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PARLIAMENTS IN AN ERA OF ILLIBERAL EXECUTIVES

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Introduction

Parliaments everywhere are experiencing a decline in the constitutional functions of deliberation, law proposing, oversight, and opposition.[1] Such practices, associated with parliamentarism, are being undermined by illiberal democrats who exploit institutional vulnerabilities in order to undermine, if not undo, democratic practice. The particular vulnerability explored in this chapter is the tendency of parliamentary democracies to concentrate power in the executive branch. It is made manifest in the "personalization" and "presidentialization" of regimes without elected presidents. This is a vulnerability not confined, therefore, to illiberal democracies. But illiberal democratic leadership has consolidated power in the executive branch in ways that impede the push and pull of competitive democratic processes. The object is to further undermine the separation of powers and shift constitutional culture in a direction that silences critics and secures command of political processes by a single faction or person into the future. Illiberal democrats aim, in short, to establish a permanent regime of prerogative power directly opposed to responsible rule by parliament.

Carl Schmitt is helpful in thinking through this moment in so far as he specified parliamentary democracy's vulnerabilities to illiberal political projects. Schmitt notoriously did so not for the purpose of preserving or even reinventing parliamentary democracy or constitutional principles like the separation of powers. Instead, he did so in order to lay the groundwork for a powerful executive – a "dictator" – who could provide "decisive" political leadership, speak for the people as a whole, and provide the unity lacking in a pluralistic state. Schmitt not only diagnosed liberal democracy's weaknesses but prescribed a path away from it premised on anti-liberal foundations. Schmitt's prescriptive account, for this reason, serves as a sketch of where illiberal democracies might be headed. The reading of Schmitt offered here is not, then, for the purpose of identifying resources with which to combat illiberalism. It is, instead, for the purpose of identifying some of the politico-legal presuppositions around the separation of powers between the legislative and executive branches underlying contemporary illiberalism.[2]

Such a discussion might be dismissed as beside the point given that Schmitt's Weimar-era theorizing was the product of post-World War I German crises. It was a "miracle" that Weimar democracy survived "as long as it did," through a succession of internal and foreign crises

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(Peukert 1991, 71; Kolb 2004, 36). Nor was there a "loyal opposition" available as both left- and right-wing movements did their best to "destroy" parliamentary institutions (Kolb 2004, 36). It could be said, then, that Weimar legal theory offers no lessons that are generalizable to other times and places. Of course, Schmitt's scholarship was the product of its unique times, exhibiting continuities with pre-Weimar developments and constitutional theorizing elsewhere on the continent (Blackbourn 2003, 373; Gijsenbergh 2015). But it also is the case that Schmitt developed an ambitious theory of the constitution in an "absolute sense" (Schmitt 2008, 59). Weimar constitutional debates, more generally, "raised basic questions about democracy and law that have a familiar ring to observers" today (Caldwell 1997, 2; Dyzenhaus 2016, 504). It is not surprising to learn, then, that Schmitt serves as an "inspiration" for some key figures in the illiberal democracies discussed here.[3] Schmitt's diagnosis and prognosis, it can be said, continues to have resonance, even influence, today.

The chapter is animated by a conception of pluralism, contra Schmitt, that insists upon an openness to rival political viewpoints. Rather than "converting differences that jeopardize … self-certainties into abnormalities and dangers" (Connolly 1995, 121), this view of pluralism denies to illiberal projects the privilege of exclusively controlling political futures. Parliamentarism pulls in this direction by generating conditions in which the voices of those excluded or ostracized are heard and acknowledged. Parliament, in this view, generates a forum for dissensus and fair play (Palonen 2019, Ch 3), premised upon the chance that governments change hands – and that such outcomes are not predetermined.[4] It also stands opposed to an authoritarian disposition that behaves in an "accusatory" mode that is not open to hearing the suffering of others (Connolly 2017, 79). This contrasting account is taken up in the conclusion.

The bulk of the chapter proceeds as follows: part one takes up the classical liberal legal account of the separation of powers and its relation to prerogative power, principally through a reading of John Locke.[5] In part two, Max Weber's sanguine take on parliamentarism is contrasted with Schmitt's approach to parliamentary failure and his prescription for a "decisive" executive. Finally, part three discusses aspects of three modern illiberal democracies (Hungary, Poland, and Turkey) whose leadership have embraced paths away from parliamentarism that are, in some ways, congruent with Schmitt's diagnosis. They are moving in a direction that ends up looking like a new form of prerogative power, centred around the executive, with unchecked authority to rule without reference to the legislative branches. The separation of powers, I argue, ceases to function as a means of giving voice to the plural interests at work in democratic societies.

The Rise and Demise of Parliament

There is "no liberty" when legislative power is united with the executive, declared Montesquieu. "All would be lost" if the same person exercised executive, legislative and judicial powers (Montesquieu [1748] 1989, 157). If Montesquieu is credited with having formulated the "separation of powers" between the three branches in his discussion of the English constitution, it generated misconceptions about the working of the eighteenth-century English constitution. Instead of strict separation, the contemporary understanding of English constitutionalism was one of a "mixed" or "balanced" constitution where monarchical, aristocratic, and democratic elements were represented in Parliament, each serving as a "mutual check" upon each other (Blackstone 1979, 150). The monarch, however, had a singular advantage, having an additional existence outside of Parliament. This is where it could be said that executive authority resided. The King, with the advice and assistance of council (first the Privy Council and, after 1688, the cabinet) conducted affairs of state, exercising a vast array of discretionary royal prerogatives (Hallam 1893, 731).

John Locke's *Second Treatise of Government*'s idealized portrayal of the English Constitution anticipated developments secured by the Glorious Revolution of 1688. Though his discussion of prerogatives is often neglected, it is a central preoccupation in the *Second Treatise* (Pasquino 1998, 199).[6] Locke distinguished between those with the power to make laws – the legislative power, which need not always be sitting – and those with the power to execute them – executive power, a power "always in being" (in light of the exigency to act urgently[7]) which was typically conjoined with "federative power" (foreign affairs) (Locke [1689] 1988, ¶144, ¶152, ¶160, ¶156). In this formulation, Locke renders executive power subordinate to the legislative (Locke [1689] 1988, ¶132, ¶149). To be sure, the executive has a "share" in law making (here he seems to be speaking of the crown-in-parliament), it is, however, "visibly subordinate and accountable to it" (speaking here of the crown-in-council) (Locke [1689] 1988, ¶152).[8] The legislative power is authorized, in Locke's account, to curb the executive. It is in the executive's ability to act urgently in the exercise of the prerogatives, however, that the executive has an advantage over the legislative. Locke expected the principle of *salus populi*, the power to act "for the public good, without the prescription of the Law, and even sometimes against it," to tame royal prerogative (Locke [1689] 1988, ¶166, ¶159, ¶160).

Locke nevertheless appreciates that prerogative authority is not always in the hands of the "wisest and best Princes." Learning from experience that rule by "weak princes" gave rise to "mistake," "flattery," and "use of this power for private ends of their own," the people "declared limitations" on the prerogative. Locke gives license to the people to continue to do so. It is a "wrong notion of government," Locke concludes, to say that the people have "encroached upon the prerogative" when they have set limits to it. For "they have not pulled from the prince anything that of right that belonged to him," but instead have declared that the power which was to be used for "their good" had been abused (Locke [1689] 1988, ¶164–165, 163). The prerogative, in other words, is a grant of trust held by the Crown on behalf of the people which the people can rescind (Mansfield 1989, 203; Simmons 1992, 218). Locke confirms, then, an ability to place limits on the Crown outside of Parliament's precincts when exercising royal prerogatives. If any part of Locke's treatise has taken hold, it is this part, as it represents the prevailing doctrine in the parliamentary world.

Prerogative authority – the undefined and unconstrained discretion held in reserve by the monarch – subsequently was wrested by degrees from the Crown by Parliament.[9] The idea of parliamentary supremacy is, in large part, an inheritance of this "excessive power" originally enjoyed by the British Crown (De Lolme 1853, 20–21). This "treasury of omnipotence," equivalent to the sum of "elasticity" and "undefined possibilities" available to the Crown under royal prerogative, were slowly assumed by responsible ministers drawn from the ranks of Parliament (McIlwain 1962, 51–53; Figgis 1922, 237). Over time it conferred extraordinary power on Parliament, the Prime Minister, and his Cabinet (Dicey [1885] 1908, 460–461; Gwyn 1965; Weston 1965). DeLolme captures the development well in his paradoxical formulation: it "was the excessive power of the king which made England free" (De Lolme 1853, 21). By assuming the powers formerly exercised by royal prerogatives – over war, peace and foreign affairs, for instance – powerful executives emerged to stand in the shoes of monarchs.

Though there is no doubt that Prime Ministers in parliamentary democracies are institutionally more powerful than Presidents, concerns about "presidentialization" expresses worry about the centralization of policy making and coordination within the executive branch, resulting in the marginalization of both cabinet and Parliament. An associated concern is the rise of "personalization" in party leadership (Poguntke and Webb 2005, 5; Rhodes, Wanna, and Weller 2009, 86) where the executive is kept at some distance from the operations of ordinary government, exploiting both "insider" and "outsider" roles (Foley 2000, 31). Prime Minister

Margaret Thatcher was the proverbial outsider who capitalized on the opportunity to govern in a personalized style. "She gave physical form to that which drives leaders into presidential solitude at the same time that it forces them into presidential prominence as a personalized intermediary between the government and the public," Foley observes (1993, 9, 87; 2004).

Personalization that is akin to presidentialization confers a "super-legitimacy … that cannot help but encourage a certain illiberalism" (Rosanvallon 2018, 55). The combination of the executive's superior and personalized legitimacy with the weaker legitimacy of legislatures divided on partisan lines renders the representative assembly the more vulnerable branch. The path to illiberalism follows from this scenario, with the executive embodying the will of the nation as a whole and the legislature speaking for only a mathematical majority. It is just this sort of vulnerability that Schmitt pinpoints and chooses theoretically to exploit.

The Age of Leadership[10]

What influenced much constitutional thought in the nineteenth century was as an ideal type of Parliament modeled upon the British experience. The historian and legislator François Guizot captured this mid-nineteenth century enthusiasm well in his lectures on the origins of representative government. For Guizot, openness and publicity associated with parliamentary processes made it possible to "maintain a permanent communication between popular opinion and government" (Guizot 2002, 63, 372; Rosanvallon 1985, 67).[11] This model, connecting public opinion to parliamentary publicity, sought to establish a "medium of genuine if incomplete identity between rulers and ruled" (Cohen and Arato 1992, 233). Max Weber hoped, too, that Germany could incorporate deliberative processes that resembled the idealized British Parliamentary one. By so doing, the crippled Reichstag could produce national leadership trained to seize the reins of state power and combat the rise of the professional bureaucracy (Weber [1918] 1994a, 178). Weber sought to adapt to German circumstances functions performed by the English Parliament, providing a "counterbalance" to rule by administrators (Weber [1918] 1994a, 185). Cross examination of expert officials in Parliament sitting as a Committee of the Whole was not available to Reichstag representatives, condemning them to "amateurish stupidity," complained Weber (Weber [1918] 1994a, 178).[12] Adopting effective parliamentary processes within the Reichstag would provide training ground for talented representatives to emerge while encouraging political education amongst the citizenry. Rule by officialdom would be substituted by responsible political leadership.

Weber did not speak much about prerogative power other than to take note of the personalist rule of the German Kaiser (Weber [1918] 1994a, 244–245).[13] If monarchical or bureaucratic rule, unchecked by parliament, amounted to arbitrary rule in Weber's etimation, then his political writings should be understood as an indictment of rule by prerogative. Weber's ambition was to avoid "plebiscitarian democracy" – which he likened to personalization (Loewenstein 1966, 63; Weber [1919] 1994b, 339). Driving electoral success were party machines relying on the "demagogic effect of the leader's personality" to win votes (Weber [1919] 1994b, 339). Even England could not avoid the development of party machinery along these lines (Weber [1919] 1994b, 342). In the US, Weber observed plebiscitarian tendencies emerging early on as a consequence of Presidential elections, unleashed during President Andrew Jackson's campaign (Weber [1919] 1994b, 344–345).[14] In Germany, similarly, political leadership "uses mass demagogy to gain the confidence of the masses and their belief in his person" (Weber [1918] 1994a, 220). Weber described this method of selection as "Caesarism" – "a profession of faith in the calling of him who demands these acclamations" (Weber [1922] 1978, 1451; Weber [1918] 1994a, 200) – serving as "dictator of the electoral battlefield" (Weber [1919] 1994c,

342)[15] This was a potential that was present in most every democracy (Weber [1918] 1994a, 220–221). "Every kind of direct election by the people of the bearer of supreme power … lies on the road towards these 'pure' forms of Caesarist acclamation," which parliamentary democracy should seek to "exclude" because it "threaten[s] the power of parliament" (Weber [1918] 1994a, 221). Despite these worries, Weber came around to the view that the Reich President, in the new Weimar Constitution, should be elected directly by the people. He would be the "bearer of the principle of the unity of the Reich" because his authority rested "unquestionably on the will of the whole people" (Weber [1919] 1994c, 307, 304; Weber [1919] 1994b, 351; Radkau 2011, 511). The tension between Caesarism and Parliamentarism never gets fully reconciled in Weber's thought. If "democratization and demagogy belong together … *quite irrespective* of the type of constitution" (Weber [1918] 1994a, 220, emphasis in original), Weber probably envisaged a version of the "balanced" constitution in which a muscular executive and a democratic parliament served to mutually check each other (Elieason 2000, 142–143; Blanc 2015, 112; Scott 2018, 7).

It was true, Weber admitted, that "[f]ashionable chatter amongst litérateurs here likes to discredit Parliaments as mere 'talking shops'" (Weber 1994a, 181). Weber nevertheless expressed a preference for the "prosaic sound waves and drops of ink" – the written and spoken word – over Ceasarism (Weber [1918] 1994a, 181). Despite the faddish critique,

> [e]veryone probably wants to see them [Parliaments] continue to exist as an authority which can compel *openness of administration*, the fixing of the *budget* and finally the discussion and passing of *legislation*, functions for which they are indeed irreplaceable in any democracy.
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> *Weber [1918] 1994a, 224; Weber [1922] 1978, 1454*

He did not waiver in his support for parliament's potentialities.

Four years later, Carl Schmitt channelled the fashionable critique in his *Political Theology*, adopting Catholic political philosopher Donoso-Cortés' characterization of the bourgeoisie as the "discussing class." "A class that shifts all political activity onto the plane of conversation in the press and in parliament is no match for social conflict," he warned (Schmitt [1922] 1985a, 58). Schmitt was in the course of formulating his own political theology rather than that of Donoso-Cortes.[16] Schmitt expanded on this critique of Parliament in his Weimar-era writings, in a direction opposite to that urged by Weber.[17] He advocated an interpretation of the Weimar Constitution that would break down the classical separation of powers giving rise to new forms of prerogative rule. In a society riven by class, religion, and race, Schmitt placed his hope in "dictatorship" that could save the German people from the "jumble" of contradictory commitments in the Constitution.[18] By exalting executive authority, condoning dictatorship, and rejecting the separation of powers, Schmitt was not seeking to defend parliamentary principles. Instead, he was categorically rejecting them.[19] His critique centred around a number of empirical observations and normative claims.

An Empty Apparatus

A principal claim was that Parliament had outgrown its intellectual roots. The institution, he wrote, "has lost its moral and intellectual foundation and only remains standing through sheer mechanical perseverance as an empty apparatus" (Schmitt [1923] 1985b, 21). Parliament initially had assembled authority to do battle with a 'strong monarchical state' (Schmitt [1931] 2015, 131). Once Parliament emerged victorious, it no longer functioned to combat the monarchy,

but turned in on itself and then against society. Schmitt "could not see where contemporary parliamentarism could find a new intellectual foundation if the principles of openness and discussion" were "inapplicable" (Schmitt [1923] 1985b, 2).

If democracy presupposed rule by the propertied and the educated, parliament ceased to be "representative of a certain type of learning" and of "political unity" (Schmitt [1930] 2000, 334–335, 337). Not only did Parliament not attract an aristocracy to serve in its chambers, it was no longer the site of "reciprocal rational persuasion" but one for the machinations of party doyens in smoke-filled backrooms (Schmitt [1923] 1985b, 50; Schmitt [1931] 2015, 141; Schmitt [1930] 2000, 338). There was no public "discussion," just the announcement of preordained decisions in the form of public votes in the legislature (Schmitt [1930] 2000, 341).[20] Democracy, too, turned out to be merely a "polemical concept" that was empty of normativity as it could be paired with any political ideology (Schmitt [1923] 1985b, 24).[21] As monarchical power both inside and outside of Parliament had devolved to victorious numerical majorities, the stakes over seizing the monopoly of state power were as high as ever.

Demise of Equal Chance

Organized interests now vied for Parliamentary supremacy in order to vanquish the opposition. This was exhibited in the demise of the principle of legality underpinning parliamentary forms – the idea of "unconditional equal chance," that "all conceivable opinions, tendencies, and movements" had the chance of securing a numerical majority (Schmitt [1932] 1996b, 28). There was no preventing majorities, once having legally secured power, from abusing it by, for instance, "declaring their domestic competitors illegal" so that the majority "is now suddenly no longer a party, it is the state itself" (Schmitt [1932] 1996b, 31). Having secured power, the majority "perceives all serious critique or even endangerment of its position as illegality, as a coup, and as a violation of the spirit of the constitution" (Schmitt [1931] 1999b, 17; Schmitt [1931] 2015, 145). Not only are opponents vanquished, the numerical majority secure a "monopoly over the production and sanctity of legality" (Schmitt [1932] 1996b, 31). Because the advantage of having the "legal possession of state power decides the case," the principle of equal chance is thereby "eliminated" (Schmitt [1932] 1996b, 35). Warring factions will struggle for supremacy over the tools of state legality and legitimacy until, at last, one set of partisans vanquishes the other (Schmitt [1932] 1996b, 93).

Pluralism's Disunity

If the state was merely "an association like others," as Harold Laski and his fellow pluralists maintained (Laski 1938, 37), then parliamentarians were no better than bit actors, pledging loyalty to their "social organization" rather than loyalty to the constitution. This put the "shared unity of the state" in peril. Pluralism, for Schmitt, was anathema to the homogeneity and "uniformity of will and uniformity of spirit" demanded by politics (Schmitt [1938] 2008b, 74). It succeeded only in weakening the "all-embracing political unit, the state" (Schmitt [1932] 1996a, 32).

If the political was the "most extreme and intense antagonism" then identification of who was friend and who was enemy was vital (Schmitt [1932] 1996b, 29). The "high points of politics," Schmitt enthusiastically observed, "are simultaneously the moments in which the enemy is, in concrete clarity, recognized as the enemy" (Schmitt [1932] 1996a, 67). The "decisive entity," for these purposes, was the "political grouping" associated with the state (Schmitt [1932] 1996a, 38, 46). The value neutrality associated with the *Rechtsstaat*, however, had pushed the

system to the point of "suicide" (Schmitt [1932] 1996b, 48). If an indivisible national community was "willed away" by pluralism, all that was left was the "abstract, empty functionalism of pure mathematical majority determinations" (Schmitt [1932] 1996b, 28). Elections became mere plebiscites where citizens were asked to respond to simple binary questions (Schmitt [1931] 2015, 141).[22]

In a pluralist parliamentary democracy, the enemy is society itself as Parliament "must bow to everybody's wishes, please everyone, subsidize everyone and be at the beck and call of conflicting interests at one and the same time" (Schmitt [1932] 1996b, 92–93; Schmitt [1933] 1999a, 23). What Schmitt labelled the quantitative "total state" loomed on the horizon. As no subject was off the parliamentary agenda, candidates for intervention by the state were plentiful. Every element of the pluralist state "aims to realize totality, as far as possible, within itself and for itself" (Schmitt [1931] 2015, 137). There was nothing that was "not at least potentially state-related and political" (Schmitt [1931] 1999b, 11). Most vulnerable to the machinations of politicization was the economy (Schmitt [1932] 1998, 221).

Executives Rule

If segregation of the economy from parliament was not possible in the pluralist state, Schmitt proposed reliance upon a "neutral third" (Constant's term) who could serve as a mediating and preserving power (Schmitt [1931] 2015, 156). What was needed was an especially "strong" personality who could express the "unity and wholeness of the German people," overcoming parliamentary divisiveness but by "specifically democratic means" (Schmitt [1931] 2015, 158, 172–173). In the Weimar constitution, this would be the Reich President.

Article 48 of the Weimar Constitution empowered the President – an official not responsible to Parliament – to make law within constitutional confines.[23] It conferred on an "extraordinary lawmaker" the ability to both make and execute laws, breaking the liberal legal order's separation of powers by conferring powers on what, practically speaking, was a "dictator" (Schmitt [1932] 1996b, 70–71). Anointed directly by the people via "plebiscitary election," he is "a politician in an especially decisive and intense sense, a political leader and not merely a neutral third" (Schmitt [1932] 1996b, 89; Schmitt [1928] 2008a, 371). Without this guarantor of the constitutional order, "chaos" would ensue (Schmitt [1932] 1998, 216). This looked like an appeal to pre-1688 royal absolutism.[24]

The "extraordinary lawgiver" would have the power to make law even over the objections of parliament. By this, did Schmitt mean to resurrect a form of rule by prerogatives? Schmitt alludes to this possibility in various of his writings. In seventeenth century England, Parliament "bitterly" did battle with the monarchy over "the independent royal right to issue decrees with the force of law." Overcoming this "independent law making" power was required, otherwise "it would have destroyed the parliamentary legislative state itself" (Schmitt [1932] 1996b, 68). It precisely was the victorious legislative state that Schmitt targeted in his withering critique by empowering an independent lawmaking power in the President. Elsewhere, Schmitt envisages the neutral third as the "rare type of authority" derived "perhaps from the authoritarian residue of a predemocratic time" (Schmitt [1932] 1996b, 90).[25] Early in his career, while serving in both military and academic capacities, Schmitt describes criminal law under a state of siege as a return to an "originary condition" (*Urzustand*). The military commander operating in such a milieu "acts like the administering state prior to the separation of powers: he decides on concrete measures as means to a concrete goal, without being hindered by statutory limits" (Scheuerman 2017, 550).[26] Prerogative rule, in other words, appears to have been within his contemplation.

Schmitt likened Weimar's Presidential role to a "commisarial dictatorship" whose responsibility was to preserve and maintain the constitutional order. The constitution, in these circumstances, was suspended in order to "protect it" (Schmitt [1921] 2014, 118). Commisarial dictatorship was contrasted with "sovereign dictatorship" which overthrows the old in favour of a new constitutional order. The sovereign power "does not appeal to an existing constitution but to one that is still to come" (Schmitt [1921] 2014, 119). As others have noted, Schmitt tended to elide the distinction between the two.[27] Preuss, for instance, characterizes Schmitt's constitutional theory as prescribing "sovereign" and not merely "commissarial" dictatorship (Preuss 2016, 483). The line between the two "get[s] blurred," observes Scheuerman (2017, 556), hinting at a "preference" for wholesale revolution via sovereign dictatorship. This reading is underscored by the expansive authority Schmitt confers on the Reich President in his interpretation of Article 48.

Much has been said about Schmitt's claim that Weimar conferred upon the President extraordinary authority to depart from the constitutional order.[28] Notable is the expansive authority he argued was delegated to the President in cases where public order and security were "disturbed or endangered." That authority was not confined to the list of seven basic rights enumerated in Article 48.2, having to do with personal freedom and property. Instead, Schmitt argued, many structural features of the constitution could be suspended by executive authority, well beyond the brief list of enumerated rights. Presidential authority was "free to intervene in the entire system," short of dissolving the Constitution, which was subject to Parliamentary override in Article 48.3 (Schmitt [1921] 2014, 220).

By acting swiftly in the execution of his commands, the President is superior to the legislative branch, rendering "practically meaningless the entire system of legal protections that was built up with great artistry to counter the orders of the executive," namely, the separation of powers (Schmitt [1932] 1996b, 70). The "extraordinary lawmaker" empowered via Article 48 combines, Schmitt claimed, both legislative and executive functions in one person (Schmitt [1932] 1996b, 71). Indeed, the "dictator" established by Article 48 is a better fit for "the administrative state, which manifests itself in the practice of measures, than a parliament that is separated from the executive" (Schmitt [1932] 1996b, 83, 93).

Nationalist Mythologizing

It is hard to understand how, if Parliament was paralyzed and dysfunctional, Schmitt could rail against a total quantitative state.[29] Was the specter of a commissary or sovereign dictatorship not more of a threat to well-established rights, such as the right to property? Might not rule by "weak princes," as Locke warned, give rise to "mistake," "flattery," and the use of "power for [the prince's own] private ends"? (Locke [1689] 1988, ¶164–165, 163). Schmitt expressed little concern in this regard. He instead exhibited confidence that an executive with the power to both make laws and execute them would not threaten core rights associated with the private sphere. A source of this confidence can be found in his discussion of "myth" in *The Crisis of Parliamentary Democracy*. Expressing admiration for Sorel's call for a general strike by appealing to working class mythology, the concept of myth was, for Schmitt, "the only criterion … for deciding whether one nation or social group has a historical mission" – it was the only way a "people or class become the engine of world history" (Schmitt [1923] 1985b, 68). "Discussing, bargaining, parliamentary proceedings, appear a betrayal of myth," Schmitt argued (Schmitt [1923] 1985b, 69).[30]

In any contest between working class with nationalist mythologizing, organized around "race and descent," the "national myth until today has always been victorious." The success of Italian

fascism offered, for Schmitt, evidence of how nationalist mythologizing "makes a stronger impact and has evoked more powerful emotions than the socialist image of the bourgeois" (Schmitt [1923] 1985b, 75). Rational discussion (speaking, presumably, of debate organized along class lines) was now supplanted by irrational appeals to a "new feeling for order, discipline and hierarchy" (Schmitt [1923] 1985b, 76). In "open confrontation" the national myth of race and nation always wins out over class, Schmitt concludes (Schmitt [1923] 1985b, 75). This particularly will be the case in so far as power, which "produces" consensus, is inclined to tilt its efforts in favour of propertied interests (Schmitt [1930] 2000, 306).[31] In which case, threats to property rights are unlikely to emerge from Schmitt's models of dictatorship. Instead, appeals to order and hierarchy would win out over parliamentary disorder. If the pluralist state was a "weak state," in an open conflict between the two, the strong state will emerge triumphant.[32]

Parliamentary Decline in Three Democracies

In this section, I briefly examine illiberal tendencies observable in three democracies (Hungary, Poland, and Turkey) that are moving in the direction of prerogative rule. The first two states are members of the European Union but have been aggressively pursuing policy paths that culminate, in the infamous words of Prime Minister of Hungary Viktor Orbán, in the construction of "an illiberal state" (Orbán 2014) – "a new constitutional order" which he declares is based upon "national and Christian foundations" (Orbán 2016). Turkey, preparing to join the EU, has probably moved farthest along the road to prerogative rule. In all three instances, the path to illiberalism had the opportunity to intensify with the spread of COVID-19, though the trendlines emphasized below were well underway before emergency measures were adopted in response to the pandemic. The discussion focuses on three characteristics already identified associated with Schmitt's constitutional thought: (i) sidelining parliament; (ii) demobilizing the opposition; and (iii) ascent of executive rule. This is not to say that other elements of Schmitt's critique are not also present, such as targeting enemies of the state or relying upon nationalist mythologies. Nor have every one of Schmitt's prescriptions been adopted in these three states. It is in the interests of focusing on parliamentary institutions, together with a desire for brevity, that these three elements are singled out.[33]

Demise of Parliament

The diminution, if not disarming, of parliament and legislative assemblies is being undertaken with a vengeance in each of these three states. Their efforts have not done away entirely with the legislative branches. Even illiberal personalized leadership "will have allies" in legislatures, a feature that the inherited judicial branches will lack (Ginsburg and Huq 2018, 101). Keeping up the appearance of democracy by maintaining representative institutions, while seizing complete command of parliamentary affairs, is what entitles these regimes to claim to be democratic.

Prime Minister Orbán has boldly declared that his governing party, FIDESZ, will formulate national policy "not through constant debates" – an affront to Parliament's deliberative functions – but "through a natural representation of interests" (Halmai 2018, 245). Having secured a supermajority of 68 percent of parliamentary seats with only 53 percent of the votes, Orbán interpreted the 2010 election as a mandate to radically alter the Hungarian Constitution in 2012[34] after only nine days of Parliamentary debate (Rydliński 2018, 97). Subsequent reform resulted in depriving parliament of key institutional functions. The "Budget Council," for instance, has authority to veto budgets issuing out of Parliament if they contribute to the national debt (Lendvai 2017, 107), a power described by the Venice Commission of

the Council of Europe as "problematic" (2011, 26). The introduction of new "cardinal laws" in the Hungarian Constitution, calling for a qualified majority of two-thirds of members of Parliament present,[35] governing such things as taxation, family protection and pensions, means that "future Parliaments cannot engage in ordinary legislation in areas that are typically decided by majority vote" resulting in "huge swaths of policy" being placed "beyond any mere majority" (Bánkuti, Halmai, and Scheppele 2012, 267). Tying the hands of future parliaments deprives future governments of the means of achieving policy changes of any significance in these areas. The practice is described as a "serious threat to democracy" by the Venice Commission (2013, 29; 2011, 6). Parliament's absence was exacerbated with the passage of emergency decrees, once the pandemic set in (Halmai, Mészáros, and Scheppele 2020; Mészáros 2020 195).

In Poland, the Law and Justice Party (PiS) has followed Hungary's example, though without a sufficient majority to initiate constitutional change. Instead, party leadership has converted the legislature into an "extension" of the office of the prime minister (Nalepa 2019, 271). Exploiting legislative privileges, PiS has curbed parliamentary debates and avoided public consultations, resulting in continual breaches of parliamentary procedure. "[R]elevant rules" are "changed after the fact," notes Przybylski (2018, 58). Parliamentary subterfuge is exacerbated by the government introducing legislation under the cover of private member bills – over forty percent in 2016 (as compared to fifteen percent and eighteen percent in the immediately preceding parliamentary terms) – in order to avoid the obligation to undertake public consultations. These bills concerned momentous matters such as seizing control of the Polish Constitutional Court (Sadurski 2018, 267; Sadurski 2019, 133). The COVID-19 pandemic further enabled the government to enact what is described as "massive and chaotic legislation" (Drinóczi and Bień-Kacała 2020, 188)

In Turkey, *de facto* and, subsequently, *de jure* constitutional reform converted the political system from a Prime Ministerial to a Presidential regime (Kabasakal 2019, 170; Uitz 2021; Yenigun 2021). This resulted in the radical decline of parliamentarism and a "power shift from parliamentary supremacy to a very strong executive" undermining the system of "checks and balances" (Gençkaya 2019, 273). It is notable that the referendum approving these constitutional changes was conducted under emergency rule, severely restricting the quality of public debate and tilting the result in favour Erdoğan and his Justice and Development Party (AKP), winning the referendum by a slim 51 percent margin (Tol 2017). The outcome of that reform has resulted in the disappearance of oral questioning of cabinet in the National Assembly, legislators having no role in approving cabinet appointments, and an incapacity for votes of no-confidence in the President to issue out of the assembly (Çalışkan 2018, 27). It is said that the "procedural capacity of parliamentarians" has been severely "weakened" (Gençkaya 2019, 273) and that Parliament has effectively been pushed aside (Kabasakal 2018, 28). Pursuant to a May 2018 law, for instance, the government can now issue decrees, having the "force of law," to implement constitutional amendments as of April 2017 (Kabasakal 2019, 179). The pandemic has endowed Turkey's governing party with an excuse "to do things that it has long planned to do, but had not been able to," according to Freedom House (2020, 3).

Demobilizing the Opposition

Accompanying the decline of parliament is depriving the opposition of any opportunity to influence government policy and legislation – sanctifying only government views and silencing oppositional ones. In Hungary, the "constitutional revolution" resulted in amendments that lacked in transparency, dialogue with the opposition, and inadequate opportunity for public debate (Venice Commission 2011, 28). Sidelining dissenting voices made it "more difficult for

the opposition gain any traction in objecting to the constitutional revolution while it was going on" (Bánkuti, Halmai, and Scheppele 2012, 254). The method of selecting justices to serve on the constitutional court was speedily altered to remove opposition participation in nominating justices in an all-party committee. Nominations now proceed directly to Parliament for a two-thirds vote of approval, which is under the complete control of Fidesz (Lendvai 2017, 103). Legislative debate has been reduced drastically, by almost one-half the time previously dedicated to enacting individual pieces of legislation (Lendvai 2017, 110). The habit of demonizing the opposition is also in full display. In the lead-up to the last 2018 election, Orbán threatened to "seek moral, legal and political recourse after the elections" against those who opposed him (Bienvenu and Santora 2018). As he admitted while in opposition: "We have only to win once, but then properly" (Lendvai 2017, 94). Now Orbán targets internationally supported NGOs rather than the "anaemic little opposition parties" (Lendvai 2017, 243).

In Poland, the opposition is being systematically shut out of important parliamentary processes, like the passage of the national budget. Budget votes have taken place "in a side room with access for opposition MPs blocked" (Przybylski 2018, 58). The "frantic pace" at which new legislation is "rushed" into law results in the "virtual silencing of the opposition through various devices" such as imposing "gag rules," adding new agenda items without notice, speeding up parliamentary deliberations, and "ignoring critical expert opinions" (Sadurski 2018, 267; Sadurski 2019, 133). Parliament's ability to scrutinize and hold the government to account has not just been curtailed, it seems to have been eviscerated.

In Turkey, the concentration of power in the office of the President sidelines legislative opposition while "changes in electoral systems" have "helped increase the power of party leaders at the expense of local party organizations and MP's autonomy" (Kabasakal 2018, 287). The non-parliamentary opposition in Turkey was emaciated after the attempted coup of President Recep Erdoğan in 2016. Led by a handful of military personnel faithful to former ally and Muslim cleric, Fethullah Gulen, in self-imposed exile in the Poconos, the coup prompted a brutal response by Erdoğan. Leading media outlets were shut down, universities closed, and the public service cleansed of personnel having anything to do with Gulen's faith movement. Hundreds of thousands have been arrested and over 300 mass trials have been held, in circumstances where 3,000 judges had been dismissed from their judicial posts (Gall 2019). Tens of thousands of others have lost their positions in the military, public ministries, and educational institutions (Keller, Mykhyalyshyn, and Timur 2016). Guilt by association with the Gulenist fifth column continues to determine their fate.

Executives Rule

The aim in Hungary, write Buzogány and Varga (2018, 818), is to "'make politics political again' by bringing questions of power, personality, and the distinction between 'us' and 'them' to the forefront." While seemingly operating under a parliamentary regime, FIDESZ has concentrated power in the Council of Ministers and in their political superior, Prime Minister Orbán. Bánkuti, Halmai, and Scheppele (2012, 268) write that Hungary has only the "façade of parliamentary government." "The appearance of parliamentarism and democratic institutions is a front for the reality of centralized executive control," they conclude. The regime has been characterized as a "*Führerdemokratie*" (Pakulski and Körösényi 2012, 20),[36] Körösényi going so far as to describe Orbán as a "heroic," "visionary," and "prophetic" leader with extraordinary political skills (2019, 289, 290).[37]

In Poland, pulling the strings behind PiS is member of parliament, Jarosław Kaczyński, whose twin brother served as President for a time. Kaczyński has been described as having another

twin – an "ideological" one – in Viktor Orbán (Rydliński 2018, 96). We "will have Budapest in Warsaw," declared Kaczyński, after losing parliamentary elections in 2011(Rydliński 2018, 101). Sadurski describes Kaczyński's ruling style as exhibiting the "absolute personalization of power" with the liquidation of competing sources of authority (Sadurski 2016). Public prosecutors, the civil service, and the media all operate under the thumb of PiS operatives. "We need a state," Kaczyński declared in 2005, "in which the executive branch will be strong and effective and which will have its own host, and where there will be a man responsible for a whole" (quoted in Bunikowski 2018, 294). Kaczyński's ultimate objective, writes Sadurski (2016), is the full "consolidation of power."

Constitutional amendments have also radically altered parliamentary democracy in Turkey. The Assembly is now deprived of its former parliamentary right to remove the head of government, short of impeachment for commission of a crime.[38] The President is empowered to veto legislation and issue executive orders having the force of law on all "subjects necessary to execute the laws." He is also empowered to "declare martial law" and a "state of exception" that permits curtailment of rights and freedoms (Varol 2018, 350). Tenure rules allow President Erdoğan to stay in office for a "potentially unlimited period of time," according to the Venice Commission of the Council of Europe (Çalışkan 2018, 28), at the very least until 2029 (Varol 2018, 353). The powers of the Turkish president have moved further along the path to rule by prerogative power than the other illiberal democracies under discussion. So long as the president has the power to rule by "decree," the more further Erdoğan's rule lurches in the direction of Schmittian dictatorship (Çalışkan 2018, 27). It is an executive superior to the legislative branch, rendering, in Schmitt's words, "practically meaningless" the separation of powers (Schmitt [1932] 1996b, 70).

Conclusion: Reviving the Age of Discussion?

The object of this chapter has been to connect critiques of parliamentarism developed in the early twentieth century to tendencies identifiable within illiberal democracies in the early twenty-first century. These tendencies point in a similar direction as did Schmitt's prognosis: towards the dismantling of the separation of powers and the revival of prerogative rule. It has not been my intention to identify proposals for rectifying democratic backsliding in illiberal democracies. Others have proposed mechanisms that might serve as institutional checks on executive-driven centralization of power (e.g. Rosanvallon 2008; Ginsburg and Huq 2018, Chapter 4). They include votes of non-confidence, constitutional courts, oversight agencies, sub-national politics (as in Istanbul's 2019 municipal election), and other democracy-protecting institutions (Tushnet 2018, 202). In addition, there is the last resort of citizenry taking to the streets. Popular uprisings are an ever-present threat to centralized executives. Notable in this regard were protests in Budapest in opposition to a new law raising the maximum hours of work that could be demanded of employees, labelled the "slave law" (Karasz and Kingsley 2018). These protests were limited in size and duration, however, having little impact on state policy.

Parliamentary self-destruction is, of course, by no means inevitable. If the quest for homogeneity is abandoned, complaints about the decline of parliament need not result in the evisceration of pluralism, deliberation, and openness. Just the opposite, it can be said, will ensue if we abandon Schmitt's either/or strategy.[39] Parliament can serve as more than an arena for "empty" debates and "perpetual discussion." So long as the various sides to policy debates can be heard, and viewpoints get circulation in the public sphere via a free press, then parliament can serve as a credible vehicle for offering up arguments "in the alternative" (Skinner 1996;

Wiesner, Haapala, and Palonen 2017). Parliamentary success turns, in other words, on the extra-parliamentary circulation of political ideas (Scheuerman 1995, 151).

Even if it appears that parliamentary opposition has been neutered, it may not be that opposition has been deprived of the "equal chance" of succeeding in electoral competition. Even in operative democracies, ruling powers aim to secure any advantage over their competition. "Repression, intimidation, manipulation of rules, abuse of state apparatus, and fraud are standard instruments of electoral technology," admits Przeworski (2018, 50). A "utopia of the *perfect* realization of the ideal" of equal chance seems a long way off (Kirchheimer [1933] 1996, 82). So long as election results are "uncertain" – so long as there is room for electoral "surprise" – then elections can remain competitive (Przeworski 2018, 70).

Nor can it be said that a single plebiscitarian executive better represents conflicting and diverse interests, even within a relatively homogenous citizenry (Scheuerman 1995, 152). Such a version of authority attributes "national homogeneity to a mere portion of the electorate" (Kirchheimer [1933] 1996, 68). Discovering the plurality of political lives helps democratic institutions to thrive rather than to self-destruct. Schmitt's contemporary, Hermann Heller, accepted this fact but within the confines of Schmitt's conception of sovereignty. Heller proposed that we understand politics as not amounting to a "decision" – the "accomplished" political fact – but to something that "daily has to be formed anew, *un plébescite de tous les jours*" (Heller [1928] 2000, 258; Heller [1934] 1996, 1187). The product of any purported "unity," Heller maintained, was the result of a plurality of political wills coming together amidst political, religious, and economic antagonisms (Heller [1928] 2000, 257–258). What was required was a "common foundation for discussion and thus … the possibility of fair play" for the opposition (Heller [1928] 2000, 260).

Plebiscitarian democracy simply does not allow for the articulation of various political wills (Kirchheimer [1933] 1996, 86). It "does not know compromise," Weber ([1922] 1978, 1455) admitted. Moreover, any capacity to discern the *salus populi* is undermined – states are often too large and too complicated to be governed by a small cabal (Cagaptay 2019). If the "political enterprise is an enterprise of interested persons," then political systems must be open to all those affected and desirous of having their voices heard (Weber [1922] 1978, 1457). Parliament precisely provides the forum to argue for the politicization of subjects that may be cast aside, beyond the public gaze.

Parliamentarism, I have argued, creates the conditions in which the voices of those excluded or ostracized are likely to be heard and acknowledged.[40] It creates opportunities for listening to others and the chance that Parliamentarians will act to mitigate exclusion. This openness to argument, the "broad bandwidth of the pluralist ethos," well represents the promise of parliamentary democracy (Connolly 2017, 84). The task at hand is to resist the temptation to centralize authority in the hands of any single executive – establishing permanent regimes of prerogative power – and, instead, to convert disagreement into sustainable democratic practice.

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Notes

1 I associate this "argumentative" style of politics with parliamentarism as do Palonen and Rosales (2015, 11) and Ihalainen (2016, 20).

2 To repeat, the version of the separation of powers under discussion here is focused on the political branches and not on the role of an independent judiciary, which is also a central part of the story today.
3 Bunikowski (2018) traces origins of Law and Justice Party discourse to Schmitt's philosophy; Antal (2017) argues that Schmitt's concept of the political influenced political advisors around Orban's Fidesz government; and Lendvai (2017, 179) reports that Orbán "accepts" and "is basing himself loosely" on Schmitt's "fundamental precepts."
4 As Tocqueville (2004, 285) observed, so long as losing political forces have an opportunity to secure a working majority in subsequent elections, "all parties are prepared to recognize the rights of the majority, because all hope someday to exercise those rights."
5 This first section also draws upon the discussion of prerogatives in Schneiderman (2015, Ch 4).
6 Some Schmittian readings of Locke envisage an executive that is not reducible to law but entitled to act extralegally. E.g. Loughlin (2010, 386) who analogizes Locke to Schmitt, operating under "the logic of norm [the legislature] and exception [the executive]." Loughlin likely believes this is so because Locke operated under the grip of "classical natural law" (Loughlin 2017, 158). See also Slomp (2009, 64) and Hampshire-Monk and Zimmerman (2007, 690). But this reading elides Locke's preoccupation, in the Second Treatise, with determining the outer limits of the prerogatives to control Parliament in light of their abusive exercise by King Charles II. See, e.g. discussion in Ashcraft (1987, 321).
7 "Accidents may happen," Locke warns, in *Two Treatises,* ¶144, also discussion at ¶152, ¶160, ¶156 ([1689] 1988).
8 Scholars have not been careful about distinguishing between the two locales in which the crown will be found. Pasquino (1998, 203), for instance, ascribes to Locke the thesis that Parliament and laws were established to limit prerogative power by, in Locke's terms, "balancing the Power of Government, by placing several parts of it in different hands" (Locke [1689]1988, ¶107). But Locke very likely is referring here to the Crown in Parliament as in the mixed or balanced constitution.
9 For a discussion of prerogatives exercised by the executive branch, see Sajó and Uitz (2017, 281–283).
10 This is Rosanvallon's term in (2018, 55).
11 For more on Guizot's notion of democratic legitimacy see Schneiderman (2017, 239–241).
12 On Weber contemplating all of Parliament sitting as Committee of the Whole, see Palonen (2014, 525).
13 On the William II's erratic and authoritarian rule see Blackbourn (2003, 304–312).
14 Weber makes no mention in his essay of indirect election of the President via the Electoral College, as in Weber ([1918] 1994a, 325) where he writes that the "chosen leader" is "elected by direct popular vote."
15 Eliaeson (2000, 140) describes Caesarism as referring to "a method for the continuous exercise of power, characteristically by using the referendum or the threat of it as a means of intimidating office holders, such as parliamentary representatives, from acting against the leader's will."
16 Mehring (2014, 127) observes that Schmitt's "studies of Cortes are not least a stylized portrait of himself," as "only an expression of his own views."
17 Schmitt's complaints look very similar to those made by Rosa Luxemburg fifteen years earlier in her essay on *Social Democracy and Parliamentarism* (1904) but for different purposes. See Jörke and Llanque (2016, 267).
18 In his *Constitutional Theory*, for instance, Schmitt described the "aspiration of the bourgeois *Rechtsstaat* … is to repress the political" in Schmitt ([1928] 2008a, 93). For this reason, Scheuerman (1995, 142) can say that Schmitt's critique of parliamentarism "turns out to be an ambitious gloss on an abstract and highly problematic claim about so-called 'concept of the political'."
19 I am paraphrasing Rosanvallon (2018, 70).
20 Richard Thoma, in his review of Schmitt's *The Crisis of Parliamentary Democracy*, acknowledged this feature of contemporary parliamentary practice, admitting that the step away from discussion and toward "decisionism" had been taken some time ago (1985, 80–81).
21 "Even during a transitional period dominated by the dictator, a democratic identity can still exist and the will of the people can still be the exclusive criterion" in Schmitt ([1922] 1985b, 28).
22 Plebiscitarian legitimacy was now the only valid form of state justification, argued Schmitt, which explained tendencies toward the authoritarian state in his work ([1932] 1996b, 90).
23 Kelly (2016, 228, 235) likens this to prerogative power.
24 The judiciary were incapable of serving in this capacity, Schmitt argued. They could not act as arbiter over "highly political questions" (Schmitt [1931] 2015, 171) nor could they act with sufficient swiftness to resolve legal controversies (Schmitt [1932] 1996b, 32; Schmitt [1931] 1999b, 13–14).
25 For a somewhat similar and sympathetic treatment of executive power, see Mansfield (1989).

26 Scheuerman relies upon Caldwell's translation of Schmitt's 1917 essay *Diktatur und Belagerungszustand: Eine Staatsrechtliche Studie* in Caldwell (1997, 59).
27 For the contrary view, see Kennedy (2004, 159–168).
28 See Dyzenhaus (1997a). Schmitt's detailed legal argument, *The Dictatorship of the President of the Reich According to Article 48 of the Weimar Constitution* is reproduced as an Appendix in Schmitt (2014, 180–226).
29 McCormick (2004: xxx) accuses Schmitt of raising the "phantom of parliamentary tyranny – in a context where parliament cannot get anything done!"
30 Schmitt is inspired by Donoso-Cortes' insistence upon irrationalist "decision."
31 The notion of power as being productive is reminiscent of Foucault (2003, 50).
32 Heller ([1933] 2015, 299) characterized this as the authoritarian state, characteristic of which is, pace Schmitt, "retreat from economic production and distribution." This did not mean "abstinence" in "subsidizing large banks" or "large industry," Heller warned. Instead, it meant the "authoritarian dismantling of social policy" ([1933] 2015, 300). Heller adds that "the German people would not tolerate for long this neoliberal state if it ruled in democratic forms" ([1933] 2015, 300). Poulantzas (2014) later adopted the term "authoritarian statism" (203). Such a regime is characterized by "intensified state control over every sphere of socio-economic life combined with a radical decline of the institutions of political democracy" (Poulantzas 2014, 229).
33 As this is mostly a descriptive account, the discussion leans heavily on the secondary literature.
34 Orbán conflates "a principle of justification with a technique of decision," which I borrow from Rosanvallon (2011, 2, italics in original removed). Voter turnout in 2014 was 61.84 percent, and in 2018 rose to 69.67 percent. See International IDEA, "Voter Turnout Database" at www.idea.int/data-tools/country-view/126/40 (accessed June 24, 2019).
35 The Constitution of Hungary, 2011 Article T (4) provides: "Cardinal Acts shall be Acts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament present."
36 Translated as "leader democracy" following Weber ([1922] 1978, 268–269). For a more critical account of Orbán's Caesarism, see Sajó (2019).
37 Revealing Körösényi's penchant for "eliding description and prescription in such a way that normative claims are hidden behind a realist façade," according to Scott (2018, 11).
38 Constitution of Turkey, Art. 105.
39 Dyzenhaus (1997b, 41) writes that Schmitt's "constant refrain" was that "there is no middle ground" between his political conception of law and the flawed liberal *Rechtstaat*.
40 Admittedly, this requires that the voices of those excluded (or their surrogates) gain access to parliamentary precincts.

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