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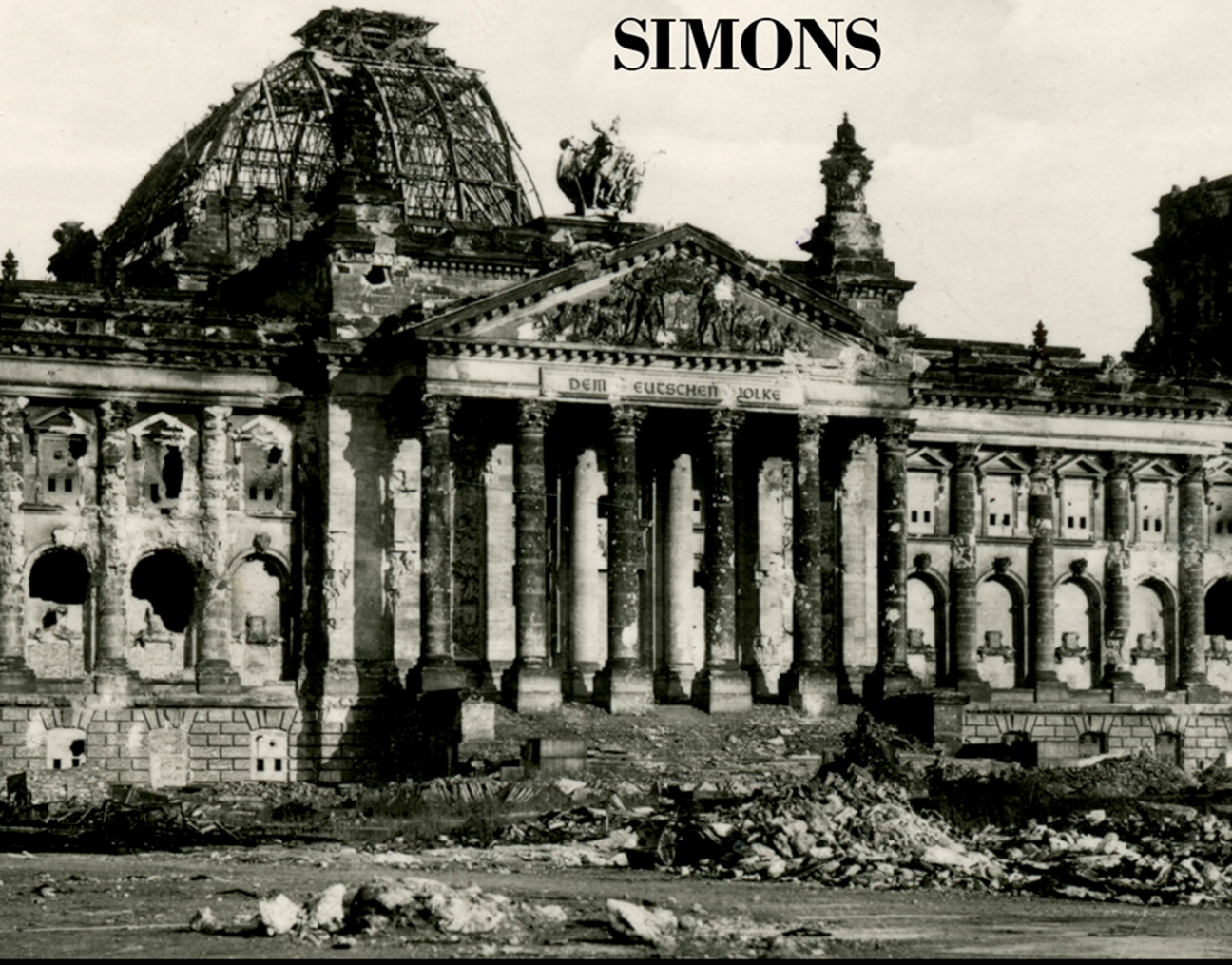

The Oxford Handbook *of* CARL SCHMITT

THE OXFORD HANDBOOK OF

CARL SCHMITT

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CHAPTER 17

CARL SCHMITT AND THE WEIMAR CONSTITUTION

ULRICH K. PREUß

Introduction

The Weimar Constitution of August 11, 1919, was the outcome of a social and political revolution that pushed Germany into the twentieth century. Although this constitution did not ratify the most radical demands and practices of the revolution, most notably the system of council democracy, it sanctioned and gave rise to deep social, political, and juridical changes, the most evident being expressed in its first article: "The German Reich is a republic. State authority derives from the people." The democratic republic replaced the autocratic, semi-parliamentary monarchy and thus created a completely new political universe. It set the seal on the "entry of the lower classes into the arena of national politics" (Bendix 1977, 89–90) and opened the gates for deep political, socio-economic, cultural, and institutional transformations (Dyzenhaus 1997a, 17–37). The democratic principle was specified as a combination of parliamentary, presidential, and plebiscitary elements through which the "necessarily heterogeneous will of the citizens should transform into a necessarily unified decision" (Gusy 1997, 90–91).[1] Arguably the most salient political thrust of the constitution was its ambition to establish a new order not just for the organization of the state but for all spheres of society. In the eyes of its founders, the democratic republic required corresponding societal institutions that would extend the scope of the responsibility of the polity into society. Thus the constitution not only contained—for the first time in Germany—a bill of rights, but also a normative frame for community life, including marriage and family, religion and religious communities, schooling and education, and, most important, the economic relations within a capitalist economy (Gusy 1997, 298–369). Aspirations to order the economic sphere played a pivotal role. Being the product of a rupture, which was as much a social as a political revolution, the Weimar Constitution aimed at taming the class struggle by reconciling, or at least mitigating, the tension between capitalism and political

democracy through the creation of universal suffrage, a competitive party system on the basis of proportional representation, institutions of collective bargaining, and workers' codetermination in large business enterprises.

One and a half years before the end of World War I, Max Weber had foreshadowed several elements of this turn in a series of journal articles published between April and June 1917: a new political order would be based on "active democratization of the masses," including political parties, professional politicians, "mass demagogy," and parliamentary government, as well as plebiscitary forms of political articulation and their corollary tendency toward Caesarism. He named it mass democracy (Weber 1994, 209–233). Mass democracy, in fact, was the political order of the Weimar Constitution.

As a consequence, the Weimar Constitution posed a serious challenge to traditional constitutional law scholarship. For almost two generations—roughly since the enactment of the constitution of the German Reich of 1871—this discipline had been dominated by legal positivism, which excluded historical, philosophical, sociological, and political considerations from legal reasoning (Stolleis 1992, 337–348; Caldwell 1997, 1339). Such a depoliticized state law could have existed only in the serenity of an age of stable bourgeois saturation and domination, a world that was still a far cry from the predicament of the German postwar society of 1919 and the years that followed. A few public law scholars of the younger generation had challenged basic assumptions of legal positivism already before the outbreak of the war—among them Schmitt (1912; see Korioth 1992; Stolleis 1992, 445–447; Caldwell 1997, 52–62)—but now the rejection of "constitutional formalism in favor of an approach that set questions of public law within politics and history" had become a plain methodological necessity for a scientific discipline whose subject had become a politicized mass society (Kennedy 2004, 5; Stolleis 1999, 153–186; Caldwell 1997, 78–84).

Even more challenging than the innovations of the Weimar Constitution as a juridico-political institution was the fact that it had to take on deep crises throughout its short-lived existence between 1919 and 1933. It had to cope with the consequences of military defeat in war, most notably the very harsh conditions of the Treaty of Versailles and attendant international isolation; a strong domestic anti-republican and anti-constitutional opposition from both right and left extremist forces, in the last years of the republic ever more frequently carried out in violent street fights among their tightly organized supporters; the erosion of the economic foundations of the middle class through inflation and economic crisis; recurrent strikes and social unrest of the impoverished popular masses; and a fractured party system that complicated the formation of parliamentary majorities and created the notorious Weimar governability problems (see the documents in Kaes et al. 1994; Jacobson and Schlink 2000, 8–21; Winkler 2005; for a politico-economic analysis of the crisis, see Abraham 1986). During the fourteen years of the Weimar period, no less than twenty cabinets held office, including sixteen parliamentary and four presidential governments (Huber 1981, 328–329). Thus, Arthur Jacobson and Bernhard Schlink have rightly identified the attempts of the German constitutional lawyers of the 1920s to conceptualize the new constitution as "a jurisprudence of crisis."

The subject of this chapter is Schmitt's view of the crisis and his response to it as a political, legal, and constitutional theorist. It does not deal with Schmitt's much-debated role as a political advisor in the final months of the Weimar Republic between July 1932 and January 30, 1933. This is a matter of historical research that lies outside my professional expertise (cf. Berthold 1999; Pyta and Seiberth 1999; Grimm 1992). The chapter's aim is rather the reconstruction of Schmitt's conceptual edifice of the Weimar Constitution, which led him to the conclusion that the founding document did not provide an appropriate political system for the German people. I start with an account of Schmitt's perception of the constitutional innovations of the Weimar Constitution and his earliest theoretical response to them, which focuses on the two varieties of the concept of dictatorship: commissarial and sovereign. Thereafter I discuss Schmitt's construction of an inherent connection between dictatorship and the constituent power of the people, both of which he viewed as authentic expressions of democracy.

In the following section I discuss the implications of Schmitt's claim of the superiority of the constituent power of the German people over the constitution as a means to protect the unity of the nation against the constitution's divisive effects. The subject of the section following that is Schmitt's conceptual construction of the relationship between the principle of democracy and parliamentarianism and his contention that the latter was an obstacle to "genuine" democracy, because it embodied the pluralist divisions of a society divided by class. I maintain that Schmitt's argument for presidential dictatorship in the critical months of 1932—a regime that was to become the slippery slope toward Hitler's takeover in January 1933—was not an inescapable choice for an interim arrangement in an extraordinary time of emergency, but rather a blueprint for the kind of constitutional framework he had, right from the outset, regarded as appropriate constitutional setup to govern the political life of the German people even in ordinary times.

Schmitt's View of the Political Order of Weimar

Schmitt shared the skeptical view of most of his colleagues about the Weimar Republic. But while they regarded the revolutionary transition of 1919 from the Wilhelmine monarchy to the democratic republic as a deep (and mostly unwelcome) rupture of the political order, which undermined the stability of society (Stolleis 1999, 79–80), Schmitt took a radically different position. In his view the Weimar Constitution was neither a revolutionary breakthrough to a modern type of liberal democracy nor merely a modified continuation of the Bismarckian-Wilhelmine regime, the "Second Reich." In his opinion, it belatedly transplanted the ideas of the liberal movement of 1848 into the twentieth century and, but, inevitably, fell short of the requirements of the time. In a 1928 article, he states quite bluntly that what would have been timely in 1848, and in part perhaps still in 1871, was totally inept in 1919. He declares the Weimar Constitution "in

a sense something posthumous" and compares this constellation with the situation of a young man who courted a girl of the same age but was rejected in favor of a rival and who decades later wins the widow (1928, 44–45; see also 2008, 54–55, 357–358). But what would the historical situation of 1919 have required, in Schmitt's mind? Writing six years later, after the Nazis had seized power and he had delivered himself to the regime, he was, of course, quite outspoken and identified the "revolution" of the National Socialists, which he believed had "liberated the German people from the centennial bewilderment of the bourgeois constitutionalism," as the solution to the historical problem created by the "belated" revolution of 1918 (2011b, 47). Arguably that was not the answer he had had in mind in the period between the founding of the Weimar Republic in 1919 and its definitive downfall on January 30, 1933, the day Hitler was sworn in as chancellor of the republic.

A preliminary approach to an answer leads us to the first book by Schmitt that makes explicit reference to constitutional problems, which he wrote after the downfall of the Wilhelmine regime: *Die Diktatur* (*Dictatorship*), with its subtitle "From the Beginnings of the Modern Idea of Sovereignty to the Proletarian Class Struggle." In fact, the relationship between sovereignty and class struggle became the leitmotif of Schmitt's stance on the Weimar Constitution. As he remarks in the preliminary note to the first edition, he wrote this text in the summer of 1920 (1978, xiii). It was the year of the first major crisis of the republic, an attempted putsch of *Freikorps* soldiers (irregular voluntary military units), following mass strikes and uprisings in the Ruhr region, the industrial heartland of Germany, and in other parts of Germany (Winkler 2005, 109–142). These instances of disorder could only be mastered by the use of the extraordinary powers bestowed on the *Reichspräsident* by Article 48(2) of the Constitution[2] (Huber 1984, 95–96, 112–114). Interestingly enough, they were commonly referred to as his dictatorial powers, and their usage as the "dictatorship of the *Reichspräsident*" (Huber 1981, 687–705). Thus, beyond the methodological originality of *Die Diktatur*, which approached the problem of dictatorship from a constitutional angle, in this period it amounted to a statement about the viability of the first democratic constitution in Germany's history.

For Schmitt dictatorship is not in itself an abnormal political status; it is rather a mode of "overcoming an abnormal state of affairs" by exercising "state authority unburdened of legal barriers for [that] purpose" (1926, 33). He defines dictatorship as the personal rule of a single person, based on an induced or presupposed consent of the people, "thus on a democratic fundament," who "uses a centralized governmental machinery which is indispensable for the control and administration of a modern state" (1978, xii). His key concept is the exception; a state of exception requires exceptional means for its overcoming. The dictator disregards norms that are valid in a normal situation but an obstacle to the efforts to end the state of exception. It is the purpose of the dictator to restore a normal situation that is more or less tacitly presupposed in the normativity of legal norms. Thus the essence of dictatorship consists of the separation of norms of law from the method of their realization through extralegal, purposeful, factual, and mostly coercive means (Schmitt 1978, xvi–xvii; McCormick 1998, 218–230; Hofmann 2010, 49–64). In *Political Theology*, published one year later, Schmitt pointedly paraphrases

and sharpens his concept of the exception, asserting that "[t]he exception appears in its absolute form when a situation in which legal prescriptions can be valid must first be brought about. . . . For a legal order to make sense, a normal situation must exist" (Schmitt 2005, 13; see McCormick 1997, 121–156; Caldwell 1997, 96–100).

In that statement the relationship between the state of exception and a normal situation has significantly changed. While the juristic element in *Die Diktatur* consisted in the linkage of dictatorship to its *telos* to restore normalcy—that is, to render itself superfluous—Schmitt's interest now turns to the question of how generally a normal situation comes into being in which legal norms are valid. Building on the above distinction between legal norms and the means of their realization, he points out that since "the legal idea cannot realize itself, it needs a particular organization and form before it can be translated into reality" (Schmitt 2005, 28, 31). First and foremost, there must be somebody who "definitively decides whether the normal situation actually exists" (13). That can only be someone who has the requisite resources at his command to restore normality, because only he would be in the position to enforce any kind of decision. This is the sovereign. "The sovereign," Schmitt argues, "produces and guarantees the situation in its totality. He has the monopoly over this last decision" (13). No predetermined normative standard for this decision exists. "Looked at normatively, the decision emanates from nothingness" (31–32). This amounts to a reversal of the original relationship between normalcy and exception: it is not the normal situation and its normativity that define the standard according to which the dictator has to restore order in an exceptional situation; rather, it is the decision of the dictator that defines the standards of normality—a normality he has to create in the first place (McCormick 1998, 224–225). This is the meaning of the famous first sentence of *Political Theology*: "Sovereign is he who decides on the exception" (Schmitt 2005, 5).

Within the conceptual framework of *Die Diktatur*, the distinction between dictatorship that restores a preexisting standard of order and dictatorship that defines order "from nothingness" is equivalent to the distinction between commissarial and sovereign dictatorship. A commissarial dictator is authorized by an existing constitution that defines the conditions under which that dictator may claim a state of exception, and which specifies the constitutional norms that he may suspend in order to restore constitutional normalcy. Sovereign dictatorship, by contrast, rejects the validity and authorizing force of an existing constitution and aims at the creation of a new, "genuine" or "true" constitution (1978, 130–152; cf. Nippel 2011). The paradigmatic pattern of sovereign dictatorship is the Marxist concept of the dictatorship of the proletariat, which serves as a vehicle for the achievement of the desired final communist society (1978, xiii, 137). Schmitt views it as an example for his recurring claim that dictatorship is not antithetical to democracy (1988a, 51–64, also 17, 28, 32). Thus he regards the notion of democratic dictatorship as an appropriate analytical tool for the study of the Weimar Constitution (2011a, 310–311; 1926, 35; see Kennedy 2011, 288–292).

In this view dictatorship and democracy meet historically in the constituent assemblies, which roused his interest because they embodied the original, "untainted," preconstitutional, "unified and indivisible" power of the people (Schmitt 2008, 126). He

regarded the Weimar constituent assembly as a "sovereign dictator" who is the "sole constituted power of the political unity of the German people" (109, 110). Note that the constituent assembly, despite its designation, is actually a constituted power, if a quite extraordinary one. The constituent power proper remains with the people; they are the ultimate source of all political power. But as an unorganized multitude they cannot have a clear will.

Thus the sovereignty of the people is delegated to a constituent assembly, which is empowered to exercise the plenipotentiary capability of the people's constituent power. By implication the constituent assembly has not just to interpret, but also to form, the constituent will of the people in the first place. This entails the paradoxical status of a body that exercises delegated power without being restricted by instructions of the principal or being responsible to him; indeed, "who even dictates his constituent without ceasing to appeal to its legitimacy" (1978, xviii, 143–144). This is the essence of Schmitt's concept of the constituent assembly as a sovereign dictator: sovereign because plenipotent, dictator because dependent on the commission of the bearer of the constituent power, unified and inherently democratic because it embodies the unity of the preconstitutional people (Schmitt 1978, 139–150; 2011a, 311; 1926, 35; 2008, 109–110; Caldwell 1997, 99–102; Cristi 1998, 183–185; Kalyvas 2008, 79–100). Moreover, this is also Schmitt's ideal of a democratic institution.

The problem is, of course, that such an institution is transitory; it is its purpose to be replaced by the powers established by the constitution, hence to make itself superfluous. At least in the case of Weimar this instance aroused Schmitt's political frustration, because he observed that the outcome of the Weimar constituent assembly, the Weimar Constitution, was quintessentially an instruction manual for the political life of a plural, disjointed, class-divided, and culturally split mass society. Most unfortunately, as Schmitt had to realize, the presupposed preconstitutional unity of the German people had disappeared with the accomplishment of the mandate of the agents of this very political unity; that is, with the entry into force of the constitution. From a liberal viewpoint this is exactly what constituent assemblies are all about: they are commissioned to create the institutional conditions for the free development of societal life, which includes the recognition and permission of value and interest diversity and conflicts and the provision of institutional means to cope with them in a civilized manner. This is what the Weimar Constitution did to a more or less satisfying degree.

By contrast, in Schmitt's view the constitution deprived the German people of its democratic identity. He missed the spirit of unity of the constituent power of the people within the framework of the constitution. Since Schmitt regarded the Weimar Constitution as a paradigm of the liberal-democratic type of constitution (2008, 54; 1965, vii), we can safely assume that he generally doubted the capacity of a liberal constitution to preserve the substantial unity of the people, presumed by him as an inherent and comprehensive quality of its constituent power. Consequently his constitutional reasoning focused on how to preserve political unity against the—in his view—dissociating forces of the constitution itself. Schmitt used several conceptual strategies to pursue this aim, including, inter alia, the theoretical assumption of the permanence and permanent

supremacy of the political will of the constituent power over the constituted powers and the dissociation of democracy and parliamentarianism, especially through the assertion of the normative superiority of what he called "extraordinary lawgivers" over the system of parliamentary legislative legality. They will be outlined successively in the following sections.

The Permanence of the Constituent Power and the Need for Dictatorship

In textbooks on constitutional law the notion of constituent power usually has a rather marginal status. Some authors claim that after the enactment of a constitution the constituent power's mission has been completed and its productive force and authority have been metamorphosed into the constitution; hence the constituent power has expired. Others assume that indeed the constituent power of the people continues to exist after the enactment of a constitution, but that its unmediated and untamed character must be contained and channeled to protect the integrity of the constitution (Böckenförde 1991, 98–107). Schmitt, on the contrary, is predominantly concerned about the preservation of the immediateness and amorphousness of the constituent power. In *Constitutional Theory* he claims the "continuous presence (permanence) of the constitution-making power," which cannot be absorbed or consumed by the constituted powers; he contends that it "expresses itself in continually new forms, producing from itself these ever renewing forms and organizations . . . without ever subordinating itself, its political existence, to a conclusive formation" (2008, 140, 128).

At first glance this assertion seems to have a merely academic significance. It is a truism that a people has the "right" to shake off a political regime and to establish a new one by way of constitution-making at any time—after all, one cannot forbid a revolution. But Schmitt's claim is different (cf. Kennedy 2004, 92–109[3]). He contends that the constituent power not only has temporal and logical precedence over the constitution, but also outranks it in normative terms. This is not meant in the sense of Kelsen's hierarchy of norms, which Schmitt of course rejected, but in the sense of the "superiority of the existential element over the merely normative one. . . . Whoever is authorized to take such actions and is capable of doing so, acts in a sovereign manner" (2008, 154; cf. Cristi 1998, 191–192). The distinction between the existential and the normative is mirrored in Schmitt's contrasting of the relative and the positive concept of the constitution: according to the former the constitution is "a multitude of individual, formally equivalent constitutional laws" that renders constitutional rank to whatever is written in the text of the constitution. "It is no longer generally asked why a constitutional provision must be 'fundamental' " (2008, 67)—this is a feature of the relative constitutional concept, which Schmitt labels the "constitutional law," as distinct and opposed to the positive concept of the constitution according to which it "originates from an *act of the constitution-making*

power."[4] It does not contain individual normative provisions, but rather an existential decision about the political form of the political unity of the people. The essence of the constitution "is not contained in a statute or in a norm" (75, 77). From this it follows that the continuing constituent power "stands alongside and above every constitution derived from it and any valid constitutional provision of this constitution" (140).

Although, Schmitt argues, the Weimar Constitution contains a series of mere constitutional laws in the sense of the relative concept of the constitution (2008, 70), it also includes several fundamental decisions concerning the political existence of the German people, most importantly the decisions for democracy, for the republic, for federalism (77–78), and against the "dictatorship of councils" and the "proletarian class-based state" (83–84), which had been the program of the radical Left. It is only due to these decisions that the Weimar Constitution is "actually a constitution and not a sum of disconnected individual provisions, which the parties of the Weimar governmental coalition agreed to insert into the text on the basis of some 'compromise' " (78). These decisions contain the substance of the constitution, which must be protected against the bent toward disunity and division made possible by its relative components. In Schmitt's opinion the main cause of these divisions is the party-dominated parliament, which "increasingly ceases to be representative of the political unity" and "becomes an exponent of the interests and moods of the masses of voters" (337). Consequently, the permanence of the constituent power is a reminder of the ever-present potentiality for its interference in the affairs of the constituted polity (cf. Kalyvas 2005, 230).

In this way the constituent power operates as a permanent observer that checks the conformity of the actions of the constituted powers with the existential decisions the constituent assembly made in the founding period of the polity. Hence the constitution is exposed to a permanent latent challenge to its normative validity. Such a theoretical construction is only plausible on the premise of a deep distrust in the legitimacy of the constituted powers. Schmitt actually disliked the Weimar Constitution because in his view it opened the door for the erosion of the people's unity. He contrasted the unity of the constituent power of the German people as allegedly manifested in the Weimar National Assembly of 1919 with the disunity of political life as it was expressed in the fragmentation of the *Reichstag* parties (Schmitt 2008, 364–366; more explicit, 2004, 85–88). After the expiration of the Weimar National Assembly (the constituent assembly) he looked for a custodian of the German people's political unity within the framework of the constitution. Only someone who, similar to the constituent assembly, is "authorized and capable" to act in an existential manner, which means as the authentic delegate of the unified people's will, came into question. In Schmitt's conceptual framework this is a democratic dictator—a curator of the unity and identity of the people in times of constitutional crisis.

In Schmitt's constitutional theory the barriers for the self-proclamation of any populist leader as the authentic mouthpiece of the people were not very high. After all, the "natural form of the direct expression of a people's will is the assembled multitude's acclamation." In modern expanded societies it finds its expression in public opinion (2008, 131, 275); obviously that is almost as much susceptible to manipulation as an

assembled multitude's mood. The immediacy of these more or less articulate manifestations elevates them above all mediated forms of expression, because "as long as a people have the will to political existence, the people are superior to every formation and normative framework" (131, 271). Even if, due to their unorganized state and their amorphous disposition, the people may not be capable of expressing a determinative and recognizable will, "the tacit consent of the people is also always possible and easy to perceive" (131, 139).

This, then, is an open invitation to those who struggle for political power to claim that *they* have understood the silence or the diffuse acclamation of the people correctly or, respectively, the overwhelming feelings of public opinion, and hence are legitimized to act on their behalf outside the constitution. An induced or presupposed consent of the people satisfies Schmitt's condition for a democratic fundament of dictatorship (1978, xiii). It opens the path toward the translation of the potency of resourceful elites into extra-constitutional political power in the name of the supremacy of the constituent power of the people. This is a scarcely concealed option for populist dictatorship—in Schmitt's conceptual frame, democratic dictatorship—in the worst case even for latent or manifest civil war.

It is a matter of debate whether Schmitt's conception of the constituent power and its relationship to the constitution followed from his love for democracy or for dictatorship. In his constitutional theory there is no contradiction between these seemingly antithetical versions of political rule: the purest form of democracy—the acclamation of the "present, genuinely assembled people" (1978, 272)—requires dictatorship, which, in turn is the indispensable agent for the formation and realization of the will of the formless people. Paradoxically, this antiliberal constitutional theory (Kennedy 1988, xxxiv; Holmes 1996, 37–50; Scheuerman 1996; 1999, 61–84; Seitzer 1998, 297) conforms to the liberal belief that a constitution is a device for constraining and eroding the people's power. This belief, however, neglects the fact that the binding devices of a constitution are predominantly enabling means of a people's self-determination rather than of their disempowerment (Holmes 1993, 227–235).

Parliamentarianism: A Liberal Camouflage of Democracy

A further key element of Schmitt's slightly depreciative view of the Weimar Constitution is his conception of the relationship between democracy and parliamentarianism. According to his reasoning, the "parliamentary system" rests on the application and mixture of different and even opposing elements (monarchical, aristocratic, democratic), among which the democratic element is largely located in the residual power of the plebiscitary decision of the people in cases of conflict between parliament and government. Parliamentarianism is "*the* political system of the bourgeois Rechtsstaat,"

which suffers "from the deficiency that is unique to this *Rechtsstaat* idea generally, for it intends to evade the ultimate, inevitable political decision and logical consequence of the principles of political form" (2008, 330).

Schmitt distinguishes two principles of political form through which political unity can be achieved: identity and representation (2008, 239; Dyzenhaus 1997b, 51–58). The former predominates where the people are the subject of the constituent power—in other words, identity is the genuine principle of democratic rule. It is defined by a series of identities: "of ruler and ruled, governing and governed, commander and follower. In pure democracy, there is only the self-identity of the genuinely present people, which is not a type of representation" (2008, 264). Referring to Rousseau, Schmitt claims that the people cannot be represented "because they must be *present*, and only something absent, not something present, may be represented" (272; see also 289). Not only does no particular relationship exist between democracy and representation; the latter "contains the genuine opposition to the democratic principle of identity" (251). What is represented is "the political unity as a whole," not the people. Thus, in the constitutional monarchy of the nineteenth century, the parliament was " 'the people's advocate', but not the representative of the political unity of the people," because in the monarchy the "totality of the subjects are in fact not supposed to be the political unity" (245).

Accordingly, the representative system of the liberal *Rechtsstaat* of the nineteenth century, which presupposed "a genuine representation of the . . . nation," was not a variety of democracy; rather, it had the "meaning of a representative elite, of an aristocratic assembly with representative character," and only its opposition to the absolute monarchy made it appear to be a democratic institution (2008, 250). When the monarchy fell with the rise of mass democracy, the liberal conception of the parliament as an association of economically and socially independent, intellectually autonomous, and judicious notables also collapsed. This appearance could no longer be sustained. For Schmitt "rising democratization"—that is, the metamorphosis of the deputy into "a dependent agent of voters and interest organizations" (250)—could not undermine the democratic quality of the parliament, because this had never existed. Yet it undercut its representative-aristocratic character, which had functioned as the representation of political unity. In Schmitt's view, in the twentieth century political unity can only be regained on the basis of the democratic principle of identity.

Note that Schmitt did not acknowledge as proof of the democratic character of the parliament the fact that in Weimar it rested upon general, equal, immediate, and secret elections for men and women older than twenty years pursuant to the principle of proportional representation. This had a major impact on the integration of the hitherto largely excluded popular masses into the political system. Not so for Schmitt. "The election or vote . . . is a *secret individual vote*. The method of the secret individual vote, however, is not democratic. It is, rather, an expression of liberal individualism" because it transforms the citizen, a political man, into a private person (2008, 273). He contends that even those constitutional procedures through which the electorate intends to express its political will—elections, referenda, popular initiatives—do not fully exhaust the democratic quality of the constitution. These procedures imply certain competences

for the people, but through them the popular will "comes into being only as a result of a system of validations or, indeed fictions" ("*Geltungen oder gar Fiktionen*") (279). Schmitt insists that in a democracy "the people cannot become . . . a mere state 'organ' " and that "*outside* all such normative frameworks, the people continue to exist as an entity that is directly and genuinely *present*, not mediated by previously defined normative systems, validations, and fictions" (271).

However, Schmitt acknowledges that no state can exist without elements of representation (2008, 241). Thus, in modern large states the people's will is no longer directly conveyed through acclamation but "expresses itself as 'public opinion' " (131, 275). He even acknowledges political parties as elements of democracy, despite his contempt for them in connection with parliaments: "There is no democracy without parties, but only because there is no democracy without public opinion and without the people that are always present as the people. . . . The current superiority of the party organizations in contrast to parliament rests on the fact that these party organizations correspond to the democratic principle of identity insofar as they, like the people, are always present and at hand without representing" (276–277; see also 251). Thus, when genuine democracy, as Schmitt argued, is defined by the continuous existence and activity of the unformed people in its twofold role as "subject of the constitution-making power" and "bearer of public opinion and subject of acclamations" (279), then the role of the people as the constitutionally formed and organized political actor and stakeholder, most importantly of course in the form of a parliament, becomes secondary and, arguably, even dispensable.

This, in fact, is the conclusion Schmitt drew when the political crisis of the Weimar Republic escalated, after the breakdown of the last parliamentary coalition in March 1930. In *Der Hüter der Verfassung* (*The Guardian of the Constitution*) he states more precisely what had already been the underlying assumption in his *Constitutional Theory* (2008, 251), namely that with the disappearance of the distinction between state and society the nineteenth-century presupposition of the parliament's claim to represent the people has eroded. As the state has become a medium of the self-organization of the society, the disunity of society has migrated, as it were, into the political sphere, most visibly into the parliament. It has become an "arena of a pluralist system," dominated by political parties, which he portrays as strictly organized power machines with a bureaucratic apparatus and a disciplined mass of followers without concern for political unity and the formation of a common political will (Schmitt 1969, 82–91). They frustrate the expectation that they can and will transform conflicting social, economic, cultural, and confessional interests, values, and opinions into a single political unity. Heterogeneous momentary and special interests have replaced a unitary and homogeneous state will; the Weimar parliamentary party state is, he writes, an "unstable coalition-party-state" (88).

In the political situation of 1930–1931, in which the *Reichstag*, hampered by serious economic crisis and deep social divisions, proved unable to find a stable governing majority, Schmitt looks for a neutral actor, one superior to the plurality of social, economic, and political forces. He finds him in the *Reichspräsident*. He has, Schmitt argues, the authority to preserve the constitutional order, because he is "the center point of a

system of plebiscitary and nonpartisan institutions through which the constitution aims at establishing a counterpoise to the pluralism of social and economic powers on the basis of democratic principles" (1969, 159). While this observation as such was certainly true, Schmitt here betrays his well-known antiparliamentary thrust, dismissing the Weimar Constitution's institutional architecture, which aimed at producing a minimum of political unity for a deeply divided society through the combination of parliamentary, presidential, and plebiscitary elements. The political meaning of the construction of the Weimar Constitution would wear away, indeed be turned upside down, if Schmitt's assertion were true: that the constitution "*presupposes* the whole German people as a unity which is directly capable of acting, not just through the mediation of social organizations, and which can express its will and in the decisive moment shall come together and assert itself despite all pluralistic divisions" (159; emphasis added).

This tendency to downgrade the parliamentary pillar of the Weimar Constitution's democratic architecture was carried forward with considerable conceptual sophistication in *Legality and Legitimacy* (2004). Schmitt attached importance to the fact that he had completed this treatise on July 10, 1932, ten days before the *Preußenschlag* (the so-called Prussia Coup) occurred—a coup d'état in which the *Reichspräsident*, using his emergency powers under Article 48(2) of the Constitution, ordered the replacement of the democratic government of Prussia with the *Reichskanzler* (chancellor of the Reich) von Papen as the "*Reichskommissar für das Land Preußen*" (Reich commissioner for the State of Prussia). Papen actively fostered the takeover of the Nazi Party and a few months later became a member of the first Hitler government. In fact, *Legality and Legitimacy* can be read as the juristic blueprint for the transformation of the Weimar Constitution into an authoritarian state, which, as history has shown, proved to be the starting point for the totalitarian regime of the Nazi Party.

Schmitt's argument relies on a narrative of Weimar's political system that verges on caricature. It tells a suggestive story about the antagonism between the empty normativism of parliamentary legality and the plebiscitary legitimacy of a saving executive authority "in which one can have confidence that it will pose the correct question [to the people] in the proper way and not misuse the great power which lies in the posing of the question" (2004, 90). More specifically, Schmitt's argument goes as follows: the Weimar Constitution is a "parliamentary legislative state," which is just another term for the notion of *Rechtsstaat* (3, 12, 17–26). Within this *Rechtsstaat* context the parliament embodies the dignity of a legislator and stands for a political system in which ideally laws, not men or authorities, governs—this is the meaning he assigned to the principle of legality (4). The *Reichstag* can only live up to its responsibility as a legislator and preserve the "dignity of legality" when it enacts general pre-established norms (10–11). These norms elicit the obedience of the citizens, who trust that these laws are just and reasonable. "All the dignity and majesty of the statute depends exclusively and directly . . . on this trust in the justice and reason of the legislature itself and in all the organs of the legislative process" (21).

If this trust exists, Schmitt argues, then even a formal and value-neutral concept of law is acceptable according to which any will of the current majority of the citizenry is

law, although not unconditionally. The condition is that there is an intact connection of "confidence between the parliamentary majority and the will of the homogeneous people" (2004, 24; cf. also 27). This is so because, "by virtue of being part of the same people, all those similarly situated would in essence will the same thing" (28). If, however, this condition is not fulfilled, "the 'law', then, is only the present decision of the momentary parliamentary majority" and would amount to the tyrannical absolutism of a majority over a suppressed minority (20, 28). In other words: in a heterogeneous, deeply divided society such as Germany after World War I, the majority decision in the parliament is not able to obligate the whole citizenry because it acts only for the majority, while the "suppressed" minority regards the majority party in legal control of state power as illegal. "So at the critical juncture, each denounces the other, with both playing the guardian of legality and the guardian of the constitution" (34).

Such was the situation in Schmitt's perception of the crisis in the summer of 1932. Of course he had been critical of parliamentarianism in general and of Weimar parliamentarianism in particular since the very origin of the Weimar political system. Now the political situation offered him plausible reasons to invoke three "extraordinary lawgivers of the Weimar Constitution," all of which have the function to displace or relativize, respectively, the "legislative state legality"; that is, the authority of the *Reichstag*. As the first lawgiver he identifies the second part of the constitution itself, headed "The Fundamental Rights and Duties of the Germans," which he calls a "Second Constitution" (2004, 37), because due to its fundamental principles of "supralegal dignity" it "contains an assortment of different types of *higher legality*. . . . It also contains part of a *counterconstitution*" (57–58; emphasis added). The second "extraordinary lawgiver" is, as Schmitt admits, somewhat fuzzily embodied in the power of one-tenth of the enfranchised voters to initiate legislation (Article 73.3), which, Schmitt argues, constitutes a distinct sphere of plebiscitary-democratic legitimacy that competes with the system of "legislative state legality" (59–66). Finally, and most important, the third lawgiver is the dictatorial authority of the popularly elected *Reichspräsident*, pursuant to article 48, para. 2, to take the necessary measures to reestablish law and order (67–83).

Schmitt is convinced that "plebiscitary legitimacy is at present the single last remaining accepted system of justification," which presupposes "a government that . . . has the authority to properly undertake the plebiscitary questioning at the right moment" (90). Hence he regards the dictatorship of the *Reichspräsident* as the best solution of the crisis. Viewed from a purely formal standpoint, this was still a commissarial dictatorship. Within the logic of Schmitt's constitutional theory, however, it amounted to a sovereign dictatorship. In Schmitt's vision the Weimar Constitution, with its parliamentary system and its liberal "distortion" of the principle of democracy, could obviously not embody the standard of normality, which a commissarial dictator would have to accomplish through his extralegal instruments. Why should a genuinely "democratic dictator" who represents the unity of the people lead the polity back to a constitutional system that cannot uphold the presupposed unity of the people? Indeed, in a speech given to an audience of German industrialists in November 1932 Schmitt spoke of the "outrageous constructional defects of the Weimar constitution," which would have to

be avoided in future constitutional reforms expected from the dictatorial powers of the *Reichspräsident* (Schmitt 1932, 55). Unsurprisingly, shortly afterward he hailed the transition from the ostensibly commissarial dictatorship of *Reichspräsident* Hindenburg to the explicitly sovereign dictatorship of Hitler on January 30, 1933, most clearly in his infamous article in 1934, "Der Führer schützt das Recht" (1988b).

Thus, dictatorship on a democratic foundation, which he had devised as an appropriate form of government at the dawn of the Weimar Republic, remained his answer in the final crisis of its dusk. As we know, and as could hardly have escaped Schmitt's sharp intellect, it was tantamount to a "wholesale disempowerment" of the people (McCormick 2004, xxxv; cf. also Scheuerman 1999, 85–112).

The epilogue of the constitutional drama of Weimar, in which Schmitt played a pivotal role as a constitutional theorist, was his performance as a counsel for the Reich in the trial on the constitutionality of the Prussian Coup at the *Staatsgerichtshof* (Seiberth 2001, 97; Dyzenhaus 1997a). Here he acted as a constitutional practitioner in defense of the use of the dictatorial powers by the *Reichspräsident* against the *Land* Prussia, whose acting center-left, so-called Weimar coalition government had come under fierce siege by the National Socialists, which had become the largest party group of the Prussian parliament in the elections of April 1932. The Prussian Coup of the Reich government significantly weakened the defenders of Weimar democracy, frail and self-destructive as it had become in March 1930, when the last parliamentary government collapsed due to the failure of the democratic parties to reach a compromise over the issue of public unemployment insurance (Huber 1984, 722–726). In his defense before the court Schmitt argued, inter alia, that the Prussian government, qua party government, was unable to make objective, just, and fair decisions about the legality of the National Socialists. Referring to the current Prussian government and its coalition partners, he claimed that the Reich president has to save the independence of a *Land*, which is jeopardized if "tightly organized and centralized political parties seize the *Land* and delegate their agents, their attendants into the *Land* government" (*Preußen contra Reich* 1976, 39, 468). It is a matter of debate whether he acted bona fide or ruthlessly. In any case, he was consistent in that he defended in the juridico-political realm what he had established theoretically with great sophistication throughout the whole lifespan of the Weimar Constitution—namely, the superiority of "democratic" dictatorship over parliamentary democracy (Dyzenhaus 1997b, 125–127).

Conclusion

In his afterword to a reprint of *Legality and Legitimacy*, written in 1957, Schmitt marked this treatise as "a despairing attempt to safeguard the last hope of the Weimar Constitution, the presidential system, from a form of jurisprudence that refused to post the question of the friend and enemy of the constitution" (2004, 95). For a naïve reader this statement might create the impression that Schmitt had been a passionate defender

of the Weimar Constitution who had mobilized the last reserves of his intellectual resources to rush to the republic's rescue. In fact, however, it is self-apologetic, at least self-delusive. In his reasoning the transformation of the parliamentary mode of governance into the order of presidential dictatorship was not a response to an exceptional case of emergency, but a deeply hailed overcoming of what he had criticized time and again as the structural defect of the Weimar Constitution—namely, the establishment of the parliament as the core institution of modern democracy. Already its renaming as the "system of legality of the parliamentary legislative state" distorted its essentially democratic function to represent the people in their plurality and to bring into balance the multiplicity of their political intentions and antagonisms. What he called "the value neutrality of a functionalist majority system" could only be overcome by the establishment of a "substantive order" (94), ranking above any kind of parliamentary legality and its sources, viz. the compromises among the pluralism of competing social forces.

By excluding social and political pluralism from the concept of democracy and mistaking the *Reichstag* as a liberal institution in decline, Schmitt's alleged rescue plan for the democratic republic could only end up in a kind of authoritarian, Caesarist, or dictatorial regime. Max Weber, too, had been sympathetic to a "democratic caesar," but he had conceived of Caesar as a political leader arising from the parliament of a mass democracy. In contrast, for Schmitt the democratic dictator was the alternative to parliamentarianism. True, Schmitt did not openly challenge the legitimacy of the Weimar Constitution. Jeffrey Seitzer, the translator of the American edition of Schmitt's *Verfassungslehre*, argues that Schmitt—at least in this opus—recast "liberal constitutionalism so that the Weimar constitutional system, defined as liberal in *his* terms, can respond to the German State crisis as *he* understands it" (Seitzer 2001, 3; see also 1998, 298). This claim is not convincing because it disregards the fact that Schmitt's reading of the Weimar Constitution ignores and rejects its basic political intentions and spirit (for a more relativizing assessment, see Seitzer and Thornhill 2008, 2, 34–35). This constitution was established as an attempt to reconcile, at least to make compatible, mass democracy and capitalism, which meant the incorporation of the hitherto excluded lower classes into the political system of a deeply divided post-authoritarian and post-war society according to the basic principles of Western constitutionalism. For that purpose parliamentarianism was devised as the pivotal pillar of the political system.

Fundamental propositions of Schmitt—for instance that democracy and parliamentarianism are antipodes (2008, 289, 292); that the working class is inapt for being integrated into the political system through the institution of parliament (337); or that genuine leadership should be "directly borne by the confidence of the masses," which, as he rightly observes, would arise "in opposition to parliament" (337)—are compelling indicators that he understood the Weimar Constitution as a futile approach to solving the problems of a modernizing mass society, inferior to any authoritarian version of polity. In other words, for him the Weimar Constitution was not a tool for the solution of the crisis of the republic, but rather a central part and cause of that very crisis itself (Stolleis 2004, 332–355).

In a pointed manner one could say that for Schmitt the constitutional system of Weimar *was* in fact the true crisis. This belief was not the upshot of the experience of the collapse of

Weimar's parliamentarianism. Already in 1928, at a time when the Weimar Republic experienced a short period of relative stability, Schmitt spelled out what Hasso Hofmann, one of the most erudite analysts of his work, rightly called the "core of his seemingly purely academic constitutional theory" (2010, xxxii). In an article about the "bourgeois *Rechtsstaat*" Schmitt affirmed that the democratic element of the Weimar Constitution was still strong enough to enable the people to find its political form, despite the constraints that had been imposed on them by the ideas of the bourgeois *Rechtsstaat*. However,

> [f]or the constitutional development of the near future the point is to save democracy from its disguise through liberal moments. Only in this way…the new situation which has been produced by the new significance of the proletariat can be mastered and the political unity of the German people reestablished.…Each democracy presupposes the homogeneity of the people. Only such a unity can be the bearer of political responsibility. If, as in the existing state, the people is a heterogeneous entity, then the integration of these masses into a unity becomes the challenge of the day. The genuine democratic method is not a method of integrating heterogeneous masses. However, the present-day people are multiply split with respect to culture, social status, class, and religion. Hence, a solution outside of those democratic-political methods must be found, or the parliament will become the stage which has precisely the function of exacerbating these antagonisms.…It is exactly the pivotal task of integrating the proletariat into this state that reveals the deficiency of the methods of the bourgeois Rechtsstaat. (Schmitt 1928, 49–50)

In other words, a nondemocratic way to integrate the heterogeneous masses into the polity had to be discovered and applied in order to create a homogeneous people. Five years later he believed (or pretended to believe) that the right response to that challenge had been found on January 30, 1933.

Notes

1. Unless noted otherwise, all translations of source material by the author.
2. Article 48.2 reads: "In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 154, partially or entirely."
3. Kennedy uses the unusual term "constitutional power" for the concept of *pouvoir constituant*, constituent or constitutive power, *verfassungsgebende Gewalt*.
4. That is, constituent or constitutive power in the sense of the previous note.

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