German Political Philosophy

The metaphysics of law

Chris Thornhill

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

9 Theories of state in the Weimar Republic

The anti-formalist tendency that shaped the contours of philosophical debate during the last years of Imperial Germany and the early years of the Weimar Republic also extended beyond philosophy, and it set the parameters for the main legal-theoretical and constitutional controversies of the 1920s. During the first years of the Weimar Republic, therefore, legal-political orthodoxy was sharply divided between two rival lines of analysis. On one side were late-positivist and neo-Kantian theorists, most notably Hans Kelsen, the Austrian constitutionalist and main founder of the democratic Austrian constitution of 1920. On the other side, although greatly divided amongst themselves, were prominent opponents of positivism, including Carl Schmitt, Hermann Heller and Rudolf Smend. The arguments between positivism and its adversaries set the tone and context for much legal discourse of the Weimar period, and the majority of legal analysis positioned itself around this divide.

Hans Kelsen: politics after personalism

Like other positivists, Kelsen's theory contains the central claim that the legitimate state has no existence independently of law, that the 'order' of the state invariably takes the form of a 'legal order',[1] and that power necessarily communicates itself as *legal power,* enshrined in a constitution. The state, therefore, does not make law, and it has no material or personal agency prior to law: the state is merely one objective legal fact amongst many other legal facts. He consequently opposed all legal doctrines that view the state as a decisive location of sovereignty or that view sovereignty as a personal or exclusive attribute. Sovereignty, he argued, does not have its foundation in the subjective will of the state or of individual persons representing the state. Rather, sovereignty resides in the law, in the *original norm* contained in the constitution of the state, and the constitution is the 'final source' of all legal power in the state,[2] and all aspects of political decision-making are regulated by the highest norms of law, which the constitution codifies.[3] A legitimate state, consequently, can never be other than a legal state, and it has no personality and no independent volitional attributes that

can be dualistically differentiated from the legal norms formulated in the constitution and applied by a constitutional court. A legitimate state, in short, is a state that fully unites law and power, and that sanctions no exercise of will, either by the state or by other subjects of law, which is not determined by law.

At one level, Kelsen's theory marked the final refinement and consummation of positivist political ideas. It clearly accentuated the classical positivist claim that sociological, personal and historical analysis of law's origins is not relevant to questions pertaining to legal validity and political legitimacy. Law is simply *pure law:* it is a 'logically closed complex of norms', and these norms regulate legal questions and dilemmas without any external direction.[4] In consequence, Kelsen explained, 'juridical knowledge' need concern itself with 'legal norms' and nothing else.[5] Like the earlier positivists, therefore, Kelsen's sought to effect a thorough depoliticization of the law and to define law as a strictly *objective* normative order. Even the terms of the constitution, he claimed, should not be construed as value-rational principles or as volitionally committed decisions about the order of state. Rather, the constitution, although authorizing law, is itself (paradoxically) nothing but an objective fact or reference of the law, which law creates for itself: it is an original norm, or a 'point of departure for a procedure', and its sole function is to create a normative frame of reference, in which legal questions can be formally processed, and in which law can refer to objective principles to regulate the exercise of power.[6] Laws are, thus, applied to the phenomena of social life as a set of pure norms, and both the phenomena and the norms applied to them are constructed by law simply as legal facts, without any consideration for external principles or broader questions of right. In this respect, Kelsen also gave a clearly Kantian inflection to his positivism. He argued that the law forms a unitary and virtual sphere serving the normative resolution of legal problems. This sphere is categorically distinct from the 'world of being', which is characterized by natural facts and by relationships between voluntaristically empowered agents.[7]

At the same time, however, Kelsen also broke with some of the main principles of positivism. For instance, he argued that the central precondition of positivism, namely the construction of both the person under private law and the state under public law as *juridical persons,* is illusory. To be sure, he acknowledged that the juridical person or the legal person might be necessary fictions, conferring consistency and cohesion on the application of legal norms.[8] Indeed, he suggested that the self-reflection of the state as a legal person may have a convenience value in that it shows that the state is subject to law in the same way that all other legal addressees exist under law.[9] Nonetheless, Kelsen saw the introduction of the concept of the juridical person into private law and public law as serving to initiate a falsely subjectivistic or anthropomorphic account of law's origin, which falsely ties law's application to conceptions of subjective-personal purposes or needs.

Law, he argued, is neither deduced by nor attached to *wills* or *persons,* either to sovereign persons applying law from above in the form of power or to private persons utilizing law from below to obtain or seek recognitions for rights or entitlements.[10] Law is derived from the objective order of law which is established, by law, in the constitution, and this objective order is the universal source of law's validity. The state, therefore, has no distinct personality; its legal character is determined by the fact that it is part of the overarching 'unity' of all legal facts, and it has no privilege or distinction against any other element in this unity as a source or focus of legal volition or application.[11] In this, Kelsen denounced positivist personalism as a miscarried attempt to place the state on neutral legal foundations, and as one further example of a general dualist inability in legal thinking adequately to comprehend the indistinctness of law and state.

The main reason for Kelsen's attack on the personalization of law and state is that he considered personalism to be inevitably close to voluntarism, and to infect legal analysis with the conception that law's application is shaped by wills. Personalizing conceptions of law, he claimed, are only able to perceive the law and the state as *heteronomous* institutions: that is, as institutions originating in non-universal conceptions of power and monopolized by the wills of determinate subjects or social groups for specific social purposes.[12] It is only where law is viewed as an overarching normative system, not concentrated in any one place, will or person, that reliable conditions of legal (and, most probably, *democratic*) order can be established, and that law effectively fulfils its most function: namely, that it satisfies the wide societal need for legal stability, pacification and reasonable freedom. Paradoxically, therefore, it is only where law is thoroughly depersonalized that it becomes adequate to a distinctively human society. It is, in other words, only where law is construed as an internally consistent and fully autonomous order of norms that it is able to reflect the conditions of autonomy and inclusion characteristic of modern societies and normally desired by the constituents of these societies. In consequence, whilst rival theories of law saw the depersonalization of the law as a token of its alienation, Kelsen saw the demise of personality in law as a precondition of societal freedom and democratic rule, for human persons.

Underlying this critique of personalistic voluntarism was a broader philosophical undertaking. In rejecting the deduction of law from persons endowed with a will or from volitionally constructed social phenomena, Kelsen's primary critique was directed against legal doctrines that make law's validity contingent on purposes imported into law from sources external to law's own norms. He saw the assumption that law might have a subjective/purposive origin or that it might respond to subjectively articulated claims and demands as distorting the consistency of law's own self-reference, and likely to lead to a misuse of the law. In addition to his critique of legal personalism, therefore, Kelsen also condemned all natural-legal modes of justification, all value-rational models of legal formation and all

contractual explanations of law's origin.[13] All external normative perspectives on law, he claimed, share (in diverse manner) the fundamentally erroneous conviction that the ground of legal validity can be dualistically detached from the law itself, and they consequently make law vulnerable to interventions that law cannot control. Natural-law arguments, for example, seek to bind the law to a realm of ontological facts or subjective values; they thus originate in a 'solipsistic epistemology', which mistakenly believes that particular value-deductions can form a reliable foundation for objective legal norms.[14] Similarly, contractarian claims that the law forms agreements of principle, which then provide a scheme for the 'legitimation of the state', make both the law and the state dependent on external values or moral notions, which the law cannot produce or regulate.[15] Legal security, both in law and state, is only reliably obtained if law is viewed as a neutral condition of objective unity, not if it is determined by substantive prescriptions.

In short, therefore, Kelsen pleaded for a methodological approach to the law which defines law as an entirely autonomous science, and for a practical approach to the law, which construes law as an entirely objective normative order. All sociological, ethical or voluntaristic notions of legal derivation, he concluded, introduce inadmissible contents into law. These notions in fact conflate law with *metaphysics:* that is, they make law contingent on the will and on subjectivistic principles which are not internally legal; they misunderstand the limits of legal debate and procedure; and they undermine the objective order of norms which law, as an autonomous order, institutes for itself. Most notably, however, these views show their attachment to metaphysical ideas because they assume that laws are created by persons or by wills, often represented in the state, which are not part of law, and have an originating or authorizing relation to law. The most fateful result of such metaphysical corruption of law, therefore, is that it leads to a 'meta-legal' notion of the state, which claims that the state 'transcends the law', and that the state freely determines the content of the law.[16] Kelsen therefore viewed the sovereign state claiming 'exclusivity' in the exercise of legal power as the malignant outgrowth of legal constructs affected by the residues of metaphysical or subjectivist conceptions.[17] 'All great metaphysicians', he argued, 'have opposed democracy and favoured autocracy'. Metaphysics opposes democracy, he claimed, because it seeks to recreate the absolute personality of God in an authoritative and absolute political order, and, accordingly, metaphysical views struggle to accept the objective neutrality of law, on which democratic law depends.[18] At the heart of all metaphysics, he claimed, is the belief that all reality can be explained by absolute causes, usually attached to absolute persons, and that these absolute causes determine the contents of absolute laws. This belief is invariably hostile to democratic ideas of law, state and freedom under law.

Kelsen extended this critique of political metaphysics to argue that dualistic or personalist ideas of state and law have not yet constructed fully positive foundations for themselves, and still rely on quasi-theological

paradigms to support their arguments. The claim that the origin of law resides in the subjective will of the state or the sovereign is, he explained, nothing more than a secular trace of religious ideology, originating in the idea that the transcendent God stands above creation and exercises purposive freedom or volitional power over it, in laws. Like Carl Schmitt after him, therefore, Kelsen claimed that legal thinking exists in a relation of 'analogy' to theology, and that there exists an 'extraordinary relatedness' between the 'logical structure of the concept of God and the concept of the state'.[19] However, unlike Schmitt, he insisted that theories of the state should resolutely abdicate their theological preconditions. This is only possible where state theory renounces the 'systemic dualism' of personalism, where it accepts the objective/democratic co-originality of law and the state,[20] and where it analyses the state as a fact of law with no priority over other facts of law. Even classical positivists, who sought to ensure that the originally 'meta-legal' state 'submits itself' to law and acts 'as a legal subject' bound by law, were still afflicted by theological myths of divine freedom and originary transcendence, and their ideas of legal personhood betrayed the belief that the will is the origin of law. It is for this reason that they failed to provide a reliable account of the state as a purely normative order.[21]

Kelsen thus clearly viewed his theory of pure law as marking a decisive step beyond metaphysical accounts of law and state, and as uniquely equipped to construct the state as a democratic unity of law and power, on positive and genuinely post-metaphysical foundations. Rather than viewing the end of metaphysics as a distinctively human political reality, however, he argued that law and power can only be understood *post-metaphysically* if they are viewed *post-personally:* if law and power are separated from all anthropological principles and objectives. The idea of personality in law and state, he suggested, always enacts a malicious transposition into law of God's original authoritative purposes and metaphysical personality, and the freedom of this personality obstructs the actual social freedom of human persons under law. His own theory, espousing a model of the purely legal state and conceiving legal application as an entirely inner-juridical process, sought to show that power has no externally founding source, and it is not informed by any 'absolute value' or absolute person.[22] Where power is detached from persons, he concluded, power becomes universal and, at least in tendency, democratic, for it is shaped only by its unity with law, and it has no metaphysical source or cause that ties it to monolithic or exclusive conceptions of its purpose or derivation. In this respect, Kelsen gave most advanced expression to the displacement of legal paradox in post-metaphysical argument. Those who accept that law has no origin in God, he explained, must cleanse their outlooks of all metaphysical beliefs, and they must accept that the origin of law is simply law, and that law hides its paradoxicality in a constitution, which refers law and state to the fact that they are merely law. It is only where law is entirely positive, in short, that it can reinstitute the

unity of reason and will that it first forfeited as it began to positivize itself, as other than God.

The Weimar Constitution: between positivism and the material citizen

Kelsen's contemporaries in the Weimar era did not share his belief that his work provided a path beyond political metaphysics. In fact, many of his critics held a directly contrary opinion of his work, and they saw it as nothing more than a new type of juridical metaphysics.[23] To his contemporaries, in fact, Kelsen's pure theory of law appeared as a doctrine that sought to organize all social reality around formally abstracted normative principles and that eliminated the decisive role of human agency and freedom in legal and political foundation. It therefore appeared, contrary to its most express intentions, as a doctrine whose anti-personalism replicated and exacerbated the errors of both formal ius-natural thinking and of positivism – as a doctrine, that is, that located the origin of law and state in an indeterminate transpersonal source, that imagined legitimacy in law and state only as a paradoxical act of legal self-causality and that consequently derived the legal order of the state from ethereal metaphysical norms. Critical responses to Kelsen's work, therefore, condemned the formality of his legal doctrine, they re-emphasized the necessary volitional foundations of strong democracies, and they generally asserted that states without volitional or anthropological foundations are metaphysical states. Common to most influential opponents of Kelsen, moreover, was the belief that purely normative and quasi-metaphysical theories of state were not equal to the concrete tasks of political life after World War I, and they could not reliably safeguard the freedoms of the fragile political democracies of inter-war Europe.

Kelsen's main constitutional intervention was the writing of the drafts for the Austrian constitution of 1920, which contained many features of a fully positivist document. Opposition to his work in Germany, however, was also bound up with controversies about the Weimar Constitution, and critical debate with Kelsen acted, throughout the 1920s, as a framework for criticizing the positivist or allegedly formalist aspects of the Weimar Constitution and for suggesting amendments to the legal order of the Weimar state. This was particularly the case in the periods of most intense political instability, notably 1919–23 and 1930–33. In some respects, it is no coincidence that criticism of Kelsen and criticism of the Weimar Constitution fell together. The constitutional fathers of the Weimar Republic created a document for German democracy that was, in part, marked by the conventional ideas of positivism. For instance, the constitution established a central state with separated powers and a limited parliamentary chamber; it defined its laws as a system of mandatory restrictions on state authority; it incorporated a distinct catalogue of rights; and it construed the constitution in its entirety as a procedural-administrative order, dictating to the state how its functions

should be fulfilled. It therefore viewied the state, in classical positivist manner, as an agent under law, whose competences must be exercised in conformity with the prescriptions of the law. Despite this, however, the constitutional fathers of 1919 in Weimar also drew on a variety of anti-positivist theoretical sources, which meant that certain aspects of the Weimar Constitution deviated from more standard positivist ideals, and they actually reflected a counter-constitution to Kelsen's pure-positivist documents for the First Austrian Republic. Amongst the constitutional fathers, for example, Weber called upon elite-democratic ideals and he argued for a personally integrative constitutional apparatus, centred in a presidential executive. The drafts for the constitution set out by Hugo Preuß were shaped by the ideals of organic theory, and they rejected static and purely normative accounts of statehood. Friedrich Naumann, who presided over the commission responsible for the catalogue of basic rights in the constitution, had his theoretical origins in the broad terrain of Cultural Protestantism, the liberal nationalist Protestant movement around Adolf von Harnack and Ernst Troeltsch which claimed that German culture and politics were formed and united by the distinctive values of loyalty, inwardness and anti-revolutionary progressivism implicit in Lutheranism.[24] In his earlier works, Naumann had tried to reconstitute German democratic theory as 'religious liberalism', sustained by historically formed Protestant values.[25] On this foundation, he urged the establishment of a constitutional system that would accept the formal principles of liberalism, but that would also allow a socially integrative political order to evolve, combining welfare policies and a strong executive leadership.[26] In his contributions to the Weimar Constitution, then, Naumann used this outlook to propose a catalogue of basic rights that were intended not, in the classical liberal or positivist style, as guarantees of individual liberty and personal legal sanctity against the state, but as programmatic principles of identity and integration around which cohesive ideas of cross-class unity could be promulgated. Naumann's favoured project in 1918–19 was, in fact, to transcribe the basic rights into a vernacular catechism, to reinforce the democratic identity of the new republic.[27]

At the centre of constitutional reality in the Weimar Republic was, thus, a clear opposition to pure positivism and an attempt to construct the constitution as a focus of social integration. Also of great importance in the debates regarding the form of the Weimar Constitution were the left-oriented organic models of Hugo Sinzheimer. Sinzheimer employed the corporate elements in the Austro-Marxist legal theory set out by Karl Renner to propose an idea of constitutional foundation that fervently contradicted formal-positivist accounts of legal personality and legal statehood.[28] Sinzheimer argued that the origin of law and state should not be identified in exclusively legal terms, but should be viewed as residing in the plural associations of civil society, especially in those representing the material-political interests of the labour movement. He thus proposed that in late-capitalist societies delegates of unions and representatives of business

should be allowed, in full legal autonomy, to negotiate conditions of labour, employment and distribution, and that agreements over these matters between the negotiating parties should obtain binding legal force. If allowed to act as legislative organs, he assumed, delegates of labour and representatives of business are likely to produce organic foundations for the legal administration of society, and, over long periods of time, they will bring whole sectors of social and economic administration under the jurisdiction of an organically formed cross-class consensus. *Labour law,* transmitting agreements between workers and management, can thus act as a powerful medium in the resolution of social conflicts, and it can even assume a central role in forming the legal preconditions of the state itself. Sinzheimer especially identified the collective wage agreement (the *Tarifvertrag*) as an element of organic law, which, reflecting a cross-class 'spirit of self-organization', can produce consensual legal arrangements from the heart of civil society and integrate an idea of *distributive citizenship* in the political order.[29] He did not entirely abandon the notion that the constitution of the state should retain a certain dignity over and against the groups of civil society.[30] Nonetheless, he identified industrial relations as a source of autonomous organic will formation, which might ultimately guide the state and its constitution towards a more egalitarian or common-economic political order, and he saw the ideal state as one centred, not in formal persons, but in the organic persons of economic bargaining franchises. For this reason, in his interventions in the debates on the Weimar Constitution, Sinzheimer ensured that the constitution contained a council clause, Article 165, which provided for rights of collective bargaining and – in principle – for the consensual/collective organization of the economy.

The Weimar Constitution, therefore, reflected a number of diverse and often contradictory legal ideas and ideals. It did not mark a full break with the basic principles of positivism. However, it based its idea of legitimacy in the state on a fuller and more integrative conception of state power and citizenship than that normally countenanced by positivism, and it defined itself as a programmatic document enabling the state to act as an agent of social unity, collaboration and community. Under the Weimar Constitution, the state obtained powers enabling it to intervene in processes of economic distribution and dispute, to regulate questions of ownership, to draw disparate sectors of society together in bargaining processes or in plebiscites and to integrate citizens into experiences of constitutional identity through a popular catalogue of rights. Indeed, the constitution enunciated the rights that it enshrined as programmatic rights, not as formal rights, and these rights contained active socio-economic provisions and prescriptions. In these respects, the Weimar Constitution clearly hoped to found itself, albeit in rather confused and tentative manner, in a paradigm of the integrated citizen, of the citizen not (in Kelsen's sense) as a fictional person under law, nor (in Laband's sense) as a formal person under law, but as an actively constitutive agent, both in civil society and the state.

Heller: the material will of the state

Despite these ambitions, however, the Weimar Constitution soon came under fire from critics at various points in the political spectrum, and it was widely argued that it did not break thoroughly enough with positivist political conceptions. Naturally, not all influential political theorists in the Weimar Republic sought to overthrow or fundamentally to correct the constitution of the republic. Its authors, predictably, remained pledged to its defence, although Naumann and Weber did not survive long enough to see the problems that the constitution created, and Preuß also died, in 1925, long before the final crises of the republic and of its constitutional apparatus. Eminent liberal lawyers, such as Gerhard Anschütz, also wrote favourably of its importance in the broader evolution of statehood in Germany, and so promoted its widespread acceptance.[31] However, after the ratification of the constitution in 1919, political theorists on both right and left rapidly began to denounce the constitution as a compromise document that failed to give effective foundation and integrity to the new political order, and that remained tied to outmoded conceptions of formal-legal rule. These attacks on the constitution were, naturally, flanked by a wider critique of the more general preconditions of positivism, and especially of Kelsen's constitutional theory.

The most sustained organicist attacks on positivism emanated from the German-Jewish Social Democratic theorist, Hermann Heller, who followed Sinzheimer in linking revisionist Marxist social analysis to a conception of the state as an organically structured life form. Heller's organicism was distinct from more conventional lines of left-leaning corporatism as it was underpinned by a cultural-anthropological theory of legal production. Following the late-historicist and early phenomenological works of Dilthey and Theodor Litt,[32] he argued that the legal and political institutions of modern society form themselves from a 'reality of experience' that unifies all members of a national or cultural order, and they endlessly regenerate themselves as new articulations of the vital experiences embedded in culture.[33] More generally, however, at the centre of this work is the common anthropological claim of organic theory: namely, that the human being is a naturally organizational creature, and that the human being fulfils its innate dispositions by forming associations and organizations with other humans. The state, accordingly, is the highest organization, and it is the highest expression of these originary human dispositions. The state, Heller consequently explained, is an 'organized' – and, if necessary, 'authoritarian' – 'life-form', giving sovereign legal expression to the agreements established between voluntary organizations of persons in civil society, on the foundation of a national-historical unity of culture and experience.[34]

Heller's theory was shaped by the conviction that positivism, especially as set out by Kelsen, constructs a purely 'depersonalized' legal state, deriving its authority from the false presumption that there exists an invariable order

of law, which can be neutrally imposed onto the complex, emergent and, at times, antagonistic reality of social evolution.[35] Tellingly, he saw in such theory the residue of an outmoded liberal ius-naturalism, reflecting a 'bourgeois ideal of security', which is not sustainable in complex and sociologically divided societies. He therefore opposed all accounts of political legitimacy and order that derive the conditions of legal rule from generalized norms or legal facts, and he denounced as wittingly paradoxical the claim that the legitimacy of the state can be derived from the laws of a constitution with no volitional content or purpose.[36] Plausible political and legal analysis, he claimed, must always proceed from the human will as the irreducible focus of political constitution and order, and it must always identify the will of the state as the guarantor of legal order, in the form of sovereignty. Both natural-law and positivist analysis, he asserted, have the corrupting weakness that they secondarize the human will, and they depreciate decisive 'responsibility', both of leaders and citizens, as the formative source of order.[37] Law, he concluded, is necessarily centred on sovereign wills, who 'give binding commands' and 'make binding decisions'.[38] Law, consequently, is always 'established, sustained and destroyed by the processes of the human will',[39] and the 'establishment of law' always has its origin in the 'command of state'.[40] A state based in the human will, moreover, always takes the form of a sovereign state, whose decisions are not subject to any other higher power or universal legal regulation.[41] Indeed, Heller claimed repeatedly that the positivization of law only occurs because, through the evolution of modern states, political executives have assumed legislative authority, and so detached the law from its original religious foundations. The human will is therefore the origin of legal positivity, and there are no laws independent of human will: the 'unity of the legal system' originates exclusively in a 'unity of wills exercising domination'.[42]

On these grounds, Heller's theory of state was intended, after Kelsen, to *repersonalize* the state and, once more, to locate the state on the anthropological foundations of will and decisive freedom. In this, however, Heller did not offer an entirely voluntaristic model of governance; he did not renounce the idea that moral or supra-positive constraints apply to the exercise of political power; and he clearly insisted that legitimate statehood must develop in the form of a *legal state.* It is illusory, he claimed, to view the state as one solitary personal will or as an 'individual subject', crystallized in an all-powerful sovereign executive and acting without legal restriction. Instead, the personality of the sovereign state should be viewed as evolving from voluntary agreements between associations in civil society, and as the form in which the freedoms pursued by these associations culminate. The state, construed in this way, is founded in an organic 'unification of wills':[43] it is the organization in which these wills are reconciled and in which their freedoms are expressed in a socially adequate manner. The state thus evolves by integrating the many wills and the many persons incorporated in the associations throughout society. Once formed as an amalgamation of

these associations, the state exercises supreme personal power over all those whom it incorporates. Nonetheless, Heller emphasized that the state, as an integrative organ, has no abstract dignity against the associations from which it evolves. On the contrary, the state only exists because it integrates other associations and because it provides a structure in which the freedoms pursued by these associations can be reflected, protected and generalized. The state, therefore, cannot separate itself from these associations in the exercise of its power; it is internally accountable to the normative elements inherent in the freedoms pursued and moderated by these associations; and – crucially – its integrity is threatened wherever it disregards the freedoms that it contains. The associations whose freedoms are ordered in the state thus form the state's constitution, and the volitional unity underlying the state constitutes at once the objective power exercised by the state and the legal form in which this power is to be exercised. The concrete evolution of a state as a centre of territorial sovereignty occurs because the state grows out of the normatively weighted interactions – that is, the 'normative associations of will' – existing between particular groups of people in a particular place, and these interactions necessarily lead to agreements over rights and freedoms that assume some degree of constitutional universality in the state and so determine the conditions under which the state can pass laws.[44] For this reason, Heller concluded that the formation of power is always insolubly bound up with the formation of law, and the state obtains its legitimacy only as the highest integrative representative of the organically structured general will of the people that it integrates. The 'volitional power of the state which positivizes law', consequently, is always 'dependent on norms', and the state cannot operate in distinction from the 'power-building character of law'. Law, Heller consequently concluded, is certainly positivized by the will of the state – but, as it is positivized, it also produces 'supra-positive foundations for its validity', and it binds the state to its own inner constitution.[45] Indeed, the state develops and regenerates itself by integrating citizens in highly diverse social and economic life contexts, and it can only fulfil this function by generating rights and laws to which all of its citizens are likely freely to accede and in which, in Kantian manner, they recognize an element of their own freedom, integrity and authorship.

In these analyses, Heller set out a new variant on the wider claim, originating in Kantian doctrines, that a legitimate state is one that unites law and freedom, or reason and will, and communicates its laws as laws of rational freedom. The organic state, he argued, must be a legal state in which the power of the state is internally formed and bound by generally accepted norms in a constitution. In this, he rejected the idea that a constitution might be external to the state, that it might prescribe terms of procedural compliance to the state, or that it might enshrine formal norms or rights against the state. Instead, he argued that the constitution of the state is the integrated yet evolving legal form of the wills that interact in civil society and create common forms for their freedoms, thus articulating

norms and rights as aspects of their participation in legal and political formation. As such, the constitution can assume a written or codified structure, but it does not fulfil its essential function by fixing normative or procedural prescriptions or universalized principles of right as *limits* on the exercise of state power.[46] Rather, the most authentic function of the constitution is to integrate and express the complexly formed will of the people, to recognize and to stabilize the freedoms pursued and elaborated by this will, and, above all, to consolidate this will as the state's own will.

An organic constitution thus unites power and law and freedom and reason in the state by producing consensual laws that positively reinforce, not negatively restrict, the will of the state, and by sanctioning rights that are fully enacted as elements of a positive will in the state. The organic constitution, in other words, is a human constitution, which disarticulates rights from their normative or metaphysical stasis against the will and which fuses freedom and reason in the state by producing laws as the stabilized articles of associative agreements concluded through society, but culminating in the state.[47] The authentic constitution is an active, experiential component of society in which all constituents of society feel and know themselves constitutively implicated.[48] As such, however, it also contains a universally normative structure, and a state that contravenes its *laws* or that neglects *rights* inevitably weakens its legal personality and so gradually also suffers a loss of *power.* The strong state, in sum, is always a legal state: the stronger the state, the stronger and more universal are its laws and the stronger and more participatory are the rights attributed to its citizens. In this, Heller gave perhaps most exemplary expression to the wider organicist conviction that the antinomical conception of the relation between freedom and reason, and power and law, is misplaced, and that law and power in fact presuppose and sustain each other. Only metaphysically abstracted analyses of law and the legal state fail, for Heller, to understand the constitutive reciprocity between law and power.

In addition to this, Heller asserted that the organic production of binding norms in civil society also contains a material or materialist dimension. Like Sinzheimer, he claimed that the formation of a state in a mass democracy must lead, not only to the formation of a *legal state,* but also to the formation of a *social-legal state.* Organic agreements in a pluralized mass society, inevitably, do not focus solely on areas of interaction regulated by formal-political laws, but they also address questions of production and economic administration. An organic state thus incorporates laws ruling consensually over questions of distribution and employment. A constitution adequate to a mass-democratic society, in consequence, is a constitution in which relations of industrial production, usually seen to pertain to private law, are brought under the public-legal will of the state, and in which the economy is made to conform, under the public rule of law, to universal material norms.[49] Fundamental to this notion of the material-organic constitution is the belief that formal-positivist constitutions not only fail to

constitute the state as a living personality, but they also allow the constitution of the state to be restricted, and often eroded, by the unregulated private law of capitalism and by bodies that are guaranteed autonomy under such law. The weak constitutions of positivist doctrine are especially designed, Heller indicated, to allow economically powerful groups to assume legally relevant power and to permit the principles of private law and private personal autonomy to prevail over the political decisions and the public personality of the state. Because of this, under positivist constitutions citizens are excluded from legal participation in the most vital areas of social exchange (that is, in those relating to production, employment and material entitlement), and their rights are hollowed out to mere formal rights of private ownership, electoral enfranchisement and contractual compliance. It is only an organic constitution, which construes legal rulings over production as politically constitutive and which is sufficiently powerful to enforce these rulings through society that can protect its citizens from the corrosive influence of private-legal freedoms in the economy and so stabilize an authentically universal legal state. Positivist constitutions recognizing the formal autonomy of private law, Heller concluded, replicate – in new form – the intrusion of external metaphysical ideas on the political order; they distract from the cohesion and legitimacy of the organically constructed constitutional state; and they order political life around principles that erode the associational bases of human life. Control of the economy, in sum, is always a 'political matter', and a politically legitimate state must ensure that all areas of social and economic exchange are regulated by one plurally uniform and sovereign will.[50]

Integration theory between anthropology and religion

One underlying implication in Heller's theory is that the legitimate state both integrates and represents the culturally united people, and it guides the body of the people towards constantly increasing levels of material and legal integration and freedom. In this doctrine, the legal principles that the state *represents* are identical with the substantial realities that it *integrates:* all disjuncture between the representative and the integrative character of the state is superseded. The positive or experiential substructure of the legitimate state is national culture, and culture forms the generic precondition of the associationally embedded norms and agreements that organize the state in legal form. The formation of reliable order is directly impeded by all modes of legal analysis, whether pure positivist, pure private-legal, classical ius-natural or rational ius-natural, which force the state onto the Procrustean bed of an empty metaphysical 'science of norms', and so dissolve the vital process of organic association and of cultural transmission between state and society.[51]

In certain respects, the cultural and integrative turn in democratic thought in the 1920s was closely tied to religious debate and tended to see

effective integration as a specific feature of Protestant states. Before Heller, for example, Radbruch argued that democracy should not be viewed solely as a legal or political condition, but also as a condition of cultural unity, in which the personality of citizens is detached from pure 'individualism' and 'arbitrariness', and formed around objectively integrating values.[52] In this, Radbruch extended the earlier hostility to legal formality amongst representatives of the Free Law Movement; he argued that political cultures formed by Roman law do not promote integrative values, whereas Germanic law and specifically German religious views tend to create collectivistic and integrated political cultures.[53] He ultimately elaborated these claims to conclude that ideas of legal personality and legal subjectivity underlying modern conceptions of valid law should be placed on new anthropological premises, and should be connected to wider objective values. The personal origin of the law, he explained, should not be conceived as an atomized individual corresponding to 'an abstract scheme of freedom, self-interest and cleverness'.[54] On the contrary, law should be viewed as a series of values and duties embedded in objective culture, and the constitutional state founded in the atomized legal subject should be replaced by a state representing the legally 'organized community'.[55] In this, he stressed that the 'transpersonal values' of authentic law are closely connected to religious values, and he ascribed a primary role to religiously formed culture in constituting this legal community and in reinforcing the values in which its unity is rooted.[56]

Further to the political right, then, Rudolf Smend argued that it is a peculiar feature of Protestant states that that they rely on *positive* processes of integration. Such states are forced to provide positivized accounts of their legitimacy and legal integrity, and – unlike Roman Catholic states – they cannot presuppose unshakeable foundations for the exercise of power. For this reason, he claimed, the legitimacy of Protestant states tends to presuppose a cultural and interpretive unity of experience; it tends to be variable and subject to constant evolution; and, most importantly, it ceaselessly enacts itself through internal processes of *integration.* Indeed, whilst Roman Catholic states obtain legitimacy through the external-metaphysical attribute of *representation,* in which the state refers its power to an invariable sequence of legal norms, Protestant states internalize this originary reference and derive legitimacy through integration, in which they internally articulate experiences of freedom and of cultural unity.[57] Lutheran states, most especially, have no external or perennial legal structure and they only sustain themselves through culturally unifying mechanisms of integration.[58] States without external representative foundations legitimize themselves primarily, Smend asserted, by referring to culturally cohesive *values,* and in so doing they generate experiences of objective identity in which laws and decisions are likely to be met with compliance and recognized as legitimate. A Protestant state is therefore legitimate, he concluded, where it can presuppose a constituency united by common 'objective values', and where it can interpret and reflect these values in its legislation.[59]

On this basis, Smend also set out a distinctive theory of the constitution and of the personality of the state. He claimed that the role of the constitution is not to secure a set of rights or norms against the state, or in distinction from everyday human existence. Instead, the constitution of a legitimate state is the 'integrating reality' or the 'living reality' of the state, which gives public shape to the values and identities around which citizens organize their lives. Where the constitution expresses a set of objectively held values, citizens feel themselves personally and objectively bound to the state, and the constitution integrates the citizens in support of the state. The rights enshrined in the constitution, he thus concluded, are not formal, ius-natural or inviolable norms by which state is formally bound, or that impose external entitlements on the fabric of the state. On the contrary, constitutional rights are active-objective elements in the interpretive culture and the objective order of value formed around the constitution, and they help provide legitimacy for the 'order of state and the order of law' because they frame value concepts that citizens share with the state and that engage citizens in interaction with the state.[60] The state thus obtains its legitimacy as a 'total event', or as an 'everyday plebiscite', in which all functions of the state participate in the unceasing task of integrating the diverse sectors of the population. Basic rights and other elements of the constitution, consequently, are not metaphysical principles that place limits on the integrative plebiscitary authority of the state. On the contrary, they are dynamic components of the state, and they contribute directly to ensuring that the everyday plebiscite will be successful.[61]

Smend's integration theory differed from that set out by Heller in that he emphasized the objective role of the constitution in integrating citizens, and he claimed that the constitution binds people into an already formed apparatus of state. Indeed, in this respect, Smend allowed a high degree of latitude in his interpretation of which values might obtain broader social recognition and contribute to the legitimacy of the state. One central implication of his theory is that the content of integrative values cannot be stipulated, but is derived and tested through ongoing processes of common interpretation. For this reason, he was willing to recognize a number of different political systems, from monarchies to republics, as capable of providing conditions of political cohesion. Nonetheless, like Schmitt at the same time, he suggested that purely liberal or parliamentary systems lack the symbolic devices to promote cohesive cultural unity: they consequently struggle to elaborate potent mechanisms of integration, and they commonly suffer from legitimatory deficits.[62] Monarchies and pure democracies are more likely to stimulate unitary declarations of support and integrity, for it is specific to such systems that they deploy symbolic resources and refer legal addressees to overarching experiences of unity in their attempts to gain consensus.[63] However, Protestant monarchies, he concluded, are the states that have the greatest chance of maintaining political integrity in modern society. Such states are specifically suited to the production of objective

values and objective sources of integration under socio-political conditions where the validating foundations of the law have become contestable.[64]

Such stances also intersected with influential positions at the extreme reactionary fringe of legal theory in the Weimar Republic. Hans Gerber, for instance, denounced the Weimar Constitution as a document that undermined the 'force of its legitimacy' through its attachment to the 'formal principle of legality', and that was ultimately incapable of sustaining an integrative ethic or sense of cultural-political identity. He therefore concluded, following Smend, that the integrative weakness of the constitutional and parliamentary order could only be offset by a strong state rooted in the most fundamental religious values of the German people: '*Auctoritas',* he explained, 'can only come from faith'.[65] He thus announced a programmatic plan to found a specifically 'Evangelical theory of state', defining law as an 'unconditional obligation' born from an objective legal community of a historical people, and so 'rejecting natural law in any form'.[66] The young Otto Koellreutter, later a prominent National Socialist legal theorist, also defined the 'idea of the Christian state' as one of the 'living' elements of the modern political order.[67]

Carl Schmitt: exceptionalism, representation and integration

The critique of positivism, in sum, crossed many political boundaries and it was reflected in many distinct political attitudes. It was central to the social-integrationist ideas on the left of the political spectrum in the Weimar Republic, yet it also clearly coalesced with extremely conservative doctrines of Protestant political substance. The rejection of positivism obtained its most dramatic and influential expression, however, in the works of Carl Schmitt.

Schmitt's first writings, before the foundation of the Weimar Republic, were close to neo-Kantian ideas. At this early stage in his thought, he argued for the 'primacy of law' over the power of the state, and he referred to Roman Catholic teachings to explain the existence of supra-positive legal norms applying to all legal frameworks and used to measure all exercise of power.[68] After the collapse of the Hohenzollern monarchy in 1918, however, Schmitt renounced normative analysis of political order, and he identified the purpose of his work in more strategic terms, as an attempt to consolidate the stability of the political orders under which he lived.[69] Most of his most influential theoretical interventions were, therefore, shaped by the desire to give substance to the political order of the Weimar Republic and to explain in concrete terms how the state might defend itself against the manifold threats (Bolshevism, foreign annexation, internal sabotage) which he saw as afflicting it. After 1919, therefore, he turned against positivism, neo-Kantianism and all types of liberalism influenced by these doctrines, and he set himself against all stances that he considered incapable, especially in the context of the weak democratic tradition in Germany, of contributing to the stability of political institutions.

Central to Schmitt's work through the 1920s was the claim that the spirit of depersonalization in liberalism and positivism had led to the evolution of a weak state in Germany, which was fraught with internal divisions, lacked cohesive foundations and was inclined to extreme indecisiveness. Most particularly, he viewed the positivist assumption that law is a *neutral* or purely normative medium of social communication that is not subject to political interference and that the legitimate state is a state bound by neutral law as an absurd and perilous fallacy of liberal political thought, whose consequences for Germany were only too visible in the acute instability of the governmental system of the Weimar Republic. This assumption, perhaps more than any other, was, Schmitt claimed, the reason why liberal political doctrines struggle to form strong states and why they are vulnerable to internal and external destabilization. The relation between law and power should in fact be examined as a site of entrenched conflict between rival organs of political interest, and legitimate political systems are those that can voluntaristically exert power and channel concrete interests through the law. Legitimate political orders must therefore be founded in one uniform, sovereign and often *personal* will, and this will must provide the precondition for all decisions of state and all laws of the state. In this, Schmitt concurred with Kelsen's claim that there always exists a 'methodological relationship' between 'theology and jurisprudence',[70] and he asserted that all aspects of political theory are 'secularized theological concepts'.[71] Like Kelsen, in fact, he also argued that the transition from sacral to secular constructs of order is a necessary and inevitable aspect of modern political life. However, unlike Kelsen, Schmitt saw legitimacy as residing in the state as the decisive will of the sovereign, not in the regulation of power by law. He thus followed Hobbes in arguing that sovereign decisions assume their legitimacy by their analogy to the primary freedom of God's will or to the primary revelation or 'miracle' of God's will. Unlike the liberal *Rechtsstaat,* which derives its idea of legitimacy from the rationally constrained God of theism, the truly sovereign state derives its form from its reference to the willing God or the God of freedom, not to the intellectual God or the God of reason.[72] The edicts of the sovereign will are not contaminated by prior constraints or norms, and they appear as secular reflections of God's originary will. Indeed, where states seek to be both rational and free, or where they allow the terms of freedom to be stipulated by universal ideas of reason, they run the acute risk of losing both their rationality and their freedom.

Schmitt consequently concluded that law on its own, defined as a neutral system of formal norms, can under no circumstances constitute the legitimate foundation of the state. The positivist or neo-Kantian claim that the state is invariably bound by an impersonal constitutional order serves only to dissipate the power of the state, and it fails to reflect the necessarily voluntaristic origin of power. Likewise, the standard liberal assumption that law is a medium of political administration that can be employed to palliate social antagonisms, manufacture compromises between rival social groups

and, so, create conditions of operative consensus for the state can only secure the most chimerical forms legitimacy for the state. These arguments, for Schmitt, entirely misunderstand the relation between law and power and between law and legitimacy. For Schmitt, the 'metaphysical system of liberalism', imputing natural harmony and neutrality as law's inalienable precondition, is not appropriate to analysing state forms under the conditions of social plurality and intense material antagonism that define modern societies.[73] In such societies, a unitary foundation of legitimacy must be established *before* law is applied, and law must resolutely transmit the principles originally constitutive of this legitimacy. If this is not the case, and if law is applied as a neutral or universal medium, law insinuates principles into the state that erode the legitimacy of the state, and it thus dismantles the basis of order on which the state is founded.

In addition to his critique of positivist ideas of legal neutrality, Schmitt was also intensely hostile to the role of political parties in the modern state; indeed, he saw party democracy as closely connected with positivism. The fact that government is conducted by political parties, and usually by coalitions between different (often naturally antagonistic) parties, he argued, means that the exercise of power is conducted by technical 'compromises and coalitions' between different associations, not by a uniform or homogenous political will.[74] Political parties allow democracy to subside into a fragmented or materially parcellated set of interests, and, in seeking to mediate balances between their diverse constituencies, they in fact impede the emergence of a substantial general will, which might give a cohesive substructure to government.[75] Moreover, the fact that modern mass-democracies permit any party to gain access to power, regardless of whether this party supports the principles of democratic rule, clearly underlines the weakness of such party democracies, and it shows that these systems are unable to express clear principles of order – or even clearly to define a 'form of state'.[76] Party democracy, in consequence, ties the political system to an uncontrolled party-political pluralism and to an uncontrolled plurality of divergent interests, many of which either actually or latently oppose the existing political order. Central to Schmitt's critique of party-democratic pluralism is, thus, the conviction that parliamentary democracy, in its customary forms, cannot be genuinely democratic.[77] Rather than enabling a condition of popular government, parliament, based in the delegations of parties, precludes the emergence of precisely that general and unifying will which all democracy requires. For this reason, he argued, 'dictatorship' itself might be more democratic than parliamentary governance.[78]

In the broadest terms, Schmitt claimed that the evolution of modern political systems has brought about the demise of the form-giving or voluntaristic element of politics, and, in consequence, it has led to a fundamental neutralization of politics and a fragmentation of the original legitimatory resources in politics. This neutralization, he argued, began with the formation of liberal political movements in the nineteenth century and

the ensuing establishment of early parliamentary-democratic systems. Through the evolution of liberalism and its doctrines of natural law and private-legal positivism, diverse private interests were admitted – as 'organizations' of 'individual freedom' – into the fabric of the state.[79] The state then became determined by a plurality of distinct legal principles reflecting the objectives of distinct social groups, and it became difficult for the state to act in accordance with one uniform will or set of prerogatives. Early liberalism nonetheless had the particular strength that its adherents, as property owners, formed a relatively closed franchise with a small active public sphere; they were thus unified by a relatively homogenous group of material interests, and they channelled consistent interests into the state and avoided taxing it with impossible regulatory burdens. However, through the subsequent expansion of the franchise to include different classes with directly opposed class interests, and then through the resultant institution of fully evolved mass democracies and welfare democracies in the twentieth century, the state has gradually been forced to internalize an amalgamation of acutely antagonistic prerogatives, the reconciliation of which in the form of one governing will is not possible. As a result, the state has been refashioned as a battleground in which interest groups (both inside and outside parliament) compete, in barely pacified manner, for a portion of political power and a share of material goods. The modern state has, thus, necessarily assumed the function of an 'instrument of social and political technology', whose primary legislative objective is simply to palliate the pluralized associations that have obtained a stake in it and that ceaselessly vie for increased power.[80] A state of this kind, Schmitt argued, is incapable of determining the actual concrete principles of government or the content of laws for its citizens, and, because of the compromises and barely obscured antagonisms in which it founds itself, it is incapable of maintaining long-term conditions of legitimacy. A state of this kind, in short, can never be *political:* underlying the transformation of the modern state is a process of materialization, through which all elements of the public will are supplanted by precariously balanced material interests, and politics is replaced by highly technical and materialized systems of command.[81] The natural-legal rationalism of liberalism and the private-legal normativism of positivism have thus acted in the course of modern history, Schmitt concluded, as politically debilitating masks for the grasping self-interest of a series of newly powerful social groups. Indeed, liberal ideas have used the shadow of metaphysical universality to impose a set of highly instrumental private purposes on the apparatus of public order, and to empty the state of the resolve necessary for underwriting political stability. Liberal doctrines, consequently, have contributed to the creation of a helpless state, whose constituents, even where they most require it, cannot rely on the state for protection – even for protection *from themselves* and from the fateful consequences of their own self-interest.[82] A structural precondition of a legitimate state is that it must be different from the interest groups in

society, and that it must be able to impose principles of order across all different sectors of society.

In many of his diagnostic writings on the Weimar Republic, Schmitt's works were marked by the (albeit at times wilfully self-contradictory) insistence that democratic government, if it is to survive, must divest itself both of its Kelsenian fictions of legal neutrality and of its interest-based pluralism, its *polycracy,* and it must refound itself in a constitution embodying a uniform and decisive will. In his major works of this period, then, he positioned himself as a conservative defender of the constitution, insisting that constitutional order is only sustained where the constitution is stated as the expression of one positive will and where this will is hardened against the 'pluralism of concepts of legality', which is promoted by liberalism and which 'destroys respect for the constitution' and erodes the fabric of democratic order.[83] The actual nature and origin of the uniform will embodied in the constitution appeared to Schmitt in different ways at different times, depending on historical context. In his first writings after the foundation of the republic, especially in *Dictatorship,* he argued that, at least in periods of crisis, commissarial dictatorship might be the governmental form that can most effectively 'protect' the constitutional will of the state.[84] At different junctures in the 1920s and early 1930s, he also set out a defence of government by presidential prerogative, and he argued that the exceptional powers embedded in the Weimar Constitution – especially those incorporated under the infamous Article 48 – should be utilized to concentrate powers in the president or in the executive around the president, in order to preserve the basic constitutional structure of the republic. In these works, he showed enthusiasm for the weakening of the legislative procedures of parliamentary governance and for the consolidation of all power around a semi-accountable presidential executive, which, he claimed, could demonstrate its foundation in a united will by garnering popular *acclamation* in one-issue plebiscites.[85] This was particularly the case in the last years of the Weimar Republic, when Germany was governed by a succession of chancellors, Heinrich Brüning, Franz von Papen and Kurt von Schleicher, who had little support in parliament and who were placed in office through presidential appointment under the powers accorded to the president in Article 48. At other points in the Weimar era, however, Schmitt was intermittently prepared to support a more broad-based constitutional rule, and he advocated increased presidial and executive power only in so far as this served to protect the democratically formed constitution of the republic. This latter view was especially pronounced in Schmitt's writings during the years of relative stability in the Weimar Republic, 1924–28. In this period, he began to adopt the view that the constitutional reality of the republic might in fact possess a degree of internal security and legitimacy, and it might indeed give form to the unified will of the German people.[86] At this time, in consequence, he set himself the task of showing how the constitution could be reformed or redevised in order to place the state on more reliable foundations. He thus

argued that constitutional forms evolving out of liberal or positivist political ideals – i.e., the guarantees for a separation of legislature, executive and judiciary and the catalogue of basic rights limiting the competence of the state and satisfying social and economic expectations outside the state – lead only to the 'relativization of state power', and they weaken the structural unity of the state.[87] Such examples of liberal divisiveness in the Weimar Constitution, he therefore claimed, should be abandoned, and they should be replaced with a constitutional form in which all institutional components of the state are integrated elements of one decisively positive will. Indeed, even at the end of the Weimar era, Schmitt did not finally throw his weight behind those agitating for a complete overthrow of the republic. During the years of the presidial regime, he saw the power of the president as a bastion against the collapse of the republic,[88] and he also sought to institute different constitutional provisions to ensure that parties intending completely to dismantle the republic (especially the Nationalist Socialist Party [NSDAP]) should be kept out of power.[89]

Because of his association with the late-Weimar presidential system, Schmitt is often associated with the so-called conservative revolutionaries of the Weimar Republic. These were a group of literary philosophers around Ernst Jünger and Oswald Spengler, who encouraged the supplanting of Weimar democracy with an authoritarian non-parliamentary government and who saw the ideal political order as one based in a militarized society, integrated by mythical symbols of national unity and order and governed by a technologically empowered aristocracy.[90] Schmitt's association with this group, however, does not capture the full range of his thinking, and, at times, it aligns him to views that are directly inimical to his own. Although he shared with Jünger and Spengler a highly sceptical approach to the parliamentary order, he did not unequivocally endorse their extreme enthusiasm for technology, and he did not sympathize with their vehemently anti-Christian attitude, their post-Nietzschean naturalism or their mythomanic construction of human authenticity. Nonetheless, Schmitt did move close to these theories in that, like the conservative revolutionaries, he claimed that legitimate government is founded in *decisions,* and that these decisions usually involve adversarial conflict over the means of political coercion.

One key aspect of Schmitt's theory, consequently, is the claim that liberal governments erroneously assume that *peace* is the natural condition of human coexistence, and they naïvely presuppose that the normative foundation of law can be derived from naturally manifest or easily moderated compromises between all members of the polity. On Schmitt's view, however, the opposite is factually the case, and the liberal belief in 'social harmony' is in fact an element of liberal metaphysics.[91] Modern polities are, in fact, marked by extremely high levels of antagonism between extremely pluralistic social groups, and the state cannot produce for itself a normative foundation from agreements between these groups. In the final analysis, therefore, the state must assert its power, not normatively, but *exceptionally.* Only the 'state

of exception', Schmitt claimed, 'reveals the core of the state in its concrete character',[92] and it is only where it demonstrates that it can produce unifying principles of order in deeply unstable social settings that a state can claim to be legitimate.[93] In this respect, therefore, Schmitt dramatized the original paradox of modern state foundation, and he fixed his theory on the defining problem of politics after the disintegration of universal order. He argued that, originally, the source of political legitimacy is the contingent will: it is the will which creates itself *ex nihilo,* without any prior, necessary or intellectualized legal circumscription and without any support in underlying natural or social dispositions. The source of legitimacy, Schmitt argued, if 'viewed in normative terms' is 'born from nothing'.[94] Once created, then, this will is the sole guarantor of political legitimacy – without the exercise of a will there is no legitimacy in the state, and the state has no recourse to principles outside the will to underwrite its legitimacy. Parliamentary legal states, however, especially those regulated by positivist or neo-Kantian constitutions, cannot establish the will to uphold legitimacy, and their claim to derive legitimacy from their essential normativity remains an index of their internal lack of legitimacy and of their reliance on pious fictions of normative harmony. Accounts of political order, such as that set out by Kelsen, which view power and law as mutually constitutive, remain entrapped in the falsehoods of metaphysical thinking, and they use paradoxical feint to transpose the original metaphysical notion of universal natural law onto the secular form of the state. Such outlooks, however, fail to grasp the basic facts of modern politics: namely, that there is no benign legal, anthropological or metaphysical power in the universe which might give support to government, that government is acutely accountable for producing and enforcing the conditions of its own stability, and that law on its own will not protect the state. Classical natural-law theories might have believed in an overarching order of norms, created and presided over by God, to which the state must refer. In a secular society where God is not an agent in history, however, the rule of law has no external substructure, and it either stands or falls with the effective presence of a sovereign will.

The philosophical motif connecting Schmitt's work of the Weimar era was, thus, an inversion of the Kelsenian equation of metaphysics and personalism. Whereas Kelsen saw a persistence of metaphysics in personalism, Schmitt saw a persistence of metaphysics in pure normativism. For Schmitt, the state is legitimate where it is founded in *decisions,* not *norms,* and – consequently – where it is *personal,* not *metaphysical:* where it accepts the radical contingency of its foundations and refuses to obscure this contingency in a paradoxical reinvocation of the lost metaphysical unity of law and power. The 'legal order', Schmitt concluded, 'is based on a decision, not on a norm', and the normative power of law is inseparable from the decisions that uphold it.[95] The voluntaristic decision underpinning political order is, therefore, emphatically not a token of a metaphysical residue in politics. The decision might exist in analogy to God's own free

creative will, and it might shadow a reference to metaphysics. Factually, however, the decision is the freedom of a polity to decide, positively, to exist in a particular way and to take a particular constitutional form and so to be other than metaphysical and to accept the paradox of its contingency and variability. The decision is the moment in which an order of state reflects its contingency and absolute positivity and where it produces reliable foundations for itself, without any reference external to itself. A state that cannot institute decisive and voluntaristic foundations for itself is necessarily *metaphysical:* it legitimizes itself through references to principles that it has not positively constituted for itself; it presupposes helpful legal norms outside its own will; and it is consequently unable to underwrite the preconditions of its own survival and it opens itself to invasion by heterogenous ideological components. This, Schmitt claimed, is especially the case with Kelsen's theory, but he saw similar metaphysical traces afflicting all examples of liberalism. Kelsen's theory, he argued, is founded in a false 'metaphysics', which identifies 'normative legality with natural legality' and which erroneously concludes that power must inevitably – for either natural or metaphysical reasons – take the form of law.[96] Therefore, whilst Kelsen saw himself as a positivist and viewed the positivization of law as a neutral and abstractly normative process of legal application, Schmitt intimated that Kelsen did not understand the meaning of legal positivity. In fact, Kelsen (on Schmitt's account) allowed law to operate as a set of metaphysical paradoxes that enable potent social interests to manipulate the law and dismantle the state's political form. It is only when it is founded in the contingent decision of one will, in consequence, that law can assume a reliable enforceable positive status.

Schmitt did not insist that the decision upholding legal and political order must be an expression of dictatorial sovereignty. The decision might, he conceded, be a decision of a historically united people, or it might be a constitutional decision, or, equally, it might be the decision of a president or a commissarial dictator. Whatever its source, however, the decision is an element of unity and integrity that communicates principles of order – 'power and authority' – through the political system.[97] Where all aspects of the political order are informed and determined by a decision, politics obtains foundation in a will that separates itself from all insubstantially abstracted, universalized or transcendental laws and that claims undiluted self-originating authority for the principles it imposes. A polity ordered by a decisive will is always an *exceptional* polity, and an exceptional polity must justify itself by absolutely positive means.

Schmitt between Protestantism and Roman Catholicism

In his assertion that the sovereign decision is the source and guarantor of order, Schmitt appeared, in certain respects, to move towards quite standard positions in the history of Protestant political doctrine. Indeed, in opposing

ideas of universal law and political metaphysics in favour of a dramatic and anti-metaphysical exceptionalism, he, surely deliberately, placed his work on the classical terrain of Protestant politics. Despite this, however, Schmitt was in fact a Roman Catholic, albeit a lapsed one, and much of his work was organized around a dialectical interchange between Protestant and Catholic ideas of political form.

The influence of Roman Catholic ideas on Schmitt's thought was evident, first, in the fact that he refused to eliminate all representative elements from the state, and he insisted that the legitimate state possess a certain structural dignity over and against the material interests and exchanges of civil society. To be sure, Schmitt did not argue (except in his very earliest works) that the state must represent supra-positive or metaphysical principles independent of particular societies or particular histories, and he did not believe that the conditions of legitimacy in the state must comply with one exclusive normative or hierarchical model. For this reason, unlike certain ultra-conservative Catholic contemporaries in the 1920s, he was willing to accept a number of different state forms as possessing legitimacy. In the context of political debate in the Weimar era, he was consequently closer to moderate Catholic thinkers such as Konrad Beyerle, Joseph Mausbach and Peter Tischleder, who attempted to promote Roman Catholic support for the constitution of the Weimar Republic, than to those such as Franz Xaver Kiefl, who denied that a non-monarchical republic could ever obtain representative dignity.[98] However, throughout his work, Schmitt insisted that the state could not be reduced to a simple form of integration and that the positive origins of legitimacy cannot be understood without a non-material or transcendent adjunct.

In his major theoretical work, *Constitutional Theory* (1928), Schmitt set out a concept of political representation that, in complex and deliberately paradoxical manner, placed itself outside the classical outlooks of Protestant political thought and that strategically fused elements of standard Evangelical theory with concepts more characteristic of common Catholic political ideas. Central to this work is an analysis of the political principles of *representation* and *identity,* which Schmitt described as the two primary and original principles of political structure, which give rise to and characterize very different forms of state. Typically, he explained, the principles of representation and identity exist only as *antinomies.* Representation, he argued, is the structural principle of pre-democratic states. It is the principle of states based in hierarchy, in supra-positive or transcendent norms. States founding themselves in this principle claim to obtain legitimacy through the metaphysical representation of 'something existential' or of 'an invisible Being', which is higher than the state itself and which is reflected in the form of hierarchy or authority.[99] In his earlier works, Schmitt in fact stressed that *representation* is the structural principle of the Roman Catholic church: the church is determined by an 'essentially representative attitude', and representation characterizes states that internalize the representative

hierarchy of the papacy.[100] Representation, therefore, is the structural principle of metaphysical states, whose source of legitimacy is outside their integrally positive legal structure. Modern society, Schmitt argued, however, is marked by a decline of representation and by the emergence of state forms founded in either real or illusory conditions of *identity.* These are state forms whose legitimacy is derived from a source internal to their own order and which have no external reference by which they can explain themselves as legitimate. Identity, consequently, is the principle of democratic states, and also – perhaps – of Protestant states, which are forced, often under exceptional circumstances, to produce the conditions of their own legitimacy. In modern mass democracies, however, the structural division between identity and representation tends to become uncertain, and most contemporary states require elements of both principles to secure their stability and legitimacy. The legitimacy of mass democracies cannot in fact be produced by identity alone, but depends on representation: it depends on the deployment of symbolic resources by the state executive and by the projection of a hierarchical dignity onto the state, over and above the rest of society. Mass democracy, therefore, cannot be constituted or sustained as legitimate if it does not contain a manifest element of representative hierarchy or *non-identity;* this representative element creates a focus of identification in the state, and it instils unity and identity amongst even deeply polarized and pluralistic groups of citizens. Mass democracies, thus, always presuppose a 'representative' or a 'non-democratic' element in order to perpetuate themselves as founded in democratic identity. Indeed, it is only this non-democratic element that allows these mass democracies to operate as democracies.[101]

Central to this aspect of Schmitt's work is a productive fusion of principles of Roman Catholic politics with principles of Evangelical political doctrine. At one level, Schmitt insisted echoing Roman Catholic political orthodoxy, that the legitimate state requires a hierarchical or metaphysical source of order and legitimate order cannot be entirely and irreducibly positive, but it must represent symbolic or intellectual principles that are originally external to its own positive form. At a different level, however, he also insisted, close to the structural principles of Evangelical political thought, that order is founded in freedom of political will, in historical unity and in positive – or even exceptional – decisions. For Schmitt, therefore, a state is legitimate if it is free; if it positively and exceptionally authorizes the internal foundations of its laws and if it integrates its citizens through its positive decisions, which have no source in metaphysical law. However, the state's decisive and positive freedom depends, paradoxically, on its ability to reflect within itself a reference to intellectual substances or metaphysical norms that it does not contain, and so to construct itself as a representative state. As a representative state, Schmitt stressed, the state need not factually represent supra-positive or transcendent legal ideas; indeed, it need not represent any particular content. Nonetheless, representation remains, for Schmitt, a necessary symbolic trace in the state, in which the

state formally shadows a metaphysical idea of its content and dignity, and it is only where a state can dramatize this representative function that it actually becomes free and self-authorizing in its legislative functions. Representation, therefore, is a necessary paradox in the state, which allows the state to project itself as united with originary metaphysical essences, yet which at all times serves the state's positive legislative freedom. Schmitt clearly recommended this use of paradox, and he saw the witting deployment of metaphysical references as a useful tool in the state's quest for positive freedom and contingent power.

Central to Schmitt's work, in sum, is the recurrent allegation that the rationalized metaphysics of the Enlightenment and the formalized metaphysics of positivism are unable to constitute a reliable and sovereign state form. For this reason, Schmitt argued that reliable and legitimate state forms are those that accept their post-metaphysical *exceptionality* and so abandon all legal and normative preconditions external to their own volitional or functional fabric. Close to the surface of Schmitt's theory is the intimation that modern post-metaphysical politics is integrally Protestant: it is the politics of identity, free positivization and exceptional contingency. In his dialectical theory of representation, however, Schmitt deliberately used a Catholic idea to aid a Protestant cause. He indicated that the construction of legitimacy as a positive fact still relies on the secular traces of Roman Catholic politics – that is, on representation. In fact, it is only where they refer to the traces of (Catholic) transcendence that secular (Protestant) states obtain the unitary legitimacy that allows them to operate as secular states. The condition of post-metaphysical politics and legitimacy, thus, still requires a metaphysical dialectic.

Hitler's lawyers: the state as metaphysics

Schmitt, provoking surprise and despair amongst those who knew him or had been taught by him, became a high-profile spokesperson for the regime of the NSDAP in the years of its consolidation, until 1936. During this time, he abandoned many of the exceptionalist and representative elements of his earlier doctrine, and instead he set out a late-historicist doctrine of concrete order to support Hitler's dictatorship. This period in his work was shaped by the belief that a political system is legitimate and commands obedience whenever it can consolidate the concrete order of a people at a given moment in its objective evolution. He therefore described Hitler as a figure supremely equipped to enforce laws likely to maintain conditions of concrete order, and he saw the origin of law as the popular national community, interpreted by the leaders of the Nazi party.[102] At this stage, therefore, the radically voluntaristic aspect of his earlier decisionism faded into the background of Schmitt's thinking, and the statist/representative element was – at least in part – replaced by a more obviously positivist approach to the law, which construed valid law as the interpretable will of a historical people.

In altering his stance to suit the new regime, however, Schmitt did not successfully secure favour for very long. Other theorists also sought to ingratiate themselves with the Nazi elite, and these theorists soon identified weaknesses in his position that made him susceptible to damaging and dangerous criticism. Koellreutter, for example, proposed a theory of the constitution which criticized Schmitt's concentration of politics on the state, and which defined law and state as legitimized by their foundation in the objective national community. He therefore described the political apparatus under Hitler as the most perfect example of 'a legal state', in which the 'idea of state' and the 'idea of law' were perfectly unified as expressions of the same underlying will.[103] Koellreutter tied this idea of the national legal state to a distinctively Evangelical political theology. He claimed, for example, that Protestant national culture is always a 'bearer of political and religious values', and that political order obtains legitimacy through its cohesion with the values embedded in this culture.[104] In this, he specifically sought to champion the principle of integration in Protestantism in order to gain capital over the principle of representation in Roman Catholicism, and so to use his theological perspective to discredit Schmitt. He argued that Roman Catholic political theology necessarily detracts from national identity and from the national sources of political authority, as it centres political life on ideas and institutions claiming representative distinction from the people and introducing universalist principles into the united body of the nation. All representative elements in political theology are, he consequently concluded, 'irreconcilable with the claim to totality made by National Socialism'.[105] In fact, Koellreutter argued that political order is always falsely construed where it is imagined as an institutional or representative hierarchy segregated from the constituents of an objectively unified nation. The representative idea of the state itself, therefore, constitutes an element of illegitimately personal hierarchy in the organic life of the national collective, and this threatens the cohesion of the community and its life as a legal state. The party, not the state, is in fact the legitimate coordinating organ in German society, and unity, not representation, is the absolute precondition of effective political power: the state, in other words, is a distant but damaging residue of political metaphysics which corrupts the life of the national community, and in a truly German community the representative state must give way to the integrative party.

Other legal and political adherents or apologists of the NSDAP also tended to propose historicist or objective-interpretive accounts of the state and its relation to law. In the early 1930s, for instance, Julius Binder intensified his earlier conservative-Hegelian approach, and he argued that law should be viewed as the objective form of a collective will, so that law contains the 'ground of its validity' entirely within itself, and cannot be criticized or steered by any 'idea of law' outside law's objective dominion.[106] Like Binder, Karl Larenz also argued that valid law results from the 'immanent structure and order' of the national community, and that 'community and law can

never be separated from each other'.[107] In his pre-1933 works, Larenz espoused a hermeneutical conception of right law, inflected by nationalist Hegelian ideas. He had thus claimed that correct application of the law hinges on the creative role of the judge in legal finding, and that the judge operates within an objective legal order that must determine questions of legal doubt.[108] This theory implied that the rights and entitlements of bearers of the law are not to be derived from universal principles, but from the wider objective exigencies of the political community. Rights are therefore sanctioned under law because the exercise of these rights contributes to the consolidation of national unity, not because they are presupposed as neutral or invariable manifestations of human dignity. Law, on this account, can never be viewed as an apolitical or abstract element in human life, but must constantly be constructed as a positive component in the reinforcement of national order. After 1933, then, Larenz extended this approach to pursue a thorough modification of liberal ideas of legal entitlement and subjectivity. The liberal-subjective or universalist construct of the legal subject must be supplanted, he argued, by a national-objective or historicist construct of the 'legal comrade' (*Rechtsgenosse*) as the bearer of rights and legal claims. Participation in the rights afforded by the law, on this perspective, must not be viewed as a universal or quasi-natural entitlement, but as depending rather on whether the person belongs to and serves the concrete purposes of a 'popular community'.[109] The person under law, therefore, is not a 'subjective will', but a 'concretion of objective law, of the order of community', tied to the 'ethical and religious life of the community',[110] and the rights of this person are fully defined and circumscribed by the needs of this community.[111] In the works of Larenz, therefore, the objectively materialized order of the community replaced all metaphysical-universal ideas of legal and political personality, and this order became the sole ground for regulating issues of legal validity. This redefinition of legal entitlement and purpose even fed into judicial practice of Hitler era, as Roland Freisler, ultimately head of the high court under Hitler, also argued that legal application should only be informed by the 'National Socialist moral order of Germany'. The judges of the National Socialist regime, he concluded, should apply law, not to dispense justice, but to serve the stability of the regime and to uphold the principles of this concrete order.[112]

Ernst Rudolf Huber also emerged at this time as an influential theorist of National Socialist law. Huber was originally a member of the informally organized school of legal thinkers around Schmitt, and his early accounts of relation between state and law were strongly influenced by Schmittian ideas on representation and ecclesiastical law. In his first publications, he emphasized the legal integrity of the church against the state, and he insisted that both church and state obtained legal dignity through their 'supra-individual justification in a universal principle'.[113] After 1933, Huber's legal teachings still retained an element of statism, which distinguished him from other theorists of the NSDAP, and he insisted that under this regime the state had

not simply been subsumed by the national community or the party. However, he also concluded that the state cannot be viewed as a location in which 'rights of sovereignty' are distilled in an institutional hierarchy, divorced from the popular legal forms of the community. The state should in fact be viewed as an organ of law that is 'formed in national comradeship', applying laws as the community's own laws.[114] Huber thus saw the legal administration of the NSDAP as finally overcoming the antinomy between strong-state absolutism evolving under Roman law, which construed the legal state as a distinct centre of legal power, and the more organic forms of law formed as Germanic common law, which viewed the state as the organic 'shape' of the historically formal people.[115]

Similarly, Ernst Forsthoff, also a student of Carl Schmitt, argued that the National Socialist movement had the particular legal advantage that it located the origin of law in the 'ordered life-relations of the members of the people' and so divested law of its pure formality and its concentration in formal-institutional hierarchies – in states.[116] National Socialism, he claimed, had its immediate foundation in Lutheranism, as both Lutheranism and National Socialism constituted legal order based in an 'invisible community', which cannot be stabilized in the 'normative security' of the formal legal state.[117] Like other theorists of the NSDAP, therefore, Forsthoff argued that valid law-finding is a process of national self-interpretation or a 'creative' process of cultural and linguistic formation.[118] This process, he concluded, should be seen as a methodological analogue to religious teaching, as both law-finding and pastoral activities depend on a constructive approach to originary texts: to national law and to the Bible.[119]

The legal teachings of the National Socialists therefore extended the anti-metaphysical perspectives that had coloured Weimar legal thought in general and that had exercised particular (but not exclusive) influence on the more conservative axis of Weimar political theory. The legal spokesmen of the NSDAP allowed the dream of a non-metaphysical law to culminate in a notion of the national community as a fully and internally united organ, suffering no separation into objectively distinct legal or institutional forms and coordinated by the party apparatus. Indeed, one theoretical element that allowed the doctrines of the NSDAP to act as a widely captivating ideology was the fact that it constructed an extreme conservative ideology whilst actually relinquishing what had traditionally been the ideological centrepiece of extreme conservatism – namely, the state. Whilst earlier conservative outlooks had tended to view the personal state as the source of law and order, National Socialist thinkers derided this conception of law's origin as a quasi-transcendental example of political metaphysics. Instead, as Schmitt had warned might ultimately be the case, these theorists used originally liberal ideas of legislative freedom and autonomy outside the state to construct a radically new type of violent conservatism, in which neither state nor law could be separately extrapolated from the national-racial community.