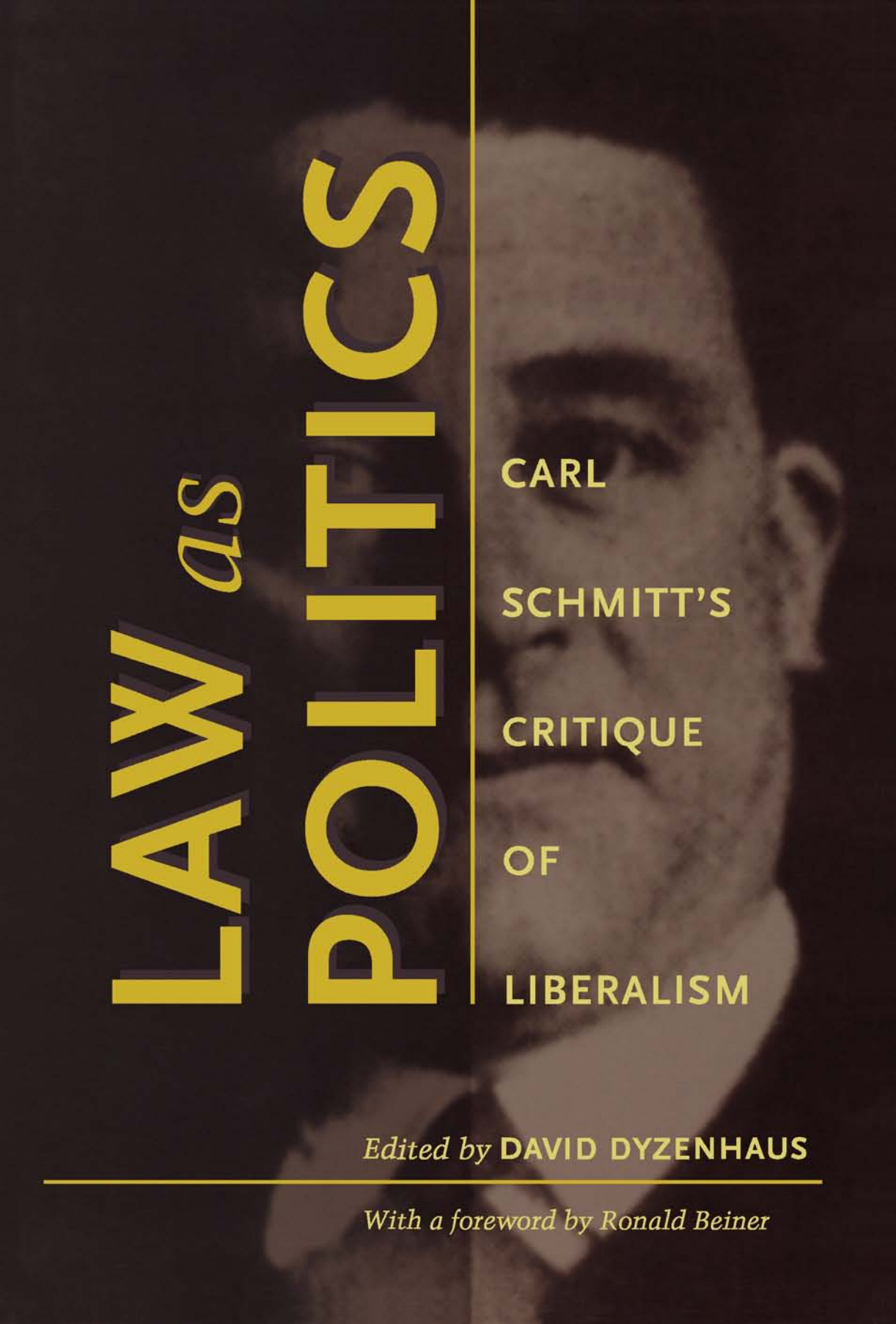
LAW as POLITICS
CARL SCHMITT'S CRITIQUE OF LIBERALISM
Edited by DAVID DYZENHAUS
With a foreword by Ronald Beiner

LAW *as* POLITICS

Carl Schmitt's Critique of Liberalism

Edited by David Dyzenhaus

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DUKE UNIVERSITY PRESS

DURHAM AND LONDON

1998

Library of Congress Cataloging-in-Publication Data appear on the last printed page of this book.

Grateful acknowledgment is made for permission to reprint the following material in this volume: | Ernst-Wolfgang Böckenförde, "Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts," in Ernst-Wolfgang Böckenförde, *Recht; Staat; Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte.* © Suhrkamp Verlag Frankfurt am Main 1991. | William E. Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt." © Rowen & Littlefield Publishers, Inc., Lanham, Md., 1998. | Portions of this volume were previously published in *The Canadian Journal of Law and Jurisprudence,* vol. 10, no. 1 (1997).

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The Concept of the Political

A Key to Understanding Carl Schmitt's Constitutional Theory

Ernst-Wolfgang Böckenförde

The focus of this chapter is not on the person, but on the *work* of Carl Schmitt, in particular the significance of Schmitt's concept of the political for an understanding of his legal and constitutional theory. Let me start with a short personal memory.

When I was a third-year law student, I read Schmitt's *Verfassungslehre.* I came across the formulations that the state is the political unity of a people[1] and that the rule-of-law component in a constitution is an unpolitical component.[2] I was puzzled by these two remarks. I had learned from Georg Jellinek that the state, from a sociological perspective, is a purposeful corporative unit and, from a legal perspective, represents a territorially based corporation. I had also gathered some knowledge about "organic" state theories, especially that of Otto von Gierke who considers the state an organism and a real corporative personality rather than a mere legal fiction.[3] On the basis of these theories, I felt unable to understand Schmitt's point that the state is the political unity of a people because in those theories the political aspect is largely missing. It was only later that, by reading and studying Schmitt's essay *Der Begriff des Politischen,* I gradually learned to make sense of the above remarks. Thus I have discovered that that essay, and the understanding of the political elaborated in it, contains the key to understanding Schmitt's constitutional theory in general. I will now explain this.

I

Let us start with the general content and the core message of the concept of the political. Given the debate triggered by that essay and in the face of its wide repercussions, one has to rescue Schmitt's core message from an array of misunderstandings. To discuss and refute these

misunderstandings—which partly stem from the intellectual and political situation to which Schmitt addressed his essay and partly reflect a deliberate refusal of any serious understanding—would require another chapter. I therefore confine myself to mentioning two common and influential misunderstandings.

The first misunderstanding relates to the distinction between friend and enemy which Schmitt develops in that essay. The misunderstanding consists in holding that this distinction serves to turn the domestic debate *within* the state into a relationship between friend and enemy and, where possible, to create a corresponding reality. This seems to thwart any peaceful (albeit perhaps combative) search for compromise and agreement as well as for shaping the domestic political and social order. The second misunderstanding takes Schmitt's essay to constitute a *normative* theory of politics and political action in such a way that the friend-and-enemy distinction as well as the resulting militant conflict becomes the purpose and substance of politics. This widespread misunderstanding has largely shaped the debate on Schmitt's concept of the political. It may be true that Schmitt did not explicitly distance himself from such an interpretation. Nevertheless, that interpretation can easily be refuted by reference to Schmitt's text.[4]

The central message as well as the academic significance of Schmitt's concept of the political can be seen in the fact that it focuses on the phenomenological criterion not of politics but of "the political" or, more precisely, the degrees of intensity within the political. To know and recognize this criterion is a precondition to any meaningful political action. The criterion in question, according to Schmitt, is that the political, considered and determined as a phenomenon, can possibly lead to an extreme antagonism between friend and enemy, an antagonism which includes the readiness for conflict, even for armed conflict. It is from this inherent possibility that the political gets its phenomenological definition. I have elsewhere[5] defined the political as follows: The political does not consist in a determined sphere of objects, but rather is a public relationship between people, a relationship marked by a specific degree of association or dissociation which can potentially lead to the distinction between friend and enemy; the content underlying this relationship can originate from any sphere or area of human life.

It is from this definition that the second core message of the concept of the political becomes meaningful—a message formulated mostly implicitly until it was made explicit in the introduction to the new edition

from 1963 of *Der Begriff des Politischen.* This is the assertion that the state is the political unity of a people.

In light of Schmitt's idea of the political, the state as a *political unity* means a pacified unity encompassing the political. While fencing itself off against other external political unities, its domestic distinctions, antagonisms, and conflicts remain *below* the level of friend-enemy groupings. This is to say that all these domestic relationships are embraced by the relative homogeneity of the people held together by some sense of solidarity (i.e., friendship). Domestic conflict can thus be integrated into a peaceful order guaranteed by the state's monopoly of coercive power. This in turn means that, as Schmitt himself pointed out, unlike foreign politics, politics within the state is "political" only in a secondary degree.[6] Domestic politics in its classical sense aims at good order within the community by trying to keep conflicts and debates within the framework of peaceful coexistence. Thus it is the purpose of the state as a political unity to relativize domestic antagonisms, tensions, and conflicts so as to facilitate peaceful debates as well as solutions and ultimately decisions that are in accordance with procedural standards of argumentation and public discourse.

However, against a widespread misunderstanding, I should emphasize that the sphere of domestic politics within a state is by no means completely detached from the concept of the political; nor is the term "political" used with a completely different meaning in such a case. Rather, the above definition of the political holds also for domestic politics, if only in a derivative sense. On the one hand, it is only on a minor scale that the concept of the political applies to domestic politics; on the other hand, this domestic application is logically derived from the criterion of the political in general. The reason for this is as follows. Conflicts about how to shape the order of coexistence also occur within the political unity, even though this unity is shielded from the intensity of a friend-enemy grouping. In such a case people publicly form groups with and against each other. Given that the political does not constitute a closed sphere in itself, this grouping can potentially occur in various spheres of public life, such as in cultural, economic, or foreign policy, and the like. The decisive point is only that this grouping must not reach the intensity of a friend-enemy relationship. Nevertheless, this phenomenon of grouping can be called political in the Schmittian sense because, if reasonable politics and conflict management fails, it possibly can escalate to the ultimate degree of intensity. The "Kulturkampf" in Prussia

and in the German Reich during the Bismarck era, for instance, stopped short of the friend-enemy grouping. It even escalated to the point of an existential conflict between the state and the Roman Catholic part of the population. Bismarck was a shrewd enough politician to see that the very existence of the Reich was at stake. Hence he searched for reconciliation with the Catholics, however stubborn they might have appeared to him. Something like this can potentially occur in every sphere of life. Escalating political conflict can arise over questions of university reform, education, or—perhaps in a few years—garbage disposal.

From a logical point of view, it seems appropriate to characterize this as a "second order concept of the political," since it is connected with, rather than completely detached from, the political friend-enemy definition. As Schmitt says, the political is neither thoroughly absent within the established political unity of a state; nor is it confined to the sphere of foreign affairs. Facing the ever-lurking potential of an escalating friend-enemy grouping, it is also present within the state, even though it does not visibly manifest itself in a normal situation.

This is to say that once a political unity has been accomplished it can never be taken for granted but must continuously preserve and reconfirm itself through the actual cooperation of the people in question. The political unity can be jeopardized both from without, that is, by threats and attacks from external enemies, as well as from within. The integration and domestication of the political sphere into the encompassing order of the state can come into question; it can become precarious to the point of concealed or open civil war, which would finally dissolve the state's very unity as a political unity. To overcome such a menace, one has to stabilize the domestic order and preempt existing or looming tensions and conflicts. What is needed above all is to avoid the escalation of conflicts and an intensity of dissociation that could lead to a breakdown of the political solidarity (i.e., political "friendship") that is based on the relative homogeneity of the people. A reasonable policy is thus one that comes about through and is determined by understanding the peculiar quality of the political.

If what I have explained so far is indeed the precise meaning of the definition of the state as a political unity of a people, some consequences for constitutional law can be drawn. Constitutional law then appears as the binding normative order and form determining the existence, maintenance, and capability for action of a political unity in the above sense. It is and must be the specific telos of constitutional law to facilitate, preserve, and support the state as a political order

and unity. An interpretation of constitutional law challenging or even undermining such an order would thus be an oxymoron. In this sense constitutional law is a genuinely political law: It deals with politics not only indirectly and incidentally, but immediately addresses the existence, form, and action of the political unity; its object, so to speak, affects the gravitational field of the political itself.[7]

II

In this section, I try to demonstrate how Schmitt's concept of the political and the corresponding characterization of the state as a political unity facilitates an understanding of crucial concepts, statements, and theses within Schmitt's constitutional theory. I also try to show how these concepts, statements, and theses—despite problems of understanding their adequacy and consistency—receive their inner justification and coherence. I do not want to anticipate the discussion of whether the purpose Schmitt pursues by these concepts and statements could also have been achieved (perhaps even better) by different means. I want to show the systematic coherence of his concepts, a coherence which frequently has been denied and yet seems to me is of crucial importance in his constitutional theory.

Ellen Kennedy has pointed to the fact that Schmitt's *Verfassungslehre* and the first version of *Der Begriff des Politischen* were written around the same time. Hence it is not surprising that the features of *Der Begriff des Politischen* are reflected in *Verfassungslehre,* even though Schmitt does not mention this explicitly. The state as political unity of a people, the rule-of-law component as an unpolitical part of the constitution—these theses are indeed put forward in *Verfassungslehre* without any further explanation. And yet, does this very fact not point to the underlying assumption, that is, the general intellectual framework? And is it not possible that this holds not only for Schmitt's *Verfassungslehre* but also for his entire work on constitutional questions?

I will now give seven examples that illuminate the thesis that *Der Begriff des Politischen* entails a key to understanding Schmitt's constitutional theory in general.

1. The concept of sovereignty and its unavoidability in constitutional law. The formula is well known: "Sovereign is he who decides on the state of exception."[8] Political unity constitutes and preserves itself by superseding tensions, antagonisms, and conflicting interests; it strives toward unity and community in such a way as to relativize and inte-

grate these conflicts. For this to happen, however, the possibility of a final decision, i.e., a decision beyond further appeal, is needed. Thus sovereignty, which includes this authority of making a final decision, is a necessary authority for the state as a unity of peace.[9] Sovereignty also facilitates a decision on whether the state of exception (translator's note: in German, state of exception—*Ausnahmezustand*—means state of emergency) applies and, if this is the case, how to deal with it. In the concept of sovereignty this authority is formulated as a legal title; that is, the sovereign has a constitutional "right" to take such a decision. This possibility fully manifests itself in the extreme endangering of the political unity, a situation which can neither be defined in advance nor be limited with reference to specific cases, because in such an extreme situation the very existence of the political unity is in jeopardy. In this conference the "right to rescue,"[10] which means the same phenomenon, has already been mentioned. Schmitt holds that sovereignty can neither be limited by legal means nor be given up, unless the state itself as a self-preserving political unity ceases to exist.[11] Whether there are actual limits on power or some political obligations which—as such or in particular situations—hinder the full elaboration of sovereignty is a different question. Limits of such a kind always exist and depend on the development of political conflict as well as on changes in power relations. Such factual limitations, however, do not put into question sovereignty as understood from a legal perspective. And even if sovereignty is legally abolished, given up, or integrated in such a way that its authority of final decision gets lost, this would not be the end of sovereignty as such; rather, it would mean the transition of sovereignty to another, more encompassing political unity which itself would then claim and, if the need arises, invoke this right of sovereignty.[12] A previously independent political unity would thus become a dependent unity, the political authority of which would be limited to deciding merely internal conflicts under the umbrella of another political unity.[13]

2. *The relationship between state and constitution.* It is a premise of Schmitt's political thought that it is not the constitution which forms the state but, rather, the state which facilitates setting up a constitution. This premise necessarily follows from the concept of the state as a political unity. As a political unity—i.e., a unity of power and peace, vested with a monopoly of coercive power in domestic affairs—the state is something *factually* given; it is given first as a concentration of power. In addition to this—and this seems especially important to me—the relative homogeneity of the people is also factually given

rather than a normative postulate or something produced by compliance with the constitution. This relative homogeneity constitutes the basis and precondition of the unity of peace as well as the application of monopolized state power which itself, first of all, must be accepted by the citizens. The legal constitution—as well as the obedience to, and application of, its normative understanding—does not constitute the state; it is much more the case that the state, as a political unity, is the presupposition of constitutional validity. This is not to deny that the state by means of its legal constitution receives a fixed form, a more precisely determined regulation of governmental activities, and hence a higher degree of stability. The very existence and substance of the state, however, does not derive from its constitution.[14]

3. The constitution and its elements. The constitution is not a contract, but a decision. More precisely, it is a decision about the type and form of the political unity.[15] As Schmitt explains in *Verfassungslehre,* a constitutional contract is possible only between existing political unities which thereby establish a confederation or federation of states.[16] The main example of this is a federal contract of the kind concluded by the German Confederation, the North German Confederation, the Swiss Confederation, or by the Act of Confederation between the states of New England. *Within* the state, however, the basic form and order cannot rest on a contract, because in such a case the principle and guarantee of unity—and hence the state as a political unity—would cease to exist. If one is to maintain the political and legal meaning, constitution by contract would be possible only as a contract between independent and autonomous political forces within the state. If this were the case, however, the principle and guarantee of state unity would be highly problematic. The question is how, under these circumstances, constitutional amendments and changes, and decisions on constitutional debates are conceivable—unless one assumes the relative tranquillity of a "*juste milieu*" or of the "halcyonic days," a situation which would facilitate permanent and harmless compromises.[17]

Given the concept of the state as a political unity, Schmitt's distinction between political and unpolitical elements of the constitution, a distinction frequently criticized and not easily understandable, can make sense and receive its intrinsic rationale. This holds also for the characterization of the rule-of-law as an unpolitical component of the constitution. To be sure, prima facie the critical question arises whether the rule-of-law component does not represent a part of the political order of the commonwealth. Yet the political in the Schmittian sense

is what underlies, facilitates, and shapes the political unity as unity: a degree of intensity of that association which supersedes conflicts and antagonisms in such a way as to provide both form and organization and furnish and maintain a working political order. This includes the legitimation of state activities, a legitimation which in a democracy originates from the people. Those elements of a constitution, however, which affect the state unity in a hindering, balancing, liberating, and perhaps pluralizing way—i.e., basic rights, separation of powers, and the accommodation of an autonomous realm of economic and commercial activities—cannot be called political in the Schmittian sense, because they relativize and limit the political unity of the state on behalf of unpolitical and liberty-serving goals of the individual.

From this perspective, it is no leap but just a logical step to asserting the priority of the political element within the constitution over the principle of the rule of law. Those regulations which establish the state's organs, shape the state's activities, and set up the procedures necessary for facilitating and preserving the political unity's activity, preservation, and defense, prevail over those elements which limit state activities on behalf of private and societal freedom. For such private and societal freedom does not constitute anything politically; it does not create the political association. Instead, liberalization and individualization, originating from the respective elements of the constitution, amount to a weakening of the political unity and its underlying homogeneity rather than to a necessary and integrating part of the political unity.[18] Differently put, the constitutional guarantee of the rule of law must be added to an existing political unity and form. It cannot exist independently of such a political unity; nor can it achieve efficacy by claiming a general priority over the political unity. Thus it is only the existing and working political unity which makes it possible to guarantee individual rights and liberties; it is the political unity which protects and maintains them in the face of human endangerment and violation.[19]

4. Constitutional jurisprudence and the "Guardian of the Constitution." From the perspective of the concept of the political, we can make sense of Schmitt's general thesis that a genuine constitutional jurisdiction is a political jurisdiction.[20] Recall that constitutional law, with respect to its content, is political law. It is political law not only in the sense that law always has to deal with politics by regulating and shaping coexistence within a political unity; but also, it is political in the sense of defining the conditions, procedures, authorizations, and limits

of state activities as well as the options and authorizations for maintaining and protecting the political unity of the state.[21] Accordingly, constitutional law, in its very content and telos, refers to the political from which in turn it receives its own definition. It is with regard to this political definition that constitutional law must be interpreted and applied; moreover, this interpretation and application itself is part of specifically political conduct.

Consequently, constitutional jurisdiction cannot be a pacified realm detached from political dissociation and the corresponding dangers, an idea suggested by the concept of a jurisprudence obedient to determinate laws which themselves are enacted in the course of political debate. Such an unpolitical jurisprudence deals with laws only after they have undergone the process of political will-formation and decision. Given the result of that decision, these laws are generally detached from (potentially) political dissociation and are to be interpreted and applied with regard to their determinate content. Being obedient only to the law and, beside that, fully independent, the judge himself does not become a political actor.[22] Constitutional jurisdiction, by contrast, has to decide over the content and interpretation of constitutional law, i.e., that law which determines and procedurally regulates the political unity and its capability of action. It therefore necessarily falls into the gravitational field of the political, in which associations and dissociations are potentially present which can ignite into conflict. If constitutional jurisdiction takes on its task in an appropriately teleological way, it is inevitably "political" jurisdiction, which—to avoid a misunderstanding—does not mean that it is bare party politics.

For Schmitt, a court operating in accordance with the standards of ordinary jurisdiction cannot serve as the guardian of the constitution.[23] Why not? Again *Der Begriff des Politischen* gives a hint. A court, as it has developed in the history of European constitutionalism, is—in its task, function, and the self-understanding of its actors—detached from the gravitational field of politics. It works only on request (no judge without plaintiff); it is bound by the claims brought forward (*ne ultra petita*); and it operates in obedience to norms which are not to be created by the judge but are, as a rule, given in legally defined statutes. The court has to apply law without being required or permitted to pursue more general political goals or purposes. The guardian of the constitution, by contrast, must act as a political organ.[24] Given that the constitution shapes the legal form of the political unity, the guardian of

the constitution is at the same time the guardian of the political unity itself. This derives also from Schmitt's understanding of the relationship between state and constitution.[25]

Incidentally, the question may arise as to what degree during the Weimar Republic Carl Schmitt and Rudolf Smend might have agreed on this point. If one carefully reads Smend's *Verfassung und Verfassungsrecht* one will notice that constitutional jurisdiction is never mentioned in that book. The constitution does not appear as a part of the legal system upheld by jurisprudence and jurisdiction; it rather regulates the process of integration in which the state receives life and reality. The legal function and the legal system, including jurisdiction, are consciously separated from the system of state power, because they pursue an idea of value that differs from the political integration brought about by the state.[26] Also what Smend writes about the peculiar goals of constitutional interpretation, that is, maximization of integration and flexible adjustment of the constitution itself,[27] does not refer to a court. That process of integration which is undertaken by the state and whose order also forms a part of the constitution is not to be guaranteed by a court.

5. *Independence and relative separation of the political sphere from private and societal spheres.* If I understand Schmitt's theory of the state correctly, a bright line running through his work is the thesis that, for preserving the political unity, the political sphere must be concentrated with the state and its organs; hence the state must hold the monopoly of the political. This becomes manifest in three aspects.

First, basic liberties constituting an autonomous realm not regulated by the state belong only to the private, unpolitical sphere. Their spilling over into the political sphere must be rejected in order to avoid the decomposition of the political sphere, a decomposition by which state organs would become instruments of private and societal self-manifestation.

The place basic liberties occupy within the general structure of *Verfassungslehre* confirms this theory.[28] Basic liberties in the sense of prepolitical and transpolitical human rights are confined to the individualistic rights of freedom in the strict understanding, i.e., the rights of the isolated individual which define and protect his or her private sphere. Among these rights are the rights of faith and conscience, personal freedom, inviolability of the private home, secrecy of the mail, and private property. The next group of rights which combine the rights of one individual with those of another—freedom of opinion, expression, and the press, freedom of assembly and association—harbor

a certain ambivalence in that their social character marks the transition to the political sphere. According to Schmitt, these rights must be considered as genuine basic rights "insofar [as] the individual does not leave the merely societal realm and free competition and free debate between individuals are to be acknowledged."[29] However, these rights can easily lose their "unpolitical character"(!) and then cease to be individual rights of freedom guaranteed as prepolitical freedom in accordance with the principles of constitutional distribution of rights.[30]

Clearly separated from these rights are the rights of political participation. They do not belong to the individual as a prepolitical subject of private interests, but address him or her as a member of the political people, that is, as a *citoyen*.[31] Hence Schmitt's clear critique of the secret ballot which destroys the public character of political legitimacy in a democracy because it summons the individual as a private person (*homme*) rather than as a member and part of the political people (*citoyen*); it thereby harbors—and this is the half-explicit crucial point in the critique—the danger of decomposition of the political unity which itself thus remains unprotected against its being overwhelmed by private and societal interests.[32]

Second, the state cannot be prevented from intervening in those spheres of basic liberties which may become politically relevant by immediately affecting fundamental preconditions of the political unity, such as a relative homogeneity of the people. From my first reading of *Verfassungslehre* I still remember the following remark: "The political problem of cinema movies influencing the masses is so important that no state can leave that powerful psycho-technical machine without control. The state must neutralize it politically. Given that the political is inevitable, neutrality means that the state must employ cinema movies to serve the political order, even if the state may lack the courage needed to openly use them as a means of integration on behalf of a socio-psychological homogeneity."[33]

The concrete context of this remark is the justification of a caveat on behalf of possible censorship of cinema movies, a caveat enshrined in the Weimar Constitution (Article 118, Sec. 2) and actually implemented in a law of 1920. In Schmitt's essays from 1932 and 1933, the years of the Weimar Republic's final crisis, his statements are even more outspoken. The background might be the practical experience of mass manipulation by the new media. Schmitt now writes that, however liberal a state might be, it can never afford leaving those new means of mass manipulation and of building a public collective opinion

to another institution.[34] Schmitt implicitly (though not explicitly) holds that otherwise the state would surrender itself and cease to exist as a political unity. One could be tempted to apply this insight to contemporary media like television; but this would be another article.[35]

A second remark can be found in a contribution to the *Handbuch der Staatsrechts.* (Schmitt was always proud of that remark and of the fact that Rudolf Smend had immediately noticed and appreciated it.) In his article Schmitt categorizes Article 135 of the Weimar Constitution as freedom of religion and—in opposition to Anschütz—not as freedom of an antireligious conviction.[36] The state, concerned with the relative homogeneity of the people as the precondition of its own existence, cannot remain completely neutral—in the sense of agnosticism—with regard to religion or nonreligion.

Third, economic and social interest groups must be confined to their specific realm and prevented from taking control over political functions of the state which itself must be shielded against political pluralism. For Schmitt, political representation of organized interest groups is impossible. Political influence of interest groups leads to a weakening or questioning of the state as a political unity—unless and until these groups take direct political responsibility as bearers of political decisions.[37] A *stato corporativo* would have been conceivable for Schmitt. Such a state rests on the constitutional recognition of guilds, unions, or other organized groups as bearers of political decision and political responsibility. What Schmitt had to criticize and actually did criticize was the occupation of the political by indirect powers, be it socioeconomic or religious and denominational powers, which for instrumental purposes extend their grip to political functions of the state without being held accountable for political decisions.[38] Hence his principled opposition to every kind of *potestas indirecta,* including that of the church.[39]

6. The necessity of a "pouvoir neutre" within the state. For the political unity of the state to be preserved and realized, an encompassing point of reference is needed which itself must be willing and able to achieve agreement and integration of conflicting and antagonistic interests. This is the task and role of a *pouvoir neutre.*[40] It is needed in order to avoid the escalation of conflicting interests and other potential antagonisms to a friend-enemy grouping and hence a threat to the political unity itself. In establishing the state order as a unity of power and peace, one does not abandon once and for all the possibility of political dissociation; depending on various circumstances, its poisonous potential can always reemerge. To prevent this, one needs a policy

of order and agreement on an encompassing scale. Such a policy, however, cannot be conducted by political forces that are tied to particular (though legally permissible) antagonistic interests.

In his book *Der Hüter der Verfassung* Schmitt looks for such a *pouvoir neutre,* which he finally finds (within the Weimar state) in the public service and in the Reich's president.[41] Whether this assessment still holds for the final phase of the Weimar Republic is a *quaestio facti* (question of fact). What I am interested in here is the *quaestio iuris* (question of law), namely, the inevitability of such a *pouvoir neutre*—whatever its actual constitutional location—for the maintenance and capability of action of any state order.

7. *Carl Schmitt's concept of representation.* Although Schmitt's concept of representation is difficult to understand and would require another chapter, I will not skip the problem here. In Schmitt's work, representation always relates to the political unity of the people, i.e., the state; it does not mean representation of the society vis-à-vis the state or representation of interests within the society. Moreover, the subject of representation is not the people *in* the state but, rather, the politically united and organized people which is the state itself.[42] Obviously, this derives from the idea that only the state as such, that is, the political unity, is capable of representation and that any other representation than that of the state would necessarily dissolve the political unity.

It is possible that the concept of representation—which, as far as I can see, Schmitt for the last time mentioned in *Verfassungslehre*—did not find a definitive theoretical formulation. One can follow various stages within the development of this concept, with different nuances and different formulations. The concept occurs first in *Romischer Katholizismus und politische Form,* later in a lengthy footnote in *Die geistesgeschichtliche Lage,* finally and in detail in *Verfassungslehre* (here also within a debate with Rudolf Smend).[43] (Leibholz's habilitation thesis on representation appeared only in 1929 and thus was not yet available when Schmitt wrote his *Verfassungslehre.*)

One has to take into account that representation of societal interests and groups constitutes a problem for the concept of representation, as it is elaborated in *Verfassungslehre;* representation of interest groups is not even considered. Another problem is democratic representation by which the citizens are represented in terms of what they have in common in order to achieve political unity.[44] Representation is conceived of in a rather static way; it means representation of something invisible and yet real, which thereby is made visible.[45] Representation thus ap-

pears like a picture of something already present rather than a process of actively bringing about unity and a conscience of commonality.[46]

On the other hand, in a chapter of *Verfassungslehre* one also finds the insight that the political unity of the people is not naturally given but rather is the object of political efforts: "Every political unity must in some sense be integrated, as it is not given by nature but rests on human decision."[47] This statement comes close to Smend's doctrine of integration from which it differs, however, in that integration in the Schmittian sense always derives from decision. Schmitt further writes: "Representation brings about unity, yet what it brings about is always the unity of a people in its political state."[48] Here the stress very much lies on active conduct, which means that representation, properly speaking, is reserved for government agents since only they can be active. To put it more precisely, it is government in the strict sense, not administration, because representation is reserved for those who epitomize and concretize the spiritual principle of political existence.[49] In this context, Schmitt cites Lorenz von Stein. But he also mentions the nineteenth-century dualism of two representations, a representation of the people vis-à-vis the monarch who himself was to represent the state as a whole, especially in foreign affairs and international diplomacy.[50] Does this mean that the former was no representation at all, not even an element of representation? Another question is how to conceive of *democratic* representation. This question occurs because representation, as a constitutional concept, always refers to the state unity as an entirety. If this is the case, however, one has to wonder how representation of the people within the state or within parliament is conceivable. It seems to me that in this regard many questions remain open and await an answer which I cannot provide here.

III

The purpose of this chapter was to display Carl Schmitt's Constitutional Theory, not to argue critically about it. I have tried to analyze this work and—against the common charge of occasionalism[51]—to demonstrate its logical consistency from a systematic point, a point that seems indeed fundamental to me. The question of whether the basic concepts, distinctions, and assertions of Schmitt's theory are appropriate for an understanding of the reality of state, state life, state existence, and state order so far has only been raised and not yet answered. It seems to me that this question should be debated on the basis of a systematic

analysis of Schmitt's work. Let me conclude by hinting at two aspects which I consider crucial for such a debate. The first aspect concerns the question of whether Schmitt's criterion of the political and his concept of the state as a political unity are right. The second aspect concerns the importance of liberty—individual as well as political liberty—for the unity and order of the state. Is Schmitt's definition appropriate or is it not—especially in view of the establishment and development of a relative homogeneity and solidarity of a people as the basis of the state's unity and capability of action?

Notes

This chapter is reprinted from Ernst-Wolfgang Böckenförde, *Recht, Staat, und Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte* (Frankfurt: Suhrkamp, 1991), by permission of the author and Suhrkamp. Translated by Heiner Bielefeldt. The original title is "Der Begriff des Politischen als Schlüssel zum staatsrechtlichen Werk Carl Schmitts."

1 Carl Schmitt, *Verfassungslehre* (Berlin, 1928), at 2, 125 *passim.*

2 Ibid., at 200.

3 Otto von Gierke, *Das Wesen der menschlichen Verbände. Rektoratsrede* (Berlin, 1902), at 8ff.

4 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corrolarien* (Munich, 1963) (hereafter *Der Begriff*), at 34–35: "War is by no means the goal or purpose or even content of politics. Being a real possibility, however, war is an ever existing presupposition which in a peculiar way determines human action and thought thereby yielding a specifically political behavior." This statement, though abbreviated and slightly different, can also be found in the third edition from 1933, at 17.

5 Ernst-Wolfgang Böckenförde, "Staat-Gesellschaft-Kirche," in *Christlicher Glaube in moderner Gesellschaft,* vol. 15 (Freiburg, 1982), at 82.

6 Schmitt, *Der Begriff,* supra n. 4, at 30f. See also the introduction of the 1963 edition, ibid., at 10f.

7 See Ernst-Wolfgang Böckenförde, "Die Eigenart des Staatsrechts und der Staatsrechtswissenschaft," in *Recht und Staat im sozialen Wandel. Festschrift H.U. Skupin* (Berlin, 1983), at 317 and at 330ff.

8 Carl Schmitt, *Politische Theologie,* 2d ed. (1934), at 11.

9 Ibid., at 20. Hence Schmitt writes that sovereignty, defined legally, does not mean a monopoly of coercion or power but a monopoly of decision. See also H. Heller, *Die Souveränität* (1927), in *Gesammelte Schriften,* vol. 2 (Tübingen, 1971), at 120ff. and 185ff.).

10 See the paper by E. R. Huber in H. Quaritsch, ed., *Complexio Oppositorum. Über Carl Schmitt* (Berlin, 1988), at 33ff.

11 Schmitt, *Der Begriff*, supra n. 4, at 39; see also Heller, supra n. 9, at 185ff. This is the starting point of Schmitt's theory of confederation which rests on the assumption that, due to the homogeneity within the confederation, an existential conflict between the federal and the state level does not occur; hence the question of sovereignty can be left undecided. See *Verfassungslehre*, supra n. 1, at 370ff.

12 Schmitt, *Der Begriff*, supra n. 4, at 51–54. Loss of sovereignty would be synonymous to loss of final political decision. In regard to such a case, Schmitt writes: "If a people lacks the force or will to maintain itself within the sphere of the political, the political does not thereby disappear. What disappears is merely a weak people" [scil.: as a political unity]. Ibid., at 54.

13 The classical legal concept for such a case is protectorate; the political concept is hegemony.

14 The relationship between state and constitution is already implied in the concept of constitution in that this concept means the decision about the way and form of the political unity whose very existence is thus presupposed. See *Verfassungslehre*, supra n. 1, at § 3 I, at 21f. This does not preclude the possibility that in a particular historic and political situation the act of constitution-giving coincides with setting up the political unity of the state. An example is the situation of state secession. However, this is not necessarily the case, and it was not the case with the establishment of the great paradigmatic constitutions, such as the French Constitution of 1791 or that of the United States in 1787.

15 Ibid., at § 3, 20 and 21–23.

16 Ibid., at § 7 II, 62ff.

17 Hence Schmitt's constant criticism of the constitutional dualism as it is typical of the constitutional monarchy. This criticism can already be found in *Verfassungslehre*, supra n. 1, at § 6 II 5, 53ff. It is much harsher in his *Staatsgefüge und Zusammenbruch des Zweiten Reiches* (Hamburg, 1934) where Schmitt takes the constitutional conflict of Prussia as an example to demonstrate that a constitutional monarchy is a permanent compromise between opposite principles of political legitimacy. For a different opinion, see E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. 3 (Stuttgart: W. Kohlhammer, 1963), at 1–20. Important in this connection is Rainer Wahl's argument that a constitutional review and constitutional monarchy could not fit together. See Rainer Wahl, "Der Vorrang der Verfassung," *Der Staat* 20 (1981): at 485ff.

18 This is not in contradiction to Schmitt's thesis in *Legalität und Legitimität* (Munich, 1932), at 87f. that, in the face of the crisis of the Weimar Republic, the second main part of the Weimar Constitution should be preserved and purged of the contradictions and fictions of a merely technical and functional system of legality to which the first part had developed. Given that the second part of the constitution contained not only liberal basic rights (in the

sense of private and societal rights) but also "orders of community life," that part of the constitution could become effective only within the framework of a working "political" order whose restoration Schmitt therefore demands.

19 It is the common conviction of political philosophers as different as Thomas Hobbes and Immanuel Kant that the state and the concentration of sovereign power established by the state are necessary to protect the individual against the dangers and threats by their fellow people. See Thomas Hobbes, *Elementa philosophica de cive* (Oxford: Clarendon Press, 1983), at chaps. 5 and 6–7; Thomas Hobbes, *Leviathan* (New York: Cambridge University Press, 1991), at chap. 17; Immanuel Kant, *Metaphysik der Sitten* (New York: Cambridge University Press, 1991), at pt. I, § 44; Immanuel Kant, *Ideen zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, vol. 9, Weischedel, ed. (Hamburg, 1954), at 40f.

20 Carl Schmitt, "Das Reichsgericht als Hüter der Verfassung" (Berlin, 1929), in *Verfassungsrechtliche Aufsätze* (Berlin, 1958), at 73ff. and 97ff. (hereafter *Reichsgericht*). Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931), at 26–34 (hereafter *Hüter*). By constitutional jurisdiction Schmitt means juridical decisions of constitutional conflicts in the original sense, that is, conflicts which concern the gravitational field of the political, such as the struggle for, as well as the maintenance, stabilization, and questioning of, political power and its execution.

21 Böckenförde, supra n. 7, at 320f.

22 Within the framework of the political system, the judge is called upon to interpret and apply laws independently of a possible former political struggle over their content. Rather than "making politics with different means," he has simply to refer to the context of the existing legal order. Exactly this is the "political" character of his task and role. See Niklas Luhmann, "Funktionen der Rechtsprechung im politischen System," in *Dritte Gewalt heute? Schriften der Evangelischen Akademie Hessen Nassau*, vol. 4 (1969), at 9f.; Ernst-Wolfgang Böckenförde, *Verfassungsfragen der Richterwahl* (Berlin, 1974), at 89ff.

23 Schmitt, *Hüter*, supra n. 20, at 48ff.; Schmitt, *Reichsgericht*, supra n. 20, at 97ff., including the postscript at 108.

24 *Hüter*, supra n. 20, at 132ff.

25 Ibid., at 2.

26 Rudolf Smend, *Verfassung und Verfassungsrecht* (Berlin, 1928), at 98 and 152f.

27 Ibid., at 78ff. and 137ff.

28 See *Verfassungslehre*, supra n. 1, at 163–70, esp. the schematic overview at 170.

29 Ibid., at 165.

30 Ibid.

31 Ibid., at 168ff.

32 This criticism first appears in *Die geistesgeschichtliche Lage des heutigen*

Parlamentarismus, 2d ed. (Munich, 1926), at 22f. (hereafter *Geistesgeschichtliche Lage*). In a succinct and straightforward way it is repeated in the article "Der bürgerliche Rechtsstaat," *Abendland* (1928): 202, as well as in *Verfassungslehre,* supra n. 1, at 245f. The critique voiced in *Die geistesgeschichtliche Lage* has explicitly been approved by Smend, supra n. 26, at 37, n. 4.

33 *Verfassungslehre,* supra n. 1, at 168.

34 Carl Schmitt, "Weiterentwicklung des totalen Staates in Deutschland," (1932–33), republished in his *Verfassungsrechtliche Aufsätze* (Berlin, 1958), at 360; see also *Machtposition des modernen Staates* (1933), at 368f.

35 See the impressively sober and well-balanced analysis by K. Eichenberger, "Beziehungen zwischen Massenmedien und Demokratie," *Festschrift Leo Schürmann* (Freiburg/Switzerland, 1978), at 405ff.

36 Carl Schmitt, "Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung," *Handbuch des Staatsrechts,* vol. 2 (1932), at 584; G. Anschütz, *Die Verfassung des deutschen Reiches vom 11. August 1919,* 14th ed. (1933), remark 4 with n. 2 referring to Art. 135.

37 See *Der Begriff,* supra n. 4, at 40–45; also Carl Schmitt, *Staatsethik und pluralistischer Staat* (Berlin, 1930); Carl Schmitt, *Positionen und Begriffe* (Berlin, 1940), at 133ff. and esp. at 136–42.

38 Schmitt, *Hüter,* supra n. 20, at 71: "Pluralism, however, means a majority of organized social power, running across different areas of the state as well as across the boundaries of countries or municipalities. This social power, although lacking the quality of a state, nevertheless manipulates the will-formation of the state."

39 Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes* (Berlin, 1938), at 117: "It is essential for an indirect power that it blurs the relationship between command and political danger, power and responsibility, protection and obedience. Being unaccountable in its indirect and yet effective exercise of power, it takes all the advantages of political power and avoids all its dangers."

40 *Hüter,* supra n. 20, at 114f., 132ff.

41 Ibid., at 149ff. and 156ff.

42 *Verfassungslehre,* supra n. 1, at 212 and 210.

43 *Römischer Katholizismus und politische Form,* 2d ed. (Berlin, 1925), at 25ff. (referring to personal dignity and representation of a spiritual principle); *Die geistesgeschichtliche Lage,* supra n. 32, at nn. 3–43 (applying representation to the political realm); *Verfassungslehre,* supra n. 1, at 204–16 (development of representation as a constitutional concept).

44 See Ernst-Wolfgang Böckenförde, *Demokratie und Repräsentation* (Hannover, 1983), at 21–26.

45 *Verfassungslehre,* supra n. 1, at 209: "Representation means to render something invisible publicly visible and hence present." See also Böckenförde, *Demokratie und Repräsentation,* at 207.

46 On the process of representation, see M. Draht, "Die Entwicklung der Volksrepräsentation," (1954), in H. V. Rausch, ed., *Zur Theorie und Geschichte der Repräsentation und der Repräsentativverfassung* (Darmstadt, 1995), at 260ff. (esp. at 275ff. and 292ff.).

47 *Verfassungslehre*, supra n. 1, at 207.

48 Ibid., at 214.

49 Ibid., at 212.

50 Ibid., at 210f.

51 Translator's note: Böckenförde here alludes to an article by Karl Löwith who accuses Schmitt of propagating a radical political decisionism (= occasionalism) by which the very continuity of time and experience is dissolved. See Karl Löwith, "Der okkasionelle Dezisionismus von C. Schmitt," in *Gesammelte Abhandlungen. Zur Kritik der geschichtlichen Existenz* (Stuttgart: Kohlhammer, 1960), at 93–126.

From Legitimacy to Dictatorship—and Back Again

Leo Strauss's Critique of the Anti-Liberalism of Carl Schmitt

Robert Howse

Introduction

The encounter between Carl Schmitt and Leo Strauss remains a source of fascination and polemics for the friends and enemies of both thinkers. According to Stephen Holmes, both Schmitt and Strauss belong to a single tradition of anti-liberalism, whose ultimate practical implication is suggested by Schmitt's fate as a Nazi apologist.[1] Indeed, Holmes places much emphasis on Strauss's criticism of Schmitt for failing to develop a critique of liberalism that goes beyond the horizon of liberalism itself and interprets this criticism of Schmitt as a call for a form of anti-liberalism more extreme and virulent than that propounded by Schmitt on the very eve of his membership in the Nazi party.[2]

Friends of Schmitt, or those who wish to revive his thought on the Right, have used his exchange with Strauss to a quite different effect. Drawing on the prestige of Strauss in America, and his international reputation as a Jewish thinker, it is possible to display Strauss's clear sympathy with elements of Schmitt's thought as an indication that the "last word" or deepest teaching of the latter cannot be fascism. Thus, Heinrich Meier, one of the leading apologists for Schmitt in Germany today, focuses on a quite different dimension of Strauss's critique of the *Concept of the Political*—in particular, on Strauss's supposition that Schmitt's ultimate concern in facing off with liberalism is to vindicate or restore the seriousness of life as against liberalism's reduction of the human drama to mere economics and entertainment.[3] Meier argues that the ultimate *dis*agreement between Strauss and Schmitt is as to whether the seriousness of life finds its vindication in theology (Schmitt) or Socratic philosophy (Strauss). Understood in this way, the