WILLIAM E. SCHEUERMAN

# THE END OF LAW

*Carl Schmitt in the Twenty-First Century*

SECOND EDITION

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Für Julia (immer noch!)
and her dreams

# Contents

# Preface

When I penned this volume's first edition over twenty years ago, the Carl Schmitt "bug" had just hit the Anglophone intellectual world, with many political theorists, jurists, and others suddenly paying close attention to Schmitt's ideas and their possible significance. In part by highlighting the ways in which Schmitt's theoretical agenda opened the door to his disastrous flirtation with National Socialism, I hoped to push back against the emerging Schmitt renaissance.

By any standard, those efforts were a failure: Schmitt is now a household name in the English-speaking academic world, and his work is more popular than ever. Elsewhere as well (e.g., China) Schmitt has since garnered a significant collection of disciples. The worldwide rise of right-wing populism means that he is very much in the news, with many far-right intellectuals energetically advising would-be rightist demagogues about Schmitt's lessons.

Why then this second edition?

I remain convinced that Schmitt creatively thematized one of the key dilemmas—*legal indeterminacy*—identified by recent legal theory. However, Schmitt then disastrously responded to its challenges by actively contributing to the construction of a postliberal Nazi legal order. Although some reviewers of the first edition interpreted my project as a contribution primarily to Nazi-hunting intellectual history, what I in fact sought to do was take Schmitt's jurisprudential thinking seriously, while simultaneously demonstrating how it invited him to participate actively in the reconstruction of German law under the Nazis. Schmitt's crucial Nazi interlude was by no means necessitated or predetermined by his political and legal theory. Nonetheless, Schmitt mistakenly believed that an identifiably National Socialist legal order could provide answers to the challenges of legal indeterminacy. Nazism appealed to Schmitt, despite his apparent disdain for Hitler and other prominent Nazis,

because it offered him a possibility to help construct a postliberal legal order Schmitt hoped could be free of liberal legalism's (allegedly) congenital flaws. In the process, his writings embraced radical Nazi antisemitism.[1] Others are free to debate possible distinctions between "traditional anti-judaism" and "biological antisemitism" in Schmitt's writings, but on my reading, Schmitt publicly endorsed the latter after 1933.[2]

I thought it illuminating, at any rate, to capture both the underlying theoretical logic of Schmitt's jurisprudence and explain how it became a source of his horrific enthusiasm for Nazism. I also deemed it potentially enlightening to bring him into a conversation with contemporary legal theory, in some contrast to those scholars who preferred to focus on Schmitt's biography and some limited sample of his political writings.

Fortunately, since the publication of this book's first edition, a number of important scholarly contributions about Schmitt's legal thinking have appeared, at least some of which have responded thoughtfully to my arguments.[3] Unfortunately, too much "Schmittiana" still downplays his crucial Nazi interlude, tending to relegate it to footnotes, before hurriedly moving on to praise Schmitt's contributions. By means of an exegetical magical wand, Schmitt gets whitewashed into a German Abraham Lincoln who tragically failed to save Weimar against its "extremist" foes or perhaps even a "radical democrat."[4] Never mind that Schmitt helped destroy Weimar and consistently expressed disdain for democracy as *collective autonomy* and *public freedom* and thus not simply liberal or "bourgeois" but many alternative accounts of democracy.[5] My book remains timely, I believe, because it pushes back against naïve reappropriations of Schmitt's work that are even more commonplace today than two decades ago.

Because of its focus, the volume says little about Schmitt's political theology. I neglect those (mostly later) writings where theological motifs appear to loom large, instead focusing on contributions that help make sense of Schmitt's core jurisprudential contributions and their relationship to his attacks on Weimar democracy. This sets my exegesis apart from many others published since the 1990s, which mine Schmitt's writings for Christian themes. Readers interested in Schmitt's political theology and his post-1950 writings will need to look elsewhere.[6] My worry with the growing scholarly preoccupation with Schmitt's political theology, as I already expressed in the first edition, is that it risks distracting us from taking some of his more provocative legal-theoretical challenges seriously enough. One aim of this volume is to encourage readers to do so.

Much of the text of the original version remains unchanged, though I have occasionally reformulated statements I now consider excessively polemical. The volume remains, however, self-consciously polemical: I worry about ongoing appropriations of Schmitt's (authoritarian right-wing) theory,

and I think readers should worry as well. Nor do I view Schmitt's growing popularity as unrelated to the growth of illiberal and antidemocratic trends worldwide.

Unfortunately, I have not been able to update references or citations by including in them the (massive) additional scholarly literature that has appeared in the past two decades. The most obvious change is that a chapter on Hans Morgenthau has been dropped, chiefly because I have since dealt elsewhere at length with Morgenthau's relationship to Schmitt.[7]

The biggest additions are three new chapters examining Schmitt's role in recent debates about crisis or emergency government. Though neglected in the first edition, Schmitt's ideas about emergency power have probably turned out to be his most significant jurisprudential contribution. As I write, U.S. President Donald Trump has declared a "state of emergency," with Trump advisor Stephen Miller aggressively defending his actions in terms that sometimes echo Schmitt's authoritarian vision of emergency government.[8] Unfortunately, Schmitt's thinking on emergency government remains extraordinarily timely. More generally, some of his core ideas seem to be undergoing a rebranding as elements of what pundits and scholars now describe as "authoritarian populism," something I briefly consider in the volume's concluding section.

## NOTES

1. On Schmitt's antisemitism, see Raphael Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory* (Madison: University of Wisconsin Press, 2007). One key difference between my interpretation and Gross' is that I think Schmitt sometimes poses insightful questions for political and legal theory, even though he consistently answered them in the worst possible fashion.

2. Even smart authors who should know better downplay Schmitt's enthusiasm for the Nazis. Oona Hathaway and Scott Shapiro note, for example, that even though Schmitt was a Nazi party member, "he was no ideologue of National Socialism," though they never really explain what being an "ideologue" would have entailed beyond Schmitt's activities (*The Internationalists: How a Radical Plan to Outlaw War Remade the World* [New York: Simon & Schuster, 2017], 218).

3. In particular, Mariano Croce and Andrea Salvatore, *The Legal Theory of Carl Schmitt* (London: Routledge, 2013); Michael Head, *Emergency Powers in Theory and Practice: The Long Shadow of Carl Schmitt* (Burlington, VT: Ashgate, 2016), 113–42; Volker Neumann, *Carl Schmitt als Jurist* (Tübingen: Mohr Siebeck, 2015); see many essays collected in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2016). Lars Vinx's excellent overview also pays proper attention to Schmitt's jurisprudence: "Carl Schmitt," *Stanford Encyclopedia of Philosophy* (spring 2016 edition),

available at: https://plato.stanford.edu/archives/spr2016/entries/schmitt/ (last accessed May 12, 2019).

4. For example, Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge: Cambridge University Press, 2008). Chantal Mouffe has long actively reappropriated Schmitt as part of her attempt to formulate an "agonistic" theory of democracy (Mouffe, *The Return of the Political* [London: Verso, 1993]).

5. For an opposing view, see William Rasch, "Carl Schmitt's Defense of Democracy," in *Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenreich and Oliver Simons (New York: Oxford University Press, 2016), 312–37.

6. For a skeptical take on Schmitt as a political theologian, see Aaron Roberts, "Carl Schmitt—Political Theologian?" *Review of Politics* 77 (2015): 449–74.

7. William E. Scheuerman, *Hans J. Morgenthau: Realism and Beyond* (Cambridge: Polity Press, 2008).

8. This should not perhaps surprise us, since Miller may have been befriended and mentored at Duke University by Richard Spencer, a far-right "white nationalist" who has publicly claimed inspiration from Nietzsche, Schmitt, and others.

# Acknowledgments

I incurred many intellectual debts while writing this study. Fred Whelan and the late Iris M. Young, former colleagues at the University of Pittsburgh (where I taught when the first edition was published), regularly offered generous advice. Vivian Curran and Albrecht Funk did so as well. Peter Caldwell and David Dyzenhaus also read more of the original manuscript than they probably care to recall. I also gained from exchanges about Schmitt with Renato Cristi, John P. McCormick, and Stanley Paulson. Ingeborg Maus and Peter Niesen were gracious hosts while I was in residence at the University of Frankfurt. The Alexander von Humboldt Stiftung (Bonn) and German Marshall Fund made it possible for me to take time off from my teaching schedule.

More recently, Bill Rasch, a colleague at Indiana University, has been a constant source of insights about Schmitt and his legacy. Our intense disagreements have forced me to think harder about the tough issues raised by Schmitt; I have been very lucky to have Bill as a conversation partner on all matters related to Schmitt. Many others, too numerous to list here, offered insightful criticisms on the volume's final chapters, at events at Indiana University Law School, Michigan State University, Purdue University, University of Texas (Austin), and the University of Vienna. Volker Schmitz helped me ready the updated edition for publication. Unless existing English translations have been cited, or otherwise noted, translations are my own.

Finally, much of the book represents a "silent dialogue" with one of my dissertation advisors, the late Judith N. Shklar, who synthesized—as I try to do here—political and legal theory in a fashion that has become far too uncommon among political scientists.

Some earlier sections of the manuscript appeared in the *Cardozo Law Review*, *Constellations*, *History of Political Thought*, *Journal of Political Philosophy*, *Oxford Handbook of Carl Schmitt*, *Review of Politics*, *Theory and Society*, and *Vienna Lectures on Legal Philosophy*. They are reprinted with permission of the publishers.

# Introduction: Why Carl Schmitt?

Carl Schmitt belongs among the ranks of twentieth-century Europe's most influential political and legal theorists. Schmitt's ideas have long been familiar to intellectuals in many parts of Europe, and some of the indisputable theoretical giants of our era (including both Jürgen Habermas and Leo Strauss) have devoted significant energy to the task of critically responding to Schmitt. As I hope to show in this study, Schmitt exerted a subterranean influence on postwar American political thought as well. Since the terrorist attacks at the outset of the twenty-first century in the United States, the United Kingdom, and elsewhere, liberal governments have responded with a volley of emergency measures. In the recent debate about such measures, Schmitt's ideas have played a prominent role.

Schmitt was also a reactionary critic of the Weimar Republic, Germany's first experiment in liberal democracy, who early on allied himself with Weimar's authoritarian opponents. In 1933, he joined the National Socialist Party and devoted some of his best years to the Nazi cause. As he aspired to formulate the outlines of an identifiably National Socialist system of law, Schmitt's Nazi period was his most prolific.

How are we to make sense of the nexus between Schmitt's theory and his political choices? The scholarly literature on Schmitt is rich and wide-ranging. However, too many scholars continue to downplay Schmitt's Nazi activities and the role he played in legitimizing a dictatorial alternative to the crisis-ridden Weimar Republic during the early 1930s.[1]

This study sketches out an alternative course. Despite massive interest in Schmitt, many readers fail to highlight the central place of Schmitt's ideas about law in his intellectual agenda. The fact that Schmitt's controversial reflections about sovereignty, dictatorship, parliamentary government, the welfare state, and international politics ultimately derive from a fundamental

critique of liberal jurisprudence tends to get obscured. To provide a more balanced picture of Schmitt's views, it is necessary to make an analysis of his ideas about law the focal point of that picture.[2] Furthermore, Schmitt's political and legal theory generates troublesome questions for those of us committed to defending liberalism's most basic protection against arbitrary power, the rule of law. If we are to preserve and strengthen the rule of law, we are intellectually and politically obliged to provide an answer to Schmitt's attack on it. We caricature or ignore Schmitt's ideas at our own risk.

I intend to demonstrate that Schmitt's political choices were intimately related to his critique of liberal jurisprudence. Schmitt embraced National Socialism because he (wrongly) believed that National Socialism could overcome the weaknesses of liberal legal theory and practice. For Schmitt, the bankruptcy of liberal law necessitated an authoritarian right-wing alternative to it. After 1933, Schmitt disastrously tried to solve what is now widely described within contemporary debates about the rule of law as the "crisis of legal indeterminacy"—by formulating a National Socialist alternative to liberal jurisprudence.

## I

Who was Carl Schmitt? A fascination with Schmitt's eventful biography, together with a relative neglect of his complex political and legal theory, plagues some of the English-language literature on Schmitt.[3] In order to compensate for this tendency, the exegesis here tends to focus on Schmitt's published writings. Nonetheless, a preliminary biographical and historical backdrop for Schmitt's theory would be useful.[4]

Schmitt was born on July 11, 1888, to a Catholic family of modest means in the provincial town of Plettenberg in the western part of Germany, in what now is part of the state of North Rhine Westphalia. He died in the same town on the Monday following Easter Sunday in 1985 at the age of ninety-six. His life spanned the heyday of the *Kaiserreich* (German Empire), the rise and fall of the Weimar Republic, Nazism, division of Germany by the Allies, the establishment and stabilization of the Federal Republic after 1945, as well as two world wars, the German Revolution (of 1918), the horrors of the Holocaust, the Cold War, and the construction of the Berlin Wall. Although he continued to write and correspond well into the final years of his life, Schmitt's most impressive intellectual achievements date roughly from World War I until the early 1950s.[5]

Schmitt studied law in Berlin, Munich, and Strasbourg, where he successfully earned his law degree in 1910, before completing his *Habilitationsschrift*, the traditional prerequisite for pursuing an academic career in Germany, in

1914.[6] Because of back injuries during basic training, he was exempted from service on the front during World War I. Instead, Schmitt worked for the quasi-dictatorial military government in power in Germany at war's end, ultimately helping to oversee the activities of the peace movement and left-wing socialists (USPD [Unabhängige Sozialistische Partei Deutschlands]) for the general staff. His first marriage in 1916 ended in embarrassment: Schmitt married a Serbian woman, Pawla Dorotic, who deceptively claimed an aristocratic background. Schmitt's attempt to divorce her brought him into conflict with the Catholic Church. When his plans to remarry in 1926 garnered a hostile response from the church, he nonetheless went ahead and did so despite the fact that he seems to have been well aware that excommunication inevitably would follow.

In my view, Schmitt's subsequent estrangement from Catholicism was probably genuine. Religious themes play at most an insignificant role in his writings from the late 1920s, and during the Nazi period Schmitt clearly distanced himself from Catholicism. Although his Catholic background is self-evident in some of his works, one ought not to exaggerate the theological overtones of Schmitt's political and legal theory.[7] For most of his career, Schmitt was a relatively secular-minded jurist, not a "political theologian" concerned with waging an intellectual crusade against atheism. Even though the currently fashionable tendency to read Schmitt as a "political theologian" or even a closet Catholic theologian has produced some illuminating results, it risks obfuscating the significance of his ideas for contemporary political and legal theory.[8]

During the Weimar period, Schmitt taught at Munich, Bonn, and then Berlin. He served as a legal adviser to the executive-centered emergency regimes established in Germany in the wake of the economic depression in 1929 and helped coordinate the legal case of those who unconstitutionally dismantled the (Social Democrat-led) Prussian state government in the "coup against Prussia" (*Preussenschlag*) of 1932.[9] Although Schmitt before 1933 probably hoped for a right-wing authoritarian solution to Weimar's crisis along lines distinct from those of the Nazis, after the Nazi takeover he immediately linked hands with Germany's new rulers. On May 1, 1933, he joined the National Socialist Party and soon garnered a number of prominent posts within the Nazi hierarchy. Despite a feud with elements of the SS in 1936 that forced him to surrender some of his positions, Schmitt remained a vocal Nazi legal thinker who played a central role in heated debates within Germany about international law and politics. He continued on as an outspoken professor in Berlin until 1945. In my view, his writings from this period provide no support for his postwar self-exculpatory claim that after 1936 he opposed National Socialism.

After the war, Schmitt was banned from teaching in part because he refused to comply with the formalities of denazification. Nonetheless, his

residence in Plettenberg served as an intellectual second home to both older and younger German conservatives hostile to democratic politics and the "Americanization" of West Germany that was such a striking facet of both popular and political culture there after World War II.[10]

Though Schmitt never publicly apologized for his complicity in the horrors of National Socialism, his influence within Europe at the time of his death in 1985 was clearly on the rise. Since then, a veritable "Schmitt renaissance" has taken place.

## II

No issue has excited the interest of jurists in our century more than the enigma of legal indeterminacy. No thinker has arguably had more to say about that enigma than Carl Schmitt.

According to the mainstream of modern liberal theory, the rule of law at a minimum requires that legal norms be (1) general in character, (2) relatively clear, (3) public, (4) prospective, and (5) stable. According to liberals, only laws of this type can help provide legal equality, assure fair notice, and preserve the accountability of government officials to citizens.

The rule of law renders state action predictable and makes an indispensable contribution toward individual freedom. Generality protects against arbitrariness by helping to guarantee that like cases be treated alike. Clarity means that the activities of those applying or enforcing the law can be held to relatively coherent standards and thus effectively controlled. Publicity demands that citizens have fair notice of when and how the state will intervene.

Similarly, laws must exist at the time an act is committed in order to furnish fair notice. Stability within law not only facilitates fair notice as well but also helps bind officials to legal norms and minimizes potentially undesirable exercise of discretion.

Imagining how a legal system lacking the virtues of the rule of law would look provides a quick grasp of the strengths of the liberal argument. By permitting government to single out individuals in an unprincipled manner, norms treating like cases in an unlike way potentially represent an abrogation of minimal standards of fairness. Excessively vague laws risk giving judges and administrators unwarranted discretionary powers. Secret and retroactive laws make it impossible for citizens to know how government is permitted to act and, moreover, render the idea of the accountability of government to the governed anachronistic.[11] Confusing changes in the legal system exacerbate the problem of unaccountability and potentially allow officials to usurp powers that may not properly belong to them. From the perspective of the ruled, such a political order means inconstancy and insecurity.[12]

Two trends in our century pose a considerable challenge to the liberal model of the rule of law. First, substantial evidence suggests that necessary forms of state intervention in the capitalist economy, as well as the concomitant expansion of the state's social welfare activities, result in placing significant discretionary power in the hands of judges and administrators.

Faced with a series of arduous regulatory and social policy tasks, legislators have sometimes done little more than write blank checks to government officials, who then face the unenviable task of implementing laws that provide little meaningful guidance.[13] Second, the proliferation of powerful constitutional courts, endowed with generous powers of judicial review over legislation, has arguably accelerated trends toward discretionary government.

Before 1945, judicial institutions along the lines of the mighty American Supreme Court were rare. Today they are relatively commonplace within liberal democracy. From a traditional perspective, this institutional development raises problems to the extent that constitutional norms are often by necessity relatively imprecise and vague (e.g., "the due process of law"). In principle, the judicial review of legislation and the rule of law are consistent. But the rule of law probably requires that constitutional courts engage in relatively limited forms of judicial review.[14] For better or worse, constitutional judges have not always respected this maxim. In the name of constitutional clauses open to a multiplicity of competing interpretations, constitutional judges have often opted to exercise far-reaching power in opposition to relatively clear statutes promulgated by legislatures.

Contemporary legal theory has responded to these challenges in three ways.[15] One answer entails reformulating the rule of law in terms of what we might describe as the limited indeterminacy thesis. According to this view, it is advisable to accept the necessity of a relatively significant sphere of discretion. Even the most cogent rule can be interpreted in relatively distinct ways; a certain amount of open-endedness necessarily inheres even in clear linguistic utterances.[16] Moreover, administrative and judicial discretion can serve legitimate purposes, and it sometimes makes sense for a polity to delegate discretionary authority to courts or bureaucrats.[17] In short, the early liberal view, as suggested by Baron de Montesquieu and others deeply hostile to judicial discretion, that the rule of law implies that there is necessarily only one determinate answer to every legal question, is overstated. But even if the legal material fails to dictate a single correct answer, it still constitutes a framework in which only a relatively limited set of answers is acceptable.[18] A commitment to the rule of law requires that forms of "indeterminacy" within the law ultimately remain peripheral to the overall activities of the legal system. In this view, legal indeterminacy can be effectively contained: most cases are "easy," though the legal system inevitably contains some set of "hard" cases.

Most liberal legal thinkers described as "formalists" fall into this category.[19] Many contemporary legal positivists do as well, as do some nonpositivists who have tried to defend a relatively rigorous conception of the rule of law.[20]

Like the first view, the second answer grapples with present-day legal realities by acknowledging that the liberal state no longer operates, if it ever did, in accordance with ideal models of perfect legal determinacy. But according to those who endorse the *undeterminacy thesis*, the legal materials (rules, statutes, precedents), typically emphasized in traditional defenses of the rule of law, generally provide minimal guidance to those faced with the tasks of interpreting and enforcing the law. Rules allow decision makers to act in a surprising diversity of ways; vague standards are necessarily ubiquitous within the law; rules often collide. Inevitably, the application and enforcement of the law are vastly more open-ended, creative processes than those committed to the limited indeterminacy thesis acknowledge. Most cases are hard, and only a few are easy. For theorists in this second camp, conventional legal materials represent an indispensable component of legal interpretation. Yet they inevitably fail to take decision makers as far as formalists typically claim.

In their more cautious moments, the legal realists probably fall within this group.[21] The contemporary free-market jurist Richard Posner does as well. Hostile to legal formalism, Posner nonetheless claims allegiance to the traditional "desire for impersonality and objectivity, for government of laws and not of men."[22] Legal materials go some way toward guiding judges. But for Posner, legal regularity is guaranteed chiefly by free-market economics and its (alleged) capacity for generating predictable results. Economic thinking should guide judges faced with the task of interpreting the substantial array of legal materials characterized by ambiguity.

Though in a different way, Ronald Dworkin falls under this rubric as well. Dworkin argues that a responsible legal decision maker is obliged to make sure that his interpretation of the law "fits" the legal materials at hand.[23] But Dworkin, like Posner, doubts that the traditional legal materials emphasized by formalist models of the rule of law are likely to render decision making sufficiently determinate. For Dworkin, legal interpretation, in accordance with what he describes as "integrity," means that judges necessarily must rely on the most coherent or "best possible" interpretation of the political morality of the community of which they are a part. Within the United States (and probably other liberal democracies as well), this means that the underlying coherence of law can be preserved only if judges grant a relatively significant place to controversial interpretations of liberal ideals of fairness and justice.[24]

A third group responds to the ubiquity of discretionary power within contemporary liberal democracy by embracing the radical indeterminacy

thesis. Recent empirical challenges to the liberal state simply underline the bankruptcy of the liberal dream of regulating power by clear general norms. In this view, legal indeterminacy is both pervasive and irreparable. Every application and enforcement of the law is willful in the sense that legal materials allow for virtually any conceivable answer to the question at hand. All cases are hard. The rule of law is a myth insofar as it obscures the fact that legal materials are "empty vessels" into which judges and administrators engage in freewheeling forms of political and social judgment unconstrained by the law. Posner and Dworkin simply do not go far enough. The problem is not just that rules are notably incomplete and thus must be supplemented by background methods or principles (in Posner's case, free-market economics; in Dworkin's, liberal political morality). Legal interpretation entails creating meaning for rules where none existed beforehand. Theorists within this camp are skeptical of attempts to reestablish the possibility of legal determinacy by appealing to ideals or principles allegedly embedded within the liberal legal system since for them liberalism itself is internally contradictory. Hence, principles implicit within every liberal legal order are unavoidably inconsistent and contradictory as well. Determinacy in law thus cannot be established by appeal to liberal law's immanent principles since a deep indeterminacy exists also at that level.[25]

In the United States, this position has been embraced by radicals in the legal academy hoping to discredit the claim that ours is a law-based state. Certain variants of legal realism can be grouped under this category as well as some of the more drastic strands within Critical Legal Studies (CLS).[26]

How does Carl Schmitt fit into these debates? Of course, Schmitt's times and intellectual context were different from our own. It should come as no surprise that Schmitt's theory resists neat codification into any of the distinct categories of argumentation just described. Schmitt has no close relations in legal theory in the United States today, and no influential American legal theory even remotely resembles Schmitt's heinous Nazi-era ideas. At most, there are potentially illuminating parallels between some of his ideas and those of contemporary writers on the rule of law.[27]

As I show in chapter 1, Schmitt very early endorsed ideas about legal indeterminacy that clearly took him well beyond traditional notions of the limited determinacy of law. In some contrast to contemporary North American defenders of both the underdeterminacy and radical indeterminacy theses, however, he believed that the critique of formalist jurisprudence necessarily pointed the way toward an assault on liberal models of deliberative parliamentarism (chapter 2), constitutionalism (chapter 3), the state/society divide (chapter 4), and international law (chapter 6). Schmitt exploited what he took to be the Achilles' heel of liberalism—formalist jurisprudence—in order to discredit liberalism altogether. Pace liberalism, legal decision making

inevitably rests on untrammeled discretion: the inevitability of a constitutive "pure decision" at the basis of every legal act demonstrates the bankruptcy of "normativistic" liberalism as a whole.

From Schmitt's perspective, the enigma of legal indeterminacy provided an effective intellectual weapon in the right-wing authoritarian assault on liberal democracy. Pervasive gaps within liberal law could be exploited for the sake of exploding the confines of liberalism.

Schmitt failed in his attack on liberalism. Too often, his theory depends on a problematic mix of intellectual caricature and historical myth. Even his critique of formalist liberal jurisprudence stumbles for this reason: like many more recent critics of formalism, Schmitt conveniently ignores its subtlety.

Yet his reflections on legal indeterminacy raise provocative questions for contemporary political and legal theory. Within North America, those who endorse radical conceptions of indeterminacy too often seem sure that the deconstruction of liberal jurisprudence constitutes a necessary first step toward establishing a progressive alternative to liberal democracy. Discrediting even modest versions of the idea of a determinate legal order is essential if we are to move beyond the sad status quo of contemporary liberal democracy. Allegedly, the attack on formalism prepares the way for a more just and equitable political and social order.[28]

The example of Carl Schmitt suggests otherwise. Schmitt's dramatic ideas about legal indeterminacy early on made him a defender of rightist dictatorship and then of National Socialism (chapter 5). For Schmitt, only authoritarian political systems can fully acknowledge the fundamentally bogus character of the liberal rule of law. In this theory, the systematic deconstruction of the rule of law clears the way not for left-wing utopia but right-wing authoritarianism. Schmitt's writings remain a thorn in the side of all those jurists who have yet to explain adequately why the dismantling of the rule of law is likely to make more freedom and equality possible, rather than robbing us of the (insufficient) liberties and equality we presently possess. In my view, radical jurists express many legitimate anxieties about the profound dilemmas faced by capitalist liberal democracy today, whereas contemporary liberals too often close their eyes to the shocking ills of an increasingly bankrupt political system, growing economic inequality, and continuing racial injustice. But contemporary jurists are wrong to think that the best way to start dealing with such problems is by tossing the achievements of liberal jurisprudence out the window. No writer better illustrates the perils of a principled antiliberal jurisprudence than Carl Schmitt.

Schmitt also raises questions for liberal U.S. jurists committed to the underdeterminacy thesis. It is true that Schmitt never directly grappled with liberal versions of the underdeterminacy thesis like those common in contemporary jurisprudence; Schmitt too readily assumes that liberalism necessarily

entails a commitment to legal formalism. Yet it would be a mistake to dismiss the contemporary relevance of Schmitt's theory simply by noting that his views rest on a critique of traditional formalist jurisprudence at which prominent contemporary liberal jurists, such as Posner and Dworkin, look askance. Like many of his right-wing Weimar peers, Schmitt endorsed antiformalism within the law as a way of undermining Weimar's fledgling democratically elected parliament; in the German setting, antiformal jurisprudence served antidemocratic purposes.[29] Can contemporary critics of legal formalism avoid related dangers? Of course, Posner and Dworkin are committed to liberal democracy, and both would rightly express outrage at Schmitt's right-wing authoritarianism. Yet from the perspective of a traditional view of the legislature as the main site for lawmaking, both theorists provide some room for concern: according to one reading, Posner and Dworkin ultimately reduce the legislature to a junior partner in a decision-making structure dominated by judicial experts.[30] Within the context of a stable liberal polity, the attempt to compensate for the limits of traditional legal materials by heightened judicial reliance on free-market economics (Posner) or interpretations of liberal political ideals (Dworkin) may seem relatively unproblematic; both Posner and Dworkin persuasively suggest that substantial elements of American legal practice correspond to their (respective economic and political) liberal agendas. But what if the legal and political system at hand lacks the deeply rooted liberalism of American legal culture?[31] What if its immanent political morality arguably rests, as in many parts of Europe between the two wars, on substantial doses of authoritarianism, illiberalism, or anti-Semitism?[32] In that setting, providing judges with substantial authority to interpret the law in terms of what Dworkin describes as the most coherent or "soundest" reading of the community's immanent political morality may help strengthen reactionary forces, especially if liberal and democratic values are relatively fragile and underdeveloped.

Schmitt similarly sought to reestablish legal determinacy by looking beyond traditional formalist legal sources and methods. But for him this required a frontal assault on modern pluralism: legal determinacy could be guaranteed only if legal decision makers were rendered fundamentally "homogeneous" in orientation. As early as 1912, Schmitt therefore suggested that only a homogeneous judiciary could resolve the crisis of legal indeterminacy. After 1933, Schmitt elaborated this idea into a full-fledged defense of National Socialist law. Interestingly, recent defenders of the underdeterminacy thesis have struggled to demonstrate that a far-reaching reliance on nontraditional legal materials and methods need not generate antipluralistic results. Posner, for example, argues—in my view unconvincingly—that his preference for a judiciary committed to free-market values is basically uncontroversial since the formal tenets of law and economics rest on a broad

consensus within contemporary society.[33] Here as well, the example of Carl Schmitt highlights the seriousness of a dilemma that contemporary jurists often prefer to downplay. Within pluralistic societies, attempts to reestablish legal predictability and regularity by appeals to suprapositive methods are often more partisan than their defenders concede.

Schmitt's political and legal theory does not offer a reasonable alternative to any of the most influential currents in contemporary debates about the rule of law. Yet both proponents of the liberal rule of law and radical critics could do worse than by grappling seriously with Schmitt's terrible legacy.

## III

The exegesis of Schmitt's political and legal theory in part 1 of this study is devoted to encouraging an exchange between contemporary political and legal theorists and Schmitt's legacy. Part 2 then examines a dialogue that has *already* taken place between Schmitt and American political thought.

Schmitt's influence on some important voices within postwar American political and legal theory has been widely documented.[34] Yet the story of Schmitt's impact on postwar political thought in the United States remains incomplete. Take Joseph A. Schumpeter's enormously influential democratic theory (chapter 7) or Friedrich A. Hayek's free-market critique of the welfare state (chapter 8): each was shaped by a more or less hidden debate with Carl Schmitt. Neither was a principled "Schmittian" in any sense of the term, and each opposed Schmitt's own political preferences and significant parts of his theory. Nevertheless, each author was ultimately influenced by Schmitt: Schmitt was more than a parochial "German thinker" lacking in significance for American political and legal thought.

Finally, we examine Schmitt's key role in recent debates about emergency or "crisis government." Following the 9/11 terrorist attacks on the World Trade Center and Pentagon, and many subsequent attacks elsewhere, legal scholars quickly turned to Schmitt's ideas about emergency powers to begin rethinking how liberal states might best respond. Even more recently, Schmitt's ideas have loomed large in thinking about the 2008 financial and other "global" crises. Schmitt's theory of emergency powers, more than any other intellectual contribution he made, has ignited a massive political and legal debate; we need to pay careful attention to it. Although Schmitt may initially seem to offer a sturdy springboard for diving into the difficult political and jurisprudential issues at hand, that springboard remains flawed. Not surprisingly, the recent preoccupation with Schmitt among analysts of emergency power, even among well-meaning progressive-minded legal scholars, generates many problematic consequences.

## NOTES

1. Important studies that have broken with this pattern are the following: Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales, 1998); and John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (New York: Cambridge University Press, 1997). Also, see the essays collected in David Dyzenhaus, ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998). My differences in relation to these works will be developed during the course of the exegesis that follows.

2. An impressive body of German-language literature on Schmitt does make Schmitt's critique of liberal jurisprudence central to an analysis of his theory: Hasso Hofmann, *Legitimität gegen Legalität. Der Weg der politischen Philosophie Carl Schmitts* (Berlin: Luchterhand, 1964); Matthias Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitts Staats—und Rechtslehre* (Freiburg, Breisgau: Karl Alber, 1988); Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus: Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (Munich: Wilhelm Fink, 1980); and Peter Schneider, *Ausnahmezustand und Norm: Eine Studie zur Rechtslehre von Carl Schmitt* (Stuttgart: Deutsche Verlagsanstalt, 1957). Two excellent English-language discussions of Weimar political and legal thought also fall into this category: Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, NC: Duke University Press, 1997); and David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997).

3. The result has been a tendency to write about Schmitt from the perspective of his own postwar account of his experiences under the Nazis. Not surprisingly, studies of this type tend to be apologetic. Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, NJ: Princeton University Press, 1983); and George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (Westport, CT: Greenwood Press, 1989).

4. I depend here primarily on the reliable account by Manfred Wiegandt, "The Alleged Accountability of the Academic: A Biographical Sketch of Carl Schmitt," *Cardozo Law Review* 16 (1995): 1569–98.

5. For this reason, I focus here on this period in Schmitt's long career.

6. Schmitt's Habilitation was entitled *The Value of the State and the Significance of the Individual* [*Der Wert des Staates und die Bedeutung des Einzelnen*] (Tübingen: Mohr, 1914). I discuss this text at length in chapter 1. The Habilitation is a sort of second dissertation.

7. In a study well received in Catholic circles in the 1920s, *Römischer Katholizismus und politische Form* [*Roman Catholicism and Political Form*] (Munich: Theatiner, 1925), Schmitt aspired to formulate and defend an identifiably Catholic conception of political representation. But in Schmitt's most important Weimar and Nazi-era treatises after his excommunication in 1926, Catholic themes are peripheral. It is true that Schmitt was fascinated by the problem of secularization, for example, in *Political Theology: Four Chapters on the Concept of Sovereignty* [1922], trans.

George Schwab (Cambridge: MIT Press, 1988), yet this no more provides unambiguous evidence of the preponderance of religious concerns within Schmitt's theory than it would, say, of Max Weber's account of "disenchantment" [*Entzauberung*]. Catholicism surely influenced Schmitt. But an exaggerated exegetical emphasis on religious motifs tends necessarily toward the esoteric in light of the fact that Schmitt's major works of interest to this study were nonreligious in character. For an excellent account of Schmitt's ideas about secularization that rightly avoids overstating Schmitt's Catholicism, see Ilse Staff, "Zum Begriff der Politischen Theologie bei Carl Schmitt," in *Christentum und Modernes Recht*, ed. Gerhard Dilcher and Ilse Staff (Frankfurt am Main: Suhrkamp, 1984), 182–208. Staff shows that Schmitt's theory at crucial junctures conflicts dramatically with the Christian belief in the equal value of every human being as well as certain traditional Christian reservations about the use of violence within the political sphere (200–1, 204–5).

8. For discussions focusing on Schmitt's theological background, see Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum "Kronjuristen des Dritten Reiches"* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1995); and Bernd Wacker, ed., *Die eigentliche katholische Verschärfung. Konfession, Theologie und Politik im Werk Carl Schmitts* (Munich: Wilhelm Fink, 1994).

9. On this moment in the history of Weimar and Schmitt's role in it, see David Dyzenhaus, "Legal Theory in the Collapse of Weimar: Contemporary Lessons?" *American Political Science Review* 91 (1997): 121–34.

10. Dirk van Laak, *Gespräche in der Sicherheit des Schweigens: Carl Schmitt in der politischen Geistesgeschichte der frühen Bundesrepublik* (Berlin: Akademie Verlag, 1993).

11. In this spirit, John Rawls comments that "if the precept of no crime without a law is violated, say by statutes being vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our liberty are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise" (*The Theory of Justice* [Cambridge, MA: Harvard University Press, 1971], 239–40).

12. For important recent discussions of the rule of law, see Joseph Raz, *The Authority of Law: Essays in Law and Morality* (Oxford: Clarendon Press, 1979), 210–29; Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory," *Ratio Juris* 2, no. 1 (1989): 79–96; Richard H. Fallon, Jr., "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97, no. 1 (1997): 1–56; and Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, NJ: Princeton University Press, 1990), 9–12, 22–56. For a broader historical perspective on the evolution of the rule of law, see Franz L. Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986).

13. On the American case, see Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2nd ed. (New York: Norton, 1979); and Cass Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge, MA: Harvard University Press, 1990).

14. Raz, *Authority of Law*, 217. Of course, this is a complicated issue; I cannot do justice to it here. My point is simply that conflicts are possible between the rule of law, as traditionally conceived, and certain forms of constitutional jurisprudence.

15. I have been inspired by an excellent attempt to elaborate on different conceptions of legal indeterminacy: Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," *University of Chicago Law Review* 54, no. 2 (1987): 462–503; and "Indeterminacy," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Oxford: Blackwell, 1996), 488–502.

16. In this vein, H. L. A. Hart argued that we should see the legal system as consisting of "a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules" (*The Concept of Law* [Oxford: Clarendon Press, 1961], 119). In this view, rules contain both a core of settled meaning and a penumbra of relative indeterminacy.

17. Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969).

18. For an example of this view, see Hans Kelsen, *The Pure Theory of Law* [*Die Reine Rechtslehre*], trans. Max Knight (Berkeley; LA: University of California, 1967), 351–52.

19. In accordance with this usage, subsequent references in this study to "formalism" refer to this model. Note, however, that formalism in the context of the limited indeterminacy thesis entails no necessary commitment to controversial attempts to defend a strict division of law from morality or politics. Some defenders of the limited indeterminacy thesis embrace such views (e.g., Hans Kelsen); others do not. As Judith N. Shklar has noted, "It is . . . one thing to favor the ideal of a Rechtsstaat above all ideological and religious pressures, and quite another to insist upon the conceptual necessity of treating law and morals as totally distinct entities" (*Legalism: Law, Morals, and Political Trials* [Cambridge: Harvard University Press, 1986], 43). The formalist position is more subtle than many of its critics concede, who wrongly read it as entailing perfect determinacy in legal decision making. Contemporary critical literature on liberal jurisprudence is filled with crude caricatures of the formalist position (David Kairys, ed., *The Politics of Law: A Progressive Critique* [New York: Pantheon, 1982]). As will become evident, Carl Schmitt relied on such caricatures as well.

20. For a defense of this view, see Frederick Schauer, "Formalism," *Yale Law Review* 97 (1988): 509–48. By means of a reinterpretation of the Frankfurt School jurists Franz L. Neumann and Otto Kirchheimer, I have tried to defend a social democratic version of the limited determinacy thesis in my *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1994). In the present study, I will not undertake to present a detailed conceptual defense of the limited indeterminacy thesis, in part because I think that others are already doing so with great effectiveness. My interest here lies chiefly in pointing to some of the perils of certain forms of antiformalism within legal theory and practice. In my view, those dangers are badly downplayed within the United States. Although it would be absurd to assert that all roads beyond legal formalism lead to Carl Schmitt, it is incumbent on those critical of traditional forms of liberal jurisprudence to grapple seriously with the dangers posed by Schmitt's fascist variety of antiformalism. I also think that formalists can learn something from Schmitt: few other theorists in this century have shown as clearly how the empirical reality of contemporary liberal

democracy conflicts with formalist legal aspirations. Whereas Schmitt relies on this insight to discredit formalism, in my view it suggests instead the need for substantial political and social reforms. For some modest proposals along these lines, see William E. Scheuerman, "The Rule of Law and the Welfare State: Towards a New Synthesis," *Politics and Society* 22, no. 4 (1994): 195–213.

21. William W. Fischer III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (New York: Oxford University Press, 1993).

22. Richard A. Posner, *Overcoming Law* (Cambridge, MA: Harvard University Press, 1995), 18. The best overview of Posner's theory is Richard Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990). I thematize Posner's antiformalism in my "Free Market Anti-Formalism: The Case of Richard Posner," *Ratio Juris* 12 (1999).

23. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), especially 225–32.

24. Put crudely, both Posner and Dworkin see those legal materials emphasized by proponents of the limited indeterminacy thesis as highly indeterminate but hope to compensate for this indeterminacy by relying on certain suprapositive methods and ideals, namely classical liberal economics (Posner) and liberal political morality (Dworkin).

25. For the classic statement of this argument, see Duncan Kennedy, "Form and Substance in Private Law Adjudication," in *Essays on Critical Legal Studies* (Cambridge, MA: Harvard Law Review, 1986). I am unconvinced that arguments of this type are as destructive of traditional liberal legal ideals as their proponents claim. Even Cass R. Sunstein, although hardly an ally of traditional formalist jurisprudence, rightly notes that "people can urge a 60-mile-per-hour speed limit, a prohibition on bringing elephants into restaurants, a ten-year maximum sentence for attempted rape, and much more without taking a stand on debates between Kantians and utilitarians. . . . [R]ules sharply diminish the level of disagreement among people who are subject to them and among people who must interpret and apply them. When rules are in place, high-level theories need not be invoked in order for us to know what rules mean, and whether they are binding." Effective rules are often realizable even in the context of profound moral and political disagreement. Indeed, we often negotiate such disagreement by means of rule making: rules are a powerful instrument for facilitating social cooperation, given real-life restraints of time and energy that often prevent actors from resolving fundamental moral and political disagreements (*Legal Reasoning and Political Conflict* [New York: Oxford University Press, 1996], 110–11).

26. For a survey, see Altman, *Critical Legal Studies*, 90–98. Altman rightly notes that CLS is a diverse and complex movement that cannot be easily summed up within a few sentences. Here I am simply referring to some (influential) lines of argumentation within CLS. On the relationship of legal realism to CLS, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995); and Andrew Altman, "Legal Realism, Critical Legal Studies, and Dworkin," *Philosophy and Public Affairs* 15, no. 3 (Summer 1986): 205–35.

27. I am not trying to engage in the game of guilt by association. Nor do I intend to suggest that those who embrace ideas that are occasionally reminiscent of Schmitt's

have already set out on the disastrous road to fascism or National Socialism. Yet I do think it fruitful to rely on Schmitt to point to some potential argumentative weaknesses within contemporary debates about the rule of law. In my view, too many contemporary American legal theorists exhibit a profound blindness in reference to the theoretical significance of the experience of totalitarian law in this century. This weakness risks rendering U.S. legal thought provincial and irrelevant.

28. See Duncan Kennedy, "Legal Formality," *Journal of Legal Studies* 2 (1973): 351–83; and Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (New York: Free Press, 1976), 221–22, 238–42. Although Unger has recently expressed some telling reservations about extreme versions of the radical indeterminacy thesis, his view of the formalist model of the rule of law as fundamentally fraudulent remains basically unchanged. In the spirit of his early writings, he also continues to express sympathy for a "case-by-case" system of law but one free of the traditionalist features of Anglo-American common law (*What Should Legal Analysis Become?* [New York: Verso, 1996], 63–77, 113–22). In addition, some CLS authors have tentatively acknowledged the open-ended political implications of the radical indeterminacy thesis. For example, Mark Tushnet concedes that "to say that indeterminacy means that disruption of the status quo becomes possible is not to say that disruption of the status quo in all its aspects is always desirable. . . . Nothing in the indeterminacy thesis asserts that disruption of everything is always desirable, or of course that disruption even of the unjust aspects is likely" ("Defending the Indeterminacy Thesis," *Quinnipiac Law Review* 16, no. 3 [1996]: 348). But even Tushnet ultimately views the task of clearing away the purported illusions of legal formalism as an important step toward greater political and social justice.

29. Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 1991). In Weimar, conservative judges and civil servants usurped substantial decision-making authority in order to challenge even modest reforms initiated by the legislature. They typically employed antiformalist devices (and reactionary interpretations of open-ended legal standards) to undermine parliamentary laws and constitutional norms in conflict with their own antidemocratic and socially conservative agenda. Weimar is theoretically interesting because it represents an example of a "transitional" legal system in which emerging liberal and democratic principles exist along with deep antiliberal and antidemocratic currents.

30. This is a complicated issue within both theories. Yet it is telling that both Dworkin and Posner tend to offer an unappealing portrayal of the legislature as dominated by irrational "special interests," which they then typically contrast to the superior rationality of judicial decision making. Within Dworkin's theory, the question at hand concerns the precise status of the requirement of "fit" within legal interpretation; in Posner's theory, it depends on the extent to which he is willing to condone judges who interpret ambiguous or open-ended legislation in accordance with free-market ideals.

31. Posner sees the common law as consistent with free-market ideals; Dworkin locates his interpretation of liberal political morality in many areas of American law. Of course, even American legal culture is by no means uniformly liberal. It long has

contained more than its own fair share of racism (Randall Kennedy, *Race, Crime, and the Law* [New York: Pantheon Books, 1997]).

32. The difficulties of what Dworkin describes as "wicked law" have been peripheral to his work (*Law's Empire*, 101–8). One of Dworkin's students, David Dyzenhaus, has gone much further in trying to tackle the difficulties that "wicked law" poses for antipositivist theory (*Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* [Oxford: Clarendon Press, 1991]).

33. Posner, *Overcoming Law*, 404. Sunstein has similarly highlighted the antipluralistic implications of Dworkin and Posner (*Legal Reasoning and Political Conflict*, 48–53, 96–100).

34. On Schmitt and Hans Kelsen, see Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 40–62, 85–119; and Dyzenhaus, *Legality and Legitimacy*, 38–160. On Schmitt and the Frankfurt School jurists, see Scheuerman, *Between the Norm and the Exception*. The intellectual connection between Schmitt and Leo Strauss has garnered much attention. For an introduction, see Robert Howse, "From Legitimacy to Dictatorship—and Back Again: Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt," *Canadian Journal of Law and Jurisprudence* 10, no. 1 (1997): 77–104.

*Part One*

# THE JURISPRUDENCE OF LAWLESSNESS

## *Chapter 1*

# The Crisis of Legal Indeterminacy

Carl Schmitt wasted no time before enthusiastically endorsing the National Socialist seizure of power in Germany. Immediately following passage of the fateful Enabling Act of March 23, 1933, Schmitt penned an array of apologetic essays in which he justified the Nazis' destruction of Weimar democracy as well as the persecution of Jews, Social Democrats, Communists, and other so-called national enemies.[1] Schmitt then helped draw up the *Reichstatthaltergesetz* of April 7, 1933, which effectively destroyed Germany's federal system and granted enormous legislative powers to Hitler and the Nazis.[2] Later that year, he put the finishing touches on *State, Movement, Folk*, which quickly became the object of a wide-ranging debate among German legal scholars anxious to influence the construction of a specifically Nazi legal alternative to the Weimar Republic's rendition of the liberal rule of law.[3] Although Schmitt seems to have preferred an alternative right-wing authoritarian solution to Weimar's crisis before 1933, he showed no reservations about embracing the Nazis in the immediate aftermath of their takeover. Both his academic and polemical writings from 1933 offer unambiguous evidence of Schmitt's fervent quest to ally himself with the National Socialist regime.

Central to understanding the relationship between Schmitt's horrible Nazi-era polemics and his often impressive pre-1933 writings, *State, Movement, Folk* both summarizes many of Schmitt's earlier criticisms of Weimar democracy and outlines the fundamental features of an alternative National Socialist legal order. Schmitt argues that the ongoing proliferation of vague, open-ended legal standards ("in good faith," "in the public interest," "public order"), already evident in the Weimar legal order and in every modern liberal democracy, suggests the anachronistic character of liberal conceptions of the rule of law. Although classical defenders of the rule of law repeatedly

emphasized the virtues of cogent, general legal norms, the liberal democratic legal order in fact decreasingly consists of such norms.

According to Schmitt, vague legal standards potentially provide a starting point for transforming the remnants of liberal law in accordance with National Socialist ideals. Consequently, jurists sympathetic to the ongoing "national renewal" should exploit ambiguous legal clauses by interpreting them in a manner compatible with Nazi aspirations. In the process, the vessel of existing German law can be filled with National Socialist concepts of a homogeneous German "folk community," even before the Nazis succeed in generating statutes explicitly attuned to their political project.[4]

In response to those worried about the obvious dangers posed by this agenda to traditional legal protections, Schmitt's *State, Movement, Folk* offers a clever answer. Judicial actors cannot be meaningfully regulated or bound by open-ended legal clauses anyway. How can a vague standard such as "in good faith" possibly assure any determinacy within judicial decision making? Hence, the emergence of amorphous clauses within liberal democracy rendered traditional liberal conceptions of judicial decision making problematic well before the onset of the "national renewal" in Germany. Of course, one might respond to Schmitt's observation here by demanding a halt to the proliferation of amorphous law. But *State, Movement, Folk* identifies two reasons for questioning this possible course of action. First, the exigencies of the contemporary interventionist state render vague legal standards "unavoidable and indispensable."[5] Traditional concepts of the legal norm are made obsolete by the emergence of necessary but highly complex forms of state action. Second, the indeterminacy intrinsic to amorphous legal standards turns out to be nothing but the tip of the iceberg. In Schmitt's view, "We have experienced that every [legal] word and every concept immediately becomes controversial, unsure, indeterminate and pliable in a fluctuating situation when different spirits and interests try to make use of them. . . . From this perspective, all existing legal concepts are 'indeterminate' legal concepts."[6] Classical liberal conceptions of a "mechanical and automatic binding" of the judge to the legal norm are clearly overstated. Pace liberal jurisprudence, all legal concepts are profoundly and unavoidably open-ended and indeterminate. Every legal decision is a hard case. Liberal demands to clarify and codify law are inherently flawed because no system of legal norms can hope to guarantee even a minimal degree of regularity and determinacy within legal decision making.

How then might the emerging Nazi political order guarantee some measure of control over the judiciary? Schmitt grasps that the expansion of possibilities for judicial discretion could work both *for* and *against* the Nazis; judges might exploit it in order to counter National Socialism. Just after endorsing the expulsion of Jews and purported political radicals from the civil service,

Schmitt argues that only a "bindedness to the folk" [*Volksgebundenheit*] and "ethnic homogeneity" [*Artgleichheit*] within the ranks of German jurists could successfully assure a measure of coherence within judicial decision making. Judicial actors must partake of German ethnicity if they are to grasp in full the subtleties and particularities of German law; ethnic Germans alone are "capable of seeing the facts of the case correctly, listening to statements rightly, understanding words correctly and offering a correct evaluation of people and things" within the confines of an intrinsically German legal system.[7] Effective legal interpretation rests on implicit assumptions deriving from our participation in the racial and ethnic life of a particular *Volk*. No matter that "ethnic cleansing" necessitates terror: in Schmitt's view, the struggle to develop an intrinsically German form of postliberal legal determinacy demands nothing less. Legal reform requires a reform of legal *decision makers*. Legal determinacy can never be adequately achieved by means of a particular set of legal statutes or doctrines. Yet a deeper and more dependable degree of legal determinacy allegedly might be realized by establishing an ethnically homogeneous judiciary, free of alien [*artfremde*] ethnic and racial tendencies. Because legal decision making to a significant degree relies on "unconscious movements" of ethnic origin, only a judiciary possessing a homogeneous, ethnically predictable composition can guarantee legal predictability and determinacy.

Chapters 5 and 6 scrutinize Schmitt's National Socialist legal and political theory. Here, I hope to trace its origins to Schmitt's pivotal early contributions to jurisprudence from the 1910s and early 1920s. First, I examine the roots of Schmitt's critique of liberal conceptions of judicial decision making, the crucial but oftentimes ignored *Law and Judgment* (1912) and *The Value of the State and Significance of the Individual* (1914) (I, II). Then I discuss the subsequent radicalization of Schmitt's hostility to liberal legal thinking that culminates in the militant antilegalism of *Political Theology* (1922) (III). I emphasize the role of Schmitt's reflections on the problem of the *indeterminacy* of law. Despite its central place within Schmitt's thinking, his reflections on legal decision making have been repeatedly ignored by the ongoing "Schmitt renaissance" in English-speaking countries.[8] Yet Schmitt's analysis of the problem of legal indeterminacy, which he first formulates in some of his earliest writings, anticipates crucial elements of the ominous arguments found in *State, Movement, Folk*. Although it would be wrong to deny that Schmitt's ideas about liberal democratic political and legal ideas undergo an evolution, or that his theorizing after 1930 takes on increasingly radical hues, Schmitt's early analysis of the problem of legal indeterminacy shows that his Nazi-era legal theory represents less of a dramatic break within his thinking than many commentators have been willing to concede. Within the problematic contours of Schmitt's legal thinking, his option for National Socialism,

unfortunately, rests on a terrible but consistent logic: Nazi law represented for Schmitt a logical answer to the most profound dilemmas of modern legal theory and practice.

## I

In this study, I hope to show that Carl Schmitt consistently relied on idealized and downright misleading interpretations of classical liberal political and legal ideals as instruments for mocking contemporary liberal democratic aspirations. In order to criticize the mundane realities of contemporary parliamentary government, Schmitt's *The Crisis of Parliamentary Democracy* (1923) hearkens back to a make-believe world of pristine nineteenth-century liberal parliamentarism. So as to debunk contemporary conceptions of liberal constitutionalism, Schmitt's *Constitutional Theory* (1928) offers a negative portrayal of twentieth-century *positivist* constitutionalist thinking and then contrasts it unfavorably to the ambitious constitutional ideals of early liberals like John Locke and Montesquieu. Schmitt's thinking on legal decision making similarly partakes of this rhetorically powerful, albeit intellectually suspect, ploy.

*State, Movement, Folk* asserts that liberal conceptions of legal decision making rest on a "normativistic faith" in a legal system free of loopholes and the corresponding view that all conceivable cases and situations can be unambiguously *subsumed* under a set of clear general norms. Liberals thus reduce the judge "to an automaton into which legal documents and fees are stuffed at the top in order that [they] may spill forth the verdict at the bottom along with the reasons, read mechanically from codified paragraphs."[9] In Schmitt's one-sided reading of liberal legal thought, Montesquieu's view of the judge as *la bouche, qui prononce les paroles de la loi* thus has exercised enormous influence.[10] Because of the impact of Montesquieu and those following in his footsteps, liberals allegedly believe that legal rules can guarantee a perfectly predictable and determinate decision in every conceivable case. Liberals believe that *all* legal decisions are "easy" cases, and *every* act of judicial subsumption can guarantee an unambiguously "right" answer.

Of course, one could argue against Schmitt here that the *underlying insight* of even relatively traditional liberal conceptions of judicial action takes a more modest—and defensible—form. Montesquieu is no more paradigmatic for liberal jurisprudence than Jean-Jacques Rousseau for democratic theory and practice; the resources of the liberal tradition are surely richer than Schmitt concedes. Even in the line of argumentation described above as the *limited indeterminacy thesis*, the idea of legal determinacy merely consists in claiming that a legal norm "cannot bind in every direction the act by which

it is applied. There must always be more or less room for discretion, so that the . . . [legal norm] . . . can only have the character of a frame to be filled by this act."[11] In this more subtle reading of the idea of the binding character of law, the interpretation of the statute or norm surely can lead to several distinct decisions, though hardly to an infinite variety of decisions. This set of possible answers remains relatively limited and predictable, for legal determinacy is always necessarily imperfect. Montesquieu's Enlightenment conception of mechanical jurisprudence indeed is anachronistic. At the same time, we probably cannot assure a minimum of legal predictability and security without a commitment to some version, however modest, of the idea of the binding character of the semantic structure of legal norms. Unless legal materials can provide at least minimal guidance to judicial and administrative actors, the ideal of the rule of law loses any significance.

Yet it is precisely this highly misleading reading of liberal thinking about judicial action that constitutes the initial target of Schmitt's 1912 *Law and Judgment: An Examination of the Problem of Legal Practice*. Here as well, Schmitt associates the core of liberal jurisprudence with Montesquieu's view of judicial action in order to caricature traditional liberal legal ideals before, not surprisingly, dismissing them out of hand. *Law and Judgment* easily demonstrates the crudeness both of Montesquieu's views and modern legal movements influenced by him, such as the German Conceptual Jurists [*Begriffsjurisprudenz*].[12] If laws could be perfectly clear and transparent, Schmitt claims, then liberals' mechanical view of judicial decision making might possess some value. But in light of the fact that only a tiny number of cases involve both an adequately clear legal norm and an act obviously meant to be determined by it, the concept of a "smooth subsumption" applies only to exceptional cases. In the overwhelming majority of situations faced by a judge, the liberal view provides no real help. Thus, Schmitt believes that his own contribution to a theory of legal decision making can rightfully *commence* from the assumption that "the traditional hermeneutics of valid law" has already been effectively discredited.[13] Given the manifestly anachronistic character of liberal views of legal judgment, Schmitt seems to believe that *Law and Judgment* need not be concerned with reconstructing an identifiably liberal conception of judicial decision making. From this perspective, the path *beyond formalism* ultimately leads *beyond liberalism*.

*Law and Judgment* proceeds to offer a rigorous critique of influential attempts within modern jurisprudence to compensate for the inadequacies of formalistic jurisprudence. To those who admit that judges necessarily are forced to downplay the letter of the law and hence should instead focus on legislative intent, Schmitt responds that such views rest on a misleading conflation of state organs with concrete individual human beings. Recourse to concepts of "the will of the legislator" or "the will of the statute" simply

obscures the nature of judicial action: the homogeneous, unified will implied by such terms is a fiction, a misleading personalization of state activity that made some sense in the context of Absolutism when lawmaking did rest on the will of a concrete individual.[14] But it makes no sense whatsoever as soon as numerous individual "wills" are implicated in the legislative process. And even if one disregards this initial problem, the fact remains that "it is factually impossible to ascertain the real, psychological content of the will of a definite human being . . . for a definite period of time."[15] An examination of legislative proceedings and historical documents related to the origins of a particular statute fails to resolve the dilemma at hand as well, for such materials should not be confused with the statute itself: "Only that published as a statute becomes a statute."[16] When relying on concepts of legislative intent, judges inevitably *construct* an ideal, rational legislator with little real relationship to the actual historical legislative process. "A 'will' suspended in the air above the judge is always first and foremost the result of an interpretation" and not, as defenders of this view posit, an objective state of affairs that a judge merely concretizes when engaging in legal interpretation.[17] Legislative "will" or intent is the product of legal interpretation, not its starting point. An (discretionary) interpretive act first *makes possible* those standards that judicial decision makers then, misleadingly, claim compose the basis of their decisions.

What then of the prominent Free Law Movement and its open acknowledgment of the discretionary character of all decision making? Anticipating many of the main arguments of American legal realism, the politically heterogeneous German Free Law Jurists similarly challenged formalistic conceptions of the law as a closed and unified set of norms. At first glance, *Law and Judgment* seems to bring Schmitt into close proximity to the Free Law Movement and its central claim that the unavoidability of judicial discretion legitimizes the judge's reliance on open-ended, suprapositive legal standards (e.g., "the needs of commerce").[18] But Schmitt considers the Free Law School insufficiently rigorous. The Free Law School extends the statutory basis of judicial action by introducing new and more flexible standards into the legal system, thereby providing a legal basis for judicial discretion. But according to Schmitt, its proponents still implicitly assume that judges nonetheless "subsume" individual legal acts under a set of legal rules, albeit a set of rules that has been substantially broadened. For Schmitt, the formalistic spirit of Montesquieu haunts even the most creative strands within modern legal thought, and a complete break with Montesquieu's bankrupt intellectual legacy demands of us that we undertake a frontal assault on the last vestiges of "normativistic" liberal legalism. Schmitt insists that the addition of vague standards into the legal system necessarily robs the concept of legal subsumption of any substance: a vague standard such as "the needs of commerce"

permits a panoply of alternative—and potentially contradictory—answers to a particular legal case.[19] The Free Law Movement thus points to the existence of a purely discretionary moment inherent in judicial action. But its defenders ultimately prove unable to face the full implications of their discovery. Ultimately, they revert to the least defensible myth of traditional liberal legal thinking, a moderate version of the idea of legal "subsumption," despite the fact that their creative theoretical innovations rob the concept of subsumption of any real substance.

While openly building on the Free Law School's tension-ridden defense of judicial discretion, Schmitt's own model of judicial action strives to explode its traditionalist confines. *Law and Judgment*'s answer to the central problem of any theory of judicial decision making—"When is a judicial decision a correct decision?"—is already implied by Schmitt's critical comments about the Free Law Movement. According to Schmitt, the Free Law School correctly anticipated that legal decision making is always characterized by what Schmitt describes as a "moment" of "indifference in reference to the content" of law [*inhaltlicher Indifferenz*].[20] The relationship between the legal norm and the judicial actor inevitably involves an element of "indifference" or indeterminacy vis-à-vis the legal norm. In more familiar terms, an element of discretion characterizes judicial decision making.[21]

But how then is the political community to be spared the obvious ills of a discretionary judiciary unregulated by the letter of the law? The young Schmitt *is* worried about the specter of judicial arbitrariness and "subjectivism." Quite provocatively, *Law and Judgment* argues that indeterminacy at the level of the law's manifest structure need *not* generate judicial chaos. *Indeterminacy within the sphere of legal norms and standards still leaves open an alternative path to legal determinacy* [*Rechtsbestimmtheit*]. Anticipating a common argumentative move within recent American jurisprudential debates, Schmitt's initial answer to the purported ills of formalistic jurisprudence is an embrace of a (peculiar) version of the *underdeterminacy thesis*: although traditional legal materials emphasized by formalist jurists fail to assure legal determinacy, other sources available to the judicial actor can succeed in doing so. The task at hand involves reconceptualizing the problem of legal determinacy so as to break dramatically with formalistic liberal jurisprudence's traditional obsession with the relationship between the legal norm and the judicial actor; the task left unfinished by the Free Law School needs to be completed. Determinacy should no longer be conceptualized in terms of a "subsumption" of a particular act under a legal norm or standard. But if legal determinacy is no longer to be located in the nexus between the legal norm and the judge, where might we look to conceive of its possibility? Schmitt offers a novel answer to this question: legal determinacy still legitimately constitutes the guiding principle of the legal system. Yet the

problem of legal determinacy must be conceptualized anew so as to focus on the *relationship between the individual judge and his peers*. In other words, the "normativistic" liberal focus on the relationship *between the norm and the judge* needs to be jettisoned for an emphasis on the relationship *between legal decision makers*. Legal determinacy indeed can be achieved by means of appeal to a shared legal/professional praxis.

In Schmitt's view, judges should acknowledge the obligatory status of a simple but absolutely pivotal principle: "a judicial decision is correct today when it can be assumed that another judge would have decided in the same way."[22] Judges can no longer seek recourse either to the letter of the law or to any of a series of compensatory mechanisms proposed by previous jurists in order to generate predictability and regularity. Instead, they need to engage in the thought experiment of asking themselves whether "another judge" would have acted in exactly the same manner. Existing legal practice already hints at the legitimacy of this principle: when judges write legal decisions, they appeal to their colleagues; when a particular case takes on special importance, it is common to insist that a number of judges cooperate in solving the case. But it now needs to gain open recognition as a superior source for an identifiably postliberal concept of legal determinacy. According to Schmitt, "The 'other judge' here described is the empirical type of the modern expertly trained jurist."[23] The "normal" judicial professional of Schmitt's own day is the standard for his proposed test. In this model, judicial "practice justifies itself by means of its own practices."[24] Legal norms, standards, and concepts are no longer "containers into which the judge deposits a particular act." Instead, they represent mere "instruments for justifying an expectation," namely that other judges would have decided in the same way.[25] Traditional judicial strategies—a reference to the letter of the law, for example—can still legitimately be employed by the judge but only if the judge in question understands the limits of such strategies by acknowledging that they are nothing but useful tools for ascertaining how the "other judge" would have acted.[26]

Schmitt's creative resolution of one of the perennial dilemmas of jurisprudence still leaves an obvious question unanswered: can it work? Might an appeal to the "empirical type of the modern expertly trained jurist" provide the judge with the meaningful guidance that liberals hope to provide by means of binding legal actors to the norm and thereby guarantee a measure of determinacy within the law? Given the manifest diversity of types of "expertly trained jurists" in the modern world, there is certainly good reason to doubt Schmitt's assertion. Liberals and conservatives, socialists as well as defenders of economic laissez-faire, have composed the ranks of expertly trained modern jurists. Felix Frankfurter and Hans Kelsen, as well as the Nazi Roland Freisler, belong among them. A thought experiment in which

the judge looks to the world of other "expertly trained jurists" is unlikely to provide unambiguous answers to difficult legal cases.

Schmitt's argument probably only makes sense if the heterogeneity of modern jurisprudence is substantially downplayed. At least implicitly, Schmitt here probably presupposes a significant degree of political, social, and doctrinal homogeneity within the German judiciary; from Schmitt's perspective, the relative unanimity of socially conservative and deeply anti-democratic views among German jurists in 1912 certainly must have provided some empirical plausibility to this assumption.[27] Only in a relatively homogeneous judicial universe might the imperative to turn and consider the views of legal colleagues conceivably provide some minimal degree of determinacy within the legal system.

*Law and Judgment* leaves this crucial assumption unstated. But it is striking in light of Schmitt's subsequent claim in *State, Movement, Folk* that only homogeneity within the judiciary can guarantee some measure of legal determinacy. Clearly, there is no trace of the horrible racial and ethnic homogeneity later defended by Schmitt, and it would be indefensible to ignore the crucial differences between Schmitt's first contribution to legal theory and its Nazi period makeover. Nonetheless, well before the Nazi seizure of power, Schmitt offered a scathing critique of traditional liberal ideas of norm-based legal decision making that both emphasized the discretionary character of judicial action *and*, simultaneously, attempted to counteract the potent problems of discretion by pointing to the legal virtues of a "homogeneous" judiciary. Along with an emphasis on the inevitable indeterminacy of liberal jurisprudence, we find the anticipation of an alternative means for guaranteeing legal regularity: homogeneity.

## II

The young Schmitt's second major contribution to political and legal thought, the 1914 *The Value of the State and the Significance of the Individual*, at first glance represents a polemic against precisely the cynical view of law that would later gain a wide following among Nazi jurists. Schmitt vehemently criticizes a diversity of "power-theories" of law that reduce the legal system to nothing but a "game" among competing power interests.[28] Such theories obscure law's essentially normative character. They provide no real place for the task of legal argumentation and justification. When pursued consistently, realist views of law deny the integrity of legal discourse by interpreting legal argumentation as a mere epiphenomenon of a more fundamental struggle among competing political and social constituencies. Thus, power realist views of law ultimately reduce law to nothing but *facticity*: they can only

speak coherently about the social and political "facts" of empirical power but hardly of "norms" and the problems of legal justification.

Schmitt then relies on this otherwise persuasive criticism of power realist conceptions of law in order to justify a conclusion that by no means automatically follows from it. He believes that an assault on a crude reductionist interpretation of law allows him to defend a thesis no less extreme than the view he challenges. Allegedly, law and power need to be seen as constituting two absolutely distinct spheres. Even those conceptions of law that permit power to be conceptualized as just one element of law, he now argues, inevitably "pollute" the normative core of law and thus distort its very essence. Law constitutes a "pure" set of norms, the realm of "ought" [*Sollen*], in stark contrast to the facticity [*Sein*] of empirical power struggles. Any attempt to mix the two spheres obscures law's essence: "pure law" is utterly distinct from "pure (i.e., legally unregulated) power." "If law is to exist, it cannot be derived from power, for the gap between law and power simply cannot be bridged."[29] The realm of facticity, the sphere of concrete power, cannot ground normativity, the sphere of legal norms. Concrete power relations are essentially alien to law and its normative core. What lacks normative significance (power) cannot be transformed into something normative; an area of social existence "alien to values" [*Wertfremde*] cannot take the form of a set of values or norms. In a manner at times strikingly reminiscent of Hans Kelsen's neo-Kantian legal positivism and its insistence on a radical division between legal science and a sociology of empirical power relations, the young Schmitt similarly posits the existence of two altogether different "worlds."[30] Law consists of norms, but power is essentially a problem of the will, and even "a gradual transition [from the norm to the will] is unthinkable."[31]

The young Schmitt quickly parts company from Kelsen, however. Whereas Kelsen rests satisfied with positing an insurmountable divide between the spheres of pure law and concrete power, Schmitt struggles to overcome the antinomy between law and power.[32] Regrettably, his quest to do so suffers from the idiosyncrasies of his analytical starting point. Like water and oil, law and power cannot be properly fused or blended. Thus, when Schmitt tries to bring law and power into a more intimate relationship, he is forced to argue that the "purity of power" has to remain intact. Even though *The Value of the State and the Significance of the Individual* polemicizes against power-realist interpretations of law, Schmitt's own view ultimately proves closer to those of his opponents than he would prefer to have us acknowledge. Within Schmitt's vision of the legal system, expressions of unregulated "pure power" ultimately remain inescapable as well.

Although the spheres of power and law cannot be merged or fused, a means of linking the two spheres can be found. In Schmitt's account from World War I, this is precisely the function of the state. State organs undertake to

translate the norms of the abstract legal universe into concrete reality. The state acts as a transmission belt between the legal sphere and the world of everyday power politics, between normativity and facticity. By undertaking to realize abstract legal norms, state institutions find themselves situated fruitfully between the realms of facticity and normativity and thus capable of mediating between the two spheres. Yet this mediation comes at a price. To the extent that the state makes it possible to render the "heavenly" realm of legal normativity relevant for the mundane sphere of "earthly" reality, law is forced to surrender its heavenly character. More specifically, the realization of legal normativity in the world of everyday empirical facts makes it necessary to compromise its normative virginity. When law is realized and thus brought into the sphere of factual power relations, it is forced to make concessions to a universe alien to its own internal dynamics. What form must this compromise take? In light of Schmitt's formulation of the problem at hand, the answer is clear: law inevitably contains elements of that universe, which it has been forced to enter into a compact with, namely the sphere of empirical power. When realized by governmental bodies, law includes a moment of normatively unregulated facticity, of *pure power* or *willfulness*.

*The Value of the State and the Significance of the Individual* thus represents a crucial evolutionary step within Schmitt's legal thinking. First, Schmitt now can offer a more detailed explanation of the underlying sources of indeterminacy in legal decision making. *Law and Judgment* generally focused on discarding relatively formalistic views of judicial action; *The Value of the State and the Significance of the Individual* now locates the fundamental source of the "indifference in reference to the content" of the law in the state's struggle to mediate between "pure power" and "pure law."[33] Owing to the unavoidable concessions that the sphere of normativity is forced to make to the realm of facticity, a "sovereign decision" is essential to legal experience. Law can never remain normatively pure if it is to become effective. From this perspective, legal indeterminacy is more than a narrow jurisprudential problem. Instead, it stems from the very heart of the political condition, conceived here as a tragic quest to link two profoundly distinct facets of human existence, normativity and facticity. Second, Schmitt now explicitly associates the "moment" of "indifference in reference to the content" of the law with an expression of "pure power"; this idea was probably suggested by *Law and Judgment*, but it was never formulated with sufficient clarity. Hence, Schmitt's claim is more ambitious than seemed evident in *Law and Judgment*. Not only is legal decision making inherently discretionary, but also discretion consists of perfect "willfulness," an expression of "pure power" unrestrained by the sphere of legal norms.

By suggesting that legal determinacy can be salvaged even if we acknowledge the inevitability of judicial discretion vis-à-vis the legal norm, *Law and*

*Judgment* tended to downplay this more dramatic implication of Schmitt's critique of liberal jurisprudence. But *The Value of the State and the Significance of the Individual* points the way to an alternative—and more radical—course of argumentation.

## III

In the shadow of World War I and then the German Revolution of 1918–1919, Schmitt's views on the indeterminacy of law undergo preciously the radicalization anticipated by *The Value of the State and the Significance of the Individual*. Schmitt formulates the outlines of an authoritarian legal theory that not only goes well beyond the critique of liberal jurisprudence outlined in *Law and Judgment* but also already points in some ways toward the ominous *State, Movement, Folk*. As we have seen, Schmitt initially focused on debunking formalistic models of judicial action, before going on to trace their ills to the phenomenon of "pure power." His next move consists in underlining a conceptual link between dictatorship and the enigma of legal indeterminacy.

In a crucial early essay, "Dictatorship and the State of Siege" (1917), Schmitt connects his abstract reflections on the problem of legal indeterminacy to one of the great political controversies of the war years. In subsequent years, Schmitt would exhibit enormous skill at making otherwise dry theoretical speculations in jurisprudence take on immediate political significance. "Dictatorship and the State of Siege" is an early example of this talent. By 1917, Germans were living under what amounted to a military dictatorship under Generals Paul von Hindenburg and Erich Ludendorff; vast arenas of political, social, and economic activity fell under the auspices of the emergency authorities. Not surprisingly, the generals and their political allies claimed that their dictatorial powers could not be legitimately controlled by traditional legal and political means. In their view, the world war required placing effectively unregulated political authority in their hands.[34] German scholars schooled in the tradition of the nineteenth-century German *Rechtsstaat* [law-based state] protested against the vast proliferation of dictatorial powers. Schmitt joined forces with those who sought to defend it.

Schmitt's essay begins by drawing a clear distinction between the institutions of a dictatorship and those of the state of siege. The former stems from French revolutionary *practice* and the experience of the war conditions of 1793, when revolutionary France was faced with universal hostility in Europe, and counterrevolutionary forces occupied parts of France itself. The Convention's dictatorship of 1793 was effectively "unlimited" [*schrankenlos*] in nature, and its success was predicated on the abandonment of an effective

separation of executive and legislative powers.[35] In contrast, the institutions of the state of siege are indebted to French revolutionary *theory*; the Enlightenment rationalism of Locke, Montesquieu, and Rousseau plays a central role here. The crucial difference is that the state of siege continues, at least on the surface, to respect the principle of the separation of powers. No fusion of legislative and executive power occurs in the state of siege. By means of a legislative delegation, vast powers are centralized in the hands of military and executive authorities, in order to ward off a concrete threat to the well-being of the legal order as a whole. Nonetheless, these powers are to remain exclusively executive in nature. Those exercising the delegated authority are denied the right to issue orders having the status of legal statutes. In this spirit, Schmitt notes that in 1848 the French general Louis-Eugène Cavaignac gave back those powers delegated to him by the legislative authorities as soon as those tasks appointed to him were completed.

What does this have to do with the German situation in World War I? At first glance, Schmitt appears to argue for limitations on the power of the military in Germany.[36] After all, Schmitt concedes that the Enlightenment-inspired French theory of the state of siege played a decisive role in shaping the German legal institutions of the emergency situation.[37] But what Schmitt gives with one hand he immediately takes away with the other. Developing his earlier ideas about legal indeterminacy, Schmitt systematically deconstructs the French conception of the state of siege. By the conclusion of the essay, Schmitt clearly suggests that its "rationalistic" attempt to maintain the separation between legislative and executive powers is doomed to fail. And at least by implication, Schmitt highlights the inevitability of a military dictatorship, in which legislative and executive powers are fused, for the sake of defeating domestic and foreign foes during a dire crisis.

Schmitt again mocks the Baron de Montesquieu's famous declaration that the judge is nothing more than *la bouche qui prononce les paroles de la loi*, suggesting that Jean-Jacques Rousseau's hostility to executive power needs to be read as a radicalization of Montesquieu's exaggerated rationalistic hostility to judicial power. Montesquieu's mechanical conception of the judge amounts to an attempt to reduce the judiciary to an accessory of the executive; for Montesquieu, the judge merely "pronounces" the law. Schmitt then claims that Rousseau builds on this doomed quest by trying to eliminate executive power altogether. Rousseau replaces Montesquieu's tripartite separation of powers with the dualism of legislative and executive powers, and the executive is described as engaging in a mechanical application of legislative norms. The legislator, undertaking action that is exclusively general in character, is the only real power in Rousseau's system. Rousseau thereby exacerbates the fundamental weaknesses of Montesquieu's model.[38] Just as Montesquieu obscures the centrality of the discretionary decision constitutive

of every judicial interpretation, so, too, does Rousseau's model miss the creative character of every administrative decision. Schmitt goes so far as to suggest that it is absurd to believe that administrative decision making can be contained within a statute: "What is true for the judicial decision . . . is even more true for the administration, for which every aim to be achieved cannot be predetermined or formulated by means of a statute."[39] In light of this problem, Schmitt argues that it makes sense to see administrative discretion as a primordial or originary form of political power [*Urzustand*]. Probably alluding to the origins of the modern state in Absolutism, Schmitt asserts that "the starting point of all state activity is administration."[40] Only later, as illustrated by the theories of writers like Montesquieu and Rousseau, was the attempt undertaken to subject situation-specific administrative discretion to norm-based legislative and judicial devices. But Montesquieu and Rousseau fail to understand that the originary discretionary power of the modern state can never be extinguished. Unregulated discretion inevitably haunts the workings of law-based government every time an administrator is asked to "apply" a statute, for no statute can succeed in fully capturing the creative [*schöpferisch*] activity of the administrator.[41]

Because of the congenital ills of the Enlightenment rationalism from which it derives, the institutions of the state of siege thus lack coherence. Representing nothing less than a return to the primordial origins of state power, the awesome discretionary power exhibited by the executive during the state of siege represents for Schmitt more than the mere "application" of a legislative statute. In reality, those holding this authority are ultimately unaffected by the legalistic dichotomy of legislative and executive power, and the separation of powers necessarily lacks the significance attributed to it by Enlightenment theory.[42] Although hesitant to state his dramatic conclusions openly, Schmitt thereby intimates that the institutions of the dictatorship and the state of siege share a crucial commonality: in the final analysis, both point to the necessity of overcoming the classical distinction between legislative and executive power in the face of a dire crisis.

The implications of this argument for Schmitt's account of legal indeterminacy are profound, even if Schmitt himself in 1917 failed to sketch them out immediately. Legally unregulated power is described as an outgrowth of an originary experience of discretionary power. Moreover, there is more than a faint suggestion in Schmitt's comments that this original *Urzustand* represents a more authentic or true form of politics than that acceptable to those who favor substantial legal limitations on the wartime exercises of emergency power; Schmitt seems delighted by the fact that the experience of World War I shatters the rationalistic illusions of naïve Enlightenment political and legal thought. Wartime dictatorship and the exercise of discretion within the application and interpretation of legal norms both derive from the

same source, the discretionary *Urzustand*. In short, legal indeterminacy and dictatorship are closely related. Wartime dictatorship is at best simply a more open expression of the unregulated discretion that plagues every act of legal interpretation and application.

Schmitt's 1921 *Dictatorship* then simply makes the conceptual link between legal indeterminacy and dictatorial power explicit. Going well beyond the relatively simple theory of dictatorship offered in "Dictatorship and State of Siege," Schmitt in 1921 distinguishes between *commissarial* and *sovereign* dictatorship: the former is temporary and aims at the restoration of an existing legal order, whereas the latter brings about a revolutionary transformation of the status quo into a novel alternative political and legal order. In contrast to *Law and Judgment*, but in accordance with the 1917 "Dictatorship and State of Siege," the dilemma of legal indeterminacy is no longer conceived here chiefly as a problem of judicial discretion and thus of interest primarily as an element of judicial action. Rather, legal indeterminacy is seen as possessing profound relevance for understanding a variety of legal actors and institutions, the most revealing of which is dictatorship. For Schmitt, the concept of dictatorship constitutes the "missing link" of modern jurisprudence. Dictatorship represents a paradigmatic attempt to grapple seriously with the exigencies of legal indeterminacy.

The work's preface restates the now-familiar idea that an "opposition" inevitably exists between a legal norm and the method of realizing it. In the language of Schmitt's prewar contributions to legal theory, a "moment of indifference in reference to the content" of the law results from the attempt to realize law in the sphere of concrete facticity. But here Schmitt argues that the omnipresent possibility of a gap between legal norms and the manner in which they gain realization in the concrete world is precisely "where the essence of dictatorship lies."[43] An analysis of the problem of dictatorship is crucial for acknowledging that the realization of a legal norm rests unavoidably on forms of (unregulated) discretionary action: "To speak in abstract terms, the problem of dictatorship, which far too rarely has been systematically analyzed, is the problem of the concrete exception within legal theory."[44] Schmitt's model of a commissarial dictatorship illustrates this point. In a commissarial dictatorship, ordinary legal norms are abrogated for the sake of realizing a "concrete goal" essential to the preservation of the legal order. A commissarial dictator must restore the preexisting system of ordinary law; if he abandons this task, he becomes a mere despot.[45] Yet because the specific actions necessary for overcoming a dire political crisis cannot be predicted beforehand, even a limited form of commissarial dictatorship is rightfully free of normal legal restraints. A temporary emergency dictatorship of this type is forced to make use of individual and concrete measures in accord with the imperatives of the crisis at hand; ordinary general statutes are unlikely to suffice in the

fulfillment of the task of overcoming the crisis. The general jurisprudential lesson here for Schmitt is that the survival of a functioning legal system presupposes highly discretionary forms of political power—in his earlier terminology, a moment of "indifference in reference to the content" of the law. The impressive discretionary authority of the emergency dictatorship is simply an unmediated expression of the irrepressible discretion that for Schmitt plagues even the "normal" process of judicial interpretation.

*Dictatorship* is a Janus-faced book. On the one hand, the "moment" of "indifference in reference to the content" of the law arguably remains just that in *Dictatorship*—a *moment* of legal existence. Schmitt's 1921 defense of a commissarial dictatorship might legitimately be read as nothing more than a defense of a temporary dictatorship, an instrument that even liberal democracy occasionally should employ amid a serious crisis in order to guarantee the very preconditions of legal and political order. But *Dictatorship* also lends itself to a more dramatic interpretation. For Schmitt, dictatorial power and legal indeterminacy exist in a relationship of "elective affinity" akin to the manner in which the faith in clear, determinate law is intimately related to parliamentary democracy.[46] Liberalism obscures the role of indeterminacy in the *legal* universe. In a parallel fashion, liberals naively believe that the specter of dictatorship can be driven from the *political* universe. As noted, for Schmitt dictatorship is simply an open expression of the discretionary power constitutive of every interpretation and application of the law. In this sense, dictatorship and legal indeterminacy go hand in hand. In light of this "elective affinity" between legal indeterminacy and dictatorship as well as the unavoidability of the former, why not then simply dump liberal democracy for a dictatorial alternative better attuned to the underlying structural logic of legal indeterminacy? If legal indeterminacy is as weighty a problem as Schmitt suggests, is not dictatorship preferable to liberal democracy and its "normativistic" failure to acknowledge the enigma of legal indeterminacy? To the extent that legally unregulated discretion represents the *Urzustand* of authentic politics, liberal democracy and the rule of law can probably at best represent a bad compromise with the structural imperatives of political and legal experience. Dictatorship (and a discretionary legal system) are more likely to accord with the imperatives of the discretionary *Urzustand*.

Schmitt ultimately embraces the latter, more radical position: as will be shown, he emphasizes the problem of legal indeterminacy in order to outline an authoritarian alternative to Weimar democracy during the late 1920s and early 1930s. But even in the early 1920s, this tendency in Schmitt's thinking is anticipated by core elements of his legal theory. It is important to see why Schmitt's use of the expression "moment" in his account of the role of "indifference in reference to the content" of the law no longer is fully appropriate even by 1921. The term "moment" might suggest that indeterminacy

is nothing but one among a number of distinct elements constitutive of legal experience, maybe even that law for the most part can be rendered determinate and predictable; that was one of the main aspirations of *Law and Judgment*. Yet if the "indifference in reference to the content of the law" consists, as Schmitt also claims, of pure power and perfect willfulness, it makes little sense to speak merely of a "moment" of arbitrariness within law. *If the element of arbitrary power within law is genuinely "pure," it would seem to follow that it is potentially unlimited: by definition, pure power or pure willfulness probably must remain an untamed and (normatively) unregulated form of power*. The "moment" of legal indeterminacy first conceptualized in *Law and Judgment* then very well probably has to be truly pervasive, law's dominant feature. Arbitrariness seems destined to make up a *ubiquitous* facet of all legal experience. Given the basic conceptual contours of his argument, Schmitt's idiosyncratic formulation of the *underdeterminacy thesis* prejudices him toward ultimately endorsing elements of the *radical indeterminacy thesis*. In turn, dictatorial power will have to take on a central role within Schmitt's theory as well.

This is precisely the thesis suggested by *The Political Theology* (1922). Although Schmitt's terminology shifts slightly—he now speaks of the centrality of the "exception" for law[47]—he insists on the genuinely *universal* significance of the "indifference in reference to the content of law" first described in *Law and Judgment*: the exception refers to "a general concept in the theory of the state, and not merely to a construct applied to an emergency decree or state of siege."[48] It would be mistaken to associate the "moment of indifference" merely with a profound crisis or state of emergency, let alone a peripheral element of judicial decision making, for "all law is 'situational law.' "[49] *In its very essence, all legal experience is permeated by indeterminacy, by the ever-changing dictates of the "concrete exception."* Schmitt does admit that "the autonomous moment of the decision recedes to a minimum" during moments of relative political normalcy.[50] But even this "minimum" is probably destined to remain quite substantial given the undefinable and unlimited contours of a pure willfulness essential to legal experience. Law is to be conceived as based ultimately on a "pure decision not based on reason and discussion and not justifying itself . . . an absolute decision created out of nothingness."[51] Because the precise role of even the most unambiguous legal concepts depends on an act of "pure will" whose structure, by definition, remains open-ended, every abstract legal concept is "infinitely pliable."[52] Although the liberal rule of law may appear effective at a specific historical juncture, a closer look will reveal the utterly open-ended manner in which even general norms and concepts are manipulated by political and legal actors. Fundamentally, every judicial act is an intrinsically political act in which judges make "sovereign decisions" in favor of a particular set

of political and aspirations: "in every [legal] transformation there is present an *auctoritatis interpositio*" in which the *auctoritatis interpositio* cannot be traced to the legal norm.[53] In this view, every judge or administrator who applies the law is simply a temporary "miniature" dictator, forced to resolve legal conflicts by an exercise of fundamentally discretionary power. As Schmitt comments later in *The Concept of the Political*, "The sovereignty of law means only the sovereignty of men who draw up and administer the law."[54] The general concepts and norms of the traditional liberal rule of law constitute at most a convenient mask for a "will to power," eagerly donned by legalistic bourgeois liberals who refuse to acknowledge the core imperatives of a violent and explosive political universe.

As John McCormick has observed, the idea of dictatorship similarly takes a more radical form in *Political Theology* than *Dictatorship*, published only a year earlier. Whereas *Dictatorship* can be read as a defense of a temporary commissarial dictatorship invested with exceptional powers in order to restore the state of legal normalcy, McCormick's assessment is that *Political Theology* allows "the ordinary rule of law [to be] dangerously encroached upon by exceptional absolutism."[55] In *Political Theology*, we can already detect the makings of Schmitt's vision of an authoritarian alternative to Weimar, a permanent dictatorship that rests on an appeal to the Weimar president, "as the personal embodiment of the popular will which cannot be procedurally ascertained in a time of crisis."[56] Although the sources of Schmitt's defense of a radical dictatorship are complex and multifaceted, my argument here should help explain one of them: to the extent that the logic of Schmitt's underlying argumentation leads him to make indeterminacy an all-important, omnipresent facet of law, the place of dictatorship similarly must gain in significance. If legal indeterminacy is a truly ubiquitous facet of legal experience, then dictatorship similarly must take on something close to an omnipresent, even permanent form. Not only do liberal democracy and the rule of law fail to deal adequately with the existence of irrepressible arbitrary power, but furthermore even a temporary, limited commissarial dictator is probably inadequate to the tasks at hand. For the enigma of legal indeterminacy necessitates a more radical form of dictatorship than that endorsed by Schmitt in 1921 in *Dictatorship*.

Interestingly, *Political Theology* says nothing about how legal indeterminacy might be combated. In contrast to *Law and Judgment*, Schmitt seems more concerned in *Political Theology* with discrediting any concept of legal determinacy than with formulating a postformalist version of it. In my reading, this shift in emphasis points to a crucial tension within Schmitt's legal thinking. To the extent that legal indeterminacy is identified with an act of unregulated, brute power, a "pure decision," is it possible for Schmitt to offer a coherent conception of legal determinacy? Does not the idea of a

predictable, determinate legal system necessarily suggest the need for *some*, however minimal, *norm-based* restraints on the exercise of arbitrary power? Can Schmitt *both* conceive of the rule of law as nothing but "the sovereignty of men who draw up and administer the law" *and* posit, as he did in *Law and Judgment*, the possibility of a new form of legal determinacy?

*State, Movement, Folk* would again try to synthesize Schmitt's radical "decisionism" and its valorization of "a pure decision not based on reason and discussion and not justifying itself . . . an absolute decision created out of nothingness" with legal determinacy, albeit in an idiosyncratic postliberal form. Yet even at this juncture in our discussion, we can begin to understand why that undertaking was destined to fail from the very outset. What type of grounding can Schmitt possibly provide for legal limits to the exercise of political power in light of his emphasis on the fundamentally open-ended character of all legal materials? A model of law that begins by associating legal experience with unregulated brute power—Schmitt himself seemed to grasp the limitations of this view in *The Value of the State and the Significance of the Individual*—is unlikely to allow for effective limits to the exercise of discretionary authority.

Not surprisingly, Schmitt's contributions to Nazi law helped bring about an assault on the foundations of the rule of law that was unprecedented in modern times. The "ethnic cleansing" of German jurists—enthusiastically endorsed by Schmitt in the 1930s—only exacerbated the Nazi regime's hostility to the modern legal tradition. Ethnic homogeneity within the judiciary hardly guaranteed legal determinacy, notwithstanding Schmitt's arguments to the contrary.

## IV

In an October 1968 preface to the West German reissue of *Law and Judgment*, Schmitt commented that too many "heated polemics" had resulted in an unfair tendency to discredit his political and legal ideas. In his view, hostile critics had reduced "decisionism" to a "dangerous worldview," and the word "decision" was unfairly associated with a "fantastic act of willfulness." He adds that *Law and Judgment* points to "the simple origins of the starting point [of decisionism]. It makes the original meaning of judgment and decision making crystal clear." Thus, the eighty-year-old Schmitt hoped that a fair-minded reconsideration of the origins of decisionism in his early reflections on the problem of legal indeterminacy could help bring clarity to a "confused" and "polemical" debate.[57]

In this chapter, I have tried to show that a second look at the young Schmitt's legal thinking *does* bring clarity to the "confused" and "polemical"

debate about his theoretical and political legacy. Pace Schmitt, it helps demonstrate that his embrace of German fascism was already anticipated by key elements of his thinking about the dilemma of legal indeterminacy well before Hitler's rise to power. Schmitt's decision to jump into bed with the Nazis was hardly preordained. Nonetheless, his pre-1933 jurisprudence helped pave the way for his embrace of Hitler.

Schmitt's reflections on legal indeterminacy potentially provide a valuable negative lesson for us today. As I noted in the introduction, those familiar with contemporary jurisprudential debates should be struck by some unsettling commonalities between certain strands of present-day jurisprudence and Schmitt's ideas about legal indeterminacy. Schmitt is hardly the only modern jurist to suggest that liberal legal interpretation rests on an expression of willful power. Although skeptical of extreme formulations of the radical indeterminacy thesis, Roberto Mangabeira Unger accuses traditional liberal legal practices of generating "forms of arbitrariness that are at least as troubling, intellectually and politically, as those of its familiar rivals."[58] The rule of law, as conceived by formalist minded liberals and democrats, entails an "unacknowledged and unaccountable exercise of power."[59] While Unger still aspires to show that liberal democratic law can be overcome by a radical democratic alternative, others argue more dramatically that what passes for legal meaning is simply what those legal communities powerful enough to force their interpretations onto legal materials have determined.[60] Yet others have tried to collapse the traditional distinction between law and politics in such a way as to conceive of legal decision making as necessarily expressing nothing more than a more or less arbitrary expression of power.[61]

To Schmitt's credit, he underlines some troublesome possible implications of such views. If, in fact, judicial (or, for that matter, administrative) action is overwhelmingly willful in character, then the foundations of traditional conceptions of the separation of power necessarily are shaken to the ground. The concept of an independent court, based traditionally on at least some, however minimal, distinction between judicial action and legislation, surely loses its traditional justification. Indeed, some form of dictatorship, in which the separation of powers has been abandoned altogether, may come to seem, as it did for Schmitt, a logical accompaniment to the inherent willfulness of all legal experience. If legal and administrative decision making inevitably is fundamentally arbitrary in character, then a political regime best attuned to the imperatives of radical legal indeterminacy might seem necessary. An authoritarian state, unregulated by legal and political restraints that hamper its reliance on ever-changing, discretionary law, would arguably provide the most logical institutional complement to the crisis of legal indeterminacy. Only an authoritarian state might "celebrate" the willfulness of legal

experience, whereas a liberal democratic state committed to the rule of law hypocritically closes its eyes to the harsh realities of legal indeterminacy.

If I am not mistaken, those today who endorse exaggerated ideas about the willfulness of liberal law have yet to face these implications. The example of Carl Schmitt suggests that it is incumbent on them to do so.

## NOTES

1. Carl Schmitt, "Das Gesetz zur Behebung der Not von Volk und Reich," *Deutsche Juristen-Zeitung* 38, no. 7 (April 1, 1933): 455–58, which offers a ringing endorsement of the National Socialist Enabling Act of March 23, 1933. The Enabling Act invested Hitler with dictatorial powers. Also, see Carl Schmitt, "Das gute Recht der deutschen Revolution," *Westdeutscher Beobachter* 12, no. 108 (May 12, 1933): 1–2.

2. For the biographical details, see Renato Cristi, *Carl Schmitt and Authoritarian Liberalism* (Cardiff: University of Wales, 1998), 25–33. Schmitt then wrote a commentary on the law he helped draft: Schmitt, *Das Reichstatthaltergesetz* (Berlin: Carl Heymanns Verlag, 1933).

3. Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* [*State, Movement, Folk*] (Hamburg: Hanseatische Verlagsanstalt, 1933).

4. Schmitt, *Staat, Bewegung, Volk*, 42–46. Also, see Carl Schmitt, *Fünf Leitsätze für die Rechtspraxis* (Berlin: Deutsche Rechts—und Wirtschaftswissenschaft Verlag, 1933), as well as Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* [*On Three Types of Jurisprudential Thinking*] (Hamburg: Hanseatische Verlagsanstalt, 1934).

5. Schmitt, *Staat, Bewegung, Volk*, 43. All translations from German texts, unless otherwise stated, are the author's own.

6. Schmitt, *Staat, Bewegung, Volk*, 43–44.

7. Schmitt, *Staat, Bewegung, Volk*, 45.

8. In German, see the illuminating article by Lorenz Kiefer, "Begründung, Dezision und Politische Theologie: Zu den frühen Schriften von Carl Schmitt," *Archiv für Rechts—und Sozialphilosophie* 76 (1990): 479–99.

9. The phrase here is Max Weber's. In contrast to Schmitt, however, Weber hoped that a modest version of this ideal could be salvaged. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol. 1, ed. and trans. Guenther Roth and Claus Wittich (Berkeley: University of California, 1979), 979. For a fine survey of Weber's contributions to jurisprudence, see Anthony Kronman, *Max Weber* (Stanford, CA: Stanford University Press, 1991).

10. Schmitt, *Staat, Bewegung, Volk*, 44–45. Schmitt refers disparagingly on many occasions to this famous passage in Montesquieu. Yet even Montesquieu's view of judicial action is more subtle than Schmitt allows. Montesquieu notes that it is only in republics where "the very nature of the constitution requires the judge to follow the letter of the law." In a monarchy judges need to "investigate their spirit" only if laws are not explicit (Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent

[New York: Hafner, 1949], 75). In fairness, Schmitt does seem to provide a more sympathetic reading of Montesquieu in his *Die Diktatur* [*Dictatorship*] (Munich; Leipzig: Duncker & Humblot, 1928), 109. For the most part, however, Montesquieu functions as a convenient bogeyman in Schmitt's assault on liberal jurisprudence.

11. Kelsen, *The Pure Theory of Law*, 349.

12. Carl Schmitt, *Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis* [1912] [*Law and Judgment*] (Munich: C. H. Beck, 1968). There is the obligatory dismissive reference to Montesquieu (7). As one recent historian of legal theory has noted, *Begriffsjurisprudenz*, or the "jurisprudence of concepts," "imagined [that] it had constructed a seamless network of rules which answered all problems scientifically, and excluded all extraneous values." *Begriffsjurisprudenz* was criticized widely for its "excessively literal, and therefore often absurd and unjust adherence to the letter of the law" (J. M. Kelly, *A Short History of Western Legal Theory* [Oxford: Clarendon Press, 1992], 359–60). Within contemporary radical jurisprudence in the United States, it is similarly commonplace to caricature formalist jurisprudence by reducing it to a crude, exaggerated variant of formalism. For a critical discussion of this move, see Solum, "On the Indeterminacy Crisis," 475.

13. Schmitt, *Gesetz und Urteil*, 15.

14. See also Carl Schmitt, "Juritische Fiktionen," *Deutsche Juristen-Zeitung* 18, no. 2 (1913): 805, where the idea that the "will of the statute" can directly guide the judge is described as a fiction.

15. Schmitt, *Gesetz und Urteil*, 27.

16. Schmitt, *Gesetz und Urteil*, 27.

17. Schmitt, *Gesetz und Urteil*, 32.

18. The Free Law School emphasized the virtues of suprapositive legal materials as a basis for judicial decision making. Its conservative proponents favored appeals to a (vague) "feeling for the law" [*Rechtsgefühl*] while those in its camp sympathetic to political and social reform sought an increased role for the empirical social sciences within the legal system. This second strand occasionally drew the Free Lawyers close to American jurists like Louis Brandeis and Benjamin N. Cardozo. Indeed, Cardozo was familiar with the German Free Law School: Benjamin N. Cardozo, *The Nature of the Judicial Process* [1921] (New Haven, CT: Yale University Press, 1965), 16–18, 70. Contemporary political and legal theorists are most likely familiar with the Free Law School from Weber's polemic against it. Weber associates the Free Law School with troublesome antiformal trends in the law. Schmitt and Weber agree that the Free Law Movement initiates a series of theoretical innovations incompatible with traditional liberal concepts of norm-based legal decision making. Unlike Weber, Schmitt sides with the Free Law School, arguing that it is only *inadequately* radical in its intellectual assault on formalist jurisprudence. See Weber, *Economy and Society*, vol. 1, 882–95.

19. Schmitt, *Gesetz und Urteil*, 20–21, 40–41.

20. Schmitt, *Gesetz und Urteil*, 67.

21. Schmitt, *Gesetz und Urteil*, 48–50. Schmitt tries to enlist Hegel as an ally by recalling the argument in *The Philosophy of Right* that "determination . . . imposes only a general limit within which variations are also possible. . . . It is impossible to

determine by reason, or to decide by applying a determination derived from the concept, whether the just penalty for an offence is corporal punishment of forty lashes or thirty-nine, a fine of five dollars as distinct from four dollars and twenty-three groschen or less. . . . It is reason itself which recognizes that contingency, contradiction, and semblance have their sphere and right" (G. W. F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood, trans. H. B. Nisbet [Cambridge: Cambridge University Press, 1991], para. 214). At least two key differences separate Schmitt and Hegel here: First, for Hegel such indeterminacy is a genuinely peripheral aspect of legal experience, in part because Hegel takes legal formalism seriously. Indeed, the view expressed in this passage fits easily under the rubric of the *limited indeterminacy thesis*. Second, this moment is never associated, as in many of Schmitt's writings, with a moment of irrational, normatively unregulated power or arbitrary willfulness. For these reasons, I find attempts to read Schmitt as a right-wing Hegelian unconvincing. In this vein, see Cristi, *Carl Schmitt and Authoritarian Liberalism*, 96–107. Hegel was many things but hardly an antirationalist who tried to undermine the rule of law. Schmitt's theory arguably fits better philosophically into Nietzschean currents within early twentieth-century German thought. But since Schmitt showed no systematic interest in Nietzsche's legacy, I am not sure how much one should make of any intellectual connection between Nietzsche and Schmitt. For better or for worse, Schmitt's main interlocutors were his peers in legal theory (Hans Kelsen, Hermann Heller), social theorists like Weber, and classical political theorists with strong institutional interests (e.g., Niccolo Machiavelli, Thomas Hobbes, and Montesquieu). My impression is that he was uninterested in much of what passed for academic philosophy in his day as well as in thinkers, like Nietzsche, whose legal ideas were peripheral to their overall thinking. For an interesting attempt to read Schmitt in the context of Nietzsche's legacy, see John McCormick, "Dangers of Mythologizing Technology and Politics: Nietzsche, Schmitt, and the Antichrist," *Philosophy and Social Criticism* 21 (1995): 55–92. For a discussion of similarities between Schmitt and Martin Heidegger, see Richard Wolin, *The Politics of Being: The Political Thought of Martin Heidegger* (New York: Columbia University Press, 1990), 28–40.

22. Schmitt, *Gesetz und Urteil*, 71.
23. Schmitt, *Gesetz und Urteil*, 71, 78–79.
24. Schmitt, *Gesetz und Urteil*, 86.
25. Schmitt, *Gesetz und Urteil*, 88. This model may be akin to the traditional English idea of a community of judges whose special training in the intricacies of the common law allegedly can provide for a measure of legal predictability. One would do well to recall, however, that a crucial element of this experience, as Weber argued, was that English common lawyers long constituted "a strong organized guild which, by corporate and economic interests, through a monopoly of the bench and a central position at the seat of the central courts," gained "a measure of power which neither king nor parliament" could ignore (Weber, *Economy and Society*, vol. 1, 794). If this comparison is a fair one, how then does Schmitt hope to guarantee a similar corporate spirit among modern expert jurists? As will be shown in chapter 5, he ultimately believed that ethnic and "spiritual" homogeneity alone could help guarantee this shared spirit. For Schmitt, legal determinacy requires the destruction of modern

pluralism. Like Weber in his discussion of the common law, some recent CLS scholars have also noted that the "sociological" composition of lawyers and the judiciary is essential for understanding why, despite deep indeterminacy at the level of legal norms and precedents, a high degree of legal predictability nonetheless may obtain within a legal system. On one level, the problem is that "what a well-socialized white male lawyer finds to be an unquestionably reasonable resolution of a legal claim may seem quite unreasonable to an Asian-American working class woman" (Tushnet, "Defending the Indeterminacy Thesis," 350, 352). Interestingly, Schmitt would have accepted this diagnosis. His answer to it, however, was to try to save legal determinacy by eliminating the pluralism at the roots of such differences.

26. This is probably the reason why Schmitt makes the odd claim that "juristic fictions" can perform a positive function in the legal process: "The fiction is a consciously arbitrary or false assumption [for example, the idea of a binding norm] that nonetheless advances knowledge and can produce valuable results" (Schmitt, "Juristische Fiktionen," 806).

27. It is noteworthy that the application of Schmitt's theory would surely have resulted in increased authority for the judiciary vis-à-vis the legislature, precisely at that juncture when Social Democracy in Germany had made substantial electoral gains. (In 1912, the SPD gained 34.8 percent of all votes cast in parliamentary elections; in 1887, the SPD had received a mere 10.1 percent.)

28. Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 22. Schmitt seems to have a number of different legal theories in mind, including socialist theories that conceive of law as an instrument of a dominant social class. Some of Schmitt's initial observations about the limits of power-realist views of law resemble the underlying argumentation of Alexander Passerin d'Entrèves's classic *The Notion of the State: An Introduction to Political Theory* (Oxford: Oxford University Press, 1967).

29. Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 29.

30. Notwithstanding Schmitt's subsequent hostility to Kelsen, Schmitt offers words of praise for Kelsen in this early work (Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 30–31). Kelsen analogously argues that legal analysis should be clearly distinguished from empirical studies of power. In chapter 3, I argue that Kelsen posits a "pure theory of law" from which an empirical analysis of the concrete dynamics of state power has been purged, while Schmitt responds with a theory in which "pure power" plays a pivotal role and the place of (normative) legal restraints is drastically demoted.

31. Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 30.

32. In a review article from this period, Schmitt argues that the widespread tendency within German legal theory to separate law's normative elements from its empirical components tends to fail: Carl Schmitt, "Review of Julius Binder, Rechtsbegriff und Rechtsidee: Bemerkungen zur Rechtsphilosophie Rudolf Stammlers," *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 17, nos. 3–4 (1916): 431–41. This observation is probably one source of Schmitt's quest to move beyond the antinomy of law versus power.

33. Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen*, 79.

34. Enormous concentrations of political power were commonplace during World War I. But they did not necessarily take the form of the military dictatorship realized

in Germany. Clinton Lawrence Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* [1948] (New York: Harcourt Brace Jovanovich, 1963), 104–17, 151–71, 240–55.

35. Carl Schmitt, "Diktatur und Belagerungszustand: Eine staatsrechtliche Studie" [Dictatorship and the State of Siege], *Zeitschrift für die gesamte Strafrechtswissenschaft* 38 (1917): 139.

36. Bendersky, *Carl Schmitt*, 19–20.

37. See also Carl Schmitt, "Die Einwirkungen des Kriegszustandes auf das ordentliche strafprozessuale Verfahren," *Zeitschrift für die gesamte Strafrechtswissenschaft* 38 (1917): 791.

38. Schmitt, "Diktatur und Belagerungszustand," 156–58. Marie Jean Antoine Condorcet is also associated here with Rousseau's failed quest to see administrative action as based on a "syllogistic" reading of the legislative norm (158).

39. Schmitt, "Diktatur und Belagerungszustand," 157.

40. Schmitt, "Diktatur und Belagerungszustand," 157.

41. Schmitt, "Diktatur und Belagerungszustand," 157.

42. Schmitt, "Diktatur und Belagerungszustand," 159–60.

43. Schmitt, *Die Diktatur*, viii. My discussion here focuses on that part of dictatorship which first appeared in 1922; the 1928 edition included an amended discussion on the emergency powers of the Weimar president. Elements of Schmitt's theory of dictatorship are also summarized in an encyclopedia article: Carl Schmitt, "Die Diktatur," in *Staatslexikon*, ed. Hermann Sacher (Freiburg: Herder, 1926), 1447–53.

44. Schmitt, *Die Diktatur*, ix.

45. Schmitt, *Die Diktatur*, viii.

46. Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1985), 33–50. The nexus between parliamentarism and the rule of law within Schmitt's theory is discussed in detail in chapter 2.

47. The concept of the "concrete exception" is intimately related to the idea of "indifference in reference to the content" of the law. For Schmitt, "the exception is that which cannot be subsumed; it defies general codification, but it simultaneously reveals a specifically juristic element—the decision in absolute purity. The exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about" (Schmitt, *Political Theology*, 13).

48. Schmitt, *Political Theolo*gy, 5.

49. Schmitt, *Political Theology*, 13. Again, the problem of legal indeterminacy here is considered to be of significance to more than a narrowly defined category of legal decision makers. It is seen as pointing to the fact that a rich diversity of political and legal actors inevitably subordinate "normativistic" law to exercises of pure power or pure willfulness.

50. Schmitt, *Political Theology*, 12.

51. Schmitt, *Political Theology*, 66. On the conceptual structure of Schmitt's "decisionism" and its relationship to similar strands in Martin Heidegger and Ernst Jünger, see Christian Graf von Krockow, *Die Entscheidung. Eine Untersuchung über Ernst Jünger, Carl Schmitt, Martin Heidegger* (Stuttgart: Ferdinand Enke, 1958).

52. Schmitt, *Political Theology*, 17.

53. Schmitt, *Political Theology*, 31.

54. Carl Schmitt, *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976), 67.

55. John P. McCormick, "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers," *Canadian Journal of Law and Jurisprudence* X, no. 1 (January 1997): 172.

56. McCormick, "Dilemmas of Dictatorship," 174.

57. Schmitt, *Gesetz und Urteil*, v.

58. Unger, *What Should Legal Analysis Become?*, 65.

59. Unger, *What Should Legal Analysis Become?*, 77.

60. Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing, Too* (New York: Oxford University Press, 1994), esp. 141–79.

61. For a critical account of such strands within CLS, see Altman, *Critical Legal Studies*, 90–98.

## *Chapter 2*

# The Decay of Parliamentarism

Carl Schmitt's idealized portrayal of nineteenth-century liberal parliamentarism and dramatic account of its alleged twentieth-century decline have significantly shaped democratic theory in Central Europe.[1] This influence is hardly surprising: Schmitt's arguments about modern representative democracy raise many difficult questions to which defenders of representative democracy need to respond. The North American revival of interest in Schmitt undoubtedly stems from this feature of his oeuvre as well. Too many liberal political philosophers have been unwilling to acknowledge the depth of problems faced by liberal democracy today.[2] In this context, Schmitt's 1920s account of the "crisis of parliamentarism" may initially appear both original and timely.

Although understandable, this characteristic emphasis on Schmitt *the democratic theorist* obscures the eminent *jurisprudential* concerns of Schmitt's considerations on representative democracy. A central aim of Schmitt's analysis of the crisis tendencies of contemporary parliamentarism is to provide support for his radical views about the inevitability of a far-reaching indeterminacy within the law. The "crisis of parliamentarism" is part and parcel of a broader "crisis of legal indeterminacy." Chapter 1 tried to demonstrate that even before World War I Schmitt was critical of those who believed that legal predictability and regularity could be achieved by appeal to the "will of the statute" or the "will of the legislator." His attack on parliamentarism needs to be read in light of those earlier reflections. In order to underline his belief in the inherent indeterminacy of liberal law, Schmitt attempts to discredit the main source of law in contemporary liberal democracy, the *legislative* branch. Parliament produces the statutes interpreted by judges and applied by administrators; parliament is the prime maker of those legal materials that, according to modern liberal democratic doctrine, ultimately generate predictability

and regularity within law and limitations on state action. If the bankruptcy of the liberal quest for determinate law is to be proven conclusively, the incoherence and the ineptness of the liberal lawmaker must be demonstrated as well.

Crude interpretations of Schmitt's ideas make deceptively easy the task of those of us concerned with defending and reconceiving representative government in a world unlike that of John Stuart Mill or Jeremy Bentham.[3] If we are to preserve representative government, we need to provide an answer to Schmitt's harsh "deconstruction" of it. After restating Schmitt's ideas about liberal parliamentarism (and their intimate relationship to the rule of law), I criticize important historical and sociological features of Schmitt's attack as well as his misleading description of the normative underpinnings of liberal parliamentarism (I, II). Contemporary representative institutions clearly suffer from many serious ills. But they are not, as Schmitt and a growing number of his defenders claim, anachronistic. Schmitt's critique of contemporary parliamentarism is badly overstated (III). In my view, a critique of Schmitt can rely to some extent on a number of inconsistencies and tensions within Schmitt's *own* account.

## I

For Carl Schmitt, the ideal of free and unhindered discussion constitutes the essential principle of classical nineteenth-century parliamentarism. Formulated most clearly by liberal intellectuals like François Guizot and John Stuart Mill, the idea of a freewheeling, deliberative parliament, where rational public opinion would be able to crystallize and guide state action, had far-reaching implications and manifested itself in a rich variety of ways.

In Schmitt's words, "Discussion means an exchange of opinion that is governed by the purpose of persuading one's opponent through argument of the truth or justice of something, or allowing oneself to be persuaded of something as true and just."[4] The liberal model of free debate implied an elected representative's capacity to be guided by the "best" or most "truthful" argument rather than power—or interest-based demands. The underlying spirit of modern parliamentarism was fundamentally rationalistic. Yet this rationalism came in different shapes and sizes; the Marquis de Condorcet's "absolute rationalism," for example, competed with the "relative" rationalism of the American Federalists.[5] In important strands of modern political thought, representatives were not expected to be omniscient philosophers concerned with determining a set of "absolute" truths. In those cases, liberal parliamentarism's implicit brand of philosophical rationalism was of a "moderate" variety, concerned with the quest for situation-specific, "relative" truths about difficult practical questions. In this spirit, parliament was to secure a

"balancing of outlooks and opinions," and a number of institutional devices, including bicameralism and federalism, were seen as making this balance of opinions among multiple parties possible.[6]

Parliamentary representatives were expected to engage in sophisticated forms of practical reflection and deliberation. If the most appropriate or the best argument guided representatives, parliamentary decision-making patterns would take a relatively flexible form; a good argument suddenly might conflict with a given set of preexisting political cleavages, and an elected representative might find himself allying with colleagues with whom he had just disagreed on a previous issue. Classical liberal parliamentarism hence presupposed an impressive degree of mutuality and reciprocity among elected representatives and the possession of a rich variety of argumentative and intellectual skills.

Of course, not all members of the political community were thought to possess such capabilities. Schmitt believes that it was more than coincidental that liberal defenses of parliament often presupposed the political hegemony of the propertied and well educated. On one level, he simply relies on a deeply antidemocratic assessment of the possibilities for broad, popular debate in developing this interpretation: since "the people itself cannot discuss . . . [and] it can only engage in acts of acclamation, voting, and saying yes or no to questions posed to it" from above, parliaments necessarily must be dominated by privileged, educated classes if they are to fulfill their deliberative functions.[7] Yet Schmitt simultaneously makes a crucial historical observation: he believes that the relative political and social homogeneity of many nineteenth-century liberal parliaments helped assure their discursive characteristics, in part because deeply divided parliaments occupied by profoundly antagonistic interests inevitably threaten the workings of "government by discussion." Separated by a deep social or political abyss, profoundly hostile political agents are likely to abandon the chivalrous mores of the "talking classes" and opt for more dramatic, potentially violent forms of political action. Schmitt hence is not claiming, as some of his formulations at first might seem to suggest, that nineteenth-century parliamentary institutions were pristine, deliberative institutions because representatives somehow were altogether free of down-to-earth interest-based claims like those common to contemporary mass democracies. Rather, Schmitt believes that a particular configuration of social interests, best captured by the idea of a parliament based on *Besitz und Bildung* (property and education), helped make the ideal of free discussion a reality within the halls of nineteenth-century parliaments.[8]

In Schmitt's account, a wide-ranging set of complementary institutions "receive[s] their meaning first through discussion and openness."[9] Discursive parliaments implied the necessity of genuinely independent representatives capable of looking beyond the narrow and parochial demands of party or

region. Edmund Burke's famous theory of representation gave expression to this ideal. Elected representatives were expected to do more than mechanically register a set of political preferences that large bureaucratic institutions had already worked out beforehand. Political parties themselves were to rest on a free competition of ideas.

Deliberative parliamentarism also constituted the starting point for modern conceptions of the rule of law. For Schmitt, "the whole theory of the rule of law rests on the contrast between law which is general and already promulgated, universally binding without exception, and valid in principle for all times, and a personal order which varies case to case according to particular concrete circumstances."[10] But this distinction made sense only within the context of liberal rationalism, according to which universality is associated with rationality and particularity with "a concrete person 'moved by a variety of particular passions.' "[11] Closely related conceptions of the separation of powers were justified as ways of guaranteeing a competition of ideas, and an elected legislature was typically made the main site of political decision making chiefly because, in contrast to the executive, it was identified as that institution most thoroughly permeated with the ethos of rational debate and dialogue. The liberal ideal of the rule of law sought to assure the supremacy of discursive parliamentarians by privileging general parliamentary statutes in relation to executive decrees and measures, which were characteristically seen as stemming from a part of the governmental apparatus incapable of being guided by reasoned debate: "legislation is *deliberare*, executive *agere*."[12]

Here as well this rationalism took both extreme and moderate forms. Repeating arguments from the 1917 "Dictatorship and State of Siege," Schmitt notes that writers like Condorcet reduced administrative action altogether to "pronouncing a syllogism in which the law is the major premise."[13] In contrast, the moderate rationalism of the American Federalists supposedly maintained "a balance between the rational and irrational," presumably because the Federalists refused to dissolve executive power into legislation as Condorcet and others had sought.[14] Nonetheless, in Schmitt's exegesis, both forms of rationalism ultimately exhibit a vulnerability to the mechanical jurisprudence of Montesquieu; *The Federalist Papers* simply offers the least doctrinaire version of this model.[15] In Schmitt's gloss, a view of the judiciary and administration as nothing but different "mouth(s) that pronounce the words of the law" is a logical offshoot of the liberal rationalist quest to subject all facets of state activity to a system of rational, codified, legislative norms.

Finally, the "whole system of freedom of speech, assembly, and the press, of public meetings, parliamentary immunities and privileges" presupposes a deliberative vision of parliamentary practice.[16] According to Schmitt, many basic rights were justified on the basis of their contribution to parliamentary

debate: a discursive civil society was to be protected by basic legal protections in order that parliamentarism could fulfill its promise of basing governmental action on an unhindered process of exchange and debate that would bring together "particles of reason that are strewn unequally among human beings."[17]

Schmitt's Weimar-era studies offer two main accounts of the demise of classical deliberative parliamentarism. In his early and highly influential *The Crisis of Parliamentary Democracy*, Schmitt relies upon nineteenth-century liberal arguments—Alexis de Tocqueville's is only the most well known—to prove the irreversibility of egalitarian and democratic trends in the West. Schmitt similarly accepts the inevitability of democracy: today "the dominant concept of legitimacy is in fact democratic."[18] Yet while authors like Tocqueville develop this theme as a way of justifying an array of liberal restraints on popular decision making and ultimately endorsing a constitutional form of popular rule, Schmitt uses it to prove the basic irrelevance of liberalism and institutions such as parliament, which he interprets as embodying liberal ideals. At first glance, Schmitt's argument may appear to rely on a theoretical sleight of hand. In *The Crisis of Parliamentary Democracy*, he simply posits a basic incompatibility between democracy and liberalism. In Schmitt's problematic account of the history of democratic political thought, democracy is to be properly understood as an attempt to establish an "identity" between rulers and the ruled, the governed and the government, and the state and the people. For Schmitt, identity means establishing a set of "identifications" that, though unavoidably incomplete and thus never concrete "palpable realities," nonetheless involve the quest to establish a far-reaching, politically significant "sameness" or homogeneity in the community.[19] Allegedly, such an identity can be established by many means. Liberal parliamentarism need not play an essential role in establishing democratic identity. Because parliaments functioned as an important vehicle for broad-based democratic demands in much of the nineteenth century, traditional liberal thought misleadingly insisted on a relationship of mutual interdependence between liberal ideas (such as parliamentarism) and democratic ones. Schmitt, however, believes that twentieth-century mass movements should put such naive assumptions to rest. Because a genuine identity between rulers and the ruled can be established by many different means, dictatorial regimes very well might do a better job of accomplishing this task than liberal parliamentary ones. In Schmitt's view, fascism and Bolshevism could be eminently "democratic" political phenomena insofar as they successfully establish an identity between state and society and between the governed and government.

This argument ominously depicts twentieth-century mass-based authoritarianism as a fulfillment of the democratic project. Schmitt thereby crudely reduces the democratic project to a quest for homogeneity and badly distorts

the core of that project.[20] But for the moment, let us focus on the *immanent* tensions of Schmitt's presentation. They, too, are quite revealing.

Thus far, Schmitt's argument suggests only that democracy can rely on instruments other than traditional liberal parliamentarism. It nowhere proves an essential or necessary contradiction between democracy and liberal parliamentarism. To achieve that far more ambitious task, *The Crisis of Parliamentary Democracy* relies on a more fundamental argument about the essential core of political experience or what Schmitt dubs the "concept of the political."[21] For Schmitt, politics is essentially conflictual, referring most basically to a potentially explosive struggle between political allies and opponents. The quintessence of political action is the ability to determine and act resolutely against a "foe," defined by Schmitt as "simply the Other, the Alien . . . [I]t is enough for his being that he is in a particularly intensive sense existentially something Other and Alien, so that in the case of conflict he means the negation of one's own form of existence and therefore must be guarded from and fought off, in order to preserve one's own appropriate form [*eigene seinsmässige Art*] of life."[22] The political foe is defined precisely by the fact that he may have to be killed at some juncture, and thus that he is an enemy or opponent in the most intense potential manner: "The concepts of friend, foe, and struggle only gain their real significance through the fact that they relate in particular to the real possibility of killing" an "alien" other.[23] Liberal parliamentarism's reliance on the principle of unhindered debate thus simply denies the core of authentic political experience. Parliamentarism presupposes that political conflicts and tensions can be resolved by recourse to debate and negotiation. But for Schmitt, the essence of political experience is to be understood as "a pure decision not based on reason and discussion and not justifying itself . . . an absolute decision created out of nothingness," according to which political opponents are identified and preparations for the possibility of violent conflict commence.[24] Parliamentarism (along with the rule of law) is thus deeply "antipolitical." In contrast, the democratic tradition's attempt to establish identity supposedly has, in Schmitt's view, an authentically political character. As theorists such as Rousseau allegedly anticipated, the establishment of political identity may very well imply the necessity of "exterminating" [*vernichten*] heterogeneous minorities that fall outside the particular form of homogeneity upon which a given democracy rests.[25] In contrast to liberal parliamentarism, democracy thereby acknowledges the centrality of intense, potentially life-threatening crises.

This step in his argument is significant not only because it seems to allow Schmitt to demonstrate a fundamental tension between ("antipolitical") liberal parliamentarism and ("political") democracy but additionally because it permits him to explain the decline of the former and the rise of the latter. Insofar as identity-based democratic politics corresponds more closely to

the basic, existential core of all genuine political experience (the so-called concept of the political), Schmitt can suggest that it is not surprising that discursive liberal parliamentarism becomes historically anachronistic. Concrete social and historical trends can be interpreted as supporting Schmitt's abstract theoretical claims about the most basic features of political experience. History, it seems, follows political theory.

In the same vein, Schmitt intimates that liberal parliamentarism is incapable of fulfilling the minimal functions of authentic political representation. For Schmitt, representation means providing a visible presence to the otherwise unseen and absent. Representation is an eminently political phenomenon; it underlines the political virtues of those represented. A political community possessing "a higher and more intense type of existence," capable of distinguishing and defending itself from other political communities, can be successfully represented, whereas something "dead, inferior or worthless" necessarily lacks the prerequisites of true representation. When a political leader represents a unified political entity, for example, the person of the political leader can hope to provide a visible expression of the strength of the political community at hand. In that case, "words like greatness, nobility, majesty, glory, dignity and honor" become appropriate descriptions of both the representative and those represented by him.[26] In contrast, a divided, inept political entity, unable to assert its "own appropriate form of life" in relation to other communities, is unlikely to gain a representative possessing such attributes. More often than not, its leaders will seem weak and incompetent.

Schmitt tends to emphasize the personalistic character of authentic representation. Representation cannot be achieved by general norms, for "the idea of representation is fully governed by the idea of personal authority . . . Representation in an eminent sense, in contrast to mere 'standing in for' [*Stellvertretung*], can only be achieved by a person possessing authority or an idea which, as soon as it gains representation, is personified."[27] Unfortunately, liberal parliamentarism stands in an uneasy relation to the prerequisites of authentic representation. Parliamentarism tries to dissolve politics into (antipolitical) deliberation and debate. And parliamentarism obfuscates the personalistic character of representation, conceiving of liberal government as an impersonal rule of law when, in fact, representation always entails the concrete "rule of men." In this way as well, liberal parliamentarism contradicts the concept of the political.

But the problem with this strand of Schmitt's critique of parliamentarism is precisely that it relies so heavily on the "concept of the political." To put the problem most simply, if one refuses to accept his idiosyncratic claims about the concept of the political, we need not accept his view in *The Crisis of Parliamentary Democracy* that parliamentarism is somehow antipolitical in character and thus, unlike identity-based democratic politics, is probably doomed.

Schmitt's conceptualization of politics, which places special emphasis on the crisis situation, distorts what much of everyday politics seems to be about, namely more or less peaceful forms of dispute and exchange.[28] Schmitt's emphasis on the criterion of intense hostility for political experience also risks romanticizing the use of political force or violence, which clearly is a highly intense form of political conflict. The essence of political experience need not be identified with a life-threatening, existential crisis, but rather with the quest to avoid or overcome such crises. When political action is based on an abstract "decision not based on reason and discussion and not justifying itself," the political sphere is likely to be overwhelmed by irresponsible and even irrational forms of behavior. Of course, Max Weber at some junctures similarly formulated a "decisionist" view of moral and political action, according to which our political and moral choices cannot be deduced from general ethical standards, given the "disenchanted" character of our universe. But in dramatic contrast to Weber, Schmitt seems unconcerned with the crucial task of minimizing the dangers of decisionism; Schmitt is unconvinced by Weber's argument in favor of an "ethic of responsibility." For Schmitt, this element of Weber's thinking is a remnant of liberal rationalism that is basically inconsistent with the core of political experience.[29]

Admittedly, Schmitt's *The Crisis of Parliamentary Democracy* provides a telling description of how contemporary parliamentarism no longer lives up to the standards of much of nineteenth-century liberal theory—most significantly, the idea of a deliberative legislature as the supreme lawmaker. Little genuinely freewheeling discussion goes on within the halls of elected legislatures today. Representatives seek to have a particular set of interests acknowledged or "registered" by governmental decision makers but hardly expect to sway their peers by means of rational argumentation. Similarly, political parties rarely rely on the free competition of ideas envisioned by nineteenth-century theorists but instead depend on an impressive propaganda apparatus aimed at mobilizing—often, at least in some settings, by means of a manipulative use of emotions and symbols—a limited portion of the political community. Representatives are no longer independent in the fashion described by theorists like Edmund Burke. His ideas are taken seriously in university seminars but not as a guide to real-life parliamentary practice. Few elected representatives are able to sacrifice the parochial interests of a specific constituency in favor of a quest for a (seemingly ephemeral) common good; few decisions are actually determined within the halls of the legislature. They now tend to be *pre*determined by the leadership of bureaucratized mass-based parties and a panoply of nonparliamentary actors, and the legislature may do little but ratify decisions made elsewhere. Whereas many classical liberals insisted on the nondelegation of legislative authority to administrative agencies, major political decisions now often are made by corporatist

decision-making units dominated by powerful and well-organized interest groups. The state administration undertakes significant lawmaking functions, and bureaucratic decrees increasingly take on greater de facto significance than parliamentary general law. As Schmitt predicted, crisis tendencies within contemporary parliamentarism are intimately related to the proliferation of vague, open-ended laws, often incapable of providing adequate direction to judges and administrators. Inevitably, rule of law virtues are sacrificed: as statutes become increasingly amorphous, highly discretionary forms of judicial and administrative decision making flourish. Significant legal *in*determinacy indeed becomes a striking feature of many arenas of legal experience. In short, there are a number of disturbing signs not only that contemporary parliaments in the West are becoming an "empty formality" but that the traditional ideal of the rule of law is under attack as well.[30]

Schmitt's description of contemporary parliamentarism, repeated in a number of essays and larger studies during the Weimar period, surely amounts to more than the rantings of a fascist ideologue. Substantial scholarship confirms many of its features. Nearly seventy-five years ago, James Bryce articulated a number of analogous concerns.[31] More recently, Charles Maier has demonstrated that the proliferation of corporatist decision-making structures in 1920s Europe functioned to deny parliaments many of their traditional legislative prerogatives; perhaps Schmitt's account can be interpreted as an attempt to come to grips with this development.[32] Similarly, many jurists and legal scholars have scrambled to explain the sources of the vast discretionary powers today enjoyed by administrators and judges.[33] Still, Schmitt's observations hardly seem to justify the apocalyptic argumentative structure of *The Crisis of Parliamentary Democracy*: Schmitt really seems to think that his account can show us that "the age of discussion is coming to an end after all."[34] His dramatic contrast between the ambitious aspirations and alleged reality of nineteenth-century liberal parliamentarism and the disappointing contours of twentieth-century representative government hardly suffices as an adequate sociological and historical explanation for the purported decline of deliberative parliamentarism. For that matter, unless we accept Schmitt's broader claims about liberal parliamentarism's profoundly "antipolitical" character, *The Crisis of Parliamentary Democracy* ultimately presents us with no sufficient reason for accepting Schmitt's belief there that deliberative parliamentarism could not be reestablished in conditions very much unlike those that helped generate it. In short, what first appears to be an empirical study of the transformation of parliamentary government turns out to be an unambitious gloss on an abstract and highly problematic claim about the so-called concept of the political.

Perhaps these inadequacies encouraged Schmitt to try to formulate a somewhat more nuanced sociological-historical explanation of

parliamentarism's transformations. A set of subsequent texts—most importantly, the crucial *Constitutional Theory* (1928)—does a superior job of tracing the history of parliamentarism in the nineteenth and twentieth centuries. In these texts, Schmitt relies on an impressive survey of nineteenth- and twentieth-century European parliaments to refurbish his basic argument. It now turns out that parliamentary bodies in some parts of Europe were able to acquire, in Schmitt's theoretical terms, some authentically "political" characteristics. Positioned between hostile monarchical forces based in the executive branch and militant, emerging workers' movements, parliaments dominated by educated, middle-class strata [*Bildung und Besitz*] played a pivotal role in the political community's chief friend/foe divisions. For a brief moment in the nineteenth century, parliament was able to function as an authentic representative body; *Bildung* was a "personal quality and therefore capable of being used in a system of representation."[35] Parliament constituted "a gathering of educated people, who represented education and reason, indeed the education and reason of the whole nation."[36] Liberal parliamentary representatives were a concrete personal embodiment of the political hegemony of the educated and economically privileged. Allegedly, they exhibited something of the "greatness, nobility, majesty, glory, dignity and honor" constitutive of effective representation. According to Schmitt, the nineteenth-century liberal bourgeoisie clearly grasped the authentic political character of its position. "Relativistic" and "formalistic" defenses of parliamentarism, like those endorsed by twentieth-century liberal theorists such as Weber and Kelsen, were alien to nineteenth-century liberals because they understood the political uses of a parliament dominated by those with education and property.[37]

But in Schmitt's account, bourgeois strata in much of Europe abandoned the more ambitious facets of the agenda of liberal parliamentarism as they discovered that alternative regime types (French Bonapartism, Prussian constitutional monarchy, or a British-style quasi-plebiscitary democratic republic) would protect their basic interest in the preservation of private property. Challenged from below, the liberal bourgeoisie increasingly reduced parliament to an instrument for the protection of class privilege. Parliament soon lost its representative functions; Schmitt argues that a parliament primarily concerned with protecting economic interests can no longer perform authentic representative functions.[38] Particularly after the revolutions of 1848, the tendency to abandon parliament among the educated and propertied became commonplace, and Schmitt thinks that it explains why "since 1848 no systematic, ideal justification of the parliamentary system is brought forward" anymore.[39] Thereafter, liberal parliamentarism's intellectual roots in a set of "normativistic" illusions about the nature of politics increasingly manifested themselves in concrete terms. Propertied liberal strata made fateful,

politically naive concessions to their opponents and obscured the existential threat posed by such foes. Most importantly, parliamentary representation—Schmitt mentions the growing electoral might of the British Labor Party as an example of what he has in mind[40]—was permitted to take on a heterogeneous and decreasingly bourgeois character. The emergence of electoral socialism means that many European parliaments no longer were unambiguously controlled by those strata that Schmitt considers alone capable of living up to the demands of unhindered discourse. Remember, for Schmitt, "the people cannot discuss—it can only engage in acts of acclamation, vote, or say yes or no to questions posed to it" from above. In Schmitt's theory, the people can do nothing but generate an "unorganized answer" given "to a question which may be posed by an authority whose existence is assumed."[41] Allegedly, to expect anything more of popular decision making would be utopian. The successful functioning of parliamentarism presupposes the political hegemony of educated, propertied classes. Without them, it is unlikely that parliament can perform its classical deliberative tasks.

According to Schmitt, the expansion of suffrage and the subsequent emergence of a parliamentary universe populated by deeply antagonistic class-based parties tend to mean (as Schmitt believes to be evident in Weimar Germany) that intense political cleavages now are located *within* parliament. Whereas the key friend/foe divisions in the nineteenth century to some extent corresponded to the separation between parliament and the executive, intense political cleavages in the twentieth century cripple parliament and make traditional forms of parliamentary politics impossible. Parliament becomes a mere forum for political majorities chiefly concerned with reorganizing the political community's underlying system of political legitimacy and institutions so as better to satisfy their particular power needs. Deeply hostile political blocs located within parliament are not simply increasingly uninterested in polite liberal debate or the traditional mores of the educated classes; now, appeals to traditional liberal parliamentary ideals and procedures, such as majority rule, are likely to serve as little but an ideological front for the power-interests and the particularistic agendas of hostile, distinct constituencies.[42] Inevitably, parliament in the twentieth century tends to become an instrument by means of which antagonistic power blocs hope to make sure that the state apparatus acknowledges the legitimacy of their private interests but hardly a source of open-ended contemplation of the "common good." Legal trends mirror this development as well: the proliferation of nontraditional forms of law stems from the difficulties of achieving political compromises within the context of socially divided political communities.[43] Schmitt's *Guardian of the Constitution* (1931) asserts that early liberalism envisioned an autonomous society distinct from the state but able to maintain control over governmental action by means of its dominance of a deliberative parliament.

But working-class-based political parties spawn new forms of state intervention in society and ultimately a fusion of state and society. In Schmitt's dramatic account, the legislature then becomes little more than a "showplace for pluralist interests" controlled by polarized interest blocs closely linked to particular facets of the interventionist state and representative of narrow elements of a political community often lacking, like the mass-based bureaucratic parties and increasingly plebiscitary elections that put legislators into power, any interest in engaging in quaint rationalistic discourse with political opponents.[44]

Parliament corresponded to the imperatives of a bourgeois-dominated political era. But in the age of mass democracy and organized working-class politics, it becomes transformed into a "technical transmission belt" for nonparliamentary decision-making complexes. "Parliament is no longer the site where political decisions are made. Key decisions are made outside of parliament."[45]

## II

Schmitt's revised and far richer sociological-historical account of liberal parliamentarism undoubtedly is superior to the original provided in the 1923 *The Crisis of Parliamentary Democracy*. Nonetheless, it still contains a number of flaws. Let me begin by mentioning just a few of the more immediate ones.

First, it is empirically implausible that the limited quality of political deliberation in most contemporary parliamentary bodies, as Schmitt occasionally suggests, can be easily blamed on the emergence of popular and working-class political movements. Although the percentage of elected representatives with working-class and lower-middle-class backgrounds increased significantly in many European legislatures at the beginning of the twentieth century, those percentages leveled out and even decreased after the 1930s and 1940s. Schmitt sees the deliberative functionings of parliament as inextricably tied to the middle-class social background of its members, but it is really only in the twentieth century—when parliaments, in Schmitt's account, *lose* their discursive capacities—that middle-class groups (and, in particular, lawyers) become truly well represented in most legislatures.[46] Of course, Schmitt also tries to present a more subtle version of this basic argument. But even the observation that labor and socialist political parties often contributed to political polarization and the paralysis of many legislative bodies at best applies, and even there only with a number of important qualifications, to a few Central European countries (such as Weimar Germany), yet hardly can be taken as a universal explanation for parliamentary failure.[47] Arguably, some polities experienced important features of parliamentary decay *despite*

the fact that mass-based workers' or social democratic parties never gained a foothold there.[48] The growing complexity of state activities in the twentieth century, which is surely the most immediate source of the growing autonomy of the state's administrative apparatus and many of the ills of representative government, cannot be explained chiefly, as Schmitt sometimes suggests, as a consequence of social-democratic-style interventions in the economy. Similarly, the relatively indeterminate character of much parliamentary legislation surely has many sources; the rise of labor and social democratic parties is at best one of them.[49]

A far more fundamental failing underlies Schmitt's sociological and historical argument, however. Much of the power of his analysis of liberal parliamentarism stems from the dramatic claim that liberal societies in fact *did* once have truly freewheeling, deliberative elected legislatures but, more or less abruptly, have *lost* them. Schmitt is not intent simply to contrast liberal democratic *ideals* with liberal democratic *reality*. He wants us to believe that at some point a "golden age" of parliamentary government existed, whose precious treasures are beyond the reach of everyone unlucky enough to be born in the twentieth century.

Yet, *The Crisis of Parliamentary Democracy* never provides an *historical* account of classical liberal parliaments. Only in *Constitutional Theory*, in a crucial section entitled "An Historical Survey of the Development of the Parliamentary System," does Schmitt attempt to provide some concrete historical backing for his idealized portrayal of nineteenth-century liberal parliaments. And there its results are remarkably meager.

Where in the world of real parliaments did independent representatives square off intellectually so as to bring together "particles of reason that are strewn unequally among human beings"? Did liberal parliamentarism as Schmitt describes it ever gain a significant foothold in nineteenth-century Europe? Given the importance of Schmitt's implicit empirical claims about nineteenth-century liberal parliaments for his claims about parliamentary decay, the reader of *Constitutional Theory* will be surprised to find out that Schmitt himself apparently did not think his model of deliberative parliaments had very much to do with political reality, or at least *Constitutional Theory* seems to suggest as much. In this work, Schmitt argues that it was primarily German and French theorists (such as Lorenz von Stein, Rudolf Gneist, François Guizot, and Benjamin Constant) who, during the first half of the nineteenth century, developed the most mature theoretical conceptions of discursive parliamentarism;[50] in contrast, Britain provided a "practical" inspiration for European liberals. But Schmitt is forced to acknowledge that nineteenth-century German liberals never managed to establish anything close to the ideal of parliamentary government outlined in advanced century liberal theory. The German *Reichstag* became politically dominant only after

the revolution of 1918 and, according to Schmitt, by then "the political and social situation was so fully transformed" in Germany—most importantly, because of the ascent of the political left—that the fulfillment of the agenda of parliamentarism amounted to a "posthumous" victory for representative government.[51] By 1918, what Schmitt considers the necessary social presuppositions of liberal parliamentarism had dissipated to such an extent in Germany that it no longer could function in the manner sought by nineteenth-century liberals. Schmitt's presentation of the French case similarly gives the reader little to work with. He acknowledges that the post-Napoleonic "constitutional parliamentary" regime after 1815 and then Louis Phillip's "parliamentary monarchy" of 1830–1848 guaranteed extensive discretionary authority to the crown and executive. It is difficult to imagine that Schmitt intends these regimes to be seen as the site of the powerful, deliberative legislatures described elsewhere in his writings. In fact, Schmitt never makes an argument for the virtues of parliamentarism under the auspices of Louis Phillip; perhaps he realizes that many contemporary observers of French parliamentarism during this period—most prominently, Tocqueville—chronicled extensive bribery, patronage, and corruption among parliamentarians.[52] Another candidate, for Schmitt, might be the French Third Republic. Despite the fact that Schmitt correctly notes that the 1875 constitution attributed unprecedented authority to the legislature, he again nowhere explicitly points to the Third Republic as an example of the broader model of liberal parliamentarism that he has in mind. Perhaps Schmitt simply knows too much about the sorry state of many features of French parliamentary politics during this period, or maybe he acknowledges that parliament by then already had begun to include working-class and lower-middle-class representatives.[53]

Nineteenth-century Britain would be the obvious source for Schmitt's idealized account of liberal parliaments. Some recent commentators claim that he builds upon the British experience in order to formulate his critique of contemporary parliaments.[54] But Schmitt explicitly admits in *Constitutional Theory* that the House of Commons before the electoral reforms of 1832 relied upon an illiberal electoral system and was an "overwhelmingly aristocratic assembly of a medieval type."[55] He goes on to note that as early as the 1850s parliamentary elections began to take an increasingly plebiscitary character and that, by 1867, parliament no longer possessed a decisive or central position in the British system. In Schmitt's view, parliament had become little but a "connecting link" [*Bindeglied*] between the cabinet and the electorate, which increasingly had become an object of mass political mobilization.[56] Schmitt is forced to acknowledge that British politics by midcentury was increasingly dominated by charismatic party leaders, like William Gladstone, effective at building mass support by means of emotional appeals. This is already the beginning of the era of Weber's

"caesaristic" party leader but hardly that of the rationally discursive, independent liberal parliamentarian.[57]

Still, Schmitt's discussion of the British experience remains revealing for one important reason. In *Constitutional Theory*, Schmitt is fascinated with how, since Montesquieu's deceptive portrayal of English political institutions in *The Spirit of the Laws*, various "constructions, schematizations, idealizations, and interpretations" of English parliamentarism served "the liberal bourgeoisie on the European continent in the struggle against Absolutism."[58] After Montesquieu's idealization of eighteenth-century England, further idealizations ensued: Schmitt claims that "the nineteenth-century English parliament became a *mythical picture* [emphasis added] for a significant portion of the liberal bourgeoisie, the historical correctness and accuracy of which does not matter."[59]

Schmitt's use of the term "myth" is significant for two reasons. Reminiscent of earlier comments about the methodological merits of relying on "juridical fictions,"[60] it lends credence to the suspicion that Schmitt himself does not really believe there ever was such a thing as a freewheeling, deliberative liberal parliament anywhere in the nineteenth century; his own historical account provides little, if any, basis for this thesis. His comments suggest strongly that the picture of a discursive English parliament was nothing but a politically efficacious "myth" employed by the liberal middle classes in their life-or-death struggle against the ancient régime and its aristocratic allies.

Even more significantly, the use of the term "myth" unveils a great deal about Schmitt's own project. In *The Crisis of Parliamentary Democracy* and other texts, Schmitt praises Georges Sorel's *Reflections on Violence* and its interpretation of the "myth" as an instrument by which a political constituency "pushes its energy forward and gives it the strength for martyrdom as well as the courage to use force."[61] In Schmitt's view, Sorel understands that politics ultimately involves potentially violent conflicts between "friends" and "foes," and that the irrational myth, in contrast to liberal ideals of peaceful deliberation and exchange, can play an effective role in mobilizing political agents so that they can "become the engine of world history."[62] Though hostile to Sorel's socialism, Schmitt delights in the French radical's thesis that, once a political and social order lacks an adequate basis in irrational myths, it "no longer can remain standing, and no mechanical apparatus can build a dam if a new storm of historical life has broken loose."[63] In short, Sorel implicitly understands the Schmittian concept of the political, and Sorel's theory of the political myth provides helpful advice to those ready to engage in conflict-ridden, life-threatening, authentically political forms of action.

Schmitt's emphasis on the "mythical" quality of discursive liberal parliamentarism here makes it difficult to avoid the following conclusions. For Carl Schmitt himself, an idealized and even unreal account of nineteenth-century

liberal-parliamentarism is a convenient political myth that takes on new functions for friend/foe politics in the twentieth century. Whereas liberals in the nineteenth century looked to Britain and the "myth" of discursive parliamentarism in order to defeat a set of deeply hostile political opponents, Schmitt now unleashes the myth of a freewheeling, discursive parliament against an extremely threatening set of contemporary foes, namely, the working-class movement and the socialist political parties. In Schmitt's view, these constituencies now constitute the main threat to those, like Schmitt himself, who hope to preserve crucial components of the increasingly fragile project of premodern, elite-dominated politics. Left-wing political movements, he believes, lead the working classes astray by demanding political and social democratization and by falsely suggesting that they can do more than simply say yes or no to simple questions posed from above by an undemocratic elite. They thereby dislodge traditional patterns of deference long shown by the broad mass of the population to a narrow elite that, in Schmitt's account, alone possesses genuine political skills. Labor, social democratic, and communist parties, at least, become the main target of Schmitt's political fury in many of his Weimar-era writings[64] and certainly the object of his ire in his discussion of the development of parliamentary democracy in the nineteenth and twentieth centuries.

## III

But perhaps Schmitt should be read more modestly. Maybe his basic argument can be salvaged if it is interpreted simply as an attempt to contrast the ambitious *ideals* of liberal parliamentarism, as they were formulated by liberalism's most impressive nineteenth-century theorists, with the unsatisfactory state of contemporary parliamentary *reality*. After all, does that not suffice? Should not liberals and democrats at least be somewhat worried if parliamentarism no longer lives up to the norms by means of which it was originally justified? Undoubtedly, parliaments today serve numerous functions unforeseen by nineteenth-century liberal theorists—at least in *The Crisis of Parliamentary Democracy*, Schmitt does not deny this[65]—but it probably still should be a matter of concern if their pivotal deliberative tasks are no longer being performed very effectively. Liberal democratic theorists defeated their political opponents in part by arguing for the superior *reasonableness* or *rationality* of parliamentary government. But contemporary liberal democracy cannot make the same claim if parliament does little but ratify decisions really made behind closed doors by the administrative apparatus and powerful organized interests.

Even this more sympathetic interpretation of Schmitt's critique of parliamentarism cannot save the core of his argument. If Schmitt is to succeed in

contrasting liberal parliamentary ideals with liberal parliamentary reality, he needs to provide an accurate portrait of those ideals. He fails in this task.

Recall Schmitt's assertion in *The Crisis of Parliamentary Democracy* that many classical liberal rights, such as free speech or parliamentary immunities and privileges, lose their "rationale" with the (alleged) demise of a deliberative parliament.[66] This is a revealing assertion. For Schmitt, many basic legal protections make sense only because they guarantee parliamentary debate and exchange. Insofar as parliament no longer performs deliberative functions, liberal protections, including free speech and freedom of assembly, necessarily become anachronistic. In short, the fate of central liberal political institutions is determined by the destiny of deliberative parliamentarism.

This claim, as Jean Cohen and Andrew Arato have noted, is an untenable interpretation of basic liberal and democratic legal protections.[67] Such protections clearly perform many functions beyond the preservation of parliamentary debate. In some of his texts, Schmitt offers a misleading, highly concretistic reading of the noble, old-fashioned ideal of government by discussion.[68] This reading allows him to underplay the importance and broader significance of a host of basic democratic institutions and rights. At some crucial junctures in his writings, Schmitt reduces the liberal democratic ideal of government by discussion, which implied a discursive and self-regulating *public sphere* in opposition to the state, to the narrower ideal of a discursive, autonomous *parliament*. But many classical liberal democratic conceptions of representative government envisioned *both* a deliberative parliament *and* a much broader, discursive public that, by virtue of its own deliberative features, would choose representatives who would advance the most reasonable or rational governmental policies and contribute in manifold ways to a relatively thoughtful expression of public opinion.[69]

Perhaps Schmitt would claim that this criticism is irrelevant to his basic argument. As we will see in chapter 4, Schmitt suggests in the early 1930s that the demise of the classical liberal state/society divide, and its replacement by an interventionist "total" state that permeates all aspects of social and economic existence in the twentieth century, obliterate any vestiges of the self-regulating, autonomous society depicted by early liberal theory. Indeed, to the extent that deliberative processes within the political community at large are deeply threatened by state bureaucracies, problematic modes of surveillance, massive private corporations, and poorly regulated forms of corporatist-style public/private authority, this second facet of the ideal of government by discussion undoubtedly becomes fragile today; many facets of the contemporary political universe suggest that such threats are authentic. By the same token, if it turns out that some type of independent public sphere in contemporary liberal democracy—though, undoubtedly, one very distinct from the property-based, privatistic civil society pictured by

classical liberal theory—still provides meaningful possibilities for at least some relatively meaningful deliberation and rational exchange, then one could respond to Schmitt by claiming that representative government has by no means exhausted all elements of its original normative agenda. Even if open discourse is hindered within some contemporary parliaments, the fact that liberal democracies may rest on a broader network of society-wide political debate and discourse would mean that the ideal of government by discussion has a future.

As part of his attack on liberal jurisprudence, Schmitt hopes to discredit the liberal legislature. Yet insofar as legislators are chosen at least to some extent on the basis of freewheeling argumentative debate and exchange, parliamentary lawmaking could still claim to rest on a minimal discursive basis. The liberal lawmaker is hardly as unambiguously incompetent, inept, or irrational as Schmitt wants to suggest. Parliamentary decision making's discursive origins, a broader society-wide process of political debate, in which opposing arguments are exchanged and contested in a host of both traditional and new settings, certainly make some contribution to the reasonableness of liberal law.

Indeed, broad-based, popularly elected parliamentary bodies conceivably are more effective at representing a greater diversity and heterogeneity of argumentative viewpoints than other, competing state institutions and thus gain a renewed basis for insisting on their supremacy in the legislative process: parliament still may be the site where "particles of reason that are strewn together unequally among human beings" are able to manifest themselves, in a much richer, diverse, and multifaceted way than in alternative aspects of the political apparatus. A single, *univocal* elected executive cannot possibly stand for or represent all possible argumentative perspectives in civil society, whereas a broad-based, *multivocal* elected legislature with hundreds of members arguably may be quite effective at reflecting the heterogeneity of "particles of reason" found in contemporary society. While a large, popularly elected parliament may be fairly well suited to the task of reaching practical compromises among differing argumentative standpoints and thus in contributing to the reasonableness of governmental policy, a plebiscitary-style elected executive may find it hard to reflect the same diversity of argumentative perspectives. Insofar as parliaments can be shown to perform this somewhat more modest function as part of a broader set of complexes making up the project of government by discussion, they hardly deserve to be considered anachronistic or irrelevant. Contra Carl Schmitt, parliamentarism today is not an "empty formality."

Admittedly, these "particles of reason" effect governmental policy in a much more indirect manner than probably would have satisfied many

nineteenth-century liberals. We also seriously need to examine a number of substantial reform proposals if the deliberative and legislative tasks of representative institutions are to be refurbished. Similarly, there are good reasons for worrying about the proliferation of open-ended law and corresponding modes of discretionary judicial and administrative decision making. But the need for reform still does not justify Schmitt's denial of the very existence of "particles of reason" in the interstices of contemporary representative democracy.

## IV

I do not mean to conclude here on what may seem, in light of the evident ills of representative democracy today, an overly optimistic tone. Substantial threats obviously challenge the ideal of government by discussion even if one focuses on the merits of a deliberation outside of parliament proper.

Nonetheless, it is an empirical question whether contemporary liberal democracy has been robbed of all deliberative spaces; Schmitt's apocalyptic account tends to obscure the significance and complexity of this question. In the same vein, many challenges to the rule of law diagnosed by Schmitt are more ambivalent than he concedes. Vagueness in law sometimes facilitates arbitrariness and exacerbates political and social inequality; on occasion, it instead helps generate increased possibilities for political participation and greater social justice.[70] Schmitt seems uninterested in the complex texture of antiformal trends within the law. For him, trends toward the *deformalization* of law simply demonstrate the bankruptcy of the liberal rule of law and its longtime ally, deliberative parliamentarism.

Here as well, Schmitt offers an important negative lesson for us. His discussion of parliamentarism points directly to the potential dangers of one-sided, deconstructive interpretations of contemporary representative democracy, which too often have flourished on both the left and right. Obscuring the complexity of the traditional liberal ideal of government by deliberation, Schmitt rushes to conclude that contemporary parliaments (and the rule of law) are an "empty formality." In part because of this mistake, he ultimately embraces a dictatorial alternative to the Weimar Republic.

In light of this fateful choice, it is imperative to strive to avoid reproducing Schmitt's errors. We can begin to do so by honestly recognizing the real ills of contemporary representative democracy while simultaneously acknowledging liberal parliamentarism's immanent normative kernel as a starting point for reforms directed at overcoming those ills.

## NOTES

1. For a discussion of Schmitt's influence, see Ellen Kennedy, "Carl Schmitt's Parlamentarismus in Its Historical Context," in Schmitt, *The Crisis of Parliamentary Democracy*, xiii–xlix. For an account of Schmitt within the German context, see Kurt Kluxen, *Geschichte und Problematik des Parlamentarismus* (Frankfurt am Main: Suhrkamp, 1983), 175–96. Insightful is also Ernst Fraenkel, *Deutschland und die westlichen Demokratien* (Frankfurt am Main: Suhrkamp, 1991).

2. This has changed, of course, with the ascent of authoritarian populism, with many liberal political theorists and philosophers scrambling to make sense of it.

3. To claim that Schmitt was simply concerned with "destroying the purely mechanical approach to parliamentarism, namely, that any qualified majority may at any moment" restructure the constitution, understates Schmitt's hostility to parliamentary government (Schwab, *Challenge of the Exception*, 67–72). Bendersky similarly obscures Schmitt's hostility to liberal representative government (*Carl Schmitt: Theorist for the Reich*, 64–84). For another simplified account of Schmitt's ideas, see John Keane, *Democracy and Civil Society: On the Predicaments of European Socialism, the Prospects for Democracy, and the Problem of Controlling Social and Political Power* (London: Verso, 1988), 153–90. Keane's argument that Schmitt ignored premodern parliaments in his account of the rise and fall of liberal parliamentarism misses the core of Schmitt's argument. In addition, Keane's suggestion that Schmitt denied the possibility of reforming parliament is inaccurate. Schmitt frequently concedes the possibility of tinkering with parliament so as to make sure that it might perform some more or less useful "socio-technical" functions; he just doubts that it could recapture its crucial, classical deliberative core. Inadequately critical of Schmitt are Richard Bellamy and Peter Baehr, "Carl Schmitt and the Contradictions of Liberal Democracy," *European Journal of Political Research* 23 (1993): 163–85. More reliable is Bernard Manin, *The Principles of Representative Government* (New York: Cambridge University Press, 1997), 193–235.

4. Schmitt, *Crisis of Parliamentary Democracy*, 5. This is a reliable English translation of the 1926 edition of *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (Berlin: Duncker and Humblot, 1926); there was an earlier 1923 edition as well. As I discuss shortly, Schmitt develops his Weimar-era argument about modern parliamentarism in *Die Verfassungslehre* [*Constitutional Theory*] (Munich: Duncker and Humblot, 1928) and *Der Hüter der Verfassung* [*The Guardian of the Constitution*] (Tübingen: Mohr, 1931). He also broaches the topic in shorter essays in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles 1923–1939* [*Positions and Concepts in the Struggle against Weimar-Geneva-Versailles*] (Hamburg: Hanseatische Verlagsanstalt, 1940); and Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954* (Berlin: Duncker and Humblot, 1973). Schmitt's critical analysis of political romanticism, developed during the same period, can also be fruitfully read as part of his critique of liberal rationalism. In *The Crisis of Parliamentary Democracy*, Schmitt emphasizes the similarities between the German Romantic notion of eternal discussion and the liberal ideal of the deliberative parliament, commenting that it is "confused" to see German Romanticism as

conservative and antiliberal (36). In this view, Romanticism suffers from many of the same ills as "indecisive" liberalism (Carl Schmitt, *Political Romanticism* [1925], trans. Guy Oakes [Cambridge: MIT Press, 1986]).

5. Schmitt, *Crisis of Parliamentary Democracy*, 35, 45–46.

6. Schmitt, *Crisis of Parliamentary Democracy*, 34–36, 40–41, 45–47. This nuance is significant because Schmitt's most formidable contemporary critic, Hans Kelsen, accused him of endorsing an "absolutistic" view of political deliberation that, in Kelsen's view, was incompatible with the basic preconditions of a "disenchanted" (Weber) moral and political universe and a genuinely modern form of democracy. For Kelsen, a political theory that emphasizes "absolute truths" tends to have authoritarian implications, whereas a fallibilistic view of politics that acknowledges the "relative" quality of most political arguments alone provides room for a genuinely liberal, open process of political decision making (Hans Kelsen, *Das Problem des Parlamentarismus* [Vienna: Wilhelm Braumüller, 1926], especially 39–40). Although I sympathize with Kelsen's critique, I am not sure that it fully captures the complexities of Schmitt's interpretation of liberal rationalism. In *The Crisis of Parliamentary Democracy*, Schmitt considers "relative" rationalism more important for parliamentarism than its "fanatical" or "absolutist" versions (Bentham, Condorcet) (Schmitt, *Crisis of Parliamentary Democracy*, 38–39, 46).

7. Schmitt, *Die Verfassungslehre*, 315.

8. Schmitt, *Die Verfassungslehre*, 310–16.

9. Schmitt, *Crisis of Parliamentary Democracy*, 3.

10. Schmitt, *Crisis of Parliamentary Democracy*, 42.

11. Schmitt, *Crisis of Parliamentary Democracy*, 42. Schmitt is citing Junius Brutus' *Vindiciae contra Tyrannos* (1579) here.

12. Schmitt, *Crisis of Parliamentary Democracy*, 45. In a perceptive critique, Ferdinand Tönnies argues against Schmitt that he tends to overstate this contrast. For Tönnies, classical models of the executive hardly excluded deliberation; by the same token, legislation was not associated with the quest for truth to the extent described by Schmitt. In short, in Schmitt's analysis, the rationalism of legislation is overstated and the potential rationalism of the executive understated (Ferdinand Tönnies, "Demokratie und Parlamentarismus," *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich* 51 [1927], 8–11).

13. Condorcet, cited in Schmitt, *Crisis of Parliamentary Democracy*, 44. See also Schmitt, "Diktatur und Belagerungszustand," where he levels the same accusation against Rousseau (158).

14. Schmitt, *Crisis of Parliamentary Democracy*, 45–46. Although undeveloped, Schmitt's comments here are extremely interesting. American constitutional democracy certainly does give much more autonomy to the executive—and, for that matter, the judiciary—than crucial strands of continental Enlightenment rationalism would have considered appropriate. Unfortunately, Schmitt downplays the interesting implications of this suggestion. After all, it might be taken as evidence that influential strands within liberal political and legal theory certainly have tried to come to grips with the problem of the "exception" in law. But the implicit claim here is that American liberalism contains more "political" elements than its European counterparts. In

chapter 6, we examine Schmitt's discussion of American conceptions of international law, where he similarly emphasizes the political capacities of American liberals.

15. Schmitt, *Crisis of Parliamentary Democracy*, 44–45.

16. Schmitt, *Crisis of Parliamentary Democracy*, 49.

17. Schmitt, *Crisis of Parliamentary Democracy*, 35.

18. Schmitt, *Crisis of Parliamentary Democracy*, 30.

19. Schmitt, *Crisis of Parliamentary Democracy*, 26–29. For a more detailed analysis of Schmitt's view of democracy and its relationship to the concepts of equality, homogeneity, and identity, see Schmitt, *Die Verfassungslehre*, especially 223–38, 276–82. In *Die Verfassungslehre*, Schmitt argues for a basic contradiction between (the "political" idea of) democracy and ("anti-political," "normativistic") liberalism. For a helpful analysis of the conceptual issues at hand here, see Ulrich Preuss, "Der Zusammenhang von Demokratie und Gleichheit in der Verfassungstheorie Carl Schmitts," in *Gleichheit und Konservatismus*, ed. F. de Pauw (Zwolle: W. E. J. Tjeenk Willink, 1985), 117–32.

20. Otto Kirchheimer and Nathan Leites perceptively argued early on that "identity" is both an empirical and normative category for Schmitt. It is tied to claims about what democracy ought to be and, furthermore, should contribute to an empirical analysis (and a critique) of contemporary democracy. On the empirical level, Schmitt believes that democracy ultimately cannot function without far-reaching "sameness" or homogeneity, but Kirchheimer rightly notes that Schmitt's emphasis on homogeneity is misleading and overstated: from multiethnic and multilingual Belgium to class-divided France and England, many relatively pluralistic, heterogeneous democracies have flourished. On the basis of the peculiarities of the deeply divided, crisis-torn Weimar Republic, Schmitt formulates a number of highly problematic empirical generalizations about twentieth-century mass democratic polities. Schmitt's normative claim is misleading insofar as it distorts the fact that democratic theorists long aspired to realize *both* freedom *and* equality, *both* collective autonomy *and* equality. Democracy was conceived of as collective self-determination and not solely or even primarily (as Schmitt argues) as equality understood in terms of a far-reaching political homogeneity (Otto Kirchheimer and Nathan Leites, "Comments on Carl Schmitt's Legality and Legitimacy" [1933], in *The Rule of Law under Siege: Selected Essays of Franz Neumann and Otto Kirchheimer*, ed. William E. Scheuerman [Berkeley: University of California, 1996], 64–68).

21. Schmitt, *Crisis of Parliamentary Democracy*, 8–15. It is significant that Schmitt was formulating this part of the argument (in 1926) at the same time that he was beginning his work on the "concept of the political."

22. Carl Schmitt, "Der Begriff des Politischen," *Archiv für Sozialwissenschaft* 58, no. 1 (1927): 4. In 1932, Schmitt extended and reworked this essay into a book; where appropriate, I cite the English translation: Carl Schmitt, *The Concept of the Political*, trans. George Schwab (New Brunswick, NJ: Rutgers University Press, 1976).

23. Schmitt, "Der Begriff des Politischen," 6.

24. Schmitt, *Political Theology*, 66.

25. Schmitt, *Crisis of Parliamentary Democracy*, 9.

26. Schmitt, *Die Verfassungslehre*, 209–10.

27. Schmitt, *Römischer Katholizismus und politische Form*, 29. Schmitt's early reflections on the concept of representation clearly contain authoritarian Catholic elements, but before long they took on nationalistic and fascistic hues. For a discussion of this development, see McCormick, *Carl Schmitt's Critique of Liberalism*, 157–205. Schmitt's views on representation do not fall easily under any of the common categorizations of representation developed within modern political theory. It sometimes seems closest to the medieval, even "mystical" model thematized by Hannah Fenichel Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 241–42, 295.

28. For an early (1936) statement of this criticism, see Neumann, *Rule of Law*, 26–27.

29. Elsewhere I have restated some of these traditional criticisms of Schmitt's "concept of the political" in "Modernist Anti-Modernism: Carl Schmitt's Concept of the Political," *Philosophy and Social Criticism* 19, no. 2 (1993): 79–98. It is no accident that Leo Strauss was so concerned about the potential dangers of this element of Weber's thinking in light of his familiarity with the ills of Schmitt's decisionism. See Leo Strauss, "Comments on Carl Schmitt's Der Begriff des Politischen" (his commentary on the 1932 version of Schmitt's study on the concept of the political), reprinted in Schmitt, *Concept of the Political*, 81–105; and more generally, Leo Strauss, *Natural Right and History* [1953] (Chicago, IL: University of Chicago, 1965).

30. Schmitt, *Crisis of Parliamentary Democracy*, 6; Schmitt, *Die Verfassungslehre*, 319.

31. James Bryce, *Modern Democracies* (New York: Macmillan, 1921).

32. Charles Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany and Italy in the Decade after World War I* (Princeton, NJ: Princeton University Press, 1975). For just a few examples of the massive contemporary literature on parliamentary decay, see Suzanne Berger, "Politics and Anti-Politics in Western Europe," *Daedalus* 108, no. 1 (Winter 1979): 46–47; Manin, *Principles of Representative Government*, which confirms many of Schmitt's arguments, 202–18; Claus Offe, *Contradictions of the Welfare State*, ed. John Keane (Cambridge: MIT Press, 1984), esp. 166–67; and Gianfranco Poggi, *The State: Its Nature, Development, and Prospects* (Stanford, CA: Stanford University Press, 1990), 128–44. Even more telling are empirical studies on parliaments in Western Europe, Japan, and the United States in Ezra Suleiman, ed., *Parliaments and Parliamentarians in Democratic Politics* (New York: Holmes and Meier, 1986). Many of them can be read as supporting a number of features of Schmitt's unflattering portrayal of contemporary parliaments. This is also true of a German anthology on parliamentary institutions: Kurt Kluxen, ed., *Parlamentarismus* (Königstein: Verlag Anton Hain, 1980). Much of the empirical literature argues that the relatively powerful U.S. Congress, especially because of the tenuous nature of party ties in the United States, provides something of an exception to these broad trends. Interestingly, Schmitt never explicitly discusses the U.S. Congress in his works; perhaps doing so would have forced him to reconsider some of

his more dramatic assertions about parliamentary decay. Perhaps, though, one should avoid emphasizing the exceptional qualities of the American case. As Theodore Lowi has powerfully argued in *The End of Liberalism*, the American Congress has similarly abandoned many of its traditional lawmaking functions.

33. For a critical survey of some of these debates, see Bernhard Peters, *Rationalität, Recht und Gesellschaft* (Frankfurt am Main: Suhrkamp, 1991), especially 51–93.

34. Schmitt, *Crisis of Parliamentary Democracy*, 1.

35. Schmitt, *Die Verfassungslehre*, 310.

36. Schmitt, *Die Verfassungslehre*, 310–11.

37. Schmitt, *Die Verfassungslehre*, 307–8. Weber and Kelsen developed defenses of liberal parliamentary practice, but they did so while breaking with liberalism's grounding in moral universalism. Both were value skeptics who believed that "disenchantment" [*Entzauberung*] rendered traditional ("substantive") moral defenses of parliamentarism anachronistic.

38. Schmitt bluntly asserts that "property is no [personal] quality that can be represented." Wealth, it seems, is incapable of representation in the Schmittian sense. For this reason, liberal parliamentarism is self-destructive. From the outset, parliament is seen as a means for protecting economic interests; when this agenda gains the upper hand in relation to the representation of *Bildung*, parliament increasingly is reduced to an economic clearinghouse, allegedly unable to fulfill minimal political functions. The tendency to undertake the functions of economic coordination behind closed doors (e.g., in secret committee meetings or in corporatist sessions closed to the public) exacerbates this trend. While representation should provide a visible, public form, parliament takes on an increasingly private, even secretive form: "The representative character of parliament and the deputy collapses. As a result, parliament is no longer the place where political decisions are made" (Schmitt, *Die Verfassungslehre*, 311–12, 319).

39. Schmitt, *Die Verfassungslehre*, 313.

40. Schmitt, *Die Verfassungslehre*, 312–14, 322–23. A pithy version of Schmitt's sociology of parliamentarism is also presented in Carl Schmitt, "Der bürgerliche Rechtsstaat," *Die Schildgenossen* 8 (1928): 127–33.

41. Otto Kirchheimer, "Constitutional Reaction in 1932" (1932), in *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer*, eds. Frederic S. Burin and Kurt L. Shell (New York: Columbia University Press, 1969), 78.

42. This is one of the central arguments of Schmitt's subsequent *Legalität und Legitimität* [*Legality and Legitimacy*] (Munich: Duncker and Humblot, 1932), esp. 30–40.

43. See Carl Schmitt, *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung* [*Judicial Independence, Equality before the Law, and the Protection of Private Property According to the Weimar Constitution*] (Berlin: de Gruyter, 1926), where he attacks the nongeneral legal form of the Weimar left's referendum in favor of expropriating royal property.

44. This aspect of Schmitt's argument is developed in depth in *Der Hüter der Verfassung*, especially 71–95. We examine it in greater depth in chapter 4.

45. Schmitt, *Die Verfassungslehre*, 319.

46. For a summary of the empirical literature on legislative composition, see Gerhard Loewenberg and Samuel C. Patterson, *Comparing Legislatures* (Boston, MA: Little, Brown, 1979), 68–78. In France, representatives with working-class or lower-middle-class backgrounds never have exceeded 35 percent of the overall total. In Great Britain, the majority even of Labor MPs since 1945 no longer has a traditional working-class background. In contrast, the representation of "professional, managerial, and white collar" groups in European parliaments now exceeds in every case 50 percent (in the German Federal Republic over 80 percent; in the United Kingdom nearly 60 percent; in France about 65 percent). Lawyers, whom Schmitt mentions in *Die Verfassungslehre* as being the typical social carriers of deliberative parliamentary politics, make up large numbers of contemporary elected representatives in many polities (in the United States about 50 percent). Although the story is complicated, substantial parliamentary representation prior to the twentieth century was pre-bourgeois. If any period in the history of parliamentarism deserves to be deemed "bourgeois," it may very well be our own rather than the mid-nineteenth century.

47. But even the German neo-Marxists who endorsed some version of this interpretation during the 1930s synthesized it with an analysis of the exceptional features of modern German history in order to explain the demise of Weimar democracy. See, for example, Franz L. Neumann, *Behemoth: The Structure and Practice of National Socialism* [1942] (New York: Harper & Row, 1944), especially 3–34.

48. Lowi, *End of Liberalism*.

49. Peters, *Rationalität, Recht, und Gesellschaft*, 51–93.

50. Recent commentators have ably contested Schmitt's interpretation of early-nineteenth-century German concepts of parliamentarism. See Hans Boldt, "Parlamentarismustheorie. Bemerkungen zu ihrer Geschichte in Deutschland," *Der Staat* 19, no. 3 (1980): 407–10.

51. Schmitt, *Die Verfassungslehre*, 338. This claim is also repeated in Schmitt, "Der bürgerliche Rechtsstaat," 127.

52. For a helpful discussion of this, see Fraenkel, *Deutschland und die westlichen Demokratien*, 35–37.

53. Schmitt, *Die Verfassungslehre*, 326–30. On the social composition of the French parliament at the end of the nineteenth century, see Loewenberg and Patterson, *Comparing Legislatures*, 73. For a helpful survey of the development of French parliamentarism in the nineteenth and twentieth centuries, see Francois Goguel, "Geschichte und Gegenwartsproblematik des französischen Parlamentarismus," in *Parlamentarismus*, ed. Kurt Kluxen, 161–87.

54. Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992), 234, and more generally, 201–6, 231–41.

55. Schmitt, *Die Verfassungslehre*, 321. Schmitt's chronology could hence be read as leaving open the possibility of a parliamentary "window of excellence" between 1832 and 1850. Yet he never explicitly describes this period as a fulfillment of his vision of classical liberal parliamentarism.

56. Schmitt, *Die Verfassungslehre*, 324.

57. Kurt Kluxen, "Die Umformung des parlamentarischen Regierungssystems in Großbritannien beim Übergang zur Massendemokratie," in *Parlamentarismus*, ed.

Kurt Kluxen, 120–30. For a criticism of romanticized accounts of eighteenth- and nineteenth-century English parliamentarism, see Wolfgang Jäger, *Öffentlichkeit und Parlamentarismus* (Stuttgart: Kohlhammer, 1973), 17–280, who provides a corrective to an analogous tendency in Schmitt. Jäger rightly criticizes the implicit assumption in Schmitt's account that nineteenth-century polities were vastly more faithful to important rule of law virtues than were their twentieth-century successors. Individual measures and open-ended law are hardly new; they were commonplace in the nineteenth century, despite significant efforts toward the codification of law. This is true of both common law and continental legal systems. For a discussion of the sad realities of the nineteenth-century Prussian Rechtsstaat, see Albrecht Funk, *Polizei und Rechtsstaat: Die Entwicklung des staatlichen Gewaltmonopols in Preussen 1848–1918* (Frankfurt am Main: Campus, 1986).

58. Schmitt, *Die Verfassungslehre*, 324.

59. Schmitt, *Die Verfassungslehre*, 325.

60. In 1913, Schmitt wrote that the "fiction . . . is a path which humanity pursues thousands of times in all the sciences to reach the right aim by means of incorrect assumptions." Specifically, Schmitt is talking here of "juridical fictions," including Montesquieu's vision of a "mechanical" judge. Schmitt vaguely suggests that it is appropriate to make use of such "fictions" in order to make progress in the sciences. Is his idealized description of parliamentarism here meant to perform the function of such a fiction (Schmitt, "Juristische Fiktionen," 805)?

61. Schmitt, *Crisis of Parliamentary Democracy*, 68.

62. Schmitt, *Crisis of Parliamentary Democracy*, 68.

63. Schmitt, *Crisis of Parliamentary Democracy*, 68.

64. A revealing example of this is Schmitt's *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung*, where he describes the German left's rather modest attempt to socialize royal property as an act of revolutionary violence (14).

65. Schmitt, *Crisis of Parliamentary Democracy*, 2–3.

66. Schmitt claims that with the demise of deliberative parliamentarism, "provisions concerning freedom of speech and immunity of representatives" lose their original grounding (3). Later, he extends this claim by arguing that with parliamentarism's demise "the *whole* system of freedom of speech, assembly, and the press, of public meetings, parliamentary privileges, is losing its rationale" (emphasis added) (Schmitt, *Crisis of Parliamentary Democracy*, 49).

67. Cohen and Arato, *Civil Society and Political Theory*, 205.

68. But probably not in all of Schmitt's writings. In *The Guardian of the Constitution* (1931), Cohen and Arato's exegetical claim that for Schmitt "the principle of discussion belongs to the level of society" (Cohen and Arato, *Civil Society and Political Theory*, 203) is accurate. But Schmitt does not think that this requires him to reevaluate his hostile account of parliamentarism. Because the collapse of the traditional state/society divide and the concomitant emergence of the modern interventionist state allegedly undermine deliberative activities in society at large, Schmitt believes that he can continue his project of developing a one-sided attack on parliamentarism.

In addition, Schmitt's view that deliberation is inherently antipolitical perhaps leads him to misconstrue the significance of the liberal ideal of government by discussion.

69. For a richer account of the classical liberal ideal of "government by discussion" than that provided by Schmitt, see Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1991 [1962]), especially 27–129. For the controversy surrounding Habermas's study, see Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge: MIT Press, 1989). I am less concerned with defending the detail of Habermas's model of the public sphere here than in recalling its success, contra Schmitt, in refusing to reduce the site of political deliberation to parliament. Habermas criticizes Schmitt's simplistic conception of deliberative liberalism in his "The Horrors of Autonomy," in *The New Conservatism: Cultural Criticism and the Historians' Debate*, ed. and trans. Shierry Weber Nicholsen (Cambridge: MIT Press, 1989), 128–39.

70. Many have emphasized these positive elements. For a recent statement of this view, see Jürgen Habermas, "Law and Morality," in *The Tanner Lectures on Human Values*, vol. 8, ed. Sterling M. McMurrin (Salt Lake City: University of Utah Press, 1988), 217–79.

## *Chapter 3*

# The Critique of Liberal Constitutionalism

Carl Schmitt's critique of liberal constitutionalism makes up the centerpiece of his political and legal thinking during the mid- and late 1920s.[1] The 1928 *Constitutional Theory* not only is Schmitt's magnum opus from the Weimar period but also represents one of the most ambitious attempts in this century to formulate a theoretical antipode to liberal constitutionalism. As a prominent German jurist has recently noted, "No one has formulated the antiliberal alternative to the modern constitutional state as clearly, tersely, and pitilessly as Carl Schmitt."[2] Because of the centrality of Schmitt's analysis of constitutionalism for our examination of Schmitt's hostility to liberal legalism, this chapter takes a careful look at it.

In chapter 1, we saw how Schmitt relied on a theory of the discretionary legal decision to deconstruct traditional models of judicial action. Schmitt's constitutional theory builds directly on this agenda by arguing that the *liberal constitutional order* as a whole rests on arbitrary, normatively unregulated power. Just as Schmitt's theory of judicial and administrative action ultimately privileges an irrational moment of decision in relation to the statute, so, too, does his constitutional theory grant a special place to arbitrary power. The moment of primordial arbitrariness thematized in Schmitt's World War I writings on military dictatorship is now located at the foundations of constitutional government. In Schmitt's constitutional theory, this originary arbitrariness not only haunts the everyday workings of liberal constitutionalism, but it also offers a starting point for developing an antiliberal alternative to it. Because liberal constitutionalism itself hints at the existence of profound problems unresolvable within its own intellectual parameters, Schmitt deems it deeply inadequate. Liberal constitutionalism is unable to grapple adequately with core features of political life (I).

I respond to Schmitt by suggesting that his argument reproduces certain errors of a mode of legal thought, Kelsen's legal positivism, that inspired Schmitt's assault in the first place. Consequently, Schmitt ultimately criticizes little more than an idiosyncratic version of liberal constitutionalism. Leo Strauss's famous observation that Schmitt's "critique of liberalism takes place within the horizon of liberalism" is accurate but *only* if we acknowledge that Schmitt's interpretation of the "horizon of liberalism" is limited.[3] However provocative, Schmitt's critique is untenable (II). Finally, this chapter concludes with a series of tentative critical comments about the disturbingly contemporary quality of Schmitt's reflections on constitutional government. At a historical moment when liberal constitutionalism once again is subject to a series of one-sided criticisms, we would do well to recall the ideas of one of its most provocative—and troublesome—midcentury critics (III).

## I

For Carl Schmitt, the essence of liberal constitutionalism is best captured by a term that he uses in an undeniably deprecatory fashion throughout his writings: *normativism*. Notwithstanding the immense diversity of liberal ideas about constitutional government, Schmitt claims that liberals have always sought to subject political power to a system of *norms*, to some type of rule-based legal regulation. Whether by means of a polemical contrast between "the rule of law" and the "rule of men," or an espousal of the now commonplace view that governmental power is legitimate only when derived from a fixed, written constitution, liberals repeatedly emphasize the political virtues of subordinating every conceivable expression of state authority to codified legal standards.

Early liberals were most rigorous in this quest; Schmitt's *Constitutional Theory* sees them as pursuing a "consistent normativity."[4] They not only aspired to regulate state power in accordance with a system of neatly codified legal and constitutional standards but also sought a higher legitimacy for positive law within a system of natural right; in turn, natural right was typically conceived in a highly legalistic manner. In this early version, normativism still took an expressly *moral* form. Liberals believed unabashedly in the rightness and rationality of their legal and constitutional ideals. Early liberal conceptions of the legal statute best embodied this spirit. For John Locke and other Enlightenment liberals, for example, state action was acceptable only when based on cogent, general laws, which Locke saw as constituting an attempt by mortals to reproduce the universalism of divine natural law. Individual legal measures were deemed potentially arbitrary and, moreover, utterly incompatible with early liberalism's ambitious moral universalistic worldview.[5]

Despite Schmitt's at times surprisingly flattering description of early liberal constitutionalism—his argumentative strategy in the 1928 *Constitutional Theory* represents another example of Schmitt's tendency to criticize contemporary liberal democracy by contrasting it unfavorably to an idealized, even romanticized interpretation of its classical predecessor—he still believes that the early liberal constitutionalist quest was ultimately doomed. Like its longtime institutional and intellectual ally, parliamentarism, liberal constitutionalism is destined to rot away. For Schmitt, normativism is always an eminently utopian worldview. Inevitably, liberals are forced to abandon consistent normativism in favor of more modest versions of normativistic thinking. Modern liberals hence ultimately surrender traditional liberalism's emphasis on the sanctity of the generality of the legal norm, and liberals increasingly tolerate legal forms incompatible with the ambitious legal ideals articulated in the theories of writers like Locke, Montesquieu, and Cesare Beccaria. In this vein, Schmitt is obsessed by the fact that liberal peers in Weimar jurisprudence unabashedly endorse a concept of the statute, according to which *any* act of the legislature, even one taking an individual or open-ended form, deserves the status of law.[6] Schmitt argues that this trend contributes to an ominous legislative "absolutism" that, as we will see, allegedly threatens to undermine the very foundations of liberal constitutional government. Liberals thereby not only abandon their traditional emphasis on the importance of generality within law but also simultaneously minimize the closely related requirements of the classical liberal ideal of *equality before the law*. Whereas early liberals like Locke interpreted this ideal as requiring the legislature to avoid actions directed at particular individuals or groups, for Weimar liberals it means nothing more than that administrators and judges should apply statutes equitably. For Schmitt the problem here is that those statutes themselves are permitted to take a discriminatory and inequitable form, which means that "equality before the law" is reduced to the absurd demand to apply unjust laws "justly": equality before the law is a farce if it merely requires a "blind" application by judges or administrators of laws fundamentally arbitrary in character. Occasionally reminiscent of some strands of recent liberal legal thought, Schmitt often points to the ways in the contemporary administrative state increasingly conflicts with traditional liberal general law. In stark contrast to liberals like Theodore Lowi or Friedrich A. Hayek, however, Schmitt's *Constitutional Theory* posits that illiberal legal trends are little more than a concrete manifestation of a fundamental failing inherent in normativistic liberal thinking. For Schmitt, liberal normativism lacks political efficacy. Thus, the ongoing decline of traditional liberal law is both predetermined and irreversible.[7]

For Schmitt, two recent manifestations of liberal constitutionalist "decay" [*Verfall*] possess special significance. First, Hans Kelsen's influential brand

of legal positivism continues to envision the legal system as consisting of a set of norms, ultimately derivable in Kelsen's view from a "basic norm," defined in *The Pure Theory of Law* as "nothing more than the basic rule, according to which norms of the legal order are produced."[8] But Kelsen breaks with traditional liberalism by demanding a clear separation between legal and moral inquiry. In this system, Schmitt mockingly comments, a legal norm is "valid if it is valid and because it is valid" but not because it refers to a more fundamental moral ideal.[9] Consistent normativism thereby evolves into a mode of "bourgeois relativism."[10] All that remains of the utopian pathos of early liberal legalism is the meager belief that law consists of a coherently structured "hierarchy" of norms. Second, Kelsen's positivism exercises an unambiguously deleterious influence on contemporary constitutional jurisprudence. For Schmitt, relativism makes it impossible for jurists to conceive of a "basic norm" or even a "system" or "hierarchy" of constitutional norms in even the most minimally coherent fashion; Kelsen is internally inconsistent. In the aftermath of the demise of natural law, "the [liberal] constitution is transformed into a series of individual positive constitutional laws. Even if there is still talk of a 'basic norm' or 'basic law' . . . this happens only as a result of leftover formulas long emptied of their original meaning. It is thus just as imprecise and confusing to speak of 'the' constitution. In reality, what is meant by this is an unsystematic majority or plurality of constitutional regulations."[11] If values are relative, a constitution can embody no set of core moral values, and all constitutional standards have to be seen as possessing equal worth. None then deserves special protective status. A clause guaranteeing that "theological faculties should remain part of the universities," like that found in Article 149 of the Weimar Constitution, can be no less vital from a consistent positivist standpoint than a basic guarantee of free speech, freedom of assembly, or free elections. From the perspective of legal positivism, constitutional amendment procedures need to treat such clauses with absolute neutrality. Hence, if nothing but a parliamentary supermajority is needed to amend the constitution, then parliament necessarily deserves as much of a right to alter (or even abrogate) the core procedures of liberal democracy as to reform the theological faculties in the university. For Schmitt, this suggests the self-evident incoherence of legal positivism: positivism offers no way to distinguish between essential and peripheral elements of the constitutional system. Kelsen's positivism culminates in a brand of nihilism unable to provide a proper defense of its *own* purportedly liberal aspirations. Because legal positivism can provide no moral justification for liberal democracy, it unwittingly equips illiberal political forces with a real opportunity for destroying the final remnants of liberal normativism: as soon as illiberal political groupings garner, for example, two-thirds of legislative votes, positivists are powerless in the face

of a likely decision to dissolve parliament itself. In its final, relativistic form, normativism arms its own enemies.[12]

From this perspective, the contemporary liberal tendency to downplay or even to abandon the classical conception of the generality of the statute represents just another example of the liberal mistake of providing potential political foes with awesome power. Although often unwittingly, legal positivists who endorse nonclassical modes of law prepare the (legal) way for radical intrusions into liberal basic rights—including, of course, the right to private property, which Schmitt considers constitutive of the liberal rule of law.[13] Writing at a juncture in the history of Weimar when the specter of a parliamentary road to democratic socialism still loomed large in the minds of many, Schmitt is clearly worried that the left might rely on the positivist critique of general law for the sake of attacking capitalist private property.[14] In criticizing legal positivism, Schmitt thus appeals to classical ideals of liberal law, not because he intends to defend classical liberal jurisprudence but solely because he wants to discredit contemporary versions of liberalism. Given his radical ideas about the indeterminacy of law, Schmitt is incapable of consistently endorsing traditional conceptions of clear legal norms capable of directing judges and administrators. But it is intellectually opportune for him to refer to traditional liberal ideas in order to underline the (purported) bankruptcy of contemporary liberalism.[15]

Why, however, did liberalism inevitably have to abandon "consistent normativity"? Why is self-destructive, nihilistic legal positivism the inexorable "final offshoot" [*letzten Ausläufer*] of classical liberalism, as Schmitt believes?[16]

Regrettably, Schmitt provides only scant historical details when sketching out his dramatic thesis about normativistic constitutionalism's inevitable decay. His argument is primarily legal-philosophical in nature. Even the most coherent brand of liberal normativism is intellectually flawed, and thus normativism must undergo a long process of historical deterioration. History, once again, follows political and legal theory: Schmitt assumes that the *immanent conceptual* limits of liberal constitutional theory can explain both its intellectual decline *and* its (alleged) real-life political ills.

Schmitt employs a variety of arguments to illustrate liberal constitutionalism's immanent flaws. Most importantly, he points out that liberals regularly presuppose the existence of a viable political apparatus; liberal constitutionalism's own stated aim is merely the limitation of an (preexisting) institutional complex. This assumption might seem trivial. But for Schmitt, it implies that liberals themselves concede, albeit in a backhanded manner, that the existence of a functioning political entity is necessarily prior to any normativistic restraints on it. Allegedly, liberals thereby begin to admit that normativism can never provide an adequate basis for a political community. Normativism

fails when forced to grapple with the most basic, "existential" elements of political experience. A people is "constituted" first and foremost by means of possessing a capacity for undertaking violence against external threats, by the fact that it is "awakened" and "capable of action" against potential political enemies.[17] According to Schmitt's *Concept of the Political*, political experience inevitably is characterized by potentially life-threatening situations in which political entities face off against "the other, the stranger," a foe, who "in a specially intense way, [is] existentially something different and alien, so that in the extreme case conflicts . . . are possible."[18] Only if a political entity can successfully ward off the "stranger" and thus guarantee its survival do liberal legal normativities even have a chance to function successfully. Normativities are ineffective for resolving truly life-threatening political conflicts: "These can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party."[19] The very intensity of such "existential" conflicts excludes the possibility of regulating them by liberal legal devices. Schmitt is thus dismissive of theorists, like Kelsen, who believed that Weimar's deep tensions could in part be healed by means of judicial intervention. In a revealing 1931 feud with Kelsen, Schmitt argues that a constitutional court was unlikely to help guarantee political stability in Weimar. In crisis situations, judicial devices are necessarily so politicized—that is, they become nothing but an unmediated battleground for warring, "existentially" opposed political entities—that they no longer can meaningfully claim to embody liberal legalistic concepts of neutrality or equality before the law. They become nothing but the weapons of an explosive, potentially violent political struggle.[20] Liberal constitutionalism becomes worthless precisely when the political integrity of the community is at stake.

Liberals refuse to concede the unavoidable limits of normativism. Nonetheless, they still must grapple with the exigencies of a political universe inconsistent with their normativistic inclinations. Hence, when liberals do try to come to grips with the imperatives of friend/foe politics, they can do so only in bad faith. Although liberal jurisprudence is hostile to dictatorship, even liberals bestow far-reaching powers on state authorities during an emergency situation. Similarly, liberals shrink at any mention of the concept of sovereignty. Nonetheless, they often make effective use of state power in order to defeat life-threatening foes. Notwithstanding liberal aspirations, constitutional government has never taken an exclusively normativistic form; it necessarily is always mixed with supranormative, "existential" elements, functioning to guarantee political self-preservation in an unavoidably violent political universe. Liberals repeatedly transgress the narrow confines of their normativistic worldview. Yet to admit this flaw openly would demand of them that they acknowledge the political irrelevance of much of their worldview.

Normativistic assumptions similarly hinder liberals from adequately conceptualizing the problem of constitutional validity. Building on his previous analysis of judicial discretion, Schmitt argues that a constitutional system is valid only when it rests on an authoritative "decision" made by a concrete "will." Just as in judicial interpretation "the legal idea cannot realize itself," so too must every constitutional system rest on a concrete decision possessing a substantial amount of autonomy from the norm.[21] In the terminology of *Constitutional Theory*, a constitution is legitimate "when the power and authority of the constituent power . . . is recognized."[22] Early liberals may have been more intellectually consistent than their successors, but even they allegedly failed to see that legitimacy requires no "justification by means of an ethical or juridical norm."[23] Early liberal conceptions of natural law remained imprisoned in the (characteristic normativistic) failure to acknowledge the primacy of those aspects of political experience incapable of being deduced from a legal norm or standard. Although Schmitt's critique of legal positivism at first seems to share many of the concerns of contemporary natural law-based jurisprudence, his argument is thus ultimately quite distinct: because core elements of political experience are essentially supranormative, legitimacy ultimately can refer to nothing more than the efficacy of a particular set of political power holders or decision makers. Here, *legitimacy is essentially a question of power*.[24] Schmitt cannot deny the obvious point that liberals *aspire* to make sense of the problem of legal validity. But in his view, they inevitably provide a distorted view of the problem at hand. For Schmitt, Kelsen's insistence on the need to separate an empirical analysis of political power and one of legal science is the most blatant example of this danger. Insisting on a radical distinction between an empirical analysis of political power and legal science, Kelsen cannot even begin to make sense of the inherently coercive character of his "hierarchy" of legal norms, let alone provide a satisfying account of the political dynamics of constitution-making. Contra Kelsen, only if we acknowledge that a constitution gains validity on the basis of a coherent political decision by a particular "will" can we begin to conceive of it as a unified, hierarchically ordered whole, where some constitutional clauses are undoubtedly more vital than others. Those who acted to establish the Weimar Constitution, for example, surely would have seen its basic liberal-democratic principles as more significant than Article 149's special protections for divinity school professors. In Schmitt's view, they might rightfully have interpreted the positivist attempt to confuse this issue as constituting a starting point for undertaking potentially illegitimate forms of action against the German people's original basic "decision" in favor of a particular political form. Positivists who insist on treating every constitutional clause in a perfectly neutral manner obscure the absolutely pivotal significance of the "will" that decided in favor of a particular political system in the first place.[25]

Furthermore, normativism prevents liberals from properly understanding the origins and the underlying dynamics of their own constitutional system. Just as liberals are hesitant to admit the necessity of dictatorial emergency powers in order to guarantee the self-preservation of a liberal democracy, so, too, do liberals prefer to obfuscate the fact that liberal constitutional systems always *presuppose* and *perpetuate* a dictatorial act: normatively unregulated power is crucial to every political system. The primordial arbitrariness earlier attributed to the judicial decision also lies at the foundations of liberal constitutional government. Furthermore, this arbitrary *Urzustand* necessarily shapes every facet of constitutional government, akin to the manner in which Schmitt earlier considered it determinative of judicial and administrative decision making. In his previous writings on legal interpretation, Schmitt saw this originary arbitrariness as the main source of indeterminacy within the interpretation and application of statutes. In his constitutional theory, it analogously becomes the source of a profound indeterminacy that threatens to plague constitutional government as a whole.

Schmitt argues that the Weimar National Assembly of 1919 possessed dictatorial powers.[26] More ambitiously, he looks to the theory and practice of the French Revolution to unmask the purported hypocrisy of liberal jurisprudence. By means of a reinterpretation of Abbeé Sieyès's constitutional theory, Schmitt argues that liberal democratic jurisprudence implicitly recognizes the existence of an omnipotent, inalienable, and indivisible founding subject, the *pouvoir constituant*.[27] For Schmitt, Sieyès's theory gives expression to the fundamental truth that in the modern sovereign, the "people" is capable only of giving itself a constitution once it has proven its ability to undertake resolute action against potential foes.[28] But the very act of demonstrating its political integrity may require that a "people" revert to utterly illiberal means. Why? A political entity must guarantee its self-preservation if it is even to begin to launch itself down the path toward liberal constitutionalism. But political self-preservation rests on the possibility of relying on instruments incompatible with liberal constitutionalism's obsession with restraining and hemming in political power. The very *differentiation* of a people from the "alien foe" is inevitably supranormative; Schmitt doubts that political identity can rest meaningfully on "normativistic" ideas, in part, as noted, because political conflict with "existential" enemies reaches such a pitch of intensity that "normativities" are likely to prove meaningless. Thus, liberal democracy necessarily presupposes the existence of a normatively unrestrained, potentially all-powerful sovereign able to ward off the "foe." In contrast to so much contemporary liberal theory, Sieyès's concept of the unrestrained *pouvoir constituant* thus openly expresses the fact that every constitutional founding rests on "a pure decision" unlimited by liberal forms of normative justification.[29]

For Schmitt, it is thus hardly surprising that the French Revolution has always been something of an embarrassment to liberals. The French experience underlines the Achilles' heel of liberal constitutional theory, namely its failure to take the concept of the constituent power seriously enough. Revealingly, Schmitt admires the fact that the French attributed the exercise of arbitrary, supralegal constituent power to the "nation," conceived in an ethnically and nationally particularistic fashion. In this view, French theory and practice magnificently capture the political verity that constitution-making rests on the preexistence of an ethnically homogeneous nation, capable of effectively distinguishing itself from other peoples and, if necessary, waging war against them.[30] The indivisibility and omnipotence of the *pouvoir constituant* can be understood only in this context. The constituent power is no mere conceptual fiction. French theory correctly grasps that a concrete *Volk*, as noted, is always "constituted" by defining itself in opposition to "the stranger . . . existentially something different and alien."

Just as liberal jurisprudence falsely posits that the irrational decision can be subjected to the legal statute, so, too, does liberal constitutional theory wrongly assume that the unregulated will of the original *pouvoir constituent* can be absorbed or replaced by the procedures and institutions of the resultant constitutional system, the *pouvoir constitué*. Schmitt considers the attempt to subject the *pouvoir constituant* to the "normativities" of the *pouvoir constitué* incoherent. If both Sieyès's original theory and much of subsequent political practice are right to see the *pouvoir constituant* as omnipotent, inalienable, and indivisible, then the liberal attempt to absorb it into the path of "normal" liberal politics is incoherent. To make the *pouvoir constituent* subject to the legal rules and procedures of constitutional government would rob it of all those elements that made it the *pouvoir constituant* in the first place. If the foundation of government presupposes the existence of a popular subject possessing unlimited powers, and if the very nature of this founding authority prevents it from being absorbed into the normativities of functioning liberal democracy, *then we have to assume that the omnipotent founding subject of liberal democracy has never been disbanded*.

Schmitt believes that we need to take the idea of the inalienability, indivisibility, and absoluteness of the *pouvoir constituant* seriously. The *pouvoir constituant* remains a power to be reckoned with even after the act of founding is complete; the omnipotent subject of every liberal democracy, the people, necessarily continues to have a real existence above and beyond liberal constitutionalism's institutional complex. *The authoritarian founding act upon which liberal democracy rests is never complete. Its dictatorial spirit haunts the mundane world of everyday liberal politics*. The omnipotent founding popular sovereign "remains the real origin of all political events, the source of all power. It gives expression to this power by means of ever-new

forms, and generates new forms and organizations out of itself, but it never conclusively subordinates its political existence to a particular form."[31] The *pouvoir constituant* makes use of normativistic liberal institutional devices, but it can also rightfully discard them at will. As Sieyès allegedly taught us, "it suffices if the nation wills it."[32] Because liberal procedures and institutions are mere instruments of the absolutely sovereign people, they inevitably lack the permanence that liberals attribute to them. The sovereign people is not to be found in the halls of parliament; it cannot be identified with constitutional or statutory rules that it may (temporarily) have decided to accept; even a legally ordained constitutional convention remains an inadequate expression of the sovereign's true nature unless the potentially unlimited exercise of its authority has been acknowledged. In addition, "Every genuine constitutional conflict concerning the political order's underlying decision can only be resolved by means of the will of the constitution-making authority itself."[33] Or, as one of Schmitt's Weimar contemporaries bluntly commented, meaningful constitutional reform can take place only by revolutionary means.[34]

For Schmitt, no "formalized" procedure or institution can capture the essence of the sovereign people, because formalization is incompatible with the willful, unrestrained nature of the *pouvoir constituant*. The willfulness of the constituent power simply cannot be subjected to the mundane, everyday lawfulness of the *pouvoir constitué*, given the radically different principles at hand. The attempt to do so, for Schmitt, is akin to transforming fire into water—in short, a naive fantasy of liberal constitutional alchemists.

*Where* then is the *pouvoir constituant* located? Schmitt's answer to this question in the 1928 *Constitutional Theory* already anticipates his open espousal of a mass-based authoritarian regime during the Weimar Republic's final, tragic years. *Constitutional Theory* revealingly tells us where the *pouvoir constituant* is *not* found: in the universe of everyday liberal democratic politics, toward which Schmitt in the 1920s was openly hostile. Schmitt does his best to ward off possible radical-democratic interpretations of his constitutional theory. A superficial reader *might* conclude that Schmitt hopes to bring about some form of "permanent revolution" in which an original democratic *pouvoir constituant* continues to exercise political authority in as unlimited and unmediated a manner as possible; one even might see Schmitt as pursuing Rousseau's preference for periodic assemblies of the entire people as a way of counteracting political decay.[35] But this is not Schmitt's position. After attributing seemingly awesome powers to the democratic sovereign, Schmitt quickly adds that the people "can only engage in acts of acclamation, vote, say yes or no to questions" posed to it from above.[36] A few years later he comments that "it cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its 'yes' the draft norms presented to it. Nor, above all, can it place a question,

but only answer by 'yes' or 'no' a question put to it."[37] The sovereign people, it seems, can only *answer* simple questions, and the questions are best formulated and posed by a strong executive who stands unlimited by parliamentary procedures that potentially undermine his authority. As one of Schmitt's Weimar critics commented, popular political action here probably is reduced to "an unorganized answer . . . given to a question which may be posed by an authority whose existence is assumed" and probably unquestioned as well.[38] Schmitt's "omnipotent" *Volk* turns out to possess a rather modest, even passive role.

In short, some form of executive-centered plebiscitarianism is likely to come closest to reliving the original founding dictatorship of the *pouvoir constituant*. "Normativistic" liberal legalism surely cannot. As will become clear shortly, Schmitt argues unambiguously during the early 1930s that only a mass-based dictatorship can hope to give adequate expression to the originary, arbitrary *Urzustand* of all political power. A "quantitative total state," wielding awesome discretionary state power to the imperatives of modern technological and economic developments, provides the best answer to the crisis of Weimar democracy.

## II

This critical interpretation should place Schmitt's analysis of modern liberal jurisprudence in *Constitutional Theory* in a fresh light. Recall Schmitt's claims that contemporary liberals provide powerful weapons to their antiliberal opponents by permitting easy constitutional revision and tolerating nonclassical forms of law. In reality, Schmitt here develops a far more dangerous antiliberal weapon than anything defended by his Weimar legal positivist foes. As I argued, even the 1928 *Constitutional Theory* probably already points to the outlines of a theoretical justification for an incipient dictator, unrestrained by the "normativities" of liberal democratic politics, who lurks in the background of everyday politics, awaiting the right moment for declaring that the "national will" has spoken in favor of constitutional counterrevolution. Although there may be legitimate reasons for worrying about the sovereign democratic legislature described by Schmitt and endorsed by some of his positivist opponents, it surely is preferable to a dictator whose authority embodies the originary arbitrariness of the Schmittian *pouvoir constituant*.[39] For the same reasons, Schmitt's occasional recourse to liberal conceptions of general, determinate law necessarily proves hollow. *Constitutional Theory* at first seems to describe a system of general laws and rights as essential to constitutional government. Yet in light of Schmitt's reflections on the constituent power, it is unclear what is to keep an authoritarian stand-in for the

*pouvoir constituant*, the willful originary source of every constitutional order, from altering or abrogating these laws at will. An executive exercising power in the name of the *pouvoir constituant* ultimately cannot, within the confines of Schmitt's theory, be justifiably limited by any of the antipolitical "normativities" of liberal constitutionalism. Needless to say, this is potentially a recipe for legal indeterminacy with a vengeance: a legal system subordinate to the willfulness of a mass-based dictator is unlikely to provide much legal regularity or security. In comparison, recent liberal concessions to the need for some open-ended, discretionary law, within a broader liberal legal system fundamentally committed to the principle of legality, look like child's play.

Nonetheless, it would be unfair to deny that Schmitt succeeds in identifying some vital questions for constitutional theory. We need not endorse Schmitt's claim that liberal constitutionalism has undergone an inexorable historical decay in order to respect his anxieties about its links to value relativism in the twentieth century. Schmitt raises tough questions about the limits of positivist conceptions of constitutional interpretation and amendment; we need only to recall that many contemporary liberal jurists have expressed at times analogous worries about more recent positivist jurisprudence. Schmitt's preference for a decisionist over a normativist interpretation of constitutionalism is surely worrisome. Yet at least Schmitt's formulation openly concedes that existing liberal democracies too often rest on arbitrary forms of power and exclusion; the real question is whether this development is as inevitable as Schmitt asserts. Schmitt's controversial theory of the *pouvoir constituant* rests on a highly selective appropriation of French revolutionary political thought. By the same token, the relationship of democracy to constitutionally based limits on popular decision making remains a controversial issue within liberal theory.[40] Whatever the faults of Schmitt's argumentation, he at least helps remind us of one of the genuine paradoxes of modern constitutionalism: "the people" alone can found constitutional government, but constitutionalism then faces the difficult task of funneling and channeling popular politics by formal, legal means.

To leave the story there, however, might lead us to miss the depth of Schmitt's hostility to liberal constitutionalism. Schmitt *speaks* to important questions within liberal theory. But he lacks the conceptual instruments necessary for analyzing these questions adequately. As I hope to show, this failing ultimately derives from Schmitt's obsession with clearly distinguishing his intellectual perspective from that of liberalism's purported "final offshoot," Hans Kelsen's brand of legal positivism. Responding to Kelsen's peculiar variety of liberal political and legal theory, Schmitt exacerbates some of the methodological weaknesses of Kelsen's legal positivism. As a contemporary of both Schmitt and Kelsen recognized early on, Schmitt answers Kelsen's legal theory of the *will-less norm* with an alternative theory

of the *norm-less will*.[41] In slightly different terms, Kelsen's pure theory of law becomes Schmitt's "pure theory of the will." Even more so than Kelsen's original, Schmitt's own radical juxtaposition of the *norm* to the *will* distorts the nature of legal and political experience. Thus, Schmitt never really succeeds in superseding Kelsen. He simply offers an authoritarian *complement* to Kelsen's legal positivism, while abandoning the numerous virtues of Kelsen's theory.

Of course, this is not the first time that Kelsen has figured in this study. Nor will it be the last. In my view, Kelsen was one of Schmitt's most impressive critics, and his reflections often provide a powerful starting point for examining the weaknesses of Schmitt's attack on the rule of law. Unlike Schmitt, Kelsen fought to the end to defend the Weimar Republic; postwar attempts to blame legal positivism for the readiness with which German jurists embraced the authoritarian state in 1933 are unconvincing.[42] At least within the sphere of constitutional theory, however, the results of Schmitt's engagement with Kelsen prove ambivalent. Notwithstanding the many virtues of Kelsen's theory, the methodology of his "pure theory" provides Schmitt with an opening for discrediting the project of liberal constitutionalism altogether.

As we saw above, Schmitt attributes the ills of liberal constitutionalism to its purported normativism. Recent commentators have interpreted Schmitt's use of this term (and many related ones, such as "normativity" and "normativization") as an instrument for criticizing *universalistic* elements of liberalism (liberal ideas about the basic equality of all persons, for example). But this reading probably attributes a degree of precision missing from Schmitt's own usage.[43] Normativism refers for Schmitt to a tremendous diversity of distinct ideas: it includes early liberal conceptions of natural law as well as modern legal positivism, robust and unabashedly (universalistic) *moral* ideals as well as value-relativistic theoretical positions, the rule of law (or rule of legal *norms*) and liberal aspirations to subject politics to *normative* (or moral) concerns, and diverse liberal views on the origins of constitutional government alongside a panoply of liberal conceptions of judicial decision making. Although Schmitt offers countless *examples* of "normativism," "normativization," and "normativities," he never defines these terms with any real specificity. The reader will look at Schmitt's massive oeuvre in vain for an adequate definition of what precisely they entail.

However effective as a rhetorical instrument for discrediting liberalism, the concept of normativism simply does not provide as solid a basis for Schmitt's ambitious critique as he believes. Repeatedly, Schmitt crudely subsumes distinct liberal ideas under the (vague) category of normativism. This move precludes his formulating an adequately subtle interpretation of liberal ideals and their distinguishing characteristics; by grouping vastly different versions of liberal thinking (Montesquieu and Kelsen, for example) under the rubric

of normativism, Schmitt has *already* taken substantial steps toward "demonstrating" the intellectual incoherence of liberalism even *before* he has even begun to articulate any real criticisms of liberal ideals. Furthermore, the straw man of normativism simply does not allow Schmitt to capture the essence of liberal constitutionalism in the first place. As any reader of Aristotle's *Politics* is well aware, modern liberals hardly stand alone in their praise of the rule of law; as Aquinas shows so well, the attempt to subject politics to "normativistic" (universalistic) moral ideals was essential to medieval Christian political thought. Yet Schmitt's use of the term "normativism" makes it difficult to determine what makes Locke or Kelsen more "normativistic" than Plato, Aristotle, Aquinas, or any of a host of competing classical authors.[44] Schmitt's attack on "normativism" may offer a starting point for criticizing the mainstream of Western political thought, but it is hardly the best way to identify and criticize the specific ills of liberal constitutionalism.

But perhaps this is unfair to Schmitt. Surely, his Weimar-era writings devote substantial attention to the task of defining the liberal rule of law, which Schmitt considers the centerpiece of liberal constitutionalist thinking. Schmitt repeatedly argues that only the *generality of the legal norm* satisfies the conditions of the rule of law-ideal, for judicial independence "in the face of an individual measure is logically inconceivable."[45] Legislative action in the form of an individual act destroys any meaningful distinction between judicial and administrative decision making. When state action is directed at a particular object or individual, judicial activity no longer differs qualitatively from inherently discretionary, situation-specific modes of administrative action; a core element of the rule of law, the idea of determinate, norm-based judicial action, thus becomes obsolete. But even this seemingly sensible specification of the concept of normativism quickly turns out to be more slippery than is initially apparent. Like Schmitt's concept of normativism, his definition of general law is too open-ended. For the most part, the concept of general law in Schmitt's theory simply precludes the legal regulation of an individual object (a particular bank or newspaper, for example). But at other junctures, general law is seen as being incompatible with legal "dispensations and privileges, regardless of what form they take"—in short, with virtually *any* form of more or less specialized legislative activity.[46] The latter view is more far-reaching than the former: whereas the former provides a rather minimal restraint on governmental activity, the latter might imply that the rule of law is incompatible with much legislation essential to the modern welfare state. That most normativistic of liberal constitutional normativities, the idea of the general legal norm, is never consistently defined in Schmitt's writings. Of course, the reason for this ambiguity is clear enough in light of Schmitt's early reflections on the enigma of legal indeterminacy: Schmitt is chiefly interested in employing the traditional idea of general law as a weapon

against contemporary liberal theories (like Kelsen's positivism) that seek to make some room for administrative and judicial discretion *without* abandoning the liberal dream of a norm-based rule of law. A principled defense of the traditional liberal ideal of general law simply cannot consistently make up a core element of Schmitt's own theory.

Let me try to suggest that Schmitt's failure to clarify the precise nature of his "normativistic" liberal foe derives from a more profound flaw in his theory. Schmitt never offers a coherent definition of normativism *because his dramatic juxtaposition of the norm to the decision itself is untenable*.

In Kelsen's pure theory of law, he resists a long tradition of methodological syncretism in legal scholarship, in which moral, sociological, and legal reflections are sloppily conflated. According to Kelsen, the failure to separate these different spheres has long proven disastrous to modern legal theory. Too often, what passes for legal science has been nothing but an ideological defense of the legal and political status quo, in which legal theory is reduced to apologetics for the existing political system and its dominant moral and political ideas. In this important sense, Kelsen's undertaking is eminently critical; he resists crude conflations of what "is" (e.g., an existing legal system) with what "ought to be" (e.g., the unfulfilled universalism of the liberal rule of law) and refuses to shroud the stark realities of political power in attractive moral and political ideas.

For Kelsen, the only way to overcome the ills of methodological syncretism is by insisting on a clear delineation of legal science from ethics, on the one side, and empirical sociology or political science, on the other. Legal inquiry needs to be given the status of an objective science, which means for Kelsen that it must undergo a rigorous separation from both moral and social scientific inquiries. In the simplest terms, Kelsen's methodological initiative takes the following form: the study of law is a normative science. But that is only to claim that a particular fact has a legal significance within a broader system of norms, according to which if a particular event takes place, then a certain consequence *ought* or *should* follow. ("If A, then B *should* be.") Normativity here refers to the fact that a particular sanction is likely to follow when a particular norm is violated. Legal sociology obscures the normative quality of legal experience. It is concerned with factual relations between legal phenomena. ("If A, then B is.") It comprehends law in the manner of a natural scientist concerned with shedding light on causal laws at work in the natural world. In Kelsen's view, empirical inquiry of this type is inherently limited, for an unavoidable gap exists between the realms of "is" and "ought." That is, an empirical analyst, in the fashion of a political scientist or legal sociologist, inevitably fails to provide insight into the normative or *should be* character of law. At the same time, the normative quality of legal experience hardly means that it is concerned with moral, ethical, or political questions.

An objective, scientific study of law is normative to the extent that it is concerned with norms. Yet it cannot hope to answer the question of which norm is morally or ethically right. The *should be* of ethics is ultimately unrelated to the *should be* of law. For Kelsen, this view is tied to a broader belief that moral and political choices inevitably lack a universally binding character; in this respect, they are basically nonscientific. Because of the inherent relativism of moral and political experience, moral and political inquiries provide an inadequate basis for the scientific study of law.[47]

Schmitt's constitutional theory is clearly intended as a critical response to the methodological idiosyncrasies of Kelsen's pure theory of law. Although generally unconcerned with the complicated nuances of Kelsen's position, Schmitt is unsatisfied with Kelsen's attempt to differentiate legal science from an empirical analysis of concrete power relations. According to Schmitt, Kelsen thereby obscures the pivotal role of coercive state authority in legal relations: "Kelsen solved the problem of the concept of sovereignty by negating it."[48] Kelsen's "basic norm" is valid only because a particular set of empirical, real-life (political) institutions guarantees its validity. Yet his pure theory of law provides no role for an analysis of the concrete institutional sources of legal validity. Kelsen's legal theory thus not only reduces the state to a hierarchy of legal norms but also ultimately has no way of making sense of law's dependence on state authority. The inherently political character of law, deriving from law's dependence on concrete political actors invested with the tasks of applying, interpreting, and enforcing it, is simply banned from legal inquiry by a methodological sleight of hand.

In his quest to criticize Kelsen's "normativistic" brand of legal positivism, Schmitt commits two fatal errors. First, he seems to read Kelsen's positivism *back into* earlier modes of liberal jurisprudence. Because Kelsen allegedly represents the *telos* of liberal legalism, his theory only manifests what was always *implicit* in previous brands of liberalism. Notwithstanding Schmitt's own statement that Kelsen embodies normativism's "final offshoot," he still seems to assume that many of his (legitimate) criticisms of Kelsen apply to each and every variant of liberal constitutionalism.[49] For example, Schmitt asserts that Kelsen's insistence on an absolute separation between legal science and an empirical analysis of state power expresses nothing but "the old liberal negation of the state vis-à-vis the law"[50]—surely an odd comment in light of the rich and detailed analyses of the concrete workings of state authority provided by liberal theorists like Montesquieu or Tocqueville as well as the awareness by at least some liberal authors that "emergency powers" (Locke's prerogative, for example) make up an unavoidable element of modern political experience.[51] But Schmitt seems unimpressed by such obvious counterarguments, in part because he is more concerned with

undermining the legitimacy of liberal constitutionalist ideals than providing a balanced assessment of their origins and evolution.

Second, Schmitt merely *reverses* Kelsen's juxtaposition of legal science (and its emphasis on the legal *norm*) to the problem of concrete political power (the *will*). But he fails to question the value of making this juxtaposition in the first place. Very much reminiscent of Kelsen's pure theory, Schmitt's constitutional theory repeatedly conceives of the "will" as something altogether distinct from the "norm." At the outset of *Constitutional Theory*, he emphatically observes that the will, "in contrast to mere norms," is something "existential" [*seinsmässige*] and thus qualitatively distinct from the "ought" [*Sollen*] character of norms. "The concept of the legal order contains *two totally different elements*: the normative element of the law and the existential [*seinsmässige*] element of a concrete order" [emphasis added].[52] Later, he adds that "the word 'will' describes—in contrast to every form of dependence on normative and abstract rightness—the essentially existential nature of the basis of [legal] validity."[53] Schmitt simply turns Kelsen's pure theory on its head. For Kelsen, the normative element of law (conceived of as distinct from state authority) is the centerpiece of legal experience, whereas Schmitt posits that the (decisionistically conceived) empirical will constitutes its core.

This shift fails to save Schmitt from the errors of his positivist opponent. Schmitt criticizes Kelsen's value relativism and worries about its alleged nihilistic overtones. But is Schmitt not far more vulnerable to nihilism in light of his uncritical endorsement of the "pure decision not based on reason or discussion and not justifying itself?" Schmitt believes that Kelsen's conception of the legal system in terms of "pure normativity" smacks of the realm of make-believe. But what about Schmitt's own "pure" decision, his "will" free of all conceivable normative restraints? Admittedly, Schmitt's extremely open-ended conception of the "normative" makes it difficult to imagine exactly *what* constitutes a "pure decision" or "norm-less will." A naive question may be in order here, however: is it not the case that the human will *always* and *inevitably* expresses itself in accordance with some type of norm or "normativistic" outlook? As Max Weber comments at the outset of *Economy and Society*, human action entails that the "acting individual attaches a subjective meaning to his behavior—be it overt or covert, omission or acquiescence."[54] This meaning may be simple or complicated, attractive or repellent, liberal or illiberal: in any event, our common world is constituted by means of purposeful human action, by modes of human activity having a practical or normative significance for us. Meaning-constitutive human activity inevitably structures the social world, and facticity and normativity thus inevitably overlap in such a way as to render Schmitt's concept of the will-less norm as one-sided and truncated as Kelsen's corresponding

norm-less will. Schmitt's idea of the norm-less will deceptively suggests the possibility of a form of unbridled subjectivity probably incompatible with the basic principles of any identifiably *human* form of subjectivity. Animals and automatons may act outside the parameters of "normative" concerns. But human beings cannot.

Schmitt believes that the primordial status of the norm-less will is demonstrated, as we saw above, by a host of practical examples. But is the political and historical evidence quite as unambiguous as he suggests? We surely might endorse some elements of Schmitt's critical account of crude, mechanical theories of judicial action in which the decision vanishes as an independent object of inquiry.[55] By the same token, we need to ask whether judicial decision making could ever take a *fully* norm-less form; as we will see, even the Nazi legal model envisioned by Schmitt during the 1930s entailed a "normative" agenda, albeit a rabidly nationalistic, deeply illiberal, and profoundly anti-Semitic one. The idea of a legal system without a crucial "normativistic" component is even more problematic than Kelsenian positivism's vision of a legal system without empirical, coercive, political elements. In modern political history, constitution-making often does presuppose explosive moments of political struggle in which a particular political entity "differentiates" itself from an alien "foe." Yet such struggles hardly occur in a normative vacuum: competing practical ideals and "normativities" obviously play a crucial role even in the most violent, life-threatening political moments—in revolutions, civil wars, and states of emergency. For that matter, does constitutional history really present us with even a single example of a normatively unregulated *pouvoir constituant*? Even the Nazis and the Stalinists accepted the legitimacy of *some* procedural rules and norms; even the most disturbing features of modern totalitarian politics express some normative ideals and aspirations, however unattractive they may be. Nazis and Stalinists may represent worrisome varieties of "normativism," but their actions hardly embody "a pure decision not based on reason and discussion and not justifying itself."

A common criticism of Kelsen's legal positivism is that empirical concerns in fact inevitably enter his pure theory of law for the simple reason that a radical delineation of legal science as distinct from sociology is untenable. Kelsen allegedly "sneaks" empirical elements back into his "pure" legal categories because without them it would be impossible to offer a minimally coherent account of legal phenomena. Less appreciated is that Schmitt's corresponding pure theory of the will reproduces Kelsen's failing on this point as well. Despite its insistence on the purity of the will in relation to the norm, Schmitt's *Constitutional Theory* repeatedly concedes that the will (and volitional elements of political reality) and the norm (normative elements) are unavoidably fused in concrete political reality. Early on, the reader is told that the "normatization" of the Weimar constitutional system is radically distinct

from the German people's existential "decision" in favor of a particular regime type. Yet Schmitt himself then openly declares that some constitutional clauses "are more than laws or normativizations" because they directly embody the original decision of the German people. In other words, although the "will" of the German people allegedly lacks all normative elements, it gains expression only by means (characteristically normativistic device) of the codified constitutional clause.[56] Schmitt then argues, as noted previously, that the liberal idea of general law is a quintessentially normativistic ideal. But he also suggests in *Constitutional Theory* that general law is "political" and thus, within the confines of his theoretical system, inherently antinormative.[57] After berating liberals for trying to subject the *pouvoir constituant* to an array of (allegedly normativistic) decision-making procedures, Schmitt offers his own model of mass-based plebiscitarianism. But the reader is left wondering why Schmitt's own proposals are necessarily more "norm-less": they certainly *seem* to constitute some type of "normativistic" regulation of popular decision making, albeit one with decidedly authoritarian credentials. In short, Schmitt himself suggests the mythical nature of his own "pure theory of the will."

Schmitt believes that he has succeeded in formulating a theoretical antipode to Kelsen's legal positivism. In reality, his alternative is little more than a distant cousin to Kelsen's positivism. Moreover, the cousin has abandoned the critical spirit of its positivist relative. Schmitt's theory simply exacerbates certain weaknesses of a highly idiosyncratic version of modern liberal jurisprudence. By no means can Schmitt legitimately claim to have superseded liberal constitutionalism. Schmitt has simply surrendered its most worthwhile achievements.

## III

Let me conclude this discussion of Schmitt's Weimar-era constitutional theory with a cautious remark about its potential contemporary relevance. Notwithstanding the ills of Schmitt's constitutional theory, it haunts contemporary debates about the relationship between revolutionary politics and constitutional government. One can easily imagine Schmitt applauding Jacques Derrida's view that the American Declaration of Independence rests on a "fabulous retroactivity," according to which a "coup of force makes right, founds right or the law, gives right, *brings the law to the light of the day, gives both birth and day to the law*."[58] In the words of one of Derrida's North American defenders, "Every system is secured by placeholders that are irrevocably, structurally arbitrary and illegitimate. They enable the system but are illegitimate from its vantage point."[59] Of course, neither Schmitt nor

Derrida is alone in arguing that constitutional government often rests on a vicious circle, in which violent willfulness alone generates a constitutional order inconsistent with the originary arbitrariness of foundational politics. For those familiar with the violent history of modern revolutionary politics, this claim is likely to appear trivial. But what Derrida and Schmitt also seem to share is the more controversial view that foundational politics *inevitably* rests on an arbitrary *coup de force*. The act of foundation is unavoidably arbitrary, notwithstanding liberal and democratic aspirations to conceive of the possibility of peaceful, norm-based political change (e.g., by means of constitutional amendments). Moreover, the original sin of foundational violence means that the constitutionalist dream of "government of laws, not men" always suffers from a fundamental hypocrisy: it obscures the arbitrariness that haunts even "normal" legal experience.[60] The link between Derrida and Schmitt here is captured by what Richard Wolin has described "as a shared fascination with 'limit situations' [*Grenzsituationen*] and extremes; an interest in transposing the fundamental experiences of aesthetic modernity—shock, disruption, experiential immediacy; an infatuation with the sinister and forbidden, with the 'flowers of evil'—to the plane of everyday life, thereby injecting an element of enthusiasm and vitality in what had otherwise become a rigid and lifeless mechanism."[61]

With parallel echoes of Schmitt, the legal scholar Robert Cover has argued that "revolutionary constitutional understandings are commonly staked in blood. In them, the violence of the law takes its most blatant form. But the relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts."[62] For Cover, as for Schmitt, legal experience unavoidably involves a moment of untamed violence. This violence manifests itself most clearly during a foundational act in which the framework of constitutional government is established. But it remains "operative" in the resultant legal order as well. In particular, the inherent violence of constitutionalism and the rule of law rears its ugly head in the criminal law (e.g., in the act of sentencing).[63] When a criminal is punished, it is deceptive to believe that a "commonality of interpretation" or "common meaning" can be achieved according to which the judge is doing more than engaging in brute violence against the defendant. The divergent experiences of punishment—the criminal undergoes bodily harm, whereas the judge returns to his wife and kids in the suburbs—make a mockery of the "ideology" of legitimate punishment.[64] For Cover, the recent interpretivist turn in legal theory, exemplified most clearly by Ronald Dworkin, similarly obscures the fundamentally violent character of the law by emphasizing the moral character and coherence of judicial decision making.

Cover's aims are undoubtedly humanitarian; existing modes of criminal punishment tend to institutionalize troublesome forms of state violence. Like

Derrida's, his reflections are intended as part of a broader progressive political agenda. But do their praiseworthy practical aspirations flow from a theoretical perspective that provides a privileged place to the experience of arbitrary power? Cover explicitly endorses the traditional ideal of an independent judiciary, and he continues to subscribe to the aspiration to "domesticate" violence.[65] Yet if the original sin of foundational arbitrariness is particularly evident in the exercise of judicial power, preserving the independence of the courts would seem a poor device for taming violence. For that matter, how is power to be domesticated in the first place, if not in part by the traditional instruments of the rule of law? Even such progressive-minded theorists start, for the most part unwittingly, from Schmittian assumptions. Can they escape Schmitt's shocking conclusions?

## NOTES

1. For discussions of this feature of Schmitt's theory, see Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 85–119; Dyzenhaus, *Legality and Legitimacy*, 38–101; and Rune Slagstad, "Liberal Constitutionalism and Its Critics: Carl Schmitt and Max Weber," in *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (New York: Cambridge University Press, 1988). The German literature on Schmitt's constitutional theory is vast. For a helpful survey, see Reinhard Mehring, "Carl Schmitts Lehre von der Auflösung des Liberalismus. Das Sinngefüge der Verfassungslehre als historisches Urteil," *Zeitschrift für Politik* 38 (1991): 200–16.

2. Ulrich Preuss, "Der Begriff der Verfassung und ihre Beziehung zur Politik," in *Zum Begriff der Verfassung: Die Ordnung des Politischen*, ed. Ulrich Preuß (Frankfurt am Main: Fischer Verlag, 1994), 10.

3. Strauss, "Comments on Carl Schmitt's Begriff des Politischen," 105.

4. Schmitt, *Die Verfassungslehre*, 9. *Constitutional Theory* [*Die Verfassungslehre*] is the centerpiece of Schmitt's Weimar jurisprudence, thus my emphasis on it here. Schmitt's constitutional theory is also concisely summarized in "Der bürgerliche Rechtsstaat."

5. On the role of general law within classical liberalism, see Schmitt, *Die Verfassungslehre*, 138–57.

6. Carl Schmitt, "Review of Gerhard Anschütz, Die Verfassung des deutschen Reiches vom 11. August 1919," *Juristische Wochenschrift* 55 (1926): 2270–72. Anschütz was a leading legal positivist in Weimar.

7. For Schmitt's most important polemic against the left's preference for nongeneral law, see Schmitt, *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz, und Gewährleistung des Privateigentums nach der Weimarer Verfassung*, 22–24, where the issue of judicial independence is scrutinized. Schmitt's views on the rule of law and the interventionist welfare state are analyzed in depth in chapter 4; his relationship to Hayek, in chapter 8.

8. Hans Kelsen, *Reine Rechtslehre* (Darmstadt: Scientia Verlag, 1985), 64.

9. Schmitt, *Die Verfassungslehre*, 9.

10. Schmitt, *Die Verfassungslehre*, 67. Although Kelsen is left unnamed, Schmitt is referring to Kelsen's democratic theory and its emphasis on the virtues of political compromise. Schmitt tends to caricature Kelsen. Schmitt's criticism here has some basis within Kelsen's thinking, however. In his democratic theory, Kelsen argues that ours is a "relativistic" age in which the belief in "absolute" moral truths necessarily has waned. Democracy is the best political form for modernity because it directly expresses the dictates of modern moral relativism. Basic liberal democratic mechanisms and procedures (free speech, minority protections) make sense only if the members of the political community accept the possibility that their moral and political views might turn out to be incorrect. If one believes in the absolute correctness of one's own views, there is no reason to accept liberal democratic procedures; then it is consistent to demand a monopoly on political power (Hans Kelsen, *Vom Wesen und Wert der Demokratie* [Tübingen: Mohr, 1929]). On this point, Kelsen proves a convenient target for Schmitt. In fact, not all legal positivists in Weimar shared Kelsen's problematic value relativism; See Ingeborg Maus, "'Gesetzesbindung' der Justiz und die Struktur der nationalsozialistischen Rechtsnormen," in *Recht und Justiz im "Dritten Reich,"* ed. Ralf Dreier and Wolfgang Sellert (Frankfurt am Main: Suhrkamp, 1989), 82–84.

11. Schmitt, *Die Verfassungslehre*, 11. But why does Schmitt accept the inevitability of the demise of natural law? In *The Concept of the Political*, he endorses Weber's famous assertion that the political and moral "life spheres" are unavoidably distinct in modernity. In short, he accepts the basic accuracy of crucial features of Weber's picture of modern "disenchantment" [*Entzauberung*] (26–28). Schmitt, *Concept of the Political*, 26–28. In his postwar diaries, Schmitt explicitly describes natural law as an anachronism (*Glossarium. Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Freiherr von Medem [Berlin: Duncker and Humblot, 1991], 50).

12. Schmitt, *Die Verfassungslehre*, 11–36.

13. In the discussion of basic rights developed in *Constitutional Theory*, private property possesses a privileged position, whereas "social rights" (e.g., to a job), which had a prominent place within the Weimar Constitution, are for Schmitt at most rights in a limited, "relative" sense (*Die Verfassungslehre*, 163–70).

14. Schmitt, *Unabhängigkeit der Richter*. On the antisocialist impulses of Schmitt's theory, the best study remains Maus, *Bürgerliche Rechtstheorie und Faschismus*.

15. Renato Cristi believes that Schmitt in the late 1920s endorsed an "authoritarian liberalism" that respected crucial rule of law values. Cristi perhaps downplays Schmitt's deconstruction of the rule of law in his early jurisprudential writings (*Carl Schmitt and Authoritarian Liberalism*, 126–45). See Schmitt's own 1931 reminder about his views on indeterminacy within judicial action in *Der Hüter der Verfassung*, 45–46.

16. Schmitt, *Die Verfassungslehre*, 8.

17. Schmitt, *Die Verfassungslehre*, 50.

18. Schmitt, *Concept of the Political*, 27. This passage might suggest a Hobbesian interest in demonstrating the primacy of power vis-à-vis law. Schmitt goes well

beyond Hobbes, however. Schmitt repeatedly gives his interpretation of friend/foe politics radical nationalistic and ethnic connotations. As Ulrich Preuss has noted, Schmitt's "ethnicist" constitutional theory rests on a substitution of the ethnos for the demos: das Volk is conceived as an "ethnic and cultural oneness," with a "capacity to realize its otherness in relation both to others and the liberal-universalist category of mankind." I employ the term "ethnicist" in this study in accordance with Preuss's definition (Ulrich Preuss, "Constitutional Powermaking for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution," *Cardozo Law Review*, 14, nos. 3–4 [January 1993]: 649–50).

19. Schmitt, *Concept of the Political*, 27.

20. Schmitt, *Der Hüter der Verfassung*; for Kelsen's reply, see *Wer soll der Hüter der Verfassung sein?* (Berlin-Grünewald: W. Rothschild, 1931). For a learned discussion of the Schmitt/Kelsen exchange, see Stanley Paulson, "The Reich President and Weimar Constitutional Politics: Aspects of the Schmitt-Kelsen Dispute and the 'Guardian of the Constitution,'" paper presented at the Annual Meeting of the American Political Science Association, Chicago, September 1995.

21. Schmitt, *Political Theology*, 28.

22. Schmitt, *Die Verfassungslehre*, 87.

23. Schmitt, *Die Verfassungslehre*, 87.

24. For Schmitt, "when the power and authority of the constituent power, whose decision the constitution rests on, is recognized," a constitution is "legitimate." Power is then described as something "necessarily real," whereas authority implies "continuity" and tradition. Moreover, "in every state, power and authority coexist and depend on each other" (*Die Verfassungslehre*, 75, 87). For an early criticism of this aspect of Schmitt's theory, see Erich Voegelin, "Die Verfassungslehre von Carl Schmitt," *Zeitschrift für öffentliches Recht* 11 (1931): 89–101. Voegelin endorses some of Schmitt's criticisms of Kelsen's legal positivism but criticizes Schmitt's failure to integrate normative concerns into his analysis of the problem of legitimacy. Later, I discuss the conceptual roots of this error.

25. Schmitt, *Die Verfassungslehre*, 20–36. As Franz L. Neumann notes, "Carl Schmitt, by adopting the American theory of the 'inherent limitations upon the amending power,' tried to distinguish between amending and violating modifications of the Constitution. He was of the opinion that amendments to the Constitution could not assail the 'Constitution as a basic decision' . . . The fundamental decisions regarding value preferences which the Constitution embodies, Schmitt thought, could not be modified even by the qualified parliamentary majority which [in Weimar] had the power to amend the Constitution" (*The Democratic and Authoritarian State: Essays in Political and Legal Theory* [Glencoe, IL: Free Press, 1957], 53–54).

26. Schmitt, *Die Verfassungslehre*, 56–60.

27. Hannah Arendt criticizes precisely those elements of French revolutionary thought that Schmitt praises here. In her view, Absolutism contributed to the failings of the French Revolution, whereas the Americans were fortunate because they were spared the specter of Absolutism. For Schmitt, despite liberalism's hostility to Absolutism, liberal constitutionalism would lack minimal "political" elements unless it preserved something of the heritage of Absolutism. In contrast to Arendt, Schmitt

dismisses the significance of the American constitutional tradition. Purportedly, the Americans lack a genuine constitutional theory. *The Federalist Papers* provide more details about "practical organizational questions" (*Die Verfassungslehre*, 78–79). For Arendt's contrasting views, see her *On Revolution* (New York: Penguin, 1963). See also William E. Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt," *Canadian Journal of Law and Jurisprudence* 10, no. 1 (January 1997): 141–62.

28. Recall from chapter 2 that Schmitt accepts the unavoidability of democratic sovereignty in the modern world (*The Crisis of Parliamentary Democracy*, 22–32). But the principle of popular sovereignty is reformulated in an idiosyncratic authoritarian manner in Schmitt's theory.

29. Schmitt, *Political Theology*, 66. For a criticism of Schmitt's use of Sieyès, see Stefan Breuer, "Nationalstaat und pouvoir constituant bei Sieyès und Schmitt," *Archiv für Rechts—und Sozialphilosophie* 70 (1984): 495–517.

30. Schmitt writes that "a people [*Volk*] must already exist as a political unity if it is to become the subject of constitution-making." He praises Sieyès's preference for the term "nation" over "people," arguing that it better captures the idea of a *Volk* capable of political action, in contrast to political entities not fully coherent in ethnic or cultural terms [*nur eine irgendwie ethnisch oder kulturell zusammengehörige . . . Verbindung von Menschen*] (*Die Verfassungslehre*, 61, 79). Schmitt also identifies the French Revolution as the birthplace of "national democracy" and comments that the presupposition of this type of democracy is national homogeneity (*Die Verfassungslehre*, 231). Although Schmitt here does leave open the possibility that homogeneity can take distinct forms, I believe that most textual evidence suggests that even during the 1920s he considered national or ethnic homogeneity most likely to guarantee political unity. See, for example, his comments on the "energy of nationalism" in *Crisis of Parliamentary Democracy*, 74–75.

31. Schmitt, *Die Verfassungslehre*, 79; Schmitt, *Die Diktatur*, 140–43.

32. Schmitt, *Die Verfassungslehre*, 79.

33. Schmitt, *Die Verfassungslehre*, 77.

34. Richard Fuchs, "Carl Schmitts Verfassungslehre," *Juristische Wochenschrift* 60, nos. 23–24 (1931): 1661.

35. Jean-Jacques Rousseau, *The Social Contract*, Book 3, Chs. 12–13, in *Political Writings*, ed. and trans. Frederick Watkins (Madison: University of Wisconsin Press, 1986), 98–101.

36. Schmitt, *Die Verfassungslehre*, 315.

37. Schmitt, *Legalität und Legitimität*, 93.

38. Kirchheimer, "Constitutional Reaction in 1932," 78.

39. The Weimar legal positivist Richard Thoma made a similar point in a famous response to Schmitt's critique of parliamentarism. (Thoma, "On the Ideology of Parliamentarism," reprinted in Schmitt, *Crisis of Parliamentary Democracy*, 81).

40. The relationship between democracy and constitutionalism remains a lively topic of dispute. See Stephen Holmes, "Gag Rules or the Politics of Omission" and "Precommitment and the Paradox of Democracy," in *Constitutionalism and Democracy*, 19–58, 195–240; Bruce Ackerman, *We the People*, vol. I (Cambridge,

MA: Harvard University Press, 1991); Ulrich K. Preuss, *Constitutional Revolution: The Link between Constitutionalism and Progress*, trans. Deborah Lucas Schneider (Atlantic Highlands, NJ: Humanities Press, 1995).

41. The Weimar theorist Hermann Heller developed this observation in his brilliant but forgotten *Die Souveranität* (Berlin: de Gruyter, 1927). For discussions of Heller's theory and its relationship to the ideas of Kelsen and Schmitt, see Wolfgang Schluchter, *Entscheidung für den sozialen Rechtstaat: Hermann Heller und die staatstheoretischen Diskussion in der Weimarer Republik* (Baden-Baden: Nomos, 1983), and Dyzenhaus, *Legality and Legitimacy*.

42. On this debate, see Stanley Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist Thesis,'" *Law and Philosophy* 13 (1994): 313–59; and Manfred Walther, "Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht?," in *Recht und Justiz im "Dritten Reich,"* ed. Ralf Dreier and Wolfgang Sellert, 323–54. In fact, antiformalistic modes of decision making played a pivotal role in the Weimar judiciary's alliance with authoritarianism.

43. For a reading of Schmitt that focuses on his hostility to universalistic liberalism, see Kaufmann, *Recht ohne Regel? Die philosophischen Prinzipien in Carl Schmitts Staats—und Rechtstheorie*.

44. Of course, modern liberalism offers a vision of the rule of law different from, say, Aquinas. My point is solely that Schmitt's conceptual paraphernalia prevents him from making distinctions of this sort. For a concise historical discussion of different models of the rule of law, see Judith N. Shklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology*, ed. Allan C. Hutchinson and Patrick Monahan (Toronto: Carswell, 1987), 1–17.

45. Schmitt, *Unabhängigkeit der Richter*, 23.

46. Schmitt, *Die Verfassungslehre*, 154. He then makes the peculiar comment that "equality [before the law] is only possible where minimally a majority of cases can be affected" (155). Occasionally, he formulates a broader conception of general law as well: general law is incompatible with regulations affecting "several individuals" (*Unabhängigkeit der Richter*, 22).

47. The literature on Kelsen is massive. An introduction can be found in Ralf Dreier, *Recht-Moral-Ideologie. Studien zur Rechtstheorie* (Frankfurt am Main: Suhrkamp, 1981), 217–40. Dreier concedes that Kelsen's insistence on a clean break between legal science, on the one hand, and ethics and sociology, on the other, is overstated, notwithstanding his clear sympathy for Kelsen and hostility toward Schmitt.

48. Schmitt, *Political Theology*, 21.

49. Schmitt considers "Kelsen's restatement of legal positivism . . . the fulfillment of the Enlightenment project which attempts to subject human interaction to an impersonal order of rules: the rule of law and not men" (David Dyzenhaus, "'Now the Machine Runs Itself': Carl Schmitt on Hobbes and Kelsen," *Cardozo Law Review* 16, no. 1 [August 1994]: 10). In the process, Schmitt makes things too easy for himself. Kelsen clearly breaks radically with much of Enlightenment liberalism. Locke and Kant surely would have worried about Kant's value-relativism; one can imagine Montesquieu shaking his head in disbelief at Kelsen's view that an empirical analysis of political power has no rightful place within jurisprudence.

50. Schmitt, *Political Theology*, 21.

51. Liberal regimes have developed effective legal "normativities" for the regulation of crisis situations (Ernst Fraenkel, ed., *Der Staatsnotstand* [Berlin: Colloquium, 1964]). John McCormick makes too many concessions to Schmitt when he argues that liberalism has failed to deal adequately with the problem of the state of emergency. McCormick's endorsement of Schmitt on this point misses the extent to which functioning liberal democracies have developed institutional mechanisms able to contain emergency situations (McCormick, "Dilemmas of Dictatorship"). See also my discussion in Part III.

52. Schmitt, *Die Verfassungslehre*, 9–10.

53. Schmitt, *Die Verfassungslehre*, 76. In *Political Theology*, where Kelsen looms large, Schmitt is even blunter on this point: Schmitt describes legal validity as deriving from a "pure decision not based on reason and not justifying itself, that is . . . an absolute decision created out of nothingness" (66). The adjective "pure" is revealing: Kelsen's "pure" system of normativity becomes Schmitt's "pure" act of empirical power.

54. Weber, *Economy and Society*, vol. I, 4.

55. Of course, even modern legal formalists (i.e., proponents of the limited determinacy thesis) consider such traditional views overstated as well.

56. Schmitt, *Die Verfassungslehre*, 24–25.

57. Schmitt, *Die Verfassungslehre*, 253.

58. Jacques Derrida, "Declarations of Independence," trans. Tom Keenan and Tom Pepper, *New Political Science* 15 (1986): 10.

59. Bonnie Honig, "Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic," *American Political Science Review* 85 (1991): 106.

60. Derrida is familiar with Schmitt: see Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority,'" *Cardozo Law Review* 11 (1990): 981. For a critical discussion of Derrida in this context, see Seyla Benhabib, "Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida," *Journal of Political Philosophy* 2, no. 1 (1994): 1–23.

61. Wolin, *Politics of Being*, 30.

62. Robert Cover, "Violence and the Word," *Yale Law Journal* 95, no. 8 (July 1986): 1607.

63. Cover notes that he is "prepared to argue that all law which concerns property, its use and its protection, has a similarly violent base" ("Violence and the Word," 1607).

64. Cover, "Violence and the Word," 1608–9.

65. Cover, "Violence and the Word," 1621, 1628.

## *Chapter 4*

# The Total State

It has long been a neoconservative commonplace that the growth of the interventionist welfare state in the twentieth century generates a potentially disastrous "crisis of governability," in which a rapid multiplication of demands for social and economic security fragments state authority and delegitimizes liberal democracy. According to this now familiar line of argumentation, growing state activity blurs the traditional liberal distinction between state and society, "overloading" government and rendering effective state action unlikely: "the more decisions the modern state has to handle, the more helpless it becomes."[1] Facing unprecedented demands for democratic participation, traditional liberal institutions seem unsuited to the imperatives of a political universe in which a highly mobilized citizenry exhibits a seemingly insatiable thirst for social justice. In this view, virtually every polity now provides evidence of parliamentary decay, as legislatures prove unable to stand above the fray of special-interest politics, the "generalized blackmailing game," and fulfill the basic functions of governance.[2] Accordingly, there is now a "crisis of democracy," in which contemporary liberal democracy faces a dramatic choice between continued decline—*or* a drastic curtailment of the alleged excesses of democratic participation—and its troublesome sidekick, the interventionist welfare state.[3] If liberal democracy is to survive, it needs to counter the leveling winds of the "spirit of equality." Liberal democracy can do so but only if it strengthens popularly elected executives too long subject to the whims of an excessively adversarial political culture.

Writing during the final crisis-ridden years of the Weimar Republic, Carl Schmitt offered an eerily similar description of legal and political trends in the twentieth century. For Schmitt, the outlines of the emerging interventionist welfare state in Weimar Germany and elsewhere in Europe suggested that we have entered the epoch of the "total state," in which traditional liberal

conceptions of the state/society divide have been abandoned, and government intervenes in all spheres of human existence in order to grapple with a dramatic increase in political and social claims.[4] Traditional liberal democratic institutions increasingly are poorly attuned to the main political and social dictates of our era, and a dramatic strengthening of executive power is the only way by which the modern state now can hope to master those forces. Despite its far-reaching character, governmental action in the age of the total state generally proves ineffective. By taking the form of a democratic polity allied to the welfare state, political institutions exhibit evidence of disorganization and fragmentation.

In light of the surprisingly contemporaneous character of Schmitt's theory of the total state, it is pivotal that we tackle it head-on. Here, I begin with a discussion of Schmitt's central role in a wide-ranging debate among Weimar political and legal theorists about the status of the so-called *total state*. Most important for my purposes here, Schmitt ultimately reaches the conclusion that only an authoritarian alternative to contemporary liberal democracy is likely to prove capable of mastering the political and social tides of our era (I, II). I then argue that Schmitt's theory of the total state made him vulnerable to National Socialism (III), before criticizing the romanticized portrayal of nineteenth-century reality on which Schmitt's theory of the total state rests (IV).

## I

In the final fateful years of the Weimar Republic, German jurists, political thinkers, and publicists focused an enormous amount of attention on the concept of the "total state." Once again, it was Carl Schmitt who played a pivotal role in this debate. Schmitt probably introduced the term "total state" into German political discourse in 1931, and it was Schmitt's initial conceptualization of it that spawned the controversial discussion that followed.[5] In the exegesis offered here, Schmitt develops two distinct but nonetheless complementary lines of argumentation. First, Schmitt traces the transformation of the liberal state into the modern interventionist welfare state (A). Second, he supplements his political and economic account of the emergence of the so-called total state with a speculative philosophy of history, according to which our era is defined by "economic-technical" imperatives requiring that authentic political actors effectively manipulate modern economic and technological instruments if they are to engage successfully in friend/foe politics (B). Finally, Schmitt welds these two lines of argumentation to a defense of an authoritarian brand of executive-based plebiscitarianism.

Nonetheless, Schmitt's *initial* 1931 contribution to a theory of the total state remains tension-ridden: Schmitt builds his defense of an executive-centered political system on empirical foundations whose most problematic features are repeatedly emphasized in his own account. The first version of the theory of the total state seems to offer nothing less than a highly ambivalent right-wing defense of an intrusive, all-embracing popular despotism, at times reminiscent of the "democratic despotism" that worried writers like Alexis de Tocqueville and generations of conservatives who followed in his footsteps (C).

## A

Schmitt's analysis of the economic and political origins of the total state represents an embellishment of his 1920s critique of liberal parliamentarism discussed in chapter 2. Relying on an idealized interpretation of modern political and social history, Schmitt's *The Guardian of the Constitution* (1931) suggests that European polities in the nineteenth century rested on a clear division between state and society.[6] Neutrality and nonintervention were the distinguishing principles of a generic liberal state, in which the autonomy of religion and of economic life was effectively guaranteed by a clear separation of state from society. Despite the purportedly limited character of the liberal state, it proved anything but weak in character. In accordance with his reflections on the short-lived political strengths of classical parliamentarism found in *Constitutional Theory* (1928), Schmitt now qualifies his earlier description of the classical liberal state as essentially "antipolitical."[7] For Schmitt, only because the liberal state was "strong enough to stand above and beyond all social forces," was it able to preserve its independence from society and to "relativize" potential conflicts—concerning religious, cultural, and economic differences—so as to prevent them from taking on explosive forms?[8] Though at first glance paradoxically, only a liberal state possessing elements of an "executive state" [*Regierungsstaat*] was able to maintain its political integrity and to gain the strength requisite for the protection of the liberal private sphere. Neutrality and nonintervention presuppose genuinely "political" capacities, and for Schmitt the nineteenth-century liberal state undoubtedly possessed such qualities. Whence the political attributes of the liberal state? *The Guardian of the Constitution* suggests that those elements of the liberal state generally considered preliberal by liberal theory in fact made classical liberalism possible. As an "executive state," resting on monarchical interests, it drew substantial prowess from the fact that it long faced off successfully against a genuine political foe, popular social and political forces unleashed by the modern liberal and democratic revolutions. The early liberal state still included vestiges of monarchical absolutism; this assured its autonomy

vis-à-vis society. For Schmitt, the fact that the forces of the *ancien regime* long were able to fight off the life-or-death threat posed to its well-being suggests that the carriers of the "executive state" possessed impeccable political credentials.

In this interpretation, the early liberal state was always a tension-ridden and contradictory political creature. While deriving impressive political efficacy from its executive, a "monarchical state of civil servants" [*monarchischen Beamtenstaat*], hostile to democratization, it simultaneously included important elements of a parliamentary "legislative state" [*Gesetzgebungsstaat*], in which precisely those popular forces despised by the executive ultimately were able to gain a foothold. Of course, at first parliaments allowed only for the participation of the privileged and educated, those having *Besitz und Bildung*, the original carriers of liberal bourgeois civilization. But even at this early juncture, the liberal state manifested the dualistic character that would ultimately destroy it. In part, state intervention in society was limited precisely because parliaments increasingly sympathetic to liberal-bourgeois aspirations functioned as a counterweight to the executive *Regierungsstaat*. More fundamentally, parliament became the main institutional base for reform demands directed against traditional political and economic elites, meaning that the pivotal friend/foe divide between monarchical executive-based interests and comparatively broad-based political and social forces soon corresponded directly to the institutional separation of the executive from parliament. In Schmitt's interpretation, nineteenth-century liberal theory is simply incomprehensible without an appreciation of this dualistic core, which for Schmitt reveals itself in a host of related antitheses central to classical liberal thought. Most important, this underlying dualism is the source of the liberal delineation of the rule of law from arbitrary power, employed originally by defenders of the parliamentary "legislative state" who sought to contrast a vision of the parliament as resting on clear, prospective, general legal norms, to the purportedly willful actions of an "arbitrary" state executive.

For Schmitt, liberalism's dualistic structure inevitably leads to its self-destruction. As parliaments gain power over the executive (i.e., as the "legislative state" supplants the "executive state"), and, as parliamentary suffrage is extended to include strata outside the ranks of the "propertied and educated," the traditional liberal division of state and society necessarily decays. The democratization of parliament, in conjunction with the simultaneous parliamentarization of the state, means that no element of the state now "stands above and beyond social forces." The dualism of executive and legislature, alongside a whole set of corresponding dualisms basic to nineteenth-century liberal theory and practice (including "state vs. society" and "executive vs. the people"), is destroyed, as "the people" (alternately, "society") occupies the state. State and society are fused, and the state becomes a mere expression

of the "self-organization of society," as mass popular movements take over positions of political responsibility and exercise substantial political power for the first time.

In this way, liberalism loses its enigmatic dualistic structure. Yet for Schmitt it does so at the price of reducing the state to a mere instrument of mass democratic constituencies. In turn, these constituencies tend to see the state as little more than a means for satisfying a host of popular demands and needs—in particular, for increased economic and social security.

The conflation of state and society generates a total state that abandons liberal postulates of state neutrality and nonintervention: "If society organizes itself into the state, if state and society are to be basically identical, then all social and economic problems become immediate objects of the state."[9] The "societalization of the state" (and, simultaneously, the statization of society) means that the state becomes an interventionist state, a regulatory state, even a welfare state:

> The state as an outgrowth of society, and thus no longer objectively distinguishable from society, occupies everything societal, that is, anything that concerns the collective existence of human beings. There is no longer any sphere of society in relation to which the state must observe the principle of absolute neutrality in the sense of non-intervention.[10]

Writing amidst the darkest days of the economic depression, Schmitt tends to underline the *economic* facets of this development. Noting that state intervention in the economy in the twentieth century has grown in dramatic leaps and bounds, he repeatedly emphasizes that even defenders of capitalism are forced to acknowledge that state intervention in economic life is necessary if private ownership is to function effectively. In contemporary capitalism, nonintervention would simply permit the strongest and most privileged economic group to exploit unfair advantages in order to defeat its weaker economic competitors. For Schmitt, nonintervention in the economy therefore is no longer consistent with the concept of neutrality as conceived by classical liberal theorists. A dogmatic insistence on nonintervention amidst the crisis-ridden conditions of twentieth-century capitalism would merely exacerbate already explosive economic tensions. No state in the twentieth century can afford to abandon the instruments of economic interventionism.[11]

From this perspective, the total state not only is a product of the immanent contradictions of classical liberalism but also represents a natural response to the social and economic conditions of an era in which few seriously doubt that the state can avoid playing a central role in social and economic affairs.

## B

Along with his economic and political discussion of the origins of the total state, Schmitt develops a highly speculative account of the basic developmental tendencies of modern European civilization since the Renaissance. In this view, Western modernity is characterized first and foremost by a ceaseless quest for *neutrality*: the motor of cultural and spiritual development has been the struggle to locate "a neutral sphere in which there would be no conflict and they [the Europeans] could reach common agreement" by peaceful means.[12] This struggle has repeatedly determined what form the "central sphere" of human activity has taken at every juncture of modern Western development. Stated in the simplest terms, European culture fled the explosive controversies of theology in the seventeenth century in order to embrace a purportedly neutral sphere of metaphysics, before pursuing humanitarian ethics (in the eighteenth century) and finally economics (in the nineteenth century). Finally, our century is moving toward an "age of technicity," in which technological development is believed capable of overcoming political conflict. In this view, the course of European culture is predicated on a tragic quest to escape conflict and disagreement, an illusionary refusal to accept the inevitability of the "pure decision not based on reason and discussion and not justifying itself . . . an absolute decision created out of nothingness."[13] Each "central sphere" is initially seen as providing a basis for a relatively harmonious form of existence able to liberate humanity from conflicts that have long plagued it, only to be abandoned as disagreement and dissent inevitably surface precisely where they were deemed expendable. Nineteenth-century liberals, for example, imagined that they could produce a perfectly harmonious political and economic universe, only to face the fact that liberalism generates political and economic conflicts as explosive as any in history. Obsessed with the task of seeking escape from the decisionistic verities of moral and political action, European civilization marches relentlessly forward in its doomed quest for "neutralization and depoliticization."

For our purposes here, the "economic" nineteenth and the "technological" twentieth centuries are the most important elements of Schmitt's often apocalyptic account. In this view, the core categories of human existence in the nineteenth century became production and consumption, while the two dominant social philosophies of the nineteenth century, liberalism and Marxism, gave expression to this fundamentally economic orientation. Moral progress was conceived as a by-product of economic development; both liberals and Marxists aspired, though obviously by means of distinct paths, to achieve a harmonious economic order capable of reducing controversy and conflict to an absolute minimum. Yet the quest for neutralization via economics inevitably failed: "religious wars evolved into the still cultural yet already

economically determined national wars of the nineteenth century and finally into economic wars."[14] Economic conflicts, in the form of explosive confrontations between competing autarchic economic and political blocs, ultimately took on unambiguously political characteristics as "the real possibility of physical killing" came to haunt the economic realm.

The twentieth century, the emerging "age of technicity," builds on the nineteenth century. Schmitt is somewhat obscure in his discussion of the relationship between the nineteenth and twentieth centuries, sometimes suggesting a radical break between the two eras, at other junctures pointing to an intimate link between them. On one level, the connection between the two eras is clear enough: faced with the failures of the economically derived quest for neutrality, Europeans in the twentieth century embrace a naive, apolitical interpretation of modern technology

> since apparently there is nothing more neutral. Technology serves everyone, just as radio is utilized for news of all kinds or as the postal service delivers packages regardless of their contents . . . With respect to theological, metaphysical, moral and even economic questions, which are debatable, purely technical problems have something refreshingly factual about them. They are easy to solve, and it is easily understandable why there is a tendency to take refuge in technicity from the inextricable problems of all other spheres.[15]

The widespread faith in technology in our era derives in part from the unfulfilled tasks of the nineteenth century, for technology is seen as capable of overcoming economic scarcity and thus resolving economic conflict. At some junctures, Schmitt suggests that his own era is best described as economic-technical, since the twentieth-century faith in technology stems from its promise to resolve the unsolved dilemmas of the nineteenth century.[16] At the very least, the *early* twentieth century is still a transitional era, positioned uneasily between the economic conflicts and ideologies of the nineteenth century and an emerging faith in the regenerative power of advanced technology. Few in the twentieth century would deny the conflict-ridden and explosive character of economic life; we thereby seem to have sacrificed that element of nineteenth-century ideology according to which economics can succeed in depoliticizing Western culture. At the same time, economic concerns remain predominant, and the new (allegedly) neutral sphere of technology has yet to supplant economics altogether. Both spheres continue to shape the contours of human existence in the twentieth century, though neither is perfectly hegemonic.

How then do Schmitt's speculative concerns relate to his theory of the total state? In a passage in what surely belongs among his most speculative lectures, Schmitt declares that the modern state always "derives its actuality

and power from the given central sphere, because the decisive disputes of friend-enemy groupings are also determined by it. As long as religious theological matters were the central focus, the maxim *cujus regio ejus religio* had a political meaning."[17] When theology constituted the "central sphere" of human culture, political leaders made sure that they alone decided on the religion of their subjects. By the same token, in our economic-technical age, "a state which does not claim to understand and direct economic relations [and technology] must declare itself neutral with respect to political questions and decisions and thereby renounce its claim to rule."[18] In the economic-technical twentieth century, political leaders are forced to "master" economics and technology. If they fail to do so, they face political extinction, since the contours of friend/enemy politics are now permeated with economic and technological concerns.

This idea contains two parts. First, in an era in which economic differences take on a potentially violent and thus a directly political character, no effective political entity can afford to ignore economics. A state that refuses to address economic concerns in a universe defined by class conflict and antagonistic "autarchic world empires" is sure to prove a weak match for competing states actively involved with the task of channeling economic forces to suit their own political purposes. In Schmitt's view, Italy and the Soviet Union have already learned this lesson; Germany would do well to follow their example and acknowledge that extensive state intervention in the economy is imperative if Germany's political integrity is to be maintained.[19] Second, Schmitt anxiously comments that the twentieth century still awaits political forces "strong enough to master the new technology."[20] Pursuing an idea reminiscent of Machiavelli's *Prince*, Schmitt seems to believe that only authentic political actors are likely to prove capable of seeing through popular illusions—in our era, the naive belief in the potentialities of technology as a depoliticizing and neutralizing force. Efficacious political leaders understand that the age of technicity is destined to prove as controversial as any previous era, and they will make sure that technology works for them and not against them.

In a revealing contribution to a discussion on "Freedom of the Press and Public Opinion" at the 1930 meeting of the German Sociological Association, Schmitt clarifies exactly *what* kind of technology he has in mind. Addressing some of Germany's most famous sociologists, Schmitt argues that the rapid development of the modern mass media contributes in an especially revealing manner to the demise of the traditional liberal state/society divide. Requiring unprecedented forms of positive state action, radio and film pose a real challenge to classical liberalism; even the most liberal polities have relied on extensive state action in order to cultivate and regulate the new media. Growing state involvement in the media—as demonstrated by the growth

of state-run radio and the public financing of the film industry in many countries—raises troublesome questions about the possibility of state neutrality in the realm of communicative freedom. In this arena as well, the march of the total state seems inexorable: the public/private divide becomes most fuzzy precisely where the mass media are most highly developed. Most importantly for Schmitt, new media technology provides immense possibilities for mass persuasion and manipulation. Whoever proves most capable of employing the mass media effectively is likely to determine, to a great extent, the political course of the twentieth century.[21]

In accordance with the economic-technical imperatives of our times, the modern total state not only is an "economic state" [*Wirtschaftsstaat*] but also faces the difficult test of grappling successfully with the dictates of an "age of technicity" and its awesome arsenal of weapons of mass persuasion. At the very least, this development requires that government abandon any vestige of the liberal commitment to nonintervention in the realm of mass communication.

## C

Contemporaries who confronted Schmitt's initial account of the total state in 1931 likely found themselves posing an obvious yet by no means trivial question: does Schmitt hope to place the development of the total state in a positive or negative light? And if we *are* to embrace the total state, what are its implications for liberal democratic politics? Schmitt's answer to this question—at least in 1931—was by no means crystal clear. No wonder his introduction of the concept of the total state into scholarly and political debate in Germany immediately generated an academic growth industry among right-wing political and legal thinkers.

Schmitt hoped to gain political mileage from his empirical analysis of the origins of the total state. In the early 1930s, Schmitt was an outspoken defender of the Weimar executive and its constitutionally dubious use of emergency powers as a means of governing Germany during a period of profound political and economic crisis.[22] Given the fact that the executive was chosen by the German *Volk* as a whole, for Schmitt it provided a better expression of the homogeneous, unified people envisioned by Weimar's constitutional architects during the relatively hopeful days of 1918 and 1919 than Weimar's ineffective, divided parliament. In this view, only the Weimar federal president was likely to fulfill authentic representative functions, and only he could provide a suitable embodiment of the awesome *pouvoir constituant* on which the Weimar polity necessarily rested.[23] Hindenburg's plebiscitary legitimacy was superior to the pathologies of Weimar's system of parliamentary legality. In 1931, Schmitt explicitly argued that the Weimar executive

could legitimately "break through" [*durchbrechen*] constitutional norms of secondary importance to the constitutional order as whole.[24] Which norms did Schmitt have in mind? Schmitt was conveniently unclear in 1931 on this point. Yet he unambiguously stated that limits to the exercise of Weimar's emergency powers were primarily *institutional* in character: the Weimar Constitution provided the parliament with controls against the abuse of executive emergency authority.[25] As Schmitt was well aware, however, the deeply divided status of the legislature during this period meant that it was unlikely to take advantage of these controls. In (only somewhat) cruder terms: because parliament lacks the ability to ward off an authoritarian exceptional state, the Weimar executive can legitimately undertake to establish such a state.

Many who encountered Schmitt's analysis of the total state in 1931 legitimately interpreted it as a defense of Schmitt's own preference for an executive-based authoritarian regime possessing at best a dubious constitutional basis.[26] After all, on one point the theory of total state is unambiguous: for Schmitt, the rise of the total state demonstrates the anachronistic character of liberal parliamentarism and the rule of law as well as the virtues of an executive-based authoritarian system allegedly better equipped to deal with the dictates of our economic-technical age. The total state requires jettisoning core liberal democratic institutions for an executive-centered regime equipped with impressive exceptional powers.

In *The Guardian of the Constitution* (1931), Schmitt describes contemporary parliaments as dominated by highly organized social and political blocs and parties, lacking even a minimal interest in rational debate. The "societalization of the state" manifests itself most clearly in a dysfunctional brand of parliamentarism having at best a faint resemblance to traditional liberal models of government by deliberation. The structure of the modern political party increasingly corresponds to the logic of the total state: in Schmitt's interpretation, parties fuse public and private by functioning as "total" institutions providing their members with tutelage from the crib to the grave. Social Democrats send their children to socialist youth camps, sign up for a socialist sports club, and then spend their retirement years as members of the socialist stamp collectors' guild or bird watchers' association; conservative parties offer a corresponding set of "total" institutions. The resulting "pluralist party-state," in which total parties ruthlessly carve up state authority for the benefit of profoundly antagonistic, all-encompassing political groupings, renders freewheeling parliamentary deliberation impossible. How could sensible debate and lawmaking ever take place between those who have undergone political socialization within the horizons of distinct, all-encompassing organizations pursuing altogether antagonistic aims?

The total state also rests on situation-specific forms of economic and social regulation incompatible with liberal models of the rule of law as resting on

clear, general legal norms. State action now needs to adapt to the complex and ever-changing imperatives of a host of social and economic spheres, and for Schmitt it is unrealistic to expect traditional liberal legislative institutions or devices to succeed in tackling the immense tasks at hand. Only an executive-allocated far-reaching discretionary power is likely to do so. Schmitt goes so far as to suggest that in the twentieth century we find ourselves in an "economic state of emergency" [*Wirtschaftsnotstand*]. Economic crises are now widely seen as possessing the life-and-death quality once associated, for example, with the possibility of an armed attack or a violent uprising, and thus the management of the economy now concerns matters having a potential impact no less devastating than the "emergencies" described by classical liberal theorists in the eighteenth and nineteenth centuries. In line with this trend, emergency political and legal devices, long considered by liberal theorists appropriate solely to dire crises in which the polity faces an immediate existential threat, have now legitimately become a *pervasive* feature of economic and social regulation. For this reason, every modern executive inevitably relies on highly particularistic forms of administrative action, often lacking even a minimal basis in parliamentary general law.[27]

The theory of the total state thereby offers a crucial *sociological* complement to Schmitt's early jurisprudential reflections on the problem of legal indeterminacy. Given that the classical distinction between parliamentary law and administrative decree is *inevitably* blurred and that law today *unavoidably* becomes vague and open-ended, highly discretionary state action is simply unavoidable. Even if judges and administrators *could* be effectively bound by legal norms, contemporary legal systems nonetheless increasingly lack precisely those (clear, prospective) general norms alone capable of providing coherent guidance to those forced to interpret legal materials. For Schmitt, liberal jurisprudence not only provides an anachronistic model of judicial and administrative action but rests on bad legal sociology as well.

In the era of the total state, far-reaching indeterminacy (in the form of irregular, highly discretionary state action) is necessarily a central feature of legal experience. In this respect as well, liberalism is simply outdated: its preference for the rule of law and relatively formalistic modes of decision making is inconsistent with the structural imperatives of our times.

As already discussed, Schmitt had previously hinted that the logical answer to the crisis of legal indeterminacy was a dictatorship, in which the unavoidability of arbitrary state action was taken as a given. In the early 1930s, this element of Schmitt's thinking becomes a pivotal feature of his theory of the total state. Schmitt's early jurisprudential writings suggest that the moment of arbitrary decision within state action might be contained—for example, by judges able to secure legal predictability and regularity despite the impossibility of binding state action to clear norms. By the early 1930s at the latest,

the moment of arbitrary decision escapes even the modest limits outlined in Schmitt's jurisprudential writings. In the form of an awesome executive effectively unregulated by law, exercising power in the interests of the German *Volk* as a whole, the moment of willful decision liberates itself from any meaningful controls whatsoever.

Schmitt thus relies on his empirical *diagnosis* of the total state in order to offer a normative *prognosis* possessing authoritarian credentials. Yet this strand within his argument clearly presents some problems for him; much of the subsequent debate about the total state debate focuses on these issues. In the simplest terms, the paradox at hand takes the following form: on the one hand, the concept of the total state is supposed to serve, at least implicitly, as a normative justification for Schmitt's own political agenda, namely an executive-based exceptional state. On the other hand, Schmitt often portrays the movement toward the total state as a *regression* having potentially disastrous implications: the inexorable transition from classical liberalism to the total state is hardly described as an altogether positive development. In effect, Schmitt undertakes to deduce his normative agenda from a series of historical transformations whose most unattractive features he repeatedly highlights.

Schmitt argues that the total state breeds clientelism and bureaucratic inefficacy. The state is "parceled out" [*parzelliert*] to competing political and social blocs struggling to gain their share of an apparatus that occupies an ever more paramount place in economic life. This "pluralistic splitting up of the state into a number of tightly organized social complexes" denies the state apparatus the minimum of integrity requisite for coherent state action.[28] The public economy (publicly operated services and firms, such as railroads or the post office) succumbs to disorganization and "planlessness" since antagonistic political and social interests exploit it for narrow purposes incompatible with the dictates of sound economics. In a 1931 essay, "Political Ideology and Political Reality in Germany and Western Europe," Schmitt's hostility to the total state's underlying "societalization of the state" becomes especially evident. Here, Schmitt describes the pluralist occupation of the state by popular political and social groupings as nothing less than the outgrowth of a foreign (American and Western European) political tradition inconsistent with Germany's indigenous authoritarian and statist traditions. In a passage foreshadowing Schmitt's worst xenophobic outbursts from the mid-1930s, he exhorts his countrymen to free themselves from such alien cultural influences and instead cultivate the "special type" [*Eigenart*] of political institutions appropriate to the special needs and conditions of Germany.[29] In this view, the total state is hardly an appropriate political and social form for contemporary Germany. On the contrary, Germany would do best to free herself from its "alien" tentacles.

In the final analysis, the movement toward an exceptional executive-based system of rule is depicted in 1931 as a more or less natural outgrowth of precisely the *same* forces that generate modern democracy's (allegedly) crippling clientelism, pluralism, and parceling out of state authority. Both the "positive" and the "negative" faces of the total state stem from a fusion of state and society engendered by the forces of political and social democratization. The inexorable trend toward an executive-dominated political system *and* the worst ailments of the interventionist welfare state constitute two sides of the same coin.

Schmitt thereby might be taken as suggesting that modern demands for political and social equality have culminated in a new form of political and social despotism, in which an all-embracing authoritarian state joins hands with the instruments of the welfare state. From this interpretative angle, Schmitt could be read as simply confirming Tocqueville's darkest anxieties about the democratic age: the total state is nothing more than a "democratic despotism" in which

> the will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to nothing better than a flock of timid and industrious animals, of which government is the shepherd.[30]

Of course, Schmitt's assessment of this "democratic despotism" is distinct from Tocqueville's. In light of Schmitt's outspoken defense of the total state's authoritarian political potentialities, he seems intent on *deepening* some of the trends that so alarmed Tocqueville and generations of political conservatives influenced by the French thinker.

Needless to say, this was an unusual agenda for a theorist of the authoritarian right, particularly given Schmitt's outspoken hostility to core components of the process of political democratization. Not surprisingly, his right-wing colleagues in German political and legal theory soon took him to task for it.

## II

Between 1931 and 1933, Schmitt's theory of the total state generated a wide-ranging debate among many of the most important voices in German political and legal scholarship. Otto Hintze endorsed Schmitt's concept of the total state, suggesting that Schmitt had perceptively captured a series of novel political and social developments.[31] In a sympathetic review article,

Ernst Rudolf Huber carefully summarized Schmitt's ideas, intimating that Schmitt simply had not gone far enough in underlining the challenges that the total state posed to traditional liberal civil liberties.[32] In a more critical tone, Gerhard Leibholz, who later became the most influential voice on the Federal Republic's constitutional court in the 1950s and 1960s, suggested that Schmitt had exaggerated the extent of political disarray and disintegration in Weimar Germany. Nonetheless, he endorsed the view that Weimar democracy seemed destined to evolve into some form of authoritarian state.[33] Meanwhile, the Nazi Party member Otto Koellreutter offered a rather confused discussion of Schmitt's theory in which he oddly characterized the total state as a "liberal power-state" [*liberaler Machtsstaat*].[34] Schmitt's own student, Ernst Forsthoff (later one of the most important voices in conservative jurisprudence in Germany after World War II), tried to defend his teacher against such criticisms in a book, appropriately entitled *Der totale Staat*, which seems to have gained some attention.[35] A slew of reactionary publicists and journalists embraced Schmitt's concept,[36] and even Social Democrats suggested that it contained some partial truths about the capitalist interventionist state.[37]

A critical response by a relatively unknown and now long-forgotten political sociologist, Heinz Ziegler, arguably played the main role in the ensuing debate. Ziegler's critique of Schmitt, sketched out in a pithy monograph entitled *Authoritarian or Total State*, not only defined the basic terms of much of the right-wing engagement with Schmitt during the final years of the Weimar Republic but also led Schmitt to clarify and even to reformulate many of his initial claims about the total state.[38]

Ziegler's 1932 assault on Schmitt leaves few stones unturned. Like Schmitt, Ziegler argues that the days of liberal democracy are numbered. But Ziegler worries that Schmitt fails to go far enough in distancing himself from the legacy of modern democracy. Ziegler thematizes precisely that ambiguity in Schmitt's theory that we identified above: Schmitt's theory of the total state arguably offers a defense of a particularly modern form of popular despotism. For Ziegler, Schmitt's theory of the total state represents nothing less than the "end and perfection of democratization," a nightmarish "egalitarian collectivism" suitable to the needs of a "disordered mass society."[39] The total state is democratic majoritarianism run amok.[40] In *The Guardian of the Constitution*, Schmitt had sought to defend vast increases in executive power by reminding his readers that only the Weimar president is directly elected by the entire people; as noted above, only the executive provides a fair expression of the political unity of the German *Volk*, and for Schmitt, only he possesses an adequate form of plebiscitary legitimacy. In Ziegler's interpretation, this line of argumentation simply confirms his suspicion that Schmitt has abandoned the ranks of authentic conservatism in favor of the

ominous egalitarianism of modern democracy; Schmitt seeks nothing less than a "democratic" dictator. Ziegler also criticizes Schmitt's interpretation of the fusion of state and society. Though acknowledging the basic accuracy of Schmitt's insistence on the unavoidability of state intervention in contemporary capitalism, Ziegler suggests that Schmitt's concept of the total state provides inadequate safeguards against those who might seek to interpret it in a statist manner. Schmitt's underdeveloped model of state/society relations in the total state *might* encourage the excessive bureaucratization and etatization of economic relations, and Schmitt's theory thus for Ziegler contains socialist implications.[41] Finally, Ziegler doubts that Schmitt's empirical diagnosis can succeed in sustaining Schmitt's authoritarian normative agenda. In Ziegler's view, a real solution to Germany's crisis necessitates a thoroughly "post-democratic" political and social system, in which leaders exercise truly autonomous and independent rule, unburdened by popular social and political demands. An authentic authoritarian state requires a radical break with the ineffective, parasitical total state described by Schmitt. Yet the plebiscitary origins of Schmitt's executive suggest that Schmitt ultimately fails to mark out a real alternative to the status quo. For Ziegler, no form of democratic mass-rule, including Schmitt's plebiscitary executive ruling by means of emergency decrees, can generate effective rulers. Plebiscitarianism suffers from the "anonymization of responsibility" and the "depersonalization" allegedly common to all forms of modern democracy. Instead of producing leaders possessing true "authority" and "personality," it is conducive to political incompetence and cheap demagoguery.[42]

Ziegler's critique clearly hit a raw nerve. Not surprisingly, Schmitt aggressively responded to it in 1932 and 1933. His response is especially revealing given the light it sheds on Schmitt's views about plebiscitarianism and modern democracy and capitalism and state regulation. Here, political liberalism is systematically discarded, whereas some core features of economic liberalism are maintained. Capitalism and liberal democracy are separated: Schmitt's economic model *empowers* capital by freeing it from the regulatory burdens of the democratic welfare state, while his plebiscitarianism drastically *curtails* genuine popular participation. What Schmitt provides here is nothing less than a political theory of authoritarian capitalism but one in which authoritarian political institutions are masked by an appearance of popular legitimacy.

In the 1932 *Legality and Legitimacy*, Schmitt offers a gracious acknowledgment of Ziegler's concerns, before declaring that popular *plebiscitarianism* is the *only* form of legitimacy available in the contemporary world. In the aftermath of the entrance of the masses onto the political scene, it is unrealistic to expect government to legitimize itself without *some* appeal to "the people."[43] *Traditional* forms of political authoritarianism, like

those favored by Ziegler, are unlikely to prove effective in an era of mass politics. But Schmitt then goes to great pains to explain why his model of plebiscitary legitimacy both represents a genuinely postdemocratic form of legitimacy and provides room for authentic leadership along the lines desired by fellow reactionaries like Ziegler. Schmitt explains that the plebiscites that he has in mind have nothing to do with concepts of a *plebiscite de tous les jours* where popular participation and decision making constitute an active, ongoing process, and citizens exercise far-reaching political power. In Schmitt's plebiscites, the people "cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its 'yes' the draft norms presented to it."[44] To be used effectively, plebiscites should take place only on a "momentary" [*augenblickweise*] and intermittent basis, and only an extremely limited choice should be presented to voters; voters only say "yes" or "no" to simple questions presented from above. The real driving force here is those who formulate and pose the questions at hand—in Schmitt's model, the executive. Schmitt adamantly comments that a plebiscite of this type is qualitatively distinct from traditional liberal democratic models of the popular election. In liberal democracy, an election provides an opportunity for freewheeling debate about candidates and political parties, and the election is seen as culminating in some "normativization" [*Normierung*], a piece of general law deriving its legitimacy from rational debate. In contrast, the Schmittian plebiscite is simply a "decision giving expression to an act of will" [*Entscheidung durch einen Willen*], a means by which the popular masses can hope to approximate "a pure decision not based on reason and discussion and not justifying itself."[45] It neither presupposes debate or contestation, nor does it generate a general legal norm intended not only to guide but also to bind and limit the executive. Pace Ziegler, plebiscitarianism hardly necessitates a principled commitment to either the normative or the institutional core of modern democracy.[46]

Schmitt simultaneously suggests that his model of plebiscitarianism provides an excellent test of aspirants for political leadership. The effective employment of the plebiscite is a risky affair. Those who succeed in posing "the right questions at the right time" can legitimately claim to have demonstrated impressive leadership skills; the successful use of the plebiscite presupposes "a very special and rare type of authority."[47] The demos is fickle and irrational, and only a select few will gain its support. In Schmitt's alternative to Ziegler's critical interpretation of plebiscitary decision making, the plebiscite hardly need subject political elites to the ills of incompetent, anonymous mass rule; instead, the true leader manipulates the plebiscite in order to mobilize the inarticulate masses in support of an agenda whose basic contours the leader has already set.[48]

Schmitt then introduces the crucial distinction between the "quantitative total state based on weakness" and the "qualitative total state based on strength" in order to underline his preference for private capitalism. In the simplest terms, the difference refers to two possible ways in which state and society can fuse. In the quantitative total state, the state ambitiously intervenes in *all* facets of social and economic existence, thus failing to acknowledge that *direct* state intervention in many areas of social life is likely to prove ineffective. Totality takes a "quantitative" form: the extent of governmental activity in the economy is what counts. In turn, the vast scope of state action in this pathological variant of the total state is driven by the fact that it remains a "pluralist party state" in which a panoply of competing political and social groupings extends the reach of government in order to increase the quantity of political and economic goods available for distribution to their members. Describing Weimar as an example of the quantitative total state, Schmitt highlights its political vulnerability: Weimar democracy is ineffective because it is forced to respond to conflicting demands from a vast array of conflicting social and political groups—in particular, labor unions, civil servants, and those claiming social welfare benefits. Schmitt even toys with the idea that the term "total state" may be misleading when applied to the "quantitative" fusion of state and society. In reality, the quantitative total state probably lacks even the minimal prerequisites of genuine statehood. In fact, its only "total" institutions are political parties, eagerly occupied with the task of occupying and extending governmental functions in order to extend their parasitical grip on political and economic life.[49]

Whereas Germany presently finds itself with a quantitative total state, according to Schmitt it desperately needs its distant qualitative cousin. In this alternative scenario, the state would still play a central role in social and economic affairs; the days of laissez-faire have come to an end. Yet the state would now simultaneously acknowledge the limits of direct interventionist devices.[50] More specifically, the state should provide the legal and institutional preconditions for a system in which capitalist proprietors engage in conscious forms of joint supervision of the economy. Schmitt is emphatically opposed to the collectivization of private property. But he does endorse "collective" decision making by capitalist proprietors. Where economic decisions are likely to have a "public" significance, state planners would not dominate the entrepreneur. Instead, entrepreneurs would engage in forms of planning. In Schmitt's own terms, the state planners should not dominate; rather, the (economically) dominant should plan. The final aim of this system would be an overall reduction of direct administrative regulation of the economy.[51] Here, totality is "qualitative" in the sense that the scope of state action is of secondary importance in relation to the effectiveness and coherence of state activity. In order for such coherence to be achieved, the state must do all it

can to encourage private capitalists to engage in relatively far-sighted, sensible forms of economic coordination. But it needs to relinquish immediately many of the interventionist devices employed, in Schmitt's view unsuccessfully, by Weimar and other "quantitative" welfare total states.

How then is the qualitative total state to be established? Schmitt's analysis here of its deformed quantitative cousin already hints at his answer to this question. For Schmitt, the main source of the ills of the quantitative total state is that it is a polycratic "pluralist party state" in which political and social blocs prevent cogent state action while simultaneously overextending state authority. Given this diagnosis, there can be only one possible answer to Germany's ills: Germany must be liberated from the pluralism that, in Schmitt's view, is ferociously devouring her once impressive state apparatus. As we have seen, as early as 1931, Schmitt had called on the Weimar president to "break through" constitutional norms inconsistent with the core of the Weimar Constitution. Which sections of the Constitution make up the core of the Constitution and thus earn the federal president's tutelage? Whereas Schmitt's 1931 answer to this question remained somewhat unclear, the 1932 *Legality and Legitimacy* bluntly declares that the first part of the Weimar Constitution, in which liberal parliamentarism is made a central component of the German Republic, codifies nothing but a "relativistic" system of "formalistic value-neutrality" undeserving of Hindenburg's protection. Because "normativistic" parliamentarism and the rule of law are outdated in an era in which discretionary power is pervasive, the main institutional base for the pluralist party state, the democratic legislature, can legitimately be abrogated by the Weimar executive. An (undisclosed) set of "basic rights and duties," outlined in the Weimar Constitution's amorphous second part, should instead provide a constitutional basis for an authoritarian alternative better attuned to the imperatives of a legal universe in which highly discretionary state action is pervasive. According to *Legality and Legitimacy*, the second part of the Weimar Constitution should be "cleansed" and then used as a constitutional foundation for a dictatorship that breaks radically with the liberal democratic components of its first section.[52] In short, by relying on selected features of the Weimar Constitution, the executive should undertake a constitutional counterrevolution culminating in an authoritarian alternative to the weak "quantitative total state."

## III

An examination of Schmitt's writings from the period immediately following the Nazi takeover suggests that he embraced National Socialism in part precisely because it promised to liberate Germany from the quantitative

total state. In a front-page editorial penned shortly after Hitler's takeover for the *Westdeutscher Beobachter*, a Cologne-based National Socialist daily, Schmitt praises the Nazis for freeing Germany from the clientelistic and parasitic "heterogeneous power clumps" basic to the pluralist party state.[53] Schmitt's main work from the same year, *State, Movement, Folk*, bluntly asserts that the experience of the "weak" Weimar total state demonstrates the utter bankruptcy of liberal democracy in the contemporary world.[54] Only revolutionary change—and for Schmitt in 1933, the Nazis offered a genuine "national revolution"—can provide the political and legal devices essential to a truly contemporary polity, a "state for the twentieth century," capable of grappling effectively with the tasks of modern economic intervention. Having watched with frustration as Weimar's semi-authoritarian presidential regimes between 1930 and 1933 fumbled the task of cleansing the total state of its least attractive features, Schmitt turned to the Nazis with the hope that they might bring about reforms necessary for achieving the qualitative total state. For Schmitt in 1933, the Nazis alone must have seemed up to the demanding tasks of modernizing the German polity so as to accord with the dictates of our "economic-technical" era.

Leading National Socialists quickly reciprocated; particularly in the early years of the new regime, Nazi leaders were eager to develop ties to highly regarded intellectuals, particularly those possessing impressive political and legal know-how. Hitler himself employed the expression "total state" during public appearances in 1933, and the term soon became part of official National Socialist parlance. Not surprisingly, Schmitt seems to have gained some credit for the concept. Its immediate popularity contributed to Schmitt's status as a "rising star" within the National Socialist ideological machinery.[55]

Of course, that the Nazis used the concept of the total state hardly proves that its basic contours were essentially National Socialist in character.[56] Some commentators have observed that Schmitt's idea of the qualitative total state might have proven compatible with support for competing forms of right-wing authoritarianism.[57] In fact, Schmitt's political favorite during Weimar's final days was clearly the reactionary General Kurt von Schleicher, who sought an authoritarian solution to Weimar somewhat distinct from National Socialism. By the same token, it is easy to see why the theory of the total state may have *predisposed* Schmitt to join forces with the Nazis, particularly after von Schleicher's maneuverings to establish an authoritarian state had failed so miserably.[58] The National Socialists not only promised an end to the crippling "pluralist party state" but also succeeded in doing so—*if* the pluralist party state is defined, as in Schmitt's theory, in reference to a plurality of independent political parties and autonomous interest groups advancing the cause, first and foremost, of the socially and economically underprivileged.[59] Nazi economic ideas, though frequently contradictory, clearly meshed with

Schmitt's own: like Schmitt, the National Socialists pushed for a private capitalist economy but one in which quasi-public forms of "economic self-administration" by privileged economic groups played a decisive role.[60] Finally, the National Socialists' perverse manipulation of the instruments of mass popular mobilization arguably approximated Schmitt's own ideas about the plebiscite. Neither the Nazis nor Schmitt considered plebiscites incompatible with mass propaganda, censorship, or the elimination of political opposition. Both saw the plebiscite, first and foremost, as a means of *manufacturing consent from above*, not a gauge of an independent public opinion based on an autonomous, grassroots process of argumentative debate and contestation. From Schmitt's perspective during the early period of the National Socialist regime, the Nazi success in whipping up mass support surely suggested that they had passed precisely that test of authentic leadership outlined in the 1932 *Legality and Legitimacy*: Hitler and his advisors must have seemed to possess an uncanny ability to pose the right questions to the *Volk* at the right time. No wonder that Schmitt offered generous praise for Germany's new dictator after Hitler had demonstrated that "very special and rare type of authority" described by Schmitt in 1932.

Schmitt's 1933 comments on the modern mass media are particularly revealing for deciphering his political intentions during the fateful year in which Nazism overwhelmed Weimar democracy. Recall again that for Schmitt our era is an *economic-technical* one, in which political actors face the task of mastering new instruments of mass persuasion, such as radio and film. What is striking about Schmitt's reflections on the mass media during this crucial year is that they *accord* with National Socialism while potentially conflicting with some elements of Schmitt's political theory: when Schmitt sketches out the concrete details of the qualitative total state, he strives to avoid any possible conflict with Nazi practice. Schmitt's apologists are likely to see this discrepancy as evidence for the fundamentally anti-Nazi orientation of Schmitt's theory. But it just as easily supports the interpretation that Schmitt ultimately formulated his ideas, at least in 1933, so as to suit Nazi needs.

In light of Schmitt's emphasis in the theory of the qualitative state on the relative autonomy of capitalist private property vis-à-vis the state, one might expect Schmitt to pursue a similar line of argumentation in his discussion of the development of mass communications and its implications for freedom of the press. Just as the qualitative total state is incompatible with a regimented state economy, so, too, in the sphere of mass communications—or so the theory of the qualitative state surely implies—new forms of "self-administration" and autonomy need to be established. Essential to the qualitative total state is that it acknowledges the anachronistic character of the traditional liberal state/society divide while still preserving meaningful freedom for capitalist

proprietors; in a similar vein, the qualitative state should logically entail some form of press and communicative freedom, albeit of a type unfamiliar to classical liberalism. Neither in the economy nor in the realm of mass communications should a *qualitative* total state run roughshod over realms of independent activity free of *direct* state control.

Unfortunately, Schmitt's reader will search in vain for an argument along these lines. On the contrary, Schmitt now announces that any state that fails to subject the instruments of modern mass communication directly to its aims is destined to "denounce its own political existence."[61] In light of the mass-psychological impact of modern media technology, any state that hopes to maintain its political integrity inevitably is forced to engage in censorship and exercise monopolistic control over the new technologies at hand. Anticipating one of the most striking facets of modern totalitarianism, Schmitt suggests that successful regimes now are driven to employ the new technological devices of mass psychological manipulation in order to build popular support for their policies. From this perspective, traditional liberal conceptions of government as based on free consent are anachronistic. In the current technological age, "consent" must be manufactured by power holders who know best how to wield its awesome propaganda devices.[62]

## IV

At the outset of this chapter, I pointed to some thematic commonalities between contemporary neoconservative accounts of the interventionist welfare state and Schmitt's theory. Of course, the decisive difference between Schmitt and more recent authors is that Schmitt ultimately concludes that a fundamental reform of the (allegedly) overloaded, fragmented, and increasingly powerless regulatory-welfare state requires an unabashedly authoritarian alternative to liberal democracy; as we have seen, this is surely one reason why Schmitt embraced National Socialism. Contemporary neoconservatives shy away from similarly shocking conclusions. Although some of them occasionally do echo Schmitt's advice when advocating a dramatic expansion of executive power, their proposals surely remain within the parameters of the liberal democratic tradition; they remain committed to defensible conceptions of human equality and thus universal suffrage, parliamentarism, and the rule of law.[63] They often seek significant institutional changes but hardly anything approximating Schmitt's mass-based dictatorship, in which the popular election is reduced to what Stephen Holmes has described as "soccer stadium democracy."[64]

Still, it is hard to ignore the possibility that Schmitt's disturbing prognosis, in some respects, offers a more consistent complement to the diagnosis of

the welfare state found in both Schmitt and some contemporary neoconservatives. The paradox at hand takes the following form: if we believe that governmental decision making is crippled by powerful organized interests that, moreover, possess a popular basis in much of the citizenry, might it not then make sense for a would-be "reformer" to seek a curtailment of traditional democratic mechanisms and rights? How else might it be possible to "purge" government of the vast array of competing interests that allegedly overload it?

As we have seen, both Schmitt and some neoconservatives offer a dire picture of recent developments in state/society relations. If contemporary liberal democracy indeed has been undermined by an apocalyptic "generalized blackmailing game," maybe only the instruments of the authoritarian state can undertake the surgery required by both diagnoses. To the extent that both accounts tend to describe our era as one in which liberal democracy faces an emergency situation, authoritarianism may seem to provide a logical path beyond the state of emergency supposedly at hand.

In light of this disturbing consideration, it seems incumbent on us that we take a closer look at the diagnosis of the modern welfare state provided by Schmitt. After all, Schmitt's diagnosis and his (authoritarian) prognosis are inextricably linked. For now, I bracket the possibility that the contemporary neoconservative diagnosis of the welfare state suffers from the same ills evident in Schmitt's theory of the total state, in part because I hope to confront this possibility directly in chapter 8. Still, the striking similarities between these two accounts of the interventionist welfare state lend some plausibility to the possibility that the critical comments on Schmitt that follow can also be applied to recent neoconservative discourse about government "overload."

Schmitt's account suffers from a number of immediate flaws. On numerous occasions in this study, I have suggested that Schmitt's critique of contemporary democracy relies on a mythical portrayal of the liberal past, particularly when it suits his attempt to discredit contemporary democracy and the welfare state. Here again, this argumentative ploy figures prominently in Schmitt's thinking. The starting point of his theory of the total state is the deceptively simple idea that state and society have undergone a potentially disastrous *fusion* in the early twentieth century, whereby a traditional liberal state/society scenario is replaced by a total state resting on the "societalization of the state." In Schmitt's account, this fusion is the most fundamental source of the ills of the contemporary (quantitative version of the) total state. The starting point for a negative comparison of contemporary democracy is provided by Schmitt's (idiosyncratic) theory of the nineteenth-century liberal state, which for Schmitt allegedly lacked any of the ills of the modern interventionist welfare state.

But where in fact did state actors in the nineteenth century consistently respect the principle of absolute neutrality in the economy? Certainly not in Central Europe, where the state often functioned as a driving force in economic development. Even in England and the United States, the historical record meshes poorly with Schmitt's reflections, chiefly because the interventionist state is hardly a mere product of twentieth-century demands.[65] Of course, decisive shifts did take place in the relationship between state and society between the nineteenth and the twentieth centuries. In the United States, for example, at least three differences can be immediately identified: economic intervention was undertaken primarily by state and municipal units, before being supplanted by far-reaching federal activity in the twentieth century; the orientation of government intervention was oriented primarily toward economic development and basically pro-business in character, while after the New Deal at least *some* forms of state action are supposed to empower the socially and economically vulnerable; in the nineteenth century, the idea of a "general expectation of justice, and a general expectation of recompense for injuries and loss," so central to the modern welfare state, was relatively underdeveloped.[66] But none of these changes is captured adequately by Schmitt's overstylized contrast between the noninterventionist liberal state of the nineteenth century and the contemporary total state. Indeed, where laissez-faire attitudes were strongest in the nineteenth century, government was arguably most "societalized," often by business groups instrumentalizing state authority in order to advance economic development.[67] From one perspective, the real novelty in the early and the mid-twentieth century is that the "societalization" of state power came to include interests locked out of the political system of the nineteenth century, including labor unions and interest groups representative of the socially and economically underprivileged. The character of "societalization" altered; pace Schmitt, we did not move from a liberal state standing "above and beyond" society to one in which society swallows up state authority.

The conceptual framework of the theory of the total state—especially the murky idea of a fusion between state and society, predicated on the incorrect view that state and society were principally "separate"—is too underdetermined to accomplish the analytic tasks Schmitt expects of it.[68] Here as well, Schmitt's vulnerability to an idiosyncratic variety of conceptual realism, in which the complex social and political patterns of a given era are conveniently interpreted to give unmediated expression to the abstract claims of the dominant dogmas of the same period, rears its head. Nineteenth-century political and economic reality never accorded neatly with nineteenth-century liberal doctrine.

Of Schmitt's contemporaries, it was the increasingly isolated figure of Hans Kelsen who best grasped the profound inadequacies underlying the

conceptual framework of the theory of the total state. In a scathing 1931 critique, Kelsen suggests that Schmitt's model of the total state is simply another example of the widespread tendency within contemporary political analysis to provide "long familiar facts with a new name."[69] Schmitt's argument that the total state represents a novel force on the political scene is undermined by the verity that many of its elements are common in history. Even states of classical antiquity and modern absolutism are "total states" in Schmitt's sense of the term. Just as it is ludicrous to argue that ambitious state intervention in society is a recent historical phenomenon, so, too, Kelsen declares, is it impossible to show that no meaningful distinction separates state and society in the contemporary regulatory-welfare state: "One need not be a defender of historical materialism in order to recognize that a state, based on a legal system guaranteeing the private ownership of the means of production and the private control of production and the distribution of goods," is hardly a "total state" intervening in *all* facets of private existence.[70] A political system that continues to preserve capitalist private property can hardly be described as one in which state and society constitute a seamless web. At least at one juncture, Kelsen points out, Schmitt himself implicitly concedes as much. Schmitt expressly defines "pluralism" as that setting where competing "social," "non-state" interests parasitically colonize the state "without ceasing to be purely social (non-state) bodies."[71] Implicitly, Schmitt thereby presupposes the continued existence of "purely social" interests within the total state. But how can Schmitt consistently do so while simultaneously arguing that the total state rests on a fusion of state and society?[72]

Schmitt tends to suggest that nineteenth-century conceptions of a division between state and society have lost *any significance whatsoever* in the twentieth century, whereas for Kelsen the meaning of the state/society divide has simply been *altered*. The fact that contemporary reality hardly conforms to early liberal ideology hardly demonstrates the anachronistic character of the underlying idea of a state/society divide.[73] Kelsen then relies on this general claim to develop a specific criticism of Schmitt's political theory. For the latter, the fusion of state and society simultaneously implies that the distinction between parliament and the executive has lost any real meaning; as we saw earlier, the dualism of "legislative state" versus "executive state" in traditional liberalism rests, in Schmitt's theory, on the more fundamental dualism of "society versus the state." For Kelsen, however, the contrast between parliament and the executive has hardly become altogether insignificant in character, though the legislative-executive nexus has obviously changed in many respects since the nineteenth century. The indisputable fact that this nexus no longer takes the form of a face-off between popular political and social interests within parliament and an executive branch dominated by aristocratic and monarchical forces hardly proves that present conflicts

between an elected legislature and the contemporary (popular) executive no longer serve a meaningful function. Alluding to the fateful battles between the executive and parliament during Weimar Germany in the early 1930s, Kelsen points out that it hardly requires great insight to acknowledge that the achievement of a proper relationship between the parliament and the executive remains of vital importance for those committed to democratic ideals of freedom and equality.[74]

Regrettably, Kelsen's refreshingly skeptical discussion of the theory of the total state seems to have been neglected during the final years of the Weimar Republic. Like Schmitt, most of Germany's overwhelmingly antidemocratic political and legal theorists were already occupied with a different task by the end of 1931 and early 1932: providing an ideological justification for an authoritarian system that would replace Weimar's "weak" democratic welfare state. In the following chapter, we take a closer look at the central role played by Schmitt in the quest to establish a National Socialist alternative to liberal democracy.

## NOTES

1. Michel Crozier, Samuel P. Huntington, and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York: New York University Press, 1975), 13. For a critical discussion, Claus Offe, *Contradictions of the Welfare State*, ed. John Keane (Cambridge: MIT Press, 1984), 65–87.

2. Crozier, Huntington, and Watanuki, *Crisis of Democracy*, 47, 177.

3. A Hong Kong businessman, hostile to attempts to guarantee self-government there, captured one possible implication of this position quite nicely: "One man one vote would be the end of Hong Kong! Lots of welfare and high taxes!" Quoted in Ian Buruma, "Holding Out in Hong Kong," *New York Review of Books* 44, no. 10 (June 12, 1997): 56.

4. On Weimar social policy: Ludwig Preller, *Sozialpolitik in der Weimarer Republik* (Stuttgart: Franz Mittelbach, 1949).

5. Schmitt concedes his debt to Ernst Jünger, who in 1930 analyzed the "total mobilization" [totale Mobilmachung] of economic, political, and technological forces as central to modern war making. Like Schmitt, Jünger sees democratization as a central source of modern total mobilization ("Die totale Mobilmachung," in Jünger, *Essays I: Betrachtungen zur Zeit* [Stuttgart: Ernst Klett Verlag, 1960], 123–47). Schmitt refers to Jünger in *Der Hüter der Verfassung*, 79. Much of this volume appeared as a series of shorter essays published in 1930 and 1931. It is the most important statement of Schmitt's initial conceptualization of the total state during the early 1930s. Schmitt then reformulated his theory of the total state in 1932 and 1933, after it was subjected to a barrage of criticisms that will be examined shortly (II).

6. Schmitt, *Der Hüter der Verfassung*, 73–91, where he provides the clearest account from the early 1930s of the nineteenth-century liberal state and its demise.

7. There is also a slight shift in emphasis here vis-à-vis the discussion of parliamentarism in *Constitutional Theory*. Rather than describing classical parliamentarism's short-lived political virtues as a weapon of the propertied and educated against the lower classes, he emphasizes the ways in which the democratization of parliament was challenged by monarchical and bureaucratic elites in the state executive. Here as well, however, Schmitt is vague about historical details: exactly when and where did a liberal state exist along the lines described here?

8. Schmitt, *Der Hüter der Verfassung*, 73. A similar observation has been made by Franz L. Neumann: "The liberal state has always been as strong as the political and social situation . . . demanded. It has conducted warfare and crushed strikes; with the help of strong navies it has protected its investments, with the help of strong armies it has defended and extended its boundaries, with the help of the police it has restored 'peace and order'" ("The Change in the Function of Law in Modern Society," in *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*, ed. William E. Scheuerman, 101).

9. Schmitt, *Der Hüter der Verfassung*, 78–79. The "societalization" of the state is also a theme in Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Mohr, 1930), where he similarly traces the transformation of the neutral liberal state into the interventionist welfare state (19–21). For Schmitt, the total state manifests itself most clearly in the emergence of the interventionist welfare state; Schmitt thus focuses on this element (and thus I do the same in my exegesis). But it is important to note that it is also characterized by a tendency to abandon state neutrality in the religious and cultural realms as well.

10. Schmitt, *Der Hüter der Verfassung*, 79.

11. Schmitt, *Der Hüter der Verfassung*, 81–82. I disagree with Cristi's view that Schmitt tried to synthesize the authoritarian state and free-market economics. Schmitt indeed does hope to limit certain (characteristically social democratic) forms of state intervention. But he does insist on the need for an active state role within the capitalist economy. The model attributed by Cristi to Schmitt accords with the historical reality of Pinochet's Chile and other authoritarian right-wing dictatorships. Yet Schmitt was less enamored of the classical liberal model of the "free market" than Cristi concedes in *Carl Schmitt and Authoritarian Liberalism*.

12. Carl Schmitt, "The Age of Neutralizations and Depoliticizations" (1929), trans. John McCormick and Matthias Konzett, *Telos* 96 (Summer 1993): 119–30. This essay was included in the 1932 version of Schmitt's *Concept of the Political*. The accompanying introduction to the Telos translation by McCormick, "Introduction to Schmitt's 'The Age of Neutralizations and Depoliticizations'" (130–43), is essential reading on this element of Schmitt's theory. In an important recent study, McCormick sees Schmitt's critique of technology as constitutive of the core of Schmitt's critique of modernity: John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (New York: Cambridge University Press, 1997). Schmitt occasionally invokes a critique of modern technology in order to lambaste liberalism. He also is more than willing, however, to endorse elements of modern

technology when it suits his battle against liberalism. In his writings on international law in the 1930s and 1940s, for example, he argues that economic and technological progress necessitates the destruction of the existing system of liberal international law and its replacement by a new system dominated by mammoth regional political units [*Grossräume*]. Furthermore, Schmitt's Nazi theory systematically reduces law to a "technical" instrument of domination and manipulation; a truncated form of instrumental or technical rationality is allowed to run amok in crucial periods of Schmitt's development (see chapters 5 and 6). McCormick ignores these elements of Schmitt's theory because his discussion of Schmitt's National Socialist interlude is incomplete. Schmitt's main "foe" is liberalism and, specifically, the liberal rule of law; the critique of modern technology is an important secondary theme in his writings. Schmitt was *not*, as McCormick claims, "a critical theorist of sorts" in "close proximity" to the Frankfurt School (*Carl Schmitt's Critique of Liberalism*, 17). The Frankfurt School believed that contemporary society could be "superseded" by a superior socialist alternative that nonetheless would preserve the rationalistic achievements of liberalism. In contrast, Schmitt crudely sought to negate the universalistic and rationalistic impulses of liberalism. I criticize McCormick's study in detail in "Review of John McCormick," *European Journal of Philosophy* (December 1998): 376–78.

13. Schmitt*, Political Theology*, 66.

14. Schmitt, "Age of Neutralizations and Depoliticizations," 138.

15. Schmitt, "Age of Neutralizations and Depoliticizations," 138.

16. Schmitt uses the term "economic-technical" to describe his own era on a number of occasions, for example, in *Legalität und Legitimität*, 96.

17. Schmitt, "Age of Neutralizations and Depoliticizations," 136.

18. Schmitt, "Age of Neutralizations and Depoliticizations," 136. This assertion, which appears in many of Schmitt's writings from the early 1930s, poses an obvious problem for him. While Schmitt hopes to rely on the diagnosis of our times as an "economic-technical age" in order to justify the unavoidability of the total state, it remains unclear why the nineteenth century, to the extent that it also was an "economic age," required only limited forms of state intervention in the private realm. Ultimately, Schmitt's argument has to demonstrate that the relatively limited interventionist devices of nineteenth-century liberalism no longer suffice in face of the complex, deeply partisan character of contemporary economic life. Yet it is unclear that his speculative contribution to the philosophy of history allows him to distinguish clearly enough between different *moments* in the "economic age," that is, between the nineteenth-century liberal belief in economics as a neutralizing force and our distinct twentieth-century acknowledgment of economics as a "central sphere." For this reason, Schmitt's two lines of inquiry about the origins of the total state need to be seen as complementary. His philosophical argument places his concrete political and economic observations within a broader historical context; at the same time, without the concrete political and economic account, his argument is incomplete as an explanation of the rise of the total state.

19. Schmitt remarks on the modern character of state/society relations in Italy and the Soviet Union as early as 1929. Importantly, Schmitt's sympathies clearly lie with the fascist version of state interventionism, in contrast to its state socialist counterpart

(Schmitt, "Wesen und Werden des faschistischen Staates," in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 111–12). Both fascism and Bolshevism are described as total states in *Der Hüter der Verfassung*, 84.

20. Schmitt, "Age of Neutralizations and Depoliticizations," 141.

21. See Schmitt's contributions to *Verhandlungen des Siebten Deutschen Soziologentages vom 28 September bis 1 Oktober 1930 in Berlin*, ed. Deutsche Gesellschaft für Soziologie (Tübingen: Mohr, 1931), 56–59. Schmitt is right to suggest that new media technology raises difficult questions for *traditional* liberal conceptions of freedom of the press, in which freedom of the press is conceived as a *negative* liberty in which state nonintervention is of central significance. Whether the need for positive state action in the realm of communicative freedom demonstrates the anachronistic character of liberal conceptions of free speech, as Schmitt soon suggests, is clearly another matter altogether.

22. As Hans Boldt has noted, the Weimar executive after 1930 "did not try to find a majority in parliament at all, and the inability of Parliament to pass resolutions had been largely brought about by the government itself, which resolved the Reichstag again and again" ("Article 48 of the Weimar Constitution, Its Historical and Political Implications," in *German Democracy and the Triumph of Hitler: Essays in Recent German History*, ed. Anthony Nicholls and Erich Matthias [London: George Allen & Unwin, 1970], 93). Schmitt served as an advisor to the emergency presidential regimes that ruled Germany after 1930; his writings are consistent with Boldt's description of the Weimar executive's ultimately catastrophic agenda. In light of the well-established fact that Schmitt defended many of the most radical anticonstitutional moves taken by these governments, it seems difficult in my view to see Schmitt as hoping to "save" Weimar. As I hope to show in the following pages, Schmitt sought a constitutional (counter)revolution, in which Weimar's basically liberal democratic core was to be replaced by a dictatorship. To use Schmitt's own terminology, this dictatorship was of a sovereign, not a commissarial type.

23. Schmitt, *Der Hüter der Verfassung*, 132–59.

24. Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung" (1931), in *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 244–45.

25. Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung," 257–59.

26. This was how Hans Kelsen interpreted Schmitt's views in his *Wer soll der Hüter der Verfassung sein?* A closer look at Kelsen's perceptive critique of Schmitt's theory of the total state follows shortly.

27. Schmitt, *Der Hüter der Verfassung*, 115–31. Also, see Schmitt, "Staatsrechtliche Bedeutung der Notverordnung," 240–42, 247, 259. Schmitt's account here does capture some of the more troubling trends in the legal systems of twentieth-century capitalist welfare states, but he fails to demonstrate the *inevitability* of such developments. Elsewhere, I have tried to argue, pace Schmitt, that both a more generous welfare state and greater legal uniformity and predictability are achievable (Scheuerman, "The Rule of Law and the Welfare State: Towards a New Synthesis"). In my view, Schmitt's lesson for those of us committed both to a robust version of the rule of law *and* to more social and economic equality is the need to undertake far-reaching legal and social reforms.

28. Schmitt, "Staatsethik und pluralistischer Staat" (1930), reprinted in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*; also see Schmitt, *Der Hüter der Verfassung*, 87.

29. Carl Schmitt, "Staatsideologie und Staatsrealität in Deutschland und Westeuropa," *Deutsche Richterzeitung* 31, no. 7 (July 15, 1931): 271–72.

30. Cited in Roger Boesche, *The Strange Liberalism of Alexis de Tocqueville* (Ithaca, NY: Cornell University Press, 1987), 251.

31. Otto Hintze, "Wesen und Wandlungen des modernen Staates" (1931), in Hintze, *Staat und Verfassung: Gesammelte Aufsätze zur allgemeinen Verfassungsgeschichte*, 2nd ed. (Göttingen: Vandenhoeck and Ruprecht, 1962), 473, 488–96.

32. Ernst-Rudolf Huber, "Verfassung und Verfassungswirklichkeit bei Carl Schmitt," *Blätter für deutsche Philosophie* 5 (1931–1932): 312.

33. Gerhard Leibholz, *Die Auflösung der liberalen Demokratie in Deutschland* (Munich; Leipzig: Duncker and Humblot, 1932), 67–70. On Leibholz see Manfred Wiegandt, *Norm und Wirklichkeit: Gerhard Leibholz (1901–1982): Leben, Werk und Richteramt* (Baden-Baden: Nomos, 1995).

34. Otto Koellreutter, "Volk und Staat in der Verfassungslehre: Zugleich eine Auseinandersetzung mit der Verfassungslehre Carl Schmitt," in *Zum Neubau der Verfassung*, ed. Fritz Berber (Berlin: Junker and Dunnhaupt, 1933).

35. Ernst Forsthoff, *Der totale Staat* (Hamburg: Hanseatische Verlagsanstalt, 1933).

36. See, for example, the study of *Die Tat* by Klaus Fritsche, *Politische Romantik und Gegenrevolution: Fluchtwege in der Krise der bürgerlichen Gesellschaft: Das Beispiel des 'Tat' Kreises* (Frankfurt am Main: Suhrkamp, 1973).

37. Franz Neumann, "Über die Voraussetzungen und den Rechtssbegriff einer Wirtschaftsverfassung" [1931], in Neumann, *Wirtschaft, Staat, Demokratie. Aufsätze 1930–1954*, ed. Alfons Söllner (Frankfurt am Main: Suhrkamp, 1978), 82.

38. Heinz O. Ziegler, *Autoritärer Staat oder Totaler Staat* [*Authoritarian or Total State*] (Tübingen: Mohr, 1931). Ziegler's ideas exercised a substantial influence on Leibholz, Koellreutter, and even Forsthoff in their responses to Schmitt. I have been unable to find much biographical information about Ziegler. In his mammoth study of totalitarian political theory, the French writer Jean-Pierre Faye claims that Ziegler ended up fighting against the Nazis as part of the Royal Air Force (*Théorie du recit: Introduction aux langages totalitaires* [Paris: Collection Savoir Hermann, 1972], 72).

39. Ziegler, *Autoritärer oder Totaler Staat*, 16, 18, 19.

40. Ziegler, *Autoritärer oder Totaler Staat*, 20.

41. As will be evident shortly, this interpretation is wrong. Nonetheless, it is understandable in terms of Schmitt's proximity during this period to an idiosyncratic group of reactionary authors, centered around the journal *Die Tat*, whose critique of contemporary capitalism often employed populist, pseudosocialist rhetoric and categories. Like many on the left, *Die Tat* suggested that capitalism was in a serious crisis and required a "revolution"; in the spirit of Schmitt, this revolution was by no means intended as an attack on the basic privileges of capital. Schmitt publicly praised *Die Tat*, describing it as one of the best political journals available in Weimar's final years. Like its editors, he also sided with General Kurt von Schleicher in

Weimar's final power feuds. See Fritsche, *Politische Romantik und Gegenrevolution*, especially 57.

42. Ziegler, *Autoritärer oder Totaler Staat*, 30–31.

43. Schmitt, *Legalität und Legitimität*, 93.

44. Schmitt, *Legalität und Legitimität*, 93.

45. Schmitt, *Legalität und Legitimität*, 92. Stephen Holmes similarly has emphasized the fundamentally antidemocratic quality of the Schmittian plebiscite (*The Anatomy of Antiliberalism* [Cambridge, MA: Harvard University Press, 1993], 49–50, 275–76).

46. In this model, "the plebiscite consists purely of an unorganized answer which the people, characterized as a mass, gives to a question which may be posed only by an authority whose existence is assumed. Structure and accountability of this authority is unknown" (Kirchheimer, "Constitutional Reaction in 1932," 78). Clearly, a model of this type has nothing in common with the aspirations of the American founders, Tocqueville, or Mill. It is unclear to what extent, in Schmitt's model, the plebiscite can be said to "contain" the executive.

47. Schmitt, *Legalität und Legitimität*, 94.

48. Schmitt, *Legalität und Legitimität*, 93–95.

49. Carl Schmitt, "Die Weiterentwicklung des totalen Staates in Deutschland" (1933), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 362.

50. This element of Schmitt's argument was anticipated as early as 1930 in a revealing lecture presented to a prominent organization of German industrialists, the *Langnamverein*, when he called for a "rollback of the state [in the economy] to a natural and correct amount." Any attempt to counteract "unnatural" forms of state intervention, however, requires a "strong state." A minimal (liberal) state is unlikely to prove up to this task in our century. See Schmitt's (untitled) lecture in *Mitteilungen des Vereins zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen*, ed. Max Schlenker (Düsseldorf: Matthias Strucken, 1930), 458–59. This lecture was important enough from Schmitt's perspective that he allowed for it to be reprinted, with some minor alterations, at least twice: Carl Schmitt, "Eine Warning vor falschen Fragestellungen," *Der Ring*, no. 48 (November 30, 1931): 344–45; "Zur politischen Situation Deutschlands," *Kunstwart* 44 (January 1931): 253–56. A translation is found in Cristi, *Carl Schmitt and Authoritarian Liberalism*, 212–33.

51. Carl Schmitt, "Starker Staat und gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern," *Volk und Reich*, no. 2 (1933): 89–90; Schmitt, "Machtpositionen des modernen Staates" [1933], in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 371. It is striking that Schmitt juxtaposes his model of "economic self-administration" to social democratic conceptions of economic democracy, in which labor unions play an important role.

52. Schmitt, *Legalität und Legitimität*, 87, 96–98. The second part of the Weimar Constitution was a mixture of liberal, democratic, socialist, and traditional elements. It included basic liberal political and civil rights as well as social rights (to a job, for example) and special protections for the family and churches. Conveniently, Schmitt is somewhat ambiguous about which sections of it should be "cleansed." He is quite

clear, however, that the liberal parliamentary devices outlined in the first part of the constitution are anachronistic.

53. Schmitt, "Der Staat des 20. Jahrhunderts," *Westdeutscher Beobachter*, 28 June 1933, 1–2.

54. Schmitt, *Staat, Bewegung, Volk. Die Dreigliederung der politischen Einheit*, 22–32.

55. Andreas Koenen, *Der Fall Carl Schmitts. Sein Aufstieg zum "Kronjuristen des Dritten Reiches,"* 411–12. Only later would Alfred Rosenberg and Rudolf Freisler, as well as Schmitt's rival within the legal academy, Otto Koellreutter, discredit the concept of the total state by accusing its leading theorist, Carl Schmitt, of failing to acknowledge adequately the Nazi conception of an ethnicist *Volk* and ignoring the central place of the National Socialist *political movement* in the emerging "new order." On this debate: Koenen, *Der Fall Carl Schmitts*, 517–23; and Peter Caldwell, "National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933–1937," *Cardozo Law Review* 16 (1995): 399–427. More generally on Nazi political theory and its relationship to Nazi political reality, see Jane Caplan, "National Socialism and the Theory of the State," in *Reevaluating the Third Reich*, ed. Thomas Childers and Jane Caplan (New York: Holmes and Meier, 1993), 98–113. In my view, Nazi critics were often inaccurate in their description of Schmitt's ideas. Alfred Rosenberg, for example, misses Schmitt's attempt to distinguish between the quantitative and the qualitative total state; he wrongly reads Schmitt as a traditional statist who favors bureaucratic intrusion in all realms of human life ("Totaler Staat?" *Völkischer Beobachter* 47, no. 9 [September 1, 1934]). In fact, *State, Movement, Folk* (1933) provides a reworked version of the theory of the total state in order to guarantee a prominent place for the purportedly "dynamic" National Socialist movement and a complementary racist conception of the Volk. As Franz L. Neumann has noted, this "tripartite theory" (in which the Nazi state, movement, and Volk constitute the pillars of the new order) was basically retained by the Nazis after 1933; only minor modifications were made (*Behemoth: The Structure and Practice of National Socialism, 1933–1944*, 66). Throughout the early and mid-1930s, Schmitt repeatedly emphasizes the limitations of traditional forms of authoritarianism in which rule is exercised by a bureaucratic elite lacking a "mass" plebiscitary basis. Schmitt was no *statist* in the manner attributed to him by his Nazi ideological rivals during the 1930s. As we will see in the next chapter, Schmitt also does far more than pay lip service to the anti-Semitic elements of the Nazi conception of the *Volk*. He makes anti-Semitism a central element of his jurisprudence.

56. By the same token, the fact that leading Nazis abandoned the term hardly demonstrates Schmitt's anti-Nazi intentions!

57. Lutz-Arwed Bentin, *Johannes Popitz und Carl Schmitt: Zur wirtschaftlichen Theorie des totalen Staates in Deutschland* (Munich: Beck Verlag, 1972), 114–15.

58. On the political battles of this period, see Gotthard Jasper, *Die gescheiterte Zähmung. Wege zur Machtergreifung Hitlers 1930–1934* (Frankfurt am Main: Suhrkamp, 1986).

59. This is not to deny that the Nazi state exhibited its own form of internal disorganization, planlessness, and administrative chaos. This is an important theme in much of the most interesting historical scholarship about the regime. See Peter Hüttenberger, "Nationalsozialistische Polykratie," *Geschichte und Gesellschaft* 2, no. 4 (1976): 417–32. The question of the polycratic nature of the Nazi state remains central to contemporary debates. See the essays collected in *Reevaluating the Third Reich*, ed. Thomas Childers and Jane Caplan.

60. Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944*, 251–364. On Nazi economic ideology is Avraham Barkai, *Das Wirtschaftssystem des Nationalsozialismus. Der historische und ideologische Hintergrund 1933–1936* (Cologne: Verlag Wissenbschaft und Politik, 1977).

61. Schmitt, "Machtpositionen des modernen Staates," in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 368–69.

62. Schmitt, "Machtpositionen des modernen Staates," 369–70.

63. As will be discussed in chapter 8, writers like Hayek do go quite a way down Schmitt's perilous authoritarian path.

64. Holmes, *Anatomy of Antiliberalism*, 49. One should add that this is a version of soccer in which the "rules of the game" (i.e., laws) are open-ended and ever-changing.

65. In the words of a leading scholar of American legal development, "By reputation, the nineteenth century was the high noon of *laissez-faire* . . . But when we actually burrow into the past, we unearth a much more complex reality." Substantial governmental regulation of the economy, *undertaken by states and municipalities*, occurred in the United States. For example, the development of railroads, perhaps the most important industrial innovation of the nineteenth century, was a product of joint state and private action; early American railroads (including the famous Pennsylvania Railroad) were mixed public and private enterprises. Even the "federal government was not totally passive," as evidenced by a number of massive development projects undertaken by Washington (Lawrence M. Friedman, *The History of American Law*, 2nd ed. [New York: Simon and Schuster, 1985], 177–78, 192–93).

66. Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), 5. Friedman sees the final change listed here as essential to a quest for "total justice" that he considers constitutive of the modern welfare state.

67. Again, the United States, where the fragmentation of state power in the nineteenth century contributed to an extraordinary lack of state autonomy in relation to the business community, is probably the best example of this (Friedman, *History of American Law*, 177–201).

68. Nonetheless, it has played a central role in German political thought in the twentieth century (Cohen and Arato, *Civil Society and Political Theory*, 201–54). Reinhart Koselleck, for example, sees it as an important cause of the "global civil war," most clearly represented by the confrontation between the United States and Soviet Union, that allegedly has characterized the twentieth century (*Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* [Cambridge: MIT Press, 1988]). On the ties between Schmitt and Koselleck, see van Laak, *Gespräche in der Sicherheit des Schweigens*, 187–88, 224–26.

69. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 32.

70. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 33.
71. Schmitt, *Der Hüter der Verfassung*, 71.
72. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 30–31.
73. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 40.
74. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 39–40.

## *Chapter 5*

# After Legal Indeterminacy?

Soon after joining the Nazi Party on May 1, 1933, Carl Schmitt was rewarded with a prestigious professorship in Berlin, the editorship of Germany's major legal publication, *Die deutsche Juristen-Zeitung*, a leading post in the Nazi professors' guild, and the position of State Councilor [*Staatsrat*] to Prussia. Most important perhaps, Schmitt's National Socialist period was his most prolific. Between 1933 and 1936 alone, Schmitt authored four books as well as over fifty essays for both academic and political journals. Waxing enthusiastic over Adolf Hitler and his struggle to "liberate" Germany from liberalism and Marxism, Schmitt repeatedly offers effusive praise for the emerging National Socialist legal order and the "national revolution" that made it possible.

Most shocking of all, Schmitt's writings from this period are filled with crude anti-Semitic diatribes. In an essay penned for the Nazi *Westdeutscher Beobachter* in March 1933, Schmitt praises the Nazi quest for racial and ethnic homogeneity [*Gleichartigkeit*], commenting that the ethnically and racially alien [*Fremdgeartete*] should cease their "dangerous" attempts to undermine the ongoing racial "awakening" of the German *Volk*. Echoing hardline Nazi "law and order" rhetoric, Schmitt simultaneously accuses "alien" elements of transforming the legal code into a defense of the rights of criminals.[1] In another piece in the same newspaper, intellectuals forced to flee Germany, including Albert Einstein, are described as racially alien elements who never belonged to the German *Volk* in the first place. In this vein, Schmitt disputes the view that Heinrich Heine deserves to be described as a German author.[2] In 1934, "normativistic" legalism is attributed to Judaism: because Jews lacked their own country and state, they allegedly generated the failed formalistic liberal attempt to limit political power by means of cogent general norms.[3] Jews purportedly polluted indigenous modes of authentic

German legal thinking, once free of the ills of legal formalism. In 1935, Schmitt describes the Nuremberg racial laws as the foundations of a new German "constitution of freedom" [*eine Verfassung der Freiheit*].[4] Elsewhere, he praises the Nazi quest to make anti-Semitism the core of the Nazi alternative to bankrupt (essentially Jewish) legal liberalism, commenting that the Nazis are right to try to protect "German blood."[5]

In 1936, Schmitt played a major role in staging one of National Socialist jurisprudence's most horrible exercises in anti-Semitism, the infamous conference on "German Jurisprudence in Struggle against the Jewish Spirit."[6] In a statement shocking in part because it merely summarizes the underlying tenor of many of his writings from the Nazi period, Schmitt declares,

> The relationship of the Jew to our intellectual work [in the field of law] is a parasitic, tactical, trader's one. Through his gift for trade he often has a sharp sense for the genuine. . . . That is his instinct as parasite and genuine tradesman. But just as little as the gift for art is shown by the Jewish art dealer's ability to discover a genuine Rembrandt quicker than a German art historian, so little is a gift for legal science shown by his ability to recognize with greater speed good authors and good theories.[7]

Scholars continue to debate the significance of Schmitt's endorsement of National Socialism. In the English-language literature, Schmitt's anti-Semitic outbursts are still described as the mere "lip service" of a traditional authoritarian, respectful of some important features of the rule of law and basically hostile to the core of Nazi doctrine.[8] In part because many of Schmitt's Nazi-era writings remain untranslated, this view has gained a certain amount of popularity in American and English scholarly circles. The more sophisticated recent German-language scholarship on Schmitt better acknowledges his real enthusiasm for National Socialism.

Much of this literature, however, is so concerned with the biographical details of Schmitt's life during this period that it unduly downplays Schmitt's theoretical aspirations and agenda. These authors are able to tell us what Schmitt had for breakfast on any given day between 1933 and 1945, and they seem amazingly confident of their ability to recount his most intimate thoughts on any of a broad array of topics. Yet they have surprisingly little to say about the theoretical roots of Schmitt's contributions to an identifiably National Socialist legal order, despite the fact that this was Schmitt's main undertaking during the Nazi period. Nor do they seem to see his racist and anti-Semitic outbursts as much more than a personal concession to the Nazi powerholders.[9]

Both here and in chapter 6, I pursue an alternative interpretative path. Though Schmitt's vanity and careerism played roles in his fateful decision to join ranks with National Socialism in 1933, theoretical reasons primed him to

do so. Focusing in this chapter on Schmitt's writings between 1933 and 1936, I suggest that Schmitt's marriage to Nazism stems at least in part *immanently* from core elements of his jurisprudence. As we have seen, for Schmitt the central problem of modern legal theory is the enigma of legal indeterminacy, according to which legal norms inevitably fail to provide meaningful guidance to legal decision makers. Schmitt sides with the Nazis because he sees them as offering a real chance for developing a novel legal order able to "solve" the dilemma of legal indeterminacy. Most shocking of all, he endorses the most terrible features of National Socialism—most importantly, its radical anti-Semitism—because he sees precisely these elements as indispensable to the task of constructing an alternative legal system capable of guaranteeing the determinacy allegedly missing from formalistic modes of liberal law. In the process, I hope to help overcome the divide between those who emphasize Schmitt's purportedly traditional legalist credentials and those who focus on his enthusiasm for the Nazi destruction of the rule of law. In my view, there is no question that Schmitt in the 1930s is concerned with reconceiving the foundations of legal determinacy; for this reason, Schmitt's writings from the Nazi period occasionally *appear* faithful to some traditional legal notions. But essential to Schmitt's idiosyncratic quest to reconceive the possibility of legal determinacy is an open endorsement of dystopian National Socialist visions of a racially and ethnically homogeneous "folk community" [*Volkgemeinschaft*]. In the final analysis, Schmitt's revised concept of legal determinacy breaks dramatically with the most humane elements of modern jurisprudence. His alternative to "normativistic" legal thinking is an intellectual and political fraud.

This interpretation should also help shed light on the complicated question of *continuity and discontinuity* within Schmitt's theory. In my view, Schmitt's Nazi-era reflections build on his Weimar-era ideas about the impossibility of the liberal quest to bind judicial and administrative actors to legal norms. As a Nazi activist, Schmitt reiterates the view stated in the early 1912 *Law and Judgment* that legal regularity still might be preserved by means of establishing a rank of homogeneous judges. There can be no question, however, that this idea, left relatively undeveloped in Schmitt's early legal writings, gains a more prominent position during the 1930s. Schmitt's Nazism represents an attempt to develop his earlier (relatively cautious) suggestion that homogeneity within the state apparatus might overcome the crisis of legal indeterminacy. In the final analysis, Schmitt's enthusiasm for Nazism stems significantly from the fact that he conceived of it as an opportunity to "test" and *embellish* an element of his early jurisprudence. But like any attempt to put theory into practice, it also demanded that the theoretical notion at hand, the demand for homogeneity within the judiciary, gain in clarity and precision. For Schmitt in the 1930s, Nazi anti-Semitism provided just

this conceptual "improvement" over the relatively inchoate and vague notion of a homogeneous judiciary suggested by *Law and Judgment*.

After turning to Schmitt's ideas on the pervasiveness of legal indeterminacy (I), I explain why Schmitt (wrongly) believed that the National Socialist legal system could overcome legal indeterminacy and secure a novel form of postliberal legal determinacy (II). I then discuss the failings of Schmitt's reconceptualization of legal determinacy (III) as well as its broader contemporary implications (IV). The problem of legal indeterminacy continues to excite the interest of many jurists. Schmitt's Nazi-era contribution to the debate on legal indeterminacy may contain some lessons for contemporary legal theory.

## I

In earlier chapters, I have tried to show that Schmitt's reflections on legal indeterminacy are central to every facet of his political and legal thought: his account of judicial and administrative action, his critique of liberal parliamentarism and constitutionalism, his disturbing analysis of the modern interventionist "total" state, and his open endorsement of a plebiscitary dictatorship during Weimar's final years. For the purposes of this chapter, it is important to recall two ways in which Schmitt's Weimar writings underscored the (alleged) bankruptcy of the traditional liberal preference for a binding and relatively determinate legal order able to provide effective direction to those who apply and interpret the law.

First, Schmitt argued early on that every legal interpretation inevitably includes an unpredictable "pure decision" that cannot be unambiguously justified by reference to the legal norm at hand: "Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied."[10] By failing to take the independent dynamics of legal decision making seriously, liberal jurisprudence allegedly succumbs to a crude "normativism" that falsely downplays the role of legally unregulated acts of power within legal interpretation. Liberalism tends to favor a model of legal decision making in which legal interpretation tends to become nothing but an act of mechanical *subsumption*. As we saw in chapter 1, for Schmitt this error is most egregious in classical liberal authors like Montesquieu. Yet modern liberals—most notably, Schmitt's main intellectual rival, Hans Kelsen—supposedly succumb to some version of it as well.[11]

Second, Schmitt noted that even liberal democratic polities increasingly rely on legal forms incompatible with the traditional preference for relatively

clear, general norms. Wherever the interventionist "total" state entails intensive regulation of the economy and ambitious forms of social policy, the significance of classical general legal norms within the legal order is dramatically reduced. The proliferation of vague clauses and principles ("in good faith," "in the public interest") within contemporary law, driven primarily by the inexorable expansion of state action in the modern capitalist economy, merely exacerbates the underlying weaknesses of traditional liberal conceptions of judicial decision making: vague clauses often allow those who apply and interpret the law to act in distinct and potentially inconsistent ways. In addition, administrative decrees and individual measures, by means of which substantial and often poorly regulated discretionary power is handed over to the executive, increasingly seem to become part and parcel of the everyday operations of the legal system. In Schmitt's prognosis, this trend suggests that classical attempts to distinguish clearly between the state of legal normalcy and the state of emergency have failed.[12] When Schmitt in 1922 bluntly declared that "all law is situational law," he was making much more than an abstract legal philosophical observation about the relationship between legal normalcy and the crisis situation.[13] From another perspective, he was merely offering an empirical *chronicle* of the decline of the liberal vision of a neatly codified system of cogent general norms capable of providing real guidance to legal decision makers.

In 1933, Schmitt's comments on the problem of legal indeterminacy take on especially drastic proportions. Whereas at least some of his previous writings on the problem of judicial decision making could be taken as implying that a *relative* indeterminacy, long downplayed by formalistic liberal jurists, characterizes the legal system, Schmitt's position now approaches what contemporary North American jurists today commonly describe as the *radical indeterminacy thesis*. In this view, "decisions officials make about the meaning of rules amount to creating meaning for the rules when there is none to begin with," and all legal cases are "hard cases."[14] In every legal situation, any conceivable result can be justified by the legal materials at hand. According to the radical indeterminacy thesis, "a competent adjudication can square a decision in favor of either side in any given lawsuit with the existing body of legal rules."[15] In Schmittian terminology, legal and administrative decision making is nothing but an autonomous "power decision" effectively unregulated by the legal materials at hand. The quest to bind officials to the legal norm is a silly formalistic liberal farce. Law is always a (normatively unregulated) decision.

Seeking to downplay the controversial character of this position, Schmitt introduces his version of the radical indeterminacy thesis by claiming that even those long under the magical spell of liberal normativism have begun openly to acknowledge its fraudulent analytical core. He attributes his own

insight about the basic failings of liberal jurisprudence to a conversation—according to Schmitt, "one of the greatest experiences and meetings which drove me as a jurist to National Socialism" (!)—with an unnamed "world-famous, wise and experienced seventy-year-old American jurist," who allegedly commented to Schmitt that "today we are experiencing the bankruptcy of all *idées générales*."[16] The universalism of legal liberalism is dead. For Schmitt, indisputable evidence for this death is the utter failure of clarity and generality in law to guarantee the predictability and determinacy that liberals long promised that it could secure. Even the Americans, long mesmerized by the illusions of the liberal rule of law, have been forced to take note of liberal jurisprudence's funeral announcement.

In a 1934 essay, Schmitt argues that the liberal preference for cogent general legal norms inevitably reduces the legal order to a situation of "chaos" and "anarchy" unable to provide a minimal measure of legal predictability.[17] General legal norms merely function as a normativistic "mask" for the reality of radical indeterminacy because even the clearest general norm is unable to provide any help to legal decision makers. Legal categories possessing real generality are, by definition, unlikely to speak to the concrete details of the case at hand. Schmitt is surely aware that he is hardly the first legal thinker to acknowledge that some tension between general rules and particular cases is probably unavoidable; liberal jurists themselves long have acknowledged this problem. But Schmitt believes that liberals obscure the depth of the dilemma at hand. In particular, ambitious dreams of a codified set of abstract categories and rules badly exacerbate the tension between rules and individual cases. By demanding that the legal code consist of rules and categories having an ever more general and abstract character, liberalism seeks a legal code profoundly alien from the real-life demands of everyday legal experience. In short, liberals strive for a legal code unlikely to speak to the needs of the legal decision maker struggling with the concrete details of everyday life, thereby creating an excessively artificial and probably even fictional legal universe inevitably having highly open-ended implications for the judge and administrator.[18]

In this account, the inherent artificiality of liberal law simultaneously stems from the fact that the traditional liberal preference for *fixed* or *codified* law heightens the gap between the legal code and the concrete tasks faced by judges and administrators. Schmitt recalls another widely acknowledged limitation of liberal general law, namely the fact that statutes always represent a potentially static "fixation" of a legislative act that, by necessity, occurs before a judicial or administrative actor applies the statute. Once again, Schmitt claims that this failing has more serious consequences than liberals concede. Although liberal law by nature is "oriented towards the past" [*vergangenheitsbezogen*], the dictates of modern social and economic life demand a legal system conducive to a future-oriented *steering*

of complex, ever-changing economic and social scenarios. Developing his earlier Weimar-era reflections on the challenges posed by the interventionist state to the rule of law, Schmitt in the mid-1930s argues that the liberal insistence on fixed laws, possessing stability and some degree of permanence, fundamentally conflicts with the dictates of modern state activity. Although emphatically emphasizing his hostility to Marxist conceptions of a planned economy, Schmitt asserts the necessity of a postliberal legal order possessing novel legal instruments able to coordinate a wide range of economic activities far better than the blunt and unduly static instrument of fixed, general law. Writing in 1935, Schmitt asserts that no better example of the "hostility to planning" [*Planfeindlichkeit*] inherent in liberal legalism can be identified than the American Supreme Court's recent attack on the New Deal.

In his interpretation, Franklin Delano Roosevelt's opponents on the court are absolutely right to see the open-ended, highly discretionary, situation-specific elements of New Deal legislation as inconsistent with the fundamental principles of liberal jurisprudence. They are utterly mistaken, however, in their failure to acknowledge the necessity of such postliberal legal forms in the era of the modern interventionist state.[19] In this analysis, pervasive legal indeterminacy is a natural by-product of modern forms of state "steering."[20] The unavoidability of deformalized law simply demonstrates the anachronistic nature of liberal legalism.

Schmitt also undertakes to make modern pluralism responsible for the deeply indeterminate character of all law. In *State, Movement, Folk* (1933), Schmitt writes that

> we have already reached the point in legal theory and practice where we quite seriously have to ask the epistemological question of to what extent a word or concept of the legislator can really bind those who have to apply the law at all. We have experienced that every word and concept immediately become controversial, unsure, indeterminate, and pliable when in a fluctuating situation different spirits [*Geister*] and interests try to make use of them.[21]

Radical indeterminacy characterizes even the most cogent legal concepts because indeterminacy derives, first and foremost, from the reality of radically distinct "spirits and interests" that inevitably try to make the law serve altogether different ends. In an implicit criticism of Max Weber, Schmitt questions Weber's faith that a minimal degree of legal determinacy is still possible in a disenchanted world characterized by an awesome array of competing gods. For Schmitt, even the relatively modest "rational legality" endorsed by Weber is necessarily a sham when jurists possessing the authority to interpret and apply the law pursue diametrically opposed moral and political agendas. In a modern pluralistic universe, legal determinacy is simply unachievable, because the demise of a widely shared, homogeneous

worldview means that those who interpret even the most crystal-clear legal concept will do so in different ways.[22]

In an especially portentous line of inquiry, *State, Movement, Folk* goes on to offer an unambiguously racist gloss on the nature of modern pluralism. Schmitt here focuses on what he describes as the "existential" determinants of legal interpretation:

> It is an epistemological verity that only those are capable of seeing the facts [of the case] the right way, listening to statements rightly, understanding words correctly and evaluating impressions of persons and events rightly, if they are participants in a racially determined type [*artbestimmte Weise*] of legal community to which they existentially belong.[23]

The racially and ethnically "alien" are purportedly incapable of interpreting German law in a manner consistent with ethnic Germans. In what undoubtedly belongs among the most astonishing reworkings of a classical liberal argument in our century, Schmitt reminds the reader of Montesquieu's famous description of the judge as merely *la bouche qui prononce les paroles de la loi*. Yet Schmitt claims that this early statement of liberal hostility to judicial discretion now necessarily must be reconstructed in light of the widely accepted "epistemological verity" that different ethnic groups possess fundamentally distinct cultural and biological characteristics.[24] In contrast to our naive universalistic Enlightenment forefathers, Schmitt comments that those of us rightly more "sensitive" to the implications of ethnic difference "now see . . . the difference of the different mouths, which pronounce seemingly similar words and sentences differently. We notice how they 'pronounce' the same words so differently."[25] For Schmitt, ethnically based variations in the "mouths" that "pronounce" the law are a major source of the crisis of legal indeterminacy. Because the "existential determination" of legal decision making no longer rests on a common ethnic and intellectual basis, legal interpretation today inevitably is open-ended and fundamentally indeterminate.

How are we to interpret Schmitt's defense here of the "existential determination" of legal interpretation? As soon will be evident, Schmitt himself quickly proceeds to use this argument in order to justify National Socialist ethnic cleansing.[26] Nonetheless, many commentators rely on biographical evidence—for example, Schmitt's (purportedly) good ties to German Jews during the Weimar period[27]—in order to downplay Schmitt's overtly racist and anti-Semitic arguments. At the same time, more recent biographical research documents that Schmitt threw himself into a rather suspect literature on the difficulties of Jewish assimilation during this period as well as the possibility that Schmitt's private life even before the National Socialist takeover exhibited the knee-jerk anti-Semitic prejudices common to those of his generation

and his social and religious background.[28] Such evidence *might* imply that for Schmitt National Socialism simply served to legitimize an open, public expression of a series of deeply rooted anti-Semitic prejudices.[29] Nevertheless, the more important point is that the results of biographical research on Schmitt are likely to remain highly open-ended in character; it is too much to expect any biographer to be able to tell us exactly what Schmitt "really" was thinking when he chose to ally himself with National Socialism.[30]

In my view, this situation leaves those hoping to get to the roots of Schmitt's National Socialist writings with only one option: to take Schmitt's legal argumentation seriously. When we do so, Schmitt's contributions from the National Socialist period exhibit a terrible—yet undeniably systematic—logic.

## II

In the shadow of the Nazi seizure of power, Carl Schmitt struggles to provide an answer to the enigma of legal indeterminacy. Clearly unsatisfied with the more dramatic implications of the radical indeterminacy thesis, Schmitt posits a postliberal conception of legal determinacy that builds directly on core features of National Socialism.

At first glance, Schmitt's most important work in legal theory from the mid-1930s, *On Three Types of Jurisprudential Thinking* (1934), seems to buttress the view of those who hope to emphasize Schmitt's Catholicism.[31] Developing a theory of what he describes as "concrete-order legal thinking" as an alternative both to liberal normativism and a "decisionism" in which an unregulated act of power, an "empty decision," is taken to be the core of legal experience, Schmitt here openly concedes his debt to the institutionalism of Catholic theorists Maurice Hauriou and Georges Renard.[32] In fact, the opening section of *On Three Types of Jurisprudential Thinking* describes the "Aristotelian-Thomist natural law of the medieval period" as a forerunner to Schmitt's own concrete-order thinking.[33] Despite Schmitt's express homage here to some strands of twentieth-century Catholicism, it would nonetheless be misleading to ignore the crucial ways in which Schmitt breaks radically with Catholic varieties of legal institutionalism. Schmitt's own comment that he prefers the term "concrete-order thinking" in order to prevent any possible confusion with Catholic jurisprudence deserves to be taken seriously.[34] Never hesitating to describe the Nazi destruction of the liberal rule of law as a perfect expression of concrete-order thinking, Schmitt's differences vis-à-vis Catholic institutionalism become clear in those sections of the study where Schmitt unabashedly endorses the most troubling aspects of the emerging National Socialist legal order. The Nazi labor law reforms of 1934, which

reclassified employees as "disciples" [*Gefolgschaft*] while stripping them of basic workplace protections, are described by Schmitt as the clearest possible real-life expression of concrete-order thinking, while the introduction of the concept of the legally unregulated "Leader" [*Führer*] into the core of German public law garners Schmitt's enthusiastic endorsement.[35] For Schmitt, concrete-order thinking requires nothing less than the supremacy of the National Socialist movement in relation both to the traditional state apparatus and the German *Volk*.[36] Schmitt also links concrete-order thinking to anti-Semitism. Universalistic liberal normativism is taken to be a "typically Jewish" mode of legal analysis. For Schmitt, those who acknowledge the basic truths of concrete-order thinking purportedly grasp that every ethnic group has a system of law particular to its special attributes. Concrete-order thinking thereby demands nothing less than that ethnic Germans free themselves from "alien" legal and intellectual influences, most importantly, from "Jewish" conceptions of the rule of law emphasizing the importance of formal protections and procedures.[37]

For our purposes here, the concrete-order theory as developed by Schmitt between 1933 and 1936 is revealing for two main reasons. First, it represents the perfect theoretical expression of Schmitt's hostility to liberal conceptions of a system of codified, general law. Its underlying insight is that society needs to be conceived as a series of variegated communities or "orders" having highly specific needs resistant to codification by general legal norms or concepts. For Schmitt, it is inappropriate to apply a liberal model of the legal system, in which law supposedly is modeled on a set of calculable traffic regulations, to complex, situation-specific institutions such as the family or the workplace. The core experiences of these concrete orders, allegedly best captured by old-fashioned terms such as faith, discipline, and honor, simply cannot be subsumed under any set of general norms.[38] Even liberal concepts of state sovereignty need to be jettisoned in favor of the idea of a concrete "folk community," whose immanent dynamics unerringly conflict with the normativistic aspirations of liberal jurisprudence.[39] Quite consistently, Schmitt describes the proliferation of vague, open-ended standards, as well as the widespread tendency in contemporary law to blur the distinction between general and situation-specific, individual law, as empirical evidence that legal development everywhere increasingly approximates the theoretical tenets of concrete-order thinking. The fact that National Socialism embraces the trend toward open-ended, situation-specific law more systematically than liberal democracy simply proves for Schmitt that Nazism represents a quintessentially modern legal system, "a state for the twentieth century," better attuned to the exigencies of contemporary legal development.[40] The logical conclusion of the ongoing conflation of legislative and administrative power is nothing less than a "Leader State" [*Führerstaat*] in which the Leader

possesses unlimited legislative and administrative authority.[41] Whereas liberal democratic polities continue to pretend that clear general norms are the best way of legally regulating complex activities, Nazism heroically "crosses the Rubicon" by systematically abandoning even the most meager remnants of this illusion.[42] In short, the theory of concrete orders rests on the assumption that the liberal quest for determinate, general law and formalistic modes of legal decision making is inherently flawed. For Schmitt, the ills of this quest must be attributed to the impossibility of the liberal attempt to gain some measure of legal determinacy *by means of the cogency and generality of the legal norm*.

Second, the theory of concrete orders points the way toward Schmitt's quest to articulate a postliberal conception of legal determinacy while building explicitly on his analysis of the irrepressible indeterminacy of liberal general law. *On Three Types of Jurisprudential Thinking* clearly shirks from one possible implication of the author's endorsement of the radical indeterminacy thesis. The radical indeterminacy thesis *might* imply that we need to conceive any act of legal interpretation as nothing but an altogether willful "decision not based on reason and discussion and not justifying itself . . . an absolute decision created out of nothingness."[43] In short, one could simply opt to celebrate the fact that legal interpretation inevitably consists of a series of expressions of more or less arbitrary, legally unharnessed power. But Schmitt now adamantly criticizes precisely this possibility, warning that decisionism "runs the risk of missing the stable content" in law.[44] A rigorous decisionist legal theory reduces law to a potentially inconsistent series of power decisions, thus proving unable to secure even a modicum of legal determinacy. A consistent decisionism would simply exacerbate the ills of (indeterminate) liberal legalism, making a virtue out of liberalism's most telling jurisprudential vice.[45]

Some interpret this argument as evidence of a momentous break within Schmitt's thinking: whereas his Weimar writings at times offer a decisionist reading of law like that now criticized by him, his National Socialist writings underline the dangers of decisionism.[46] Elements of the story recounted earlier in this book might seem to support this interpretation. I have also argued that the moment of judicial decision problematized in Schmitt's early legal writings "explodes" within Schmitt's late Weimar theory, ultimately shattering the normative restraints that Schmitt initially placed on it. Schmitt's celebration of the "norm-less" decision culminates in the embrace of an alternative to Weimar that Schmitt himself in 1932 describes as a dictatorship.[47] Nonetheless, it would be a mistake to take this as evidence of a basic discontinuity within Schmitt's thinking. First, during the Nazi period, Schmitt *continues* to emphasize the willful, arbitrary character of *liberal* law; within the confines of liberalism, judicial and administrative action is unavoidably

irregular and inconsistent. Of course, this line of argumentation is perfectly consistent with his Weimar reflections. Second, even Schmitt's early Weimar writings on judicial and administrative activity suggest, even though with great caution and questionable success, that willfulness within law could be overcome by extranormative features of the legal system, that is, by means of a homogeneous judiciary. What we have here is a shift in emphasis but no inconsistency. In the context of the defeat of Weimar liberal democracy by the Nazis, it makes perfect sense for Schmitt to turn to the *constructive* task of developing a postliberal alternative to a system of liberal law that, in his view, is unavoidably plagued by willfulness. By the same token, when Germany was still liberal democratic, it was appropriate to emphasize the *deconstructive* side of his agenda, namely the critique of liberal jurisprudence. In that context, the celebration of the irrepressibility of the arbitrary decision within (liberal) law not surprisingly occupied the foreground of Schmitt's reflections. But even Schmitt's Weimar oeuvre contained both critical and constructive moments. The real difference is that the constructive side of this agenda now gains dramatically in significance. But even this shift within Schmitt's theory makes sense only within the context of its underlying continuities.

More astute commentators argue that it would be best to take his attempt here to criticize decisionism with a grain of salt. For these critics, concrete-order thinking itself is simply an "ideology" masking the reality of a National Socialist legal system that is fundamentally decisionist in character.[48] To the extent that Schmitt's apparent critique of decisionism during the Nazi period obscures fundamental continuities within his thinking, this criticism is legitimate. Nonetheless, National Socialist law was clearly not decisionist if decisionism means that judges and administrators can freely interpret and apply the law in *any* way they happen to consider appropriate at any given moment; Nazi-era judges were *not* free to decide in ways incompatible with National Socialist ideology. Although I take the characterization of Schmitt's Nazi-era theory as decisionist as an understandable attempt to capture how Schmitt makes a mockery of even a minimally acceptable conception of law, it remains crucial that we carefully trace the underlying logic of Schmitt's quest to reconceive the possibility of a novel form of legal determinacy. Only by doing so can we begin to understand why Schmitt's theory proved so useful to the Nazis. An authentic decisionist model of legal interpretation, in which legal actors are free to act *against* National Socialist principles as well as *in favor* of them, would not have been as helpful to the Nazis as Schmitt's own.

Of course, *State, Movement, Folk* intimated one possible path for salvaging a legal system relatively determinate and predictable in character: if a central source of legal indeterminacy lies in the heterogeneous character of those who interpret and apply the law, then the establishment of homogeneity within the ranks of German jurisprudence might go at least some way

toward making legal predictability a real possibility. Although it is hopeless to expect much from a reform of the legal code, a radical reconstitution of jurists themselves [*Juristenreform*] might counteract some of the dangers at hand. In Schmitt's own words,

> There is only one path [to legal determinacy]; the National Socialist state has decisively followed this path, and Roland Freisler captured its essence with the greatest clarity with the demand "Reform of the Jurists Instead of Reform of the Law." If there is still to be an independent judiciary despite the fact that a mechanical and automatic binding of the judge to a preexisting set of codified norms is no longer possible, then everything depends on the nature and makeup of our judges and administrators.[49]

Schmitt's enthusiastic engagement for National Socialism can be directly traced to this eerily straightforward set of axioms. Because of his overtly ethnicist gloss in *State, Movement, Folk* on the sources of modern pluralism, only one solution is left here for beginning to reestablish some measure of legal determinacy: an ethnically homogeneous caste of judicial experts dedicated to an equally homogeneous worldview. In this fashion, the imperatives of Schmitt's legal theory in the mid-1930s come to intersect neatly with National Socialist racism and anti-Semitism. Just as the demand for ethnic and racial homogeneity [*Artgleichheit*] constitutes a core element of National Socialism, so, too, does Schmitt's attempt to formulate an alternative to liberal normativism require an ethnically and racially homogeneous estate of jurists.[50]

In fact, it is precisely the task of establishing an ethnically and methodologically homogeneous estate [*Stand*] of legal practitioners that takes on absolute primacy both for Schmitt the legal theorist and Schmitt the Nazi functionary in the 1930s. For immanent jurisprudential reasons, Schmitt enthusiastically endorses the Nazi quest to guarantee ethnic and racial homogeneity within Germany.[51] Not surprisingly, he pays special attention to the implications of this quest for German jurisprudence: Schmitt repeatedly proclaims that the creation of ethnic homogeneity is the *only* way Germany can hope to achieve a relatively determinate and predictable system of law.

As a leader of the Nazi law professors' guild, Schmitt in this period emphasizes the implications of this position for the reform of legal education as well. He not only endorses the purging of racially "alien" faculty members but also quite consistently endorses Nazi book burnings and calls for the ethnic cleansing of university libraries and reading lists.[52] At times Schmitt seems to suggest that the mere fact of ethnic homogeneity suffices to establish a "spiritually" homogeneous jurisprudence. More commonly, his polemics from this period imply that ethnic homogeneity *in conjunction* with an explicitly National Socialist legal education and training alone can create

a homogeneous caste of future jurists likely to interpret and apply necessarily indeterminate legal clauses in a consistent manner. Ethnic homogeneity, it seems, is a necessary but not a sufficient condition of a determinate system of legal decision making. Thus, homogeneity needs to be complemented with a system of education able to keep aspiring judges and lawyers free from the taint of ethnically "alien" intellectual influences. In this spirit, Schmitt openly praises the Nazi destruction of intellectual pluralism and academic freedom in Germany's once impressive legal faculties, while simultaneously demanding that faculty members intent on guaranteeing that Nazism avoid the ills of normativism make absolutely sure that the basic verities of National Socialism are drummed into the minds of aspiring lawyers and judges.[53] Although conceding that the reconstruction of German jurisprudence along such ambitious lines is unlikely to be achieved within a few years, Schmitt never hesitates to praise the ruthless manner with which National Socialism has already begun to cleanse Germany of ethnically alien elements and the liberal normativism allegedly so popular among them.

Might the quest for alternative forms of homogeneity within German law just as easily have followed from Schmitt's quest to establish a postliberal form of legal determinacy? Did Schmitt's project require the embrace of the most horrible features of National Socialism? As mentioned above, Schmitt before 1933 sympathized with non-Nazi variants of right-wing authoritarianism. At the same time, it is unclear what other forms of homogeneity, given the basic contours of Schmitt's theory, might more effectively have played the role taken by nightmarish Nazi anti-Semitism. Schmitt was obviously hostile to left-wing attempts to establish social or class homogeneity. Even during the Weimar period, he noted that radical nationalism constituted the most authentic "political" force in our century.[54] Of course, radical nationalism need not take on racist or anti-Semitic features. Yet in light of Schmitt's profound hostility to modern universalistic conceptions of human equality, it is easy to see why he so quickly made Nazi anti-Semitism constitutive of his political and legal theory. Nazism surely broke in a drastic fashion with modern universalism; in this respect, Nazism was more consistent and rigorous than even Mussolini's Italy. In my view, this is why Schmitt ultimately considered Nazism superior to its numerous authoritarian competitors on the world scene in the 1930s: only the Nazis systematically abandoned the moldy *idées générales* that, in Schmitt's view, so long had exercised a detrimental influence on modern legal thought and practice. Of course, the relationship between political theory and praxis is always complex. Yet given the flawed structure of Schmitt's theory, his embrace of Nazism represented a logical choice.

No less revealing are Schmitt's contributions to a series of crucial debates within National Socialist jurisprudence during the first five years of the new

regime. In an important recent essay, Peter Caldwell challenges the myth that Schmitt's theoretical position within National Socialist jurisprudence was consistently more moderate than that of rivals, such as Otto Koellreutter, who embraced Nazism well before Schmitt.[55] For our purposes here, especially striking is the manner in which Schmitt's attempt to construct an identifiably National Socialist conception of legal interpretation rests on the twin pillars of the programmatic agenda described above: Schmitt considers the formalist liberal quest to gain determinacy by means of clear general norms doomed, but he simultaneously hopes that some measure of determinacy might be achieved by a reconstitution of the ranks of the German legal profession. By systematically developing this line of argumentation, Schmitt offers a brand of jurisprudence particularly well suited to the political needs of the National Socialist leadership.

German jurists in 1933 were immediately confronted with the imposing problem of how to interpret legal statutes predating the Nazi takeover, many of which stemmed from Germany's first experiment in republican government, the Weimar Republic. Indeed, because the Nazis tarried awhile before instituting their own explicitly National Socialist laws, the question of how pre-Nazi-era statutes were to be interpreted by administrators and judges remained of central significance for much of the Nazi period. The fact that the overwhelming majority of jurists faced with the task of applying and interpreting such laws had been trained in pre–National Socialist conceptions of legal interpretation simply exacerbated the problem at hand from the perspective of Germany's new power holders. In the simplest terms, two alternatives seem to have presented themselves: one could try to bind judges tightly to preexisting statutes by insisting that judges continue to employ relatively traditional formalistic decision-making devices, or one could argue that National Socialist judges had no obligation to enforce laws predating the "national revolution" of 1933. Conveniently, the former position might reassure traditional elites, influential in the courts and administration during the regime's early years, that National Socialism was less frightfully subversive than its more militant representatives implied. At the same time, this option risked binding judges and administrators to laws that were utterly incompatible with National Socialist aspirations. In contrast, embracing the latter position might nicely serve Nazi policy aims, yet it risked legitimizing a freewheeling "activist" judiciary that might feel empowered to act, willy-nilly, in opposition to National Socialism. In light of the relative methodological heterogeneity of German jurists in the immediate aftermath of Hitler's takeover, this second option implied obvious political risks for National Socialism.

Relying on his theoretical reflections on the question of legal indeterminacy, Schmitt formulates an ingenious solution to this enigma. First, he argues against simply discarding the idea of a binding system of law altogether.

Clearly worried by the specter of activist judges hostile to National Socialism, Schmitt insists, contrary to the second possibility just described, that judicial action always requires some basis in the law. Judges should *not* be allowed to act ex nihilo; they must be able to ground their actions in *some* legal act.[56] But this assertion hardly leads Schmitt to embrace the competing view that judges are bound to pursue traditional modes of judicial interpretation when faced with statutes predating the Nazi period. According to Schmitt, this first view presupposes an anachronistic liberal view of legal determinacy. Refashioning familiar arguments, Schmitt cleverly asserts that those who support traditional views of legal determinacy badly obscure the fact that no legal text can provide real guidance to decision makers. In this view, the interpretation of any legal text is ultimately determined by the particular "spirit" inhering, as he put it in his gloss on Montesquieu in *State, Movement, Folk*, in the "different mouths" that " 'pronounce' the same words so differently." Thus, it is mistaken to claim that preexisting legal statutes necessarily conflict with National Socialism; such a view presupposes a degree of determinacy necessarily missing from the legal materials at hand. Those appealing to the text of pre-1933 laws in order to challenge National Socialism are simply juxtaposing their own (anti-Nazi) ethnic and intellectual "spirit" to the "spirit" of National Socialism. For Schmitt, they cannot legitimately claim to speak even in the name of those legal texts that seem overtly anti-Nazi in character.[57]

In this account, the very attempt to formulate the problem at hand as a choice between "judicial discretion" and "the binding of the judge to the statute" is incorrect in light of its implicit dependence on certain liberal legal illusions. In a pivotal but generally overlooked 1936 essay, Schmitt describes the manner in which traditional modes of legal interpretation in Germany tended to emphasize the semantic structure of the legal norm as a way of avoiding the problem of undertaking to resolve conflicts between the heterogeneous interests that played a role in the legislative history of the statute. Forced to grapple with the incompetence of the liberal legislature, jurists emphasized the coherence and relative autonomy of the statute vis-à-vis the irrationality of parliamentary politics. Faced with the unenviable task of trying to determine legislative intent in a pluralistic political world in which it was virtually impossible to do so, Schmitt concedes that it made some sense for pre-Nazi jurists to pursue a kind of interpretative literalism according to which "the statute is always more clever than the lawmaker."[58] But Nazi judges have no reason, even if it were possible to do so in the first place, to privilege the text of the statute over the task of ascertaining the underlying "spirit" of the legal order as a whole. The crisis of parliamentarism has been resolved by the Nazis; thus, jurists now should abandon their literal and formalistic interpretative devices. In contrast to the inept and pluralistic character of liberal parliamentary politics, Schmitt argues, National Socialism represents

a coherent worldview, as sketched out in the Nazi Party Program as well as in a series of statements of legislative intent that function as helpful guides for judges and administrators trying to ascertain the basic principles of Nazi law. In this qualitatively different political context, there is no longer any pressing reason why the legal text should be favored vis-à-vis interpretations that may seem to depart from the semantic structure of the legal text. In the homogeneous ethnic and political universe of National Socialism, a central rationale behind interpretive literalism no longer obtains.[59]

For Schmitt after 1933, the first, indispensable step toward legal determinacy is clear enough: all laws must be interpreted in accordance with the coherent ethnic and intellectual "spirit" of National Socialism. For this reason, the creation of a judiciary exemplifying that same ethnic and ideological spirit is absolutely pivotal; "alien" ethnic groups will never feel at home in a concrete order not of their "kind" [*Art*]. In the (relatively limited) case of a judge's applying a piece of explicitly National Socialist legislation, it may even appear at first glance that the judge or administrator is simply engaging in a traditional mechanical application of the statute.[60] Nonetheless, the real force at work even in this scenario is the question of the spirit interpreting and applying the law. Schmitt concedes that vague, open-ended clauses easily lend themselves to an interpretation in accordance with the basic principles of National Socialism. But even seemingly clear pre-Nazi statutes quite legitimately can be interpreted in accordance with National Socialism: the ethnic predispositions and spiritual commitments of the juridical decision maker, and not the semantic attributes of the legal text, unavoidably are the truly decisive factors in legal interpretation.

For Schmitt, "The binding [of the judge] rests on his adaptation [*Einfügung*] to an order of the folk resting on ethnic and racial homogeneity."[61] Only an estate of jurists intimately bred and trained in the particular legal mores and modes of thinking of the German folk is likely to interpret the law in a manner consistent with other legal practitioners who participate in the same shared ethnic community or concrete order. For the National Socialist leadership in the years immediately after the demise of Weimar, Schmitt's argumentation here must have seemed heaven-sent. His position demands judicial compliance to National Socialist ideology while simultaneously countering the risky specter of forms of judicial activism *inimical* to Nazi ideology. Schmitt pays lip service to classical ideas of a "judge bound to law," thereby assuaging the fears of relatively traditional jurists potentially alienated by the radical antilegalist features of National Socialism, while in reality legitimizing a dramatic loosening of traditional forms of legal binding. This view makes *every* element of German law potentially subordinate to Nazi policy aims, *without requiring potentially time-consuming changes in the legal code*. Not surprisingly, Schmitt's ideas here were eagerly embraced

by some Nazi leaders, and his model of legal interpretation exercised a real influence on National Socialist legal thinking throughout this period.[62]

Far more clearly than many of his colleagues, Schmitt presciently grasped that National Socialism was fundamentally hostile to *any* system of traditionally conceived binding law, even one fundamentally anti-Semitic in character. More resolutely than even those jurists whose pre-1933 Nazi credentials were far more weighty than his own, Schmitt appreciated that the establishment of an altogether novel, identifiably National Socialist legal code was at best unnecessary for the Nazi leadership and at worst a potential impediment likely to be exploited by legal traditionalists who might use it in order to limit the awesome power of the Nazi power elite. Indeed, a constant theme in Schmitt's writings in this period is the ever-lurking danger of those who speak in the name of the "rule of law" [*Rechtsstaat*] while, in effect, trying to squash the National Socialist quest to construct what for Schmitt represents a superior, historically unprecedented system of legal determinacy via "the reform of jurists."[63] For Schmitt, the mushy and misleading concept of the rule of law is best discarded. He tends to consider the term "Leader State" [*Führerstaat*] a better description of National Socialism. Although National Socialism allegedly seeks legal determinacy and some measure of predictability, Schmitt repeatedly insists, its rendition of them differs qualitatively from that of its historical predecessors.[64]

In this account, those in favor of the establishment of a new expressly National Socialist legal code continue to pray at the altar of the formalist "empty fiction" of a loophole-free system of airtight, binding legal norms. He reminds those who disparage what may initially appear to be mere minor changes or amendments to the existing German legal code that even such alterations can function effectively to bring about profound and potentially revolutionary changes in the legal system.[65] In fact, Schmitt considers the National Socialist seizure of power a perfect example of this jurisprudential verity.[66] For Schmitt, those who insist on establishing a new Nazi legal code simply fail to appreciate the intellectual and political novelty of the emerging National Socialist legal system. The judge in the Leader State is bound to the law, but this law has a different internal structure from that of the law of other constitutional systems; hence, judicial bindedness means something fundamentally new.[67] Because the judge partakes of the same ethnic community and folk spirit as the supreme lawmaker, the judge can legitimately veer, when necessary, from the express letter of the law in order to make sure that the will of the supreme Leader is respected in the individual case at hand. In this view, the judge is an assistant and even a colleague [*Mitarbeiter*] of the Leader, because both partake of a shared ethnic and spiritual background and thus are "bound" together by something far more profound than the semantic structure of the legal text.[68] Only because the establishment of racial

and ethnic homogeneity makes a binding of this sort possible, can National Socialism permit judges to interpret legal texts in what may wrongly *appear*, from the vantage point of a more traditional jurisprudential perspective, to be a discretionary or even arbitrary manner.

For this reason, Schmitt often criticizes the claim that National Socialism is a *dictatorship*. Given the obvious brutality of the Nazi regime, it is easy to chalk this shockingly apologetic view up to Schmitt's opportunism. But here as well, much more than opportunism is at work. However apologetic and misleading, Schmitt's claim does capture something important about Nazism: National Socialism did in fact break dramatically with traditional forms of arbitrary government like those traditionally criticized by liberals who defended the ideal of the rule of law. Nazism was much more radical in its assault on minimal features of the rule of law than even the meanest "despotism" described by authors such as Locke and Montesquieu.

Because of the existence of a shared ethnic basis between the Leader and the judge, for Schmitt their relationship cannot be described as dictatorial in character. Similarly, the relationship between the German *Volk* and Leader rests on a shared "existential" basis and thus is hardly arbitrary or dictatorial in nature. In contrast, Schmitt considers the rule of the English in India dictatorial: there, one ethnic and racial group exercises power over a distinct racial group.[69] As we saw earlier in this study, during the Weimar period Schmitt often pointed to an "elective affinity" between dictatorship and legal indeterminacy: in light of the unavoidability of open-ended, arbitrary law, an executive-based dictatorship seemed the best answer to the legal imperatives of this epoch. It is easy to see, given the conceptual structure of Schmitt's theoretical framework, why the embrace of Nazism followed so smoothly for Schmitt in 1933: because National Socialism potentially "solves" the problem of legal indeterminacy, it also offers an opportunity for overcoming the theoretical and practical problems of dictatorship. Nazism can resolve the crisis of legal indeterminacy; by implication, it simultaneously suggests the possibility of a postliberal authoritarian state fundamentally distinct from traditional forms of dictatorship. In this respect as well, for Schmitt Nazism represents a revolutionary intellectual and political advance over the worn-out categories and practices of traditional political thought and practice and hence a "state for the twentieth century."

Schmitt's view of the relationship between the Leader and judge might appear to represent an attempt to improve the stature of the judge by justifying a measure of judicial independence in relation to the Nazi leadership. But for Schmitt, judges are by no means thereby invested with unlimited discretionary privileges *in relation to the National Socialist spirit of the legal code as a whole*. No judicial action incompatible with the mores and spiritual currents of National Socialism is to be tolerated. Moreover, for Schmitt that

spirit is coherently and consistently defined by the Nazi leadership and, most importantly, Hitler. Schmitt goes so far as to proclaim that Nazi law is sure to be far more determinant and predictable than law ever was within liberal democracy. Notwithstanding the Nazi abandonment of liberal concepts of legal determinacy, Schmitt proudly declares, National Socialism possesses more legal integrity than *any* competing legal system in the world.[70] Whereas liberal democracy continues to stumble along the worn-out path of normativistic liberalism, Nazism alone undertakes the quintessentially modern task of guaranteeing legal determinacy by means of "the reform of jurists."

## III

In 1936, segments of the SS, allied with a number of Schmitt's most jealous rivals in the legal academy, succeeded in forcing Schmitt to give up a number of his posts. Schmitt's defenders have repeatedly exaggerated the depth of the blows experienced by Schmitt. The fact of the matter is that Schmitt continued to exercise a substantial impact on Nazi legal thinking; in chapter 6, we examine his turn to the politically explosive field of international law in 1937 and 1938. Nonetheless, there is no question that Schmitt's political defeat in 1936 momentarily limited his impact on the ongoing construction of a National Socialist legal order.[71]

In light of the story told above, there is a certain irony to Schmitt's political troubles in 1936. After arguing vehemently that only the ethnic cleansing of the German judiciary could help provide a new form of binding, determinate law, Schmitt himself now comes face to face with the most obvious failing of his position: ethnic homogeneity is unlikely to go far in assuring jurisprudential consistency or agreement.[72] In 1936, even those "existentially" homogeneous colleagues who shared Schmitt's enthusiasm for National Socialism *disagreed* so heatedly with Schmitt about the proper contours of a National Socialist legal order that they willingly expended a great deal of political capital in order to do serious political damage to Schmitt. National Socialism did its best to exterminate the specter of what John Rawls terms "the fact of pluralism." But even its awesome power proved unable to guarantee Nazism complete victory in its struggle against the basic contours of a modern pluralistic intellectual universe. Although it would be silly to chalk up disagreement among Nazi lawyers as a victory for modern pluralism, it would be no less problematic to miss the ways in which continuing disagreement even among hardcore Nazi jurists suggests the inherent fragility of Schmitt's claim that a shared "existential determination" of judicial decision making could contribute to a novel postliberal form of legal determinacy. Schmitt's hope that ethnic cleansing might help secure legal determinacy ultimately proved

more fantastic than even the most overstated liberal "empty fiction" of an airtight legal code free of loopholes, in which the judge is nothing more than *la bouche qui prononce les paroles de la loi*.

Nonetheless, judicial decisions in Nazi Germany did prove basically consistent with the "spirit" of National Socialism.[73] Yet this consistency was guaranteed, first and foremost, by institutional and political mechanisms. As Otto Kirchheimer, German-Jewish émigré and one-time left-wing aficionado of Schmitt's jurisprudence, observed in a prescient 1941 discussion of Nazi law,

> The [Nazi] judge, like any other administrative official, is accountable for the contents of his decision. Where the relentless pressure of the party through channels like the *Schwarze Korps* should prove of no avail . . . new organizational statutes provide ample facilities for discharging or transferring a recalcitrant judge. The judiciary is entitled to have and to express opinions of its own only in those cases where it does not act as a kind of common executive organ to the combined ruling classes.[74]

In the final analysis, the most important feature of Schmitt's works between 1933 and 1936 is that they contributed systematically to precisely this subordination of the judiciary to the Nazi power elite. In this sense, Schmitt's writings did help guarantee some elements of a special form of legal determinacy. Yet this legal determinacy had nothing to do with earlier liberal conceptions of determinate law, nor can its relative "success" in guaranteeing a measure of consistency in legal action be traced to the (mythical) binding power of common ethnic roots.

As Kirchheimer notes, for classical liberalism the rationality of law stemmed from its predictable character, which meant that

> contending individuals and groups, though they are never sure which of the many possible interpretations of their behavior will prevail in any given case, usually could confine their actions within such limits that these could not be said to contradict openly the wording of the law and the procedural requirements of the established courts and agencies.[75]

In traditional liberalism, legal rationality rested in part on the existence of relatively determinate, universally applicable rules "which could be referred to by the ruling and the ruled alike and which thus might restrict the arbitrariness of administrative practice."[76] For Kirchheimer, Nazi law is also "rational," yet this rationality takes an altogether different form from that of liberalism: "Rationality here means only that the whole apparatus of law and law-enforcing is made exclusively serviceable to those who rule."[77] In this legal manifestation of what Kirchheimer describes as a form of truncated

technical rationality, what counts is that legal decision makers provide a legal veneer for the political preferences of the ruling elite. In this caricature of traditional conceptions of legal determinacy, determinacy simply means that legal decisions cohere as closely as possible to the needs of the Nazi power elite. In Kirchheimer's account, this postliberal form of legal determinacy represents an unprecedented attempt to introduce "the industrial methods of taylorism . . . into the realm of statecraft in order to get the most precise answer to the question" of how the preferences of privileged party, state, and economic elites can be put automatically into effect.[78]

There is no question that Schmitt contributed to the achievement of some elements of this form of legal "determinacy" in Germany during the 1930s. By demanding the cleansing of elements potentially hostile to National Socialism and the destruction of any real legal and constitutional limits on the Nazi leadership, Schmitt surely played a role in making sure that those who interpreted and applied the law served the wishes of the National Socialist elite.[79] Although Schmitt's theorizing too often obscures the harsh realities of National Socialist law, at times his own categories inadvertently unmask Nazi legal ideology. By repeatedly emphasizing the notion that the judge is a colleague or "assistant" to the omnipotent Leader, for example, Schmitt comes quite close to an express acknowledgment of one of the most troubling facets of National Socialist law: both in Schmitt's theory and in National Socialist reality, the judge inevitably becomes a mere administrative accessory of the National Socialist leadership.

## IV

Today, it is a commonplace among some jurists that a profound and unavoidable indeterminacy necessarily characterizes the legal system. In the words of one legal theorist, "*All* rules will contain within them deeply embedded, structural premises that clearly enable decision makers to resolve particular controversies in opposite ways. . . . [A]ll law seems simultaneously either to demand or at least allow internally contradictory steps."[80] Notwithstanding traditional liberal aspirations for a binding and relatively determinate set of legal norms, law turns out to contain an irrepressible *arbitrariness*. Legal categories are simply "empty vessels" filled by acts of power that force meaning into them. In this view, *all* cases are "hard cases."

In contrast to most current proponents of the radical indeterminacy thesis, however, Schmitt was ultimately unsatisfied with simply deconstructing the liberal rule of law. As this chapter tried to demonstrate, Schmitt undertook the reconstructive task of formulating a postliberal conception of legal determinacy, in which core features of the radical indeterminacy thesis

nonetheless continue to function as an analytic presupposition for an alternative understanding of legal interpretation. I suspect that some contemporary jurists are likely to consider Schmitt's attempt to salvage legal determinacy as ultimately inconsistent with his initial acceptance of the radical indeterminacy thesis. They often *celebrate* the irrepressible (decisionistic) arbitrariness allegedly at the core of liberal law in order, like Schmitt, to deconstruct it; they seem less interested in the task of sketching out a postliberal corrective to the legal status quo. From their perspective, Schmitt's attempt to establish legal determinacy by means of ethnic homogeneity might represent a particularly revealing example of the profound evils inherent in the anachronistic quest for legal determinacy. For those who accept this interpretation, Schmitt's Nazi-era writings will simply confirm the advantages of a rigorous version of the radical indeterminacy thesis, according to which *any* attempt to buttress the "myth" of legal determinacy is doomed to fail.

Of course, that position is problematic on its own terms: as Schmitt suggested during the Weimar period, those who accept the radical indeterminacy thesis arguably may need to abandon the most defensible features of the liberal democratic state as well. In contrast to some voices today endorsing the ongoing dismantling of the rule of law, Schmitt's thinking on this matter may at least be more consistent and systematic: legal nihilism and liberal democracy hardly make good bedfellows. But another interpretation of Schmitt's National Socialist theory is possible as well. In this alternative line of inquiry, Schmitt radicalizes some tendencies within contemporary jurisprudence. Rather than resting satisfied with the ambiguous implications of the radical indeterminacy thesis, Schmitt tackles the hard questions often ignored by contemporary jurists, despite the fact that they follow logically from the radical indeterminacy thesis: what exactly should replace the liberal rule of law and its emphasis on relatively determinate rules? What type of legal order is possible in the shadows of the indeterminacy thesis? What form should a postliberal legal system take in light of the inherent indeterminacy of liberal law? The fact that Schmitt offers an ominous totalitarian antidote to the crisis of legal indeterminacy may suggest that the reconstructive task at hand is likely to prove more difficult than some contemporary defenders of the radical indeterminacy thesis concede. Like Schmitt, at least some of them seem bent on purging legal theory of even the most minimal elements of the liberal legal tradition. Enlightenment bashing has become an academic growth industry within some segments of the American legal academy.[81]

One of the most important unintended achievements of Schmitt's theory is that it systematically outlines the basic contours of an alternative legal model that welds antiliberalism to the radical indeterminacy thesis. There is, of course, an underlying logic to Schmitt's frightening argument: if legal determinacy cannot be achieved at all by means of traditional legal materials, then

the attempt to establish homogeneous judges does acquire a certain amount of plausibility. Given the conditions of modern pluralism, however, there can be no question that this project is a recipe for political disaster. Schmitt's embrace of the "cleansing" of the judiciary—indeed, of the political community as a whole—is surely one conceivable result of the total abandonment of the liberal concept of binding legal norms.

One influential line of argumentation within contemporary radical jurisprudence asserts that every modern legal system represents a patchwork of competing and fundamentally inconsistent moral and political ideals. For this reason, the quest to assure legal determinacy by appealing to a coherent set of moral or political principles seen as embedded within the legal system fails; the undeterminacy thesis, as defended by Dworkin and others, necessarily stumbles, since the ideals immanent within modern law are as incapable of providing a determinate answer to hard cases as are legal rules or statutes.[82] Schmitt would have agreed with the basic outlines of this diagnosis.

His answer to it was to eliminate moral and political pluralism and thereby salvage legal determinacy. The case of Carl Schmitt clearly contradicts the rather naive assumption shared by some jurists today "that liberating those who wield legal power from the 'mistaken' belief that legal doctrine constrains their actions will have progressive effects."[83] In Germany at mid-century, the "liberation" of state officials from binding legal norms hardly generated "progressive" results.

## NOTES

1. Schmitt, "Das gute Recht der deutschen Revolution," *Westdeutscher Beobachter*, 12 March 1933, 1–2. An important element of Nazi ideology was its "law and order" appeal. See Otto Kirchheimer, "Criminal Law in National Socialist Germany," in Scheuerman, ed., *The Rule of Law under Siege*, 172–95.

2. Schmitt, "Die deutschen Intellektuellen," *Westdeutscher Beobachter*, 31 May 1933, 1–2.

3. Schmitt, "Nationalsozialistisches Rechtsdenken," *Deutsches Recht* 4, no. 10 (1934): 225–29.

4. Schmitt, "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung* 40, no. 19 (1935): 1133–36.

5. Schmitt, "Die nationalsozialistische Gesetzgebung und der Vorbehalt des '*ordre public*' im internationalen Privatrecht," *Zeitschrift für die Akademie des Deutschen Rechts* 3 (1936): 207, 208.

6. Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," *Deutsche Juristen-Zeitung* 41, no. 20 (1936): 1195–99.

7. Schmitt, cited and translated by Dyzenhaus, *Legality and Legitimacy*, 99. A pamphlet could easily be filled with Schmitt's anti-Semitic outbursts from the

1930s and 1940s. When Schmitt proudly commented in 1936 that under his editorship the *Deutsche Juristen-Zeitung* played a leading role in trying to eliminate the "Jewish influence" over the "German spirit," he was not exaggerating ("Schlusswort des Herausgebers," *Deutsche Juristen-Zeitung* 41, no. 24 [1936]: 1454).

8. For examples of this approach, see Bendersky, *Carl Schmitt: Theorist for the Reich*, and Schwab, *Challenge of the Exception*.

9. For an example, see Paul Noack, *Carl Schmitt: Eine Biographie* (Berlin: Propyläen, 1993).

10. Schmitt, *Political Theology*, 30.

11. This (incorrect) interpretation of Kelsen is suggested in Schmitt, *Political Theology*, 14, 19, 28–35.

12. This trend has been anxiously thematized by other authors as well: Rossiter, *Constitutional Dictatorship*; and Jules Lobel, "Emergency Power and the Decline of Liberalism," *Yale Law Review* 98 (1989): 1385–433.

13. Schmitt, *Political Theology*, 13.

14. Altman, *Critical Legal Studies*, 91.

15. Solum, "On the Indeterminacy Crisis," 462.

16. Schmitt, "Nationalsozialistisches Rechtsdenken," 225. My initial guess was that the unnamed American jurist here may have been Roscoe Pound. During a controversial visit to Austria and Germany in 1934 that garnered extensive coverage in the American press, Pound insisted to reporters that evidence of brutality in Central Europe had been greatly exaggerated. In addition, he dryly described Hitler as "a man who can bring them [the Central Europeans] freedom from agitating movements." According to one report, Pound met with faculty members at the University of Munich in 1934. In September of the same year, he was awarded an honorary degree from the law faculty of the University of Berlin, whose most prominent faculty member—and "leader" of the Nazi lawyers' guild—at that point was no other than Carl Schmitt. See Charles Beard, "Germany Up to Her Old Tricks," *The New Republic* 80 (1934): 299; and David Wigdor, *Roscoe Pound—Philosopher of Law* (Westport, CT: Greenwood Press, 1974), 250–51. Of course, Pound's legal theory was fundamentally distinct from Schmitt's. Yet like Schmitt, Pound had long criticized formalistic legal thought. By the 1930s, however, Pound had become anxious about the implications of antiformalism for legal determinacy, soon taking on the role of an outspoken conservative political and methodological critic of legal realism and its more radical attacks on formalism. Interestingly, there is a certain parallel to Schmitt's development in the 1930s as well: Schmitt embraces antiformalism while nonetheless hoping to salvage the possibility of legal determinacy. However, the legal theorist Or Bassok has now made a strong case that the US jurist in mind was probably Josef Redlich (Or Bassok, "The Mysterious Meeting between Carl Schmitt and Josef Redlich" [March 1, 2019]. Available at SSRN: https://ssrn.com/abstract=3360359 or http://dx.doi.org/10.2139/ssrn.3360359).

17. Schmitt, "Unsere geistige Gesamtlage und unsere juristische Aufgabe," *Zeitschrift der Akademie für deutsches Recht* 1 (1934): 12.

18. Schmitt, "Nationalsozialistisches Rechtsdenken," 227–28.

19. Schmitt, "Die Rechtswissenschaft im Führerstaat," *Zeitschrift der Akademie für Deutsches Recht* 2 (1935): 438–40. Liberal jurists have similarly noted that formal

"rules force the future into the categories of the past" within drawing Schmitt's anti-liberal implications from this observation (Schauer, "Formalism," 542).

20. This extends throughout Schmitt's Nazi period. In an essay written in part during the early 1940s but first published in 1950, Schmitt similarly chronicles the inevitable decline of codified, general law and the proliferation of indeterminate forms of open-ended law. In the twentieth century, the liberal legislature is replaced by a "motorized lawmaker," which hands over vast delegations of authority to the executive in response to the enormous needs of ever-changing, situation-specific state action in the era of modern interventionist politics. Here as well, Schmitt sees the main source of this development in the unavoidability of the state's "steering of the economy" (Carl Schmitt, *Die Lage der europäischen Rechtswissenschaft* [*The Situation of European Jurisprudence*] [Tübingen: Internationaler Universitätsverlag, 1950], 20–22).

21. Schmitt, *Staat, Bewegung, Volk*, 43. The German word *Geist* is difficult to translate; the closest English approximation is "spirit." But *Geist* takes on ethnic and racist connotations for Schmitt during the mid-1930s. This comes out pointedly in a journalistic piece, where he comments that to partake of German "spirit" much more is required than mastery of the German language or academic credentials from a German university: one needs to belong to the (particularistic) German *Volk*. Thus, German Jews (such as Heine or Einstein) lack a proper German "spirit" (Schmitt, "Die deutschen Intellektuellen," 1–2).

22. In an analogous vein, contemporary CLS theorists argue that the fact that every modern legal system rests on a patchwork of inconsistent principles and ideals dooms the quest for legal determinacy. Indeterminacy is as profound at the level of the legal system's immanent principles and ideals as it is at the level of formal rules and precedents. The decisive difference here is that Schmitt then concludes that moral and political pluralism should be sacrificed for the sake of preserving legal determinacy. It goes without saying that CLS scholars disapprove of the racism and anti-Semitism evident within Schmitt's writings.

23. Schmitt, *Staat, Bewegung, Volk*, 45.

24. The word "biological" is Schmitt's own. This would seem to counter those who have insisted that Schmitt endorsed a traditional Catholic anti-Judaism but hardly radical Nazi anti-Semitism (*Staat, Bewegung, Volk*, 45). Schmitt can be read elsewhere as criticizing Italian fascism for "ignoring" the importance of racial difference. In comparing fascist and Nazi law, he notes that "the greatest difference" exists vis-à-vis the racial question and the relationship of the state to party. On both points, Nazism is superior in Schmitt's view (Carl Schmitt, "Faschistische und nationalsozialistische Rechtswissenschaft," *Deutsche Juristen-Zeitung* 41, no. 10 [1936]: 619–20).

25. Schmitt, *Staat, Bewegung, Volk*, 45. In an essay from the same year, Schmitt comments that "our liberal grandfathers and fathers" failed to understand the "existential" determination of all thought. Specifically, they missed that every *Volk* has basic instincts, styles of thought, and a "spirit" distinct to it (Schmitt, "Die deutschen Intellektuellen," 1–2).

26. Schmitt, "Das gute Recht der deutschen Revolution," 1; Schmitt, "Ein Jahr deutscher Politik," *Westdeutscher Beobachter*, July 23, 1933, 1.

27. Reference is typically made to Schmitt's dedication of his most important Weimar study, *Die Verfassungslehre*, to Dr. Fritz Eisler. Needless to say, the existence of such personal ties is no evidence of a lack of anti-Semitism.

28. Koenen*, Der Fall Carl Schmitt*, 315–16, 357–59, 372–73.

29. Raphael Gross, *Carl Schmitt and the Jews: The "Jewish Question," the Holocaust, and German Legal Theory*.

30. For a critique of Schmitt's recent biographers, see Ingeborg Maus, "Die Bekenntnisse der Unpolitischen. Zur gegenwärtigen Carl Schmitt—Renaissance aus Anlass einer Biographie," *Frankfurter Rundschau*, April 2, 1994, ZB2.

31. The most detailed version of this interpretation is Koenen, *Der Fall Carl Schmitt*.

32. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, 54–55.

33. Schmitt, *Über die drei Arten*, 7.

34. Schmitt, *Über die drei Arten*, 57–58.

35. Schmitt, *Über die drei Arten*, 63–64.

36. This is the basic argument of Schmitt, *Staat, Bewegung, Volk*. Schmitt provides a prehistory of the Nazi "movement-dominated" state in *Staatsgefüge und Zusammenbruch des zweiten Reiches* (Hamburg: Hanseatische Verlagsanstalt, 1934). Schmitt's attempt to develop a tripartite political theory in which the National Socialist movement possesses supremacy garnered criticism from competing Nazi ideologues who worried that Schmitt's description of the "folk" as a nonpolitical entity unfairly downplayed the supposedly democratic character of National Socialism. On this debate, see Neumann, *Behemoth*, 66.

37. Schmitt, "Nationalsozialistisches Rechtsdenken," 226. For Schmitt's association of "empty" formalistic elements of the rule of law with Judaism, see, for example, the reference to "Stahl-Jolson" in Carl Schmitt, "Der Rechtsstaat," in *Nationalsozialistisches Handbuch für Recht und Gesetzgebung*, ed. Hans Frank (Munich: Zentralverlag der NSDAP, 1935), 6. Schmitt's anti-Semitic diatribes against Julius Stahl (originally Jolson) seem to have been his very own "contribution" to Nazi anti-Semitism. Stahl's name is dirtied in many of Schmitt's texts from this period.

38. Schmitt, *Über die drei Arten*, 52.

39. As chapter 6 will elaborate, this is a pivotal feature of Schmitt's analysis of international law.

40. This term is first introduced by Schmitt in "Der Staat des 20. Jahrhunderts," *Westdeutscher Beobachter*, 28 June 1933, 1. It becomes one of Schmitt's stock phrases during this period.

41. Schmitt, "Der Führer schützt das Recht" (1934), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 199–204.

42. Schmitt, "Die Rechtswissenschaft im Führerstaat," 438–39. Ingeborg Maus correctly emphasizes the central place here of Schmitt's account of the decay of the classical liberal concept of general law ("'Gesetzesbindung' der Justiz und die Struktur der nationalsozialistischen Rechtsnormen," in Dreier and Sellert, *Recht und Justiz im "Dritten Reich,"* 81–104).

43. Schmitt, *Political Theology*, 66.

44. Schmitt, "Preface to the Second Edition" (1934), in *Political Theology*, 3. Schmitt is intent in this period on showing that National Socialist law, if built on

the foundations sketched out by his theory, need not take an arbitrary [*willkürlich*] form. For a clear statement of this view, see Schmitt, "Nationalsozialismus und Rechtsstaat," *Juristische Wochenschrift* 63, nos. 12–13 (1934): 713–18. This aspiration is also summarized clearly by one of Schmitt's doctoral students in a book review of his mentor's work: Günter Krauss, "Review of Schmitt, *Staat, Bewegung, Volk*: Zu einer neuen Schrift von Carl Schmitt," *Deutsches Recht*, 4, no. 1 (1934): 24, where the possibility of legal determinacy is linked directly to racial and ethnic homogeneity.

45. Heidegger perhaps endorsed a form of decisionism while, like Schmitt, ultimately undertaking to counteract extreme individualistic and voluntaristic readings of it. For Heidegger, this entailed incorporating the *Dasein* of *Being and Time* within the historical collective or community of National Socialism; for Schmitt, the quest to avoid a subjectivistic, even arbitrary model of law analogously encouraged him to endorse Nazi conceptions of a homogeneous ethnic and racial community (Wolin, *Politics of Being*, especially 28–40, 53–66). From this perspective, Heidegger's brief 1933 letter to Schmitt, in which he thanks Schmitt for sending him a copy of *The Concept of the Political*, may represent more than a polite professional formality: during this period, both authors were intent on overcoming manifest dangers of decisionism by means of integrating National Socialist models of the community into the heart of their theories. Heidegger's letter to Schmitt has been reprinted in *Telos*, no. 72 (1987): 132. Interestingly as well, Heidegger during the 1930s saw National Socialist Germany as representing a superior "third path" beyond the ills of Western liberalism and Eastern Bolshevism. In his view, both competing systems were fundamentally similar in many important respects: "From a metaphysical point of view, Russia and America are the same; the same dreary technological frenzy, the same unrestricted organization of the average man. . . . [And thus] the farthermost corner of the globe has been conquered by technology and opened to economic exploitation" (cited in Wolin, *Politics of Being*, 103). Furthermore, Heidegger saw the Nazi experiment as being threatened unfairly by the imperialistic "pincers" of the United States and the Soviet Union; Germany was endangered by liberalism and socialism and thus should lead the way in circumventing the annihilation of European culture. As we will see in chapter 6, this diagnosis is reproduced in Schmitt's writings in international law during the same period.

46. George Schwab, "Introduction," in Schmitt, *Political Theology*, xxv. Schwab comments that at the end of the Weimar period Schmitt "realized the limits of decisionism." Matters are complicated by the fact that Schmitt himself during this period occasionally emphasizes a "break" in his thinking, according to which decisionism is abandoned for "concrete order thinking." Of course, this was politically advantageous for Schmitt in 1933 and 1934: it allowed him to emphasize the "distinct" National Socialist character of his theory. In a different manner, this reading was also politically convenient for Schmitt's defenders after World War II, who hoped to salvage the "real" (i.e., pre-Nazi) Schmitt by emphasizing a profound break between Schmitt's Weimar and Nazi periods.

47. Schmitt, *Legalität und Legitimität*, 87.

48. Neumann, "The Change in the Function of Law in Modern Society," in Scheuerman, ed., *Rule of Law under Siege*, 138

49. Schmitt, *Staat, Bewegung, Volk*, 44. Schmitt's comments on common law systems are interesting in light of this argument. For Schmitt, common law systems suggest that legal determinacy is possible by means other than those prescribed by legal formalism and its characteristic emphasis on the virtues of a systematic legal code. In particular, England shows that determinacy is achievable by means of a homogeneous "rank" of jurists schooled in the special needs of the English "national community" (Schmitt, "Aufgabe und Notwendigkeit des deutschen Rechtsstandes," *Deutsches Recht* 6 [1936]: 185). At the same time, Schmitt considers Anglo-American common law inferior to his proposed German alternative. British and American common lawyers are allegedly infected by the naive "normativities" of universalistic liberalism and thus remain incompletely antiliberal in their thinking.

50. For a statement of the central place of ethnic homogeneity to Nazism, see Schmitt, "Ein Jahr nationalsozialistischer Verfassungsstaat," *Deutsches Recht*, 4, no. 2 (1934): 29; and Schmitt, "Das gute Recht der deutschen Revolution," 1, where Schmitt explicitly draws the connection between the core of Nazi ideology and his vision of Nazi law: "the underlying legal conception, permeating and buttressing the whole legislative task that lies before us, can be captured by one word: homogeneity." Schmitt's legal theory thereby captures what arguably constitutes a core feature of National Socialism.

51. The most shocking is Schmitt, "Die Verfassung der Freiheit," where he argues that the Nuremberg racial laws should be interpreted as a guide informing judges and administrators how they are to interpret *all* elements of the German legal system. In this respect, they represent a preamble for the legal order as a whole and thus a specifically National Socialist "constitution." Also, see Schmitt, "Die nationalsozialistische Gesetzgebung und der Vorbehalt des '*ordre public*' im internationalen Privatrecht," 206, 208.

52. Schmitt, "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," 1194–97; and Schmitt, "Die deutschen Intellektuellen," 1.

53. Schmitt, "Bericht über die Fachgruppe Hochschullehrer im BNSDJ," *Deutsches Recht* 4, no. 1 (1934): 17. Schmitt's didactic concerns come out clearly in a number of essays: Schmitt, "Über die neuen Aufgaben der Verfassungsgeschichte" (1936), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar—Genf-Versailles*, 229–35; and Schmitt, "Review of Hans Gerber, Auf dem Wege zum neuen Reich," *Deutsche Juristen-Zeitung* 39, no. 23 (1934): 1474. The intensity of Schmitt's activities as a teacher in Berlin is documented in Christian Tilitzki, "Carl Schmitt—Staatsrechtlehrer in Berlin," *Siebente Etappe* (October 1991): 67–117.

54. Schmitt, *Crisis of Parliamentary Democracy*, 75.

55. Caldwell, "National Socialism and Constitutional Law."

56. Schmitt, "Neue Leitsätze für die Rechtspraxis," *Juristische Wochenschrift* 62, no. 50 (1933): 350–51; Schmitt "Nationalsozialismus und Rechtsstaat," 716. Consistent with his radical ideas about legal indeterminacy, Schmitt's concept of the binding of the decision maker to the law here is extremely minimal: it merely requires that the judge or administrator identify *some* basis within the legal system for his actions, even if that entails nothing more than an appeal to an open-ended standard such as "public morals" or "in good faith."

57. Schmitt, "Der Weg der deutschen Juristen," *Deutsche Juristen-Zeitung* 39, no. 11 (1934): 692–95.

58. Schmitt, "Aufgabe und Notwendigkeit des deutschen Rechtsstandes," 184. Also, see Schmitt, "Die geschichtliche Lage der deutschen Rechtswissenschaft," *Deutsche Juristen-Zeitung* 41, no. 1 (1936): 16.

59. Schmitt, "Aufgabe und Notwendigkeit des deutschen Rechtsstandes," 183–85. Of course, Nazi ideology was arguably less consistent than Schmitt asserts here. Perhaps this is why he is concerned during this period with highlighting what he takes to be its core element, namely, the pursuit of ethnic homogeneity [*Artgleichheit*]. In this way, he hopes to clarify the essential ideological and "spiritual" core of National Socialism, which legal actors then should refer to when deciding cases.

60. Schmitt, "Aufgabe und Notwendigkeit des deutschen Rechtsstandes," 184.

61. Schmitt, "Der Weg der deutschen Juristen," 698. In this vein, Schmitt writes that "legality within its most narrow confines" requires racial and ethnic homogeneity (Schmitt, "Der Neubau des Staates—und Verwaltungsrechts," in *Deutscher Juristentag 1933. Ansprachen und Fachvorträge*, ed. Rudolf Schraut [Berlin: Deutsche Rechts—und Wirtschaftswissenschaft Verlagsanstalt, 1934], 252).

62. Instead of waiting for new statutes, judges and administrators in Germany simply ignored the language of existing law whenever it conflicted with Nazi policy or ideology. In this way, rule of law protections were discarded first and foremost not by new legislation but simply by antiformalistic judicial devices. For our purposes here, it is important to recognize that Schmitt offered an intelligent defense of such practices. On Schmitt as a major influence on Nazi law, see Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (Munich: DTV, 1994), 101–80.

63. Richard H. Weisberg's study of Vichy law might be taken as evidence that Schmitt's worries about a residual formalism were overstated. Even though French jurists during the Vichy period appear to have preserved more elements of a traditional legalistic approach than their colleagues on the other side of the Rhine, they nonetheless managed to play a crucial role in Vichy's most heinous crimes (*Vichy Law and the Holocaust in France* [New York: New York University Press, 1996]). More comparative research on the French, the German, and the Italian variants of fascist law is needed before this problem can be resolved. Studies of fascist law typically remain trapped within the intellectual confines of particular national legal traditions, despite the international character of fascist and Nazi movements at mid century.

64. Schmitt, "Ein Jahr nationalsozialistischer Verfassungsstaat," 27; Schmitt, "Was bedeutet der Streit um den Rechtsstaat?" *Zeitschrift für die gesamte Staatswissenschaft* 95 (1935): 189–200; and Schmitt, "Einleitung," in Günther Krauss and Otto von Schweinichen, *Disputation über den Rechtsstaat* (Hamburg: Hanseatische Verlagsanstalt, 1935), 85.

65. Schmitt, "Kodifikation oder Novelle," *Deutsche Juristen-Zeitung* 40, nos. 15–16 (1935): 923–24.

66. Schmitt, *Staat, Bewegung, Volk*, 5–11; Schmitt, *Das Reichstatthaltergesetz*; Schmitt, "Das Staatsnotrecht im modernen Verfassungsleben," *Deutsche Richterzeitung* 25, nos. 8–9 (1933): 254–57; and Schmitt, "Das Gesetz zur Behebung der Not von Volk und Reich," 455–58.

67. Schmitt, "Kodifikation oder Novelle," 924.

68. Schmitt, "Kodifikation oder Novelle," 924–26; and Schmitt, "Aufgabe und Notwendigkeit des deutschen Rechtsstandes," 184–85. Of course, the same logic implies giving the *Führer* legally unlimited legislative and administrative powers.

69. Schmitt, "Der Neubau des Staates—und Verwaltungsrechts," in Schraut, ed., *Deutscher Juristentag 1933*, 250–51.

70. Schmitt, "Nationalsozialismus und Rechtsstaat," 716.

71. For a reliable account of this feud and the distortions of it by Schmitt's postwar followers, see Bernd Rüthers, *Carl Schmitt im Dritten Reich*, 2nd ed. (Munich: C. H. Beck, 1990), 81–108. Archival research also suggests that the threat to Schmitt during 1936 has been ridiculously exaggerated. For example, one of his presumed Nazi enemies, Reinhard Höhn, continued to serve with Schmitt as coadvisor on a host of dissertation and habilitation projects until the end of World War II at the University of Berlin (Tilitzki, "Carl Schmitt—Staatsrechtlehrer in Berlin," 38–39). Of course, academic co-advisors often squabble. Yet it is unlikely that Höhn and his buddies in the SS were intent on destroying Schmitt—physically, if necessary—if Höhn continued to cultivate professional ties with Schmitt well into the 1940s. As we will see in chapter 6, after his feud with the SS in 1936, Schmitt hardly abandons the anti-Semitic ideas constitutive of his contributions to Nazi law after 1933. Schmitt's 1938 study on Hobbes, for example (Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes* [*The Leviathan in the State Theory of Thomas Hobbes*] [Cologne: Hohenheim, 1982]), is filled with anti-Semitic comments; Schmitt again offers a critique of the rule of law in which Jews are blamed for the "normativistic" legal tendencies allegedly inimical to the modern state. For a survey of the anti-Semitic contours of Schmitt's interpretation of Hobbes, see Dyzenhaus, *Legality and Legitimacy in Weimar*, 91–94.

72. In fact, anti-Semitism played an important role in some facets of the Nazi legal system, while in others its role was minimal (Ernst Fraenkel, *The Dual State* [New York: Oxford University Press, 1941]). The fact that Schmitt made so much of anti-Semitism arguably highlights the radicalism of his views within the Nazi debate.

73. Dreier and Sellert, eds., *Recht und Justiz im "Dritten Reich"*; Hubert Rottleuthner, ed., *Recht, Rechtsphilosophie und Nationalsozialismus, Archiv für Rechts—und Sozialphilosophie Beiheft 18* (Frankfurt am Main: Fischer, 1978); Ilse Staff, ed., *Justiz im Dritten Reich* (Frankfurt am Main: Fischer, 1978); and Michael Stolleis, *Recht im Unrecht. Studien zur Rechtsgeschichte des Nationalsozialismus* (Frankfurt am Main: Suhrkamp, 1994).

74. Kirchheimer, "The Legal Order of National Socialism," in Kirchheimer, *Politics, Law and Social Change*, 102–3. A combination of enthusiasm for the regime and a set of informal and formal control mechanisms assured judicial compliance with National Socialism (Ralph Angermund, *Deutsche Richterschaft 1919–1945* [Frankfurt am Main: Fischer, 1990]).

75. Kirchheimer, "Legal Order of National Socialism," 99. This is an interpretation of liberal jurisprudence according to which it rests on the *limited indeterminacy thesis*.

76. Kirchheimer, "Legal Order of National Socialism," 99.

77. Kirchheimer, "Legal Order of National Socialism," 99.

78. Kirchheimer, "Legal Order of National Socialism," 100.

79. Nonetheless, it would be a mistake to overstate the extent to which the Nazis achieved even this perverse form of legal determinacy. In this chapter, I have tried to explain why that project was destined to fail. Well into the 1940s, the Nazi leadership worried about inconsistencies within judicial decision making (Heinz Boberach, ed., *Richterbriefe: Dokumete zur Beeinflussung der deutschen Rechtsprechung 1942–1944* [Boppard am Rhein: Harald Boldt, 1975]).

80. Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987), 59–61, 258.

81. Examples of this genre can be found in Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995).

82. Roberto M. Unger, "The Critical Legal Studies Movement," *Harvard Law Review* 96 (1983): 571; Unger, *What Should Legal Analysis Become?*, 66–67.

83. Solum, "On the Indeterminacy Crisis," 500.

## *Chapter 6*

# Indeterminacy and International Law

For those skeptical of Carl Schmitt's normative and political aspirations, Schmitt's writings on international law pose a special challenge. International law remains one of the least developed areas of modern law. Its norms are open-ended and vague, enforcement mechanisms limited in character, and employment too often subject to the opportunistic whims of great powers that may see it as little more than a handy political weapon. More than any other area of the law, international law is vulnerable to fundamental criticism. Not surprisingly, Schmitt occasionally succeeded in identifying the underlying inconsistencies of liberal international law, particularly in its interwar rendition, and his Weimar-era writings at times formulated a perceptive analysis of the League of Nations and modern forms of imperialism. Of particular importance here is Schmitt's early fascination with the sources of the U.S. hegemony in Central and South America as well as his discussion of the increasingly decisive role of the United States in the European arena after World War I (I, II).

Yet Schmitt ultimately relied on precisely this critique of liberal international law to offer what surely constitutes one of his most terrible contributions in a long and often sordid intellectual career: a defense of National Socialist imperialism during the late 1930s and 1940s. This phase of Schmitt's theory not only demonstrates his support for National Socialism well into the 1940s but also builds on core features of his Weimar critique of international law. Even in the Weimar period, Schmitt revealed a clear sympathy for forms of imperialist domination that, in his view, had successfully pierced the hypocrisies of liberal legalism. In the years following Hitler's seizure of power in 1933, Schmitt came to believe that Germany finally possessed a real chance to enter the elite club of great powers. Most provocative of all, Schmitt argued that the Nazis should learn from their main rival in the international

arena: the example of American imperialism in Central and South America allegedly offered an excellent starting point for justifying German hegemony in Europe. Schmitt's writings after 1938 thus primarily focused on the task of defending what he described as the German "greater region" [*Grossraum*], purportedly modeled on the lessons of American political and economic domination in the New World (III, IV).

Unfortunately for Schmitt, his attempt to turn the enigmas of American foreign policy against contemporary liberal aspirations for a binding system of international law fails. Schmitt repeatedly thematizes the Achilles' heel of contemporary international law—the fact that the great powers often manipulate its open-ended, indeterminate features—in order to deconstruct and undermine it. But his argument can be read, against the grain, as an appeal to get rid of this Achilles' heel. Although Schmitt accurately describes many of the ills of American foreign policy, he cannot legitimately claim to build his critique of liberal international law on the experience of American imperialism. In this part of his theory as well, Schmitt conveniently distorts the history of the liberal past in order to discredit the unfulfilled agenda of the rule of law (V).[1]

## I

In a fascinating yet long-forgotten monograph on the Allied occupation of the Rhineland region of Germany after World War I, the political theorist Ernst Fraenkel demonstrates that Allied policy toward the defeated Germans was one that explosively combined "political cynicism and legal idealism." Appealing to an ambitious Wilsonian liberalism resting on a virtually "unlimited belief in the force of law," the victorious Allies established a system of highly discretionary martial rule that in reality had little to do with the ambitious ideals of Western liberal jurisprudence.[2] Notwithstanding the endorsement of the Allied occupation by the newly established League of Nations, the occupying powers in fact considered themselves "entitled to do whatever they considered proper in their own interests," and thus a system of arbitrary situational law, suited to the ever-changing political needs of the French, British, and American occupation forces, characterized the Allied exercise of power in one of Germany's most important regions.[3] In Fraenkel's interpretation, the enormous gap between liberal legal ideals, together with the sad reality of legal arbitrariness in the Rhineland, was one of the sources of the assault on liberal democracy in Weimar Germany. For a sizable number of Germans directly under the hegemony of Allied rule, Wilsonian liberalism's dream of extending the rule of law to the international arena understandably looked like nothing more than a rhetorical cover for a mean exercise of brute

power. To Germans living outside the occupied territories as well, the significance of Allied hypocrisy seemed equally self-evident. Horror stories from the Allied occupation played a central role in the political propaganda of all the major parties but especially those on the nationalist authoritarian right. Owing in part to the hypocrisy of Allied rule, this propaganda often proved highly effective.

Schmitt's writings from the 1920s easily allow us to guess at the impact this experience must have had on the young legal scholar, who clearly identified emotionally with the western and overwhelmingly Catholic section of Germany subject to Allied rule. As an instructor at the University of Bonn (between 1921 and 1928), Schmitt was provided with what amounted to a daily initiation into one of the more unfortunate moments in the history of the international order between the world wars. Predictably, many of Schmitt's writings from this period tackle manifestations of the gap between "political cynicism and legal idealism" chronicled by Fraenkel. Even if we endorse normative and political standpoints antithetical to Schmitt's own, there is no question that some of Schmitt's criticisms are legitimate.[4] Nonetheless, we risk trivializing Schmitt's Weimar intellectual and political agenda if we simply read him as preoccupied, like so many of his countrymen on both the right and the left, with overcoming the local ills of the Allied treatment of post–World War I Germany. The power—indeed, the explosiveness—of Schmitt's reflections here stems from his success in translating commonplace criticisms of the Versailles Treaty and the League of Nations into a full-fledged assault on the intellectual core of the liberal quest in the twentieth century to include the international arena within the scope of a system of general, binding legal norms.

For Schmitt, allied domination of Germany is nothing but a particular version of a specifically modern form of imperialism, practiced most astutely by the United States, in which liberal international law generates a new and unprecedented system of domination more oppressive than any previous form of colonial domination. Liberals in the twentieth century espouse a universalistic ideal of self-determination, in which all peoples are granted the right to develop legally equal, independent sovereign states. Thus, direct forms of colonial domination are now basically anachronistic in character; in the twentieth century, direct territorial annexation becomes the exception to the rule. Schmitt considers this normative model a paradigmatic case of liberal hypocrisy. In reality, liberals today undermine state sovereignty by subjecting the vast majority of states to a tiny group of Leviathans, whose hegemony is all the more secure because liberal international law renders it invisible. The liberal ideal of the universal equality of all states now chiefly functions as a mask for novel forms of political and economic exploitation. In a similar vein, liberals dream of regulating political relations between independent

states in accordance with a set of general norms and courts capable of applying those norms. Just as earlier liberal theorists sought to replace the state of nature within the domestic arena with a systematic rule of law, so, too, do modern liberals aspire to overcome the state of nature between nations by subjecting international conflicts to a rational and universally binding system of enforceable legal norms. But in Schmitt's view, the proliferation of liberal legal devices on the international scene merely provides a new set of weapons for those states, the great powers, that are best situated to exploit them. The quest for codified law on the international scene is bound to fail. In this view, international law is unavoidably and inherently a highly partisan system of "political justice." The League of Nations is at most a League of the Great Powers.

Here as well, the problem of legal indeterminacy plays a central role in Schmitt's theoretical reflections. As discussed in previous chapters, Schmitt emphasizes the basically indeterminate character of liberal law in order to discredit the rule of law. He relies on the same method in order to attack liberal conceptions of international law. Because the core of liberal international law, like its domestic corollary, is inherently open-ended in nature, the idea of a binding international rule of law is necessarily an illusion, albeit a potentially dangerous illusion suited to the needs of those political interests best capable of exploiting the radical indeterminacy of law. In the international arena as well, liberal rhetoric about the rule of law simply serves as an ideological front for a system of law that is fundamentally decisionistic. The real question is always who will best prove able to take advantage of the decisionist essence of liberal international law: as far as the "decisive concepts of international law" are concerned, "the primary and most important question is not (the always easily disputable and dubious) content of the norm, but rather the question of *quis judicabit*?"[5] Because international law is unlikely to bind members of the international community even in the most modest fashion, it is imperative that those hoping to make sense of its operations figure out which political actors are most likely to manipulate legal norms and determine their content. An empirical analysis of political power, not legal hermeneutics, thus should make up the core of the study of international law. Even in the 1920s, Schmitt suggests that given the ascent of the United States, the Americans are most likely to "decide" the content of international law and thus gain most from its proliferation.

Schmitt systematically develops this position in his polemic against the Allied occupation of the Rhineland, but it immediately becomes crucial to his broader assault on liberal international law. Although the Rhineland occupation is endorsed by the League of Nations and the Wilsonian liberalism on which it rests, in reality the Allies rely on vague legal clauses in order to exercise extensive forms of discretionary power in Germany. The Versailles

Treaty left the extent of reparations undefined; sanctions were so broadly defined that the Allies have been able to justify virtually any action by reference to them; the investigative powers granted the Allies (in order to prevent German rearmament) allow for unlimited invasions of privacy; the powers of the occupying forces are so badly defined that arbitrary rule has now become the status quo in the occupied zone.[6] Of course, none of this is coincidental. Vague clauses are preferred by the biggest boys on the international block because they are best situated to exploit them. Open-ended legal clauses are even more common in the international arena than in the domestic setting because the great powers have sought to oppose the establishment of statutes that might be taken as requiring some limitations on their sovereignty. In crucial moments, every great power knows that it needs to remain the sovereign judge in those cases affecting its political interests. For Schmitt, the League of Nations has left this state of affairs fundamentally unaltered, notwithstanding its claims to the contrary.[7]

Most hypocritical of all, the reality of Allied arbitrariness in postwar Germany is veiled by the political rhetoric of humanitarian liberalism. In Schmitt's assessment, the League of Nations is fundamentally committed to the territorial status quo in Central Europe. Because it would be utopian to expect the League to try to overcome the self-evident misadventures of the Allies in postwar Germany, the League and Allied mistreatment of German are inextricably intertwined.[8] Allied injustice is justified by reference to Wilsonian liberalism and its belief that the League represents a peace-loving tool in the employ of "universal humanity." This easy alliance between universalistic liberalism and the League's policies generates a convenient ideological offshoot for the Allies: if the Allied occupation is ultimately an act of "universal humanity," then even modest criticisms of the occupation forces, let alone the League itself, can easily be branded "inhumane." Liberal universalism in international law thereby rests on an exclusionary logic by which those opposed to practices committed under its auspices are described as acting against "humanity." Those challenging Allied injustice quickly become "criminal" opponents of international law, whereas even a violent exercise of power under the auspices of international law represents a "legal" contribution to the humanitarian-ethical pursuit of universal peace, a mere "police" action in which international law is simply "executed." This is the main reason why Schmitt considers liberalism the most fundamental source of the "discriminatory concept of war," according to which wars undertaken under the auspices of international law increasingly are no longer even described as wars, while wars in opposition to international law (and the territorial status quo ensconced in its norms) are pictured as criminal acts of a lawless inhumanity. Liberal states use international law to mask their own acts of violence as expressions of legality while discriminating against their opponents

by describing their actions as criminal and inhumane. Notwithstanding the claim of international law to seek universal peace, for Schmitt it is therefore destined to generate wars more horrible than those hitherto known to modern history. Those challenging the international liberal legal system immediately become the "criminal" enemy of all mankind. Thus, "the Geneva League of Nations does not eliminate the possibility of wars. . . . It introduces new possibilities for wars, permits wars to take place, sanctions coalition wars, and by legitimizing and even sanctioning certain wars it sweeps away many obstacles to war."[9]

For Schmitt, the quest to use international law to resolve stormy political conflicts like those concerning the Rhineland rests on a politically absurd assumption, namely, the fundamental normalcy of the territorial status quo of post–World War I Central Europe. Life-and-death political conflicts cannot be effectively solved by liberal legal devices. "Normal" legal rules are inappropriate in a situation of crisis or abnormalcy. In this spirit, early modern political theorists long recognized that the rule of law was a poor device for regulating the most fundamental political conflicts. They pictured relations between different states as representing an international "state of nature" qualitatively distinct from the "rule of law" sought within the domestic arena. In Schmitt's view, something akin to this state of nature still characterizes international politics. Although for Schmitt the idea of the state of nature is conceptually problematic, it gives expression to a crucial political verity: political communities in the international arena inevitably confront adversaries who "must be repulsed or fought in order to preserve one's own form of existence."[10] Of course, liberals may pretend otherwise, emphasizing the "potential" of the League for overcoming the irrational character of international relations, but for Schmitt it would be naive to confuse such aspirations with the reality of contemporary politics.[11] Because Germany's interests are still fundamentally opposed to those of the Western Allies, the attempt to regulate relations between Germany and her international competitors by peaceful legal means not only is bound to fail but also represents a bad-faith effort on the part of Western liberalism to veil its fundamentally anti-German political agenda in the deceptively attractive language of international law.

Schmitt repeatedly argues that the recourse to typically liberal forms of legal conflict resolution (e.g., international tribunals) necessarily rests on a fiction—the existence of a functioning international political community in which existential, life-and-death political conflicts have been resolved. But no such community exists, either between Germany and her Western rivals or within the international community as a whole. The League of Nations is at best capable of coordinating "conferences" that perform some useful functions but otherwise is unlikely to act as an effective decision-making body, given the fact that it lacks the homogeneity essential, in Schmitt's theory, to

any successful political entity: "The differences in culture, race, and religion must lead to tensions" within the League of Nations that are unlikely to be effectively resolved in light of their fundamental political character.[12] "The real possibility of killing" haunts such conflicts, and "these can neither be decided by a previously determined general norm nor by the judgement of a disinterested and therefore neutral party."[13] In a telling metaphor, Schmitt concludes that the League rests on the ill-fated endeavor to create friendship between "lions" (i.e., the great powers) and "mice" (second-class powers).[14] At best, judicial devices may function to mask these conflicts. More likely, the lions will simply employ them as one weapon in their struggle to wipe out the mice.

The gist of this argument is that legalistic liberals falsely believe that they can formalize—that is, subject to formal law—life-and-death political divisions between unavoidably heterogeneous, antagonistic political entities incapable of being formalized. The obvious vagueness of so much of international law turns out to make up only the tip of the iceberg. Even if it were possible to codify international law, this measure would hardly overcome the main problem at hand. After all, lions and mice are sure to differ about the interpretation of even those legal terms that seem unambiguous and clear-cut in nature. *All* legal concepts, and not just those obviously open-ended in character, are "easily disputable and dubious" in the international arena. Radical indeterminacy is at the very core of international law; it is not simply a problem resulting from vague and deformalized standards.[15] Admittedly, Schmitt's Weimar writings do focus on semantically ambiguous, open-ended legal standards as the most obvious source of indeterminacy in international law. Nonetheless, it would be a mistake to read Schmitt as suggesting that a system of formal, codified law could free itself from the specter of radical indeterminacy. *All* forms of liberal law are necessarily plagued by the problem of radical indeterminacy.

The Allied treatment of Germany is of more than local significance in another respect as well. In Schmitt's eyes, it provides an example of how the indeterminacy of liberal law allows liberalism, despite its lip service to the ideal of universal self-determination, to make the modern sovereign state a hollow shell of its former self. Pace modern liberal rhetoric about the legal equality of all sovereign states, in reality an ever-smaller number of political giants dominate international affairs. Although deeply hostile to legal positivism and its most impressive contemporary advocate, Hans Kelsen, Schmitt does admit that positivist theories of sovereignty contain an empirical half-truth about contemporary political reality: their hostility to traditional conceptions of state sovereignty corresponds to the very real decline in effective sovereignty among second-class states forced to live in the shadow of a relatively small group of massive sovereign "lions."[16] In this part of Schmitt's

story, modern liberalism has abandoned any real interest in annexing territories or engaging in unmediated forms of direct political domination, chiefly because modern liberals have been forced to acknowledge the potential political costs of traditional forms of colonial domination.[17] Liberalism has simply found more effective instruments of control.

Most importantly, contemporary liberal states make ample use of what Schmitt considers the most creative American innovation in modern international law, the nonintervention treaty.[18] Fascinated by the United States' repeated use of the nonintervention treaty in its relations with Central and South American neighbors, Schmitt considers two of its features decisive. First, the promise of nonintervention nominally rests on a formal recognition of the sovereignty of the weaker state. Second, the treaty in fact makes a mockery of the idea of sovereignty by tying it to a series of typically open-ended, vague legal conditions that Central and South American countries (such as Cuba, Nicaragua, and Haiti) are supposed to meet. The nonintervention treaty is *in fact* an intervention treaty because the United States maintains the right to intervene if certain conditions—"public order," the "protection of life, liberty and property," "continued respect for international treaties"—are not upheld. Of course, the obvious vagueness of these conditions provides impressive leeway for extensive American intervention in the domestic and foreign affairs of a weaker power. Because of the de facto military and economic superiority of the United States in the new world, the United States in most cases unilaterally applies the ambiguous clauses at hand: "In the case of all of these nonintervention agreements it is important to note that due to the indeterminacy of their concepts the hegemonic power decides at its discretion and thereby places the political existence of the controlled state in its own hands."[19]

Schmitt delights in noting that the example of the nonintervention treaty illustrates his more general jurisprudential insight that "the exception is more interesting than the rule."[20] Not the main body of the general norms of the nonintervention treaty but rather its declaration of a series of exceptions to the rules of nonintervention allows us to make sense of the real state of affairs between the United States and the political "mice" living in its shadow. The United States has long made generous use of such exceptional clauses, and military interventions resting on them—which, as Schmitt emphasizes, are often undertaken for the sake of protecting American property—have defined much of the contours of Latin American history.

Yet the nonintervention treaty is only one of the many weapons of modern American imperialism. According to Schmitt, the United States is well on the way (by 1932) to becoming the world's dominant power, chiefly because it best understands the political potentialities of the emerging system of international law. Schmitt's Weimar writings constantly make use of a terse

phrase that he thinks allows him to capture the idiosyncrasies of American imperialism: "officially absent, but effectively present." In Central and South America, American power is invisible to the extent that the United States recognizes the sovereignty of smaller powers. In fact, the United States is the dominant force in the region, owing in part to its skillful manipulation of the exceptions outlined in the nonintervention treaties. In addition, the Monroe Doctrine, whose elastic clauses similarly provide the United States with vast discretionary power in the Americas, plays a crucial role in guaranteeing the de facto hegemony of the United States.[21] Schmitt marvels at the fact that "this Monroe Doctrine is a very general, very broad 'doctrine,' which provides grounds for altogether contrary forms of action. . . . What actually makes up the concrete substance of this multilayered, ever-changing, highly transformable Monroe Doctrine is decided by the United States alone. Only the United States determines what the Monroe Doctrine means in the concrete case."[22] In an analogous fashion, the liberal League of Nations simply ignores the most worrisome form of American power in Europe, American economic penetration of the European economy, despite the obvious importance that American economic muscle possesses for the fate of European civilization. Whereas the League strives to illegalize traditional forms of military expansionism and conquest, it does absolutely nothing to oppose the increasing economic penetration and domination of much of Western Europe by the United States. From the perspective of the League, the most important form of American power on the continent is "invisible" but only because the liberal ideology at the core of the League is blind to the political potentialities of capitalist economic power.[23]

Schmitt tries to get maximum mileage out of the fact that Article 21 of the League of Nations, which declared that the League and the Monroe Doctrine were compatible, seems to rest on an endorsement of the Monroe Doctrine. Once again, the exception—in this case, a seemingly obscure element of postwar international law—purportedly proves more interesting than the rule.[24] The United States of course never formally joined the League but, for Schmitt, remains its dominant force. In this sphere as well, the Americans have proven brilliant at exercising "officially absent, but factually present" power. By accepting the main tenets of the Monroe Doctrine, the League allegedly hands over de facto political sovereignty in the Americas to the United States, which exploits the open-ended clauses of the Monroe Doctrine in order to intervene willy-nilly in the political and economic affairs of its neighbors. In this interpretation, the League's recognition of the legitimacy of the Monroe Doctrine means that the League effectively excludes meaningful European involvement in the Americas. At the same time, many of the Latin and South American states in which the United States exercises de facto hegemonic power are themselves active members of the League.

Schmitt claims that their votes often played a decisive role in determining the outcome of crucial League resolutions about European affairs.[25] But if the United States is the de facto sovereign in much of the Americas, and if the substantial impact of the American states in the League is really nothing but a veiled exercise of power by the United States, then one is compelled to conclude that the United States is the "officially absent" but effectively decisive power within the League. The United States tolerates no European intervention within its American "empire," while simultaneously playing an active role in shaping the affairs of those European countries excluded from participation in the affairs of the Americas.[26]

Schmitt goes so far as to speculate that the 1928 Kellogg Pact potentially represents a starting point for transforming the Monroe Doctrine into a world-wide affair, according to which the United States would come to exercise hegemonic power on the global scale as it long has within the Americas.[27] Here as well, Schmitt underlines the problem of legal indeterminacy in order to pursue this surprising line of argument. Although promising to illegalize war, the Kellogg Pact in fact bans only wars that are an "instrument of national policy," in other words, traditional wars of national conquest. By no means does it intend to prevent military action under the auspices of "international politics," that is, wars engaged in for the sake of "universal humanity" according to liberal international law. Thus, the Kellogg Pact simply gives expression to the "discriminatory concept of war" that allegedly can function only to privilege the military adventures of liberal states over their rivals. Which liberal state is likely to determine the question of *quis judicabit*? In the case of the Kellogg Treaty? Who is best positioned to exploit its ambiguities? For Schmitt, the answer is obvious, in light of the fact that the economic, military, and political power of the United States is increasingly unmatched in the twentieth century. Just as the United States uses the open-ended clauses of the Monroe Doctrine in the Americas, Schmitt posits, so, too, can we be sure that it soon will rely on the Kellogg Pact to decide single-handedly when a war is defined as an instrument of international peace, a peaceful instrument for the maintenance of order and security, or when it is nothing but an act of barbarism undertaken against humanity.[28] For Schmitt, the United States is sure to describe its own wars, however bestial in character, as legal instruments having a humanitarian character, while describing its rivals' as criminal acts engaged in by the enemies of humankind.

## II

Schmitt's Weimar-era critique of liberal international law in the interwar years undoubtedly captures some of its fundamental weaknesses. Those

familiar with the postwar Realist literature in international relations theory can find parallels with Schmitt; elsewhere, I have directly addressed the intellectual nexus between Schmitt and important "IR" Realists such as Hans J. Morgenthau.[29] By the same token, it would be a mistake to let Schmitt off the hook too easily even where his analysis seems most impressive.

Schmitt provides a powerful warning about the potential dangers of new forms of imperialism that wrap themselves in the mantle of liberal universalism. Unjustified wars surely have been waged in the name of "universal humanity" in our century, and Schmitt provides his reader with a heightened sense of the real dangers of military power when employed by a self-righteous political and economic liberalism.[30] At the same time, it is unclear exactly how Schmitt's frontal attack on novel forms of liberal political and economic domination is consistent with his polemics against modern universalism. For example, Schmitt repeatedly expresses outrage at the potential barbarism of new forms of liberal war making. But why is this a problem in the first place unless Schmitt himself implicitly shares at least some typically modern, universalistic concerns about the basic equality and value of all human life? Schmitt is no closet liberal. But is it merely a coincidence that Schmitt's outraged attack on the violence of modern liberal wars occasionally proves oddly reminiscent of the very "humanitarian pacifism" which he so despises?[31] It is striking that the phenomena analyzed by Schmitt—for example, what historians have described as the "informal imperialism" practiced by the United States in parts of the Americas—have so often been successfully criticized within the intellectual parameters of a universalistic normative standpoint, namely, by liberals and Marxists just as disgusted as Schmitt with its obvious hypocrisies.[32] Yet liberal and Marxist analyses are more consistent in at least one respect. Why criticize the United States' political and economic domination of Latin America unless we presuppose, at least on some minimal level, a basic moral respect for peoples subjected to foreign political and economic exploitation? Foreshadowing some currents of contemporary postmodern anti-universalism, Schmitt too often simply assumes that liberal universalism necessarily rests on an inherently exclusionary logic. In a revealing comment in *The Concept of the Political*, for example, he makes the liberal "discriminatory concept of war" culpable for the attempt to exterminate native Americans in North America.[33] But is liberal universalism the culprit here and not a *fraudulent* universalism favoring the interests and perspectives of privileged white European settlers?

For those, like Schmitt, convinced of the inherent cultural and political imperialism of modern liberal universalistic ideals, such traditional concerns are sure to seem quaint and unconvincing. Without implicit recourse to them, however, it is unclear how Schmitt can ground what occasionally seems to represent the standpoint of his entire critique of liberal international law. At

crucial junctures, Schmitt criticizes the liberal agenda in international relations by emphasizing that its imperialistic core denies Germany "the right to her own free, independent, and undivided existence."[34] Yet this argument counts implicitly on one of the core conceptions of modern international law, the legal equality of all independent, sovereign states. Yet precisely this typically modern conception of statehood, notwithstanding its obvious limitations today, borrows substantially from certain elements of modern universalism: just as early modern political thought pictured independent, free, and equal individuals within a "state of nature," in a similar fashion early modern international law attributed "personhood" to the early modern state, and the "person" of the state was then pictured as free and legally equal within the international arena. How can Schmitt legitimately rely on such notions in light of his heated polemics against modern universalism?

It is also difficult to avoid the conclusion that a certain conceptual dogmatism characterizes Schmitt's declaration that interstate relations in our century remain fundamentally unregulated in character, that is, that international affairs still take place in a scenario approximating the "state of nature." My intention is not to downplay the irrationalities of contemporary interstate relations. Still, Schmitt provides us with a stark and overly dramatized choice: *either* we accept the unavoidability of a "state of nature" between states (in which there is at best only an extremely limited place for international law) *or* we strive for a centralized "world-state," possessing homogeneity and thus capable of functioning effectively as a coherent political entity. Because Schmitt considers the latter option both unlikely and fundamentally unattractive, he ultimately leaves us with a bleak picture of international politics in which the "real possibility of physical killing" necessarily continues to play a central role.[35]

Yet many of the more impressive defenses of liberal international law, and institutions like the League of Nations and United Nations, provocatively suggest that this formulation of the task at hand is fundamentally inaccurate. Schmitt's conceptual dogmatism means that he fails adequately to engage such views fully. For example, Schmitt delights in mocking Kelsen's vision of an international legal order in which traditional conceptions of state sovereignty have become anachronistic, but he fails to acknowledge some of the subtleties of Kelsen's account of international law. At least at some junctures in his career, Kelsen clearly shared some of Schmitt's skepticism about the likelihood of an emerging world state. At the same time, Kelsen struggled to identify the possibility of "transitional stages" in legal development between the violence-ridden "state of nature" and a full-scale international system of legislation and judiciary. Drawing a series of fascinating parallels to legal evolution in the domestic arena, Kelsen in 1940 argued that contemporary international law needs to be described as a system of "primitive

law" possessing many of the same attributes as relatively underdeveloped, decentralized systems of law. In this view, it is simply historically inaccurate to collapse the concept of law and the existence of a centralized lawmaker. Core elements of the former long functioned in many legal cultures without the latter, as the obvious example of customary law suggests. Even in an underdeveloped and incomplete system of international law lacking a central sovereign, Kelsen notes, sanctions do exist. In a manner akin to primitive systems of law familiar from the past, the application of these sanctions tends to be decentralized (i.e., it remains in the hands of individual states that maintain war-making powers) and relatively irregular in character. Nonetheless, it is wrong to believe that the absence of an international sovereign dooms us to a situation of utter lawlessness.[36]

Kelsen's theory is *not* the final word on the matter. Nonetheless, it is striking that so many of Schmitt's criticisms can be interpreted as attacks on elements of liberal international law that liberals themselves rightly have considered evidence of the *underdeveloped* character of existing international law. Liberals, of course, have long led the battle against vague and open-ended legal norms; Locke, for example, famously warned of the dangers of "indeterminate resolutions" in the law. From a classical liberal perspective, the persistence of such norms within international law could be taken simply as (obvious) evidence of its unfinished character.[37] In a similar vein, it is important to note that many international jurists have rightly questioned the "legal" status of the Monroe Doctrine, arguing that its elastic form and employment as an instrument of American imperialism meshes poorly with a defensible conception of the international legal system.[38] Conveniently, Schmitt simply dismisses concerns of this type; for him, the fact that the Americans rely on the Monroe Doctrine is evidence enough of its "legal" character.[39]

What of Schmitt's suggestion that radical indeterminacy is an inherent feature of international law, even when relatively clear-cut norms are at hand? Of course, this is a complex matter. Yet at least one element of Schmitt's own reflections suggests that such indeterminacy might be reduced. To the extent that Schmitt attributes legal indeterminacy to the existence of vast de facto inequalities between political "lions" and "mice," we might interpret his argument as a critique of a *superficial* form of liberal legalism that wrongly ignores the obvious problems posed by vast inequalities in the international arena. If the existence of "lions" and "mice" is one main source in the international arena of legal indeterminacy, then those of us committed to the extension of the rule of law to the international arena can draw a positive lesson from Schmitt's critique distinct from his own: our legalistic instincts can be satisfied only if we finally drive the "lions" from the international arena, in short, by reducing the de facto material, military, and political inequalities

among states. In that case, Schmitt's theory reminds us of the basic soundness of the insight that the rule of law needs to take the form of what Schmitt's chief social democratic rival in Weimar, Hermann Heller, described as the *social* rule of law.[40] In the international arena, just as in the sphere of domestic politics, the effective operation of the formalities of the rule of law requires a relatively substantial degree of factual equality.[41]

Does Schmitt propose an alternative to the liberal international order? Although occasionally nostalgic for the days of the Holy Alliance, Schmitt's Weimar writings never sketch out a clear alternative to the purported evils of "Geneva and Versailles." Nonetheless, his pre-1933 comments about the Monroe Doctrine point clearly toward the makings of Schmitt's subsequent National Socialist theory of international law. In this area of Schmitt's thinking as well, his Nazi-era theorizing builds directly on his Weimar ideas about legal indeterminacy.

As we have seen, Schmitt considers the Monroe Doctrine an essential component of modern American imperialism. But his assessment of the Monroe Doctrine is by no means purely negative. On the contrary, Schmitt can barely restrain his enthusiasm for this "astonishing political achievement of the United States."[42] In 1932, he bluntly asserts that it would be wrongheaded to consider the Monroe Doctrine a form of mean-spirited, inferior "cleverness and Machiavellianism."[43] On the contrary, the Monroe Doctrine is of "world-historical significance," a perfect manifestation of a "real and great imperialism."[44] The Americans have taught the rest of the world that the essence of modern imperialism is the manipulation of elastic legal concepts for the sake of swallowing up small and medium-sized states whose sovereignty is unlikely to survive the rapid economic and technological transformations of our era; the possibility that Germany might join their ranks clearly worries Schmitt. The Americans have brilliantly employed the Monroe Doctrine to reveal the future face of international relations: the world is destined to be carved up into a small group of "huge complexes," encompassing entire continents or more, in which a single political entity exercises de facto sovereignty over its neighbors.[45] The United States' domination of the Americas represents the future of international relations everywhere. In part, this has been achieved because the vocabulary and categories of American liberalism have become hegemonic in much of the world: "A people is only conquered when it subjects itself to an alien vocabulary and alien concepts of law, particularly international law."[46] American political hegemony rests on an uncritical acceptance by the world community of a set of inherently imperialistic liberal categories.

Even in the Weimar period, for Schmitt the real question is which countries are likely to gain membership to the elite group of "huge complexes" destined to dominate the globe. Although pessimistic in 1932 that Germany would

prove up to the task at hand, Schmitt's envious glance here at the American achievement already says a great deal about his underlying aspirations: "as a German" examining the Monroe Doctrine, Schmitt comments, "I can only have the feeling of being a beggar in rags talking about the riches and valuables of strangers."[47]

Within a few years of the Nazi takeover, Schmitt would argue that it was possible for Germany to trade in her beggar's rags for a share of imperial glory. To that episode in our story, I now must turn.

## III

Extensive scholarship on National Socialist theories of international law convincingly demonstrates that Nazi lawyers during the 1930s were faced with the impossible task of trying "to reconcile the irreconcilable."[48] On the one hand, political opportunism compelled recourse to many of the traditional categories of modern international law. Hitler's removal of Germany from the League of Nations, German rearmament, and the repossession of the Saar and Rhineland areas were justified, both in popular and academic discourse, by appealing to a relatively traditional conception of an international order consisting of equal, independent, and indivisible sovereign states: reliance on the traditional discourse of modern international law performed the vital function of easing legitimate fears outside Germany about Hitler's true intentions. If German remilitarization were simply an attempt to salvage a sovereignty acknowledged by many to have been unfairly undermined by the Versailles Treaty, what possibly could be so disagreeable about it?

At the same time, Nazi lawyers were supposed to rely on the foundations of the National Socialist *Weltanschauung* to construct an alternative to modern universalistic conceptions of international law. Accordingly, many of them rushed to embrace racist and anti-Semitic ideas in order to discredit liberal international law, just as their colleagues in the areas of public and civil law were busily debunking liberal formal law in the name of the "substantial" law of the German *Volksgemeinschaft*. This more radical strand in Nazi international law theory in the 1930s generally culminated in what John Herz early on perceptively characterized as a "pluralistic dissolution of uniform international law," in which general norms within international law were taken to be inconsistent with ethnic and racial difference.[49] Nazi racism and anti-Semitism meshed poorly with the more traditional features of Nazi legal discourse: notions of racial and ethnic inequality, for example, clearly conflicted with the conception of the formal equality of all states, just as they clashed with liberal concepts of formal equality within public or civil law. Predictably, Nazi international law from the 1930s proved tension-ridden and

inconsistent. Too often, the blatant racism and anti-Semitism of Nazi international law doctrine threatened to undermine its politically opportune traditionalist moments, for such traditional features often relied, if only implicitly, on modern universalistic moral and political ideals.

Carl Schmitt's contributions to a theory of Nazi international law between 1933 and 1938 exhibit precisely this intellectually enigmatic quest "to reconcile the irreconcilable." Like many of his colleagues, Schmitt appealed to traditional conceptions of state sovereignty in order to provide a justification for Hitler's main foreign policy moves during the 1930s, and Schmitt missed no opportunity to praise Hitler and his guidance of National Socialist foreign policy.[50] Simultaneously, the "pluralistic dissolution of uniform international law" unavoidably occupies a central place in Schmitt's reflections as a result of his enthusiastic endorsement of Nazi racism and anti-Semitism.

In *National Socialism and International Law* (1934), Schmitt polemicizes against universalistic models of international law by demanding an alternative that would rest unambiguously on the Nazi view that there are different racial "types" [*Arten*] of human beings and thus different "types" of human communities.[51] Schmitt's ethnicist arguments here serve the same purposes they perform in his parallel reflections on public and private law from this period. *National Socialism and International Law* criticizes "reactionary" and "nihilist" jurisprudential views, according to which the radical indeterminacy of international liberal law renders *any* system of interstate legal relations worthless.[52] For Schmitt, those emphasizing the radical indeterminacy of liberal law correctly perceive that formalistic liberal legalism generates nothing but legal "chaos," but they risk condoning this sad state of affairs by failing to appreciate the possibility of a postliberal legal paradigm able to overcome the crisis of legal indeterminacy.[53] As was discussed in chapter 5, Schmitt believed that legal indeterminacy could be counteracted by situating legal devices within an ethnically homogeneous community and an accompanying corps of jurists at home having its special "instincts" and trained in its particular modes of thought. From this perspective, indeterminacy within international law is chiefly a product of the liberal failure to recognize the dependence of an effective legal system on a common ethnic and racial "concrete order." Although the heterogeneous League of Nations inevitably suffers from the worst ills of legal indeterminacy, a regional alternative, resting on the ethnic and racial similarities of some European peoples, allegedly could guarantee a measure of legal determinacy among a (select) group of European states: "An authentic League of European peoples can only be successfully grounded by acknowledging the problem of ethnic substance [*völkische Substanz*] and by resting on the national and ethnic relatedness [*nationale und völkischen Verwandschaft*] of these European peoples" composing its membership.[54] Although he is conveniently vague about exactly

*which* peoples are to constitute this new system, let alone which form its relations to ethnically distinct peoples is to take, Schmitt in the mid-1930s is unambiguous about two points: the Soviet Union is not an authentically European power, and the "substance" of this new system of regional law has to be determined by the Germans.[55]

Not surprisingly, Schmitt's formulations from this period are mired in contradiction. He delights in declaring that the anti-universalistic character of Nazi law renders it "non-imperialistic and nonaggressive," and thus a dramatic intellectual and practical advance over both liberal law and Bolshevism, whose own universalistic features mean that it exhibits imperialistic qualities as well.[56] For Schmitt, the anti-imperialistic character of German law is assured in part by its anti-Semitic and racist attributes: if liberal universalism is inherently imperialistic, then the only answer to it can take the form of a rigorous *anti-universalism* along the lines sketched out by National Socialism. In this spirit, Schmitt praises German law because it starts with the "fact" of ethnic difference and is merely concerned with the "defensive" task of protecting "German blood" (!).[57] In contrast to liberalism, it thereby refuses to force one particular conception of humanity upon its neighbors; liberal concepts of universal equality posit a basic sameness among human beings, and liberalism hence lends itself to imperialism, as exhibited by busybody liberal outrage at Germany's legitimate experimentation in racial legislation. In this view, the anti-imperialistic character of Nazi law manifests itself most clearly in the principle that "reciprocal respect" should characterize relations between distinct ethnic groups. Pace liberalism, a belief in the existence of inherent ethnic differences hardly necessitates imperialistic relations between distinct ethnic and racial groups.

But what exactly is the basis of this "reciprocal respect"? The reader will search Schmitt's writings from this period in vain for an adequate grounding for it. Contra Schmitt, the mere fact of ethnic difference hardly provides an adequate justification for the suggestion that *all* ethnic groups are worthy of respect; only some (modern, more universalistic) conception of basic human equality arguably is capable of justifying a position of this type. What happens when a particular "folk" declares that its particular nature requires it to dominate others? Schmitt has no answer to this question, in part because the great achievement of National Socialist law in his view lies precisely in the fact that it finally has freed Germany from the suffocating tentacles of modern universalism.

Schmitt's emphasis on the alleged anti-imperialism of National Socialist law corresponds to the underlying logic of his reflections from this period on modern war. Radicalizing his initial Weimar-era reflection on liberalism's "discriminatory concept of war," Schmitt now suggestively describes a Germany besieged by imperialistic powers that *already* have launched an attack

on her territorial integrity. At precisely that historical juncture when Hitler's foreign policy took an increasingly expansionist tone, Schmitt provides a corresponding justification for Nazi belligerence.

Embellishing his earlier critique of the League of Nations, Schmitt again underlines the ways in which liberal international law blurs any meaningful distinction between war and peace. Intervention under the auspices of international law is a humanitarian "police action," even if it takes a bloody form, whereas relatively mild forms of nonviolent opposition to the League are criminalized: if a German military band in the occupied Rhineland plays a military hymn on a Sunday afternoon, Schmitt sarcastically comments, the indeterminate clauses of the Versailles Treaty allow the Allies to describe the action as a military "attack" on the League itself.[58] Schmitt now takes the additional step of arguing that this conceptual confusion in liberal international law corresponds to a real state of affairs in contemporary Central Europe. Because Western liberals have relied on legal devices (the Versailles Treaty, the League of Nations, the Kellogg Pact) to mask their assault on German sovereignty, and because modern war making now clearly involves propagandistic and economic instruments (economic sanctions, for example) long employed against Germany, it is absurd to claim that the Allies succeeded in reestablishing "peace" in Germany after 1918.[59] The Allies have merely been employing more subtle (and effective) instruments of war making since 1918; Schmitt's analysis seems to suggest that World War I has yet (in 1937!) to come to a close. The villain here is Woodrow Wilson, whom Schmitt considers responsible for the hypocrisies of liberal international law and its "discriminatory concept of war."[60] And, at least after 1937 (when relations between Britain and Germany rapidly deteriorate), the British are described as the inventors of the horrors of modern total war. It is they who allegedly have been most consistent in criminalizing those who dare to question the hypocrisies of liberalism. According to Schmitt, peace-loving peoples have more to fear from English liberalism than from the German "total state" established by Hitler.[61]

But Germany is not simply under attack by Anglo-American liberalism and its dangerous universalistic, left-wing second cousin, Soviet Bolshevism. Even the purportedly neutral powers are now Germany's existential foes. In a series of writings in 1937 and 1938 on the problem of neutrality, Schmitt vehemently argues that genuine neutrality is simply inconsistent with participation in the League of Nations, or any of the other institutions of modern liberal international law, given their inherently imperialistic character. If the League of Nations is nothing but the latest weapon of the liberal "total war" undertaken for the sake of a fictional universal humanity, then neutrality is impossible within the confines of League membership. Although professing neutrality, even mild-mannered Switzerland thus has joined the ranks of Germany's foes through its membership in the League.[62]

By 1938 and 1939, Schmitt's message to his countrymen was plain enough: Nazi aggression in Europe represents nothing more than a *defensive*, anti-imperialistic battle, legitimately undertaken for the sake of protecting the "ethnic difference" of the Germans and "related" European peoples. Needless to say, this interpretation meshed neatly with that of the Nazi party leadership.

## IV

On April 1, 1939, Schmitt gave a lecture on international law at the University of Kiel that immediately garnered attention from both academics and the general public.[63] Major daily newspapers provided positive reports about Schmitt's comments, and Schmitt's ideas soon became the object of an intense debate among Nazi jurists.[64] As noted in chapter 5, Schmitt had experienced a political and intellectual setback at the hands of academic rivals and elements within the SS in 1936. Schmitt's 1939 lecture, which offered the outlines of a specifically National Socialist theory of what he described as the *Grossraum* (greater region), represented his revenge against his detractors. Once again, Schmitt was able to reestablish his reputation as one of Nazi Germany's leading jurists; once again, Schmitt was in the public eye. Schmitt's writings during this period reveal the depth of his commitment to National Socialism. Schmitt's post-1938 writings on international law are hardly the writings of an "unpolitical" intellectual scared by the specter of a German concentration camp.[65] Well into the 1940s, Schmitt enthusiastically contributed to the construction of a distinctly Nazi legal order because he firmly believed that only the Nazis could overcome the jurisprudential ills of modern liberalism.[66]

As previously discussed, Schmitt's Weimar-era reflections on American imperialism suffer from a fundamental tension. On the one hand, Schmitt considers the Americans culpable for many of the hypocrisies of contemporary liberal international law. On the other hand, Schmitt is clearly envious of the success of the Americans. Schmitt's late Nazi-era essays are primarily occupied with the task of overcoming this tension. In 1939, Schmitt again turns to the experience of American imperialism. But now he struggles to overcome the ambiguities of his previous account in order to make use of the American case as a justification for Nazi expansionism in Eastern and Central Europe. Schmitt's message in 1939 is a simple one: Germany can join the ranks of the world's great powers by developing her own version of the Monroe Doctrine. If the Nazis are to succeed in making sure that Germany joins the ranks of the handful of "huge complexes" destined to swallow up small and medium-sized states, they need to learn from the foreign policy successes of the greatest of the world's great powers, the United States.

Of course, this undertaking raises obvious problems for Schmitt in light of his previous emphasis on the *liberal* character of American imperialism. How are the Germans to emulate the Americans without succumbing to the (alleged) ills of legal liberalism? In order to answer this question, Schmitt now juxtaposes the "original" Monroe Doctrine to its subsequent imperialistic distortions. According to an argument repeated throughout this period in his career, the former assures American hegemony in the Americas but allegedly lacks most of the ills of modern forms of liberal imperialism. In contrast, the latter rest on an expansive universalistic liberalism and provide a justification for American capitalism and its unceasing quest for foreign markets. Whereas the late Monroe Doctrine (which Schmitt associates with the "big stick" policies of Theodore Roosevelt) offers nothing worth copying by the Nazis, elements of the "original" Monroe Doctrine present a positive model, though hardly one deserving of blind imitation.

First, the early Monroe Doctrine allegedly possesses a genuine political character, deriving from its acknowledgment of the life-or-death existential threat posed to the fledgling American republics by the monarchical, antidemocratic Holy Alliance. Second, it rests on a "political idea," namely, a militant commitment to a particular (liberal democratic) mode of political existence. Third (and probably most important within Schmitt's gloss), it was primarily a geopolitical principle, meaning for Schmitt that it insisted that "alien" (i.e., European) powers had no legitimate place in the Americas.[67] As the most powerful American state, the United States necessarily monopolized the task of warding off alien powers. Revealingly, Schmitt not only considers this legitimate but also tends to underline its (supposedly) defensive characteristics.

In this account, only at the end of the nineteenth century did the Americans mistakenly transform the Monroe Doctrine into an instrument of American economic domination and a legitimization for intervening, willy-nilly, in the affairs of extra-American powers. Although the Monroe Doctrine has always possessed liberal democratic elements, it was not until the end of the nineteenth century that the Americans *subordinated* the Monroe Doctrine's sensible geopolitical orientation to the missionary impulses of an expansionist, universalistic liberalism aimed at achieving an American-dominated capitalist free market and system of international law. Only at that juncture did the Monroe Doctrine's liberal universalistic moments reign supreme and American imperialism become a force to be reckoned with on the world scene. For Schmitt, Great Britain plays a central role in this transformation. By joining hands politically and spiritually with the British (e.g., in World War I), the Americans ultimately inherited British dreams of a truly universal empire that would span the entire globe. Supposedly, the close ties of the United States to her chief liberal ally in Europe merely exacerbated the worst imperialistic tendencies of American liberalism.[68]

What form should a German Monroe Doctrine take? Most of Schmitt's writings from 1939 and the early 1940s try to answer this question. For obvious reasons, Schmitt repeatedly insists that the German rendition of the Monroe Doctrine needs to take the form of a creative reworking of the original. He clearly wants nothing to do with any of its liberal democratic features.

First, the Germans should build on the American insight that open-ended, elastic legal concepts are essential in the sphere of international politics. In contrast to the Americans, however, Schmitt situates these concepts within a "concrete order" of "specifically located, living with and next to each other and respecting each other" peoples [*Jede Ordnung sesshafter, mit und nebeinander lebender, gegenseitig sich achtende Völker*].[69] For Schmitt, a concrete order of this type must also exclude ethnically alien [*artfremde*] peoples; it seems that mutual respect is possible only among ethnically "related" peoples.[70] Even at this late stage in his Nazi career, Schmitt continues to hint at the possibility of developing a postliberal legal system by means of establishing a political community based on ethnic and racial "relatedness."[71]

Second, just as the Americans succeeded in developing a legal vocabulary appropriate to the particular needs of American liberal democracy, so, too, should the Germans formulate a legal theory resting on the special needs of the National Socialist *Volkgemeinschaft*. For this reason, Schmitt delights in relying on concepts and terms that lack any easy equivalent in other languages. By implication, only those in possession of authentic German "instincts" and mores are likely to understand them fully; Schmitt thereby builds on his claim from the mid-1930s that the ethnically derived "spirit" [*Geist*] of those who seek to interpret any given legal concept is always decisive. The key category of his theory is the complex term *Grossraum*, which literally means "great room" or "large space" but is often translated as "region" or "zone."[72] Most advantageous about this idiosyncratic German expression for Schmitt is that it illuminates the difference between his theory and traditional forms of "Jewish" liberal legalism. Embellishing familiar anti-Semitic arguments, Schmitt again argues that liberal jurisprudence was disproportionately influenced by cosmopolitan Jewish thinkers (in particular, Kelsen) who allegedly suffered from the lack of a "natural relationship to a concrete area of land."[73] The formalistic orientation of liberal legalism stems from the special needs of a people that has always lacked a territorially definable political "home" of its own. Whereas liberal jurisprudence thus absurdly tries to construct a system of universal international law valid for all places and all times, Schmitt argues that Nazi international law, in the spirit of the early Monroe Doctrine, must give a central place to the geographical and territorial situatedness of law. Allegedly, the term *Grossraum* best captures this regional or geographical facet of legal experience. In a similar vein, Schmitt insists on describing the dominant power within every *Grossraum* with the

untranslatable Reich. Whereas expressions derived from the Latin *Imperium* allegedly connote assimilationist, "melting pot" [*Schmelztiegel*] aspirations alien to Nazi conceptions of ethnic homogeneity, Schmitt suggests, the German term *Reich* is free of such unwanted connotations.[74]

In short, *international* law in the literal sense of the term is impossible. At best, one can hope to achieve legal forms linking neighboring, "related" ethnic communities located in rough proximity to one another.[75] For Schmitt, this insight implies the illegitimacy of legal intervention into any *Grossraum* by "alien" peoples located outside of it. In this fashion as well, the Monroe Doctrine is exemplary. Just as the United States long insisted that European powers should stay out of American affairs, so, too, should Europeans now insist that alien [*raumfremde*] powers—most importantly, the United States—mind their own business by avoiding involvement in European affairs. Schmitt thereby appeals to the Americans to respect their own foreign policy traditions by acknowledging the legitimacy of the emerging German Monroe Doctrine. Of course, Schmitt's timing here could not have been more opportune: he formulates this argument just as Nazi armies commence their drive for world conquest.[76]

Schmitt also argues that the German *Grossraum* theory, like the early Monroe Doctrine, needs to be guided by a distinct "political idea." But here the American example is only of minimal value. Schmitt bluntly declares that the early Monroe Doctrine's political commitments are now absurd, given the anachronistic character of liberal democracy in the face of modern economic and technological developments; Schmitt accepts the irrelevance of liberal democracy as self-evident.[77] The Germans should also employ the category of "freedom" in order to guarantee their hegemony in Europe. But they should advance a truly modern notion of what Schmitt now describes as "ethnic freedom" [*völkische Freiheit*]. In this view, National Socialism wages a heroic battle against assimilationist liberal ideals of citizenship by positing a political alternative capable of protecting the singularity and particularity of distinct ethnic groups. In Schmitt's argument here, the "liberty" to have one's ethnic and racial difference respected is a central goal of National Socialism.[78] For this reason, the Nazi *Grossraum* theory has an obvious existential foe: universal liberalism not only ignores the fundamental problem of ethnic difference but also seeks a global community in which the need for distinct *Grossräume*, each possessing legal devices particular to its special ethnic character, is obscured.

Although acknowledging the supposed virtues of competing models of National Socialist international law, Schmitt continually implies that his model alone captures the essence of National Socialism.[79] At first glance, this may seem surprising. However problematic on its own terms, Schmitt's discourse of "respect" for ethnic difference seems distinct from cruder ideas

of racial hierarchy advanced by rival Nazi ideologues. Yet precisely because Schmitt's argument here is more subtle than that of competing Nazi concepts of racial inequality, it potentially is all the more dangerous. Schmitt may have been a "better" Nazi than some of his rivals precisely because he offers a relatively sophisticated defense of National Socialist imperialism. His poison is so deadly precisely because it initially may not taste like poison.

First, Schmitt bluntly asserts that Jews in Central and Eastern Europe constitute an "alien" body.[80] They are undeserving of "ethnic freedom" in the first place. Second, he is notoriously vague when discussing which groups are "ethnically related" and thus rightful members of a *Grossraum* based on the principle of "ethnic freedom"; Schmitt himself is clearly primarily concerned with justifying Nazi intervention on behalf of ethnic German minorities in Central and Eastern Europe.[81] Despite the rhetoric of "ethnic freedom," it amounts in practical terms in his writings to nothing more than a defense of military intervention in the name of "saving" German minorities in Europe from the purported horrors of the "melting point" of ethnic assimilationism. (Of course, this was one of the most infamous justifications used by Hitler to dismantle the state system of Central and Eastern Europe; Schmitt's arguments here again neatly correspond to the political imperatives of Nazi foreign policy.) In light of the broader structure of his argument, none of this is a surprise. For Schmitt, the Germans are, in fact, a "superior" people in a vital sense of the term. Schmitt never hesitates to justify German predominance in the European *Grossraum* that he hoped the Nazis would achieve; supposedly, the Germans alone can establish a superior *Reich* capable of overseeing the "ethnic freedom" of subordinate peoples. As will shortly become evident, Schmitt believes that the era of the modern nation-state is rapidly coming to a close. Nonetheless, he still argues that some indispensable elements of modern statehood need to be preserved by political entities in order to avoid being decimated by their rivals. In particular, successful political communities need to develop impressive organizational and bureaucratic capacities in order to grapple with the dictates of an increasingly complex social and economic environment; of course, this was one of the main themes of his theory of the "total state" in the early 1930s. Just as the United States was long able to rely on its organizational superiority in the Americas to act as a "guardian" of its vision of (liberal) freedom, Schmitt suggests, so, too, should Germany now take advantage of its (purported) political and organizational talents to become guardian of its own vision of "ethnic freedom" in Europe.[82]

In a 1942 essay on the particularities of French legal culture, Schmitt asserts that different nationalities tend to possess different attributes and traits.[83] When read in light of Schmitt's emphasis on the purported superiority of German organizational capacities and suggestions that such differences are ethnically grounded,[84] his theoretical reflections ultimately risk becoming

nothing more than a complicated way of declaring that Germans are now Europe's "natural" rulers. What evidence does Schmitt adduce for Germany's organizational superiority? As the German scholar Hasso Hofmann has commented, if "one asks for a positive justification for the German claim for political leadership [in Schmitt's theory], the findings are quite unsatisfying."[85] For Schmitt, Hitler's "successes" in the sphere of foreign policy seem to provide their own justification: German organizational superiority is demonstrated by means of German military and economic resurgence.[86] Interestingly, precisely where Schmitt's recourse to the early Monroe Doctrine potentially contradicts a main component of Nazi imperialism, namely, the German annexation of foreign territory, Schmitt sides with the Nazis. Recall Schmitt's emphasis in the Weimar period that the Monroe Doctrine acknowledged the formal sovereignty of Latin and South American states by refusing to engage in the open annexation of weaker states. In his Nazi-era attempt to build on the legacy of the Americans, Schmitt not only downplays this point but also now openly argues that the idea of the legal equality of all sovereign states is nothing more than another moldy liberal myth worth discarding. Like the idea of the formal equality of all persons, the formal equality of all states is a silly fiction.[87]

Schmitt's concept of the *Grossraum* corresponds to the political needs of Nazi racial imperialism. But it simultaneously builds on a series of sociological half-truths about contemporary trends toward ever more centralized political and economic modes of organization. Schmitt's late Nazi writings repeat his claim from the Weimar period that most small and medium-sized states are now being systematically robbed of their sovereign status. Nowadays, the real players on the international arena consist of a handful of political giants. What drives this movement? Schmitt suggests that its sources are primarily economic and technological. Modern technology and contemporary economic organization have outstripped the nation-state, just as modern capitalism rendered the political decentralization of medieval and Renaissance Europe anachronistic. Existing political boundaries too often hinder the rational exploitation of economic and technological devices. Markets and economic networks are now supranational in character; radio allows political propaganda to reach the homes of foreigners living thousands of miles away from the voice of the broadcaster, while modern air warfare means that borders can be penetrated and foreign cities decimated within the blink of an eye. In this context, most existing state borders have little relation to the economic and technical possibilities of a world that seems to shrink in size daily, and modern nation-states are destined to be replaced by "greater regions"—in Schmitt's terminology, Grossräume—better attuned to the centralizing tendencies of our era and the "space revolution" [*Raumrevolution*] characteristic of it.[88]

Schmitt makes sure to distinguish his views from those of liberals who dream of an international market economy. In the language of contemporary social science, Schmitt endorses *regionalization* but not *globalization*. That is, he envisions a world carved up into a handful of relatively separate political, legal, ethnic, and economic blocs, but he is deeply hostile to any idea of a truly global political and economic community.[89] His reasons for this preference are manifold, including, as noted, a hostility to ethnic "assimilation." But at least one consideration is primarily sociological: he believes that a truly globalized economy is unavoidably "chaotic" because it is inherently "hostile to planning" [*planfeindlich*].[90] As we saw in chapter 4, Schmitt is a proponent of a form of state interventionist capitalism. Yet he considers it unlikely that such intervention can prove effective if forced to tackle the problems of a truly global political economy. While regionalized political units larger than the contemporary nation-state can be "organized" economically and technologically quite well, a truly global political economy is likely to overwhelm existing organizational capacities. Thus, so much of Schmitt's seemingly anti-capitalist rhetoric during this period turns out to be nothing but hostility to a *specific* form of competitive, free-market, laissez-faire capitalism, which in Schmitt's eyes is tied inextricably to the interests of Britain and the United States. Schmitt himself prefers an authoritarian mode of organized capitalism. But precisely because contemporary capitalism requires organization by political authorities, it makes most sense to conceive of the approaching global "order" as one consisting of a handful of competing regional *Grossräume* but hardly a world state.

## V

I have already tried to suggest that Schmitt's theory of the *Grossraum* meshed neatly with the aims of Nazi imperialism. Indeed, Schmitt himself actively sought to justify virtually every twist and turn in Nazi foreign policy by means of it. During 1939 and 1940, Schmitt employs the concept of the *Grossraum* in order to suggest the existence of a set of common interests between Nazism and the United States against Great Britain, to justify the Soviet-Nazi Pact, and to defend Japanese imperialism in the Pacific.[91] After the United States joins the Allied cause and Hitler invades the Soviet Union, it is then used to defend the Nazi war against both countries.[92] In light of our exegesis here, the enormous pliability of Schmitt's theory is hardly surprising. Schmitt hopes to formulate an elastic, open-ended set of concepts capable of guaranteeing German supremacy in Europe. As he noted during the Weimar period in his initial discussion of the Monroe Doctrine, *every "great imperialism" needs such concepts in order to justify situation-specific modes of political action*

*required by the rapidly changing dictates of Realpolitik*.[93] Schmitt's intellectual "accomplishment" in the late 1930s and 1940s was that he developed a specifically National Socialist theory of international law that nonetheless provided the Nazis with plenty of room to engage in just those maneuvers required by an emerging imperialistic power. Schmitt offered a theory containing Nazi anti-Semitic elements, while making sure to avoid unduly circumventing the awesome discretionary powers required by the Nazi political leadership in its quest to conquer Europe.

In chapter 5, I criticized Schmitt's view that legal determinacy, even in the context of vague and open-ended norms, could be salvaged by establishing an ethnically homogeneous political community and "rank" of jurists. Schmitt's own manipulation of the *Grossraum* idea for the sake of defending every major Nazi foreign policy move underlines the bankrupt character of this agenda. In this theory, international law is reduced to a mask veiling the momentary dictates of racial imperialism. Schmitt accuses liberalism of suffering from a radical indeterminacy that renders legal experience chaotic and even arbitrary. His emphasis on the indeterminacy of liberal international law, though overstated, can hardly be dismissed out of hand; much international law does suffer from this ill. But Schmitt's own antidote to liberal jurisprudence hardly resolves the problem at hand. Here as well, the only "determinacy" achieved by Schmitt's alternative to liberalism is that guaranteed by the fact that he extends "the industrial methods of taylorism . . . into the realm of statecraft in order to get the most precise answer to the question of how the will of the political leadership can be put into practical effect as speedily as possible."[94] In Schmitt's legal theory, international law is systematically reduced to a direct and unmediated plaything of Nazi *Realpolitik*. The ills of existing liberal international law no doubt stem in part from the fact that its legal character too often is undermined by the need to make concessions to the great powers; the open-ended character of much international law derives from this source. However, Schmitt's Nazi alternative simply makes a virtue out of this vice. His system of international law lacks any of the traditional virtues of liberal law—for example, the predictability that derives from the fact that public, general norms should apply to all members of the international community—for the sake of achieving a "determinacy" that consists in nothing but unmediated subservience to those who happen to exercise power most effectively in the international arena.

Can Schmitt legitimately claim to build on the legacy of the Monroe Doctrine? An impressive body of postwar German-language scholarship on Schmitt's theory of international law rightly argues that his recourse to American foreign policy represents a poor starting point for the theory of the *Grossraum*. Schmitt badly exaggerates the geopolitical facets of the early Monroe Doctrine. At least initially, the Monroe Doctrine was clearly a

defensive measure undertaken against the expansion of European colonialism in the Americas, but it was long widely seen as consistent with existing European political and economic privileges on the American continents. European intervention in the American sphere was pervasive throughout the nineteenth century. In fact, the dominant power in South America until the end of the nineteenth century was probably Great Britain, not the United States. In contradistinction to Schmitt's *Grossraum* theory, American foreign policy during most of the nineteenth century hardly resisted all European intervention within its sphere, and the United States was not what Schmitt would have described as a dominant *Reich* within the Americas. Moreover, the early Monroe Doctrine was greeted warmly by the United States' sister republics in the Americas, in part because its liberal democratic ideals, at least initially, were more than an ideological cover for American political and economic hegemony. American states hoping to free themselves from colonial tutelage thus enthusiastically endorsed President Monroe's response to the Holy Alliance's ominous declaration of intent to strengthen counterrevolutionary forces in the Americas. During much of the nineteenth century, the Monroe Doctrine was also fundamentally universalistic, at least in the sense of resting on an Enlightenment-inspired belief in the superiority of liberal democratic legal and political forms. In the final analysis, it had little in common with Schmitt's *Grossraum* theory, let alone the Nazi butchery condoned by it.[95]

Nonetheless, Schmitt's exegesis is partly correct on one important point. At the end of the nineteenth century, the Monroe Doctrine was reduced to a legal front for brutal forms of political and economic expansion. But Schmitt's analysis of the sources of this development is utterly wrongheaded. As we have seen, Schmitt attributes the imperialistic character of the "late" Monroe Doctrine in part to its embrace of universalistic liberal legal and political ideals. As a matter of fact, as interpreted by Theodore Roosevelt and defenders of American imperialism at the turn of the twentieth century, the Monroe Doctrine jettisoned the most defensible features of liberal universalism for Social Darwinism and crude concepts of racial inequality. Racial ideas, occasionally anticipating elements of those embraced by the Nazis and Schmitt in the 1930s and 1940s, took on a central role in American foreign policy precisely during that period that Schmitt accurately describes as imperialistic in character. Hannah Arendt was absolutely correct when she noted, "If race thinking were a German invention, as it has sometimes been asserted, then 'German thinking' (whatever that might be) was victorious in many parts of the spiritual world long before the Nazis started their ill-fated attempt at world conquest." As Arendt rightly notes, "Racism has been the powerful ideology of imperialistic policies since the turn of the century."[96] When Senator Albert J. Beveridge declared in 1900 that "God has made us adepts in government that we may administer government among savage and

senile peoples," he was simply echoing sentiments then commonplace among America's ruling elite and her intellectual apologists.[97] One of the founders of American political science, John Burgess, argued at the end of the nineteenth century that only "Aryan peoples" possessed a talent for political order and organization, and thus the Americans (in Burgess's theory, an "Aryan" people, albeit one increasingly threatened by immigration from Eastern and Central Europe) could legitimately interpret the Monroe Doctrine as a call to gain political supremacy over the racially "inferior" masses composing much of the world's population.[98] Foreshadowing some components of Schmitt's theory, Burgess relied on the political myth of the inherent "political genius" of Northern Europe; he then uses this myth to justify imperialism: "the temporary imposition of Teutonic order on unorganized, disorganized, or savage peoples for the sake of their own civilization and their incorporation in the world society" was justified in light of the fact that the "Teutons" represent the world's "great modern nation builders."[99] This racism was characteristically linked to a demand for "free markets" for American goods and capital, typically defended by means of the view that American capitalism had outgrown her national borders. To some extent anticipating Schmitt's view that modern economic and technological developments render the traditional nation-state anachronistic, American imperialism at the end of the nineteenth century rested on an explosive synthesis of expansionist capitalism and racism. It is no accident that it was during this period that direct territorial annexation (e.g., Hawaii) was justified in part by appeal to the Monroe Doctrine, notwithstanding its manifest inconsistency with the spirit of President Monroe's original declaration.

Of course, Theodore Roosevelt was neither a fascist demagogue nor was the American empire at century's end a Nazi *Grossraum*. The dangerous combination of racism and capitalism constitutive of modern imperialism has taken many different forms. As Arendt has shown in her classic *The Origins of Totalitarianism*, National Socialism built on elements of earlier varieties of imperialism, yet Nazism nonetheless represented a historical novelty. Patterns of thinking, institutions, and events essential to earlier forms of imperialism came to "reveal an altogether different meaning [within National Socialism] than what they stood for in the original context."[100] My point here simply is that Schmitt's gloss on the Monroe Doctrine conveniently obscures the manner in which the imperialism attributed to the "late" Monroe Doctrine anticipates some features of his *own Grossraum* theory. This blind spot is hardly surprising. If any period in the evolution of the Monroe Doctrine is reminiscent of Schmitt's *Grossraum* theory, it was that of the "late" Monroe Doctrine, when the liberal universalism despised by Schmitt took a backseat to the quest for profits and foreign plunder.

At many junctures during this study, I have suggested that Schmitt relies on historical myths in order to discredit his intellectual foes. He uses this ploy in his theory of the *Grossraum* as well. Schmitt's shocking defense of Nazi imperialism offers the clearest expression of its enormous political and intellectual dangers. In Schmitt's attack on liberal international law, historical fiction played a central role in preparing the way for the horrors of the Nazi war in Europe.

## NOTES

1. For some useful German-language literature on this moment in Schmitt's career: Lothar Gruchmann, *Nationalsozialistische Grossraumordnung. Die Konstruktion einer "deutschen Monroe-Doktrin"* (Stuttgart: Deutsche Verlagsanstalt, 1962); Dan Diner, *Weltordnungen. Über Geschichte und Wirkung von Recht und Macht* (Frankfurt am Main: Fischer, 1993), 77–124. Although written by a Nazi and thus suffering from some obvious problems, Ernst Rudolf Huber's " 'Positionen und Begriffe': Eine Auseinandersetzung mit Carl Schmitt," *Zeitschrift für die gesamte Staatswissenschaft* 101 (1941): 1–44, includes some insightful comments about Schmitt's critique of international law.

2. Ernst Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918–1923* (New York: Oxford University Press, 1944), 4–5. As part of the Versailles agreement, the Saar and Rhineland regions were placed under the control of Allied-dominated commissions. Occupation of the Saar was to last fifteen years, and then a referendum was to decide whether it would become part of Germany or France; according to the original agreement, foreign troops were to occupy the Rhineland until 1935. Beyond the fact that the Versailles Treaty thereby robbed the Germans of control of two strategic economic and military regions, it also gave the Allies the potential to regulate and limit German military forces at large.

3. Fraenkel, *Military Occupation and the Rule of Law*, 194.

4. See, for example, his discussion of irregularities in electoral laws in the Saar (Schmitt, "Die Wahlordnung fuer das Saargebiet von 29. April 1920," *Niemeyers Zeitschrift für Internationales Recht* 34 [1925]: 415–20).

5. Schmitt, "Die politische Lage der entmilitarisierten Rheinland," *Abendland: Deutsche Monatshefte für europäische Kultur, Politik und Wirtschaft* 5, no. 10 (1929–1930): 308.

6. Schmitt, "Das Rheinland als Objekt internationaler Politik" (1925), 32; "Der Status Quo und der Friede" (1925), 35; "Völkerrechtliche Probleme im Rheingebiet" (1928), 99–100, all reprinted in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*.

7. Schmitt, *Die Kernfrage des Völkerbundes* (Berlin: Duemmlers Verlag, 1926), 10–11.

8. Schmitt, *Die Kernfrage des Völkerbundes*, 47–55. Schmitt argues that Article 19 of the League, which allows for the reconsideration of "conditions whose

continuance might endanger the peace of the world," is effectively irrelevant given the power constellations found within the League.

9. The argument is stated most clearly in Schmitt, *Concept of the Political*, 56, but its elements are scattered throughout Schmitt's Weimar writings. It also plays an important role in his Nazi-era writings.

10. Schmitt, *Concept of the Political*, 27.

11. Schmitt, *Die Kernfrage des Völkerbundes*, 4; and Schmitt, "Völkerrechtliche Probleme in Rheingebiet," 108. Schmitt's clearest defense of the idea that interstate relations approximate the "state of nature" described by early modern political thought is found in his 1938 study on Hobbes. There, Schmitt expresses a certain nostalgia for Hobbes's "nondiscriminatory concept of war," according to which the individual sovereign state alone is suited to the task of defining justice and providing for legality. Because the state of nature in which individual states are located is basically lawless, "there can be neither a legal war nor a legal peace" (between separate nations) (*Der Leviathan in der Staatslehre des Thomas Hobbes*, 76). Schmitt shows respect for Hobbes's view that this model alone is able to overcome the dangers, so obvious in Hobbes's time, of civil wars between competing religious groups, each of which claims a monopoly on religious and moral truth. From Schmitt's perspective, modern international law suffers from ills dangerously reminiscent of those described by Hobbes. By legitimizing a (fictional) system of international law, liberalism undermines state sovereignty, so pivotal in the Hobbesian view to political stability, and paves the way for new "holy wars" to be waged in the name of universal liberal ideals (*Der Leviathan in der Staatslehre des Thomas Hobbes*, 72–76). It is important to note that Schmitt's nostalgia for the Hobbesian model is qualified substantially by his view that the era of the modern sovereign nation-state is now coming to a close. In the twentieth century, we cannot realistically hope to recapture this era and the Hobbesian rules which defined it; at the same time, Schmitt finds reference to it useful in his battle against liberalism. In addition, part of Schmitt's argument here is the empirical allusion that an international community based on Hobbesian principles is likely to prove more humane than one based on modern liberalism; lacking the universalistic pathos of modern liberalism, it is unlikely to wage brutal wars in the name of humanity. As Schmitt argues most clearly in a study published after World War II, but clearly begun during the early 1940s, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* [*The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*] (Cologne: Greven Verlag, 1950), Wilsonian liberalism thus represents an attack on what had been an unambiguously superior system of international relations. There, neither the Kaiserreich nor Hitler's Germany is held responsible for the German catastrophe and the collapse of international law in our century. On the contrary, the disruptive force of Wilsonian liberalism allegedly destroyed the Hobbesian conception of the "non-discriminatory war" and paved the way for the horrors of our times. Wilson, not Hitler, launched World War II (!). For timely contemporary criticisms of this line of argumentation, see Hans Wehberg, "Universales oder Europäisches Völkerrecht?" *Die Friedens-Warte* 41, no. 4 (1941): 157–66, for a critical discussion of Schmitt's romanticized view of preliberal international politics; Golo Mann, "Carl Schmitt und die schlechte Juristerei," *Der Monat*

5 (October 1952): 89–92, for a critical discussion of Schmitt's hostility to Wilsonian liberalism.

12. Schmitt, *Die Kernfrage des Völkerbundes*, 19–20, 63–80. See also Schmitt, *Die Verfassungslehre*, 376–37, as well as "Das Doppelgesicht des Genfer Völkerbundes" (1926), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 41.

13. Schmitt, *Concept of the Political*, 27.

14. Schmitt, *Die Kernfrage des Völkerbundes*, 68.

15. Hence Schmitt's statement that the most important legal concepts within the international arena are always fundamentally controversial. In my reading, this is more than one of Schmitt's many rhetorical flourishes; it should be taken absolutely seriously as a jurisprudential claim (Schmitt, "Die politische Lage der entmilitarisierten Rheinland," 308). This is also the source of his repeated assertion that the question of *quis judicabit?*, rather than the "normativities" of international law, needs to be considered the centerpiece of international law.

16. Schmitt, *Die Kernfrage des Völkerbundes*, 10–11; and Schmitt, "Völkerrechtliche Probleme im Rheingebiet," 107. Kelsen again is Schmitt's target here. In many works, Kelsen argued for the primacy of international law vis-à-vis the domestic legal system of each state. The internal norms of individual states must conform to international law; in the case of a conflict, international law should prevail. In Kelsen's theory, "municipal laws must always conform to international law; in cases of conflict, the latter declares all domestic rules or acts contrary to it to be illegal." See Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon, 1986), 21; and Hans Kelsen, *Das Problem der Souveranität und die Theorie des Völkerrechts* (Tübingen: Mohr, 1920). From Schmitt's perspective, Kelsen's theory represented an ideological justification for the worst hypocrisies of liberal international law. More recent empirically minded scholars have confirmed Schmitt's anxieties about the declining significance of the idea of the legal equality of all states (Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* [Cambridge: Cambridge University Press, 1996], 13).

17. Schmitt, "Das Rheinland als Objekt internationaler Politik," 28–30. In this view, open annexation has proven too costly: the annexing powers often were seen as having a series of obligations—for example, guaranteeing basic legal and even political rights—to the peoples of annexed territories. Schmitt's argument here is also a challenge to Joseph Schumpeter's influential theory of imperialism, according to which modern capitalism is essentially pacific and nonimperialist in character. For Schumpeter, imperialism is an atavistic leftover from a precapitalist era. For Schmitt, Schumpeter's theory represents a "highly political denial of the political character of economic processes and concepts." That is, it is a characteristically liberal-economic attempt to mask the potential political qualities of economic power (Schmitt, "Völkerrechtliche Formen des modernen Imperialismus" [1932], in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 162). I take a closer look at the nexus between Schmitt and Schumpeter in chapter 7.

18. Schmitt, "Das Rheinland als Objekt internationaler Politik," 29; "Der Völkerbund und Europa," 91–92; "Völkerrechtliche Probleme im Rheingebiet," 106;

and "Völkerrechtliche Formen des modernen Imperialismus" (1932), 169–72, all reprinted in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*.

19. Schmitt, "Das Rheinland als Objekt internationaler Politik," 29. For example, Article 3 of the Treaty of Havana (1901) reads that "the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, liberty, and individual liberty." Relying on Article 3, the United States occupied Cuba between 1906 and 1909 (cited in Hans Morgenthau, *Politics among Nations: The Struggle for Power and Peace*, revised and enlarged ed. [Chicago, IL: University of Chicago Press, 1954], 295–96).

20. Schmitt, *Political Theology*, 15. Exception or "optional clauses" certainly do play a major role in international law (Morgenthau, *Politics among Nations*, 263–66).

21. President Monroe's unilateral declaration of December 2, 1823, acknowledged the legitimacy of existing European colonies and dependencies within the Americas, while simultaneously proclaiming that "with governments who have declared their independence," attempts to suppress that independence would be interpreted as "manifestations of an unfriendly disposition towards the United States" (cited in Hans Morgenthau, *Politics among Nations*, 39).

22. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 166. Also on the Monroe Doctrine, see Schmitt, *Die Kernfrage des Völkerbundes*, 11, 20, 54, 72–73. The central place possessed by the Monroe Doctrine in modern international law in Schmitt's theory is evinced by the fact that he includes it in an edited collection of international law documents from 1930 (Carl Schmitt, ed., *Der Völkerbund und das politische Problem der Friedenssicherung* [Leipzig: Teubner, 1930]).

23. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 162–63; Schmitt, *Concept of the Political*, 54–55, 78–79.

24. Article 21 was a concession to Wilson, who argued—against Latin American opposition—that it was necessary if the U.S. Senate were to accept American membership in the League. The Senate never permitted U.S. membership in the League, but the League was left with an ambiguous statement about its relation to what, by the end of the nineteenth century, had come to serve as the main justification for American interventionism not only in the Americas but also in the Pacific region and Far East.

25. Schmitt counts eighteen American states, one-third of the League members, as de facto vassals of the United States. His favorite example of American influence is the vote on the 1931 German-Austrian Customs Union, in which Latin American votes proved pivotal. Obviously, his argument here is exaggerated. American influence in Brazil, for example, was relatively limited in contrast to its role in Cuba or Panama (Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 172).

26. On the United States and the League of Nations, see Schmitt, "Der Völkerbund und Europa," 91–92; and "Völkerrechtliche Formen des Imperialismus," 174–75.

27. The Kellogg Pact of August 27, 1928, condemned war as a means of national policy. Most members of the international community soon signed it, but the great powers insisted on certain reservation clauses. The United States declared the Monroe Doctrine consistent with it; Great Britain followed the American example by

declaring a right "to defend regions of the world the welfare and integrity of which constitute a special and vital interest for our peace and safety."

28. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 176–77.

29. I discuss Schmitt's impact on Morgenthau in "Carl Schmitt and Hans Morgenthau: Realism and Beyond," in *Reconsidering Realism: The Legacy of Hans J. Morgenthau*, ed. Michael Williams (Oxford: Oxford University Press, 2007), 62–92.

30. In this vein, see Danilo Zolo's recent account of the Gulf War as the "first cosmopolitan war" waged with the full support of the liberal international legal order and the United Nations. As Zolo reminds us, "The Allies used a greater quantity of explosives in the forty-two days of 'Desert Storm' than were used in the whole of the Second World War." On the American side, 148 died; on the Iraqi side, the numbers are probably 220,000, including many civilians (Danilo Zolo, *Cosmopolis: Prospects for World Government* [Cambridge, MA: Polity Press, 1997], 24).

31. For example, see Schmitt, *Concept of the Political*, 48–49, where Schmitt declares that it "is a manifest fraud to condemn war as homicide and then demand of men that they wage war, kill and be killed, so that there never again will be war."

32. William Appelman Williams, *The Tragedy of American Diplomacy*, 2nd ed., revised and enlarged (New York: Dell, 1972), for example, similarly describes the idiosyncrasies of American "imperial anti-colonialism."

33. Schmitt, *Concept of the Political*, 55. The idea that liberal constitutionalism is inherently hostile to "difference" has experienced a revival of sorts in recent years. For a critical discussion, see William E. Scheuerman, "Constitutionalism and Difference," *University of Toronto Law Journal* 14, no. 2 (1997): 263–80.

34. Schmitt, "Völkerrechtliche Probleme im Rheingebiet," 108.

35. "A world state which embraces the entire globe and all of humanity cannot exist. The political world is a pluriverse, not a universe" (Schmitt, *Concept of the Political*, 53).

36. Hans Kelsen, *Law and Peace in International Relations* (Cambridge, MA: Harvard University Press, 1948). One could also criticize Schmitt here from the perspective of recent empirical work on "international regimes" or "governance without government." This body of literature focuses on systems of shared norms and institutions within the international arena (e.g., the World Trade Organization [WTO]) whose rules are enforced by a complex coalition of individual states but by no single sovereign in the classical sense of the term. Many scholars have suggested that this phenomenon has gained in importance in recent decades (James N. Rosenau and Ernst-Otto Czempiel, eds., *Governance without Government: Order and Change in World Politics* [Cambridge: Cambridge University Press, 1992]).

37. For a discussion of the proliferation of deformalized law in the international arena by one of Schmitt's contemporaries, see Thomas Baty, "The Trend of International Law," *American Journal of International Law* 33 (1939): 653–64. U.S. lawyers of a "critical" bent have become skeptical of the traditional liberal quest for codified law. Like Schmitt, they thematize the pervasiveness of indeterminacy within international law. Unfortunately, they seem undeterred by its possible perils. For an overview of this discourse, see Nigel Purvis, "Critical Legal Studies in Public International Law," *Harvard International Law Journal* 32, no. 1 (1991): 81–127.

38. Gruchmann, *Nationalsozialistische Grossraumordnung*, 146–47.

39. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 167–68.

40. Hermann Heller, "Rechtsstaat oder Diktatur?" in Heller, *Gesammelte Schriften*, vol. II, ed. Christoph Müller (Tübingen: Mohr, 1992), 443–62.

41. The United Nations rests on an unambiguous commitment to the establishment of greater social justice. For this reason, the United Nations at least acknowledges the centrality of linking the quest for international law to the struggle to counteract illegitimate de facto inequalities. For a recent attempt to build on this legacy, whose chief opponent in the international realm often has been the United States, see David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, CA: Stanford University Press, 1995). In this spirit, Jürgen Habermas discusses the necessity of developing transnational forms of social policy in his "Jenseits des Nationalstaats? Bemerkungen zur Folgeproblemen der wirtschaftlichen Globalisierung?" in *Politik der Globalisierung*, ed. Ulrich Beck (Frankfurt am Main: Suhrkamp, 1998), 67–84.

42. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 178.

43. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 179.

44. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 169.

45. Schmitt, *Die Kernfrage des Völkerbundes*, 11; and Schmitt, "Völkerrechtliche Probleme im Rheingebiet," 107.

46. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 179.

47. Schmitt, "Völkerrechtliche Formen des modernen Imperialismus," 179.

48. Joseph Florian and John Herz, "Bolshevist and National Socialist Doctrines of International Law," *Social Research* 7, no. 1 (1940): 6.

49. John Herz, "The National Socialist Doctrine of International Law and the Problems of International Organization," *Political Science Quarterly* 54, no. 4 (1939): 539. Herz also makes the underlying contradiction within National Socialist law described here the main theme of a superb monograph, written after he was forced to flee Germany: Eduard Bristler [John Herz], *Die Völkerrechtslehre des Nationalsozialismus* (Zurich: Europa, 1938). Much of the literature on Nazi international law confirms the conclusions of Herz's groundbreaking research in the 1930s. See Virginia L. Gott, "The National Socialist Theory of International Law," *American Journal of International Law* 32 (1938), especially 711–13; Detlev F. Vagts, "International Law in the Third Reich," *American Journal of International Law* 84 (1990): 661–700; and Rüdiger Wolfrum, "Nationalsozialismus und Völkerrecht," in *Recht und Rechtslehre im Nationalsozialismus*, ed. Franz Jürgen Säcker (Baden-Baden: Nomos, 1992), 89–101.

50. See Carl Schmitt, *Nationalsozialismus und Völkerrecht* (Berlin: Junker & Dunnhaupt, 1934), in which he demands that Germany be treated as an equal in the international community; and Schmitt, "Sowjet-Union and Genfer Völkerbund," *Völkerbund und Völkerrecht* 1, no. 5 (1934): 267, where he repeats the demand. Schmitt's writings from this period provide a virtually complete apologetic history of the main trends within Nazi foreign policy. Germany quit the League on October 14, 1933; Schmitt immediately endorsed this move in a front-page newspaper article, telling his readers that a vote for Hitler (on November 12, 1933) constitutes a vote for

peace (Schmitt, "Frieden oder Pazifismus?" *Berliner Börsen-Zeitung*, November 11, 1933, 1). Schmitt's 1934 publications similarly endorse this decision. In 1935, Hitler directed the press to describe the 1935 Soviet-French pact as an attack on the Locarno Pact, a collective security agreement of 1925 intended to relax tensions stemming from the occupation of the Rhineland (see Ludolf Herbst, *Das nationalsozialistische Deutschland 1933–1945* [Frankfurt am Main: Suhrkamp, 1996], 144); Schmitt immediately jumped on the bandwagon with "Über die Innere Logik der Allgemeinpakte auf gegenseitigen Beistand" (1935), reprinted in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 204–9, and a front-page article in Germany's leading legal journal, "Die Sprengung der Locarno-Gemeinschaft durch Einschaltung der Sowjets," *Deutsche Juristen-Zeitung* 41, no. 6 (1936): 337–41, where the Nazi position is defended. He praises Italian fascist atrocities in Ethiopia in "Die siebente Wandlung der Genfer Völkerbundes" (1936), in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 210–13. Immediately after the passing of the Nuremberg laws, Schmitt rushes to defend them in "Die nationalsozialistische Gesetzgebung und der Vorbehalt des '*ordre public*' im Internationalen Privatrecht." His writings are also filled with polemics against the traditional legal idea of *pacta sunt servanda*, that is, the principle of the sanctity of treaties, precisely when Hitler was systematically dismantling Germany's treaty obligations to her neighbors.

51. Schmitt, *Nationalsozialismus und Völkerrecht*, 5, 7.

52. Schmitt, *Nationalsozialismus und Völkerrecht*, 15, 17.

53. Schmitt, *Nationalsozialismus und Völkerrecht*, 19.

54. Schmitt, "Die siebente Wandlung des Genfer Voelkerbundes," 213. This argument is repeated frequently. See also, Schmitt, "Über die Innere Logik der Allgemeinpakte auf gegenseitigen Beistand," 209, where he refers to the idea of a distinct "European community"; and "Sprengung der Locarno-Gemeinschaft durch Einschaltung der Sowjets," 339–40.

55. Schmitt, "Sprengung der Locarno-Gemeinschaft durch Einschaltung der Sowjets," 337–41; and Schmitt, *Nationalsozialismus und Völkerrecht* 28.

56. Soviet Marxism is universalistic in outlook and thus, for Schmitt, its legal conception is inherently imperialistic as well. Schmitt, "Die nationalsozialistische Gesetzgebung und der Vorbehalt des '*ordre public*' im Internationalen Privatrecht," especially 206, 211. The argument is repeated elsewhere, even after Schmitt's alleged break with National Socialism in 1936: see "Völkerrechtliche Neutralität und völkische Totalität" (1938), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar—Genf-Versailles*, 257; and "Neutralität und Neutralisierungen" (1939), also in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 286.

57. Schmitt, "Die nationalsozialistische Gesetzgebung und der Vorbehalt des '*ordre public*' im Internationalen Privatrecht," 208.

58. Schmitt, *Nationalsozialismus und Völkerrecht*, 21. For the general argument, see Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Munich: Duncker and Humblot 1938), especially 42–43.

59. Schmitt, "Über das Verhältnis der Begriffe Krieg und Frieden" (1938), in *Positionen und Begriffe mit Weimar-Genf-Versailles*, 247; also see, Schmitt, "'Inter pacem et bellum nihil medium,'" *Zeitschrift der Akademie für Deutsches Recht* 6 (1939): 595.

60. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, 51–52. This argument is then developed in greater depth in *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 191–299.

61. Schmitt, "Totaler Feind, totaler Krieg, totaler Staat" (1937), in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 238; and Schmitt, *Land und Meer. Eine weltgeschichtliche Betrachtung* [1942] (Stuttgart: Reclam, 1954), 5. Schmitt's anti-British arguments are summarized in Stephen Holmes, *The Anatomy of Antiliberalism*, 53–57.

62. Schmitt, "Das neue Vae Neutris," reprinted in *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 252–53; and Schmitt, "Völkerrechtliche Neutralität und völkische Totalität" (1938), 257.

63. The lecture served as the basis for a number of articles and, most important, Schmitt's 1939 book, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte* (Berlin: Deutscher Rechtsverlag, 1939).

64. For example, Karl Heinz Bremer, "Völkerordung und Völkerrecht," *Münchner Neueste Nachrichten*, April 26, 1939, 4; "Das 'Reich' im Völkerrecht," *Frankfurter Zeitung*, April 3, 1939, 2; and "Grossräumiges Denken: Prof. Carl Schmitt sprach in Kiel," *Deutsche Allgemeine Zeitung*, April 4, 1939, 7. On the reaction, see Bendersky, *Carl Schmitt: Theorist for the Reich*, 251–61. Lothar Gruchmann's monograph shows that Schmitt's writings were an important contribution to a broader Nazi attempt to appropriate the idea of the Monroe Doctrine for the sake of both keeping the United States out of the war between 1939 and 1941 and justifying Nazi imperialism. Hitler himself referred to the Monroe Doctrine in an important speech held on April 28, 1939, just a few weeks after Schmitt's lecture in Kiel gained national attention. Joachim Ribbentrop also made use of this discourse, and there is at least some evidence that the United States, if only for a brief moment, took it seriously during the summer of 1940 (Gruchmann, *Nationalsozialistische Grossraumordnung. Die Konstruktion einer "deutschen Monroe-Doktrin,"* 11–20). The question of whether Schmitt directly influenced Hitler's April speech is less important than the fact that Schmitt, once again, had managed to propel himself into the very center of debates within Nazi international law. Of course, Schmitt's timing could not have been more opportune: the outlines of the *Grossraum* theory were sketched out right before the Nazi invasion of Poland.

65. Bendersky, *Carl Schmitt*, 243–73.

66. This move also entails trying to overcome the antinomies found within Schmitt's writings in international law from 1933 to 1938. Schmitt now abandons traditional ideas (e.g., the idea of the formal equality of all sovereign states) in favor of a full-fledged, National Socialist conception of international law.

67. Schmitt's contrast between the (good) "early" Monroe Doctrine and its (bad) "late" rendition is alluded to in many of Schmitt's texts from this period. It is formulated most clearly in *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 21–40; "Grossraum gegen Universalismus" (1939), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 295–302; and Schmitt, "Die letzte globale Linie," in *Völker und Meere*, ed. Egmont Zechlin (Leipzig: Otto Harrassowitz, 1944), 342–49. The "early" Monroe Doctrine is also described positively in Schmitt, *Der Nomos der Erde im Völkerrecht*, 256–70.

68. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot*, 53–54; and Schmitt, "Die Raumrevolution," *Das Reich*, September 29, 1940, 3. (*Das Reich*, by the way, was edited by Josef Goebbels.) Carl Schmitt, *Land und Meer. Eine weltgeschichtliche Betrachtung*, 59–60. Schmitt's account of English liberalism, whose universalistic attributes he somewhat crudely traces to the fact that England very early became a sea power, is also articulated in "Das Meer gegen das Land," *Das Reich*, March 9, 1941, 17–18; and "Beschleuniger wider Willen oder: Problematik der westlichen Hemisphäre," *Das Reich*, April 19, 1942, 3.

69. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 7. *Sesshaft* can be translated roughly into "seated" or "situated."

70. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 64.

71. See, for example, Schmitt's comment that "norms and rules only gain their meaning and logic within the context of a concrete order" in "Die Auflösung der europäischen Ordnung im 'International Law' (1890–1939)," *Deutsche Rechtswissenschaft* 5 (1940): 277.

72. For example, the term *süddeutscher Raum* can be translated as "the region of southern Germany" or *Wirtschaftraum Hamburgs* as the "economic region of Hamburg."

73. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 12–13. Raphael Gross has argued that Schmitt's *Raum* terminology is fundamentally anti-Semitic in character: Raphael Gross, "Carl Schmitts 'Nomos' und die Juden," *Merkur* 47 (1993): 410–20. A similar argument has also been proffered by Wolfgang Palaver, "Carl Schmitt on Nomos and Space," *Telos* 106 (Winter 1996): 105–27. Schmitt's writings during this period are splattered with anti-Semitic references. For example, see "Das 'Allgemeine Deutsche Staatsrecht' als Beispiel rechtswissenschaftlicher Systembildung," *Zeitschrift für die gesamte Staatswissenschaft* 100 (1940): 22, where he describes the German-Jewish jurist Otto Mayer as an example of how the "relatedness" of the French and Germans was "poisoned" by means of inappropriate Jewish "involvement" [*Einmischung*] in their affairs; and "Die Formung des französischen Geistes durch den Legisten," *Deutschland-Frankreich: Vierteljahresschrift des deutschen Instituts/Paris* 1 (1942), where he associates Judaism with zealotry (18) and talks of the "total lack of connections of the Jewish spirit to the German people" (24). In addition, it is difficult to overlook the anti-Semitic imagery employed by Schmitt in his account of modern liberal universalism. Both Anglo-Saxon liberalism and the Jews allegedly endorse a *raumlosen Universalismus* (territory-less universalism), and thus Schmitt considers it fitting to describe the British as encouraging an "exodus" of valuables and legal titles from Europe ("Das Meer gegen das Land," 17–18; and "Raum und Großraum im Völkerrecht," *Zeitschrift für Völkerrecht* 24 [1941]: 179). Nicholaus Sombart was intimate with Schmitt during this period and has persuasively documented the depth of Schmitt's anti-Semitism (*Jugend in Berlin, 1933–1942. Ein Bericht* [Frankfurt am Main: Fischer, 1991], 249–76; also, Sombart, *Die deutschen Männer und ihre Feinde: Carl Schmitt—ein deutsches Schicksal zwischen Männerbund und Matriarchatsmythos* [Frankfurt: Fischer, 1991], 261–94).

74. Schmitt, *Völkerrechtliche Raumordnung mit Interventionsverbot für raumfremde Mächte*, 71.

75. Schmitt is extremely vague when describing the likely form relations between distinct *Grossräume* should take ("Raum und Grossraum im Völkerrecht," 146, 177).

76. After the United States joins forces with the British, Schmitt criticizes the Americans for having joined the wrong side ("Beschleuniger wider Willen oder: Problematik des westlichen Hemisphäre," 3). This 1942 piece also sheds light on Schmitt's picture of the United States, which he describes as politically indecisive and socially divided and thus incapable of establishing a coherent international order. Given its internal contradictions, the United States is most likely simply to export disorder to the rest of the world. Schmitt's comments here anticipate the picture of the United States presented in many sections of *Der Nomos der Erde im Völkerrecht*. Raphael Gross, in my view, correctly argues that many of Schmitt's anti-Semitic ideas are reformulated as anti-American ideas after World War II (Gross, "Carl Schmitts 'Nomos' und die Juden"). This tendency is already evident in Schmitt's writings from the early 1940s.

77. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 36.

78. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, especially 63–65, 70–71; and Schmitt, "Die Raumrevolution," as well as "Raum und Großraum im Völkerrecht," 178, where he relies on the term *ethnic freedom* [*völkische Freiheit*]. In 1944, the *Grossraum* is described as aiming to protect the "historical, economic and spiritual substance and particularity" of any given people ("Die letzte globale Linie," 349). In his postwar writings, Schmitt continues to make use of the category of the *Grossraum*. But its racial and ethnic elements are downplayed in favor of economic and technological considerations. Of course, those features are part of the original analysis as well.

79. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 15–16, where he praises competing National Socialist conceptions of a *Raum*-based international order (like that developed by Karl Haushofer) but argues that his model is ultimately superior. In a similar vein, see Schmitt, "Reich und Raum. Elemente eines neuen Völkerrechts," *Zeitschrift der Akademie für Deutsches Recht* 7, no. 13 (1940): 201–2; and Schmitt, "Raum und Großraum im Völkerrecht," 146, where he refers to the SS author Werner Best. Best criticized Schmitt's theory, accusing it of lacking sufficient Nazi credentials: Best, "Völkische Grossraumordnung," *Deutsches Recht*, 10, no. 25 (1940): 1006–7; and "Nochmals: Völkische Grossraumordnung statt: 'Völkerrechtliche' Grossraumordnung," *Deutsches Recht* 11, no. 29 (1941): 1533–34. However, Schmitt's position and Best's are ultimately similar. Schmitt makes use of the "folk" terminology (e.g., in his concept of "*völkische Freiheit*") as Best demands. Another rival, Reinhard Höhn, attacks Schmitt's theory of the *Grossraum* for failing to break adequately with a traditional legal formalism favoring "abstract" and "general" categories over "concrete" ones. At the same time, Höhn praises Schmitt for introducing the *Grossraum* terminology into Nazi legal thinking; Höhn comments that Schmitt performed a great "service" by making the problem of the *Grossraum* the centerpiece of debates among Nazi international lawyers (283).

Although the essay's polemical tone could lead the reader to miss this point, Höhn refines and embellishes Schmitt's theoretical innovations. There are some clear differences in tone and emphasis here, but Schmitt and Höhn clearly share a great deal as well (Höhn, "Grossraumordnung und völkisches Rechtsdenken," *Reich, Volksordnung, Lebensraum* 1, no. 1 [1941]: 256–88). For a fine discussion situating Schmitt's theory in the context of competing Nazi theories, see Dan Diner, *Weltordnungen. Über Geschichte und Wirkung von Recht und Macht*, 77–124. Schmitt's apologists often refer to these refinements to suggest that Schmitt's view was distinct from that of the Nazis (e.g., Bendersky, *Carl Schmitt*, 252–55.) Two caveats are in order here. First, there was no single National Socialist theory of international law; Schmitt's theory was one among a number of competing Nazi models. The fact that Schmitt differs on occasion, for example, from Haushofer or Best hardly means that Schmitt's theory was not basically Nazi in character. There was never a single, homogeneous Nazi theory of international law—or, for that matter, much else. The relationship between ideology and political practice within National Socialism is simply more complicated than this view tends to suggest. Second, Schmitt himself implies that his theory of international law supersedes, in the Hegelian sense, competing Nazi models of international law. That is, his theory contains the "most developed" features of their insights while nonetheless answering questions that competing theories cannot. In my reading of Schmitt, this claim definitely needs to be taken seriously. The mere fact that his theory is more complex than that of his intellectual rivals hardly transforms Schmitt, as writers like Bendersky have suggested, into a principled anti-Nazi. Especially interesting on this score is a 1942 book by G. A. Walz, published by the Nazis themselves: much of this book borrows directly from Schmitt's writings! G. A. Walz, *Völkerrechtsordnung und Nationalsozialismus* (Munich: Zentralverlag der NSDAP, 1942).

80. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 64.

81. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 55–66, where he criticizes universalistic models of minority protection in Eastern Europe.

82. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 77, 82–88.

83. Schmitt, "Die Formung des französischen Geistes durch die Legisten," where he comments that "one people [*Volk*] is especially musical, whereas another is technologically talented and educated," 2.

84. For example, he continues to subscribe to the idea that the Jews are an "alien" [*artfremd*] people possessing traits fundamentally distinct from those of the Germans.

85. Hofmann, *Legimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts*, 220.

86. For examples of Schmitt's praise for Hitler's leadership during this period, see *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 87–88; also "Grossraum gegen Universalismus," 302, where Hitler is praised for trying to use the Monroe Doctrine against the Americans; and "Führung und Hegemonie," *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im*

*Deutschen Reich*, 63 (1939): 7–8, where Schmitt waxes enthusiastic about Hitler's leadership abilities.

87. Schmitt, *Völkerrechtliche Grossraumordnung mit Interventionsverbot für raumfremde Mächte*, 75–76, 82–83.

88. The economic and technological elements of the *Grossraum* theory are developed at many junctures: "Die Raumrevolution," 3; "Das Meer gegen das Land," 17–18; "Raum und Grossraum im Völkerrecht," 145–49; "Reich und Raum: Elemente eines neuen Völkerrrechts," 201–2. More generally on the demise of the modern nation-state, see "Staat als konkreter, an eine geschichtliche Epoche gebundenen Begriff" (1941), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 375–85. Clearly, this element of Schmitt's theory is hardly inherently fascistic. In a strikingly similar mode, contemporary analysts of "globalization" describe a "compression of time and space," which is more than slightly reminiscent of what Schmitt described as the *Raumrevolution*. What is, obviously, troubling in Schmitt's theory is the beliefs that such trends are inconsistent with the rule of law and democratic government and that the "space revolution" justifies German political and economic domination of her neighbors. For a good survey of the debate on globalization, see Malcolm Waters, *Globalization* (New York: Routledge, 1995).

89. Linda Weiss persuasively argues that contemporary changes in the capitalist world economy suggest not a globalization of economic and political processes but a regionalization ("The Myth of the Powerless State," *New Left Review* 225 [1997]: 3–27). In her view, we are witnessing the development of regional political and economic blocs (the EU, NAFTA, APEAC) in Europe, the Americas, and Asia, in which economic integration is deepened within distinct regions but not necessarily across and between such regions. Within each region, Weiss argues, a single, dominant "catalytic" state plays a crucial role in deepening regional economic and political ties. To the extent that this interpretation is accurate, it is difficult to avoid acknowledging the *diagnostic* foresight of some elements of Schmitt's *Grossraum* theory. As the prominent international lawyer Antonio Cassese has noted that trends toward political and economic regionalization pose difficulties for the liberal ideal of a truly *international* legal order (*International Law in a Divided World*, 411). Schmitt's theory clearly illuminates some of these dangers. Interesting in this context is also Samuel P. Huntington's best-selling *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996). Huntington occasionally echoes Schmitt, notwithstanding the fact that he is a liberal democrat whose political preferences are obviously different from Schmitt's. For Huntington, as for Schmitt, the trend toward regionalization is irreversible. For both authors, each "greater region" (in Huntington's terminology, "civilization") rests on a political, economic, and cultural identity distinct from its competitors, and each "greater region" is likely to consist of a leading state and set of peripheral "concentric" states. Huntington not only shares Schmitt's skepticism about the prospects of international legal devices for the regulation of conflicts between distinct civilizations but also similarly argues that liberal universalism is self-righteous and potentially disruptive within the international arena (e.g., see 310). Reminiscent of Schmitt's call for the Americans to return to the nonimperialistic (read, nonuniversalistic) phase of the Monroe Doctrine, Huntington similarly wants the West (most importantly, the United

States and Western Europe) to abandon its (Enlightenment) universalistic aspirations. Just as authoritarian Asian states have recently emphasized the virtues of indigenous "Asian values" in order to delegitimize international legal devices, so, too, should the "West" emphasize its own distinct, particular "values." Like Schmitt, Huntington is quite vague when describing how conflicts between civilizations are to be resolved; it is probably no accident that he concludes with a call for the West to maintain its military superiority (312). I am grateful to Nathan McCune for bringing the similarities between Schmitt and Huntington to my attention.

90. Schmitt, "Die Raumrevolution" 3; as well as the reference to the "chaos" of British liberal universalism in "Raum und Grossraum im Völkerrecht," 169.

91. In particular, see "Schmitt, "Grossraum gegen Universalismus," 295–302; and "Raum und Grossraum im Völkerrecht," 176.

92. This strategy is seen most clearly in Schmitt, "Beschleuniger wider Willen oder: Problematik der westlichen Hemisphäre," 3; and "Die letzte globale Linie," 347. In particular, the latter essay, probably written during the second half of 1943, underlines the depth of Schmitt's commitment to the National Socialist cause. Even at this late juncture in World War II, he accuses the United States of engaging in imperialism in Africa, the Near East, and Asia (348). German and Japanese military involvement in these parts of the world, it seems, was merely defensive in character. In light of this essay, it seems to me that Reinhard Mehring is wrong when he claims that Schmitt's writings correspond to Nazi foreign policy until 1942. I see no reason for excluding the likelihood that Schmitt's views coalesced with those of the Nazis until the end of World War II. See Reinhard Mehring, *Pathetisches Denken: Carl Schmitts Denkweg am Leitfaden Hegels: Katholische Grundstellung und antimarxistische Hegelstrategie* (Berlin: Duncker and Humblot, 1989), 165.

93. For a reliable discussion of how Schmitt's Nazi theory builds directly on his analysis of American imperialism, see Schneider, *Ausnahmezustand und Norm*, 224–26.

94. Kirchheimer, "Legal Order of National Socialism," 100.

95. Developing these arguments, and many others, in opposition to Schmitt's reinterpretation of the Monroe Doctrine is the important achievement of Gruchmann's *Nationalsozialistische Grossraumordnung. Die Konstruktion einer deutschen "Monroe-Doktrin."*

96. Hannah Arendt, *The Origins of Totalitarianism* (San Diego, CA: Harcourt Brace Jovanovich, 1979), 158.

97. This rhetorical gem can be found in Morgenthau, *Politics among Nations*, 44.

98. Burgess was an influential professor at Columbia University and founder of the *Political Science Quarterly*.

99. John Burgess, cited in John G. Gunnell, *The Descent of Political Theory: The Genealogy of an American Vocation* (Chicago, IL: University of Chicago Press, 1993), 49–50. Of course, the fact that Burgess sees imperialism as temporary distinguishes his views significantly from Schmitt's. At the same time, Burgess offers more than a restatement of John Stuart Mill's well-known defense of liberal colonialism. By the end of the century, race thinking came to play a central role in colonial and imperial thinking to an extent that was not the case in Mill's theory.

100. Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks, CA: Sage, 1996), 64.

# Epilogue to Part One: Carl Schmitt in the Aftermath of the German Catastrophe

In the first part of this study, I have tried to show that Carl Schmitt very early identified the central issue of recent legal theory, but that he wrongly believed that National Socialism offered the only real solution to it. Ultimately playing an important part in what Friedrich Meinecke famously described in 1946 as the "German catastrophe," Schmitt believed, well into the 1940s, that only Nazism offered an answer to the enigma of legal indeterminacy.

Did Schmitt revise his views following Germany's military defeat in 1945? Probably not. The overwhelming tone of Schmitt's postwar writings is fundamentally unrepentant. Schmitt's recently published diaries document the depth of his anti-Semitism well after the Nazi defeat.[1] Schmitt does occasionally critically comment on Hitler there, but his distaste for the emerging American-driven liberal hegemony in postwar Western Europe constitutes a more conspicuous component of his reflections.[2] Although free of the unrestrained anti-Semitic histrionics so pervasive in Schmitt's Nazi writings, his most important postwar contribution to legal theory, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, builds directly on the theory of the Grossraum discussed in chapter 6. Many of the basic arguments directed against "normativistic" Judaism in the Nazi period are now redirected against the United States.[3] His *The Situation of European Jurisprudence* (1950) similarly builds on Schmitt's ideas from the early and mid-1930s, especially the belief that a European "concrete order" might overcome the crisis of legal indeterminacy. The key argumentative shift is that Schmitt now leaves the *source* of postliberal legal determinacy undisclosed.[4] A short essay from the same year simply reiterates earlier criticism of legal positivism

in order to blame the rise of Nazism on Schmitt's liberal and democratic political and intellectual opponents.[5]

None of Schmitt's postwar writings suggests any regret or sense of responsibility on his part for the German catastrophe.[6] On the contrary, Schmitt clearly considered himself a victim not only of Nazism but also of attempts to "reeducate" the Germans after the war.[7] Between 1945 and 1947, he spent more than a year in an American military jail (his American interrogators seem to have dismembered his personal library as well), and then Schmitt was banned from university teaching after the war. Throughout the remainder of his life, he clearly considered this punishment undeserved.

Schmitt was imprisoned because the Americans at first considered charging him at the Nuremberg Trials, before deciding to drop the matter because of the difficulty of linking Schmitt directly to Nazi atrocities. Ironically, Schmitt seems to have benefited from liberal jurisprudence's traditional preference for clarity and relative specificity in the definition of criminal acts. Yet General Lucius Clay hoped to punish the intellectual "masterminds" of Nazi Germany, and given Schmitt's prominent role among Germany's jurists, Schmitt was an obvious target.[8] In a series of exchanges with Robert Kempner, a German-Jewish refugee who played an important role in the American involvement in the Nuremberg Trials, Schmitt unequivocally denied any complicity in Nazism. Typically, his responses contain a number of (convenient) half-truths. Schmitt pointed out that his theory of the *Grossraum* was distinct from some competing Nazi theories of international law; he failed to mention that his own relatively complex ideas served his Nazi masters quite well. Schmitt also claimed that his *Grossraum* writings tend to avoid the crude Nazi discourse of "biological racism"; Schmitt conveniently forgot to note that his own theory of "ethnic freedom" [*völkische Freiheit*] corresponded neatly to Nazi foreign policy objectives and certainly represented a form of ethnic and racial thinking containing terrible political implications. Moreover, Schmitt's conceptual framework for the *Grossraum* theory was always fundamentally anti-Semitic.[9]

Schmitt's defenders have long tried to exploit his suggestion at war's end that his status in the Nazi regime, at least after the 1936 feud with the SS, was akin to Benito Cereno's in Herman Melville's fascinating 1855 novella of that title. In Melville's story, slaves seize control of a Spanish slave ship and kill the captain and much of the crew. In his stead, they force, at risk of death, a surviving Spaniard, Benito Cereno, to "play" the role of captain in order to avoid detection when an American ship approaches the former slave ship. According to Schmitt's defenders, Schmitt, like Benito Cereno, had no real power among the Nazis after 1936. Germany, like the Spanish slave ship, had been seized by an irrational mob and a set of petty tyrants (Hitler and

the Nazis). Akin to Cereno, Schmitt after 1936 was an ornament used by the regime, at the risk of harsh punishment, in order to gain a measure of intellectual respectability. Finally, Schmitt was "saved" by the Americans, who rightly squelched the political forces that threatened Schmitt's very existence.

Schmitt at one point does suggest an interpretation along these lines.[10] In light of our discussion of Schmitt's Nazi-era contributions here, however, there can be no question that it represents a desperate attempt at self-exculpation.

An alternative interpretation of Schmitt's highly ambivalent allusions to Benito Cereno is also possible. If I am not mistaken, this second reading is more in tune with the realities of Schmitt's Nazi-era activities.

When mentioning Benito Cereno in *Ex Captivitate Salus: Experiences from the Period 1945–47*, a book penned while imprisoned by the Americans, he was by no means thinking primarily of the role of intellectuals in Nazi Germany. In a revealing passage, he comments, "I am the last conscious representative of the *jus publicum Europaeum*, its last teacher and student in an existential sense, and I am experiencing its demise just as Benito Cereno experienced the journey of the pirate ship."[11] As we saw in chapter 6, Schmitt considered the United States responsible for destroying the traditional European system of interstate relations. In particular, Wilson's liberalism and its "discriminatory concept of war" allegedly undermined traditional European international law and generated the disorders of twentieth-century European politics; this is also one of the main themes of his postwar *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, which Schmitt was probably working on when Ex Captivitate Salus was written. During the early 1940s, Schmitt also associated the United States with ethnic assimilationism. As we saw above, he believed that the Nazi quest for "ethnic freedom" offered a viable alternative to the liberal universalistic melting pot [*Schmelztiegel*]. When read in conjunction with Melville's story, Schmitt's comments, written within the walls of an American jail, take on fresh significance. Melville occasionally describes the slave ship in terms that could be read as anticipating Schmitt's own nightmares about liberal assimilationism. Melville makes a great deal of the racial composition of the ship, the *San Dominick*, repeatedly bringing attention to its mixed white, black, and "mulatto" crew: "the visitor was at once surrounded by a clamorous throng of whites and blacks, but the latter outnumbering the former more than could have been expected. . . . But, in one language, and as with one voice, all poured out a common tale of suffering."[12] Melville's description is clearly intended to fill his nineteenth-century North American reader with anxiety. The very name *San Dominick* is supposed to remind readers of the Jacobin-inspired slave rebellion of 1799 in Santo Domingo (Haiti).[13] Read in this light, Schmitt's employment of Melville is meant to describe Schmitt's experiences

as a prisoner (both literally and metaphorically) of an ethnically and racially mixed American demos, now in control of the "ship" of European history. In this alternative reading, Schmitt is remarking critically, *not* about his place in the Nazi regime (which, in his view, tried unsuccessfully to counteract the American-led attack on the traditional European state system) but about his precarious status in an American-dominated Europe intent on pursuing a global, assimilationist economic and legal order. In Melville's story, the real captain of the rebel pirate ship, the tyrannical Babo, is described by Melville as an African who has "spent some years among the Spaniards."[14] In this respect as well, Schmitt's perception of his status in an American-dominated Germany parallels a crucial element of Melville's story. As his diaries reveal, Schmitt was obsessed during this period with the fear that American policy in postwar Germany was being significantly shaped by German-Jewish refugees who, in Schmitt's view, were returning to the continent to gain revenge against those, like Schmitt, who had led the courageous attack against "Jewish" normativism: "Precisely the assimilated Jew is the real enemy," Schmitt brutally comments in his diaries from after the war.[15] Reminiscent of the dangerous Babo in Melville's story, according to Schmitt, "assimilated" Jews now lead America's attack on Germany: "A very special master of the world, this poor Yankee, so fashionable with his ancient [*uralt*] Jews."[16]

Of course, Schmitt's reflections here are not only repulsive but poorly informed as well. American policy in postwar Germany was chiefly determined by the imperatives of the Cold War, not by angry German Jews returning home to gain revenge on former Nazis.

One irony of Schmitt's writings from the immediate postwar era is that his lifelong battle against formalistic legal liberalism now required him to defend some of the same legal devices that, just a few years earlier, he had denounced so ferociously. This predicament should come as no surprise to us: those threatened by the exercise of political power, rather than those who, like Schmitt during the Nazi period, engaged in its exercise, always have had the most to gain from the traditional formal protections provided by the rule of law. Facing the specter of Allied denazification, Schmitt immediately joined forces with those in Germany seeking a speedy conclusion to Allied "reeducation." Soon an outspoken defender of his old Nazi cronies' battle against Allied prosecution, Schmitt formulated a critique of the Nuremberg Trials in which he anticipated the main arguments employed against it in subsequent years by German conservatives.[17] Although Schmitt himself earlier viciously denounced the classical ideal of *nullum crimen, nulla poena sine lege* (no punishment without a preexisting statute),[18] he now appealed to the same principle in order to discredit the judicial prosecution of war criminals. A 1952 essay on Hobbes similarly criticizes retroactive lawmaking.[19] His postwar diaries speak critically of the use of vague, open-ended legal norms

in the Nuremberg Trials, and a 1950 piece alludes appreciatively to Anglo-American conceptions of due process.[20] A 1949 newspaper article calls for a general amnesty for former Nazis.[21] Of course, during the Nazi period, Schmitt had enthusiastically praised the Nazi employment of vague, open-ended standards and had expressed no qualms about National Socialist forms of retroactive lawmaking.[22] National Socialism—Schmitt claimed—offered a world-historical solution to the inherent ills of "alien" Anglo-American liberal legal thought. In those days, Schmitt never said a word in favor of amnesty for those persecuted by the Nazis.

Having devoted his best years trying to demonstrate the bankruptcy of liberal jurisprudence, Schmitt's postwar appeal to some elements of it necessarily rings hollow. In the face of the cautious (and ultimately limited) attempt by the Allies to denazify Germany, recourse to liberal jurisprudence proved opportune for Schmitt. But there is no textual evidence that his postwar experiences culminated in a fundamental revision of Schmitt's one-sided deconstruction of the liberal rule of law.

In contrast to Melville's Benito Cereno, who dies just after his liberation, Schmitt himself survived the "pirate ship" of the Federal Republic quite well: he reached the ripe old age of ninety-six. Although he was forbidden from teaching at German universities, and even though his most striking theoretical achievements were behind him, Schmitt continued to influence a sizable number of intellectuals in postwar West Germany.[23] As I hope to demonstrate in part 2 of this study, he also influenced postwar intellectual trends in the United States. The spirit of Carl Schmitt continues to haunt not only German courts and much German political discourse[24] but political thinking in the United States as well.

## NOTES

1. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51*, 18, 81, 154, 241, 255, 264.

2. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51*, 54, 117, 120–22, 186, 250, 264.

3. Gross, "Carl Schmitts 'Nomos' und die Juden."

4. Schmitt's *Die Lage der europäischen Rechtswissenschaft* [*The Situation of European Jurisprudence*] recounts the story of the deformalization of law (described here as the "motorization" of the legislator), resulting chiefly from the "steering of the economy by the state" (20). As previously discussed, this diagnosis played an important role in his theory of the total state and his Nazi-era writings from the 1930s. Schmitt now alludes to common European legal traditions as a possible source of a postliberal form of legal determinacy. Yet it is unclear exactly what common traditions Schmitt has in mind.

5. Schmitt, "Das Problem der Legalität" (1950), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*, 440–51.

6. In a letter of July 7, 1976, to the political theorist Ingeborg Maus, Schmitt continued to deny any responsibility for the rise of National Socialism: "*Ich* habe Hitler nicht ermächtigt . . . und ich [habe] *vor und nach* 1933 seine Legitimierung und sogar Legalisierung von Weimar her in Frage gestellt." ("I never empowered Hitler. . . . And both before and after 1933 I disputed his legitimacy and even legality from the perspective of Weimar.") I am grateful to Professor Maus for providing me with a copy of this letter.

7. This response was far too common among Germans after the war. See Josef Foschepath, "German Reaction to Defeat and Occupation," in *West Germany under Construction: Politics, Society & Culture in the Adenauer Era*, ed. Robert G. Moeller (Ann Arbor: University of Michigan Press, 1997), 73–92.

8. Claus-Dietrich Wieland, "Carl Schmitt in Nürnberg" (1947), 1999: *Zeitschrift für Sozialgeschichte des 20. und 21. Jahrhunderts* 2, no. 1 (1987): 96–122; van Laak, *Gespräche in der Sicherheit des Schweigens*, 31–36.

9. "Interrogation of Carl Schmitt by Robert Kempner, I—II," *Telos* 72 (1987), especially 111, 115.

10. Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Cologne: Greven Verlag, 1950), 21–22.

11. Schmitt, *Ex Captivitate Salus*, 75.

12. Herman Melville, *Billy Budd, Sailor and Other Stories*, ed. Harold Beaver (New York: Penguin, 1970), 221. Schmitt is not the only political theorist to grasp the significance of Melville's "Benito Cereno." See John Schaar, "The Uses of Literature for the Study of Politics: The Case of Melville's 'Benito Cereno,'" in his *Legitimacy and the Modern State* (New Brunswick, NJ: Transaction, 1981), 53–88.

13. See the editor's annotations in Melville, *Billy Budd, Sailor and Other Stories*, 449.

14. Melville, *Billy Budd, Sailor and Other Stories*, 290.

15. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51*, 18. Schmitt accuses the Jews of committing terror (!) against him (81); see also his nasty comments about those who fled Nazi Germany (252). Those who interrogated Schmitt (Kempner and Otto Flechtheimer) were of German-Jewish background.

16. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51*, 264.

17. Carl Schmitt, *Das internationale Verbrechen des Angriffskriegs und der Grundsatz "nullum crimen nulla poena sin lege,"* ed. Helmut Quaritsch (Berlin: Duncker and Humblot, 1994). Written in the summer of 1945, this book was commissioned by a prominent German industrialist, Friedrich Flick, who sought to avoid prosecution by the Allies. The manuscript serves this function well. Schmitt now does concede that crimes were committed by the Nazi leadership. The purpose of this concession, however, is merely to limit Allied prosecution to a tiny clique of political leaders; Schmitt's concern here is clearly with *minimizing* the scope of Allied denazification as much as possible. By no means should denazification extend to "ordinary business people." (Flick, by the way, was anything but that; he was one of Germany's leading industrialists before and after the German defeat in 1945.) Moreover, Schmitt

argues against the view that the Germans had acted in opposition to international law in 1939 by invading Poland, insisting that wars of aggression were by no means universally condemned at the outbreak of World War II. Schmitt's attempt to place sole responsibility for Nazi crimes in the hands of a tiny group of the Nazi elite was typical among Germans after the war: a very small group of criminals (Hitler, Josef Goebbels) was made responsible for the evils of Nazism, whereas the vast majority of Germans were depicted as innocents who had been mesmerized by a band of devils. Of course, this interpretation was opportune, especially in light of the fact that most members of the tiny band of evildoers held responsible for the war were dead by war's end anyhow (Hitler, Rudolf Hess, Roland Freisler, and others). Given that this text was published only after Schmitt's death and that Schmitt's *published* writings from this period are unrepentant, I am not sure how much one is to make of his admission that some crimes were committed by the Nazis.

18. Schmitt, "Nationalsozialismus und Rechtsstaat," 714.

19. Schmitt, "Dreihundert Jahre Leviathan," *Universitas: Zeitschrift für Wissenschaft, Kunst und Literatur* 7 (1950): 180.

20. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–51*, 146, 278; Schmitt, *Die Lage der europäischen Rechtswissenschaft*, 30.

21. Schmitt recalls the etymological origins of the concept of amnesty: "Amnesty means forgetting," and only by means of forgetting the purported crimes of Nazism can Germany allegedly put an end to the "civil war" of which denazification constitutes the latest stage of "continued injustice" ("Amnestie—Urform des Rechts," *Christ und Welt* 2, no. 45 [1949]: 1–2).

22. Schmitt, "Der Führer schützt das Recht," *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*.

23. van Laak, *Gespräche in der Sicherheit des Schweigens*; William E. Scheuerman, "Unsolved Paradoxes: Conservative Political Thought in Adenauer's Germany," in *Against Mass Technology and Mass Democracy: Essays in Twentieth Century German Political Thought*, ed. John P. McCormick (Durham, NC: Duke University Press, 1999), 221–44. Schmitt's direct influence on the authors of the Basic Law was limited. See Ulrich K. Preuß, "Vater der Verfassungsväter?: Carl Schmitts Verfassungslehre und die verfassungspolitische Diskussion der Gegenwart," in *Politischen Denken Jahrbuch 1993*, ed. V. Gerhardt, H. Ottmann, and M. Thompson (Stuttgart: J. B. Metzler, 1993), 117–34. Also: Bernhard Schlink, "Why Carl Schmitt?" *Constellations* 2, no. 3 (1996): 429–41.

24. See John Ely, "The Frankfurter Allgemeine Zeitung and Contemporary National Conservatism," *German Politics and Society* 13, no. 2 (1995): 81–121, for a discussion of Schmittian discourse in Germany's premier conservative newspaper.

*Part Two*

# CARL SCHMITT IN AMERICA

## *Chapter 7*

# Carl Schmitt and the Origins of Joseph Schumpeter's Theory of Democratic Elitism

It is widely acknowledged that Joseph Schumpeter's democratic theory exercised tremendous influence on American political science immediately after World War II.[1] Less well known is that the genealogy of Schumpeter's "theory of democratic elitism" can be traced to a series of interwar debates in Central Europe about the fate of parliamentary democracy. None other than Carl Schmitt, a colleague of Schumpeter's at the University of Bonn in the 1920s, played an important role in these debates. Schmitt was probably influenced by Schumpeter's initial contributions in the early 1920s to democratic theory. In turn, Schumpeter's classic *Capitalism, Socialism, and Democracy* (1942) can be read as an attempt to respond to Schmitt's own diagnosis of the crisis of parliamentarism.

I begin by describing a set of theoretical affinities between Schumpeter's and Schmitt's basic intellectual projects. Both authors respond to Max Weber's account of modern Western rationalism by suggesting that Weber downplays the role of the *irrational* within modern political and economic life. For both authors, *charismatic leadership* plays a far more important role in modernity than Weber ever acknowledges (I). I then turn to the specifics of Schumpeter's and Schmitt's dialogue on modern liberal democracy. Here as well, both authors are primarily concerned with the cultivation of an elite of charismatic leaders capable of circumventing the leveling winds of modern mass democracy. In order to counter the most problematic features of Schmitt's theory, Schumpeter struggles to show that a realistic, empirically minded analysis of modern liberal democracy need not culminate in a defense of dictatorship. By doing so, Schumpeter hopes to distinguish his own model of political competition from its fascist rivals (II, III). Nonetheless, Schumpeter's quest probably fails. Schumpeter's democratic theory ultimately remains mired in the same right-wing authoritarian intellectual milieu of which Schmitt was so much a part during the 1920s (IV).

## I

Schmitt was primarily a jurist and Schumpeter an economist by training. Yet both were concerned during their long intellectual careers with the task of formulating a critical response to Weber's account of the distinctive traits of modern Western rationalism. Although many commentators on Schmitt and Schumpeter have acknowledged the central place of Weber in the writings of both authors, thus far none has noted their basic similarity in approach to Weber.

In the modern state, the advent of rationalism for Weber entails a system of tightly organized and cogently formulated general legal norms, in which "every concrete legal decision. . . [is] . . . the 'application' of an abstract legal proposition to a concrete 'fact situation'" according to a formal set of abstract legal propositions and logic.[2] In this view, judicial and administrative decision making are increasingly formalistic in character. For certain influential strands within modern jurisprudence, decision makers ideally were to be akin to "an automaton into which legal documents and fees are stuffed at the top in order that [they] may spill forth the verdict at the bottom along with the reasons, read mechanically from codified paragraphs."[3] Modern law can be described as rational for many reasons. Its systematic character rests on the (rational) scientific activity of legal experts, who play a crucial role in its emergence and cultivation. In addition, modern law's formal character corresponds to the needs of a *disenchanted* world, in which law necessarily has been robbed of any transcendent normative bearings; thus, it matches the needs of a social universe in which instrumental rationality has become predominant. Determinate and thus relatively predictable in character, modern rational law effectively facilitates the pursuit of private subjective interests and values, while simultaneously acknowledging that its own structure no longer can give expression to any universally acceptable moral ideas.

Schmitt's relationship to Weber is surely a complex one.[4] Schmitt accepts core elements of Weber's description of modernity as fundamentally rationalized and disenchanted in character. But it should now also be clear that so many of Schmitt's most important writings during the 1920s and 1930s represent an attempt to offer a critical response to Weber. First, Schmitt adamantly opposes the Weberian suggestion that modern law increasingly takes the form of a cogent legal code able to provide predictability and calculability; the core of Schmitt's legal theory during the 1920s and 1930s rests on the idea that legal trends that Weber clearly considered *irrational* and antimodern (e.g., the proliferation of antiformal law, or the basic indeterminacy of judicial decision making) are pervasive within modern law. In addition, Schmitt defends a plebiscitary authoritarian alternative to modern liberal democracy. Dictatorship, not parliamentary democracy, is best suited

to the imperatives of modern social and economic experience. In the process, Schmitt at times defends the possibility of what from Weber's perspective surely would have represented an enigmatic reenchantment of modernity: *Legality and Legitimacy*, for example, concludes with a call for a dictatorship based on charisma or perhaps "the authoritarian residues of a predemocratic era."[5] Of course, Weber himself occasionally toyed with the virtues of charismatic leadership in political essays immediately before his death in 1920.[6] Still, there is no question that Schmitt substantially radicalized this feature of Weber's political reflections. Weber hoped to overcome the deficiencies of modern parliamentarism by supplementing parliamentary government with mass-based plebiscitarianism, arguing that charismatic leaders provide a healthy corrective to highly bureaucratized modern representative bodies and political parties. In contrast, Schmitt opts to *supplant* parliamentarism with plebiscitary authoritarianism. For Schmitt, modernity's insidious egalitarian tendencies can be counteracted successfully if we achieve an authoritarian dictatorship dominated by leaders (allegedly) possessing a proven ability to engage in decisive political action.

Schumpeter's critical engagement with Weber's account of modern *economic rationalism* parallels Schmitt's response to Weber. Just as Schmitt underlines elements of modern experience that are irrational from Weber's perspective, Schumpeter suggests that Weber badly neglects the centrality of the charismatic economic entrepreneur, the heroic "leader" and driving force of modern capitalist development.[7] Parallel to Schmitt, Schumpeter hopes to defend charismatic leadership from the ultimately debilitating forces of modern rationalism, which in Schumpeter's account are destined to culminate in an ominous form of bureaucratic state socialism. In this view, the best protection against the ills of modern rationalism is a defense, albeit probably an ill-fated one, of the creative entrepreneur whose central attribute is the ability to engage in decisive, unforeseeable, and even "irrational" forms of economic action.

In Weber's theory of modern economic experience, core elements of modern capitalism provide a perfect expression of modern rationalism and its quest to render natural and social processes calculable. Just as modern law alone provides for optimal legal predictability, only in modern capitalism does "exact calculation" reign supreme in economic affairs. Characterized most fundamentally by a "systematic utilization of goods or personal service" in which "calculation underlies every single action of the partners," modern capitalism alone rests on highly developed forms of accounting and bookkeeping, formally free labor, and the separation of business from household activities, each of which facilitates the quest for predictable forms of economic activity able to secure optimal control over the natural world.[8] In this view, the modern capitalist entrepreneur is a sober, bourgeois type,

expressive of a demanding "asceticism [that] was carried out of monastic cells into everyday life."[9] The discipline of the entrepreneur corresponds to the demands of a highly calculable and predictable economic universe in which increasingly "the technical and economic conditions of machine production . . . determine the lives of all the individuals who are born into this mechanism . . . with irresistible force."[10] Of course, in the *premodern* "capitalism[s] of promoters, speculators, concession hunters . . . above all, the capitalism especially concerned with exploiting wars," Weber acknowledges, entrepreneurial activity was "irrational" and adventurous, as entrepreneurs sought profit by means of risky and often reckless speculation, piracy, and even force.[11] But *in modern* capitalism, the entrepreneur allegedly trades in his more romantic traits for the self-possession of the contemporary businessman. Just as modern capitalism rests on the principle of exact calculation, so too does its leading figure, the modern entrepreneur, come to embody a disciplined, systematic and calculating ethos increasingly common among all strata of modern society.

Despite his emphasis on the rationalistic contours of modern capitalism, Weber never denies that some forms of modern socialism represent a possible extension of crucial elements of modern rationalism. By aspiring to deepen trends toward a "mechanized" and bureaucratized economic universe, socialism undoubtedly represents one possible outcome of the modern quest for predictability and calculability: "it is from . . . the discipline of the factory," the main institutional microcosm of the broader capitalist quest for efficiency, "that modern socialism has emerged."[12] Of course, Weber argues that state socialism is likely to culminate in a bureaucratic nightmare, perhaps even a "mechanized petrification" unprecedented in Western civilization. Yet this hostility serves only to reinforce his sense of the profoundly ambivalent character of modern rationalism. Having generated possibilities for individual liberty, rationalism potentially prepares the way for a state-dominated economy capable of satisfying basic economic needs in a regular and highly calculable fashion but unlikely to provide even the most minimal possibilities for human autonomy.

Schumpeter's massive oeuvre builds, both explicitly and implicitly, on Weber's account of modern economic life. Schumpeter's writings are filled with descriptions of the "rationalizing" attributes of modern capitalism; in the pivotal *The Theory of Economic Development*, he explicitly attributes his use of this term to Weber.[13] Most importantly, he follows Weber closely in stressing the important place of modern capitalism in the emergence of a modern "rationalistic" civilization in which metaphysical, mystical, and romantic modes of thought are relegated to the sidelines and scientific "matter-of-fact" attitudes increasingly predominate. For Schumpeter, as for Weber, modern capitalism is "the propelling force of the rationalization of

human behavior,"[14] facilitating the disenchantment of the modern world and a host of changes in human behavior and thought. Capitalist civilization is fundamentally antiheroic and utilitarian in character. Contra Karl Marx, it is also basically pacific; as Weber intimated, the modern capitalistic ethos of "exact calculation" is ultimately inconsistent with military and political adventurism.[15] Because "the same rationalization of the soul rubs off all the glamour of supra-empirical sanction from every species of classwise rights," economic rationalism also inevitably fans the flames of modern mass democracy, inadvertently jeopardizing even minimal forms of political and economic privilege.[16] In this interpretation, capitalism need not fear the specter of the cataclysmic economic breakdown prophesied by Marxist theorists. Instead, immanent threats to capitalism derive from its own rationalistic culture, which for Schumpeter incessantly breeds radical egalitarian challenges to the legitimacy of forms of traditional political and capitalist inequality: Schumpeter repeatedly undertakes to demonstrate that intellectuals steeped in the culture of modern rationalism tend to give expression to anti-capitalist views, thereby undermining the very institutional roots of the rationalistic culture of which they are so much a part. In a world in which a pervasive rationalism means that nothing can be sacred, even capitalism itself is likely to come under attack.[17]

Schumpeter goes even further than Weber in suggesting that state socialism rests on broader developmental tendencies constitutive of modern economic rationalism; here, economic rationalism leads *unavoidably* to an oppressive, perfectly rationalized state socialism.[18] Pace Mises and Hayek, socialism *is* economically feasible.[19] Even more importantly, it simply represents a deepening of present trends toward an economy dominated by huge bureaucratized firms in which leadership functions are exercised by a corps of highly trained technicians and specialists:

> The economic process tends to socialize *itself*—and also the human soul. By this we mean that the technological, organizational, commercial, administrative, and psychological prerequisites of socialism tend to be fulfilled more and more. Let us again visualize the state of things which looms in the future if that trend be projected. Business, excepting the agrarian sector, is controlled by a small number of bureaucratized corporations. Progress has slackened and become mechanized and planned. . . . Industrial property and management have become depersonalized—ownership having degenerated to stock and bond holdings, the executives having acquired habits of mind similar to those of civil servants. Capitalist motivation and standards have all but wilted away. The inference as to the transition to a socialist regime in such fullness of time is obvious.[20]

For Schumpeter, Marx was basically right to predict that small-scale competitive capitalism would inevitably be replaced by a "corporate capitalism"

with a relatively small number of massive firms in which entrepreneurial functions themselves are rationalized. But Marx was wrong to see socialism as representing an altogether novel force in human history. On the contrary, socialism simply offers more of the instrumental rationality, mechanization, and bureaucratization so familiar to those already acquainted with the "iron cage" of rationalistic modern capitalist civilization. Socialism simply entails putting additional locks on the cage so as to eliminate any possibility of escape.

Although less hopeful than Weber about the prospects of capitalist civilization, Schumpeter nonetheless takes it upon himself to do battle with the socialist specter. In order to do so, however, Schumpeter introduces into the core of his economic theory a conception of the capitalist entrepreneur that is dramatically at odds with Weber's account of modern rationalism. In the process, his theoretical agenda approximates core features of Carl Schmitt's.

Whereas Weber tends to depict the modern capitalistic entrepreneur as an embodiment of the "sober" calculative ethos of modern capitalism, Schumpeter offers a more colorful portrayal of the entrepreneur. Indeed, a number of scholars have perceptively suggested that Schumpeter simply applies Weber's sociological category of charisma to his famous analysis of economic leadership in the capitalist firm.[21] Substantial textual evidence supports this interpretation. In Schumpeter's account, the entrepreneur is a heroic figure, capable of pursuing economic innovation by piercing the crust of worn-out commercial routines and introducing new forms of economic activity. The entrepreneur possesses a "will to conquer," a "joy of getting things done," resoluteness, vision, and a "sensation of power."[22] Without him, economic life would consist solely of a series of routinized "circular flows." Economic development would never occur, since no new goods, productive methods, sources of supply, forms of industrial organization, or markets would ever be introduced. It is his creative activity, not the changing currents of consumer demand, that for Schumpeter constitutes the fundamental phenomenon of economic development in modern capitalism. Consumers merely *respond* to the creative achievements of the entrepreneur. They no more determine entrepreneurship than, say, consumer demand "necessitated" innovations in computer technology in the 1960s or 1970s.

Moreover, the creative activity of the entrepreneur is badly captured by standard economic models of human rationality like those implicit in Weber's gloss on modern capitalism's ethos. Despite its centrality for modern economic life, modern social science has yet to develop tools appropriate for analyzing entrepreneurship.[23] In a provocative discussion of what we today would describe as the foundations of "rational choice theory," Schumpeter argues vehemently that many traditional conceptions of the "rational economic man" fail to capture the essence of entrepreneurship. In this view, the

core of entrepreneurship consists in the ability to act in *novel* ways that often seem *irrational* from the perspective of preexisting forms of economic behavior. Existing models of rational action stumble here because

> the nature of the innovation process, the drastic departure from existing routines, is inherently one that cannot be reduced to mere calculation, although subsequent imitation of the innovation, once accomplished, can be so reduced. Innovation is the creation of knowledge that cannot . . . be "anticipated" by the theorist in a purely formal manner, as is done in the theory of decision making under uncertainty.[24]

Neoclassical conceptions of rational action correspond to an economic world of routine and the repetition of similar events. Yet they do a poor job of capturing forms of unprecedented and drastic shifts in behavior having highly unpredictable consequences. From the perspective of a model of rationality modeled on *calculation*, entrepreneurial activity seems utterly irrational.

For Schumpeter, the final tragedy of capitalism is its immanent subversion of the *differentia specifica* of capitalist development, the entrepreneur. Filled with nostalgic paeans to the disappearing entrepreneur of classical capitalism, Schumpeter's writings suggest that rationalization ultimately turns against precisely that figure so crucial to capitalism, the (irrational) charismatic entrepreneur.[25] Workers are not the only ones whose lives are remade under capitalism according to the dictates and rhythms of rationalization. The activities of the classical entrepreneur are similarly broken down into a distinct set of tasks, to be tackled by an array of specialized technicians, engineers, and managers.

> Rising specialization and mechanization, reaching right up to the leading functions, has thrown open positions at the top to men with purely technical qualifications that would, of themselves, be inadequate to the needs of family enterprise. A laboratory chemist, for example, may come to head a major chemical enterprise, even though he is not at all a business leader type.[26]

Yet this mechanization of entrepreneurship inevitably means the disappearance of those outstanding "leading personalities" [*Führerpersönlichkeiten*] who play a pivotal role in modern capitalism.[27] Economic innovation may still be possible in socialism. But it will no longer entail charismatic economic leaders forced to combine the tasks of management, investment, and risk-taking as well as serving as an inspirational force capable of motivating and disciplining the workforce. For Schumpeter, the ethos of the modern technical specialist is simply incompatible with the "magic" of charismatic authority.

This strand in Schumpeter's account suggests some surprising thematic parallels with Schmitt's political and legal theory. While both authors hold

crucial features of Weber's account of the modern condition in high regard, both ultimately move away from Weber's basically ambivalent assessment of modernity; Schmitt and Schumpeter are generally most interested in the negative facets of modern rationalism. While both thinkers do conjure up appealing images of an idealized liberal past, they do so only in order to present contemporary social and political development, conceived as a necessary offshoot of modern rationalism, in the worst possible light. Revealingly, both seek (irrational) figures allegedly capable of "saving" Western modernity from the excesses of rationalism. Schumpeter the social scientist tends to avoid express political proclamations. Nonetheless, a defense of the *differentia specifica* of modern capitalism, the creative, charismatic entrepreneur, clearly constitutes the underlying political agenda of many of his works.[28] For Schmitt, the defense of the creative, charismatic decision maker is similarly crucial to the formulation of a political and intellectual project attuned to the dictates of the twentieth century.[29] Schumpeter's economic "leader" and his Schmittian cousin possess a number of common traits. For Schmitt at crucial junctures, the mere capacity for resoluteness becomes the most important criterion of authentic political action. Analogously, Schumpeter embraces a conception of the entrepreneur in which possession of a "supranormal" will is arguably its most striking characteristic.[30] Both Schmitt and Schumpeter make it clear that not only the possession of charismatic capacities make effective leadership possible (for Schmitt, in the state; for Schumpeter, within the factory) but also such skills are possessed by only a tiny minority of human beings. Schmitt clearly doubts that most people possess the capacity for genuine political action, while Schumpeter similarly argues that the vast majority of human beings is incapable of even minimal economic innovation: "where the boundaries of routine stop, many people can go no further."[31] If humanity consisted solely of such inferior economic "types," no change—economic or otherwise—would occur. Reminiscent of great political and military leaders, economic leaders make up that small portion of humanity able to " 'lead' the means of production into new channels," generating development.[32] Not surprisingly, Schumpeter is as dismissive of social democratic models of worker self-management and economic democracy as Schmitt is of universalistic conceptions of popular sovereignty. Democratic conceptions of economic organization simply fail to do justice to the inevitability of an unequal distribution of economic "know-how." For Schumpeter, socialism is economically workable but only in the form of highly bureaucratized "centralist socialism," based on substantial state ownership and central planning, in which a relatively small group of economic and political leaders oversees economic affairs.[33]

For both Schmitt and Schumpeter, "magic"—be it economic or political in character—is in short supply amid the conditions of modern disenchantment.

The point, however, for both authors is to try to preserve certain forms of it. For Schmitt, this endeavor entails an assault on liberal democracy and the defense of dictatorship; for Schumpeter the economic theorist, it requires a defense of forms of capitalist production in which the entrepreneurial function has yet to be fully rationalized.

At times, Schumpeter can sound as militant in his defense of the charismatic economic leader, the private capitalist entrepreneur, as Schmitt in his defense of dictatorship. Yet Schumpeter is less hopeful than Schmitt about the fate of charismatic leadership in the modern world. Schmitt still believed, while embracing dictatorship in the early 1930s, that charismatic leadership can be successfully salvaged in modernity. In contrast, Schumpeter's economic theory ultimately offers a tragic vision, in which economic rationalism turns on capitalism and charismatic economic entrepreneurship while paving the way for socialism. Schumpeter's writings take on defensive and even resigned tones. At best, he hopes to slow the approaching socialist tide by defending the remaining vestiges of capitalist entrepreneurship where it still thrives.

## II

In 1920, Schumpeter published a lengthy essay, "Socialist Possibilities for Today," in Germany's leading social science journal, the *Archiv für Sozialwissenschaft und Sozialpolitik*. Although ignored even by some Schumpeter aficionados today, the essay is surely one of his most important. Already the most famous non-Marxist economist in Central Europe, Schumpeter had just finished a bout as a member of the new German Republic's Socialization Commission and then an unsuccessful term as finance minister for Austria's first democratically elected government under the democratic socialist Karl Renner. In both positions, Schumpeter's position was a peculiar one. Although an outspoken right-wing critic of socialism, Schumpeter opted to work for governments committed to the socialization of the economy. Appointed to both posts primarily because of his economic expertise, Schumpeter's odd situation was quickly remarked upon by the press: one newspaper suggested that he possessed "three souls"—one conservative, one liberal, and one left-wing—a social democratic newspaper accused him of the most vile opportunism, and the satirist Karl Kraus noted sarcastically that Schumpeter had "more different views than were [even] necessary for his advancement."[34] Schumpeter himself quipped that he had chosen to work for socialists because "if somebody wants to commit suicide, it is a good thing if a doctor is present."[35]

Fortunately, Schumpeter's 1920 essay provides a more detailed explanation of his idiosyncratic political activities after World War I. Anticipating

many of the basic economic arguments of the subsequent *Capitalism, Socialism, and Democracy*, Schumpeter insists on the inevitability of state socialism: the bureaucratization of the capitalist economy and undeniable trends toward concentration, the "technization" of the classic entrepreneur and his replacement by a corps of managers and trained technical experts, the growth of anti-capitalist sentiment among the educated classes, and an ongoing transformation of private property tending to reduce the capitalist owner to a *rentier*, all point the way toward the likelihood of socialism. From this perspective, Schumpeter's apparent "embrace" of socialism after World War I simply amounted to an acknowledgment of the main structural forces at work in modern economic life. As Schumpeter never tired of repeating, the structural inevitability of socialism has no normative connotations. Despite his empirical predictions, Schumpeter himself always militantly opposed socialism.

Still, why is it appropriate for a conservative hostile to socialism to put his talents at the service of socialist politicians? Why not just lament the emergence of socialism while avoiding complicity in its alleged sins? Schumpeter's 1920 essay suggests an answer to this question. Schumpeter argues that the inevitability of socialism says nothing about the likely *time horizon* for its emergence. One of the main theses of "Socialist Possibilities for Today" is that socialization in many areas of the economy still remained premature after World War I. Although many trends indeed suggest the ongoing demise of capitalism, most of them are still relatively "unripened" in character.[36] As a political personage, Schumpeter thus hoped to use his influence to discredit demands for socialization in those areas of the economy where the presuppositions of successful socialization—conveniently, Schumpeter's own discussion of these preconditions is quite ambiguous—remained unfulfilled. Where socialization seemed imminent and probably unavoidable, a principled conservative could still play a role in socialization by making sure that socialist proposals minimized possible threats to economic efficiency and individual freedom. As an advisor to socialist-dominated governments, Schumpeter hardly sought to subvert socialization from within. But he did hope that his political activities would allow him to minimize its potential ills.[37]

More important for our purposes here, Schumpeter's essay offers a disturbing account of the inevitable demise not only of capitalism but also of representative democracy. Arguing that traditional liberal parliamentary institutions in contemporary Europe seem increasingly anachronistic even in those countries with rich liberal democratic traditions, Schumpeter describes many ways in which "the facts [of political life] discredit the official phraseology of our political life."[38] Reasonable deliberation has been jettisoned for a political universe dominated by bureaucratic mass parties akin to "psychotechnical machines" mobilizing support by means of appeals to

unconscious irrational instincts; for Schumpeter, voters seem reminiscent of imprisoned Africans chained to slave ships over which they have no control; independent deliberative parliamentary representatives have been replaced by more or less obedient puppets, lacking even the bare time necessary to scrutinize legislative proposals; those pulling the strings are party bosses able to manipulate the meanest human instincts; parliament rarely exercises even a minimally critical function in relation to the executive. In short, parliament has lost its original meaning, its original techniques have failed, and its workings reveal themselves to be nothing but a farce.[39]

Schumpeter goes so far as to argue that the ongoing decay of liberal parliamentarism is an unavoidable consequence of modern mass democracy and the closely related striving for social equality.[40] Here again, the tragic overtones of Schumpeter's narrative are striking. Rationalistic capitalist civilization generates demands for political and social equality that unwittingly subverts the rationalistic ethos of liberal representative government. Both economic and political liberalism are characterized by an explosive dialectic, according to which they spawn mass political movements hostile to all forms of political and social hierarchy.

Appreciatively citing Georges Sorel's critique of liberal democracy, Schumpeter comments that all "leading individuals and classes" throughout history have rightly recognized that democratization entails "sinking in a swamp of mediocrity," and that democratic mediocrity is sure to undermine possibilities for effective political action.[41] Although enthralled by the (irrational) charisma of the capitalist entrepreneur, Schumpeter exhibits little sympathy for the emotionalism of modern mass democratic politics: mass democracy disfigures liberal parliamentarism, reducing its instruments to the inappropriate playthings of immature political and social actors inferior to those for whom they were originally intended. Democratization implies "chaos" and "disintegration,"[42] because it means giving the irrational and politically unfit masses unprecedented political power.

In this account, liberal parliamentarism was able to function effectively in the past only because it rested on a social consensus stemming from the fact that the poor and working classes lacked any say in parliamentary affairs. Of course, parliament was never perfectly homogeneous; Schumpeter acknowledges the relatively diverse sources of parliamentary representation even in nineteenth-century Europe. Nonetheless, parliamentary representatives in the nineteenth century—primarily from the bourgeoisie, the aristocracy, and the state bureaucracy—did share a relatively far-reaching set of common social interests which gave the liberal aspiration for "government by discussion" a real chance of succeeding, even if liberal theorists undoubtedly provided an overly idealized gloss on the realities of nineteenth-century parliamentarism.[43] Thus, liberal parliamentarism is bound to decay when political

movements mobilizing the excluded pose a real challenge to the political and social status quo: "parliamentary deliberation about something that one group of parties refuses to accept under any circumstances loses any meaning."[44] In particular, when (irrational) democratic and socialist movements raise radical demands, parliament ceases to function effectively as a freewheeling, deliberative body. Utter political paralysis may result; in more fortunate polities, compromise between basically antagonistic social and political groupings becomes the modus vivendi of parliamentary government. In any event, the days of rationalistic parliamentarism have come to an end.[45]

"Creeping socialism," spawned by the entrance of the masses onto the political scene, hence inevitably facilitates the decay of parliamentary democracy. Not only is the movement toward socialism likely to destroy liberal democracy, but it is also difficult to imagine how socialism, once established, could coexist with liberal parliamentarism. In socialism, independent entrepreneurs would no longer guarantee the "discipline" in the workforce requisite for economic efficiency. Political authorities would now have to do so. For Schumpeter, traditional liberal institutions are unlikely to prove up to this task, and political authoritarianism and the militarization of work life thus are probably necessary for guaranteeing order in the workplace once the independent capitalist entrepreneur, the "leading personality" of the workplace, has been eliminated.[46] Schumpeter also claims that it is difficult to see what function parliamentary deliberation could possibly have in a socialist society. Since the most divisive political issues of our era, namely those concerned with economic divisions, have ostensibly been resolved, it is unclear why socialists would remain committed to the ideal of freewheeling debate, especially if worried about the specter of antisocialist groups making use of parliamentary institutions to incite opposition.[47]

Predictably, Schumpeter's bleak predictions ignited a minor controversy in the pages of the *Archiv für Sozialwissenschaft und Sozialpolitik*.[48] One of the German-speaking world's most famous economists, who until recently had been a relatively prominent public figure in Central Europe's new democracies, had done nothing less than proclaim the inevitable demise of liberal parliamentarism. Of course, many others in Central Europe during the same period—most prominently, Max Weber—had vividly described similar ailments in their analyses of modern liberal parliamentarism. But no scholar of Schumpeter's standing, and certainly none who had served in such prominent official capacities, had gone as far as Schumpeter in proclaiming the inevitability of parliamentary decay.[49] Schumpeter clearly hit a raw nerve. After all, he was implicitly suggesting that Central Europe's first and still relatively insecure experiments in liberal democracy had simply come too late, having missed the glory days of nineteenth-century parliamentarism before mass movements emerged to subvert parliamentary institutions. From

this perspective, both the German and the Austrian experiments with parliamentary democracy were probably ill-fated experiments with a political form whose death knell was already sounding loud and clear throughout Western Europe.

Schumpeter's work on parliamentary decline was possibly one reason why he was named to a position on the relatively prestigious faculty at the University of Bonn in 1925. By the mid-1920s, the Bonn faculty had established itself as a center for scholarship on the problem of parliamentary decay. One of Schumpeter's predecessors on the economics faculty, Moritz Julius Bonn, authored two important studies on parliamentary decay during the early 1920s dealing with many of the same issues as Schumpeter, while nonetheless shying away from Schumpeter's dramatic conclusions.[50] Like Schumpeter, M. J. Bonn believed that liberal parliamentarism was challenged by a series of novel social and economic developments; unlike Schumpeter, he was an unambiguous liberal democrat who militantly defended the underlying ideals of classical parliamentarism. The political scientist Erwin von Beckerath, whose brother was a colleague of Schumpeter's in the economics department,[51] was an expert on authoritarian attempts to resolve the crisis of parliamentarism. His 1927 *Wesen und Werden des faschistischen Staates*, a sympathetic account of Italian fascism, gained critical acclaim among right-wing circles.[52] Most important, Carl Schmitt—who was quite close to M. J. Bonn and surely acquainted with Beckerath—of course had also devoted a substantial amount of attention to the fate of parliamentarism in his *Crisis of Parliamentary Democracy* (1923). A relatively intense exchange seems to have taken place between the members of this unofficial circle. Schmitt and M. J. Bonn sparred both publicly and privately about the fate of parliamentary government,[53] and Schmitt would later write a relatively favorable view of Beckerath's book in which he took its author to task only for *downplaying* some of the strengths of Italian fascism as an alternative to liberal democracy.[54]

Not surprisingly, Schumpeter soon became familiar with those colleagues in Bonn who were preoccupied with the problems of parliamentary fragility. Archival documentation suggests that Schumpeter and Schmitt, who taught together at Bonn between 1925 and 1928, were personally acquainted.[55] Both were close in age (Schumpeter was born in 1883 and Schmitt in 1888), had similar antidemocratic political proclivities, and shared a Roman Catholic background. There is also evidence that Schmitt and Schumpeter swapped ideas, which is surely not surprising given the obvious overlap in interests. In a revealing 1948 letter to the German sociologist Helmut Schelsky, Schmitt reminisced about the "great pleasure" he gained from discussions with Schumpeter in Bonn during the 1920s, noting that he continued to gain personal satisfaction from Schumpeter's influence in postwar intellectual life

in Europe and North America.[56] Schumpeter was also familiar with Schmitt's work. Schmitt published a number of short pieces, including one on democratic theory and the first (1927) version of his "Concept of the Political," in the *Archiv für Sozialwissenschaft und Sozialpolitik*, on whose select editorial board Schumpeter served.[57] Archival materials suggest that in 1926 the journal put Schumpeter in charge of trying to encourage Schmitt to complete what later became the famous "Concept of the Political," and Schumpeter appears to praise Schmitt's reflections on "the political" in two revealing pieces of correspondence. In a letter from November 23, 1926, Schumpeter comments in a "personal vein" to Schmitt that "no other author" known to him possesses the same ability to address this "set of problems," and then in a postcard of September 8, 1927, from the vacation resort town of Baden-Baden, Schumpeter tells Schmitt that he "once again" found himself "admiring" Schmitt's "On the Concept of the Political."[58] The same journal also published a widely cited critical discussion of Schmitt's analysis of liberal parliamentarism by Richard Thoma, one of Germany's leading legal positivists.[59]

In turn, Schmitt was clearly familiar with Schumpeter's "Sociology of Imperialism," which he cited on a number of occasions in order to clarify his "concept of the political."[60] Although Schmitt's references to Schumpeter's theory of imperialism at first glance seem critical in nature, the German political theorist Ernst Fraenkel has plausibly suggested that Schmitt's "concept of the political," which legitimizes the attainment of power for its own sake within "a situation in which traditional values have lost their binding power and rational values are not acceptable," simply gives abstract theoretical expression to Schumpeter's conception of imperialism as resting on the "aimless quest for power."[61] For Schumpeter, "imperialism is the objectless disposition on the part of the state to unlimited forcible expansion."[62] According to Fraenkel, Schmitt offers a conception of politics conducive to the boundless expansionism characteristic of imperialism in this interpretation; Schmitt's concept of the political envisions nothing less than a corresponding *l'art pour l'art* in the political sphere.[63]

Schmitt was also acquainted with Schumpeter's ideas about parliamentary decline, and Schumpeter probably exercised some influence on Schmitt's *Crisis of Parliamentary Democracy*.[64] At the very least, the argumentative parallels between the two authors are striking. Of course, many of their contemporaries—Walter Lippmann in the United States, for example—were also chronicling the pathologies of mass politics during the 1920s. But few commentators on parliamentary fragility share as much as Schmitt and Schumpeter. Both openly take sides normatively with irrationalist and antidemocratic elite theorists, while simultaneously exuding a certain nostalgia for the lost world of rationalistic liberal parliamentarism. Schumpeter makes use of Sorel in order to discredit universalistic liberal democratic conceptions

of popular sovereignty, while Schmitt praises Sorel's "original historical and philosophical perceptions" and makes them a central component of his assault on liberalism in *The Crisis of Parliamentary Democracy*.[65] (Schmitt later claimed credit for having introduced Sorel into academic political and legal theory in Germany.[66] As a matter of fact, Schumpeter beat him to it.) Like many other political observers at the same time, both authors emphasize the irrationalism of modern mass democratic politics, blaming the demise of deliberative politics on the entrance of popular movements, allegedly incapable of engaging in rational debate, into the parliamentary public sphere. But Schmitt and Schumpeter also rely on a similar sociological interpretation of the rise and fall of liberal parliamentarism. For Schmitt, as for Schumpeter, liberal parliamentarism was able to live up to the ambitious aspirations of classical liberal political thought only as long as political participation was limited to those with property and education [*Besitz und Bildung*]. Once mass-based political movements challenge the hegemony of the propertied classes by pursuing a left-wing anti-capitalist agenda, liberal parliamentarism necessarily must die. Schmitt suggests that the collapse of the classical liberal state/society divide inevitably prepares the way for a "total state" in which deliberative parliamentarism is defunct; Schumpeter describes an irreversible "march into socialism," demonstrated in part by growing state activity in the capitalist economy and destined to destroy liberal parliamentarism. For both, the rise of social democracy and the modern interventionist welfare state inevitably undermines the foundations of liberal parliamentarism and prepares the groundwork for an authoritarian future.

## III

Our discussion of Schumpeter's Bonn interlude places his enormously influential "theory of democratic elitism" in a new light. Of course, *Capitalism, Socialism, and Democracy* admits no intellectual debt to Carl Schmitt. To have done so in the United States in 1942 surely would have constituted scholarly suicide.[67] Nonetheless, it is difficult to avoid the suspicion that Schumpeter's argument was shaped by the irrationalist, authoritarian milieu in which Schmitt played such an important part in Germany in the 1920s and 1930s. Of course, Schmitt was not the only writer bashing liberal democracy from the far right after World War I; as we will see, Schumpeter himself was clearly influenced by the Italian economist and social philosopher, Vilfredo Pareto. Nonetheless, affinities once again surface between Schumpeter's democratic theory in *Capitalism, Socialism, and Democracy* and Schmitt's writings from the 1920s and early 1930s. Schumpeter may not have "borrowed" his ideas directly from Schmitt, yet his intellectual exchange with

Schmitt at Bonn at the very least helped cement Schumpeter's own antidemocratic proclivities.

Echoing Schmitt's conception of democratic homogeneity, Schumpeter here is hostile to universalistic conceptions of democracy and suggests that democracy can logically rest on exclusionary definitions of the populace based on race, ethnicity, or religion.[68] Like Schmitt, he argues that the border between democracy and authoritarianism is often blurry.[69] Schmitt insists that an authentic political theory must build on a pessimistic philosophical anthropology; *Capitalism, Socialism, and Democracy* does precisely this.[70] Schumpeter repeats his view that mass-based political decision making is inherently illogical and irrational, now adding that traditional liberal democratic conceptions of democracy constitute a political myth, in the Sorelian sense, employed by political minorities hoping to gain control over the masses.[71] Akin to the advertising techniques of the modern corporation, political propaganda and manipulation are essential facets of a political universe in which a plebiscitary appeal to the lower classes is necessary for the exercise of power.[72] Schumpeter even seems to embrace a decisionism reminiscent of Schmitt's: "rifts on questions of principle . . . cannot be reconciled by rational argument because ultimate values—our conceptions of what life and society should be—are beyond the range of mere logic."[73] For Schumpeter, as for Schmitt, fundamental political and moral choices ultimately rest on expressions of the (irrational) will. In contrast to Weber, neither author says much about how to ameliorate the worrisome implications of this vision.[74]

Schumpeter's alternative to traditional democratic "phraseology" similarly approximates elements of Schmitt's plebiscitary alternative to parliamentary democracy. *Capitalism, Socialism, and Democracy* simply presupposes the conclusion of the earlier "Socialist Possibilities for Today" that classical liberal parliamentarism is dead, and thus "the wishes of the members of a parliament are not the ultimate data of the process that produces government."[75] For both Schumpeter and Schmitt, government is inevitably executive-dominated. Thus, the main task of contemporary political theory is to guarantee the possibility of rule by effective elites that are able to demonstrate authentic leadership capacities. In this spirit, Schumpeter demands that we reverse the traditional view of the relationship between electorate and leadership "and make the deciding of issues by the electorate secondary to the election of the men who are to do the deciding."[76] Like Schmitt, Schumpeter allows for substantial possibilities for elite mass manipulation, openly conceding that the "manufactured [popular] Will is no longer outside the theory, an aberration for the absence of which we piously pray; it enters on the ground floor as it should."[77] For Schmitt, "the people cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its 'yes' the draft norms presented to it. Nor, above all, can

it place a question, but only answer by 'yes' or 'no' the question put to it."[78] Democracy only means that the people have the opportunity of accepting or refusing the *proposals* of their rulers. In a slight modification of this thesis, Schumpeter concludes that "democracy means only that the people have the opportunity of accepting or refusing the *men* who are to rule them."[79]

Nonetheless, Schumpeter does try to distance himself from some of the most troublesome implications of Schmitt's plebiscitary model. Even before his National Socialist interlude, Schmitt was notoriously vague about exactly how plebiscitary leadership is to be chosen by the electorate. Characteristically, he only refers in the passage just quoted to the people's right to say "yes" or "no" to *questions* posed to it, thereby failing to specify the mechanisms by which the electorate can guarantee that leaders invested with the substantial authority of defining and formulating such questions do so in a manner relatively compatible with the popular will.[80] As I noted earlier in this study, Otto Kirchheimer was right on the mark when he observed that

> for Carl Schmitt . . . the democratic character of the plebiscite consists purely in an unorganized answer which the people, characterized as a mass, gives to a question which may be posed only by an authority whose existence is assumed. Structure and accountability of this authority are unknown.[81]

For Schumpeter, the somewhat distinct conception of democracy as involving the electorate's power to say "yes" or "no" to its *leaders* necessarily entails acknowledging the central place of "free competition among would-be leaders for the vote of the electorate."[82] This political competition is sure to be imperfect; as noted, Schumpeter's model tolerates substantial elite manipulation of the electorate.[83] Still, Schumpeter's introduction of this idea of elite competition does represent a noteworthy conceptual innovation in relation to Schmitt. Writing from the safe shores of North America at the outbreak of World War II, Schumpeter uses it to ward off the more ominous implications of the antidemocratic *Parlamentarismuskritik*—so evident in Schmitt's embrace of National Socialism—which he and Schmitt had practiced so well in the 1920s. In Schumpeter's model, the concept of free competition allegedly requires the endorsement of certain residues of classical liberalism. Even if political competition among elites is necessarily imperfect in character, Schumpeter claims that it continues to presuppose some (unspecified) minimum of basic political liberties.[84] Although openly dismissive of traditional liberal political thought, the concept of the "free vote" is not altogether lacking in substance here. Leaders face restraints—*some* chance of being dumped in favor of someone else—even if they are likely to be occupied with the task of "manufacturing" consent most of the time.

Here, full-fledged dictatorship is characterized by the permanent *monopolization* of political power by an elite group and the abrogation of even the

most minimal possibility of elite competition.[85] National Socialism certainly was a dictatorship in this sense of the term. For Schumpeter, his former colleague Schmitt's embrace of it hence was certainly inconsistent with the "democratic method." Schmitt's diagnosis of the ailments of liberal democracy was basically correct, but a distinct prognosis is possible, or at least *Capitalism, Socialism, and Democracy* suggests as much.

*Capitalism, Socialism, and Democracy* vaguely attributes the sources of the pivotal concept of elite competition to modern economic theory. But if we move beyond the narrow horizons of Schumpeter's well-known 1942 monograph and take a closer look at Schumpeter's many other writings, we can easily trace it to Vilfredo Pareto, whom Schumpeter greatly admired.[86] Schumpeter helped introduce the teaching of Pareto's economic theory into the German-speaking world, and Pareto's influence is apparent in a number of Schumpeter's most important writings.[87] Pareto's impact on Schumpeter's democratic theory is undeniable: Schumpeter's concept of elite competition is substantially inspired by Pareto's emphasis on the virtues of elite circulation. Like Schumpeter, Pareto synthesized a profound skepticism for popular decision making with a fervent commitment to market capitalism, emphasizing the irrationality of the vast majority of humanity and the resulting absurdity of egalitarian democratic ideals. For Pareto, popular self-government is an oxymoron, and rule by a tiny elite inevitable. The nature of this elite depends on the particular functional imperatives of the social and political order in question. In a society of thieves, for example, the capacity to steal successfully would determine social and political rank. Although obviously sharing considerable common ground with Schmitt, Pareto's position is distinct from Schmitt's in one important way: Pareto insists that the cultivation of a truly capable set of leaders presupposed what he described as the *circulation des élites*. Even though the possession of those traits essential to the basic operation of a particular social and political system constitutes the original source of the privileged status of every ruling elite, every dominant elite tends to ossify by sealing itself off from the lower strata. As Schumpeter accurately paraphrases in his often-flattering gloss on Pareto,

> There is in the lowest strata a tendency to accumulate superior ability that is prevented from rising, and in the topmost stratum . . . a tendency to disaccumulate energy through disuse—with resulting tension and ultimate replacement of the ruling minority by another ruling minority that is drawn from the superior elements in the *couches inférieurs*. This *circulation des élites* does not affect the principle that it is always *some* minority which rules . . . though it does produce [mythical] equalitarian philosophies or slogans in the course of the struggles that ensue.[88]

For Pareto, some political and social systems hinder the rise of "superior" materials from the lower stratum. Thus, not only are they prone to instability,

but their leadership is also likely to grow decrepit. In contrast, those providing a well-oiled mechanism for elite circulation not only permit the regeneration of political and social leadership but also are relatively safe from the specter of violent upheaval.

Significantly, Pareto believed that the circulation of elites was relatively high in modern democracy, which he otherwise described in terms as unflattering as those used by Schmitt and Schumpeter.[89] By building on this element of Pareto's alternative brand of irrationalist political theory, *Capitalism, Socialism, and Democracy* offers a clever response to Schmitt. Employing Pareto's insight, Schumpeter suggests that only a system providing some modicum of circulation among political elites is likely to assure the effective, charismatic political leadership desired by Schmitt; as Pareto taught, leadership is likely to ossify if unchallenged. Pace Schmitt, Schumpeter thus claims that one of the advantages of the competition between elites at the heart of his "democratic method" is that those who succeed in gaining power are likely to possess real skills in "the handling of men. And, as a broad rule at least, the ability to win a position of political leadership will be associated with a certain amount of personal force and also other aptitudes that will come in usefully in a prime minister's workshop."[90] Schumpeter seems doubtful that charismatic leadership is likely to be generated by any political system. But *if* it is to surface, it is most likely to do so where political leaders compete for the "free vote." According to Schumpeter, only his model of elite circulation, not Schmitt's openly fascist brand of plebiscitary authoritarianism, is likely to generate forceful, authentic leadership.

## IV

Is Schumpeter successful in formulating an alternative to Schmitt's political theory? In my view, it would surely do an injustice to Schumpeter to ignore the obvious differences between his "democratic method" and Schmitt's views.[91] Even with all of its widely noted failings, Schumpeter offers a vision normatively and institutionally superior to Schmitt's.[92] In particular, Schumpeter's expectation that his approach is likely to assure the preservation of some basic civil and political rights makes it more appealing than Schmitt's. By the same token, it is difficult to overlook the possibility that Schmitt simply presents a more *consistent* theoretical expression of a series of worrisome basic assumptions shared by both authors.[93] If one accepts the presuppositions of the bleak philosophical anthropology shared by Schumpeter and Schmitt (as well as Pareto and Sorel), why side with Schumpeter's theory of democratic elitism over its adamantly authoritarian right-wing cousins? If the overwhelming mass of humanity is incapable of engaging even in minimally

reasonable forms of political debate, why not follow Schmitt and deny them basic political and civil rights? Significantly, Pareto himself seems to have endorsed Mussolini's fascism in his final years, to some extent because he grasped that the *circulation des élites* hardly *necessitated* democratic techniques. For Pareto, contemporary "plutocratic democracies" seem increasingly prone to instability, in part because a politically and an economically dominant bourgeoisie faces "an intensification of the sentiments of hatred for the 'haves'" among the politically and socially underprivileged.[94] Might not an authoritarian alternative to contemporary liberal democracy prove more effective at guaranteeing the cultivation of "leadership materials" among the socially and political underprivileged and a superior system of elite circulation? By the early 1920s, Pareto probably thought so.[95]

In short, the main justification for Schumpeter's democratic method ultimately rests on its claim to provide capable and effective elite circulation. But this is surely an insufficient basis for justifying even the rather pale version of liberal democracy envisioned by Schumpeter; authoritarian political systems have often done quite well at making sure that ruling strata are recruited from the "ruled classes."[96] In the final analysis, Schumpeter defends the preservation of a minimum of civil and political rights because he sees them as necessary for elite circulation, for "free competition" among would-be leaders. It is by no means self-evident, however, that elite competition in this sense requires the protection of even the most elementary universal civil and political rights.

In a 1929 discussion of right-wing intellectual trends in early twentieth-century European thought, Hermann Heller made a similar observation about the intellectual relationship between Pareto and Schmitt's fascist political theory: for Heller, Pareto's position is distinct from Schmitt's, yet Schmitt's theory nonetheless represents a logical offshoot of Pareto's antidemocratic irrationalism. Since Heller's comments about Pareto's relationship to Schmitt can be applied to Schumpeter as well, it is worth quoting them at length:

> For Pareto, every political theory and political ideal, from Plato to Comte and Marx, is merely bad metaphysics, and every ideology is simply an instrument of struggle in the *bellum omnium contra omnes*. . . . Since these fictions are still necessary for the domestification of the human "beast," according to Pareto they can still provide the basis for a technology of state power . . . as part of a neo-Machiavellian political theory for a disillusioned bourgeois society. But if all political and legal thinking is simply the expression of a highly particular historical and social situation, if there is no set of common meanings shared between different generations, classes, parties, and nations, then there is no basis for debate or rational action. . . [t]hen indeed the basic category of the political is [Schmitt's] friend/enemy distinction, in which emphasis is placed on the

> necessity of exterminating the existentially "other" during the case of conflict. Then the point of politics and of all history is the naked struggle for power, and those engaged in this struggle merely need to acknowledge which ideology is most effective at the present time in order to gain power in the eternal and ultimately meaningless circulation of elites.[97]

For Schumpeter as well, even the most minimal talk of the common good is hogwash, classical democratic political theory is bad metaphysics, elite rule is unavoidable, and "rifts on question of principle . . . cannot be reconciled by rational argument."[98] What then can save the logic of Schumpeter's own "disillusioned bourgeois" theory from the fate of Pareto's? Like Pareto, Schumpeter suggests that democratic "phraseology" is merely a myth employed by elites aspiring for power in the eternal competition for leadership positions. Can we be certain that Schumpeter's own "democratic method" is not just another myth in the employ of aspiring elites in the "naked struggle for power"—against defenders, perhaps, of the processes of political and social democratization so despised by Schumpeter?[99]

Schumpeter's theory *is* a rival to Schmitt's. This is a friendly rivalry, however, resting on mutual respect and an extensive set of shared intellectual assumptions. Schumpeter's theory is hardly fascistic. Yet Schumpeter may be only a few steps away from Schmitt's path.

To Schumpeter's credit, he never took the final steps toward embracing Schmitt's openly fascist alternative. Amid the bloody cataclysms of mid-century Central Europe, this was no mean achievement for a theorist with Schumpeter's antidemocratic background. Still, this hardly frees us today from the task of recalling the intellectual nexus between Schmitt and one of the major intellectual forces in postwar American political science. However unpleasant, scholarship will now have to examine the alarming possibility that authoritarian right-wing political theory exercised a subterranean influence, via Schumpeter, on this discipline. From one perspective, Schumpeter's "democratic elitism" simply reformulated an onerous tradition of Central European authoritarianism in order to make it more palatable to an American audience. Whitewashed of its more openly antidemocratic rhetorical flourishes, Schumpeter's contribution to this tradition proved an attractive starting point for historically and philosophically naive political scientists seeking an "empirical" alternative to the classics of normative democratic theory.

In what belongs among the great intellectual paradoxes of our times, many American political scientists, in the immediate aftermath of the victory over National Socialism in 1945, embraced a tradition of political thought that was complicit in the antidemocratic sins of twentieth-century European political theory and practice.

## NOTES

1. On Schumpeter's place within postwar political analysis and, in particular, neoconservative social and political thought in the United States, see Peter Bachrach, *The Theory of Democratic Elitism: A Critique* (Boston, MA: Little, Brown, 1967); David M. Ricci, "Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought," *Journal of Politics* 32, no. 2 (May 1970): 239–67; and Nicholas Xenos, "Democracy as Method: Joseph A. Schumpeter," *Democracy* 9, no. 4 (October 1981): 110–23. Schumpeter has also played an important role in rational choice theory; I address this aspect of his work later.

2. Weber, *Economy and Society*, 657.

3. Weber, *Economy and Society*, 979. I should add that Weber himself ultimately accepted a modified version of this view, in accordance with what I have described earlier in this study as the *limited indeterminacy thesis*. Although skeptical of the extreme legal formalism endorsed by some modern legal thinkers, Weber sought to defend its underlying spirit.

4. I have also discussed this topic in my *Between the Norm and the Exception*, 13–38, 67–96. For an approach less critical of Schmitt, see G. L. Ulmen, "The Sociology of the State: Carl Schmitt and Max Weber," *State, Culture, and Society 1*, no. 2 (1985): 3–57.

5. Schmitt, *Legalität und Legitimität*, 94.

6. This is a heated issue in the Weber literature. For a start, see Wolfgang Mommsen, *Max Weber and German Politics, 1890–1920*, trans. Michael S. Sternberg (Chicago, IL: University of Chicago Press, 1984), esp. 381–89, where Mommsen discusses Weber's influence on Schmitt.

7. In this view, the true entrepreneur represents a "leading personality" [*Führerpersönlichkeit*]. Joseph Schumpeter, "Sozialistische Möglichkeiten von heute" ["Socialist Possibilities for Today"], *Archiv für Sozialwissenschaft und Sozialpolitik* 48 (1920–21): 318.

8. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (New York: Routledge, 1992), 18–19.

9. Weber, *Protestant Ethic and the Spirit of Capitalism*, 181.

10. Weber, *Protestant Ethic and the Spirit of Capitalism*, 181.

11. Weber, *Protestant Ethic and the Spirit of Capitalism*, 20–21.

12. Max Weber, "Socialism," in *Max Weber: Selections in Translation*, ed. W. G. Runciman, trans. E. Matthews (Cambridge: Cambridge University Press, 1992), 252. For a helpful discussion of Weber's views of socialism, see Wolfgang Mommsen, *The Political and Social Theory of Max Weber: Collected Essays* (Chicago, IL: University of Chicago Press, 1989), 53–73.

13. Joseph Schumpeter, *The Theory of Economic Development* (Cambridge, MA: Harvard University Press, 1934), 57 n. 1. More generally, on the intellectual relationship between Weber and Schumpeter, see Jürgen Osterhammel, "Varieties of Social Economics: Joseph A. Schumpeter and Max Weber," in *Max Weber and His Contemporaries*, ed. Wolfgang Mommsen and Jürgen Osterhammel (London: Allen and Unwin, 1987), 106–26; and Richard Swedberg, "Introduction," in Joseph A. Schumpeter, *The Economics and Sociology of Capitalism*, ed. R. Swedberg (Princeton, NJ:

Princeton University Press, 1991), 45–46; the Weber-Schumpeter nexus is thematized in many passages of Richard Swedberg, *Schumpeter: A Biography* (Princeton, NJ: Princeton University Press, 1991). Schumpeter himself wrote an interesting eulogy for Weber, "Max Weber's Work," in 1920. It has been reprinted in Schumpeter, *Economics and Sociology of Capitalism*, 220–29.

14. Schumpeter, *Capitalism, Socialism and Democracy*, 3rd ed. (New York: Harper and Brothers, 1950), 125. Rationalization does, however, come up against anthropological impediments; the vast majority of humanity in this view is incapable of fully embracing rational habits (Schumpeter, *Capitalism, Socialism, and Democracy*, 129, 144–45). As will become evident, this point is crucial for Schumpeter's critical view of modern political and social democratization.

15. The basically pacific nature of capitalism is a main theme of Schumpeter's "The Sociology of Imperialism," also reprinted in Schumpeter, *Economics and Sociology of Capitalism*, 141–219.

16. Schumpeter, *Capitalism, Socialism, and Democracy*, 127.

17. This is one of Schumpeter's favorite themes; it is repeated in many of his writings. See *Capitalism, Socialism, and Democracy*, 131–64; also "Can Capitalism Survive?," "An Economic Interpretation of Our Times: The Lowell Lectures," and "The Future of Private Enterprise in the Face of Modern Socialistic Tendencies," reprinted in Schumpeter, *Economics and Sociology of Capitalism*, 339–405.

18. This element of Schumpeter's work was one of the reasons why it gained so much attention during the 1940s, when socialism—in one form or another—indeed seemed to constitute for many the likely outcome of developmental trends within Western civilization. Not surprisingly, Schumpeter's belief in the inevitability of socialism has been extensively criticized in recent years. See Arnold Heertje, ed., *Schumpeter's Vision: Capitalism, Socialism and Democracy after Forty Years* (New York: Praeger, 1981); and *Capitalism and Democracy: Schumpeter Revisited*, eds. Richard D. Coe and Charles K. Wilbur (Notre Dame, IN: University of Notre Dame Press, 1985).

19. Schumpeter, *Capitalism, Socialism, and Democracy*, 172–73.

20. Schumpeter, *Capitalism, Socialism, and Democracy*, 219.

21. For Weber, charisma refers "to a certain quality of an individual personality by virtue of which he is considered extraordinary and treated as endowed with supernatural, superhuman, or at least specifically exceptional powers or qualities. . . [O]n the basis of them the individual concerned is treated as a 'leader'" (Weber, *Economy and Society*, 241). This description could easily fit Schumpeter's entrepreneur. See Edward A. Carlin, "Schumpeter's Constructed Type—the Entrepreneur," *Kyklos* 9 (1956): 27–43. Swedberg similarly notes, "That there exist some similarities between Schumpeter's heroic entrepreneur and Weber's charismatic leader is obvious" (*Schumpeter: A Biography*, 35). It is revealing that Schumpeter is dismissive of Weber's "protestant ethic thesis" and by implication Weber's emphasis on the religiously inspired "ascetic" rationalism of the early modern capitalist entrepreneur (Joseph A. Schumpeter, *Business Cycles: A Theoretical, Historical, and Statistical Analysis of the Capitalist Process* [New York: McGraw-Hill, 1939], 228).

22. Schumpeter, *Theory of Economic Development*, 93. Also see *Capitalism, Socialism, and Democracy*, especially 132–33, where Schumpeter's description of the entrepreneur emphasizes his "individual decision and driving power." Schumpeter is not arguing that capitalist ownership necessitates the exhibition of entrepreneurial skills. Entrepreneurship refers to a series of special traits, which some property owners obviously do not possess. Of course, "everybody knows the type of old respectable firm, growing obsolete . . . and slowly and inevitably sinking into limbo" despite its entrepreneurial roots ("Social Classes in an Ethnically Homogeneous Environment," in Schumpeter, *Economics and Sociology of Capitalism*, 243). Nonetheless, there is a special relationship in this account between capitalism and entrepreneurship: a capitalist economy allows those with entrepreneurial skills to become proprietors.

23. In his final years, Schumpeter hoped that economics would correct this failing by focusing proper attention on the entrepreneur ("Comments on a Plan for the Study of Entrepreneurship," in Schumpeter*, Economics and Sociology of Capitalism*, 406–28). It is hard to avoid the conclusion that Schumpeter's argument here rests on a truncated conception of rationality. His main point is that the entrepreneur cannot be conceived as engaging in predictable forms of technical rationality; for this reason, the entrepreneur is "irrational." Clearly, a richer conceptualization of the nature of rationality might have allowed Schumpeter to avoid this conclusion. Of course, creativity and unpredictability hardly entail a *lack* of rationality, as Schumpeter might be interpreted as arguing.

24. Nathan Rosenberg, "Joseph Schumpeter: Radical Economist," in *Schumpeter in the History of Ideas*, ed. Yuichi Shionoyo and Mark Perlman (Ann Arbor: University of Michigan Press, 1994), 48. For textual support for this interpretation, see Schumpeter, *Theory of Economic Development*, 79–83. This element of Schumpeter's thought is downplayed by those, like Anthony Downs and Gary Becker, who have enlisted Schumpeter into the ranks of "rational choice" political analysis. In some ways, Schumpeter *does* argue for an economic analysis of politics in which political action is explained by means of formal models of rationality borrowed from economic theory. Yet, he repeatedly emphasized the significant *failings* of approaches that *universalize* the experience of the "rational economic man" and, second, that he was doubtful of the scope of rational action *especially* in the political realm. Formal modeling has obvious appeals for those of us engaged in political science. The problem, however, is first, whether formal models are capable of grappling with novel and innovative forms of action, and second, whether formal models based on the "rational economic man" are appropriate for spheres of activity fundamentally dissimilar from the market. See the acknowledgments of Schumpeter's influence in Gary Becker, "Competition and Democracy," *Journal of Law and Economics* 1 (1958): 106; and Anthony Downs, *An Economic Theory of Democracy* (New York: Harper Brothers, 1957), 29. More generally, on Schumpeter's relationship to rational choice, see William C. Mitchell, "Schumpeter and Public Choice, Part I: Precursor to Public Choice?" *Public Choice* 42, no. 1 (1984): 73–88; Mitchell, "Schumpeter and Public Choice, Part II: Democracy and the Demise of Capitalism: The Missing Chapter in Schumpeter," *Public Choice* 42, no. 2 (1984): 161–84; and Manfred Prisching, "Schumpeter's Irrational Choice Theory," *Critical Review* 9, no. 3 (Summer 1995):

301–24. Emily Hauptmann has argued in support of the proposition that modern rational choice analysis reproduces the profound hostility to democratic politics found in Schumpeter's political theory (*Putting Choice before Democracy: A Critique of Rational Choice Theory* [Albany, NY: SUNY Press, 1996], especially 9–13).

25. Schumpeter's reworking of Weber's theory does generate one problem missing from Weber's original account: why is capitalist civilization so "rationalistic" if its most important figure, the creative entrepreneur, is anything but the embodiment of ascetic rationalism described by Weber? In my reading of Schumpeter, he provides no adequate answer to this question. At times, a eulogy for the charismatic entrepreneur exists uneasily along with an equally respectful eulogy for the rationalism of classical capitalist civilization.

26. Schumpeter, "Social Classes in an Ethnically Homogenous Environment," in *Economics and Sociology of Capitalism*, 246.

27. Schumpeter, "Sozialistische Möglichkeiten von heute," 318.

28. Schumpeter typically argues for the inevitability of socialism, before proclaiming that entrepreneurship has yet to be fully obliterated and that socialism may still take a substantial period of time before emerging. Thus, many of his specific comments on the details of economic policy lead him to embrace views that we would describe today as "free market." See, for example, "An Economic Interpretation of Our Times: The Lowell Lectures," reprinted in Schumpeter, *Economics and Sociology of Capitalism*, 363–72, where he rails against the anti-capitalist implications of progressive taxation. His sympathetic review of Hayek's *The Road to Serfdom* is also telling in this respect: see Schumpeter, "Review of Hayek, *The Road to Serfdom*," *Journal of Political Economy* 54 (1946): 269–70.

29. As will become clear in the discussion of his democratic theory, this aspiration is hardly altogether alien to Schumpeter, either.

30. Schumpeter, *Theory of Economic Development*, 82.

31. Schumpeter, *Theory of Economic Development*, 93.

32. Schumpeter, *Theory of Economic Development*, 89.

33. Schumpeter, *Capitalism, Socialism, and Democracy*, 168, 300–1.

34. Cited in Swedberg, "Introduction" to Schumpeter, *Economics and Sociology of Capitalism*, 16.

35. Swedberg, "Introduction," 14.

36. Schumpeter, "Sozialistische Möglichkeiten von heute," 318. The implications of this argument for the details of socialization proposals under discussion in postwar Germany and Austria are then outlined on 351–60.

37. For example, in Schumpeter's contributions to the Socialization Commission, "his criterion for the public enterprise, in the manner of private enterprise, was efficiency, with provisions for incentives for management and workers" (Robert Loring Allen, *Opening Doors: The Life and Work of Joseph Schumpeter*, vol. I [New Brunswick, NJ: Transaction Books, 1991], 163–64.

38. Schumpeter, "Sozialistische Möglichkeiten von heute," 328.

39. Schumpeter, "Sozialistische Möglichkeiten von heute," 327–30.

40. Schumpeter, "Sozialistische Möglichkeiten von heute," 330.

41. Schumpeter, "Sozialistische Möglichkeiten von heute," 328.

42. Schumpeter, "Sozialistische Möglichkeiten von heute," 327.
43. Schumpeter, "Sozialistische Möglichkeiten von heute," 325.
44. Schumpeter, "Sozialistische Möglichkeiten von heute," 327.
45. Schumpeter, "Sozialistische Möglichkeiten von heute," 331.
46. Schumpeter, "Sozialistische Möglichkeiten von heute," 308.
47. Schumpeter, "Sozialistische Möglichkeiten von heute," 326–28.
48. Carl Landauer, "Sozialismus und parlamentarisches System: Betrachtungen zu Schumpeters Aufsatz 'Sozialistische Möglichkeiten von heute,'" *Archiv für Sozialwissenschaft und Sozialpolitik* 48 (1922): 748–60. Landauer offers a detailed summary of Schumpeter's main theses as well as a critical response to Schumpeter's claim that political and social democratization inevitably must cripple parliamentarism.
49. This is one reason why interpretations of Schumpeter's democratic theory as essentially Weberian miss some crucial parts of the story. For one example of this genre, see David Held, *Models of Democracy* (Stanford, CA: Stanford University Press, 1987), 143–85. Schumpeter is indebted to Weber in many ways, but Schumpeter's hostility to classical liberal parliamentarism is far more profound than Weber's. Weber was anxious about the future of liberal parliamentarism and sought, as mentioned earlier, to supplement it with plebiscitary leadership; nonetheless, he fought to preserve core elements of liberal parliamentarism, and in many ways he clearly saw English parliamentary life as a model for political reconstruction in Germany after World War I. Weber was famously disgusted by the political involvement of the irresponsible "literati." In light of this fact, I find it difficult to fathom Weber endorsing Sorel's attack on popular rule with the same enthusiasm as Schumpeter.
50. M. J. Bonn, *Die Auflösung des modernen Staates* (Berlin: Verlag für Politik und Wirtschaft, 1921); and M. J. Bonn, *Die Krise der europäischen Demokratie* (Tübingen: Mohr, 1925), translated as *The Crisis of European Democracy* (New Haven, CT: Yale University Press, 1925).
51. See Herbert von Beckerath, "Joseph Schumpeter as a Sociologist" (1950), in *J. A. Schumpeter: Critical Assessments*, ed. John Cunningham Wood (New York: Routledge, 1991).
52. Allen, *Opening Doors*, vol. 1, 203; and Erwin von Beckerath, *Wesen und Werden des faschistischen Staates* (Berlin: Springer, 1927).
53. Schmitt makes reference to Bonn in many of his works, and Bonn corresponded with Schmitt on the issue of parliamentary decay. Bonn was also one of Schmitt's promoters in the German university system, helping him gain positions at Munich, Bonn, and then at the University of Berlin in 1928. Some of Bonn's correspondence with Schmitt is cited in Ellen Kennedy, "Introduction: Carl Schmitt's *Parlamentarismus* in Its Historical Context," xxxvi–xxxvii. I should note that I am indebted to Kennedy's introduction for bringing the importance of Schumpeter's 1920 essay to my attention. Despite Kennedy's misleading comments about Schumpeter's relationship to Marxism (xxvi–xxvii and xlvi n. 50), Schumpeter integrated some Marxist ideas *only in order to criticize them* from the right. M. J. Bonn was Jewish and was forced to leave Germany when the Nazis took power. His postwar reminiscences about Schmitt, whom he described as his "most brilliant colleague," at Bonn, make fascinating reading for those interested in Schmitt's biography (M. J. Bonn, *The Wandering Scholar* [New York: John Day, 1948], 330–31).

54. Carl Schmitt, "Wesen und Werden des faschistischen Staates" (1929), reprinted in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 109–15.

55. In a letter from Schumpeter to Schmitt dated March 16, 1926, Schumpeter extends his best wishes to Schmitt and his new bride (against the wishes of the Catholic Church, Schmitt married his second wife on February 28, 1926). In a postcard of September 8, 1927, Schumpeter apologizes to Schmitt and his wife for not having been able to attend a social event to which Schumpeter had been invited. Both pieces of correspondence are on file at the Carl Schmitt Archives, Nordrhein-Westfälisches Hauptstaatarchiv, Düsseldorf.

56. The letter, from February 19, 1948, appears in Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, 101.

57. Carl Schmitt, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff" (1924); and "Zu Friedrich Meineckes 'Idee der Staatsräson,'" (1926), both reprinted in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 45–66. See also Schmitt, "Der Begriff des Politischen," *Archiv für Sozialwissenschaft und Sozialpolitik* 58 (1927): 1–33.

58. Based on the dates of the correspondence, Schumpeter must be referring to "The Concept of the Political," though the essay is never directly mentioned by name. Both letters are on file at the Carl Schmitt Archives, Düsseldorf.

59. Richard Thoma, "Zur Ideologie des Parlamentarismus und der Diktatur," *Archiv für Sozialwissenschaft und Sozialpolitik*, 53 (1925): 212–17.

60. Schmitt, "Der Begriff des Politischen," 32; Schmitt, "Völkerrechtliche Formen des modernen Imperialismus" (1932), 162; and Schmitt, *Die Kernfrage des Völkerbundes*, 36.

61. Fraenkel, *Dual State*, 201–2.

62. Schumpeter, "Sociology of Imperialism," 143.

63. Schmitt's 1948 letter to Helmut Schelsky potentially provides some support for this interpretation: Schmitt notes that at the close of the 1927 version of "The Concept of the Political," the reader will find evidence of the influence [*Wirkung*] of Schumpeter's "last conversation" with Schmitt in "1926/27" (?) (Schmitt, *Glossarium*, 101). Schmitt left Bonn for Berlin in 1928; Schumpeter went to Harvard in 1932.

64. In the introduction to the original 1923 edition of *The Crisis of Parliamentary Democracy*, Schmitt cites those who have influenced his account, including the works of his friend M. J. Bonn (92 n. 4). Among the first references is one to Carl Landauer's article on Schumpeter, in which the author both summarizes Schumpeter's diagnosis of the "crisis of parliamentarism" and offers a critical response to it. Most striking about the literature cited by Schmitt here is that it tends to emphasize the problems posed for parliamentary democracy by social and economic developments.

65. Schmitt, *Crisis of Parliamentary Democracy*, 66.

66. Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles*, 313.

67. Indeed, the scholarly paraphernalia of this section of Schumpeter's study is extremely scarce; Schumpeter seems most indebted to Gustav Le Bon, Graham Wallas, and, most importantly, Vilfredo Pareto. Part of this stems from the author's attempt to offer an accessible, "popular" work. Part of it, however, derives from the

fact that some of the inspirations for his ideas would have irritated an American audience.

68. Schumpeter, *Capitalism, Socialism, and Democracy*, 241–45. Schumpeter adds that "the United States excludes Orientals and Germany excludes Jews from citizenship; in the southern part of the United States Negroes are also often deprived of the vote" (244). In the context of his argument here, this *might* be taken as suggesting that Nazi Germany rests on some "democratic" elements. Like Schmitt, Schumpeter robs the concept of democratic equality of any commitment to universal civil and political rights.

69. For Schumpeter, "a large element of democracy" entered into "autocracies, both *dei gratia* and dictatorial, of the various monarchies of a non-autocratic type." Schumpeter, *Capitalism, Socialism, and Democracy*, 246.

70. Schumpeter, *Capitalism, Socialism, and Democracy*, 256–64.

71. Schumpeter, *Capitalism, Socialism, and Democracy*, 247–49, 264–68. See also: Joseph A, Schumpeter, "Vilfredo Pareto," in his *Ten Great Economists: From Marx to Keynes* (New York: Oxford University Press, 1951), 139.

72. Schumpeter, *Capitalism, Socialism, and Democracy*, 263. Schmitt, of course, was also fascinated by the possibilities for modern mass propaganda that modern technology provided.

73. Schumpeter, *Capitalism, Socialism, and Democracy*, 251.

74. Weber famously sought to moderate his own decisionism by means of the "ethic of responsibility."

75. Schumpeter, *Capitalism, Socialism, and Democracy*, 282. Schumpeter's 1942 study also represents an attempt to resolve some of the problems raised by his 1920 essay. One of the main theses of *Capitalism, Socialism, and Democracy* is that democracy—either in capitalism or socialism—is still possible, if we abandon the ambitious legacy of rationalistic liberalism and embrace his "democratic method" as an alternative. In *Capitalism, Socialism, and Democracy*, Schumpeter is struggling with the question of what form of popular rule is still possible *given* the basic irrationality of most people and the inevitability of the "match towards socialism." His "theory of democratic elitism" represents his answer to this question: "socialism and democracy may be compatible *provided the latter be defined as it has been*" in the chapter on democratic elitism [Schumpeter's own emphasis] (*Capitalism, Socialism, and Democracy*, 411).

76. Schumpeter, *Capitalism, Socialism, and Democracy*, 269.

77. Schumpeter, *Capitalism, Socialism, and Democracy*, 270.

78. Schmitt, *Legalität und Legitimität*, 93.

79. Schumpeter, *Capitalism, Socialism, and Democracy*, 284–85 [emphasis added].

80. What Schmitt says about this topic, even during the 1920s, is not particularly encouraging. See, for example, his attack on the (purportedly) privatistic and antipolitical liberal institution of secret, individual voting (*Die Verfassungslehre*, 243–46).

81. Kirchheimer, "Constitutional Reaction in 1932," 78.

82. Schumpeter, *Capitalism, Socialism, and Democracy*, 285.

83. Schumpeter explicitly excludes only military coups as well as "the acquisition of political leadership by the people's tacit acceptance of it or by the election *quasi*

*per inspirationem*." He quickly expresses reservations about the latter two exclusions, however, concluding that the first is still common in mass political parties dominated by the boss, whereas the second concerns a mere electoral "technicality" (!). Such qualifications potentially bring him closer to Schmitt's rather vague model of a plebiscitary election than might at first appear to be the case (*Capitalism, Socialism, and Democracy*, 271).

84. Schumpeter, *Capitalism, Socialism, and Democracy*, 271–2. Unfortunately, Schumpeter is vague here on the issue of *how much* individual freedom is implied by his "democratic method."

85. Schumpeter, *Capitalism, Socialism, and Democracy*, 296.

86. Swedberg, *Schumpeter: A Biography*, 15, 192–93. This admiration is expressed loud and clear in Schumpeter's essay, "Vilfredo Pareto," in *Ten Great Economists*, 110–42.

87. Allen, *Life and Work of Joseph Schumpeter*, vol. 1, 208. Tom Bottomore has convincingly shown that Pareto influenced Schumpeter's analysis of social classes and many other elements of his thinking (*Between Marginalism and Marxism: The Economic Sociology of J. A. Schumpeter* [New York: St. Martin's Press, 1992], 53, 76, 107, 111).

88. Schumpeter, "Vilfredo Pareto," in *Ten Great Economists*, 137–38.

89. Vilfredo Pareto, *Sociological Writings*, ed. S. E. Finer, trans. Derick Mirfin (New York: Praeger, 1966), 274. Significantly, Schmitt was probably familiar with some of Pareto's writings, though his writings provide no evidence that he systematically engaged with Pareto's ideas until *after* World War II. (See the bitter entries from his diary from July 22–23, 1948: Schmitt, *Glossarium*, 180–82.) Pareto's gloss on elite circulation often takes on unambiguously ethnicist and even protoracist connotations (*Sociological Writings*, 133, 159). Although these themes play a relatively secondary role in Schumpeter's work, they are not altogether absent. In a 1927 essay, Schumpeter concedes that he was once influenced by "the racial theory of classes" and still believes that "racial differences" are significant for the analysis of class formation. Still, racial differences are "not the heart of the matter," and thus their analysis can be bracketed in any discussion of the class structure ("Social Classes in an Ethnically Homogeneous Environment," in *Economics and Sociology of Capitalism*, 230).

90. Schumpeter, *Capitalism, Socialism, and Democracy*, 289.

91. Substantial biographical evidence from the 1930s and 1940s suggests that Schumpeter was an iconoclastic political reactionary with a soft spot for elements of the authoritarian right. After Hitler's takeover, Schumpeter criticized the American press for its purportedly indiscriminate attacks on the new regime in Germany (Schumpeter was no refugee; he came to Harvard in 1932 primarily for career reasons); for Schumpeter, Franco's movement was "really the most national and democratic imaginable and means nothing else but the revolt of the very soul of Spain against barbarism and crime" (cited on 223), and he seems to have toyed with conservative Catholic models of corporatist planning. Not surprisingly, he despised Franklin Delano Roosevelt and the New Deal, speaking at one point of Roosevelt's ten-year "dictatorship" (cited on 148) (Swedberg, *Schumpeter*, 147–51, 169–71, 222–23).

92. For a classic statement of these criticisms, see Carole Pateman, *Participation and Democratic Theory* (Cambridge: Cambridge University Press, 1970).

93. Schmitt likely would have dismissed Schumpeter's emphasis on elite *competition* as reliance on an economic category unsuitable to the core of authentic political experience. For Schmitt, such recourse to concepts of competition in politics represents a characteristically liberal quest to subordinate political experience to fundamentally economic modes of analysis. For Schmitt, Schumpeter's model surely does injustice to the political (Schmitt, *Concept of the Political*, trans. George Schwab, 28).

94. Pareto, *Sociological Writings*, 320. Interestingly, Schumpeter downplays Pareto's fascist preferences (Schumpeter, "Vilfredo Pareto," 118).

95. On Pareto's relationship to fascism, see *Pareto and Mosca*, ed. James Meisel (Englewood Cliffs, NJ: Prentice Hall, 1965).

96. Soviet-style state socialist regimes are probably the most obvious example of this.

97. Hermann Heller, "Bemerkungen zur Staats—und rechtstheoretischen Problematik der Gegenwart," *Archiv des öffentlichen Rechts* 55 (1929): 337–38.

98. Schumpeter, *Capitalism, Socialism, and Democracy*, 251.

99. Interestingly, "Schumpeter repeated over and over in his diary, 'Democracy is government by lying'" (Swedberg, *Schumpeter*, 193).

*Chapter 8*

# The Unholy Alliance of Carl Schmitt and Friedrich A. Hayek

Carl Schmitt's impact on contemporary free-market conservativism is more far-reaching than his influence on democratic theory in postwar political science. Notwithstanding the fact that Friedrich A. Hayek repeatedly acknowledged his intellectual debts to Schmitt, and even though a number of central features of Hayek's legal and political argumentation parallel Carl Schmitt's theorizing, Schmitt's impact on Hayekian liberalism has been effectively ignored.[1] In this chapter, I would like to provide a corrective to this oversight by demonstrating the existence of significant structural ties between Schmitt's analysis of legal decay in the modern interventionist state, one of the central themes of Schmitt's writings from the late 1920s and early 1930s, and Hayek's influential postwar account of a "road to serfdom," whose way he believes has been marked out by the rise of the welfare state and the alleged disintegration of the liberal rule of law. Although many differences undoubtedly separate Schmitt and Hayek, Hayek nonetheless builds on key elements of Schmitt's theoretical assault on the Weimar left. Moreover, Hayek ultimately proves unable to avoid the troubling political implications of Schmitt's earlier attack on the democratic welfare state. Just as the logic of Schmitt's argumentation leads him to embrace an authoritarian alternative to Weimar, Hayek's reworking of Schmitt ultimately encourages him to endorse a set of institutional proposals having dubious liberal democratic credentials.

In recent decades, countless political analysts have argued that the free-market attempt to restructure capitalist democracy bodes poorly for democratic politics. Even though this study obviously can make only a modest contribution to that debate, the "unholy alliance" of Carl Schmitt and Friedrich Hayek does raise difficult questions for those committed to the widely held belief that neoliberal economics and liberal democracy are simply two sides of the same coin. Authoritarianism and capitalism have coexisted quite

well in this century. A close examination of the intellectual relationship between Schmitt and Hayek helps explain why.

## I

Let us try to recall for a moment an all but forgotten juncture in early twentieth-century German history. It is 1926: even though the Weimar Republic is enjoying a brief moment of relative stability, memories of political and economic disorder are still very much alive in the minds of German citizens. Although Weimar's founding document—authored by impressive jurists and statesmen like Friedrich Naumann and Hugo Preuss but nonetheless in many ways a tension-laden product of the explosive political situation of war-weary, postrevolutionary Germany—promises substantial social and economic reforms, the Constitution's ambitious social democratic agenda remains unfulfilled thus far.[2] In order to remedy this failing, Weimar Communists (KPD) and Social Democrats (SPD) join forces and make use of the Weimar Constitution's relatively generous possibilities for direct democracy by proposing a referendum demanding the expropriation of royal property. The Kaiser was forced to flee Germany during the revolution of 1918, but the status of substantial monarchical properties, even at this relatively advanced juncture in the history of the Weimar Republic, remains unclear. The referendum has great symbolic significance. For democrats and leftists, a victory would represent a sign that Weimar has finally succeeded in smashing one of the pillars of the old order. In the eyes of those sympathetic to monarchical property claims, the referendum suggests all the potential dangers of mass-based democratic politics.

Although well over fourteen million voters support the expropriation of princely property, the left, as so often in 1920s and early 1930s Germany, is ultimately defeated at the polls. Conservative publicists and intellectuals—not the least of whom is Carl Schmitt, then an ambitious young jurist at the University of Bonn with a growing reputation—play a significant role in this defeat. His *Judicial Independence, Equality before the Law, and the Protection of Private Property According to the Weimar Constitution* (1926) offers a scathing critique of the left's quest to expropriate royal property. This work depends on an interpretation of the classics of modern liberal jurisprudence in order to formulate a dramatic contrast between *general legal norms and individual legal commands or measures* explicitly directed at particular objects and persons. In Schmitt's 1926 account, only general law satisfies the conditions of the ideal of the liberal rule of law [*Rechtsstaat*], respects the ideal of equality before the law, and guarantees judicial independence. The generality of the legal norm represents the very core of liberal legalism, for legal

equality "in the face of an individual measure is logically inconceivable."[3] Legislative action that approximates the form of an individual command inevitably blurs any meaningful distinction between judicial and administrative decision making: when law is directed at a particular individual or object, judicial action no longer differs qualitatively from inherently discretionary, situation-specific modes of administrative activity, and the idea of an independent judiciary is thereby robbed of any substance. When subject to an individual legal act, the judge becomes superfluous and the idea of a judge "bound to the law" thus a farce. Although Schmitt's pivotal book devotes surprisingly little energy to a clarification of the exact nature of the crucial distinction between general and individual legal action, he believes that he can categorize the left's attempt to expropriate royal property an individual measure and thus demonstrate its ominous implications. If the legislator can "divorce some particular married couple, seize control of any single newspaper, close down a single association, [or] arrest unpopular persons," political tyranny results.[4] Hence, the Weimar left's attempt to expropriate monarchical properties constitutes an act of "revolutionary violence." Such action may be necessary during the emergency situation or a dire political crisis, but it lacks legitimacy in a period of relative political normalcy.

Our exegesis of Schmitt's legal theory in part 1 of this study places Schmitt's comments here in the appropriate context. Throughout the Weimar period, Schmitt was a harsh critic of liberal jurisprudence. Indeed, his recourse here to elements of the liberal rule of law is purely strategic. At many junctures in the 1926 study, it indeed becomes clear that Schmitt merely means to suggest that as long as the Weimar constitutional system is committed to legal liberalism, it must endorse a traditional model of the rule of law and, by necessity, conflict with the left's attempt to undertake individual legal measures against royal property.[5] By no means should we read Schmitt's employment of traditional strands of liberal legalism as an expression of a genuine sympathy for the liberal rule of law. As was shown in part 1, Schmitt deconstructed that ideal well before publication of his 1926 pamphlet. Schmitt in 1926 merely speaks as a constitutional lawyer intent on informing his countrymen that if they aspire to take the liberal features of the Weimar Constitution seriously, they necessarily must oppose left-wing legal acts as inconsistent with the idea of general law.

Core elements of Schmitt's subsequent Weimar-era analysis of legal evolution in the era of the democratic interventionist state are anticipated by Schmitt's deceptively simple set of arguments from 1926. Very much in the shadow of this early study, Schmitt's interpretation of the ideal of the liberal rule of law plays a crucial role in his battle against Weimar's failed quest to establish the outlines of the modern democratic welfare state. Schmitt cleverly transforms the traditional ideals of liberal legalism into a weapon against

Germany's first attempt to secure a stable liberal democracy. In chapter 3, I note that Schmitt occasionally relies on traditionalist legal liberal ideals *in order to subvert legal liberalism*. This is precisely the strategy taken here in his reflections on the rule of law and the welfare state.

Schmitt's peculiar and highly selective appropriation of traditional liberal democratic definitions of the legal norm—in his 1926 study, some of his comments seem to imply that general law is incompatible with virtually *any* form of state intervention in social and economic affairs![6]—represents another example of his tendency to rely on caricatures of early liberal political thought in order to disgrace contemporary aspirations for democratization. His view of general law blatantly distorts the complexity of traditional conceptions of it. Schmitt writes that "where only one individual or *several individuals* [emphasis added] should be affected [by a legal act], one can no longer speak of equality" before the law.[7] Is the proviso that a legal act cannot be directed at "several individuals" meant to eliminate the possibility of any form of more or less specialized legislation? Unfortunately, the reader will look in vain to Schmitt's writings from the late 1920s and early 1930s for an adequately precise conception of the generality of law. Too often, Schmitt seems to prefer to leave the reader with a set of (unexplicated and often rather murky) quotes from classical liberal political theory. This strategy is hardly surprising: Schmitt is interested in discrediting legal liberalism, not offering a defense of it by reformulating its intellectual foundations. In the *Constitutional Theory* (1928), where Schmitt provides his most extensive discussion of his view of general law, he writes that the principle of equality before the law means that legal "dispensations and privileges, regardless of what form they take," are unacceptable.[8] This rather open-ended definition of the generality of law clearly allows him to attack even the most cautious attempts at characteristically modern forms of social and economic regulation, which undoubtedly require *differentiated and specialized* forms of legislation (focused on specific objects and groups of individuals). If any form of particular or specialized legislation potentially constitutes a tyrannical act of revolutionary violence, the democratic welfare state will have to be depicted in nightmarish terms.

Indeed, Schmitt's writings from Weimar's final years—most importantly, *The Guardian of the Constitution* (1931) and *Legality and Legitimacy* (1932)—are filled with nasty polemics directed against Weimar Germany's so-called pluralist party state, which, in effect, was Weimar's precocious version of the democratic welfare state and against its dependence on abandoning nineteenth-century liberalism's (alleged) distinction between state and society. Although numerous commentators have since pointed to the exceedingly modest character of the Weimar welfare state,[9] Schmitt offers a terrifying portrait of Weimar's experiments with the instruments of interventionist

politics. As we discussed in chapter 4, Schmitt argues that powerful organized interest groups colonize the Weimar governmental apparatus to such an extent that the German regime is no longer capable of standing above and beyond antagonistic, organized political and social constituencies and resolving conflicts among them. In Schmitt's at times downright apocalyptic account, the emerging welfare state entangles government in a multitude of social and economic spheres. But this entanglement simply results in a crippling of the state's autonomous decision-making capacities; the welfare state no longer allows government to serve as an effective arbitrator among competing interest groups. The "pluralist party state" fails to "distinguish between friend and foe."[10] The emergence of the democratic interventionist state threatens to plunge contemporary politics into a potentially explosive political crisis in which an "ethics of civil war" may be needed to guide political action. The integrity and coherence of the governmental decision-making apparatus are undermined so drastically that constitutionalism in the modern welfare state increasingly amounts to little but an attempt to reach a fragile "peace treaty" among hostile agglomerations of social and political power.[11]

Schmitt's own chief intellectual foe, legal positivism, purportedly facilitates this process in two main ways. First, legal positivists like Kelsen challenge traditional views of state sovereignty in favor of a view of modern democratic government that emphasizes its socially heterogeneous and compromise-oriented character. For Schmitt, positivists endorse precisely that parceling out of state decision-making authority to competing interest groups whose perils Weimar so dramatically illustrates. They encourage profoundly divisive structural tendencies in the democratic welfare state that suggest that its inherent logic is that of the emergency situation.[12] Second, they abandon the classical emphasis on the *semantic* generality of the legal norm in exchange for a view emphasizing the statute's democratic *origins* in a series of parliamentary procedures, thereby legitimizing the subjection of political life to modes of individual, case-oriented legislation that may constitute, as Schmitt had noted in 1926, acts of revolutionary violence.[13] By means of a remarkable intellectual sleight of hand, Schmitt then can depict precisely those voices who fought to the end to defend Weimar—in particular, positivists like Kelsen, sympathetic to the emergence of the democratic welfare state—as revolutionaries bent on debilitating the "substantial kernel" of the Weimar constitutional order.

But Schmitt's original 1926 account contains two further implications as well. Both are rigorously sketched out in his writings from the early 1930s. Although Schmitt repeatedly blames social democrats and their jurist friends for having brought Germany to the brink of political collapse, his *Judicial Independence, Equality before the Law, and the Protection of Private Property According to the Weimar Constitution* still leaves open the possibility

that the abandonment of liberal general law may be justified amid a serious political crisis. Even in 1926, Schmitt conceded that a crisis could require an emergency dictatorship ready to abandon so-called normativistic liberal law in favor of individual measures and commands.[14] In the face of the left's attempt to construct the democratic welfare state—as we have seen, for Schmitt this trend constitutes an implicit revolutionary threat—*just such an emergency regime is what Schmitt now proposes*. With the emergence of executive-based quasi-authoritarian regimes (under Heinrich Brüning and then Franz von Papen) in Germany in 1930,[15] Schmitt outlines a disturbing defense of a plebiscitary dictatorial system guided by precisely those individual measures and commands whose dangers he had seemed to warn his German readers about just a few years earlier. By means of an idiosyncratic reworking of the classical liberal democratic aspiration to distinguish general (parliamentary) laws from individual (executive) decrees, Schmitt provides a justification for a discretionary emergency dictatorship, in his view absolutely necessary if the inept, inefficient, and politically perilous "pluralist party state" is to be replaced by a system superior to it. As Peter Gowan has similarly noted, Schmitt hoped to jettison the democratic Weimar welfare state for an authoritarian alternative, a new type of interventionist state that would succeed in divesting itself of burdensome "welfare obligations, [and] commitments to protecting [the] social rights" of subordinate social constituencies.[16] According to Schmitt, the "quantitative total state"—a weak, social-democratic-inspired interventionist state—should be replaced by a "qualitative total state"—an alternative brand of interventionism but one that guarantees authentic state sovereignty while simultaneously managing to provide substantial autonomy to owners of private capital.[17] Despite his railings against social-democratic forms of state activity, Schmitt explicitly argues that an "economic-financial state of emergency" necessitates far-reaching forms of governmental activity in society. Economic affairs and conflicts have become so central to modern politics that Schmitt believes that a careless attempt to disengage the state from social and economic affairs would simply exacerbate social and political tensions and further deepen the crisis of state sovereignty in Germany. But if virtually *any* attempt to undertake state intervention in social and economic life implies a frontal attack on the rule of law-ideal, it would seem that the interventionist state necessitates nothing less than the *complete* abandonment of the liberal rule of law. In other words, interventionist policies require a full-fledged system of arbitrary rule, and governmental social and economic regulation inevitably contains an arbitrary, decisionist legal core.

In *Legality and Legitimacy*, Schmitt expressly sketches out the final implications of this line of argumentation. As we saw earlier, there Schmitt concedes that the "the administrative state which manifests itself in the praxis of

'measures' "—by which he means the interventionist state—"is more likely to be appropriate to a 'dictatorship' " than to classical liberal democracy. If the contemporary interventionist state requires discarding general law (and if, furthermore, the interventionist state is absolutely essential to contemporary politics), then the modern interventionist state will have to take the form of an executive-centered dictatorship. Arbitrary government is unavoidable in the era of interventionist politics.[18]

Ultimately, Schmitt's peculiar restatement of the liberal concept of general law thus leads him to pursue an unambiguously illiberal and antidemocratic agenda. It also permits him to vary his argumentation so as to accord with the ever-changing political imperatives of the battle against Weimar liberals and leftists. At first, Schmitt instrumentally employs his definition of general law in a *defensive* manner against attempts by the left to undertake novel forms of state intervention in the capitalist economy. But when Weimar's liberal and left-wing defenders lose political ground, Schmitt then can rely on his interpretation of the liberal legal statute in order to *justify* the establishment of an openly authoritarian, belligerently bourgeois interventionist state.

Would it not be better simply to abandon interventionist politics altogether? Could one try to recapture a classical liberal state/society scenario? Schmitt himself had often recalled, in surprisingly flattering terms, the world of early liberalism in his writings. So why not go back to it?

This is precisely Hayek's answer to the paradoxes of contemporary interventionist politics—which Hayek sees Schmitt as having quite accurately described. Schmitt, however, considers any attempt to return to early liberalism disingenuous. As he comments in *The Guardian of the Constitution*, in the contemporary political universe the demand for "nonintervention becomes a utopia, even a self-contradiction. For nonintervention would mean . . . nothing more than intervention on behalf of those who happen to be most powerful and most irresponsible."[19] For Schmitt, the real question is *who* intervenes, and *whose* interests are to be served by intervention. In his view, substantial state activity is necessary. In contrast to social democratic forms of intervention, Schmitt's own "qualitative total state" allegedly need not infringe unfairly on the privileged position of private capital.

## II

Let us now try to return to a second moment in contemporary history. It is 1944. World War II has discredited much of the political right, and the left seems poised for a series of impressive political victories. Once again, the specter of expropriation rears its head. Many on the left consider nationalization a legitimate instrument of progressive public policy, and even some

conservatives openly advocate the expropriation of select forms of private property. A young émigré scholar from Austria, Friedrich A. Hayek, responds with a polemic destined to become something of a political bestseller in the postwar world.[20] Addressed "to the socialists of all parties," Hayek's *The Road to Serfdom* dramatically argues that the emerging democratic welfare state is destined to undermine the rule of law and the legal predictability and certainty guaranteed by it.[21] For those familiar with Weimar-era legal debates, much of Hayek's account is surprisingly unoriginal. His own intellectual socialization, as he seems to concede on several occasions, took place in the shadow of the Weimar debates.

Inadequately sensitive to the fundamentally instrumental character of Schmitt's occasional recourse to legal liberalism, Hayek seems to parallel Schmitt's analysis in a number of respects.[22] First, Hayek relies on a dramatic contrast between *general law* and *individual commands or measures*, and his definition of general law is exceedingly open-ended: reminiscent of Schmitt, Hayek states that the rule of law requires that statutes not refer to the "wants and needs of particular people."[23] Although Hayek claims to derive this view from classical liberal political thought, he provides little real textual support for this view in *The Road to Serfdom*; as a matter of fact, classical concepts of general law are more complicated than Hayek suggests.[24] Second, Hayek argues that the growth of state intervention in the economy culminates in a "total state." Of course, Schmitt had introduced this term into German political thought in 1930 when describing the same phenomenon, in which the classical liberal state/society distinction allegedly loses any real significance, and Hayek expressly cites Schmitt's statement in *The Guardian of the Constitution* that the "*neutral* state of the liberal nineteenth century [is being transformed into] the *total* state in which state and society are identical."[25] Most importantly, Hayek seems to endorse Schmitt's central thesis. For Hayek, as for Schmitt, the emerging welfare state *necessitates* arbitrary forms of situation-oriented legal action, and it inevitably cripples parliamentary authority. The mere fusion of state and society, manifested most unambiguously in the contemporary democratic welfare state, unavoidably generates arbitrary government. Hayek shares Schmitt's view that the logic of the interventionist state corresponds most closely to a plebiscitary dictatorship, in "which the head of government is from time to time confirmed in his position by popular vote, but where he has all the powers at his command to make certain that the vote will go in the direction he desires."[26] In Schmitt's categories, the interventionist state is decisionist to the core, and a mass-based plebiscitary dictatorship is best suited to the imperatives of a legal universe destined to take on increasingly decisionist characteristics.

Whereas Schmitt endorses trends toward an authoritarian mass-based dictatorship, Hayek believes that we need to avoid the errors of the Germans: "it

is Germany whose fate we are in some danger of repeating."[27] Thus, Hayek opts for a radical curtailing of the welfare state and a return to the "neutral state of the liberal nineteenth century." Allegedly, we can avoid the "road to serfdom," by taking the road back to that historical period when the purported fusion of state and society had yet to occur.

Although *The Road to Serfdom* refers to Schmitt on a number of occasions, Hayek's comments there are misleading. He criticizes Schmitt's Nazi-era polemics, while conveniently ignoring the extent to which his own account of legal decay in the administrative state parallels the idiosyncrasies of Schmitt's argumentation. In subsequent years, however, Hayek is far less reticent about acknowledging his debts to Schmitt. In *The Constitution of Liberty* (1960), which builds on the basic argument of *The Road to Serfdom*, Hayek introduces his definition of general law—which Hayek, like Schmitt, considers the centerpiece not only of the rule of law-ideal but also of liberalism itself[28]—by citing Schmitt's major Weimar-era studies and commenting that "the conduct of Carl Schmitt under the Hitler regime does not alter the fact that, of the modern German writings on the subject, his are still among the most learned and perceptive."[29] Though Hayek refers to a number of additional sources for his definition of law, he seems to attribute a special place to Schmitt, whom he considers the most impressive opponent of Weimar legal positivism and its disastrous quest (for Hayek, as for Schmitt) to blur the distinction between general law and individual commands and measures. Indeed, Hayek's 1960 study can be interpreted as an attempt to struggle with the limits of Schmitt's problematic definition of the generality of law. At many junctures, Hayek seems to follow Schmitt in suggesting that legal generality is incompatible with any form of legal differentiation or specification whatsoever.[30] But in *The Constitution of Liberty*, he appears to recognize the limits of the extreme character of this view. Now he admits that general law is consistent with legal specialization, as long as no individual person or object is *explicitly* named, and a particular legal category is acceptable both to those who fall under it and those who fall outside it.[31] Soon Hayek appears to throw his hands into the air in desperation: he admits that "no entirely satisfactory criterion has been found that would always tell us what kind of classification" is compatible with the ideal of general law.[32] This concession is truly astonishing, given the centrality of the concept of general law to his entire project. Even scholars sympathetic to Hayek's political agenda have emphasized the ambiguity of his definition of general law, and some have even gone so far as to deem it incoherent.[33] But such commentators ignore the manner in which Hayek's open-ended definition of general law allows him, in a manner once again similar to the twists and turns of Schmitt's analysis of legal decay in the welfare state, to rely on what initially seems to be a constant in his theory (the centrality of general law) so as to accord with the immediate imperatives of

the political struggle against defenders of the welfare state. Hayek undoubtedly remains hostile to the interventionist welfare state throughout his intellectual career; this is inevitable given his view of the decisionist character of legal action when state and society have fused and the welfare state begins to emerge. But the *intensity* of this hostility clearly shifts. In his 1976 Preface to *The Road to Serfdom*, Hayek himself admits that he had not freed himself adequately in 1944 from "interventionist superstitions,"[34] and his final study, the three-volume *Law, Legislation, and Liberty* (written in the 1970s, amidst immense dissatisfaction with the welfare state and growing neoconservative political strength), is far more belligerent in its antiwelfare state polemics than *The Road to Serfdom*, which was written at a moment of broad sympathy for traditional left-wing economic policies. Because some versions of Hayek's definition of general law suggest that virtually any form of state intervention is incompatible with general law, whereas others provide at least some room for welfare state-type activities, this ambiguity is probably inevitable. Hayek's reliance on Schmitt generates a number of strikingly "decisionistic" elements within the core of his own project.

Still, Hayek's hostility to discretionary tendencies in the contemporary interventionist state hardly makes him a Schmittian. Even if Hayek's account parallels important elements of Schmitt's, it still differs from Schmitt's in many ways. It would be well, for example, to recall Hayek's idiosyncratic attempt to ground the rule of law in a brand of epistemological skepticism that sees rule-based action as an effective way for human beings to compensate for the ultimately limited nature of rationality.[35] And are not Hayek's political intentions, as noted above, clearly distinct from Schmitt's? If so, why should it matter if Hayek borrows from Schmitt?

The relationship between Hayek and Schmitt is more intimate, however, than I have been able to describe thus far. In his final works, Hayek openly endorses the core of Schmitt's critique of the so-called pluralist party state. Moreover, he is quite honest about this: because the tendency toward legal decay in the interventionist state "has been most explicitly seen" by Schmitt, Hayek writes in *Studies in Philosophy, Politics, and Economics*, he believes that he can use Schmitt's detailed analysis of the democratic welfare state in order to criticize it.[36] Although Schmitt "regularly came down on what to me appears both morally and intellectually the wrong side," Hayek notes subsequently in *Law, Legislation, and Liberty*, the flawed character of the contemporary democratic welfare state "was very clearly seen by the extraordinary German student of politics, Carl Schmitt, who in the 1920s probably understood the character of the developing form of [interventionist] government better than most people."[37] Hayek's 1970s restatement of Schmitt's critique of the Weimar welfare state culminates in a series of institutional proposals having rather disturbing and even authoritarian implications. Having chosen

to play by the rules of Schmitt's intellectual universe, Hayek proves unable to escape from all of its dangers.

In *Law, Legislation, and Liberty*, Hayek once again criticizes the tendency to abandon an emphasis on law's semantic generality in favor of a view emphasizing law's democratic origins in the legislative process. Again he attributes this fatal error to legal positivism and, most importantly, to Hans Kelsen. But now Hayek takes an additional step. He argues that the disintegration of general law generates a situation in which governmental authority is handed over to competing organized interests. When general law is abandoned, traditional liberal democratic institutions undergo a dramatic functional transformation. Open debate and political exchange within parliament are replaced by bargaining among bureaucratic parties more concerned with having their narrow interests represented than with engaging in liberal dialogue with their political opponents. Parties become amalgams of special interests aiming to have their (particularistic) desires achieved by particular or individual laws. Legislatures are so busy providing special favors to interest groups, and their activity is no longer distinct enough from that of administrators, that they no longer have time even for meaningful political deliberation.[38] When government is permitted to issue measures and commands, it makes sense for legislators to appeal to privileged, particularistic interest blocs; allegedly, this danger is reduced when legislators are allowed only to issue general rules and, thus, commit themselves solely to policies embodying the common good. Because contemporary liberal democracy has betrayed the traditional concept of general law, a "para-government has grown up, consisting of trade associations, trade unions and professional associations, designed primarily to divert as much as possible of the stream of governmental favour to their members."[39] Since the legislature is no longer limited by the requirements of legal generality, it is nominally omnipotent. But in fact it "becomes as a result of unlimited powers exceedingly weak, the playball of all the separate interests it has to satisfy."[40] The overall account of the contemporary welfare state here is very much like Schmitt's: supporters of the welfare state and their legal positivist allies ignore the virtues of legal generality, thus paving the way for the fusion of state and society and a "quantitative total state" that intervenes in a multitude of social spheres and seems all-powerful, but in fact is robbed of any real decision-making authority.

What then is Hayek's answer to the quagmires of contemporary interventionist politics? In the final volume of *Law, Legislation, and Liberty*, he concludes that we need institutional reforms that recapture the gist of classical attempts to distinguish clearly between legislative and governmental (or administrative) activities. Legislation should be limited to general rules, whereas government should be subordinate to legislation and "act

on concrete matters, the allocation of particular means to particular purposes."[41] Because the activities of existing legislatures have come to differ little from what classical liberal thought would have considered situation-specific, relatively discretionary administrative activities, the contemporary legislature should be subordinated to a new upper house, that alone could guarantee lawmaking guided by genuine political exchange and based on general rules. Because "probity, wisdom, and judgement" are required of Hayek's ideal deliberative legislators, most appropriate would be an "an assembly of men and women elected at a relatively mature age for fairly long periods, such as fifteen years, so that they would not be concerned about being re-elected."[42]

Hayek's proposed legislature, which "should not be very numerous" and would consist of representatives "between their forty-fifth and sixtieth years," would be chosen in a manner altogether different from present legislatures. Since "it would seem wise to rely on the old experience that a man's contemporaries are his fairest judges," government would "ask each group of people of the same age once in their lives" to elect the legislature.[43] Making voting a one-time act should encourage "probity" among citizens as well and thus help immunize them from the perils of special-interest politics.

Two features of Hayek's curious institutional proposal are of special significance for us here. First, a real conceptual tension manifests itself in Hayek's political model, and it probably stems from his implicit dependence on Schmitt. Repeatedly, Hayek in *Law, Legislation, and Liberty* argues that "governmental" activities are unavoidably discretionary. This point is consistent with his endorsement of Schmitt's thesis that state intervention in social and economic affairs tends to require a decisionistic legal form.[44] But how then would it be possible to subordinate or regulate these activities in accordance with general legislative norms? If they are truly decisionistic—and thus a profound threat to freedom—it would seem that Hayek would probably have to exclude this possibility. By definition, decisionist state activity cannot be regulated in accordance with classical liberal legal norms. Hayek's dilemma looks something like this: *either* interventionist activities are genuinely decisionist and thus cannot be effectively subjected to "normativistic" general rules *or* they may not be all that decisionist after all and thus need not imply that the welfare state has already taken significant strides down the "road to serfdom." Unfortunately, Hayek sometimes wants to have it both ways. He wants to warn people of the inevitable perils of growing state activity *and* to claim, at least implicitly, that state activity may not be all that worrisome since it potentially could be regulated in accordance with general law.[45]

Second, one needs to ask whether Hayek's model deserves to be considered compatible with the basic ideals of modern liberal democracy. Liberal

democracy has taken relatively distinct institutional forms in modern history. This fact should suggest that liberal democratic ideals are compatible with a rich diversity of institutional mechanisms. Could Hayek's proposals here pass some hypothetical test or standard that we might come up with for determining whether a particular set of institutions can still be deemed liberal democratic? To be sure, his model would result in a vast reduction in existing possibilities for democratic participation, and a sizable number even of the rather apathetic citizens found in contemporary liberal democracy would probably see them as constituting a substantial rollback of some of their most basic democratic rights. If we were to answer this question in the negative, it might further suggest that Hayek's reliance on Schmitt has proven rather costly. For then, we could interpret Hayek's argument as an implicit concession to Schmitt's view that the "pluralist party state" ultimately can be transformed effectively only by authoritarian means. As noted above, Schmitt openly endorsed aspirations to free the interventionist state from social policy-based obligations to subordinate social groups, and he advocated a new form of interventionist politics but one allegedly distinct from its Weimar predecessor in part because of its guarantees of autonomy to the owners of private capital. Despite undeniable differences between Hayek and Schmitt on this issue,[46] there is more than a faint echo of Schmitt's project in Hayek's argument: the concluding chapter of *Law, Legislation, and Liberty* ends with a call for a "dethronement of politics"—specifically, a dramatic reduction of state activity, which Hayek sees as overwhelmingly *social democratic* in character, in private capitalism. Although it would be unfair to Hayek to obscure the real differences between his rather peculiar political model and Schmitt's preference for a plebiscitary dictatorship,[47] Hayek is ultimately less distant from Schmitt than Hayek claims. Hayek is legitimately disturbed by Schmitt's model of a plebiscitary dictatorship in which questions are posed from above by an authority unaccountable to effective public control. Yet his own institutional vision is hardly altogether free of the authoritarianism evident in Schmitt's proposals.

Given Hayek's acceptance of so much of Schmitt's unflattering portrayal of the contemporary democratic welfare state, how could this be otherwise? Let me restate the underlying enigma noted in chapter 4: if we believe that the decision-making authority of contemporary government is crippled by characteristically welfare state-type organized interests, and if such interest blocs possess a genuinely popular basis in substantial portions of the citizenry[48] (e.g., labor unions in parts of Western Europe), does it not then make sense for some would-be reformer to demand a curtailment of traditional democratic mechanisms and rights? How else might the state be effectively cleansed of the influence of groups representing public employees, senior citizens, labor, or any of a diversity of other interests potentially hostile to

an aggressive bourgeois economic agenda? Moreover, if the current situation is as apocalyptic as Schmitt and Hayek claim, dramatic action would seem absolutely imperative today. If the welfare state necessarily means, as Schmitt hinted in 1930, that its inhabitants are in a situation of civil war, then it is perfectly logical for critics of the welfare state to respond with an emergency dictatorship of their own.

## III

To its credit, Schmitt's theory at least indirectly acknowledges that a full-fledged assault on the democratic welfare state today may very well find itself forced to revert to authoritarian political means. Hayek never explicitly endorses this view. Nonetheless, his peculiar brand of neoliberalism ultimately illustrates Schmitt's point. Notwithstanding Hayek's anxieties about the growth of discretionary state authority in our century, he seems to have surprisingly few qualms about defending a rather troubling political alternative to contemporary liberal democracy. Why? Like Schmitt, Hayek ultimately sees the interventionist welfare state as a genuine revolutionary threat to a political universe dominated by those with "property and education" [*Besitz und Bildung*]. Given the welfare state's purportedly revolutionary character, both theorists are ready to unleash a disturbing array of political instruments against it.

An analysis of the unholy alliance of Carl Schmitt and Friedrich Hayek potentially does more than provide an exegetical explanation for the sources of the more problematic political components of Hayek's market-oriented neoliberalism. In my view, it potentially offers a fruitful starting point for understanding the elective affinity between free-market economics and authoritarian politics that has become so common in the contemporary political universe. The unholy alliance of Schmitt and Hayek suggests that there is certainly more than one possible "road to serfdom" open to us today. In our times, the most tempting of such roads may very well be prepared by those who claim to represent liberal ideals but in fact caricature and thereby rob those ideals of anything worth defending.

## NOTES

1. For one noteworthy exception, see Renato Cristi, "Hayek and Schmitt on the Rule of Law," *Canadian Journal of Political Science* 17, no. 3 (1984): 521–36. Cristi rightly argues that "some of Schmitt's basic assumptions have penetrated his [Hayek's] philosophy of liberty, effectively determining the content of his argumentation" (523).

2. See Heinrich Potthof, "Das Weimarer Verfassungswerk und die deutsche Linke," *Archiv für Sozialgeschichte* 12 (1972): 433–86.

3. Schmitt, *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung*, 23.

4. Schmitt, *Unabhängigkeit der Richter*, 23. In the immediate aftermath of World War II, when the specter of socialization again momentarily loomed large in Germany, Schmitt again rolled out these criticisms of individual legal acts ("Rechtstaatlichen Verfassungsvollzug" [1952]), in Schmitt, *Verfassungsrechtliche Aufsätze*, 452–86.

5. Schmitt, *Unabhängigkeit der Richter*, 4, where Schmitt notes that the thesis of his study is that the proposed legal acts by the left "violate numerous positive determinations of the Weimar Constitution." Schmitt in this book is speaking as a jurist interpreting the Weimar Constitution, which he believes to contain a substantial liberal [*bürgerlich*] element.

6. It is important to recall that many classical defenders of the generality of the legal norm clearly suggested that it was compatible with substantial forms of legal *specialization* and *intervention* in socioeconomic affairs. Jean-Jacques Rousseau writes that "when I say that the object of law is always general, I mean that the law always considers subjects as a body and actions in the abstract, never a man as an individual or a particular action. Thus the law can very well enact that there will be privileges, but it cannot confer them on anyone by name. The law can create several classes of citizens, and even designate the qualities determining a right to these classes, but it cannot name the specific people to be admitted to them" (Jean-Jacques Rousseau, *On the Social Contract*, ed. Roger Masters [New York: St. Martin's Press, 1978], 66). Similarly, Hegel defended the idea of the generality of the legal norm, but he saw it as being consistent with extensive state intervention in the economy (Hegel, *Philosophy of Right*, para. 211). Even Locke, who is particularly influential for Schmitt's discussion of this theme in *The Crisis of Parliamentary Democracy*, is more ambiguous than Schmitt lets on. True, Locke warns his reader repeatedly of the dangers of "indeterminate resolutions" and "extemporary, arbitrary decrees," but simply to assume—as Schmitt seems to—that Locke must have been thinking of forms of state action like those common in the modern welfare state suggests a rather anachronistic reading of seventeenth-century English liberal thought. John Locke, *Two Treatises on Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1967). Although Schmitt's delineation of general law from individual measures does reproduce some elements of classical modern jurisprudence, his formulation obscures why writers like Rousseau were concerned about legal generality in the first place: they wanted *like rules for like cases*. This is important: when stated in this manner, it *might* suggest the legitimacy of some *individual* legal acts when a democratic government is confronted with a genuinely peculiar or "individual" situation—when a large corporation or bank is on the verge of bankruptcy, for example. Of course, such acts have become relatively widespread in the era of the contemporary interventionist state. To conflate them with acts of "revolutionary violence" seems, at the very least, to trivialize the perils of revolutionary dictatorship. For a somewhat more satisfying account of the problems posed by traditional views of liberal general law, see Kent Greenawalt, *Law and Objectivity* (New York: Oxford University Press, 1992).

7. Schmitt, *Unabhängigkeit der Richter*, 22.

8. Schmitt, *Die Verfassungslehre*, 154. He then makes the rather obscure comment that "equality [before the law] is only possible where minimally a majority of cases can be affected" (155).

9. Preller, *Sozialpolitik in der Weimarer Republik*.

10. Schmitt, *Concept of the Political* (1932), 39–45, where Schmitt links his "concept of the political" to his critique of "pluralist" tendencies in the modern interventionist state.

11. This argument was intimated as early as 1930 in Schmitt, "Staatsethik und pluralistischer Staat" (1930).

12. Schmitt, *Der Hüter der Verfassung*, especially 63, where Schmitt refers to the view of democracy developed by Kelsen in *Vom Wesen und Wert der Demokratie*.

13. Schmitt, *Die Verfassungslehre*, 143–57. This criticism is especially disingenuous in light of Schmitt's own radical deconstruction of the idea of norm-based judicial and administrative action.

14. Schmitt, *Unabhängigkeit der Richter*, 23.

15. For an historical survey of this period, see Jasper, *Die gescheiterte Zähmung*.

16. Peter Gowan, "The Return of Carl Schmitt," *Debate: Review of Contemporary German Affairs* 2, no. 1 (1994): 120.

17. Schmitt, "Starker Staat und gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführen." In this crucial essay, Schmitt argues that much of the capitalist economy should be "self-administered," but he contrasts his use of this term with social democratic conceptions of worker self-management. For Schmitt, "economic leaders" [*Wirtschaftsführer*]—in other words, owners and managers—need to be given substantial autonomy in their industries and factories, and they need to be freed from *social-democratic* forms of regulation. The essay is a revealing one: first, it represents an early attempt to extend the infamous *Führerprinzip* into the economy; and second, it reproduces the view, widespread among propertied groups in Germany in 1933, that the Nazis might succeed in guaranteeing German business far more autonomy than it had succeeded in maintaining in the Weimar period. For a helpful introduction to Schmitt's (often ignored) economic views, see Volker Neumann, *Der Staat im Bürgerkrieg: Kontinuität und Wandel des Staatsbegriffs in der politischen Theorie Carl Schmitts* (Frankfurt am Main: Campus, 1980).

18. Schmitt is hardly the only author to claim that growing state intervention in the twentieth century has engendered increasingly discretionary forms of decision making. But even if it is true that there is at least *some* empirical support for Schmitt's claim, there is certainly no reason why it is an inevitable and irreversible facet of contemporary politics.

19. Schmitt, *Hüter der Verfassung*, 81.

20. Hayek was born in 1899 in Vienna. He completed degrees at the University of Vienna in law and political science, before becoming an intellectual accomplice of Ludwig Mises in the late 1920s. Hayek left the University of Vienna for a position at the London School of Economics in 1931, though he clearly stayed in close contact with intellectual and political developments on the continent well after leaving Vienna (Kurt R. Leube, "Friedrich August von Hayek: A Biographical Introduction,"

in *The Essence of Hayek*, ed. Chiaki Nishiyama and Kurt R. Leube (Stanford, CA: Hoover Institution Press, 1984), xvii–xxxvi. Schmitt was probably unfamiliar with much of Hayek's work, though a copy of his "Confusion of Language in Contemporary Political Thought" (1968) was found in Schmitt's library at his death. This essay has been reprinted in Friedrich A. Hayek, *Economic Freedom* (Oxford: Basil Blackwell, 1991), 357–82. I have been unable to find evidence either of correspondence or of personal contact between Schmitt and Hayek.

21. Friedrich A. Hayek, *The Road to Serfdom* [1944] (Chicago, IL: University of Chicago Press, 1976).

22. Hayek obviously knew of Schmitt's National Socialist proclivities in the 1930s. But he failed to grasp fully that even in the Weimar period, Schmitt's model of the rule of law was fundamentally oriented toward discrediting formalistic legal liberalism. Hayek seems to have been unfamiliar with many of those texts in which Schmitt explicitly deconstructs liberal jurisprudence (most importantly, Schmitt's early writings on legal indeterminacy). Because of this, he tends to take Schmitt's occasional dependence on an overstylized interpretation of the classical liberal rule of law at face value.

23. Hayek, *Road to Serfdom*, 73.

24. Moreover, Hayek's implicit claim that the liberal legal order once primarily rested on such norms constitutes, at best, a sloppy contribution to legal history. Where did Hayek's pristine liberal legal universe exist? When did law ever chiefly consist of norms having the general form described by him here? Hayek is remarkably vague in answering these questions. The issue is further complicated by Hayek's nostalgia in his late writings for customary and traditional common law. Contrary to what Hayek occasionally seems to believe, it is rather dubious to claim that traditional law looked at all like the legal model—based on clear general norms—otherwise endorsed in his theory. See Friedrich A. Hayek, *Law, Legislation, and Liberty*, vol. 1 (Chicago, IL: University of Chicago, 1973), especially 72–94. Hayek would do well to recall the criticisms made by many classical writers, most prominently by Bentham, of the "monstrous confusion" (Hegel) of traditional customary law. See H. L. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), especially pp. 21–39; and Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986).

25. Cited in Hayek, *Road to Serfdom*, 178.

26. Hayek, *Road to Serfdom*, 69. He also introduces (67) the peculiar concept of an "economic dictatorship," which may hearken back to Schmitt's account of an "economic-financial state of emergency" that, according to Schmitt's argument in *The Guardian of the Constitution*, justifies the extensive use of emergency powers by the Weimar federal president in the realm of economic and social affairs.

27. Hayek, *Road to Serfdom*, 2.

28. Notwithstanding the undeniable importance of the concept of the rule of law to modern liberalism, it is surely peculiar to claim that the essence of liberalism "is a doctrine about what the law ought to be" (Friedrich A. Hayek, *The Constitution of Liberty* [Chicago, IL: University of Chicago Press, 1960], 103). Schmitt's view of liberalism is similarly idiosyncratic: liberalism is a "normativistic" ideology whose centerpiece is the rule of law—and the "normativism" of general law.

29. Hayek, *Constitution of Liberty*, 485 n. 1. The works cited here include *Die Verfassungslehre* and *Der Hüter der Verfassung* and later *Die Unabhängigkeit der Richter* (487 n. 9). In a subsequent work, Hayek appreciatively cites Schmitt's statement that "there can be no 'equality before a measure' as there is equality before the law" (*Law, Legislation, and Liberty*, vol. 1, 139).

30. See also the definition provided in *Law, Legislation, and Liberty*, vol. 3 (Chicago, IL: University of Chicago Press, 1979): "The basic conception of classical liberalism, which alone can make decent and impartial government possible, is that government must *regard* all people as equal, however unequal they may in fact be, and that in whatever manner the government restrains (or assists) the action of one, so it must, under the same abstract rules, restrain (or assist) the actions of all others. Nobody has special claims on government because he is rich or poor" (142–43).

31. As far as the latter qualification is concerned, Hayek writes that legal distinctions "will not be arbitrary, will not subject one group to the will of the others, if they are equally recognized as justified by those inside and outside the group [affected by them]" (*Constitution of Liberty*, 155). The first precondition is clearly rather minimal since legal action can still take an "individual" form even if no specific person or object is expressly named (e.g., "all citizens living in cities with a population over seven million will pay an extra tax that the federal government henceforth will describe as an NYC tax"). In order to criticize the second precondition, R. Hamowy has commented that "laws granting privileged status to select groups are commonly acquiesced in by larger majorities even when such laws run counter to their own ends" ("Law and Liberal Society: F. A. Hayek's *Constitution of Liberty*," *Journal of Libertarian Studies* 2 [Fall 1978]). In other words, the fact that a particular legal category may be acceptable both to a substantial number of people who fall within and outside of it may not be able to provide the check on governmental arbitrariness which Hayek thinks that it can.

32. Hayek, *Constitution of Liberty*, 209.

33. Chandran Kukathas, *Hayek and Modern Liberalism* (Oxford: Oxford University Press, 1989), 148–64; Hamowy, "Law and Liberal Society"; and W. P. Baumgarth, "Hayek and the Political Order: The Rule of Law," *Journal of Libertarian Studies* 2 (Winter 1978). For an (unconvincing) attempt to defend Hayek's view of general law, see John Gray, *Hayek on Liberty* (Oxford: Basil Blackwell, 1984), 64. The literature on Hayek is voluminous, but for two helpful general accounts of his analysis of the rule of law, see Gottfried Dietze, "Hayek on the Rule of Law," in *Essays on Hayek*, ed. Fritz Machlup (London: Routledge and Kegan Paul, 1977); and Raz, *Authority of Law*, 210–29. For a thoughtful critical overview of Hayek's intellectual legacy, see David Miller, "F. A. Hayek: Dogmatic Skeptic," *Dissent* (Summer 1994): 346–53.

34. Hayek, *Road to Serfdom*, xxi.

35. According to Hayek, "the reliance on abstract rules is a device we have learned to use because our reason is insufficient to master the full details of complex reality." The rule of law thus has its basis in the very core of human nature (*Constitution of Liberty*, 66). For a critique of this portion of Hayek's argument, see Shklar, "Political Theory and the Rule of Law," 9–16.

36. Friedrich A. Hayek, *Studies in Philosophy, Politics, and Economics* (London: Routledge and Kegan Paul, 1967), 169.

37. Hayek, *Law, Legislation, and Liberty*, vol. 3, 194–95. The passage includes an extended quote from Schmitt's *Legality and Legitimacy* in which he argues that the pluralist party-state is "total" but "weak" because it is forced to intervene in all areas of social and economic existence in order "to satisfy the demands of all interested parties."

38. Not surprisingly, Hayek cites Schmitt's *Crisis of Parliamentary Government* at various junctures, and his argument seems to parallel Schmitt's on this issue as well (*Constitution of Liberty*, 443 n. 2).

39. Hayek, *Law, Legislation, and Liberty*, vol. 3, 13.

40. Hayek, *Law, Legislation, and Liberty*, vol. 3, 99.

41. Hayek, *Law, Legislation, and Liberty*, vol. 3, 23.

42. Hayek, *Law, Legislation, and Liberty*, vol. 3, 113.

43. Hayek, *Law, Legislation, and Liberty*, vol. 3, 113.

44. Hayek writes that "the employment of the resources at its [the state's] command will require constant choosing of the particular ends to be served, and such decisions must be largely a matter of expediency. Whether to build a road along one route or another one, whether to give a building one design or a different one, how to organize the police or the removal of rubbish, and so on, are all not questions of justice which can be decided by the application of a general rule" (*Law, Legislation, and Liberty*, vol. 3, 23–24). The passage is extremely revealing: it suggests that even some of the most basic tasks of government, for Hayek, may necessitate decisionistic legal forms.

45. This is another reason why the option for the minimal state makes so much sense given the broader contours of Hayek's argument. For him, "the difference between a society of free men and a totalitarian one lies in the fact that in the former" state activity is reduced as substantially as possible. Only the minimal state hides from view the underlying tensions within Hayek's account here: only in a situation in which state intervention is virtually nonexistent could a would-be Hayekian legislature not have to worry too much about this rather obvious contradiction in his theory (*Law, Legislation, and Liberty*, vol. 3, 24).

46. Most importantly, Schmitt thinks that extensive state intervention is consistent with substantial decision-making authority for private capital, whereas Hayek believes that all but the most minimal forms of state activity (and, as has been shown, perhaps even these as well) constitute a threat to private capital.

47. One might perhaps describe it as "rule by a narrow group of citizens with a substantial amount of gray hair but a rather insubstantial democratic base."

48. Both Schmitt and Hayek, not surprisingly, tend to downplay *this* facet of contemporary politics.

*Part Three*

# CARL SCHMITT'S TWENTY-FIRST CENTURY

## *Chapter 9*

# States of Emergency

Few thinkers have been as preoccupied with the political and legal challenges posed by emergencies, and perhaps none has garnered both as much favorable *and* unfavorable press for his reflections, as Carl Schmitt. Following the 9/11 terrorist attacks on the World Trade Center and Pentagon, and similar attacks in France, Spain, and the United Kingdom, Schmitt's ideas about states of emergency have played a major role in the relevant political and legal debates.[1] His ideas have surfaced as well in controversies concerning the emergency responses to the 2008 financial and more recent austerity and "Euro" crises.[2] For prognosticators of a looming environmental crisis, Schmitt's ideas represent a useful theoretical source.[3] At the outset of the twenty-first century, Schmitt has become a household name among Anglophone political and legal scholars who otherwise evince little interest in continental European political and legal thought.

Contemporary fascination with Schmitt's ideas about states of emergency derives in part from two distinct theses, each of which he rigorously advanced. Schmitt argued for the unavoidability and ubiquity of dire crises or emergences, while linking this fundamentally empirical claim to a far-reaching *legal skepticism*. Schmitt believed that liberalism's characteristically "normativistic" quest to subject-wide swaths of human affairs to general law—that is, the rule of law—is both conceptually misguided and historically obsolescent. Liberalism's legalistic inclinations rob it of the conceptual and institutional materials necessary for mastering ever more widespread crisis scenarios, whose imperatives inevitably explode the ordinary paraphernalia of law-based government. Manifold emergency situations demand state action inconsonant with the rule of law: liberalism's various attempts to circumscribe emergency action (e.g., constitutional emergency power clauses like Weimar's Article 48) regularly fail. Emergencies—oftentimes of a life-or-death

nature—demand unexpected and oftentimes unforeseeable exercises of far-reaching discretionary executive power. Since emergencies are both irrepressible and commonplace, and liberalism's arsenal of legalistic restraints necessarily founders, Schmitt's remark that the "exception is more interesting than the rule" was intended as much more than a clever aphorism.[4] Emergencies, which "cannot be circumscribed factually and made to conform to a preformed law," not only increasingly constitute the normal rather than exceptional state of political and legal affairs, but their proliferation also highlights the structural advantages of an executive-dominated authoritarian institutional alternative, liberated from obsolete legalistic (and especially liberal) ideals.[5]

In this chapter, I revisit the roots of Schmitt's views about emergency power in three crucial historical and biographical conjunctures: World War I, when Schmitt served in Munich with the military authorities responsible for overseeing Germany's wartime emergency regime; the Weimar debates about Article 48 and particularly a prominent 1924 lecture in which he offered a latitudinarian account of presidential prerogative; and Weimar's dying days, when he defended—and sometimes advised—the German president in support of his reliance on far-reaching emergency measures. My aim is not the crudely historicist one according to which we can "explain" Schmitt's ideas by reducing them to their context. By the same token, without close attention to these three decisive political moments, we cannot make proper sense of them, which—as I hope to show—exhibit more continuity than widely asserted.[6] In particular, their core elements were already sketched out in his initial foray into the topic during World War I. Chapters 10 and 11 then examine the redeployment of Schmitt's ideas about emergency government in recent political and jurisprudential debates.

## I

World War I resulted in a vast expansion of emergency authority within all participating states. Even in liberal democracies like the United States and the United Kingdom, it generated relatively novel legal forms (e.g., legislative emergency delegations to the executive) and also dramatically accelerated the general developmental tendency for *de facto* emergency power to transcend conventional *de jure* restraints.[7] Most striking perhaps, the exigencies of modern total warfare demanded its extension well beyond strictly military and security-related matters: essential features of modern warfare (e.g., propaganda and extensive state economic regulation) rapidly became objects of emergency regulation. In Germany, where the war's outbreak led to the declaration of a "state of siege" [*Belagerungszustand*], state officials were promptly given vast authority to suspend basic rights and to exercise an

effectively unlimited right to issue directives in myriad political and social arenas.[8] The distinction between temporary military decrees and general legislation was soon blurred, with the courts condoning military promulgations of administrative orders having the force of law [*gesetzvertretenden Charakter*]. In contrast to liberal democracies where wartime dictatorial measures remained at least in principle subject to a popularly elected president, in Germany they for the most part entailed—despite some disagreements among scholars about its scope and severity—military dictatorship.

Schmitt spent much of the war in Munich working for the regional *Generalkommando*, the military authority responsible for exercising emergency rule in Bavaria's great metropolis and, by war's end, the site of massive political and social turmoil. Although his diaries suggest that he was bored by the day-to-day bureaucratic routines, in September 1915 he was assigned the task of providing a justification for an expansive interpretation of emergency powers with the aim of extending them for "a few years after the war."[9] In a pair of 1917 publications, both of which helped land him his first teaching position at the University of Strassburg, Schmitt did just that. More generally, the two essays mirror the dramatic shifts in emergency power that occurred during World War I. They outlined ways in which relatively traditional legal instruments—most important, the state of siege—could be theoretically retailored to fit novel conditions. In Schmitt's account, they could only do so if interpreted as permitting vast administrative (and especially military) discretion. Many of Schmitt's subsequent ideas about emergency rule, including the key intuition that the legitimate scope of emergency action is not only irrepressibly broad but also that conventional legal devices are unlikely to contain it effectively, were already part and parcel of his 1916 and 1917 writings.

The first and more conventional of the two pieces deals with the impact of the military state of siege on the ordinary criminal law, a subject Schmitt taught at Strassburg. Initially given as an introductory lecture [*Probevorlesung*] to his would-be colleagues on the legal faculty, Schmitt pleads—not surprisingly, given the lawyers and jurists making up his audience—for the preservation of a modicum of judicial independence. However, its compass turns out to be rather narrow. Schmitt dutifully recounts that under the state of siege German military authorities are put in charge of the state administrative apparatus. They can legally abrogate core legal rights and basic protections and set up special courts.[10] Without critical comment, he notes that the military government has been exercising far-reaching power not simply in the political and military but also economic realms.[11] In fact, their measures have taken on a quasi-legislative status, notwithstanding efforts by critics to maintain a clear separation between general law and emergency decrees.[12] For most areas of governance, the only real restraint on them is their sense of duty and professional responsibility: military officials are expected to act

in the public interest. In short, Schmitt reminds his readers what they surely already knew: wartime Germany was being governed in many spheres of life by a military dictatorship.

Schmitt quickly notes, however, that the state of siege still prohibits military authorities from disbanding the ordinary criminal courts. Despite the fact it enjoins them to search homes without a warrant, censor newspapers, issue decrees having the force of law, detain suspects absent regular legal checks, and set up some extraordinary courts, the ordinary criminal courts still maintain a modicum of institutional autonomy. Consequently, Germany's military should not try to hire and fire ordinary criminal judges at will. Even if criminal prosecutors should be made subordinate to the military government, Schmitt claims, the emergency regime should not jettison the ordinary courts altogether and simply appropriate to themselves the job of punishing those found guilty of crimes, notwithstanding massive transformations necessarily taking place elsewhere on the country's political and legal terrain.[13]

During 1916 and 1917, Schmitt shuttled back and forth between his military and academic duties in Munich and Strassburg. On one reading of the *Probevorlesung*, his position provides a justification for an alliance between the military government and criminal lawyers along the lines he temporarily embodied. Military authorities should properly recognize the advantageous political and legal functions exercised by the ordinary courts as "junior partners" in the wartime emergency government—hardly an implausible expectation, given the profoundly conservative and nationalistic predilections of his legal colleagues. Addressing his fellow jurists, Schmitt defends a measure of judicial independence. Yet, he does so not in order necessarily to challenge the military regime by subjecting it to judicial review or blocking its activities but instead in order to maintain a role for his colleagues in Germany's wartime legal system.

The second and more provocative essay from the same period, "Dictatorship and State of Siege," arguably sheds the legalistic contours still haunting Schmitt's remarks on wartime criminal law. Initially, the essay neatly separates the state of siege from dictatorship.[14] Under the former, executive power is concentrated, while the separation of powers between the legislative and executive branches in principle remains intact. In a dictatorship, legislative and executive authority are fused, as occurred during the French Revolution under the Jacobins.[15] In stark contrast to the dictatorial practices of revolutionary France, the state of siege is depicted as a basically conservative constitutional device whereby the executive is temporarily permitted to engage even in otherwise illegal acts for the sake of preserving the status quo. During the state of siege, administrative power is concentrated in the hands of military commanders so that they can tackle concrete threats to public order. Even if doing so entails granting them substantial decision-making power, their decisions still lack a strictly legislative status. Military authorities issue

temporary decrees appropriate to the specific necessities at hand. In contrast to standing general laws, however, their decrees lose any validity as soon as the crisis subsides and the state of siege ends. Similarly, even if the state of siege permits the military government to abrogate basic rights, such rights remain on the books: when the threats at hand have been successfully warded off, basic rights will again be respected.

At first look, Schmitt again appears to outline a relatively legalistic model of emergency powers, where constitutionally circumscribed military discretion differs sharply from lawless dictatorship. Limited to undertaking specific discretionary measures, crisis measures are to be rigorously distinguished from normal constitutional and legal devices, and they are not supposed to alter the normal operations of the constitutional system. However, as discussed earlier in chapter 1, the essay then deconstructs the sharp dichotomy between dictatorship and state of siege, characterizing it as little more than a troublesome leftover from the French Enlightenment, to which Schmitt traces it. As he acknowledges, during a state of siege the traditional distinction between temporary measures and general laws in fact tends to get blurred. Recognizing that this trend raises various jurisprudential problems, Schmitt observes that the German courts have nonetheless condoned it.[16] Although coy about the sources of this development, for him one of them seems manifest enough: if military governors during a state of siege are allowed to do whatever is necessary to counteract the threat at hand, what impedes them from potentially setting major and indeed transformative legal changes into motion? The seemingly neat dividing line between the conservative—or at least stabilizing—institutions of the state of siege and dictatorship becomes messy. Legal praxis contradicts legal doctrine.

Schmitt then proceeds to offer an explanation for this tension. The French Enlightenment was predicated on an insufficiently appreciative assessment of both the historical primordiality and institutional creativity of the executive and state administration: the rationalistic French mistakenly sought to reduce executive discretion to an absolute minimum. Despite the ways in which French revolutionary praxis in actuality undermined the separation of powers, Schmitt notes, the French stubbornly held onto a dogmatic view of it.[17] Obfuscating the crucial fact that administrative authority should be conceived along the lines of an originary condition [*Urzustand*] prior to the realm of abstract legal norms and by no means reducible to them, conventional ideas of the state of siege obscure its special traits. When properly conceived, the state of siege represents a return to the origins of modern statehood, when administrative creativity unhampered by the modern rule of law and constitutional government possessed predominance: "Within the space [of positive law], a return to the originary condition takes place, so to speak, the military commander acts like the administering state prior to the separation of powers: he decides

on concrete measures as means to a concrete goal, without being hindered by statutory limits."[18] Notwithstanding legalistic claims to the contrary, administrative activity can never be completely contained or limited by general norms or other legal means. During a state of siege, the discretionary core of the modern administrative apparatus again rears its head.

Although the 1917 essay never sufficiently defends these claims, their implications are clear enough: the state of siege represents an attempt to recapture that originary "law-free space" [*rechtsfreier Raum*] by modern legal means. There military commanders act in a manner akin to bureaucrats under the auspices of early modern European absolutism, who had yet to succumb to naïve modern Enlightenment ideals of legality. In Schmitt's analysis, emergency actors need to be able to act in a potentially unlimited fashion if they are to do their job properly. Who is to say ahead of time what measures may be necessary to defeat the potentially existential peril at hand?

By belittling the endeavor to subject the executive to general laws, Schmitt undercut the possibility of a clear analytic separation between the state of siege and dictatorship. And by celebrating the existence of an original discretionary power intrinsic to the executive and administrative apparatus, allegedly repressed by a misbegotten Enlightenment-inspired legalism, he provided a justification for substantial executive emergency discretion. Not surprisingly perhaps, the essay offered no discussion of the continuing importance of judicial independence, even as modestly interpreted in its sister piece from the same period. Schmitt saw Germany as subject to the constitutional mechanisms of the state of siege. Yet he creatively envisioned those strictures as legitimizing a law-free space, whose underlying dynamics were described as necessarily undermining efforts to tame executive power and the state's administrative apparatus by the rule of law and other Enlightenment-inspired legal innovations. Schmitt's wartime essay provided, as Peter Caldwell astutely comments, "a radical rejection of 'western' constitutionalism."[19]

Schmitt's Munich superiors had asked him to justify the extension of military rule beyond the conclusion of hostilities. Read superficially, the essays shy away from providing direct support for this agenda. However, by suggesting that emergency government represented an authentic attempt to recapture the authentic originary condition of modern statehood, while questioning both the normative desirability and practical viability of restraining executive discretion by normal legal means, his argument provided theoretical grounds for doing so. Condoning both the ongoing fusion of military measures with general legislation and the spread of emergency rule into new arenas (e.g., the economy), it served his military superiors quite well. Perhaps best of all, it did so while at least appearing to remain loyal to a relatively traditional conception of the separation of powers, despite the fact that Schmitt's own argument made mincemeat of the state of siege's legalistic features.

## II

Schmitt's most sympathetic commentators typically make a great deal of a 1924 lecture he gave in Jena at the annual meeting of German jurists, where as a law professor (now based in Bonn) with a growing reputation he offered a creative reinterpretation of Article 48 of the Weimar Constitution, Germany's first attempt to guarantee that emergency powers mesh with liberal democratic constitutionalism. The lecture, "The Dictatorship of the Reich President According to Article 48 of the Weimar Constitution," was subsequently reprinted as an addendum to the second edition of his most impressive scholarly tract from the 1920s, *Dictatorship*.[20] In the Jena presentation, Schmitt countered liberal-minded jurists who interpreted Article 48 as only permitting abrogations of a narrow range of specified basic rights. Instead, Schmitt expounded a

> latitudinarian conception of the President's [emergency] dictatorial power, maintaining that the dictator [i.e., President] might temporarily suspend almost all the articles of the Constitution, if necessary to save it, and not just the seven mentioned in Article 48 itself. He could not permanently alter the Constitution, but he could temporarily prevent the operation of a large part of it. Schmitt advanced the idea that the operation of Article 48 itself provided for "an untouchable minimum of organization"—that is, there were several governmental organs (President, Cabinet, Reichstag) constitutionally joined together in the execution of those functions foreseen by Article 48. . . Any temporary abridgement of other articles was not a serious and unconstitutional matter.[21]

According to the conventional scholarly interpretation, Schmitt advocated a broad interpretation of presidential emergency powers, yet he allegedly still criticized the possible employment of Article 48 as an instrument of fundamental constitutional change.[22] On this reading, he saw Article 48 as providing for a wide-ranging "constitutional dictatorship" (i.e., temporary limited emergency government aimed at protecting Weimar's underlying constitutional and institutional framework). However, he opposed interpreting it as a constitutional conduit to unharnessed emergency dictatorship for the sake of basic political transformation.

Despite some textual support for this interpretation, it overlooks a number of revealing ambiguities in Schmitt's overall account.[23] Here as well, Schmitt initially evinced apparent fidelity to relatively legalistic notions of emergency government while systematically dismantling their conceptual foundations. We can only make sense of this intellectual strategy, however, if proper attention is paid to the ways in which Schmitt's thinking about Article 48 builds directly on his earlier wartime writings.

As he notes in the 1924 Jena lecture, his reading of Article 48 depends on the crucial distinction between commissarial and sovereign dictatorship, as it had been developed in the main body of *Dictatorship*, with the former referring to temporary dictatorial power exercised for the purpose of upholding the constitutional status quo and the latter to dictatorial power pursuant to the creation of a new order. Schmitt interprets Article 48 as representing a specifically modern and rule-of-law-oriented [*rechtsstaatlich*] version of commissarial dictatorship, aiming under ideal circumstances at the complete legal regulation of emergency government: both the conditions of its invocation and the precise ways in which emergency power is to be employed should be legally codified. In this spirit, Schmitt insists, Article 48 pointed to the possibility of fully codifying emergency rule. However, he quickly adds, Weimar's various governments had never finished the job: though Article 48 expressly called on the *Reichstag* to pass legislation providing for further codification, it never did so. Consequently, Schmitt concludes, Article 48 remained legally incomplete and thus provisional.[24] As we will see, this was a major amendment to his overall argument.

*Dictatorship* built immediately on the wartime conceptual juxtaposition of state of siege to dictatorship. Significantly, it also smuggled in some of Schmitt's earlier skepticism about the ultimate value of the distinction. Executive discretion is briefly described in *Dictatorship* as indispensable to the modern state.[25] Commissarial dictatorship refers to executive-dominated emergency government, where the executive is obliged to temporarily suspend basic rights and pass far-reaching individual measures for the sake of reestablishing political order. The traditional institution of the state of siege represents an important example of it. Crucially, commissarial dictatorship allows emergency authorities to do whatever they consider necessary to overcome the concrete threats at hand. Yet their acts are not supposed to possess the character of ordinary law: individual emergency measures are strictly delimited from standing general laws. In contrast, sovereign dictatorship entails full-scale revolutionary dictatorship, along the lines of the Jacobins and more recent political conjunctures, including the 1918 German Revolution. Its legal acts are transformative and thus also effectively permanent. According to Schmitt, the Weimar Constitutional Assembly exercised the powers of sovereign dictatorship when it created Germany's first republican system. Acting in the name of the people as a whole, conceived of as a constitutionally unbound *pouvoir constituant*, postwar Germany's sovereign dictatorship destroyed the preexisting political order in order to create a novel one. Whereas commissarial dictatorship ostensibly rests on the traditional separation of powers, sovereign dictatorship does away with the distinction,[26] in part by undermining any attempt to limit its endeavors to temporary measures.

However, the actual implications vis-à-vis Article 48 of the two basic types of dictatorship soon become rather ambiguous. The detailed historical exegesis provided in *Dictatorship* mentions some cases—for example, 1848 France—where commissarial and sovereign dictatorship apparently fused together.[27] *Dictatorship* interprets Article 48 as a highly legalistic—and thus problematic—version of commissarial dictatorship, since it mistakenly aims to subject emergency authority to complete legal codification. For Schmitt, this is a tendentious legacy of the liberal rule of law: building on his wartime skepticism of the French Enlightenment-inspired attempt to subject "originary" executive and administrative authority to legality, he seems skeptical about the viability as well as desirability of such attempts.[28] The 1924 Jena lecture then proceeds to describe manifold ways real-life legal practice conflicts with Article 48 when interpreted as an instrument of limited emergency rule. As Schmitt was aware, Article 48 was already being employed as a launching pad for far-reaching executive legislation over a vast range of policy arenas, including state regulation of the economy.[29] Just as wartime legal praxis blurred the division between the state of siege and dictatorship, so too does real-life Weimar praxis impair the related separation of sovereign from commissarial dictatorship. As in Schmitt's previous wartime writings, the tension between legal doctrine and legal praxis ultimately serves as evidence for the flawed character of the former.

To be sure, Schmitt did not rush to embrace the ongoing conflation of emergency decrees with general laws, though in some writings he was already eagerly identifying the fruitful political possibilities such trends proffered those hoping to strengthen the Weimar executive.[30] Yet as with the earlier binary divide between state of siege and dictatorship, by the end of the day he had taken major steps toward belittling the real-life significance of the differences between commissarial and sovereign dictatorship.

In Schmitt's narrative, commissarial dictatorship presupposes a basically coherent political unity where potentially explosive political and social divides have been defused. Otherwise, a new state-based order may still need to be created—by sovereign dictatorship—in the first place. The reestablishment of law and order presupposes that it previously existed. Yet as Schmitt notes, it remains unclear whether Weimar has in fact ever achieved the indispensable minimum of law and order. Operating among more or less permanent disorder, Article 48 therefore should not be interpreted as an exclusively commissarial emergency instrument.[31] Germany's special historical situation helps explain Article 48's so-called provisional character. Even if the sovereign dictatorial powers exercised by Weimar's constitutional framers were supposed to be jettisoned in favor of legalistic [*rechtsstaatlich*] commissarial dictatorship along the lines hinted at in Article 48. However, this never transpired because Weimar's unceasingly "abnormal situation"

necessitated "securing additional room to play" [*einen weiteren Spielraum sichern*] for emergency dictatorship.[32] Even if Weimar's constitutional founders originally intended to grant the president limited constitutional commissarial powers, the presidency—acting via Article 48—still simultaneously represents the "residue" [*Residuum*] of the National Assembly's sovereign dictatorship.[33]

So, Schmitt ultimately envisioned Article 48 as *fusing* elements of both commissarial and sovereign dictatorship: it should not be interpreted as representing a resolute choice for one over the other. This peculiar scenario directly reflected a host of contradictory political and legal dynamics, Schmitt believed, that continued to plague the German Republic's eventful history.[34] Unlike his wartime writings, neither *Dictatorship* nor the 1924 Jena lecture succumbed to crude Enlightenment-bashing or a heavy-handed critique of French rationalism with heavily nationalistic overtones. Yet the results were similar. At least as far as Article 48 was concerned, the separation between limited commissarial (or constitutional) and unlimited sovereign (or transformative) dictatorship gets blurred. John P. McCormick rightly observes that *Dictatorship* already hinted at Schmitt's own preference for a "counter-theory of sovereign dictatorship," a right-wing authoritarian response to modern left-wing revolutionary notions of sovereign dictatorship.[35] Crucially, Schmitt expressly identified Article 48 as one of its possible constitutional bases, seeing it as a residue of sovereign dictatorship.

As noted, Schmitt during the 1920s offered a number of express denouements of attempts to read Article 48 as potentially justifying a revolutionary transformation of the Weimar system. Even on his own conceptual terms, however, such claims should be interpreted as contextual and historically contingent and thus potentially subject to dramatic reconsideration. On one plausible reading of Schmitt's position, Article 48's commissarial features deserved to be considered preeminent only when the Weimar system as a whole could be plausibly viewed as having achieved political unity and stability. In contrast, to the extent that Weimar lacked the requisite stability, Article 48 as a residue of sovereign dictatorship deserved to be taken seriously. To the degree that Article 48 highlighted the unfinished and provisional character of the existing constitutional system, it invited significant—and potentially far-reaching—legal and constitutional change.

Revealingly, even in 1928, when the German Republic at least momentarily appeared to achieve a substantial measure of stability, Schmitt still doubted that his country had achieved sufficient political unity. "In the case of the [Weimar] state today, we are dealing with a people pieced together heterogeneously" and thus still lacking a modicum of political unity. Weimar remained "divided in many ways—culturally, socially, by class, race, and religion."[36] Only the necessity of repaying war reparations

to the victorious Allies, he suggested, provided some minimal, albeit insufficient, political glue.

Soon Schmitt would radicalize this line of argumentation, by 1930 describing Weimar as a politically incoherent pluralist party state whose profound internal fractures conflicted directly with political stability's necessary prerequisites. At any rate, the relatively commonplace view that Schmitt supported a limited commissarial—and basically constitutional—dictatorship during the 1920s does not hold up to careful scrutiny. In contrast to recent scholarship, one of Schmitt's own historical contemporaries, the U.S. political scientist Clinton Rossiter, was on the mark when he observed that even the otherwise impressive *Dictatorship* "failed in the end to draw a sufficiently precise distinction between constitutional dictatorship and opportunistic Caesarism."[37]

## III

During Weimar's final hours, and with special intensity commencing during the summer of 1932, Schmitt served as crown jurist for an increasingly authoritarian set of executive-dominated emergency regimes, for which not only did he provide concrete legal advice,[38] but in defense of whose constitutionally suspect practices he penned a pair of fascinating books, *Guardian of the Constitution* (1931), and *Legality and Legitimacy* (1932). Schmitt recounted the decline of elected legislatures, seeing in the Weimar parliament's dramatic disintegration impeccable evidence of a world historical trend while simultaneously embracing the executive's ever-widening recourse to a broad interpretation of Article 48. Although he described his reform efforts as consistent with core elements of the Weimar system, in actuality he advocated a fundamental institutional transformation, in which the president, characterized in 1932 as ideally possessing a "rare type of authority" based on "the impression of a great political success; perhaps from the authoritarian residue of predemocratic times; or from the admiration of a quasi-democratic elite," would exercise plebiscitary rule via questions posed to a passive people, which would "only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. They also cannot set norms but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they cannot pose a question but can only answer with yes or no to a question placed before them."[39]

For this chapter's limited purposes, I highlight those ways in which Schmitt's views from this period, which both justified and helped contribute to the demise of Weimar democracy, built directly on his previous ideas about emergency government. As in his earliest writings from

World War I, Schmitt regularly polemicized against those who associated authoritarian political trends—and his forceful advocacy of them—with dictatorship,[40] when in reality his own theory's conceptual layout suggests unambiguously that they deserved to be described as such. Here again, a certain legalistic veneer masked a radically anti-legalistic agenda.

As early as World War I, Schmitt had condoned the extent to which emergency authority covered a wide range of novel social and economic matters. In 1931, as part of his contribution to debates about the total state, he forthrightly argued that the modern state's irrepressible dependence on extensive regulatory and interventionist measures meant that the executive could rightfully declare an "economic-financial emergency" in order to pass controversial measures otherwise unacceptable to Germany's bedraggled legislature. Article 48, in short, permitted the promulgation of extensive social and economic regulation. Denying the executive such authority, he now bluntly contended, meant undermining the modern state's capacity to tackle severe economic and financial crises, which in Schmitt's eyes were widely and quite legitimately seen as potentially life-threatening.[41] He now also openly endorsed the fusion of individual emergency measures with general law, arguing that the former should be seen as having the force of law. Since the economic state of emergency depended on complex, situation-specific measures, this second claim coalesced with the acknowledgment of the centrality of economic emergency government. Otherwise reasonable legalistic reservations about the fusion of general law and executive decrees, along the lines Schmitt himself occasionally raised during the 1920s,[42] were described as having been swept aside by conventional legal and judicial practice, which had long tolerated it. In effect, Schmitt reverted to a familiar theoretical strategy: when legal praxis conflicts with legal doctrine, the latter trumps the former, with Schmitt once again according normative status to problematic factual trends.

In 1931, he also reiterated his reading of Article 48 as possessing an unfinished provisional character.[43] De facto emergency economic regulation, in conjunction with an ever more expansive interpretation of the president's authority to pursue emergency legislation without clear parliamentary support, he noted, had at least partially filled in Article 48's original legal holes. By further expanding the scope of presidential prerogative, Article 48 been partially completed. This de facto codification, however, merely functioned to give the executive vast leeway to act beyond and even against parliament.

For Schmitt, the conflation of individual measures with general laws necessarily entailed a major blow against traditional views of the separation of powers, according to which general parliamentary lawmaking differed from the situation-specific orientation of the executive and administrative

apparatus.[44] As we have already observed, during World War I Schmitt criticized the separation of powers: the ascent of an emergency regime that discarded it must have seemed like an empirical vindication of his basic intuitions about its congenital flaws. With Germany after 1930 to an ever greater degree ruled by an executive-dominated regime that promulgated a vast array of specialized economic and social measures, many of which seemed practically indistinguishable from general law, the result was a blurring of the divide between commissarial and sovereign dictatorship. By permitting the Weimar executive to pursue far-reaching emergency acts with the force of law, the door was opened wide to massive institutional changes. *Legality and Legitimacy* chronicled—and oftentimes seemed to endorse—key ways in which the Weimar president had garnered superior de facto as well as de jure power advantages vis-à-vis Weimar's embattled parliament.[45]

Arguing that Germany faced a full-scale existential crisis, directly threatening his country with the imminent loss of a bare modicum of political unity,[46] Schmitt relied on the residual attributes of sovereign dictatorship he had previously identified as inhering in Article 48. An authoritarian presidential regime, ruling on the basis of Article 48—here interpreted as a springboard for potentially transformative executive action—should replace the Weimar status quo. In effect, the Weimar Constitution's complex emergency power clauses were reduced to little more than a fig leaf for executive-dominated discretionary rule. Revealingly, *Legality and Legitimacy* seemed to concede that the trends Schmitt defended were "contrary to the wording of the Weimar Constitution."[47]

Not surprisingly, Schmitt located the emerging presidential system's institutional basis in the administrative state (i.e., civil service and military), whose special institutional capacity for situation-specific individual measures he described as especially valuable to the management of the complex economic and social tasks essential to tackling the "economic-financial emergency." The executive-based administrative state's originary discretionary power, whose subjection to Enlightenment legalism Schmitt had ruefully eulogized during World War I, was now apparently shedding the deleterious "legalism" that had stood in its way.

What about the possibility of subjecting emergency government to judicial review, as in fact has sometimes happened in liberal democracies? Although conceding that such a possibility might still be open to polities resting on a widely shared and (probably classical liberal) political economy, where state intervention was narrowly circumscribed and rested on a broad consensus, in Germany and elsewhere it would inevitably mean that the judiciary would take on deeply controversial and thus eminently political tasks for which it was poorly suited.[48] Courts would disingenuously mask their political undertakings in misleading legalistic language, obfuscating the political choices at

hand. Just as troubling, they would muck things up, undertaking decision-making tasks best left to others.[49] If the separation of powers were destined to decay because of the necessities of modern state economic intervention, the resulting institutional changes should strengthen the hand of the executive—in Schmitt's view, that branch most attuned to the day-to-day needs of modern social and economic affairs. In chapters 5 and 6, I argued that Schmitt's enthusiasm for National Socialism stemmed in part from immanent jurisprudential reasons. Not surprisingly, his defense of Germany's new regime rested as well on views about emergency government formulated as early as 1917. Schmitt's embrace of Nazism in 1933 was hardly predetermined. By the same token, his longstanding views about emergency law help explain why and how his decision to jump into bed with the Nazis in 1933 represented much more than personal or professional opportunism.

In an otherwise sober 1936 survey of attempts by France, Great Britain, and the United States to tackle the economic crisis via emergency legislation, Schmitt might at first glance be taken as suggesting to his Nazi overlords the necessity of constructively learning from those liberal democracies also struggling with the dual tasks of overseeing the crisis and providing a coherent legal framework for a modern regulated economy. By the essay's conclusion, however, it again becomes clear that his real aim was to discredit modern constitutionalism and the rule of law. Because Western liberal democracies remain disastrously mired in the anachronistic quest to maintain the separation of powers between the executive and legislative branches, Schmitt asserts, they are proving inept at dealing effectively with the novel regulatory tasks at hand. Schmitt even seems to criticize the authoritarian presidentialist regime he had previously prescribed for Weimar: like interwar German, and even the semi-authoritarian presidentialist regime it became after 1930, liberal democracies failed in undertaking the "decisive step" toward dismantling the separation of powers.[50] Only the Nazis had done so, Schmitt claims. Consequently, their system of decision making is fundamentally better attuned to the imperatives of emergency economic government.

In a related 1935 piece, "Die Rechtswissenschaft im Führerstaat" ["Legal Science in the Leader-State"], Schmitt pointedly argues that liberalism's preference for fixed, codified general norms, along with the separation of powers, creates a problematic time lag in its decision-making apparatus. By trying to separate lawmaking from execution, liberalism relies on general statutes that mesh poorly with the contemporary need for government to steer complicated, ever-changing present—and future-oriented economic matters. The temporal gap between law creation and execution in liberalism inexorably leaves state officials poorly equipped to pursue effective economic intervention: they "always come too late" by basing their decisions of legal relics oftentimes unrelated to present and prospective social and economic conditions. Here as

well, Schmitt praises the Nazis for alone having "crossed the Rubicon" and finally dismantled parliamentary general law and the separation of powers in order to handle the regulatory imperatives of the modern interventionist state.[51] National Socialism supersedes the problem of a time lag that plagues liberalism by simply getting rid of the obsolete divide between lawmaking and legal application: in National Socialism, Schmitt appreciatively comments, "Law is no longer an abstract norm referring to a past act of volition, but instead the volition and plan of the Leader."[52]

Revealingly, no empirical evidence is provided to document the tendentious assertion that Nazism was better suited to the exigencies of the modern regulatory state. Schmitt's own contemporaries immediately challenged this view of the National Socialism as an institutionally imposing answer to the challenges of modern governance, instead highlighting its pervasive corruption and bureaucratic ineptness.[53] By then, however, it was too late for Carl Schmitt: he had already crossed the Rubicon and enthusiastically joined forces with the Nazis.

## NOTES

1. For a survey of the debate, see Jason L. Ralph, *America's War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford: Oxford University Press, 2013). See also chapter 10. Schmitt is a target of the most important recent systematic study of emergency powers: Oren Gross and Fionnuala ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006).

2. Philip A. Wallach, *Legality, Legitimacy, and the Responses to the 2008 Financial Crisis* (Washington, DC: Brookings, 2015), 22–33; and Jonathan P. White, "Emergency Europe," *Political Studies* 63 (2015): 300–18.

3. Geoff Mann and Joel Wainwright, *Climate Leviathan: A Political Theory of our Planetary Future*. (New York: Verso, 2018).

4. Schmitt, *Political Theology*, 15.

5. Schmitt, *Political Theology*, 6

6. A tendency to overstate apparent discontinuities in Schmitt's thinking on emergencies plagues even the best English-language literature: McCormick, "Dilemmas of Dictatorship," 217–51.

7. Rossiter, *Constitutional Dictatorship*, 242

8. For the details, see Hans Boldt, *Rechtsstaat und Ausnahmezustand. Eine Studie über den Belagerungszustand als Ausnahmezustand des bürgerlichen Rechtsstaates im 19. Jahrhundert* (Berlin: Duncker & Humblot, 1967); Heinz Kreutzer, "Der Ausnahmezustand im deutschen Verfassungsrecht," in *Der Staatsnotstand*, ed. Ernst Fraenkel (Berlin: Colloquium Verlag, 1965), pp. 19–23; and Christian Schudnagies, *Der Kriegs—oder Belagerungszustand im Deutschen Reich während des Ersten Weltkrieges* (Frankfurt: Peter Lang, 1994).

9. Quoted in Reinhard Mehring, *Carl Schmitt. Aufstieg und Fall. Eine Biographie* (Munich: Beck, 2009), 88. This extension of the wartime emergency in fact happened (Mehring, *Carl Schmitt*, 114–15). I have relied here on Mehring's biographical account of Schmitt's wartime activities.

10. Schmitt, "Die Einwirkungen des Kriegzustandes auf das ordentliche Strafprozessuale Verfahren," 785–87.

11. Schmitt, "Einwirkungen des Kriegszustandes," 787–88.

12. Schmitt, "Einwirkungen des Kriegszustandes," 784–85.

13. Schmitt, "Einwirkungen des Kriegzustandes," 788–96.

14. Schmitt, "Diktatur und Belagerungszustand. Eine Staatsrechtliche Studie," 138–56. Some of Schmitt's readers simply miss the radicalism of his early views (Bendersky, *Carl Schmitt: Theorist for the Reich*, 19–20; and Schwab, *Challenge of the Exception*, 14–15). Fortunately, some have not (e.g., the excellent discussion in Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 55–62).

15. Schmitt, "Diktatur und Belagerungszustand," 141–44.

16. Schmitt, "Diktatur und Belagerungszustand," 153.

17. Schmitt, "Diktatur und Belagerungszustand," 141.

18. Schmitt, "Diktatur und Belagerungszustand," 160; I am relying on Caldwell's translation.

19. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, 61.

20. Carl Schmitt, "Die Diktatur des Reichspräsidenten nach Art. 48 der Weimarer Verfassung" [1924], 213–59, in Schmitt, *Die Diktatur*, 2nd ed. (Munich: Duncker & Humblot, 1928). The literature on Article 48 is massive. But see Hans Boldt, "Article 48 of the Weimar Constitution, Its Historical and Political Implications," in *German Democracy and the Triumph of Hitler*, ed. Anthony Nicholls and Erich Matthias, 79–98; Richard Grau, "Die Diktaturgewalt des Reichspräsidenten," in *Handbuch des Deutschen Staatsrechts*, 2nd ed., ed. Gerard Anschütz and Richard Thoma (Tübingen: Mohr, 1932), 274–95; Rossiter, *Constitutional Dictatorship*, 29–74; Gerhard Schulz, "Artikel 48 in politisch-historischer Sicht," in *Der Staatsnotstand*, 39–71; and Frederick Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Cambridge: Harvard University Press, 1939).

21. Rossiter, *Constitutional Dictatorship*, 69.

22. Ellen E. Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham, NC: Duke University Press, 2004); Kennedy, "Emergency Government within the Bounds of the Constitution: An Introduction to Carl Schmitt, 'The Dictatorship of the Reich President According to Article 48 R.V.,'" *Constellations* 18 (2011): 284–98 (unfortunately, Kennedy's translation in the same issue of *Constellations* of the 1924 Jena lecture omits a crucial concluding section as it appeared in an addendum to the 1928 edition of *Dictatorship*); Andreas Kalyvas, "Editor's Note," *Constellations* 18 (2011): 268–70; and Schwab, *Challenge of the Exception*, 29–43.

23. Schmitt, "Diktatur des Reichspräsidenten," 242–54.

24. Schmitt, "Diktatur des Reichspräsidenten," 233–34.

25. Schmitt, *Diktatur*, 12–13.

26. Schmitt, *Diktatur*, 148–49.

27. Schmitt, *Diktatur*, 200.

28. Schmitt, *Diktatur*, 171–205; "Diktatur des Reichspräsidenten," 256.

29. Schmitt, *Diktatur*, pp. 216–21. On Weimar as economic state of emergency, see Rossiter, *Constitutional Dictatorship*, 41–50; and Watkins, *Failure of Constitutional Emergency Powers*, 73–85.

30. See, for example, Carl Schmitt, "Reichspräsident und Weimarer Verfassung," *Kölnische Zeitung* (March 15, 1925), 1.

31. Schmitt, *Diktatur*, 204, 259. On the immanent conceptual tendency for commissarial dictatorship to collapse into its sovereign cousin, see also Hofmann, *Legitimität gegen Legalität*, 69–71.

32. Schmitt, "Diktatur des Reichspräsident," 240; also Schmitt, *Diktatur*, 203–4.

33. Schmitt, "Diktatur des Reichspräsidenten," 241

34. Schmitt, *Diktatur*, 203.

35. McCormick, "Dilemmas of Dictatorship," 228.

36. Carl Schmitt, "Liberal Rule of Law" (1928), *in Weimar: A Jurisprudence of Crisis*, ed. Arthur Jacobson and Bernhard Schlink (Berkeley: University of California Press, 2000), 299.

37. Rossiter, *Constitutional Dictatorship*, 14, n10.

38. For the particulars, see Mehring, *Carl Schmitt*, pp. 281–302; also, Dirk Blasius, *Carl Schmitt. Preussischer Staatsrat in Hitlers Reich* (Göttingen: Vandenhoeck & Ruprecht, 2001), 15–120.

39. I rely and in this chapter more generally on Jeffrey Seitzer's reliable translation: Schmitt, *Legality and Legitimacy* (Durham: Duke University Press, 2004 [1932]), 89–90.

40. For example, see Schmitt, *Hüter der Verfassung*, 117. However, see also *Legality and Legitimacy*, 83.

41. Carl Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung" (1931), in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jaren 1924–1954*, 235–61; also, Schmitt, *Hüter der Verfassung*, 115–31. On the general problem of economic emergency rule, see William E. Scheuerman, "The Economic State of Emergency," *Cardozo Law Review*, 21 (2000): 1869–94.

42. Schmitt, *Hüter der Verfassung*, 118–31; and Schmitt, *Legality and Legitimacy*, 67–83.

43. Schmitt, *Hüter der Verfassung*, 118.

44. Schmitt, *Legality and Legitimacy*, 71.

45. Schmitt, *Legality and Legitimacy*, 59–83. See also the discussion of the "total state" in chapter 4 of this volume.

46. Schmitt, *Hüter der Verfassung*, 71–95, where Schmitt describes Weimar as a (deeply divided) "pluralist party state."

47. Schmitt, *Legality and Legitimacy*, 67.

48. Schmitt, *Hüter der Verfassung*, 13–14, where he describes the U.S. constitutional order—and its strong Supreme Court—as resting on such political and social homogeneity.

49. Schmitt, *Hüter der Verfassung*, 12–70.

50. Carl Schmitt, "Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen: 'Legislative Delegationen,'"

(1936), in Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles, 1923–1939*, 227–29.

51. Schmitt, "Die Rechtswissenschaft im Führerstaat," 439. Note also the criticism of Italian fascism here for not having gone as far as the Nazis in dismantling the separation of powers. In its provocative critique of the "motorized lawmaker," Schmitt's postwar *Die Lage der europäischen Rechtswissenschaft* (Tübingen: Universitäts-Verlag, 1950) builds upon these Nazi-era writings.

52. Schmitt, "Rechtswissenschaft," 439.

53. This is a central theme of Neumann's *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (1944).

## *Chapter 10*

# Counterterrorism

No one should be surprised by the revival of scholarly interest in the perennial question of how emergency power can be made to conform to the rule of law. In the twentieth century, two world wars, the economic crisis of the 1930s, and the cold war spurred states to outfit the executive with far-reaching emergency authority. With only slight delay, academic pronouncements followed government action, generating a host of impressive discussions of the dilemmas posed by extraordinary executive power.[1] In accordance with this familiar pattern, the September 11, 2001 terrorist attacks on New York City and Washington, DC, and subsequent attacks elsewhere, quickly opened the door to significant extensions of discretionary forms of emergency executive authority, while scholars and many others rushed to make sense of the legal and institutional paraphernalia of the so-called war against terrorism.[2] No less predictably, the counterterrorist response has generally augmented executive power and diminished basic civil liberties. More surprising perhaps is the fact that so much of the ensuing debate has tried to tackle the tasks at hand by relying on the work of Carl Schmitt. Although Schmitt focused a great deal of his intellectual prowess on the question of emergency power, he was a harsh critic of liberal democracy, and his suggestive reflections on emergency power are motivated by the quest to demonstrate the impossibility of making executive emergency power consistent with the rule of law. For Schmitt, liberal democracy and emergency power are akin to water and oil: they simply do not mix. Because extensive emergency powers are now an indispensable component of modern government, liberal democracy is anachronistic, since it is not up to the task of providing sufficient possibilities for executive prerogative while preserving its core identity.

Nonetheless, a rich array of contemporary analysts of emergency power now considers it possible to accept some of Schmitt's theoretical claims

without endorsing his authoritarian conclusions. In particular, Schmitt's contention that emergency power is incapable of being effectively contained or restrained by legal and constitutional norms—in Schmitt's terms, the idea that the exception necessarily explodes the confines of any general norm—has garnered a number of disciples, none of whom apparently considers Schmitt's own authoritarian political preferences a necessary consequence. Because of their significance to the present debate, I begin with a critical review of Schmitt's core conceptual claims about emergency powers (I), before interrogating prominent attempts to employ those claims in the context of recent debates about counterterrorism. Unfortunately, those who embrace Schmitt's ideas about emergency power inevitably generate internal conceptual dilemmas that undermine their professed commitments to the rule of law (II). After underscoring the weaknesses of this approach, I examine some more fruitful attempts to synthesize emergency power and liberal democracy. They start with the decidedly *anti-Schmittian* thesis that emergency power can in fact be successfully legalized, and that legal and constitutional mechanisms for emergency power need not self-destruct. Unfortunately, some of these proposals are plagued by a series of unstated yet problematic assumptions concerning executive power, the immediate carrier of any emergency government (III).

## I

One of Schmitt's most provocative claims is that conventional "normativistic" political and legal thought neglects the problem of the exception, defined as constituting an extreme peril or danger to the existing political and legal order. In a crisis situation, extreme measures may need to be undertaken, yet no legal norm can foresee let alone constrain which measures might be required. Liberal-minded proponents of law-based government supposedly prefer to ignore this harsh fact of political life. They naively believe that general norms can bind state actors and provide more or less effective guidance to state officials even during emergencies. Liberal states correspondingly institutionalize legal devices (e.g., constitutionally based emergency powers, clauses like Weimar's Article 48, statutory delegations of special power to the executive along the lines of the U.S. Patriot Act, or *ex post facto* judicial checks on the executive prerogative as found in common law systems) by which they hope to circumscribe emergency power. In Schmitt's view, all such attempts are ultimately doomed since the exception potentially requires the exercise of absolute authority and perhaps even the suspension of the entire legal order. Who is to say ahead of time which measures may be required for the political community to survive in a harsh and violent world?

Schmitt's *Political Theology* concludes, in what probably is the most famous sentence from his entire intellectual career, "he who decides on the exception is sovereign" in the sense that the power to determine and act on an emergency latently represents the highest power in any given legal order.[3] The actor outfitted with the power to grapple with the emergency must *belong to* the legal order since it must *name* him, while simultaneously *standing outside* of it since he alone decides whether the constitution in its entirety requires suspension. Schmitt deduces from this argument the additional claim that any legal order necessarily presupposes a moment of legally unrestrained power or "pure decision" independent of standing law. Bluntly stated, even law-based liberal government ultimately rests on the specter of unmitigated dictatorial power.[4]

Schmitt's argument about emergency power rests on three distinct theses, each of which requires careful unpacking. He argues for the *unavoidability and ubiquity of emergencies* (A) while combining this basically empirical claim with a deeply rooted *legal skepticism* (B). Finally, a dire portrayal of the political universe, derived from his odd brand of political *existentialism*, adds a special punch to the explosive theoretical mix (C). What should we make of each of these claims?

## A

Schmitt prophesied that crisis management would constitute a paramount activity for contemporary government, as it struggles to tackle a host of oftentimes unprecedented political, military, and economic challenges, at least some of which pose major threats to the existing political and legal order. The necessity for emergency action, in short, appears more widespread than classical liberalism conceded.[5] Though by no means sharing his normative preferences, many now share Schmitt's suspicion that the apparent unavoidability as well as ubiquity of emergency executive authority potentially undermines the rule of law. It was a group of liberal U.S. senators, for example, who anxiously noted in 1974 that U.S. law included "at least 470 significant emergency statutes without time limits delegating to the Executive extensive discretionary powers . . . This vast range of powers, taken together, confer enough authority to rule this country without reference to normal constitutional processes."[6]

Schmitt's thesis that emergencies are both *irrepressible and ubiquitous* is now at least implicitly accepted by a large number of scholars, many of whom claim that it is long overdue for liberal democrats to acknowledge the inevitability of numerous future emergencies.[7] There is more than a mere hint to this argument as well that it represents an advance vis-à-vis the purportedly naïve tendency in at least some strands of classical liberalism—the lack of

emergency clauses in the U.S. Constitution is often mentioned as evidence—to imply that the normal operations of ordinary lawmaking suffice if we are to deal effectively with life-or-death crises. Yet the contemporary debate also occasionally reproduces a weakness plaguing Schmitt's original version of the argument. His analysis of emergency government sometimes neglects its complex political and economic origins, tending to attribute its growth to the intrinsic failings of liberal jurisprudence.[8] In an analogous vein, many contemporary commentators narrowly focus on the purported limitations of liberal jurisprudence and traditional models of the rule of law.[9] But if the general expansion of emergency power is motored significantly by capitalist economic crises, globalization, imperial ambition, militarism, the "risk society," terrorism, or other malleable recent social trends rather than historical givens, it becomes possible to imagine limiting emergency government *without* abandoning traditional liberal models of emergency government. If the main reason, for example, for redesigning U.S. institutions is to ward off future terrorist attacks, is not the most immediate task at hand not reforming our political and social order, or at least altering U.S. foreign policy so as to minimize the likelihood of terrorist attacks in the first place?

## B

Schmitt fuses this plausible empirical claim with the more controversial point that no legal norm can fully contain or constrain emergencies. A crucial thesis of *Political Theology* is that no statutory or constitutional norm can hope to predict and thus spell out *ahead of time* which actions might be required in order successfully to tackle the crisis at hand. First, any emergency may represent a *novel* scenario which existing law fails to anticipate and, second, the necessity of potentially *absolute* power means that the *scope* and *specific character* of appropriate emergency action can never be prospectively delimited. Schmitt doubts that the traditional rule of law preference for *clear prospective* law can obtain during a dire crisis. The most the law can do prospectively is announce *who* is to exercise emergency power.[10]

This second argument is a mixed bag as well. It focuses on valuable but limited facets of the rule of law—the aspirations for clarity and prospectiveness—to pursue the extreme conclusion that law necessarily fails to constrain emergency power. Schmitt is probably beating a straw man, however. In fact, *no* legal norm can ever fully capture all future cases which potentially fall under it. Is there any reason to assume that this familiar legal dilemma is necessarily more pronounced in the sphere of emergency law? Despite the fact that no legislator obviously possesses a perfect crystal ball completely able to foresee the scope of future emergencies, there are at least some grounds for hoping that they might do a decent job of crafting norms able to cover

most cases quite well. Law always contains a "penumbral" sphere in which decision making will be *relatively* indeterminate. But this familiar fact hardly justifies tossing the aspiration to regulate emergency power by legal devices out the window altogether. Schmitt starts with an excessively formalistic interpretation of the law, before proceeding to underscore the weaknesses of that model in order to discount basic liberal legal aspirations altogether.[11] Moreover, the rule of law rests on much more than a commitment to the legal virtues of clarity and prospectiveness; even minimalist definitions of the rule of law typically include additional attributes (e.g., generality, publicity, stability, and an independent judiciary). Might it not be possible to maintain *other* core elements of the rule of law in emergency legal regulation even if we were to concede that no lawmaker can ever clearly anticipate the exact contours of future emergencies? As Lon Fuller noted over fifty years ago, a legal system can legitimately compromise *some* basic legal virtues while maintaining its identity as a normatively defensible model of legality.[12]

Schmitt may have been right to predict that the task of prospectively codifying a *substantive* definition of what specifically constitutes an emergency always proves difficult.[13] Yet it remains unclear that we therefore must discard the possibility of any legal constraints on the exercise of emergency power. Following a recent suggestion by Andrew Arato, we can respond to Schmitt's skepticism by arguing that it nonetheless remains possible to develop a set of constitutional *procedures*—along the lines of the constitutionally based formal emergency mechanisms now found in constitutions around the globe[14]—in order to allow for the effective but simultaneously legally constrained employment of emergency power.[15] This defense of procedural or decisional rules arguably meshes with Schmitt's basic intuition that law can at most name those decision makers best suited to the exercise of emergency power. In fact, many present-day constitutional emergency clauses arguably deemphasize the importance of some legally pre-given substantive definition of what specific events or occurrences deserve to be described as emergencies in favor of underlining the importance of a legally regulated *process* of political and institutional give-and-take in which special powers are delegated to some actors (typically, the executive) while being made accountable to others (judges and legislators). This approach relies less on trying to define prospectively the particular contours of all conceivable emergencies. Instead, it establishes procedural mechanisms whereby political actors themselves can determine whether or not a particular development at hand constitutes an emergency.

One might counter that any attempt to separate the substantive definition of the emergency from the procedural rules determining the exercise of emergency powers is counterintuitive at best and theoretically incoherent at worst.[16] Yet recall that in *any* existing liberal democracy, a rich diversity of

competing and even antagonistic substantive views can be found, for example, concerning the proper *scope* and *substance* of ordinary legislative power: we continue to disagree about its appropriate extent (in debates about privacy and economic regulation, for example) as well as its purposes and ends. This disagreement need not undermine the effective exercise of legitimate legislative power, however. We accept or at least accede to various constitutionally based procedural devices (e.g., voting procedures, various institutional rules) that produce more or less successful exercises of legislative power, even if we disagree substantially about their proper character or scope.[17]

## C

For Schmitt, legal restraints on emergency power are not only misconceived because they fail to anticipate novel crises; they are also inappropriate because the emergency situation may necessitate unchecked state power and hence the surrender of rudimentary legal restraints on its exercise. Basic threats to the survival of the polity legitimize extreme and even violent measures. In Schmitt's theory, this view depends on a dreary portrayal of the political universe as consisting of a series of ruthlessly competitive collectivities, each of which faces off against existentially defined "others" who pose an imminent life-or-death threat.[18] The international system pits such entities against one another in a brutal fight for survival.

International political life still contains starkly violent elements akin to those underscored by Schmitt. Yet it also institutionalizes competing elements that function to correct his bleak picture. Even great powers like the United State are increasingly subject to those mechanisms: "the United States, like it or not, is being brought into the ambit of international norms."[19] When we conceive of the international arena as at least *partially* rule-guided and legally organized, Schmitt's postulate that the competitive struggle for survival requires potentially unbounded expressions of state power becomes less self-evident as well. Since the international system now contains a number some limited yet meaningful legal mechanisms for conflict resolution, it is by no means as self-evident as Schmitt asserts that dire crises may require dictatorial power. Because existing international legal institutions already provide some legal devices for combating terrorism, for example, liberal democracies may not be forced to pursue authoritarian or violent measures in order to do so.

None of the key participants in the recent debate about counterterrorism embrace Schmitt's view of international politics. Yet many still accept Schmitt's key conclusion: authoritarian and even inhumane measures may be indispensable if we are to ward off disaster. But the argument is typically made by conjuring up the specter of terrorists in crowded subways carrying radioactive briefcases or horribly destructive "ticking bombs."[20] Might not even torture be appropriate if it alone could provide information useful for warding off mass

murder?[21] Proposals along these lines have understandably garnered a number of critical responses, most of which refurbish the humanitarian view that torture neither produces useful information nor minimizes political violence.[22]

## II

So how then has Schmitt resurfaced in post-9/11 debates about emergency powers? Some authors, broadly influenced by poststructuralism, endorse Schmitt's analysis of emergency power as a way of pursuing a radical critique of what this perspective's most impressive representative, Giorgio Agamben, characterizes as the transformation of the state of exception into "the dominant paradigm of government in contemporary politics."[23]Although cognizant of Schmitt's own sorry political choices, they believe that his analysis can serve as a secure conceptual fundament for a critique of contemporary political trends. The U.S. response to 9/11, and responses by other liberal states elsewhere to similar attacks, tore away the liberal veils that shrouded dark but fundamental truths, they believe, about the authoritarian attributes of every liberal system, with Guantanamo Bay demonstrating that "Schmitt's dictum on sovereignty and its formulation still makes sense."[24] In this spirit, Nasser Hussain praises Schmitt's decisionist and antinormative model of law, commending him for understanding that general legal norms and particular exceptions are always intimately and unavoidably interconnected.[25] In contrast to naïve liberal democrats who misleadingly conceive of the emergency as somehow *outside* the general law, or perhaps mere episodic *lapses* from it, Schmitt was right to claim that sovereign action on the exception always rests on the legal order while simultaneously transcending and even standing outside of it. Unlike liberal jurisprudence, Schmitt's framework accurately recognizes that authoritarian acts of sovereignty always represent the other side of the coin of the rule of law.

The Schmittian thesis that the exception or emergency represents a "space devoid of law" yet simultaneously rooted in the legal order is a central preoccupation of Agamben's *State of Exception* as well. Schmitt is praised for offering "the most rigorous attempt to construct a theory of the state of exception," chiefly because he gasped the deeply paradoxical "threshold" character of the concept of the emergency:

> The specific contribution of Schmitt's theory is precisely to have made such an articulation between state of exception and juridical order possible. It is a paradoxical articulation, for what must be inscribed within the law is something that is essentially exterior to it, that is, nothing less than the suspension of the juridical order itself.[26]

Though inscribed within the law, the emergency is simultaneously external to it; the emergency explodes the confines of the legal order while necessarily resting and thereby belonging to it. As a reading of the complex twists and turns of Schmitt's reflections on this paradox, Agamben's text has much to recommend. Agamben is justified in pointing out that emergency power has become a ubiquitous facet of contemporary politics, though his analysis provides few useful pointers for how we might distinguish effectively between some emergency settings (e.g., Nazi Germany) and others (Guantanamo Bay). Troubling as well is Agamben's implicit assumption that a mere exegesis of Schmitt (mixed in with just enough references to other fashionable thinkers) suffices to illuminate the causally complex trends generating the trend toward executive-centered emergency government. When Agamben addresses the legal and empirical literature on emergency power, he is too dismissive.[27] Like other recent commentators on Schmitt and emergency power, he mistakenly assumes the possibility of accepting much of Schmitt's argumentation without sufficiently confronting its authoritarian logic. Having endorsed many features of Schmitt's theory of emergency power, for example, Agamben concludes that "the task at hand is not to bring the state of exception back within its spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights," that is, somehow firm up the rule of law, "since it is not possible to return to the state of law."[28]

In a Schmittian vein, Agamben believes that a deep analysis of emergency power necessarily discredits the rule of law. But how then might we ward off the specter of rampant executive prerogative and emergency government, both of which Agamben, in contrast to Schmitt, abhors? Agamben leaves us with nothing more than the deeply mysterious suggestion that rather than trying to salvage the rule of law we need to "halt the machine" by showing the "central fiction" of the "very concepts of state and law," in order "ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war."[29]

Agamben's obscure pronouncements are sure to keep some segments of the academic world busy, but they also help ensure that his ideas will have little impact on actual political and legal policy makers. The same cannot be said about those political theorists and jurists who rely in a more subtle and selective fashion on Schmitt to criticize existing liberal democratic legal regulation of the emergency and propose reforms. At the risk of oversimplification, let me briefly and rather schematically describe four (A–D) general strategies employed by contemporary U.S.-based political and legal thinkers who have tried to constructively engage Schmitt's ideas on emergency rule to investigate recent legal and political trends. In my view, none of them succeeds, chiefly because each accepts too much of Schmitt's underlying logic.

They have a harder time circumventing their normative and political blind spots than the authors in question seem to recognize.

## A

The first strategy might be polemically described as *sneaking Schmitt back in via the back door*. In this vein, political theorists Bonnie Honig and Austin Sarat admonish Schmitt for relying on what they take to be an inappropriate dependence on an overstated conceptual binary opposition between law (or "rule of law") and emergency.[30] In opposition to Schmitt's (allegedly) crude opposition of law to emergencies, we should interpret exceptional and emergency politics as necessarily interwoven into ordinary politics and the normal rule of law. The state of exception should be "seen as part (even if an extreme part) of the daily rule of law-generated struggle between judicial and administrative power."[31] On this reading, Schmitt apparently missed the ways in which the emergency, which he associated with the existence of a legal space unregulated by general rules, cannot be conceptualized as neatly distinguishable from normal political and legal experience. Key elements of the state of emergency (e.g., far-reaching legal discretion) turn out to be constitutive of everyday democratic politics. One consequence of this binary divide within Schmitt's thinking, Honig suggests, is a troublesome tendency to overstate the distinction between rule of law and "rule of men."[32] Another is then to try to circumvent Schmittian "decisionism" by unduly favoring the conventional liberal strategy of checking emergency power by depending unduly on familiar legal-institutional devices (e.g., civil liberties and judicial reform). Instead, if we recognize that "exceptionalism" permeates everyday legal and political affairs, we can begin to appreciate untapped possibilities for "forms of popular political action that engage in agonistic struggle with legal structures and institutions."[33] In short, the potentially positive role of democratic politics (in Honig's terms, "agonistic cosmopolitics"), where the conventional divide between legal generality and discretion gets blurred, is pushed inopportunely to the wayside by Schmitt's rigid conceptual framework.

The problem with this position is that it purports to be critical when in reality it mirrors Schmitt's own thinking. As David Dyzenhaus rightly notes, "It is precisely Schmitt's point that the exception is the norm because it is a feature of every legal decision."[34] One can sensibly read Schmitt's reflections on emergency power as an analogous attempt to undermine what he considered to be an overstated "normativistic" juxtaposition of exception or emergency to general law: exceptional or emergency situations turn out not only to be ubiquitous, but they also cannot be neatly separated from so-called legal normalcy. This, in part, is why he was skeptical that emergencies could be tamed or regulated by constitutional devices (e.g., Article 48) and also

why he believed that an element of so-called originary discretionary power was indispensable to political and legal affairs, despite conventional legal and constitutional ideas to the contrary.

Not surprisingly, at least some of what Honig and Sarat have to say ends up echoing Schmitt. Like Schmitt, they criticize—and risk caricaturing—the traditional intuition that the rule of law can be meaningfully distinguished from the "rule of men." The binary opposition between rule of law and "rule of men" is easily deconstructed by Honig only because, like Schmitt, she tends to equate the former with a straw man legal hyperformalism along the lines occasionally endorsed by early modern jurisprudence (e.g., Montesquieu, Beccaria) but not most modern liberals.[35] Even if we accept her rather heavy-handed view of the rule of law, the best way to overcome its limitations probably does not entail jettisoning "the quest to bind ourselves everywhere by law" for an ill-conceived decisionism that celebrates law's "promisingly undecidable dimension."[36]

Although Honig's politically progressive intentions obviously differ fundamentally from Schmitt's, her insufficiently developed ideas about "agonistic cosmopolitics" offer insufficient reassurance to those who might legitimately want to hold onto the traditional view that the rule of law, separation of powers, and civil liberties constitute indispensable restraints on political and legal arbitrariness.

## B

We might describe a second trend in the debate as *Carl Schmitt meets Critical Legal Studies (CLS)*. Although CLS shares with Schmitt a hostile interpretation of liberal law, its sharply varying political perspectives would inevitably seem to doom any attempt at synthesis. In fact, the CLS turn to Schmitt clashes with the latter's progressive politics.

Mark Tushnet, a prominent CLS jurist, relies especially on Schmitt's *Political Theology* to outline a number of provocative claims about the nexus between law and emergency rule. Like Honig and Sarat, Tushnet apparently considers the standard divide between emergency and ordinary law misleading: "Emergencies merely surface the usually hidden role of politics in determining the content of law."[37] The interpretation of even a seemingly unambiguous emergency constitutional clause is always fundamentally a political but not legal matter.[38] Schmitt was right to observe that no constitutional lawmaker could realistically anticipate all conceivable emergencies: attempts to codify emergency powers via constitutional means therefore fail "to address the situation facing policy makers." Consequently, "one cannot use law to determine when legality should be suspended."[39] Even if traditional proponents of law-based government naively hope otherwise, political reality demands of us that we admit that constitutional provisions

merely "provide executive officials with a fig leaf of legal justification for the expansive use of sheer power. What appears to be emergency power limited by the rule of law is actually unlimited emergency power."[40] In part perhaps because Schmitt's legal skepticism overlaps with some of Tushnet's own strong views about legal indeterminacy, he interprets Schmitt as having presciently grasped that emergency power is necessarily unchecked by the law. Emergency power is inherently "extra-constitutional," congenitally flawed attempts to restrain it by legal and constitutional mechanisms notwithstanding.[41]

So how then to minimize the dangers of unlimited emergency power? For Tushnet, popular politics, interpreted as basically distinct from conventional liberal legal institutions and practices, might successfully counter the specter of legally unchecked "black holes."[42] Only "the vigilance of the public acting, as it was put in the era of the American Revolution, 'out of doors,'" can protect us from abusive forms of emergency rule.[43] Like Honig, Tushnet seems to envision mass-based democratic political action as the best antidote to irresponsible emergency rule.

Even if Tushnet's appeal to vigilant democratic publics sets him apart from Schmitt, his clear-cut conceptual juxtaposition of mass politics (i.e., the idea of a people acting "out of [legal] doors") to conventional ideals of the rule of law and constitutionalism echoes the latter's own controversial quest to draw a sharp line between democracy and liberalism. Predictably, it potentially reproduces its familiar weaknesses. Democracy without civil liberties, the rule of law, or constitutionalism risks culminating in some variety of executive-dominated rule over an easily manipulated populace, where the citizenry will simply lack effective recourse to conventional legal and constitutional checks over political elites. History provides cases galore of political elites relying on the specter of crises, real or otherwise, to generate mass support while undertaking dubious illegal and unconstitutional action. Authoritarian emergency government and popular mobilization are by no means necessarily opposed. Schmitt's own institutional preference during Weimar's final years was for an effectively unchecked emergency executive able to rest on some modicum of mass-based plebiscitarian legitimacy. Vigilant and self-directed democratic publics, in contradistinction to a manipulated populace, can only thrive where civil liberties, the rule of law, and some measure of judicial independence remain intact. Having endorsed key components of Schmitt's theory of emergency power, it remains unclear that Tushnet can completely escape its snares.

## C

A third strategy in the ongoing reception of Schmitt's theory of emergency powers is best described as *mainstreaming Carl Schmitt*. This approach has

been taken by two prominent legal scholars, Eric Posner and Adrian Vermeule, whose provocative *The Executive Unbound: After the Madisonian Republic* (2010) represents the most important attempt thus far to integrate Schmitt's views of emergency government into U.S. legal scholarship. Echoing Schmitt, they believe that the modern administrative and interventionist state, in conjunction with more or less constant crises covering a broad range of political and economic matters, has debilitated what they call "liberal legalism." The modern administrative state generates a highly politicized "rule by exception" and not the rule by law, and its dominant institutional player is the executive (i.e., president) who now takes the form of a mass-based plebiscitarian figure poorly checked by legal and constitutional devices. In their analysis, no legal or constitutional innovation has so far succeeded in countering the ascent of a more or less permanent emergency-centered system resting on far-reaching legal and administrative discretion.

In short, Schmitt's own vision for a presidential emergency regime has *already* materialized in the United States. Unbeknownst to most Americans, his theory of emergency government correspondingly offers a perceptive starting point for understanding the real-life U.S. liberal democracy. Posner and Vermeule follow Schmitt in looking askance at the liberal (and specifically Madisonian) idea of a separation of powers, arguing not only that the administrative and interventionist state has effectively dismantled it but also that reform strategies hoping to refurbish it are destined to fail.[44]

Posner and Vermeule endeavor to distance themselves from Schmitt, however, by insisting that presidential emergency government is not quite as bad as one might assume: it turns out to be congruent with core liberal political ideals. By no means should we associate it with "tyranny" or "dictatorship," terms apparently that too often get sloppily bandied about.[45] They implicitly reject Schmitt's implicit view that liberalism should be seen as a metaphysical whole, with its legal and political-institutional elements inextricably interconnected.[46] Even absent the institutional paraphernalia of legal liberalism, effective *political* checks can operate so as to restrain the executive and prevent an authoritarian state along the lines endorsed by Schmitt. Similar to Tushnet, whose left-wing and radical democratic political instincts are alien to them, they posit that by identifying some expressly political mechanisms we can drink Schmitt's medicine without suffering its nasty side effects. In contrast both to Tushnet and Honig, however, their antidote to Schmitt has little in common with radical democracy. Instead, they see Schmitt's ideas as potentially consistent with a viable and realistic understanding of existing liberal democracy.

Their volume is filled with interesting ideas about how distinctive political mechanisms do the work liberal jurists previously expected of the rule of law and separation of powers. On their view, the existing U.S. political system is generally doing well at advancing the preferences of the median voter. Even if the executive remains the dominant institutional player, he or she has to stand for election. Fortunately, presidents typically worry about their future reputations; this encourages them to pursue a sensible political course. Presidents can and often do successfully send signals to the public communicating that their intentions are well-motivated, and that in fact voters might perhaps make the same decisions if they were in possession of the right information. By communicating properly (e.g., by appointing members of the opposing party to his cabinet), presidents can gain credibility, and voters might come to acknowledge the soundness of what the executive is doing.[47] In societies having the requisite levels of wealth and education, liberal democracy can flourish even absent liberal legalism: relatively well-educated and alert citizens with sufficient resources can typically make sure that their government will act in sensible ways. Because the United States falls in this category, its citizens need not worry too much about reproducing the tragic history of Schmitt's Germany.

Yet, Posner and Vermeule never really put worries to rest that presidential emergency government comes at too high a price. The underlying problem is that they have implicitly accepted too many Schmittian intuitions. Like Schmitt, they oddly and sometimes dramatically juxtapose "liberal legalism" to "politics." Thus, after showing that liberal legalism cannot restrain the administrative state, they are left with the idiosyncratic task of trying to prove that "politics" (conceived here as fundamentally distinct from liberal legalism) can do the job, while overlooking the legal and constitutional underpinnings (e.g., Congress' constitutional powers) of the executive's dependence on public opinion. Even the relatively limited array of political mechanisms they highlight relies on conventional liberal-legal devices. In part what separates U.S.-style elections from those found in authoritarian and semi-authoritarian regimes, for example, is a rich body of constitutional jurisprudence requiring that certain basic rules be properly upheld during elections. Although Posner and Vermeule are probably right to observe that some traditional features of liberal legalism have experienced decay, political mechanisms that have stepped into the gap probably fall in a grey zone between what we might describe as "pure partisan politics" and "perfect formal legality." But they are by no means disconnected altogether from liberal legalism.

If we reject their overstated juxtaposition of "legalism" to "politics," things may not look quite as bleak for the rule of law and separation of powers. When Congress, for example, refuses to go along with the president's call to increase the debt ceiling, not just "politics" but also "liberal legalism" is still at work. The president's plebiscitarian appeal to the general populace can be effectively countered by an influential group within the House of Representatives, which knows how to use familiar constitutional devices to check executive power. In the Senate, the filibuster rule—a problematic offshoot of liberal legalism, to be sure, but a component of it nonetheless—allows a minority of Senators to do the same. Whatever the faults of his original analysis, Schmitt was right to see legal and political liberalism as two sides of the same coin: if you abandon core elements of the rule of law and the separation of powers, robust legislatures, the existence of a freewheeling independent public opinion and civil society, and meaningful free elections will also be threatened. A political system dominated by an executive unchecked by legal and constitutional means is unlikely to take a desirable form: civil rights will be insecure; the executive will dominate decision making; elections will be a sham; and the welfare and regulatory states will constitute little more than devices by means of which dominant elites secure political stability and the social status quo.

## D

A fourth strategy can be characterized as *using Schmitt against Schmitt*. Perhaps the most impressive representative of this genre is the legal scholar Oren Gross, who has published an incisive critique of Schmitt's theory.[48] His skepticism about Schmitt notwithstanding, Gross implicitly endorses two core features of Schmitt's theory of emergency power. First, he accepts Schmitt's insistence on the *irrepressibility and ubiquity of the emergency*, offering a detailed chronicle of the many ways in which declarations of emergency power, typically accompanied by troubling forms of executive prerogative, have contaminated the normal operations of the legal system.[49] Like Schmitt, Gross also questions the traditional view that emergencies can be effectively accommodated by the normal operations of the legal order: "General norms are limited in their scope of application to those circumstances in which the normal state of affairs prevails."[50] This classical "accommodationist" view is flawed because emergency situations generate hard cases that typically make bad law in the sense that statutes or judicial precedents generated during a crisis are poorly suited to normal conditions. In Gross' view, we can observe a general tendency toward a ratcheting down of basic legal liberties resulting from the troubling proliferation of emergency power: over the course of the last century, the ubiquity of emergency rule means that executive discretion

has expanded dramatically and civil liberties consequently suffered. A central source of this tendency is that ordinary law too often has been polluted by emergency-era statutes and precedents that extend the scope of executive prerogative and are allowed to remain on the books well after the crisis that generated them subsides.

So how can we provide liberal democratic government with generous room to ward off a large array of likely emergency situations (including terrorism) while preventing the pollution of the everyday legal system by anti-libertarian emergency measures and judicial precedents? By way of proposing an answer to this question, Gross implicitly endorses a second feature of Schmitt's argument: he smuggles elements of Schmitt's *legal skepticism* into his own account by embracing the view that no legal or constitutional norm can satisfactorily contain or effectively regulate emergency power.[51] Legal norms and emergency power, as Schmitt posited, simply do not mix, and thus it remains impossible to codify emergency provisions.[52] Every attempt to provide a statutory or constitutional basis for their exercise necessarily works to *normalize* problematic forms of emergency power. Emergencies inevitably escape the confines of any legal norm and poison the legal system as a whole.

For Gross, the best way to maintain the purity of ordinary law—and thereby preserve the rule of law—is by denying any legal basis to emergency action. Yet emergency action remains indispensable. The solution to the riddle is to allow for emergency measures, even of an extreme character,[53] while conceptualizing them as external to the law: when state officials undertake emergency measures, they should openly and publicly acknowledge their *extralegal* character.[54] Because emergency power can never be safely cabined by the law, we might as well admit its irrepressibly extralegal nature. Even when the law bans extreme measures, emergency actors will probably pursue them anyhow. To be sure, Gross' political intentions remain indisputably liberal democratic. Following Kant more than Schmitt, Gross hopes that a strict requirement for publicity and transparency in emergency action will function to restrain state officials from undertaking unnecessary measures in the first place. Publicity tests buttress the possibility of effective *ex post facto* checks, since they make it easier for the public, acting by means of any of a number of conceivable institutional instruments described by Gross, to offer a considered judgment of whatever emergency measures officials may have pursued. An official might be forced to resign, face criminal or civil charges in court, or impeachment. Alternatively, illegal action might be indemnified, or it could be effectively endorsed by more conventional political mechanisms (e.g., a landslide reelection for a political official who openly admitted to extralegal action in order to "save the country").[55]

Gross' ideas have been subject to a number of criticisms.[56] Since Gross may be wrong to claim that emergency law has generally undermined basic liberties, we have fewer reasons to worry that existing approaches for dealing with crisis situations require a fundamental overhaul or to oppose constitutional emergency power clauses on the grounds that they necessarily contaminate ordinary law.[57] David Cole points out that Gross' proposal is conceptually inconsistent since the argument presupposes that the emergency can never be legally contained while simultaneously positing a sharp distinction between extralegal emergency situations and legal normalcy.[58] Given Gross' own legal skepticism, however, why assume that extralegality can be neatly cabined away from the legal system as a whole? Why not instead expect a blurring of so-called extralegal emergency actions and normal law? One can easily imagine many scenarios in which extralegal emergency acts are politically condoned after the fact and subsequently relied on to provide justifications for subsequent emergency acts possessing at best a dubious legal basis. Much of Gross' argument is directed polemically at purportedly unrealistic attempts to master emergency situations by law. But how realistic is *his* proposal? Why would any state official in her right mind concede the extralegal character of her actions? Why not, as with the tortured legal justifications for indefinite detention provided by the U.S. government following 9/11, instead latch onto some meager legal precedent and simply declare even the most outrageous emergency actions legal? In a political culture ideologically committed to the rule of law, many political and institutional disincentives work against state officials publicly conceding the extralegality of their acts. Given the impressive institutional advantages often enjoyed by the executive, there are good reasons for questioning the effectiveness of both the prospective and retrospective checks proposed by Gross. In the final analysis, his proposal risks condoning massive executive-level illegality—recall his endorsement of the view that emergency situations are both numerous and unavoidable—while suggesting a series of politically and institutionally unrealistic restraints.

## III

Contemporary scholars influenced by Schmitt still leave us with an important lesson: we need to think hard about the prospect of far-reaching institutional reforms to circumvent the specter of an authoritarian emergency regime. Schmitt's vivid theoretical defense of emergency government highlights at least some of the dangers potentially awaiting those who ignore evidence of liberal democratic decay. This is only the most obvious reason why it remains

well worth our time to pay close attention to it. Like no other political or legal thinker in the last century, he placed the problem of emergency government on the intellectual front burner, and he consistently did so as to unsettle those of us committed to liberal and democratic legal ideals. At the very least, his ideas about emergency rule call out for a response from those hoping to preserve the rule of law.

Only by effectively subjecting the exercise of emergency power to legal regulation can we break with Schmitt's flawed contributions to a theory of emergency government. Fortunately, the recent debate points to two possible paths for doing so. Although a complete discussion of the complex issues of institutional design raised by the debate would take us well beyond the scope of our discussion here,[59] we can describe its more intellectually creative participants as either *democratic institutionalists* or *liberal common lawyers*. With the notable exception of Bruce Ackerman, the former group consists substantially of normatively minded political scientists; its ideas are deeply influenced by what Pasquale Pasquino and John Ferejohn describe as neo-Roman ideas of emergency government, though typically modified in accordance with core liberal political and legal ideals.[60] The latter group is made up primarily of legal scholars and is inspired by elements of the U.S. system and common law systems elsewhere, many of which provide ordinary courts of law with a pivotal role in the supervision of emergency rule.[61]

The democratic institutionalists posit that improved democratic accountability goes hand in hand with stricter *ex ante* legal devices, and they envision well-designed constitutionally based emergency powers as crucial in achieving their goals. Demanding a clear delineation of emergency from ordinary law, the democratic institutionalists require that emergency power's exercise meet precisely formulated constitutional standards. This approach, they claim, avoids the potentially dangerous conflation of emergency and normal law and works best to preserve the rule of law, while permitting potentially extensive emergency measures. Special emergency "powers that can be called up during an emergency are fixed in advance of the emergency itself" by means of clear constitutional provisions determining a number of basic rules for their exercise.[62] In this model, decisions to institute as well as end emergency government never should be left in the hands of those who exercise emergency power, constitutional provisions must specify when and how it is to be put into effect and subsequently revoked, and no emergency action can be given a permanent legal character beyond the immediate crisis.[63]

Emergency regimes need not take the form of the legal black holes described by Schmitt and his admirers: democratic institutionalists insist that most basic legal freedoms would continue to operate under an emergency, though there would have to be some relaxations.[64] But such relaxations

would only be legitimate when warranted directly by the task of warding off whatever specific peril the political community faces.

Although by no means discounting the potential virtues of both ongoing and *ex post facto* judicial supervision of emergency power, democratic institutionalists usually doubt that judicial checks suffice to ensure either democratic accountability or fidelity to the rule of law. Relying on a critical portrayal of the existing U.S. emergency system,[65] where rights violations during a crisis are examined in the context of individual judicial rulings, two chief claims are made. First, elected representative legislatures are best suited to overseeing emergency power because of their superiority, vis-à-vis both the executive and judiciary, as formally organized sites for freewheeling democratic deliberation and debate. Especially during moments of crisis, where controversial questions concerning the proper relationship between civil liberties and national security take center stage, and "the values in question are controversial, or they are abstract values whose applicable meaning is unclear and awaits more specific determinations," inclusive democratic deliberation is indispensable if legitimate decisions are to be made.[66] But what then is to prevent legislative majorities from using emergency government as a political weapon against partisan rivals? Or, in light of the *de facto* executive domination of the legislature in most liberal democracies, reducing parliament to a rubber stamp for executive-dominated emergency rule?

One response to such anxieties is to argue that well-constructed constitutional clauses can help guarantee that emergency government rests on broad popular legitimacy and is "representative of every part of the citizenry interested in the defense of the existing constitutional order."[67] The South African Constitution, for example, includes strict supermajoritarian requirements in its emergency power regime.[68] Inspired by the South African example, Ackerman advocates a supermajoritarian escalator in which *every* (temporally delimited) extension of emergency power requires *deeper* legislative support than prevision extensions. On his view, one attractive result of his proposal would be to minimize the familiar danger of a partisan employment of emergency powers: those exercising emergency power would be forced to keep their political rivals "in the loop" as well as guarantee that their actions rest on broad and growing legislative support, well after the initial impulse to "rally 'round the flag' " (and hand over vast powers to the executive) dissipates.[69] This model hardly depends on a naïve faith in the political virtues of elected legislators, who indeed are just as likely to succumb to political hysteria as those they represent. On the contrary, the proposed supermajoritarian procedures arguably embody a healthy institutional manifestation of popular *distrust* of elected representatives.

Second, well-designed constitutional emergency powers help realize the rule of law by subjecting them to legal devices manifesting the classical

legal virtues of clarity, publicity, generality, prospectiveness, and stability. For democratic institutionalists, an independent judiciary can play a role in upholding the rule of law, yet good legislative and constitutional craftsmanship and decision making—for example, constitutional and legislative norms that pay proper heed to rule of law ideals—are at least as important. Of course, every legal system necessarily faces hard cases. This fact hardly requires us to throw the baby out with the bathwater, however, and discount the possibility of squaring the circle of emergency power by subjecting it to general law. As Ackerman argues, supermajoritarian constitutional procedures not only improve democratic accountability but also work to reduce the danger of administrative arbitrariness and legal abuse: they discourage state officials from pursuing controversial authoritarian policies. For example, most U.S. citizens immediately following 9/11 were willing to delegate substantial emergency power to the executive. Yet many of the Bush administration's most worrisome measures (e.g., indefinite detentions, Guantanamo Bay, some features of the Patriot Act) soon became controversial. A supermajoritarian escalator would perhaps have made it far more difficult for Bush and his successors to maintain controversial emergency measures. Rather than counting somewhat unrealistically on judges, facing the inevitable limitations of deciding on idiosyncratic individual cases, to preserve the rule of law by correcting for such abuses subsequent to their occurrence, this model helps keep them from spreading in the first place. Ackerman and other democratic institutionalists also assert that the U.S. model of judicial oversight has never worked very well anyhow; the protection of civil liberties during wartime in U.S. history leaves much to be desired.[70] For example, the infamous Korematsu ruling "has never been formally overruled, a fact that has begun to matter after September 11. . . . What will the Supreme Court say if Arab Americans are herded into concentration camps? Are we certain any longer that the wartime precedent of Korematsu will not be extended to the 'war on terrorism?' "[71]

In sharp contrast, the liberal common lawyers are skeptical of the possibility of constitutional emergency clauses, realistic *ex ante* legal regulation of emergency power, and the effectiveness of elected legislatures in overseeing its employment. Laurence Tribe and Patrick Gudridge, for example, argue that constitutional emergency powers risk normalizing their exercise and inadvertently exacerbating the likelihood of authoritarian emergency action. If, as Ackerman and the democratic institutionalists concede, emergencies are increasingly commonplace, it becomes difficult to identify any bright line separating them either temporally or spatially from ordinary politics. If no such distinction can be found in the actual political universe, the quest to draw a bright legal or constitutional line is doomed as well. The ongoing "war on terrorism" hardly requires sweeping short-term emergency powers, along

the lines proposed by the democratic institutionalists, but instead "narrow but constant power" that, like the problem of terrorism itself, cannot be neatly contained either temporally or spatially. If liberal democracies were to invoke constitutional emergency procedures in response to the multitude of crises they face, the ominous result might be more or less permanent authoritarian government.[72] Only where elected political institutions (e.g., the executive and legislature) can act flexibly in response to a crisis but are subsequently reined in by case-oriented judicial decision makers, serving as the chief defenders of fundamental liberal legal values, can we achieve both effective emergency action and sufficient protections against its potential excesses. For Tribe and Gudridge, the U.S. system—which they describe as resting on an "anti-emergency constitution"—does reasonably well on this score.

Although echoing Schmitt's skepticism about formal law and prospective legal codifications of emergency power, the common lawyers, *pace* Schmitt, refuse to abandon the rule of law. In their alternative account, however, the best way to avoid legal abuse during a crisis is by means of a vigilant judiciary. This is a model of the rule of law in which it is unrealistic to expect too much from even the best constitutional or statutory craftsmanship. In Dyzenhaus' vigorous defense of the common law position, "the law that rules is not just positive law; the law includes values and principles to do with human dignity and freedom. It also presupposes that judges are the ultimate guardians of these values."[73] Cole speaks for many as well by underscoring the advantages of judicial oversight of "narrow but constant" emergency power. Precisely because of the diversity of problems facing state officials during moments of crisis, "one size does not fit all" in regulating it. The case-oriented focus of the courts make them especially adept at handling the unavoidable complexity of crisis government: "Courts take up issues of emergency powers not in the abstract . . . but in the context of specific cases."[74] Offering a traditionalist vision of the merits of the common law, Cole argues that not only can future generations gain from the accumulated wisdom of judicial precedent but also that structure of common law reasoning requires judges to take a relatively sophisticated long-term perspective on the problems of emergency government. He mentions five grounds in support of this view. First, common law courts often act *after* the emergency or at least initial moment of popular anxiety has subsided, meaning that their rulings "bring more perspective" to the question at hand than competing institutional actors. Second, their decisions depend on statements of reasons that bind future cases, and the importance of judicial precedent means that such decisions typically have a longer "shelf life" than those of other institutions. Third, judges can effectively incorporate earlier lessons from the past into their rulings, contributing to the "measured development of rules in the context of specific cases." The common law model encourages judicial

learning and thus improved management of future emergency regimes.[75] Fourth, the process of judicial decision making generates an official public record "that may facilitate reaching a just result," since it renders judicial decisions objects of intense public scrutiny. Fifth, the judiciary is relatively independent of the political process, meaning that courts are less likely to prove susceptible to the immediate political pressures facing other branches. During emergency conditions, their decisions are more likely to be considered and deliberate in character.[76]

Scholars of emergency power have taken major steps toward discarding troublesome Schmittian ideas about the impossibility of law-based emergency government. Both democratic institutionalists and common lawyers offer impressive arguments; there may be sound reasons for concluding that no single institutional model of liberal democratic emergency government is universally valid, either normatively or as a matter of concrete constitutional politics. Nonetheless, it remains striking that both sides, despite key differences separating them, implicitly share a set of common institutional assumptions. A great deal of energy is exerted in weighing the comparative strengths and weaknesses of representative legislatures and the judiciary: the democratic institutionalists offer a relatively benign view of the legislature as the chief institutional location for overseeing emergency power, whereas the common lawyers defend the judiciary and traditional legal reasoning. Yet neither side has much to say about that institution, *the executive*, which inevitably represents the most important site for the *actual exercise* of emergency government.[77] Of course, a central question in the debate is how the executive is best regulated or restrained by judicial and legislative devices. Its participants are also familiar with many of the legal difficulties posed by the complex realities of the modern administrative state. Yet few ask whether executive power, in its present form, is sufficiently attuned to effective emergency management. In fact, both sides often mouth traditional clichés about the executive's role during emergency situations, according to which it alone can act efficiently and rapidly in warding off immediate perils to the political community. It might appear as though little has been learned about executive power since Montesquieu or Hamilton, who famously described *executive unity* as essential to fast-moving "expeditious" action, best attuned to the exigencies of crisis government. As the traditional argument goes, the "single person" of the unitary executive acts quickly and efficiently in the face of danger, whereas a large representative deliberative legislature, let alone a judiciary bogged down in time-consuming formalities and procedures, cannot.[78]

Formulated prior to the emergence of the modern this traditional picture requires reconsideration. The realities of modern executive power mesh poorly with our traditional preconceptions. Despite the traditional metaphor

of the single executive, the machinery of the modern executive is a complex and multiheaded creature, made up of competing bureaucratic fiefdoms. Conflict and disagreement are no less common there than within the legislature or judiciary. Modern political science aptly speaks of the "plural executive," while a vast body of scholarly literature, not surprisingly, suggests that executive action can be at least as sluggish and inefficient as that of competing institutions.[79] We need to take a hard look at the executive and try to figure out, as Rossiter demanded seventy years ago, how precisely it might be made into "a more effective and trustworthy unit of government in emergency times."[80] A more complete theory of emergency power will need to pay closer attention to the overall political and constitutional structure of the liberal democratic executive.[81] For example, much of the ongoing discussion seems oblivious to recent debates about *presidentialism* and its possible perils. As observed in chapter 9, Schmitt suggested a clear link between authoritarian presidentialism and emergency rule. Unfortunately, otherwise liberal-minded scholars usually fail to heed a warning Schmitt's analysis inadvertently generates: in its presidentialist variety, the modern executive seems susceptible to authoritarian tendencies. Instead, participants in the debate on emergency power probably downplay the fact that presidentialism tends to exacerbate the dilemmas of emergency government. Its relative inflexibility—for example, the fact that presidential terms of office are fixed—makes it more difficult for the electorate to rid itself of an incompetent or unaccountable executive with a poor record of emergency management. The strict separation of power characteristic of presidential regimes also means that the executive and legislature often find themselves in a zero-sum rivalry for political influence. Since emergencies provide the executive with obvious opportunities for extending their power, presidential regimes include many built-in incentives for the executive to declare or even create emergencies, real or otherwise. Despite the Hamiltonian dogma that presidentialism best guarantees political order and stability, the historical record suggests that presidential regimes are prone to lawlessness.[82]

As Herman Finer once noted, presidentialism unrealistically requires the executive to undertake an awesome and probably impossible diversity of arduous political tasks. Presidents combine the roles of chief legislator or prime minister, party leader, and honorary king (or queen): he or she oversees the administrative apparatus, is chiefly responsible for dealing with emergencies, serves as chief legislator, proposes and oversees the budget, conducts foreign policy and serves as military commander in chief, distributes patronage, serves as party leader, and functions in a quasi-monarchical fashion as a symbol of national unity and strength.[83] Consequently, "the whole potency of the presidency is founded on a gamble," since presidential leadership "is based on the hazards of the nerves, brains, and character of a single man"

unlikely to perform the superhuman tasks required of it.[84] There may be good reasons for expecting presidential systems to respond poorly to the challenges of crisis government.

This failure to challenge conventional presuppositions about executive power haunts not just recent debate about emergency government but also troublesome international and postnational legal developments to whose analysis we now turn. The proliferation of emergency mechanisms "beyond the nation state" suggests both the political relevance and normative dangers of Schmitt's legacy.

## NOTES

1. See Robert S. Rankin and Winfried Dallmayr, *Freedom and Emergency Powers in the Cold War* (New York: Meredith, 1964); and Rossiter, *Constitutional Dictatorship*.

2. See Ralph, *America's War on Terror*. For a discussion of the debate outside the United States (and the United Kingdom), see Günter Frankenberg, *Political Technology and the Erosion of the Rule of Law* (Cheltenham: Edward Elgar, 2014).

3. Schmitt, *Political Theology*, 5.

4. See the previous discussion in chapter 1.

5. This is a central theme, for example, of the imposing study by Gross and Aolain, *Law in Times of Crisis*. See also Jules Lobel, "Emergency Powers and the Decline of Liberalism," *Yale Law Journal* 98 (1989): 1386–433.

6. United States Senate, Special Committee on National Emergencies, *A Brief History of Emergency Powers in the United States* (Washington, DC: U.S. Government, 1974), vi.

7. For example, Bruce Ackerman argues that technological changes increase the likelihood of future terrorist attacks ("Don't Panic," *London Review of Books* (February 7, 2002), 15–16), while John Ferejohn and Pasquale Pasquino suggest that "contemporary emergencies cannot easily be limited in time or space" ("The Law of Exception: A Typology of Emergency Powers," *International Journal of Constitutional Law* 2 [2004]: 228). A strong version of this claim is found in Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010).

8. See William E. Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore, MD: Johns Hopkins University Press, 2004), 117–27.

9. Dyzenhaus, for example, ties the pathologies of executive emergency rule to the purported preponderance of legal positivism among judicial actors. Schmitt, who was also hostile to positivism, would have agreed (Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* [Cambridge: Cambridge University Press, 2006]).

10. Ferejohn and Pasquino, "Law of the Exception," 226.

11. This view hardly requires subscription to a naïve brand of legal formalism. But it certainly is inconsistent with extreme notions of legal indeterminacy.

12. Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964).

13. Oren Gross, "Providing for the Unexpected: Constitutional Emergency Provisions," *Israel Yearbook on Human Rights* 33 (2003): 13–44.

14. For a survey, see Kim L. Scheppele, "Law in a Time of Emergency: States of Exception and the Temptations of 9/11," *University of Pennsylvania Journal of Constitutional Law* 6 (2004): 1001–80. Of course, this suggestion raises difficult questions of institutional design. An important question would be *which* system of constitutional regulation might do the best job at successfully negotiating the dilemmas identified by Schmitt. Poorly designed systems might very well exacerbate them.

15. Andrew Arato, "The Bush Tribunals and the Specter of Dictatorship," *Constellations* 9 (2002), 470.

16. Mark Tushnet, "Emergencies and the Idea of Constitutionalism," in *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. M. Tushnet (Durham, NC: Duke University Press, 2005), 47.

17. If such substantive disagreement becomes too great, however, procedural mechanisms will likely fail.

18. See the discussion of Schmitt's ideas about international politics in chapter 6.

19. Peter J. Spiro, "Realizing Constitutional and International Norms in the Wake of September 11," in *Constitution in Wartime*, 198.

20. Richard Posner, *Law, Pragmatism, Democracy* (Cambridge: Harvard University Press, 2003), 313.

21. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002), 131–64, who defends the "torture warrant" or judicially supervised torture.

22. For a sample of the debate, see Sanford Levinson, ed., *Torture: A Collection* (Oxford: Oxford University Press, 2004).

23. Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, IL: University of Chicago Press, 2005), 2.

24. Magnus Fiskesjo, *The Thanksgiving Turkey Pardon, the Death of Teddy's Bear, and the Sovereign Exception of Guantanamo* (Chicago, IL: Prickly Press [University of Chicago], 2003), 54.

25. Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003), 15–20, 144.

26. Agamben, *State of Exception,* 33.

27. See, for example, his dismissive remarks about Rossiter (Agamben, *State of Exception,* 6–9).

28. Agamben, *State of Exception,* 87.

29. Agamben, *State of Exception,* 87.

30. Austin Sarat, "Introduction," in *Sovereignty, Emergency, Legality*, ed. A. Sarat (Cambridge: Cambridge University Press, 2010), 3.

31. Bonnie Honig, *Emergency Politics: Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009), 86.

32. Honig, *Emergency Politics*, 84.

33. Honig, *Emergency Politics*, 66.

34. David L. Dyzenhaus, "Emergency, Liberalism, and the State," *Perspectives* 9 (2011): 73.

35. Honig, *Emergency Politics*, 82–86

36. Honig, *Emergency Politics*, 86.

37. Mark Tushnet, "Meditations on Carl Schmitt," *Georgia Law Review* 40 (2006): 886.

38. Tushnet, "Meditations on Carl Schmitt," 886.

39. Tushnet, "Emergencies and the Idea of Constitutionalism," 47.

40. Tushnet, "Emergencies and the Idea of Constitutionalism," 49.

41. Tushnet, "Emergencies and the Idea of Constitutionalism," 48.

42. Tushnet, "The Political Constitution of Emergency Powers: Some Conceptual Issues," in *Constitution in Wartime*, ed. M. Tushnet, 155.

43. Tushnet, "Emergencies and the Idea of Constitutionalism," 50.

44. In this reformist mode, see Peter Shane, *Madison's Nightmare: How Executive Power Threatens American Democracy* (Chicago, IL: University of Chicago Press, 2009).

45. Posner and Vermeule, *Executive Unbound*, 176–205.

46. Schmitt, *Crisis of Parliamentary Democracy*, 33–50.

47. Posner and Vermeule, *Executive Unbound*, 137–50

48. Oren Gross, "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the 'Norm-Exception' Dichotomy," *Cardozo Law Review* 21 (2000): 1825–68.

49. Oren Gross, "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" *Yale Law Journal* 112 (2003): 1011–1134.

50. Oren Gross, "The Prohibition on Torture and the Limits of Law," in Levinson, *Torture*, 239.

51. Like Gross, Richard Posner opposes constitutionally based emergency laws: a true emergency can never be effectively codified beforehand (Posner, *Law, Pragmatism, and Democracy*, 305). The good news is that existing statutory and constitutional provisions provide sufficient "wiggle room" to accommodate emergency action: the law is always elastic enough to allow for decision makers to readjust the normal balance between liberty and security in accordance with emergency exigencies. In contrast to Gross, and probably closer to Schmitt, Posner seems less worried about maintaining the purity of ordinary law by eliminating emergency action from its scope. On another point as well, his position seems reminiscent of Schmitt. Since Posner's "legal pragmatist" standpoint suggests that law is always open-ended enough to allow for even relatively far-reaching abrogations of civil liberties, the obvious question then becomes, *who decides on or determines* the appropriate balance between security and liberty during a crisis? Like Schmitt, Posner believes that judicial actors are poorly situated for making these types of decisions. In contrast, the executive's "unimpeded access to . . . expertise" means that it is more likely to achieve the right balance (*Law, Pragmatism, Democracy*, 316). Posner wants to leave the regulation of the emergency under the rubric of existing law but only because law is always sufficiently elastic to allow for a proper measure of judicial deference to an executive conceived as best able to guarantee our security.

52. Gross, "Providing for the Unexpected."

53. Even torture, it seems, may be necessary in some situations. See Gross, "Prohibition on Torture."

54. However, Gross argues that *moral* tests always operate in crisis situations. Political leaders who opt for extralegality should be guided by a Weberian ethic of responsibility, which openly recognizes the tragic dimensions of decision making.

55. Gross, "Chaos and Rules," 1099.

56. See the many essays collected in Victor Ramraj, ed. *Emergencies and the Limits of Legality* (Cambridge; Cambridge University Press, 2008).

57. For example, Eric Posner and Adrian Vermeule ("Accommodating Emergencies," in *Constitution in Wartime*, ed. M. Tushnet, 55–94) argue that there is no systematic reason to expect either a ratcheting up or ratcheting down of basic liberties resulting from emergency government.

58. David Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Time of Crisis," *Michigan Law Review* 101 (2003): 2565–95.

59. At a minimum, a model of emergency power needs to explain *which institution* can declare an emergency, *which institution* can end it, *what new powers* are available during it, which legal protections remain *inviolate*, and by *what standards* courts review emergency power.

60. Ferejohn and Pasquino, "Law of the Exception." The classical Roman or republican model, for example, placed substantial power in the hands of emergency governments (for the details, see Nomi Claire Lazar, *State of Emergency in Liberal Democracies* [Cambridge: Cambridge University Press, 2009], 113–35). The most prominent representative of this position is Bruce Ackerman (*Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* [New Haven, CT: Yale University Press, 2006]), though sympathy for its elements can be found in the writings of many others, including Tom Campbell ("Blaming Legal Positivism: A Reply to David Dyzenhaus," *Australian Journal of Legal Philosophy* 28 [2003]: 31–38), Gabriel Negretto and Jose Antonio Rivera ("Liberalism and Emergency Powers in Latin America: Reflections on Carl Schmitt and the Theory of Constitutional Dictatorship," *Cardozo Law Review* 21 (2000): 1794–824), Kim Scheppele, and the present author ("Emergency Power," *Annual Review of Law and Social Science* 2 [2006]: 257–77).

61. In this second group I would include, among others, David Cole, David Dyzenhaus (*Constitution of Law*), Daniel Farber (*Lincoln's Constitution* [Chicago, IL: University of Chicago Press, 2003]), William Rehnquist (*All the Laws but One: Civil Liberties in Wartime* [New York: Vintage, 1998]); perhaps also Geoffrey Stone (*Perilous Times: Free Speech in Wartime* [New York: Norton, 2004]), Sunstein and Jack Goldsmith ("Military Tribunals and Legal Culture: What a Difference Sixty Years Makes," *Constitutional Commentary* 19 [2002]: 261–89), and Laurence Tribe.

62. Ferejohn and Pasquino, "Law of the Exception," 235.

63. Rossiter's landmark study (*Constitutional Dictatorship: Crisis Government in the Modern Democracies*) seems to represent an inspiration to many writers in this camp.

64. Ferejohn and Pasquino, "Law of the Exception," 234; also Bruce Ackerman, "The Emergency Constitution," *Yale Law Journal* 113 (2004): 1029–91. Ackerman argues that torture should be off-limits.

65. In the U.S. system, the executive may initially respond by relying on a claim of inherent executive power, and Congress typically delegates substantial discretionary authority to the executive.

66. Campbell, "Blaming Legal Positivism," 36.

67. Rossiter, *Constitutional Dictatorship*, xiii.

68. After twenty-one days, extensions of emergency authority must be approved by 60 percent of the National Assembly. The state of emergency can never be extended for more than three months.

69. Ackerman, "The Emergency Constitution"; "This is Not a War," *Yale Law Journal* 113 (2004): 1871–907.

70. See, for example, Andrew Arato, "Bush Tribunals and the Specter of Dictatorship," 457–76.

71. Ackerman, "Emergency Constitution," 1044.

72. Laurence Tribe and Patrick Gudridge, "The Anti-Emergency Constitution," *Yale Law Journal* 113 (2004): 1814–15.

73. David L. Dyzenhaus, "Humpty Dumpty Rules or the Rule of Law: Legal Theory and the Adjudication of National Security," *Australian Journal of Legal Philosophy* 28 (2003): 13.

74. David Cole, "The Priority of Morality: The Emergency Constitution's Blind Spot," *Yale Law Journal*, 113 (2004): 1763.

75. A Whiggish faith in gradual progress can be detected among many of the common lawyers.

76. Cole, "Judging the Next Emergency," 2575–77.

77. However, for formidable attempts to correct for this oversight, see Bruce A. Kleinerman, *The Discretionary President: The Promise and Peril of Executive Power* (Lawrence: University of Kansas Press, 2009); and Clement Fatovic, *Outside the Law: Emergency and Executive Power* (Baltimore, MD: Johns Hopkins University Press, 2009).

78. Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, 26–70. On the challenges posed by presidentialism to recent models of emergency government, see Scheuerman, "Presidentialism and Emergency Government," in *Emergencies and the Limits of Legality*, 258–86.

79. Gary King and Lyn Ragsdale, *The Elusive Executive: Discovering Statistical Patterns in the Presidency* (Washington, DC: Congressional Quarterly Press, 1988).

80. Rossiter, *Constitutional Dictatorship*, 408.

81. In fact, we may need to rethink the traditional notion of a tripartite separation of powers, which is poorly suited to many tasks of modern government. See Ackerman, "The New Separation of Powers," *Harvard Law Review* 113 (2000): 642–729.

82. Juan Linz, "Presidential or Parliamentary Democracy: Does It Matter?" in J. Linz and A. Valenzuela, eds., *The Failure of Presidential Democracy* (Baltimore, MD: Johns Hopkins University Press, 1994), 3–87.

83. Herman Finer, *The Presidency: Crisis and Regulation* (Chicago, IL: University of Chicago Press), 118.

84. Finer, *The Presidency*, 23.

*Chapter 11*

# States of Emergency beyond the Nation-State?

Key trends in postnational law and politics highlight the contemporary relevance of Carl Schmitt's definition of sovereignty (or "highest power") as "he who decides on the exception."[1] These developments should alarm us because Schmitt's conception of sovereignty is incompatible with constitutionalism, the rule of law, and modern democracy, notwithstanding his defenders' efforts to claim otherwise.

I begin by briefly recalling why Schmitt's view of sovereignty is normatively problematic (I). Building on the sociologist Craig Calhoun's notion of a global "emergency imaginary," I then suggest that some striking facets of our globalizing legal constellation seem, unfortunately, to corroborate Schmitt's unattractive conceptual framework (II). Finally, I argue that significant differences remain, for better and (sometimes) for worse, between emergency power "beyond the nation state" and emergency power *within* nation-states. Most importantly, international and postnational states of emergency lack domestic or municipal emergency government's central institutional basis, namely, a relatively unified, hierarchically organized executive branch. Though we should worry about the legal trends at hand, the messy contours of executive power "beyond the nation state" should probably discourage politically overheated reactions (III, IV).

## I

What is wrong with Schmitt's view of sovereignty as "he who decides on the exception"? At first glance, the definition seems harmless enough, or at least one might gather as much, given the often uncritical and even adulatory fascination with Schmitt's theory.[2]

There is, of course, a massive literature on the topic. For our purposes here, I only mention the definition's most egregious problems.

First, as Schmitt's contemporaries early on quite accurately noted, his definition is one-sidedly, narrowly preoccupied with the legal exception or the emergency, as though sovereignty had little or nothing to do with the normal operations of politics and law.[3] His definition tends to limit our ideational horizons, encouraging us to view political and legal experience through a poorly tinted lens, always on the lookout, in effect, for crises and emergencies, leading us to obscure many conventional ways in which sovereignty (in the rudimentary sense of "highest political power") gets exercised.[4] To use Schmitt's own problematic language, his definition is exclusively "decisionist" but not also suitably "normativist," because it misleadingly downplays the normal or ordinary operations of political power.

Second, and more fundamentally, Schmitt's view undermines the crucial modern intuition that law (and indeed, the *rule of law*) is essential and indeed probably constitutive of sovereignty. By locating sovereignty beyond or outside normal legal channels, Schmitt offers a polemical and one-sidedly antilegal view. That account obscures the crucial fact that since Thomas Hobbes modern political and legal thinkers have struggled with the task of synthesizing or combining the notions of "highest (or ultimate) political power" with a sufficiently robust vision of law-based government. They have regularly tried, with greater or lesser degrees of success, to *bring together* sovereignty and law.[5] By conceptual fiat, Schmitt effectively declares this rich and multifaceted endeavor, perhaps *the* central problematic of modern political and legal thought, fundamentally bankrupt. One normatively disturbing consequence is that the rule of law (and related ideas, such as constitutionalism) are *a priori* devalued.

On his view, law and sovereignty are categorically and conceptually, not just contingently or empirically, opposed. They become akin to oil and water and simply cannot, despite the efforts of Rousseau, Kant, Hegel, and countless others, ever really be institutional allies. If you want sovereignty, and in a crisis-ridden political universe, Schmitt posits, you would have to be politically naïve *not* to want it, you need to envisage law as basically hostile to sovereignty.

Third, Schmitt undermines—again, I fear, by what amounts to conceptual or definitional fiat—a rich tradition of trying to conceive sovereignty in democratic terms, as *popular* sovereignty, as a final or ultimate power resting in the hands of a politically and legally self-constituted "people."[6] Such a view of sovereignty, by the way, appears not only in the republican Rousseau but also in one of the great influences on modern liberalism, Locke. Sovereignty, for Locke, is not located in any specific person or institution but in the hands of the people as a whole; predictably, his theory inspired many

eighteenth-century revolutionaries in both America and France.[7] At times, Schmitt, admittedly, appears to build constructively on this rich tradition, and especially the idea of a supra-legal *constituent power*,[8] one of its most provocative conceptual legacies, which he interprets in a radically nationalistic vein. In the final analysis, however, his quasi-monarchical (and also, patriarchal) definition of sovereignty takes him in a very different analytic direction: sovereignty is "*he* who decides on the exception [author's emphasis]." In fact, Schmitt tellingly continues, "He decides whether there is an extreme emergency as well as what must be done to eliminate it . . . it is he who must decide whether the constitution needs to be suspended in its entirety."[9] Sovereignty is singular and personalistic, in the sense of being best embodied in a single person. For Schmitt, in contrast to Locke or Rousseau, sovereignty is ultimately located in a *concrete* person or institution, in the *unitary person of the executive*.[10] Correspondingly, Schmitt devoted much of his energy during the 1920s and early 1930s to the task of demonstrating why the Weimar president represented the rightful carrier of the German Republic's latent constituent power, which he interpreted in a systematically anti-pluralistic vein.[11]

Schmitt's definition of sovereignty, by day's end, makes it difficult, if not impossible, to conceive it as resting in the hands of a diverse or pluralistic democratic community of political and legal equals. Not just sovereignty and law but also sovereignty and democracy are categorically opposed. Not surprisingly, Schmitt's preferred model of democratic participation, as the young Otto Kirchheimer aptly commented in 1932, entails nothing more than "an unorganized answer which the people, characterized as a mass, gives to a question posed by an authority whose existence is assumed."[12] For Schmitt, democracy is necessarily an executive-dominated affair because, as he bluntly asserted, "the people can only say yes or no, it cannot counsel, deliberate, or discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its 'yes' the draft norms presented to it. Nor, above all, can it put a question, but only answer by 'yes' or 'no' a question put to it."[13]

Of course, more might be said about Schmitt's notion of sovereignty. Here I instead turn to some worrisome tendencies plaguing the international and postnational legal constellation in which we find ourselves. Unfortunately, Schmitt's peculiar definition of sovereignty remains surprisingly pertinent to those trends.

## II

Much of present-day global political consciousness seems to rest on what the sociologist Craig Calhoun aptly describes as an "emergency imaginary,"[14]

according to which a host of political challenges are conceived forthwith as sudden, abnormal, unforeseen, and probably unpredictable emergencies, demanding expeditious top-down surgical responses. The global emergency imaginary is prevalent not only in familiar discussions of (so-called) natural and environmental disasters[15] but also in the economy, health policy (e.g., SARS or Ebola), counterterrorism, and "humanitarian" or other "complex emergencies," typically involving refugees and displaced persons. Wherever we turn, in short, we encounter ubiquitous political talk of major crises or emergencies. Though Schmitt might have been surprised by the cross-border sources and repercussions of many of the (alleged) emergencies at hand, the underlying imaginary rests implicitly on an intuition he clearly shared: dire crises are both irrepressible and commonplace, and that ours increasingly seems to be an era in which the legal exception risks becoming normalized.

As Calhoun points out, however, we need to acknowledge the emergency imaginary's potential dangers. It misleadingly assumes a more or less well-functioning global system, accidentally disrupted by an operational aberration; it downplays the degree to which many "emergencies" represent predictable consequences of endemic structural trends in the global political economy. Conveniently, it shifts blame away from long-standing structural roots and also from the privileged social and political players who benefit disproportionately from the global status quo. Similarly, it downplays how the powerful and privileged disproportionately shape crisis discourse.[16] Finally, it favors top-down political managerialism over the arduous (grassroots) political action necessary to keep many "emergencies" from transpiring in the first place.

Calhoun hardly denies the existence of serious or even dire political challenges or global "crises."[17] Yet, he correctly underscores the necessity not only of critically interrogating the emergency imaginary but also the need to do so by recourse to critical social theory. The global emergency imaginary is a political and social construct, with very real consequences for people, and one that is contested on a playing field plagued by vast inequalities in power and privilege. Our analysis needs to make sense of such social "facts." Unlike Schmitt, Calhoun smartly refuses to view the proliferation of emergencies and emergency rhetoric as quasi-ontological, as essential to "the political" and thus irrepressible.[18] Nor does he follow Schmitt in emphasizing the alleged pathologies of liberal jurisprudence, in the process attributing problems to liberal views of law whose primary sources probably lie elsewhere.[19] To Calhoun's credit, he intuits that a proper diagnosis of the emergency imaginary will necessarily call on critical-minded social sciences *as well as* political and legal theory.

Unfortunately, the global emergency imaginary appears to be playing a significant role in shaping troublesome legal developments. In the face

of what are widely perceived as emergencies outstripping national regulatory capacities, major international organizations (IOs), for example, have recently exercised contentious forms of discretionary power. In the context of intensified globalization, the myriad (economic, epidemic or health-related, natural, and political) crises law is supposed to tackle seem ever more postnational or transboundary in nature, meaning that they oftentimes play "out at the transnational level, affecting more than one member state at the same time."[20] As these new (or sometimes refurbished) nodes of emergency coordination increasingly undergo institutionalization, one consequence appears to be the proliferation of new sites for discretionary and sometimes arbitrary power, placed in the hands of a confusing panoply of international and postnational actors. Critical commentators worry that the emerging global legal order includes too many "authoritarian sub-orders" or decisionist legal "islands"—the Schmittian language is no coincidence—where intrusive, legally unchecked emergency power seems to gain the upper hand.[21]

Now, in some ways, this is a story familiar to scholars of international law; I do not want to exaggerate its novelty. So, for example, many human rights lawyers have long recognized that the international human rights law (IHRL) system for overseeing emergencies is riddled with inconsistencies, irregularities, and huge compliance gaps.[22] Global and regional agreements on human rights—including the International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR), American Convention on Human Rights (ACHR)—acknowledge the unavoidability of crisis or emergency scenarios while endeavoring to regulate them by legal means. They do so, standardly, by distinguishing between human rights, which can never be suspended and those subject to possible derogations, and then by outlining a set of procedures participating states are expected to abide when pursuing such derogations.

The myriad complexities notwithstanding, the general legal pattern seems relatively clear. First, human rights agreements usually specify core rights that cannot be derogated (e.g., the ECHR's prohibitions on torture). Second, they specify which rights are then subject to derogation (e.g., political rights, to free expression, the right to assembly). Third, they outline a basic two-step test member states are required to pass to justify derogations. States need, first, to demonstrate that the crisis at hand is sufficiently serious or dire. Even when they successfully do so, they still, second, need to show that emergency interventions are in fact necessitated by the crisis, in other words, that crisis responses strictly accord with some basic idea of *proportionality*.

Unfortunately, real-life practice proves decidedly more unsettling than the legal regulations at hand. Much literature suggests that IHRL has not done a good job taming the emergency: as Schmitt would have predicted, even within the seemingly humanitarian contours of international human rights

law, the "exception is [indeed] more interesting than the rule."[23] As one international jurist notes in his foreword to an impressive study of the topic, "the escape clauses of 'states of exception,' if not strictly confined and controlled, can empty this system of all substance."[24] What may initially *seem* like an admirable system for checking emergency power in reality too often gives nation-states massive discretion to declare "public emergencies," with courts for the most part acting cautiously and deferentially in response.[25] Even when relatively clear legal distinctions seem to be at work, they seem subject to far-reaching inconsistencies. Despite seemingly straightforward legal boundaries between derogable and nonderogable rights, for example, we find substantial evidence for what a recent UN Special Rapporteur on Torture, Manfred Nowak, dubs the "incurable tendency" to use public emergency clauses to pursue "the arrest, incommunicado detention, exile, torture, or murder of countless persons."[26] Declared emergencies are often accompanied by violations not just of derogable but also nonderogable rights, notwithstanding the law's plain meaning.[27] The system's attempt to cordon off a group of secure core rights collapses. Too often, IHRL emergency clauses operate as a stepping-stone to far-reaching state discretion—and even fundamental violations of core rights—by individual nation-states.

Though disturbing, this story remains relatively familiar, in part for the simple reason that the main culprit in such cases typically remain nation-states and, more specifically, national *executives* that exploit IHRL emergency clauses and sometimes, unfortunately, make mincemeat of human rights in the process. As Schmitt regularly pointed out, "the primary and most important question is not the content of the norm, but rather the question of *quis judicabit?*"—who gets to decide?[28] Within existing IHRL emergency law, nation-states often remain the key players; accordingly, national executives tend to determine what IHRL's legal structures in fact mean.

However, when we examine recent examples from international organizations, including some that have gained a measure of institutional autonomy from nation-states, the story becomes more interesting yet no less worrying.

For example, the World Health Organization (WHO) has undergone a dramatic augmentation of its emergency authority in the aftermath of a series of major health epidemics (SARS, Ebola).[29] Operating with an exceedingly broad definition of "emergency," the World Bank has developed complex mechanisms for "rapid bank responses" to a host of crisis scenarios, financial or otherwise,[30] while the World Trade Organization (WTO) confronted the 2008 financial crisis with measures its director general and secretariat pursued without a clear mandate from member states.[31]

Similarly, the UN Security Council (UNSC), in possible violation of the UN Charter and its usual operating procedures, responded to the 9/11 terrorist

attacks by promulgating what were effectively far-reaching legislative measures member states were uniformly required to heed.[32] Not only did the UNSC employ the cover of a terrorist "emergency" to appropriate legislative authority, but the measures in question carved out what many legal scholars described as a realm of basically unchecked prerogative: crucial to the new legal regime was a blacklist where those placed on it faced severe sanctions yet were denied basic due process and a right of appeal. (Only with the creation of an ombudsperson in 2009 did the UN arguably guarantee some basic legal protections.)[33] According to vocal critics, the UNSC's counterterrorism measures entailed a basic constitutional reordering of the UN system.[34] They also impacted *national* executives, which embraced the measures in part because they allowed executives to expand their powers vis-à-vis national legislatures and courts.[35] On this view, the UNSC effectively exploited the global emergency imaginary to remix the fundaments of the UN system and the balance of power between political institutions within existing territorial states. Evidence from the UNSC's recent nonproliferation policies suggests that this pattern is probably being reproduced there as well.[36]

Within the European Union, political elites responded to the 2008 financial meltdown and more recent "Euro crisis" by announcing controversial emergency economic measures that contravened long-standing legal procedures and mechanisms.[37] The resulting European-wide emergency economic government has relied extensively on ad hoc and legally dubious top-down executive measures while demoting ordinary deliberative and lawmaking channels. Here as well, a novel and undeniably complex system of post-national emergency power has strengthened the hand of a select group of institutional actors and helped alter the preexisting national-level balance of power between the executive and legislature. On the political sociologist Wolfgang Streeck's telling diagnosis,

> Together with the [European] Council, the Commission and the ECJ [European Court of Justice], but if need be also without them, the ECB [European Central Bank] has developed into the de facto government of the biggest economy on earth, a government entirely shielded from 'pluralist democracy' that acts, and can only act, as the guardian and guarantor of the liberal market economy. Since the crisis of 2008, which is of course far from over if it ever will be, the Bank has acquired wide-ranging capacities to discipline the sovereign states and societies in and under its jurisdiction to make them pay proper respect to the rules of a neoliberal-*cum*-market regime.[38]

In member states receiving bailouts and other forms of financial support, parliaments have been forced to fast-track contentious austerity measures, with some legislation providing a *carte blanche* to government ministers to

issue decrees regulating a vast arena of social and economic matters. As the legal scholar Christian Joerges has noted,

> The Union is experiencing a kind of state of emergency in which the law is losing its integrity . . . [t]he European Central Bank is disregarding its statutes; parliaments are contravened to make fast-tracked decisions that cannot be meaningfully discussed; Greece, and other members of the Union are being told that their sovereignty is now "limited": changes of government take place under exceptional circumstances.[39]

Some analysts have gone so far to speculate about the specter of a nascent Schmittian planetary sovereignty, a "Climate Leviathan," in which powerful global interests would coalesce to ward off the looming "climate emergency," "defined by an exception proclaimed in the name of preserving life on Earth."[40] Although proponents of this view concede that its global parameters would surely have irritated Schmitt (a lifelong critic of the idea of world government), an emerging worldwide "decisionist" system of technocratic climate governance, in which privileged state jointly exercise sovereign power as a way of preserving capitalism while countering environmental disaster, may loom on the global political horizons.

Although the details are complicated, a general pattern seems to be emerging. Key international and postnational institutional players tap into, while helping simultaneously to construct, the emergency imaginary, so as to pave the way for an expansion of discretionary authority, particularly when they see political and institutional advantages in doing so. Not surprisingly, inconvenient yet arguably dire scenarios unlikely to work to their political or institutional advantage, or situations where powerful global players are sure to block action, tend to get neglected. (Nonnuclear members of the UN, for example, would never succeed in declaring the refusal of the major nuclear powers to disarm a worldwide security "emergency" demanding intervention into the internal affairs of Russia, for example, or the United States.) On a planet plagued by stunning inequalities, not all "emergencies" are created equal. In turn, institutional players, especially when they can plausibly claim some success in mastering the difficult tasks at hand, then seek to regularize new emergency mechanisms, which in turn potentially provide a sturdier basis—and perhaps also some further political incentives—for future emergency interventions.[41] According to an important body of scholarship, emergencies and emergency government have played a major role in the formation of the modern state.[42] Interestingly, we find some striking parallels here, with crisis management and postnational institutionalization going hand in hand. Of course, whether the final result will look anything like a postnational or even world state remains an open question.

At any rate, new modes of quasi-Schmittian "sovereignty" are being constituted by powerful international and postnational actors who purport to be best capable of navigating the exigencies of the exception or emergency. Moreover, they do so in a manner that too often discards the law or at least stretches it to its (interpretative) limits: their actions sometimes follow a "decisionist" legal logic. Anxious commentators are now busily debating whether the various manifestations of this trend are best understood as representing examples of what Schmitt famously described as "commissarial" or "sovereign" dictatorial authority, a debate that need not detain us here.[43] The bottom line is that Schmitt's troublesome view of sovereignty finds ready empirical corroboration "beyond the nation state." This result would not necessarily have surprised Schmitt. As we explored in chapter 6, his theory of the *Grossraum* not only diagnosed the demise of key elements of the modern territorial state but also the processes of social acceleration and spatial compression on which globalization ultimately rests.[44] For political reasons, of course, he would assuredly have been alarmed by the basically liberal orientation of major IOs and postnational entities such as the EU. His deep anti-cosmopolitan antipathies would have probably made him skeptical of some of these institutional trends as well. Nonetheless, Schmitt can be plausibly interpreted as having intuited the possibility of a post-Westphalian order based on an emergency-centered logic of sovereignty.

## III

Schmitt was by no means fully consistent, however, in his analysis of sovereignty's necessary institutional presuppositions. Some of his remarks, at any rate, could be read as inferring a more conventional institutional pattern. The fact that the "sovereign decision frees itself from all normative ties and becomes in the true sense absolute," he writes in *Political Theology*, represents "undoubted proof" of the "superiority" of the "existence of the state" vis-à-vis law's normativity.[45] The primacy of the sovereign decision, it seems, demonstrates the primacy of the modern state over law. Relatedly, Schmitt typically envisioned the most appropriate carrier of sovereign discretionary power in similarly familiar terms, that is, as a "unified," hierarchically ordered executive in possession of the requisite capacity for effective crisis management, or what Hamilton famously dubbed "decision, activity, secrecy, and dispatch," which Hamilton described as generally characterizing "the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[46] Significantly, such conventional ideas about the institutional virtues of the executive, conceived as a single or unitary

person, first clearly emerged in the context of the modern territorial (and especially, nation) state.

Postnationalization complicates such presuppositions, as it does the standard premise that the executive possesses ready access to the territorial state's arsenal of power and coercive instruments (e.g., the military and police), ideal-typically viewed as organized in a relatively centralized and hierarchical fashion and financed through taxation. When we examine those institutional players now playing major roles in postnational emergency management, they hardly fit the traditional template. IOs like the WHO or World Bank lack direct access to the usual instruments of state coercion and rely on nation-states to enforce their directives. Although the move to regularize emergency authority there has generated some administrative streamlining, with new decision-making capacity predictably accruing to the secretariat and other elites, they remain in many ways unwieldy institutional creatures, in some cases (e.g., the WHO) more focused on providing technical guidance than effective political leadership.[47] If in fact they are plausibly characterized as possessing rudiments of "executive power," it often remains difficult to delineate such power from their legislative and judicial activities. Whether or not anything like the traditional separation of powers, in fact, is found "beyond the nation state" remains a matter of legitimate scholarly disagreement.[48]

Even if we opt to interpret the UNSC as a nascent global-level executive, the fact remains that it does not presently operate like most national executives. Although executives everywhere are institutionally complex and differentiated, within territorial states their activities nonetheless tend to be more centralized and administratively coherent. The UNSC, of course, grants a veto to each of its five permanent members, and because it relies on voluntary support for UN peacekeeping operations, it lacks direct control over the sort of coercive power national executives generally enjoy. The UN executive and administrative machinery is plagued by extreme decentralization, messily overlapping institutional jurisdictions, and an underdeveloped civil service.[49] When one turns to the globe's most developed postnational political order, the EU, "there is no single, comprehensive and unitary European executive institution or body."[50] Executive power there takes a complex, decentralized, and variegated character. "Executive actors and administrative constellations transgress levels of governance and national borders" in historically unprecedented ways.[51] The EU executive offers up an unwieldy mix of institutions participating in the enforcement and implementation of EU-wide decisions. The 2008 financial and recent "Euro" crises, as noted, have strengthened the ECB and resulted in some major political decisions being made outside formal political and legal channels.[52]

As in many other areas of international and postnational governance, executive power in the UN and EU seems chameleonic, dispersed, and

fragmented. Even if we cautiously determine that it still makes sense to use the familiar language of "executive power" to describe key international and postnational emergency players, it takes a vastly different—and far messier—form than it does nationally. To be sure, we should not use some idealized account of executive power within nation-states as a measuring rod; even there, institutional realities conflict with the standard or ideal-typical visions of executive power found within the classics of modern political thought. Nonetheless, the gap between concept and reality seems substantially greater in the context of international and postnational emergencies.

What implications follow for our evaluation of the legal trends at hand? How might institutional amendments to what initially appears to be an updated postnational, yet still identifiably Schmittian, brand of sovereignty, alter the original picture? And should we worry about the specter of a looming Schmittian (i.e., antidemocratic and antiliberal) global emergency regime?

The most sensible answer to this question is that we obviously need to take the perils seriously while paying proper attention to some mitigating circumstances. The complex and variegated structure of present-day postnational emergency authority both reduces and aggrandizes the likely dangers.

First, some "good" news: postnational executives typically depend on nation-states and national executives for enforcement, which generally means that they cannot autonomously mobilize effective power or efficiently implement decisions on their own. Global executives, in short, remain clumsier and less organizationally adept than most of their national counterparts. We need not worry too much, to put the point crudely, about the WHO or WTO calling out the police or military to squelch existential threats, real or otherwise—and potentially our liberties as well. Consequently, it seems problematic to view them as akin to emergency "dictators," as classically conceived, since they lack some core attributes of executive power necessary for coherent, expeditious, and decisive action.[53] We seem to have come a very long way, in any event, from not only Roman emergency dictatorship but also Lockean executive prerogative.

At least in principle, the institutional lacunae at hand should reduce the prospect of harmful and legally dubious emergency action. The executive's institutionally fragmented character renders the conventional view of the executive as congenitally best suited to expeditious or high-speed emergency intervention even more ideological than in most nation-states.[54] In the postnational arena, describing emergency actors as possessing *any* real capacity for "decision, activity, secrecy, and dispatch" seems even more far-fetched.

Similarly, a potentially deleterious personalization of executive power, as found especially in presidential systems, where the executive not only possesses institutional incentives to exploit crises but does by claiming a special aura or "charisma," represents far less of a threat when emergency executive

power is coproduced by a messy mixture of institutions and office holders.[55] The authoritarian image of the charismatic "man on a horse" arriving at sunrise to ward off an existential threat seems particularly far-fetched when emergency action is pursued by a potpourri of global technocrats, political officials (some of whom are likely to have strong national ties and thus conflicting political loyalties), privileged private interests, and NGOs.

Yet, it would be mistaken to occlude possible perils. Within at least some nation-states, emergency actors operate within a more or less well-functioning tripartite separate of powers; their actions are also in principle accountable to national publics. Parallel political mechanisms remain underdeveloped and perhaps nonexistent in the postnational arena. Which legislative or judicial bodies "beyond the nation state" are best suited to constraining postnational emergency power and holding its key players accountable? The answer seems unclear. Who might realistically be counted on, for example, to check the UNSC when it engages in troublesome forms of crisis government? How might relevant postnational or even global publics exercise the requisite political oversight?

Nor should we prematurely celebrate postnational emergency governance's fragmented institutional contours: inefficient and inept administrative organizations contribute to legal irregularity and inconsistency.[56] Such fragmentation can impede appropriate crisis action. Many forms of emergency humanitarian intervention, in particular, seem badly coordinated and embarrassingly chaotic; in such contexts, a more effective UN system for execution and implementation might in fact be desirable. Here again we find evidence of the emergency imaginary's implicit political and social biases. UN emergency relief on behalf of displaced persons and refugees, for example, is notoriously inept and badly organized, for many familiar political reasons.[57] In contrast, post-9/11 counterterrorism "emergency" measures, aggressively backed by powerful nation-states, rapidly generated far-reaching political and institutional consequences. An effective global response to climate change may in fact require something like worldwide "green Keynesianism" and a "green New Deal" that can only be effectively implemented via a significant enhancement of global-level state—and ultimately, executive—capacities.[58]

Not all emergencies, as we have seen, are created equal. Nor do postnational emergency mechanisms that might serve the socially excluded or downtrodden usually match the effectiveness of those favored by privileged global political and social players.

A related problem plaguing IO emergency action is that bodies like the WHO primarily designed for collecting and sharing expert scientific knowledge are now being called on to play political roles for which they were poorly designed. The result appears to be a conflation of politics and science where both end up getting disfigured. To the extent that IOs increasingly

take on the core *political* tasks of emergency management, they will need to confront some difficult matters of institutional design.[59]

Significantly, postnational emergency actors still tend to possess one trait widely associated with classical conceptions of the executive: their deliberations often remain secret or at least opaque, in part because they may not meet transparency tests akin to those national executives face, in part simply because of the messy institutional contours of postnational executive power. The latter makes it extraordinarily difficult to identify who in fact is responsible for specific emergency interventions. Unlike the unitary or at least hierarchical executive, the variegated, institutionally diversified contours of postnational emergency power tend to render decision making even less transparent than on the national stage. Classical theorists of executive power like Hamilton favored a unitary executive, as noted, because they deemed it more "energetic" than a plural executive; they also preferred it because it allowed for heightened political accountability: a single executive, Hamilton believed, could be more readily held responsible for specific political actions than a plural executive, whose members were likely to pass the buck when things failed to work out as planned.[60] In the present-day EU, not surprisingly, those opposed to emergency austerity measures are having a hard time identifying whom they should target. Their own (e.g., Greek or Spanish) national governments? Brussels? The so-called troika? ECB? The Germans (e.g., Wolfgang Schäuble or Angela Merkel)?

As a small-town Kentucky coal miner one reportedly asked when learning that the mine where he worked had been acquired by a foreign-based multinational corporation, "Who do we shoot now?"

## IV

As I have tried to argue, the authoritarian prospects of the global emergency imaginary remain real. We should worry about them: disturbing facets of our present-day international and postnational legal constellation reproduce Schmitt's normatively and politically unpalatable ideas about sovereignty. Yet, for better and (sometimes) for worse, emergency power at the international and postnationals level is being exercised in exceptionally confusing, messy, and probably inept ways. Given some of the dangers at hand, that might not be such a bad thing.

As scholars, we have a responsibility to critically interrogate the crisis imaginary that permeates contemporary political thinking. As citizens, we need to figure out how we can change policy and institutions, both nationally and postnationally, to counter the specter of unchecked emergency rule. Even if emergency rule "beyond the nation state" remains underdeveloped and immature, we need to act responsibly to prevent its full maturation.

## NOTES

1. Schmitt, *Political Theology*, 5.

2. Most recently, Paul W. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

3. See, for example, Neumann, *Rule of Law*, 25–27.

4. Sovereignty, of course, is a contested concept. For a survey, see Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, trans. Belinda Cooper (New York: Columbia University Press, 2015).

5. As documented in Neumann's unfairly neglected *Rule of Law: Political Theory and the Legal System in Modern Society*.

6. Grimm, *Sovereignty*, 73–75.

7. John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis, IN: Hackett, 1980 [1960]), para. 149–58.

8. For a reading of Schmitt in this vein, see Kalyvas, *Democracy and the Politics of the Extraordinary*, 79–186.

9. Schmitt, *Political Theology*, 7.

10. See also, Hermann Heller, *Die Souveranität. Ein Beitrag zur Theorie des Staats-und Völkerrechts* [1927] in Heller, *Gesammelte Schriften*, Vol. 2 (Leiden: A. W. Sijthoff, 1971), 88–89.

11. See, in particular, Schmitt, *Der Hüter der Verfassung*.

12. Kirchheimer, "Constitutional Reaction in 1932," 78.

13. Cited in Kirchheimer, "Constitutional Reaction in 1932," 78.

14. Craig Calhoun, "A World of Emergencies: Fear, Intervention, and the Limits of Cosmopolitan Order," *Canadian Review of Sociology and Anthropology* 41 (2004): 373–95. Following Charles Taylor (*Modern Social Imaginaries* [Durham, NC: Duke University Press, 2003], Calhoun defines "imaginary" as part of a "complex package of terms through which the social world is simultaneously grasped and constructed, and produced and reproduced" (377).

15. I say "allegedly" because many "natural" disasters are now substantially products of human action. The very idea of a purely natural disaster is probably anachronistic.

16. So, for example, in the United States the ongoing ISIS terrorist threat represents an "emergency" (requiring far-reaching executive emergency discretion), whereas gun violence—though vastly more murderous—does not, in part because of the vast political influence of the NRA.

17. So he does not go as far as Janet Roitman (*Anti-Crisis* [Durham, NC: Duke University Press], 2013), who moves toward discarding it altogether. My sense is that Calhoun is right to proceed more cautiously.

18. As one might legitimately interpret Schmitt's *The Concept of the Political*.

19. Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, 118–20.

20. Arjen Boin, Magnus Ekengren, and Mark Rhinard, *The European Union as Crisis Manager: Patterns and Prospects* (New York: Cambridge University Press, 2013), 9–10.

21. Christian Kreuder-Sonnen and Bernhard Zangl, "Which Post-Westphalia? International Organizations between Constitutionalism and Authoritarianism," *European Journal of International Relations* 21 (2015): 17–20.

22. For a more detailed discussion of the debate, see William E. Scheuerman, "Human Rights Lawyers v. Carl Schmitt," in *Human Rights in Emergencies*, ed. Evan J. Criddle (Cambridge: Cambridge University Press, 2016), 175–201.

23. Schmitt, *Political Theology*, 15.

24. Georges Abi-Saab, "Foreword," in Anna-Lena Swensson-McCarthy, *The International Law of Human Rights and States of Exception* (Nijhoff: Brill, 1998), v.

25. See Oren Gross, "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies," *Yale Journal of International Law* 23 (1998): 433–501.

26. Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl am Rhein: Engel, 2005), 84.

27. See also Scott P. Sheeran, "Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics," *Michigan Journal of International Law* 34 (2013): 491–512.

28. Carl Schmitt, "Die politische Lage der entmilitarisierten Rheinlande," 308.

29. Tine Hanrieder and Christian Kreuder-Sonnen, "WHO Decides on the Exception? Securitization and Emergency Governance in Global Health," 45 (2014): 331–48; and J. Benton Heath, "Global Emergency Power in the Age of Ebola," *Harvard International Law Journal* 57 (2015): 1–52.

30. World Bank (Operations Policy and Country Services) (2007), *Toward a New Framework for Rapid Bank Response to Crises and Emergencies*.

31. Joost Pauwelyn and Ayelet Berman, "Emergency Action by the WTO Director-General: Global Administrative Law and the WTO's Initial Response to the 2008–09 Financial Crisis," *International Organizations Law Review* 6 (2009): 499–512.

32. Anna Hood, "The United Nations Security Council's Legislative Phase and the Rise of International Law-Making," *Legal Perspectives on Security Institutions*, ed. H. Nasu and K. Rubenstein (Cambridge: Cambridge University Press, 2015), 141–66.

33. See, however, the skeptical assessment of Gavin Sullivan and Marieke de Goede: "Given the structural nature of . . . core deficiencies at play," it is difficult to see how the ombudsperson could be interpreted as "consistent with substantive rule-of-law principles and facilitate the global rule of (administrative) law" ("Between Law and the Exception: The UN 1267 Ombudsperson as a Hybrid Model of Legal Expertise," *Leiden Journal of International Law* 26 [2013]: 853–54).

34. Jean L. Cohen, "A Global State of Emergency or the Further Constitutionalization of International Law: A Pluralist Approach," *Constellations* 15 (2008): 456–84; and Christian Kreuder-Sonnen, *Der globale Ausnahmezustand. Carl Schmitt und die Anti-Terror-Politik des UN Sicherheitsrates* (Baden-Baden: Nomos, 2012).

35. Kim Scheppele, "The International State of Emergency: Challenges to Constitutionalism after September 11" (Yale Legal Theory Workshop, September 21, 2006).

36. Daniel H. Joyner, "The Security Council as a Legal Hegemon," *Georgetown Journal of International Law* 43 (2012): 225–57.

37. Christian Kreuder Sonnen, "Beyond Integration Theory: The (Anti-)Constitutional Dimension of European Crisis Governance," *Journal of Common Market Studies* 54 (2016): 1350–66; Agustin Jose Menendez, "The Existential Crisis of the European Union," *German Law Journal* 14 (2003): 453–527; and Jonathan P. White, "Emergency Europe," *Political Studies* 63 (2015): 300–18. Much of the present chapter can be interpreted as a dialogue with Kreuder Sonnen's and also White's work; both writers have taught me a great deal.

38. Wolfgang Streeck, "Heller, Schmitt and the Euro," *European Law Journal* 21 (2015): 370. More generally on EU law's market liberalism, Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: Oxford University Press, 2008).

39. Christian Joerges, *Europe's Economic Constitution in Crisis* (Bremen: ZENTRA Working Papers in Transnational Studies, 2012), 12.

40. Mann and Wainwright, *Climate Leviathan*, 15.

41. For an exemplary discussion, see Tine Hanrieder and Christian Sonnen-Kreuder, "WHO Decides on the Exception? Securitization and Emergency Governance in Global Health."

42. For the U.S. case, Tyler M. Curley, "Models of Emergency Statebuilding in the US," *Perspectives on Politics* 13 (2015): 697–713.

43. Kreuder-Sonnen, *Der globale Ausnahmezustand. Carl Schmitt und die Anti-Terror-Politik des UN Sicherheitsrates*.

44. For a useful discussion, William Hooker, *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge University Press 2009), 69–125.

45. Schmitt, *Political Theology*, 12.

46. Publius (Hamilton), "Federalist 70," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 392.

47. Benedict Kingsbury and Lorenzo Casini, "Global Administrative Law: Dimensions of International Organizations Law," *International Organizations Law Review* 6 (2009): 335–37.

48. Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 150–226.

49. Thomas Weiss, *What's Wrong with the United Nations and How to Fix It* (Cambridge: Polity Press, 2009), 215–33.

50. Deidre Curtin, "Challenging Executive Dominance in European Democracy," *Modern Law Review* 77 (2014): 6.

51. Curtin, "Challenging Executive Dominance in European Democracy," 5.

52. Streeck, "Heller, Schmitt, and the Euro," 370.

53. See also White, "Emergency Europe."

54. Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, 53–54.

55. For the now classic discussion of presidentialism's ills, Linz, "Presidential or Parliamentary Democracy."

56. Weak or failing states, of course, rarely buttress the rule of law.
57. Weiss, *What's Wrong with the United Nations*, 75–87.
58. Mann and Wainwright discard this possibility as insufficiently transformational (*Climate Leviathan*, 99–128).
59. For a discussion, see Heath, "Global Emergency Power in the Age of Ebola."
60. Publius, "Federalist 70," 395–96.

# Conclusion: Carl Schmitt Now?

Carl Schmitt's political and legal theory will continue to attract attention because it addresses not only one central concern of contemporary jurisprudence, the problem of legal indeterminacy, but also a host of related issues of vital importance to contemporary democracy. Only by honestly acknowledging the diagnostic merits of his political and legal theory can we begin to understand why so many impressive intellectuals have grappled seriously with Schmitt's theory. Schmitt spoke directly to some of the great dilemmas of our times, and to pretend that Schmitt's identification and analysis of those problems were idiosyncratically German (whatever that precisely means) obscures the depth of the problems faced by contemporary democracy. Of course, Schmitt's resolution of each of these problems was ultimately disastrous, and he built on authoritarian, illiberal, and anti-Semitic traditions that were well established within nineteenth- and early twentieth-century Germany. Yet Schmitt was by no means the only political or legal thinker in our century whose theory integrated the ugliest pathologies of Western modernity. He offered an especially fatal mix of these elements, but they can be located in many other writers and competing intellectual traditions.

The answer to antiformal trends within the legal system is not to abandon the rule of law. Representative government and the public sphere are threatened in many ways; Schmitt's attack on them simply throws the baby out with the bathwater. The interventionist welfare state has often heightened administrative discretion and strengthened the executive branch. However, there is no reason to assume that we cannot effectively counteract such trends. Liberal international law is weak and is often applied hypocritically. But the answer to these ills is hardly to free the great powers from universal legal norms altogether. Schmitt diagnosed serious problems within existing liberal states, but at each juncture his own theoretical response exacerbated

the problems at hand. His embrace of National Socialism vividly illustrates the dangers intrinsic to his own bankrupt answers to the problems faced by liberal democracy in our century.

Schmitt's most important lesson to us, not surprisingly, concerns the primary target of his political and legal theory, the rule of law. No thinker better illuminates the intellectual and political dangers of engaging in a one-sided deconstruction of the idea that governmental action can and should be regulated according to clear, general norms and relatively formalistic modes of judicial action. By the same token, Schmitt was right to see that formalistic models of law often fail to accord with the legal and political realities of our century. Contemporary lawmaking regularly falls short of the classical demand that like cases be treated alike by means of relatively cogent, stable norms; the regulatory and welfare states, as well as being indispensable, pose real challenges to liberal jurisprudence; the dream of an international order regulated by law generates dilemmas that go well beyond those concerning the establishment of the rule of law on the domestic scene. In the final analysis, Schmitt's example should leave us with a sense of the indispensable virtues of the rule of law as well as legitimate unease about its status and prospects today. Schmitt's provocation cries out for a defense of the rule of law that takes his (occasionally) prescient observations seriously, while distancing itself from his own unjustified assault on the unfinished struggle against insecurity and arbitrariness. Such a defense requires not only acknowledging the normative bankruptcy of Schmitt's ideas but also demonstrating that the rule of law can operate effectively in a novel political and social environment that poses myriad challenges to it.

Unfortunately, the global ascent of right-wing authoritarian populist leaders (e.g., Jair Bolsonaro, Recep Tayyip Erdogan, Viktor Orban, Donald Trump) suggests that the political threats at hand remain real. With undeniable echoes of Schmitt, contemporary right-wing populists conceive democracy as a mode of identity politics, resting on a substantialist interpretation of equality (in sharp contrast to "abstract" Enlightenment notions), requiring the realization of sameness or "homogeneity" and a clear delineation vis-à-vis threatening political "enemies." As in Schmitt's account, homogeneity can take many forms, as Jan-Werner Müller correctly notes (in a critical discussion of U.S. President Trump), since "who exactly gets excluded and how—whether Mexicans by way of a wall or Muslims by way of a religious test—can vary from day to day."[1] Nonetheless, it is no accident that recent right-wing populist rhetoric—like Schmitt's mid-century examples—regularly take on extreme nationalist, ethnicist, and racist overtones, given the politically explosive character of conflicts about such matters in diverse, complex modern societies.[2] For contemporary populists, as for Schmitt, "the people" (as constituent power) represents an ever-looming presence—if necessary, one that can be mobilized against existing institutions and ordinary

political procedures. Democracy in this sense has nothing to do with liberalism, since liberalism and democracy are fundamentally antagonistic. Consequently, democracy's realization can legitimately take authoritarian and dictatorial forms because deliberative parliamentary government and the rule of law, Schmitt idiosyncratically asserts, rest exclusively on liberal but not democratic grounds.

As soon as basic rights or the separation of powers impede the unified popular will's (supposed) embodiment in the single person of the plebiscitary leader, they can be pushed aside. Like Schmitt, right-wing populism is hostile to the rule of law. When in power, populists remodel legal and constitutional practice according to the adage "for my friends everything, for my enemies, the law." They transform law and courts into discriminatory weapons against their political "enemies," while looking the other way when "friends" skirt the law's boundaries.[3] Populist leaders tout their fidelity to constitutionalism and the rule of law but in reality instrumentalize them as part of a struggle against the "other" (e.g., immigrants, racial minorities, the "liberal elite"). Trump pays lip service to the rule of law, for example, while reducing it to a hyper-politicized version of *authoritarian legalism*, that is, "law and order," with its main targets being black protestors (i.e., Black Lives Matter), Muslims, undocumented immigrants, refugees, and others whom Trump apparently considers a threat to "real Americans." Repressively deploying the law whenever it suits his political agenda, he appears to treat his own endeavors—and those of his allies—as above the law. Flagrant corruption and conflicts of interest within his administration are pushed aside; Trump has actively resisted—and probably obstructed—efforts to investigate Russian involvement in the 2016 U.S. presidential election; he pardons racist officials (e.g., former Sheriff Arpaio) who are political allies; and he views the U.S. Department of Justice and Attorney General as extensions of his own army of personal lawyers.

Carl Schmitt's authoritarian political and legal theory remains pertinent because its features still haunt political affairs in the first decades of the twenty-first century.

## NOTES

1. Jan-Werner Müller, "Real Citizens," *Boston Review* (October 26, 2016), last accessed August 13, 2018, from http://bostonreview.net/politics/jan-werner-muller-populism.

2. Schmitt, *Crisis of Parliamentary Democracy*, 9.

3. Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016), 60–68. For further discussion of Schmitt and Trump, see my "Donald Trump Meets Carl Schmitt," *Philosophy and Social Criticism* 54 (2019).

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