Since there is nothing greater on earth, after God, than sovereign princes…

-Jean Bodin, 1576

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Revolutions in Law and Sovereignty: Carl Schmitt and the Theory of the Modern State

by

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To the memory of my cousin, Stuart (1973-2006)

Abstract

Carl Schmitt's engaging but no less controversial writing on state sovereignty and political authority continues to inform contemporary debates at the intersections of political, legal and social theory. In this thesis, I address Schmitt's early polemical texts located at these intersections, and argue that his contributions to state theory continue to be sources of deep historical and sociological insight. I demonstrate that his writings take on the character of classical political texts. Before we officially announce the state as an object of inquiry as being dead, we should remember what Schmitt teaches us about the hegemony of any sovereign state: the state as such does not simply "wither away" or dissipate as a result of free-market capitalism – as some Marxist and liberal thinkers alike might have us believe. In the context of his own historical situation, Schmitt reminds us that the ambiguities and aporias of "the state" and "the political" live on in various guises, and often without consideration for our wishes.

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Introduction

The conceptually difficult interrelation between the state and the political is one of the most enduring problems in political and legal theory, and is duly experiencing a wave of renewed scholarly attention today. The great history of attempts to rethink the category of the political in conjunction with the state, starting at least with Jean Bodin's theory of sovereignty[1] and spanning until the present day, demonstrates the complexity involved in establishing a sustained theory of the sovereign political state. It appears to be the case that no matter how hard we might try, there remains the stubborn theoretical problem that "the political" [*das Politische*] and "the state" [*Der Staates*] erroneously become reduced to and conflated with one another. In this thesis my aim is to show that this conflation should be avoided. By distinguishing between the political and the state, I claim that we can begin to interrogate *the political* more acutely and richly in theory construction. On this basis, I believe we can conceive of "the political" as something more than simply the study and reification of the state as an immutable and exhaustive political form.[2] This means that politics and the political is defined here most broadly, and is not necessarily confined to the practices and capacities of the state.

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[1] Jean Bodin, *On Sovereignty: Four Chapters From Six Books on the Commonwealth*, ed. and trans. Julian H. Franklin, *Cambridge Texts In the History of Political Thought* (New York: Cambridge University Press, 1992).

[2] Regarding political form or social formation, Claude Lefort rightly argues that "we must not confuse a capacity to act politically, with a view to the formation of a reforming or revolutionary state, with the capacity to conceive of society as a political society" because "*[s]uch a conception would require a reflection on the nature of the division that has been established between civil society and the state*; it would require a reflection on the implications of the distinction that has emerged historically between, on the one hand, political power, whose boundaries were delimited and whose formation, exercise and renewal were subjected to democratic rules and, on the other hand, administrative power, whose sphere of competence was equally restricted in principle but always more extended in fact, by virtue of its responsibility for the needs of the population and its ever more regular, even more detailed control of social life." In short, and for the concerns of the present argument, we are able to develop must more sophisticated analysis of politics and state if we conceive of the always-ambiguous separation between the two. See: Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, ed. John B. Thompson (Cambridge, Massachusetts: The MIT Press, 1986)., 278. Emphasis added. Consider also:

This thesis, then, represents an attempt to depart from ambiguous understandings of politics and state, and an endeavor to create a space for clear distinctions in political theorization, even in the face of the seeming impossibilities of such efforts. In other words, we will attempt to *interrogate* this ambiguity, but also recognize the *necessarily* ambiguous and aporetic nature of the relationship between state and politics in contemporary society. Political theory and action, nevertheless, both start and end by making conceptual distinctions and by approaching and challenging the loss of "clarity and intelligibility" and the entrance into "a zone of indistinction" that some argue marks Western politics today.[3] Making distinctions and discovering new modalities of critique is an integral part of any reinvigorated political practice.

I argue that the controversial German jurist and political philosopher Carl Schmitt (1888-1985) provides a compelling response to these conceptual difficulties. The persuasive nature of his theory is due in part to his stubborn effort to reveal an autonomous concept of "the political" separated at least in part from the state.[4] As such, Schmitt's succinct statement remains as relevant today as when he enunciated it in 1932: "The concept of the state presupposes the concept of the political [*Der Begriff des Staates*

Claude Lefort, *Democracy and Political Theory*, trans David Macey (Minneapolis: University of Minnesota Press, 1988)., 3.

[3] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, ed. Werner Hamacher and David E. Wellbery, trans. Daniel Heller-Roazen, *Meridian Crossing Aesthetics* (Stanford, California: Stanford University Press, 1998)., 122.

[4] George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2 ed., vol. 248, *Contributions in Political Science* (New York: Greenwood Press, 1989)., vii. In his introduction to the second edition Schwab argues that the recent turn to Schmitt's work since the "Schmittian Renaissance," beginning as early as the 1980s, can be explained by reference to Schmitt's bold attempt to theorize the state in the face of Marxist explanations. As Schwab argues, "The thoughtful, English, moderate-left scholar Paul Hirst is a most recent example [of an attempt to outline a theory of the state]. After having searched the range of Marxist thought for answers about how best to construct a working constitution for an industrially advanced Western democratic socialist state [...] he rejected answers that were, in fact, nonanswers provided by Marxist thinkers."

setzt den Begriff des Politischen voraus]."[5] The difficulty with philosophical "presupposition [*Voraussetzung*]," which this statement demonstrates as a decisive example, is whether a philosophical concept or system of thought can adequately come to grips with or fully account for its own presuppositions. Can a system of thinking ever explain or address that which stands as its prerequisite – that which stands outside it, but makes its identity possible in the first instance? Furthermore, and more urgently for the present concern, this difficulty begs the readily applicable question of whether the modern state form can ever adequately recognize or identify with its own distinctly *political*, and perhaps even religious, roots, and, in any case, *unstable foundations*?[6] Can the modern state actively acknowledge the contingency of its founding moment, and allow for genuinely healthy civic expressions of political dissent and resistance to its claims for absolute formal control and representation over life? The "political," defined here, is always something more – or, better, that which *is* something more – than the sovereign established state that tries to completely contain and monopolize *what is political*.

For Schmitt, the essence of the authentic political moment amounts to a *particular* sovereign decision over friends and its enemies. Since this distinction "corresponds to," yet is never synonymous with the "relatively independent criteria of other antithesis," such as good and evil (morality), beautiful and ugly (aesthetics), profitable and unprofitable (economics), and so on; the friend/enemy distinction or ontology comes to

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[5] Carl Schmitt, *The Concept of the Political*, trans. George Schwab, Second ed. (The University of Chicago Press, 1996)., 19. A shorter version of this text, without a focus on the state, was first published in article form as "Der Begriff des Politischen," *Heidelberger Archiv für Sozialwissenschaft und Sozialpolitik* 58, no. 1 (August 1927)., 1-33.

[6] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago, USA: The University of Chicago Press, 2005)., 36.

frame how human thought makes sense of socio-political organization.[7] In short, the political, so defined, organizes social life through the diagnosis of what is an enemy, or that which does not "fit" with the existing order of things. As he writes in a famous and often cited passage: "The political enemy need not be morally evil, or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specifically intense way, *existentially something different and alien*, so that in the extreme case conflicts with him are possible."[8] This is an "ontology or epistemology of the political" that Schmitt maintains can allow us to formalize the "purely political," which is existential but specific and concrete (as opposed to universal and abstract).[9] Thus, Schmitt's contention is that by understanding the purely political existentially, a relatively autonomous space of concrete political practice is created in which something like a state authority reserves the right to make distinctions between friends and enemies.[10] "Thereby the inherent *objective nature and autonomy of the political*," writes Schmitt, "becomes evident by virtue of its being able to treat, distinguish and comprehend the friend-enemy antithesis independently of other antitheses."[11] However, even beyond the ability to treat the "objective" and positive "nature" of the political, the realization of this political space involves *state sovereignty*. The "authentic" political decision recognizes the basis of its founding moment and origin in sovereign state-making violence.

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[7] Schmitt, 1996b, 26.
[8] Ibid., 27. Emphasis added.
[9] Jacques Derrida, *The Politics of Friendship*, trans. George Collins, *Radical Thinkers 5* (London: Verso, 2005)., 115.
[10] Andrew Norris, "Carl Schmitt on Friends, Enemies and the Political" *Telos* 112 Summer (1998).
[11] Schmitt, 1996, 27.

The truly *political decision*, in Schmitt's sense of the concept, is a transcendent act possible only after the state's legality *and* legitimacy has been already established.[12] And, therefore, the sovereign state as such always already *presupposes* a movement away from conditions of radical political uncertainty, including indefinite periods of political struggle, civil war, and ongoing circumstances of general and particular social discord. Because "the sovereignty of the state," as William Rasch comments "and not the autonomy of the social system, is the site of political legitimacy" in Schmitt's reading the state's primacy is politics.[13] This means that the state is foundationally a political entity that sovereign decision attempts to stabilize and legitimize through space and time – but, as I have already said, the state and the political cannot be reduced to eachother.[14]

In this respect, state sovereignty is a departure from the turbulent space of pre-state politics, or the Hobbsian "state of nature," and involves the performative and active identification of potential friends and enemies. This activity, Schmitt claims, of sovereign decision-making, in the context of an international climate with other states, has the potential to create the stable and secure state that we often take for granted today. But this is not necessarily the case. Following its founding sovereign moment and will to power, however, the political practice of the state is, strictly speaking, *reactive*: that is to say, state activity becomes the fending off of resistance to its self-assured but only precarious legitimacy and endurance in the struggles of modern politics. In other words, the *modern*

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[12] "Legality and legitimacy" is an important distinction in Schmitt's work, following the influence of Max Weber's *Economy and Society*. Schmitt writes that: "Relying on Richard Thoma, one can also discover, in every individual state action, an element of legislation as well as of administration and even of judicial decision. Specifically, all of these elements and manifestations of state action are reunited in the sovereign. The sovereign is highest legislature, judge, and commander simultaneously. He is also the final source of legality and the ultimate foundation of legitimacy." Carl Schmitt, *Legality and Legitimacy*, ed. Jeffrey Seitzer, trans. Jeffrey Seitzer, 2nd ed. (Durham and London: Duke University Press, 2004)., 7.

[13] William Rasch, "Conflict as Vocation: Carl Schmitt and the Possibility of Politics," *Theory, Culture, and Society* 17, no. 6 (2000)., 2.

[14] Ibid., 4.

realist state is political in two distinct and concrete senses: First, because of its established authority to decide on a series of binary oppositions, such as *what is* political/nonpolitical, public/private, or legal/illegal *after* its legitimacy or sovereign force is established. However, even prior to the possibility of this sovereign movement and activity, the state relies upon or presupposes an origin in (legitimate) state-making violence. This means that the state is *foundationally* political, especially in "secularized" modernity, in which political legitimacy is increasingly hard to come by and constantly open to challenge. Because the state is a distinctly modern political form and idealized entity that seeks to continually *mark a break* with its religious roots in the Divine Right of Kings (in a process usually called secularization), it must also actively politicize this rootedness as a residual form in pre-modern authority and domination. My claim here is that this generates a reactive and relentless modern state form that searches to *envelop its roots all the while exposing these unstable origins*, in the quest to naturalize this authority, and to continually expand – or at minimum attempt to expand – the reach of its founding legitimacy and ensuing political force. This state universalism is insidious and has specific consequences for any realist theory of state.

In its most elementary form the modern state is an ever-evolving state-making process without end. Much like Marx claimed in his early *On the Jewish Question,* for example, the state exists as a permanent revolutionary force, continually searching to cover its "prerequisites," or that which makes it possible: "At those times when the state is most aware of itself, political life seeks to stifle its own prerequisites – civil society and its elements – and to establish itself as the genuine and harmonious species-life of man. But it can only achieve this end by setting itself in *violent* contradiction with its own

conditions of existence, by declaring a *permanent* revolution."[15] There is a similar articulation of state-making in Schmitt's work. For the latter, the state is understood as a permanent revolution in founding and re-founding because the state is always an unfinished and unstable process of movement and departure from its origin. And, therefore, for Schmitt those attempts to mask or cover these original *political* roots – that is, to declare its actions as distinctly non-political, objective, and perhaps eternal are what Schmitt declares to be properly state-based *political* acts. Schmitt tells us, in other words, that these actions of state neutralization are "concrete" political acts *par excellence.* His work, in this sense, represents an extremely bold attempt to politicize aspects of state politics and originary constitution-forming sovereignty that may appear to be *non*political events or objective legal processes and decisions. I address some of Schmitt's tendencies towards extreme forms of politicization in the final concluding chapter.

Gopal Balakrishnan correctly points out in his biographical sketch of Schmitt that it is important to keep in mind that civil war was a major concern for the theorist throughout the duration of his long and thriving career.[16] Balakrishnan writes that: "His formative political moment came with the realization that the age of traditional conservative-liberal politics was at an end, and that new approaches to the problem of legitimacy were required to hold the fort against the discontents of civilization."[17] Against these discontents, and by seeking to outline a new ontological basis for politics, Balakrishnan argues, Schmitt proposed to develop a positive theory of the state capable of subverting, or at least of momentarily stifling, the revolutionary energies that he felt existed in his immediate political environment in the 1920s. However, even beyond this,

[15] Robert C. Tucker, ed., *The Marx-Engles Reader* (New York: W.W. Norton & Company, 1978)., 36.
[16] Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (New York: Verso, 2000)., 20.
[17] Ibid., 5.

we must also remember that Schmitt set his energies directly on the construction of a strong or "total" state: one that could use the "state of exception" to its advantage for survival in times of crisis.[18] In this way, by using the state of exception, he felt the state should come to grips with the properly political basis of state and constitutional law, yet be agile enough to respond to "concrete" crises.

State and constitutional law are founding *political* entities in Schmitt's reading, and cannot be absolutely neutralized or ever completely extinguish the possibilities of political struggle and even civil war – using Giorgio Agamben's (following Aristotle's) language, politics is a potentiality that is never fully realized in the actual, and thus cannot be fully neutralized by the state.[19] Politics, in short, is a potential. Civil and revolutionary politics, conceived as a decision over friends and enemies, always overflows the boundaries of the state, because where you have the state, you have the uncertain and unpredictable terrain of politics and struggles for power. The question now becomes how far this struggle for political power will reach, which we will see later in regards to Agamben's radical extension of Schmitt's theory of state power. If the state is always, at least in part, unsuccessful in containing the potential of politics, what does this mean for theoretical definitions of politics and state today?

Multiple Schmitts

Before moving on to explicitly outline the three chapters that makeup this thesis, I acknowledge my general understanding of Schmitt as a historical actor and political philosopher. If it is not already clear, in the course of this argument Schmitt is recognized

[18] Agamben, 2005, 1.
[19] Ibid., 34.

as an important and serious intellectual figure who is too often prematurely dismissed in contemporary theory and political debates. This dismissal only deters us from reading deeply and understanding his position and localized polemics. In this sense, this argument marks, in part, a defense of his intellectual project. I have found that as a result his extensive deliberation and tireless engagements throughout the majority of the twentieth century (after all, he lived an incredibly long time, and throughout an amazingly violent twentieth century from 1888-1985) there is no longer one Schmitt, but, in fact, "Multiple Schmitts." I introduce this distinction for two reasons: First, because he is used for all sorts of agendas today – on both the right and the left of the political spectrum, and everywhere in between. But, second, because in the span of over forty plus years of writing, there were many twists and turns in his theory as an engaged jurist and political philosopher. Schmitt is usually read as developing a completely consistent and coherent theory of power since his early works, which is not true in a precise textual sense. Some may insist, however, that this is true for all intensive purposes – but I would prefer to challenge this reading in the course of this thesis. Simply put, Schmitt did not outline a coherent system of thought.[20]

Schmitt's attempt to write in clear and unambiguous language should not detract us from appreciating the great vagueness and open character of his theories. His work invites multiple interpretations and interpenetrations, such as how the state and the political are to be understood. He is an extremely difficult thinker to follow, not constraining himself to a single, coherent line of argumentation, and not remaining

[20] As Ulrich Preuss writes: "Undoubtedly, Carl Schmitt belongs among the most equivocal and notorious European intellectuals of the twentieth century. [...] As is now widely acknowledged, Schmitt was an 'occasionalist' thinker who did not elaborate a theoretical system." Ulrich K. Preuss, "Political Order and Democracy: Carl Schmitt and His Influence" in Chantal Mouffe, ed, *The Challenge of Carl Schmitt* (London: Verso, 1999)., 155-56.

faithful to a distinct arena or even broad discipline of thought, other than a stubborn concern with "the political."[21] Schmitt was an obsessed thinker who studied and theorized political, legal and social philosophy extensively.

Even though I wish to argue that he continued to return to the problems of law-establishing and political authority in this thesis, I must say with a word of caution that he was a thinker who worked like a "bricoleur"[22]: that is, Schmitt never shied from exploring new critical areas of inquiry, reconsidering old or formerly held ideals, and searching for fresh insights into philosophical problems. Schmitt was concerned not to simply "rehash" political debates and ideas of the past. Rather, his aim was primarily to re-explore and re-vitalize *political discourse* across a wide spectrum of thinking in the course of an enormous volume of writings.[23] Schmitt was a "pioneering" or even classical political philosopher, to which the recent renaissance of interest in his work testifies. Schmitt was concerned to understand how new formulations of republican and revolutionary politics of the nineteenth-century had irreparably changed the entire face of the political state, civic participation, and the subsequent exploits of theory and philosophy in the twentieth century.[24] Schmitt was one of the principal political theorists of the twentieth-century.

Thus, Schmitt arguably demonstrated a certain kind of mastery over every topic he approached throughout his long and enduring career. Most importantly, he continued to search after the distinction or "borderline" between the concepts of the state and the

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[21] As Derrida understands it "he is a political expert who would acknowledge no other regional knowledge, no other experience than the 'political', the right to found a political discourse." Derrida, 2005, 115.
[22] Balakrishnan, 5.
[23] Jason Edwards, *The Radical Attitude and Modern Political Theory* (New York: Palgrave Macmillan, 2007)., 170.
[24] Carl Schmitt, "The Age of Neutralizations and Depolitizations," *Telos* Summer 1993, no. 96 (1996).

political, each of which he felt retained at least a degree of separation from one another. In the course of writing this thesis I have found that Schmitt outlines a potentially violent political theory of the state, and by consequence legality. Schmitt's realist perspective of the state reveals a conceptual theory of politics, law, and social order that attempts to understand and identify with the *origins of law*. As I already touched on above, for Schmitt politics always carries with it the "possibility" of violence and war, but also the promise of the ideals of peace and security as well. These possibilities may explain some of the controversy and dismissals surrounding his work spanning into contemporary political and legal debates today.[25]

When the Schmittian state is viewed from this vantage point of the possibility of violent outcomes, it follows that authentic political practice does two things in his *oeuvre*, each of which seems contradictory with the other. First, through acts of politicization, a "truly" democratic and decisive sovereign acts to maintain the peace and security of the state and the people the sovereign power is democratically mandated to protect.[26] Yet, secondly, this sovereign action, revealed in concrete decisions in the normative order, searches to "secure" while simultaneously "politicizing" the people. This decision, however, always retains the distinct possibility of killing an enemy or enemies in the course of decision. Taken together, this means that the sovereign decision has the potential for violent outcomes through the active identification of enemies, but this violence is often *necessarily* perpetrated because it is performed in the name of protecting and making secure a particular "people" from an existential enemy. This is exactly why

[25] For example, Hallward's title makes it clear what he feels should be done with Schmitt's legacy: Peter Hallward, "Beyond Salvage," *The South Atlantic Quarterly* 104, no. 2 (2005).
[26] Concerning the "truly democratic leader" in Schmitt, see the introduction to: David Dyzenhaus, ed., *Law as Politics* (London: Duke University Press, 1998)., 2.

the young Leo Strauss claimed that Schmitt's theory of sovereign politics following Hobbes makes intelligible the entire sphere of depoliticized liberalism.[27] This is because, at least according to Strauss' incisive reading of Schmitt's *Concept of the Political*, constitutional liberal freedoms presupposes the peace and security of the sovereign state and the people, and, that is to say, the negation of warlike mortals.[28] Even though Schmitt insisted that the political is by definition a social "good," and like any other "good" it is deeply open and unpredictable bringing with it the possibility of "the bad," Strauss writes that for Schmitt: "The political is a basic characteristic of human life; politics in this sense *is* destiny; therefore man cannot escape politics [...] Thus the effort to abolish the political for the sake of humanity has as its necessary consequence nothing other than the increase of inhumanity."[29]

As Strauss already recognized in the 1930s, Schmitt's understanding of the primacy of the political (even in the supposed currents of liberalism) is his major theoretical and philosophical insight, which, as Muguel Vatter explains, has key implications for the controversies regarding his work in contemporary state and legal theory. The puzzle of how to interpret Schmitt's work today:

> is best exemplified by the contradictory judgments that continue to be made about it: for liberal critics, Schmitt's discourse is clearly antiliberal and totalitarian, while for Strauss (in this similar to Agamben), his discourse is in reality a "liberalism with opposite polarity" [because, as Strauss has written, for Schmitt the effort to end politicization (as in economic forms of liberalism) is a political engagement *par excellence*], perhaps even a discourse that brings out what is repressed

[27] Leo Strauss in Schmitt, 1996b.
[28] Ibid., 103.
[29] Ibid., 94-95.

> and hidden in liberalism. But in what sense is Schmitt symptomatic of a coincidence between these apparent opposites, liberalism and totalitarianism?[30]

Whether Schmitt's work is totalitarian, or simply illiberal, or whether it is in fact relatively "friendly" to liberal premises is the major basis of dialogue concerning his work today. In this thesis, I shall develop a careful understanding of Schmitt's work in this context, briefly recognizing its distinct polemical and historical situations, as well as its contextual place in the history of attempts to outline a theory of politics and state.

My approach in this task is threefold. In what follows, I conduct a detailed textual analysis of the most important aspects of Schmitt's early works (written from approximately 1915 to 1929) in order to develop an understanding of the "early" Schmitt, as well as to identify some of the most pressing and problematic repercussions of his line of thought. The most problematic aspect of Schmitt's thought seems to revolve around the legitimation of state violence, which is part of his tendencies towards extreme politicization. In the following chapter, I prepare the historical grounding of Schmitt's early polemical works of the 1920s, beginning with two important but still very early, indeed even speculative, texts: *Die Diktatur* (1921) and *Political Theology* (1922; 1934). This discussion addresses Schmitt's early critique of legality, including his continued return to the problem of sovereignty, the state of exception, and the problem of law-founding violence.[31] In the second chapter, I build upon this ground to prepare an analysis of the transformations in Schmitt's direction as he postured to "adjust" his theory in relation to the rise of the National Socialism in the 1930s, a movement he sought to resist throughout the 1920s. While he at least partially found a theoretical means to resist

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[30] Muguel Vatter, "Strauss and Schmitt as Readers of Hobbes and Spinoza: On the Relation between Political Theology and Liberalism," *CR: The New Centennial Review* 4, no. 3 (2004).
[31] Schmitt, 2004.

the proto-fascist National Socialist movement throughout this time, he officially became an influential member and theorist of the National Socialist German Workers' Party (NSDAP), or the German Nazi party led by Adolf Hitler in the spring of 1933. And, finally, in the third chapter, I address the important critique of Schmitt's "methodological extremism," as well as Giorgio Agamben's recent engagements with Schmitt's influential critique of liberalism.

Schmitt's involvement and implication with Hitler should not be lost as a consideration in our thinking about his work. Schmitt remains, and likely will remain for some time to come, an important reference for political theory because he has opened key avenues to explore the nature of the concept of "the political" in relation to the state. Indeed, this former student of Max Weber[32] continues to command our attention primarily because of his theoretical and historical recognition of the ambiguous relationship between the state and the political. But Schmitt is also consistently remembered for his controversial (and we must say unapologetic[33]) alignment with the ruling NSDAP throughout the 1930s, before he was alienated and silenced within the party at least by 1937.[34]

It is undoubtedly true that Schmitt, arguably to a greater extent than Martin Heidegger[35], has been a controversial figure not only for his powerful and anti-liberal

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[32] Schmitt participated in Weber's famous seminars held at Munich in 1919-1920. This had a formidable influence on Schmitt's *Political Theology* in 1922, and later *The Crisis of Parliamentary Democracy* published in 1923.

[33] Joseph Bendersky, "Schmitt at Nuremberg" *Telos* no. 72 Summer (1987).

[34] Joseph Bendersky, *Theorist of the Reich* (Princeton, New Jersey: Princeton University Press, 1983)., 243.

[35] For a detailed analysis of Heidegger's relation to the National Socialist movement, including a chapter on Schmitt's famous comment regarding the 'Death of Hegel in 1933,' see: James Phillips, *Heidegger's Volk: Between National Socialism and Poetry*, ed. Mieke Bal and Hent de Vries, *Cultural Memory in the Present* (Stanford California: Stanford University Press, 2005). In regards to the earlier path-breaking analyses of this relationship see: Victor Farias, *Heidegger and Nazism*, ed. Joseph Margolis and Tom Rockmore (Philadelphia: Temple University Press)., Pierre Bourdieu, *The Political Ontology of Martin Heidegger*,

writings, but also for his implicit support for the extreme and decisive atrocities committed in the name of German National Socialism and the unity of the German state. Rather than being a merely incidental detail of his personal life and political ideology, Schmitt's life, legacy, and political theory converge in important and significant ways. And, therefore, I am suggesting that the aporetic realms of theory and practice are impossible to keep segregated from one another when discussing Schmitt. As Schmitt himself teaches us, theory and practice, philosophy and biography, belief and ethos, are intimately bound with one another. Moreover, and as we shall see, there is an analogous but still unstable relationship between the state and the political in the overall line of flight of his political philosophy.

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trans. Peter Collier (Stanford, California: Stanford University Press, 2001)., Jacques Derrida, *Of Spirit: Heidegger and the Question*, trans. Geoffrey Bennington and Rachel Bowlby (Chicago: University of Chicago Press, 1989).

Chapter 1: The Concept of "The Political" and its Relation to the State

Contemporary commentators are usually quick to bemoan the legal usurpation of the constitutional Weimar Republic at the hands of Hitler's National Socialist Party in 1933, yet they often fail to contextualize this event in relation to Weimar's hurried inauguration and implementation in 1919.[36] An important part of this routinely overlooked context is found within Carl Schmitt's early texts. I contend in this chapter that Schmitt's *Die Diktatur*[37] and *Political Theology*[38] are important works deserving close scholarly attention because they outline in detail Schmitt's explicit reasoning and call for the necessity of classical formation of dictatorial power during the crisis in Germany throughout the early 1920s. I seek to show that Schmitt's work can be properly understood as a polemical response to those republican and constitutional debates occurring in Germany during the inaugural years the Weimar Republic, including the influence of liberal-leaning thinkers such as Hans Kelsen, Hugo Preuβ, and Max Weber among others.

Schmitt's effort to formulate a legitimate political basis for the state was brought about directly as a result of his polemic with the objectivism of legal positivism (with its focus on a constitutionally created normative order, in which all subjective elements would be eliminated, as we shall see below) in circulation throughout the early years of

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[36] A good example of this decontextualized reading, which tends to place blame for the fall of Weimar almost exclusively on the "crisis mentality" of Schmitt, is Richard Wolin in several articles written on the controversial thinker. For example, consider the following: Richard Wolin, "Carl Schmitt, Political Existentialism, and the Total State," *Theory and Society* 19 (1990)., and Richard Wolin, "Carl Schmitt: The Conservative Habitus and the Aesthetics of Horror," *Political Theory* 20, no. 3 August (1992). However, among others mentioned in this thesis, the following are two recent and notable exceptions to these decontextualized readings. See: Peter C. Caldwell and William E. Scheuerman, eds., *From Liberal Democracy to Fascism: Legal and Political Thought in the Weimar Republic* (Boston: Humanities Press, Inc., 2000)., and Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (London: Duke University Press, 1997).

[37] Carl Schmitt, *Die Diktatur: Von Den Anfängen Des Modernen Souveränitätsgedankens Bis Zum Proletarishchen Klassenkampf* (Berlin: Duncher & Humblot, 1989).

[38] Schmitt, 2005.

the 1920s, as well as the Communist theory of dictatorship that loomed large in post revolutionary Germany, Eastern Europe, and post-revolutionary Russia. The historical basis of Schmitt's critique is an important aspect of his work, and should not be lost on considerations of Schmitt as a serious and relevant political thinker today. As an outcome of this polemic, and in the context of the immediate discord in Europe, Schmitt reconsidered the figure of the dictator as a definite *political* entity; and one that he argued could address the concrete dangers of negating the question of sovereignty. As Schmitt would declare famously and succinctly in the first line of his *Political Theology:* "Sovereign is he who decides on the exception [*Soverănist, wer über den Ausnahmenzustand entscheidet*]."[39]

The devastating defeat of Germany in World War I meant the demise of the failed experiment of the German Empire (1871-1918), and left the region with a radically uncertain future. The signing of the Treaty of Versailles officially marked the end of the war in 1919. It is well known that the Treaty was particularly heavy-handed in its treatment of Germany; in fact, the entirety of Versailles was written in many ways *against* Germany. Within the treaty, Germany had to accept blame for starting the war by invading Belgium in 1914, which instantaneously *caused* Britain and France to declare war on Germany and later on the majority of the Central Powers.

However, as the authors who preface the Treaty's 1968 English reprint suggest, the significance of Versailles is still not well understood: "no treaty in history has produced so much comment, has been so freely criticized, and possibly so little read and understood as the treaty of peace signed at Versailles."[40] Schmitt was one such critic who

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[39] Schmitt, 2005, 5.
[40] *The Treaty of Versailles and After* (United States Department of State, 1968)., iii.

read the significance of the terms very closely, and took its claims seriously. That is to say, Schmitt understood the significance of the nearly unprecedented "internationalism" of the Treaty of Versailles. For the first time in the history of modern European jurisprudence, a single state was named entirely guilty and culpable for an interstate war.[41] Germany was subsequently forced to surrender all of its foreign colonial possessions; most notably major parts of what are today Poland, France, Denmark, Austria, Belgium, German East Africa, South West Africa, and the Pacific possession of the Samoan Islands and Nauru. Germany was also ordered by the League of Nations to repay over 30 billion dollars in war reparations for a variety of battles and destructions for which it was deemed to be single-handedly responsible. These terms were coldly called the "Conditions of Peace," in which Germany was charged with "the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized has ever consciously committed."[42] To provide a sense of the magnitude of these terms, it is important to note that on 29 May 1919 the German delegate Brockdorff Rantzau responded to the "German Observations of Peace Conditions" as follows: "We are to renounce," he wrote,

> all foreign securities. We are to hand over to our enemies our property in all German enterprises abroad, even in the countries of our allies [...] we must thus renounce the realizations of all our aims in the sphere of politics, economics, and ideas. Even in internal affairs we are to give up the right of self-determination. The International Reparation Commission receives dictatorial powers over the whole of life of our people in economic and cultural matters. Its authority extends far

[41] Kervégan writes: "The Treaty of Versailles introduced into international law (which had hitherto been founded on the legal parity of states) a fundamental modification which 'criminalized' the defeated (with the German Emperor considered a war criminal). This criminalization of the enemy was a break with the essential experience of modern international law." Jean-François Kervégan, "Carl Schmitt and 'World Unity'" in Mouffe, 1999, 59.
[42] *Versailles Treaty*, 44.

> beyond that which the emperor, the German Federal Council and the Reichstag combined ever possessed within the territory of the Empire. This Commission has unlimited control over the economic life of the State, of communities of individuals. Further, the entire educational and sanitary system depends on it. It can keep the whole German people in mental thralldom [...] In other spheres also Germany's sovereignty is abolished.[43]

Clearly this statement was a tactic and plea for mercy by the German diplomat early on in the negotiation process. This plea paid off, at least in part, because the Americans intervened shortly thereafter and claimed from the start that the terms of the treaty were too harsh and heavy handed on the already unstable German state.

To add to these frustrations, Germany was thence occupied by foreign powers and witnessed the rise of the radical racist militia of the Freikorps and "the front generation."[44] In short, Germany struggled to grapple with its failure both as an Empire and as a nation-state.[45] Schmitt became one amongst "a number of notable legal scholars" who arose throughout the time to address these challenges from a Catholic and conservative standpoint.[46] As a result of the collapse of the Monarchy following the Revolution in 1918, it was apparent to the maturing Schmitt that the newly created Weimar Republic also risked being relegated to the dustbin of Germany's traumatized history if it could not attain a sense of stability and normalcy of its own.[47]

Schmitt was rapidly becoming known across Europe for his writings on the crisis of state in Germany following the revolution, as well as on what he saw to be the

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[43] Ibid., 40.
[44] Richard Bessel, *Germany after the First World War* (Oxford: Claredon Press, 1993)., Vi.
[45] Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (London: Duke University Press, 2004)., 1.
[46] Caldwell and Sheuerman, 3.
[47] Balakrishnan writes that following the revolution "[t]he Weimar Republic was hovering on the brink of collapse: a liberal democracy whose centre of gravity was an unstable system of corporatist bargaining, antithetical to older norms of government by discussion; the geopolitical shell of a recently defeated Great Power, locked into a precarious new world order rigged to limit the sovereignty of rogue states (Germany and Soviet Russia) with reparations, sanctions and police action." Balakrishnan, 2.

punishing terms of Versailles. The latter, Schmitt argued, provided a deadly challenge to the existence of Germany as a state because of the legalistic, political, and existential threats that it brought forth, which he felt eroded the already precarious stability of Germany.[48] For Schmitt, Versailles did not bring about peace and serenity following the war, as promoted by the Allies, but actually exacerbated Germany's plight in what he saw to be an ongoing war on all fronts: to the east, Germany was threatened by the hegemony of post-revolutionary Soviet Union, while to the west, it faced the ongoing threat of France, Britain, and, to a lesser degree, the United States. Most importantly, however, Schmitt was concerned with the heated internal politics of Germany and Austria.

Contribution to the National Opposition

Again not alone in this effort, Schmitt became a vital part of the growing opposition to the implementation of parliamentary democracy in Germany. He felt that this implementation obscured the "concrete" political roots and instabilities of Weimar.[49] Instead, he argued that Germany required the backing of a temporary dictatorship to gain much needed security in the context of unrivalled chaos. The failures to recognize the need for authoritative and decisive power, or dictatorship, as Schmitt insisted repeatedly in the 1920s and as late as 1934, involved unwillingness by those with the power to confront the reality and wide range of political struggles and provocations occurring in the region. It was not only the external political pressure placed upon Germany by the Allies that was posing a problem. Most importantly, it was those enemies of all

[48] Ibid., 20.
[49] Nathan McCune, "Carl Schmitt's Concept of the Political: Thomas Hobbes and the Political Theological Critique of Liberal Democracy" (University of Toronto, 2001).

ideological stripes within the country who threatened to push it into an indefinite state of civil war. As one commentator notes:

> During the postwar revolutionary turmoil he experienced first hand the tension and insecurity generated by political polarization of the city when his office was broken into by a band of revolutionaries, and an officer at a nearby table was shot. Such experiences gelled into an abiding fear of civil wars, but also a fascination for the political and moral atmospheres they generated; this fear and fascination were to shape his whole political outlook.[50]

Balakrishnan reminds us that civil war was a grave concern for Schmitt throughout the duration of his long and thriving career, and a concern that had definite consequences for his theory of the political and state.

All of these factors helped to shape Schmitt as a conservative thinker in the rather diverse "National Opposition" at the time, which involved many influential public intellectuals, including those who were concerned about the vitality of Weimar's constitutional authority from a wide-variety of political perspectives. For example, novelist Thomas Mann also questioned the demands made by Versailles, asking where Germany was to turn politically. "Is it a crime," Mann asked, "to seize power when history forces your hand and there is no one else there?"[51] Mann, like Schmitt, was concerned that the political extremism of the National Socialists was assured in part because of the tumultuous past and wholly uncertain future. Mann's conclusion, however, was much less stark than Schmitt's. At least by 1930 in "*Appell an die Vernunft*," Mann officially endorsed the Social Democratic Party (SPD), citing its solid historical tradition and experience stretching back to the left-wing membership of Rosa Luxemburg and Karl Liebknecht. These figures provided leadership for the Spartacist League's split with the

[50] Balakrishnan, 20.
[51] Thomas Mann, "An Appeal to Reason," In Anton Kaes, Martin Jay, and Edward Dimendberg, eds., *The Weimar Republic Source Book* (Berkeley: University of California Press, 1994)., 157.

SPD over its support for the war, and who were both tragically assassinated by the early racist Freikorps. "Whither National Socialism would lead us," Mann wrote, "we do not know for the simple reason that it does not know itself; and we are daily strengthened in our doubts of its real will to power."[52]

Schmitt, unlike Mann, was less comfortable relying on the democrats (in whatever variety – there were, after all, several divisions and factions) as a solution to these woes. Schmitt reacted strongly against the form that the Weimar Republic took at the hands of two Democrats in particular, Hugo Preuβ and Hans Kelsen, who played major roles in defending the legal authority of the Weimar Republic.[53] Schmitt, with nearly unending rhetorical force, opposed these figures on the grounds that their proposed theory of constitutional law, during and extending long after the war, ignored the possibility and even periodical necessity of dictatorial power. Schmitt was deeply hostile to legalistic perspectives that failed to properly comprehend and account for the violent foundations of law. Schmitt alleged that a definite lack of authentic sovereign leadership was responsible for furthering the conditions of instability, pluralism, and the resulting atmosphere of chaos in the region.

For these reasons, Schmitt argued, the new German constitutional state was in a continued condition of crisis from its birth in 1919 until its demise between 1929 and 1933. David Dyzenhaus writes that Schmitt's solution was to lead the way towards formal dictatorship because: "In place of parliamentary democracy, Schmitt proposed a 'truly' democratic leader, one who wins the acclaim of the people through his articulation of a unifying vision of the substantive homogeneity of the people. That leader will create

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[52] Ibid., 157.
[53] Arthur Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley, California: University of California Press, 2000)., 15.

a normal situation out of the chaos of pluralism by making a genuinely political, sovereign decision."[54] Understood from the perspective of Germany on the continued brink of civil war even long after 1918, it is easier to understand why in a late edition of *Political Theology,* Schmitt still called for decisive leadership. Dictatorship, he felt, could operate beyond "normative law":

> Not resting on natural right or the law of reason, merely attached to factually 'valid' norms, the German theory of public law of the Wilhelmine and Weimar periods, with its so-called positivism and normativism, was only a deteriorated and therefore self-contradictory normativism. Blended with a specific kind of positivism, it was merely a degenerate decisionism, blind to the law, clinging to the 'normative power of the factual' and not to a genuine decision.[55]

Schmitt makes his point in stark opposition to those aspects of constitutional legal theory, which, as he argues repeatedly throughout his career, fails to understand the significance of the "genuine decision" or supralegal powers of discretion that are included in but always beyond the letter of a constitutional or purely legal order.[56] This means that law is more than the simple enshrinement and study of a "neutralized" norm, since it reveals "both the lack of ethical and political substance" as well as "the hypocrisy of the liberal bourgeois who pursues his interests without visibly and openly engaging in political conflict."[57] As the important secondary commentator John McCormick convincingly argues, for Schmitt, insight into the political roots of the state and the distinct possibility of conflict points towards the fundamental weakness of law and order models of power, whether in their democratic, liberal, or constitutional varieties, when confronted with a decision on the *exception* to the rule of law. In other words:

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[54] Dyzenhaus, 2.
[55] Schmitt, 2005, 3.
[56] Schwab, 1989; Joseph W. Bendersky, *Carl Schmitt: Theorist of the Reich* (Princeton, New Jersey: Princeton University Press, 1983)., 112..
[57] Heiner Beilefeldt in Dyzenhaus, 24.

> All of these problems [concerning the crisis of legal legitimacy following the war] 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.*[58]

For Schmitt, the rule of law contains very specific "pre-legal" political foundations ("substantive values or concrete decisions" as McCormick writes above) that are irreducible to the normal situation. And, furthermore, no amount of empirical investigation or arduous inquiry into the norm can produce a lasting understanding of this "real" basis of law and order.

This was a controversial thesis in its day and without doubt remains so today. Schmitt was at pains theoretically to articulate the political aspects of legality that are prior to the letter of the law. As Schmitt argues in *Roman Catholicism and Political Form,* "[n]o political system can survive even a generation with only naked techniques of holding power. To the political belongs the idea, because there is no politics without authority and no authority without the ethos of belief."[59] Here "authority" refers to those prelegal, political foundations of law, and "belief" refers to the authenticity and legitimacy of those origins in law-creating violence. In short, the Schmittian definition of sovereignty suggests that politics and authority are inescapable and irreducible. Concomitantly, Schmitt inquired into the realm of formal "authority" which made the belief in legal order possible in the first place, and this he did with reference to a formally decisive and dictatorial figure. The indivisible sovereign, or dictator, decides order. As a

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[58] McCormick in Carl Schmitt, 2004, xvi. Emphasis added.
[59] Carl Schmitt, *Roman Catholicism and Political Form*, ed. George Schwab, *Global Perspectives in History and Politics* (Westport, Connecticut: Greenwood Press, 1996).,17.

consequence of this "decisionist" move, he tended to stress the challenge, or exception, that the emergency situation posed for any normative legal order. He did so to such an extent that the emergency tends to become the central preoccupation of his early works.[60] As McCormick writes, at this time: "it is almost impossible to recognize when he is discussing normal constitutional operations and when he is discussing emergency ones; all of the former have been subsumed in the latter."[61]

This intense concern with the exception (which made belief in order to be fundamental) is Schmitt's early contribution to political and legal theory. This, in turn, pushed his thinking towards explaining the legitimate political and constitutional right reserved for sovereign power in the concrete instance of order-making decision. Schmitt was emphatically concerned, especially during these early years of his career, with what he deemed to be the state of exception, defined as that which "is not codified in the existing legal order, [and] can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like. But it cannot be circumscribed factually and made to conform to a performed law."[62] The power to decide on the extreme situation presupposes constitutional authority, but, precisely when utilized, it also exceeds this specific legal order because the state of exception does not necessarily presume any clear relation to an existing codified "law". The concrete instance of decision brings about the creation of a new formal order because sovereign decision is: "a pure decision not based on reason and discussion and not justifying itself [according to a constitution], that is, to

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[60] Samuel Weber, "Taking Exception to Decision: Walter Benjamin and Carl Schmitt," *Diacritics* 22, no. 3/4 (1992).
[61] John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (New York: Cambridge University Press, 1997)., 146.
[62] Schmitt, 2005, 6.

an absolute decision created out of nothingness itself."[63] The decision that is "created out of nothingness itself" but which changes the entirety of law and legality in total, is what Schmitt called "legal decisionism."

Schmitt and other anti-liberal and anti-positivist critics felt it to be something of a mistake to conceive of the Weimar Republic primarily in normative terms particularly given the crisis throughout its birth.[64] Schmitt insisted that Weimar left "itself especially susceptible to emergencies" because of its blind faith "in the technical apparatus of its standing constitutions" which ignored the problem of the state and its enemies.[65] That is to say, Weimar allowed for only naïve and naked forms of power marked by romantic and bourgeois understandings of law and politics. The constitution was a legal order that did not serve to create the basis for an orderly polis because it could not clearly distinguish between friends and enemies aimed towards the stabilization of state. Schmitt felt that the pluralism of Weimar erroneously presupposed an orderly and pacified polis, when the actual conditions were just the opposite.

The Polemic Against Legal Positivism

In a very direct way – and this is crucial to our present concerns – Schmitt understood Germany's political, economic, and legal problems to be related to the many conceptual deficiencies he saw residing within the most basic assumptions of German legal positivism itself.[66] In doing so, methodologically at least, he was able to connect

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[63] Ibid., 66.
[64] Jacobson and Schlink, 2.
[65] McCormick, 1997, 167.
[66] Caldwell and Sheuereman, 9; Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy*, ed. Howard Williams, *Political Philosophy Now* (Cardiff: University of Wales Press, 1998)., 63.

problems in legal scholarship to the concrete political struggles of the time. This was how he bridged the gap between his work in academic disputes and his political concerns with the vitality and endurance of Weimar. Contrary to many assumptions today, Schmitt was not out to destroy the already precarious stability of the Weimar Republic. Rather, he sought to find the authority to strengthen it, and to preserve it, albeit by granting the president extraordinary constitutional power.[67] Even though Schmitt viewed Weimar merely as a temporary solution to a spectacular problem, he felt it was absolutely necessary to develop much needed constitutional authority given the situation in the post-war and revolutionary climate. For example, in an oft-cited passage from 1922, Schmitt argues that:

> According to article 48 of the German constitution of 1919, the exception is declared by the president of the Reich but is under the control of the parliament, the Reichstag, which can at any time demand its suspension. The provision corresponds to the development and practice of the liberal constitutional state, which attempts to suppress the question of sovereignty by a division and mutual control of competences. But only the arrangement of the precondition that governs the invocation of exceptional powers corresponds to the liberal constitutional tendency, not the content of article 48. Article 48 grants unlimited power [*unbegrenzt herrschermacht*]."[68]

This aspect of constitutionally granted "unlimited power" was the main critique Schmitt leveled against the legal positivism that had crystallized in the Weimar period. Schmitt's concern is that article 48 does not grant unlimited power to the president, but rather represents an attempt to contain that exception within the terms of the constitution. It is, therefore, not a true exception, but an effort to legally "contain" (always *in vain*, according to Schmitt) the exception. Resulting from "methods of the legal positivism that

[67] Bendersky, 30.
[68] Schmitt, 2005, 11.

had come to dominate the legal profession during the German Empire" Schmitt felt, put simply, that Weimar was doomed to fail if it did not use the tools available to maintain its authority.[69] We will return to this point in the final chapter.

Schmitt's principle opponent in this struggle was the influential Hans Kelsen (1881-1973), whose thought went on to deeply influence the positivism of the Vienna Circle,[70] and who, along with Preuβ, was one of the founders of the Weimar Constitution. Kelsen was an extreme thinker in a different way, proposing what he called the "Pure Theory of Law" [*Reine Rechtslehre*], alleging that it was not only ideal, but also possible to separate out a normative legal sphere from political and social spheres, in order to contain the potentials of religious autocracy and dictatorship within the confines of a normative framework. Kelsen called this normative framework the *Grundnorm*. The *Grundnorm*, or "basic norm," represented his thesis that norms act as the fundamental basis underlying any legal system. Furthermore, he argued that if one could understand the norm at any point in a legal system, one could also understand the totality of that legal order.

The *Grundnorm* thesis was itself controversial. One commentator, for instance, writes that "Kelsen's theory of legal validity is distinguished in sharp opposition to all justifications based on content; the validity of a legal norm is founded solely on the fact

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[69] Caldwell, 1997, ix.

[70] Kelsen's thought has a considerable range of influence beyond this singular example. In order to properly contextualize Schmitt's polemic against the legal positivism of his era, a careful understanding of Kelsen's work is vital. For an introduction to the "Kelsen Circle," including the connection to Freud in Vienna, consider: Clemens Jabloner, "Kelsen and His Circle: The Viennese Years," *European Journal of International. Law* 9, no. 2; Charles Leben, "Hans Kelsen and the Advancement of International Law," *European Journal International Law* 9, no. 2; Norberto Bobbio and Danilo Zolo, "Hans Kelsen, the Theory of Law and the International Legal System: A Talk," *European Journal of international Law* 9, no. 2; Danilo Zolo, "Hans Kelsen: International Peace through International Law," *European Journal of International Law* 9, no. 2.

of a legitimate norm-creating act, and not teleological considerations."[71] So it is normative law that *conceals* and *reveals* its basis in a decision or act. Kelsen's formalist, content-free theory of law held that politics ought to remain separate from "objective" legal scholarship in order to arrive at a pure depoliticized form of state and law. As such, law amounted to little more than the enshrinement of norms into law, independent of political or ideological ends, and, most importantly, independent of the wishes of its practitioners. As he wrote with his own sense of urgency:

> In a society shaken by world war and world revolution, struggling groups and classes are interested more than ever in the production of useful ideologies, which make possible the most effective defense of the interests of those holding power as well as those striving to get it. That which reflects their subjective interests they would present as objective truth. Here, "scholarship" about state and law is made to serve. It provides the "objectivity" that politics itself is unable to produce. And – as though, even in this violation, it were unable to deny its nature – it truly provides it with disastrous "objectivity," to the right as well as to the left. And thus from the concept of the state, the conservative professor [i.e. thinkers such as Schmitt] derives – in a strictly scholarly manner of course – the impossibility of democracy and the necessity of some sort of fascism or corporative state [*Ständestaat*] [...] [they] explain a reality of state and law incompatible with their political ideals as a manifestation of "sickness" or "decay," concealing their political desires [...] it is only surprising that more of us do not see through the complete worthlessness of this "scholarship," which merely masks politics [...] what is *not* surprising, however, is the fact that that proponents of such legal "scholarship," on the right as well as the left, are uncomfortable with a theory that prefers not to join this masquerade.[72]

Kelsen's own polemical and even sarcastic tone is obvious here. The development of the "pure theory of law," he passionately alleged, would potentially ground a science of state

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[71] Peter Heath in Hans Kelsen, *Essays in Legal and Moral Philosophy*, trans. Peter Heath (Dordrecht, Reidel, 1973)., xviii.

[72] Hans Kelsen, "Legal Formalism and The Pure Theory of Law," originally "Juristischer Formalismus und reine Rechtslehre." Translated from the German in Jacobson and Schlink, 79.

beyond the politicism and partisanship he saw residing in the legal scholarship of the day. Kelsen began this area of research in his early critique of the legal reasoning of the German Empire in 1911.[73] In the subsequent years he developed an astoundingly consistent line of legal and moral philosophy in the face of the major proponents on both the left and right (including Schmitt on the right, as we will see) who claimed that the norm was an insufficient basis to account for the entirety of law. Yet, as Kelsen saw things, it was positive law itself, without referent to variants of natural law that could account for the ongoing stability and legitimacy of law. Again and again he would claim: "positive law, in its own intrinsic sense, is 'law', i.e., a valid, binding order, independent of this relation to natural law." [74]

Schmitt and Kelsen showed some resemblance in their opposition to Paul Laband's (1838-1918) statutory positivism of the Empire prior to the war. However, by the end of it their positions diverged significantly.[75] That is to say at least as early as 1910, both Schmitt and Kelsen criticized the supposedly simplistic account of legal theory of the Laband School, whose thought closely expressed the nature of the 1871 Bismarchian Constitution.[76] Although the legal theory is complex and technical in many respects, it is important that we understand at least one respect here: Laband sought to exclude references to natural law in juridical debates, including questions of origins in constitutional law. This strategic exclusion or bracketing was essential towards what Laband found to be the more relevant focus on the legal "will of the state:"

> Labandian positivism differed from both sociological legal positivism, which took cognizance of social norms, and statist legal positivism, which considered common law to be positive law if the

[73] Caldwell, 1997, 41.
[74] Kelsen, 31.
[75] Caldwell, 1997, 41.
[76] Ibid., 42.

> normative rules for recognizing law so allowed it. Laband furthermore refused to grant the constitution as a whole any special authority.[77]

Laband's *State Law* described the existing field of public law of the Empire including "its rules for creating new statues, establishing administrative jurisdictions, issuing ordinances, and so on."[78] However, by the turn of the twentieth century, there was a growing opposition in Germany recognizing that Laband (as well as the foundations of the Bismarkian Empire) did not properly consider the origin of law, the legitimacy of it, or the more-pressing question of the time and duration of its authority. His analysis worked largely at the descriptive level, many critics claimed, following in the line of criticisms leveled by Georg Jellinek's law and sovereignty theories and the German Free Law Movement.[79] The latter, it is known, "questioned the possibility, even the desirability, of the positivist model of applying norms."[80] Jellinek for example wrote that: "Law is possible only on the condition that a directing and coercive force is present."[81] In other words, he was to ask one of the most fundamental questions in law and sovereignty studies: "how can the state, conceived as sovereign, be subject to law?"[82]

It is on the relationship between law and the state in which Kelsen (siding with Laband) and Schmitt (siding with Jellinek) proved to show significant differences. Kelsen took the facticity and "positivism of the Empire to its extreme" while Schmitt maintained that "a nation is a state if it can distinguish friend from enemy and thus decide on the type and form of its political existence."[83] Again, they were each extreme thinkers, but in

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[77] Ibid., 4.
[78] Ibid., 4.
[79] Ibid., 42.
[80] Ibid., 42.
[81] Georg Jellinek qtd. In ibid., 42.
[82] Ibid., 42.
[83] Jacobson and Schlink, 19.

completely opposite directions. Schmitt clearly did not see Kelsen's positivism representing a reasonable break with the Laband school or with the allegedly simplistic or narrowly-defined constitutional theory of the Empire. Schmitt argued that Kelsen's attempt to raise legal scholarship to a normative science further *obscured the importance of recognizing the uncertain and political foundations of law and state.* In turn, Schmitt based the majority of his polemical attacks in the first edition of *Political Theology* in 1922 directly against Kelsen's legal positivism. This demonstrates the steadily growing influence of Kelsen's thought as well as Schmitt's ambition and gnawing suspicion of it. Schmitt took notable exception to Kelsen's *Reine Rechtslehre*, arguing that Kelsen abstractly separated the conceptual from the concrete in the form of a Kantian dualism: "That a neo-Kantian like Kelsen does not know what to do with the state of exception is obvious."[84] Kelsen, he argued, "arrived at the unsurprising result that from the perspective of jurisprudence the state must be purely juristic, something normatively valid. It is not just any reality or any imagined entity alongside and outside the legal order. [For Kelsen t]he state is nothing else than the legal order itself, which is conceived as a unity, to be sure."[85] Because Schmitt at this time had become more confident in his rejection of any notion of a legally unified or normatively based state, he proceeded to launch a whole gamut of polemical attacks against Kelsen, each of which would be worth quoting here as demonstrations of the veracity and extent of Schmitt's emblematic critique and polemic *contra* Kelsen's work. Schmitt specifically asked: "How can it be possible to trace a host of positive attributes to a unity with the same point of ascription when what is meant is not the unity of a system of natural law or of a general theory of

[84] Schmitt, 2005, 14.
[85] Ibid., 19.

the law but the unity of a positive-valid order?"[86] In an analysis of the state without any reference to the traditional philosophical tenants of natural law:

> Kelsen solved the problem of the concept of sovereignty by negating it. The result of his deduction is that the concept of sovereignty must be radically repressed. This is in fact the old liberal negation of the state vis-à-vis law and the disregard of the independent problem of the realization of law.[87]

Against the background of his scathing indictment of Kelsen's legal positivism, as well as the Labandian tradition of the pre-Weimar Empire, Schmitt set out to formulate a sovereign theory of state and law capable of finding a place for the merits of a powerful dictatorship reserved to protect the state and the life it represents. It is important now to the two forms of dictatorship that Schmitt outlined in detail in 1921.

Forms of Dictatorship

Whatever we might be able say about Kelsen's completed normative legal system in retrospect, it is apparent that Schmitt himself was overly eager to endorse an extreme and distinctly dangerous position in the course of his own maturing work. Schmitt demonstrated a certain urgency regarding the crisis in Germany that he felt his "decisionist" legal theory could address in a way that Kelsen and the positivists simply could not. After all, from Schmitt's point of view, legal positivism brought about the legal and political crisis in Germany by completely ignoring the problem of state origins, and the problem of sovereignty and the state of exception[88]; therefore, it also lacked an adequate understanding of the true force of law to remedy it.

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[86] Ibid., 20.
[87] Ibid., 20-21.
[88] Ibid., 16.

In 1921, Schmitt published *Die Diktatur* in Germany only months before *Political Theology* was released. *Die Diktatur* details Schmitt's early endorsements of the merits of a powerful and personified dictatorship that, he argues, forever haunts constitutional legality itself. This haunting is the ever-present possibility of dictatorship that stands behind the letter of the law as its guarantor, becoming active at the "boundary of law itself, the exception."[89] On the basis of a theory of dictatorship, Schmitt openly and ambitiously deemed his decisionist framework capable of saving the Weimar Republic from the challenges being delivered both from inside and outside of Germany at the time. As Schmitt wrote in *Die Diktatur*, the question of dictatorship has important repercussions for understanding the "essence" of law and decisive authority:

> A dictatorship therefore that does not have the purpose of making itself superfluous is a random despotism. Achieving a concrete success however means intervening in the causal path of events with means whose correctness lies solely in their purposiveness and is exclusively dependent upon a factual connection to the causal event itself. Dictatorship hence suspends that by which it is justified, the state of law, and imposes instead the rule of procedure interested exclusively in bringing about a concrete success [...: that is, a return to] the state of law.[90]

With a distinctly Leninist bent, Schmitt argues here that a return to "the state of law" is not protected by the internal coherence and objectivity of the legal sphere, or non-partisan "scholarship" as Kelsen proposed. This meant that jurisprudence is more than the distanced study of legal norms and should include a theorization of the realm of authority beyond any legal code. Schmitt proposed a theory that recognized the force of law as being protected by an indivisible and formal dictatorial power that retains the ability,

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[89] Kennedy, 84.
[90] Translated in McCormick, 124.

right, and force to intervene in the concrete realities of the world, even if this may entail the suspension of the legal norm in process.

For Schmitt, dictatorial exception is a worldly yet transcendent power operating beyond abstract legal norms. This makes, as Agamben claims, "the opposition between norm and decision [...] irreducible, in the sense that the decision can never be derived from the content of a norm without a remainder."[91] This means that the remnant of sovereign power retains the right and authority of decision over the limits or borders of the norm. And, more to the point, Schmitt himself was seriously concerned that the "bourgeois political literature either ignores the concept [of dictatorship] altogether or treats it as a kind of slogan to be used against opponents."[92] Schmitt, rebelling against the bourgeois politicos, was unwilling to take the instance of dictatorship lightly, due to its significance in the current crisis. Instead, he preferred to define it *conceptually* (or even formally) in relation to the concrete event, or what is better known in the literature today as "the state of exception" or the "state of emergency."

Schmitt makes an important distinction between two forms of dictatorship in *Die Diktatur.* The first reaches back to the classical Roman institution. The second was derived from the heated Marxist-Leninist debates following the 1917 Soviet Revolution and in the context of a resurgence of disputes regarding Marx's "dictatorship of the proletariat." Very basically, Schmitt distinguishes between *commissarial* and *sovereign* dictatorship in this text. Commissarial dictatorship, he argues, is the form of dictatorship that suspends a formerly founded legal order, albeit only temporarily, in order to regain its tradition of legitimate power and significance following a short-term incidence of

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[91] Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago, Illinois: The University of Chicago Press, 2005)., 36.
[92] McCormick, 1997, 124.

crisis. Sovereign dictatorship, on the other hand, is far reaching in scope and involves the indefinite suspension of a legal order in total. This suspension, however, is not necessarily performed in the service of reestablishing that formal order. The latter form of dictatorship founds a new constitutional order in the very act of suspending the "old" rule, since the sovereign creates new law with the decision to declare a state of emergency in the face of crisis, or the clear and present danger represented by an external enemy. In other words, there is no simple resumption of the old order at all, because the legal order has been fundamentally altered through the course of decision. Schmitt searches to sustain this distinction between the two forms of dictatorship in *Die Diktatur*. Yet, he changes his position in important ways less than a year later in *Political Theology*.[93] Why does the author change his position so significantly in the short time between the earlier and later publications?

In the earlier work, Schmitt is alarmed by the fact that it is only the Communists who get the problem of dictatorship partially "right," making their position far superior to that of the legal positivists, who, as we saw above, only attend to the concept of dictatorship and sovereignty by negating its central importance.[94] Schmitt argues that it is the Communists who properly interpret the technical and real need for sovereign dictatorship in the events of political crisis and turmoil. But, that said, even the communist theory of dictatorship fails to truly grasp the crux of the issue. For Schmitt, the main problematic is to understand that the dictators' relationship to the re-establishment of state law, order and tranquility following the emergency situation is an integral aspect of any sovereign power. For orthodox Communists who understand the

[93] Schmitt, 2005, 121.
[94] Ibid., 127.

state as an immediate expression of class interests, the bourgeois state must eventually "wither away" alongside the rise of the revolutionary proletariat. In Schmitt's assessment, and by contrast, the emergency situation is only ended *by the decisive state*, and therefore any dictatorship *must* eventually recognize and legitimize the rule of law (and consequently the state) for this reason. In short, without something like a state, there is no possibility of law and normalcy at all. McCormick in support of this reading argues that:

> The Communist doctrine of dictatorship, on the other hand, completely changes the relationship of normal and exceptional situation, and hence Communists inevitably and irreversibly transform the nature of dictatorship [...] [T]he Communists free themselves from the constraints of the rule of law associated with that standing order, as well as implicit in the classical constitutional notion of dictatorship, because their norm is no longer "positive constitutional" but rather "historical-political"; that is, dictatorship is now dependent on the yet-to-be-realized telos rather than a previously established constitutional order.[95]

Schmitt reservedly sides with the revolutionary force of Marxist dictatorial theory because at least it is able to recognize the liberal ignorance regarding the questions of the decision and state sovereignty. This means that according to Schmitt, the Communists would have been "entitled to overthrow the liberal state" should the opportunity have arisen due to the liberal failings to constitute an authentic politics.[96] That is to say that liberals only engage in politics to *neutralize decisive and real politics* – that is to "neutralize" the primacy of decision on state friend and enemies – as well as to disavow the importance of the real state of exception. Schmitt, however, does not stop here. He breaks with the theory of Communist dictatorship as early as his work on dictatorship,

[95] McCormick, 128.
[96] Ibid., 128.

arguing that the Communists legally allow *no ability whatsoever to reestablish the state* once it is suspended throughout the duration of crisis by dictatorial transcendent power. The Communist "dictatorship of the proletariat," then, fails to relinquish the state at all following the state of crisis, particularly given the rhetoric of state "withering". In Schmitt's view, the communists along with the economic-minded commit a continued "onslaught against the political." So, it is not only the withering away of the state that Schmitt rejects. He also rejects: 1) the reduction of politics to socio-economic concerns; and 2) the belief in a universal or international political subject, such as the proletariat who are united beyond state borders. As he writes more fully:

> Today nothing is more modern than the onslaught against the political. American financers, industrial technicians, Marxist socialists, and anarchic-syndicalist revolutionaries unite in demanding that the biased rule of politics over unbiased economic management be done away with. There must no longer be political problems, only organizational-technical and economic sociological tasks.[97]

For the conservative-thinking Schmitt, recognizing the real historical importance "to oppose a state based on discussion with one based on decision,"[98] these were unfeasible and neutralized positions, which either attempted to dissolve the politically decisive state in permanent dictatorship, or left no alternative other than economic capitalist tyranny characteristic of the modern technical state in the United States, for example. Thus, Schmitt continued to express the need for a realization of the *telos* of the state that remains distinctly possible beyond the horizon of dictatorship. Schmitt writes,

> Principally now an exclusive technical interest exists in state and political matters such that legal considerations are in the same way inappropriate and contradictory to the matter at hand. The

[97] Schmitt, 2005, 65.
[98] Carl Schmitt, "The Unknown Donoso Cortes," *Telos* Fall 2002, no. 125 (2002)., 85.

> absolutist-technical state conception [...] has no interest in law but rather only in the expediency of state functioning, specifically, the single executive who requires no legal norm to proceed.[99]

Schmitt's theory of the state is a subtle theoretical intervention that attempts to set itself apart from the revolutionary anarchists and communists *and* the economic minded liberal democrats in the postwar climate. Schmitt sought out a new articulation between dictatorship and law, and between state and politics. He was at pains in *Die Diktatur* to maintain a theory of law that relies upon the periodical leadership of a dictator. Subsequently, in *Political Theology*, Schmitt continued along a similar trajectory to develop a distinct theory of sovereign power, able to found a new formulation of dictatorship not confined to either Marxist or liberal definitions of legitimate state power. However, we still must ask: what remains of the relationship between state sovereignty and law and politics in Schmitt's theory of power as it developed, and how does he attempt to lend a sense of legitimacy to this identity? For an answer to these inquiries we must once again turn in detail to Schmitt's *Political Theology* which will provide a line of response. As we shall see, there always remains an ambiguous and irreparably unstable relationship between the state and the political in Schmitt's work.

Re-Thinking Political Theology

The liberal legal positivists had no justification to suspend the constitutional legality in times of crisis, because of the negation of the question of sovereignty. Schmitt's theory of sovereign dictatorship, by contrast, had a definite justification and response: in times of crisis, he who acts, and who decides to save the legitimacy and

[99] Schmitt quoted in McCormick, 132.

force of the state is sovereign. In *Political Theology* Schmitt no longer made a distinction between commissarial and sovereign dictatorship. This was because at this point precisely he decided "only the sovereign [...] and not the commissarial dictator [...] may decide and declare a state of exception."[100] In other words, he who decides that a concrete state of exception exists, and what must be done to alleviate it, is the indivisible sovereign power.

Because of the extensive "concrete" transformations Schmitt witnessed in Europe throughout the time, including the rise of Mussolini in 1922 and the rapid modernization of Stalin's USSR following the revolution, Schmitt's thinking *beyond* the decisionist paradigm is not outlined in any sustained detail in his early work in *Political Theology*. As we have already seen, Schmitt was still defining the "sovereign decision" as a law founding and dictatorial intervening force capable of upholding the founding authority of the state. In the works written in 1923, as I will address in the next chapter, Schmitt inaugurated the long process of rethinking his own decisionism, in the course of developing of a theory of politics capable of accounting for the contemporary "concrete" transformations in Europe throughout the nineteenth and twentieth centuries.

For example, writing from the vantage point of 1929, in "The Age of Neutralizations and Depoliticizations," Schmitt explained that a thorough examination of the nineteenth century was fundamental towards a clear understanding of the threats that Europe faced following the First World War. He was concerned at this time not only with a depoliticized form of liberalism in Europe, but also the threat that the Soviets represented as an emerging economic *and* revolutionary force to the East. For Schmitt, the Russians took the reigning forms of liberal economics of the nineteenth century

[100] Schwab, 44.

Europe very seriously, and made the course of contemporary political affairs in Europe appear to be on the hegemonic decline. For these reasons, Schmitt argues that:

> The Russians have taken the European 19th century at its word, understood its core ideas and drawn the ultimate conclusions from its cultural premises. We always live in the eye of the more radical brother, who compels us to draw the practical conclusions and pursue it to the end. Aside from foreign and domestic policy prognoses, one thing is certain: that the anti-religion of technicity has been put into practice on Russian soil, that there a state arose which is more intensely statist than any ruled by the absolute princes -- Philip II, Louis XIV or Frederick the Great. Our present situation can be understood only as the consequence of the last centuries of European development; it completes and transcends specific European ideas and demonstrates in one enormous climax the core of modern European history.[101]

Russia's ability to take "the European 19th century at its word" signified that the country could potentially advance beyond that of European political development. In this way, Schmitt was gravely concerned that Russia threatened to surpass its teacher Europe. Still, this passage also signifies to the always Euro-centric Schmitt, Russia's potentially superior form of economic liberalism because of its development of a strong state alongside an allowance for some liberal freedoms. At the time, he feared that Russia would master both sides of the equation: that is, post-revolutionary Russia had an impending potential to trump even European superiority.

As discussed above, Schmitt always admired political forms that recognized both the necessity of the strong state, yet also allowed for times of legality, normalcy, including some support for freedoms, or "constituent power," which he defined in 1928 as "the political will whose power or authority is capable of adopting the concrete global

[101] Schmitt, 1996a.

decision on the mode and form of political existence."[102] In this regard, and by the late 1920s at least:

> Schmitt, in his *Verfassungslehre* [published in 1928], designated the people as a legitimate subject of constituent power and rejected the monarchical conception that legitimated the German constitution of 1871. After all it was the decision of the people that had given birth to the Weimar constitution [...] Constituent power *qua* sovereign transcended the constitution; the manner of its activity could not be prescribed constitutionally. Only when the decision of a sovereign people had been expressed could one strive to regulate its formulation and execution.[103]

In the immediate context, Schmitt devoutly felt that Weimar had the potential to make a clean break with the legal positivism of the Empire because, "in contrast to the Constitution of the Empire of 1871, which in its preamble had derived legitimacy from the monarchs and government of the individual states, the Weimar Constitution referred to the German people in its totality."[104] For Schmitt, this reference to the constituent people in the constitution contained an important rupture. If Weimar could find the strength to found a *truly representative sovereign politics*, at the concrete representational level between the sovereign and the people, and one that could create order out of the chaos of pluralist radical demands, then it also had an opportunity to begin afresh by founding a new state not ignorant of the real state of things, or the nature of the political "people" as such. Thus, from this point forward, when Schmitt mentions "the Sovereign" he means it in a fully real and performative sense: substantially, the Sovereign is he who makes a particular decision to intervene and restore "the normal," and, that is, *order*. This restoration of order is a new and abrupt foundation of the political State. So, the

[102] Schmitt translated and quoted in Cristi, 120.
[103] Ibid., 121.
[104] Jacobson and Schlink, 9.

sovereign can now be representative of "the people" as some form of a concrete (and not abstract) totality.

It should be understood that Schmitt is primarily speaking here to the immediate context in Germany given the "Machiavellian idealism of Versailles,"[105] which quite obviously favored the decisive declaration of "peace" at the hands of the Allied powers. He understood these international terms as externally based sovereign decisions deeply affecting the fate of Germany, but these decision were not, in fact, willed by the German people. In his 1925 *The Status Quo and The Peace* Schmitt directly addressed the sphere of international politics and the Versailles Treaty. "But stabilization of the present situation," Schmitt writes:

> would stabilize precisely this unsatisfactory, wholly unstable situation; and the result would be that, through artificial perpetuation and legalization, one achieves not calm and peace, but new conflicts, a new sharpening of contradictions and perpetuation of the lack of stability. A dangerous, perhaps deadly cycle for entire peoples! [...] We are told that a guarantee of the status quo is peace. Certainly, peace, even *the* peace, the peace of Versailles. A status quo stabilized on this basis is as problematic as peace itself. Here, too, one sees the wealth of internal inconsistencies that today dominate Europe's political and moral condition.[106]

What concerned Schmitt throughout the duration of the 1920s was the inability of the German state to steer its own course.[107] For Schmitt, the usual suspects were to blame for the weak form of state: the legal positivist impotent response to emergency only fed the

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[105] Tracy B. Strong, *Friedrich Nietzsche and the Politics of Transfiguration, Expanded Edition* (London, England: University of California Press, 1988)., 20.
[106] Carl Schmitt, 1925 "*The Status Quo and Peace.*" In Jacobson and Schlink, 293. Emphasis in original.
[107] Jacobson and Schlink convincingly argue that since "the German state, by contrast [to the American state], precedes the constitution [...] the law of the state was in crisis in Weimar. It was in crisis because the state was in crisis for all but a brief period from the inception of the Weimar Republic in 1919 until its demise in 1933.," 1.

fire of further strife, resulting from its aims towards an objective and depoliticized theory of law. At the theoretical level, as Schmitt frankly states in *Political Theology*:

> All law is 'situational law.' The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision. Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide.[108]

Schmitt only begins the long process to enunciate the need for a *personified* understanding of state power and legal authority in these texts. In this sense, he began to follow more closely in the theory of the charismatic leader contained in the political thought of Max Weber. Yet, on the basis of his own political claims, and in his ongoing polemic with liberal-leaning thinkers, Schmitt was at pains to show that his decisionist framework would retain the power, through its radical invocation of personified dictatorship, to save the Weimar Republic, while still retaining a certain notion of the rule of law and of the state. This appears to have been no easy task even for the impressive intellect of Schmitt, who is widely understood to have "demonstrated a remarkable capacity of accommodation" throughout his career.[109]

As we shall see below, for the rather complex reasons outlined above, attempting to find the basis for a personified idea of a truly representative state, in 1923 Schmitt moved towards a difficult institutional mode of thinking that revised his theory of "decisionist" sovereignty. He did so because the objectivity thesis pursued by Kelsen et. al. left only powerless leaders devoid of important existential considerations of what it concretely means to *act politically,* because "whether one has confidence and hope that

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[108] Schmitt, 2005, 13.
[109] Translator's introduction to Carl Schmitt, *Political Romanticism*, trans. Guy Oakes (Cambridge, Massachusetts: The MIT Press, 1986)., viii.

[the extreme situation] can be eliminated depends on philosophic, especially philosophical-historical or metaphysical, convictions."[110]

In the final analysis, it is not the technocratic state machinery that is capable of engaging in the concrete decisions of politics, or to recognize the threatening reality of the state of exception. Rather, it is only those political actors invested in sovereign institutions and engaged in *this world*, meaning those who understand "the philosophical-historical or metaphysical" significances attached to their actions in concrete realities. As we saw in the previous chapter with reference to Strauss, Schmitt's attack on norms cannot eliminate his conviction that "serious" human relations must be political (not just "entertainment"), and that these kinds of "serious" political relations are better – and, that is, normatively "good" actions and decisions.[111] For Schmitt, decision in this world cannot be completely grounded in or reduced to the orders of norms and facts, but only (paradoxically, perhaps) in history, philosophy, and, ultimately, in metaphysical convictions about the real state of politics in the world.

[110] Schmitt, 2005, 7.
[111] Strauss in Schmitt 1996b, 100-1.

Chapter 2: The Turn to Concrete Order Thinking

Because Schmitt was radically opposed to any immanent form of individualism, he was now forced to reconsider the previous full-fledged endorsement of the decisionist paradigm of thought. For this reason, in a late preface written for *Political Theology* in 1933, Schmitt provides a key reinterpretation of his text, given the further extenuation of his thinking and changes in the concrete state of affairs – that is, given the rise of the personality politics of Mussolini, Stalin, and Hitler in the 1920s. However, even as early as 1923, we can see that Schmitt began to consider the political a triad – state, movement, people – or what he called "institutional legal thinking."[112] The outstanding feature of this thinking is that laws and not men govern. To be certain, this is a theory of law and politics that is very different from individual-oriented liberalism, but also constitutes a substantial break with the dictatorial paradigm outlined above. In this chapter, I conduct an analysis of two major texts Schmitt published only months apart in 1923: *The Crisis of Parliamentary Democracy*[113] and *Roman Catholicism and Political Form.*[114] Taken together, these texts attempt a radical politicization of parliamentary republicanism, to show that the history of parliament is not necessarily connected with democracy, and a legitimation of Roman Catholicism's historical development of political representation and universalism. As we shall see, and as Cristi correctly notes: "Schmitt realized [in *Roman Catholicism and Political Form*] that the universalism that the Church inherited from Roman imperialism allowed it to accommodate its solemn course through history in

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[112] Schwab, 120; See also: Carl Schmitt, *On Three Types of Juridical Thought,* trans. Joseph W. Bendersky (Westport, CT: Greenwood Press, 2004).
[113] Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (Cambridge, Mass.: MIT Press, 1985).
[114] Carl Schmitt, *Roman Catholicism and Political Form*, ed. George Schwab, trans. G.L. Ulmen, vol. 380, *Contributions in Political Science* (Westport, Connecticut: Greenwood Press, 1996).

the face of continually changing circumstances. Retaining its own constitution unaltered, it adapted to various state and government forms."[115] The central focus in what follows is to develop a basic outline of the theory of political representation Schmitt proposes within these works.

George Schwab argues that during the time of Hitler's "conquest of power" in the mid to late twenties, Schmitt came to reconsider his decisionist paradigm in light of changes in the "concrete" state of affairs.[116] Schwab, an important Schmitt expert and early translator of his works, proposes that at least by 1928 it became evident to the German theorist "that his purely decisionist approach was insufficient, and therefore he began then to explore the possibilities of establishing a legal system based on concrete orders."[117] I am proposing in this chapter that Schmitt began to question his own decisionism already by 1923, in the two works discussed in this chapter. I insist that making this distinction is not an empty gesture or scholastic posture. Rather, I suggest it is important to direct critical attention towards these "intervening" works (between the more widely read and cited *Political Theology* and *The Concept of the Political*) on parliamentary democracy and the Catholic Church. These works, typically thought of as a mere bridge between two distinct points in Schmitt's career, actually stand on their own independently, and may even provide some of Schmitt's most important insights for addressing the contemporary political situation.

A close reading of these texts reveals the deep rupture in Schmitt's work and thinking at this time. If politics basically amounts to sovereign "real possibility" of

[115] Cristi, 90.
[116] Schwab, 115.
[117] Ibid., 115.

making distinctions between friends and enemies, which Schmitt would clearly declare for the first time in the article *The Concept of the Political* in 1927, he decided already by 1923 that this political possibility somehow exists within the confines of institutional-legal "decision" as well. Along the lines of an analysis of forms of political representation, Schmitt set for himself the task in 1923 to somehow separate his diagnosis of mechanistic, technocratic politics, or those animated by the liberalism in his day, to that of genuinely sovereign *and* institutional form of decision-making somehow able to approximate a "Catholic theory of representation."[118] The authentic theory of representation that Schmitt now sees as constitutive of sovereignty is outlined here with great attention to historical detail, and involves two distinct forms of political rationality. These works from 1923 are experimental and transitional texts, which flirt on the edges of absolute nihilism, where nothing of legitimacy remains, while simultaneously attempting to outline a *positive* basis for legitimate political and institutional order. I want to propose that, far from rendering them inconsequential or confused, this very ambiguity constitutes the strength of these texts. Here Schmitt mingles together two conceptions of the theory of political decision he elsewhere tries to keep separate. But a genuinely political decision may rely on precisely this uncertainty. In short, Schmitt thought institutional legality *and* legitimacy was possible by breaking with the earlier theory of dictatorship and through a theorization of "concrete order thinking."

The Crisis of Parliamentary Democracy

In 1925, legal scholar Richard Thoma, in his review of *The Crisis of Parliamentary Democracy*, argued that Schmitt lacked "precision" and even "a coherent

[118] Ibid., 185.

perspective" in the work. This critique is still incisive and amongst the strongest enunciated regarding the speculative text. "[P]erhaps Carl Schmitt is in danger," he wrote, "of overemphasizing the literary appearance of things and is not always conscious that theoretical justifications for political institutions must be accepted with caution."[119] Contending that Schmitt became overly hasty in an unrestrained ideological attack on the institution of modern parliament, Thoma distanced himself from the ideological thrust of the book, while simultaneously recognizing it as a "very remarkable recent study."[120] In his review of the book, Thoma attempted to connect Schmitt's theory of dictatorship to the rise of Italian Fascism in 1922. He quite obviously found affinities between Schmitt's early writings on dictatorship and Mussolini's rise to power in the same year. Thoma concluded that Schmitt's analysis of the parliamentary tradition lacks "a coherent perspective" and "ends in a muddle" because it is too focused on absolute articulations of power, including Mussolini's authoritarianism on the one hand, and Sorel's theory of mythic proletarian violence on the other.[121] This type of ambiguous judgment regarding the significance of Schmitt's work – as Thoma put it, in which "happy agreement and a negative critique very nearly counterbalance each other"[122] – was not unusual at the time, and in many circles remains the crux of debate today.[123] There are many critics since the 1980s who have made lasting careers out of denouncing Schmitt's work for the most

[119] Thoma quoted in Schmitt, 1985, 80.
[120] Ibid., 80.
[121] Schmitt, 1985, 79.
[122] Ibid., 78.
[123] One contemporary example of this is Peter Hallward. Hallward is not equivocal when expressing his low regard for Schmitt's mature work, which he argues proves to justify the European "exclusion of others." As Hallward summarizes his article: "[w]hat follows will argue that little of substance should be salvaged from Schmitt's profoundly reactionary analysis before moving on to consider a number of alternative paths out and away from a neo-Schmittean understanding of our present situation." Hallward, 237.

part;[124] while there are those who attempt to retain specific aspects of it, especially his early decisionist criticisms of the relativist tendencies in modern liberalism.[125] Among these, in the next chapter, we shall look at Giorgio Agamben's controversial invocations of Schmitt.

The contemporary commentator Renato Cristi is one such scholar who finds grave shortcomings in Schmitt's most conservative assumptions. However, he has productively resisted the urge to reject it outright. Instead, he has sought to reexamine Schmitt in relation to both a resurgence of interest in conservative thought across Europe and North America, as well as the concern to "generate the antibodies needed to forestall the rise of anti-democratic liberalism in Canada and the United States," considering the work of Peter Caldwell, David Dyzenhaus, Stephen Holmes, John McCormick, William Sheuerman and Richard Wolin, [126] to most of whom I refer in this thesis.

In his influential *Carl Schmitt and Authoritarian Liberalism,* Cristi argues that, since his war writings in *Political Romanticism* (1918) and following the German Revolution, Schmitt was concerned with erecting *both* a strong state and a vibrant civil society, a combination that Schmitt felt war-time Europe was willing to forgo:

> The intellectual task attempted by Schmitt immediately after the publication of *Political Romanticism* and prior to 1923, was a bid to reassert the juridical validity of notions such as sovereignty, authority and dictatorship. These non-romantic notions were needed to strengthen the state and keep it from drowning in the vortex of civil society. The rise of liberalism had

[124] Edwards, 170; On Leo Strauss's relation to the "Schmittean" critique of liberalism see: Robert Howse, *Leo Strauss- Man of War? Straussianism, Iraq, and the NeoCons,* Unpublished manuscript, but found online at: http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/straussiraq.pdf, 11.
[125] Howse, 11; Robert Howse in Dyzenhaus, 56.
[126] Cristi, 3.

> depoliticized public discourse to such an extent that the real nature of the state had been obfuscated.[127]

In Cristi's reading, Schmitt understood liberalism as being enabled or determined by the the sovereign exception and that "sovereignty only attained visibility in exceptional situations."[128] Even beyond this, however, Schmitt introduced throughout the extent of his Weimar writings "the plea for a strong state" that could protect itself against ongoing concrete states of emergency but also allow for the normalizing capacities of the political state.[129] Cristi contends that, for Schmitt, the liberalism at play in Weimar ignored its roots in political and juridical struggle in the writings of Bentham, Guizot, de Tocqueville and Mill, by seeking to erase or separate itself from the history of political gains the institution had made against Divine Right in the nineteenth century. So, as controversial as it might be, Cristi argues that Schmitt actually sought to *strengthen* the institution of parliament by locating and critiquing its historical foundation and tradition of ideals, rather than giving it a destructive Nietzschean "final push" on its fated way down. The latter reading, by not recognizing the distinct break Schmitt made from his advocacy of dictatorship a couple of years earlier, is mistaken because it too readily ignores the difficult content found in the texts of 1923. If one reads these texts in their entirety, it is not difficult to demonstrate that Schmitt had already broken with the thinking at this time on dictatorship in both *Die Diktatur* and *Political Theology.* By 1923, Schmitt was not speaking of dictatorship, or at least not in the same way. He was now speaking primarily of the substance of authority and political representation.

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[127] Ibid., 63.
[128] Ibid., 109.
[129] Ibid., 74.

We can find evidence of this turn in Schmitt's response to Thoma's criticisms. Mentioning his critic the "leading jurist" Thoma, Schmitt rebutted that in *The Crisis of Parliamentary Democracy* his intention was to set the stage for a serious political discussion. But this was a discussion with which his partisan critics were reluctant to participate: "A calm and factual debate," Schmitt wrote, "that distances itself from all party-political exploitation, and serves as propaganda for no one, might appear impractical, naïve, and anachronistic to most people today [...] Perhaps the age of discussion is coming to an end afterall."[130]

Notwithstanding the most obvious ambiguities in these texts, which Thoma's remarks clearly discern, Schmitt does outline in detail two distinct forms of institutional political representation, each of which holds the promise of reaching deeply into the core of his enduring political ontology. Although it is clear that the author was uncertain of many things in these texts, such as what his new theory and definition of the political would positively resemble (keeping in mind that the friend-enemy distinction was not formally introduced until 1927 in the article *The Concept of the Political*), Schmitt was already specifying in detail what would become his most lasting understandings of desirable forms of sovereignty and political representation. It is clear that for Schmitt, at this point, "the political" has at least something to do with specific political forms of institutional sovereignty, which he found in the embodied history of the Catholic Church, and hardly at all in parliament given the current "crisis" of parliamentary democracy he continued to bemoan.

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[130] Schmitt, 1985, 1.

Roman Catholicism and Political Form

By looking in detail at *Roman Catholicism and Political Form*, we can see that Schmitt at this point exactly begins to outline an institutional form of thinking about political representation and law, which marks a break with his earlier theorizations of dictatorship in the two works discussed in the previous chapters. This really is the first time in his career to this point that Schmitt identifies and advocates for a particular institution in his continually evolving definition of the political and of sovereignty. That is, unless, of course, one counts "dictatorship" as an institution, which I believe we should not.[131]

Schmitt, in both of these works, wants to rescue *democracy* from a strict identification with *liberalism*, as in the common trope "liberal-democracy." He searches to do so within the confines of the autonomous institutional authority and "papal infallibility" of the Catholic Church. To Schmitt's dismay without doubt, liberalism and democracy became wrapped up and conceptually intertwined with one another throughout the nineteenth century in the struggle against the eternal return of Divine Right. The Catholic Church is certainly not a dictatorship, but its formal hierarchical structure, and connection to the Divine was not lost on Schmitt. He found that, throughout the nineteenth century most crucially, the Church was able to resist the relativization of politics, including the loss of decisive authority and a representational connection to the Divine. In short, he felt the Church maintained its traditional structure, even in the face of widespread individualism, political romanticism and the technical rationalization of the political throughout the century. Perhaps due to his early leanings

[131] As I addressed in the previous chapter, dictatorship is a sovereign figure that stands beyond an institution. It is not an institution in itself.

towards an advocacy for dictatorship, Schmitt did not understand hierarchical institutions to be necessarily "anti-democratic." Democracy, for Schmitt, means that some authority represents "the people" as a totality, or "the general will," as Rousseau calls it. He viewed Catholic claims to authority to be very compelling in long historical terms, because the Church had been successful at synthesizing opposing political forces into enduring forms of political unity and force. He felt this to be the case even in the face of Catholic repression surfacing in Germany at least by 1871 with the birth of the largely Protestant German Empire.

Schmitt found strength in the "*Complexio Oppositorum*, a complex of opposites" in the Catholic Church. As opposed to parliament to be sure, the Church represented a strong and sober political force in his 1923 writings, and one that he uses as an exemplary representational institution.[132] At this point, Schmitt held that the Roman Catholic Church maintained a connection to justice that other modern and instrumental forms only envied from a distance:

> In the proud history of the Roman Church, the ethos of its own power stands side by side with the ethos of justice. It is even enhanced by the Church's prestige, glory, and honor. The Church commands recognition as the Bride of Christ; it represents Christ reigning, ruling and conquering. Its claim to prestige and honor rests on the eminent idea of representation; it engenders the eternal opposition of justice and beauty. The antagonism is inherent in the general condition of human nature, though pious Christians view it as a peculiar form of an even more peculiar malice. The great betrayal laid to the Catholic Church is that it does not conceive Christianity as a private matter, something wholly and inwardly spiritual [as in Protestantism], but rather has given it form as a visible institution.[133]

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[132] Balakrishnan, 53.
[133] Schmitt, 1996c, 31.

Schmitt held that the ethos of the Catholic Church, as a complex and positive social institution, developed a historical and politically sophisticated ability to synthesize opposing political forces and struggles, because "there appears to be no antithesis it does not embrace."[134] Moreover, these are antitheses the bourgeois subject tries to depoliticize by evading "decision and fix[ing] their attention on endless parliamentary discussions and debates in the press."[135] The universal *complexio oppositorum* of the Church, on the contrary, much like the long-standing Roman and British Empires, proved to realize successful political forms because it found the vital ability to control even opposed political forces, and to do so while protecting its own political sovereignty and principled integrity connected to the "Idea" of authority and Justice. Even though the "limitless opportunism" and "elasticity" of parliament in the nineteenth century had changed the face of politics forever, nevertheless "the power of Catholicism" remained a principled force of universalism, carried over from the Roman Empire for the most part.[136] Schmitt writes, for example, that "from the standpoint of the political idea of Catholicism,"

> the essence of the Roman-Catholic *complexio oppositorum* lies in a specific, formal superiority over the matter of human life such that no other imperium has ever known. It has succeeded in constituting a sustaining configuration of historical and social reality that, despite its formal character, retains its concrete existence at once vital and yet rational to the *n*th degree. This formal character of Roman Catholicism is based on a strong realization of the principle of representation, the particularity of which is most evident in its antithesis to the economic-technical thinking dominant today.[137]

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[134] Ibid, 7.
[135] Cristi, 72.
[136] Schmitt, 1996c, 4-5.
[137] Ibid., 8.

Even making reference to gender dynamics (albeit essentializing ones), which he rarely does, Schmitt goes so far as to argue that the Church became the arbitrating master of gender synthesis: combining "the manly ability to resist and womanly compliance – a curious mixture of arrogance and humility" Catholics such as the Spaniards, Poles, and the Irish "have Catholicism to thank for a large part of their national strength of resistance."[138] As odd as it might be to claim that Catholic universalism is to thank for these nationalistic movements, Schmitt argues that the strength of resistance is at least in part connected to a specific relation to "soil" – that is, it is telluric – because, as opposed to the industrial urbanized Protestants, Schmitt claims Catholics "are mostly agricultural peoples who know no large industry."[139]

Retaining this characteristic longing for soil and an always-already-lost homeland – a mourning practice which Protestants necessarily fail to understand – "probably" most emigrants, he writes, who yearn for a return to a connection with "mother earth," and who do not understand "nature and spirit, nature and intellect, nature and art, nature and machine" as legitimate dualisms, have been Catholic.[140] This spirit of both resistance and compliance was accomplished due to the *complexio oppositorum* inspired by their guidance under the representational structure of the Church. The latter political form, Schmitt contends, helped disparate Roman Catholic peoples around the globe to understand that the Protestant binaries are not legitimate or singular dualities at all. Because it was able to resist the synthesizing modality of capitalism and its ensuing economization of the world, the Catholic Church as a specific institution "must consist in something more" than Protestantism because it had been able to stand the test of time

[138] Ibid., 6.
[139] Ibid., 10.
[140] Ibid., 11.

against the instrumentalization of politics. Schmitt insists that this includes an avoidance of a methodological fixation on the "exact" sciences. As such, against the scientific rationalism and the "natural-technical sciences,"

> Catholics are profoundly dissatisfied with established apologetics, which appear to many as sophistry and forms without content. But all this misses the essential point, because it identifies rationalism with the thinking of the natural sciences and overlooks the fact that Catholic argumentation is based on a particular mode of thinking whose method of proof is a specific juridical logic and whose focus of interest is the normative guidance of human social life.[141]

My argument here is that this "normative guidance of human social life" constitutes Schmitt's 1923-revised definition of authentic sovereign representation. For the reasons detailed above, Schmitt does not see Catholic political form as suggesting an "abstract" form of sovereignty or one that presupposes the order and harmony of the people. On the contrary, Roman Catholicism is a *political formulation of institutional sovereignty* that recognizes the concrete nature of the people it seeks to represent. That is to say, if Catholic modes of political representation seek formally to unify substantial "complex of opposites," then parliamentary, or at least democratic, modes of representation assume the unity of a "general will" precedes them, and seek only to represent, not to constitute, that prior social unity. If the former understands politics to involve, at least in part, the active constitution of a provisional social entity, the latter claims transparently to "represent" an already existing, substantial and unalterable, social unity. If we can find ways to detach Schmitt's conservative commitment to the Catholic Church and its institutions, the first conception of political representation might be seen to provide more effective resources for contemporary, renewed theories of democratic or radical

[141] Ibid., 12.

democratic political practices. Indeed, it might be seen to resolve, or at least address, the "crisis of parliamentary democracy" Schmitt so convincingly identified – a crisis that doubtless remains with us today.

Turning now to Schmitt's critique of parliamentary democracy, we will see that his analysis seeks to challenge liberalism's assumption of the homogeneity and passivity of "the people." In the context of our argument, Schmitt argues that liberalism as a metaphysical political form seeks to dangerously fuse the state and the people into a direct and inseparable identity.

Modern Parliament: The "Inauthentic" Form of Representation

In *The Crisis of Parliamentary Democracy,* Schmitt accomplishes something different from his writings on the Catholic Church. His writings in this text are negative and pessimistic. His claim is that parliamentary democracy is an inauthentic form of political representation that supposes the people to be a sutured totality.

In this text Schmitt provides a radical critique of the rational-technical form of politics operating in the *Rechtstag*, at least following the establishment of the Weimar Republic. This form, Schmitt proposes, focusing on primarily abstract senses of openness and discussion in the house of parliament, is problematic because it operates under the commonsensical utilitarian principle stating that it is better to get along with others than to "quarrel" continuously. As Schmitt writes: "people know that it is better most of the time to tolerate one another than to quarrel and that a thin settlement is better than a thick lawsuit. That is without doubt true, but it is not a principle of a specific kind of state or

form of government."[142] According to Schmitt's deep historical reading, the problem with this parliamentary governing theory, aimed towards "toleration," is that it ignores the enduring problems of state form and stability in exchange for political expediency and the immediate resolution of conflicting interests. Moreover, operating under the rubric of politics, this neutral or non-political politic is actually predicated on a series of "compromises and coalitions" in which "[a]rgument in the real sense that is characteristic for genuine discussion ceases."[143]

This disavowal of "genuine" discussion, however, is not to say that liberalism is not a politics in Schmitt's view. Rather, at this point exactly, he understands liberalism as a very specific metaphysical form of representation that operates as though its activity is non-political or neutral.[144] We can see that *The Crisis* set the ground-work for many of the conclusions he developed in the much more widely read *The Concept of the Political.* In the former, however, Schmitt was already radically challenging the very liberal premise, which suggests that "parliamentary-democracy" is a self-assuredly legitimate and specifically democratic identity. What is the significance of the relationship between "parliament" and "democracy" and how is it that these singularities became so closely connected in European social and political thought?

As Schmitt explained in the defense of *The Crisis*, he felt that political concepts were topics of debate *par excellence.* In a consistently polemical tone, Schmitt addressed the line of historical development of parliamentary thought, beginning with the roots of Rousseau's *Social Contract*, which he contends started the historical trend of identifying conceptual singularities so that "democracy, liberalism, individualism, and rationalism,

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[142] Schmitt, 1985, 6.
[143] Ibid., 6.
[144] McCormick, 43.

all of which are used in connection with modern parliament" become bound with one another.[145] For Schmitt, there was something deeply suspicious concerning the prevailing modern *inability* to define democracy conceptually in any clear sense, independent of the liberal tradition of rights-based individualism, but also of the economic "critique of politics." Once Schmitt looks closely at the concrete formation of parliamentarianism, he observes that, "for an abstract logic it really makes no difference whether one identifies the will of the majority or the will of the minority with the will of the people if it can never be the absolutely unanimous will of all citizens (including those not eligible to vote)."[146] Schmitt argues that the crisis of parliamentary democracy had resulted from imprecise conceptual definitions of democracy that did not recognize the *separation* between different concepts. "A series of identities," as Schmitt writes, always remains incomplete between:

> governed and governing, sovereign and subject, the identity of the subject and object of state authority, the identity of the people with their representatives in parliament, the identity of the state and the current voting population, the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws) [...] They can never reach an absolute, direct identity that is actually present at every moment. A distance always remains between real equality and the results of identification.[147]

Likewise, in the chapter "On the Contradiction between Parliamentarism and Democracy", Schmitt write that this "distance" also exists between definitions of the political and democracy beyond an abstract understanding of "equality". Equality of the people, he argues, is a category of democracy that must be accorded "its value and

[145] Ibid., 21.
[146] Ibid., 26.
[147] Ibid, 27.

substance." This is done by recognizing "equality" with reference to its opposite, or "inequality" as such. Schmitt writes that:

> Until now there has never been a democracy that did not recognize the concept "foreign" and that could have realized the equality of all men. If one were serious about a democracy of mankind and really wanted to make every person the equal politically of every other person, then that would be an equality in which every person took part as a consequence of birth or age and nothing else. *Equality would have been robbed of its value and substance*, because the specific meaning that it has as political equality, economic equality, and so forth – in short as equality in a particular sphere – would have been taken away. Every sphere has it specific equality and inequalities in fact.[148]

That is to say, according to Schmitt, all forms of political equality rely on, or presuppose, political inequality. Or, to import the language of Schmitt's later work into this discussion, the identification of "friends" requires the designation of "enemies."

Searching desperately to find the singular concept of democracy, and to enunciate a radical challenge to the political universalism contained in parliamentary democratic theory, Schmitt displayed a strong sense of urgency as he tugged at the heart stings of modern parliamentarism as a legitimate, political institution. As we have already seen, Schmitt railed against its self-assurance and deficiencies as a reigning political ideology. One additional example is in order. He writes:

> *Every sphere has its specific equality and inequalities in fact.* However great an injustice it would be not to respect the human worth of every individual, it would nevertheless be an irresponsible stupidity, leading to the worst chaos, and therefore to even worse injustice, if the specific characteristics of various spheres were not recognized. In the domain of the political, people do not face each other as abstractions, but as politically interested and politically determined persons,

[148] Ibid., 11. Emphasis added.

> as citizens, governors or governed, politically allied or opponents – in any case, therefore, in political categories.[149]

Schmitt's claim is that the parliamentarians do not readily admit that they govern not "things", but "life." And, therefore, they attempt to deny the political character of their work. Likewise, McCormick argues that Schmitt, heavily influenced by Max Weber in the 1920s, proposed a radical distinction between the spheres of "matter" and "life." McCormick writes: "The economic-technical rationality that is characteristic of modernity maintains rules that pertain not to people as such but to objects in a scheme of production and consumption – mere 'matter.'"[150] For Schmitt, there is a difference between rules that govern human behaviour and those that deal with the inanimate, that which is without life.[151] This is an important aspect of Schmitt's work to keep in mind. Schmitt worried that depoliticized liberalism was extremely dangerous because it proposed to speak on behalf of a homogeneous and pacified people, and to do so without respecting and simultaneously problematizing the difficulties of its form of representation or communication between state and people. For this reason, a rational-technical "propaganda apparatus" remains in the guise of parliamentary procedure, where politicians, political actors, and interest groups become "social or economic power-groups calculating their mutual interest," and their friends' interest, in accordance with the supposed direct representation of the whole people.[152] This does not, however, arrive at any clear understanding of the truly foundational aspects of the political authority, or even the autonomy of "the political" as an independent ontological sphere. For Schmitt, genuine political representation ensures the ongoing stability and perseverance of the

[149] Ibid., 11. Emphasis added.
[150] McCormick, 43.
[151] Ibid., 43.
[152] Schmitt, 1985, 12.

state against the constant and unruly challenges of pluralism. Parliament, then, itself takes "openness" as "an absolute value" in itself and leaves the problems of state stability unexamined because "[t]he openness of political life seems to be right and good just because of its openness."[153]

In short, Schmitt's argument is that the modern theory of parliament bases itself fundamentally on openness and free discussion. Thus, in the long historical genealogy of the institution, commentators have come to the consensus that parliament is therefore an official space that emerged through the rationalism of the Enlightenment via the later philosophies of Kant, Bentham, and Mill, among many others, in which politicians debate and discuss the issues in a "balanced" fashion, while representing the people "through freedom of speech, freedom of the press, freedom of assembly, and parliamentary immunities."[154] Parliamentary politics, then, bases itself on the same ideology as "freedom of opinion in liberal thought."[155] Schmitt's major criticism of liberalism in this line of argument is that it does not respect the separation between the people and the party, the party and state, or the political and other registers or spheres of human thought and action. This is why liberalism, or rather "liberal-democracy," is an "inauthentic" and even dangerous form of representation: it ignores "the gap" between the state and the people and, therefore, does not recognize the ambiguous and unstable *political* relationship between them.

In *Roman Catholicism*, Schmitt shows that ultimately it was "law" itself that was deeply affected by these liberal transformations of instrumental conceptions of state power. He argues that, as a consequence of these transformations:

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[153] Ibid., 39.
[154] Ibid., 38.
[155] Ibid., 39.

> Jurisprudence lost both its meaning and the specific concept of representation during the popular struggle with the king for representation in the nineteenth century. The German theory of the state, in particular, developed a scholarly mythology at once monstrous and confused: parliament as a secondary political organ represents another, primary organ (the people), but this primary organ has no will apart from the secondary organ, unless it be by 'special proviso'; the two juridical persons are but one, constitute two organs but only one person, an so on.[156]

Schmitt's point here is to deny that these series of identities or relations between "organs" *ipso facto* make parliamentarism *necessarily* democratic or just. According to Schmitt, there really is no clear reason why the principles of parliamentary politics should be seen as "inherently" democratic, because of references to the ideals of openness and endless deliberation. Most importantly, Schmitt's proposes that only with a clear appreciation of liberalism "as a consistent, comprehensive metaphysical system" – that is, by taking liberal political theory seriously and at its word can one understand the most pressing foundations of parliamentary politics, which denies its need to decide on the exception at one point or another.[157] Schmitt explains that "all this is only an application of a general liberal principle. It is exactly the same: That the truth can be found through an unrestrained clash of opinions and that competition will produce harmony. The intellectual core of this thought resides finally in its specific relation to truth, which becomes a mere function of the eternal competition of opinions."[158]

As we can see, Schmitt's response to the problem of endless *doxa* is not to respond with a truth procedure of his own. For Schmitt, politics is more than a truthful action or "image of balance" analogous to the executive branch and parliament as a legislative organ working in tandem. This means that his criticism of parliamentary

[156] Schmitt, 1996c, 26.
[157] Schmitt, 1985, 35.
[158] Ibid., 35.

democracy does not seek to sustain a politics that fundamentally grounds itself in truth. As I mentioned in the previous chapter, Schmitt is concerned with the sovereign, and now institutional, decision that comes from nowhere, and does not concern itself with what is true, ethical, or, at times, even legal.

It follows from this that Schmitt is concerned more with the political substance of concepts rather than with attempting to identify this substance in relation to a preordained truth, such as a norm. This is to say that *there is no truth to politics other than its own dialectical historicity*, and this is why he is in conflict with Platonists like Leo Strauss and those critical of historicism. Schmitt undertakes to investigate the immanent content of "the political" and "the democratic," by recognizing the conceptual boundaries of seemingly related spheres of thinking through time. Schwab remarks, for example, that Schmitt's consideration of parliament was to recognize how it came about historically by opposing itself to the sovereignty of the monarch. Once the sovereignty of the people became the guiding basis of democracy, the nineteenth century was polemical precisely in the sense that it was "anti-monarchical."[159] Thus, "[o]nce democracy lost its enemy, the king, then it became clear, according to Schmitt, that its political aim had vanished."[160] This loss brought about the "crisis" of parliamentary democracy, the apparent loss of the political, and the direct identification or fusion of liberalism and democracy.

This line of criticism, it must be noted and contextualized in closing, displays part of Schmitt's enduring evaluation of certain forms of political and democratic thought around him, given the advent of Enlightenment modernity, and along-side trends towards

[159] Schwab, 62.
[160] Ibid., 62.

instrumental rationality. Much like Schmitt, then, Max Weber found problematic those forms of democratic politics, conducted not as a social and charismatic practice, but understood in abstract and disengaged senses from the world of political struggle. For Weber, politics occurs at espoused personal and social levels, and is not something that is somehow brought about independently of human will. Wellen, in support of this reading, writes: "[f]or Weber freedom is not *positively* achieved by guaranteeing certain rights, opportunities or by recognizing principles of human dignity. Rather freedom becomes ethically meaningful for him as a self-formative quality of persons or 'personalities' that can and must prove itself in the realistic conditions of action."[161]

Ellen Kennedy incisively argues that Schmitt's work in 1923 should be seen not only as an engagement, but also as a polemic against liberal scholars following in the tradition of Weber.[162] Schmitt must be read as a deeply polemical thinker. In particular, Kennedy contends that Schmitt was responding to *and* simultaneously providing a critique of certain aspects of Weber's insistence on "personal decision," as well as Kelsen's pure theory of law outlined in the previous chapter. Kennedy argues that "[w]hat the arguments of Kelsen, Krabbe, and Preuβ [influenced by Weber] failed to recognize, in Schmitt's view, is that the historical connection of personality with formal authority in modern political thought came from an especially clear awareness of what the essence of the legal decision entails."[163] To act politically is deeply part of the human condition for Weber and Schmitt, albeit in different ways, and it cannot be feigned by machinic technologies. Politics is something strived after in the name of intrinsically

[161] Richard Wellen, *Dilemmas in Liberal Democratic Thought since Max Weber*, ed. Garrett Ward Sheldon, vol. 10, *Major Concepts in Politics and Political Theory* (New York: Peter Lang, 1996)., 10.
[162] Kennedy, 84.
[163] Ibid., 84.

human values and meanings.[164]

Against the "soulless machine," Weber understood politics as a vocation (as he called one of his most important lectures in 1918), which influenced a plethora of scholars across Europe including Schmitt's work on Catholicism and Lukács' *History and Class Consciousness* in particular, each published originally in 1923.[165] In the lecture "Politics as Vocation," Weber argued that politics was drastically different from "dilettantism" in the United States, and amounted to a certain way of authentically *being politically*, analogous to a "slow boring of hard boards" as he described it.[166] Weber (like Schmitt) was very critical of the experiment with democracy in the United States, which he understood to be using politics for instrumental and calculated "irresponsible" ends. In both lectures *Politics as a Vocation* and *Science as a Vocation*, Weber passionately denounced the fashionable mysticism of the younger generation, and the related retreat from what he theorized to be a politics of responsibility. These were some of the indirect themes of Schmitt's first major work, the intellectual history entitled *Political Romantik*, already published early in 1918.[167] Similarly opposed to politics led by dilatants and politics of patronage in the United States, or, alternatively, liberal forms purporting to function automatically as technologies in Europe – Schmitt's work in 1923, commemorating Weber's death in 1920, outlined a second form of political representation (embodied in the Catholic Church) that would provide a remedy to instrumental politics. In this effort, he attempted to complete the critique of certain forms of democratic *fin de siècle* politics begun by Weber in the final years of his life. Whether

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[164] Wellen, 11.
[165] McCormick, 32.
[166] Max Weber, *From Max Weber: Essays in Sociology*, trans. H.H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958)., 128.
[167] Schmitt, 1986.

he was completely successful in this effort is still a matter of considerable debate. As Caldwell and Scheuerman conclude, he was not. They write: "Thus the contrast between medieval Catholic representation and liberal parliamentary representation in [*Roman Catholicism and*] *Political Form* proves to be something of a false opposition. The technocratic deficiencies that Schmitt accentuates in the latter actually produce sociopolitical results reminiscent of the kind of 'publicity of display' that is characteristic of the former."[168] That is, the authors argue that Schmitt was not able to clearly make the case that the Catholic Church, with its supposed authentic form of representation, escaped the problems of representation he sought to discredit (and Weber sought to strengthen) in parliamentary democracy.

In conclusion, Schmitt at least sought to counteract those forms of politics that relied upon economic and highly rationalized forms of control and, in turn, ignored what he thought to be the true foundations of the sovereign state. As McCormick argues, "what Weber's students, Schmitt and Lukács, will want to know is how their master's paradigm – methodological and political, although Weber claims to keep the two orientations distinct – provides meaningful and effective political activity in an age dominated, in precisely Weberian terms, by a seemingly autonomous technology and an apparently irresistible process of rationalization."[169] As a result of this influence, Schmitt proposed an articulation of institutional forms of representation recognizing most importantly that "neutrality is impossible" and that the sovereign must decide.[170]

Now that I have developed at least a sketch of the two forms of political representation in Schmitt' work – an authentic and an inauthentic one – we can turn to

[168] Editors' introduction to Caldwell and Scheuerman, 72.
[169] McCormick, 41.
[170] Vatter, 182.

recent engagements with his theoretical project in the context of contemporary theoretical and political projects. While Schmitt's work has been taken up in a number of different ways, I will focus primarily on the works of Giorgio Agamben, and his politics of potentiality. If Agamben is most interested in Schmitt's theory of "the state of exception" or the "sovereign exception," I want to continue to draw attention to Schmitt's earlier understanding of political representation. Instead of rejecting it *tout court*, I would prefer to renew and reinvigorate theories regarding the democratic project. Not without a fair share of irony, and as odd as it might seem to some, the work of Carl Schmitt might actually enliven the very political form some understand his work set out to destroy.

Chapter 3: Contemporary Engagements with the Early Works

Written in the devastated country following World War I, Schmitt's main conceptual concerns in his early works are almost invariably related to the unstable Weimar Republic. In this environment, Schmitt became interested in the republic's response to crisis, which he viewed to be vitally important for the development of a positive theory of the state. In Schmitt's reading, at least by the end of the "long" nineteenth century (1789-1914), liberalism and legal positivism, the political and the state, had become intertwined conceptually.[171]

Schmitt launched relentless attacks against these confusions, alleging that muddled approaches towards understanding the role of the state did not allow for considerations of the exceptional situation or the nature of dictatorship. The exceptional situation, he argued, operates by and large *outside* the constraints of constitutional protections and safeguards. Furthermore, for the reason of the omission of the problem of sovereignty, economic-minded liberalism and post-political Communism was unable actualize successful forms of democratic government because each did not recognize the unacknowledged and disavowed political character of positive law. As we have already seen in some detail, Schmitt played a prominent role in the early development of a theoretical critique of modern liberalism and legal positivism.[172]

I have attempted to outline Schmitt's arguments and stark polemics in the previous chapters. The intent of the present chapter is to bring to the forefront recent interventions with specific aspects of Schmitt's work in social and political theory. I will

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[171] McCormick, 127.
[172] Jorge E. Dotti, "From Karl to Carl: Schmitt as a Reader of Marx" In Mouffe, 1999, 112.

link Giorgio Agamben's and Schmitt's projects in this chapter. As we shall see below, Agamben want to think "the exception" as grounded in Western metaphysics and modern biopower. His basic argument (in relation to Schmitt, at least) is that the state of exception had profound implications for the entire history and operation of Western politics.

Methodological Extremism and Decisionism

Before turning to Agamben's contemporary and currently influential engagement with Schmitt's state exception, let us first return to Schmitt's own theorization on the exception. As we have already seen in some detail, Schmitt's early work focused to a great extent on the nature of the exception. He concerned himself with the sovereign power of exception, or the self-declared but still legal ability he felt that the head of state had to transcend or self-exempt itself from the legal constraints of any constitution in order to protect that constitution. This was a distinctly modern form of sovereignty, Schmitt reasoned, that accompanied the history of secularization and which took on an increasingly urgent sense in Europe following the First World War.[173]

At the theoretical level, Schmitt's contention is that the exception to the rule is unable to be completely reduced to law, but, nevertheless, functions to make the normal rule of law intelligible, at least in part. In other words, the exception is always something more and less than the codified law, but it is somehow inscribed within the legal order itself. Since the exception "defies general codification," the main focus for Schmitt becomes *the sovereignty of decision* that subverts the force of the norm especially in

[173] Paul Hirst argues that, for Schmitt "[s]tates arise as a means of continuing, organizing and channeling political struggle. It is political struggle which gives rise to political order." Paul Hirst "Carl Schmitt's Decisionism" in Mouffe, 1999, 9.

times of state crisis. As he argues, "for a legal order to make sense a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists."[174] This difficulty is something of an ambiguity in the multiple Schmitts we find: it is always ambiguous about whether the sovereign decides on the exception, the norm, or both. I will return to this issue in his work below.

It is important to note that the problem of sovereignty is not as clearly separated from the legal order as Schmitt seems to contend in the most confident parts of his decisionist argumentation. Although statements such as the "sovereign is he who decides on the exception" may appear to be free from confusion or ambiguity at first glance, a close textual examination makes apparent the paradoxical or even aporetic nature of this theory. The crux of the problem is that the extent of the exceptional powers deemed to be necessary in periods of crisis is difficult, if not impossible to determine, since it would require at least some reference to constitutional legality to make such calculations. As we discussed it before, Schmitt argues that:

> According to article 48 of the German constitution of 1919, the exception is declared by the president of the Reich but is under control of the parliament, the Reichstag, which can at any time demand its suspension. This provision corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences. But only the arrangement of the precondition that governs the invocation of exceptional powers corresponds to the liberal constitutional tendency, not the content of article 48. *Article 48 grants unlimited power.*[175]

Here Schmitt basically argues that provisions such as Article 48 in the Weimar Constitution gives existence to the state, claiming that, "if individual states no longer

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[174] Ibid., 13.
[175] Schmitt, 2005, 11. Emphasis added.

have the power to declare the exception, as the prevailing opinion on article 48 contends, then they no longer enjoy the status of states."[176] However, this becomes ambiguous when Schmitt, of his own accord, proceeds to explain that not every "disturbance" creates the need to deem a state of exception:

> A jurisprudence concerned with ordinary day-to-day questions has practically no interest in the concept of sovereignty. Only the recognizable is its normal concern; everything else is a "disturbance". Such a jurisprudence confronts the extreme case disconcertedly, for not every extraordinary measure, not every police emergency measure or emergency decree, is necessarily an exception. What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order [... b]ecause the exception is different from anarchy and chaos, order in the juristic sense still prevails even if it is not of the ordinary kind.[177]

Accordingly, it is only when a state of exception is deemed to be *necessary* that sovereignty is thus constituted. In this case, we can see that "the concept of sovereignty" becomes crucial: first, by deciding upon the fact of a state of exception, and second, by suspending the rule of law previously in force in order to confront the state of exception and its challenge to the existence of the state.[178] For these reasons, and according to Schmitt's own reasoning, sovereignty exists by determining the limits of the state of exception, as well as that of the state form itself. However, when are we to know when a constitution should be suspended, and when it should not? What disturbances constitute a threat to the state and which do not? This is unclear because it would rely upon some form of normative order.

In any case, this decision on the normal situation and the exception is known as Schmitt's legal decisionism, which countered the normative-legal thought of thinkers

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[176] Ibid., 11.
[177] Ibid., 12.
[178] S. Weber, 10.

such as Hans Kelsen, as we saw in the previous chapters of this thesis. Schmitt, in tradition stretching back to the classical political philosophies of Thomas Hobbes and Jean Bodin, argued that the norm or rule is an insufficient basis to account for the essence of sovereign power, due to the historical fact that sovereignty only "becomes actual by decision and interpretation" and involves ensuring the tranquility and order of the state.[179] Similarly, as Hobbes argued, "[t]he sovereign is judge of what is necessary for the peace and defense of his subjects."[180] Or as Bodin wrote: "For the word of the prince should be like an oracle."[181] Thus, the legitimacy of sovereign decision does *not* rest at the level of the normative order. Rather, it is the case that the latter relies upon the former for its security. In support of this reading regarding "order," we can appreciate Schwab's comments that this focus on the decision impacts Schmitt's theoretical oeuvre in two specific ways:

> Decisionism, in the general sense of Schmitt's understanding of the concept, refers to two related points: (1) the capacity of an individual to establish order, peace and stability from a chaotic situation, and (2) that person's responsibility to safeguard the newly created stable situation. Should order, peace and stability break down, it becomes the task of this particular individual to undertake all necessary measures to reestablish order.[182]

By contrast to this focus on order, however, Samuel Weber, in his influential and deconstructive work on Schmitt and Walter Benjamin, argues that one of the most alarming aspects of their respective works on sovereignty is the ongoing insistence on the *extreme case*, or what Weber calls Schmitt's and Benjamin's "methodological

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[179] Schwab, 45.
[180] Thomas Hobbes, *The Leviathan* (London: Collier Books, 1962).,137.
[181] Bodin, 14.
[182] Schwab, 45.

extremism."[183] In his larger endeavor to contrast Schmitt's work with that of Benjamin, Weber makes the relevant point that the nature of sovereign decision is much more problematic and alarming in the case of Schmitt than it is even in Benjamin. The precise details concerning Benjamin's work in *The Origin of German Tragic Drama*[184] are beyond the scope of present concerns. Yet, it is important to make note of Weber's claim that in Schmitt the sovereign decision always remains a real "possibility," whereas in Benjamin "the very notion of sovereignty is radically put into question."[185] While political sovereignty for Schmitt is a potential that can be realized as a decision by the state, in Benjamin's work on the German Baroque theatre, by contrast, the sovereign "is split into an ultimately ineffective bloody tyrant and a no more productive martyr." For Benjamin, this proves to undermine the coherence and unitary status of sovereignty itself.[186] In Benjamin's account, therefore, the sovereign is *incapable* of arriving at decision, since the unlimited demand for power makes him into either a tyrant or a martyr, and certainly not a legitimate and order-making sovereign.

Although I am inclined to agree with Schwab's reading of decisionism (especially since it helps us to make sense of the normalizing capacities of institutions in Schmitt's work), Weber does make a strong case regarding Schmitt's tendency towards methodological extremism. In the case of Schmitt, this concern is prompted by his repeated references to the extreme, the concrete emergency, and the crisis as the philosophical "foundation," for thinking about and theorizing the links between law and politics, and between the state and the political. Reading *Political Theology* reveals that

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[183] S. Weber, 7.
[184] Walter Benjamin, *The Origin of German Tragic Drama,* trans. John Osborne (London: NLB, 1977).
[185] Weber, 15.
[186] Ibid., 15.

there is no shortage of instances of this extreme methodology and politicization. In fact, Schmitt dangerously goes so far as to say that the exceptional case is *the* basis of "concrete" philosophical inquiry:

> Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree. The exception can be more important to it than the rule, not because of a romantic irony for the paradox, but because the seriousness of an insight goes deeper than the clear generalizations inferred from what ordinarily repeats itself. *The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception.*[187]

Schmitt's focus on the exception and the extreme case seems to suggest that the central means towards understanding any legal order rests "on the decision and not the norm."[188] While working towards a definition of sovereignty for instance, we can see that Schmitt makes widespread methodological reference to the exceptional situation since "it is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty."[189] Thus, in his intent to construct a positive and polemically loaded definition of sovereignty, Schmitt advances the argument that the exception ought to play no small part in our interpretations of the rule of law or in discussions of juridical forms. He seems to suggest also that the decisive state is not something that emerges *only* in a state of exception. Taken together, Schmitt seems to leave it as an open question whether the exception becomes the fundamental basis of the rule of law or not, and whether the state reveals itself in situations other than the exceptional ones. Let us be clear, Schmitt waivers on this point: sometimes he talks about the exceptional situation

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[187] Schmitt, 1985, 15. Emphasis added.
[188] Ibid., 10.
[189] Ibid. 6.

and the exception to the rule, and, at others, he speaks of the normalizing capacities of long-standing historical institutions such as that of the Catholic Church. This is the difference, for example, between Weber's and Schwab's readings of Schmitt discussed above. But in Schmitt's himself, my argument is that his exact position remains decidedly *ambiguous*. That is, he varies on his most general arguments from text to text.

As Weber interludes, the exceptional situation is an interesting paradox within Schmitt's work:

> If the "decision" is as radically independent of the norm as Schmitt claims, it is difficult to see how the decision of the state to suspend its laws can be justified at all, since all justification involves precisely the appeal to a norm [...] If such interruption and suspension can never be predicted or determined in advance, they are nonetheless not arbitrary insofar as they are understood as necessary in order to preserve the state as the indispensable condition of all possible law and order. [190]

On this basis, Weber's conclusion is that the decision *cannot* be an absolute one in Schmitt because it is constituted at least in some relation to the norm; that is to say by breaking with the norm paradoxically in order to re-establish it. Thus, the decision is not made without relation to the norm at all, to derive the "absolute power" given by article 48 as Schmitt claims above. On the contrary, the decision is made with *some* relation to the norm: it is actually given at least partially *within* the confines of institutional legality. With the intent to preserve the norm, the exception can be "judged only *after the fact, as it were, which is to say, from a point of view that is once again situated within a system of norms.*"[191] For this reason, therefore, the decision is anachronistic and indeed less absolute than Schmitt is willing to admit at some points in his argument, especially

[190] Ibid., 10.
[191] Ibid., 10. Original emphasis.

because it is indeed only justifiable in so far as it "provides the conditions for the re-appropriation of the exception by the norm."[192] Indeed Schmitt does point to this ambiguity in his work. He writes: "The state suspends the law in the exception on the basis of its right of self-preservation, as one would say."[193] What we can say here with confidence is that Schmitt is relatively unclear, especially in these early works, on what forms of institutional legitimacy are able to suspend the old order while it still remains, at least in part, in force.

Representation and Institutional Force

One way to approach this difficulty is to remember that, as I attempted to show with reference 1923 texts, and even more so for the later Schmitt, sovereignty has less to do with the state of exception and more to do with institutions and representation.[194] As we saw in chapter two, the later works inaugurated a theory of "Concrete Order Thinking," as a form of thinking about law and legitimacy that recognizes the powerful and order-making force reserved for the traditional state forms and institutions. The conservative and counter-revolutionary elements in Schmitt suggest that institutional sovereignty leads towards the legitimation or justification of normalizing violence, *institutional force* as we might call it, in which law-making and state-making violence become deeply implicated and virtually indistinguishable from one another. Schmitt's work on representation and the Catholic Church is the prime example of this *indistinguishability*, in which he argues that the Church was able to incorporate

[192] Ibid., 10.
[193] Schmitt, 12.
[194] Wolin, 1990, 396.

authoritatively a "*complexio oppositorum*, that is, the unity of the plurality of interests and parties,"[195] or the "complex of opposites" as we discussed it previously.

Schmitt's later work understood – and perhaps rightly so – that the pinnacle of sovereign political power is representation. The complex representational relationship between sovereign and subject(s) not only makes the entirety of law and the state possible, but it also makes the specific formations of *life as such* possible. Distinguishing inside from outside – the sovereign and its representatives standing as the absolute outside, while remaining "inside" that normative order only in part – makes forms of life intelligible by marking the terms of their inclusion and membership in the representational and institutional order. This modality of sovereign power, order making, and exclusionism is able to trump economic-technical thinking because it understands that the decision is much more than a calculation of subjective mutual interest. State sovereignty, in Schmitt's sense, is not something that emerges as a result of a series of economic calculations over capital accumulation, the realization of surplus labour-power, or as "a product of the social division of labour" (as some Marxist thinkers understand the sovereignty of state today under the conditions of "late capitalism"[196]). Rather, for Schmitt, sovereignty involves, more generally, a "genuinely" political decision over the means needed to secure, protect, and further the livelihood of life processes of a *particular people* as opposed to others. Thus, economic exchange is only part of this puzzle. A vibrant economy is possible only from the vantage point of an *already* configured and secured sovereign state. Schmitt is concerned with this original

[195] Schmitt, 1996c, 26.
[196] Ernest Mandel, *Late Capitalism*, trans. Joris De Bres (London: Verso, 1978)., 474. Mandel writes that the state "arose from the growing autonomy of certain superstructural activities, mediated to material production, whose role was to sustain a class structure and relations of production."

configuration as opposed to Marxist economic explanations that attempt to account for the emergence of private property and the "bourgeois" state.

It should be said that for Schmitt, institutional power produces life only obliquely in the Foucauldian sense. For example, Michel Foucault argues in "Truth and Juridical Forms" (1974) that in early nineteenth century institutions, such as factories, hospitals, schools for teaching, and prisons for discipline, "the operation of these institutions implied a general discipline of existence that went far beyond their seemingly precise ends."[197] Foucault proposed that the function of sovereignty changes throughout the nineteenth century in particular ways, making room for formations of life and the body capable of achieving the important labour demands needed to build the new totality called "society." In fact, he claims that the entire face of sovereignty changes throughout this period, with the impact of revolutions in democratic or popular sovereignty. If the "face" of sovereign power changes with the rise of the constitutive "people," and is eventually transformed from the will of the king to the will of the people, then the legitimacy of social institutions change correspondingly. For Foucault, sovereign power is transformed alongside the process of scientific enlightenment and historical secularization. Most importantly, this changed *how institutions govern social life*. As Foucault contends,

> Already in the control authorities that appeared from the nineteenth century onward, the body acquired a completely different signification; it was no longer something to be tortured but something to be molded, reformed, corrected, something that must acquire aptitudes, receive a certain number of qualities, become qualified as a body capable of working. The first function is to extract time, by transforming people's time, their living time, into labor time. Its second function

[197] Michel Foucault, "Power," *Essential Works of Foucault 1954-1984*, Vol 3, ed. Paul Rabinow (New York: The New Press, 1994)., 81.

> consists in converting people's bodies into labour power. The function of transforming the body into labour power corresponds to the function of transforming time into labour time.[198]

In an important sense, the body that labours through time becomes possible only as the spheres of law and sovereignty changes. In other words, sovereignty and power is not external to the body, to social practices, to sexuality, etc. It is also not that power is simply unidirectional – that is flowing from sovereign to subject. Rather, for Foucault, power is to be conceived of as a "polymorphous, polyvalent power" that transforms the body and life into productive power.

However, we can see that it is also regarding the problem of sovereignty that Foucault and Schmitt part ways. For Foucault, sovereignty seems to somehow evaporate or, at minimum, transform itself into the biopolitical administration of life at least by the nineteenth century. But in Schmitt's work, by contrast, the deeply political nature of law reveals that sovereignty does not simply dissipate with the emergence biopower, or with analysis of "the social." Rather, sovereignty and exceptionalism become co-constitutive: sovereign exception continues to reveal itself at least at the margins of law – precisely in the moment of the decision, and in the case of state emergency.

Agamben and the State of Exception

As I argue here, Giorgio Agamben uses Schmitt's theory and critique of liberalism in an effort to define the modern problem of the state of exception. Agamben understands the state of exception to be a fundamental point of departure toward understanding the unfolding of the Western political paradigm of governance. In *State of*

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[198] Ibid., 82.

Exception, Agamben immediately addresses the aporia of sovereign decision in Schmitt's theory:

> The question of borders becomes all the more urgent: if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds, then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception – that is the suspension of the law itself – as it original means of referring to and encompassing life, then a theory of the state of exception is the preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.[199]

In the ambiguous zone of the exception that is neither totally inside nor totally outside law, Agamben develops his theory of the state with explicit debt to Schmitt, Foucault, and even Samuel Weber's critique of decisionism.[200] Arguing that the concept of sovereignty is an integral but marginalized aspect of political theory and political philosophy, Agamben re-invokes the controversial early work of Schmitt in an attempt to show that "the sovereign decision [...] creates a boundary of law, an inside and outside, precisely in declaring a state of exception."[201] Agamben is concerned explicitly with theorizing "the double exclusion" of the state of exception, which creates a lacuna in which the legal norm has been suspended indefinitely.[202] Agamben's basic claims is that:

> In truth, the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold or a zone of indifference, *where inside and outside do not exclude each other but rather blur with each other.* The suspension of the norm

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[199] Agamben, 2005, 1.
[200] Agamben writes that: "Sam Weber has acutely observed how Benjamin's description of the sovereign diverges ever so slightly, but significantly, from its ostensible theoretical discourse in Schmitt.'" Ibid., 55.
[201] Nasser Hussain and Melissa Ptacek, "Thresholds: Sovereignty and the Sacred," *Law & Society Review* 34, no. 2 (2000)., 500.
[202] Paul A. Passavant, "The Contradictory State of Giorgio Agamben," *Political Theory* 35, no.2 (2007)., 154-55.

> does not mean its abolition [...] hence the interest of those theories that, like Schmitt's, complicate the topological opposition into a more complex topological relation.[203]

Agamben argues that the limits of the juridical order and the norm have become increasingly hazy and mystified with the process of state making in modernity. This trend, according to his own "long" historical reading, gained secure footing at least by the early to mid twentieth-century because: "During the world wars, the recourse to a state of emergency was spread to all belligerent States."[204] Thus, Agamben extends Schmitt's early claims significantly by suggesting the analogy as follows: Just as German law was in the ambiguous zone of suspension in Germany from 1933 until 1945 *legally* under Hitler, likewise "the intentional creation of a permanent state of emergency has become one of the most important measures of constitutional states, democracies included."[205] Even though, technically speaking, a state of emergency may not even be declared, numerous modern democracies operate today *as if* [206] they are in fact operating in a continual state of emergency: "Today, in the face of the continuous progression of something that could be defined as a 'global civil war,' *the state of exception tends more and more to present itself as the dominant paradigm of government in contemporary politics*" making differences between constitutions to be increasingly meaningless distinctions.[207] As we can see, and especially at it extremes, this key claim appears to be alarmist and even excessive in its scope.

At stake in these discussions is the paradoxical politicization of life which

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[203] Agamben, 2005, 23. Original emphasis.
[204] Giorgio Agamben, "The State of Emergency," Generation Online, http://www.generation-online.org/p/fpagambenschmitt.htm, 1.
[205] Ibid., 2.
[206] Agamben's messianic critique of the "Kantian As-if" doctrine can be found here: Giorgio Agamben, *The Time that Remains: A Commentary on the Letter to the Romans*, trans. P. Dailey, series ed., W. Hamacher *Meridian Crossing Aesthetics* (Stanford, California: Stanford University Press, 2005)., 36-42.
[207] Ibid., 2. Emphasis added.

Agamben never tires of theorizing. He envisages important affinities between the problematic conflation of state and politics in Western political culture,[208] arguing that one of the most devastating consequences of the rampant expansion of state power, at least by the early twentieth-century, was the paradoxical politicization and simultaneous de-politicization of life caught up with the advent of increasingly totalizing forms of capitalism. But we must ask: *How can life be politicized, yet simultaneously de-politicized?* As Agamben writes, politicization and depoliticization seem to coincide in a dialectical inducement of *movement*:

> My first consideration is that the primacy of the notion of movement lies in the function of the becoming unpolitical of the people (remember that the people is the unpolitical element that grows in the shadow and under the protection of the movement). So the movement becomes the decisive political concept when the democratic concept of the people, as a political body, is in demise. Democracy ends when movements emerge. Substantially there are no democratic movements (if by democracy we mean what traditionally regards the people as the political body constitutive of democracy). On this premise, revolutionary traditions on the Left agree with Nazism and Fascism [...] *The concept of movement presupposes the eclipse of the notion of people as constitutive of the political body.*[209]

This leaves much to be pondered. In relation to the emergence of the state addressed in Schmitt, Agamben foresees in this very movement the transformation of "the people" *into* a population. Agamben here is engaging Foucault's observation concerning the historical liminal zone between sovereign power and biopower, which accompanies the process of scientific Enlightenment. Following along the path of Foucault's work on biopower,[210]

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[208] Giorgio Agamben, "Movement", Spring 2005 (retrieved April 6th, 2006 from: http://www.theport.tv/wp/pdf/pdf2.pdf).
[209] Ibid. Emphasis added.
[210] To be found in: Michel Foucault, "Right of Death and Power over Life" in *The History of Sexuality: An Introduction, Vol I*, trans. R. Hurley (New York: Vintage Books, 1990), pp. 135-159.; Michel Foucault,

Agamben contends that power is transformed through space-time from the realm of overt displays of spectacular sovereign power, to a much more nuanced and ramified form of control over sociality, or ways of being. Subsequently, with the historical emergence of democracy, what we see is a proliferated focus on *the people as an object-like totality.* Properly speaking, as the state increasingly takes on the exhaustive concern of the welfare of the people as its sole function and legitimating ethos, "the people" as a political category becomes politicized as an object of state control. This is, however, accomplished only at the expense of depoliticizing the plural and antagonistic *existence* of the people in the process of movement. Remember as Agamben was quoted above: "The concept of movement presupposes the eclipse of the notion of people as constitutive of the political body." This means that, as opposed to the concept of "the people," a "movement" must be partial and antagonistic – it needs an enemy.

Agamben's concept of movement seeks to understand the population reduced to *bare life* (zoë), as he calls it, or "the politicization of bare life as such," which he contends became the "decisive event of modernity."[211] For Agamben, "only within a biopolitical horizon will it be possible to decide whether the categories whose opposition founded modern politics (right/ left, private/ public, absolutism/ democracy, etc.) – and which have been steadily dissolving, to the point of entering today into a real zone of indistinction – will have to be abandoned or will, instead, eventually regain the meaning they lost in that very horizon."[212] He argues that, because the transformation of the people into a population is now historical fact, "the people" has become "a demographical

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Security, Territory and Population, trans. G. Burchell, series ed. A. Davidson, *Michel Foucault: Lectures at the Collège de France* (Palgrave Macmillan, 2007).

[211] Agamben, 1998, 4.

[212] Ibid., 4.

biological entity, and as such unpolitical. An entity to protect, to nurture [... w]e live in an era when the transformation of people into population is an accomplished fact."[213] According Agamben, the people-turned-population becomes the key object of the state to be controlled and nurtured at nothing short of the biopolitical level. As long as the state exists with a well-secured monopoly on the political welfare of life, Agamben seems to be suggesting that we cannot expect much else. It is apparent here that his reliance on Schmitt is decisive. After all, if we are to follow the latter to his own haunting conclusions:

> the endeavor of a normal state consists above all in assuring total peace within the state and its territory. To create tranquility, security, order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation.[214]

The will of the state, in this purview at least, is to secure the "total peace" and homogeneity of the state, which protects the community of "friends" against the danger of the "enemy." However, if this enemy becomes the precarious life of the people itself, the state has a mandate to reduce the population to *bare life*, to its most basic form, to be sheltered from danger both from *with-in* and *with-out*. The historical transformation that Schmitt and Agamben map appears to expose the deeply political problem that life itself becomes highly (de)politicized, and bound together with the friend/enemy distinction. From this perspective, foreign policy is transformed *into* domestic policy. As a consequence, it must be suggested that in light of the relation between politics and the state in late capitalism, this leaves the movement of life in an extraordinarily precarious

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[213] Agamben, "Movement".
[214] Schmitt, 1996b, 46.

position: arguably reduced to bare life, and left to the mercy of the state whose functioning is increasingly inseparable from the friend/enemy decision.

In line with my earlier discussion concerning Schmitt's legal decisionism, Agamben looks extensively at the theoretical nature of the decision in relation to the norm. Picking up on Schmitt's paradoxical insight that the norm "can be suspended, without thereby ceasing to remain in force,"[215] he also contends that the state of exception makes for a *political space* (a double exclusion, as he calls it) in which it is possible to distinguish between the norm and the decision "in order to make [the latter's] application possible."[216] Although this is confusing at first, Agamben clarifies:

> We can, then, define the state of exception in Schmitt's theory as the place where the opposition between the norm and its realization reaches greatest intensity. It is a field of juridical tension in which a minimum of formal being-in-force (*vigenza)* coincides with a maximum of real application and vice versa. But even in this extreme zone – and indeed by virtue of it – the two elements of the law show their intimate connection.[217]

This paradoxical political space of connection (yet separation) between norm and decision marks the key point of convergence between Agamben and Schmitt's political theory of the state decison. Analogous precisely to the relationship between the norm and the decision, the law and the exception to law take on a profound historical and legal interconnectedness and significance with one another. As Agamben argues, the "*force of law*," as the long-standing tradition in Roman and medieval law, takes on amplified significance in the modern era beginning with the French Revolution:

> Only in the modern epoch, in the context of the French Revolution, does it begin to indicate the supreme value of those state acts declared by the representative assemblies of the people. Thus, in

[215] Agamben, 2005, 36. Original emphasis.
[216] Ibid., 36.
[217] Ibid., 36.

> Article 6 of the constitution of 1791, *force de loi* designates the untouchability of the law, which even the sovereign himself can neither abrogate nor modify. In this regard, modern doctrine distinguishes between the *efficacy of the law* – which rests absolutely with ever valid legislative act and consists in the production of legal effects – and the *force of law*, which is instead a relative concept that expresses the position of the law or of acts comparable to it with respect to other acts of the juridical order that are endowed with a force superior to the law.[218]

The importance of this insight is not that the *force of law* makes the state of exception impossible, but precisely the opposite. The *force of law* makes it possible to separate the norm from its application, or the law and the decision on exception, whereby "decrees, provisions and measures that are not formally laws nevertheless acquire their 'force.'"[219] By separating the *force of law* from the law itself, the lacuna of the exception takes on the force of law although paradoxically in a locale that is technically outside of the legal order itself. In line with Schmitt's own concern with dictatorship, the "force of law", insists Agamben, "floats as an indeterminate element that can be claimed both by the state authority (which acts as a commissarial dictatorship) and by a revolutionary organization (which acts as a sovereign dictatorship). The state of exception is an anomic space in which what is at stake is a force of law without law (which should therefore be written: force-of-~~law~~)."[220] For Agamben, the "force of law without law," or the state of exception as an anomic space, provides for us a methodological insight that can, at least in part, conceive of the mystical aspects of legal authority, including a partial discernment of the "threshold at which logic and praxis blur with each other and a pure violence without *logos* claims to realize an enunciation without any real reference."[221]

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[218] Ibid., 37.
[219] Ibid., 38. Original emphasis.
[220] Ibid., 39.
[221] Ibid., 40.

I am arguing that the ambiguous space of exception – that is neither inside nor outside of the sphere of law – is Agamben's major engagement with Schmittian political philosophy. By expanding Schmitt's early work radically out of its immediate context, Agamben's point is that the state of exception has deep repercussions for the *entirety* of modern politics since the decision has only an ambiguous and unstable relationship with the institutional constraints imposed by constitutional law. Given the extent that Agamben takes his argument – in which he writes, "it is important not to forget that that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one"[222] – it is fair to say that the critique of Schmitt's "methodological extremism," may have valid resonances for Agamben's recent work as well. As he reminds us in his introduction to *State of Exception*, one of the guiding questions of Agamben's work asks: "what does it mean to act politically?" Sharing Schmitt's reservations about the loss of political autonomy in modernity, given the rise of the "automated" liberal politics, which they each agree tends to ignore the problem of the state of exception and the force of sovereign decision, Agamben also relies for the most part on the "extreme situation" as a provocative space for the theoretical "grounding" of politics and the permanent state of exception.

For Agamben, politics happens in this space of exclusion between the normal rule of law and its exception. For this reason, and in the interest of future directions in this line of inquiry, one must ask what implications this has for Agamben's theory of politics, but also for the futures of political and social theory more generally? It would seem that the question remains as to whether the state of exception *has* become the normal operation of law and politics in contemporary Western democracies. How is it possible that the

[222] Ibid., 5.

exception has become the norm, if, as we have already seen, there always remains an *irreducible gap* between the exception and the norm? There must be a normal situation that sovereign exception attempts to restore. Also, we must ask whether the exception makes intelligible the norm in the first place. We must continue to ask what forms of political practice are capable of "critique" in this space of exception, and whether there remain possibilities for civil political participation that can effectively confront the indefinite state of exception. If such a "ground" or basis for critique were even possible, which it seems it is not since the exception has no prior ground or condition according to these theories, how do we even begin to "act politically" to resist the exception? It appears that there are no easy answers to these questions, because the modern state of exception is a product of a revolutionary-democratic tradition, and not one that necessarily seeks to find the "conditions of possibility" required for reflexive critique.

However, these questions become essential given Agamben's and Schmitt's reasoning that traditional forms of political participation are no longer effective within the current conditions of Western politics. However, Agamben, in particular, appears to promise the renewal of dialogues in political and legal theory capable of reaching beyond traditional definitions and responses to these questions. He argues that by identifying the nature of the state of exception, we can begin to formulate new discourses on law and politics. But, in a consistently decadent tone, he writes:

> Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law [...] From the real state of

> exception in which we live, it is not possible to return to the state of law, for at issue now are the very concepts of "state" and "law."[223]

Through a broad re-definition and re-deployment of the "political," "state" and "law," Agamben is searching for discourses in which "the only truly political action is that which *severs* the nexus between violence and law."[224] How this new condition of politics – a politics without relation to current definitions of law and state – comes to be, in concrete terms, remains extremely tenuous in Agamben's theory to date. However, since his bold engagement with Schmitt leaves hope that effective political praxis can be accomplished with a better understanding of the workings of the state of exception, it remains paramount that we continue to press these deliberations and boldly ask "what does it mean to act politically?" Agamben's theory, by building upon Schmitt's work, challenges us to continually belabour these difficulties, and search after innovative responses in the course of discussion. Agamben does leave a window of hope in this context, with his concept of "life," or sacred life, which, he seems to claim, is both the cure and the curse of modern politics.

Much like Agamben ambitiously declares beginning in *Homo Sacer,* we must begin today to do nothing less than theorize "life as such," somehow apart from the reign of sovereign power and the biopolitical state. Yet, my feeling is that if we are to do this, we first must prove capable of escaping some of the deepest paradoxes residing within Schmitt's theory of sovereignty, including the supposed need for sovereign exception in times of self-declared state crisis. Schmitt introduces a very difficult problem for political and legal theory generally. This is along with others who have theorized on the paradoxes

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[223] Ibid., 87.
[224] Ibid., 88. Emphasis added.

of modern popular sovereignty – beginning with Bodin and Hobbes and spanning to the present day with Agamben. The problem here is that there appears to be no "outside" of sovereign operations of power. Now that we rely on something like a state form it seems to function independently, without human guidance, and with only "extraordinary" sovereign decision. This is because sovereign power is simultaneously inside and outside of law (that is, both making it possible, and internally protecting it by decree), and thereby deciding independently when to exempt itself from the rule of law to intervene in and "protect" civil society – perhaps even from itself.

The sovereign decree stating that: "there is no outside of law," as a consequence produces certain forms of life, through an increasingly depoliticized understanding of law (that is, by not recognizing the contingency, variability, and political nature of law and decision). These are, admittedly, very serious claims: from Agamben's perspective, life and law become very nearly indistinguishable today, because law only allows certain forms of resistance to power.[225] If we are to utilize Agamben's concept of "life", or "sacred life" as life that "can be killed but not sacrificed," then we need to completely re-conceive how to understand operations of juridical power and the dominant trends liberal-conservative understandings of modern Western politics. But what does the analysis of sovereign power and the state of exception hold in store for the futures of contemporary theory and democratic practice(s)? I cannot answer this perhaps too ambitious question here. However, I can only begin by theorizing on the paradoxes of this activity of "re-thinking." For future research in this area, I believe we must start to connect Agamben's notion of "life" with a more nuanced and historically informed

[225] Agamben, 1998, 29.

understanding of Schmitt, in order to think about some of the major issues in the conceptual sphere of international and national politics facing us today.

In his quest towards a post-state-based politics, Agamben leaves at least as many questions unanswered as he generates. He does, however, suggest that Schmitt is correct in his theorization and understanding of state sovereignty. Although Schmitt did make it clear that the state of exception was only *temporarily* needed in times of crisis (as we saw in chapter one), Agamben, for different political reasons and in different contexts, radicalizes and universalizes this thesis to its furthest extreme – and this is saying much, because, after all, we are talking about a further radicalization of Schmitt's already incredibly radical thesis. In turn, Agamben's claim is that "the production of a biopolitical body is the original activity of sovereign power" and, following Walter Benjamin's famous statement produced under the extreme duress of fascism prior to his death, the exception has become the rule.[226] This means that sovereignty does not only stand in the background as an agent of security, transcendently protecting life periodically, as Schmitt proposed it. Rather, Agamben's assertion is even more extensive and even more far-reaching, or so it seems. Agamben's claim is that sovereignty "[p]laces biological life at the center of its calculation, [and] the modern State therefore does nothing other than bring to light the secret tie uniting power and bare life."[227] Again, for Agamben, this production and control of bare is *the* problem of modern politics, and, therefore, where we should begin to focus our attention in politics and in law.

So, it might just be that modern sovereignty does not operate only to protect life, but actually functions to form it, and to create life in particularly coercive ways, which

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[226] Ibid., 6.
[227] Ibid., 6.

we might call "biopolitics." Perhaps it is true that modern sovereignty creates the nomad, a deterritorialized creature constantly in search of territory, in search of a space and a nomos. In this sense, then, the machine runs itself, at least if we are to take Agamben's radical thesis seriously. Yet, we still must begin to seriously question whether his theory is relevant for contemporary political/ social concerns. Can we find ways to think outside of primarily nationally based law and sovereign modes of power, and to propose new ways of understanding the theoretical and legal bases of the nation-state and international institutions today? In important ways, the twentieth century meant a movement towards unprecedented faith in the discourse human rights, along-side new legitimacies for international institutions such as the U.N., N.A.F.T.A., the E.U., etc. There are genuinely positive aspects to these movements. These innovations, I believe, are being under-theorized and over aestheticized today.

If we are to properly engage and take the care to understand Schmitt, we have to find ways to turn his thesis on its head: that is, to connect the problems of domestic policy to international (foreign) policy (and not the other way around as Schmitt conceives of it). We must recognize that human rights and international institutions are not as neutral or apolitical as they may seem. Particular politics – even international ones today, such as, for example, the great push to ratify the European Union Constitution at all costs – happen on "the ground" and make interventions in the Real. That is, they are historically situated, and emerged in the context of specific international and national climates. As Schmitt reminds us, the international movements of the twentieth century began at least by the end of the First World War, when the meaning of war underwent

significant transformations as a consequence of the Treaty of Versailles.[228] Schmitt provides tools for us to use in theory construction. He argues that internationalism is yet another social belief system and political authority, and a system of thought that holds the promise of moving beyond the problems of the self-assured, anachronistic, and narcissistic sovereign nation-state. However we might be able to use Agamben extension of Schmitt, including the introduction of the concept of "life," we must seriously question whether or not we can ever escape the ongoing problems of the politicization of life that too often occur when we invoke the discourse of "human rights." In an important sense, "life" is not another abstract "category" or "political concept" for us to theorize on, but *always already* involves human life and dignity.

With that said, and in the face of these dangers and incredible ambiguities, we must begin to develop a concept of life that is concretely emplaced, engaged in particular political struggles, and in localized contexts and milieus. In short, we must ask: how do the discourses of politics, such as human rights for instance, relate to "life," as Schmitt and Agamben theorize it. And how much does a new abstract concept of life, without telos (pure means) as Agamben proposes, provides for us; and how much does it simply abstract our thinking from the problems of this world.

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[228] Schmitt, *The Nomos of the Earth*, trans and annotated by G.L. Ulmen (New York: Telos Press, Ltd., 2003)., 259.

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