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Legal Theory in the Collapse of Weimar: Contemporary Lessons?

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The Weimar Republic is frequently invoked in political theory as an example when the issue is the appropriate response of liberal democracies to internal, fundamental challenges. I explore that example through the lens of a 1932 court case that tested the legality of the federal government's "coup" against Prussia. In my analysis of the court's judgment and of the arguments of three political and public law theorists, Carl Schmitt, Hans Kelsen, and Hermann Heller, I argue for Heller's democratic vision of the rule of law. In my conclusion, I compare problems in Kelsen's position with problems in the recently articulated position of John Rawls in order to suggest what lessons Weimar may have for contemporary political theory.

The collapse of the Weimar Republic (1918–33) haunts political debate these days, as disaffected groups with increasing support again challenge the most fundamental values of liberal democracies. It is with this challenge that contemporary political philosophy grapples when it tries to deal with the "fact of pluralism." Any attempt to contest those conceptions of the good life which go against the grain of liberal democratic values invites the charge that liberalism is just one ideology among others, each seeking to enforce its partial idea of the good on the whole.

In responding to the fact of pluralism, liberal philosophers, most notably John Rawls (1993), have begun to defend the liberal state in a self-consciously political fashion. The liberal state will not concede the space of politics to those who want to use that space to destroy it with its neutral stance among different individual conceptions of the good. But Rawls also alleges that the highly controversial task of drawing the limits of legitimate politics does not rely on any partial liberal concept of the good.

Does the failure of the Weimar Republic hold any lessons for contemporary attempts to demarcate legitimate politics? In answering this question, my focus is on the positions of three important political and legal philosophers of late Weimar.¹ One is the communitarian existentialism of Carl Schmitt. The second is the legal positivism of Hans Kelsen. The third is the social democratic view of Hermann Heller, who argues for an ethical conception of law such that law provides a constraint on political power.

These positions were brought into sharp contrast by the political decisions made by Germany's federal government in 1932. On July 20, Field Marshall von

Hindenburg, the *Reichspräsident*, or president, issued a decree "concerning the restoration of public safety and order in the area of the *Land* of Prussia."² This decree is a crucial moment in the breakdown of Germany's first experiment with democracy.³

The decree was issued under the authority granted the president by the emergency powers section of the Weimar Constitution, Article 48. It declared the chancellor of the Reich, Franz von Papen, to be the commissioner for Prussia, the largest and most powerful of the German *Länder*, and gave him authority to take over its political machinery.⁴ It was issued at the behest of Papen's cabinet, and it formed an integral part of the strategy of the minister of defense, General von Schleicher. The decree responded to the alleged inability and unwillingness of Prussia's government—a coalition in which the main socialist party, the Social Democratic Party (SPD), dominated—to deal with the state of political unrest and violence within Prussia.

² For the full text, see *Preussen* [1933] 1976, 481. For a detailed discussion of the events and the legal issues, see Grund 1976 and Grimm 1992. My evaluation differs sharply from both of theirs.

³ Any account of ideas that "tests" them in the laboratory of history runs certain risks when the history is based on secondary sources (see Lustick 1996). The most obvious risk is that one will rely only on those secondary sources which confirm the conclusions one wishes history to support. My own choice relies heavily on those who observed directly the events detailed here and who were committed democrats: Brecht [1944] 1968 and Eyck 1967. The two most important more recent works on the political history of Weimar (Bracher 1984, Mommsen 1996) agree with these observer accounts on the two points crucial to my own argument in the text. They agree that Weimar was destroyed by the exploitation of its structural problems by those opposed to parliamentary democracy rather than by the structural problems. And they agree that right up until Hitler's seizure of power, displays of democratic commitment by important institutional actors, including the courts, could have made a difference to the course of events. One has to accept both of these points before one can start to make a case for the characterization of the events of July 20 as a coup. Both points are controversial in the historical literature on Weimar, though the preponderance of opinion is with Bracher and Mommsen. For an even-handed discussion of the secondary sources, see Kolb 1988, especially chapters 5 and 6.

⁴ One grave structural weakness in the federal system was that it perpetuated a prewar problem by leaving Prussia intact as a political entity. For Prussia contained almost two-thirds of the German population and occupied almost two-thirds of German territory. In addition, the seat of federal government continued to be the Prussian capital, Berlin. This created a severe imbalance in intergovernmental relations, which the framers of the Weimar Constitution left to politics to work out.

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¹ Finn (1991, 166–77) discusses some of the issues considered in this article and also provides an account of Schmitt and Kelsen. His account, however, suffers from an almost total reliance on secondary English sources. This results, on the one hand, in a poor understanding of Schmitt and, on the other, in a neglect of Kelsen's writings on the events, together with an overestimation of Kelsen's actual influence on the legal actors.

This coalition was the most important base of institutional resistance to the Nazi march to power, and it was removed at the stroke of a pen.

Schleicher and the others in Papen's cabinet of right-wing aristocrats intended the coup as the first move in a plan to rid politics of the SPD. They would then be able to crush the communists and simultaneously tame Hitler by drawing him within the control of an increasingly authoritarian cabinet. The strategy would be complete once Hitler was neutralized and the cabinet, having eliminated all internal opposition and obstacles (including the *Reichstag*), ruled Germany by decree.

At the time of the coup, the Prussian government considered armed resistance. But both because it seemed that such action would end in defeat and because, as social democrats, they were committed to legality, they chose to challenge the constitutional validity of the decree before the *Staatsgerichtshof*, the court set up by the Weimar Constitution to resolve constitutional disputes between the federal government and the *Länder*.⁵ The court effectively upheld the decree in late October, by which time the SPD was no longer an effective force.⁶

The legal and political significance of this case was clear. Some of the most important public law theorists of the day argued before the court, turning the legal argument into a battle of legal philosophies. Among these were Schmitt, by then the foremost legal theorist of the right and Schleicher's chief legal advisor, and Heller, who argued on behalf of the parliamentary delegation of the Prussian socialists.

Kelsen, Dean of the Law Faculty, University of Cologne, did not participate in the proceedings before the court but felt compelled to write a detailed analysis of the judgment before it was officially published (Kelsen 1932–33). For many years he had been a chief target of Schmitt (as well as Heller), and his analysis of the judgment followed hard on the heels of his own scathing polemic against Schmitt's assertion that the president was the true guardian of the Weimar Constitution (Kelsen 1930–31).

Schmitt won the professorial battle in that the court's judgment effectively upheld his position. Nine months later, after Hitler came to power, he joined the Nazi Party and offered it his legal services. Although he could not teach after the war because of his involvement with the Nazis, Schmitt is still influential in Germany, and in some quarters his ideas are fashionable in Europe and North America. In a time when the idea of a constitutional or legal order which can accommodate the claims of a plurality of groups seems increasingly imperilled, Schmitt, who argued against the possibility of such an order, is likely to gain an even larger audience.

⁵ In terms of Article 19 of the Weimar Constitution, the *Staatsgerichtshof* was given the jurisdiction to decide on constitutional disputes within a *Land*, between *Länder*, and between a *Land* and the central government. The president was charged with executing its judgments.

⁶ For the full text of the judgment as well as of the argument before the court, see *Preussen* [1933] 1976.

In contrast, Kelsen, a Jewish democrat, was forced out of his post at Cologne in 1933.⁷ He made his way via Geneva and Prague to the United States, where, despite many hardships, he continued to work and publish until his death in 1973. But his positivist philosophy of law is studied for the most part by a few specialists.⁸

Heller died in 1933 in Madrid. He was only 42 years old and was trying to complete a full statement of his legal philosophy in his *Staatslehre*, or theory of the state.⁹ He was an important participant in debates about public law and legal theory in Germany, especially in late Weimar, but in comparison with Schmitt or Kelsen he receives little attention in Germany and, until quite recently, was almost unknown in the English-speaking world.¹⁰

In what follows, I shall show how the legal events around the coup provide a fruitful lens for viewing the debate among Schmitt, Kelsen, and Heller. Under the pressure of making practical arguments on a fundamentally important political issue, the three theorists expose the vulnerabilities as well as the strengths of their theories.¹¹ I shall also argue that the lens refracts onto the present. In particular, it highlights the most problematic aspects of the contemporary liberal response to pluralism, exemplified in the recent work of John Rawls.

THE WEIMAR CONSTITUTION AND THE JULY 20 COUP

By the time of the coup, parliamentary democracy was severely weakened in Germany. The collapse of the grand coalition government in 1929 ushered in an era of increasingly authoritarian rule by presidential decree. This was made possible by the peculiar place of the president in the Constitution. Writing in 1944, Arnold Brecht, one of the leading constitutional and legal figures of Weimar, states that it was perhaps inevitable that a realistic constitution for postwar Germany should provide, as it did, for a president with

⁷ Schmitt, it should be noted, had joined the faculty earlier in that year, and as a matter of course he had needed and had sought Kelsen's support for such a move. He returned the favor by participating in the machinations that led to Kelsen's dismissal. See Rüthers 1989, 138–9, quoting from the memoirs of Hans Meyer, a student of Kelsen's at that time.

⁸ Kelsen's legal philosophy has had an immense indirect effect on Anglo-American legal philosophy, however, through the work of H. L. A. Hart (1961) and Joseph Raz (1983).

⁹ Gerhart Niemeyer, Heller's assistant at that time, worked the manuscript into a publishable state and it was issued in 1934 in Holland.

¹⁰ See the excellent discussion of Heller in Scheuerman 1994. See also Niemeyer 1941 and Kennedy 1984. The best German study of Heller remains Schluchter 1983.

¹¹ It has been suggested to me that such pressures arguably required the protagonists, especially the two who appeared in court, to twist their arguments to suit the results they wanted. Yet, this suggestion underestimates the extent to which, in the legal culture of Weimar Germany, the legal issues at stake in 1932 were viewed as an occasion for decision by different constitutional theories, rather than by the court; see Schlink 1994, 218. In addition, I would argue that practical contexts in any case provide the best lens for an appreciation of the merits of conflicting theories.

broad emergency powers under parliamentary control (Brecht [1944] 1968, 143–4).¹² The Weimar Constitution was drafted in a time of civil unrest which was accurately expected to persist beyond the founding of the new republic. The exercise of these powers, given to the president by Article 48, required the countersignature of the cabinet; and the cabinet, while appointed by the president, had to enjoy the confidence of the *Reichstag*. But the president also had the power to dissolve that body, a power limited only by the vague requirement that he could do this “only once on the same ground.”¹³ The power to dissolve the *Reichstag* combined with the power to appoint the cabinet meant that the president could ensure a cabinet which would give him the requisite countersignature and which did not have the confidence of the *Reichstag* simply because there was for the time being no parliament in existence. Thus, as Brecht ([1944] 1968, 48–9) says, the problem was not so much the broad framing of the emergency powers but that they could potentially be exercised free of control.

Until an election in April 1932, an SPD-dominated coalition could count on majority support in the Prussian parliament. In anticipation of a situation in which the Nazis would be the strongest minority party, the coalition changed the electoral regime by replacing the requirement that a prime minister could be elected by a relative majority if, on the first ballot, the incumbent had been voted out with the requirement that the new prime minister be chosen by an absolute majority. In that election, the Nazis increased their representation in the Prussian parliament to the point at which they and the German Nationalists controlled about 200 votes, in contrast to the 160 of the SPD and the Center Party. Since the Communist Party had 57 votes and would oppose a government dominated by either the Nazis or the SPD, majority support could not be found for a new government. The old coalition government then resigned, but under Prussian electoral law it continued to operate as a caretaker until a new prime minister had been chosen and had named his cabinet.

On June 14, 1932, Schleicher set in motion his intricate plan by which political disorder would provide the excuse for dealing, first, with the left and, then, with the extreme right. The federal government lifted a ban on Hitler’s paramilitary organization—the SA—while a similar ban on the communist Red Front remained in force. The decree unbaning the SA was followed by

one of June 28 that prohibited *Land* governments from imposing their own bans on the Nazi organizations. In that month, street battles became the order of the day, as the triumphant return of the Nazi paramilitary to the streets brought a furious and bitter response from the communists.¹⁴

On July 14, Papen secured the emergency decree from Hindenburg that permitted him to usurp the Prussian government’s powers. This was on the wholly contrived pretext that the Prussian government, in particular the SPD element, intended to conspire with the communists to act against the Nazis. Papen kept this decree “in his pocket” until the outbreak of violence gave him the excuse he wanted. On July 20, the Prussian government was forcibly removed from office, and Papen became commissioner for Prussia. The Prussian government sought an injunction from the *Staatsgerichtshof* to prevent Papen from taking office, but this was refused on July 25, on the ground that the injunction would anticipate the final decision of the case.

That final decision was given on October 25 and upheld Prussia’s right to participate as an independent political entity at the federal level, but it effectively gave the Reich government the free hand it wanted in Prussia’s internal affairs. In any case, the time that had lapsed was more than ample for the destruction of Prussia’s republican institutions. The Nazis were only months away from power and given to increasing public indications of their contempt for law and order, which gave the lie to Papen’s pretext for intervention in Prussia.¹⁵

In short, even if the court’s decision had gone against the cabinet, its direct effect might not have been large. But if the court had declared the coup unconstitutional, then a major crack would have opened in the veneer of legality that Papen and Schleicher sought to paint over their attempts to establish government by decree in Germany. While both were willing to use the authority of the president’s office and person to break free of the parliamentary system entrenched in the Constitution, they (and Hindenburg himself) were anxious to be seen to be keeping within the law.¹⁶ In

¹⁴ There were 99 killed and more than 1,000 wounded in skirmishes, most dramatically on Sunday, July 17, in Altona, a communist-dominated suburb of Hamburg, where the battle in the streets left 17 dead.

¹⁵ On July 31 in Königsberg, the Nazis murdered political opponents on the right as well as the left. An emergency decree of August 25, which provided the death sentence for acts of political terrorism, was answered by a particularly brutal Nazi murder of a communist. When those directly responsible were sentenced to death, Hitler publicly applauded them and dedicated himself and the Nazis to securing their release. Erich Eyck (1967, 420–1) aptly describes Papen’s reaction: “And so the same national cabinet that had established a national commissioner of Prussia, ostensibly to preserve public peace and order, broke down in the face of the Nazis’ threats and, on September 2, commuted the . . . assassins sentences to life imprisonment, thus assuring them their freedom as soon as Hitler came to power. Never before had a German government bowed so openly to political terror.”

¹⁶ As Brecht ([1944] 1968, 66–7) put it, by “using only the constitutional remedy of an appeal to the court, the Prussian ministers were led by the desire to preserve the constitutional basis of governmental

¹² Brecht, a former judge and senior civil servant, was a counsellor in the first quasi-democratic cabinet, which oversaw the transition from monarchy to parliamentary democracy. He held high office in the federal government until 1927 and was deeply involved in the attempt to preserve and strengthen democracy at the federal level until he was dismissed on demand of the right. He was then appointed by the Prussian government as one of its chief delegates to the *Reichsrat*, and he appeared before the court to defend the Constitution in 1932. (The *Reichsrat* was a kind of senate but did not function as a full upper house of parliament.) He was removed from office by the Nazis in May 1933, in his words “literally the last official in the service of democratic institutions,” and left Germany in that year to join the faculty of the New School for Social Research in New York; Brecht [1944] 1968, xii–xvi, at xv.

¹³ Article 25.

turn, the legality of Hitler's seizure of power would have appeared even more dubious (Bracher 1984, 525).

Was the coup unconstitutional? An account of the judgment rendered by the court prepares the ground for answering this question.

THE JUDGMENT OF THE COURT

The two crucial paragraphs of Article 48 read as follows:

If a *Land* does not fulfil the duties imposed on it by the Constitution of the Reich or by a law of the Reich, the President can ensure that these duties are performed with the help of armed force.

If the public safety and order of the German Reich is seriously disturbed or endangered, the President may take the measures necessary for the restoration of public safety and order, and may intervene if necessary with the help of armed force. To this end he may temporarily revoke in whole or in part the fundamental rights contained in [a list of basic rights].¹⁷

The decree authorizing the coup claimed to be based on both paragraphs one and two, but in fact Papen's own justification for the coup, and much of the argument put by his representatives before the court, relied heavily on the first paragraph.¹⁸ Papen's case for action in terms of paragraph one rested on the allegation that the Prussian government was, in collaboration with the communists, bringing about a state of disorder by acting unfairly against the Nazis. Any further case for action under paragraph two had thus also to be based on this allegation. And, as we have seen, Papen and Schleicher had sent the Nazis a message of qualified support by unbanning their paramilitary organizations while leaving the ban on the Red Front in place and then decreeing that *Land* governments could not use their own emergency procedures to ban the SA.

The court held in respect of paragraph one that it had to be shown that the Prussian government was not fulfilling its duty in terms of the Constitution and federal law to deal to the best of its ability with the breakdown in law and order. And the court rejected Papen's allegations in this regard (*Preussen* [1933] 1976, 511–3).

In respect of paragraph two, the court held that it did not have to broach the question of whether it was entitled to determine if a breakdown in public safety existed in order to evaluate whether the president was entitled to act. According to the court, the July 20 decree had been issued at a time of manifest breakdown in public order, indeed, when Germany was on the verge of a civil war that threatened the constitutional order itself. It reasoned that the president was

powers and to force Hindenburg back within constitutional bounds." And Hans Mommsen (1996, 452) comments that the "decision blocked the presidential cabinet's road to an open coup d'état."

¹⁷ The basic rights were articles 114, inviolability of personal liberty; 115, inviolability of the home; 117, privacy of mail, telegraph, and telephone; 118, freedom of opinion and press; 123, freedom of assembly; 124, freedom of association; and 153, inviolability of private property.

¹⁸ For the full text of the decree, see *Preussen* [1933] 1976, 481, and for an English translation, Brecht [1944] 1968, 145–6.

entitled to take the measures he had taken—seize control of not only the Prussian police but also the entire machinery of state in Prussia. And, it commented, even if the Prussian claim were true that the situation had at least in part been brought about by the Reich government, the court's reasoning on this score was not affected (*Preussen* [1933] 1976, 513–4).

This left the issues of whether the president had abused his discretion and overstepped its limits. In regard to abuse, the Prussian authorities had relied on allegations, hotly disputed by the Reich government's representatives, that the intervention had come about as a result of negotiations between the Reich government and the Nazis with a view to deposing the Prussian government. The court considered these allegations unproved. But it held that, even if true, the charges failed to show that the decree was not aimed at restoring public safety and order. At most, the allegations offered some insight into why the Reich government became convinced that an intervention based on paragraph two was necessary. In addition, the court dismissed the Prussian argument that the Reich government's intervention in Prussia alone, when there was a general breakdown of law and order, was sufficient proof of an abuse of discretion (*Preussen* [1933] 1976, 514).

The court then rejected the Prussian contention that the measures taken overstepped the limits of discretion since they included all the Prussian ministers in their scope, not just the prime minister and the minister of the interior, that is, the officials directly responsible for maintaining law and order. The court held that the scope of the discretion was for the president and not the court to determine. As long as the chancellor kept within the limits of that discretion, he was answerable only to the president (*Preussen* [1933] 1976, 514–5).

The court did hold that the decree could not contradict the Constitution, and this left some remnants of the Prussian government in place.¹⁹ But in effect this gave Prussia nothing, which was starkly pointed out by one of the court's concluding observations. The court noted that its decision to leave the Prussian government intact for the very limited purposes it considered constitutionally required was a recipe for friction with the commissioner. But, it said, if the friction was caused by an act of the Prussian government that amounted to a violation of its duty to the Reich, then the president could always rely on paragraph one to bring Prussia into line (*Preussen* [1933] 1976, 516–7).²⁰

¹⁹ In particular, the decree of the federal government could not infringe on Article 17, which provided that each *Land* should have its own constitution and government that enjoyed the confidence of the people's assembly; nor could it infringe on Article 63, which guaranteed its representation in the *Reichsrat*. Thus, the court held the decree invalid only to the extent that it purported to deprive the Prussian government of its right to represent Prussia in the Prussian parliament, in the *Reichsrat*, and in its relations with other *Länder*. It also held that the decree could not infringe on Prussia's right in terms of Article 33, which gave each *Land* the right to be represented in and to speak out in debates before the *Reichstag* and its committees (*Preussen* [1933] 1976, 515–6).

²⁰ As Kelsen (1932–33, 81) commented, this observation put a Damoclean sword over what remained of the Prussian government.

We have still to deal with the question of whether the decision had merit. There are three possible answers, each given by the respective legal philosophy of Schmitt, Kelsen, and Heller.

SCHMITT'S ARGUMENT BEFORE THE COURT

Schmitt appeared with four others for the Reich.²¹ He was soon in the thick of things in argument about the correct characterization of the events prior to and on the day of the coup, for Brecht invoked in Prussia's opening address to the court a passage from a text Schmitt had just published.

A main claim of this text—*Legalität und Legitimität* [Legality and legitimacy]—is that a parliamentary democracy is committed to safeguarding above all the principle of “equal chance.” According to this principle, those who happen to hold political power must be committed to keeping open for their opponents the path to power, whatever the political ideology of their opponents. Schmitt finds it absurd that a parliamentary democracy should offer an equal chance to all parties. He asserts in the passage quoted by Brecht that it is suicidal for a parliamentary democracy if the party in power holds to this principle when the opponent is ideologically committed to the destruction of parliamentary democracy (Schmitt [1932] 1988, 37; *Preussen* [1933] 1976, 12). On the face of it, this passage fit snugly into the Prussian argument, for Brecht contended that Prussia had to take all the steps the law allowed to keep the Nazis from power since they were intent on retaining power forever, once they obtained it (*Preussen* [1933] 1976, 11–28).

Schmitt responded, first, that Brecht failed to see that his question was who should decide which party to a conflict should be dealt with as illegal because it is an enemy of the state, the people, or the nation. That decision cannot, he said, be made by one of the parties to the conflict, who would decide in a purely self-interested way. The decision must be made by an independent government (*Preussen* [1933] 1976, 39). Second, at issue was not merely a political conflict that threatened to explode into civil war. Rather, two states confronted each other, one of which was “occupied” by one of the conflicting parties; both demanded the right to make politics and “then politics in the most far-reaching and intensive sense.” He denied that he was questioning the claim that a *Land* in general had the right to a political policy which diverged from that of the Reich. Instead, the issue was Prussia's bid to decide the crucial question of politics—who was an enemy of the state and the Constitution (*Preussen* [1933] 1976, 40–1). Schmitt accused the SPD of a “subterfuge” in its

²¹ Six parties claimed standing as applicants to the court: Prussia, represented by the ministers who had been removed from office; the ministers themselves; the Prussian SPD; the Prussian Center Party; the *Land* Bavaria; and the *Land* Baden. Both of these *Länder* had caretaker governments and so shared an interest with Prussia in the outcome of the case. I will avoid altogether the issue of their argument as to their standing before the court and the court's response.

bid to preserve parliamentary democracy in Prussia. In his view, Prussia itself, or more accurately the SPD's role in Prussia, was the threat to which the Reich government reacted, not the breakdown or threatened breakdown in public safety and order within Prussia (p. 469).²²

Thus, Schmitt considers it irrelevant that it was in a bid to preserve democracy in Prussia and in Germany as a whole that the Prussian SPD had engineered a role for a caretaker government in the event the republican parties could not command a parliamentary majority. The issue for Schmitt had nothing to do with the Prussian government's inability to command majority support. As Heller pointed out in argument before the court, the Reich government itself had no mandate from the *Reichstag* (*Preussen* [1933] 1976, 250). For Schmitt, then, the Papen government's mandate—its legitimacy—stemmed from its independence from parliamentary politics. This independence rendered it capable of dealing with its enemies, who included those wishing to save parliamentary democracy as well as the Communist Party. Indeed, for Schmitt it is political parties in general that pose a threat to state sovereignty. A decision to intervene to preserve parliamentary democracy would perpetuate the struggle between political parties that, according to Schmitt, “poisons” Germany (p. 39). A government that enjoys a parliamentary mandate is part of the problem since such a government is under the control of one or more political parties.²³

Schmitt went on to claim that the Constitution was silent as to whether a *Land* was guilty of failing to fulfill its constitutional responsibilities when it adopted a different policy from the federal government. The question was one of constitutional interpretation that had to be settled by reference to the meaning of the Constitution as a whole and to its historical origins. Schmitt, however, in turning here to an idea of the totality of the Constitution, is not advocating an approach to constitutional interpretation which seeks to achieve a coherent understanding of the whole document. For, as we shall now see, what Schmitt means by totality is not at all the relevant sections of the Constitution, but those elements that provide a basis for sovereign decision.

Schmitt argued that paragraphs one and two of Article 48 had to be understood as part of one structure devised by the framers of the Constitution to protect the unity of the Reich. That meant protecting against the threat of civil war when political parties felt no obligation of loyalty to the internal policies of the

²² For strikingly ambiguous claims in this regard, see Schmitt in *Preussen* [1933] 1976, 288–91, at 290–1; compare Heller's response at pp. 292–4. Schmitt also indignantly rejected the “insulting equation” of the Nazis with the Communist Party (and thus the Prussian attempt to discredit Papen). He maintained that when the Reich government had decided to change its practice regarding the Nazis, this was simply in “objective and rightful” recognition of the simple fact that millions of Germans supported the movement (p. 39).

²³ As Schmitt put things in the concluding paragraph of his essay published on behalf of the Reich government, the issue was not one of Reich and state against Prussia, but of Reich and state against party and political faction (Schmitt 1932, 958).

Reich government. He asserted that, in such a situation, a *Land* was obligated to follow government policies and could be compelled to do so by the government acting in terms of paragraph one, while the Reich government simultaneously took the steps it deemed fit under paragraph two to restore law and order (*Preussen* [1933] 1976, 130–5, 175–81).

In his concluding remarks, Schmitt did not shy away from the radical implications of his argument. He addressed the procedural presuppositions of the case and in effect questioned the value of legal process itself. First, Prussia's standing to argue before the court was at issue since the decree purported to replace the Prussian government with the commissioner. Second, he dealt with the jurisdiction of the court to pronounce on the validity of the decree itself as well as the action taken in its terms. These were, Schmitt maintained, not only legal but also deeply political matters. In regard to standing, he argued that while Prussia had standing, the Prussian government had none, since it had been constitutionally replaced by the commissioner. Of course, this crudely begs the question of constitutionality, but Schmitt's argument is that the court cannot pronounce on that issue since it is a political one.

Schmitt did not contest the claim that the court was the guardian of the Constitution. Rather, this role of the court was confined by its character as a court of law, and thus it was guardian only insofar as an issue was appropriate for a legal and judicial body. Since the issues in this case were deeply political, and the president was the guardian of the Constitution in matters political, the question of constitutionality was for him to decide. For Schmitt, this role for the president was made clear by the powers given him in Article 48 to decide the crucial questions of politics (*Preussen* [1933] 1976, 466–9).

Although Schmitt believed that political power transcends all legal constraints, there is what we might think of as a quasi-normative constraint on power. Schmitt's academic writings argue that the political sovereign is not simply he who commands the resources of power (Schmitt [1932] 1976, [1922] 1988). Such command is a necessary but not sufficient condition for an exercise of sovereign power, for Schmitt holds that, in addition, the sovereign decision has to make the distinction between friend and enemy.

Now we can fully appreciate Schmitt's response to the use of his work by Brecht to buttress Prussia's argument. Schmitt is not claiming in the passage quoted by Brecht that a parliamentary democracy must make the friend/enemy distinction if it is to save itself. Rather, his claim is that a parliamentary democracy is potentially suicidal since it cannot make the distinction it needs to protect itself.

The point of Schmitt's distinction between friend and enemy is the "substantive homogeneity" of the German people. More accurately, the decision as to who is friend and who is enemy is an existential one in the sense that it makes substantive homogeneity possible. It simultaneously brings "the people" into existence and ensures their preservation. Once substantive homogeneity is in place, the individuals who compose

the group have a worth that far transcends anything a liberal democratic society can offer ([1932] 1976, 47–53, [1928] 1989, 209–10).

Thus, the quasi-normative constraint that makes a decision a genuine political decision is its friend/enemy distinction. Ruled out is an attempt to perpetuate parliamentary democracy, for such an attempt adopts what Schmitt considers to be the pretense of liberal legalism. That is, it pretends that the distinction between friend and enemy has no place in its politics. It then contradicts itself by permitting to flourish interest groups which are dedicated to the kind of ideology that seeks to eradicate the idea of substantive homogeneity altogether (Schmitt [1932] 1976, 69–79).

The major weakness of Schmitt's legal theory is, I submit, the difficulty of accepting that it is an account of constitutionality and legal order. As Heller pointed out in his argument before the court, the case Schmitt argued on behalf of the Reich seemed to lead inexorably to the conclusion that there was no more to the Weimar Constitution than the emergency powers contained in Article 48 (*Preussen* [1933] 1976, 248–9).²⁴ To come to this conclusion, to hold that Article 48 is to be interpreted in a normative vacuum, is to hold that it merely provides the occasion for an exercise of power. The idea of emergency powers is then made vacuous, since it presupposes that the powers must be used to restore a state of *ex ante* legality whose norms continue during a state of emergency to limit executive action. Indeed, the very idea of a state of emergency is made vacuous, since the decision that a state exists is put in the exclusive control of the executive.

The conclusion clarifies an ambiguity in Schmitt's work in the 1920s on emergency powers and on constitutional theory (Schmitt [1928] 1989, [1922] 1989). In those writings he often seems ultimately undecided as to whether law can ever effectively constrain political power. But the conclusion that a genuine political decision is not subject to legal constraints follows directly from the most famous sentence of his corpus, penned in the early 1920s: "Sovereign is he who decides on the exception" (Schmitt [1922] 1988, 5).

This ambiguity reflects, I suggest, the attitude of many Germans to Weimar. But it did not exist merely in the heads of those doubtful about or hostile to the idea of German democracy; it was embedded in the structure of the Weimar Constitution. That fact was highly significant for those who were dubious about or hostile to Weimar. In their eyes, the loss of the kind of legitimacy that disappeared with the monarchy meant the introduction of a permanent state of emergency, since they either doubted or outright rejected the thought that there could be any other kind of legitimacy. In other words, the fact of constitutional ambiguity maintained a permanent opportunity to restore the legitimate regime, as they understood it. But, in the

²⁴ Heller's comment was directed primarily at another of the Reich's legal representatives, Professor Jacobi, whose argument went even farther, according to Heller, than anything Schmitt had argued. But Heller clearly meant to include Schmitt's argument within the scope of his comment.

absence of an hereditary monarchy, legitimacy is existentially created and then authenticated through the acclaim—the “Ja”—of the people (Schmitt [1928] 1989, 81–91). Hence, Schmitt’s account of politics and law is ultimately committed to welcoming the advent to power of any force that will make the friend/enemy distinction in order to establish the substantive homogeneity of the German people.

The argument Schmitt presented to the court was thus to ask it to rule that it had no role to play in deciding on substantive legal constraints on the federal government, that it had no authority to make any ruling save that it had no authority. The court did not accept this role. As we know, it upheld Prussian claims to its status at the federal level, it asserted its right to scrutinize the legality of executive claims to authorized action under Article 48, and it rejected the federal government’s claim to have authority in terms of Article 48.1. But in rejecting any authority to scrutinize the substantive merits of the federal government’s case in terms of Article 48.2, the court made an almost empty shell of the legal constraints it did uphold, which gave the federal government most of what it wanted.

In effect, the court seemed to vindicate Schmitt’s claim that the limits set by legalism are in substance no limits at all. And I will now show that his claim is supported to the extent that Kelsen seems unable to argue the court should have done better.

LIBERAL LEGALISM

Early in the era of presidential rule by decree, Kelsen saw where Schmitt’s line of reasoning would end. In a 1930 essay, Kelsen argued that constitutional review of executive action by judges is merely the most logical way of ensuring that government action stays within the law. Such review ensures conformity to what he calls the principle of legality. Schmitt’s claim that the president is the sole guardian of the constitution, unconstrained by law, would culminate, Kelsen predicts, in an “apotheosis” of Article 48; parliamentarianism would be destroyed by a mystical force that regards parliamentary democracy itself as the source of all threats to public safety and order (Kelsen 1930–31, 622–3). And as Kelsen later argued, the court’s judgment on the constitutionality of the coup brought about that apotheosis (Kelsen 1932–33).

Kelsen stated that the court was right to uphold its authority to inquire into the presuppositions of Article 48.1 and 48.2. This amounts merely to the court assuming its unrestricted jurisdiction in such matters, a jurisdiction granted by Article 19 of the Constitution (Kelsen 1932–33, 69–71). It follows that the court had the right to decide what measures were appropriate. But he finds that the court’s treatment of this particular issue is highly ambiguous: It vacillates between formulations that give a wholly unfettered discretion to the president and formulations that seek, to a greater or lesser degree, to limit that discretion. In particular, he argues that the court’s reasoning is fundamentally and irreparably contradictory. It has no principled reason

for upholding some legal constraints but not others (pp. 73–7).

According to Kelsen, the court attempted to repair this contradiction by making a distinction between the discretionary powers of the minister of a *Land* with respect to the particular affairs of that *Land*, which may be removed, and all others, which may not. The ground of the distinction offered by the court was simply that the latter pertain to the preservation of the independence of a *Land* and its place within the Reich and so are inviolable. But, Kelsen asks, how can a *Land* exercise these powers when their basis, that is, the entire internal administration, is at the disposal of officials appointed by the president? Not only is the distinction impossible to put into practice, but also there is not the slightest justification for it in the positive law. Henceforth, to the extent that there is any administration, its foundation resides neither in the Weimar nor in the Prussian constitution; it must reside in the norm contained in the decree of the president (Kelsen 1932–33, 77–81).

Kelsen also comments adversely on the court’s express wish for cooperation in such circumstances between the governments of the Reich and a *Land*. Such cooperation is legally and politically impossible, especially because of the Damoclean sword hanging over the *Land* by virtue of the court’s interpretation of Article 48.1. That is, the court says the president can intervene should the government of the *Land* fail to fulfill its duty in its remaining sphere of operation. And, Kelsen notes, it hardly seems that anything could be done in violation of the government’s duty, since government has in effect been removed (Kelsen 1932–33, 81–3).

Up until this stage of his analysis, Kelsen generates in the reader the expectation that the court had the power and even the duty to invalidate the decree. In particular, it could have declared that the presuppositions of action under Article 48.2 had not been fulfilled or that, while they had been fulfilled, the measures in fact adopted went beyond the powers of the president because they overstepped absolute constitutional limits. But the last part of Kelsen’s analysis lets the court entirely off the hook.

Kelsen begins this part by drawing attention to what he takes to be a flaw in the court’s judgment. The court did not in fact declare which particular aspects of the federal government’s decree were invalid or valid, but merely said that action in terms of the decree would be invalid “insofar as” it impinged on the inviolable constitutional provisions. Kelsen’s opinion that this is a flaw is driven by the claim that the norm contained in the president’s decree is valid until it is in fact nullified, and hence it is only voidable; that is, any presidential decree is valid until expressly invalidated by the court, as long as the decree is within “the limits of his authority” (Kelsen 1932–33, 82–5). In the absence of a declaration of invalidity by the court, the president’s decree remains valid.

According to Kelsen, this flaw is compounded by the fact that Article 19 of the Constitution, which established the court, concludes: “The president will execute the judgment of the court.” Two interpretations of this

article are, he states, possible: Either the judgment is declaratory of invalidity and thus immediately effective, or it is effective from the time of execution by the president. On the first interpretation, the judgment in this case is ineffective because it is altogether unclear what the court invalidated. On the second interpretation, it is for the same reason unclear what the president is required to do, that is, whether he is obliged to issue a new decree or to invalidate the old, and so he is not in fact obliged to do anything (Kelsen 1932–33, 85–9).

Kelsen then ends his critique of the judgment by exonerating the court. The result of a juristic or scientific analysis is, he declares, unsatisfying. The root of this difficulty is not the judgment but the technical inadequacy of the Constitution. It does not provide effective checks for its preservation, in particular no constitutional court properly equipped and aware of its role in exercising control over application of Article 48. This was not an oversight but a consequence of the age-old opposition of German jurisprudence to judicial control of what it takes to be an extralegal “political sphere.” Control was given instead to an “executory law,” a statute of the *Reichstag* that would, in terms of Article 48.5, “determine the particulars” of valid action; but the *Reichstag* had never gotten round to enacting such a statute.

Kelsen asserts that, as a result, the president had an unfettered discretion. The authors of the Constitution no doubt intended for the president’s powers to be strictly limited to the restoration of order and security in the narrowest sense. But this intention, which is not as easy to determine as the content of a statute, and which, even if determinable, is not the exclusive basis for interpretation, was not given an adequate technical expression.

Thus, in the absence of a general norm contained in a statute determining the limits of Article 48, an extensive as well as a restrictive interpretation is permitted. It thus would be self-deceiving to suppose that Article 48 could not be used to change the federal state into a unitary state. The boundaries of Article 48 cannot be discovered in the process of interpretation but only in the process of constitutional lawmaking.

Kelsen concludes that the interpretation of Article 48 entailed by the president’s decree was not only as plausible as the court’s but also, from a political standpoint, to be preferred. While it was a radically centralizing measure, it at least brought about, technically speaking, an administratively manageable situation. In contrast, the court strove to find a middle ground that actually increased the legal confusion. “The Weimar Constitution is not saved on the golden middle way which the court sought” (Kelsen 1932–33, 89–91).

Of course, this conclusion and the argument leading to it allow for the possibility that the court could have done what Kelsen clearly regards as legally permissible from a scientific point of view. That is, the court could have issued an order which both had the requisite constitutive character, an act of clear judicial legislation, and invalidated the decree in whole or in part.

Moreover, Kelsen tends toward advocating invalidation in whole.

But in choosing to focus on the court’s failure to give its order this character, Kelsen seems to make clear his view that whatever the court ordered, as long as its order was both constitutive and clear, would be equally valid from the standpoint of legal science. Thus, the court could just as well have ordered that the decree stand as a whole. Kelsen believes such an order to be the effect by default of the judgment and in a way preferable because the situation of radical centralization is at least unconfused. He is, therefore, prepared to go even farther than the court, since he holds that even the formal limits the court upheld, in particular the principle that Prussia’s right at the federal level was inviolable, could be abolished by the president’s decree.

On the one hand, then, Kelsen’s argument tends in the following direction. Constitutional review is the technically appropriate means for bringing to expression the principle of legality, which is identified as a principle by legal science. The issue in the case, although it concerns an actual political conflict, is also a legal question and eminently justiciable, that is, decidable by a court. The appropriate judgment is one which would have upheld the democratic and federal structure of the Constitution. On the other hand, he wants to argue that legal science has little to say on this matter, because from its standpoint a judgment that the decree was constitutional and that it was unconstitutional are equally political acts of judicial legislation. Neither the positive law nor Kelsen’s legal theory supply any legal reason to reject Schmitt’s argument before the court.

In sum, Kelsen seems at times to be developing a theory of constitutionality that would show how the formal aspects of a legal order impose genuine constraints on political power.²⁵ This theory appears to be organized around a principle of legality which gives substance to the idea of the *Rechtsstaat*. It is in terms of such a theory that he criticizes both Schmitt and the judgment. As soon as Kelsen comes to the point of saying what such constraints would amount to, however, he either seems to retract entirely or to say that debate about such constraints is a matter for politics, not legal science.²⁶

Why does Kelsen reach this conclusion? He holds that the correct or scientific account of legal order is given by his Pure Theory of Law (Kelsen [1934] 1992).

²⁵ The case for this view of Kelsen is made in detail in Dyzenhaus forthcoming.

²⁶ Indeed, Kelsen’s major criticism of Schmitt is not with the substance of Schmitt’s legal and political agenda but with dressing up the agenda in a legal argument, whereas in truth Schmitt was advocating a political position. In other words, Schmitt is criticized not because of his political objective to expand the powers of the president but because he presented his objective as a “scientific treatment” (Kelsen 1930–31, 627–8). One should not ignore that there is a certain force to this point. Schmitt usually adopts the guise of the legal scientist, a dispassionate commentator on legal order. Only occasionally does he let this mask drop and allow his passion for the political to peep through. Kelsen shows effectively how Schmitt’s conception of the political drives everything else in his theory.

That is, a legal system is a hierarchy of norms, and the validity of each is traceable to a more fundamental norm, until one hits bedrock in the *Grundnorm* or basic norm of the system. Such an order is free of contradictions since any apparent conflict between two norms will be resolved by a more fundamental norm, which gives an official the power to make a binding decision. Similarly, any factual matter to which the law is relevant can be resolved by the law, not in the sense that one can deduce the content of the right decision from a higher-order norm, but in that there will be a higher-order norm which empowers an official to make a binding decision. Since the validity of the basic or constitutional norm cannot be traced to any other norm, Kelsen asserts that its validity therefore must be assumed. The content of the basic norm is contingent on what the founders of the particular legal order in fact willed (pp. 59–60).

Kelsen often claims that any state is a *Rechtsstaat*, no matter the political ideology it serves—communist, fascist, or liberal (Kelsen [1928] 1981, 253). He also states that any dispute as to whether and how the law resolves the facts of a particular case is settled by an act of official discretion, for example, by the judge determining an outcome by ultimately resorting to his own political and ethical views (Kelsen [1934] 1992, 67–8, 84–9).

The major problem for the Pure Theory is that it seems to exemplify exactly the contradiction Schmitt claimed to be endemic to liberal legalism. It seeks to constrain politics by law but ends in a position whereby the political, free of all legal constraints, seems to dictate decisions as to what the law is. The political, that is, provides the criteria for judgment.

In addition, it is difficult to see just what basis Kelsen might offer for criticizing the political ambition of Schmitt's authoritarian theory. At times he comes close to arguing that his understanding of the principle of legality is that one which is required to make sense of a system of parliamentary democracy, itself seen as the fulfillment of a commitment to individual liberty (Kelsen [1929] 1981). In his view, democracy is the political system which creates a coercive order of the kind that screens out any claim that the majority possesses the truth, or that the minority can ever be entirely wrong, by keeping open the opportunity for the minority to become the majority at any time (pp. 101–3).

But, despite the fact that Kelsen seems committed to establishing the *Rechtsstaat* as the legal order of parliamentary democracy, he retreats just before his argument makes a substantive connection between law and political values. His retreat is the result of an avowed relativism about political values, a stance which precludes him from bridging his conceptions of political and legal order by dint of a fully argued commitment to a substantive political theory. Democracy is to be preferred only because it is the expression of a political relativism, itself the product of an epistemological relativism.

Kelsen's position in legal theory, which drives his analysis of the judgment, thus maps neatly onto his

position in political theory.²⁷ The latter perceives no qualitative difference between the legal order of a parliamentary democracy and the legal order established by a dictator.

HELLER'S DEMOCRATIC VISION

Heller was determined to make the case that the pattern of events both before and after the coup showed that, far from being the action of the independent, apolitical government portrayed by Schmitt, the coup was the result of deliberate arrangements between the Nazis and Papen's cabinet. That would, in his view, suffice to show an unconstitutional abuse of discretion (*Preussen* [1933] 1976, 76–7).

The president of the court, Bumke, put to Heller a question which clearly presaged the court's judgment on this issue.²⁸ Even if such arrangements were relevant to the issue of action under paragraph one, did they have any relevance to action under paragraph two? That is, was Heller denying that public safety and order were disturbed and endangered in Prussia prior to the coup (*Preussen* [1933] 1976, 77)?²⁹

Heller's response denied the premise that the disturbance was of the kind contemplated by Article 48. He said that public safety and order had been constantly disturbed in Germany since 1914. The question for the court was whether the disturbance in Prussia was of such a magnitude as to justify intervention and, if so, an intervention that abolished the government when at the same time the Reich government did not act against the other *Länder* in that way.

In Heller's view, the crucial question for the court was whether the Prussian government had been willing and able to deal with the disturbance. Not only was that clearly the case, he maintained, but also, in view of the

²⁷ A complicating factor in any evaluation of Kelsen's monograph on democracy is what status he himself would have assigned it: whether he regarded it as an exercise in value-laden political theory by contrast with his work in legal science. My view is that he at the least saw it as a work of political science, that is, a work about politics from the same scientific standpoint as his work in legal science.

²⁸ Heller's appearance before the court on behalf of the Prussian SPD was not a happy one. He lacked Brecht's cool demeanor and, indeed, was often both sarcastic and angry. His opening salvo against Papen and Hitler brought a rebuke from Bumke that set the tone for their interaction throughout the hearing; *Preussen* [1933] 1976, 35–7, at 37. For further such ill-tempered exchanges between Heller and Bumke, see pp. 63–5, 250, 470, and especially 410–1, where Bumke reacts in a way that shows his anger at Heller's challenge to the court. The tone of the exchanges between Schmitt and Heller was also angry; see, for example, pp. 356 and 470. Bumke a respected, highly conservative jurist during Weimar, threw in his lot with the Nazis after 1937 and committed suicide in 1945. For a scathing account of his career, see Müller 1991, 39–45.

²⁹ Heller's determination in this regard created some tensions between his own argument and that presented by Brecht, who had announced at the outset that the Prussian government did not seek in any way to impugn Hindenburg's integrity, but merely wanted to make sure he had the right information and the right understanding of the Constitution. And Brecht extended this courtesy to the motives of the Reich government (*Preussen* [1933] 1976, 8–9). Bumke did his best to play on this tension (p. 77) and to cut off Brecht's and Heller's attempts to play on tensions in the Reich's arguments; see, for example, pp. 85, 187. Heller ([1932] 1992a, vol. 2) had already sketched this argument in a response to Schmitt.

events following the coup, it had proved itself better able to do so than had the commissioner (*Preussen* [1933] 1976, 77–8).

Heller acknowledged that in practice the question of the validity of action in terms of the different paragraphs could be linked. But in contrast to Schmitt he argued that, in the context of the coup, if action under paragraph one was not justified, then the Prussian government could fulfil its duty of maintaining public peace and order, and thus there could be no basis for intervention under paragraph two. His argument was that the lack of a basis was demonstrated by the kind of intervention that occurred, namely, an obvious political strike against the Prussian government to rid it of SPD influence.³⁰ In particular, he rejected Schmitt's premise that a court was not competent to assess the validity of action in terms of either paragraph because Heller rejected Schmitt's argument for that premise—to grant such competence to a court would constrain the president's power so as to threaten the destruction of the Reich.³¹

The importance of Schmitt's premise for the Reich's case is clear. The initial proclamations to justify the coup relied more heavily on paragraph one than paragraph two. That is, once the court is conceded the competence to decide on the validity of action in terms of paragraph one, then there is a risk the court will find, as it did, that the action could not be justified, which almost compels a similar conclusion in terms of paragraph two. As we have seen, only the court's finding that any threat to public safety and order was sufficient to justify whatever decree the president saw fit to issue overrode the logic of the argument which invalidated the decree.³²

Heller, indeed, warned the court in the clearest terms of the consequences of a decision of the kind it eventually reached. If the court were to uphold the validity of the Reich's intervention, it would in effect uphold the contention that the participation of the SPD in government was in itself a threat to public safety and order. The SPD's role in building democracy in Germany would then be at an end, and, Heller declared that the consequences were obvious to all present.

He noted that Brecht had invited the court to speak clearly if it were to uphold the validity of the intervention. Heller, as a social democrat, invited the court to do the same, for then the political situation of Germany would be clear for once and for all. As a jurist and a German, however, he wanted the court to take account of the fact that the route one adopts to reach an end can be crucial and that one cannot build a legal order without being genuinely bound to the law (*Preussen* [1933] 1976, 406–9).

As Heller made clear in an essay published shortly after the coup, his argument depended on the idea that

an unlimited jurisdiction or competence is self-contradictory. He argued that the president's jurisdiction under Article 48 had to be limited by the very Constitution which granted it. Those limitations were the ones that accorded with the correct understanding at law of the presuppositions of the Constitution (Heller [1932] 1992a, vol. 2).³³

In his monographs on legal theory, Heller argues that the standards for correct judgment about the content of law are legal, and he says that these standards must govern legal interpretation, including interpretation by judges. His position differs from Schmitt's in that, with Kelsen, he thinks law provides a constraint on power. But he differs from Kelsen in holding that the constraints can be given substance only by principles of law which, while immanent in legal order, are in their nature political and ethical and fundamental to such order (Heller [1934] 1992, vol. 3, 332–3).³⁴

Heller argues that one cannot make sense of the idea of legal order without recognizing the role of such fundamental principles of law in constituting legal order. The rules of positive law, which for Kelsen are what law amounts to, according to Heller are made possible only by the existence of these fundamental principles of law. Moreover, the role of positive law is to give content to the fundamental principles. Thus, an awareness of their existence is essential to the interpretation of positive law.

Heller acknowledges that, even if one assumes the existence of fundamental principles, such as equality before the law, their content is controversial. Furthermore, just as the existence of positive law is made possible by the fundamental principles, so they in turn require the existence of positive law in order to manifest themselves in legal order. They thus require the existence of a political decision unit, a sovereign entity capable of making the decisions that positivize fundamental principles. It might then seem that the content of positive law is arbitrary, dependent as it is on the character of the people who staff the decision unit.

Heller's response to this claim is that it rests on the mistake made by both Schmitt and Kelsen when they suppose that legal meaning is up for grabs in a case of political controversy as to the content of positive law, which cannot be solved by the positive law. It is a mistake for at least two reasons. First, it assumes the truth of the relativist position that controversy over

³⁰ For further argument along these lines, see Heller in *Preussen* [1933] 1976, 379–80.

³¹ *Preussen* [1933] 1976, 135–9, esp. 138–9, referring to Schmitt's argument at 130–4. See also Heller at pp. 167–70, p. 186.

³² Subject, of course, to the notional constitutional constraints the court upheld.

³³ This argument is anticipated in Heller [1927] 1992, vol. 2, 127. It is important to appreciate that prior to 1930 Heller was hostile to judicial review, although it is not clear to what extent his hostility was based on the conservative, even right-wing, character of the German judiciary or on a democratic theory which confined the legislative role to parliament (Heller [1929] 1992, vol. 2). One interpretation of his advocacy for an activist role for the court in this case is that it was driven purely by the political impotence at this time, of the *Reichstag* which had the authority under paragraph three of Article 48 to revoke emergency measures. My own view is that there is a basis for a theory of democratic judicial review in Heller's work, one which was merely brought to the surface by the events of the 1930s.

³⁴ On this understanding of Heller, his work would provide a better basis for the theory of value-oriented judicial review in postwar Germany than the conservative and highly influential work by Rudolf Smend, whose constitutional writings from this period are included in Smend 1995.

legal interpretation among different groups means there is no rational resolution of those issues. That is, the only resolution is by irrational mechanisms of politics. Second, it fails to see that politics is not merely the irrational play of forces, that political power is in its nature subject to legal constraints (Heller [1929] 1992, vol. 2; [1934] 1992, vol. 3).

We are now in a better position to understand the point of Heller's argument before the court. He did more than call for a return to the legal status quo ante of parliamentary democracy. He wanted the court to understand that it had to play a role in restoring the institutional or organizational integrity of democracy. He was asking the court to help keep alive the democratic impulse of the Weimar Constitution because this impulse should inform the judicial understanding of fidelity to law.

His remark that Germany had not enjoyed public safety and order since 1914 goes to the heart of the conflict between pro- and antirepublican forces in Weimar. As we have seen, Article 48 was drafted in anticipation of the need for central government to deal with political crises whose resolution outstripped the ordinary mechanisms of politics and law. Its particular structure, and the failure of the *Reichstag* to take advantage of Article 48.5 to "determine the particulars" of valid action, meant that embedded in the Weimar Constitution was a fatal ambiguity between two conflicting political commitments. On the one hand was the commitment to the legitimacy of parliamentary democracy, on the other was the commitment to the legitimacy of a charismatic leader.

It is worth noting that Friedrich Ebert, the first president of the Weimar Republic, often resorted to Article 48 between 1918 and 1925, not only to put down rebellions from the extreme right and left but also, much more frequently, to deal with economic, fiscal, and social problems. He thus set the stage for the practice by the presidential cabinets of late Weimar, but there is a crucial difference.

While the *Reichstag* accepted Ebert's actions in derogation of its legislative rights,³⁵ there was no doubt that everything he did sought to bring about, under very difficult economic, social, and political conditions, a period of stability in which democracy could take root. Indeed, he tried to avoid use of Article 48 and preferred to ask the *Reichstag* for an enabling statute that gave him authority for a limited period to legislate by decree on a particular issue, an authority which was subject to parliamentary veto (Rossiter 1948, 44–9).

In other words, Ebert's use of Article 48 presupposed that the normal, constitutional situation was parliamentary democracy, and the particular measures he took were directed by the norms of that situation. It was not political conflict per se that constituted an emergency but political conflict which threatened the maintenance of parliamentary democracy. Such an understanding of a state of emergency meant that both its definition and its resolution were framed by law.

Schleicher and Schmitt, in contrast, considered the

perpetuation of parliamentary democracy amid the turmoil of late Weimar to be the state of emergency to which the federal government should react. And that reaction was clearly aimed at establishing a new constitutional and legal order through the back door of Article 48 (Mommsen 1996, chapter 12).

In sum, Heller's view that there was no state of emergency did not deny the extreme nature of the political crisis faced by both the federal and the *Land* governments in 1932. Rather, he perceived a state of emergency as not simply a political crisis but as a constitutional-legal response to such a crisis. No matter the depth of political conflict, for a declaration of a state of emergency to be valid, it must be aimed at the return to the normal, constitutional situation in whose service the relevant legal provisions stand. The fact that the *Reichstag* had never enacted the executory law under Article 48.5 did not mean the legal norms which such a law would have concretized had no application. If the court were to make any sense of its role as an essential component of legal order, it had to apply an understanding of just those norms.

Heller thus thinks that to make sense of the idea of the *Rechtsstaat* one must attempt to link together law, politics, and democracy in one theory about legal order. Kelsen's constant refusal to take the messy step of bridging conceptions of legal and political order collides with his recognition that virtually every legal decision has to take politics and morals into account. By contrast, Heller integrates his theory of the appropriate political organization of democracy and his account of legal order in a way that directly confronts concrete questions of appropriate institutional arrangements.

Heller is in one respect similar to Kelsen: He wants to emphasize that law provides us with a means to positivize values. But he departs from Kelsen in supposing that there must be a point to the process of positivization. The point comes from the realization that we have to make our order of values together—that the final court of appeal does not lie beyond our collective sense of what is right and wrong. But law is then not just an instrument of that collective sense. Rather, law is the way of ascertaining that sense in a process in which those charged with authoritative determinations of the content of the law are kept accountable. Put differently, the legal order is not just an instrument of democracy but an essential part of its realization.

For Heller, the basis of legal order is in part a social one, the citizen's sense of both the actual level of social equality reached and the commitment of the society to social equality. It is in part a political one, the sense of whether politics makes room for citizens to be authors of their own political and social order, so that they are able to influence both legislation and law reform. In the terms Heller uses to describe the citizen, this sense is one of the contingency of the concrete order established by law. It is contingent in that it is the result of politics, but of politics conducted within democratic institutions and thus subject to change. This sense of contingency, that is, requires the institutions of the

³⁵ It only once required cancellation of a decree.

democratic *Rechtsstaat* to be intrinsic elements of legal order. It is one which makes the following criteria for the validity of law: the democratic process of its production, its implementation and execution through a system of the division of powers, and its openness to reform in the light of citizens' experience of it (Heller [1928] 1992, vol. 2; [1932] 1992b, vol. 2).

Heller's view is that the point of the democratic institutional structure of the *Rechtsstaat* is to make it possible for the values of social and political order to be positivized in a way that makes the powerful accountable to the subjects of their laws. Morality, in the sense of the values by which the collectivity can legitimately require we live, is just the set of values that are concretized through the positive law. The subjects of the law become its authors through their representatives, who enact legislation, but their authorship does not end there—it continues through an appropriate process of concretization of the legislation.

What makes that process appropriate is that, both institutionally and substantively, the interpreters of the law must regard themselves as participating in a process of legislation which instantiates fundamental ethical principles of law. Most abstractly, these are the principles that promise both freedom and equality to all citizens. The ultimate check on delivery of such promises can be nothing other than the individual legal conscience—the individual citizen's sense of whether the law is living up to its promise (Heller [1934] 1992, vol. 3, 333–9).³⁶

Indeed, Heller regards the seeds of modern democracy as sown with the appearance of two ideas: The law binds the rulers to the ruled, and the rulers must find an immanent justification for their rule. Legal process is not then empty form but a process with a substantive point which both shapes and is shaped by the process. To forget this is to legitimate the abuse of legal form by those who want to use it as a cloak for their attempt to seize power.

LESSONS FROM WEIMAR?

Let us return to the question of how, in light of Weimar, political and legal philosophy should respond to the fact of pluralism—the fact of conflict about fundamental values.

Under the direction of John Rawls (1993), liberalism now seems driven by the fear that to claim truth for one's position is to invite a clash of truth claims, which can only breed dissent and conflict. Hence, in seeking to set out the values of the domain of the political, liberalism must claim only that these are the values to which it is reasonable to assent. These "freestanding" values together make up an "overlapping consensus" about the basics of political and legal order (p. 140).

For Rawls, these values stand free of comprehensive positions or individual conceptions of the good life.

³⁶ In the pages cited in the text, Heller argues that it is a necessary paradox of the democratic *Rechtsstaat* that the ethical right of resistance of the legal conscience is something which has weight but no legal recognition. I explore his complex position on this issue in Dyzenhaus forthcoming.

While such positions perforce claim truth for themselves if they enter the space of public reason or constitutional discourse, the values constituting that space claim only reasonableness. But the claim to reasonableness is far from modest. It operates to exclude the truth claims of comprehensive positions from the public and requires them to contest one another only within the sphere Rawls calls the "social" (p. 220).

Rawls recognizes the effects of relegating comprehensive positions to the social sphere. Illiberal groups will find it hard to maintain themselves since their comprehensive positions are perforce undermined by the public culture of political liberalism (pp. 199–200). And Rawls is clear that if such groups try to gain control over politics they should be "contained" (pp. 37, 54, 60–1). Indeed, in an emergency situation, when it appears containment is not working, political liberalism may have to drop its claim to mere reasonableness and assert its truth in a conflict over political fundamentals (pp. 152–6). Rawls thus seems to vacillate between a curious "epistemic abstinence" about fundamental political values and a deep practical and epistemological commitment to them.³⁷

I suggest that there is more than a passing resemblance between this vacillation and Kelsen's refusal to bridge his conceptions of political and legal order by dint of a fully argued commitment to a substantive political theory. The claim to reasonableness of Rawls's political liberalism and the claim to purity of Kelsen's legal theory aspire to a neutrality that will not alienate otherwise fundamentally divided groups. They both wish to preserve democratic politics by not insisting on the rightness of a set of values. But their methods of avoidance create a tension with their commitment to democratic politics.

Indeed, I suggest that Rawls and Kelsen end up gravitating toward opposite poles of the tension within the liberal idea of the rule of law which Schmitt wishes to highlight. This is the tension between a neutrality so neutral that anything goes and a neutrality which is sham because in effect it privileges a partial liberal understanding of the good.

On Kelsen's positivist conception, laws with any content at all can fit the criteria for the validity of law. Unlike Kelsen, Rawls wishes to privilege certain values as the values of politics. He thus proposes criteria of validity which have more (liberal) substance to them. But since, like Kelsen, he wants truth claims to be checked at the door of politics, he remains evasive about their status in a way which invites the charge of sham neutrality.

The tension in the liberal conception of the rule of law can be reduced in two different ways. First, Rawls could give up on the justificatory project altogether.³⁸ But that would take Rawls along the Kelsenian path, whose danger is not that it is paved exclusively for either saints or sinners, but that it cannot discriminate between the two. That is, the tension is reduced at the

³⁷ I owe the term "epistemic abstinence" to Raz (1994).

³⁸ Richard Rorty (1991) believes Rawls has already taken this option.

theoretical level but in a way which leads to the principled defenselessness of liberalism. The tension is displaced into a free-for-all of politics, where politics is conceived as a kind of normative vacuum, a space contested by groups making distinctions between friend and enemy, on whatever lines they care to define (Schmitt [1932] 1976, 38).

Second, Rawls might develop a full justification for the values of the “political.” But that justification would have to avoid what Rawls correctly wants to avoid—the privileging of any particular view of the good life.

I suggest that Heller offers the basis for a way out of this tension. In his view, politics is not a normative vacuum but the space one has when those institutions are in place which best allow for the emergence, contestation, and revision of fundamental values in the light of experience. The rule of law is then the institutional mechanism of democracy. Its justification is the same as the justification for democracy itself. And that justification requires both a fully argued commitment to the rightness of democracy and a recognition that democratic politics must be much more open than liberals today commonly suppose.³⁹

Of course, as Heller often emphasized, this will make democratic politics into a risky realm. Besides anything else, the very question of the best institutional arrangements must become the subject of political debate and decision. But, in a time of increasing skepticism about the value of liberal democratic institutions, it may well be best, along with Heller, to face up properly to that question.

³⁹ Habermas (1996) can thus be viewed as the standard-bearer of Heller’s project.

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