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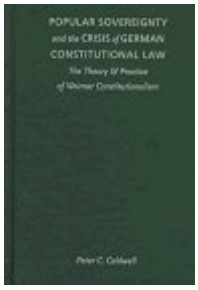
Peter C. Caldwell. *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism.* Durham, N.C.: Duke University Press, 1997. xiv + 300 pp. $23.95 (paper), ISBN 978-0-8223-1988-7; $84.95 (cloth), ISBN 978-0-8223-1979-5.



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Peter Caldwell's first book has the appearance of an extraordinarily traditional work of intellectual history. Caldwell summarizes major lines of argument and debates among German constitutional theorists, beginning with Paul Laband's innovative intervention in the Prussian constitutional crisis of the 1860s, and culminating with the court battles over the use of emergency powers pursuant to Article 48 of the Weimar Constitution. Because Caldwell guides us so confidently through these murky waters, the reader is not thrown into confusion when Caldwell introduces into his work the additional sophistication of postmodern theory and the comparative analysis that transform this book into one that can be read profitably not only by German historians and legal scholars but by American students of jurisprudence as well.

Caldwell distinguishes the German tradition of statutory positivism from sociological positivism, which links law to a community's social practices, and from H.L.A. Hart's statist positivism, which identifies law with norms posited by legal authority or produced through legal procedures. For statutory positivists, a statute, duly approved by the legislature, is the highest expression of the sovereign will. German legal positivists could thus assert the validity of Germany's anti-Socialist legislation and its persecution of Catholics, although both programs involved violations of constitutionally-protected rights (p. 34). So long as the legislation reflects the will of a sovereign body formed in conformity with constitutional norms, the legislation establishes legal norms that stand above the constitution.

Caldwell does not make the one-sided argument, however, linking a legal positivism that could legitimize clear abuses of political power to the lawlessness of Nazism. Instead, he explores the variety within this legal tradition in order to show how legal positivism could be reconciled with republicanism and to suggest ways in which the tradition retains its ability to challenge assumptions and to provoke thought on the theoretical foundations of constitutional government. Caldwell introduces his English-speaking audience to a cast of lesser-known German legal theorists ranging from Rudolf Smend, who voiced admiration for many elements of fascism (pp. 125-26) and yet eventually supported the Weimar Republic (p. 121), to Hermann Heller, a Social Democrat whose dialectical theory resisted any attempt to localize sovereignty in any existing institution or state organ. Caldwell also reevaluates the contributions of the better-known German legal scholars, Carl Schmitt and Hans Kelsen.

Politics frames and often informs Caldwell's account of the positivist tradition. The narrative begins with a brief sketch of the Prussian constitutional crisis that introduces Laband's theory of statutory positivism. According to Laband, until the budget received the King's approval, it was a mere administrative ordinance, lacking statutory authority, within the constitutional monarchy. Until the budget was approved, existing statutes continued to operate (pp. 19-21). Laband thus reconciled the high-handed politics of the Prussian monarchy with constitutional theory and made it possible for Prussian liberals to embrace their defeat without appearing to abandon their principles. Laband created the theoretical as well as the political parameters within which legal scholarship was to be practiced in Germany for decades to come. The remainder of Caldwell's narrative explores attempts by later scholars both to challenge the theoretical founda-

tions established by Laband and to explore alternatives to the politics of the legal scholarship of the *Kaiserreich*.

Statutory positivism has very different political overtones depending on the nature of the sovereign authority. While Laband allowed the King ultimate authority to approve statutes and thus to give them the force of law, sovereign authority in the Weimar Republic was vested in the Reichstag, which authored the statutes from which law derived. Caldwell thus argues that Gerhard Anschuetz and Richard Thoma took statutory positivism to its logical conclusion in interpreting the Weimar constitution as standing not above the legislature but at its disposition (pp. 68-69). Even Anschuetz grew alarmed at the radicalism of the early Weimar Republic, however, and he thus flirted with the idea that judges might need to intervene in order to protect private property (p. 79). He and Thoma nevertheless demonstrate, at least on a theoretical level, the extent to which legal positivism can provide robust support for popular government.

Caldwell makes controlled, strategic use of postmodern theory in framing his central chapter on the paradoxical foundations of constitutional democracy. Returning to a problem he introduced in the first chapter as "Jellinek's paradox" (p. 42ff), Caldwell presents Derrida's comments on the U.S. Constitution. Derrida noted that the "We the People" with which the U.S. Constitution begins is both a performative and a constative utterance. The "People" does not exist, and yet it here exercises sovereign power. Derrida then proceeds to make one of Caldwell's central points: this utterance can be viewed as giving a "fabulous retroactivity" to the sovereign subject, or it can be treated as a "coup of force" that founds and creates the law (p. 85). These two positions on the U.S. Constitution correspond to the positions of Kelsen and Schmitt respectively in the German constitutional debates of the Weimar era. Rather than acknowledge this retroactivity, however, Kelsen sidesteps the paradox by unifying the normative and objective legal system in the basic norm from which all other norms in the legal system could be logically derived. For Schmitt, law has a real, substantive foundation: the people united in opposition to an enemy (p. 107).

While Kelsen criticized certain authoritarian tendencies in Laband's legal theory, Schmitt laid the foundations for a theory of dictatorship (pp. 4-5). American scholars have recently latched onto Schmitt as a possible source of criticisms of late twentieth-century liberalism, but Caldwell reminds us, repeatedly and pointedly, that Schmitt was a Nazi and a thoroughly nasty person. Caldwell recounts, for example, how Kelsen had in 1932 supported Schmitt in his quest for a professorship at Cologne. A few years later, however, after Schmitt had become a "star of the Nazi legal profession," he refused to sign a faculty petition aimed at protecting Kelsen's university appointment (p. 87). Schmitt's behavior was actually consistent with his theoretical position granting the executive unlimited emergency powers. Caldwell also stresses Schmitt's role in articulating legal justifications for those emergency powers towards the end of the Weimar Republic, and he shows the instrumentality of those emergency powers in the establishment of Hitler's regime (pp. 174-175).

Kelsen's neo-Kantian theory sought to establish the *a priori* categories underlying law that made legal norms present to cognition. These categories are distinct from analogous categories underlying theories of ethics, psychology, and causality. Kelsen could thus explain the possibility of legal guilt, or in the civil context, liability, in the absence of psychological intention or moral responsibility (p. 48). By treating law as something apart from morality, Kelsen did not mean to rule out the possibility of moral, ethical or political critiques of law (p. 89). He intended only to provide independent theoretical foundations for the legitimacy of a legal system. Schmitt, by contrast, rather than seeking to ground the state's sovereign authority in logical categories, embraced the myth of the state as an autonomous will that could not be subject to external criticism (p. 52). Schmitt could thus ultimately support the embodiment of all sovereign authority in one leader whose decisions could function as the real basis of democracy during a period of crisis (pp. 171-2).

The role of the judiciary both in the German legal system and in positivist legal theory is a theme to which Caldwell returns throughout his book. He notes throughout the relatively scant attention paid to the judiciary in the German political systems of the *Kaiserreich* and the Weimar Republic. Technically, according to legal positivism, there could be no constitutional review of statutes by the judiciary (p. 35). Nevertheless, during the Weimar Republic, German courts were called upon to decide basic issues. Caldwell focuses on the *Reichsgericht*'s decisions concerning state expropriation of property, the meaning of equality under Article 109 of the Weimar Constitution, and the interpretation of the notorious Article 48 of the Weimar Constitution, which granted emergency powers to the President. Caldwell's discussion shows the powerful impact of legal scholarship on the decisions of Germany's highest courts.

Although Caldwell certainly explores the relationship of legal scholarship to the politics of the Weimar Republic (and its collapse), he does not follow the pattern of so many scholars who treat this period and claim that their areas of expertise are among the hidden or unacknowledged causes of the demise of representative government in Germany. Caldwell demonstrates the influence of legal positivism on legal practice in the Weimar Republic, and he clearly establishes the lukewarm republicanism of most Weimar legal theorists, but he does not imply that a more robustly republican constitutional theory could have prevented the collapse of the Weimar Republic. While Caldwell makes no bold claims about how the collapse of the Weimar Republic will have to be reevaluated in the light of his research, his work enhances our understanding of the institutional and legal structures that contributed to the mental and political landscape of early twentieth-century Germany.

Although Caldwell does an excellent job of providing brief, clear summaries of the historical events to which these legal theorists responded, his work is unlikely to appeal to many readers who lack a firm grounding in German history. While German readers may have at least some familiarity with the figures Caldwell treats, Caldwell's American audience is likely to be limited to graduate students and German scholars. But the work also can be strongly recommended to undergraduates with a strong interest in German intellectual history generally and legal history in particular. American students of jurisprudence would benefit tremendously from the introduction Caldwell provides to continental legal theory.

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