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One of the enduring controversies about the German jurist Carl Schmitt concerns his relationship to the Weimar Republic and the ramifications of his ideas for liberal democracy. Was Schmitt an "authoritarian liberal or termite of the republic"?[1] Does he offer today's liberal democrats worthwhile lessons for sustaining their political system, or should he be regarded as a malevolent will-o'-the-wisp, luring impressionable thinkers into dark and dangerous forests? Benjamin Schupmann's stimulating study falls squarely into the former camp. Schmitt did not seek to undermine the legitimacy of the Weimar Republic or justify its transformation into a different political system, Schupmann argues. Instead, "Schmitt's state and constitutional theory was intended to force Weimar's liberal democrats out of their comfort zone by showing them that liberalism is a political commitment and that liberals have enemies" (214).

Schupmann concedes that Schmitt's defense of the republic was chiefly motivated by a desire to "stabilize the German state and defend its authority," not by any "freestanding commitment to the core values of liberal democracy" (29). Nevertheless, if saving the Weimar Republic necessitated upholding the political decision on which it was based, namely, the decision in favor of a "bourgeois *Rechtsstaat* [rule-of-law state]" then, according to Schupmann, Schmitt was prepared to mount an unconventional defense of liberal values against the threat of mass democracy and parliamentary proceduralism.

In seeking to "challeng[e] the prevailing interpretation that Schmitt was vehemently illiberal" (24–25), Schupmann aims to disclose the lessons that today's defenders of liberalism can draw from Weimar's failures. Schmitt was not an "occasionalist" or willfully inconsistent thinker, he claims, but rather a theorist with a driving preoccupation: "Always, at least in the background of his thought, there is the concern about the power of a democratic majority to use positive law procedures against the state and constitution" (64). Schmitt feared that the Nazis and Communists might use legal parliamentary procedures, such as constitutional amendments or votes of no-confidence, to undermine or paralyze the Weimar Republic from the inside out. Schmitt's analyses of these dangers, along with his proposals for addressing them, constitute in Schupmann's view the most compelling theoretical justification for the practice of "constrained democracy" (203).

In Schupmann's view, Schmitt's constitutional theory demonstrates that the "bourgeois *Rechtsstaat*" rests, most fundamentally, on individual liberty rights such as freedom of conscience and property. It follows, then, that second-order political participation rights could justifiably be constrained, e.g. through banning anti-constitutional parties or prohibiting unconstructive votes of no-confidence, in the interests of safeguarding the "substantive value of liberty" (213). Schupmann believes that Schmitt's warnings about Weimar's vulnerabilities possess considerable value in the present moment, given

[1] Peter C. Caldwell, "Controversies over Carl Schmitt: A Review of Recent Literature," *Journal of Modern History* 77:2 (2005): 357–387, at 363.

recent attempts by populist parties, such as Hungary's Fidesz Party and Turkey's Justice and Development Party, to exploit parliamentarism as a means to weaken liberal democracy (218).

During the Weimar Republic, the notion that supralegal values or decisions ought to take precedence over positive law was associated with the "antipositivist" movement in jurisprudence, which "combined features of the Historical School with other juridical approaches, such as Hegel's, to defend a non-transcendent source of the law that was nevertheless more than statute, will, and procedure" (12). *Carl Schmitt's State and Constitutional Theory* seeks to establish Schmitt's intellectual identity as an anti-positivist thinker and explain how "that orientation affects the meaning of Schmitt's well-known concepts" (21). Schupmann provides a clear and accessible account of the disputes between statutory positivists and anti-positivists, toggling between theoretical debates and political events to make Schmitt's methodological perspective intuitively plausible to readers (1–25).

He provides an illuminating analysis of Schmitt's concept of representation, and makes a persuasive case that Schmitt based his concept of sovereign authority on Max Weber's ideal type of "office charisma" (94). In keeping with his emphasis on seeing Schmitt's anti-positivism as the key to his constitutional thought, Schupmann dissuades readers from conceiving of Schmitt's notion of political decision as wholly arbitrary or indeterminate. In Schmitt's view, "The legitimacy of a political order or community hinges on whether it concretizes some politicized truth compelling enough to depoliticize their other commitments. The truth is a basis for political Friendship. Without it, other convictions will politicize and collide violently" (100).

More controversial, however, is Schupmann's claim that Schmitt "theorized a form of liberalism that could recognize itself as an existential commitment, rather than a procedure, and that could recognize its Enemies" (200). He argues that Schmitt saw the Weimar Constitution's basic rights as the repository of the "politicized truth" from which all positive law emanated: "basic liberal rights alone could offer a coherent decision on Weimar's basic political status" (176). In *Legality and Legitimacy*, Schmitt depicted the Second Principal Part of the Weimar Constitution, which enumerated the "Basic Rights and Duties of Germans," as tantamount to a second coherent constitution alongside the First Principal Part's adumbration of the "parliamentary legislative state" (176–81). "Now, if in the knowledge that the Weimar Constitution is two constitutions, one chooses between them, then the decision must fall for the principle of the second constitution and its attempt to establish a substantive order," Schmitt reasoned.[2]

Such statements lend credence to Schupmann's interpretation. There are, however, good reasons to question the sincerity of Schmitt's selective appeals to liberal principles. Might they not represent a cynical strategy of using one liberal ideal (basic rights) as cudgel to bash others (representative democracy, separation of powers, legality), with the ultimate goal of delegitimating contemporary liberalism?[3] The overriding priority that Schmitt accorded to "the political" would seem to preclude investing liberal "values" with existential dignity. "To demand seriously of human beings that they kill others and be prepared to die themselves so that trade and industry may flourish for the survivors or that the purchasing power of grandchildren may grow is sinister and crazy," he declared in *The Concept of the Political*. "[T]he question is whether a specific political idea can be derived from the pure and consequential concept of individualistic liberalism. This is to be denied."[4]

Complicating matters further, the distinction that Schmitt ascertained between the first and second parts of the Weimar Constitution is not the only (or even the most fundamental) cleavage to appear in his constitutional theory. Schmitt argued that the "bourgeois *Rechtsstaat*" component of the modern liberal constitution, which expressed "a decision in the sense of

[2] Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2004), 94.

[3] William E. Scheuerman, *Carl Schmitt: The End of Law* (Lanham: Rowman & Littlefield, 1999), 65.

[4] Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), 48, 69–70.

bourgeois freedom: personal freedom, private property, contractual liberty, and freedom of commerce and profession," coexisted uneasily with "another distinctly *political* component."[5] Bourgeois basic rights were "part of the substance of the constitution" and thus immune from elimination through the constitutional amendment procedure.[6] However fundamental they might be for the maintenance of the "bourgeois *Rechtsstaat*," basic rights and the division of powers nonetheless "cannot found a political form on their own."[7] The properly political component of any constitution must be found in its combination of "two opposing formative political principles," identity and representation, whose interplay articulates the "political unity" of a people.[8] States that could not perpetuate their political unity were, in Schmitt's estimation, eventually bound to fail. Much of his late Weimar writing aimed to show how some forms of democracy, such as a plebiscitary-elected presidency, could shore up the political unity that liberal institutions had permitted to weaken and disintegrate.

Schmitt famously analyzed contemporary mass democracy as an unstable marriage between two heterogeneous elements, liberalism and democracy.[9] Unlike many interpreters, who have seen Schmitt as embracing an authoritarian, plebiscitary form of democracy, Schupmann portrays him as opting for liberalism and rejecting or downplaying democracy. "By applying his state and constitutional theory to Weimar," he argues, "Schmitt provided an unorthodox defense of liberal democracy. He argued only a commitment to individual liberty—and not democracy—could coherently and stably serve as the basic political status of the Weimar state" (200). While Schmitt was no friend of parliamentary democracy, that institution hardly exhausted his conception of what a "democratic" political form might look like.

When Schupmann observes, "it is extremely difficult to categorize Schmitt as any sort of democrat, at least according to today's understanding of the concept" (22), he overlooks Schmitt's point, which is that "today's understanding" might foreclose methods of expressing political unity that nonetheless remain democratic—provided, of course, that one accepts Schmitt's vision of democracy. As Jeffrey Seitzer and Christopher Thornhill have pointed out, Schmitt advances "one of the greatest and most controversial challenges to modern political theory: that is, his claim that the conditions of legitimate democratic governance are in fact best maintained by systems that do not conform to standard conceptions of democracy."[10]

What lessons can today's committed liberals learn from reading Schmitt? According to Schupmann,

> "[Schmitt] believed that the twentieth century 'triumph' of democracy and liberalism led many, thinkers and lay people alike, to forget that constitutional democracy requires authoritative constraints on its political practices. [...] Schmitt pressed his fellow jurists in Weimar that, when forced to decide, they would agree that a Nazi majority legally seizing parliament and meeting whatever threshold requirements necessary to rewrite the constitution could *not* do so legitimately" (33–34).

Whatever we might make of Schmitt's legal arguments, the fact remains that no "Nazi majority" ever seized power in Germany. Schupmann incorrectly refers to the Nazis' possession of a "two-thirds majority in the *Reichstag"* in March 1933

[5] Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer (Durham: Duke University Press, 2008), 169.

[6] Ibid., 214–215.

[7] Ibid., 235.

[8] Ibid., 239.

[9] Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge: MIT Press, 1985), 8–9.

[10] Jeffrey Seitzer and Christopher Thornhill, "An Introduction to Carl Schmitt's *Constitutional Theory*: Issues and Context," in Schmitt, *Constitutional Theory*, 1–50, at 40.

(5). The Nazis, who won 44% of the vote in the March 1933 Reichstag elections, managed to gain the supermajority required to pass their constitution-amending Enabling Act through the violent exclusion of Communist deputies and the intimidated acquiescence of all other parties except the Social Democrats.[11] The Enabling Act was a *fait accompli*, for the Nazis had already acquired the tools necessary to exercise political power—the Reichstag Fire Decree, control over the Prussian police force, and toleration by the army—through the fateful decision taken by President Hindenburg and his advisors in January 1933 to appoint Adolf Hitler chancellor and entrust him with Article 48's emergency powers.

It was the institution of presidential government, which Schmitt so vigorously defended, rather than the constitutional amendment procedure, that opened the door to Hitler's dictatorship.[12] In light of the gulf between Schmitt's interpretation of Weimar's weaknesses and the reality of its collapse, we should be cautious about drawing practical lessons from his political writings. As a jurist who "performed a fateful conceptual split between the 'substance' of the people on the one hand and the empirical outcome of elections or opinion surveys on the other," Schmitt may render more service to contemporary populists than their liberal opponents.[13]

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[11] As a result, the Nazis were able to command support from 83% of the Reichstag deputies present. J. Noakes and G. Pridham, eds., *Nazism 1919–1945* (Exeter: University of Exeter Press, 1998), 1: 154–61.

[12] Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Weimarer Republik und Nationalsozialismus* (Munich: Beck, 1999), 113; John P. McCormick, "Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt's *Legality and Legitimacy*," in Schmitt, *Legality and Legitimacy*, xiii–xliii, at xlii.

[13] Jan-Werner Müller, *What Is Populism?* (Philadelphia: University of Pennsylvania Press, 2016), 52.