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**Book Section:**

Stanton, Tim orcid.org/0000-0002-8282-9570 (2016) Popular sovereignty in an age of mass democracy: politics, parliament and parties in Weber, Kelsen, Schmitt and beyond. In: Skinner, Quentin and Bourke, Richard, (eds.) Popular Sovereignty in historical perspective. Cambridge University Press , pp. 320-358.

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**POPULAR SOVEREIGNTY IN HISTORICAL PERSPECTIVE, ED.  
QUENTIN SKINNER AND RICHARD BOURKE (CAMBRIDGE:  
CAMBRIDGE UNIVERSITY PRESS, 2016)**

**CHAPTER 13 [PP. 320-58]**

**POPULAR SOVEREIGNTY IN AN AGE OF MASS  
DEMOCRACY: POLITICS, PARLIAMENT, AND PARTIES IN  
WEBER, KELSEN, SCHMITT, AND BEYOND.**

Timothy Stanton

*Abstract:* Max Weber developed a distinctive view of the possibilities and polarities of modern politics. His thinking about popular sovereignty is placed here in the context of a long-running German debate about how to reconcile two principles, those of popular self-government from below and authority from above. Weber's unwillingness to compromise these principles, or to subordinate one to the other, led him to adopt different positions at different times about the role of parliament and political parties in holding these two principles together in practice. As a result, he bequeathed no single set of bearings to the future. An attempt is made to show, by means of an analysis of the ways in which Weber developed his positions, and by a comparison of those positions with views developed in response by Hans Kelsen and Carl Schmitt, that the question of whether Weber's thought led directly to Schmitt's or, indeed, to Kelsen's, is a question *mal posée*. What popular sovereignty means in an age of mass democracy remains an open question which we must answer for ourselves.

*Subjects:* Popular sovereignty, democracy, representation, leadership, political institutions, the state, Max Weber, Hans Kelsen, Carl Schmitt.

# POPULAR SOVEREIGNTY IN AN AGE OF MASS DEMOCRACY

## Politics, parliament, and parties in Weber, Kelsen, Schmitt, and

### beyond\*

#### §I

‘In my view’, declared Leopold von Ranke in 1854, ‘the leading tendency of our time is the conflict between two principles, that of monarchy and that of popular sovereignty. All other conflicts and oppositions are connected to this one’.<sup>1</sup> Ranke proceeded to admonish those who wished too devoutly to see history moving inexorably in the direction of the triumph of the second principle over the first following the revolutions of 1848. This was to misunderstand ‘what the bell had struck’. So many destructive tendencies were bound up with the principle of popular sovereignty that both culture and Christendom would be put at risk if it decisively gained the upper hand. Accordingly monarchy—‘hereditary

\* I have followed existing translations where possible, noting any amendments I have made. I have not tried to make quoted matter consistent with standard usage. Where no translations from German are available, I have made my own. I should like to thank John Dunn, Martin van Gelderen and Quentin Skinner for comments on earlier versions of the chapter, Mark Philp for discussion of its contents, and the Director, Staff and Fellows of the Lichtenberg Kolleg, University of Göttingen, where the present version was completed.

<sup>1</sup> Ranke, *der neueren Geschichte*, p. 141.

authority from above' as against 'self-government from below'<sup>2</sup>—had to be given its place, being necessary to eradicate those destructive tendencies which popular principles 'swept in with them in a great flood'.<sup>3</sup> The outstanding problem of Europe, he insisted, was how to reconcile these two principles with one another. It was a problem that could not be ignored.<sup>4</sup>

The profound disquiet about popular sovereignty to which Ranke's words gave resounding expression, and the matching desire for a contrary principle to nullify its projected effects, was widespread among Germans of the next generation. Some time after Ranke issued his admonition we find Friedrich Nietzsche considering the same problem in rather more apocalyptic terms. 'I believe' he confided to his notebook in the autumn of 1885, 'that the great, advancing, and unstoppable *democratic* movement of Europe, that which calls itself 'progress'...fundamentally signifies only the tremendous, instinctive conspiracy of the whole herd against everything that is shepherd...and Caesar, to preserve and elevate all the weak, the oppressed, the mediocre, the hard-done-by, the half-failed; as a long-drawn-out slave revolt, at first secret, then more and more self-confident, against every kind of master, ultimately against the

<sup>2</sup> *Ibid.*, p. 139: 'Nationalsouveränität und Monarchie, Erblichkeit von oben, Selbstregierung von unten'.

<sup>3</sup> *Ibid.*, p. 142.

<sup>4</sup> Ranke, *der neueren Geschichte*, p. 143.

very concept of ‘master’’. In Nietzsche’s view, all genuine instances of progress in human life had been ‘the work of an aristocratic society which believed in a long ladder of order of rank and difference in value between man and man [for] without the *pathos of distance*, as it arises from the deeply carved differences between the classes, from the ruling caste’s constant looking outwards and downwards unto its underlings’, the self-development and ‘self-overcoming of man’ was impossible.<sup>5</sup>

By the time German politicians of the generation after Nietzsche were forced to hastily improvise a new political system under the shadow of Bolshevism and out of the ruins of the second Reich, late in the autumn of 1918, anxiety about popular sovereignty had ripened in many segments of society into open resentment of democracy and parliamentary government. The situation, however, seemed to admit of no alternative. The abdication of the Kaiser was announced on 9 November and the following day the incoming Chancellor, Friedrich Ebert, informed the German public that the new government would be a government of the people. Thomas Mann spoke for many who felt themselves forced into a position they had never wished to occupy when he proclaimed ‘I want the monarchy...I don’t want this parliament and party business that will sour the whole life of the nation with its

<sup>5</sup> Nietzsche, *Writings*, p. 68.

politics...I don't want politics. I want competence, order, and decency'.<sup>6</sup>

Max Weber, who had identified himself as 'a resolute follower of democratic institutions' as early as 1905,<sup>7</sup> also chose that moment to speak out in defence of monarchy. Nothing seemed to him less desirable at this critical juncture than 'a radical break from monarchic traditions', even if his 'support for the monarchy provoked general headshaking' amongst disbelieving and disapproving friends and colleagues.<sup>8</sup>

These observations bring me to the central problem to be considered in this chapter. Where exactly did Weber position himself in what Ranke called the great movement 'of action and reaction of minds' incited by the problem of popular sovereignty and monarchy,<sup>9</sup> and what was his legacy? This question has been fiercely debated by historians at least since the publication of Wolfgang Mommsen's revisionist work of 1959, *Max Weber and German Politics*, and interest only quickened with the dramatic intervention of the young Jürgen Habermas at a conference

<sup>6</sup> Eschenburg, *Die improvisierte Demokratie*, p. 43, as cited in Kennedy, 'Carl Schmitt's *Parlamentarismus*', p. xxiv. For Mann's general attitudes in this period, see his *Reflections of a Nonpolitical Man* (1918), pp. 16-17, which denounced democracy as 'foreign and poisonous to the German character' and suggested that the 'much decried 'authoritarian state' is and remains the one that is proper and becoming to the German people, and the one they basically want'.

<sup>7</sup> Weber, 'Capitalism and Rural Society', p. 370.

<sup>8</sup> Mommsen, *Max Weber*, p. 291.

<sup>9</sup> Ranke, *der neueren Geschichte*, p. 142.

at Heidelberg in 1964 to celebrate the centenary of Weber's birth.<sup>10</sup> At issue is not merely the depth of Weber's commitment to democratic institutions but whether he was really committed to them at all. For the views he developed in his later political writings, especially from 1919 onwards, have struck numerous commentators as 'hostile to the very spirit of democracy' as a regime 'uniquely committed' to the realization of the principle of popular sovereignty.<sup>11</sup> The predilection for 'Caesarian' or 'leader democracy' (*Führerdemokratie*) which those writings evinced, with a directly elected and powerful presidential figure, savoured to many, including Mommsen, of the illiberal nationalism of Wilhelmine Germany, but also looked forward to the decisionism of Carl Schmitt and, beyond that, into the darkness of Nazi dictatorship.<sup>12</sup>

Mommsen argued that Weber's support for the monarchical principle was the result of 'technical considerations about the best form of government'. Monarchy enjoyed a formal advantage over republican and other forms of popular government in that 'the highest position in the state was permanently occupied',<sup>13</sup> thus providing a practical and

<sup>10</sup> See Stammer (ed.), *Max Weber and Sociology*.

<sup>11</sup> J. E. Green, 'Max Weber', 188.

<sup>12</sup> See e.g. Becker, '*Der Römische Cäsar*', Mommsen, *Max Weber*, and, more guardedly, McCormick, 'Legal Theory'; and compare Green, 'Max Weber', Kilker, 'Max Weber'.

<sup>13</sup> Mommsen, *Max Weber*, p. 289.

constitutional limit to both the drive for power of personally ambitious politicians and the desire of the military to extend its power into the political sphere, averting the threat of ‘Caesarian domination [by] military parvenus’.<sup>14</sup> But the ‘conservative strain’ in Weber’s political thought, as Mommsen called it, infected his plans for constitutional reform and emptied his professed commitment to democratic institutions of genuine resolution: it was to military parvenus, not to Caesarian domination, that Weber was opposed.<sup>15</sup> A similar line of criticism was pursued by David Beetham when he objected that Weber’s account of democracy ‘makes no reference to democratic *values*, much less regards them as worth striving for’. His theory of government, Beetham went on, ‘did not seek to justify such government in terms of recognizably democratic values, such as increasing the influence of the people on policies pursued by those who governed’.<sup>16</sup> On the contrary, and as his advocacy for monarchy in 1918 demonstrated, Weber was ambivalent at best about democratic values. In

<sup>14</sup> Weber, ‘Capitalism and Rural Society’, p. 370.

<sup>15</sup> Georg Lukács, who had been a member of Weber’s circle at the University of Heidelberg before the First World War, suggested in 1954 that Weber’s support for the institutions of democracy was a ‘technical measure to help achieve a better functioning imperialism’. See Lukács, *Die Zerstörung*, p. 488, cited in Green, ‘Max Weber’, 195.

<sup>16</sup> Beetham, *Max Weber*, pp. 101-2.



the final analysis his valorisation of charismatic rulership was difficult to square with the democratic ideal of a sovereign people.<sup>17</sup>

As the people took to the streets in the winter of 1918-19, Munich and Berlin became battlegrounds in which rival republics were noisily proclaimed and ruthlessly put down. Germany was engulfed by what Weber famously damned as ‘a bloody carnival that does not deserve the honourable name of a revolution’.<sup>18</sup> It is little wonder, therefore, that his later writings could be interpreted as expressing a growing disaffection for popular power and a longing for authority, order and control.<sup>19</sup>

This chapter argues, by contrast, that Weber should not be read as disavowing the principle of self-government in favour of authority, but instead as working towards his own novel response to the problem of how to conceive and apply these principles together in an age of mass democracy.<sup>20</sup> His putative solution did not mean asserting one principle

<sup>17</sup> For a comprehensive and illuminating discussion of the difficulty, see Derman, *Max Weber*, pp. 176-98.

<sup>18</sup> Marianne Weber, *Lebensbild*, p. 642. For the revolution, see Kolb, *Weimar Republic*, pp. 3-22, Hans Mommsen, *Rise and Fall*, pp. 20-50, Peukert, *Weimar Republic*, pp. 47-51.

<sup>19</sup> See e.g. Kahler, *Der Beruf der Wissenschaft*, and compare the judgement of Max Horkheimer (Stammer (ed.), *Max Weber*, p. 53), who attended Weber’s lectures on socialism at the University of Munich in 1920, and came away sadly disappointed, convinced that ‘Max Weber must be ultraconservative’.

<sup>20</sup> A similar conclusion is developed in a different direction by Jeffrey Edward Green, first in ‘Max Weber’, and now, more expansively, in *Eyes of the People*.

over the other, or compromising differences;<sup>21</sup> rather it meant seeking the proper balance between the competing tendencies they represented. Naturally, this allowed for—indeed it required—different postures to be adopted at different times. In 1905-6 it meant throwing ones weight behind democratic institutions against the claims of “‘aristocracies’ and ‘authorities’” and ‘the rule of capitalism’.<sup>22</sup> In 1918-19 it meant re-establishing a balance against an unchecked politics of popular will by revitalising or drawing attention back to the virtues of leadership, individual responsibility, and independent judgement. This was as much an imaginative and rhetorical challenge as it was an institutional and political one—not just a matter of offering a theory or propounding a scientific truth, though Weber certainly thought he was doing that, but of trying to exhort his audience to certain modes of thought and action through his example<sup>23</sup> and his words.<sup>24</sup>

The challenge was heightened by the fact that the competing tendencies of thought about the constitution of government for which the principles of popular sovereignty and monarchy stood were given form

<sup>21</sup> See Mommsen, ‘Antinomian Structure’, for this style of thinking as typical of Weber.

<sup>22</sup> Weber, ‘Constitutional Democracy in Russia’, pp. 68-69.

<sup>23</sup> For personality and personal contact as an important contributory element in the formation of Weber’s posthumous reputation, see Derman, ‘Skepticism and Faith’, esp. 495-503.

<sup>24</sup> See Weber, ‘Science as a Vocation’, pp. 145-46.

and content through a political vocabulary which, because common to both, was systematically ambiguous. Democracy, for instance, might suggest both the institutional means of limiting the exercise of political power and a plebiscitary device to legitimate the concentrated and extensive exercise of that power by a single individual. The practical meaning of such terms thus depended—as arguably it still does—on how these different ways of thinking were mediated.

As John Dunn observes, democratic governments, at least presumptively, are governments whose rule is authorised by those whom they rule, and, in presumption again, so authorised not by a single mythical episode in the distant past, but by a series of iterative occasions over time. The point of these occasions is to recast every citizen as subject to democratic laws, ‘through some imaginatively accessible and pertinent set of mediations, and hence as part author of the laws to which each is subject’.<sup>25</sup> The difficulty which Weber felt it necessary to confront was that, under the peculiar conditions of mass society, the mediations purporting to provide that authorisation were uniformly disreputable exercises in utopianism or self-deception. Modern democratic institutions and the bureaucracy that governed them operated according to the permeating rationalism and functionalist logic characteristic of modern European civilization, which, he argued, had brought about the

<sup>25</sup> See Dunn, ‘Legitimacy and Democracy’, p. 9.

‘disenchantment of the world’ (*Entzauberung der Welt*).<sup>26</sup> They were moved by reasons and forces entirely internal to them. What could democracy, what could popular sovereignty, *mean* in such circumstances as these? It is the answers that Weber gave to this question, and the ways in which two of his successors, Hans Kelsen and Carl Schmitt, responded to those answers, that will be the principal focus of my attention in the remainder of this chapter.<sup>27</sup>

Three statements may be taken together as providing a prospectus for what follows. The first is found in the preamble to the Weimar Constitution of 1919 and runs: ‘The German people, united in every branch...has given itself this Constitution’. The guiding principle of the new constitution was that the German state was and should be the political organisation of the people: the people were the Reich and [as Article 1 went on to assert] ‘The German Reich is a Republic. All state authority emanates from the people’.<sup>28</sup> The second occurs in a letter written in 1908 by Weber to his young friend Robert Michels: ‘Any thought of removing the rule of men over men through even the most sophisticated forms of ‘democracy’ is ‘utopian’...concepts such as ‘the

<sup>26</sup> Weber, ‘Science as a vocation’, p. 139.

<sup>27</sup> The challenge laid down by Weber was also taken up, in different ways, by Friedrich Meinecke and Ernst Troeltsch to name only two. For Schmitt’s response to the former, see Schmitt, ‘Idee der Staatsräson’.

<sup>28</sup> Hucko (ed.), *The Democratic Tradition*, p. 149, and compare p. 50.

will of the people', the 'true will of the people', etc., ceased to exist for me long ago. They are *fictions*'.<sup>29</sup> The third comes from Edmund Morgan's account of the origins of self-government in England and the United States, *Inventing the People*. 'Government', Morgan observes there, 'requires make-believe...make believe that the voice of the people is the voice of God. Make believe that the people *have* a voice or make believe that the representatives of the people *are* the people'. In order to be effective [Morgan goes on] these 'fiction[s] must bear some resemblance to fact...Because fictions are necessary, because we cannot live without them, we often take pains to prevent their collapse by moving the facts to fit the fiction, by making our world conform more closely to what we want it to be...the fiction takes command and reshapes reality'.<sup>30</sup>

The principal purpose of the present chapter, then, is to explore the ways in which fact and fiction interacted in Weber's thinking about popular sovereignty, politics, and the modern state, and how Hans Kelsen and Carl Schmitt reacted to what they found in Weber. This notable triumvirate has already been discussed at length and with great distinction

<sup>29</sup> Lepsius and Mommsen (eds.), *Briefe, 1906-1908*, p. 620, cited in Mommsen, *Max Weber*, pp. 394-95 (translation amended).

<sup>30</sup> Morgan, *Inventing the People*, pp. 13-14. For discussion, see Przeworski, *Democracy*, pp. 11-13.

in many books<sup>31</sup> and my aim here is simply to analyse Weber's account of democracy and the state as a late contribution to a movement of thought stretching back to Ranke. I hope by this means to put some of the more familiar aspects of the story in a new light, and thence to consider the views of Kelsen and Schmitt anew in that same light, before offering some brief reflections on the subsequent fortunes of those views and the prospects of popular sovereignty and democracy in the present age. But to begin we must turn back to Weber.

## §II

When Weber first applied his mind to politics it was in a practical context in which the German Reich under Bismarck had striven for several decades to impose a single scheme of law in the empire and, at least by implication, a single source of direction emanating from his will.<sup>32</sup> The pulverising and depoliticising consequences for civil society of this

<sup>31</sup> See, in addition to the works by Derman and Mommsen cited above, Baume, *Hans Kelsen*; Caldwell, *Popular Sovereignty*; Caserta, *Democrazia e costituzione*; Diner (ed.), *Hans Kelsen and Carl Schmitt*; Dyzenhaus, *Legality and Legitimacy*; Eberl, *Die Legitimität*; Gross, *Carl Schmitt and the Jews*; Herrera (ed.), *Le droit, Le politique*; Kalyvas, *Democracy*; Kelly, *State of the Political*; Korb, *Kelsens Kritiker*, pp. 135-48; Topitsch, *Gottwerdung*; Ulmen, *Politischer Mehrwert*; Zarone, *Crisi e critica*.

<sup>32</sup> For Bismarck and the German Reich, compare Darmstaedter, *Bismarck*, pp. 172-408; Michael Gross, *The War against Catholicism*, pp. 240-91; Pulzer, *Germany*, Chapter 2; and, at length, Pflanze, *Bismarck*. For the Reich Constitution of 1871, see Hucko (ed.), *The Democratic Tradition*, pp. 22-38, 119-45.

assault were registered at the time by Otto von Gierke, among others, who looked to the medieval period to distil from the practice of the guilds, leagues, and corporations a tradition of pluralist thinking about the real personality of groups that had been sidelined and squashed by the modern state.<sup>33</sup> In the process, Gierke had delivered an indirect but astringent commentary on the political situation of late nineteenth century Germany. Weber's commentary on the consequences of Bismarck's policy, written towards the end of the Great War, which provided a yet more devastating commentary of its own, bespoke the same recognition, but it was more direct.

Weber stated that Bismarck's political legacy was 'a nation *entirely lacking in any kind of political education*'. Above all Bismarck had bequeathed to the future 'a nation *entirely without any political will*, accustomed to assume that the great statesman at the head of the nation would take care of political matters for them'. Weber continued in words that must be quoted at length:

Furthermore, as a result of his misuse of monarchic sentiment as a cover for his own power interests in the struggle between the political parties, he left behind a nation accustomed to *submit passively* and fatalistically to whatever was decided on

<sup>33</sup> Gierke, *Das deutsche Genossenschaftsrecht*.

its behalf, under the label of ‘monarchic government,’ without criticising the political qualifications of those who filled the chair left empty by Bismarck and who seized the reins of government with such an astonishing lack of self-doubt. It was in this area that the most severe damage by far was done...At the same time his enormous prestige had the purely negative consequence of leaving *parliament utterly without power*...The powerlessness of parliament also meant that its intellectual level was very low [But] whether a parliament is of high or low intellectual quality depends on *whether great problems* are not only *discussed* but are *conclusively decided* there. In other words, it depends on *whether anything happens in parliament* and on *how much depends on what happens there*, or whether it is merely the reluctantly tolerated rubber-stamping machine for a ruling bureaucracy.<sup>34</sup>

Weber’s complaint was that Bismarck had created an abyss within the state, between laws and policies which derived their authority from his personal cachet and the ovine acquiescence of the masses. Individual will and judgment had no role to play in this situation except in the severely straitened sense that they could be read off mass obedience to law. Both

<sup>34</sup> Weber, ‘Parliament and Government’, pp. 144-45.



here and elsewhere in Weber's writings,<sup>35</sup> this complaint was reformulated as a wider statement about the nature of politics in the modern world.

The steel-hard logic of modern politics, as Weber understood it, moved remorselessly towards a reckoning with three fundamental questions. The first was how is it possible to salvage any remnant of individual freedom worthy of the name in the face of an all-powerful trend towards bureaucratisation in the modern state? The second, we have seen, was how is democracy possible at all in the same conditions? The third was what sorts of person could carry the hopes of freedom and democracy responsibly in these conditions?<sup>36</sup> Some of Weber's answers are implicit in the remarks quoted above, but to understand how he arrived at those answers it is necessary to say a little more about his views of the twin crises of modern statehood and modern individuality.

<sup>35</sup> For parliament, see e.g. Weber, 'Bureaucracy', pp. 232-39, 'Suffrage and Democracy', pp. 81-82, 96-106. For inadequate political education, see 'Bureaucracy', pp. 240-44, 'National Character and the Junkers', pp. 388-9, and, entire, 'The Profession and Vocation'.

<sup>36</sup> Weber, 'Parliament and Government', pp. 159-61. See also 'Constitutional Democracy in Russia', p. 69: 'It is quite ridiculous to attribute to today's high capitalism...any 'elective affinity' with 'democracy' or indeed 'freedom' (in *any* sense of the word), when the only question one can ask is how these things can 'possibly' survive at all in the long run under the rule of capitalism'.

Already by 1895 Weber had concluded that it was a grave mistake to ascribe moral or metaphysical grandeur to the state and to think of it as ‘elevated ever higher, the more its nature is shrouded in mystical obscurity’.<sup>37</sup> The state was nothing other than ‘the worldly organisation of the nation’s power’ and must be understood in these terms. It was a bearer of ‘economic and political-power interests’, not values, and it could not be used to realise ultimate values or ‘to impose them on the future’.<sup>38</sup> Still less could it impose them itself. This was firstly because it was not a ‘person’ or ‘personality’<sup>39</sup> and secondly because modern politics was not a realm of ultimate values: ‘The fate of our times’, Weber repeated, ‘is characterised by rationalization and intellectualization and, above all, by the “disenchantment of the world”’. Precisely the ultimate and most sublime values have retreated from public life either into the transcendental realm...or into the brotherliness of direct and personal human relations’.<sup>40</sup> The ends of life could not be institutionalised and

<sup>37</sup> Weber, ‘The Nation State’, pp. 16-17. Here Weber surely had in his sights not only Hegel, whose students had recalled him claiming that the state was ‘the march of God in the world’ but also Ranke, who had referred to states in *Das politische Gespräch* as ‘spiritual substances...thoughts of God’. Compare Hegel, *Philosophy of Right*, p. 279, and Ranke, *Geschichte und Politik*, p. xxii.

<sup>38</sup> Weber, ‘The Nation State’, p. 17, p. 15.

<sup>39</sup> For Weber’s rejection of the ‘personality’ of the state, see Kelly, *State of the Political*, Chapter 3.

<sup>40</sup> Weber, ‘Science as a Vocation’, p. 155.

could not be matters of public consensus. When ‘ultimate *Weltanschauungen*’ collided, as inevitably they did, one had ‘eventually to choose between them’,<sup>41</sup> a matter of personal, not collective decision. Every individual living in the ‘world’ found ‘himself subject to the struggle between multiple sets of values, each of which, viewed separately, seems to impose an obligation on him. He has to choose which of these gods he will and should serve, or when he should serve the one and when the other. But at all times he will find himself engaged in a fight against one or other of the gods of this world’.<sup>42</sup> The state was different. By virtue of its ‘depersonalization’, it operated impartially, according to its own norms and ends, ‘*sine ira et studio*, without hate and therefore without love’, and was impervious to ‘substantive ethicization’. Its ends were simply those of power and its distribution.<sup>43</sup>

This conclusion was powerfully affirmed in Weber’s casually shocking observation that the modern state was an ‘organisation’ (*Betrieb*) in exactly the same way as a factory. In both cases ‘the relations of rule’ within the organisation were determined by ‘firmly established areas of responsibility, the keeping of files, [and] hierarchical

<sup>41</sup> Weber, ‘The Profession and Vocation’, p. 355.

<sup>42</sup> Weber, ‘Between Two Laws’, pp. 78-79. See also ‘Science as a Vocation’, p. 147-48

<sup>43</sup> Weber, ‘Religious Rejections’, p. 334.

structures of superiority and subordination’.<sup>44</sup> Accordingly, from a social-scientific point of view, the state was differentiated from other enterprises—such as factories—only by its means, being defined as ‘a human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory’, that is to say, a structure of domination.<sup>45</sup>

One upshot of this insight was to enable Weber to argue for the democratisation of the German state against those ‘academic *littérateurs*’ who wished to see the Reich Constitution of 1871 preserved in perfection. If the state was an organisation which, in principle, functioned in a ‘*rationaly calculable* manner according to stable, general norms’, like ‘a machine’, it could and should be altered, as any machine would be adjusted, in the interests of operational efficiency.<sup>46</sup> But it had disabling consequences too. It became impossible, for one thing, to credit the idea that the state was the outcome of a voluntary and rational agreement, or

<sup>44</sup> Weber, ‘Parliament and Government’, p. 146. *Betrieb* has connotations of regularised purposive activity and may be translated into English variously as ‘organisation’, ‘enterprise’, ‘firm’, ‘business’, ‘operation’ or the like (see Lassman and Speirs (eds.), *Political Writings*, p. 372). For Weber’s own discussion of the term as meaning ‘continuous rational activity of a specified kind’, see his *Economy and Society*, pp. 52-53.

<sup>45</sup> Weber, ‘The Profession and Vocation’, pp. 310-11, ‘Religious Rejections’, p. 334.

<sup>46</sup> Weber, ‘Parliament and Government’, pp. 266-71. For discussion, see Derman, *Max Weber*, pp. 105-7.

that it derived its legitimacy from that source: the ‘optimistic faith in the natural harmony of interests among free individuals’, Weber observed, had ‘nowadays been destroyed forever by capitalism’,<sup>47</sup> while belief in natural law and objective universal values had gone the same way. Neither was it possible to regard the law of the state as having been authored by the people in any meaningful sense. Law was just one more ‘rational, technical apparatus...continually transformable in the light of expedient considerations and devoid of all sacredness of content’. One peculiar side effect of this development, Weber noted in passing, was to have promoted ‘actual obedience to the power, now viewed solely from an instrumentalist standpoint, of the authorities who claim legitimacy at the moment’.<sup>48</sup>

Weber was formally agnostic about whether what legitimacy those authorities possessed derived from charisma, tradition, or law,<sup>49</sup> but his writings left the firm impression that for most people everything turned on a disposition to obedience. Whatever legitimacy the state enjoyed was more a matter of faith or belief, or indeed wishful thinking, on the part of those who obeyed than anything else, and its long-term prospects turned on whether ‘mass discipline’ would continue to trump periodic

<sup>47</sup> Weber, ‘Constitutional Democracy in Russia’, p. 46.

<sup>48</sup> Weber, *Economy and Society*, p. 895, p. 875.

<sup>49</sup> Weber, *Economy and Society*, pp. 212-54, 266-98.

‘explosions’ of ‘undirected mass fury’, a question, Weber said, ‘of nerves’.<sup>50</sup> As he had reprimanded Michels, the fact was that, even in a democratic state, domination of the ruled by the ruler was unavoidable. If the genuine self-rule of the people was impossible—a fiction—what other possibilities remained?

The choice reduced, as Weber saw it, to one between ‘leaderless’ and ‘leadership democracy’, which he placed in contrapuntal relationship.<sup>51</sup> The former, which Weber associated with Bolshevism, was the apotheosis of bureaucratization, the rule of officials in which the mass of citizens were “‘administered’ like a herd of cattle’ and left ‘without freedom or rights’”.<sup>52</sup> The second responded to what Weber identified as ‘the essence of all politics...*conflict, the recruitment of allies and a voluntary following*’.<sup>53</sup> What it involved in practice was a different question, to which Weber offered somewhat different answers at different times.

In the end this was a question about where, if anywhere, the leadership he desiderated might be found. Three potential answers seemed to present themselves: the monarch, bureaucrats, or politicians. The second option effectively collapsed the distinction between leaderless

<sup>50</sup> Weber, ‘Parliament and Government’, pp. 231-2.

<sup>51</sup> Weber, ‘The Profession and Vocation’, p. 351; *Economy and Society*, p. 269.

<sup>52</sup> Weber, ‘Suffrage and Democracy’, p. 129. Compare ‘Socialism’, pp. 291-4.

<sup>53</sup> Weber, ‘Parliament and Government’, p. 173.

and leadership democracy and so could be discounted. The first had some residual appeal, at least rhetorically, because it implied a source of leadership outside the bureaucratic machine and capable of directing it. Weber's avowed support for the principle of monarchy in 1918 reflected that appeal, but *au fond* he was extremely pessimistic about the chances of monarchy escaping bureaucracy's smothering embrace—under 'the conditions of the modern state...no monarch...has ever been, nor can he be, a counterweight to and a means of controlling the...power of *specialised officialdom*'<sup>54</sup>—and withering about the inept dilettantism of the Tsar and Wilhelm II and their kind during the First World War. The 'special qualities necessary' for leadership, Weber observed sardonically, 'including the strict *objectivity*, the steady sense of *proportion*, the restrained *self-control*, and the capacity for *unobtrusive* action which it calls for—these are not necessarily inherited along with the crown'.<sup>55</sup> They were, however, qualities that Weber associated with politicians.

In 'Parliament and Government in Germany under a New Political Order', written between April and June of 1917, Weber attributed the formation and cultivation of those qualities to 'the machinations of party struggle' in parliament. Parties [he would note elsewhere] presuppose the recruitment of a following to a cause by a variety of means both coarse

<sup>54</sup> Weber, 'Parliament and Government', p. 163.

<sup>55</sup> Weber, 'Pseudo-democracy', p. 245.

and subtle.<sup>56</sup> Parliament provides an institutional framework within which politicians compete for votes and for eminence, develop their own leadership qualities, and in the process create roles of authority, thereby filling the vacuum that had opened under Bismarck. It is not ‘the many-headed assembly of parliament’ as such that governs or makes policy, but the leader or leaders whose virtuosity in appearing to harmonize competing interests brings success in this competition. ‘*That is how things should be*’, Weber wrote. ‘This element of ‘Caesarism’ is ineradicable (in *mass states*)’.<sup>57</sup> It was this aspect of Weber’s thinking that provoked Habermas’s outburst that Carl Schmitt, the *Kronjurist* of the Third Reich, was ‘a ‘legitimate pupil’ of Weber’s’,<sup>58</sup> but Weber presented it as the only meaningful sense in which citizens could be ‘integrated into the state by making them its *co-rulers*’.<sup>59</sup>

In two texts of February 1919, ‘The Profession and Vocation of Politics’ and ‘The President of the Reich’, Weber offered an alternative analysis. He now suggested that parliament, or parliament alone, could

<sup>56</sup> Weber, ‘Class, Status, Party’, pp. 194-95.

<sup>57</sup> Weber, ‘Parliament and Government’, p. 174.

<sup>58</sup> Stammer (ed.), *Max Weber*, p. 66. Stammer reports that following ‘a friendly piece of advice’, Habermas decided that, on reflection, ‘a natural son’ of Weber’s was ‘a more appropriate expression’, presumably because it slyly left open the question of Schmitt’s ‘legitimacy’.

<sup>59</sup> Weber, ‘Suffrage and Democracy’, p. 127.



not sufficiently train and discipline prospective leaders.<sup>60</sup> The reasons for this change of emphasis—or change of mind—are not entirely transparent. One probable cause is that the Constitution of the Weimar Republic, which would come into effect on 14 August 1919, specified a complicated form of proportional representation. Weber had been involved in discussions surrounding the drafting of the Constitution and knew what was in the offing. His intense sensitivity to bureaucratization led him to worry that the party lists would be filled by placemen who regarded ‘national politics as ‘Hecuba’’, producing ‘*a parliament of closed, philistine minds*, in no sense capable of serving as a place where political leaders are selected’. It was therefore essential to find a counterweight to parliament. The counterweight he identified was plebiscitary leader democracy, whereby politicians would be forced to compete directly for the support of a mass electorate, resulting in a ‘*head of state resting unquestionably on the will of the whole people*’.<sup>61</sup>

<sup>60</sup> Green, ‘Max Weber’, 210, sees in this analysis a decisive turn ‘against th[e] parliamentary system’ Weber had previously advocated. Villa, ‘The Legacy’, p. 78, suggests that it is supplementary to, and ‘presupposes a continuity with’, that system. What Weber had previously argued was that plebiscitary principles would be injurious to ‘the role of the party leaders and the responsibility of officials’ in parliament. See his ‘Parliament and Government’, p. 226.

<sup>61</sup> Weber, ‘The President of the Reich’, p. 306, p. 304. Compare ‘The Profession and Vocation’, pp. 339-51.

Weber died of pneumonia in the following year. The posthumous publication of *Economy and Society* revealed that he understood plebiscitary democracy as a device through which the ‘basically authoritarian principle of charismatic legitimation’ was transformed in a democratic direction. The validity of charismatic authority, Weber contended, rested entirely upon ‘recognition by the ruled, on “proof” before their eyes’. The progressive rationalisation of this process brought about a remarkable reversal: ‘instead of recognition being treated as a consequence of legitimacy, it is treated as the basis of legitimacy: *democratic legitimacy*...the personally legitimated charismatic leader becomes leader by the grace of those who follow him...Plebiscitary democracy—the most important type of *Führer-Demokratie*—is a variant of charismatic authority, which hides behind a legitimacy that is *formally* derived from the will of the governed. The leader...rules by virtue of the devotion and trust which his political followers have in him personally’.<sup>62</sup>

In this way, leadership was formed through the electoral process, as politicians engaged in a fight to win and retain popular attention and acclaim. The deeply ambivalent character of the process in view, in which the personal qualities of politicians were transmuted into charismatic authority through their success in a political contest which appeared to select for what it in fact produced, found its complement in

<sup>62</sup> Weber, *Economy and Society*, pp. 266-68.

Weber's equally ambiguous language: he wrote of a 'self-selected leader of the masses' (*selbstgewählten Vertrauensmann der Massen*), a phrase which could mean either 'a spokesman elected by the masses themselves'<sup>63</sup> or someone who selected himself as worthy of their confidence by dint of his own 'initiative, effort, and capacity to lead and direct a political machine'.<sup>64</sup>

Weber sweetened this pill by suggesting that electoral competition would draw on talent developed in local, associational life, in the sporting clubs and hobby groups that made up civil society. But it was not clear, if he himself had ever thought it was clear, that this combination of skilful political leadership and low-level pluralism could sustain the disposition to obedience required for stability on terms compatible with individual freedom and democracy as most people understood them: if plebiscitary democracy was the specified means of 'deriving the legitimacy of authority from the confidence of the ruled', Weber nonetheless conceded that 'the voluntary nature of such confidence [was] only formal and fictitious', while 'its real value as an expression of the popular will' was also open to question.<sup>65</sup> Once this was recognised, a further question arose about why anyone should, in the end, regard the results of any

<sup>63</sup> As given in Weber, 'The President of the Reich', p. 305 (italics removed).

<sup>64</sup> The interpretation preferred by Green, 'Max Weber', 192.

<sup>65</sup> Weber, *Economy and Society*, p. 267.

modern democratic process as legitimate. An answer to that question was ventured in the writings of Hans Kelsen.

### §III

Hans Kelsen was born in 1881 in Prague, then in the Austrian part of the Austro-Hungarian Empire. His family moved to Vienna in 1883. After reading for a law degree, Kelsen completed a doctorate on Dante's theory of the state, which was published in 1905.<sup>66</sup> In 1911 he published a second book, originally his *Habilitationsschrift*, a massive study of the theory of public law entitled *Hauptprobleme der Staatsrechtslehre*.<sup>67</sup> During the First World War he acted as an adviser to the military administration and as legal adviser to the War Ministry. After the war he took up a professorship in public and administrative law at the University of Vienna. In 1919 he was invited to draft the new Austrian Constitution, which was adopted in 1920. In that document Kelsen gave special importance to the role of the Constitutional Court, to which he was appointed as a member in 1920, remaining a member for ten years until he resigned in protest at political interference with its work.<sup>68</sup> During this

<sup>66</sup> Kelsen, *Die Staatslehre*. For Kelsen's biography, from which the information provided here is drawn, see Ladavac, 'Hans Kelsen'.

<sup>67</sup> Kelsen, *Hauptprobleme*.

<sup>68</sup> As Ladavac records, '[d]espite the fact that Austria's administrative authorities permitted remarriage in Catholic Austria, the lower courts considered these

period Kelsen continued to publish on many subjects, including sovereignty and the relationship between state and international law, laying the groundwork of the ‘pure theory of law’ with which his name has come to be inextricably linked.<sup>69</sup> But he also wrote about the nature and prospects of democracy, taking his cue from Weber’s diagnosis of the defining characteristics of the modern state, initially in a short essay of 1920,<sup>70</sup> later expanded to book length and published in 1929 under the same title, *On the Essence and Value of Democracy*.<sup>71</sup>

Kelsen began with an observation of fact: ‘Not all those belonging to the people as subject to norms or rule can take part in the process of norm creation—the form in which rule is necessarily exercised—or can form the people as ruling subject. Democratic ideologues themselves’, he went on, ‘often do not realize what an abyss they are concealing when they identify the “people” in the one sense [as a multitude of persons subject to certain norms] with the “people” in the other [as a unified ruling entity]’.<sup>72</sup> A perfect coincidence of individual wills and the provisions of the state would be possible only in the imaginary situation

dispensations invalid. Led by Kelsen, the Constitutional Court overturned these rulings, but in the final score the Christian Social Party won the case. And Kelsen lost his place on the Court’. See ‘Hans Kelsen’, 392.

<sup>69</sup> For which, see Voegelin, ‘Kelsen’s Pure Theory’ and Vinx, *Kelsen’s Pure Theory*.

<sup>70</sup> Kelsen, ‘Vom Wesen und Wert’.

<sup>71</sup> Kelsen, *Vom Wesen und Wert*.

<sup>72</sup> Kelsen, ‘Essence and Value’, pp. 90-1 (translation amended).

of a state of nature in which unanimous agreement in the form of a contract or covenant provided the foundation of political society: since real political life was not like that, a different approach was needed. This meant the replacement of the principle of unanimity implicit in Rousseau's account of the social contract with a principle of majority, as the best available approximation of the ideal of freedom.<sup>73</sup> As Kelsen put it, the idea 'that, if not all, then at least *as many people as possible shall be free*, that is, that as few people as possible should find their wills in opposition to the general will of the social order' leads rationally to 'the majority principle'.<sup>74</sup>

Of course any decision taken by a majority, when understood in these terms, requires a restriction of the freedom of those belonging to the minority. But it was just a fact that in modern mass states this kind of restriction was necessary for any kind of collective self-government to exist in a manner appropriate to place and time. Since, as Weber had recognised, direct democracy was utterly impractical outside 'the very favourable conditions of the Swiss cantons', democracy had to be representative.<sup>75</sup> For Kelsen this implied a system of parliamentary representation, which enabled '*the formation of the governing will of the*

<sup>73</sup> Kelsen, 'Essence and Value', pp. 85-87.

<sup>74</sup> Kelsen, 'Essence and Value', p. 87.

<sup>75</sup> Weber, 'Parliament and Government', pp. 225-27. For discussion, see Bellamy, *Liberalism*, pp. 214-16.

*state according to the majority principle through a collegiate organ* [meaning a body of representatives authorised to create or execute legal norms] *elected by the people*...the state's will is not formed directly by the people itself, but by a parliament created by the people'.<sup>76</sup> Described in this way, parliamentary democracy was a compromise between the demands of freedom and the division of labour characteristic of modern states. The facts of political life in modern industrialised societies were such that the 'people' as such could not rule themselves directly and must be content severally and collectively with their allotted role in the creation of an 'organ' which then determined the will of the state.

The salient facts were two. The first was that there was no people *per se*. 'Split by national, religious, and economic conflicts...the unity that appears under the name "people"...is—according to sociological findings—more a bundle of groups than a coherent mass of one and the same aggregate state'.<sup>77</sup> The second was that in modern conditions, as Weber had once insisted, political parties were crucial. In the 1929 text, Kelsen would go so far as to say that modern democracy was impossible

<sup>76</sup> Kelsen, 'Essence and Value', p. 95. For 'collegiate organ', compare Kelsen, *Bolshevism*, p. 7: 'A state is a democracy if the legislative and executive powers are exercised by the people either directly in a public assembly, or indirectly by organs elected by the people on the basis of universal and equal suffrage...[T]he principle of majority decisions in collegiate organs represents the maximum of autonomy possible within a social order'.

<sup>77</sup> Kelsen, 'Essence and Value', p. 90.

without them. He discerned in anti-party views a poorly-concealed animus to democracy and hinted at an ideologically-driven plot by the supporters of monarchy to prevent its implementation.<sup>78</sup> His own view was that competition for election between parties which reflected the divisions and differences of civil society was the only practicable means of arriving at the united will that the ideal of the social contract represented in thought and image. As he put it, political parties were like ‘many underground streams feeding a river that comes to the surface only within the popular assembly or the parliament, where it is directed into a single channel’.<sup>79</sup> Out of this procedure the will of the state is produced.

Kelsen repeatedly emphasised that parliament, not the people, formed that will. The two had been elided, he suggested, by the ‘*fiction of representation*’. This fiction served ‘to legitimize parliamentarianism from the standpoint of *popular sovereignty*’. It had been a powerful force in earlier struggles against autocracy and monarchy, and had held the political movements of the nineteenth and early twentieth centuries ‘on a rational middle course’ by canalising popular aspirations to self-determination into elected parliaments. But in the long run, Kelsen suggested, it played into the hands of parliament’s opponents. For they had seized upon the facts to which Kelsen adverted to argue that the

<sup>78</sup> Kelsen, ‘Essence and Value’, p. 92, and see related notes printed on pp. 350-3.

<sup>79</sup> Kelsen, ‘Essence and Value’, p. 92 (translation amended).



democratic ideal of a free sovereign people had been betrayed in practice and that the modern parliamentary system ‘promised something it failed to carry out’.<sup>80</sup> Kelsen retorted with disarming frankness that no such promise had been made. Parliament was not and could not be the voice of a sovereign people. It was a machine, a ‘specific, socio-technical means of creating the state’s order’.<sup>81</sup> The lubricant which oiled the wheels of this machine was compromise, which Kelsen treated as the corollary of his majority principle.

Kelsen argued that ‘the will of the community formed according to the so-called majority principle’ was the result of a ‘clash of political wills’. The ‘entire parliamentary process, with its techniques of dialectic and contradiction, plea and counterplea, argument and counterargument, aims at achieving *compromise*’. All parliamentary procedures therefore aimed at finding a middle line between the opposing views of majority and minority:

Parliamentary procedure creates guarantees that the various interests of the groups represented in parliament can raise their voices and manifest themselves in a public process...from the

<sup>80</sup> Kelsen, ‘Essence and Value’, pp. 97-98. Article 21 of the Weimar Constitution perpetuated this fiction by stating that Deputies of the Reichstag were ‘representatives of the whole people’. See Hucko (ed.), *The Democratic Tradition*, p. 154.

<sup>81</sup> Kelsen, ‘Essence and Value’, p. 98.

confrontation of thesis and antithesis of political interests a synthesis is somehow created. But that cannot mean a “higher”, absolute truth, an absolute *value* above group interests, with which parliamentarianism is often wrongly saddled by those who confuse its reality with its ideology, but a compromise.<sup>82</sup>

As it happened, Kelsen doubted that there *was* an absolute superior truth to be known, offering his own version of Weber’s value pluralism when suggesting that consensus about values could only be arrived at by an analogous method.<sup>83</sup> But the commitment to compromise which his moral and political theory alike required rested at bottom on the Freudian hypothesis of a psychological propensity to engage in compromise peculiar to democratic society.

Kelsen had enjoyed frequent contacts with Freud and his circle in Vienna, participating in Freud’s ‘Wednesday Meetings’ and joining the Vienna Psychoanalytic Society in 1911. He used Freud’s analyses in his discussions of democracy, postulating that the democratic ‘character’ was typified by a relatively reduced sense of ego, extended sympathy, and pacifism, and the tendency to direct aggressive drives inward rather than

<sup>82</sup> Kelsen, ‘Essence and Value’, pp. 102-3 (translation amended).

<sup>83</sup> Kelsen, ‘Essence and Value’, pp. 107-9.

outwards.<sup>84</sup> Discount this hypothesis, and there may be some reason to doubt that whatever ‘general will of the state’ emerged from these procedures would readily win the people’s assent.

What, though, of the will of the people? For Kelsen, the ‘people’ was simply a juridical fiction which answered to the fact that a given collection of persons was subject to the same juridical order, to ‘the will of a state’.<sup>85</sup> But ‘the will of the state’, there again, is also a juridical fiction, as, indeed, is the state itself, which is ‘a simplifying personification of the legal code which constitutes the social community, which forms the unity of a multiplicity of human conducts’. The idea of the state, Kelsen continued, was like that of substance in natural philosophy—merely an image that gave intuitive immediacy to what upon analysis turned out to be a bounded system of pure relations which ‘primitive’ minds postulated as something real.<sup>86</sup> It may be unnecessary to add that if the state was a system of relations, sovereignty could not be meaningfully predicated of it. The rule of law meant just that, the *sovereignty* of law as a self-referring norm, the validity of which was found only in procedural consistency.

<sup>84</sup> Jabloner, ‘Kelsen and his Circle’, 382-4. For the democratic character, see Kelsen, ‘Essence and Value’, p. 108, and, at length, *Staatsform*.

<sup>85</sup> Kelsen, ‘Essence and Value’, p. 90. The idea that a people could give itself a constitution would of course look very odd in this light.

<sup>86</sup> Kelsen, ‘Conception of the State’, 35-36.

Carl Schmitt did not think of the state in these terms. In his text of 1923, *The Crisis of Parliamentary Democracy*, he, like Kelsen, took as his starting point Weber's analogy between the state and a modern capitalist enterprise. But he claimed that Kelsen was one of many who had pursued this analogy to conclusions which were potentially catastrophic,<sup>87</sup> developing understandings of politics, parliament, and parties which could neither account for nor generate the substantive values a stable political order required. In a succession of works, Schmitt developed positions about all three which put into question almost everything that Kelsen wished to defend.<sup>88</sup>

<sup>87</sup> Schmitt, *The Crisis*, p. 24, which picked out Kelsen's essay of 1920, 'Vom Wesen und Wert' as typifying the way in which this analogy had been used. Compare Schmitt, *Political Theology*, p. 65: 'The kind of economic-technical thinking that prevails today is no longer capable of perceiving a political idea. The modern state seems actually to have become what Max Weber envisioned: a huge industrial plant'. For Schmitt's relations to Weber, see Engelbrekt, 'What Carl Schmitt Picked Up', McCormick, *Carl Schmitt's Critique*, pp. 31-82, Ulmen, 'Sociology of the State'.

<sup>88</sup> To present the matter in these terms has the (intended) effect of mutually secluding Schmitt and Kelsen from the wider debates and controversies in which they were involved. For that reason the following section says nothing about the sources of Schmitt's thinking or rival figures and schools of thought prominent in his day. This narrowing of attention should not be taken for an uncritical endorsement of the idea that these two thinkers exhaust all conceptual possibilities or were fixated exclusively upon one another. Of the two, Kelsen was by far the better known and more eminent figure in German jurisprudence in the 1920s. To take him as one's opponent, as Schmitt did, was by implication to place oneself on his level. Different purposes were served for Schmitt by the facts that Kelsen was, notwithstanding his eminence, an

#### §IV

Schmitt began from the metaphysical assumption that political forms like the state have real existence. He used an analogy between the state and the church, as against a capitalist enterprise, to establish the distinctive character he wished to attribute to the state. According to Schmitt, the state, like the church, was a concrete unity. That unity rested on two principles, which were opposed to one another but which needed to be combined together for unity to be possible. These were, respectively, identity and representation. The archetypal model for their successful combination was the medieval Roman Catholic church, which Schmitt

‘outsider’, coming from Prague and owing his intellectual formation to the Austro-Hungarian empire, and a converted Jew. The difficulty—perhaps the impossibility—of disentangling these purposes from Schmitt’s oeuvre as a whole is demonstrated in Gross, *Carl Schmitt and the Jews*. For Kelsen as ‘the enemy’, see Schmitt, *Dictatorship*, p. xlv (Kelsen is accused of ‘relativistic formalism’); *Political Theology*, pp. 18-22, (where Schmitt finds in Kelsen ‘relativistic superiority’, ‘unproved certainty’, and ‘methodological conjuring’), p. 29 (‘The objectivity that he claim[s] for himself amount[s] to no more than avoiding everything personalistic and tracing the legal order back to the impersonal validity of an impersonal norm’), p. 42, p. 49; *Constitutional Theory*, pp. 63-5, p. 106 (Kelsen’s state theory is dismissed as an ‘empty husk’); *Concept of the Political*, pp. 70-73 (which, without naming Kelsen, inveighs against ‘pure...individualistic liberalism’ [emphasis added] and its appeal to ‘abstract...norms’).

described, accordingly, as a *complexio oppositorum*, a complex of opposites.<sup>89</sup>

Identity implied a condition in which a group of people was ‘factually and directly capable of political action by virtue of a strong and conscious similarity, as a result of firm natural boundaries, or due to some other reason’. In that case, Schmitt went on, ‘a political unity is a genuinely present entity in its unmediated self-identity’.<sup>90</sup> However, this principle could never be realised without its co-operative contrary, since the political unity of a people was neither natural nor spontaneous. It was rather the result of a constitutive sovereign decision about friend and enemy which established who was embraced within that unity and who was not. In every state, therefore, there had to be a person or persons to represent that unity by making present through their public acts the otherwise fictional idea that the people could act as a unit, by taking the decisions and performing the actions which sustained that people as a real unity.

What this meant was creating ‘total peace’ within the state and its territory by producing ‘tranquility [*sic*], security, and order’, and thereby establishing ‘the normal situation [which] is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no

<sup>89</sup> Schmitt, *Roman Catholicism*, pp. 7-8, 14, 18-19.

<sup>90</sup> Schmitt, *Constitutional Theory*, p. 239.

norm can be valid in an entirely abnormal situation'.<sup>91</sup> Schmitt had no time for those who spoke, as Kelsen had done, of a 'sovereignty of the law'.<sup>92</sup> Law only became valid with the decision that secured the foundational unity of the state, and sovereignty was defined in terms of that decision: 'sovereign is he who decides on the exception'.<sup>93</sup> This definition at once linked sovereignty to an existing order and suggested that a sovereign could act outside the norms of that order, including the provisions of emergency law, to restore the normal situation when the existence of the state was threatened. In 1934 Schmitt made explicit the implied analogy with the medieval papacy: the decisions of the sovereign, like those of the infallible pope, presume an existing political form. They do not create it *ex nihilo*: 'the infallible decision of the Pope does not establish the order and institution of the church but presupposes them'.<sup>94</sup>

<sup>91</sup> Schmitt, *Concept of the Political*, p. 46. See also *Legality and Legitimacy*, p. 71, 'State Ethics', p. 304.

<sup>92</sup> Schmitt, *Political Theology*, pp. 18-19, 29-31; *Constitutional Theory*, p. 187. See also Schmitt, *On the Three Types*, p. 50, for the same position expressed in fiercely polemical terms: '[T]hrough this "rule of law"...law destroys the concrete kingly or leadership order (*Führerordnung*); the master of *Lex* subdues *Rex*'.

<sup>93</sup> Schmitt, *Political Theology*, p. 5.

<sup>94</sup> Schmitt, *On the Three Types*, p. 60. Schmitt had previously claimed that the Weimar Republic was a continuation of, not a break with, the Reich Constitution of 1871, the insinuation being that similarly dramatic modifications of the current political order could also be represented as upholding existing constitutional principles. See his 'Liberal Rule of Law', p. 294. For discussion, see Bates, 'Political Theology'; Baume, 'On Political Theology'; Kelly, 'Carl Schmitt's Theory'.

These same views conditioned Schmitt's thinking about the Weimar constitution.

A democratic constitution, Schmitt claimed, was the result of an exercise of constituent power by a politically united people.<sup>95</sup> If the people did not already exist, he reasoned, it could not give itself a constitution, and the same logic bore against treating the constitution as expressing the principles of some hypothetical contract or covenant between otherwise disunited individuals. If the constitution was not given by the people to itself, it would not be a democratic constitution. The Weimar constitution, then, expressed the decision of an *already existing* sovereign people to give itself the form of a state: and so the essence of the constitution, Schmitt argued, was contained in its preamble and Article 1, rather than in its subsequent articles, those which, as it happened, contained provisions for parliamentary government, constitutional courts, individual rights and freedoms, and so forth.<sup>96</sup> This argument was lethally double-edged and it had a double effect. Schmitt used one side of the argument to puncture Kelsen's ambitions for

<sup>95</sup> Schmitt, *Constitutional Theory*, pp. 75-77, 125-30, 140-46. See Kelly, 'Carl Schmitt's Theory', 122-34.

<sup>96</sup> In the preface to the second edition of his book on *Dictatorship*, published in 1928, Schmitt dismissed the idea that the constitution should be identified with each of its 181 Articles. It was necessary, he said, to discriminate between merely *formal* elements and inalienable ones. See Schmitt, *Dictatorship*, p. xxxiv.



parliament and political parties. He used the other side to fillet Article 48 of the constitution, which gave the President of the Reich emergency powers to secure public order and security, and to stuff it with his own distinctive conception of sovereign power to validate presidential dictatorship in the name of democracy.<sup>97</sup>

Parliament, or so Schmitt declared, was no longer a forum where a ‘will of the state’ could form. So far from reconciling oppositions to produce a united will, it had become the forum of a pluralistic division of organized social powers. Perhaps it had once functioned successfully, in the nineteenth century, when its purpose was to integrate the bourgeoisie into the monarchic state, but in the conditions of mass society ‘the apparatuses and machines’ which had served that purpose were useless.<sup>98</sup> The present situation was one of ‘unpredictable parliamentary majorities, incapable of governing...changing from one instance to the next, of...innumerable and in all respects heterogeneous political parties [which reflected] the pluralistic division of the state itself’, all constantly shifting.<sup>99</sup> Decisions were not taken in parliament at all, but in its committees, in which the interests of economically powerful groups were traded off in secret, resulting in one compromise after another,

<sup>97</sup> For Article 48, see Hucko (ed.), *The Democratic Tradition*, p. 160.

<sup>98</sup> Schmitt, ‘Liberal Rule of Law’, p. 297.

<sup>99</sup> Schmitt, *Der Hüter*, pp. 88-89.

compromise being a bottomlessly pejorative term in this context. Parliamentarians had become mere delegates of those interest groups, not genuine representatives of the people, and the formal provisions of contemporary parliamentary law concerning the independence of representatives were ‘superficial decoration, useless and embarrassing’. It was as if, Schmitt memorably sniped, ‘someone had painted the radiator of a modern central heating system with red flames in order to give the appearance of a blazing fire’.<sup>100</sup> Kelsen’s ‘subterranean streams’ were channels of pollution which corrupted parliament and made a mockery of the notion of popular sovereignty.

*The Crisis* attempted to make this case by turning Kelsen’s own reasoning against him. If parliament is no more than an expedient answering to the practical necessity of a political division of labour in the modern state, Schmitt asks, why cannot the will of the people be represented just as effectively by ‘a single trusted representative’ as an assembly? The argument from expediency, ‘without ceasing to be democratic’, will also justify ‘an antiparliamentary Caesarism’.<sup>101</sup> There has to be, he goes on to argue, a deeper reason for favouring an assembly.

<sup>100</sup> Schmitt, *The Crisis*, p. 6.

<sup>101</sup> Schmitt, *The Crisis*, p. 34.

Reconstructing Kelsen's steps, he discovers it in a foundational commitment to the principle of government by truth.<sup>102</sup>

Schmitt begins his analysis by fastening on Kelsen's invocation of Weber's analogy between the state and the modern factory. By equating the two, he suggests, Kelsen reduces the political to a shadow of economic reality and treats political problems as if they were 'fundamentally the same' as economic problems. It follows that for Kelsen the solution is likewise the same in both cases: 'free competition', the unrestrained clash of opinions in an assembly in the one case and an unregulated market in the other—'everything must be negotiated in a deliberately complicated process of balancing'.<sup>103</sup> Parliament thus obtains its rationale as the place 'where a relative truth is achieved through discourse, in the discussion of argument and counterargument [between] multiple parties'.<sup>104</sup>

<sup>102</sup> Schmitt, *The Crisis*, pp. 34-7, 44-50. For critical discussion, see McCormick, *Carl Schmitt's Critique*, pp. 179-86 and, more broadly, Manin, 'On Legitimacy'.

<sup>103</sup> Schmitt, *The Crisis*, p. 25, p. 34-5, esp. p. 35: 'Normally one only discusses the economic line of reasoning that social harmony and the maximization of wealth follow from the free economic competition of individuals, from freedom of contract, freedom of trade, free enterprise. But all this is only an application of a general liberal principle. It is exactly the same: That the truth can be found through an unrestrained clash of opinion and that competition will produce harmony'.

<sup>104</sup> Schmitt, *The Crisis*, p. 46.

Schmitt contends, however, that this rationale has been vitiated by various changes which began in the nineteenth century and continue to accelerate in the present day.<sup>105</sup> The simulacrum of a *complexio oppositorum* has survived,<sup>106</sup> but the disconnection of structures from deliberation has opened a prospect in which segmental interests battle with one another to control state action via rationalised administrative processes from which contestation is systematically eliminated. In short, an intellectual and practical apparatus sustaining a core of unity has been dissolved and a multiplicity of dissonant voices has taken its place. Modern parliamentary democracy is exposed as a contradiction in terms: it fragments and destroys the popular will that it notionally represents.

One effect of this contention is to draw attention back to the confounding question of unity. In order for a people to be self-governing, Schmitt believes, it is necessary that it should be one, rather than a disorderly heap of many: it must be subject to a single will—its own—in order for the identity of ruler and ruled in which the essence of democracy consists to be realised. Kelsen himself had allowed that this identity was essential to democracy.<sup>107</sup> But he was emphatic that,

<sup>105</sup> See Schmitt, *The Crisis*, pp. 22-50, and compare *Concept of the Political*, pp. 22-5.

<sup>106</sup> See Schmitt, *Roman Catholicism*, p. 26.

<sup>107</sup> Schmitt, *The Crisis*, pp. 25-6. Compare Kelsen, 'Essence and Value', p. 89. Of course Kelsen parted company with Schmitt over the *value* of democracy, which he,

interpreted literally, it was absurd. As we have already seen, by ‘the people’ Kelsen meant nothing more than the ‘system of the acts of individual human beings determined by the state’s legal order’. This made it natural for him to suppose that in reality there was an ‘unavoidable distance between the will of the individual and the state order’.<sup>108</sup> Yet this invites an obvious objection: how is that supposition compatible with the claim that the people rule themselves? Kelsen’s answer is that precisely *because* the ‘isolated individual has no real political existence,

because he can gain no actual influence on forming the will of the state...democracy is possible in earnest only if individuals integrate into associations for the purpose of influencing the common will from the standpoint of their various political goals. Collective groupings which unite the similar interests [wants, wills] of their individual members as political parties have to mediate between the individual and the state...A democracy is necessarily and unavoidably a multi-party state’,

unlike Schmitt, located in the preservation of individual freedom and the protection of minorities.

<sup>108</sup> Kelsen, ‘Essence and Value’, p. 90, p. 88.

for by this means alone the ‘normative fiction’ of the people is translated into political fact as a single will emerges from the interplay of discrete, separated parts within the state.<sup>109</sup>

Schmitt counters that this is simply impossible. Unity of the relevant kind can never be accomplished through the mere aggregation of private wills. Even the ‘unanimous opinion of one hundred million private persons’ would not constitute ‘the will of the people’, because ‘the people exist only in the sphere of publicity’ as a concrete political entity.<sup>110</sup> Schmitt reads into Kelsen’s positions a subversive logic which aims to divide and depoliticise the German people through the insinuation, both open and concealed, of the pathologies of the private individual and his interests into every domain of life and thought.<sup>111</sup>

<sup>109</sup> Kelsen, ‘Essence and Value’, p. 92. See also p. 94: ‘Irresistible developments lead in all democracies to the organisation of “the people” into political parties; or, rather, since “the people” as a political force does not previously exist, democratic developments integrate the mass of isolated individuals into political parties, thus releasing for the first time social forces that can somehow be described as “the people”’.

<sup>110</sup> Schmitt, *The Crisis*, p. 16. Readers will recognise that Schmitt is silently helping himself to something like Rousseau’s distinction between the general will and the will of all, which is the sum of every particular will. Compare Rousseau, ‘Social Contract’, p. 60.

<sup>111</sup> Schmitt, *The Crisis*, p. 20. Here and elsewhere Schmitt nests such claims in a wider story about world-historical tendencies which, it is implied, malign forces are seeking to exploit and accelerate. See e.g. Schmitt, *The Crisis*, pp. 33-50, and, at length, *Political Theology, Concept of the Political* and ‘The Age of Neutralizations’.

Worse still, it is succeeding. The practical outcome of those positions is a state besieged by rival social and economic forces and the disaggregation of the people into a mess of solipsistic individuals and particular partisan interests.<sup>112</sup>

## §V

When Schmitt looked about him in 1928 he claimed to see

a people...divided in many ways—culturally, socially, by class, race, and religion...The German Reich is primarily a unity for paying reparations; it appears as such from the outside. However, politically nothing is more necessary than to envision the task of integrating the German people into political unity from the inside.<sup>113</sup>

For the meaning of ‘malign forces’ in this context, see Gross, *Carl Schmitt and the Jews*.

<sup>112</sup> Compare Rousseau, ‘Social Contract’, p. 122: ‘when the State close to ruin subsists only in an illusory and vain form, when the social bond is broken in all hearts, when the basest interest brazenly assumes the sacred name of public good; then the general will grows mute, everyone, prompted by secret motives, no more states opinions as a Citizen than if the State had never existed, and iniquitous decrees with no other goal than particular interest are falsely passed under the name of Laws’.

<sup>113</sup> Schmitt, ‘Liberal Rule of Law’, p. 300.

Such prognostications were scarcely new. In 1919 Weber had drawn a similar inference. ‘Particularism’, he had declared, ‘cries out for a *bearer of the principle of the unity of the Reich*’.<sup>114</sup> Traditionally this had been the monarch. But the age of monarchy, if not the principle that it represented, was gone.<sup>115</sup> Weber’s preference, we know, was for the President of the Reich to fill the vacancy, carried into office on a wave of popular support; but popular support cuts both ways: ‘Let us ensure that the president of the Reich sees the prospect of the gallows as the reward awaiting any attempt to interfere with the laws or to govern autocratically’.<sup>116</sup> It should also be remembered that his conception of plebiscitary democracy was presented as a counterweight to parliament,

<sup>114</sup> Weber, ‘The President of the Reich’, p. 307.

<sup>115</sup> The Reich Constitution of 1871 made the King of Prussia both President and Emperor of the Reich and its sole authorised representative. See Hucko (ed.), *The Democratic Tradition*, pp. 119-45. Compare Weber, ‘The President of the Reich’, p. 306: ‘Let us...debar all members of the dynasties from this office in order to prevent any restoration by means of a plebiscite’.

<sup>116</sup> Weber, ‘The President of the Reich’, p. 306. Marianne Weber records the following conversation between her husband and General Erich Ludendorff, which took place around the time that ‘The President of the Reich’ was published. ‘In a democracy’, Weber explains, ‘the people choose the leader in whom they place their trust. Then the chosen person says, “Now keep quiet and do as you are told”. The people and parties may no longer interfere with him...Afterwards the people can judge him—if the leader has made mistakes, then off to the gallows with him!’. Ludendorff replies, perhaps rather disconcertingly, ‘I could get to like such a ‘democracy’!’ See Marianne Weber, *Lebensbild*, p. 703, as cited in Derman, *Max Weber*, p. 184.



not as a replacement for it. Indeed Weber predicted that the ‘mighty current of democratic party life’ stirred up by the need to organise election campaigns before a mass public would ‘benefit parliament’ too. He was certain that, whatever its defects, there were some functions for which ‘parliaments are indeed irreplaceable in all democracies’. ‘The complete abolition of the parliaments has not yet been demanded seriously by any democrat’ ran one serenely confident sentence in *Economy and Society*, ‘no matter how much he is opposed to their present form’.<sup>117</sup> Enter Carl Schmitt.

Schmitt agrees with Weber that ‘monarchy’s hour has tolled’.<sup>118</sup> But so too, he indicates, has parliament’s. It can contribute nothing to the great task in view, the task of unifying the German people, because it is an instrument of division, a screen for individual self-assertion and sectional interest. It is for the same reason undemocratic. Democratic legitimacy, Schmitt maintains, ‘rests on the idea that the state is the political unity of a *people*...the state is the political status of a people’.<sup>119</sup> The purest expression of that unity is found in the direct and unmediated expression of the will of a people assembled together, constituting itself as a single entity—‘the self-identity of the genuinely present people’—an

<sup>117</sup> Weber, *Economy and Society*, p. 1454. For further discussion, see McCormick, *Carl Schmitt’s Critique*, pp. 175-9.

<sup>118</sup> Schmitt, *The Crisis*, p. 8.

<sup>119</sup> Schmitt, *Constitutional Theory*, p. 138, p. 131.

ideal that Schmitt, like Kelsen, found in Rousseau.<sup>120</sup> Such purity may be unattainable in the extended territory of the modern nation state, as Rousseau himself recognised,<sup>121</sup> but it remains for Schmitt the ‘natural form’ in which a people’s will is expressed. In modern conditions, he then asserts, this united will is articulated most effectively in public acclamation, ‘saying yes or no’, and this acclamation becomes ‘all the more simple and elementary, the more it is a fundamental decision on their own existence’; in other words, the more closely it approaches the ideal.<sup>122</sup> But the people can acclaim only what is presented to it or, better yet, re-presented to it by a spokesman capable of incarnating and expressing its own general will. ‘Compared to a democracy that is direct’, Schmitt concludes, ‘not only in the technical sense but also in a vital sense, parliament appears an artificial machinery...while dictatorial and Caesaristic methods not only can produce the acclamation of the people but can also be a direct expression of democratic substance and power’.<sup>123</sup> The question Schmitt posed to Kelsen has its answer.

It is true that Schmitt sometimes made enthusiastic noises about Weber’s ‘democratic ideal of a political leader’, an elected President

<sup>120</sup> Schmitt, *Constitutional Theory*, p. 264.

<sup>121</sup> See Rousseau, ‘Government of Poland’, pp. 239-55.

<sup>122</sup> Schmitt, *Constitutional Theory*, p. 131.

<sup>123</sup> Schmitt, *The Crisis*, p. 17.

above the party fray and ‘borne by the confidence of the entire people’,<sup>124</sup> but his own view, that dictatorship is not antithetical to democracy but founded upon it, ought to clarify any vestigial ambiguity on this score.<sup>125</sup> His avowed position was that the state, as a substantive body, was already disintegrating, and the German people and constitution with it: what remained was ‘a highly fragmented pluralized *Parteienstaat* [with] clumps of power subject to political influence’, each seeking ‘to exploit the moment of their power’ and using ‘every type of justification as a weapon in domestic political struggle...Neither parliamentary legality nor plebiscitary legitimacy...can overcome such a degradation to a technical functional tool’. Even ‘the constitution itself breaks up into its contradictory components and interpretative possibilities such that no normative fiction of a “unity”’—surely he had Kelsen in his sights—‘can prevent warring factions from making use of that...constitutional text...they believe is best [to] knock...the opposing party to the ground in the name of the constitution’.<sup>126</sup>

<sup>124</sup> Schmitt, *Constitutional Theory*, p. 367.

<sup>125</sup> See Schmitt, *Dictatorship*, pp. 180-226. Green, *Eyes of the People*, pp. 169-71, offers a most interesting discussion of Schmitt’s ‘plebiscitary theory’, but the difficulties identified there put question marks against the utility of the chosen description.

<sup>126</sup> Schmitt, *Legality*, p. 93.

State, people, and constitution could be restored only by direct recourse to the political in its purest sense: that sovereign decision about friend and enemy which alone makes substantive existence possible. This is why, for Schmitt, the essence of state sovereignty had to be understood ‘not as the monopoly to coerce’, as Weber had imagined, but ‘as the monopoly to decide’.<sup>127</sup> Since Article 48 gave the President whatever power was needed to secure order in an emergency, and since the decision about whether the state exists at all is placed entirely in his hands by Schmitt, the state of emergency becomes permanent and the President is free to act in whatever way he deems necessary to secure the continued existence of state and people. This paradox is captured most vividly in Schmitt’s description of the President as ‘guardian of the constitution’ precisely because his decision, which transcends all constitutional constraints, sustains in existence the people whose will it expresses.<sup>128</sup>

The theoretical reflection Schmitt undertook as part of the great task he envisaged therefore led him finally to a conception of politics and

<sup>127</sup> Schmitt, *Political Theology*, p. 13.

<sup>128</sup> Schmitt, *Der Hüter*, esp. p. 159. Compare *The Crisis*, p. 29: ‘only political power, which should come from the people’s will, can form the people’s will in the first place’. For Schmitt’s position more generally, see Caldwell, *Popular Sovereignty*, pp. 85-199; Dyzenhaus, ‘Legal Theory’ and *Legality and Legitimacy*, pp. 38-101; Kennedy, *Constitutional Failure*, pp. 119-53. Kelsen responded to Schmitt’s claims directly in *Wer soll der Hüter*. For discussion, see Baume, *Hans Kelsen*, pp. 36-9.

political rule very far removed from Weber's, one in which charisma and the electoral contestation which developed it ultimately had little place: his extraordinary lawgiver combined 'legislative and executive [power]...in his person. [He was free] to intervene in the entire system of existing statutory norms and use it for his own purposes'. The threat of the gallows receded to vanishing point.<sup>129</sup>

By 1935 that great task had been completed in terms that met with Schmitt's evident approval: 'Today the German people has...become the German people again...The state is now a tool of the people's strength and unity. The German Reich now has a single flag...and this flag is not only composed of colors, but also has a large, true symbol: the symbol of the swastika that conjures up the people'.<sup>130</sup> These claims appeared in an essay with the title 'The Constitution of Freedom'.

Schmitt did not condescend to explain what he meant by freedom in the essay. But his other writings in and after 1933 made clear what previously had been hedged about or disclosed only to the extent that explicit statement was unavoidable to advance the argument in hand: that

<sup>129</sup> Schmitt, *Legality*, pp. 68-71. Kalyvas, 'Who's Afraid', 92. Balibar, *We, the People*, p. 137, writes of 'the transfer of full powers of decision to a charismatic leader', but textual support for this gloss is not provided. For a more ambivalent treatment, which narrows the gap between Weber and Schmitt, see Green, *Eyes of the People*, pp. 166-71.

<sup>130</sup> Schmitt, 'The Constitution of Freedom', p. 325.

its meaning included the removal of all existing constitutional protections for the individual and the forcible creation of the people's unity through the dispossession and extrusion of its 'enemies' and excluded parliamentary sovereignty, an independent judiciary, a plurality of political parties, and the rule of law.<sup>131</sup>

Kelsen was one of the many casualties of freedom. In 1933 he was removed from his Chair at the University of Cologne on account of his Jewish origins. His recently appointed junior colleague, Schmitt, declined to sign a letter of resolution in his support.<sup>132</sup> Kelsen's landmarks may have been crumbling, but his commitment to democracy was unshakable. Shortly before his dismissal, he had addressed himself directly to the acutely pressing question of how democracy should defend itself against enemies who exploited the system to bring it down from the inside—a prospect raised, with cunning dialectical negativity, in Schmitt's 1932 text *Legality and Legitimacy*. Kelsen's response was that the question was answered in the asking: a democracy that seeks to assert itself against the will of the majority by force has already ceased to be a democracy. How, then, should a democrat act when confronted with this eventuality? Kelsen answered emphatically, '[He] must remain true to his colours, even when the ship is sinking, and can take with him into the depths only

<sup>131</sup> See Schmitt, *State, Movement, People*, pp. 10-11, pp. 25-7.

<sup>132</sup> See Gross, *Carl Schmitt and the Jews*, pp. 25-6.

the hope that the ideal of freedom is indestructible and that the deeper it has sunk, the more passionately it will revive'.<sup>133</sup> Kelsen went down with his ship. He resurfaced first of all in Geneva, where he worked until 1940, returning intermittently to Prague until that, too, became impossible, before emigrating to America where he would remain until his death in 1973.

In 1955 Kelsen returned again to the question of democracy in a long essay published in the journal *Ethics*. 'Foundations of Democracy' reaffirmed his commitment to a proceduralist vision of democracy, with the majority principle and the protection of the rights of minorities at its centre. He issued stern warnings about those who, invoking the will of the people and the benefits of 'leadership', wished to abandon democracy and bring in autocracy under the guise of a democratic terminology. A discreet but cutting footnote remarked that a 'typical representative of this doctrine is the one expounded by Carl Schmitt, who enjoyed temporary success as ideologist for National Socialism'.<sup>134</sup> Kelsen would not have relished the sequel. Today Schmitt is celebrated in many circles as one of the most important and penetrating critics of liberal democracy history

<sup>133</sup> See Kelsen, 'Verteidigung', p. 237, as cited in Jabloner, 'Hans Kelsen', p. 74.

<sup>134</sup> See Kelsen, 'Foundations', 1-32, with accompanying note on 96. Compare Schmitt, *State, Movement, People*, p. 37: 'The strength of the National Socialist State resides in the fact that it is dominated and imbued from top to bottom and in every atom of its being by the idea of leadership'.

has produced<sup>135</sup> while Kelsen's efforts to defend that democracy in an hour of desperate need have been almost forgotten.<sup>136</sup>

## §VI

The primary purpose of this chapter has been to explore the way that Max Weber set himself to analyse the contemporary political situation in Germany, to suggest an intellectual context which sheds light on that analysis, and to use the same context to examine a series of oppositions, across a range of issues, between Hans Kelsen and Carl Schmitt. Recent studies of Weber, and the long shadow that his work cast over many aspects of the Weimar Republic's intellectual life, have been much preoccupied with the question of whether his later political writings

<sup>135</sup> For the resurgence of interest in Schmitt, see Koenen, *Der Fall*, pp. 1-24. For a representative instance, see e.g. Mouffe, *The Return*, pp. 117-56, esp. p 118: 'I propose to take as my starting point [for 'a thoroughgoing study of the liberal democratic regime'] the work of one of its most brilliant and intransigent opponents, Carl Schmitt. Though Schmitt's criticisms were developed at the beginning of the [twentieth] century, they are, in fact, still pertinent and it would be superficial to believe that the writer's subsequent membership of the National Socialist Party means that we can simply ignore them'. Schmitt is subsequently praised—apparently without irony—for his 'rigour' and 'perspicacity'. See also Freund, 'Schmitt's Political Thought', and Piccone and Ulmen, 'Introduction to Carl Schmitt'.

<sup>136</sup> At least by Anglophone scholars: no complete translation of *Vom Wesen und Wert* appeared in English until 2013 (see Kelsen, *The Essence*). This situation is beginning to change, however. See esp. Baume, *Hans Kelsen*, but also Pettit, *On the People's Terms*, p. 287; Przeworski, *Democracy*, pp. 24-38; Saffon and Urbinati, 'Procedural Democracy'.



continued the liberal and democratic lines of thought which his Anglophone admirers especially had discerned in his earlier work, or whether they constitute instead a dramatic *volte face* towards decisionism, authority and anti-parliamentarianism. Is there, in other words, a direct path from Weber to Kelsen and beyond, or does the path lead from Weber to Schmitt and from there to the pathologies of National Socialism?<sup>137</sup>

Perhaps this is the wrong question to ask. Weber bequeathed to his successors not a set of directions but a set of dilemmas about how to live a meaningful life and conduct politics responsibly in the conditions of the modern world. In working through those dilemmas they developed positions which have exercised a powerful influence on democratic theory down to our own day, establishing parameters which continue at once to circumscribe and to energise the range of internal movement potential in our politics.<sup>138</sup>

<sup>137</sup> See Villa, 'The Legacy', esp. pp. 74-5, 92-3, which argues against a 'slippery slope' from Weber to Schmitt. Compare Eden, 'Doing Without Liberalism', Ringer, 'Max Weber's Liberalism', Warren, 'Max Weber's Liberalism'.

<sup>138</sup> Consider a recent synoptic discussion of the 'main approaches' to democracy in current academic debates, which distinguishes three: (i) the 'epistemic' conception of democracy as a process of truth seeking, (ii) the 'populist' conception of democracy as a mobilising politics that defies procedures, and (iii) the 'minimalist' conception in which democracy understood as a system in which parties lose elections. The authors seek to reclaim a fourth approach, 'procedural democracy', which they explicitly associate with Kelsen. See Saffon and Urbinati, 'Procedural Democracy'.

Many of Kelsen's most Weberian claims were repeated by Joseph Schumpeter in his *Capitalism, Socialism and Democracy* of 1942.<sup>139</sup> Schumpeter attacked what he called the 'classical doctrine' of democracy, according to which the people itself decides issues through the election of representatives who identify and implement its general will. About this doctrine, Schumpeter made four points. First, that there was no such thing as a general will that 'all people could agree on or could be made to agree on by the force of rational argument'. Second, that agreement should not be expected because ultimate values could not be decided by rational argument. Third, that even if a general will somehow emerged the agreement that it superficially embodied would necessarily be manufactured rather than natural and lack 'not only rational unity but also rational sanction'. Finally, there was the question of implementation, about which no agreement could be expected either.<sup>140</sup>

As Schumpeter presented it, the political process was completely divorced from the pursuit of truth and the common good. What was good for one individual or group was not so (and not felt to be so) for another and no amount of deliberation, nor any process of aggregation, would alter this sociological fact. Schumpeter did not share Kelsen's optimism about the likelihood of compromise between parties and had little

<sup>139</sup> Kelsen cited Schumpeter's text approvingly in 'Foundations of Democracy', 4.

<sup>140</sup> Schumpeter, *Capitalism*, pp. 250-53.

patience with schemes for proportional representation, not least because he doubted whether any individual was the bearer of interests, preferences, or volitions that were sufficiently well-defined or known to him for anyone else to represent them.<sup>141</sup> In view of his deep scepticism about the idea that it possessed intrinsic value or could realise any popularly imposed goal, Schumpeter defined democracy by the process it characteristically employed, being ‘that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’, based on the principle that ‘the reins of government should be handed to those who command more support than do any of the competing individuals or teams’.<sup>142</sup> In a democracy, the people do not rule: their role is to elect those who do. Schumpeter was moved to wonder how the classical doctrine, which was ‘so patently contrary to fact’, could have retained its allure for so long and commended his own theory as ‘much truer to life’ than its rival.<sup>143</sup>

The thought that democracy, properly understood, was merely a method through which leaders were selected proved irresistibly attractive to political theorists of the 1950s and 1960s entranced—as many were—

<sup>141</sup> Schumpeter, *Capitalism*, p. 261.

<sup>142</sup> Schumpeter, *Capitalism*, p. 269, p. 273.

<sup>143</sup> Schumpeter, *Capitalism*, p. 264, p. 269. This view of democracy is defended on normative grounds in Przeworski, ‘Minimalist Conception’.

by the prospect of a purely descriptive social science. This way of thinking enjoyed considerable vogue for a time, providing as it did a decisive and reassuringly simple criterion for distinguishing democratic arrangements from undemocratic ones, and it spawned in its turn various economic and empirical theories of democracy which genuflected to Schumpeter as a source of inspiration.<sup>144</sup> The possibility of a purely empirical and value-neutral social science soon came under suspicion, however, and with it the pretensions of the empirical theorists of democracy to have eliminated all normative considerations from their analyses. The very act of description involved an implicit appeal to evaluative criteria which, once laid out, led some to question whether the Schumpeterian model salvaged enough of what was conventionally understood by the term ‘democracy’ to merit the description in the first place. Quite what remained of popular sovereignty on his model, for instance, was obscure;<sup>145</sup> likewise why democrats should or would give their allegiance to a set of procedures which, on Schumpeter’s own

<sup>144</sup> Among the former, see especially Downs, *Economic Theory*; among the latter, Dahl, *A Preface* and *Who Governs?* For discussion, see Skinner, ‘Empirical Theorists’.

<sup>145</sup> Skinner, ‘Empirical Theorists’, 290-303 showed the difficulty of resolving this question in the terms with which the empirical theorists and their critics alike were operating.

admission, might be less adept at securing outcomes acceptable to all the competing groups that comprised the people than a dictatorship.<sup>146</sup>

Reflecting on these questions, a number of prominent theorists began to seek new grounds on which to mount a normative defence of democracy. John Rawls initially attempted to vindicate a conception of democracy suitable to a just society on terms which set out from the different wants and interests of real individuals, but came to realise that a bargain among competing groups would not deliver justice:<sup>147</sup> each would ‘take a narrow or group-interest standpoint’ rather than aiming at a common good.<sup>148</sup> His first response was to impose a common standpoint on all parties through the procedural contrivance of a ‘veil of ignorance’ which deprived them of knowledge of their own particular circumstances, thereby bracketing the problem of particularism and enabling him to present the principles of justice chosen behind the veil as expressing a general will common to all similarly situated rational agents. In later work he confronted the problem more directly, invoking the principle of public reason to explain how citizens, divided on questions of ultimate value, could nevertheless deliberate together about matters of public

<sup>146</sup> Schumpeter, *Capitalism*, pp. 255-6.

<sup>147</sup> See Rawls, ‘Justice as Reciprocity’.

<sup>148</sup> Rawls, *A Theory*, pp. 360-1.

concern and sustain over time an ‘overlapping consensus’ about political justice.

Elaborating his position, Rawls recalled the fate of the Weimar Republic which, in his summary account, fell when the members of powerful elites abandoned constitutional politics and gave up on the co-operation needed to make it work. Schmitt was cited in passing;<sup>149</sup> but it soon became evident that Rawls’s flanks were exposed to lines of criticism that Schmitt had pressed against Kelsen:<sup>150</sup> while Rawls continued to assign priority to the basic rights and freedoms of individuals, not only over procedural rights but also over any collective or common good,<sup>151</sup> self-interested individuality remained ‘the *terminus a quo* and *terminus ad quem*’ of his conception of democracy and public reason reduced to an ideological instrument which masked its own service to particular interests and the endless bargaining of such interests—of the sort Rawls agreed was incompatible with justice—in a highly moralized and misleading language of consensus.<sup>152</sup> In response, some commentators (unwittingly) marched backwards into positions

<sup>149</sup> Rawls, *Political Liberalism*, pp. lix-lx.

<sup>150</sup> See Schmitt, *Concept of the Political*, pp. 70-1.

<sup>151</sup> For procedural rights as ‘subordinate to the other freedoms’, see Rawls, *A Theory*, p. 233; for rights as prior to the common good, see e.g. p. 560.

<sup>152</sup> See Johnson, ‘Carl Schmitt’, 20; Dyzenhaus, ‘Legal Theory’, 132-3; and compare Mouffe, *The Return*, pp. 102-34.

Kelsen had occupied, defending democratic procedures and institutions as the best guarantors of equal political freedom among individual citizens between whom no consensus should be expected.<sup>153</sup>

A somewhat different approach was developed by Jürgen Habermas. Habermas was as illusionless about Schmitt as he was irreverent,<sup>154</sup> but he shared some of Schmitt's stated doubts about the ability of existing democratic procedures to deliver meaningful outcomes. He proposed to identify the conditions under which they might do so. These turned out to involve the reinvigoration of institutions and principles that Kelsen held dearest, including 'the significance of deliberative bodies in democracies, the rationale of parliamentary opposition, the need for a free and independent media and sphere of public opinion, and the rationale for employing majority rule as a decision procedure'.<sup>155</sup> Thus the problem became one of achieving

<sup>153</sup> See e.g. Wolterstorff, *Understanding Liberal Democracy*, Part Two. Compare p. 295: 'to affirm the liberal democratic polity is to put the shape of our life together at the mercy of votes in which the infidel has an equal voice with the believer'.

<sup>154</sup> See Habermas, 'The Horrors', p. 129: '[Schmitt] wants to lay the conceptual groundwork for detaching democratic will-formation from the universalist presuppositions of general participation, limiting it to a...substratum of the population, and reducing it to argument-free acclamation by the immature masses. Only thus can one envision a caesaristic and ethnically homogeneous *Führerdemokratie*, a democracy under a Führer in which such a thing as "sovereignty" would be embodied'. For irreverence, see note 58 above.

<sup>155</sup> See Benhabib, 'Deliberative Rationality', 42.

mutual understanding with others about the world of human experience and activity rather than harmonising, neutralising, or reconciling competing claims or partisan interests. Habermas used the same logic to hobble the Schmittian critique of public reason before it left the blocks. Democratic principles were not subordinate to, but neither did they seek to trump, basic rights and freedoms. Rather they were ‘equiprimordial’ and complicit, rights being understood not as individual possessions but as relations grounded in mutual recognition and interpersonal action.<sup>156</sup>

Popular sovereignty was treated in similarly diffusive terms. ‘The people from whom all governmental authority is supposed to derive does not comprise a subject with will and consciousness’, Habermas insisted. ‘It only appears in the plural and *as* a people it is capable of neither decision nor action as a whole’.<sup>157</sup> As with Kelsen, so with Habermas it is only through participation in the procedures of democratic decision-making that individuals rule themselves. For Habermas this ideally implies communicative interaction free from coercion, bureaucratic control, or socio-economic subordination. In reality, however, these hindrances are always present to some degree, and in recent writings

<sup>156</sup> Habermas, *Between Facts and Norms*, pp. 82-131.

<sup>157</sup> Habermas, ‘Popular Sovereignty’, p. 41.



Habermas has acknowledged roles for bargaining, voting, and leadership alongside deliberation in the daily life of a democracy.<sup>158</sup>

The attempt to sublimate popular sovereignty into certain specified procedural conditions or discursive processes duly provoked a reaction among writers who wished to reintroduce into political theorising the idea that the people could act as one, possessing a collective will and being capable of expressing it without the mediation of representative institutions. Thus Ernesto Laclau, in a work of 2005, could echo Schmitt in suggesting that the collective will was represented truly only by a figure (or figures) that spoke for the people as a whole, beyond parliament and parties, and so achieved the perfect identity of ruler and ruled which Schmitt had made the essence of democracy. Laclau likewise bewailed the reduction of the people to a plurality of inconsistent interests and values and its debilitation through strangulation in rules and procedures.<sup>159</sup> He wanted to recover and mobilise the people's potential for revolutionary action. Critics have worried that his way of thinking leaves little scope for opposing or criticising whatever emerges in the realisation of that potential, 'let alone challenging it through effective

<sup>158</sup> Habermas, *Between Facts and Norms*, pp. 336-40 and 'Leadership and *Leitkultur*'

<sup>159</sup> Laclau, *On Populist Reason*, pp. 162-4.

political contestation'.<sup>160</sup> They also worry about the potential for the people to be demobilised, their participation in politics reduced to a passive spectatorship that presents an even less effective means of contesting political decisions than electoral politics 'or subordination by the hegemonic collective under the representation of a charismatic leader'.<sup>161</sup> In making these points, it is Kelsen's positions these critics claim to be restating.

## §VII

A recent book announces that we are living in *The Time of Popular Sovereignty*. It tells us that popular sovereignty is the only true ground of democratic legitimacy. At the same time it argues that the people is a series of events, not a collective agent or an aggregation of persons, and so constantly in flux, yet that it is still sovereign; that its decisions are not necessarily right, that it does not embody rationality, and that there is no intrinsic obligation on the part of citizens to obey it.<sup>162</sup> Confronted with a notion of sovereign power that is simultaneously in nobody's possession

<sup>160</sup> Saffon and Urbinati, 'Procedural Democracy', 453. The authors note (476, n. 93) Laclau's recent comments about the 'illegitimacy' of opposition to Argentina's 'populist' leader Cristina Kirchner and his belief in the importance of her being re-elected indefinitely to allow her hegemonic project to be consolidated.

<sup>161</sup> Saffon and Urbinati, 'Procedural Democracy', 452-3. An attempt is made to address this worry in Green, *Eyes of the People*.

<sup>162</sup> Ochoa Espejo, *Popular Sovereignty*, pp. 180-225.

and everyone's, and in principle binding on none, our first impulse may well be to heed the advice of Frank Ankersmit, who has suggested that we would do better to 'abandon the doctrine of popular sovereignty just like that of the divine right of kings: in representative democracy...no segment of society and no institution...can properly be said to "own" the state and the political powers embodied in it'.<sup>163</sup>

Sound reasons for firmly resisting that initial impulse were enunciated many years ago by R. G. Collingwood, when he observed that sovereignty 'is merely the name for political activity, and those who would banish sovereignty as an outworn fiction are really only trying to shirk the whole problem of politics'.<sup>164</sup> Of course that problem may be understood in many different ways. For Schmitt, the problem presented itself in the form of a question about how political unity could be maintained in the face of an increasingly intense pluralistic struggle of interests and ideals. On his assumptions, plurality could never be a preface to peaceful co-existence (because plurality implied a variety of positions each of whose claims were total) but, rather, was the prelude to a contest for survival. Kelsen's assumptions led him to another destination. He found value in plurality and thought it possible for civilized people to come together in their differences, giving every

<sup>163</sup> Ankersmit, *Political Representation*, p. 118.

<sup>164</sup> Collingwood, 'Political Action', p. 106.

political conviction the same chance to be articulated and to compete freely to win the hearts and minds of citizens.

The conceptions of democracy defended by Kelsen and Schmitt complemented their wider positions. Kelsen emphasised the constituted power of the people, understanding by the people the individuals who play their various parts, above all electoral, in establishing their representatives and thus in forming and conditioning the institutions which deliver the laws under which they live. Schmitt dwelt upon the constituent power of the people, understanding by that same term a united body acting as one to give itself constitutional form, receiving its unity at the moment of formation from the sovereign power that decides in its name.

So described, their conceptions mirror almost exactly the two ‘diametrically opposed notions’ symbolising ‘two equally opposed states of affairs’ that Sheldon Wolin once identified within democracy: ‘One is the settled structure of politics and governmental authority typically called a constitution, and the other is the unsettling political movement typically called revolution. Stated somewhat starkly: constitution signifies the suppression of revolution; revolution the destruction of constitution’.<sup>165</sup> A recent commentator notes that Wolin ‘urges us to recognize that authentic democracy takes shape exclusively around the

<sup>165</sup> Wolin, ‘Norm and Form’, p. 29, p. 37.

latter pole', that popular sovereignty manifests itself truly only in extraordinary moments of collective disobedience and mass protest.<sup>166</sup>

But would we be wise to follow these urgings?

My own judgement is that we would not.<sup>167</sup> For the two notions Wolin identifies are not, so it seems to me, alternative opposites each giving its own complete understanding of democracy but rather twin poles which, through their partnership and interaction, provide both the limits and the impetus to our thinking about democracy and our attempts to govern ourselves and to shape the course of our common political life. Each one exerts a pull which makes itself felt over the full range of movement. These limits are not fixed for all time—as we have seen, they are the historic deposits of an intellectual and political contest that is ongoing—but on any given occasion they are relatively fixed and constrain all contesting parties to a certain field of vision and a certain range of opportunity.<sup>168</sup>

At the limit, where the pull of its counterpart is weakest, each notion gains a potency through purity and simplicity which ultimately disposes it to excess and exposes it to self-defeat: the view is unrestricted and the possibilities are sharply polarised. Schmitt saw in the liberal

<sup>166</sup> Bilakovics, *Democracy*, pp. 204-5.

<sup>167</sup> For a similar judgement, on contrasting grounds, defended at much greater length, see Pettit, *On the People's Terms*, esp. pp. 252-92.

<sup>168</sup> This image is adapted from Oakeshott, *Politics of Faith*, p. 116.

constitutionalist state an empty formalism which encouraged the reign of private interest and with it, or so he feared, the kind of enfeebling lethargy that overtakes a people when it has given up on politics and on the idea of ruling itself. He oriented his theory of democracy around the concrete will of a united people, united in and under a leader with unchallenged authority. Kelsen saw behind Schmitt's invocation of popular will over and against the existing constitutional order, and in all similar attempts to ignore or evade the 'facts' of modern political life, 'the gaping stare of the *Gorgon's naked power*'.<sup>169</sup> He denied that the people had a will and oriented his rival theory around the protection of the rights of minorities and procedures which assured the possibility that the minority 'may at any time itself become a majority'.<sup>170</sup>

Each theory, whatever else we might think of it, has the merit of illuminating the strengths and weaknesses of its rival; yet each must partake of something of the other to be viable. When democratic procedures and institutions are systematically unaccountable to the people in whose name they operate—when the fact bears no resemblance at all to the fiction—they have little to commend them and little capacity to compel the adhesion of citizens even in times of relatively untroubled stability and security, let alone in times of test; but there is always

<sup>169</sup> Kelsen, 'Ansprache', pp. 54-55.

<sup>170</sup> Kelsen, 'Essence and Value', p. 108.

something to be said for a regime in which, however unsatisfactory it is in other respects, we retain the ability at regular intervals, and without bloodshed, to remove our governors ‘when enough of us have had more than enough of them’.<sup>171</sup> It may be that, in the end, in our efforts to realise the ideal of a self-governing people we cannot do better than such a regime. (We can assuredly do appreciably and dismayingly worse).<sup>172</sup> We cannot doubt, however, that the question of whether and how we *might* do better remains one of the most central questions of contemporary life. To shirk it is to shirk the whole problem of politics.

<sup>171</sup> Dunn, ‘Legitimacy and Democracy’, p. 16. See also Przeworski, ‘Minimalist Conception’.

<sup>172</sup> For a sustained recent attempt to show how we can do better, see Pettit, *On the People’s Terms*. For a salutary corrective, see Dunn, *Breaking Democracy’s Spell*.

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