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**Carl Schmitt’s Constitutional Textbook**

This first English translation of Carl Schmitt’s *Verfassungslehre* (1928), prepared by Jeffrey Seitzer and published under the title *Constitutional Theory*, makes a welcome contribution to the growing corpus of Schmitt’s writings available in English. His scholarly works span several eras of German history, beginning in the Wilhelmine Empire of 1910, traversing the First World War years, the Weimar Republic, the Third Reich and World War II, and postwar Germany. The last work published in his lifetime appeared in 1970.[1] Schmitt (1888-1985), the so-called Crown Jurist of the Third Reich, published his *Verfassungslehre* during the only sustained period of calm that the Weimar Republic enjoyed. Schmitt’s reputation suffered from his membership in the NSDAP and his many publications in support of the Third Reich from 1933 to 1936—whether sincere or opportunistic—has been a matter of vigorous debate. His copious political and legal writings continue to challenge liberal thought, engendering countless scholarly books and articles and a quasi-cottage industry of articles in the journal *Telos*.

The trajectory of his legal-political thought tended toward justification of strong executive government. His *Die Diktatur* (1922) distinguished between what he called “commissarial dictatorship” and “sovereign dictatorship.” The former, characteristic of the dictators appointed for limited terms during the Roman republic, functioned in times of emergency, not to abrogate, but to preserve the constitutional footing of the nation. A sovereign dictator, on the other hand, replaced the constitutional foundation of the state and became a tyrant with unlimited tenure. In *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923), translated as *The Crisis of Parliamentary Democracy* (1988), Schmitt doubted the viability of parliamentary government, predicting that factionalism would doom it to stalemate. The prediction was accurate in the case of Weimar, with a Reichstag beset with multiple parties that were unable to form the coalitions necessary to agree for long on the composition of the cabinet. The fourteen years and two months of the Weimar Republic witnessed fifteen governments, thirteen different chancellors, and fifteen coalitions. What stability existed in Weimar Germany was provided by the president, as the framers of the constitution foresaw. In the Weimar Republic, there were only two: Friedrich Ebert and Paul von Hindenburg.

In *Constitutional Theory*, Schmitt defended the Weimar constitution, which had been adopted August 11, 1919. Its most controversial feature was Article 48, which empowered the president to preserve public security and order with “necessary measures,” including the use of armed force. Article 48 explicitly authorized the president to suspend the operation of six constitutional articles that protected basic civil rights: inviolability of living quarters, privacy of communications, freedom of speech, freedom of association, freedom from arbitrary expropriation, and an analog of habeas corpus.

In the final three years of the Weimar Republic, par-
limentary party factionalism brought conventional legislative and cabinet government to a halt. The German state became governed by presidential decree, in reliance on Article 48. During this period, Schmitt emerged from academic life and became an advisor to the government thanks to his friendship with General Kurt von Schleicher, who served as Weimar's last chancellor in the republic's final two months. Although Schmitt owed his political influence largely to Schleicher's patronage, he offered no protest when Schleicher and his wife were murdered during the Night of Long Knives on June 30, 1934. On the contrary: Schmitt celebrated the bloody events with an article bearing the jaw-dropping title "The Führer Protects the Law."[2]

To many, the quasi-dictatorial powers allotted to the popularly elected president represented a welcome restoration of the kaiser, functionally if not in name. Indeed, the president was seen by many as an Ersatzkaiser. Presidential prerogative was invoked repeatedly in the first five years of the republic. Toward its end, the commissarial dictatorship of which Schmitt had written in 1922 became a reality as the multiparty Reichstag finally proved unable to muster the majorities necessary to govern. The commissarial dictatorship of Hindenburg eventually metamorphosed into the sovereign dictatorship of Adolf Hitler. In August 1934, Hitler united the offices of chancellor and president in his own person. The stability of the republic can be roughly gauged by the frequency with which the president's emergency powers were invoked. From October 20, 1919 through December 29, 1924, Article 48 was invoked 135 times, but only 10 times from January 29, 1925 through July 15, 1930. From July 16, 1930, through September 27, 1932, Article 48 was invoked 88 times.[3]

In Constitutional Theory, Schmitt contextualized the Weimar constitution within the historical development of constitutional government in France, Switzerland, Belgium, the United States, England, and Germany itself—with particular consideration of the 1871 constitution of the Second Reich. The Weimar constitution, approved on August 11, 1919, attempted to balance representative parliamentary government with a cabinet headed by a chancellor and a popularly elected president. Clearly recognizing the challenge of factionalism to a functioning German republic, the framers of the constitution placed special trust in the president as an official above party and beholden only to the electorate as a whole. Schmitt's methodology is historical. He identifies threads running through constitutions from the French and American revolutions onward and rejects the "contract" theory of state formation. The state is formed, not by a fictional agreement among constituent individuals, but by a unity of purpose among the homogeneous many that finds expression ultimately in the decisive action of the one or the few. This process comes about by virtue of what Schmitt calls "the people's ever-present, active constitution-making power" (p. 139).

The book is divided into four broad parts, treating respectively the concept of the constitution, its Rechtsstaat component, its political component, and the constitutional theory of the federation. For Schmitt, "constitution" is a concept separate from the document customarily given that name. The constitution in the ideal sense is not a law or series of laws, but an act of political will, whereby a people united by a common purpose creates a state. Schmitt subdivides the concept into three categories. "Constitution in the absolute sense" is "the concrete manner of existence that is a given with every political unity" (p. 59). A second sense is constitution as "a special type of supremacy and subordination" (p. 60). In this sense, "the state is a constitution. It is a monarchy, aristocracy, democracy, council republic, and does not have merely a monarchical or other type of constitution" (p. 60). The third sense of constitution is dynamic: "the principle of the dynamic emergence of political unity, or the process of constantly renewed formation and emergence of this unity from a fundamental or ultimately effective power and energy" (p. 61). (The copious italicization is present in the German original, as well as in the translation under review.)

What we customarily call a "constitution" (for example, when we refer to the United States Constitution) to Schmitt is "constitutional law" or the "relative concept of the constitution" (p. 67). Both the United States and Weimar Germany would be categorized as Rechtsstaaten. As Schmitt points out, the majority of contemporary constitutions are of the "modern, bourgeois Rechtsstaat" type (p. 169). The German Rechtsstaat cannot be translated into English with a single word. A Rechtsstaat is a state governed by law, as distinguished from (say) a tyranny. Seitzer wisely renders Rechtsstaat in the original German. He thereby avoids repeated, awkward resort to multiversal English locutions. The terms "constitutional state" (Verfassungsstaat) and "bourgeois Rechtsstaat" (bürgerlicher Rechtsstaat) are often used interchangeably in common usage (p. 169). The Rechtsstaat is based on bourgeois freedom, which, in turn, leads to a pair of principles: the principle of distribution and the organizational principle. The principle of distribution presupposes complete freedom for the citizen and limited authority for the govern-
ment. By virtue of the organizational principle, government is divided into a system of defined competencies—“Gewaltenteilung,” which Seitzer translates as the familiar “separation of powers” (p. 170).

Schmitt’s *Verfassungslehre* was written at the same time as his seminal *Der Begriff des Politischen* (1932), translated by George Schwab as *The Concept of the Political* (2007). Schmitt’s idea of the constitution can best be grasped via an understanding of his idea of the political. For Schmitt, the political impulse arises from the recognition of the friend-enemy distinction, a notion elaborated at length in *The Concept of the Political*. The threat posed by the “other” (however defined) generates the political impulse. The political impulse, in turn, generates the state. As Schmitt writes at the very beginning of *The Concept of the Political*, the definition of a state inherently requires the previous definition of the political. But if the political impulse is founded on the friend-enemy distinction, what is the characteristic of a people that permits it to identify itself as “us” and the enemy as “them”? For Schmitt, the defining quality of a *Volk* is homogeneity, in Schmitt’s hands a protean term. It signifies a sameness that can describe culture, religion, ethnicity, custom, all or some of these, or, more generally, the “self-identity of the people” (p. 260)—a quality or cluster of qualities shared by a group of people with sufficient intensity to set that people apart from some other group of people having contrasting qualities. Schmitt also incorporates the sense that the “other” people, the enemy, constitute a threat to the “us” people.

Read by itself, *Constitutional Theory* offers a rigorous, in-depth study of the ideas informing the modern *Rechtsstaat* constitution. Read together with *The Concept of the Political*, *Constitutional Theory* presages an ominous grouping of mutually hostile nation-states, each formed on the basis of a homogeneous people that has willed its separateness and is enclosed by impermeable boundaries. Just as the post-Westphalian nation-state concept is undergoing serious rethinking,[4] the relevance of Schmitt’s constitutional schema on a shrinking planet with massive population movement and interchange may be reasonably called into question. Schmitt himself hints as much when he questions whether public opinion as such can exist in a society defined by classes. Translated to contemporary terms: can homogeneity, necessary according to Schmitt to generation of the political presupposition of the state, exist in the face of “identity politics”?

Seitzer’s translation is readable and faithful to the original. No reviewer of a translation can leave the translator’s labors unmolested, and there are a (very)few ambiguities or inelegancies. An example is on p. 313, where Seitzer offers “political party conflicts … would lead to appeals for help by foreign governments.” Reference to the original suggests that “appeals for the help of foreign governments” would have been clearer. But such cavils serve little purpose other than to convince the reader that the reviewer has actually read the book. The translation helpfully inserts the pagination of the original German text within the English text. This inclusion facilitates reference to the original, whose pagination is essentially unaltered in the most recent paperback edition.[5] In any future edition of the translation, it would be helpful if the bracketed pagination were printed in boldface, as it is often difficult to find the page reference to the original within the text, because the page reference is printed in the same type as the main text.

The editors of the original German text followed the ingratiating practice of including Schmitt’s extensive notes sequentially within the text, but in smaller type. The translation under review follows the same practice. The translator has a small number of notes of his own, located at the end of the text. *Constitutional Theory* contains a useful introduction by Seitzer and Christopher Thornhill and, in an appendix, the text of the Weimar constitution, translated into English. This inclusion is particularly useful, as Schmitt’s text makes frequent reference to that document.

Notes


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