THE RULE OF LAW UNDER SIEGE: CARL SCHMITT AND THE DEATH OF THE WEIMAR REPUBLIC

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Despite the fact that the authoritarian German political thinker Carl Schmitt devoted much of his intellectual energy to an analysis of the profound transformations undergone by the rule of law in the twentieth century, few commentators in the Anglo-American intellectual world have grappled systematically with Schmitt's contributions to legal scholarship. It is the central contention of this essay that precisely such an undertaking is essential if we are to appreciate the depth of Schmitt's hostility in the early 1930s to liberal democracy. An interpretation of Schmitt's writings from the late 1920s and early '30s which places special weight on his highly provocative critique of the liberal rule-of-law ideal suggests that Schmitt was far less eager to defend the liberal democratic core of the Weimar Republic than a number of influential recent commentators would like us to believe (Part I). Indeed, Schmitt's 'deconstruction' of the liberal rule of law needs to be answered by those of us concerned with defending and reformulating the rule-of-law ideal in a political and social universe profoundly unlike that which generated it centuries ago. By means of recourse to one of Schmitt's contemporaries and most perceptive of critics, Otto Kirchheimer, I conclude by offering a few tentative comments on how we might respond to Schmitt's deeply illiberal ideas from the late 1920s and early '30s about the rule of law (Part II).

I

The modern rule-of-law ideal has taken many different theoretical and historical forms, but its centrepiece has undoubtedly been the idea that governmental action must be rendered calculable and restrained: it was the exercise of arbitrary power, of despotism as they dramatically labelled it, that worried liberals as diverse as the bourgeois Locke and the rabble-rouser Paine, the aristocratic Montesquieu and the state-builder Madison. In the ominous shadows of all too real experiences of political tyranny, they all came to recognize that poorly regulated and unpredictable state action made even a bare modicum of political and social autonomy impossible, and they busily set about envisioning institutional instruments with which state action could be made predictable and thus more humane. The rule-of-law doctrine has its genesis in their imaginative and historically unprecedented attempt to grapple with this task.

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Locke's answer is in many ways the paradigmatic one. Arbitrary government can only be prevented if the political order is governed by 'promulgated standing' laws, a separation between the legislature and executive, and an independent judiciary. In this classic statement of the idea of a rule of law, the legislature must be dominant. This guarantees a 'government by law', and not, as Locke and his peers feared, one dominated by executive 'decrees' or 'prerogative'. Governmental action must be based upon clearly formulated, publicly declared rules. But, crucially, the legislature also must be restrained. It too can be a source of irregular inroads on individual freedom and property, and uncontrolled legislative majorities can prove as oppressive as unrestrained monarchs. Like the natural law whose purpose it is to uphold, positive legislation must therefore be general in character, and an important part of this ideal is that it cannot take the form of vague and amorphous 'extemporary dictates and undetermined resolutions'. 'Undetermined' law is similar to an irregular decree insofar as it provides excessive leeway for state representatives to act in a potentially arbitrary, nongeneral fashion.[1] Thus, the legislature is not permitted to issue situation-specific measures or decrees, meaning (for Locke) action directed against individual persons or objects. Otherwise, the 'civil state' might turn out to be as unpredictable and miserable as the 'state of nature' had become in its final stage, and government could be allowed to run roughshod over those freedoms whose purpose it is to protect.

The idea of the general legal norm plays a crucial role in this early liberal version of the rule of law, and it is arguably the pillar of the famous contrast between a 'rule of men' and a 'rule of law'. Only if legislation does not refer explicitly to particular persons or objects, but instead is issued in advance and meant to apply potentially to all cases and persons in the abstract, can it succeed in depersonalizing the exercise of state authority. Only then can government action be truly impartial. When general norms, and not the particularistic and 'passion-ridden' dictates of an executive or all-powerful assembly guide state action, is political authority regularized and tamed. If legislatures are permitted to undertake individual acts, nothing prevents lawmakers from pursuing oppressive acts (against a particular property owner, for example) incapable of being generally applied and thus lacking a universal justification. Indeed, insofar as general positive legislation is supposed to correspond to the similarly general imperatives of the 'law of reason' (natural law), the rule of law can even be said to embody humanity's quest to model its order upon the divine rationality that Locke, rather traditionally, still sees as embodied in the universe. It is what makes us most like God. The rule of law represents the

[1] John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, 1967), esp. II, Ch. XI, §137. For a discussion providing helpful background about the immediate historical and intellectual context for this conception, see M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Oxford, 1967), esp. pp. 53–75.

hegemony of *ratio*, in contrast to mere *voluntas*. But this is all lost if state action 'be varied in particular Cases . . . [and if we] . . . have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough'.[2] Then humanity has succumbed to the rule of passion and, indeed, has turned away from God.

Despite their increasingly secular character, more recent versions of the rule of law have maintained this emphasis on clearly formulated general legal norms. Although God has generally disappeared from the picture, the general norm has stayed in place. It helps explain the abiding emphasis on the idea of a separation of powers — which, of course, has also taken countless forms. But central to most of them has been the notion that calculable and restrained government presupposes a division between executive and legislative power as well as an independent judiciary. Abstract and clearly formulated general norms should only be 'applied' to particular cases which administrators and judges have to confront; blurring these functions might confuse the crucial distinction between impartial (or general) and particular acts and thus contribute to irregular and, therefore, potentially arbitrary action. As Max Weber noted in *Economy and Society*, administrators and judges were ideally to be like 'an automaton into which legal documents and fees are stuffed at the top in order that [they] may spill forth the verdict at the bottom along with the reasons, read mechanically from codified paragraphs'.[3] Despite the slightly sarcastic tone with which Weber describes this classical idea, and though he rightly recognizes that it necessarily expresses more a noble aim than legal reality itself, he too thought it worth defending and saw it as constituting a basic presupposition of modern 'rational' legal authority and a minimum of legal security. Only when legal norms are coherently formulated and general in character can administrators and judges be expected to act in a manner that minimizes the danger of inconsistent state action.

When developing his revised attack on the 'pluralistic' 'legislative state' (*Gesetzgebungsstaat*) and 'parliamentary legality' during Weimar's final years, Schmitt has such conceptions of the rule of law in mind. In his view, the liberal rule of law contradicts the concrete realities and most basic imperatives of contemporary politics.[4] As I hope to demonstrate, Schmitt's exposition

[2] Locke, *Two Treatises*, II, §142.

[3] Max Weber, *Economy and Society* (Berkeley, 1979), p. 979.

[4] Schmitt develops the ideas discussed here (between 1928 and 1933) in numerous texts from this period, but its central features are worked out in: 'Wesen und Werden des Faschistischen Staates' (1929), 'Staatsethik und pluralistischer Staat' (1930), 'Die Wendung zum totalen Staat' (1930), 'Weiterentwicklung des totalen Staats in Deutschland' (1933), all collected in Carl Schmitt, *Positionen und Begriffe im Kampf mit Weimar-Genf-Versailles* (Hamburg, 1940); C. Schmitt, *Der Hüter der Verfassung* (Tübingen, 1931); C. Schmitt, *Legalität und Legitimität* (Berlin, 1932). I will also refer to other texts as

'trashes' the rule-of-law ideal without acknowledging the legitimate worries about unharnessed and irregular state power that generated early conceptions of it in the first place. Although at least some of Schmitt's empirical observations are partially correct, and even though his description of the transformation of the rule of law undoubtedly addresses a number of real problems for those of us who do not share Schmitt's normative standpoint, the fact that the rule of law today functions in a manner very different from that envisioned by its classical defenders hardly constitutes an argument for abandoning it, let alone an adequate defence of the authoritarian option embraced by Schmitt in the 1930s.

Schmitt's case against the rule of law rests in part on a critique of the 'pluralist' welfare state with at least some similarities to contemporary conservative attacks on the welfare state. In a series of writings from the late '20s and early '30s Schmitt undertakes to document the manner in which powerful social groups effectively colonize the Weimar Republic's political apparatus. In his view, extensive state action in the economy (and the resultant blurring of the traditional state/society divide) contributes to a potentially catastrophic situation in which the Weimar state loses its institutional integrity and becomes incapable of acting in an adequately 'decisive' manner. In Schmitt's categories, the central state gradually abandons its monopoly on 'the political'.[5] The

appropriate during the course of my exegesis. For a helpful overview of some of Schmitt's legal ideas from this period, but one which does not cover their transformation during the early '30s adequately: Rune Slagstad, 'Liberal Constitutionalism and Its Critics: Carl Schmitt and Max Weber', in *Constitutionalism and Democracy*, ed. J. Elster and R. Slagstad (Cambridge, 1988). The best overview in English of Schmitt's thinking from this period is Richard Wolin, 'Carl Schmitt. The Conservative Revolutionary: Habitus and the Aesthetics of Horror', *Political Theory*, Vol. 20, No. 3 (1992); Richard Wolin, 'Carl Schmitt, Political Existentialism, and the Total Sate', *Theory and Society*, Vol. 19, No. 4 (1990). From the vast German literature I have found the following especially helpful: Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (Munich, 1976), as well as her essays in Ingeborg Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus* (Munich, 1986); Volker Neumann, *Der Staat im Bürgerkrieg. Kontinuität und Wandlung des Staatsbegriffs in der politischen Theorie Carl Schmitts* (Frankfurt, 1980), esp. pp. 100–137; Jürgen Fijalkowski, *Die Wendung zum Führerstaat* (Cologne, 1958); Hasso Hofmann, *Legitimität gegen Legalität: Der Wege der politischen Philosophie Carl Schmitts* (Neuwied, 1964).

[5] In the 1927 'Der Begriff des Politischen' Schmitt develops a conception of the political sphere centred upon a normatively unregulated act or 'decision' directed against a 'foe'. For Schmitt, the foe 'is simply the Other, the Alien, and it is enough for his being that he is in a particularly intensive sense existentially something Other and Alien, so that in the case of conflict he means the negation of one's form of existence and therefore must be guarded from and fought off, in order to preserve one's own appropriate form (*eigene, seinsmäßige Art*) of life'. What Schmitt describes as 'the real possibility of violence' thus becomes essential for distinguishing political action from other forms of human action,

Weimar rendition of the modern welfare state is no longer capable of standing 'above' competing political and social interests and, resolutely and autonomously, determining the outcome of conflicts between them, in part because the institutional structures which should allow it to do so are effectively taken over by powerful interest groups and pluralistic 'special interests'. While the contemporary liberal democratic welfare state is thus at best little more than an 'arbitrator' capable of working out bad compromises among a motley group of political and social interest blocs, Schmitt admiringly notes that Italian fascism and even Soviet Bolshevism still possess a capacity for decisive, sovereign political action. There, the state apparatus allegedly constitutes a 'higher, on the basis of its own strength and authority decisive ''Third'' ',[6] superior to competing social and party-based political and social interests and able to force its will upon them when necessary.

According to Schmitt, the pluralist doctrines of English writers like Harold Laski and G.D.H. Cole thus contain a number of revealing insights. The pluralists' endeavour to reduce the state to nothing but one among a number of competing social institutions in fact reflects real-life developments in contemporary politics, and the pluralists' dramatic talk about 'the end of the state' embodies the fact that in the contemporary era the state no longer constitutes the ultimate authority in social and political affairs. But if the situation suggested by the pluralists' insistence on the 'death of the state' is indeed an actual one — Schmitt adds — then the contemporary welfare state finds itself (in 1930) in a historical juncture approaching civil war. The demise of a coherent, unified state apparatus, exemplified most clearly by the fact that state institutions and decision making allegedly have been divided up among oftentimes deeply antagonistic pluralistic social and political blocs, means for Schmitt that

such as those (Schmitt tells us) encountered in the moral, economic or religious spheres. Schmitt's definition of sovereignty in the 1922 *Political Theology* (Cambridge, Mass., 1988) in terms of 'he who decides on the exception' is inextricably tied to his more basic conception of the political sphere. Genuine (or 'sovereign') political action is defined in reference to the capacity to act effectively in a (potentially violent) crisis that no longer can be resolved effectively by means of general norms or rules, or what Schmitt disdainfully refers to as 'normativities'; thus, the centrality of the 'exception' to Schmitt's definition. Carl Schmitt, 'Der Begriff des Politischen', *Archiv für Sozialwissenschaft*, Vol. 58, No. 1 (1927).

[6] Schmitt, 'Wesen und Werden des Faschistischen Staates', p. 112. If I seem to fuse my discussion of Schmitt's attack on the Weimar Republic with his more general critique of the liberal democratic welfare state, this is because Schmitt seems to do so himself. Notwithstanding its clear faults, this approach may not be altogether illegitimate; as a significant amount of literature documents, Weimar in many ways was a pacesetter in establishing the institutions of the contemporary welfare state. Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York, 1963), pp. 3–34; Detlev Peuckert, *Die Weimarer Republik* (Frankfurt, 1987), esp. pp. 132–48.

a situation of political normalcy has vanished and that an 'ethics of civil war' should guide political action. Even if the central state itself is incapable of decisive, sovereign political action, Schmitt adamantly insists, there is no escaping from the logic of friend/foe politics that he had described in his 1927 'The Concept of the Political': some conflict or cleavage is bound to take a truly intense, potentially violent political form, and some interest bloc or constituency may be destined to ride this political cleavage to a position of dominance. From the perspective of the concrete political actor, the very real question in the political universe of the early '30s hence becomes how one can manage best to grapple with the onerous implications of the disintegration of traditional state authority. Particularly in a situation as explosive as that characteristic of crisis-ridden liberal democracy, political actors need to identify their potential 'foes' — and then work to undermine them.[7]

For Schmitt, this crisis has long term structural roots. Classical liberalism envisioned an autonomous and self-regulating society — clearly distinct from the state and free from its influence while, simultaneously, able to control state action by means of a monopoly over a freewheeling and discursive sovereign parliament, whose legislative acts were to embody the 'general will' and take a general legal form. Schmitt thinks that too much of liberal democratic thought in our century naïvely continues to presuppose this anachronistic constellation. Particularly because of the centrality of social and economic conflicts to modern politics, extensive state activity in social and economic life has proven unavoidable; only by means of far-reaching intervention can the state hope to maintain its grip on potentially explosive class-based social antagonisms. With the rise of the interventionist or, as Schmitt describes it, 'total' state, the classical separation between the state and an autonomous society inevitably collapses, and liberal democratic institutions necessarily undergo a series of profound functional transformations. Amidst the conditions of the contemporary interventionist state the legislature, for example, is little more than a 'showplace for pluralist interests', and no one seriously believes anymore that it articulates a 'general will' by means of unhindered debate and exchange. Parliament is controlled by antagonistic interest groups and powerful blocs representative of distinct segments of a profoundly divided polity lacking, like the bureaucratized parties and plebiscitary elections which put legislators into power, any interest in engaging in quaint rationalistic liberal discourse with political opponents. In reality, political interests chiefly aspire to get their interests registered by state administrators, and to make sure that those of their hated foes do not get represented. Who today could share the old-fashioned faith in the discursive rationality of parliament or parliamentarians? Or believe

[7] Schmitt, 'Staatsethik und pluralistischer Staat', esp. pp. 144–5. See also Schmitt's comments about English pluralism in the 1932 version of *The Concept of the Political*, trans. George Schwab (New Brunswick, 1976), pp. 39–45.

that the rule of law still functions to guarantee the sanctity of a self-regulating society?[8]

Most significantly, Schmitt relies on an interpretation of the liberal legal norm which permits him to show that it has become anachronistic in the age of interventionist politics. Certainly, it is true that modern defenders of the idea that law should take a general form like Locke and Rousseau, though for different reasons, envisioned a political setting where there would be little need for extensive state activity in society, and their emphasis on the virtues of general law can surely be read as an attempt to limit state intervention altogether as much as to make sure that it takes a normatively acceptable form. At first glance the insistence on law's generality indeed seems incompatible with forms of specialized legislation (directed at a specific social group, or a branch of industry) like that common today. Yet to leave the story there would be too simple. Though one of the most eloquent defenders of modern formal law, Hegel (for example) was neither a believer in bourgeois *laissez-faire* nor a Rousseauian 'civic religion' allegedly capable of minimizing state intervention in society, and there is surely evidence that other defenders of general law as well did not conceive of it as an absolute prohibition on state regulation of social and economic affairs.[9] Even Rousseau writes:

> when I say that the object of law is always general, I mean that the law considers subjects as a body and actions in the abstract, never a man as an individual or a particular action. Thus the law can very well enact that there will be privileges, but it cannot confer on them on anyone by name. The law can create several classes of citizens, and even designate the qualities determining who has a right to these classes, but it cannot name the specific people to be admitted to them.[10]

In other words, general law can legitimately regulate specific groups of problems or individuals ('there will be privileges') as long as it does so without naming an individual person or object and simply refers to an 'abstractly' defined category. Rousseau thinks that a progressive income tax directed at 'subjects as a body' or en masse (for example: all those who earn more than X francs) is perfectly legitimate if it serves the general will, but he would be worried about law directed at a particular individual ('citizen A should pay X' simply by virtue of being citizen A and having, let us say, fallen into disfavour with a particular political authority).[11] True, Rousseau exaggerates the extent

[8] Schmitt, *Der Hüter der Verfassung*, pp. 71–91.

[9] For Hegel's views on the generality of law: Hegel, *The Philosophy of Right*, trans. T.M. Knox (New York, 1967), para. 211.

[10] Rousseau, *The Social Contract*, ed. Roger Masters (New York, 1978), p. 66.

[11] Rousseau, 'Political Economy', in *The Social Contract*, esp. pp. 230–2.

to which this distinction is always so clearcut (what happens when only citizen A earns more than X francs?),[12] but he — like Locke, Montesquieu, Kant, Hegel, Bentham, and many others in the modern political tradition — still sees it as a minimal check on the possibility of arbitrary state action.

Carl Schmitt probably underplays the complexity of this issue, and like many defenders of so called 'deformalized' regulatory law reaches the conclusion that the dominant liberal conception of the legal norm conflicts with the basic requirements of extensive state intervention in social and economic affairs.[13] In Schmitt's view, a polity forced to act in innumerable spheres of social life, and which no longer simply regulates the broadest contours of societal activities but instead now itself takes over many activities once left to the private sphere, cannot rely on an instrument as blunt as the classical general norm. More specialized, unprecedented forms of lawmaking, and broad grants of legislative authority to administrative bodies, are absolutely imperative after the demise of the classical state/society distinction. Such regulation rarely can be considered classically general in character. The fact that much of contemporary law is not only explicitly individual in form (directed, for example, at a particular firm or bank) but relies upon what Locke described as worrisome 'undetermined resolutions' ('in good faith', 'in the public interest') that provide far-reaching room for potentially arbitrary administrative discretion is taken by Schmitt as evidence that the core of the liberal rule of law — the generality of the legal norm — has become obsolete, and that the idea of the separation of power, which relied so heavily upon it, no longer makes any sense. If the view of judges and administrators as passive 'automatons' was probably already highly deceptive in classical liberalism, it certainly is today when law is destined to take an increasingly amorphous, nonformal structure. Administrators and judges no longer passively 'apply' cogent general rules that demand a relatively unambiguous type of action on their behalf, and in part because both legislative and administrative actors inevitably undertake discretionary action against specific individuals and particular objects, Schmitt concludes, the distinction between legislative and administrative activities necessarily is robbed of any real justification in our era.[14]

[12] It is precisely this ambiguity which Schmitt, as we will see, in part plays upon in developing his criticism of the liberal rule of law.

[13] As one commentator has noted, the twentieth century has witnessed 'the rapid expansion of the use of open-ended standards . . . in legislation, administration, and adjudication . . . Such indeterminate prescriptions have always existed in law, but they grow rapidly in prominence' with the emergence of the welfare state. Roberto Unger, *Law in Modern Society* (NewYork, 1976), pp. 193–4.

[14] For crucial background: Schmitt, *Der Hüter der Verfassung*, pp. 17–20; Schmitt, *Die Verfassungslehre* (Berlin, 1928), pp. 125–57. Most fundamentally: Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg, 1934), pp. 58–60.

Schmitt's view of this problem had been a different one just a few years before, when he had sided with Weimar conservatives hostile to nonclassical forms of state intervention. He then denounced, for example, the German left's popular 1926 call to socialize royal property as an act of 'revolutionary violence', insisting that it constituted a decree or measure directed at a particular person which the liberal tradition (rightly, he then argued) had denied legislative authorities the power to enact. Measures, as Locke and so many others had insisted, were contrary to parliamentary government (at least, he hinted, during a situation of political normalcy) and instead belonged properly to the realm of acts legitimately undertaken by the state during a profound political crisis. Governmental acts against the Prussian princes would open the door to similarly arbitrary measures against particular interests or objects — a specific news- paper, perhaps, or a vocal critic of the regime — and thereby put us on what Frederick Hayek, who in some respects developed strikingly parallel arguments some fifteen years later, soon ominously described as the 'road to serfdom'.[15]

Like Schmitt, Hayek makes the distinction between the individual measure and general law the centrepiece of his legal theory. But while also arguing that the welfare state and formal law are inconsistent and similarly attacking contemporary 'pluralistic' legislatures for being 'colonized' by powerful social and power blocs associated with the welfare-state project, Hayek suggests that we can recapture nineteenth-century competitive capitalism and some type of early liberal version of the relationship between state and society and save classical general law. In the 1932 *Legalität und Legitimität* Schmitt draws very different results from a similar constellation of assumptions. Insofar as Schmitt questions Hayek's belief in the possibility of reconstructing a (romanticized) early capitalist economy, his position is in some respects undoubtedly the more realistic one; given its full-scale abandonment of the minimal achievements of political liberalism, its consequences are far more heinous. Whereas Hayek's valorization of the distinction between the individual command and general norm culminates in a theory of so called economic 'libertarianism', it helps Schmitt embrace fascism. If (1) the contemporary interventionist ('total') state requires discarding general law (and, furthermore, there is no going back to an early liberal state-society constellation which might allow us to regain it), and (2), there are still good normative reasons for preserving a distinction between

[15] Carl Schmitt, *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung* (Berlin, 1926). F. Hayek, *The Road to Serfdom* (London, 1976), esp. pp. 54–65; Hayek, *Law, Legislation, and Liberty*, Vols. I–III (London, 1973). Hayek arguably acknowledges his debt to Schmitt in an obscure yet revealing footnote on pp. 194–5 of Volume III where he notes that some facets of his analysis were anticipated by 'the extraordinary German student of politics, Carl Schmitt'. For an initial but inadequate comparison of Hayek and Schmitt: F.R. Cristi, 'Hayek and Schmitt on the Rule of Law', *Canadian Journal of Political Science*, Vol. 17, No. 3 (1984).

general legislative norms and individual or particular decrees (which should not be promulgated by a central legislature), as Schmitt still insists, then the modern interventionist state can only take one form — an executive-centred dictatorship. As Schmitt openly tells us, 'the administrative state which manifests itself in the praxis of ''measures'' ' — and with this he means the Weimar Republic and the emerging welfare state — 'is more likely appropriate to a ''dictatorship'' ' than the classical parliamentary state.[16] Because popularly elected legislative bodies can only legitimately issue classical-style general norms, they are incapable of grappling with the exigencies of the modern interventionist state, to which dictatorial government is better suited. Parliamentarism and the liberal rule of law may have 'fit' an early capitalist, relatively non-interventionist state/society constellation, but they are irrelevant to the imperatives of contemporary politics.

While actually making an argument for the necessity of an authoritarian answer to Weimar's crisis, Schmitt hence can seem to remain true to the classical belief in the necessity of discriminating between legitimate general and illegitimate individual legislative acts. While preparing the way for dictatorial government, he can rely upon a partial appropriation of the arguments of classical authors like Locke and Rousseau.

Despite his attempt to delineate the political sphere from that of morality in 'The Concept of the Political', Schmitt's analysis lacks none of the pathos characteristic of early liberal defences of the general legal norm. If the abandonment of general law represented for Locke a sinful attempt to flee from the imperatives of God's laws, Schmitt now does his best to match Locke. In his view, parliamentary government's abandonment of classical formal law, and the widespread view that legitimate parliamentary action need not take a classically general form, means that 'the way would be open to an absolutely ''neutral'', value-free, quality-less, empty formalistic-functionalistic conception of legality'.[17] Without the minimal guarantee of justice provided by the classical legal norm's general structure, and without any legitimate reason for maintaining some faith in the rationality of parliamentary decision making or in the belief that its legal acts represent society's general interests, parliamentary legality is reduced to the empty and indefensible notion that a majority can, willy nilly, determine what is legitimate. Lacking this most basic of restraints on legislative action, its every act would have to be considered acceptable and, in Schmitt's view, the legal order is thereby denied any way of discerning friend from foe, or its real defenders from its opponents. Any majority-backed party, and thus even those clearly opposed to the Weimar Constitution, could legitimately seize power and undertake any policies that they deemed appropriate,

[16] Schmitt, *Legalität und Legitimität*, p. 87.

[17] *Ibid.*, p. 27.

however ridiculous, unjust or tyrannical they might be. In short, either parliamentary government opts for general law and refuses to undertake modes of social legislation incompatible with it, or it has necessarily succumbed to moral 'emptiness' and is destined to self-destruct. The paradoxes of parliamentary legality are thus twofold. Not only is the interventionist state essential to modern politics and (simultaneously) incompatible with parliamentary politics, but parliamentarism's unavoidable abandonment of classical liberal notions of the legal norm probably dooms it.

Schmitt then relies on Max Weber — a paradoxical yet nonetheless forceful defender of crucial elements of the traditional liberal rule of law — in sketching out the broad outlines of such an alternative. Weber had tried to make sure that the Weimar Constitution would leave room for a powerful popular executive outfitted with instruments allowing him to appeal above parliamentary and party institutions, both of which Weber thought most likely to be overrun by the politically stultifying process of bureaucratization. Parties and legislatures would probably fail to produce the charismatic leadership allegedly essential to modern mass democratic politics, the importance of which (in part because of his rather limited faith in the rationality of popular decision making) Weber came to emphasize with a particular vengeance during his final years.[18]

In juxtaposing 'plebiscitary legitimacy' to parliamentary 'legality', Schmitt clearly has this context in mind. Significantly, Schmitt radicalizes Weber's views here. Whereas for Weber the idea of a mass-based charismatic leader stands uneasily alongside more traditional liberal conceptions of legality, Schmitt sheds Weber's tension-ridden constellation of its most defensible features.

Because the emergence of radically pluralistic politics and the concomitant abandonment of state 'substance' in Weimar allegedly represents an emergency and perhaps even a civil war, Schmitt concludes that the Weimar President should be outfitted with unprecedented powers which permit him to issue executive measures of a far-reaching political and legal significance. Not only does Schmitt think that Hindenburg should be provided with lawmaking powers that make the regime's executive decrees effectively dominant in everyday politics and in the crucial sphere of social and economic policymaking, but he *can also legitimately overrule constitutional norms*; Schmitt thereby furbishes the Weimar executive with the power to undertake profound consti-

[18] For discussions of this theme in Weber's final writings and on his attempt to shape the Weimar Constitution: Wolfgang Mommsen, *Max Weber and German Politics* (Chicago, 1984), pp. 332–414, and especially Mommsen's excellent discussion of the relationship between Schmitt's *Legalität und Legitimität* and Weber's typology of forms of legitimacy, pp. 448–53. Also: David Beetham, *Max Weber and the Theory of Modern Politics* (Oxford, 1985), pp. 215–49.

tutional revisions.[19] Classical general legal norms are to make way for ('norm-less') executive and administrative decrees, and the idea of legislative supremacy, and thus one of the centrepieces of the original liberal rule-of-law ideal, is to be surrendered. Only unprecedented emergency powers, Schmitt now claims, might allow Hindenburg to become the 'higher' and 'neutral' force, so desperately needed by substanceless Weimar Germany, capable of standing above the political system's antagonistic social and political factions and the paralyzed legislative bodies overwhelmed by them. Because the Weimar President is directly elected by the entire people, he alone truly expresses the political unity of the German citizenry, and only he embodies the Constitution's original vision of a 'homogeneous' *folk*, as opposed to the heterogeneity of the pluralist party structure, colonized and divided parliament, and the

[19] Schmitt writes that the Federal President should be allowed to rely upon 'measures' to break through (*durchbrechen)* 'constitutional norms' because not every facet of the Weimar Constitution is 'more important' than 'the protection of the Constitution itself'. Carl Schmitt, 'Die staatsrechtliche Bedeutung der Notverordnung insbesondere ihre Rechtsgültigkeit' (1931), in Schmitt, *Verfassungsrechtliche Aufsätze* (Berlin, 1973), pp. 244–5. Of course, the question then is what makes up the 'Constitution itself' (above and beyond specific constitutional norms). In my reading, Schmitt's interpretation of this 'substance' is overtly authoritarian. Crucially, *Legalität und Legitimität* concludes by claiming that the basic 'decision' that has to be made in Germany either has to be for the 'substantial contents and forces of the German folk' or for the 'continuation' (*Weiterführung*) of 'functionalistic value-neutrality'. Schmitt associates the former with an unspecified 'substantial kernel' of the Weimar Constitution's section on 'Basic Rights and Basic Duties'; the latter refers in part to the basic procedures of (liberal) parliamentary rulemaking. Schmitt explicitly dubs his own 'decision' a 'dictatorship'. Schmitt, *Legalität und Legitimität*, pp. 87, 96–8. The two most influential Schmitt scholars in the English-speaking world, George Schwab and Joseph Bendersky, trivialize too much of Schmitt's argumentation from this period. Schmitt radicalized some facets of the Weimar Constitution in a manner alien to the Constitution's underlying spirit in order to replace the genuinely democratic features of the Republic with a form of mass-based dictatorship. 'Saving' Weimar for him meant abandoning a complex and multi-sided but basically liberal-democratic constitutional order with an executive-centred regime that would rely on easily manipulable forms of plebiscitary decisionmaking. Schmitt ends up endorsing a revolutionary ('sovereign') dictatorship and not simply a temporary ('commissarial') one. True, Schmitt seems to have hoped that the reactionary clique centred around General Schleicher would succeed in warding off the Nazi threat during the early '30s, and Schmitt certainly was not an active Nazi before 1933 (he joined the party, with Martin Heidegger, on 1 May 1933). But Bendersky's attempt to transform Schleicher and the other authoritarian élites who eventually handed over power to the Nazis into something close to principled anti-fascists badly obscures the role played by many right-wing authoritarians in preparing the way for the Nazi takeover. See: Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, 1982); George Schwab, *The Challenge of the Exception* (Berlin, 1970). Also, for a critique of their work: Bill Scheuerman, 'Carl Schmitt and the Nazis', *German Politics and Society*, No. 23 (Summer 1991). On Schmitt's ally Schleicher: Gotthard Jasper, *Die gescheiterte Zähmung. Wege zur Machtergreifung Hitlers* (Frankfurt, 1986), pp. 88–126.

outdated liberal rule of law that helps keep it afloat.[20] The ('political') principle of plebiscitary legitimacy, which is intimated in some sections of the Weimar Constitution, should replace ('normativistic') liberal conceptions of legality, and the legacy of the complex and multifaceted liberal-democratic Weimar Constitution should be inherited by some form of mass-based executive-centred regime.

How will this regime legitimize itself after having abandoned anachronistic conceptions of parliamentary legality and the rule of law? As Schmitt tells us, charisma, or perhaps 'the authoritarian residues of a predemocratic era', might perform this function.[21]

II

In a set of pathbreaking essays for the journal *Die Gesellschaft* in 1932 and 1933, the twenty-seven year old Social Democrat (and future associate of the neo-Marxist Institute for Social Research) Otto Kirchheimer argued that Schmitt's reasoning had led him to endorse a thinly-veiled 'constitutional revolution' aimed at jettisoning parliamentary government and the rule of law for a disturbing brand of 'postdemocratic caesarism'.[22] Although at first glance simply one version of a widely expressed demand in crisis-ridden Weimar for a presidential regime, Schmitt's argument was actually far more radical. Quite perceptively, Kirchheimer identified many of the sources of this development in the peculiarities of Schmitt's theorizing about the rule-of-law ideal: Schmitt's apparent demonstration of the irrelevance of the modern rule-of-law ideal for the exigencies of the contemporary administrative state had contributed to Schmitt's own option for an authoritarian alternative to the Weimar Republic and its highly controversial attempt to institutionalize the rudiments of the welfare state. While noting that Schmitt continued to describe his proposed plebiscitary alternative to Weimar as 'democratic' in character, Kirchheimer rightly reminded his audience in 1932 that Schmitt had expressly argued that 'the people can only say yes or no, it cannot counsel, deliberate, or

[20] 'Homogeneity' is central to Schmitt's anti-universalistic, illiberal concept of 'democracy': see Carl Schmitt, *The Crisis of Parliamentary Government* (Cambridge, Mass., 1985), pp. 8–15; Schmitt, *Die Verfassungslehre*, pp. 226–38.

[21] Schmitt, *Legalität und Legitimität*, p. 94.

[22] Otto Kirchheimer, 'Constitutional Reaction in 1932', reprinted in: Kirchheimer, *Politics, Law, and Social Change* (New York, 1969), pp. 77–8, 80. A number of other essays by Kirchheimer from this period have been reprinted in *Social Democracy and the Rule of Law*, ed. Keith Tribe (London, 1987). Kirchheimer's relationship to Schmitt is a complex one. Kirchheimer completed his doctoral dissertation under Schmitt's guidance at the University of Bonn in 1928 and even went on to borrow substantially from the core of Schmitt's theory in his earliest writings, but beginning about 1930 there is already evidence of a growing distance from Schmitt.

discuss. It cannot govern or administer, nor can it posit norms; it can only sanction by its 'yes' the draft norms presented to it. Nor, above all, can it put a question, but only answer by 'yes' or 'no' a question put to it.'[23] Schmitt had thereby reduced democratic decision making to nothing more than 'an unorganized answer which the people, characterized as a mass, gives to a question posed by an authority whose existence is assumed. Structure and accountability of this authority are unknown'.[24] The Weimar Constitution had surely assumed more during the relatively hopeful days of 1918 and 1919 than a passive, worn-down 'folk', whose main function would be to engage in occasional bouts of well- orchestrated ceremonial acclamation.

In 'Constitutional Reaction in 1932' Kirchheimer makes a crucial observation that can help serve as a somewhat more systematic starting point for formulating a response to Schmitt's attack on the rule of law. As Kirchheimer recounts, Schmitt 'tries with great emphasis to make generality a necessary characteristic of every parliamentary law, concluding from the erosion of this corollary of parliamentary rule that parliament must give way to the dictatorship of the administrative state'. But 'in reality it is by no means proved that universality is a necessary attribute of the law or that the bureaucracy is in a better position to legislate in the present situation than parliament'. Conceivably, an authoritarian interventionist state ruled by a mass-based executive and a set of bureaucratic allies 'can regulate things faster, more kaleidoscopically, and without that minimum of protection for the affected parties which characterizes parliamentary rule', but it is by no means clear that anyone should want to trade-off basic political protections for bureaucratic 'efficiency'; Kirchheimer even suggests that bourgeois strata flocking to the ranks of the far-right cannot possibly want this.[25] More fundamentally, why should we simply assume, as Schmitt seems to, that the legal order's universality or generality today should be primarily located in the (general) *semantic* structure of the legal *norm*, and not instead in its 'general' (that is, democratic, broadly participatory) *origins*? Could the 'generality' of contemporary democratic law not legitimately take a different form than that suggested by early (inadequately democratic, privatistic) liberalism?[26] Might there not be good reasons for restating the idea of general law?

[23] Cited in Kirchheimer, 'Constitutional Reaction in 1932', p. 78.

[24] *Ibid*. We should recall Hannah Arendt's 'painful' realization that totalitarian regimes 'are always preceded by mass movements and that they command and rest upon mass support up to the end'. H. Arendt, *The Origins of Totalitarianism* (New York, 1951), p. 301.

[25] Kirchheimer, 'Constitutional Reaction in 1932', p. 84.

[26] This aspect of Kirchheimer's argument is first raised in two 1930 publications: Kirchheimer, 'Eigentumsgarantie in Reichsverfassung und Rechtsprechung', in Kirchheimer, *Funktionen des Staats und der Verfassung* (Frankfurt, 1972), p. 20. Also: Kirchheimer, *The*

More recently, Jürgen Habermas has raised similar questions in arguing against Weberian and neo-Weberian views of law which in Habermas' view tend to place too much emphasis on the semantic clarity and systematic structure of contemporary law for determining what is specifically 'modern' about it; perhaps we can rely upon Habermas to develop the young Kirchheimer's tentative criticisms. More clearly than Kirchheimer, Habermas argues that Enlightenment liberalism too often confused law's semantic generality (that is, the demand that the legal norm not refer to individual cases or persons) with a broader and more fundamental system of ('general') democratic legitimacy from which modern law draws its normative energies. Law's reasonableness stems primarily from the (universal) debate and exchange generative of it, and not its semantic form *per se*, and the error of those who emphasize the latter is that they often obscure the broader democratic *process*'s 'procedural universalism' of (general) participatory and communicative rights and procedures essential to 'types of deliberation and decisionmaking that take equally into consideration all relevant aspects of an issue and all interests involved'.[27]

This is not the place to examine the virtues of a reconstruction of the classical ideal of general law along such lines.[28] For our purposes here it suffices to note that such a reworking of the traditional idea of general law is foreclosed to Schmitt — and that this contributes decisively to the extremist character of his legal views. Schmitt is obsessed with articulating a vision of democracy characterized precisely by the fact that it is to be freed from even the most meagre spectre of universalistic, 'normativistic' liberalism (and, in particular, its defence of the idea of the formal equality of all persons). In his eyes, democracy is an existential, 'political' category radically at odds with Enlightenment liberalism and the ideal of the rule of law which he takes to be its mainstay.[29] A restatement of the idea of legal generality along the lines implied by Kirchheimer and Habermas thus would amount from Schmitt's perspective

Limits of Expropriation, reprinted in *Social Democracy and the Rule of Law*, pp. 114–16. For a similar criticism of Schmitt's concept of the legal norm from the same period: Hermann Heller, 'Der Begriff des Gesetzes in der Reichsverfassung' (1928), in *Gesammelte Werke*, Vol. II (Leiden, 1971).

[27] Jürgen Habermas, 'The Tanner Lectures', in: *The Tanner Lectures on Human Values*, Vol. VIII (1988), ed. S. McMurrin (Salt Lake City, 1988), pp. 246–9, 275. I should note that Habermas is *not* trying to collapse the idea of the rule of law into a particular conception of democracy. Rather, he thinks that we need to restate the rule-of-law ideal in a manner which places somewhat less weight on the semantic generality of the legal norm.

[28] For an attempt to do so: Bill Scheuerman, 'Neumann v. Habermas: The Frankfurt School and the Case of the Rule of Law', *Praxis International*, Vol. 13, No. 1 (1993).

[29] This comes out in many texts, but especially in Schmitt, *The Crisis of Parliamentary Government* and Schmitt, *Die Verfassungslehre*.

to little more than yet another attempt to subdue the 'non-normative' dynamics of friend/foe politics with inappropriate, moralistic criteria whose internal logic is altogether distinct from that of the political sphere.[30] A restatement of the generality of law which placed greater (normative) emphasis on law's democratic origins would be akin to trying to synthesize water and fire — in other words, two fundamentally distinct elements.

Instead of reinterpreting the rule-of-law ideal in a manner that would give somewhat less weight to the importance of the semantic generality of law (and thus allow us to understand why the rule of law, even in the age of the administrative regulatory state, has hardly vanished altogether), Schmitt must take the proliferation of non-general, non-traditional modes of law in our century as nothing more than evidence of the anachronistic quality of the rule of law and its chief progenitor, universalistic Enlightenment liberalism. Schmitt cannot acknowledge the possibility that complex modes of non-traditional legal regulation, like those widespread in the contemporary welfare state, sometimes actually buttress the broader 'generality' of democratic law. Insofar as at least some modes of deformalized law undermine inequalities posing illegitimate checks on the process of democratic will-formation, they contribute, in Habermas' words, to the universality of 'types of deliberation and decisionmaking that take equally into consideration all relevant aspects of an issue and all interests involved'. If Schmitt had been able to take that step, then he might have seen that the ongoing process of legal deformalization involves a series of highly complex and ambivalent transformations in twentieth-century politics, and hardly the one-sided, inexorable *Verfall* (decay) that he associates with it.

Most significantly, he might then have been more careful before reaching the troublesome conclusion that the modern rule-of-law idea had become basically irrelevant to contemporary politics — and thus that an authoritarian alternative liberated from its shackles might prove superior to it.

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[30] For Schmitt's radical delineation of the political from the moral sphere, see especially Schmitt, *The Concept of the Political*. There Schmitt writes that the criterion of friend/foe has nothing to do with 'normative antitheses', and that his concern 'is neither with abstractions nor normative ideals, but with inherent reality' (p. 28).