constitutional jurisprudence will likely not rise to this profound challenge of our times.

Can Carl Schmitt's work help? It may seem odd that the authoritarian statist, Nazi doctrinaire, and denouncer of "the tyranny of values" may count as a source of insight in our times. And it is true that a turn to Schmitt says as least as much about our current predicament as it does about the lasting insights of his work. But Schmitt made the case that the domain of constitutional jurisprudence is comprehensive and must include theories of both sovereignty and government. Since state theory is among the necessary preliminaries of a theory of the constitution, the latter must include, as Schmitt's does, a conception of both of state forms and of forms of government.[2] It is to his credit that he held on to the concept of legal form – "the constitution is a form of forms, *forma formarum*"[3], Schmitt wrote – even as he looked beyond it to protect the Weimar order from what he saw as abuses of positive law. Moreover, it is Schmitt

[1] Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 46 (George Schwab trans.) (University of Chicago Press, 2005) [original publication 1922].
[2] Schmitt was critical of Kant for disregarding state form. Carl Schmitt, Constitutional Theory 255 (Jeffrey Seitzer trans.) (Duke University Press, 2008) [original publication 1928] [hereinafter CT] ("Kant's logically consistent understanding of the bourgeois Rechtsstaat renders relative all principles of political form by making them into organizational means of the balancing of powers."). For a neo-Kantian approach, see generally Hans Kelsen, General Theory of Law and State 115-122, 283-303 (Anders Wedberg trans.) (Harvard University Press, 1945).
[3] *CT* 60.

who carries out an argument about democracy's "polemical meaning"[4] and connects it to a particular form of political sovereignty. Like sovereignty, representation, and all other political concepts, democracy must be understood through its negation – through that which it is not. Democracy is not monarchy or aristocracy, the other state forms that Schmitt – "provisionally"[5] – recognize, as he works out a jurisprudential structure broad enough to encompass them all but also fine-tuned to their dissimilarities. The distinction between state form and form of government is central also to that account, which sets for itself the task of explaining how the modern bourgeois Rechtsstaat captures the jurisprudential imagination by attaching itself to both democracy and monarchy. This coupling is not risk-free and Schmitt points to the "self-contradictions" of the Weimar Constitution, its "somewhat confused synthesis"[6] of liberal Rechtsstaat constitutionalism and democratic (political) components, as evidence of constitutionalism attempting to overcome the inhibiting cast of form of government and to become, under the influence of liberalism, a theory of the state.[7] Schmitt's solution to this problem is to refocus attention on sovereignty, reinforce the concept of statehood, and bring a classification of state forms within the proper domain of constitutional theory.

Verfassunglehre [Constitutional Theory], published in 1928, five years before becoming the Reich's crown jurist[8], is his only attempt at a systematic constitutional jurisprudence. There Schmitt introduces a distinction between *Verfassung*, the political element of the constitution made of the fundamental political decisions of a particular people, and *Verfassungsgesetz*, the non-political element that incorporates individual constitutional laws. Some commentators have analogized this distinction to the more familiar one between the sprit and the letter of the constitution.[9] But that analogy misses the mark. It downplays the all-important role of state form as an

[4] Carl Schmitt, The Concept of the Political 30 (George Schwab trans.) (University of Chicago Press, 1996) [original publication 1932]
[5] *CT* 235.
[6] *CT* 83.
[7] See Martin Loughlin, Against Constitutionalism (Harvard University Press, 2022), at x ("constitutionalism is now an over-powerful theory of state-building"). Loughlin goes on to point out that "[c]onstitutionalism is a discrete concept expressing a specific philosophy of government. It should not be conflated with more general themes revolving around constitutional government or constitutional democracy", at 7.
[8] See Reinhard Mehring, Carl Schmitt: A Biography 273-403 (Daniel Steuer trans.) (Polity Press, 2014).
[9] John P. McCormick, Carl Schmitt's Critique of Liberalism 234-235 (Cambridge University Press,1997). But see Martin Loughlin, The Foundations of Public Law 210 (Oxford University Press, 2010) (identifying the distinction between the constitution of the state and the constitution of the office of government as "fundamental to the exercise of unearthing the foundations of public law.")

intrinsic criterion for identifying relationships of rank and dependency within the constitution, thus transforming the constitution from a flatland into a landscape with a rich variety of landforms. More importantly, it misses the crucial role of state form in laying out the implications of some of Schmitt's central claims (to be unpacked below): the sovereign creates the state, through the constitution, in a political act of unified will; that determined political will confers validity on the constitution and fills it with content *qua* fundamental political decisions; secondary rules of change and suspension during emergencies are inapplicable to the political element of the constitution; the Rechtsstaat is a "supplement to the political component" and should not be "confused" with the entire constitution.[10]

Verfassunglehre is typically read as a critique, to this day deeply influential with critics of liberalism, of an irreducible tension between democracy and constitutionalism. As a form of political sovereignty, democracy gives expression to a people's political unity, their unconstrained expression of collective identity.[11] Constitutionalism, at least liberal constitutionalism, as Schmitt saw it, does the opposite: it puts limits on power, thus hindering the sovereign's ability to impose its will in the world. Even when constitutionalism does not undermine the essence of the democratic project, constitutional democracy remains a walking contradiction. What makes the contradiction less impactful, in Schmitt's view, is its resolution – easy, at least in theory, not always so easy in practice –: the sovereign declares emergency, breaks the cycle of legal routine, and steps in to take back control. Ironically, however, this dyad norm-exception/routine-revolution characterizes ordinary political times, when limits on the back and forth of politics test the sovereign's patience. But during exceptional times, to invert Schmitt categories, not just the power but the authority of the sovereign itself is under threat, for reasons independent of run-of-the-mill constitutional constraints. At moments when protecting the integrity of the state form becomes paramount, often the best strategy (*contra* Schmitt) is the reinforcement of the form of government.

This coupling has stark implications for Schmitt's attempt to distinguish two constitutional dimensions: the existential dimension of state form and the normative

[10] *CT* 55 (Preface).
[11] A good discussion is in Heiner Bielefeld, Schmitt's Critique of Liberalism: Systematic Reconstruction and Countercriticism, in Law as Politics: Carl Schmitt's Critique of Liberalism 23-36 (David Dyzenhaus ed.) (Duke University Press, 1998)

dimension of the form of government. "The state does not *have* a constitution … [t]he state *is* constitution,"[12] Schmitt writes. And since everything that exists must have a form, state form is existential – as Loughlin puts it, "not [itself] the product of legal form [but] a lived condition of order."[13] Hence Schmitt's observation that the state "*is* a monarchy, aristocracy, democracy, council republic, and it does not *have* merely a monarchical or other type of constitution."[14] By contrast, the form of government is normative, the product of norms. And language reflects its nature: we say the state *has* (not, *is*) a separation of powers, or basic rights, a parliamentary, presidential, or mixed regime etc. But the wall separating the existential from the normative begins to crack when the limitations come by way of fundamental political decision of the people themselves, as they do when, with "full political consciousness," the German Reich "characteriz[es] itself as a constitutional democracy."[15] Schmitt chastises the German people for showing confusion about their political choices, although one takes note that the Germans were hardly alone in this respect. It was true when Schmitt himself admitted it, and it remains even more so today, that every other modern constitution is just like Weimar in this respect.[16] The use of language confirms this: we say that a state *is* (not, *has*) a constitutional democracy. Where all this leaves us is my question in this essay.

I start below from the familiar, normative dimension of constitutionalism. Schmitt refers to it as the "relative" constitution, which is a set of constitutional provisions to which liberal theories of the Rechtsstaat apply their idealizing prowess. I then turn to what he sees as ontologically prior to the constitution: the political component. In that context I introduce the concept of state form and contrast it to the form of government, specifically by following how Schmitt distinguishes fundamental political decisions from individual constitutional norms. I then discuss this distinction in the context of constitutional democracy. What Schmitt said about Bismarck's Reich Constitution, that it combined elemental simplicity with complicated incompleteness[17], applies as well to his own constitutional theory. While Schmitt

[12] *CT* 60 (italics in the original).
[13] Martin Loughlin, The Foundations of Public Law, at 213.
[14] *CT* 60 (italics in the original).
[15] CT 78.
[16] *CT* 162 ("the Weimar Constitution, like every modern constitution, is a mixture of liberal (Rechtsstaat-based) and democratic (political) components.").
[17] *CT* 53 (Preface).

theorizes the downward connections between Rechtsstaat as a form of government and its myriad institutional forms, he fails to theorize upward connections, also through constitutional norms, between the form of government and the forms of state. This subset of constitutional norms points to a family of constitutional theories, informed or at least compatible with liberal sensibility, that incorporate command through norm – power through law, sovereignty through government – without, as Schmitt ends up doing, blaming the sovereign for its decision in favor of both democracy and constitutionalism.

§ 1.

Scan the text of any constitution. It contains what Schmitt calls a "diversely constituted set of norms."[18] These norms have two core features. First, they are written. A strict correlation between written form and constitutional stature – if all constitutional elements are written, and, conversely, if only written norms can be constitutional – leads Schmitt to worry about separating the constitution from statutes, a distinction he deems crucial. For not only are both types of laws written but they are written by the same type of agent – whether in a constitutional assembly or a constituted legislature –, that is, political representatives elected for limited terms.[19] It is true that, unlike most statutes, constitutions entrench policies that the current parliamentary majority seeks to immunize from future change. But, according to Schmitt, it trivializes the constitution to pin the distinction between it and statutes on entrenchment alone. Thus trivialized, the constitution becomes "relative"[20], mere codification of sectarian political (self-) interest, that is, a diverse set of provisions that one parliamentary majority writes into the constitution to immunize them from future alteration.

A second feature, beyond their written nature, is that constitutional provisions appear to be of equal value. They are, as Schmitt puts it, "indistinct and equally

[18] *CT* 70.
[19] *CT* 68-71. This concern resonates with many scholars of constitutional thought. See Martin Loughlin, Against Constitutionalism 2 (criticizing what he calls "the documentary constitution", Against Constitutionalism 2); Sylvia Snowiss, From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review, Studies in American Political Development, Volume 2 (1987): 1-67, 15 (identifying a "widely held perception that the uniqueness of American fundamental law lay in its explicitness.").
[20] *CT* 67-74.

relative."[21] Both core provisions ("The Reich is a republic") and more mundane ("The Reichstag sets up its own rules of procedure", Art 26 (2) of the Weimar Constitution) exist on the same plane. All provisions that satisfy the criterion of validity, at least so long as that criterion is source-based, content-agnostic and binary, are of equal value. Add to this a constitution such as Weimar's, whose text imposes no limits on amendability, and the constitution, as mentioned, is a diversely constituted set of formally undifferentiated norms. As Schmitt puts it, constitutional laws appear as "an unsystematic majority or multitude of constitutional law provisions."[22]

But constitutional laws, so understood, cannot fulfill their function so long as they remain in a state of entropy. A variety of factors, ranging from jurisdictional matters to structural connections between constitutional and infra-constitutional laws, to the temporality of constitutional ordering and to practical political necessities, make a certain degree of organization and systematization necessary. But where to find a principle of ordering when the text itself provides none? Since liberalism "represses the political"[23], it does not look toward politics for an answer. Instead, the liberal conception of the Rechtsstaat seeks to discover normative principles immanent in the closed system of legal norms. Thus results the "ideal" bourgeois Rechtsstaat constitution. The ideal constitution is the outcome of a process of idealizing the relative constitution.[24]

Idealizing normative accounts rationalize constitutional laws as neither random nor solely the scriptural expression of legislative majorities. What before the process of idealization were diverse norms, post idealization appear as a hierarchy with "framework laws or fundamental principles"[25] at the top. These principles are organizational (the "separation (so-called division) of powers") or distributive ("basic rights", understood in a structural rather than substantive way as allocative principles of decision-making authority[26]). No longer a random multitude, the constitutional laws of the Rechtsstaat now appear to be part of a system.[27] Furthermore, by

[21] *CT* 67-68.
[22] *CT* 66.
[23] *CT* 93.
[24] Schmitt calls it "ideal constitution" (*CT* 89-93) but a more appropriate label, at least in this reading, would be "idealization."
[25] *CT* 78.
[26] For an example of this insight applied to American legal doctrine, see Laurence H, Tribe, Structural Due Process, Harvard Civil Rights-Civil Liberties Law Review vol. 10 (2): 269-321 (1975).
[27] *CT* 173-176.

recognizing fundamental principles as "necessary to a free and genuine constitution"[28], the system includes elements that may not be expressly listed in the constitution.[29]

Nevertheless, Schmitt finds limits in the Rechtsstaat idealization of the relative constitution. Systematization through interpretation within a closed system of norms establishes hollow hierarchies so long as all norms, including fundamental principles, remain subject to regular amendment procedures (Art 76 Weimar) and can be suspended during a state of exception.[30] Thus, if one shortcoming of constitutional relativization is that it puts the constitution's deepest commitments in the hands of the legislative majority that could undermine them without formal violation of the constitution[31], then idealizing the Rechtsstaat makes little practical difference in terms of immunizing those commitments. Furthermore, and at a theoretical level, Schmitt takes exception to the normative criterion itself. Grounding validity in the norms themselves legitimates a Kelsenian analysis that ends up placing the ultimate basis of validity in yet another norm, (supposedly) presupposed in the normative logic of the legal system itself. Schmitt counters that "no normative validity makes itself valid."[32] He offers an alternative grounding of legal validity: "[c]onstitutional laws are valid first on the basis of the constitution and presuppose a constitution."[33] That constitution is not a norm; its validity is thus grounded not on higher norms but on political will – specifically, on "a political will [that] itself generates its own unity."[34]

In Schmitt's conception, the political cannot be extricated from the domain of constitutional jurisprudence. Constitutional theory must theorize it, it must engage it. The implications of this view are far-reaching. It is not enough, he argues, to pay lip service to sovereignty, as Rechtsstaat idealizations do when stipulating the sovereignty of law, not men. Schmitt sees sovereignty as irreducibly connected to a decisionmaker, and to personal decision. Similarly, Rechtsstaat idealizations do not capture the

[28] *CT* 91.
[29] *CT* 171 ("Even where basic rights and separation of powers are not explicitly expressed or proclaimed in a modern Rechtsstaat constitution, they must be valid as principles of the bourgeois Rechtsstaat, and they must be part of the positive-legal content of every constitution that contains a decision for the bourgeois Rechtsstaat.").
[30] *CT* 80.
[31] Benjamin A. Schupmann, Carl Schmitt's State and Constitutional Theory, 138 (Oxford University Press, 2017).
[32] Schmitt, Legality and Legitimacy, 6.
[33] *CT* 76.
[34] *CT* 70.

totality of constitutionalism; they only structure the organization and distribution of a political power whose nature, Schmitt argues, its theories fail to conceptualize. Thus, from this perspective, the modern Rechtsstaat is a form of government, an account of the structure and exercise of political power.[35] The crucial point is that, as a constitutional theory, that account is at best partial: "[a] constitution that contains nothing other than guarantees of the bourgeois Rechtsstaat would be unthinkable."[36] The Rechtsstaat concept of law must be supplemented with a political concept, that is, with an account of the sovereign's act of concrete will that gives the state its political form of existence.[37] Such an account of political sovereignty subsumes the form of government to state form.

§ 2.

Schmitt's conception of the absolute constitution conceptualizes sovereignty as factual, actually existing power. Because it predates statehood, it can be neither structured – read, limited – by norms nor otherwise contained by state institutions. Schmitt writes:

> "A proper understanding requires that the meaning of the term "constitution" be limited to the constitution of the *state*, that is to say, the political unity of the people. In this limited meaning, "constitution" can describe the state itself, and, indeed, an individual, concrete, state as political unity or as a particular, concrete type and form of state existence. In this instance, it means the *complete condition* of political *unity* and *order*."[38]

A number of theorems follow. Acts of sovereignty are decisions that reveal the content of the sovereign's will regarding constitution-making. The determined political will of the sovereign confers validity on the constitution; its content gives the constitution its substance; its unity confers unity on the constitution itself, which in turn reflects the political unity of the sovereign. Sovereign will cannot, by definition, be encumbered by norms, although it remains an open question to what extent the

[35] Contemporary authors who find this conception by and large convincing have associated the unpolitical element of the constitution with constitutionalism *tout court*. See generally Loughlin, Against Constitutionalism, supra. Jeremy Waldron, Isaiah Berlin's Neglect of Enlightenment Constitutionalism, in Isaiah Berlin and the Enlightenment (Laurence Brockliss & Ritchie Robertson (eds.)) (Oxford University Press, 2016).
[36] *CT* 93.
[37] *CT* 187.
[38] *CT* 59 (italics in the original).

task of constituting a political order itself gives it parameters.[39] The same holds true with regard to the constitution-making power with the additional caveat that the exercise of that power does not fundamentally alter the nature of the sovereign's will. Constitutional encasement does not turn will into (mere) norms. Normativity is medium; it does not draw fundamental political decisions into a nature-altering vortex. Ergo, the constitution has an irreducible political component, made of the fundamental political decisions of the sovereign. It also has, perhaps surprisingly, an unpolitical component: the relative constitution.

To start unpacking the political element of the constitution, consider the following two claims. The first is already mentioned above, from *Verfassunglehre*: "The state does not *have* a constitution … [t]he state *is* constitution."[40] In *Der Begriff des Politischen*, Schmitt writes: "The concept of the state presupposes the concept of the political."[41] If the political is inherent in the state, and the state is the constitution, it follows, as Böckenförde argued, that "constitutional law is a genuinely political law." He explains: constitutional law "deals with politics not only indirectly and incidentally, but immediately addresses the existence, form, and action of the political unity; its object, so to speak, affects the gravitational field of the political itself."[42] The political, in this understanding, is different from "politics." Unlike the latter, which involves competition among parties or factions, the political is geared toward the unity of the sovereign – in a democracy the collective unity of a people.

The basis of that unity cannot be a diversely constituted set of norms – say, the 181 articles of the Weimar Constitution – even when an idealizing theory orders them into a system. The real grounds of unity are the actual political existence of a particular people.[43] Beyond "contradiction, disconnectedness, and lack of clarity," it is the will of

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[39] Andreas Kalyvas discusses the weight that Schmitt puts on the difference between dictatorship and sovereignty: "While Schmitt portrayed the nature of dictatorship as free from the prescribed legal norms, he understood the essence of sovereignty to reside in something entirely different, mainly, in its creative, instituting powers to set new systems of fundamental laws, to 'instaure' political orders, and to bring into being novel constitutions. Consequently, while dictatorship is *norm-breaking*, sovereignty is *norm-founding*." In Andreas Kalyvas, Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt 91 (Cambridge University Press, 2008).

[40] *CT* 60 (italics in the original).

[41] Schmitt, The Concept of the Political, 19.

[42] Ernst-Wolfgang Böckenförde, The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory, in Law as Politics: Carl Schmitt's Critique of Liberalism (David Dyzenhause ed.) (Duke University Press, 1998), 41 (footnote omitted).

[43] *CT* 65 ("the unity of the German Reich does not rest on [the] 181 articles [of the Weimar constitution] and their validity, but rather on the political existence of the German people.").

the people as something "existentially present: its power and authority lie in its being."[44] The act of will establishing a constitution is an instance of a decision – a manifestation of power, an act of sovereignty. It is also, and importantly, a conscious act. For only a conscious sense of unity – of oneness – can reach for itself and determine "a particular complete form" of political existence.[45] The demands that Schmitt's theory of the absolute constitution put on the content of that determination has implications regarding the nature of political agency. Only "this fundamental procedure, in which a people act with political consciousness" is transformative in the sense Schmitt envisions. A people "belongs together ethnically or culturally, but it is not necessarily a bonding of men existing *politically*"; by contrast, a people acting politically are "a unity capable of political action, with the consciousness of its political distinctiveness and with the will of its political existence."[46] Thus, the people transform into a nation through that very act of political self-assertion.

But how can the people, *ex nihilo*, come into political existence through a conscious act of will? Does that conscious will not depend on the satisfaction of a set of preliminaries? Perhaps it does. But I read Schmitt to hold that the factuality of actually existing power, not its preliminaries, is what matters for political theory - and even more so for constitutional theory.[47] For that facticity breaks what would otherwise become an endless cycle of self-referential justification. Power creates law; power cannot depend on the law it creates. Sovereignty thus becomes the conceptual mechanism by which thought integrates fact.

Note here a difficult challenge. The assertion of the claim to power at the foundation of a political order is implausible under conditions of social heterogeneity since the epistemic makeup of society undercuts the people's conscious self-assertion of unitary will. Schmitt's much debated claim that collective unity requires and reinforces actual (factual) substantive homogeneity must be understood in this context. That claim is central to his constitutional theory: the conception of the absolute constitution turns on an understanding of the political, which in turn presupposes substantive homogeneity. Contra Laski and other proponents of pluralist

[44] *CT* 64.
[45] *CT* 75 (specifically referring to determination as "conscious").
[46] *CT* 127 (italics in the original).
[47] See also Carl Schmitt, The Leviathan in the State Theory of Thomas Hobbes (George Schwab & Erma Hilfstein trans.) (University of Chicago Press, 2008).

theories of the state, whom he chastises for denying the connection between sovereignty and political unity, for Schmitt "the political community transcends all other associations and societies."[48] This language raises immediate red flags to contemporary readers given the barbarous reinforcement of ethnic homogeneity of the Nazi regime to which Schmitt lent his reputation and his mind. But commentators insist that a different, broader interpretation of homogeneity is not precluded by Schmitt's theories. If the point of homogeneity is to overcome factionalism, then Schmitt should not be interpreted to mean the people as "a naturally (or racially) homogeneous community."[49] Instead, as Böckenförde argued, homogeneity should be seen as a form of "solidarity (i.e., friendship)".[50] The friend-enemy distinction reinforces the unity of the political community. "All political concepts … have a polemical meaning,"[51] and since sovereignty is presumably no exception, its polemical meaning entails "the ever-present possibility of conflict."[52] Critical to the political, in this conception, is the potentiality of an enemy in opposition to which the community finds or reinforces its unity. As Peter Caldwell noted, the (necessary) enemy constitutes the friend.[53] In any event, vitality, intensity, and, perhaps, creative force are attributes of a political realm whose existence depends on struggle, conflict – "the possibility of the extreme case taking place."[54]

There are reasons to be skeptical of this sanitized interpretation of the political. Without going into much detail, if the above interpretation reads a political component of the constitution in *Verfassunglehre* through *Der Begriff des Politischen*, on account

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[48] Schmitt, The Concept of the Political, 47. While Schmitt refers to the transcendence of partnership, the grounds of unity are immanent in the political community.
[49] Ellen Kennedy, Introduction, in Carl Schmitt, The Crisis of Parliamentary Democracy, xxxii (Ellen Kennedy trans.) (MIT Press, 1985) [original publication 1926]. Kennedy refers here specifically to Schmitt's argument in the first edition of that book.
[50] Böckenförde, supra at 39
[51] Schmitt, The Concept of the Political, 30.
[52] Id. at 32.
[53] Peter Caldwell noted the irony of the (necessary) enemy constituting the friend. Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law 117 (Duke University Press, 1997).
[54] Schmitt, The Concept of the Political, 35 ("The phenomenon of the political can be understood only in the context of the ever present possibility of the friend-and-enemy grouping (…)."). Commentors emphasize the connection between the political and intensity. See Samuel Moyn, Concepts of the Political in Twentieth-Century European Thought, in The Oxford Handbook of Carl Schmitt 298 (Jens Meierhenrich and Oliver Simons, eds.) (Oxford University Press, 2016) (referring to Hans Morgenthau's analysis of the intensity of the dispute between enemies in Schmitt as "a quality, a tone" that could attach to other domains). Böckenförde similarly refers to the political in Schmitt as a degree of intensity - up to and including "extreme antagonism" between friend and enemy - as a precondition to any meaningful political action, but also as a feature that could originate from "any sphere or area of human life", in Böckenförde, supra at 37.

that Schmitt worked on both texts at around the same time, then Schmitt's Preface to the Second Edition of *Parlamentarismus* [1926] should also be taken into consideration. Published two years before *Verfassunglehre*, in response to Richard Thoma's devastating review of the First edition, Schmitt offers reflections on substantive homogeneity that, to put it mildly, do not rhyme with friendship:

> "The belief in parliamentarism, in government by discussion, belongs to the intellectual world of liberalism. It does not belong to democracy… Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second – if the need arises – elimination or eradication of heterogeneity. To illustrate this principle it is sufficient to name two different examples of modern democracy: contemporary Turkey, with its radical expulsion of the Greeks and its reckless Turkish nationalization of the economy, and the Australian commonwealth, which restricts unwanted entrants through its immigration laws, and like other dominions only takes emigrants who conform to the notion of "a right type of settler." A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity."[55]

If "vitality" or "intensity" are not necessarily inapposite to the concept of the political, nor do they capture what Schmitt saw as its essence. An abstract understanding of intensity or vitality is disconnected from politics. Schmitt was clear that the political reinforces through violence the boundaries between friends and enemies. It requires the rejection – annihilation? – of enemies. If law is needed to preserve homogeneity, the following question arises: is homogeneity, thus preserved through whatever means necessary, still an organic or natural homogeneity, or does it become artificial, somehow manufactured? That would disturb the sequence Schmitt envisions – first homogeneity, then elimination or eradication of heterogeneity – by adding a prequel: first, elimination or eradication of heterogeneity, then homogeneity, and then elimination or eradication of heterogeneity, and so on. Perhaps the question is essentially unanswerable, and there simply is no easy way of distinguishing organic from manufactured homogeneity. That might be a good way out of this difficulty, but it cannot be Schmitt's way out given his insistence that the state reflect the unity – read, substantive homogeneity – of the sovereign. After the shift from dynastic to democratic sovereignty, it is the homogeneous people who act consciously through

[55] Schmitt, The Crisis of Parliamentary Democracy, Preface to the Second Edition, at 9 (footnotes omitted).

their constitution-making power. Since the constitution is the state, it - the constitution - cannot play any role in the (unitary) nature of the sovereign. That is why Schmitt insists on the facticity of sovereignty. But the statement is pure tautology when facticity itself has to be presupposed.[56]

§ 3.

One of Schmitt's main concerns about the modern bourgeois Rechtsstaat is that it formalizes constitutional law. Dissolving the constitution into "a multitude of individual"[57] constitutional laws has the effect of relativizing the absolute constitution. But, Schmitt counters, "[t]he German Reich cannot be transformed into absolute monarchy or into a Soviet republic through a two-thirds majority decision of the Reichstag."[58] The state form of the German Reich, under the Weimar Constitution, was democracy. Irrespective of constitutional amendment rules, alterations to state form are impermissible. Such changes necessitate wholesale constitutional reform. Could England, for example, be turned into a Soviet state by a majority decision of the English Parliament? Clearly not, answers Schmitt. "Only the direct, conscious will of the entire English people, not some parliamentary majority, would be able to institute such fundamental changes."[59]

The point is that the choice of a form that a state gives to itself – democracy, monarchy, aristocracy – is different from other choices. For instance, Art 112 (3) of the Weimar Constitution mandates that "[n]o German may be submitted to a foreign government for prosecution or punishment." That provision, and many others like it, could be revised pursuant to the procedures set out in Art 76 of Weimar. Not so with provisions such as Art 1: "The German Reich is a republic. The state power is derived from the people." As Schmitt explains, state form is part of the substance of the constitution, the mechanism by which constituent power seeks self-preservation

[56] While it would not be wrong to find a comparable founding tautology in Hobbes, the difference is that liberalism has sought ways to address that weaknesses. Consider the facticity of pluralism in John Rawls's work. According to Rawls, reasonable pluralism is a fact, the "the long-run result of the powers of human reason within an enduring background of free institutions.", in John Rawls, Political Liberalism 144 (Columbia University Press, 1993). But the method of political liberalism – specifically, taking as starting point the practices of constitutional democracies, and proceeds to a rational reconstruction of the principles that underpin those practices – shows that the facticity of pluralism is an observation, not a presupposition.

[57] *CT* 67.

[58] *CT* 79.

[59] *CT* 80. Art 79 (3) of the Grundgesetz of 1949 makes unamendable Art 20 which states the form of government among the principles of the constitutional order.

through juridical form.[60] Provisions regarding state form are not mere norms; they are fundamental political decisions about the "type and form of its own being."[61] Fundamental political decisions reflect the decisions of the sovereign and thus the "fundamental prerequisite of all subsequent norms."[62] Taken together, these political decisions constitute "the entirety of the political form of existence."[63] For instance, when state officials swear an oath to the constitution, it is to the absolute constitution and its existential bond of political existence they swear allegiance to rather than to an amendment procedure or any norm within any subset of the multitude of individual constitutional laws.[64]

But how is one to know what the fundamental political decisions are? For unless that question receives an answer, Schmitt's constitutional theory risks replicating the normativist rationality of the nonpolitical elements of the constitution, *mutatis mutandis* to the political elements: the greater the need of rational (re)construction of the fundamental political decisions, the less likely it becomes that sovereignty can break the circle of self-referential normativity. It is a corollary of the fundamental political decisions thesis that these decisions must be identifiable, sufficiently precise and intelligible. And thus, in the case of the Weimar constitution, Schmitt identifies these decisions as follows: the decision for democracy (the preamble assertion that "[t]he German people provided itself this constitution" and state authority derives from the people, cf. Art 1(2)); the decision for the Republic and against monarchy ("The German Reich is a republic," Art 1(1)); the decision for a federal-state structure for the Reich (Art 2); the decision for a fundamental parliamentary-representative form of legislative authority and government; finally, the decision for a bourgeois Rechtsstaat with principles, fundamental rights, and separation of powers. Through these decisions, made with "full political consciousness", the German Reich as "characterizing itself as a constitutional democracy."[65]

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[60] As Kalyvas puts it, "the constitution can be defined by its intent to preserve and secure the founding decision of the sovereign people concerning the content and type of its political existence", Kalyvas, supra, at 131. Since "the popular sovereign can survive only when it is invested with a juridical form", Id. at 133, "the task of the democratic constitution, by contrast, is to protect the sovereign constituent power", at 136.
[61] *CT* 125.
[62] *CT* 78.
[63] *CT* 80.
[64] *CT* 81.
[65] *CT* 78. See also Kalyvas, supra at 131 (listing the fundamental political decisions of a constitution as: political and legal equality, political rights and universal suffrage, principle of identity between ruler

How does Schmitt identify these as the political elements of the Weimar Constitution? They certainly do not jump off the page. Formally speaking, immunity provisions (no-deportation-of-citizens) and structural ones (the Reich is a republic) seem to have equal weight insofar as the text does not single out some provisions over others, especially in a constitution without eternity clauses. Any ranking requires interpretation, and thus theory. Select provisions (democracy, republican government) appear on the theorist's radar because the radar sensors have been calibrated to identify them. Schmitt set his radar to identify the type and form of political unity pursuant to the theory that any constitution by definition contains decisions about form of state and government. Everything in existence must have a form, so the state too must have a form. The decision about its form – "its concrete life, and its individual existence" – is in the "soul" of the state: the constitution.[66] Because as far as statehood is concerned, no form means no constitution[67], the only question is not *if* but *where* to find the decision about the form. The text of the constitution is the obvious place. If the text fails to deliver, then the search moves elsewhere to "customary law or practice."[68]

Let us note another tension in Schmitt's theory on this point. The claim that a constitution must include a set of fundamental decisions regarding the type and form of political unity must be squared with the particular set of decisions that Schmitt identifies as part of Weimar's political decisions. Schmitt writes at times as if only decisions about state form are included (democracy, monarchy or oligarchy). These decisions are a subset of all "genuine decisions on questions of principle."[69] But what about other decisions, such as those he describes as conflicting or contradictory decisions involving Weimar's form of government? Schmitt identifies "Bourgeois guarantees of personal freedom and private property, all of an individualistic variety, socialist programmatic principles, and Catholic natural law" as decisions – not norms – resulting in a "somewhat confused synthesis."[70] It would seem that decisions can be conflicting. Some can be the result of genuine compromises or seek to hide the

and ruled, specific form in which sovereignty is represented (parliamentary, presidential etc.)). Compare to Kelsen, supra [General Theory], at 284-300 (discussing freedom, principle of majority, equality, representation as fundamental principles of democracies).

[66] *CT* 60.
[67] *CT* 82.
[68] *CT* 83.
[69] *CT* 84.
[70] *CT* 83.

impossibility of reaching such a compromise. Some are "drawn out or postponed." In the case of Weimar, Schmitt traces dilatory compromises to deeper social conflicts, such as regarding the relationship between church and state and between state and schools.[71]

Some degree of uncertainty about delineating decisions from each other and even from individual constitutional laws poses a threat to Schmitt's theory. For if the shortcoming of the liberal conception of the Rechtsstaat is its idealizing the relative constitution through a criterion immanent in the constitutional laws themselves, then Schmitt's theory would open itself up to the comparable charge of rationalizing the absolute constitution by systematizing fundamental political decisions according to a criterion derived from within the theory itself. Schmitt is aware of that serious challenge and seeks to avoid it: "the peculiarity of the dilatory formal compromises must remain evident, because otherwise the juristic interpretation of that type of constitutional provision ends in a hopeless confusion."[72] He is certainly right to worry that dilatory compromises risk collapsing the distinction between fundamental decisions and constitutional laws. But the warning falls flat. For one cannot just wish away the implications of such compromises for constitutional interpretation; one must show, if one can, how juristic interpretation can tell apart fundamental political decisions from political compromises.

§ 4.

Schmitt insists, as we have seen, on the conceptual distinction between fundamental political decisions and constitutional laws. The former originate directly from the sovereign, and their authority is not conditioned on compliance with higher norms or the satisfaction of additional standards. Fundamental decisions cannot be suspended during constitutional emergencies or altered through regular amendment procedures. Their special immunity from change implies that the sovereign's representatives cannot undo the substantive choices of the sovereign even in the absence of textual limits on constitutional change. Schmitt contrasts this theory to formal, liberal constitutionalism, which lacks the resources to immunize elements of the constitution against procedurally-nondeficient changes. He writes: "[a]

[71] *CT* 85.
[72] *CT* 87.

constitution resting on the constitution-making power of the people cannot be transformed into a constitution of the monarchical principle by way of constitutional "amendment" or "revision" [… t]hat would not be constitutional change [… i]t would instead be constitutional annihilation."[73] The point of this is to show that, unlike liberal constitutionalism, which draws its doom from tolerating the intolerable, Schmitt's theory can identify and fight attempts to annihilate the constitutional order with tools that liberal theory validates as compliant with formal constitutional procedures.

But look more closely to the above example. Schmitt's example does not involve changes to any aspect of the Rechtsstaat. It involves, rather, decisions regarding the state form. It is statehood – not, for instance, the re-electability of the Reich President (Art 43(1) of Weimar) – that cannot be changed by decisions of parliament. To be sure, changes to the state form are possible, just not within the confines of the existing constitution. "In this sphere," Schmitt writes, "there cannot be any legal succession at all."[74] A new act is necessary, which must originate only from the sovereign.[75] Changes to state form require an act of sovereignty (as we will see below, a remixing of identity and representation as formative political principles) and thus the presence of the sovereign.[76] Schmitt borrows from Sieyès the idea that the "constituent power is always in the state of nature", with the implications that the rules and norms by which ordinary – or normal – politics unfolds do not apply to the sovereign itself. This aspect of constitutional theory – the sovereign looming large, capable of yielding the power to constitute a new constitutional order or the power to intervene within an existing order pursuant through calling an exception[77] – is again presented as an advantage of his theory over liberal constitutionalism. The latter, at least in Schmitt's view, focuses exclusively on constitutional laws, thus on the non-political elements of the

[73] *CT* 151.
[74] *CT* 151.
[75] *CT* 153 ("Democratic principles require a special act of the people's constitution-making power for the monarch to be reintroduced under the Weimar Constitution.").
[76] Note that what changes here is not the sovereign as such, which remains the people. Schmitt writes: The people, the nation, remain the origin of all political action, the source of all power, which expresses itself in continually new forms, producing from itself these ever renewing forms and organizations. It does so, however, without ever subordinating itself, its political existence, to a conclusive formation." For analysis, see Kalyvas, supra at 143 ("a change from monarchy to parliamentarism or from parliamentarism to socialism can be decided and undertaken only by the people in its higher capacity as the sovereign power during extraordinary politics.").
[77] Sovereign is he who can make the exception, as Schmitt famously writes in Political Theology, supra at 5. By implication, the sovereign makes decisions about the exception.

constitution that aim to limit power. His own theory avoids that mistake by conceptualizing sovereignty at the very foundations of the political order.

The always-present flexibility and the ability for unconstrained action to the satisfaction of the people's political self-expression explain to some extent Schmitt's appeal to critics of liberalism over the past century. As Peter Caldwell captures this idea, "the immanent will of the people ha[s] a transcendent character; it could never be encompassed or regulated by the written constitution."[78] Now, it is true that during his years as a crown jurist of the Third Reich and his direct involvement with National Socialism, Schmitt invoked those theories with malign intent. For example, the Enabling Act (1933) and the Reich Governors Law (1935) could be defended under his theory on political, constitutional grounds, irrespective of their questionable legality under the Rechtsstaat rules. Add to this also Schmitt's theory of "absolute species identity [Artgleichheit]"[79] between the leader (and, more generally, the office of the executive) and the people, as the basis of the total Führer state. On these grounds rose his critique of "government by discussion" and parliamentarism, the separation of powers, and "the irresolvable conflict between the military Führer state and the bourgeois Rechtsstaat"[80] – with preference for the former, as embodiment of the nation.

But, to return to a theme common to Schmitt's contemporary readers, suppose that it was possible to decouple the theory from Schmitt's own political choices. At a general level, one implication of separating the political and nonpolitical elements of the constitution is that a measure's failure to comply with the latter is not fatal if the said measure is in compliance with the political aspects of the constitution. Conversely, the argument that compliance with the Rechtsstaat rules guarantees validity on condition of further compliance with the political elements can also be established. For critics who see liberalism as inhibiting deep, meaningful reform and thus stifling the free self-expression of the sovereign people, Schmitt's ideas could be relied upon to show how a commitment to deep democracy can empower the people to act in compliance with the political elements of the constitution, if not with the formal limitations of the "rule of law."

[78] Caldwell, supra at 100.
[79] Mehring, supra at 312-314.
[80] Id. at 314.

Yet, those who find this line of analysis enticing would do well to realize that separating political and nonpolitical elements of the constitution produces its own ossification effects. Freeing the sovereign people from norms that bind their freedom might indeed unleash a certain degree of creativity to make and remake their political world. What cannot be made or unmade is the agent itself – the people. Put differently, a political community can create and recreate its form of statehood through a conscious act of political will.[81] Yet any such move takes place outside of the existing legal framework within which a political community operates. Because, as Schmitt argues, there is no succession at the level of constituent power, each manifestation of constituent power reflects a willingness to remake the world whole, anew. There is no continuity (except ontological). Since the constitution is the state and the state gives form to political unity, any kind of change in the identity of the sovereign requires a break. Therefore, while the sovereign can experiment about any aspect of its political existence, it cannot experiment with respect to the most important matter: its own being. There is a high price to pay for removing the nation itself from iterative acts of reconstitution. For if history teaches anything, it is that a nation does not stand in relation to its political projects as premises stand in relation to conclusions. The makeup of the nation, and of a people, is very much part of its political project. It would deprive a political community of core opportunities, in addition to undermining the "principle of growth"[82] of its law, were questions of membership excluded from political experimentation.

§ 5.

Recall the fundamental political decisions of the German people, according to Schmitt's reading of the Weimar constitution: decision for democracy, for the Republic and against monarchy, for a fundamental parliamentary-representative form of legislative authority and government; and "clearly and unambiguously,"[83] the decision for the political form and principles of the bourgeois Rechtsstaat with principles,

[81] *CT* 75 ("new forms can be introduced without the state ceasing to exist, more specifically, within the political unity of the people ending.").
[82] Benjamin Cardozo, The Growth of Law 21 (1924) ("The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth."). Insofar as the exclusion of political itself from experimentation is tied to a nineteenth century conception of national identity, that itself might be "inherently anti-democratic", as argued in Richard Tuck, Active and Passive Citizens 66 (Princeton University Press, 2024) (also presenting a conception of democracy that gives suffrage to habitants, resident aliens, at 64-66).
[83] *CT* 78.

fundamental rights, and separation of powers. Through these acts of will, as reflected in the constitution, the pouvoir constituant reaches a fundamental decision: "the German Reich is a constitutional democracy."[84]

As a fundamental political decision, the choice for Rechtsstaat is part of the substantive content of the constitution and, therefore, presumably part of the political component of the constitution.[85] It is, in that sense, just like the decision for democracy itself. At the same time, however, Schmitt characterizes the principles and component elements of the modern Rechtsstaat as constitutional laws, and thus part of the nonpolitical elements of the constitution. These laws aim to structure and limit the sphere of the political. Assuming for now that Schmitt was right about the Rechtsstaat as a limitation on a political power whose existence it takes for granted, one apparent difficulty arises from the fact that, by including the choice for constitutional democracy among fundamental political decisions, the sovereign can be seen as having made the fundamental political decision to limit itself.

Schmitt's solution to this tension is multifaceted. In part, it relies on something akin to a principle of ordering among political decisions. The choice of statehood gives form to political unity, whose factual existence is at the genesis of the political order. Statehood is conceptually prior to the form of government, which involves modalities of the exercise of political power. But since the form of government – Rechtsstaat – is conceptualized abstractly, its specification allows for a variety of institutional forms. For instance, a regime might set up the separation of powers differently, depending on whether it is presidential or parliamentary or mixed, all of which count as permissible downward normative specifications of the Rechtsstaat. While the choice itself for the Rechtsstaat is a fundamental decision, the specification of that decision through constitutional norms will eventually reach a level of detail in individual constitutional laws that are part of the non-political dimension of the constitution. But for in-between points, where fundamental constitutional principles or framework laws are located, the question is if they are more like political decisions and subject to the special regime or more like individual norms. Schmitt suggests the former, but without

[84] *CT* 88.
[85] See Caldwell, supra at 108 ("The basic organization of the Republic – president, cabinet, and Reichstag – cound not be infringed on or suspended through use of the Article 48.").

a sufficiently robust theoretical explanation since the bulk is his concerns lies elsewhere.

Liberal theorists of the Rechtsstaat "confuse" the unpolitical component of the constitution with the entire constitution.[86] Implied in his freedom-constitutes-nothing line of argument is that the Rechtsstaat's form of government that must be supplemented and conceptually subsumed to the form of statehood. Different permutations are possible between the two types of forms. Since all political power can be limited, a form of government can in principle attach itself to any state form.[87] But attachment is not tension-free. Schmitt seems particularly worried that the qualifier "constitutional", as in constitutional monarchy or constitutional democracy, might end up undercutting the animating principle of the form of statehood. As he writes with reference to monarchy, constitutionalism can have the effect of turning the form of statehood into a form of government: "the turn of phrase constitutional monarchy leaves open the decisive question as to whether the monarchy ceases to be state form and becomes mere governmental form or whether the monarchical principle remains intact."[88]

If the worry is governmental creep on statehood, so to speak, then presumably the solution is to prop up the integrity of the state form. And that, in turn, requires a reinforcement of the separation – and ordering, as I have called it – of the relation between statehood and government.[89] Schmitt is adamant that such a reinforcement cannot take place within the framework of liberalism. Bereft of a self-standing conception sovereignty – Schmitt fondly quotes Kelsen stating that "the concept of sovereignty must be radically repressed"[90] - liberalism inevitably treats statehood alongside government.

Without litigating now Schmitt's views about the ideological biases and conceptual blind spots of liberalism, it is not evident that these would be the main obstacles in reinforcing the line between forms of statehood and forms of government.

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[86] *CT* (Preface), 55.
[87] *CT* 236 ("the modern Rechtsstaat constitution can appear in the form of a monarchy as well as a democracy.")
[88] *CT* 314
[89] See generally Richard Tuck, The Sleeping Sovereign: The Invention of Modern Democracy (Cambridge University Press, 2016); Martin Loughlin, supra [Against Constitutionalism].
[90] Schmitt, Political Theology 21 (quoting Hans Kelsen, Das Problem der Souveränität, 320).

The political reality of mixed forms exacerbates the tensions between form of statehood and form of government. Consider the following. Constitutional monarchy is an "intermediary position between the monarchic and the democratic principles." The same is presumably true of all state forms to which the qualifier "constitutional" attaches. This first type of mixture is political and non-political elements of the constitution. Another type is mixture within the political elements of the constitution. Here, different state forms "bond with one another and are mixed together."[91] While Schmitt traces this mix to different principles of political form from Aristotle to the French Revolution[92], ideal types of state forms mix in political practice through a combination of the two principles of political form: identity and representation.[93]

Abstractly stated, identity implies a "genuinely present entity in its unmediated self-identity"[94], whereas representation entails an awareness that, since actual presence is impossible, the people must be represented "by men personally."[95] Importantly, no state form can do entirely without either principle "in the reality of political life."[96] While the precise mix depends on the particular state form, both identity and representation are present in the concrete political formation of a people.[97] The important point for now is that since no mix is ever perfectly stable, an overly impactful Rechtsstaat can unsettle its equilibrium. Most commonly, Schmitt believes, the substantive qualities of the Rechtsstaat have the effect of enhancing representation at the expense of identity. This process explains the metamorphosis of parliamentarism from a form of government to something akin to a state form.[98] Now, Schmitt's aim is to re-establish the primacy of identity over representation. Identity

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[91] *CT* 237.
[92] *CT* 237-238.
[93] *CT* 239 ("All distinctions of genuine state forms […] may be traced back to this decisive opposition of identity and representation."). See also *CT* 248 ("All divisions of state forms derive from this difference between both principles of form. The traditional division of monarchy, aristocracy, and democracy contains a genuine core and involves something essential because it is traceable to the fact that among these three state forms one of each principle of form is predominant in a different manner.").
[94] *CT* 239.
[95] *CT* 239.
[96] *CT* 239.
[97] *CT* 241 ("no state without representation because there is no state without state form, and the presentation of the political unity is an intrinsic part of the form."). But see Richard Tuck, supra [Active and Passive Citizens] (presenting Rousseau's argument that representation is in tension with democracy.).
[98] This might be a source of insight, for instance if parliamentarism is novel for of aristocracy. See Mehring, supra at 192. Schmitt acknowledges that parliamentarism "contains a distinctive relativity, linkage, and mixture of opposing political principles and structural elements that correspond to the special interests of the bourgeois Rechtsstaat", in *CT* 250.

explains the personal element remaining in existence even under the most extreme version of representation. Hence the ascendancy of the Reich President above the Reichstag, in what Ulrich Preuss calls a move "mobilizing the 'substance of the constitution' against its functional elements."[99] Finally, identity also explains the special status of fundamental political decisions within a constitution, as well as the difference of nature and effect between these decisions and individual constitutional laws.

Schmitt's conception of identity has been influential in contemporary legal thought and practice. Judge-made unamendability doctrines often invoke identity to justify hard limits on constitutional change. For example, the Indian Supreme Court justified the basic structure doctrine on the ground that the amendment power does "not include the power to abrogate or change the identity of the constitution or its basic features."[100] The aim is to immunize the identity of the constitution as if to protect the underlying integrity of a community's act of political self-creation. The difficulty, however, and the reason why a mismatch remains between the principle of identity and the political elements of the constitution, is that identitarian frameworks are over-inclusive. They identify as unchanging a constitutional nucleus broader than what Schmitt delineates as the political elements of the constitution. Removing identity-altering norms from usual processes of constitutional change interferes with legitimate processes of democratic self-government through constitutional change. The de-establishment of an official religion, limitations to the president's powers to dissolve the legislature in a mixed regime, changes to the constitution's official language or the inclusion of justiciable protections for economic and social rights – all these are changes that alter a constitution's identity. But, to the extent they are not fundamental political decisions, democratic communities should not be prevented from making such changes, through their duly elected representatives, as part of their processes of self-rule.

[99] Ulrich K. Preuss, The Critique of German Liberalism, Telos 71, 99 (1987), cited in McCormick, supra at 236. McCormick goes on with a helpful discussion of parliament versus the president, Id. at 237-244.
[100] Kesavananda Bharati v. State of Kerala (1973), cited in Roznai, Unconstitutional Constitutional Amendments 43 (Oxford University Press, 2019).

The point is that reliance on identity does not stabilize the state form. In fact, it is not much different from the convoluted – read, "monstrous and confused"[101] – liberalism's solution to the problem of representation. Schmitt pours great scorn on the latter: "parliament as a secondary political organ represents another, primary organ (the people) but this primacy organ has no will apart from the secondary organ, unless it is by special provisio"; the two juridical persons are but one, constitute two organs but only one person, and so on."[102] Point well taken. But now compare the fictions going adrift in Schmitt's answer to the preservation of the principle of identity in a constitutional democracy: the principle of identity demands protecting the sovereign's fundamental political decisions that are part of the constitution but different in nature from other constitutional provisions, despite being indistinguishable from them, because a nation gives its political existence form and type through political decisions of unlimited power except the power to impose limits on itself despite undeniable evidence of that intent from the content of its decisions.

§ 6.

It is one thing to claim that state form is important to the incorporation of sovereignty –and "the political" – into constitutional theory; it is another to see that incorporation as tracking exclusively the element of state form. But could such incorporation not take place through an expanded conception of the form of government? More provocatively, is incorporation conceivable (or can it be successful) outside the form of government?

Schmitt frames the issue of incorporation as a corrective to liberal constitutionalism. Refinement, not corrective, is another way to think about it. It was, after all, Schmitt's astute observation that "certain substantive qualities"[103] are implicit in the Rechtsstaat. He further surmised – less astutely, at least to liberals – that the incorporation of such qualities into the liberalism makes not just possible but necessary a distinction between "*legal norm* and *command* based on mere will or a *measure*."[104] Is that so? Does liberal normativity crumble when forced to incorporate

[101] Carl Schmitt, Roman Catholism and Political Form 26 (G.L. Ulmen trans.) (Greenwood Press, 1996) [original publication 1923].
[102] Id.
[103] *CT* 190.
[104] *CT* 181.

the existence of substantive qualities? That would the case if liberalism were only form and no substance. Most liberal theory, including post-metaphysical inclination, rejects this kind of content agnosticism.[105] It is, however, a legitimate question whether, as much as liberalism might wish to incorporate an account of substance within its formal framework, the philosophical presuppositions implicit in such an admission are compatible with liberalism's first principles. I believe they are, but that is not a question I can pursue here. What I can do, briefly, is to sketch out a direction of theoretical development, informed or at least compatible with liberal sensibility, that incorporates command through norm – power through law, sovereignty through government – without, as Schmitt does, blaming the sovereign for its supposed state of constitutional confusion.

At the core of this development is a conception of constitutional norms, which stand apart from the rest of legal norms, including from other norms of constitutional rank, by virtue of their capacity to connect the form of government upwards with the form of state. One way to get to this conception is through the Rechtsstaat idealization of the relative constitution. The result of that process is the recognition of certain fundamental principles and framework laws, as Schmitt calls them, both structural and substantive (rights), as necessary element[s] of the Rechtsstaat. As we have seen, idealization establishes a hierarchy among constitutional norms and, importantly, shows how some fundamental norms are implicit in the constitution. As Schmitt writes in an important passage, "[e]ven where basic rights and separation of powers are not explicitly expressed or proclaimed in a modern Rechtsstaat constitution, they must be valid as principles of the bourgeois Rechtsstaat, and they must be part of the positive-legal content of every constitution that contains a decision for the bourgeois Rechtsstaat."[106] Thus, at a conceptual level, certain norms are implicit in the concept of the Rechtsstaat and part of its constitutional order regardless whether the text of the constitution makes explicit mention of them.

Schmit is critical of this kind of idealization, for the reasons discussed. But because his interest lies elsewhere, in the recovery of sovereignty as a constitutional concept, he ignores that the idealization is not juridically haphazard. Its roots in

[105] See Frank I. Michelman, Constitutional Essentials: On the Constitutional Theory of Political Liberalism (Oxford University Press, 2022) ("[a] liberal society will always have in view, for its substantive constitutional matter, a regulatory aim."at 4).
[106] *CT* 171.

modern constitutional history run deep. When Madison and Hamilton identified the "fundamentals of the [American] Constitution" with the principles of "republican government"[107], they were continuing a tradition going back at least to Montesquieu of thinking about constitutional principles as norms "deriv[ed] directly from the nature of the government."[108] Nature of government, in this context, means the form of statehood that Schmitt operates with in *Verfassunglehre*. Similarly, Hamilton identifies some norms "resulting"[109] from the form of government – in an interpretation that, again, neither distinguishes nor ignores state form. Emer de Vattel wrote about fundamental norms that constitute the (equivalent of the) form of statehood as a matter of the law of nations.[110] The central idea among all these authors is that a set of norms derive from and instantiate the sovereign's fundamental choice of a particular *forma civitatis*. Think of them as peremptory constitutional norms, in the sense of norms constitutive of the form of government, to be distinguished from voluntary norms that are jurisdiction-specific (such as, for instance, the provisions regarding the Evangelic Lutheran Church in the Finnish Constitution or the Second Amendment to the US Constitution). [111]

These are, to be sure, norms. As norms, they do not dislocate the political, in Schmitt's understanding. But strident as it might be to hold, with Schmitt, that "there is no hierarchy of norms but rather only a hierarchy of men and instances"[112], recall that even he admits that, insofar as the constitution of the form of government is concerned, constitutional norms exist and their hierarchical ordering is possible. The

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[107] Alexander Hamilton, Papers III, 549, cited in Gerald Stourzh, Alexander Hamilton and the Idea of Republican Government 58 (Stanford University Press, 1970). See also The Federalist no. 52, at 299 (James Madison or Alexander Hamilton), in James Madison, Writings 299, 299 (Jack N. Rakove ed., Library of America 1999) (1788) ("[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government").

[108] Montesquieu, The Spirit of the Laws 10 (Anne M. Cohler et al. trans. & eds., Cambridge University Press 1989) [original publication 1748]. For a study of the implications of this doctrine in contemporary constitutional law, see Antonio Reposo, La Forma Repubblicana Secondo L'Art. 139 della Constitutione (Padova, 1972).

[109] Alexander Hamilton, Opinion on the Constitutionality of a National Bank (identifying "resulting" as the result of "the whole mass of the powers of the government & from the nature of political society"), reprinted in Alexander Hamilton: Writings 613, 615–16 (Library of America ed. 2001).

[110] Emer de Vattel, The Law of Nations 92 (Béla Kapossy & Richard Whitmore eds.) (Liberty Fund, 2008) [original publication 1758] ("The laws made directly with a view to the public welfare are political laws; and in this class, those that concern the body itself and the being of the society, the form of government, the manner in which the public authority is to be exerted—those, in a word, which together form the constitution of the state, are the fundamental laws. . .").

[111] Vlad Perju, Elements of a Doctrine of Transnational Constitutional Norms, 22 International Journal of Constitutional Law 292 (2004). See also Vlad Perju, The Second Coming of Political Liberalism, 137 Harvard Law Review 1905, 1933-1939 (2024).

[112] Schmitt, Legality and Legitimacy, supra.

question then becomes the connection between (peremptory) constitutional norms and what Schmitt calls fundamental political decisions. In terms of content, at least as far as a constitutional democracy is concerned, both categories include universal suffrage, equality guarantees, a principle of identity (alignment) alongside representation, basic rights, principles of the distribution of power. In terms of change, neither category is subject to regular rules of amendment. They are both are immune from change by the people's elected representatives though not by the pouvoir constitutant. Just as the German Reich or the UK cannot become a Soviet republic, so an established constitutional democracy cannot see its form undermined by changes to its peremptory norms though action of the people's political representatives. The resulting insight, that constitutional norms of government actualize underlying conceptions of statehood, is not new. Writing over four centuries ago, in 1610, against taxation without sanction in parliament, James Whitelocke captured this insight when reportedly challenging the law as "against the natural frame and constitution of the policy of this Kingdom, which is Jus publicum regni, and so subverteth the fundamental law of the realm, and induceth a new form of state and government."[113]

Whitelocke might not have the benefit of four centuries of constitutional thought but his reference to form of state and government reveals crucial insight. Changes to select laws or norms are so defining of the nature of the constitutional order that they affect not only state or government – but both state and government. Later constitutional thinkers, including Schmitt, share to some extent this insight when, for instance, writing about the dual nature of democracy – for Schmitt, both state form and republic, or "method for the exercise of certain activities [,] a form of government or legislative for."[114] State form as criterion for identifying peremptory norms amounts to an ordering criterion that checks many boxes: it explains how government and statehood are connected through constitutional norms; why peremptory constitutional norms neither deny nor hide, but protect, the choice of state form and the acts of sovereignty; how constitutionalism is not exogenous to democracy as a state form but part of the choice for democracy itself; how sovereignty is embedded in the form of government. It validates Schmitt's interpretation of Weimar

[113] Cited in Charles McIlwain, Constitutionalism: Ancient and Modern 14 (Liberty Fund, 2007) [original publication 1940].
[114] *CT* 255. See also John Dunn, Democracy (2005) (discussing the complex interplay between democracy as a political value and democracy as a form of government, and noting that "[n]o one, after the last century, can sanely doubt that forms of government matter greatly," at 162).

as a fundamental political decision for constitutional democracy, not just democracy, though without his misplaced scorn for the sovereign's supposed confusion. Not only are limitations of sovereignty not arbitrary when they are the sovereign's choice – that point is by now trite – but, *contra* Schmitt, the denial of limitations violates sovereignty if it denies the sovereign's power to impose limits on itself.

Our predicament, however, is that constitutional theory once again remains far behind constitutional practice. An argument about norms connecting sovereignty and government must rest on classifications of governments far more nuanced than what is currently on offer. Schmitt's recognizes this gap both when making his tripartite classification provisional and when attempting, with questionable success, to introduce alternative classifications.[115] Kelsen too noted this lack, although he believed his conception was immune to difficulties stemming from it. He wrote that democracy and autocracy, "are not actually descriptive of historically given constitutions, but rather represent ideal types. In political reality, [… e] very State represents a mixture of elements of both types, so that some communities are closer to the one, some closer to the other pole. Between the two extremes, there is a multitude of intermediate stages, most of which have no specific designation."[116] Almost a century later, such intermediate stages still lack specific designations. This is an important gap that constitutional theory must fill, including through a critical engagement with Schmitt's work.

[115] Such as, for instance, the distinction between sovereign dictatorship and commisarial dictatorship. See Carl Schmitt, Dictatorship (Michael Hoelzl & Graham Ward trans.) (Polity Press, 2013) [original publication 1921].
[116] Kelsen, supra [General Theory of Law and State], at 284.

6.

CARL SCHMITT AS A METHOD? WHETHER SCHMITT IS STILL RELEVANT METHODOLOGICALLY

By Dominik Rennert*

Abstract

Carl Schmitt's Weimar works are foremost exercises in methodological innovation. In their move away from purely doctrinal scholarship, they consciously reacted to the political crises that plagued the first German republic. Our current political shifts at least share a resemblance with these crises of the 1920s. This raises the question whether Schmitt might again be methodologically relevant. I argue that he could be, but is not. In some ways, a method similar to Schmitt's could help us. In "Guardian of the Constitution" (1931) especially, Schmitt brings together constitutional law with an acute analysis of the Weimar Republic's social and political structure that offers a first puzzle piece of today's research on varieties of democracy and capitalism. Today again, taking in the social and political structure with which public law interacts can help us gauge whether public law institutions conceived at the height of the 20th century are still performing their function under today's dramatically changed circumstances. But even in his most practical Weimar text, Schmitt's constant need to infuse supposedly descriptive observations with cloaked irrational normative assumptions remains present. This tendency creates methodological openings for hidden intentions to creep in that especially in politically fluid situations, when established consensus breaks down, can cause a lot of damage. Such an approach would currently, where we need good analysis, not only be unhelpful; it would make matters worse.

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CARL SCHMITT AS A METHOD? WHETHER SCHMITT IS STILL RELEVANT METHODOLOGICALLY

I. Introduction

Is Carl Schmitt still methodologically relevant today? There are reasons to believe that he could be. His most famous Weimar writings of the 1920s and early 1930s were foremost exercises in methodological innovation. They repeatedly broke the mold of conventional doctrinal public law scholarship. These methodological innovations were precise reactions to the democratic crises that plagued the first German republic. As such, they did not happen in a vacuum. With the breakdown of the German Empire in World War I and the establishment of the Weimar Republic, we notice a broader shift in public law away from the "formalist" doctrinal method of the Empire to a broader "material" method that worked in an increasingly interdisciplinary fashion. This Weimar shift seems to be a prominent example of the larger phenomenon that the methodological lens widens in times of political crisis when an established consensus that allowed a more doctrinal approach becomes fluid again. Schmitt's Weimar texts are very openly such a response to crisis. Already his *Political Theology* of 1922 makes that abundantly clear, not just in its famous opening sentence. At one point in the text, Schmitt states directly that political upheavals naturally must lead to a reaction against the "formalistic" method in public law.[1]

Today again it is, I think, fair to say that we appear to be experiencing a fundamental political shift in our political systems after decades of relative stability. We at least share a sense of crisis with the 1920s. This raises the question whether Schmitt's methodological innovations can still be relevant today for public law scholarship.

My short answer is going to be "no". My slightly longer answer is: They could be, but they're not. I want to explain this answer by taking two methodological probes: the first from *Political Theology* (II.), the second from *Guardian of the Constitution* of 1931 (III.).

[1] CARL SCHMITT, POLITICAL THEOLOGY 16 (G. Schwab trans., 1988 [1922]) [hereinafter SCHMITT, POLITICAL THEOLOGY] ("When theories and concepts of public law change under the impact of political events, the discussion is influenced for a time by the practical perspectives of the day. Traditional notions are modified to serve an immediate purpose. New realities can bring about a new sociological interest and a reaction against the 'formalistic' method of treating problems of public law.").

II. The Bad Example: *Political Theology* (1922)

1. Argument

Political Theology as an argument is the attempt to counter a set of democratic and social democratic authors––Hans Kelsen, Hugo Preuß, Hugo Krabbe, and Kurt Wolzendorff––who each rejected authoritarian concepts of legal sovereignty and top-down late-absolutist notions of state organization to accommodate new political realities and different political outlooks: [2] Kelsen in Austria reacted to the end of the Austro-Hungarian Empire and the first Austrian Republic; Krabbe in the Netherlands argued for early concepts of supranational integration through law; Preuß, a strong critic of the German Empire, had been a main contributor to the Weimar Constitution; while Wolzendorff had built on Socialist notions of a council republic, which briefly during the 1918 revolution had become an alternative to Weimar's parliamentary system, to develop a model of strong societal and economic self-administration.

Schmitt's counterargument to all of them is actually quite simple: He claims that the legal form *itself* requires a central, authoritarian institutional setup with an individual at the top who authoritatively "creates" the legal order through their decisions.[3] Sovereignty is, in his words, necessarily "decisionistic and personalistic".[4] In a fashion, the most important word in Schmitt's "Sovereign is he who decides on the exception"[5] is the "he": the individual that sits at the top of the institutional top–down structure.

2. Method

This argument––deriving substantive institutional arrangements from the legal form––is essentially (bad) metaphysics. Schmitt is aware of this.[6] *Political Theology* as a method is the attempt to explain that while metaphysics was discredited in the natural sciences, it is the only proper way to think *legally*. To get there, Schmitt employs what he calls a "sociology of juristic concepts".[7] Its point is to link legal concepts––in his

[2] Cf. SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 18–30. I am leaving to one side Schmitt's argument in Chapter 1, *see* Anna-Bettina Kaiser, *The Many States of Exception in the Work of Carl Schmitt*, in this collection.
[3] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 30.
[4] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 48, also at 33.
[5] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 5.
[6] Very consciously SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 39–40.
[7] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 37.

case, sovereignty––to their wider context, and more precisely, to the social and political structure in which those concepts arose.[8]

In reality, however, this "sociology of juristic concepts" amounts to very little. When stripped of much of the sidetracks in the text, the method essentially boils down to two steps:

First, Schmitt recalls that the inventors of the concept of sovereignty, Bodin and Hobbes, thought that only a sovereign individual could create and stabilize a legal order (he also cites approvingly the assumption of their 17th century that, just as supposedly only an individual architect can properly construct a house or a city, the best constitutions are designed by a single *législateur*).[9] In doing so, Bodin's and Hobbes' concept of sovereignty essentially captures and legitimizes the social and political structure of the absolutist monarchies of their 17th century, that is, the monarch who subdues the warring estates––especially in France, but also in Brandenburg-Prussia.[10] To drive the point home, Schmitt famously claims that this Hobbesian personalistic image mirrors the metaphysics of the age, that is, the image of a theist interventionist god; and that this metaphysics is the "most intensive and clearest expression" of an epoch and its social and political structure.[11]

Where things get interesting is Schmitt's second step. He claims that only the 17th century was ever capable of producing truly *legal* thinkers.[12] Later epochs, by contrast, and especially the 19th century, increasingly came under the pernicious influence of the "natural sciences", which pushed "legal" thinking to the side.[13] What he means effectively is that all attempts to conceive sovereignty collectively––which eventually lead to democratic notions of legitimacy[14]––are fundamentally aberrations from "legal" thought, that is, the thought of Bodin and Hobbes.

This odd claim creates odd juxtapositions. Kelsen, by arguing that democracy is the proper institutional response to 20th century political and ideological heterogeneity, not only becomes a (non-legal) ideologue in Schmitt's eyes; by supposedly employing "natural sciences"––that is, Kantian epistemics––, he becomes, according to Schmitt,

[8] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 45–46.
[9] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 46–48, also at 33–35.
[10] *Cf.* SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 48–49.
[11] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 46.
[12] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 47–48 and already at 33–35.
[13] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 48–52.
[14] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 51.

himself a (bad) metaphysician.[15] On the other hand, the absolutist political structure of the 17th century becomes representative of the structure of *any* legal system and thus the only viable alternative, too, for highly complex modern industrial societies––of course, no longer as absolutist monarchies, but instead in its modern incarnation, the dictatorship as conceived by Southern European 19th century Catholic anti-republican counterrevolutionaries.[16]

3. Evaluation

When we strip Schmitt's argument of its many frills, very little remains. To my mind, it seems pointless to enquire what Schmitt means by the claim that only the 17th century was "truly legal", or that the 19th century was overwhelmed by "natural sciences". These terms appear to be mainly empty, while at the same doing a lot of heavy lifting. The argument is less held together by meaningful concepts than by a form of vibrant (and rather masculine) writing that has a certain aesthetic appeal. Quite fittingly perhaps, form is employed to compensate for substance.

By the same token, very little remains of Schmitt's supposed methodology in *Political Theology*. One of its methodological problems is that the promised "sociology of juristic concepts" is never actually attempted: One would think that when situating concepts, one would have to analyze what sovereignty can mean under Weimar's social and political structure. Instead, Schmitt decontextualizes the structure of the 17th century and turns it into the *necessary* structure of law––quite the opposite of context-analysis. What seems to animate this claim is the odd "idealist" belief that by describing the context in which a concept first arose, one can pin down its content in perpetuity. Concepts, of course, do not work this way.

This is all the more damaging because, thinking of the political situation of the Weimar Republic and of continental Europe in 1922, *Political Theology* is obviously not an innocent text. The military dictatorship under Ludendorff and Hindenburg is only just over, the Kapp Putsch is still fresh on everyone's mind; in Southern Europe, fascist and nationalist movements are gathering steam; in 1923, Hitler will emulate Mussolini and

[15] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 49.
[16] SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 51–52 and Chapter 4 ("On the Counterrevolutionary Philosophy of the State [de Maistre, Bonald, Donoso Cortés]").

try to march on Berlin. To loosely quote Goethe: One notices the intention behind *Political Theology*, and one is put out.

III. The Slightly Better Version: *Guardian of the Constitution* (1931)

It is instructive to contrast Schmitt's method in *Political Theology* with the method he employs in the later *Guardian of the Constitution* of 1931.[17] By that time, the political situation of the Weimar Republic had worsened dramatically. In 1930, the last parliamentary government, the makeshift Müller coalition that united the Social Democrats with the liberals of the right, had succumbed to the considerable fiscal restraints imposed partly by economic crisis, a stagnant economy, and a new wave of protectionism, partly by institutional constraints embodied by Hjalmar Schacht and the *Reichsbank*; in the subsequent election, the far right had risen dramatically. One does not have to squint very hard to see parallels in German politics today. What followed this final parliamentary government were the presidential cabinets under *Reichspräsident* Hindenburg that marked the republic's last stage.

1. A different approach

In *Guardian of the Constitution*, Schmitt reacts to this by shifting methodological registers.[18] Again, he attempts to link political institutions and constitutional norms with social and political structure. This time, however, he focuses on the *current* social and political structure of the late Weimar Republic, or on what he calls the "constitutional situation" ("*Verfassungslage*").[19]

What ensues is a detailed analysis of how this "situation" is most importantly marked by what Schmitt terms "pluralism".[20] What this analysis essentially describes is the transition from the authoritarian system under the Empire, with its bureaucratic monarchical governments, to the emerging structures of a corporatist consensus democracy, that is, to the specific model of democracy that took shape in continental and Nordic Europe around that time, with proportional representation and coalition

[17] Wherever possible, I cite the partial English translation C. SCHMITT, *The Guardian of the Constitution [1931]*, in THE GUARDIAN OF THE CONSTITUTION: HANS KELSEN AND CARL SCHMITT ON THE LIMITS OF CONSTITUTIONAL LAW 125–173 (L. Vinx trans. & ed., 2015) [hereinafter SCHMITT, *Guardian*], otherwise the German original CARL SCHMITT, HÜTER DER VERFASSUNG [GUARDIAN OF THE CONSTITUTION] (5th edn. 2016 [1931]) [hereinafter SCHMITT, HÜTER].
[18] Expressly SCHMITT, HÜTER, *supra* note 17, at 72–73.
[19] SCHMITT, *Guardian*, *supra* note 17, at 125; *see* also SCHMITT, HÜTER, *supra* note 17, at 72 ("Every institution and even every norm contains within itself for its existence and its validity this connection with a situation …", my translation).
[20] SCHMITT, *Guardian*, *supra* note 17, at 125–146.

governments, strong social partnerships between Big Business and Big Labor, and eventually strongly export-oriented economies. Accordingly, this transition was not an isolated German development; in the interwar period, we can trace similar processes in many of Germany's neighbors, in the Scandinavian countries, in Switzerland, in Belgium, in the Netherlands, or in Austria.[21] With the exception of Austria, all these countries achieved, after prolonged periods of intense economic and political turmoil in the wake of the Great Depression, stable inter-class accommodations in the 1930s, as Peter Katzenstein famously described 50 years later.[22]

What makes Schmitt's analysis in *Guardian of the Constitution* so remarkable is that he is among the first to analytically capture this transition. He couches his analysis in a specific vocabulary, most notably the distinction between "society" and "state", by describing it as a "pluralist" "occupation" of the "state" by the forces of "society". Schmitt is quite clear on who these "pluralist" forces of society were: the milieus of the old "inner enemies of the Empire" ("*Reichsfeinde*"), that is, the former opposition to the bourgeois-aristocratic Protestant camps that dominated the Empire, the Social Democrats on the one hand and political Catholicism on the other. It had been the intense repression of both the worker and the catholic milieu under Bismarck––first in the *Kulturkampf*, then in the Anti-Socialist Laws––that had led the bourgeois National Liberals to enter into the loose coalition with Bismarck and the old aristocratic conservative forces that would carry the Empire until its collapse. Conversely, it was these "enemies of the Empire" who together with the liberals of the left formed, during World War I, the "Weimar" coalition that would carry the democratic transition of 1918–19 and authored Weimar's constitution. In this situation, choosing the term "pluralism" to denote both these two camps and the political system they conceived was a conscious decision on Schmitt's part. By borrowing the term from the English "Pluralist" theorists around the Anglican John Neville Figgis and the Socialist Harold Laski, this attempted to capture this unified opposition against an overbearing administrative state that the (catholic) church and the labor movement had formed.[23] As Schmitt wrote in 1930 to his doctoral student

[21] TORBEN IVERSEN & DAVID SOSKICE, DEMOCRACY AND PROSPERITY ch. 2 (2019).
[22] PETER J. KATZENSTEIN, SMALL STATES IN WORLD MARKETS 136–190 (1985).
[23] *See* CARL SCHMITT, THE CONCEPT OF THE POLITICAL 40–45 (G. Schwab trans., 2007 [1932]) [hereinafter SCHMITT, CONCEPT OF THE POLITICAL]. Both Figgis and Laski had been inspired by Bismarck's defeat in the *Kulturkampf* and the Anti-Socialist Laws when formulating their theory; much like Preuß and Wolzendorff (*supra* II.1.; *cf.* SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 24–25), they had also borrowed from Otto v. Gierke's theory of the association (*see* RUNCIMAN, PLURALISM AND THE PERSONALITY OF THE STATE [1997]), another of Schmitt's adversaries.

Ernst-Rudolf Huber: "What is most interesting to me is the alliance between church and union that appears in pluralist state theory and the way arguments that had been made to benefit the church are now being repurposed to benefit the union. I was unaware that the party coalition that is today ruling Prussia is capable of such a grounding in intellectual history and that it is this 'pluralist state' which appears behind the simultaneity of the *Kulturkampf* and the Anti-Socialist Laws."[24] (Prussia, by far the largest state within Weimar's federal system, had been ruled consistently since 1919 by the Weimar Coalition, offering a stark contrast to the unstable governments at the federal level; after 1930 it served as the coalition's last political foothold, until the presidential cabinet under v. Papen deposed its government in the 1932 Prussian coup d'état, with Schmitt as its legal advisor.)

What is more, Schmitt's analysis is very precise in describing the similar social structure of both the social-democratic and the catholic camp.[25] Their repression under the Empire had led both camps to socially organize to a high degree, in modern mass parties (the SPD and the Center) and in other political organizations (chief among them the Free and catholic unions, but also rich the landscapes of societal associations that among them formed the worker and Catholic milieus). As such, these "social power-complexes", as Schmitt called them,[26] were much better positioned to succeed under Weimar's free and equal electoral system than the formerly dominant bourgeois-aristocratic camps of the right, whose privileged access to the Empire's authoritarian administrative governments had freed them early-on from the need to construct robust and competitive modern party organizations in the mold of the SPD and the Center.[27]

In addition to describing their social structure, Schmitt also very clearly captures the shape of the political system they formed. First, he pins down the two mechanisms that served as their levers to, in his words, "capture" the "state"––that is, the monarchical administrative state under the Empire––and turn it into the "self-organization of society"[28]: parliamentary responsibility––that under Weimar's democratic constitution governments no longer depended on the monarch, but required the confidence of a parliamentary majority (Article 54); and, even more importantly

[24] Letter of May 2, 1930, in CARL SCHMITT – ERNST RUDOLF HUBER. BRIEFWECHSEL 1926–1981 [CORRESPONDENCE 1926–1981] 69 (E. Grothe ed., 2014) (my translation).
[25] SCHMITT, *Guardian*, *supra* note 17, at 136–139; also SCHMITT, HÜTER, *supra* note 17, at 62–63.
[26] SCHMITT, *Guardian*, *supra* note 17, at 198.
[27] On this point, *see* DANIEL ZIBLATT, CONSERVATIVE PARTIES AND THE BIRTH OF DEMOCRACY ch. 6–9 (2017).
[28] SCHMITT, *Guardian*, *supra* note 17, at 131.

perhaps, the move to proportional representation (Article 22).[29] In fact, Schmitt is among the first to describe the link between highly organized minority camps––most notably a strong labor movement, but on the continent also parties of religious defense––and a shift to proportional representation that we observe in all the consensus-democratic systems around this time,[30] highlighting it as a fundamental departure from the way parliamentary government had first formed in Great Britain in the 18th and 19th century.[31]

Second and more interestingly even, Schmitt rightly points out that under this specific consensus-democratic model, the central political phenomenon becomes the *agreement*, the "compact" or "compromise" between the different social camps and their political organizations.[32] What is more, he very acutely traces this phenomenon across the entire landscape of Weimar's institutions. In parliament, the need for coalition governments within Weimar's six party-system meant that it was not the supposed free debate between individual members that drove decision-making (an image that had long dominated German notions of parliamentarism), but rather the constant negotiations among the ruling parties, through their coalition agreements, but also in their everyday management of the considerable economic, cultural and political crises with which the young republic had to fend.[33] In fact, Weimar's constitution itself had been conceived through a series of intense negotiations and compromises among the pro-republican camps.[34] What further compounded the system's pervasive need for consensus was Weimar's "inclusive" federalism that involved the *Länder* governments through the *Reichsrat* in the legislative process at the federal level while tasking them with executing federal legislation,[35] and an expanding welfare state system that delegated the fiscal infrastructure of its sickness and accident relief funds to separate self-administrating public bodies,[36] turning the ruling parties into the central coordinators and anchors across these various nodes and veto points. Even outside the narrower realm of government, negotiation become the dominant mode of problem-solving. The economic nature of many of the pressures

[29] Both moves had in fact preceded the revolution, having been forced through by the nascent Weimar coalition in the final months of World War I.
[30] IVERSEN & SOSKICE, *supra* note 21, at 90–97.
[31] SCHMITT, *Guardian*, *supra* note 17, at 139–141, 143–144.
[32] SCHMITT, HÜTER, *supra* note 17, at 60–70.
[33] SCHMITT, *Guardian*, *supra* note 17, at 141–143, 143–144.
[34] SCHMITT, HÜTER, *supra* note 17, at 63–64, 70; also CARL SCHMITT, CONSTITUTIONAL THEORY 82–88 (J. Seitzer trans. & ed., 2008 [1928]) [hereinafter SCHMITT, CONSTITUTIONAL THEORY].
[35] SCHMITT, HÜTER, *supra* note 17, at 94–96.
[36] SCHMITT, HÜTER, *supra* note 17, at 91–94.

meant that the umbrella organizations of Big Labor and Business had to be included in the political decision-making process,[37] triggering a sustained attempt to transform their fractious relationship into a corporatist system of coordinated collective bargaining and economic steering and turning the question to what extent the Ministry of Labor should intervene in this process into a constant source of friction.[38]

What Schmitt also captured of course was the breaking point around which the continued efforts to stabilize the new system eventually collapsed. The parliamentary parties proved increasingly unable to meet the unremitting demand for compromise within the system, turning the first German Republic into what Schmitt termed an "unstable coalition party state".[39] Already after 1928, but entirely when the Great Depression severely limited the available fiscal space, the consensual coalition system within parliament unraveled to give way to its proto-authoritarian alternative, the presidential cabinets under Hindenburg.

2. Assessment

As I have been quite critical of *Political Theology*, I want to take some care to distinguish the positives from the negatives in the method of *Guardian of the Constitution*.

a) The positives

To my mind, the positive aspects of Schmitt's shift to the "current" social and political structure are considerable. Not least, we can see the relevance of his analysis in how influential it became: It was soon taken up by Franz Neumann in his seminal diagnosis of the Weimar Republic's structure and collapse, by Otto Kirchheimer in his early political science texts during and after World War II, and eventually by Jürgen Habermas in his famous study on the structural transformation of the public sphere mapping Germany's transition to a mass democracy.[40] Through Neumann, it later informed Charles Maier's influential work on the history of the political economy of continental Europe in the interwar period, and in the 1970s spread into the political

[37] SCHMITT, HÜTER, *supra* note 17, at 62–63, also 96–100.
[38] *Cf.* SCHMITT, HÜTER, *supra* note 17, at 141–149.
[39] SCHMITT, *Guardian*, *supra* note 17, at 143.
[40] FRANZ NEUMANN, BEHEMOTH 3–34 (P. Hayes ed., 2009 [1944]); also Franz Neumann, *The Change in the Function of Law [1937],* in FRANZ NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE: ESSAYS IN POLITICAL AND LEGAL THEORY 22, 49 (H. Marcuse ed., 1964); Otto Kirchheimer, *Changes in the Structure of Political Compromise*, 9 Zeitschrift für Sozialforschung 264 (1941); JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE (T. Burger trans., 1993 [1962]).

sciences and the beginning comparative study of democratic and capitalist systems by authors like Philippe Schmitter, Gerhard Lehmbruch or Fritz Scharpf who first began to notice and describe to what extent the continental and Nordic democracies and economies differed in shape and design from their liberal British and US counterparts.[41] Unintentionally, Schmitt had developed a first puzzle piece of what we know today as the research on varieties of democracy and capitalism and their respective paths to democratization.[42]

Of course, this avenue of analysis has branched away from public law. Still, I want to highlight that Schmitt's approach in the *Guardian of the Constitution* of widening the gaze to take in the wider political and social structure with which legal institutions interact and which determine their functioning is increasingly again becoming relevant to public law, too. Not least since we have been experiencing, for the last 40 years, a fundamental shift away from the traditional social structure of industrial society that sorted the political system along the socioeconomic cleavage. This entirely new situation and the new forms of polarization it entails raise a number of questions as to how constitutional and administrative law institutions that were conceived in the mid-20th century, at the height of industrial society, can preserve their function under a new set of circumstances.

In this situation, an approach similar to Schmitt's increasingly becomes helpful. Its relevance for German public law is clear at a time where a new party system––which in several ways resembles the old Weimar system––puts new strains on the Basic Law and the capacity for compromise within the political system. In a similar vein, taking the wider social and political context into account allows us to gauge whether sets of regulations that were put in place after World War II to help to resolve the structural tensions that had plagued Weimar––like a restabilized corporatist system of collective bargaining or a strongly constitutionalized system of media regulation[43]––are still fulfilling their functions today.[44] For the US, too, such a wider approach enables us to ascertain whether the changes that have been brought, in the 1980s and 1990s, to the

[41] CHARLES S. MAIER, RECASTING BOURGEOIS EUROPE (3rd edn. 2015); PHILIPPE C. SCHMITTER & GUSTAV LEHMBRUCH EDS., TRENDS TOWARD CORPORATIST INTERMEDIATION (1979); FRITZ W. SCHARPF, GAMES REAL ACTORS PLAY (1997).
[42] For a synthesis, *see* IVERSEN & SOSKICE, *supra* note 21.
[43] PHILIP MANOW, SOCIAL PROTECTION, CAPITALIST PRODUCTION ch. 4–5 (2020); DANIEL C. HALLIN & PAOLO MANCINI, COMPARING MEDIA SYSTEMS ch. 6 (2004).
[44] *See* also Dominik Rennert, *Corporatism,* in THE OXFORD HANDBOOK OF THE GERMAN CONSTITUTION (P. sDann & C. Möllers eds., *forthcoming*).

New Deal's regulatory regimes, *e.g.*, on the labor market or the media system, have fulfilled the promises with which they were introduced or whether they have instead exacerbated the societal and economic shifts that are driving the high levels of negative polarization today.[45]

Taking a step back, it appears that we are currently at the crest of one of those methodological waves that I mentioned at the outset: When Schmitt worked at a time where a cluster of conflicts of the industrial society that started in the 1870s came to a head, we might currently be experiencing a similar period for the knowledge society that began to form in the 1970s. It makes sense that the problems in public law would show some parallels, and so should the methodological response.

b) The negatives

If these are the positives, then why do I still claim that we should not emulate Schmitt's approach, but are better served studying those later authors, like Neumann? Essentially, even in the more hands-on *Guardian of the Constitution* the irrational method of *Political Theology* remains present. Schmitt's reason for parliamentary breakdown is not that the Weimar parties are not accustomed to coalition governments––which was especially true for the camps of the right to which Schmitt himself belonged: The low levels of social organization that they had inherited from the Empire led them in every crisis moment to hark back to their former privileged political position, looking for authoritarian ways out of Weimar's constraints and its constant need for stable electoral support. When their elites subsequently embraced the presidential cabinets after 1930, their former electoral milieus among the Protestant petty bourgeoisie and the farmers switched their support to the National-Socialist party.

Instead, Schmitt again introduces highly stylized notions of the "unity of the state" and the constitutional order that organized parties must *necessarily* and *always* destroy.[46] They are necessarily incapable of achieving political stability through inter-class compromise. A brief comparative look to the neighboring countries would have quickly debunked this claim.[47] And not just that, in Schmitt's odd universe and social ontology,

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[45] *See*, *e.g.*, YONCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA (2018); also Dominik Rennert, *Amerikanische Krise und Verfassungsrecht [The US Crisis and Constitutional Law]*, 149 Archiv des öffentlichen Rechts 677 (2024).
[46] SCHMITT, *Guardian*, *supra* note 17, at 143–146; also SCHMITT, HÜTER, *supra* note 17, at, 60–64, 70.
[47] Cf. KATZENSTEIN, *supra* note 22, at 139–150.

compromise *itself* is impossible; idea systems can only be adopted entirely or not at all.[48] Behind this odd belief, of course, lies his famously distorted notion that politics must necessarily function as a friend–enemy polarization over closed political ideologies that can only resolve itself when one side overpowers the other, rendering any attempt at compromise effectively an act of political defeat (and even "death").[49] Unsurprisingly then, Schmitt later claims, in 1932, that the early attempts at inter-class compromise that the Weimar constitution achieved were essentially a mirage, asserting that its social welfare guarantees did not actually form part of its relevant "core".[50] And on the institutional side, too, it is again only the military-administrative state, this time personified by the *Reichspräsident* (and his presidential cabinets), that can restore order and preserve that supposed "unity" of the constitution.[51] As before, behind those claims rests the notion that only the absolutist 17th century achieved an institutional setup that is truly adequate to a political order.[52] Now, however, this notion is for the first time linked to his concept of politics[53]: Much like in the 17th century, only a strong, authoritarian executive can sort friend from enemy and overpower the enemy within. At least, this can serve as a reminder that friend-enemy polarizations and calls for top-down politics and executive strength conceptually go hand in hand.

The *methodological* problem with these claims is, in fact, less that Schmitt embodied the destructive authoritarian impulses of much of the German right of his time. It is rather his constant need to infuse supposedly descriptive observations with cloaked irrational normative assumptions. This need becomes all the more damaging, the more realistic these observations appear. Especially in politically fluid situations, where established consensus breaks down, these claims create a methodological opening through which hidden––or not so hidden––intentions can creep in and potentially

[48] SCHMITT, CONSTITUTIONAL THEORY, *supra* note 34, at 82–88.
[49] SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 23, at 27–37.
[50] Carl Schmitt, *Grundrechte und Grundpflichten [Basic Rights and Basic Duties] (1932)*, in CARL SCHMITT, VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924–1954 [CONSTITUTIONAL LAW ARTICLES FROM THE YEARS 1924–1954] 181–231 (4th edn. 2003).
[51] SCHMITT, *Guardian*, *supra* note 17, at 155–158, 161, 172–173; also one year later in CARL SCHMITT, LEGALITY AND LEGITIMACY 39–83 (J. Seitzer trans. & ed., 2004 [1932]).
[52] *Supra* III.2.; *see* also SCHMITT, POLITICAL THEOLOGY, *supra* note 1, at 48–49 ("In the struggle of opposing interests and coalitions, absolute monarchy made the decision and thereby created the unity of the state.").
[53] *See* also SCHMITT, CONCEPT OF THE POLITICAL, *supra* note 23, at 37–45.

cause a lot of damage. Such an approach would currently, where we need good analysis, not only be unhelpful; it would make matters worse.

7.

IS CARL SCHMITT STILL RELEVANT TO CONTEMPORARY PUBLIC LAW?

By Andreas Voßkuhle*

Abstract

The distinction between law and politics has characterized numerous public law discourses since the 19th century. With his study "Der Begriff des Politischen" (1932, 3rd ed. 1963), *Carl Schmitt* provided crucial argumentative support for the so-called separation thesis. Using the commonly held notion that constitutional courts should not engage in politics as an example, I would like to emphasize the limited explanatory value of the separation thesis. Instead of illuminating reality and the existing power structures, it obscures them. We should therefore dispense with the separation thesis.

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IS CARL SCHMITT STILL RELEVANT TO CONTEMPORARY PUBLIC LAW?

1. The separation between law and politics has characterized numerous discourses in public law since the 19th century. A prominent example of the influence of the separation thesis is the widely held belief that constitutional courts should avoid political decisions.

The easiest way to criticize or delegitimize a court decision (in Germany) is to say, "This is a political decision!" If you said, "This decision is nonsense, I don't like it" which is pretty much the same, everybody would say, "Come on, this is not a legal argument." However, if you label the decision as political, they will say, "Oh, really, that is interesting. We have to think about that!" Nevertheless: No one today would deny that constitutional courts are political institutions. Nor would anyone deny that the decisions of constitutional courts have a political impact. However, most justices[1] and many legal scholars vehemently deny that the process of constitutional adjudication, i.e. the application of constitutional norms to a dispute, is political in nature.[2] Only those who have a clear political agenda or who are highly critical of constitutional jurisdiction as a whole[3] regularly take this view in order to discredit the institution itself.[4] The U.S. Supreme Court's "political-question doctrine"[5], which allows the Court

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[1] See, e.g., Fresh Air: *Justice Breyer*: The Court, The Cases and Conflicts, NPR, (Sept. 14, 2010), http:/www.npr.org/templates/story/story.php?storyId=129831688: „I know some pretty good politicians. That isn't what a judge is. And that isn't what we do." See also *Andreas Voßkuhle*, Karlsruhe Unlimited? Zu den (unsichtbaren) Grenzen der Verfassungsgerichtsbarkeit, in: Andreas Voßkuhle, Europa, Demokratie, Verfassungsgerichte, Suhrkamp, Berlin, 2021, p. 314 (320): „Above all, in contrast to the forum of political debate, only legal arguments are ultimately heard in the deliberations of the two senates of the Federal Constitutional Court. Constitutional Court judges who fail to observe this rule must be prepared for their influence on the outcome of the deliberations to diminish rapidly. However, no colleague likes to be marginalized." (translation by the author).

[2] See *Dieter Grimm*, Was ist politisch an der Verfassungsgerichtsbarkeit?, in: Dieter Grimm, Verfassungsgerichtsbarkeit, Suhrkamp, Berlin, 2021, pp. 89-104.

[3] On radical criticism in the Anglo-American world, see the analysis in *Dieter Grimm*, Neue Radikalkritik an der Verfassungsgerichtsbarkeit, in: ibid., pp. 357-398, and *Martin Loughlin*, Against Constitutionalism, Harvard University Press, Cambridge et. al., 2022. For a critical view on the German Constitutional Court see e.g. *Matthias Jestaedt/Oliver Lepsius/Christoph Möllers/Christoph Schönberger*, The German Federal Constitutional Court. The Court without Limits, Oxford University Press, Oxford, 2020. For a helpful view from outside see *Justin Collings*, Democracy's Guardians. A history of the German Federal Constitutional Court, 1951-2001, Oxford University Press, Oxford, 2015; *Aurore Gaillet*, La Cour constitutionnelle fédérale allemande: Reconstruire une démocratie par le droit (1945-1961), La Mémoire du Droit, Paris, 2021; *Russel A. Miller*, An Introduction to German Law and Legal Culture. Text and Materials, Cambridge University Press, Cambridge, 2024, pp. 256-290.

[4] See e.g. the balanced analysis of *Samuel Issacharoff*, What Does the Supreme Court Do?, in: Anna-Bettina Kaiser/Niels Petersen/Johannes Saurer (eds.), The U.S. Supreme Court and Contemporary Constitutional Law: The Obama Era and Its Legacy, Baden-Baden, 2018, pp. 19-39. See also *Cass R. Sunstein*, Radicals in Robes. Why Extreme Right-Wing Courts Are Wrong for America, Basic Books, New York, 2005.

[5] See e.g. Marbury v. Madison, 5 U.S. 137 (1803); Luther v. Borden, 48 U.S. 1 (1849); Baker v. Carr, 369 U.S. 186 (1962); Goldwater v. Carter, 444 U.S. 996 (1979); Rucho v. Common Clause, 588 U.S. 684 (2019), and *Erwin Chemerinsky*, Constitutional Law – Principles and Policies, Wolters Kluwer, New

to decline cases with political implications, is also rooted in the belief that law and politics can clearly be separated.

2. In my view, the explanatory value of the so-called separation thesis is extremely limited. We should therefore dispense with it.

The importance of binary distinctions is measured by their analytical explanatory value. Dichotomies such as state/society, formal/informal or friend/ foe can help to systematize a complex field. For the distinction between law and politics to be helpful, there must be clear criteria for what defines politics. This is not the case, leading me to my third observation.

3. To this day, a generally accepted definition of the term "political" has been sought in vain.[6]

There is a consensus that the term "political" refers to activities related to the community and encompasses three dimensions: a substantive dimension (policy), a procedural dimension (politics) and an institutional dimension (polity).[7] However, it remains unclear what exactly these dimensions refer to in each case. Some link the concept of politics to the concept of power, following Machiavelli's ideas – but what is power?[8] Others define politics as the ability to make collectively binding decisions.[9] This definition, however, excludes, many important social actors such as the press, trade unions or think tanks. On closer inspection, the term "political" remains vague and meaningless. *Carl Schmitt* shared this view.[10]

4. This blank space within political science but also within jurisprudence is therefore filled in a peculiar way. Carl Schmitt's 1932 study, "The

York, 6th ed., 2019, pp. 140 et seqq.; *Laura E. Little*, The United States Constitution, Aspen Publishing, Burlington, 2024, pp. 76 et seq.

[6] Illuminating on the various lines of development and positions from a historical perspective *Ernst Vollrath*, Politik, in: Joachim Ritter/Karlfried Gründer (eds.), Historisches Wörterbuch der Philosophie, Vol 7, Wissenschaftliche Buchgesellschaft, Darmstadt, 1989, pp. 1038-1072, and *Volker Sellin*, Politik, in: Otto Brunner/Werner Conze/Reinhard Kosselleck (eds.), Geschichtliche Grundbegriffe, Vol. 4, Klett-Cotta, Stuttgart, 1978, pp. 789-874.

[7] See e.g. *Karl Rohe/Andreas Dörner*, Politikbegriffe, in: Dieter Nohlen/Rainer-Olaf Schulz (eds.), Lexikon der Politik, Vol. I, Politische Theorien, C.H. Beck, München, 1995, p. 453 (456).

[8] See e.g. *Georg Zenkert*, Die Konstitution der Macht. Kompetenz, Ordnung und Integration in der politischen Verfassung, Mohr Siebeck, Tübingen, 2004.

[9] See *Niklas Luhmann*, Die Politik der Gesellschaft, Suhrkamp, Frankfurt a.M., 2002, pp. 140-169.

[10] *Carl Schmitt*, Der Begriff des Politischen. Text from 1932 with a foreword and three corollaries, Dunker & Humblot, Berlin, 9th revised ed., 2015, pp. 20 et seqq.

Concept of the Political" has exerted and continues to exert a noteworthy influence on our understanding of politics.

In the absence of a clear and convincing concept of politics, people intuitively tend to fall back on familiar concepts. Carl Schmitt's study "The Concept of the Political" is probably his best-known work, not only in Germany but throughout the world, and is also the work of his that has actually been read the most.[11] The essay does not have that many pages, is superficially easy to understand and charismatic. However, those who do not read it carefully or are only familiar with its title mistakenly assume that the political is definable and represents something unique.

5. According to Carl Schmidt, political thinking is characterized by the ability to distinguish between friend and enemy on both a theoretical and a practical level. Unsurprisingly, his concept of the state is permeated by his concept of the political. An essential characteristic of the state as a political entity is therefore the jus belli, i.e. the authority to determine, through one's own decision, who the enemy is in a given case and to engage in conflict with them.

While I do not want to summarize the book, which all readers know well, I would like to point out a special feature of its reception: There are many interesting insights in "The Concept of the Political", for example regarding the pluralism of states or the concept of man in political theories. However, the distinction between enemy and friend significantly dominates these aspects in the reception.[12]

6. Through this conceptualization, the political becomes an existential category tied to the survival of one's own community. It is thereby robbed of any democratic innocence.

In contrast to the student movement's battle cry "everything is political", Carl Schmitt narrows down the concept of the political to existential moments. In his view, normal everyday politics only unfolds in the shadow of the friend-enemy distinction. Yet, the literal translation of the ancient Greek politiká is: "things that concern the citizens

[11] See *Ernst-Wolfgang Böckenförde*, „Der Begriff des Politischen" als Schlüssel zum staatsrechtlichen Werk Carl Schmitts, in: Ernst-Wolfgang Böckenförde, Recht, Staat, Freiheit, Suhrkamp, Frankfurt a.M., 1991, pp. 344-366; *Hasso Hofmann*, Legitimität gegen Legalität. Der Weg der politischen Philosophie Carl Schmitts, Duncker & Humblot, Berlin, 2nd ed., 1992; *Helmut Quaritsch*, Positionen und Begriffe Carl Schmitts, Duncker & Humblot, Berlin, 3rd ed., 1995; *Reinhard Mehring*, Carl Schmitt. Der Begriff des Politischen (1927), in: Manfred Brocker (ed.), Geschichte des politischen Denkens, Suhrkamp, Frankfurt a.M., 2007, pp. 510-524.
[12] See fn. 11.

(city)".[13] It is therefore about the everyday organization of a community, which in ancient Greece was linked to the preliminary forms of democracy. This more intuitive understanding of the political is displaced by Schmitt's conception.

7. Perhaps even more important than the subtle persistence of the friend-enemy distinction are the counter-concepts to the concept of the political , such as the concept of neutrality, which Schmitt concretizes in the first corollary (lat. corollarium: gift, addition) to his essay "The Concept of the Political". Under the heading: "1. neutrality in the sense of objectivity on the basis of a recognized norm" we find the following passage:

> *"This is the neutrality of the judge as long as he decides on the basis of a recognized norm that can be determined in terms of content. The binding nature of the law (which contains substantive obligations) is what makes objectivity and thus this kind of neutrality possible in the first place, as well as the relative independence of the judge in relation to the other (...) will of the state; this neutrality leads to a decision, but not to a political decision."*[14]

It is this perspective, that still dominates the jurisprudential discourse today, at least in Germany.[15]

8. It is therefore not surprising that the 1972 publication by Rudolf Wassermann "The Political Judge"[16] caused a scandal in German jurisprudence. Wassermann, who was one of the central figures in the judicial reforms of the 1970s in West Germany and President of the Higher Regional Court of Braunschweig, essentially argued that every judicial decision includes a margin of discretion and that judges are political actors.[17] Power and responsibility are by no means alien to judicial activity – a rather trivial insight from today's perspective.

In the late sixties and in the seventies this was not a trivial insight, although *Joseph Esser*, perhaps the most important German private law scholar of the second half of the 20th century, had already established in the 1950s, inspired by common law, that the text of the norm is merely the "starting point" for the application of the law.[18] In

[13] See *Christian Meier*, Politik, in: Joachim Ritter/Karlfried Gründer (eds.), Historisches Wörterbuch der Philosophie, Vol. 7, Wissenschaftliche Buchgesellschaft, Darmstadt, 1989, p. 1038.
[14] *Carl Schmitt,* (fn. 10), p. 100 et seq. (translation of the author).
[15] See instead of many *Thomas M. J. Möllers*, Juristische Methodenlehre, C.H. Beck, München, 6th ed., 2025, § 13 para. 91 et seqq.
[16] *Rudolf Wassermann*, Der politische Richter, Piper, München, 1972.
[17] See *Andreas Voßkuhle*, Rechtsschutz gegen den Richter. Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG, C. H. Beck Verlag, München, 1993, pp. 270 et seq.
[18] *Josef Esser*, Grundsatz und Norm, J.C.B. Mohr (Paul Siebeck), Tübingen, 4th ed., 1990.

addition, *Regina Ogorek*, in her book "Richterkönig oder Subsumtionsautomat?"[19], revealed that realistic assumptions about the work of judges already existed in the 19th century. So why did the prevailing opinion within the judiciary and within legal scholarship so vehemently oppose the idea that judges also have power and responsibility? In my view, it was a reflexive defense of the role lawyers played during the Nazi era. If one reduces the the judge's role to that of a mere "subsumption machine", then lawyers "only" applied the law and bear no complicity in Nazi injustice. This view appealed to many lawyers, especially as many former Nazis were still active in the highest federal courts as we know today.[20]

9. The distinction between law and politics tends to obscure the insight that judges have (political) power and responsibility.

It was precisely for this reason that a political movement emerged in Germany at the end of the 1960s that took a critical look at the past of lawyers who were still in active service and, in particular, at the role of the judiciary.[21] Ultimately, this "sociology of judges" led to the establishment of modern legal sociology in the Federal Republic of Germany. In addition to the topic of "political justice"", the topic of "class justice" played an important role.[22] From today's perspective, the movement was a forerunner of the American Critical Legal Studies movement.[23]

10. Broad definitions of the term politics take into account that the distinction between law and politics tends to obscure critical insight in the work of lawyers. Accordingly, political action can be understood as the behavior of individuals, groups, organizations, parties, parliaments and governments aimed at shaping public life.[24] These actions differ in the degree of influence and responsibility depending on the constellation but the underlying behavior remains essentially political and is therefore subject to close analysis.

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[19] *Regina Ogorek*, Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert, Vittorio Klostermann, Frankfurt a.M., 1986.

[20] See *Michael Kißner/Andreas Roth*, Justiz im Umbruch. Die Geschichte des Bundesgerichtshofs 1950 bis 1965, De Gruyter, Oldenbourg, Berlin, 2024, pp. 114 et seqq. Classic: *Bernd Rüthers*, Die unbegrenzte Auslegung, Mohr Siebeck, Tübingen, 6th ed., 2005. See also *Bernd Rüthers*, Geschönte Geschichten – Geschonte Biographien. Sozialisationskohorten in Wendeliteraturen. Ein Essay, Mohr Siebeck, Tübingen, 2nd ed., 2015.

[21] See e.g. *Susanne Baer*, Rechtssoziologie, Nomos, Baden-Baden, 5th ed., 2022, § 5 B.

[22] See e.g. *Klaus F. Röhl*, Rechtssoziologie, Carl Heymanns Verlag, Cologne et. al., 1987, pp. 355-363.

[23] See only *Alan C. Hutchinson* (ed.), Critical Legal Studies, Rowman & Littlefield, Toronto, 1989.

[24] See *Andreas Voßkuhle*, Die politischen Dimensionen der Staatsrechtslehre, in: Helmuth Schulze-Fielitz (ed.),
Staatsrechtslehre als Wissenschaft, Die Verwaltung, Beiheft 7, Duncker & Humblot, Berlin, 2007, pp. 135-157 (137 et seq.).

The essence of this approach is to avoid counter-concepts based on an either-or logic and instead to work with scales and shades that allow for a much more nuanced view of our society and the actors involved. However, this approach is accompanied by a loss of unambiguity and gravitas, which is why it is not very popular among democratically enlightened Schmitt supporters such as *Ernst-Wolfgang Böckenförde* or *Florian Meinel*.[25]

11. With these considerations in mind, I would like to return to our initial example, the demand that constitutional courts should not engage in politics. What does this actually mean? In my view, it is about the fundamental question of how far the competences of the constitutional courts extend.

At first glance, this statement may appear rather banal and unsurprising. What is surprising, however, is that many legal scholars believe that they can tackle the core question of the scope of judicial review – particularly within debates on constitutional jurisdiction – by relying on the distinction between law and politics, a concept which is very weak in terms of explanatory value. The ubiquitous calls for "judicial self-restraint" are equally misguided.[26] Sometimes courts need to take bold actions, for example in the case of new challenges such as data or climate protection.[27] It is not possible to determine exactly when the court should exercise restraint and when it should not. This depends entirely on the specifics of the case. In any event, the doctrine of judicial self-restraint does not provide any criteria.

12. The question of the appropriate scope of constitutional courts' competences can be answered from a functional point of view.

Since the 1970s, there have been increasing efforts within German constitutional law to introduce functional-legal considerations into the discussions on the limits of the constitutional court's role.[28] From a functional-legal point of view, the body legitimated for a particular task is the one that, based on the division of labor outlined in the Basic

[25] To the influence of the school of thought of Carl Schmitt see *Frieder Günther*, Denken vom Staat her. Die bundesdeutsche Staatsrechtlehre zwischen Dezision und Integration 1949-1970, C.H. Beck, Munich, 2004.
[26] See *Andreas Voßkuhle*, in: Peter M. Huber/Andreas Voßkuhle (eds.), GG, Vol. III, C.H. Beck, Munich, 8th ed., 2024, Art. 93, para. 36. See also BVerfGE 36, 1 (14) – Grundlagenvertrag.
[27] On the various reasons behind activist behavior of constitutional courts see *Andreas Voßkuhle*, Die weltweite Krise der Verfassungsgerichtsbarkeit, in: Juristenzeitung, 2024, pp. 1-7.
[28] See e.g. *Andreas Voßkuhle*, in: Peter M. Huber/Andreas Voßkuhle (eds.), GG, (fn. 26), Art. 93, paras. 40 et seq. First considerations in this direction by *Gerhard Zimmer*, Funktion – Kompetenz – Legitimation, Duncker & Humblot, Berlin, 1979.

Law, is structurally closest to the decision to be made in terms of its overall performance profile, and thus appears to be best equipped to handle the task.[29] The aim is an appropriate and efficient distribution of roles among the state organs, with the focus not so much on the end product (statute, judgement, etc.) but on the decision-making process itself, i.e. the procedure and its constitutional formulation. Against this background, the functioning of a constitutional court is characterized and at the same time constrained by numerous factors: the independence of the judges, their lack of self-interest in the outcome of their decisions, the neutrality of the whole procedure, the absence of time pressure, the obligation to provide ex post legal justification for decisions in specific cases, etc. This institutional profile significantly distinguishes the work a constitutional court is suited for from tasks best handled by the government, the administration or the parliament.[30] Due to its institutional profile, a constitutional court is not institutionally equipped to make decisions that require reconciling competing interests and preferences or making predictions about future developments – tasks for which parliaments are better suited. It is precisely this problem of delimiting competences that the distinction between law and politics attempts to address, though without doing much to solve it.

[29] See BVerfGE 49, 89 (129 et seq.) – Kalkar; BVerfGE 68, 1 (86) – Nuclear weapons.
[30] See detailed *Andreas Voßkuhle,* (fn. 17), pp. 94-141.

EPILOGUE:

CANCELLING SCHMITT?

By Joseph H.H. Weiler*

A European colleague recently sent me a letter he received from a student-edited American law journal in which the editors asked him to remove two footnote references to Carl Schmitt because of his Nazi past. My colleague sought my advice….

In my answer to my European colleague, I first expressed the view that 'cancelling' Schmitt from public law and political theory scholarly discourse was an idea or policy I could not support. So I advised my colleague to reject the student editors' request. And, as is for everyone to see, both EJIL and I•CON publish articles that discuss or reference Schmitt. We are journals of public law, so it would be odd if Schmitt did not pop up regularly.

But I also expressed empathy and sympathy with the underlying sentiment and concern of the student editors of the journal in question. Whence this empathy and sympathy?

Schmitt was an enthusiastic and active member of the Nazi Party. The Kronjurist of the Third Reich, it was he who intellectually and academically helped 'kosher' the pig: The infamous Enabling Law of 1933 that solidified Hitler's takeover of the German state. Yes, he has made fundamental contributions to political theory and public law, and on some issues his writing, whether in agreement or disagreement, could be considered indispensable. But his is not a case of a famous author or composer or orchestra conductor or film maker who happened, in his or her 'private' life, to be a racist or misogynist or an anti-Semite. (One can be all three together – I know a few.) This 'gallery of rogues' is lengthy, especially, but not only, the further we look into the past. We could close shop – there would be little left to publish – if that became a defining test.

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Schmitt is one of those whose very writing oft displays intellectual affinity to National Socialist ideology, and in some respects that ideology is integral to such work – the *Mein Kampf* for the thinking person. To judge from the contemporary adulation he receives from some in both the Left and Right, it appears that these writings are either unknown or are conveniently forgotten.

Here is a brief sample. In his writing on democracy and in his debates with, say, Hermann Heller, his insistence on 'homogeneity' as a prerequisite for democracy may seem innocuous enough. Yes, after all, some form of demos is ontologically part of democracy discourse. But how to understand demos? Schmitt himself was able, in the climate in which he wrote, to avoid euphemisms and spell out, unadorned, the implications of his understanding of 'homogeneity'. Thus, in his *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, we find: 'Zur Demokratie gehört also notwendig erstens Homogenität und zweitens—nötigenfalls—die Ausscheidung oder Vernichtung des Heterogenen' [Democracy therefore necessarily involves first homogeneity and secondly – if necessary – the elimination or annihilation of heterogeneity]. No less.

The next step follows naturally. Referring approvingly to, *inter alia*, Turkey's expulsion of its Greek community, Schmitt legitimates what today we refer to as 'ethnic cleansing': 'Die politische Kraft einer Demokratie zeigt sich darin, dass sie das Fremde und Ungleiche, die Homogenität Bedrohende zu beseitigen oder fernzuhalten weiß' [The political power of a democracy is shown by the fact that it knows how to eliminate or keep away the foreign and the unequal].

The 'unequal'? We do not need to guess what he had in mind here. Consider the following example: Reichsgruppenwalter Staatsrat Schmitt convened a conference in 1936 of leading figures in the legal world to discuss 'Das Judentum in der Rechtswissenschaft' [Judaism in Legal Science]. In the concluding address to the conference, Schmitt does not shy away from the implication of the theoretical construct: the cleansing begins with books ('Säuberung der Bibliotheken') but inevitably moves to demonization of their authors: 'Der Jude hat zu unserer geistigen Arbeit eine parasitäre, eine taktische und eine händlerische Beziehung' [The Jew has a parasitic, a tactical and a mercantile relation to our spiritual work]. As such, that particular heterogeneous element is defined as a

'Todfeind' [mortal enemy]. Some 'foe'. The logic of Schmitt's final statement is unassailably pure. His concluding words speak for themselves: 'Was wir suchen und worum wir kämpfen, ist unsere unverfälschte eigene Art, die unversehrte Reinheit unseres deutschen Volkes. "Indem ich mich des Juden erwehre", sagt unser Führer Adolf Hitler, "kämpfe ich für das Werk des Herrn"' [What we seek and what we fight for is our own unadulterated kind, the untainted purity of our German people. "By resisting the Jew" says our leader Adolf Hitler, "I am fighting for the work of the Lord']. Yes, this excommunicated Catholic loved to talk and write about 'spirituality' and the 'Lord.'

So how do I reconcile my earlier stated position of principle, namely that I cannot agree with 'cancelling' Schmitt from scholarly discourse and the deep revulsion that the man and much of his writing evoke in me?

I try in my own work, when Schmitt makes an appearance, always to find a way to remind my readers who we are dealing with in a footnote or even in the text itself. Schmitt, notoriously, encouraged his colleagues to avoid citing Jewish authors, and when unavoidable to identify them as Jews. Would there be a measure of poetic justice in avoiding citing Schmitt unless truly necessary, and when unavoidable to identify him as a Nazi?

Why Schmitt, you may ask, and not many others with a variety of 'dark pasts'? Well, first it is not only Schmitt. But still, I do not do the same for many others. It is the classical problem of drawing lines. But for me Schmitt is an 'easy' case, not even close to whatever line one may end up drawing. And this for three reasons: first, it is the seriousness of his failings, both in thought and deed; second, these failings are integral to a not insignificant part of his work; but mostly, it is because of the fact that Schmitt is a contemporary (yes, he died in 1985 mourned by a whole generation of adoring former students) who cannot hide behind the 'that was the climate of the time' excuse. Yes, it might have been back in the 1930s, and many of the great and mighty were, indeed, seduced. And here is the rub. To my knowledge, like his fellow traveller Martin Heidegger (about whom the sorely missed George Steiner was scathing on this very issue), he never uttered a word of remorse for his Nazi past until his death. *Errare humanum est, perseverare autem diabolicum.* It is the combination of these three factors that impel me to add a

metaphorical plaque to the intellectual statue of Schmitt reminding the reader who the man was.