IDENTIFYING OR EXPLOITING THE PARADOXES OF CONSTITUTIONAL DEMOCRACY?

An Introduction to Carl Schmitt's *Legality and Legitimacy*

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Carl Schmitt's *Legality and Legitimacy* is an invaluable artifact from the most notorious crisis in the history of constitutional democracy.[1] It is also a critical yet often overlooked conduit in a century-long debate over the legitimacy of the rule of law that raises perennial issues concerning the stability of parliamentary government. Schmitt composed and published the book in 1932 as Germany's Weimar Republic (1919–33) staggered through its final crisis—one characterized by devastating economic depression and often violent political disorder.[2] Schmitt, who has since become recognized as the last century's foremost reactionary thinker,[3] dissected the Weimar Constitution, identifying it as both the source of the near-civil-war circumstances plaguing the Republic and as a possible solution to them as well. He claimed that while the parliamentary, liberal, and legalistic aspects of the 1919 constitution may have exacerbated Germany's problems, the presidential, democratic, and popularly legitimate component might actually solve them.

Whether Schmitt's prescriptions proved to be simply inadequate to the severity of the crisis or intentionally and successfully accelerated the Republic's demise in 1933 has been a controversial question for years.[4] Certainly, Schmitt's subsequent endorsement of National Socialism has made the case difficult for those who portray him as merely a diagnostician of the immediate circumstances, whose practical intention, if he had

one at all, was to save the Republic. No matter what Schmitt's motives in 1932 may have been, the ideas of *Legality and Legitimacy* were intimately entwined with political reality because he advised powerful conservative cabinet ministers, most notably the aristocrats Kurt von Schleicher and Franz von Papen. Indeed, it is quite possible that one or both conveyed Schmitt's thoughts to President Paul von Hindenburg; we know for sure that the aides of Schleicher and Papen were citing *Legality and Legitimacy* in support of various political and legal strategies throughout the last year of the Republic.[5]

Beyond the immediate Weimar context, *Legality and Legitimacy* holds a critical place in intellectual debates over the ability of liberal- or social-democratic regimes to secure substantive legitimacy through legal procedures. If legitimacy requires compliance with authority on grounds other than the mere threat of sanction or the simple force of habit, then why do people obey the law? Max Weber first raised the issue at the start of the Weimar Republic in the "Economy and Social Norms" and "Sociology of Law" sections of his posthumously published *Economy and Society*.[6] Weber left ultimately unsubstantiated his claim that rational-legal authority stood alongside traditional and charismatic authority as an independent type of legitimacy.[7] The status of legal authority was rendered even more precarious by Weber's professed doubts over the efficacy or even continued existence of rational-formal law as the nineteenth-century state governed by the liberal rule of law, the *Rechtsstaat*, was eclipsed by the administrative or welfare state, the *Sozialstaat*.[8] Finally, in his later writings Weber ascribed superior democratic legitimacy to a directly elected president over the party-dominated and bureaucracy-dependent parliament.[9] Hence Germany's greatest social scientist and leading public intellectual, who had himself contributed to the framing of the Weimar Constitution, bequeathed to the nation's first attempt at a constitutional parliamentary democracy these serious hesitations over its analytical consistency and historical possibility.[10] These hesitations would not be lost on Carl Schmitt.

The potentially problematic relationship of legality and legitimacy continued to haunt German political thought throughout Germany's second attempt at constitutional democracy, the Federal Republic. It persistently emerged in all of the major

works of its greatest political philosopher and social theorist, Jürgen Habermas,[11] until finally occupying the central place in his recent magnum opus, *Beyond Facts and Norms*.[12] Habermas would go to great lengths to show that the substance of rational-legal legitimacy consists in the *participation* of citizens in the formulation of legal and constitutional norms, and not in, as Weber suggested, their "belief in" such norms or, as Schmitt averred, their collective acclamation or rejection of them. Habermas has often found Schmitt lurking behind arguments that, on the one hand, insist on the homogeneous concrete will of a demos that preexists and takes priority over legal or constitutional arrangements,[13] or that, on the other hand, posits a purely formalistic apparatus that does not take into account the moral-practical reason institutionalized in and carried out by legal procedures.[14]

More generally, Schmitt's *Legality and Legitimacy* raises many questions that often prove awkward for liberals, constitutionalists, and even democrats who understand themselves to be committed to the rule of law. To count off a minor litany of such questions: When does law reflect the popular will to the extent that those over whom it is exercised can be said to have authored or at least consented to it? Is it when law is elevated to unchangeable or remotely accessible constitutional norms? Or do statutes produced by a parliament satisfy such conditions? If so, can simple majorities lay claim to a general will or are supermajorities required to do so? If the content of law is decided by a majority of the people's representatives, is it consensually binding on as much as 49 percent of the population, or does it merely serve the 51 percent's coercion of them? On what grounds could any vote short of parliamentary unanimity meet the standards of legitimacy? Moreover, percentages notwithstanding, the party compromise and bargaining that plainly characterize the legislative formulation of law suggest little connection with a general will. Might not the proclamations of a more unitary institution like the president, generally elected, better reflect a broader popular will?

Schmitt poses some deeper, even existential problems for liberal democracy as well. A rule-of-law regime founded on completely formal or procedural standards, for example, allows parties that are avowed enemies of the law to help formulate and apply that law—thereby opening the way for its abuse.

Furthermore, law placed in the service of democratically responsive policies of regulation and redistribution necessarily descends into arbitrariness and incoherence. Schmitt suggests that the new legal policies of the latest party or interest-group coalition that formulated them constitute a kind of revolution approximating an illegitimate assault on the very structure of state and society. All of these problems can be solved, Schmitt claims, by admitting that there are preconstitutional and prelegal substantive values or concrete decisions to which appeals might be directed when the formal rules of a liberal- or social-democratic regime collide or appear vulnerable. If such substantive criteria indeed prove available, then these, and not the law itself, as liberals hope, are the source of the regime's legitimacy.

Granted the profundity of these questions, it is fairly astounding that *Legality and Legitimacy* has not appeared in English before now. Consider its place as (1) first-person testimony to historical disaster or a blueprint for it, (2) a crucial link between intellectual figures as widely influential as Weber and Habermas, and (3) an inconvenient reminder of the difficult relationship of democracy and the law. Jeffrey Seitzer's excellent translation now makes available to Anglophone audiences this work that most blatantly exposed and perhaps most shamelessly exploited the apparent paradox of legality and legitimacy in twentieth-century political theory and practice. In the book itself Schmitt asserted that the problem of legality and legitimacy must be interrogated both "historically and conceptually" (LL 15). My ensuing remarks in this introduction are organized precisely along these lines.

The Conservative Stab in the Back? Schmitt and the Sabotage of the Republic

The collapse of the Weimar Republic is often understood as a case of antidemocratic forces exploiting formal legal and constitutional procedures for their own advantage. National Socialism, so the story goes, gained success in Germany by garnering sufficient popular support through legal means so as to seize, suspend, and destroy the very legislative apparatus that brought them to power. In other words, the Nazis

gained power "legally," just as Schmitt in *Legality and Legitimacy* prophesied that they or the Communists would. More generally, this thesis supposedly illustrates the inherent weakness of regimes based on the rule of law. Notwithstanding its powerful resonance in narratives about the viability of constitutional democracy in the twentieth century, this may in fact be a gross mischaracterization of the historical record.[15] In this brief sketch of the context of *Legality and Legitimacy*, I hope to draw attention to extralegal machinations that contributed as much or more to the demise of the Weimar Republic than the fragile nature of the rule of law.

While ultimately a devastating year for the Republic,[16] 1932 was a profitable one for the forty-four-year-old Carl Schmitt. The book-length version of *The Concept of the Political*, first published in essay form in 1927, appeared early in the year.[17] The "friend-enemy" theory of politics and the state that it espoused garnered significant attention and was reviewed widely in the scholarly and popular presses. Schmitt held an academic position at the Handelhochschule, a school of administration and management, in Berlin. Even if it was not the appointment in a prestigious law school to which the ambitious lawyer aspired, it did allow him to reside in the capital. Thus situated, Schmitt could continue to advise government officials on political and legal matters, as he had been serving the cabinet of Chancellor Heinrich Brüning. But, as the events of the year unfolded, Schmitt would be drawn more deeply into current affairs and would interact more intimately with statesmen than he ever had before.

In April, President Hindenburg, the former Field Marshall of the Army, was returned to office in a two-round electoral victory over Adolf Hitler. But Hitler, head of the National Socialist Party (NSDAP), garnered a surprising 37 percent of the vote. Combined with its already intimidating physical presence—the party's Storm Troopers (SA) and Security Forces (SS) outnumbered the German army more than four to one—the new electoral muscle of the NSDAP was disquieting for the conservatives attempting to govern the nation in these days of economic depression and political unrest. For several years, conservative elites at various levels of the Reich had been playing a dangerous game: they generally looked the other way as the Nazis beat down the more hated Communists and at-

tempted to intimidate the rival Social Democratic elements in the country—sometimes even encouraging such activity. But now the NSDAP proved to be a power in its own right. On May 30, in the first effort at appeasing the party, conservative ministers ousted Brüning, who was unpopular with the Nazis, and began relaxing restrictions on the party's paramilitary wings, the SA and SS. The ministerial cabal also hoped that Brüning's dismissal would lead to a new, more wide-ranging, pan-conservative governing coalition.

When that did not materialize, the new Chancellor, Franz von Papen, attempted to solve both the Nazi and Communist threats by using the emergency-decree powers granted to President Hindenburg by Article 48 of the Weimar Constitution. The first Weimar President, Friedrich Ebert, ruled through emergency decree to address economic crises and armed revolt in the early years of the Republic. By 1932, most of the elites around Hindenburg wished to use such decrees simply to institute their preferred policies, which were at odds with those of many of the duly elected members of the *Reichstag*. Papen, along with Interior Minister Wilhelm von Gayl, would have liked to have suspended parliament indefinitely and amended the constitution to empower an aristocratic upper house and restrict the franchise in significant ways. The influential Defense Minister, General Kurt von Schleicher, feared that such drastic measures would convert an already violent social situation into all-out civil war. After all, over one and a half million people were enlisted in paramilitary groups of one kind or another spanning the political spectrum. To avoid a revolution, Schleicher and his aides, Colonel Erich Marcks and Colonel Eugen Ott—with whom Schmitt consulted fairly closely—favored the use of Hindenburg's emergency powers in less overtly drastic but still legally questionable and parliament-circumventing ways.

These were the circumstances in which Schmitt wrote *Legality and Legitimacy* in the spring of 1932. Given his affiliation with the ruling conservative clique, it is not surprising to find Schmitt arguing in favor of wide presidential latitude under Article 48. Schmitt asserts that the lack of clarity in the constitution concerning jurisdictional authority, the contradictions that it manifests between liberalism and democracy, and its professed directly democratic spirit all jus-

tify presidential supersession over every other aspect of the document. With a parliamentary election looming in midsummer, Schmitt published parts of the monograph as a journal article in advance of the rest of the book.[18] These sections criticize the principle of "equal chance," whereby all parties are eligible to gain seats in the parliament and thereby contribute to the creation of law—or to obstruct it, as was too often the case in the Republic. The article theoretically justifies, if not specifically endorses, an executive ban on parties like the Communists and the National Socialists who profess enmity toward the constitution and the legislative process itself. How we understand this article and the subsequent book is crucial for how we understand Schmitt's actions in this period and where we should situate him politically: was he trying to destroy the republic, or was he trying to save it? Schmitt argues that even the most formally neutral constitution cannot espouse neutrality toward its own existence; no constitution can with consistency facilitate its own destruction. Is this commonsense advice or an anticonstitutional subterfuge? Schmitt excerpted other parts of the book in progress two weeks later, explicitly warning against any further electoral gains for the "still immature" National Socialist Party.[19]

Schmitt's political advisees did not, however, pursue the strategy of banning the antiparliamentary parties as the election approached. Still trying to placate the Nazis, whose electoral appeal they hoped to diminish and/or whose favor as potential coalition partners they hoped to curry, the Papen cabinet struck left. On July 20, eleven days before the Reichstag election, the *Land* or state of Prussia was placed under martial law, its duly elected Social Democratic government removed, and the statewide ban on National Socialist paramilitary activity lifted. The pretense for this emergency action was the Social Democratic government's purportedly extralegal and ineffectual attempts to maintain order, although the number of dead (approaching 100) and the number of injured (exceeding 1,000) that resulted from the unleashing of the SS and the SA put the lie to that. Prussia, unlike the wider Reich, had been governed by prorepublican forces, including moderate and progressive officials—in other words, exactly the governing coalition that the Brüning cabinet had maintained before being undermined and recently dismissed by the con-

servative ministerial clique. Clearly, Papen attempted in the nation's largest state (Prussia amounted to roughly two-thirds of Germany as a whole) the kind of authoritarian coup that he and his cabal had already perpetrated against Brüning at the national level. The Prussian government challenged the Reich's authority to act in this manner, and a constitutional court case was slated for October, to be heard by a tribunal before which the greatest legal minds in Germany, Carl Schmitt included, would appear.[20] In any case, Papen's machinations failed: the Nazis neither lost electoral support nor became coalition partners of the conservatives.

On July 31, the NSDAP received almost 38 percent of the vote and the Communists nearly 15 percent, affording them a combined veto power over any parliamentary coalition that might be formed against them. When the Reichstag convened on September 12, Papen circumvented a Nazi-Communist no-confidence vote by dissolving the parliament. The constitution called for new elections in sixty days, but Schleicher lobbied Hindenburg for an extended postponement so that the cabinet's economic policies could take effect, perhaps yielding a better electoral showing for the conservatives down the road. Schmitt suggested to Schleicher's aides that such a recourse would violate the letter of the law but nevertheless might be justified on substantive constitutional grounds. In any case, here as later, Hindenburg, no friend to liberal or social democracy, either in fear of indictment proceedings or serious about his oath to uphold the constitution, resisted the idea of resorting to overt constitutional abrogations such as the postponement of elections.

In the meantime, the courtroom drama that would display the political and legal fissures of the Republic took place in Leipzig under the name *Prussia v. the Reich*. Prominent jurists such as Schmitt, Hermann Heller, and Gerhard Anschütz appeared in person and Hans Kelsen submitted written commentaries. Schmitt's *Legality and Legitimacy* was published in time to be cited frequently at the trial—and was surprisingly invoked in the opening remarks of the Social Democratic plaintiffs to justify the Prussian government's restrictive policies toward the Nazis. In his own statements before the court, Schmitt justified the Reich's actions against the Prussian government on the premise that the Prussian state govern-

ment behaved toward the Nazis as merely one party dominating another, and not as an objective, independent, and therefore legitimate authority. In *Legality and Legitimacy* Schmitt seems to distinguish the constitutionally enabled, presidentially facilitated actions of the conservative clique with whom Schmitt was affiliated at the national level from the merely strategic-party behavior he attributes to their political rivals in the parliament. Critics like Heller and Kelsen were not convinced that Schmitt could successfully prove along similar lines in the subnational Prussian context that the Social Democratic government was *not* a democratically *legitimate* authority but merely a strategically *legal* one. The case was resolved on October 25 with a rather indecisive ruling: the court reinstalled the Social Democratic government, but it also upheld Papen's status as emergency "Reich's commissar" in the Land, answerable only to President Hindenburg. At this point the Prussian government's authority had sufficiently eroded and the Nazi presence had significantly solidified so as to render the judgment moot.

Despite the fact that the Nazis endured serious setbacks in the national elections of November 6, the Papen cabinet was still split on the appropriate course of action. Chancellor Papen wanted Hindenburg to suspend parliament, ban the extremist parties, and draw up a new constitution. Schleicher, with the support of Schmitt's friend Johannes Popitz, harbored hopes for a parliamentary coalition drawn from the proworker, anticapitalist wings of *all* the major parties across the political spectrum.[21] Hindenburg gave Schleicher a chance, confirming him as chancellor on December 3, but his anticipated parliamentary support did not materialize, especially among conservatives scared off by the redistributive implications of Schleicher's proposals.[22]

Now desperate, Schleicher asked Hindenburg to dissolve the parliament. But the president, assured by Papen that the Nazis could be contained, appointed Hitler Chancellor on January 30, 1933. Any hope that the Republic might survive this disastrous decision was lost with the Reichstag fire of February 27. The pretext of an imminent Communist revolution gave the Nazis an occasion to combine terrorist tactics and legal maneuvers in a suspension of constitutional rights and elimination of all effective political opposition. The Enabling

Act of March 23, 1933, was passed by the parliament under the cloud of extraprocedural and socially repressive Nazi measures. By the end of March 1933, Papen had recruited Schmitt to help attend to the legal details of the Nazi coordination of power. The Republic was finished.

Schmitt's National Socialist career has been well documented: he soon enrolled in the party, acquiesced in the academic purges of leftists and Jews, publicly justified the circumstances surrounding the Röhm purge and the accompanying murder of Schleicher and his wife, accepted the position of Prussian Attorney General, expressed vitriolic anti-Semitism in his published work, fell from favor with the regime in 1936, and refused to submit to the stipulations of official rehabilitation after the war. For our purposes here, the question is whether the book *Legality and Legitimacy* warned against an outcome—the collapse of the Republic—that Schmitt seemed initially to oppose (even if he later benefited from it professionally) or whether he actually encouraged that outcome. During 1932, Schmitt was much closer to Schleicher than to Papen: thus it might be fair to suppose that he, like his patron, was not as radically antiparliament, anti-rule-of-law, and proauthoritarian as Papen. Schleicher's general orientation and Schmitt's public statements at the time suggest that the suspension of parliamentary institutions might be justified only because the concrete "circumstances" rendered the parliament unworkable (see LL 27). And, certainly, if Schmitt was in favor of specific amendments to the constitution or a wholesale scrapping of the document, then why did he not say so, as Papen did?

These are serious points, ones that the reader should keep in mind when interpreting the main text of *Legality and Legitimacy*. However, the commentary that follows in the next section is motivated by the following alternative considerations. Beyond the demands of concrete circumstances, *Legality and Legitimacy* traces an analytical and historical logic that may point to the permanent obsolescence and necessary elimination of the parliamentary provisions in the Weimar Constitution. As for the absence of a specific plan to subvert, change, or overthrow the constitution, Schmitt, like Schleicher, may have only eschewed such programmatic statements because they would have precipitated a civil war from which his side might not have emerged victorious. Indeed, I suggest that *Legality*

and Legitimacy justifies presidential decrees that would have a permanent and not just temporary force of law: Schmitt argues that the increasing bureaucratization of society gives presidential decrees a more stable and enduring quality than parliamentary statutes that merely reflect transitory legislative majorities.

Therefore, Schmitt may offer no concrete plans for revisions because presidential discretion, guided by an oligarchic cabinet, is itself a vehicle of substantive constitutional reform. At the very least, the book may be "passively" complicit with a permanent abolition of the separation of powers presupposed by the rule of law because Schmitt sets no limits on the president's power to issue decrees, especially in the capacity to indefinitely postpone parliamentary *and* presidential elections. Readers may wish to form their own opinion of this controversial text without prior influence, specifically regarding its author's intentions toward the fate of the Weimar Republic in 1932. Thus they might skip the following critical summary of the book, returning to this section of the introduction only after reading the body of Schmitt's *Legality and Legitimacy*—or, if they so choose, perhaps not at all.

The Scope of "Legitimate" Extralegality

Like many of Schmitt's books, *Legality and Legitimacy* is short and forceful, filled with statements of analytical brilliance standing alongside illogical assertions; it is characterized by rhetorical magnificence accompanying snide *Schadenfreude*. After the war, Schmitt consistently maintained that the work was merely an objective analysis of the immediate crisis of 1932, significantly downplaying the prescriptive and certainly the polemical aspects of the book.[23] But these aspects, as much as the historical significance and substantive content of *Legality and Legitimacy*, help make the work compelling even today.

A NOVEL TYPOLOGY OF REGIMES Schmitt begins the book by defining the "parliamentary legislative state" (LL 7). The legislative state assumes that the "community will" is expressed in sets of norms, specifically, norms established by a parliament.

But these norms cannot take just any shape: they must be impersonal, general, and preestablished, that is, they take conditional semantic form ("if x, then y"), refrain from targeting specific individuals or groups, and seldomly apply to circumstances retroactively. Institutionally, the legislative state assumes a strict separation between the law and its application, and therefore between the parliament and the administration, the legislative and the executive. As Schmitt describes it, since the nineteenth century, these characteristics of the legislative state have been associated with the configuration known as the Rechtsstaat (LL 7).

Because there is no personal authority in this system, only norms, Schmitt claims that the legislative state assumes away the issue of "obedience" (LL 8). The legacy of Weber's somewhat shallow defense of legality as a form of legitimacy is palpable here. Ignoring all Kantian justifications of obedience to law as a form of self-rule, Schmitt avers that contemporary legality does not account for *why* authority is obeyed. The component with which he started, "community will" embodied in norms, has withdrawn from his account to such an extent that legal norms now appear free-floating, almost spectral, certainly unconnected with real human beings. Law disconnected from both those who make it and those over whom it is applied might easily be identified as illegitimate.

In Schmitt's account of legitimacy, obedience is affiliated most closely with personal authority alone: in Weberian terms, presumably a traditionally legitimated ruling family or a charismatically legitimated exemplary character. But, throughout the book, Schmitt adds to the idea of "consent," which in the Weberian paradigm separates legitimate domination from naked domination, a distinctively Hobbesian twist that brings both back into close proximity: Schmitt formulates consent not in the active terms of compliance but rather in the negative connotation of a "right to resistance." Legitimacy depends not on the overt compliance of those over whom authority is exercised but rather on their choice not to resist such authority. This particular phrase—"right to resistance"—raises a specter that "consent" alone does not: the presence of violence that hovers over a legitimate system. It raises the issue of the circumstances under which the terms of legitimacy have been called off and armed conflict ensues or resumes.

Tellingly, Schmitt also leaves out of this account of legality early in the book something that Weber at least acknowledged might be the source of independent legitimacy for the law: its rationality. According to Weber's thin definition, adherence to the necessary logical construction and appropriate application process of norms is nevertheless a potential source of the legitimacy of law. This formal definition of legal rationality does not account for any substantive rationality that might reside in statutes that are produced through parliamentary deliberation and public criticism. Even if such a state of affairs was beyond the realm of possibilities in Weimar,[24] Schmitt only mentions very late in the chapter the substantive grounds that previously justified parliament and the Rechtsstaat: the guarantee of "right and reason through a process distinguished by discussion and publicity" (LL 28). In the context of *Legality and Legitimacy*, legality possesses neither procedurally formal nor moral-practical rationality.

During his discussion of the legislative state early in the work, Schmitt abandons as obsolete the classical typology of regimes—democracy, aristocracy, and monarchy—and replaces it with the distinctions among legislative, jurisdiction, and governmental/administrative states. The classical regime-types were determined by the class or person that dominated them—hence according to concrete authority—while the new are determined by the manner in which they formulate and apply law.[25] In the jurisdiction state, judges make law. They do not apply to a case preexisting law created by another institution but rather create, in the moment of their decision, law that other subordinate institutions, perhaps even a parliament, subsequently acknowledge as correct (LL 9). The governmental and administrative states are decree-states in which decrees emanate, respectively, from either the personal will of a head of state or a bureaucratic official (LL 9).

Schmitt intimates that the jurisdiction state might be a Rechtsstaat since it is defined in some relationship with law, and he later muses that any of the states mentioned could be demarcated in this way (LL 19). According to this very loose definition of a Rechtsstaat, monarchical or administrative decrees could be deemed just as "legal" as laws passed by a parliament. Schmitt's motives become apparent as he begins merging decrees with laws in this manner over the course

of the book, thus subverting the conventional definition of the Rechtsstaat that presupposes a decree/law distinction. In Anglo-American terms, this distinction conforms with the difference between the rule of men and rule of law: any person can dictate arbitrary decrees, but only a parliament, being representative of the nation and having deliberated extensively, can issue rational laws. But Schmitt draws on noted liberal jurist Richard Thoma to suggest that the contemporary legislative state, identified explicitly as a Rechtsstaat because it is engaged in the dictating of decrees as much as the issuing of laws, is really a mixture of all the types of regimes mentioned above and not an independent type of its own (LL 9). Then, having raised doubts about the conceptual qualifications of the legislative state in relationship to the Rechtsstaat model, Schmitt immediately announces that he is uninterested in ideal types anyway, especially when such types do not conform to factual reality.

But an insidious point has been made: Schmitt suggests that the Rechtsstaat ideal generally identified with the legislative state—a closed system of discretely formulated legal norms, administered by a separation between the legislature and the executive—is a fiction in the contemporary circumstances of a "turn toward the total state" (LL 11). Schmitt here refers to the two alternatives for states emerging in the early twentieth century: the weak "quantitative" total state, a welfare state or Sozialstaat, and the strong "qualitative" total state that most closely resembles Mussolini's Italian state.[26] The former state is drawn into society by myriad special interests, thus depleting the state's vitality, while the latter sets its own terms of engagement with society, thus retaining its vigor and integrity. The quantitative total state presides over the subversion of the separation of power and the deformalization of law as groups ask for more specific regulations, especially redistributive policies, that expand the administration in an unprecedented manner.[27] Drawing on Weber's studies of bureaucracy, Schmitt raises the specter that the administrative decrees associated with the total state represent the ascendance of the administrative over the legislative state (LL 11). In fact, he adds that the radical nature of this era of great transformation is especially conducive to the further development of the administrative state and the decline of the legislative state, as well as

ruling out the jurisdiction state, the latter two being appropriate for more stable times (LL 11–12).[28]

LEGITIMACY REDEFINED Shifting back to analytical from historical analysis, Schmitt decisively inflates into a full-blown contradiction what might have been a mere weakness in Weber's theoretical formulations. If Weber cast legality as a thin form of legitimacy, Schmitt specifically invokes Weber to render it the very *antithesis* of legitimacy: in the legislative state, "'*legality*' . . . has the meaning and purpose of making superfluous and negating the legitimacy of either the monarch or the people's plebiscitarian will as well as of every authority and governing power" (LL 14). Note that Schmitt chooses as antagonists for legality one example that represents traditional legitimacy and another that represents charismatic legitimacy. One could expect that Schmitt's readership might tolerate the legal supersession of the traditional *Kaiserreich* by the Republic, but not of the charismatically charged will of the people that was intended to take the Kaiser's place and was institutionalized in the 1919 Constitution. According to Schmitt's logic here, legality *thwarted* rather than facilitated the transfer of sovereignty from the monarch to the people in Germany's first democracy.[29]

Further discrediting legality as a concept, Schmitt draws on the commonsense opposition between what is "merely formal" and what is "legitimate," as well as pointing up what he takes to be the absurd fact that something as substantively significant as a coup d'état may be described in strictly legal terms. A regime may vote itself out of existence legally but never legitimately. Therefore, what is strictly legal is seldom what is really important. In this context, Schmitt may even hint at his own designs in offering an alternative example: "a parliamentary dissolution might substantively conform to the spirit of the constitution, and yet not be legal" (LL 14). In other words parts of a constitution may be legally violated so as to save it legitimately. But we have yet to conceive what aspect of the Weimar Constitution Schmitt might be trying to save.

In this example, Schmitt defends a logic in which something becomes its opposite—an unconstitutional act in fact proves to be constitutionally faithful—in response to what he deems the perversities of logic often resorted to in defense of strict

legality. He claims that the opening up of "the legal process to all conceivable aspirations, goals, and movements, even the most radical and revolutionary, enabling them to achieve their aim without violence or disruption[, is] a legal process that establishes order while at the same time it functions in a completely 'value-neutral' way. . . . The distinctive rationalism of the system of legality is obviously recast into its opposite" (LL 15). In other words, open legality invites the triumph of absolute illegality. These are the germs of the "inherent weakness of the rule of law" thesis mentioned in the section above, an issue to which I will return below.

Recall that Weber ultimately reduced the concept of legal legitimacy to a scenario where subjects "believed" in the law. But since belief and rational demonstration are not always reconcilable this definition undermines what makes law an independent source of legitimacy: rationality. This formulation allows Schmitt to relativize rationality's potential as a universal standard into a mere opinion or cultural disposition characteristic of a particular time and place. Schmitt claims that belief *in* rationality, perhaps plausible in the eighteenth and nineteenth centuries, has today evaporated: "The legislative state seems to be something higher and ideal so long as the belief in the rationality and ideality of its normativism is still vibrant in times and in peoples that remain able to cultivate a (typically Cartesian) belief in *idées générales*" (LL 15). But, as Schmitt first suggested in his study of parliamentarism ten years earlier and reiterates in *Legality and Legitimacy*, in contemporary circumstances, belief in *will* is reasserting itself over belief in *reason*.

To be sure, Schmitt softens these charges somewhat by declaring that he himself is not a steadfast opponent of the statute-making process as such: parliaments issuing general norms that officials then enforce is an acceptable state of affairs when there is in place an acknowledged higher authority such as a constitutional monarch, but not when a parliament pretends to fill such a role itself (LL 19). Thus the nineteenth-century German constitutional monarchy was an acceptable legislative state, whereas the Weimar parliamentary system is not (LL 19).[30]

Schmitt proceeds to devote several pages to a rehabilitation

of the German bureaucracy from charges of extreme rationalism and technicism, perhaps to lay the foundations of a new antilegal administrative state (LL 15–17). He rejects many of Weber's assumptions about bureaucracy and German bureaucracy, in particular, but eagerly retains Weber's infamous remark about the functional narrowing of parliament into a forum for the training of leaders (LL 15–17).[31] The Reichstag's abuse of the bureaucracy has benefited neither, but Schmitt intimates that the latter might be redeemed in a new state configuration (LL 18).

Moving from the bureaucracy to the military—the two pillars of the old constitutional monarchy and, potentially, of an emerging presidentialist democracy—Schmitt discusses the demise of the German army in terms of a disarming of the German *people*. It is this space vacated by the monarchy—space in which the bureaucracy has been exploited by the parliament and the army dishonored by foreign powers—that the figure of the President makes its first significant appearance in the work. Schmitt declares that the president, selected by "the entire German people," now has the role of coordinating the army and the bureaucracy (LL 18). Schmitt depicts the President as the sole weapon available to a German people illegitimately relieved of their arms.[32]

PARLIAMENTARY GOVERNMENT DISCREDITED Having constructed this institutional-ideological framework, Schmitt goes on to establish a fairly crude opposition between statutory regulations and fundamental rights: he associates one with the transitory whim of a parliamentary majority and the other with a quasi-sacred preconstitutional will (LL 21, 27). Of course, both can be and have been conceived of as different instances of the present popular will within a democratic arrangement that merely sets different levels of accessibility to itself depending on the gravity of the issues involved.[33] But this justification for supermajoritarian positions is too formal, and likely, as we will see, too popularly participatory for Schmitt. Distinctions between constitutional amendments and statutory laws must be made by a decision rather than along the lines of formal rules. In this spirit, Schmitt diagnoses a sort of liberal false consciousness whereby the supremacy of statutes, in-

tended to achieve justice and secure freedom, actually entails a threat to rights, rights that he associates explicitly with, once again, the right to resistance: "Only through the acceptance of these pairings [law and statute, justice and legality, substance and process] was it possible to subordinate oneself to the rule of law precisely in the name of freedom, remove the right to resistance from the catalogue of liberty rights, and grant to the statute the previously noted unconditional priority" (LL 22). Of course, the only infringements on rights actually perpetuated by the Weimar Reichstag were the regulatory and redistributive policies that conservatives interpreted as unacceptable violations of quasi-sacred property rights. Certainly the attempt to ban paramilitary groups, or at least disarm them, ought not to be equated with a violation of the basic right to resistance, as Schmitt does here (and conservatives intoxicated with weapons do in other liberal democratic regimes) (LL 24).

But Schmitt wishes to raise a phantom of parliamentary tyranny—in a context where parliament cannot get anything done![34] Schmitt transforms the actual crisis of Weimar parliamentarism—the fact of a weak legislative institution virtually incapable of reaching agreement—into the threatening instrument of an irrational will of some numerically superior party. Of course, he does not mention the past track record or even the present possibility of parliamentary practices of consensus formation and deliberation that do not, without unprecedented self-contradiction, infringe on the very guarantees and rights that facilitate the lawmaking process.

On the contrary, Schmitt's strategy seems to entail a switch from a *dishonest* to an *admitted* relinquishing of the right to resistance: in other words, an exchange of a surreptitious submission to parliamentary statutes for an acknowledged submission to the plebiscitarianly representative President. The one is a subjection to a particularistic, legalistically empowered party; the latter, a subjection to the general, democratically legitimate will. An irony of Schmitt's concern here, still relevant today, is that those social forces most aligned with corporate and military power, therefore those with the best means to "resist," are the ones most concerned with the right to resistance against liberal or progressive government policies.

For Schmitt, the "'value-neutral,' functionalist and formal concept of law" (LL 28) facilitates the legislative state's self-obsolescence since it provides no substantive ground by which to judge the intentions or aims of the different political parties. Thus this staunch anti-parliamentarian is himself concerned that parliament will be seized by parties who have unparliamentary intentions: "Whoever controls 51 percent would be able legally to render the remaining 49 percent illegal . . . and to treat partisan opponents like common criminals, who are then perhaps reduced to kicking their boots against the locked door" (LL 33). Under such circumstances, the majority becomes "the state itself" (LL 35); their ability to behave in this manner is the political "premium" or "surplus" of holding power (LL 35).

In this context, Schmitt raises the threat of the parliament issuing emergency statutes, a right he wishes to reserve for executive decrees because the latter are, according to him, more closely bound to the democratic will (LL 33). But throughout the essay he does not demonstrate *why* this is true: is it because of the general election that selects the President, or is it some unmeasurable relationship between the office of the President and the people established in the constitution? Along these lines, therefore, it is alarming that while Schmitt criticizes the constitution for allowing majorities to tyrannize minorities, he discredits any specific or formally legal way one might guard against such an outcome, instead deeming the only acceptable limitation on parliament to be the prudence of an executive, itself formally unlimited and practically unrestrained.

Schmitt expresses suspiciousness of formal procedures throughout the book, even if these are the best means for making institutions accountable. For instance, he disdains the notion that one can solve the problem of protecting the rights of minorities by making the requirements for constitutional amending more difficult—such as by raising the threshold from 50 to 65 percent of a vote. This increase does not define "the quality and dignity of the additional quantum" (LL 42). Merely rendering the requirement formally "more difficult" gives rise to more *quantitative* reasoning over the issue of minorities and majorities and the criteria for constitutional emendation and not necessarily a *qualitative* confrontation with them. Schmitt's unqualified antiformalism renders

his own positive valuations fairly metaphysical—most specifically, his advocacy of democracy.

DEMOCRATIC HOMOGENEITY Schmitt issues the challenge that real democrats ought to admit that the will of the people as a whole more closely approximates justice than that of some party in parliament: "[T]he homogeneous people have all the characteristics that a guarantee of the justice and reasonableness of the people's expressed will cannot renounce. No democracy exists without the presupposition that the people are good and, consequently, that their will is sufficient" (LL 27–28). Of course, democratic theory does not assume, on *ontological* grounds, that the people at large are just; rather, it assumes that the results of their participation, interaction, discussion, and then decision are usually what is for the best. Instead of a process of will formation, Schmitt's definition emphasizes a static will that renders the rectitude and efficacy of the popular will absurdly unlikely.

Moreover, he is simply wrong to state that "every democracy rests on the presupposition of the indivisibly similar, entire, unified people" (LL 29). There are many theories of democracy that allow for pluralism among parties, diversity among individuals, negotiation among classes, and so on; but Schmitt defines democracy in such a way so as to exclude such theories from the parameters of democratic theory. However, one must conclude that only under the standard of such assertions about democracy can right-wing, elitist, nostalgic monarchists like Schmitt present themselves as "democrats" or "populists." Constitutional democracy is established precisely to set limits such that elites like Schmitt's advisees could *not* associate their interests or idea of the good with the "homogeneous will" of the people writ large. The kind of right-vanguardism that Schmitt pursues through the dubious constitutional powers of the presidency would prove to be one of the chief hallmarks of fascism.

Expanding his critique of constitutional neutrality to moral neutrality, Schmitt proceeds to engage in the classic tarring with a nihilist brush those who would hold open-mindedness as a political value: "There is no middle road between the principled value neutrality of the functionalist system of legality and the principled value emphasis of the substantive constitu-

tional guarantees. The functionalism of the weighted majorities would at least be a reasonable 'compromise.' In regard to the question of neutrality or nonneutrality, whoever intends to remain neutral has already decided in favor of neutrality. Value assertion and value neutrality are mutually exclusive. Compared to a seriously intended value assertion and affirmation, conscientious value neutrality means denial of values" (LL 49). The passage could come out of the writings of postwar conservatives who were purportedly reacting against the nihilism of the fascists and the Nazis.[35] In this fighting mood against relativism, Schmitt professes admiration for liberals like Thoma who are willing to identify "fascism and bolshevism" as political enemies of law, freedom and the value neutrality that Thoma holds to be a substantive value. On the other hand, Schmitt criticizes legalists like Anschütz who push value neutrality "to the point of system suicide. Anything is legal, without presuppositions or conditions, that is passed by way of simple statutes or those amending the constitution" (LL 50). The problem is that when carefully interrogated, the "substantive values" generally harbored by authoritarians and conservatives like Schmitt, Hindenburg, Schleicher, and Papen is the preservation of the privilege of sociopolitical elites. Perhaps unsurprisingly, as we will see, *Legality and Legitimacy* ultimately moves in this direction as well.

Thus Schmitt caricatures the legislative state that he has identified with Weimar parliamentarism as a crude tyranny of the majority that is overly aggressive when redistributing property through "substantive law regulations" but excessively weak when allowing all parties access to its lawmaking process through "value-free neutrality." Schmitt avers that this legal-parliamentary part of the constitution stands in opposition to the part with no "substantive law regulations of significant scope, but rather . . . a fundamental rights section that guarantees the bourgeois sphere of civil and political freedom in general and, as such, stands opposed to an organizational part regulating the process of state will formation" (LL 59). This other part of the constitution would therefore both protect bourgeois property rights and defend the essence of the constitution—the conservative definitions of freedom and security. According to Schmitt's description here, the Weimar Constitution is either a Rechtsstaat without a king or a Sozial-

staat without Bolshevik self-confidence. Any alternative between these poles is either insufficient to the requirements of the times or analytically self-contradictory: there are, Schmitt observes, "states with a constitution limited to organizational-procedural regulations and general liberty rights" and those with "constitutions containing extensive entrenchments and guarantees in the form of substantive law," but they "contradict one another in principle, both structurally and organizationally" (LL 60). In other words, no one constitution can guarantee freedom *and* equality.

MERGING NORMAL AND EXCEPTIONAL SITUATIONS But Schmitt does not leave matters there. In Mephistophelean fashion, he begins to propose to the advocates of material legal guarantees the possibility that these are best provided by the substantive part of the constitution and not the parliamentary aspect, which is purely formal (LL 57). After all, transitory parliamentary majorities cannot supply reliable concrete policies for effective, long-term regulation and redistribution, for these can be repealed with a change of the electoral-political wind. This possibility reveals the existence of what Schmitt calls a division in the constitution between "an extraordinary higher lawmaker and simple lower one" (LL 62), between superior and subordinate lawmakers (LL 62–63). The parliamentary legislative state simply runs according to "a different internal logic" than plebiscitary democracy (LL 63). Schmitt fairly readily admits that the constitution does not *explicitly* elevate the latter over the former. He concedes that this hierarchy must be deciphered rather esoterically through the obstacles posed by prevailing legalist fictions and the petty political compromises that characterized the framing of the constitution (LL 63). In fact, Schmitt describes this tension between the two constitutions, "higher" and "lower," as a civil war between one aspect of the document that is anachronistic, transitory, dangerous, and self-contradictory and one that is vibrant, democratic, efficient, and permanent (LL 61).

If it is not textually explicit, how does Schmitt determine the supremacy of the presidential over the parliamentary aspect of the constitution? He appeals to the Rousseauian logic supposedly undergirding every democracy, a logic according to which representatives must "fall silent" when "the repre-

sented themselves speak," especially in emergencies: Schmitt concludes that "the plebiscitary process is always stronger" (LL 64). The people are more directly and thereby more faithfully represented by the President than the parliament. But this view of democracy, shared not only with Rousseau but with Lenin as well, inevitably privileges elites.[36] Plebiscitarianism is, after all, a nominal celebration of the people that actually perpetuates their wholesale disempowerment; it constitutes the creation of an informational vacuum into which "well-intended" elites can easily step: "[O]ne provides threshold requirements and limitations for parliament, though not for the direct expressions of the people's will itself, about which one has known since ancient times that the people cannot discuss and deliberate" (LL 68). Elite discretion and not formal rules will fill in the blanks left in efforts to determine the popular will, absent their articulation of it themselves.

A major obstacle to Schmitt's attempt to elevate presidential emergency decrees issued under Article 48 over parliamentary statutes is the fact that the two are explicitly distinguished in the constitution. The Reichstag makes statutes of potentially enduring value while the president issues *Maßnahmen* or measures of expressly limited duration.

Schmitt's response to this difficulty is the suggestion that since parliamentary statutes have become more like measures in recent history, conversely, it is not unreasonable to conceive democratically legitimated presidential measures as law (LL 65). In terms that recall "the exception" from his *Political Theology* written a decade before, Schmitt declares that the extraordinary circumstances lend decrees more than normative equality with statutes; decrees have acquired a normative superiority such that "law" now means a measure and not a statute (LL 66). The spiritual undertones that characterized *Political Theology* reemerge when Schmitt remarks that the material or concrete quality of presidential decrees mean that "the extraordinary lawmaker can create accomplished facts in opposition to the ordinary legislature," which issues only abstract norms (LL 72). In other words, the President possesses a world-making, God-like fiat of exceptional legislative authority. At this point, a certain narrative becomes discernible in the work: Schmitt's story of a popularly representing executive emerging to reform a state that had been undermined by

parliamentary profligacy sounds like an epic in which a Caesarist hero redeems a decayed and corrupted city. To say the least, this is a far cry from Schmitt's subsequent claims that the work reflects only pure, analytical rigor.

Obviously, Schmitt's elevation of emergency measures to the status of law merges the lawmaking and law-applying tasks kept separated theoretically and institutionally in the Rechtsstaat. Since the parliament has already reduced statutes to measures in economic regulation and redistribution, Schmitt intimates that the President might as well exert more legitimate decree-issuing power that will restore the force of law squandered by the parliament. After all, the presidency more appropriately reflects and directs the will of the people. Ordinary party-pluralist or leftist Sozialstaat practice based on bargaining, compromise, and, optimally, deliberation aimed at societal self-transformation is hereby seized by Schmitt for the purposes of an exceptional, right-wing imposition of order by unilateral action on the part of the executive branch. Schmitt implies that most administrative measures issued by the Sozialstaat merely reflect the intentions of the particular party or interest group that lobbied for them; on the contrary, those issued by the President will purportedly reflect the will of the whole people. Again, however, as the book proceeds, Schmitt consistently reveals this to be a theory of democracy that disempowers the people. According to Schmitt's logic, if the people attempt to actually *participate* politically, they will be merely represented by parties that supposedly threaten popular unity. If they simply *acclaim* the President and his policies, however, they can be represented, embodied, as a whole, because *he* is a whole: "For the extraordinary lawmaker of Article 48, the distinction between statute and statutory application, legislative and executive, is neither legally nor factually an obstacle. The extraordinary lawmaker combines both in his person" (LL 74).[37]

FROM RULE OF LAW TO RULE BY DECREE Either attempting to allay the fear of his critics or simply out of sheer cynicism, Schmitt points to a case where presidential emergency measures restrict the activity of the NSDAP. This is an example where "the President is free to intervene in the entire system of existing statutory norms and use it for his own purposes"

(LL 74). In fact, as the coup of July 20 demonstrates, emergency presidential action was more generally used to the *advantage* of the Nazis against associations and parties on the left. Ultimately, however, these considerations do not really matter, because Schmitt adamantly asserts that the President's emergency powers are unlimited. As to whether the President's use of such power is an institutional innovation, Schmitt suggests that the precedent to set aside several "fundamental rights" was not established by the executive but rather by the parliament through its novel redistributive policies. Thus the President is simply dealing with difficult circumstances created by parliamentary abuses by perhaps resorting to the suspension of *all* rights if the emergency requires it (LL 69–70). Schmitt subtly invokes 1848 as the significant date after which the Rechtsstaat was undermined by the expansion of "administrative law adjudication"; in other words, in the wake of the mid-nineteenth-century revolutions, working-class parties subsequently bureaucratized lawmaking through demands for property redistribution and economic regulation (LL 76). The President is merely reforming a system already made corrupt by the left.

In doing so, Schmitt suggests that the President will merely practice more honestly and efficiently what liberals and the left have been doing with deleterious results for the regime for some time. Liberals think that they have needed no recourse to the "extraordinary constitution" and the emergency executive action it offers because they conceive of parliament as already possessing the power to suspend rights (LL 70–71). But Schmitt argues that this kind of thinking and the practice that results threaten the very reason-to-be of the Rechtsstaat. This logic allows legal-parliamentarians to render themselves superfluous: "The legislative state with its statutory priority and legislative-reservation knows just one lawgiver, namely, its legislature, the parliament. The legislative state tolerates no competing extraordinary legislative power. According to this system, the 'measures' of the office empowered for extraordinary action are not contrary to law, but they also do not have the force of law. These measures need not and cannot have the force of law, because the suspension of the basic rights is provided for and, through this suspension, the limitations of the legislative state, which had made a statute and the force of

law necessary, collapse" (LL 76). The freedom-preserving form of the statute—that it is formulated and applied by separate institutions—is violated by such parliamentary action, which thereby revokes the moral supremacy of the institution of parliament. Later in the text, Schmitt refers to those who would maintain this view of parliamentary lawmaking as "representatives of 'Rechtsstaat' thinking" (LL 86), with the important term itself presented in quotation marks because the adherents of such a view have themselves, with their facilitation of the Sozialstaat, violated the precepts of the nineteenth-century Rechtsstaat model (LL 80).

THE PERMANENT PRESIDENT Schmitt suggests that only the President can properly redirect and realize this transformation of law from Rechtsstaat statute to Sozialstaat measure or decree that parliamentary government has been pursuing "in Germany through ten-year-long governmental practice" (LL 76). Thus Schmitt reveals that he is not only addressing a concrete situation but settling old scores as well: in other words, you liberals who deposed the Kaiser and turned the Reichstag against the wealthy will now get what you deserve. Seitzer's translation allows these rhetorical and polemical aspects of the text to show through in all their fighting force: "The ordinary legislature can intrude on the fundamental rights only on the basis of the statutory reservation. However, it cannot set them aside. The extraordinary lawgiver, by contrast, can do both and, leaving aside all other factors, thereby surpasses the ordinary legislature and is superior to it in a novel way" (LL 77).

But if Schmitt consistently invokes emergency circumstances, can he be charged with promoting a permanent presidential-decree state? After all, he begins discussing the emergency powers of the President in terms of a classical dictatorship, according to whose criteria an emergency actor may not change or terminate a prior constitutional situation but only restore it. The potentially perpetual and abrogating quality of the executive action that Schmitt describes purportedly does not violate this standard because he presents it as maintaining consistency with a constitutional a priori: the initial democratic will or spirit of the document.[38] That this a priori status is admittedly not determinate institutionally but rather is an amorphous pre-institutional will is not a prob-

lem for Schmitt in *Legality and Legitimacy*. It certainly would have been problematic for proponents of the republican Roman model from which the term "dictatorship" is derived.[39] In Schmitt's attempt to pass off a constitutionally abrogating emergency dictatorship as a constitutionally preserving one, we witness the transformation of dictatorship from a temporary and task-specific constitutional practice to the modern political phenomenon best represented by the example of a military junta.[40]

The bond that Schmitt forges between a preconstitutional democratic will and its institutional manifestation in the plebiscitarily elected President allows Schmitt to justify emergency action that might endure far beyond the immediate circumstances—especially action that might otherwise be proscribed by the fetid and foreign-influenced formal restrictions associated with strict legality. Schmitt reiterates that since parliamentary practice has been conducted in a manner where statutes have become ephemeral, decrees will be more permanent now that the popular will has been reunited with its institutional embodiment that issues such decrees (LL 80–81).

Schmitt does not insist that every constitution manifests this tension between a hidden, extraordinary lawgiver who has been papered over with artificial and stifling parchment restrictions placed there by invading foreign powers or weak-willed legalists. The French constitution of 1875, for instance, organically embodies what is merely a facade in the Weimar Constitution. Schmitt ridicules the French for having a constitution that inheres within it *no* extraordinary lawmaker, but he concedes that at least it is consistent in its liberal-parliamentary character, even if it exists without a fundamental will (LL 88).[41]

THE NEW DEMOCRACY: RULE BY OR OVER THE PEOPLE? In this spirit, Schmitt is at pains to avoid appearing as a constitutional dogmatist: equating a democratic will with presidential substance is not the only way to configure a constitutional regime. He insists that a parliamentary institution might serve as a sufficient source of unity if it were not, as it has been in Weimar, the amalgam of compromises "of thoroughly heterogeneous power organizations" and "the showplace of a pluralist system" (LL 90) that "no longer has the

dignity of an assembly" (LL 92). Schmitt insists that when parliamentary elections were the "selection" of notables, the "elevation of an elite," the institution might have possessed such dignity (LL 92). In other words, when liberalism was still sufficiently aristocratic, before it was commandeered by the mass-democratically, redistribution-obsessed forces of 1848, it was an appropriate foundation of a constitutional regime.

But these parties that have supplanted liberal elites must now be prevented from (and Schmitt's text implies perhaps punished for) dishonoring the German state by the heroic part of the constitution. Schmitt exults at the thought that the venal power-seeking parties are now "run[ning] up against the system of a plebiscitary-democratic legitimacy [that has been] set against the parliamentary legislative state's system of legality" (LL 92). But he emphasizes that the President is not merely taking up tasks that parliament can no long conduct. Rather, in acting faithfully with an unverifiable preconstitutional will, the President conducts a qualitatively different kind of politics, one in which public reason associated with parliament is supplanted by popular will identified by the president: "The meaning of the plebiscitary expression of will is . . . *not norm establishment*, but *decision through one will*, as the word 'referendum,' or popular decision, aptly expresses" (LL 92, emphasis added).

Again, lest one think that this signifies the empowerment of the people, Schmitt describes what democratic practice amounts to under this scenario: "The people can only respond yes or no. They cannot advise, deliberate, or discuss. They cannot govern or administer. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them" (LL 93). This acclamatory model of democracy conjures up the image of hostages, bound and gagged, relegated to mere head-nodding or -shaking when their captor proposes a meal. Like Odysseus's sailors or Caligari's zombie, the demos has no real will apart from its master's direction or manipulation.[42]

The issue of elite manipulation is the clearest indication that Schmitt has exploited Weber's reduction of legal legitimacy to "belief" in the law's validity. The people's belief that law is valid may stand independent of the particular procedure of

formulating or applying the law. There is no reason why the people cannot believe that law is valid, and hence legitimate, because elites say that it is, or because the latter narrow the means by which people validate the law so as to render the process meaningless. According to this shrinking of rationality and procedure, plebiscites can be as rational a method of validating the law as parliamentary practices. Schmitt duly notes earlier in the work that Weber associated legal validity with political legitimacy in contemporary regimes (LL 16–17). But here Schmitt draws on Weber's lack of confidence in that assertion to merge legal validity with charismatic authority instead of logical or procedural rationality: "[P]lebiscitary legitimacy is the single type of state justification that may be generally acknowledged today as valid" (LL 93). Schmitt goes so far as to admit the "authoritarian" quality of this assertion, but insists nevertheless that "plebiscitary legitimacy is the single last remaining accepted system of justification" (LL 93). If government is going to be legitimate in contemporary circumstances —circumstances of mass democracy, pluralist interests, and complex bureaucratic governance—authority must be justified plebiscitarily.

Yet Schmitt proposes as the only limit on the authority of plebiscites the faith in its administrators to ask the appropriate question, and do so at "the right moment" (LL 94). The constitutional guidelines and restrictions of the Rechtsstaat are replaced by "confidence" that the extraordinary lawgiver "will pose the correct question in the proper way and not misuse the great power that lies in the posing of the question" (LL 94). Weber's relegating to "belief" the substance of legal legitimacy has the effect of collapsing law into charisma: "belief" can be easily equated with the faith generated by the charisma of a person who "embodies" the popular will. Schmitt tries to show that plebiscites are self-limiting and actually demonstrate a leader's dependence on the people rather than their power over or manipulation of the latter: "the appeal to the people will always lead to some loss of independence, and even the famous example of the Napoleonic plebiscites shows how precarious and reversible such legitimating devices are" (LL 94). But the tyrannical rule of the first Napoleon, at least, was not, as we know, terminated by plebiscite, but rather through the force of opposing armies. This does not promote confidence

in plebiscitary-presidential democracy as a stable regime type fully accountable and responsive to the general populace.

THE INHERENT VULNERABILITY OF CONSTITUTIONAL DEMOCRACY? In conclusion, I would reiterate that a major problem with the "inherent weakness" thesis of legal or constitutional democracy, for which Weimar consistently serves as the model, is that it ignores the extralegal intimidation and thuggery—tolerated and often encouraged by Schmitt's associates—against Social Democrats and Communists that more directly contributed to the "formally legal" victory of the Nazis. Just as the historical facts of the demise of the Republic cannot be captured by the story that the Nazis gained power through formal legal means, so *Legality and Legitimacy* cannot be understood as a neutral, purely analytical diagnosis of the Weimar Republic that lacks a substantive agenda of its own. This would put the work in a bizarrely awkward position, given its author's criticisms of value-neutrality as one of the main problems plaguing the Republic. More specifically, I have suggested that the substantive-value agenda of the work does not conform with a temporary suspension of the liberal-legal parliamentary components of the constitution so that the democratic-plebiscitary presidential components might reinstitute them once the crisis had passed. On the contrary, *Legality and Legitimacy* is a blueprint for the permanent supersession of the former by the latter, a work whose intention may not be "Nazi" in 1932, but certainly is fascist. It should be recalled that in 1932 the NSDAP did not yet have a monopoly on fascist political alternatives in Germany or in Europe, a fact to which the policy proposals and practices of Mussolini, Papen, and, perhaps, Schleicher attest.

In this sense, *Legality and Legitimacy* is the historical document that bears witness to a dubious historical "truth" contrived in Germany by natural law jurists and brought to America by figures like Leo Strauss after World War II: that the greatest danger to stability in modern societies is popular government too easily enabled by legality, and not, say, the subversion of legal democracy by conservative elites.[43] The latter is closer to the truth of Weimar's collapse, as Schmitt's subsequent career certainly illustrates, the narratives of natural law theorists and Strauss notwithstanding. Schmitt was cor-

rect when he declared in *Legality and Legitimacy* that truth would have its "revenge" (LL 98). The content of that truth, however, was not necessarily the weaknesses of constitutional democracy but rather the proclivity of authoritarian elites to exploit those weaknesses in potentially devastating ways.