

# Vienna Lectures on Legal Philosophy, Volume 1

Legal Positivism,  
Institutionalism and Globalisation

Edited by  
Christoph Bezemek, Michael Potacs  
and Alexander Somek

• H A R T •

OXFORD • LONDON • NEW YORK • NEW DELHI • SYDNEY

HART PUBLISHING  
Bloomsbury Publishing Plc  
Kemp House, Chawley Park, Cumnor Hill, Oxford, OX2 9PH, UK

HART PUBLISHING, the Hart/Stag logo, BLOOMSBURY and the Diana logo are  
trademarks of Bloomsbury Publishing Plc

First published in Great Britain 2018

Copyright © The editors and contributors severally 2018

The editors and contributors have asserted their right under the Copyright, Designs and Patents  
Act 1988 to be identified as Authors of this work.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or  
by any means, electronic or mechanical, including photocopying, recording, or any information  
storage or retrieval system, without prior permission in writing from the publishers.

While every care has been taken to ensure the accuracy of this work, no responsibility for loss or  
damage occasioned to any person acting or refraining from action as a result of any statement  
in it can be accepted by the authors, editors or publishers.

All UK Government legislation and other public sector information used in the work is  
Crown Copyright ©. All House of Lords and House of Commons information used in the  
work is Parliamentary Copyright ©. This information is reused under the terms of  
the Open Government Licence v3.0 ([http://www.nationalarchives.gov.uk/doc/  
open-government-licence/version/3](http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3)) except where otherwise stated.

All Eur-lex material used in the work is © European Union,  
<http://eur-lex.europa.eu/>, 1998–2018.

A catalogue record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication data

Names: Bezemek, Christoph, editor. | Potacs, Michael, editor. |  
Somek, Alexander, editor.

Title: Vienna lectures on legal philosophy / Edited by Christoph Bezemek,  
Michael Potacs and Alexander Somek.

Description: Portland, Oregon : Hart Publishing, 2018. |  
Includes bibliographical references and index.

Identifiers: LCCN 2018005368 (print) | LCCN 2018005869 (ebook) |  
ISBN 9781509921720 (Epub) | ISBN 9781509921713 (hardback : alk. paper)

Subjects: LCSH: Law—Philosophy. | Law—Methodology.

Classification: LCC K212 (ebook) | LCC K212 .V54 2018 (print) | DDC 340/.1—dc23

LC record available at <https://lccn.loc.gov/2018005368>

ISBN: HB: 978-1-50992-171-3  
ePDF: 978-1-50992-173-7  
ePub: 978-1-50992-172-0

Typeset by Compuscript Ltd, Shannon  
Printed and bound in Great Britain by TJ International Ltd, Padstow, Cornwall  
To find out more about our authors and books visit [www.hartpublishing.co.uk](http://www.hartpublishing.co.uk).  
Here you will find extracts, author information, details of forthcoming events  
and the option to sign up for our newsletters.

# 3

---

## Why Read Carl Schmitt?

---

MARTIN LOUGHLIN

### I. Introduction

It is difficult to think of a modern jurist who has generated as much controversy as the German public lawyer, Carl Schmitt. In a series of wide-ranging works spanning most of the twentieth century, Schmitt made a major scholarly contribution to jurisprudence and political theory, and also had a significant influence on the study of history, philosophy and literature. Notwithstanding the breadth of his range, the main theme of Schmitt's work is surely his critical analysis of liberal democracy. No legal scholar has asked such penetrating questions about the governing arrangement that across the Western world is taken as the main basis of legitimacy, that of constitutional democracy.

Schmitt's critical perspective was evidently shaped by his personal circumstances: coming of age in the authoritarian regime of Wilhelmine Germany, he established himself as a leading public lawyer in Germany's first failed experiment with social democracy in the Weimar Republic, then made a bid to play a leading role as a jurist in the totalitarian Nazi regime, and after the war lived in a state of internal exile in the constrained democracy of the post-war Federal Republic. His personal experience of witnessing the collapse of authority following Germany's defeat in the First World War and the failure to build a robust social democratic system in the Weimar Republic no doubt shaped his views about liberal democracy. But although essentially a situational thinker, he also presented his critique in general philosophical terms. Schmitt argued that the apotheosis of liberal democracy, expressed as an abstract and de-historicised system, signified secularisation, de-politicisation, loss of meaning and lack of authority. He believed that the institutionalisation of liberal democracy would lead ultimately to the rule of the machine.

The impact of his disconcerting message was reinforced by the brilliance of its delivery. Schmitt was a master of the essay format. A classical education and professional legal training combined to produce a style far removed from the prevailing conventions of rigidly formal academic legal German.

He delighted in an epigrammatic style, illustrations of which are peppered across his writings:

- The concept of the state presupposes the concept of the political.<sup>1</sup>
- The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.<sup>2</sup>
- All genuine political theories presuppose man to be evil.<sup>3</sup>
- Sovereign is he who decides on the exception.<sup>4</sup>
- All significant concepts of the modern theory of the state are secularised theological concepts.<sup>5</sup>
- There is no politics without authority and no authority without an ethos of conviction.<sup>6</sup>
- The situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion an empty formality.<sup>7</sup>
- The concept of legality derived from [the legislative majority] principle would ... be a shameless mockery of all justice.<sup>8</sup>
- In modern economy, a completely irrational consumption conforms to a totally rationalised production.<sup>9</sup>
- The machine is not the key to happiness but to utopia.<sup>10</sup>

This is a seductive style. It expresses Schmitt's response to what he perceived as the deterioration in linguistic precision resulting from the flowery ambiguities of romanticism. One reason for reading Schmitt is because he asks such penetrating questions about the character of modern liberal democracy, but another is the sheer enjoyment to be derived from the manner of its delivery. One reason why Schmitt is still widely read is that those two features of his work take on an even greater force today.

In his essay 'Politics and the English Language', published in 1946, George Orwell complained that written English 'is full of bad habits which spread by imitation.'<sup>11</sup>

<sup>1</sup> C Schmitt, *The Concept of the Political*, trans G Schwab (Chicago, IL, University of Chicago Press, 2007 [1932]) 19.

<sup>2</sup> *ibid* 26.

<sup>3</sup> *ibid* 61.

<sup>4</sup> C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans G Schwab (Chicago, IL, University of Chicago Press, 2005 [1922]) 5.

<sup>5</sup> *ibid* 36.

<sup>6</sup> C Schmitt, *Roman Catholicism and Political Form*, trans GL Ulmen (Westport, CT, Greenwood, 1996 [1923]) 17.

<sup>7</sup> C Schmitt, *The Crisis of Parliamentary Democracy*, trans E Kennedy (Cambridge, MA, MIT Press, 1988 [1926]) 6.

<sup>8</sup> C Schmitt, *Legality and Legitimacy*, trans J Seitzer (Durham, NC, Duke University Press, 2004 [1932]) 28.

<sup>9</sup> Schmitt, *Roman Catholicism* (n 6) 14.

<sup>10</sup> C Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951* (Berlin, Duncker & Humblot, 1991) 95.

<sup>11</sup> G Orwell, 'Politics and the English Language' in G Orwell, *A Collection of Essays* (Garden City, NY, Doubleday, 1954) 163.

He held up political writing as a particularly egregious example of the general phenomenon. Orwell argued that these habits ‘can be avoided if one is willing to take the necessary trouble’, that avoiding them enhances clarity of thought and that thinking clearly ‘is a necessary first step towards political regeneration’.<sup>12</sup> Orwell’s complaint is not peculiar to the English language. The ugliness of the style he identifies—‘it becomes ugly because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts’<sup>13</sup>—is now common in much academic writing. Schmitt’s style stands in sharp contrast to the examples of tortuous political writing Orwell uses to illustrate his case. Schmitt’s writing today finds a receptive readership across the political spectrum partly because of its lucidity. He speaks today not only to conservatives seeking to maintain order while recognising that traditional ways no longer carry authority, but also to radicals who find the shrill moralism of much leftist academic writing to be posturing without concrete political engagement.

In addition to his style, the substantive arguments Schmitt invokes to discredit liberal democracy have also acquired added force. The recent dramatic expansion in the constitutional jurisdiction of courts fuelled by the growing discourse of rights has forced jurists to reconsider the relationship between law and politics, a theme that runs throughout Schmitt’s work.<sup>14</sup> Similarly, the extended use of emergency powers that suspend normal constitutional protections, which has become a common feature of constitutional democracies since 11 September 2001, has led many scholars to adopt Schmitt’s distinction between the norm and the exception as their framework of analysis.<sup>15</sup> Some have made broader claims and, accepting the essence of Schmitt’s argument that the political is founded on a friend–enemy distinction, see current global conflicts as involving a ‘clash of civilizations’.<sup>16</sup> Arguing against scholars who treat globalising trends as a movement towards some benign universal cosmopolitan order, critics have implicitly invoked Schmitt’s argument that ‘the desire to escape this conflict by rejecting every earthly power would lead to the worst inhumanity’.<sup>17</sup> And at a general philosophical level, some have used Schmitt’s ideas to demonstrate the limits of Enlightenment rationality, arguing that totalitarianism and contemporary terrorism are not in fact reactions to it, but the direct consequences of its historical unfolding.<sup>18</sup>

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> See C Schmitt, *Constitutional Theory*, trans J Seitzer (Durham, NC, Duke University Press, 2008 [1928]); Schmitt, *Legality and Legitimacy* (n 8); C Schmitt, *The Tyranny of Values*, trans S Draghici (Washington, DC, Plutarch Press, 1996 [1979]); C Schmitt, ‘The Legal World Revolution’ (1987) 72 *Telos* 72.

<sup>15</sup> Schmitt, *Political Theology* (n 4); C Schmitt, *Dictatorship*, trans M Hoelzl and G Ward (Cambridge, Polity, 2013 [1921]).

<sup>16</sup> SP Huntington, *The Clash of Civilizations and the Remaking of World Order*, rev edn (New York, Simon & Schuster, 2011).

<sup>17</sup> Schmitt, *Roman Catholicism* (n 6) 32. See, eg, W Rasch, *Sovereignty and its Discontents: On the Structure of the Political* (London, Cavendish/Birkbeck Law Press, 2004).

<sup>18</sup> See, eg, R Koselleck, *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society* (Cambridge, MA, MIT Press, 1988).

These various factors go some way towards explaining why Schmitt continues to be so widely read. His major works are all in print in their original German and have gone through several editions. They have been translated into numerous languages, and all have been published in English. But this is just the tip of the iceberg of Schmitt scholarship. Over the last 20 years especially, a huge number of books and papers devoted entirely or mainly to Schmitt's thought have been published.<sup>19</sup>

Yet the questions of whether, why and how we should read him remain intensely contested. Is he actually an incisive analyst of constitutional democracy or simply an apologist for authoritarianism? Is his an honest analysis or are his bold epigrams surrounded by obscure allusions that mask unexamined prejudices? Does he make an original diagnosis of modernity or is he merely a 'conservative revolutionary'?<sup>20</sup> Does he offer the left a political theory that Marx's economic determination overlooks or is he a nineteenth-century reactionary warning of the threat democracy poses? Is he a constructive critic who counsels against an over-reliance on Enlightenment rationality or an irrationalist who rejects the entire tradition of Western thought? Is he not in fact best understood as a political theologian whose philosophy hangs together not as a reasoned analysis but only as an exercise of faith?<sup>21</sup>

Some of these questions raise issues which I lack the competence to address. I have chosen to focus on what I have indicated is Schmitt's main theme, that of the meaning and significance of constitutional democracy, and to offer some reflections on the importance of his work on that subject. To keep the exercise manageable, I will examine Schmitt's method under the headings of division, decision and derision.

## II. Division

Carl Schmitt *divides*. The method that informs the entire body of his work is derived from a series of binary divisions: order and disorder, abstract and

<sup>19</sup> In German, for example, eight volumes of essays and notes were published between 1988 and 2003 as Carl-Schmitt-Gesellschaft (ed), *Schmittiana: Beiträge zu Leben und Werk Carl Schmitts* (Berlin, Duncker & Humblot, 1988–2003). By 2016, this had been supplemented by three additional volumes in a new series. A definitive biography was published in 2009: R Mehring, *Carl Schmitt: Aufstieg und Fall* (Munich, Beck, 2009), English Edition: R Mehring, *Carl Schmitt: A Biography* (D Steuer trs, Cambridge, Polity, 2014). The most recent work of particular interest to my main theme is V Neumann, *Carl Schmitt als Jurist* (Tübingen, Mohr Siebeck, 2015). In English, the most recent reference work is J Meierhenrich and O Simons (eds), *The Oxford Handbook of Carl Schmitt* (New York, Oxford University Press, 2016), an 800-page work of 30 chapters containing a complete bibliography of Schmitt's writing and a comprehensive critical overview of his thought and work.

<sup>20</sup> R Wolin, 'Carl Schmitt: The Conservative Revolutionary Habitus and the Aesthetics of Horror' (1992) 20 *Political Theory* 424. Cf J Bendersky, 'Carl Schmitt and the Conservative Revolution' [June 1987] *Telos* 27.

<sup>21</sup> See H Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* (Chicago, IL, University of Chicago Press, 1995).

concrete, friend and enemy, war and peace, norm and exception, legality and legitimacy, normativism and decisionism, liberalism and democracy, parliamentarism and dictatorship, commissarial dictatorship and sovereign dictatorship, telluric partisanship and revolutionary partisanship, state and society, public and private, the unity and duality of God.<sup>22</sup> This use of such binary distinctions, a hallmark of classical thought, is the most distinctive characteristic of Schmitt's scholarship. It is powerful and attractive precisely because it cuts to the core. The dilemmas, ambiguities and paradoxes that permeate so much of contemporary thinking are alleviated by the adoption of a technique that seems to reduce the complexity of political questions to a clear dualism. It is especially seductive because, once adopted, the technique can be applied to almost any facet of human experience.

One reason for his use of this technique is Schmitt's commitment to nominalism. Understood as a philosophical position, nominalism can mean either the rejection of universals or simply the rejection of abstract ideas. Schmitt's political and legal writing indicates that he is a nominalist in both senses. His nominalism leads him not only to reject universal claims, but also to break down all abstractions and reifications 'to their most elementary accessible components for us to adequately grasp what they are about'.<sup>23</sup> Schmitt uses binary division in a systematic way and reduces the elements of these dualisms to their most basic, most concrete, meanings.

This method is put to work in his critique of liberal democracy. For Schmitt, liberal democracy is a trite formulation because it masks the fact that liberalism and democracy are antagonistic ideas. This basic antagonism has been hidden throughout much of modern history, he contends, because the alliance between liberalism and democracy in common cause against monarchical absolutism 'has obscured the awareness of this contradiction'.<sup>24</sup> Only with the emergence in the twentieth century of mass democracy does the contradiction become clear, manifesting itself primarily as a crisis of parliamentary democracy. Schmitt then shows that underpinning the antagonism between liberalism and democracy are the antithetical concepts of liberty and equality. They are antithetical because liberty necessarily leads to inequality; the establishment of equality must necessarily be illiberal. Unless this basic conceptual distinction is taken seriously, he is saying, constitutional scholars will not be advancing scientific knowledge, but rather merely be trading in rhetoric.

<sup>22</sup> I return to many of these, but of those not considered further see C Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (New York, Telos Press Publishing, 2007) (telluric and revolutionary partisanship); C Schmitt, *Political Theology II: The Myth of the Closure of any Political Theology* (Cambridge, Polity, 2008) 124–30 (unity and duality of God).

<sup>23</sup> A Botwinick, 'Same/Other versus Friend/Enemy: Levinas contra Schmitt' in Meierhenrich and Simons (n 19) ch 12, 342.

<sup>24</sup> Schmitt, *Crisis of Parliamentary Democracy* (n 7) 17.

Consider where this distinction leads him. Schmitt argues that in its political meaning, equality is a substantive concept that requires not only that equals are treated as equals, but also that ‘unequals will not be treated equally’.<sup>25</sup> This is said to be the foundation of democracy, and it requires ‘first homogeneity and second—if the need arises—elimination or eradication of heterogeneity’.<sup>26</sup> That may seem a chilling statement when read today, but it does not imply the disappearance of all heterogeneous distinctions. Rather, Schmitt is arguing that, conceived politically—and recall that his criterion of the political is the distinction between friend and enemy—equality is a status held by citizens in a world in which states are the primary institutions of political allegiance. Equality has political worth only so long as it has substance. A democracy ‘demonstrates its political power’, he explains, ‘by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity’.<sup>27</sup>

Liberalism, by contrast, is not a ‘state form’; it is only ‘an individualistic-humanitarian ethic and *Weltanschauung*’.<sup>28</sup> Schmitt maintains that universal and equal suffrage is ‘the consequence of a substantive equality within the circle of equals’.<sup>29</sup> An equality of rights therefore makes sense only ‘where homogeneity exists’.<sup>30</sup> But the idea that every person ‘should *eo ipso* be politically equal to every other person ... is a liberal, not a democratic, idea’.<sup>31</sup> And for Schmitt, this is an unrealisable cosmopolitan aspiration that can lead only to a loss of political meaning.

The political, in common with all other domains, has its own specific conceptions of equality and inequality which must be respected if coherence is to be maintained. ‘However great an injustice it would be not to respect the human worth of every individual,’ he asserts, ‘it would nevertheless be an irresponsible stupidity, leading to the worst chaos, and therefore to even worse injustice, if the specific characteristics of various spheres were not recognized.’<sup>32</sup> If political equality loses its substantive value, then ‘substantive inequalities would in no way disappear from the world and the state; they would shift to another sphere, perhaps separated from the political and concentrated in the economic, leaving this area to take on a new, disproportionately decisive importance’.<sup>33</sup>

Schmitt’s claim is that the antagonism between liberalism and democracy is logical and conceptual. If one prevails, it is at the expense of the other. This does not mean ‘that liberty ceases to exist in a democracy or that equality has no place within liberalism’, but, as Rasch explains, it does mean that ‘each must alter its basic

<sup>25</sup> *ibid* 9.

<sup>26</sup> *ibid* 9.

<sup>27</sup> *ibid* 9.

<sup>28</sup> *ibid* 13.

<sup>29</sup> *ibid* 10.

<sup>30</sup> *ibid* 10.

<sup>31</sup> *ibid* 11.

<sup>32</sup> *ibid* 11.

<sup>33</sup> *ibid* 12–13.



definition in order to be welcome on the other's terrain'.<sup>34</sup> This division establishes the organisational framework of Schmitt's major work on constitutional theory, in which the liberal principle of the rule of law establishes the sphere of private autonomy in contrast to the democratic principle of the power-organising element of the constitution. The former, which strives to limit the political, is conceived as antagonistic to the latter, which expresses the political will of the people as a collective unity.<sup>35</sup>

The relevance of Schmitt's claims can be seen all around us today. Take, for example, the fact that a growing liberalisation of advanced Western states is accompanied by a decline of its welfare role.<sup>36</sup> If the citizenry is becoming less homogeneous, Schmitt would argue, the sense of common feeling—that is, substantive equality—is likely to diminish, and this leads to a greater resistance on the part of citizens to hand over larger proportions of their wealth in order to sustain collective welfare. Another example can be found in symptoms of the emergence of what many now call 'illiberal democracy'.<sup>37</sup> These symptoms can be found in the rise of nationalist parties across Europe and in the electoral success of Donald Trump in the USA. 'Even a democratic state, let us say the United States of America,' writes Schmitt in 1926, 'is far from allowing foreigners to share in its power or its wealth.'<sup>38</sup> That political stance has hardly diminished today, whether expressed as 'Hungary for Hungarians' or President Trump's 'America First' mantra. Consider also the significance of Schmitt's statement about the power of the popular will:

If democratic identity is taken seriously, then in an emergency, no other constitutional institution can withstand the sole criterion of the people's will, however it is expressed. Against the will of the people especially an institution based on discussion by independent representatives has no autonomous justification for its existence, even less so because the belief in discussion is not democratic but originally liberal.<sup>39</sup>

This statement captures very clearly many of the dilemmas that surround the debates following the outcome of the UK's Brexit referendum in 2016.

As an analytical framework for examining the political challenges of contemporary constitutional democracies, Schmitt's account of liberalism and democracy—of the relationship between liberty and equality—continues to offer penetrating insights. Some might conclude that Schmitt's technique lacks nuance, but this is an inevitable consequence of his use of binary division. Yet as a diagnostic technique it remains of value. Even such a systematic critic as David Dyzenhaus recognises that Schmitt 'raises challenges for liberals and democrats that are still pertinent

<sup>34</sup> W Rasch, 'Carl Schmitt's Defense of Democracy' in Meierhenrich and Simons (n 19) ch 11, 320.

<sup>35</sup> Schmitt, *Constitutional Theory* (n 14).

<sup>36</sup> See, eg, M Roser and E Ortiz-Ospina, 'Income Inequality' (Our World in Data 2017), available at <https://ourworldindata.org/income-inequality/> (accessed on 18 December 2017).

<sup>37</sup> F Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York, Norton, 2007); cf J Ober, 'Lessons of Demopolis', available at <https://aeon.co/essays/the-marriage-of-democracy-and-liberalism-is-not-inevitable> (accessed on 18 December 2017).

<sup>38</sup> Schmitt, *Crisis of Parliamentary Democracy* (n 7) 11.

<sup>39</sup> *ibid* 15.

and important'.<sup>40</sup> Provided he is read as offering a diagnostic technique, Schmitt's analysis exposes tensions that pervade contemporary political and constitutional issues. Those who disagree jump too quickly to the conclusion that his argument is normative rather than conceptual. It is to the normative aspects of his work that I now turn.

### III. Decision

Carl Schmitt *decides*. His technique of division forces us to take a stand. Whereas Hegel and Marx seek a synthesis to overcome the opposition of thesis and antithesis, Schmitt's method is to set up divisions in order to impel us towards a decision. This, too, is a distinctive aspect of his style. Friedrich Meinecke once observed of Heinrich von Treitschke that he thought in imperatives: 'his statements are like decrees', Meinecke wrote, and his demonstrations thereby 'acquire a certain violence and explosiveness'.<sup>41</sup> Meinecke's words apply equally to Schmitt.

Schmitt decides in favour of the objective over the subjective, the public over the private, the political over the economic, the collective over the individual, conflict over co-operation, order over freedom, the exceptional over the normal, *voluntas* over *ratio*, concrete over abstract, and the existential over the normative. His basic orientation in deciding between these binary distinctions is expressed most concisely in *Political Theology*:

A philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important than the rule, not because of a romantic irony for paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition.<sup>42</sup>

This argument has the merit of being so clearly expressed that if one disagrees it should not prove difficult to present the countervailing view. It avoids the 'on the one hand' and 'on the other' fudge, and forces us to explain precisely what is wrong with his argument.

The quotation provides a leitmotif of his Weimar writing. In *The Concept of the Political*, for example, he argued that the extreme case of war reveals the essence

<sup>40</sup> D Dyzenhaus, 'The Concept of the Rule-of-Law State in Carl Schmitt's *Verfassungslehre*' in Meierhenrich and Simons (n 19) ch 18, 504.

<sup>41</sup> F Meinecke, *Machiavellism: The Doctrine of Raison d'État and Its Place in Modern History*, trans D Scott (New Haven, CT, Yale University Press, 1957) 397.

<sup>42</sup> Schmitt, *Political Theology* (n 4) 15.

of the political because war is an exceptional state that requires a *decision*.<sup>43</sup> His analysis of the concept of sovereignty in *Political Theology* identified the sovereign as the agent with the *decision-making* authority to 'suspend the law in the exception on the basis of its right of self-preservation'.<sup>44</sup> In *The Crisis of Parliamentary Democracy*, he argued that parliamentarism—government by discussion—belongs to the world of liberalism, not to the world of mass democracy, and that ultimately a political *decision* would have to be made about the relative importance of liberal and democratic elements within the Weimar Constitution.<sup>45</sup> His major work, *Constitutional Theory*, is organised around this basic tension between the democratic (or political) aspects that organise governmental power and the liberal (or legal) aspects that limit that power.<sup>46</sup> And as the various crises of the Weimar regime unfolded, he argued that the institution best placed to protect a constitutional order of divided authority is not the judiciary, the symbol of legal decision-making, but the President as the symbol of political decision-making.<sup>47</sup>

What lies behind the decisionist theme running so consistently through Schmitt's Weimar writings is the accusation that under the influence of legal positivism jurists have avoided engaging with political questions.<sup>48</sup> They have withdrawn to the safe haven of a normative conception of law whose authority can be presupposed. For Schmitt, this is a wholly inadequate response, especially for public lawyers, who cannot and should not avoid engaging with the question of how political authority is established.<sup>49</sup> They must deal with the political realities of their times. Instead of engaging in abstract theorising, they should build their constitutional theories from experience.

This is what leads him to conclude that the foundations of political authority are only revealed under crisis conditions. In such circumstances, the critical factor is the sovereign power of *decision*. This power is masked in normal times, but it comes to the fore in response to any threat to political unity.<sup>50</sup> Such unity is not just hypothetical; it exists because of a concrete historical process. It does not

<sup>43</sup> Schmitt, *Concept of the Political* (n 1) 32–37.

<sup>44</sup> Schmitt, *Political Theology* (n 4) 12.

<sup>45</sup> See also Schmitt's argument in C Schmitt, 'Hugo Preuss: His Concept of the State and his Position in German State Theory' (2017) 38 *History of Political Thought* 345.

<sup>46</sup> Schmitt, *Constitutional Theory* (n 14) is divided into four parts: the concept of constitution, the liberal (*Rechtsstaat*) element, the political component and the theory of the federation.

<sup>47</sup> C Schmitt, *Der Hüter der Verfassung* (Tübingen, Mohr, 1931). L Vinx (ed), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge, Cambridge University Press, 2015) chs 2 and 3. This also explains Schmitt's specific interest in the work of de Maistre and Donoso Cortes. He explained that, 'with an energy that rose to an extreme between the two revolutions of 1789 and 1848', Maistre and Donoso, 'thrust the notion of the decision to the center of their thinking', Schmitt, *Political Theology* (n 4) 53. In Maistre, Schmitt contended, we see 'a reduction of the state to the moment of decision, to a pure decision not based on reason and discussion ... to an absolute decision created out of nothingness', *ibid* 66.

<sup>48</sup> See Schmitt, 'Hugo Preuss' (n 45) 351–52.

<sup>49</sup> See M Loughlin, 'Politonomy' in Meierhenrich and Simons (n 19) ch 21, 572–73.

<sup>50</sup> Schmitt, *Political Theology* (n 4) 12.

depend on some abstract idea, but instead expresses the homogeneity of a people. The constitution of this state is essentially a decision of the sovereign will whose continuing existence bolsters the constitution's authority.

The decisions Schmitt makes on these matters may be based on an analysis that is anti-positivist, anti-parliamentarian and anti-liberal in character, but they should not be dismissed without careful consideration. Constitutions are not purely normative constructions: they are part of the historical processes of state-building. Constitutions, drafted at particular moments in time, establish their authority only through a political process in which allegiance is forged. Achieving this while simultaneously generating political will is not straightforward. For the purpose of building political unity and overcoming conflict, the imposition of will—whether through use of emergency powers or the promotion of a cult of strong, charismatic leadership—is often required. Even in mature constitutional democracies, jurists often overlook the 'extra-constitutional' work achieved through political party mechanisms or administrative processes insulated from democratic control in order to enable governments to function effectively.<sup>51</sup> Again, as a diagnostic analysis of the way government works, Schmitt's account, provocative though it may be, bears serious consideration by anyone seeking to understand modern public law.

#### IV. Derision

Carl Schmitt *derides*. It is precisely because he divides, by reducing all issues to a binary distinction, and decides, by opting strongly for one side of that binary question, that Schmitt can be seen as treating opposing views with derision. He is engaged in polemics, and the strengths of that method also exposes its correlative weaknesses. The general target of his attack is liberal normativism, the idea that political authority can be explained as an autonomous system of norms. Many of his arguments are directed at the cogency and sustainability of the liberal framework of government entailed by this normativism. But does his style of argument through binary division and concrete decision lead to liberal normativism being merely derided?

The case against him is best illustrated by returning to Schmitt's argumentative style. If we refer back to the quotation from *Political Theology* produced above (p 56), for example, we see that his assertions become increasingly more extreme. From his initial contention that the importance of the norm is deceptive since 'the exception is more interesting than the rule', he goes on to suggest that 'the rule

<sup>51</sup> See EA Posner and A Vermeule, 'Demystifying Schmitt' in Meierhenrich and Simons (n 19) ch 23.

proves nothing; the exception proves everything', and then finally explains that in the exception 'the power of real life breaks through the crust of a mechanism that has become torpid by repetition'. An initially incisive point is made only to be extended so far that it overreaches and reduces the contrary position to caricature. He sometimes applies the technique in reverse, so that having started with an extreme claim for maximum initial impact its meaning is subsequently modified. Thus, in *The Concept of the Political*, Schmitt boldly asserts that 'all genuine political theories presuppose man to be evil', but then explains that by 'evil' he really means only that man is 'a dangerous and dynamic being'.<sup>52</sup> Whatever the specific style of presentation, Schmitt's method sets up the binary division to come down on one side in a decisive manner that brooks no equivocation.

The problem with Schmitt's technique is that by presenting the issues at stake in such a striking manner he is liable to distort them. Take, for example, his analysis of the importance of Bodin's work. He recognises that Bodin 'stands at the beginning of the modern theory of the state'<sup>53</sup> and that his *Six Books on the Commonwealth* is the 'first depiction of modern public law'.<sup>54</sup> Yet, contrary to the orthodox view, he argues that Bodin's great achievement rested neither on his elaboration of a concept of sovereignty nor, as I have argued elsewhere, his account of the constitutive and regulative rules of public law.<sup>55</sup> Fearing that such interpretation makes Bodin the founder of a liberal concept of public law, Schmitt maintains rather that Bodin's great innovation was to have revealed the sovereign's most defining characteristic as the ability, in an emergency, to rule contrary to established laws. 'When the time, place and individual circumstances demand it', he notes, Bodin accepted that 'the sovereign can change and violate statutes'.<sup>56</sup> This may be thought-provoking, but it is a purely decisionist interpretation, and one which seems to me to skew Bodin's significance. Only by accentuating the central importance to Bodin of the sovereign act of decision is Schmitt able to assert that 'this decisionism is essentially dictatorship'.<sup>57</sup>

Schmitt's analysis of Bodin's importance leads to another stark binary distinction, that between authority and anarchy. Having imposed that distinction on himself, however, he is then pushed into the uncharacteristic position of having to equivocate. It is not difficult to see why. Does he fall in with Bodin and Hobbes, who, as modernisers, sought to remove questions of religious truth from the public sphere and make such claims subservient to the civil authority? Or does he follow de Maistre and Donoso Cortes, who believed that authority rests ultimately on the truth of certain values, ie those of Catholicism? Is Schmitt here seeking to

<sup>52</sup> Schmitt, *Concept of the Political* (n 1) 61.

<sup>53</sup> Schmitt, *Political Theology* (n 4) 8.

<sup>54</sup> Schmitt, *Constitutional Theory* (n 14) 101.

<sup>55</sup> M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) 58–60.

<sup>56</sup> Schmitt, *Constitutional Theory* (n 14) 101.

<sup>57</sup> *Political Theology* (n 4) 66.

present himself as the Hobbes or the Donoso of the twentieth century?<sup>58</sup> Views on this vary.<sup>59</sup> If it is towards Bodin and Hobbes that Schmitt veers, then he is in danger of espousing a position he derides, that of a liberal jurist. But to go the way of de Maistre and Donoso is to choose a road which hardly anyone today would want to follow.

It may therefore be the case that Schmitt's technique is reductive, impelling us towards an extreme position in which sound criticisms of liberal normativism, such as its presupposition of authority and its avoidance of the political and discretionary aspects of governmental power, are weakened by being caricatured. Many of his arguments, such as the need for liberalism to adopt the friend–enemy distinction and to act politically to defend itself, do offer insights; however, history shows that liberalism is capable of establishing a more robust political regime than Schmitt suggests. During the post-war period, liberal democratic regimes learned the lesson that Schmitt had been teaching by taking decisive political action to maintain the stability of their orders.<sup>60</sup> In many constitutional democracies, the political decision was taken that the regime must not only insulate certain political decisions from the will of the people, but also that many of the most important collective economic decisions (over monopoly and competition, regulation of the economy, monetary policy, etc) should be removed from the sphere of direct political decision.

## V. Division, Decision and Derision in the Reception of Schmitt's Work

It is not surprising that during the turbulent political environment of the Weimar Republic there was intense debate between leading scholars of public law about the

<sup>58</sup> George Schwab, for example, calls Schmitt the 'Hobbes of the twentieth century': Introduction to Schmitt, *Political Theology* (n 4) xl.

<sup>59</sup> Some scholars have suggested that Schmitt's thought evolves from an early interest in Donoso towards a more mature usage of Hobbes. See, eg, PE Gottfried, *Carl Schmitt: Politics and Theory* (New York, Greenwood Press, 1990) esp ch 2. Gottfried notes that 'from Donoso, Schmitt borrowed a concept of political theology' (19), but claims that his 'defense of Catholic counterrevolutionaries, especially Donoso, was not based on a shared religious faith but on common anthropological assumptions' (25) and that from the mid-1920s he 'no longer concerned himself with the question of Catholic orthodoxy' and 'hailed Bodin and Hobbes as precursors of a new form of political thinking' (25–26). However, others, acknowledging his retreat from Hobbes, believed he moved in the other direction and towards the theological aspects of political authority. See, eg, G Maschke, 'Die Zweideutigkeit der *Entscheidung*: Thomas Hobbes und Juan Donoso Cortes im Werk Carl Schmitts' in H Quaritsch (ed), *Complexio Oppositorum: Über Carl Schmitt* (Berlin, Duncker & Humblot, 1988) 199: 'so mag man zu dem Schluss kommen, dass Schmitt eher als der "Hobbes of the twentieth century" der Donoso del siglo veinte gewesen ist' ('so one might conclude that Schmitt, rather than being the 'Hobbes of the twentieth century', is the Donoso of the twentieth century').

<sup>60</sup> See Schmitt, *Legality and Legitimacy* (n 8) s12 'Legality and the Equal Chance for Achieving Political Power'; A Sajó (ed), *Militant Democracy* (Amsterdam, Eleven International Publishing, 2004).

appropriate methods of the discipline, a debate whose range and rigour remains unsurpassed.<sup>61</sup> This was a debate in which Schmitt, who during the Weimar years held chairs in public law at Greifswald, Bonn, the Handelshochschule in Berlin and then Cologne, was intimately engaged. Schmitt was for this reason a controversial—even divisive—figure throughout the Weimar era. But his subsequent notoriety was acquired less from the stance he adopted in those debates than from his actions during the 1930s.

In January 1933, Hitler was appointed Reich Chancellor, and after the Reichstag fire in February was given extraordinary emergency powers that quickly led to the consolidation of the Nazi dictatorship. During his period at the Handelshochschule in Berlin, Schmitt had been brought into government advisory work by Popitz, and in February 1933 was called upon to undertake similar work. Having made the fateful decision to accept, in May 1933 Schmitt joined the Nazi party, and during the first three years of that regime made a pitch to play an influential role. By the time he fell out of favour in 1936 after his Nazi credentials were questioned, he had received many prestigious appointments, including as professor of public law in Berlin University, as a Prussian State Counsellor, as chair of the Association of National Socialist Jurists and as editor of *Deutsche Juristen-Zeitung* (until then Germany's most respected law review). During this period, Schmitt wrote many scurrilous and anti-Semitic articles.<sup>62</sup>

These decisions—to join the Nazis and then to promote himself into a prominent role in that regime—have divided those who have tried to assess the value of his scholarly work. Were Schmitt's actions those of an opportunist or were they consonant with his true political convictions? And what impact does the answer to that question have on the issue of whether, because of his association with Nazism, jurists can extricate anything of value from Schmitt's work? The most serious scholarly question is whether Schmitt's method of division, decision and derision leads him directly to the endpoint of Nazi apologist. If it does, then it is unlikely there can be much of value to be extricated from his work, and the answer to the question this article poses is that any scholarly insight he offers is indelibly stained.

There are some who adopt this view, but in a rather casual manner. Whenever I read an article that prefaces his name with the appellation 'Nazi jurist', it is often apparent that its author has not read Schmitt's work with much attention. There being no detailed corroboration of the claim, these writers invoke his name for polemical reasons. They are therefore, somewhat ironically, adopting a

<sup>61</sup> W März, 'Der Richtungs- und Methodenstreit der Staatsrechtslehre, oder der staatsrechtliche Antipositivismus' in KN Nörr, B Schefold and F Tenbruck (eds), *Geisteswissenschaften zwischen Kaiserreich und Republic* (Stuttgart, Steiner, 1994) 75–133; W Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus: Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Recht im 19. Jahrhundert* (Tübingen, Mohr Siebeck, 1993); D Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford, Oxford University Press, 1999); A Jacobsen and B Schlink, *Weimar: A Jurisprudence of Crisis* (Berkeley, University of California Press, 2002).

<sup>62</sup> R Mehring, *Carl Schmitt: A Biography* (Cambridge, Polity, 2014) pt III.



characteristic of Schmitt's own method, that of reducing jurisprudential analysis to a basic friend–enemy criterion. This is reminiscent of the way that early-modern jurists would raise the spectre of Machiavelli as the purveyor of evil, but then proceed implicitly to make use of his teachings.

There are also some scholars who dismiss Schmitt's work on the basis of detailed study. The most systematic critique comes from Raphael Gross, who argues that Schmitt's anti-Semitism was not just part of his engagement with Nazism in the period between 1933 and 1936. Gross maintains that Schmitt's entire work during both the Weimar era and the post-war Federal Republic was permeated with anti-Semitism.<sup>63</sup> He concludes his analysis by suggesting that it is difficult 'to imagine how contemporary political theory could profit from Schmitt's work' and that '[c]ontinuing to assimilate and use Schmitt's ideas without an acknowledgement of the strong role antisemitism played in them means passing on elements of that same conceptual substance—albeit for the most part in encoded form.'<sup>64</sup> That is, Schmitt is so tainted that we should not read him, or should do so only with this clear warning.

Can Gross's argument be sustained? His thesis is based primarily on Schmitt's private correspondence and his diaries. In these sources, Schmitt undoubtedly expresses anti-Jewish sentiments of shocking crudity. Schmitt's diaries reveal, in Joseph Bendersky's words, a figure 'whose inner essence was often a tumultuous cauldron of tormenting anxieties, emotional outbursts, and crudely expressed prejudices'.<sup>65</sup> Bendersky concludes that they expose someone 'whose doubts, fears, and self-conscious inferiority was inseparable from intellectual arrogance'.<sup>66</sup> The evidence suggests Schmitt was anti-Semitic and that 'his relationships with and attitudes toward Jews [were] nuanced, complex (often vague), and certainly inconsistent as well as contradictory', and that this attitude does not seem to have emerged 'from any systematic study or analysis of the Jewish Question'.<sup>67</sup> They reveal a man who, without doubt, comes across in many respects as a nasty character. But what conclusions can be drawn from this with respect to his scholarly arguments?

<sup>63</sup> R Gross, *Carl Schmitt and the Jews: The 'Jewish Question', the Holocaust, and German Legal Theory*, trans J Golb (Madison, University of Wisconsin Press, 2007); R Gross, 'Carl Schmitt and the Jews; The "True Enemy": Antisemitism in Carl Schmitt's Life and Work' in Meierhenrich and Simons (n 19) ch 3. (Subsequent references are to the *Handbook* article.)

<sup>64</sup> Gross, *ibid* 111.

<sup>65</sup> J Bendersky, 'Schmitt's Diaries' in Meierhenrich and Simons (n 19) ch 4, 117.

<sup>66</sup> *ibid* 117.

<sup>67</sup> *ibid* 135. Schmitt had many Jewish friends, and dedicated his work *Constitutional Theory* to a Jewish friend who was killed in the First World War. In an early study, he had also ridiculed racist teaching on the grounds that it was a degenerate expression of romanticism: C Schmitt, *Theodor Däublers Nordlicht: Drei Studien über die Elemente, die Geist und die Actualität des Werkes* (Berlin, Duncker & Humblot, 1991 [1916]) 15: 'Die ganze Romantik der Rassenlehren beruht auf ähnlichen, namentlich morphologischen Spekulationen, und Leute, die sich Realpolitiker zu nennen lieben, machen naturwissenschaftliche, angeblich exakte Rassenunterschiede geltend, während sie im Grunde nur moralische Deutungen meinen' ['The entire romanticism of racial doctrine rests on similar, namely morphological, speculations and people who like to call themselves *Realpolitiker* make natural-scientific—presumably exact—racial differences valid, but these have moral significance only'].



It is dubious to make the leap, as Gross does, from Schmitt's personal and privately expressed thoughts to his scholarly positions. The evidence from his diaries may reveal a crude anti-Semitism, but they do not seem to indicate any strong affinity with Nazi ideology. Bendersky, for example, concludes that those who argue that 'Schmitt's theories were aimed at establishing a *Führerstaat* that came to fruition in the Nazi *Machtergreifung* or that his ideas committed him to welcoming Hitler' are difficult to sustain.<sup>68</sup> Of the few brief pre-1933 diary references to Nazis in Schmitt's diaries, none were sympathetic.<sup>69</sup>

Gross's core scholarly thesis against Schmitt the jurist is to claim that Schmitt's anti-normativism and his critique of those who equate state with legal order displays consistent anti-Semitism.<sup>70</sup> This seems to me to be tenuous at best, though I should make it clear that my own jurisprudential position is both anti-normativist and critical of those like Kelsen, who equate state and legal order. A more balanced assessment is, I suggest, provided by Jens Meierhenrich, who suggests that Schmitt's work was driven by such a fear of disorder that there was neither a 'break' nor 'continuity' between his Weimar- and Nazi-era writings.<sup>71</sup> Schmitt may never have fully converted to Nazi ideology, but from 1933 he was certainly willing to convert his deep-seated authoritarianism into the idea of the emerging racist state. For many, this is impossible to ignore or forgive, making his scholarly standing one on which many remain divided.

## VI. Conclusion

The most basic answer to the question 'why read Carl Schmitt?' is that he presents a systematic, unorthodox and challenging account of the constitution of political authority from which all public lawyers, even while disagreeing with his claims, have much to learn. He maintains that public lawyers commonly presuppose the authority of the existing institutional order and therefore assume that legal method elaborates a moral scheme. For Schmitt, by contrast, any foundational account must take into consideration existential conditions which, given human nature, must include the role of enmity and therefore also of force, struggle and domination. Schmitt builds his account of political authority not on the normative foundations of the just polity, but on the dynamics of power politics.

Schmitt's account is a powerful corrective to the distortions of normativism. He may be right to claim that the question of how authority is established shapes the concept of public law, but this involves a struggle not only over existence, but also

<sup>68</sup> *ibid* 119.

<sup>69</sup> *ibid* 132.

<sup>70</sup> See Gross (n 63), 109.

<sup>71</sup> J Meierhenrich, 'Fearing the Disordering of Things: The Development of Carl Schmitt's Institutional Theory, 1919–1942' in Meierhenrich and Simons (n 19) ch 6, 173.

over meaning. Schmitt recognised that ‘all political concepts, images and terms have a polemical meaning’ and can be made precise only when ‘they are focused on a specific conflict and bound to a concrete situation whose ultimate consequence is a friend–enemy grouping’.<sup>72</sup> Abstract concepts—he offers as illustrations terms such as state, society, sovereignty, constitution and absolutism—are ‘incomprehensible if one does not know exactly who is to be affected, combated, refuted or negated by such a term’.<sup>73</sup> In this domain, conceptual formulation is itself political. And when he says that ‘all law is “situational law”’,<sup>74</sup> he means the concept of law itself is intrinsically bound up with a political struggle.

The significance of these struggles over meaning thus depends on how we read Schmitt. If the focus is on division—on his technique of binary division—then we read him as a nominalist. In this domain, concepts have no precise meaning in the abstract or as universals; meaning is always concrete. If the focus is on decision—on meaning as the product of a particular resolution in an actual historical context—then we read him as an anti-rationalist. And if the focus is on derision—the way he presents liberal democracy as devoid of meaning—then we interpret him as an irrationalist for whom the secularising processes of modernity are leading to a loss of meaning.<sup>75</sup> Consequently, if we stick to his method of division, we read his work as a diagnostic exercise; if we emphasise his decisionism, he leads us towards an authoritarian outcome; and if we highlight his derisory treatment of liberal democracy, his work seems to require that we embrace a contentious political theology.

<sup>72</sup> Schmitt, *Concept of the Political* (n 1) 30.

<sup>73</sup> *ibid* 30–31.

<sup>74</sup> Schmitt, *Political Theology* (n 4) 13.

<sup>75</sup> See Schmitt, *Theodor Däublers Nordlicht* (n 67) 61: ‘Das Recht war zur Macht geworden, Treue zur Berechenbarkeit, Wahrheit zur allgemein anerkannten Richtigkeit, Schönheit zur guten Geschmack ... An die Stelle der Unterscheidung von gut und böse trat eine sublim differenzierte Nützlichkeit und Schädlichkeit’ [‘In modernity] right was converted into power, faith into predictability, truth into a generally recognized accuracy, beauty into good taste’ and ‘in place of the distinction between good and evil there emerged a sublime differentiation between usefulness and harmfulness’].