THREE

Remarks on Carl Schmitt's *Legality and Legitimacy*

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Carl Schmitt's *Legality and Legitimacy* analyzes the core principles of the Weimar Constitution as well as the present and future status of German constitutional trends.[2] A substantial portion of Schmitt's arguments attempt to demonstrate that there is a contradiction between democracy's underlying justification and specific elements contained in the Weimar Constitution or arising from its application. Schmitt fails to discriminate sufficiently between providing a justification for a particular system of normative ideals and analyzing empirical political reality. He conflates two different tasks—an analysis of normative political ideals (*Sollensideen*) that focuses on their logical structure, and an examination of specifically political forms of human behavior (which can be intended by normative ideals) concerned with the question of whether a system of normative ideals can "function" properly when put into effect. Implicitly, Schmitt assumes that the internally contradictory character of a system of political ideas based on a definite system of normative ideals in itself constitutes evidence that the political system in question cannot "function" properly—signs of a strand of conceptual realism in his theory.[3] Since almost all of Schmitt's claims presuppose a certain justification for democracy, a discussion of this part of his theory seems necessary. Schmitt defines democracy as the fundamental principle of making decisions on the basis of simple majorities. He furthermore argues that democracy can only be justified within the context of a homogeneous society. Thus, he comments that "the method of will-formation by means of simple majority decisions only makes sense and can only be tolerated if a substantial homogeneity of the people can be presupposed."[4] But since it seems that homogeneity refers to an empirical condition and thus by itself cannot

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constitute an ultimate justification, the postulate that democracy can only be realized in a homogeneous society seems to be the result of a somewhat more fundamental argument within Schmitt's theory. His *Constitutional Theory* explains in greater detail the significance of the need for homogeneity for democracy.[5] There, Schmitt grounds his view by referring to the principle of equality, which he claims constitutes the presupposition of every democratic system. But in opposition to Schmitt, we need to keep in mind that the principle of equality by itself does not suffice as a justification for democracy; it does not necessarily follow from the equal treatment of all members of society that the majority should decide.[6] Since Schmitt undertakes to do precisely this, majority rule inevitably seems senseless to him.[7] Instead, majority rule only becomes understandable if the demand for equality is integrated into a demand for the realization of freedom, defined here as an agreement between an unhindered process of will-formation among citizens with the will of the government; the demand for freedom then takes the form of trying to realize it for as many people as possible.[8]

The concept of liberty has many different meanings. In constitutional theory it has been used to describe two domains that historically have long appeared alongside one another. Nevertheless, these two domains differ. First, the concept of liberty can refer to the process by which norms are created, but, second, also to the relationship between the contents of particular norms and spheres of individual activity. So far, our comments here have been concerned with the former. In this first sense, liberty refers to political liberty (liberty *within* the state); in the second sense, liberty refers to individual liberty (liberty *from* the state). Individual liberty, which traditionally has been associated both with rights that guarantee the liberty of the individual as well as those rights that permit individuals to come together and form groups, possesses two key attributes. First, individual liberty guarantees that the process of political will-formation can take an unhindered form. This function can be described in terms of the *rights of citizenship*. Freedom of the press, freedom of opinion, and the rights of assembly and association belong under this rubric.[9] They constitute a necessary supplement to so-called *political rights*, such as voting rights and the right of equal access to all governmental posts. Political rights are naturally a component of liberty *within* the state and fundamental to the process of democratic will-formation.[10] At the same time, individual liberties are the precondition for a private sphere of freedom for the individual; here, we can speak of *private rights*. First and foremost, the right to property and religious freedom belong to this category, as well as other liberties, insofar as they do not serve political goals.[11] It is simply not the case that all three types of liberties—political rights, the rights of the citizen, and private rights—have always coexisted in history.[12] "Political liberty," in the narrow sense of fundamental participatory rights, even exists to some extent in nondemocratic states

such as Italy.[13] Specific to democracy is the full realization of political rights alongside the full realization of the rights of the citizen: only this combination can guarantee an unhindered process of will-formation. In contrast, private liberties do not represent a necessary feature of democracy. The existence of private rights, and even to some extent the rights of citizenship, may even prove to be independent of the amount of political freedom realized at a particular historical juncture.[14] Schmitt's definition of liberty places special emphasis on the liberty of the individual; in addition, he distinguishes between the liberty of the isolated individual and the liberty of individuals interacting with other individuals. Since Schmitt conceives of liberty in terms of a sphere of individual action beyond the scope of the state and fails to consider whether individual freedom stands in some relationship to the process of democratic will-formation,[15] he is incapable of acknowledging the distinction between the rights of citizenship and private rights; in our definition, private liberty is merely described in reference to the intention underlying individual behavior, and it is therefore irrelevant whether this aim is pursued by an isolated individual or by individuals acting together. Schmitt defines political liberty according to its scope, but its significance only emerges [for Schmitt] in relation to the postulate of equality; liberty becomes a correlate of equality. Consequently, Schmitt obscures the dual character of the rather heterogeneous complex of ideas that make up the concept of liberty: it constitutes the foundation both of citizenship rights necessary for democracy and private rights. This all serves to suggest, as Hans Kelsen has shown,[16] that majority rule constitutes an institutional guarantee for the realization of a greater degree of freedom than other decision-making procedures. In accordance with Rousseau's *Social Contract*, we have to assume the inevitability of the emergence of special interests within every society. Admittedly, as the scope of such special interests decreases—and here we can only think in terms of quantitative shifts—so too does the sphere of heteronomy decrease. After all, under such conditions the probability of differences of opinion, and the concomitant chance of being outvoted by a majority, decline. Nonetheless, the total transcendence of all differences in opinion has to be seen as constituting a utopian idea because it would imply the destruction of individuality itself. If we start from the relatively uncontroversial claim that an acknowledgment of the virtue of a particular value necessitates that we try to realize it as fully as possible even if it turns out to conflict with competing values, and even if the real world is likely to present challenges to our undertaking, we can come to the following conclusion: even given some relatively high degree of heterogeneity within society, the mere acknowledgment of the principles of equality and freedom demands that we still strive to realize them as completely as can be achieved. It is not possible to show within the confines of this essay that a justification of democracy along these lines has been historically dominant or that precisely this view is the basis for the Weimar Constitution and its self-legitimization as the world's most liberal. In order to prove the accuracy of this interpretation, we merely need to refer to the often-cited speech of former Secretary for the Interior David—a rather moderate politician who was a contemporary of the Constitution's architects—as well as to the preamble of the Constitution itself, which speaks of the German people's quest to revitalize and secure a political system according to the principles of freedom and justice.[17]

The justification for democracy suggested here is only one of many possibilities. We can distinguish between two different basic types of justification. One grounds the democratic principle of political organization by recourse to the "formal" values of freedom and equality, independently of the objective content of concrete decisions that result from democratic decision-making procedures. Another justifies this organizational principle only because of the objective character and basic correctness of democratically derived decisions. The concepts of democracy developed by Rousseau—and, apparently, Kelsen as well—depend on both types of arguments.[18]

One reason why Schmitt rejects democracy is that he believes that "whoever possesses a majority position (namely, 51 percent of the votes) no longer commits injustice, but simply attributes to all of his actions the status of law and legality. Because of these implications, the concept of a functionalistic principle of legality devoid of any substance is pursued *ad absurdum*."[19] But there is a *quaternio terminorum* in the use of the term *injustice* here. Certainly, it is true that it is perfectly legal in a parliamentary democracy for a 51 percent majority to pass some set of material-legal norms as long as this is done in accordance with the existing constitutional system's underlying organizational norms. But that might change nothing from the perspective of some citizens, who might consider the legal norms in question unjust. This seems to be the type of situation that Schmitt has in mind in the passage just quoted: those who felt that a particular set of legal norms were unjust would have to belong to a minority. In a nondemocratic state, the same type of situation would arise when an indeterminate number of dissenting voices, but in this case potentially amounting to more than 49 percent of all subjects, considered as subjectively unjust a set of norms that are considered by the holders of power to be just.[20] In the case that the supreme power does not consider these norms unjust, there is only one way in which a difference between a democratic and nondemocratic state could result: only if the nondemocratic state institutionalized an authoritative decision-making body to which dissenters could appeal with a claim that injustice had been done to them. But even then the unavoidable problem of *quis custodiet ipse custodes* would remain as unresolved as beforehand. Even absolutism failed to institutionalize a constitutional device of this type.[21]

Incidentally, the establishment of such a device would not only transform existing democratic bodies into nothing but a set of intermediate powers for a "jurisdictional state" (*Jurisdiktionsstaat*), like that recently criticized by Schmitt, but it would similarly disfigure institutions of a new type of plebiscitary authoritarianism like that suggested by Schmitt.[22]

So far, we have only considered those possibilities for justifying democracy that focus on the direct acceptance of values obligatory for their own sake. But the relationship of democracy to a particular set of values can also be "instrumental" in an indirect fashion. At any given point in time, a democratic system may not directly realize a given set of values. Nonetheless, it may be believed that at some point in the future democracy will effect the realization of those values. This position can insist on either the maintenance or the abandonment of democracy once the values in question have been realized. In both cases, democracy is justified because it is a means to something else; for the first category of justifications mentioned above, democracy is a goal in itself. The political theory of Marxism is an example of this view of democracy, whereas National Socialism is an example of an instrumental view, seeking the abolition of democracy.

Yet Schmitt does not simply claim that democracy cannot be justified in a heterogeneous society. He also claims that democracy cannot function amidst heterogeneity because it does not allow all people to act in a universally legal manner.[23] But we can point to a whole series of phenomena that are difficult to square with this thesis. One cannot claim that France was homogeneous in the period between the Panama Dispute and the railway strike of 1910. The proletariat had yet to be integrated into the mainstream of French politics, and issues of "*politique et idéologie pure*" still played a pivotal role in political consciousness. The ideological legacy of the French Revolution has divided the French people since 1789. Now that these ideas have become hegemonic, they serve to integrate social groups into a stable society. Yet at the turn of the century, during a critical period in the history of the Third Republic, this ideological legacy still had real force. It had the capacity to polarize the French, yet the process of democratic will-formation was not disturbed.[24] In Great Britain, increasing heterogeneity is becoming ever more apparent: the consolidation of the Labour Party helped put a process into motion in which pronounced social divisions now take the form of divisions among political parties. The fact that there are situations where a concept of substantial national homogeneity is consciously employed as an instrument of political integration could just as easily be interpreted as a symptom of an overall weakening of the extent to which national homogeneity is self-evident. This process is all the more significant in the face of the fact that it was linked to the unprecedented "*hors de la nation*" declaration of a major British party—in short, to an attempt to limit the ideology of national homogeneity to a mere portion of the electorate. Significant national and social heterogeneity in Belgium has resulted in a transformation of political parties into typical integrative parties, but until now no serious threat to the functioning of democracy has been evident there.[25] The ongoing trend toward heterogeneity is the source of the fact that ideas of homogeneity important for contemporary political consciousness decreasingly correspond to political reality; homogeneity is thus largely founded on ideology in the sense given the term by Karl Mannheim.[26] A "false consciousness" of this type can be generated by a process in which the "superstructure" lags behind transformations of the social substructure. The contents of a particular form of consciousness may once have been "right" insofar as they corresponded to a particular set of real conditions, but they become "false" as soon as substantial changes in those conditions have taken place. For example, until recently a virtually unlimited faith in the virtues of a form of egotistical calculation, namely interest-based solidarity, functioned as a powerful integrative instrument in the United States. Its efficacy can be demonstrated simply by comparing the manner in which nationally heterogeneous groups have been assimilated in America to similar attempts at assimilation in Europe. But if it proves to be the case that the economic depression means that North American capitalism has entered a new stage in its history, it would seem that this quasireligious calculative worldview is going to be put to a difficult test as it comes up against a set of real conditions that conflict with it. Particularly in light of its pragmatic structure, it is questionable whether this worldview is going to prove able to survive the test at hand. With remarkable sociological consistency, the dream of a "new prosperity" is now being used as an instrument of social integration in the United States. Social coherence once was founded on the fact that the expectation of social mobility suggested itself to the individual. Now an ideologically denatured form of this reality is supposed to cement social bonds.[27] But a democratic ideology may not be "false" simply because it lags behind transformations of real social conditions. In addition, an ideology may be misleading because it interprets democratic reality in the light of a preconceived utopia that is incorrectly seen as being already realized in the existing democracy. This tendency is evident in the ideological development of broad segments of the European working classes, whose original allegiance to social democracy seems to have been transferred to existing political democracy. Parallel to the ongoing decline of subjective homogeneity, contemporary democracy is faced with the transformation of its very foundations, and thus a "foundational crisis" is taking place. It is impossible to deny that those moments when such transformations are necessary are precisely those when democracy often finds itself in a critical situation. But in the face of both the inadequate inductive basis for the argument and significant empirical evidence to the contrary, Schmitt's bleak assessment of the impossibility of democracy's situation in a heterogeneous

society has not been sufficiently grounded. After all, new potential solutions to this problem are becoming evident: they take the form of an increasingly consistent "instrumental" view (*Mitteleinstellung*) to democracy. As long as constitutions had to represent the interests of relatively uniform social classes, little attention was paid to the significance of the instrumental relationship between distinct social classes and democracy. This remains true even though Charles Beard has recently claimed that the American Constitution originally rested on a coalition of "money, public securities, manufactures, and trade and shipping."[28] This instrumental conception currently manifests itself most clearly in the written norms of the constitution having a material-legal character, like those found in the Weimar Constitution (which is founded on the "social contract" of the Legien-Stinnes agreement)[29] and the recent Spanish Constitution.[30] It reflects the experience of parties that support a democratic constitution because they see it simply as that political apparatus best capable of achieving a necessary degree of political unity in a heterogeneous society. From the perspective of parties of this type, democracy's basic virtue lies in the fact that it provides a better chance for each of the respective parties to exercise power than a nondemocratic system can provide. The increasingly pervasive status of this instrumental view of democracy—compatible in style with so many other facets of the ongoing "disenchantment of the world"[31]—admittedly contributes to the instability of democracy to the extent that political shifts may suggest to key parties or power groups that democracy no longer functions as an adequate instrument for reaching their particular goals. This appears to be the case in Germany; its significance is arguably even greater for understanding recent developments in Germany than those factors described by Carl Schmitt.[32] It is clearly impossible to make generally valid statements about the relative frequencies of positive and negative instrumental views of democracy among various social groups. But recent experience does suggest that a positive instrumental view of democracy is capable of generating political stability (Germany between 1925 and 1929, Belgium, Czechoslovakia, Australia, perhaps even Spain).

So far our discussion of the functioning of democracy in a heterogeneous society has ignored questions concerning the strains put on modern constitutions by material-legal constitutional standards that go beyond the traditional set of organizational norms and guarantees of freedom.[33] But Schmitt not only claims that parliamentary democracy outfitted with a traditional set of basic rights is incapable of functioning properly, but that material-legal constitutional standards (regardless of whether they are exempt from amendment or possess special protection because they can only be amended by means of qualified majorities) constitute an additional source for the inevitable instability of contemporary democracy.[34] Before we can explicate this thesis, it is appropriate to categorize the relevant main

types of material-legal standards found in the Weimar Constitution and of interest to Schmitt in his study.[35] The standards at hand include those demanding that the administration and judiciary immediately seek to achieve their concretization (in other words, norms of fixation [*Fixierungsnormen*], such as Article 143, paragraph 3, Articles 144 and 149),[36] as well as those that contain no such obligation. In the latter group, we find standards that constitute demands on the lawmaker to act in a specific manner but do not allow citizens to sue if they believe they have been left unfulfilled (programmatic norms, such as Articles 151, 161, and 162)[37] and those that merely authorize the legislator to act in a certain way (authorization norms, for example, Article 155, paragraph 2, Article 156, paragraphs 1 and 2, Article 165, paragraph 5).[38] It only makes sense to establish authorization norms when it seems at least questionable that their goals would have been admissible without the authorization; programmatic standards, however, make sense even when their admissibility was not questioned beforehand because they put "moral pressure" on the legislator. To the extent that fixation norms are realized by means of norm-based legal action undertaken by governmental authorities, they have real substance. When they fail to be fulfilled, programmatic and authorization standards lack such substance.

How does the existence of such norms affect the functioning of democracy in different settings? In situations characterized by a *relatively unchanging distribution of power*, norms of fixation play the following role: by removing certain objects from the immediate access of simple majorities they make it more difficult for those objects to become the target of everyday political struggles. They reduce tensions and hence tend to improve the functioning of democracy.[39] When they are chosen correctly, that is, they correspond to the specific political constellation, they anticipate political results that otherwise would first have to have been achieved by means of a political struggle. Such fixation norms thus seem to amount to introducing the principle of planning into the system of competitive democracy. At the same time, fixation norms deny simple majorities that stand in a relationship of enmity to those institutions protected by the norms a safety-valve for achieving their wishes. Such standards thus may result in a situation where dissatisfied mass movements fail to reach their goals because of the especially restrictive basis of the legal order and eventually opt for radical antidemocratic alternatives; this is a real possibility especially if a *variation in social power relations* has taken place. But there is still a noteworthy compensatory element that works against this possibility. Groups that are attached to the institutions protected by a particular fixation norm tend to have a positive relationship to democracy in general. A good example for both tendencies—that is, for a potential increase as well as decrease in democratic stability—is provided by the special constitutional protections enjoyed by the civil service. The constitutional guarantees provided to the civil service in

Article 129[40] (as well as by Article 41 of the new Spanish Constitution) limit the scope of political spoils. This reduces the intensity of struggles between parties because the opportunities for political patronage are diminished. At the same time, the parties' respect for the principle of legality is subject to a tough test if they believe that the realization of their political goals is tied to the rapid replacement of personnel in the state bureaucracy.

The same effect is evident in the sphere of programmatic and authorization norms as long as they are not realized in a situation characterized by *a constant distribution of power.* Here, the potential beneficiaries of these norms are brought into a positive relationship to the democratic system (Articles 156, 165, paragraph 2) because of the Constitution's endorsement of their ideal values as well as the political opportunities offered by the norms.[41] What consequences do such norms have for the operation of democracy when there is a *variable distribution of power* and a particular political majority attempts to realize the goals set out in an authorization norm? They would seem to contribute positively to the functioning of democracy to the extent that an increase in power of the group in question is permitted to take a legal form—in other words, to the extent that an expansion in the power status of a particular group is secured by legal means. In this fashion, both the Weimar Constitution and the new Spanish Constitution would allow the transition from an agricultural order dominated by big landed property to a more egalitarian one by means of a simple legislative act (Article 155 of the Weimar Constitution, Article 44 of the Spanish Constitution). To summarize: the material determinations of the second part of the Weimar Constitution are quite indeterminate as far as the question of the functioning of democracy is concerned. Whether an integrative or disintegrative function dominates is determined by their particular content and social milieu. All we can do here is limit ourselves to fleshing out their possible consequences.

Schmitt makes the further point that the introduction of material standards in the Constitution's second section alters the organizational core of parliamentary democracy in such a way that parliamentary sovereignty is abrogated in favor of a system based on the primacy of jurisdictional elements.[42] Schmitt is right to identify trends pointing in this direction, but—significantly—they emerge where the causes Schmitt identifies are not present. According to Schmitt, such changes in organizational structure occur especially where we find constitutions with "special material constitutional clauses that can only be changed by amending the constitution."[43] But the most significant example of a "jurisdictional state" is the United States. If we ignore the Eighteenth Amendment for a moment, the American Constitution clearly represents an example of one "limited to organizational and procedural rules and basic liberties."[44] It is the "due process clause" in the Fifth and Fourteenth Amendments of the American Constitution—both

originally had a purely procedural character—that the Supreme Court (and the lower courts which follow its lead) has relied upon in order to outfit itself with impressive controls over both federal and state legislation.[45] One interpretation of this jurisdictional element in the American political system goes so far as to speak, not at all unjustly, of the "supremacy of the federal judiciary in matters involving persons and property."[46] As far as matters related to private property are concerned, the supremacy of the legislature in the United States has been effectively destroyed. Although the American courts do not "confront the state in the role of a guardian of a social and economic order that remains basically unchallenged," as Carl Schmitt claims,[47] but rather are conscious architects of a conservative "upper house" intent on defending propertied interests in opposition to legislatures elected on the basis of universal suffrage,[48] no threat to the functioning of the transformed American political system has resulted. None of the opponents of the Supreme Court's "usurpation" of power has even tried to make this type of claim. Whereas the contours of jurisdictional supremacy can be clearly identified in the American case, the German constitutional system has only taken relatively modest steps in this direction—despite the fact that Germany, in contrast to the United States, exhibits all the preconditions of this development emphasized by Schmitt. The only movement toward an expansive constitutional interpretation has occurred with regard to the politically irrelevant Articles 131 and 153 of the Constitution.[49] The interpretation of the constitutional guarantee of property does provide evidence of certain similarities to the jurisprudence of the American Supreme Court, but it remains fundamentally different because the concept of property at the base of German jurisprudence remains much narrower. Besides—and this is decisive for our discussion here—the protection of property does not belong among the familiar basic rights.[50] Nor have the courts made use of the possibility of relying on Article 109 as a starting point for establishing a system of jurisdictional supremacy.[51] In the face of the "administrative state"—which Schmitt rightly sees as characteristic of the system of emergency-based decree rule now found in Germany—possibilities for the expansion of jurisdictional power are gaining substantially in scope. There is now a real possibility that a new political system based on a mixture of specifically administrative and jurisdictional elements will be able to emerge. But that is a process that transcends the scope of this essay; Schmitt himself believes that such a process stands in opposition to positive constitutional norms for the most part only because of legal customs (*Gewohnheitsrecht*).[52] This is simply not the place to examine the entire constellation of issues that Schmitt discusses under the title "the exceptional legislator *ratione necessitatis.*"[53]

As noted above, Schmitt's view of democracy leads him to posit the existence of a series of contradictions between democracy and the underlying

justification of a number of central elements of the Constitution. By demonstrating that democracy can be justified within the context of a heterogeneous society, we at the same time have implicitly shown that there may be good reasons for a democracy to institutionalize special constitutional protections of a material-legal type. For heterogeneity implies the need for special protection. Schmitt argues that even if the heterogeneity of Weimar democracy constitutes a case where there may be a legitimate motive for special constitutional protections, and even if the need for them is quite substantial,[54] their establishment nevertheless generates a contradiction. This contradiction arises between the first section (with the exception of Article 76)[55] and its founding principle and the second section of the Weimar Constitution and its respective founding principle. The justification of the first part of the Constitution allegedly demands an unrestricted "functionalism"—in other words, a constitution that simply consists of organizational standards with the exception of guarantees of basic rights. Schmitt calls this type of democracy a parliamentary legislative state (*parlamentarische Gestezgebungsstaat*) if it possesses the characteristics of a legislative state and its decisive manifestations can be found in norms established by Parliament.[56] At the same time, Schmitt claims that the basic justification of the Constitution's second section requires the abrogation of Article 76; it should either be fully exempt from amendment, or only the competent organs of the estate-based (*ständestaatlich*) state should be allowed to amend it.

> If we are logically consistent, recognizing the necessity of providing special protections for certain interests or groups from political majorities has to culminate in a situation where those interests or groups are placed completely beyond the range of functionalistic parliamentary and democratic decision-making procedures. It would be consistent to grant them a full exemption from amendments *itio in partes* or the acknowledgement of a right to exodus and secession.[57]

Thus, Article 76 contradicts the founding principle of the second as well as the first section of the Constitution.[58] Schmitt simply excludes the possibility that there could be a compromise between the imperatives of "functionalism" and the need for special constitutional protections. He explicitly repudiates the compromise found in the Weimar Constitution as unreasonable by characterizing it as an attempt to uphold "neutrality" between the principle of neutrality and the principle of nonneutrality. Yet the point is not that we simply need to identify a neutral position between these two alternatives. Instead, it is a question of distinguishing between impeded and unimpeded neutrality. Beyond this, Schmitt's conclusion that a decision to opt for neutrality here in fact implies a nonneutral decision appears to be

wrong. Schmitt succumbs to a mistake made by Pascal: "*et ne point parier que Dieu est, c'est parier qu'il n'est pas.*" But Voltaire pointed out long ago that it is obviously incorrect to make this statement, for those who are filled with doubts and in search of enlightenment probably place their bets neither on behalf of God's existence nor against it. The decisive point is this: it is not clear why it should be acceptable for some objects to be fully exempted from the operations of the functionalism of the first part of the Weimar Constitution (which Schmitt believes necessarily has to be unrestricted), but why it then should be intolerable to impede the legislative regulation of such objects by political majorities as the Weimar Constitution has tried to do. In both cases, it is a question of compromises between the value of democratic forms and the value of definite objective values; the Weimar Constitution is characterized by an emphasis on the former. Its underlying support for democratic forms has merely been moderated in such a way that voting procedures have simply been altered for a specified set of objects. Undoubtedly, a ceiling to special protections would have to be established in such a way that if a constitution were to transgress it, the amount of democratic procedures remaining would be so minimal that one might just as well have established procedures justifying the possibility of abolishing democracy.[59] But no one can claim that the second section of the Weimar Constitution has reached such a limit. The justification of democracy that we have tried to sketch out here makes it possible to claim that in principle there is no contradiction between the existence of Article 76 and the core of the second section of the Weimar Constitution (that is, with the exception of the basic rights promulgated there). The facts of the case are different as far as the applicability of Article 76 to the Constitution's basic organizational norms is concerned. In his earlier *Constitutional Theory*, Schmitt relied upon a distinction between the Constitution and constitutional laws[60] to make the case that some constitutional norms are unalterable. He distinguishes these norms by determining whether they belong to the fundamental structural decisions of the Constitution. If we identify democracy's basis with an ultimate decision in favor of the principles of freedom and equality, and if we in principle accept Schmitt's distinction between the Constitution and constitutional laws, a very different assessment of the nature of the Constitution's unalterable core would nevertheless result. On the basis of the justification of democracy developed above, we can examine the question of exemption from amendment procedures from two competing perspectives. The first axiom could take the form of claiming that Article 76 should only be used to lead to variations in the system of constitutional standards that satisfy the following conditions: compromises between democratic forms and concrete values should still only be allowed to appear in the second part of the Constitution (which can be altered by constitutional

annulments, supplements, and extensions); basic liberties need to be excepted from the sphere of such compromises.[61] Variations in the organizational part of the Constitution and in its closely related provisions for basic liberties are only permissible if they are necessary for achieving the greatest realizable degree of freedom and equality when structural changes in the political community require new organizational forms. If we view the problem from this perspective, it becomes clear that some constitutional standards or parts of them are always *sine qua non* and will therefore be basically unalterable. These include those that guarantee an identity between the wills of 51 percent of the citizens and the will of the government: in short, those that guarantee universal, equal, secret, and proportionally based elections, as well as a system of representation with a certain minimum of elected representatives and a maximum term of office. This is not to deny that changes in active and passive suffrage might be permitted under some circumstances when the political community has undergone structural transformations. For example, evidence for a change in the average time it takes for individuals to gain maturity might constitute justification for altering Article 22; the voting age stated there is apparently only supposed to give expression to a particular age at which individuals are thought to reach maturity. In contrast, an abrogation of the principle of "one person, one vote" or any "unjustified" increase in the minimum voting age would constitute an illegitimate impairment of political liberty. Constitutional standards that contribute to an unrestrained process of will-formation—in other words, the rights of citizenship—are inalienable.[62] But all "private" rights can be amended. The Hobbesian theorem that the abrogation of political freedom can be democratically justified contradicts the concept of political freedom that we have developed here: our justification emphasizes the importance of the existence of inalienable institutional opportunities for every citizen to reconcile state action with his will—in other words, to make sure that freedom and equality are the individual freedom and equality of all citizens. Thus, an abandonment of liberty along Hobbesian lines cannot be democratically justified.

Instead of this system of inalienable rights, there might be another way to solve the problem. According to an alternative interpretation, Article 76 could be relied upon so that a compromise between democratic forms and definite concrete objects could manifest itself in any section of the Constitution and, thus, even in its organizational core and in its guarantees of basic liberties. Some minimum of the principles of political freedom and equality would still have to be realized here, however; otherwise, not a "compromise" but a "rape" of democratic procedures would have taken place. From this standpoint, one could justify slightly lengthening the legislature's term of office.[63] But the legal establishment of a hereditary monarchy would not be permissible. And constitutional reforms, like those outlined by Schmitt in the final chapter of his study, would no longer prove up to the task of guaranteeing the necessary minimum of freedom and equality. If we had to make a choice between these two approaches toward the problem of constitutional amendment described here, the former seems to be in greater accordance with the basic idea of democracy. This solution insists that despite any compromise that democracy must make, the principle of *equal* participation by *everyone* is absolutely sacred. This suggests that the organizational core of the Constitution, along with provisions for basic rights that properly belong to that core, constitute—as Schmitt's position itself clearly points out—a "relativistic holy sanctuary." Its destruction would mean the death of democracy itself.[64]

Schmitt's remarks suggest that democracy cannot be justified merely on the basis of the idea of equality. In addition, an "equal chance" to become part of a political majority is essential to the "principle of justice underlying this [parliamentary-democratic] system of legality."[65]

First, we need to clarify the different meanings attributable to the idea of an "equal chance" in this context. In the process, we will examine the question of whether it is essential for developing a justification of democracy. Finally, we will comment on Schmitt's view of the relationship between the principle of an "equal chance" and the existence and effective functioning of a democratic system.

The term "equal chance," it seems, is chiefly used to describe two different basic states of affairs.

First, it can refer to the equal treatment of all persons, parties, and legislative proposals at certain stages in the generation of democratic laws. In the context of an election, first, an equal chance is guaranteed when every individual candidate or list of candidates—or proposed law in the case of a referendum—is admitted indiscriminately. The second application of this principle refers to the manner in which votes for representative bodies or a referendum are counted. In this context, realizing the principle of equal chance demands, on the one hand, that every vote is counted equally and, on the other hand, that parties gain representation in proportion to the number of votes gained by them; in short, there should be a proportional system of representation. Finally, the principle of equal chance directly concerns parliamentary proceedings. It requires that, on the one hand, the same type of majority is necessary for passing all types of laws, and that, on the other hand, there has to be an equal legal chance for every party to participate in a political majority. This condition is satisfied either when every form of coalition is illegal or when every form of coalition is permissible. Proposed reforms of parliamentary procedure that have the aim of only allowing parties to cooperate in toppling a government by a vote of no confidence when they share a unified set of reasons for doing so reduce the chances of any extremist party for belonging to a majority coalition—after

all, these reforms only make sense when the opposition is divided. Reforms of this type improve the chances for neighboring, more moderate parties, insofar as they can opt for either side.

The principle of equal chance also has a second meaning. An equal chance to make up a political majority can be achieved only when the right of every party to gain this status is left undisturbed by legal standards. The relevant standards here are the material norms of the Weimar Constitution and so-called "political norms." The latter refer to every standard, regardless of how it has been made into law, that exercises an immediate influence on political organization and on the activity of the citizen within the process of public opinion formation. By means of an examination of Schmitt's analysis of this issue, we need to determine to what extent norms of this type disfigure the process in which both the governing party and the opposition are supposed to have an equal chance of gaining majority status. The governing party is likely to benefit whenever we find amorphous legal standards—and they exist in every legal system—that can be employed in a discretionary manner to restrain the activities of opposition parties. This is part of what Schmitt has in mind when he refers to the "political premium resulting from a legal possession of power." Schmitt believes that the following standards are among those which might function in this way: "public security and order, danger, emergency, necessary measures, constitutional subversion, vital interests."[66] Another source of a political advantage for the ruling party stems from the *absence* of *specific* norms, which we will describe in more detail. Constitutional clauses such as the rights of citizenship described above fall into this category, as do legal norms that make it difficult for ruling parties to benefit from "spoils." An example here is the attempt to regulate campaign funds by legal means.[67] Finally, an "unequal chance" between a governing party and the opposition can occur when ruling groups simply act in a manner that conflicts with the law. Because it benefits from the presumption of the legality of government actions, a *fait accompli* can be achieved that even judicial review may prove unable to undo.[68]

Now that we have tried to distinguish among the different meanings of the idea of equal chance, we need to examine the problems posed by the principle of "equal chance" for the justification of democracy that Schmitt suggested.

Schmitt believes that equal chance constitutes the "material principle of justice for a democracy." In the following section, we will try—to the extent that the idea of equal chance can be shown to be necessary for democracy—to explain this necessity as deriving "monistically" from the principles of freedom and equality.

It seems uncontroversial to claim that the view of democracy that we offered above requires the institutionalization of "one person, one vote" as well as the indiscriminate admission of all individual candidates and parties

to elections. The same can be said for a proportional electoral system. For only this type of voting system offers both an institutional guarantee that a specific number of voters will match a corresponding number of representatives and that 51 percent of the representatives will be chosen by approximately 51 percent of the voters. This is essential for a parliament to function as a "plebiscitary intermediary."

As far as the second basic definition of the principle of equal chance is concerned, the "unhindered" structure of democratic opinion-formation, described above as an essential element of political liberty, means that opposition parties should be discriminated against by means of neither the discretionary use of indeterminate nor the determinate legal norms mentioned above. Furthermore, it is evident that a system that presupposes respect for the principle of legality cannot possibly justify illegal government action—that is, the third potential source of "unequal chances" between governing and opposition parties.

The normative justification of democracy formulated above hardly by itself necessitates material-legal norms—either within a constitution or outside it—to realize an equality of chances among political parties. By the same token, this does not preclude the possibility that such norms may be required by the postulate of "social" equality or "social" freedom. Historically, the coincidence of political *and* social forms of freedom and equality has often been of the greatest significance. Both liberalism and socialism demand both forms of freedom and equality.[69] This leads directly to the thesis that today freedom and equality can only be total: they have to be realized both in the political and social sphere, or we are not likely to achieve them at all.

Still, there is an immediate causal relationship between the principle of equal chance between political parties and the realization of freedom and equality within the political sphere: only the institutionalization of the ideal of an "equal chance" could mean that the "formally" unhindered process of public opinion-formation (that is, the impossibility of legal restraints on it) is "materially" unhindered as well. All currents of socialist thought have seized upon this state of affairs for polemical purposes, and it plays the key role in, for example, Lenin's *State and Revolution*.[70]

Schmitt thus considers the existence of an "equal chance" essential for the justification of democracy. Yet he also believes that this ideal is incompatible with the everyday operations of modern democracy. Democracy is thus confronted with a choice: it is either unrealized or unjustified. In what follows, we examine Schmitt's thesis by discussing its implications for the different types of democratic regimes described in his analysis.

What are the facts of the case in a parliamentary democracy where the sphere of basic freedom (*Freiheitsrecht*) is exempt from amendments? In this system, we see no meaningful limits to the possibility of realizing the

principle of equal chance as initially defined above—with the exception that we would have to distinguish between some permissible and impermissible legal norms resulting from the existence of a sphere of freedom possessing special protective status.

As far as the existence of "political norms" that influence the relationship between the governing and opposition party is concerned, the possibility of an abuse of such standards undoubtedly exists in this type of political system. Yet a belief in the possibility of eliminating this danger altogether would truly have to be described as a "normativistic illusion." The same can be said—as Schmitt himself concedes[71]—for a certain amount of amorphousness within legal norms. But historically it has been typical of precisely this type of political system that it has tried to reduce legal indeterminacy as much as possible.

In regard to dangers resulting from the absence of certain *specific* norms, it needs to be said that it is *exactly* one of the special characteristics of this type of constitutional system—and this is what distinguishes it from other types of democracy—that it makes at least some such norms as unassailable as possible. The constitutional structure of this system includes provisions for what historically have been described as basic liberties and what we have categorized above in this article as the rights of citizenship. In this way, the right to property can function as an instrument that helps protect the possessions of oppositional organizations and thus secures its contributions to the process of public opinion-formation.

But the example of property shows exactly how the same right that in some ways helps to preserve the principle of "equal chance" between the government and the opposition can also serve altogether different, and even contrary, purposes. By means of the results of its effects on the economic structure, the right to property, as well as that to personal liberty, brings about an inequality of political chances among social groups. If the democratic socialist position—that its economic structure could bring about "equality of opportunity" while preserving the rights of citizenship—were justified (which we need not examine here), this would indicate that a type of democracy with a specifiable normative content exists, in which a maximal approximation of the ideal of "equal chance" in *every* sense of the term has been achieved. Schmitt is right to argue that parliamentary democracy cannot establish full "equal chances" for all parties, but he is wrong to claim that this failing results chiefly from parliamentary democracy's basic organizational structure. Instead, such failures can be traced back to the concrete content of specified private rights and certain other material-legal standards.

The second type of democratic system that we need to consider would be one outfitted with basic liberties and material-legal norms, like those examined above, that could be suspended by a qualified majority and whose particular contents still need to be specified. The same can be said about this system of government that was said about the previous one: with the exception of the rules concerning qualified majorities, the principle of "equal chance" in the sense of the first basic definition could be realized here.

However, this system would generate *greater* possibilities for *inequalities* between governing parties and the opposition than we were able to identify in the previous case. This stems from the fact that this system relies not only on amorphous norms like those just discussed but also on additional indeterminacies within the material-legal section of the Constitution. Article 137, paragraph 5 of the Constitution, for example, declares that religious bodies that are not public corporations can only gain this status "if, by their constitution and the number of their members, they give assurance of permanence." The indeterminacy of the words used here inevitably provides substantial room for governmental discretion; this is likely to produce some of the consequences described above. But material-legal determinations of this type might also function to assure *increased equality* between governing parties and the opposition insofar as they are not amorphous. Each clause of this type works to protect the core of a particular institution from intervention. Such protection becomes effective when the relevant institution stands in opposition to the governing parties, that is, when it is connected with an opposition party in some fashion. Inasmuch as ties between the relevant set of institutions and a particular party take on real significance for a party's electoral chances—and that is all that matters for us right now—these electoral chances become independent of whether the party in question belongs to the governing coalition or the opposition to the extent that the relevant institutions are clearly supported by a constitution. A tendency toward the equalization of electoral chances results as potential political norms are eliminated. This is valid, for example, in the case of the institutional basis for the labor unions provided by Articles 159 and 161 of the Constitution.

Norms of fixation contribute either to equalities or to inequalities between parties according to whether they are apportioned "unequally" or "equally" among parties and their respective institutional supports. Attributing constitutional status to labor's right to organize, for example, increases the independence of labor-based parties in relation to the government while altering their status in relation to other parties that (either directly or indirectly) may be "more" or "less" protected by a constitution.

So what can we ultimately say about Schmitt's claim that it is simply impossible to realize the principle of "equal chance" in a democracy?

During the course of the conceptual distinctions that we have made here, we saw that Schmitt's thesis primarily refers to the "equal chance between governing parties and opposition parties in the face of the existence of political norms." In the case of two possible causes of inequality between

the ruling party and the opposition—namely, where we find amorphous legal standards and where governmental action conflicts with the law—we reached the conclusion that they could occur in a democracy, but only because, as Schmitt himself puts it, "no political system can do without" phenomena of this type.[72] Above and beyond that, democracy is capable of eliminating one of the main causes of such inequalities to the extent that it gives basic rights a legally binding character. Moreover, it is reasonable to believe that any additional illegal advantages potentially enjoyed by those in power could be disposed of by means of appropriate legislation.

If we compare *an oppositional group's chance* of attaining power in a nondemocratic state with the "*equal chance*" *of gaining 51 percent of the votes in a democracy,* democracy does greater justice to the principle at hand. True, the utopia of a *perfect* realization of the ideal of an "equal chance"—which, as Schmitt concedes, is impossible in any political context; the presumption of the legality of governmental action and the immediately enforceable nature of governmental decisions are essentially *differentia specifica* of public law—cannot be achieved. Yet democracy is the only political system that provides an institutional guarantee that even the most decisive transitions of power need not threaten the continuity of the legal order. In addition, democracy is best able to approximate the goal of an "equal chance" in the manner that we have tried to describe here.[73]

Schmitt claims that the justification for parliamentarism contradicts the underlying justification for direct democratic decision making outlined in Article 73, paragraph 3.[74]

> The dualism that exists between these two forms of legislation is a dualism between two distinct systems of justification—a system of parliamentary legality and a system of plebiscitary democratic legitimacy. The possible race between them is not simply a competitive struggle between two decision-making instances, but between two very different conceptions of what law is.[75]

This thesis presupposes a conception of parliament that does not see it as justified by the social and technical requirements of the division of labor. Instead, special emphasis is placed on the specific material character of the norms typically created by parliament.[76] On the basis of this view, Schmitt believes that there is a qualitative difference between parliamentary norms and unmediated expressions of the popular will as well as—once the superior character of parliamentary law is acknowledged[77]—an argument for disqualifying the people from engaging in direct democratic decision making. At the same time, Schmitt does not go so far as to suggest that there could be a political system resting purely on direct democracy and characterized by the absence of any representative elements whatsoever, since every state allegedly requires some representative features.[78] When applied

to the Weimar Constitution, the following seems to follow from Schmitt's thesis for the relationship between direct democratic and parliamentary lawmaking: within the framework of the Weimar Constitution, Parliament has the authority to supersede law that the people have previously endorsed by a referendum. This is because parliamentary and direct decision-making procedures are both similar in function and incommensurable in status; of decisive importance is the fact that no norm explicitly prevents Parliament from revoking a popular referendum.[79] This shows that Schmitt's view of the contradictory relationship between parliamentary and direct democratic decision making ultimately depends on a particular justification for the existence of parliament. If we rely on the traditional conception of parliament as a "plebiscitary intermediary" (which Jacobi has most recently made use of)—in Schmitt's view, this interpretation necessitates making concessions to parliament's "degraded" form in contemporary society—it becomes possible to see parliamentary lawmaking and direct democracy as compatible within the same constitutional system. In addition, this view allows us to suggest an answer to the positive legal question that arose; representatives should not be allowed to act in opposition to the express will of the people because the representative must remain silent when the people speak.[80] Moreover, it is crucial that we apply this insight not simply, as Schmitt has done, to direct democracy—in other words, to the executive (there is no other representative instance there)—but to parliament as well.[81] Thus, it seems correct to argue that "because the institutions of direct democracy are an inevitable consequence of a *democratic state,* they should be superior to the institutional mechanisms of *indirect* parliamentary democracy" (as Schmitt puts it, although he fails to assume this for the Weimar Constitution). Schmitt—who interprets "the system of *parliamentary legality* as an intellectually and organizationally unique and independent complex that stands in no intrinsic relationship to democracy or the will of the people"—refuses to apply the deductions made above to the Weimar Constitution, reasoning that in Weimar, "alongside the exceptional plebiscitary decision-making complex, the overall organizational features of a parliamentary system are still present."[82] But this argument would only be correct if the Weimar Constitution really were a parliamentary legislative state in Schmitt's meaning of the term—in other words, if Weimar's architects had sought a system of parliamentary democracy in which the centrality of the "*législateur*" was justified by the Schmittian theory of parliamentarism. Only then could we conceive of parliament as altogether independent of any type of democratic foundation. As far as recent attempts to justify parliament are concerned, there are many signs that the type of classic argument developed by Schmitt in *The Crisis of Parliamentary Democracy* is on the decline; this corresponds to a more general retreat of certain early liberal

positions in contemporary thought. Increasingly, parliament is justified as a "plebiscitary intermediary."[83] Parliament's decreasing significance constitutes the ideological background for this trend.[84] Still, this says nothing about parliament's potential role as an organ of democracy (*Transformationsorgan*). Charges directed everywhere against the chaos of "power blocs" in fact refer to a real set of problems: parliament is no longer a site for autonomous opinion-formation, but is simply an institution where preformed opinions are registered. This suggests that the institution at the heart of the problematic at hand may no longer be the technical apparatus of parliament but, instead, political parties that now function as unmediated organs of mass democratic politics. The general ideological trend has been captured by many interpretations of postwar constitutional government.[85] Indeed, in the case of the Weimar Constitution, its founders on several occasions explicitly endorsed an interpretation of Parliament that emphasizes its direct democratic functions. Jacobi has discussed this issue in great length in his discussion of the problem of prioritizing constitutional elements with special emphasis on Article 1, paragraph 2 of the federal constitution.[86]

Such a justification of Parliament would not require—but it also would not contradict—the demand that if a norm is to be given legally binding status by a parliament, more votes should be necessary for approving it than are necessary in direct democratic mechanisms. If this is the case, then another purported contradiction within the Constitution that Schmitt has identified, namely that concerning the participation requisite for the two allegedly competing systems of legislation,[87] can be resolved. Above and beyond that, the alleged factual basis does not appear to be proven. There are three conceivable cases at hand.

In order to *amend the Constitution,* Article 76 states that a simple majority of eligible voters (at least 51 percent) suffices in a referendum. In the case of constitutional amendments undertaken by Parliament, Article 76 demands a two-thirds majority. Moreover, at least two-thirds of the members of Parliament need to attend the vote. In opposition to Schmitt's claim that "in Parliament, a two-thirds majority is necessary to amend the Constitution, whereas direct democratic mechanisms only require a simple majority," it is important to note that under certain circumstances the number of votes in Parliament required to amend the Constitution could be less than is required in direct democratic decision making. First, this can happen whenever a proportion of representatives who are present sinks below a certain level; if the maximum legally acceptable number of parliamentary absences occurs, a mere 44 percent of the representatives are needed to amend the Constitution. This case presupposes 100 percent participation by those in attendance, and it does not include the possibility of a forfeiture of votes. Second, less than 51 percent of the eligible representatives suffices if 100 percent do attend but a certain number abstain or forfeit their votes.[88]

When parliamentary and direct-democratic devices lead to a conflict concerning a particular *legislative statute,* a majority of at least 50 percent of elected representatives is needed to pass a parliamentary resolution.[89] Passing the referendum in opposition to such a resolution requires the agreement of a majority of all votes cast; in addition, a majority of eligible voters has to have taken part in the direct democratic vote (Article 75).[90] So the minimal acceptable number of votes necessary for passing a parliamentary resolution is always less than the number needed in order to pass a referendum in opposition to the parliamentary law, as long as participation is less than 100 percent and some votes are lost (i.e., they were cast for a candidate who received no mandate). Schmitt argues against this point by claiming that it is not factually significant that a *majority* of voters needs to take part in passing a referendum, since *everyone* who participates in a successful direct democratic campaign, in accordance with Article 75, is likely to support the proposal in question in the first place.[91] Thus, there allegedly is no meaningful distinction between statutory and constitutional lawmaking when undertaken by direct democratic means. But one can counter this interpretation by pointing to the possibility—and reality—of the "terror" that can be unleashed against those who embrace a minority position in a referendum; this can lead them to change their material "no" (expressed most effectively by a simple refusal to participate in the referendum) into a formal "no." To the extent that the number of such "terrorized" is fewer than the number of "terrorists" and the absolute number of the "terrorists" includes more than 25 percent of eligible voters, this "no" may generate results diametrically opposed to the original purpose. If these preconditions are not met, "terror" is likely to be senseless, and surely harmless.[92]

Where there is no conflict between parliamentary and direct-democratic devices, 60,000[93] votes for Parliament are necessary to pass a legislative statute, whereas at least one vote is required through direct democratic means. If we ignore this factually insignificant difference for a moment, there does not seem to be any qualitative difference between the proportion of votes required for direct-democratic in relation to parliamentary mechanisms. Keeping the turnout rate of the vote undetermined within certain limits here corresponds to keeping those numbers undetermined in a referendum, since—in contrast to the second case—here the secrecy of the ballot is effectively preserved.

This alternative argument suggests that Schmitt's decisive distinction between legality and legitimacy can no longer be defended. Although Schmitt does not explicitly define these terms, it seems that "legality" refers for him

to the underlying justification of parliamentary lawmaking—this justification is linked to the allegedly immanent character of parliamentary *lex*—whereas "legitimacy" refers to the justification of direct plebiscitary lawmaking. But Parliament's place in the German constitutional system no longer rests on the intrinsic *ratio* of parliamentary activity. Instead, it depends on the same attributes that provide a justification for direct democratic decision making. *They are therefore different organizational forms of the same type of legitimacy.* Beyond the question of suspending parts of the Constitution that we addressed above, there is no structural difference between the people acting by means of constitutionally ordained direct-democratic mechanisms and Parliament; both are expressions of the "*pouvoir constitué.*"

But this, of course, is no longer the case once we cease to interpret the Weimar Constitution (and other democratic constitutions having a similar structure) and instead focus on the imperatives of an ideal constitution and corresponding political system modeled in accordance with the values and justificatory universe of Carl Schmitt. Within Schmitt's intellectual world, legality and legitimacy certainly can diverge. In fact, legality can be fully dislodged by legitimacy. The need to eliminate parliamentary legality results for Schmitt merely from the demonstration that its underlying justification is no longer manifest in empirical reality. Monolithic plebiscitary legitimacy is supposed to take the place of parliament. But even if the highest organ of the state can be elected in a democratic manner, we could no longer use the term "democratic" to describe it. The point here is that according to common usage, democracy depends, if not on the existence of a central parliamentary body, then at least on the operation of a plurality of representatives. The reason for this is that the degree to which freedom and equality can be realized is inversely related to the degree to which representation is concentrated. The election of a member to parliament of my liking presupposes that I have voted alongside 59,999 other citizens who also supported him; participation in the presidential election presupposes that—taking into account that the number of candidates ultimately tends to be reduced (and assuming that all voters support candidates whom they genuinely endorse, and thus ignoring the possibility of mere protest candidates)—it is necessary for me to vote alongside a far larger number of fellow citizens. In contrast to parliamentary elections, presidential elections require a much more far-reaching form of unity between my will and the will of others. But as the scope of this unity grows, the average distance between the individual will and the will of the candidate correspondingly increases: in other words, my freedom is reduced because more compromise was necessary. The same trend toward a reduction of the amount of realizable political freedom—brought about by a hypertrophy of a unification of wills—is manifest in Schmitt's model of plebiscitary decision making, in which the people are permitted to say "yes" or "no" to questions posed to

them by a governmental body.[94] But here the choice of alternatives is reduced even more: in the case of presidential elections, we *tend* to have two choices, whereas in a plebiscite we *inevitably* have *only* two choices. Even if one wants to try to justify a legally based reduction of popular political activity by means of anthropological arguments,[95] the consequences that we have just described for political freedom would result in any event. But might this concept of democracy justify a transition from the type of democracy represented by Weimar to a type along the lines just sketched out, in part because it would guarantee greater political stability? This question concerns the applicability of Schmitt's general theoretical claims to particular characteristics of constitutional development in contemporary Germany. His main thesis can be easily identified: like many other participants in contemporary political debate, Schmitt believes that the Weimar Constitution is collapsing. In his version of this argument, the source of this development is to be located in the internal contradictions of the Weimar Constitution. Here, we have tried to offer a critical examination of this position.

Schmitt's diagnostic thesis is followed by a prognostic one: a constitution reformed according to his plans could presumably provide for more political stability. Both parliamentary democracy and its caesaristic modification constitute constitutional systems that allow for legal regulations embodying—so long as they are in accordance with material-legal constitutional standards—many conceivable contents; thus, both are value-neutral to some extent. The legislative mechanisms of both constitutional systems are clearly distinct from traditional ones to the extent that they both attempt to integrate this great invention of modern democracy. But this says nothing about their factual stability, and it provides no answer to the question of whether historical development will prove capable of making good use of the relatively open-ended constitutional forms made available to it. In our view, the answer to this question—and this points to the limits of this study without trying to claim that we have by any means completely answered all the questions raised by it—depends chiefly on many different factors that determine the structure of political action today. The dependence of political behavior on so many interrelated factors leads to a situation where a variation in just one factor can lead to disproportionate disturbances in the political equilibrium. This makes it very difficult to come up with reliable prognoses, even if we ignore the antinomy underlying those prognoses whose character as *arcanum* becomes a precondition for their accuracy. Would we be able to make all the comments typically heard today about the stability and continuity of French democracy if the successor to Charles X had not favored the flag of lilies over a second restoration,[96] if Boulanger had not been the prototype of a "*dictateur manqué*,"[97] if intact, antidemocratic elements in the leadership of the French army during the Dreyfuss

period had recognized the real significance of this legal case?[98] Might not we be talking today about Russian democracy's auspicious source of constancy in the relatively homogeneous peasant masses if the February regime had anticipated the battle phrases of the Bolsheviks? To pose these questions does not mean that we can provide an affirmative answer to them. It only means that if we are to provide an accurate assessment of the *possibilities for constitutional development* available, we need to take *every conceivable extraconstitutional factor into consideration.* It seems that only if constitutional theory tackles this task by working in close cooperation with all those disciplines concerned with social experience[99] will it gradually be able to convey general solutions to such problems.

(Translated by Anke Grosskopf and William E. Scheuerman)

NOTES

1. Editor's Note: With Nathan Leites.
2. Carl Schmitt, *Legalität und Legitimität* (Munich: Duncker & Humblot, 1932).
3. See Erich Voegelin, *Zeitschrift für Öffentliches Recht* 11 (1931): 108–109.
4. Schmitt, *Legalität und Legitimität*, p. 31.

Editor's Note: Schmitt long had argued that majority rule within genuinely heterogeneous societies inevitably resulted in political majorities "raping"—as Schmitt repeatedly phrased it—political minorities whose interests and ideals were distinct and even "alien" to those of majorities. Thus, majority rule only made sense as a decision-making procedure if substantial political homogeneity could be presupposed; only in a homogeneous setting could a majority decision genuinely claim to represent the democratic community's common good or "general interest."

5. Carl Schmitt, *Die Verfassungslehre* (Munich, 1928), pp. 169, 235.
6. Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Tübingen, 1929), p. 9. (Here, Kirchheimer is relying on Hans Kelsen's interpretation of the principle of majority rule in order to criticize Schmitt. Whereas Schmitt grounds the principle of majority rule in a substantialist interpretation of the democratic principle of equality, Kelsen insists that majority rule is only defensible if democracy is understood as involving the quest to realize *both* equality *and* freedom. In Kelsen's interpretation, when a majority determines the nature of governmental action, more than half of the political community's wills can be said to shape governmental activity autonomously. Accordingly, majority rule allows a relatively impressive real-life approximation to the idea of a fully autonomous community. Kelsen, *Vom Wesen und Wert der Demokratie*, pp. 3–13, 53–68.)
7. Schmitt, *Die Verfassungslehre*, p. 278.
8. For a discussion of the view that both freedom and equality constitute the basic principles of democracy, see W. Starosolsky, *Das Majoritätsprinzip* (Vienna, 1916), beginning on p. 84. More recently see Dietrich Schindler, *Verfassungsrecht und soziale Struktur* (Zurich, 1932), p. 133; G. Salomon, *Verhandlungen des 5. deutschen Soziologentages* (Tübingen, 1926), pp. 106–109.

9. When one accepts the thesis that only a truly "humane" social order could provide maximal possibilities for political autonomy, then the scope of the rights of citizenship increases dramatically. See Luiz Jimenez de Azua, *Zeitschrift für ausländisches und öffentliches Recht* 3 (1932/1933): 3, 377.
10. For a discussion of their relationship to the concepts of "autonomy" and "individual responsibility," see Pribram, *Verhandlungen des 5. deutschen Soziologentages*, p. 100.
11. On the necessary organizational structure of this type of liberty in a democracy see Heinz Ziegler, *Die moderne Nation* (Tübingen, 1931), p. 237. Of course, Ziegler's thesis that democracy replaces individual freedom with collective freedom is only correct to a limited degree, for precisely the necessary organization of liberty guarantees a chance for the individual to break with a majority and then stand in opposition to it.
12. On the different concepts of liberty and the possibility that they may not coexist see James Bryce, *Modern Democracies* (London, 1921), vol. 1, beginning on p. 60. Harold Laski, *Liberty in the Modern State* (London, 1930) recognizes the different functions of liberties, but his pluralist theoretical background prevents him from formulating clear conceptual distinctions. See also his *A Grammar of Politics* (London, 1925), beginning on p. 146.
13. See Schmitt's categorization of rights in *Die Verfassungslehre*, pp. 168–169, and *Handbuch des deutschen Staatsrechts*, vol. 2 (Tübingen, 1932), p. 594; Franz L. Neumann, *Koalitionsfreiheit und Reichsverfassung* (Berlin, 1932), p. 16.
14. On the coexistence of absolutism and individual freedom: Ferdinand Tönnies, "Demokratie und Parlamentarismus," *Schmollers Jahrbuch* 51 (1927): 7.

Editor's Note: This is a peculiar—and somewhat disturbing—account of "private rights." How humane could a democratic society without guarantees of religious freedom possibly be?

15. Carl Schmitt, *Freiheitsrechte und institutionelle Garantien der Reichsverfassung* (Berlin, 1931), beginning on p. 27.

Editor's Note: Basic rights are essentially privatistic according to Schmitt: in his own words, "basic rights in the most authentic sense of the term include only [the classical] liberal rights of the individual person" (Schmitt, *Die Verfassungslehre*, p. 164). As Kirchheimer is arguing here, this leads Schmitt to obscure the relationship between democratic decision making and individual liberties. Even more immediately, it seems to imply that basic democratic rights—like the principle of "one person, one vote"—somehow partake less completely of the status of "rights" than, for example, the right to private property. This view also leads Schmitt to debunk the demand of many of his left-wing contemporaries for so-called "social rights," which clearly are distinct from classical liberal private rights. For Schmitt's account of basic rights see Schmitt, *Die Verfassungslehre*, pp. 157–182. For his peculiar distinction between "the liberty of the isolated individual" and the liberty of "individuals who act in unison with other individuals," see esp. pp. 165–166, 170.

16. Kelsen, *Wesen und Wert der Demokratie*, pp. 9–10.
17. This is in reference to David's speech from July 31, 1919. The preamble is referred to in many different attempts to interpret the Weimar Constitution. For examples of this see Hans Liermann, *Das deutsche Volk als Rechtsbegriff* (Berlin, 1927), beginning on p. 166; Rudolf Smend, *Verfassung und Vefassungsrecht* (Munich, 1928),

pp. 8–9. For an interpretation of the democratic significance of the ideals of freedom and equality here see Richard Thoma in *Handbuch des deutschen Staatsrechts*, ed. Gerhard Anschütz and Richard Thoma (Tübingen, 1930–1932), vol. 2, p. 190.

Editor's Note: David was a cosigner of the Weimar Constitution.

18. Smend, *Verfassung und Verfassungsrecht*, p. 114

19. Schmitt, *Legalität und Legitimität*, p. 33.

Editor's Note: Schmitt's argument here is a complex one. In a nutshell, he claims that the abandonment of the classical demand that legitimate parliamentary action should be required to take a *general* form effectively robs parliamentary decision making of one of its last remaining normative guarantees. Without the assurance of some degree of justice as provided by the classical liberal legal norm's general structure, and without any sensible reason for assuming that a particularly impressive degree of rationality inheres in contemporary parliamentary rule making, majority-based parliamentary rule making provides no protection against injustice—or even tyranny.

20. On the problems that result when governmental authorities see a particular set of legal norms as unjust see Gustav Radbruch, *Rechtsphilosophie* (Leipzig, 1932), p. 82. For a sociologically well-grounded analysis, but one that remains imprisoned within the problematic epistemology of value-relativism, see Thoma's comments in *Handbuch des deutschen Staatsrechts*, vol. 2, p. 142.

21. For the French case and the role of "lit de justice" as an uncontestable legal instrument in the absolutist period see Robert Holtzmann, *Französische Verfassungsgeschichte* (Munich, 1910), p. 350. English constitutional history does not seem to be familiar with the problem; see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (London, 1915), beginning on p. 224; Frederic William Maitland, *Constitutional History of England* (Cambridge, 1908), beginning on p. 266; Julius Hatschek, *Englische Verfassungsgeschichte* (Munich, 1913), beginning on p. 499. In the discussion of the dispute between Coke and the crown found in these accounts, emphasis is placed on the power of the crown in relation to judicial action (and not the power of the judge in relation to the crown) and on the question of administrative authority to issue arrest warrants.

22. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Mohr, 1931), chapter I.

Editor's Note: A "jurisdictional state" is defined by Schmitt as a state in which

> a judge who decides a legal dispute, and not the legislature that issues norms, has the final say. . . . A typical expression of the jurisdictional state is a concrete case-oriented legal decision, in which "rightful" law, justice, and reason are made apparent without having been mediated beforehand by general legal norms. Thus, this type of political system does not exhaust itself in the normativism of mere [parliamentary] legality. (Schmitt, *Legalität und Legitimität*, p. 9)

23. Schmitt, *Legalität und Legitimität*, pp. 43, 90.

24. Incidentally, it is striking that the fascination with the problems of democracy, as exhibited by so many different types of political ideologies, obscures the fact that democracy—with the exception of the American case—is a relatively new phenomenon in historical terms. France has only had equal voting rights since 1852, Italy since 1911, Great Britain since 1918, and Belgium only since 1921. The accelerated psychical dynamics of contemporary history manifests itself in the fact that a new set of institutions can seem antiquated even before they have had a chance to prove themselves. See Moritz Jaffe on political parties and democracy in *Archiv für Sozialwissenschaft* 65 (1931): 106–108.

25. On the concept of integrative parties see Sigmund Neumann, *Die deutschen Parteien* (Berlin, 1932). On the trend toward heterogeneity in Belgium see Bourquin in *Jahrbuch des öffentlichen Rechts* 18 (1930): 187. He speaks of a substitution of the "ministères homogènes" by the "minstères mixtes."

26. Karl Mannheim, *Ideologie und Utopie* (Berlin, 1929).

27. On the transformation of the spirit of the frontier into a system of conscious mass manipulation see Charlotte Lütkens, *Staat und Gesellschaft in Amerika* (Tübingen, 1929), beginning on p. 176.

28. Charles Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1923), p. 324.

29. Editor's Note: The Stinnes-Legien agreement of November 15, 1918, required employers to withdraw all support for "yellow dog" unions and helped establish the principles of collective bargaining within Weimar.

30. Recall Hugo Preuss's comments at the Constitutional Committee of the National Assembly: "A uniform orientation is not dominant here. Instead, what we see is the coming together of different orientations that otherwise would have distinct goals. Together, they may generate a constellation that allows these goals to be linked together."

31. Of course, for those who believe that democracy should be maintained even when a particular set of goals has been achieved, the instrumental character of their view of democracy is inevitably reduced. It is important to recognize that the problem of justifying democracy—as undertaken earlier in this essay—is an essential task for many who see democracy as a mere instrument.

32. See Albert Jovishoff, "Kapitalismus und Demokratie," *Zeitschrift für öffentliches Recht* 12 (1932), beginning on p. 625.

33. See Karl Löwenstein, *Erscheinungsformen der Verfassungsänderung* (Tübingen, 1931), p. 3.

34. Schmitt, *Legalität und Legitimität*, p. 47.

35. See Schmitt's typology in *Handbuch des deutschen Staatsrechts*, vol. 2, paragraph 101.

36. The term "norm of fixation" is used in a broader sense than Schmitt does: *Handbuch des deutschen Staatsrechts*, vol. 2, p. 604.

Editor's Note: Article 143, paragraph 3: "The teachers in public schools shall have the rights and duties of state officials"; Article 144 states that "the entire school system shall be under the supervision of the state; the latter may cause the municipalities to participate therein. The supervision of schools shall be carried on by technically trained officials"; Article 149 begins with the demand that "religious instruction shall be part of the regular school curriculum with the exception of non-sectarian (secular) schools."

37. Editor's Note: Article 151 requires that "the organization of economic life must conform to the principles of justice to the end that all may be guaranteed a decent standard of living"; Article 161 requires that "the Reich shall, with the controlling participation of the insured, establish a comprehensive scheme of insurance for

the conservation of health and of the capacity to work;" Article 162 reads, "The Reich shall endeavour to secure international regulation of the legal status of workers so that the entire working class of the world may enjoy a universal minimum of social rights."

38. Editor's Note: Article 155 postulates that "the distribution and use of landed property shall be controlled by the state in such a manner as to prevent abuse and to promote the object of assuring to every German a healthy habitation"; Article 156, paragraph 1: "The Reich may by law, without prejudging the right of compensation, and with due application of the provisions in force with regard to expropriation, transfer to public ownership private economic enterprises suitable for socialization"; and paragraph 2: "In case of pressing need, the Reich may, in the interests of collectivism, lawfully combine . . . economic enterprises and associations in order to secure cooperation in production"; Article 165, paragraph 5: "Powers of control and administration may be conferred upon workers' and economic councils within the spheres assigned them."

39. The elimination of such tensions can be interpreted as an attempt to uncover an underlying sphere of homogeneity within political consciousness (recall Hugo Preuss' comments cited above). But if one accepts the thesis that only homogeneity allows democracy to function, *this* type of homogeneity does not seem to suffice. Thus, Ernst Fraenkel's claim (*Die Gesellschaft*, no. 10 [1932]: 38) that the second part of the federal constitution is a *conditio sine qua non* as far as the particular function of interest here is concerned, is just as dubious as Schmitt's opposing thesis.

40. Editor's Note: Article 129: "Officials shall be appointed for life except as otherwise provided by law. . . . Duly acquired rights of officials shall be inviolable."

41. Editor's Note: Article 165, paragraph 2: "Workers and employees shall, for the purpose of looking after their economic and social interests, be given legal representation in factory works councils as well as in district works councils organized on the basis of economic sectors and in a works council for the entire Reich."

42. Schmitt, *Legalität und Legitimität*, pp. 57–58, 61.

Editor's Note: In other words: material-legal standards provide a starting point for attempts by the judiciary to gain substantial decision-making authority. Recall that Kirchheimer seemed to endorse this view in "Legality and Legitimacy." Here, he qualifies that argument.

43. Schmitt, *Legalität und Legitimität*, p. 60.

44. Schmitt, *Legalität und Legitimität*, p. 60.

45. John Commons, *Legal Foundations of Capitalism* (New York, 1924), p. 333. More recently, see the polemical account provided in Louis B. Boudin, *Government by Judiciary* (New York, 1932), chapters 33 and 34, and the German-language account in Heinrich Rommen, *Grundrechte, Gesetz und Richter in den USA* (Münster, 1931), p. 89.

46. Charles Beard, *American Government and Politics* (New York, 1931), p. 49. Also see the very cautious but ultimately positive assessment of this set of practices in Ernst Freund's informative "Constitutional Law," in *Encyclopedia of the Social Sciences*, vol. 4 (New York, 1930), p. 254.

Editor's Note: The discussion here concerns the *pre-New Deal* Supreme Court and its repeated assaults on legislative-based social reforms.

47. Schmitt, *Der Hüter der Verfassung*, p. 254.

48. Although there have been different evaluations of this trend, the basic facts of the case are uncontroversial: John Burgess in *Political Science Quarterly* 10 (1896): 420; Charles Warren, *Congress, the Constitution, and the Supreme Court* (Boston, 1925), pp. 176–177. For a critical analysis see Boudin, *Government by Judiciary*, chapter 2.

49. Editor's Note: Article 131: "If an official in the exercise of public authority vested in him is guilty of a breach of his official duty towards a third party, responsibility shall attach primarily to the state or to the public body for which the official serves"; Article 153: "Property shall be guaranteed by the constitution. Its nature and limits shall be prescribed by law."

50. Editor's Note: This is a peculiar comment, unless one reads Kirchheimer simply as pointing out that the Weimar Constitution's codification of property rights was no longer placed in that portion of the constitution (Article 109 to Article 118) outlining traditional *individual* liberal rights. Weimar's founders believed that private property should no longer enjoy the same status as the inviolability of the person (Article 114), or the freedom of speech (Article 118).

51. For a survey of this debate see Albert Hensel, *Die Reichsgerichtspraxis im deutschen Rechtsleben*, vol. 1 (Berlin, 1929). On the jurisprudence of Article 109, see Gerhard Leibholz's comments in *Archiv für öffentlichen Rechts* 9 (1930): 428. For a typical treatment of Article 109 by the upper courts see *Entscheidungen des Reichsgerichts in Zivilsachen* 136: 221.

Editor's Note: Article 109 assures the legal equality of all German citizens.

52. Schmitt, *Legalität und Legitimität*, beginning on p. 71. Rule by emergency decree in contemporary Germany is no longer merely a provisional facet of a basically democratic constitutional system. It now is reminiscent of the situation of a "suspended constitution" like that found in 1848 and 1849, see Johannes Heckel in *Archiv für öffentlichen Rechts* 22 (1932): 309.

53. Editor's Note: The reference here is to part 2, chapter 3 of Schmitt's *Legalität und Legitimität*, where he outlines an argument that openly calls for the destruction of traditional parliamentary democracy and its replacement with a dictatorial "administrative state."

54. Schmitt, *Legalität und Legitimität*, p. 43.

55. Editor's Note: Article 76:

> The constitution may be amended by legislative action. However, resolutions of the parliament for amendment of the constitution are valid only if two-thirds of the members are present and two-thirds of those present give their assent. Moreover, resolutions of the federal council (Reichsrat) require a two-thirds majority of all the votes cast. If by popular petition a constitutional amendment is to be submitted to a referendum, it must be approved by a majority of the qualified voters.
>
> If the parliament adopts a constitutional amendment over the veto of the federal council, the President shall not make this law valid if the federal council demands a referendum within two weeks.

56. Schmitt, *Legalität und Legitimität*, p. 7.

57. Schmitt, *Legalität und Legitimität*, p. 44.

58. Editor's Note: According to Schmitt, Article 76 contradicts the "functionalism" of formal parliamentary rule-making devices by demanding a qualified majority for amendments to the material-legal clauses of the Constitution's second section. In other words, Article 76 implicitly abandons a perfectly "value-free"

perspective. At the same time, the "value-laden" character of that second section demands that some of its objects stand altogether outside the scope of "functionalistic" decision making; thus, Article 76 *also* contradicts the Constitution's "substantial" second section.

59. When Hans Kelsen (in *Wesen und Wert der Demokratie*, p. 55) describes a qualified majority as a closer approximation to the idea of freedom than a simple majority, this is only possible because he has both private and political freedom in mind. For a discussion of why it is necessary to distinguish between these types of liberties, see the comments at the beginning of this essay.

60. Schmitt, *Die Verfassungslehre*, beginning on p. 26. Also, Carl Bilfinger in *Archiv des öffentlichen Rechts* 11 (1926): 118, and in his *Nationale Demokratie als Grundlage der Weimarer Verfassung* (Halle, 1929). For a survey of the literature see Thoma in *Handbuch des deutschen Staatsrechts*, vol. 2, p. 154, and Walter Jellinek, *Grenzen der Verfassungsgesetzgebung* (1931).

Editor's Note: As Franz Neumann notes below in "The Change in the Function of Law in Modern Society," Schmitt

> was of the opinion that amendments to the Constitution could not assail the "Constitution as a basic decision. Constitutional amendments might modify only certain aspects of the Constitution. The fundamental decisions regarding value preferences which the Constitution embodies, Schmitt thought, could not be modified even by the qualified parliamentary majority which had the power to amend the Constitution.

Neumann might have done a better job of describing the nature of the fundamental "decision" that Schmitt had in mind: it is truly "political," which for Schmitt means that it is an "existential," "pure decision not based on reason and discussion and not justifying itself, that is, an absolute decision created out of nothingness." Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Cambridge: MIT Press, 1985), p. 66.

61. The expressions used here are to be understood in the sense attributed to them in Löwenstein, *Erscheinungsformen der Verfassungsänderung*, beginning on p. 114.

62. From this perspective, the abolition of direct democratic decision-making procedures by means of a two-thirds majority is not permissible: Walter Jellinek in *Handbuch des deutschen Staatsrechts*, vol. 2, p. 185; Thoma's view is found in the same volume on p. 114, and Jacobi's in *Die Reichsgerichtspraxis im deutschen Rechtsleben*, pp. 257–258. Both Thoma and Jacobi believe that amendments can be made in these procedures, but that the possibility of amending them is subject to a referendum. This position ignores the fact that the people organized into a political system do not have the same rights as the people as "*pouvoir constituant*."

63. In a similar vein, but by means of an argument that emphasizes the intent of the Constitution's architects, see Walter Jellinek in *Handbuch des deutschen Staatsrechts*, vol. 3, p. 185. See also Gmelin's comments in *Archiv für öffentlichen Rechts* 19 (1930), beginning on p. 270.

64. Although both of them refer to Schmitt's *Legalität und Legitimität*, neither Thoma nor Jellinek develop a principled argument for why some organizational norms and basic rights cannot be altered. Thoma's comments on the principles of freedom and justice in *Die Grundrechte und Grundpflichten der Reichsverfassung* (Berlin, 1929), vol. 1, p. 47, only refer to the question of impermissible individual measures, even though there is explicit reference to "bills of attainder." He does not seem to acknowledge that some parts of the Constitution are unalterable because of reasons of principle. This becomes clear in *Handbuch des deutschen Staatsrechts*, vol. 2, p. 154. On the questions of amending the Constitution, see also Gerhard Anschütz, *Kommentar zur Reichsverfassung* (Berlin, 1932), beginning on p. 385. There, he expresses opposition to the "new" teaching [that is, the idea that there must be some core to the Weimar Constitution that cannot be altered by means of Article 76—ed.] about this issue because he believes that it implies the existence of an obligatory referendum about the constitution itself. This argument is unacceptable: this would be a referendum of the "*pouvoir constitué*," but a power reserved to the "*pouvoir constituant*" is at stake here. This whole set of problems serves to encourage the elaboration of a set of general constitutional structures. Such "inherent limitations on the legislation" do not, however, have the same political relevance as the formula of "due process of law" for a concrete economic system. See Ernst Freund, "Constitutional Law," *Encyclopedia of the Social Sciences* (New York, 1930), p. 251.

65. Schmitt, *Legalität und Legitimität*, p. 36.

Editor's Note: For Schmitt, parliamentary democratic decision making seems at the very least to presuppose a commitment to the minimal normative ideal that every party should have a chance to make up a political majority; otherwise, there is no reason why any particular political constituency should opt to respect the mechanisms of majority rule in the first place. Schmitt then proceeds to argue that even this rather minimal condition is continually violated in contemporary democracy. Governing majorities take advantage of a "political premium" deriving from their possession of state authority: 1) they interpret amorphous legal concepts ("public order," "emergency," etc.) in a manner that suits their own political aims and harms their opponents [*Ermessenshandhabung*]; 2) they enjoy the benefits of the presumption of the legality of their actions [*Legalitätsvermutung*]; 3) in situations where their acts may be of a questionable legal character, they enjoy the advantage of control over the administration. This allows them to execute their decisions even before there is a chance for the opposition to appeal to a court [*sofortige Vollziehbarkeit*] [Schmitt, *Legalität und Legitimität*, pp. 35–40]. As we will see, Kirchheimer and Leites also critically scrutinize this claim. But it is important that Schmitt's intention here is clear: he wants to demonstrate that even the most minimalistic interpretation of democratic decision making is a failure—and thus that democracy cannot possibly live up to those standards that it claims to be in accordance with.

66. Schmitt, *Legalität und Legitimität*, p. 35.

67. On possibilities for legal regulations of the financing of elections see Edward Sait, *American Parties and Elections* (New York, 1927).

Editor's Note: This claim is inadequately explicated. But Kirchheimer seems to be suggesting that the *lack* of some constitutional norms or legal rules—such as a constitutional clause assuring free speech or rules regulating campaign financing—can also undermine "equal chances" for different parties.

68. Schmitt, *Legalität und Legitimität*, p. 36.

Editor's Note: Schmitt's original argument here is described in note 64 above. Kirchheimer and Leites seem to alter his original position somewhat in their account of the nature of a "political premium resulting from the legal possession of political power."

69. R. H. Tawney, *Equality* (London, 1929), p. 125.

70. Editor's Note: For a critical discussion of Lenin's *State and Revolution*, see Otto Kirchheimer, "Marxism, Dictatorship, and the Organization of the Proletariat," in *Politics, Law, & Social Change: Selected Essays of Otto Kirchheimer*, ed. Frederic S. Burin and Kurt Shell (New York: Columbia University Press, 1969).

71. Schmitt, *Legalität und Legitimität*, p. 35.

72. Schmitt, *Legalität und Legitimität*, p. 35. See also Lester Ward's comments in *Reine Soziologie* (Innsbruck, 1907), vol. 1, p. 305. Roffenstein (in *Schmollers Jahrbuch* 45 [1921]: 109) summarizes Ward's view: "Every gain in power provides an additional advantage in the struggle to gain more power."

73.

> The contemporary law-based democratic state depends first and foremost on free and equal political competition, and a legally guaranteed equal chance for every group to advance its ideas and interests by political means. This legally equal opportunity can in fact seem dubious because of inequalities in education and property; this can happen to such an extent that a proletarian dictatorship may seem to fulfill this egalitarian ideal more effectively than the contemporary law-based state. But the impressive degree to which this political ideal still corresponds to social reality can be seen in postwar Italy in the emergence of the Catholic Popular Party with its extremely radical social demands.

Hermann Heller, *Europa und der Fascismus* (Berlin, 1931), p. 100. There clearly are parallel examples in contemporary Germany.

74. Editor's Note: Article 73 outlines procedures for a referendum:

> A law passed by parliament shall, before it becomes valid, be subject to a referendum if the President of the Reich, within a month, decides.
>
> A law, whose validity has been deferred on the request of one-third of the members of parliament, shall be subject to a referendum upon the request of one-twentieth of the qualified voters.
>
> A referendum shall also take place, if one-tenth of the qualified voters petition for the submission of a proposed law. Such petition must be based on a fully elaborated bill. The bill shall be submitted to the parliament by the ministry accompanied by an expression of its views. The referendum shall not take place if the bill petitioned for is accepted by the Reichstag without amendment.
>
> Only the President may order a referendum concerning the budget, tax laws, and salary-related regulations.
>
> Detailed regulations in respect to the referendum and initiative shall be prescribed by a federal law.

75. Schmitt, *Legalität und Legitimität*, p. 69; see also p. 66.

Editor's Note: Schmitt believes that the Weimar Constitution's direct-democratic elements conflict with its traditional liberal-parliamentary features. This stems from the fact that Weimar's founders (allegedly) sought a parliament in accordance with traditional liberal conceptions of parliamentary government. In other words, they emphasized the classical ideals of rationalistic liberal parliamentarism—for example, the aspiration to guide political affairs by general norms stemming from a process of free-wheeling rational discourse. According to Schmitt, plebiscites are guided by an altogether distinct logic: whereas Parliament is based on *ratio*, referenda necessarily are guided by an irrational, emotional expression of *voluntas*. According to Schmitt, this contradiction manifests itself in a series of inane decision-making devices within the Weimar Constitution; Kirchheimer addresses some of these arguments below. Schmitt, *Legalität und Legitimität*, pp. 62–69.

76. On the problem of justifying Parliament see Gerhard Leibholz, *Wesen der Repräsentation* (Berlin, 1929), especially p. 71.

77. Qualities that help justify the special status of the legislature in Schmitt's eyes include "reason" and "moderation." Schmitt, *Legalität und Legitimität*, p. 68; see also pp. 13, 15.

Editor's Note: For Schmitt's discussion of parliamentarism see *The Crisis of Parliamentary Democracy* (Cambridge, MIT Press, 1985). For his discussion there of the special character of parliamentary law, see esp. pp. 44–48.

78. Leibholz, *Wesen der Repräsentation*, p. 170, footnote 3.

79. Schmitt, *Legalität und Legitimität*, pp. 63, 69.

80. This only applies if nothing crucial occurred between that juncture when the referendum took place and that moment when Parliament passed a law. If something relevant for the law in question has taken place in the meantime, then the representative function of Parliament demands of it that it reconsider the legislative proposal in question in the spirit of the referendum that had been approved by the people. A parliamentary law that contradicted a referendum could come into existence if it substantiated a shift in public opinion that had resulted because of changes in the political situation. See Jellinek in *Handbuch des deutschen Staatsrechts*, vol. 2, pp. 181–182. Unfortunately, his example is not well chosen. It is not evident why alterations in the use of the death penalty abroad should have an immediate effect on the political perspective of the majority of the German people.

81. Schmitt, *Legalität und Legitimität*, p. 64.

Editor's Note: Recall the special place accorded the executive in the provisions of Article 76—reprinted above—for a referendum.

82. Schmitt, *Legalität und Legitimität*, p. 63.

83. The liberal-democratic oriented literature describes this process in terms of the "distrust to parliament." This expression is meant to capture the loss of parliament's autonomy, but it says nothing about parliament's technical functions. As far as the role of parliament in democracy is concerned, this "distrust" is an eminently democratic virtue: Harold Laski, *A Grammar of Politics* (New Haven, 1925), p. 321; Agnes Headlam Morley, *The New Democratic Constitutions of Europe* (Oxford, 1926), p. 32.

84. See the extensive analysis provided by Karl Löwenstein in his "Soziologie der parlamentarischen Repräsentation nach der grossen Reform," *Archiv für Sozialwissenschaft* 51 (1924). Also see *Annalen des Deutschen Reichs 1923–1925*, p. 4:

> Since the emergence of mass democracy, the cabinet is only formally subordinate to the lower house. The ruling power is in the hands of the electorate. The lower house is no longer the master of the state, but rather a mere transmission belt and instrument of control for the electorate.

The possibility of replacing parliament in a democratic state is discussed in Graham Wallas, *The Great Society* [reprint: Lincoln, Neb., 1967]; Ferdinand Tönnies, "Parlamentarismus und Demokratie," *Schmollers Jahrbuch* 51 (1927). Despite his criticisms of it, James Bryce acknowledges the technical necessity of parliament in *Modern Democracies* (New York, 1924), vol. 2, p. 377.

85. This transition from a substantial justification of Parliament to one that emphasizes its sociotechnical functions is described by Ziegler, *Die moderne Nation*, beginning on p. 285. But he does so without acknowledging the significance of this development for the attempt to provide a justification for contemporary parliament.

86. See Jacobi, *Reichsgerichtspraxis im deutschen Rechtsleben*, pp. 244–245; Thoma in *Handbuch des deutschen Staatsrechts*, vol. 2, p. 114.

87. Schmitt, *Legalität und Legitimität*, p. 67.

Editor's Note: One consequence for Schmitt of the Weimar Constitution's attempt to synthesize traditional liberal parliamentarism with new forms of plebiscitary decision making is that contradictions emerge concerning the number of votes needed to pass laws by means of these two distinct legislative "systems." See note 74.

88. Focusing attention on the problem of parliamentary absenteeism is justified because parliamentarians may fail to show up to vote for political reasons.

89. When this type of conflict arises need not be discussed here. See Schmitt, *Legalität und Legitimität*, pp. 67, 69.

90. Editor's Note: Article 75 reads that "a resolution of the parliament shall not be annulled unless a majority of the qualified voters participate in the election."

91. Schmitt, *Legalität und Legitimität*, p. 67.

Editor's Note: Schmitt writes there that

> in parliament, amendments to the constitution require a two-thirds majority instead of a simple majority; in the case of a referendum, no one dares to demand a qualified majority of the present, unmediated people; this would constitute an all too obvious contradiction of the basic democratic ideal of majority rule. So Article 76 requires a simple majority of qualified voters in order to amend the constitution by means of a referendum. In contrast, Article 75 requires the participation of a majority of qualified voters in a referendum if it is to result in the annulment of a parliamentary resolution. . . . Today, things have reached such a state that only those who plan to vote "yes" in a referendum take part in it. If they constitute a majority of qualified voters, a referendum will be passed which at the same time always necessarily satisfies the conditions outlined in Article 76 for constitutional amendments by means of a referendum. In practical terms, any distinction between statutory and constitutional lawmaking thereby vanishes.

92. On the question of "terror" in the context of direct democratic decision making see Karl Tannert, *Die Fehlgestalt des Volksentscheids* (Breslau, 1929).

93. Editor's Note: That is, the approximate number of votes needed to elect a member to the parliament at the time Kirchheimer and Leites authored this essay.

94. Schmitt, *Legalität und Legitimität*, beginning on p. 93.

95. As far as the possibility of an identical system of norms having a diversity of possible theoretical justifications is concerned, it is striking that the view that the people have preeminence *within* the constitutional system (as Jacobi's theory argues), and the view that they have preeminence *outside* of it (Schmitt's view), can be linked to contrary assessments of the basic character of the people. Jacobi, *Die Reichsgerichtspraxis im deutschen Rechtsleben*, p. 243, p. 247, note 30.

96. See Georges Bernanos, *La grande peur des bien-pensants* (Paris, 1931), p. 104.

97. See Charles Seignobos, *Histoire de la France contemporaine* (Paris, 1921), p. 139.

98. Seignobos, *Histoire de la France contemporaine*, beginning on p. 202.

99. See John Dewey, *The Public and Its Problems* (New York, 1927), p. 171.

PART II

Law and Politics in the Authoritarian State