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BOOK REVIEW

Should We Read Carl Schmitt Today?

by
D.A. Jeremy Telman*

Books Reviewed in this Essay

THE CHALLENGE OF CARL SCHMITT
Chantal Mouffe ed., 1999

CARL SCHMITT: THE END OF LAW
William E. Scheuerman (1999)

LAW AS POLITICS: CARL SCHMITT’S CRITIQUE OF LIBERALISM
David Dyzenhaus ed., 1998

INTRODUCTION

Chantal Mouffe introduces The Challenge of Carl Schmitt by asking, “Why should we read Carl Schmitt today?”1 How one answers this question depends on who the “we” is. Mouffe’s introduction summarizes approaches to Schmitt taken in a volume whose authors are political theorists “all identified with the Left.”2 These authors read Schmitt in order to gain “insights that can be used to

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2. Mouffe, Introduction, supra note 1, at 1. Not all of those who advocate a revival of interest in Schmitt are associated with the political left. Some of Schmitt’s current defenders use his
rethink liberal democracy with a view to strengthening its institutions.\(^3\) In this essay, I address Mouffe’s question from the perspective of a different “we” – that of legal scholarship. In answering Mouffe’s question, I also tweak it because I think Mouffe’s question answers an anterior question that she does not explicitly pose: in the case of Carl Schmitt, the leading legal theorist for the Third Reich,\(^4\) I believe it is appropriate that we first ask whether we should bother reading him at all.

In the Anglo-American context, the reception of Schmitt’s work has focused on two topics: his influence on Central European leftists, especially the Frankfurt School,\(^5\) and the potential uses to which contemporary theorists might put his critique of liberalism. The two issues are related: contemporary leftists now investigate the reasons why leftists of Schmitt’s generation were so interested – and commented so positively – on Schmitt’s works.\(^6\) Ellen Kennedy, whose articles on and translations of Schmitt’s work have contributed greatly to the recent revival of interest in Schmitt, believes she has discovered the source of earlier interest in Schmitt’s work, arguing that “the most cogent and coherent critique of liberal institutions in this century was developed by Schmitt.”\(^7\) According to Kennedy, Schmitt’s legal and political theory filled a gap in left-wing

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5. The debate in the United States about the extent of Schmitt’s influence on the Frankfurt School began in earnest with Kennedy, Carl Schmitt, supra note 2. Telos has since become the major source for new translations of Schmitt and for new English-language commentaries on his writings.


theory, supplementing the economic and social theory of Karl Marx by analyzing the condition of the liberal state under 20th-century capitalism.8

But the revival of interest in Schmitt is somewhat mysterious, especially as so many of the theorists who now advocate a reappraisal of his significance stress that they abhor his politics and reject his conclusions.9 Indeed, Schmitt’s perspective on liberalism is unusual because his opposition to modern mass politics and parliamentary democracy enables him to be utterly merciless in his attacks on the assumptions, the aspirations, and the techniques of the modern liberal state. Moreover, the sudden rush to Schmitt remains puzzling because other German legal positivists of the Weimar era offered equally searching critiques of liberalism. Hans Kelsen, the most influential legal positivist of that era, did so from a centrist position. Herman Heller drew on the German social democratic tradition in his analysis of the political structures of Germany’s first parliamentary democracy. The revival of interest in Schmitt is thus encouraging not as an end in itself but as an indication of a new openness among North American scholars to the German legal positivist tradition.

The first part of this essay is divided into three sections. Part I begins by outlining Schmitt’s biography and tracing his intellectual and professional development. It then assesses Schmitt’s place in the context of German legal theory in the first half of the 20th century. It concludes by recounting the unlikely re-emergence of Schmitt as a political and legal theorist whose work is touted for its critique of political liberalism.

Part II returns to the question of whether we should read Carl Schmitt today and what useful lessons we might derive from his writings. This Part details the various reasons the writers under review here have given for Schmitt’s continued relevance.10 While the articles collected in Law as Politics generally assess Schmitt’s importance as a historical figure and his continuing impact on German

8. Id. at 41-42. In the second part of his book, entitled “Carl Schmitt in America,” Scheuerman devotes three chapters to a discussion of the diffusion of Carl Schmitt’s ideas into American political theory through the writings of Joseph Schumpeter, Friedrich A. Hayek, and Hans Morgenthau. WILLIAM E. SCHEUERMAN, CARL SCHMITT: THE END OF LAW 181-251 (1999). While this part of Scheuerman’s book begins the very important work of assessing Schmitt’s actual influence and importance, it is the least convincing part of his work on Schmitt, based as it must be on tenuous biographical connections, inferences drawn from the availability of Schmitt’s writings and topical affinities, and the fine art of divining influence. See e.g., id. at 197-98 (demonstrating the existence of a connection between Schmitt and Schumpeter, but not demonstrating the extent of Schmitt’s influence). John P. McCormick interprets Scheuerman’s work as an attempt to “explicate [the] subterranean relationship between liberalism and fascism . . . .” MCCORMICK, SCHMITT’S CRITIQUE, supra note 1, at 14. McCormick thus provides an additional ground for reviving Schmitt, but even Scheuerman does not really seem to be interested in showing a fundamental theoretical affinity between liberalism and fascism. Rather, Scheuerman indicates the need to investigate the extent to which liberal theory might be indebted to Schmitt so that liberals can be on guard against the implications of Schmittian theory.

9. See discussion infra accompanying notes 111-14, of the views of some of the contributors to both THE CHALLENGE OF CARL SCHMITT and LAW AS POLITICS.

10. In discussing the two collections of essays, I have focused on the question of Schmitt’s relevance to contemporary political and legal theory. Accordingly, I devote relatively little space to the essays included in those collections that address other aspects of Schmitt’s writings or assess his relationship to other thinkers.
politics and constitutional law, *The Challenge of Carl Schmitt* argues for the more general applicability of Schmitt's critique of Rawlsian political liberalism. Scheuerman takes an entirely different approach in *Carl Schmitt: The End of Law*, focusing on Schmitt's critique of liberalism for its inability to justify the government's use of discretionary power in realms where legal norms underdetermine the outcome of particular conflicts. Scheuerman shows Schmitt's importance in the context of the contemporary American critique of liberal jurisprudence, which has often focused on the failure of constitutional democracy to achieve its aim of guaranteeing the functioning of a rational, predictable legal system that provides equal justice for all.

In what follows, I fault Mouffe and some of the authors she includes in *The Challenge of Carl Schmitt* for positing Schmitt's importance as a political theorist rather than demonstrating that importance. Dyzenhaus' collection, by contrast, is far more convincing in showing Schmitt's importance in German constitutional history and the continuing impact of his thought on German constitutional theory and on German politics. Scheuerman, as well as many of the authors collected in *Law as Politics*, argues that Schmitt is best read as an object lesson — as a dramatic example of the dangers of sacrificing liberal democracy for stability and order. I share their assessment, as well as their conclusion that Schmitt is most usefully read in conjunction with Hans Kelsen, Hermann Heller, Rudolf Smend, and Schmitt's other interlocutors from the Weimar period.11 These other Weimar thinkers developed their legal theories in the face of the same problems that Schmitt confronted. Their conclusions are equally instructive for contemporary theory, and they, unlike Schmitt, chose to support democracy over fascism.

I.

WHO WAS CARL SCHMITT

A. A Brief Biographical Sketch

As discussions of Carl Schmitt's scholarship focus on the varying accounts of the significance of Schmitt's collaboration with Nazism to an assessment of his writings, Schmitt's biography is only slightly less controversial than those writings. Schmitt was born in 1888 in a small town in the German Rhineland; he died in the same small town in 1985.12 He earned his law degree in 1910 and, in 1914, completed his *Habilitationsschrift*, a post-doctoral dissertation that qualifies its author for an academic career. Schmitt thus received his training during the heyday of legal positivism, which thrived in the German universities of the *Kaiserreich* and the Weimar Republic.13 He worked for Germany's military government at the end of World War I and then taught at leading German universities during the 1920s. By the end of that decade, Schmitt had become a

11. Unfortunately, the writings of these authors are largely unavailable in English. Kelsen's legal theory is available, however, in HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY (B.L Paulson and S.L. Paulson trans., 1992).
12. SCHUEERMAN, supra note 8, at 2.
13. BENDERSKY, supra note 4, at 9-10.
leading legal advisor to the authoritarian governments that oversaw the collapse of the Weimar Republic. Later, Schmitt defended the actions of Chancellor Franz von Papen, who seized control of the Prussian government in July 1932, in a sort of coup d’état (the “Preußenschlag”) in which the federal government displaced the elected Social-Democratic leaders of Germany’s largest state.

Schmitt’s support of von Papen’s coup set the stage for one of those rare occasions when legal theorists face off in a high-stakes game of power politics. The legality of von Papen’s actions were tested before the German Supreme Court in Leipzig. Although Kelsen did not participate in the proceedings, his writings clearly shaped the arguments put forward by Hans Nawiasky, one of the lawyers representing the ousted Prussian government. Hermann Heller also represented Prussia. In support of von Papen’s government, Schmitt argued that Article 48 of the Weimar Constitution empowered the President (and the Chancellor acting under emergency powers granted him by the President) to take extreme measures in order to check radical political parties. The Supreme Court was not entirely convinced, but it did not reinstate the independent Prussian government. Since the Social Democratic government of Prussia had provided a significant bulwark against the rise of Nazism, historians often point to the Preußenschlag as a critical turning point in the Weimar Republic’s demise.

Schmitt did not join the Nazi Party until May 1933, as his natural political inclinations favored a more old-fashioned authoritarianism. Soon after joining


16. Kennedy, Carl Schmitt, supra note 2, at 37-38, n. 2. G.L. Ulmen criticizes Peter Carl Caldwell and David Dyzenhaus for treating Schmitt as an ally of von Papen when Schmitt was actually associated with Kurt von Schleicher’s authoritarian attempt to exclude the Nazis from government. Ulmen, supra note 2, at 1113, 1118, 1124. However, Ulmen does not address Schmitt’s role in defending von Papen’s actions before the German Supreme Court.

17. George Schwab, one of Schmitt’s translators, argues rather pathetically that Carl Schmitt could not have shared the ideas of the Nazis in 1932 because at that point, as an advisor to Germany’s existing authoritarian government, he advocated the exclusion of extremists on both ends of the political spectrum from participation in politics. Schwab, Introduction, in Carl Schmitt, The Concept of the Political 14, n. 28 (George Schwab trans., 1996) [hereinafter SCHMITT, THE CONCEPT]. Schmitt was thus disappointed that President Paul von Hindenburg “labored under the impact of leftist doctrines,” and would not “eliminate the political challenges” facing his government. Id. at 15. While this does indicate that Schmitt favored traditional forms of authoritarian government over Nazi-style totalitarianism, it by no means indicates that Schmitt’s ideas could not be reconciled with those of the Nazis. Schmitt believed that states had to be empowered to make vital decisions in times of crisis in the interest of stability. In 1932, Schmitt believed that the state needed to eliminate fascists and communists from the political spectrum. In 1933, he believed that the Nazi state needed to eliminate its enemies, right, left and center. Scheuerman adopts a slightly more generous view regarding Schmitt’s association with Nazism, arguing that Schmitt’s authoritarian theory of the total state “made him vulnerable to National Socialism.” Scheuerman, supra note 8, at 86. But Scheuerman also argues that “Schmitt’s marriage to Nazism stems immanently from core elements of his jurisprudence.” Id. at 115 (emphasis in original). Schwab also argues that Schmitt’s anti-Semitic remarks were insincere; that he was merely attempting to ingratiate himself with the Nazis.
the Nazi Party, however, Schmitt was awarded a professorship at Germany's leading university in Berlin, as well as the editorship of Germany's leading legal publication, *Die deutsche Juristen-Zeitung.*\(^\text{18}\) Schmitt's collaboration with the Nazis was short-lived, lasting from March 1933 until December 1936.\(^\text{19}\) Consequently, some of those who advocate Schmitt's continued importance urge us not to judge the work of a prolific theorist whose thought continued to develop, beginning around the time of World War I and continuing into the Space Age, on the basis of one 45-month period.\(^\text{20}\) But during that time Schmitt authored four books and published over 50 essays in academic and political journals.\(^\text{21}\) Moreover, Schmitt was a reactionary critic of the Weimar Republic long before he joined the Nazi Party, and, although his feud with elements within the Nazi leadership forced him to surrender some of his positions, Schmitt's writings up until 1945 do not bear out his post-war claims that he had joined the opposition after 1936.\(^\text{22}\) As Scheuerman puts it, "[t]he overwhelming tone of Schmitt's

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18. Scheuerman, supra note 8, at 113.


20. Ulmen accuses Dyzenhaus and Caldwell of distorting Schmitt's writings by finding too much continuity in his thought. Thus Ulmen finds it significant that, during the Weimar Republic, Schmitt did not write about the importance of a mythical leader who could resolve social conflicts in industrial society. Ulmen, *supra* note 2, at 1112, 1118. Ulmen would distinguish Schmitt's views from Nazism because his crucial friend/enemy distinction was not explicitly racial and his racism was not biological. *Id.* at 1109, n. 10.

21. Scheuerman, *supra* note 8, at 113. These writings included crude attacks on Jews and foreigners and enthusiastic defenses of the racial Nuremberg laws. *Id.* at 113-14.

22. *Id.* at 1, 4. Some commentators prefer to divide Schmitt's career into three distinct periods: the Schmitt of the teens and twenties, the Schmitt of the Nazi period, and the post-Nazi Schmitt. Agostino Carrino, *Carl Schmitt and European Juridical Science,* in Challenge of Carl Schmitt, *supra* note 1, at 180, 186. While there were undeniable shifts in the focus of Schmitt's work throughout his career, I believe that Schmitt's writings generally evidence the continuity of his thought. Carrino acknowledges this continuity with respect to Schmitt's legal writings. *Id.* at 187. *See also,* Strong, *supra* note 19, at xxv ("It seems to me relatively clear that in most aspects of his thought Schmitt's understanding of law and the world did not change throughout his life. This includes at least some aspects of his open anti-Semitism during the period 1933-1936."); Jean-François Kervégan, *Carl Schmitt and "World Unity",* in Challenge of Carl Schmitt, *supra* note 1, at 54, 55-56 (noting that Schmitt began developing the major themes of his post-war writings as early as the 1920s). Ingeborg Mau argues that Schmitt consistently advocated the same sort of social function for the political system, while acknowledging "situation-specific modifications of Schmitt's juristic constructs." Ingeborg Mau, *The 1933 "Break" in Carl Schmitt's Theory,* in Law as Politics, *supra* note 1, at 196, 199. She concludes that "Schmitt's theory coincides with the interest of those parts of the bourgeoisie that did not autonomously bring fascism into existence in 1933, but that for a long time successfully used fascism for its own purposes, only to be cheated by it in the long run." *Id.* at 212. John P. McCormick argues that there was a break in Schmitt's theory of
postwar writings is fundamentally unrepentant. Schmitt’s recently published diaries document the depth of his anti-Semitism well after the Nazi defeat.”23 In any case, as I indicate below, Schmitt is read today precisely for his writings of the ‘20s and ‘30s, the period when he was most engaged in advocating the replacement of Germany’s existing parliamentary democracy with a dictatorship. Whether or not his brief association with Nazism defines Schmitt’s career, it certainly defines that portion of his career during which he generated the writings that are today celebrated for their critique of liberalism.

B. Schmitt’s Place in German Legal Theory

1. The Positivist Tradition

Legal positivism has never enjoyed widespread favor in this country, but our rejection of the legal positivist tradition has lacked nuance. In his extremely useful book on German legal theory, Peter Carl Caldwell distinguishes the German tradition of statutory positivism from sociological positivism, which links law to a community’s social practices,24 and from H.L.A. Hart’s statist positivism,25 which identifies law with norms posited by legal authority or produced through legal procedures.26 For statutory positivists, a statute, duly approved by the legislature, is the highest expression of the sovereign will. So long as legislation reflects the will of a sovereign body formed in conformity with constitutional norms, the legislation establishes legal norms that stand above the constitution. German legal positivism first emerged as a means of justifying the legal authoritarianism of Bismarck’s Kaiserreich, but the leading practitioners of legal positivism during the Weimar Republic supported the Republic, although with varying degrees of conviction.27


23. Scheuerman, supra note 8, at 175.
24. See Lawrence M. Friedman, Law and Society: An Introduction 3-5 (1977) (setting out, as the object of the sociology of law, the authoritative description of public rules).
27. See e.g., id. at 65 (discussing Gerhard Achschütz’s evolution from a defender of constitutional monarchism into one of the most important commentators on the Weimar constitution and the laws of the Weimar Republic), 123 (“It took at least ten years for [Rudolf] Smend to become reconciled to the Weimar Republic.”), 129-30 (noting in Heller’s attempt to articulate a social democratic politics of nationalism a tendency to adopt uncritically biological notions of race and suspicion of internationalism, both associated with the anti-democratic forces in Weimar).
Legal positivism generally rejects the theory, based in natural law, that grounds legal norms within a larger moral normative system. The challenge for German legal positivism was to justify existing legal norms without subordinating those norms to universalizing moral claims. Hans Kelsen, the Austrian legal theorist whose writings dominated German legal theory during the Weimar Republic, acknowledged this difficulty by positing the existence of certain basic legal norms which, while not dependent for their existence on moral norms, could be subjected to moral critique.28 In the United States, Kelsen's theory failed political litmus tests because, although Kelsen personally supported parliamentary democracy, his desire to produce a pure theory of law required him to avoid connecting the system of law to any substantive political theory. Unable to reconcile the privileging of a particular political perspective with the radical epistemological relativism that informed all of his work, Kelsen created a system in which the legal constraints on state action are purely formal. Any action by a state official is valid so long as the official was authorized to take that action.29 Of course, such action can still be subjected to external normative critique, but Kelsen's theory did not seem to American legal theorists to provide a sufficiently robust defense of democracy or for sufficient safeguards against abuses of the law by fascist or totalitarian governments.

Schmitt took a very different approach from Kelsen, grounding legal norms in the existence of a unified, homogeneous people. Schmitt rejected Kelsen's complex system of legal rules balanced within the bounds of potential external normative critique and replaced it in his own theoretical system with an act of popular will.30 Schmitt stood out among his contemporaries through his strenuous advocacy of the establishment of legal determinacy by a homogenous judiciary committed to the stability of the existing state.31 His commitment to homogeneity was no mere theoretical stance, for he endorsed the expulsion of Jews and political radicals from the German civil service and advocated a similar ethnic cleansing within the ranks of German jurists.32 Despite his collaboration with the Nazis, however, Schmitt was no simple-minded racist or nationalist, and both his peers and contemporary theorists recognize that Schmitt had a keen eye for the vulnerabilities of modern parliamentary democracy. A further exploration of the main themes of Schmitt's political theory is required in order to render comprehensible the attraction of this anti-democratic thinker to contemporary theorists interested in criticizing liberal political theory.

2. Schmitt's Central Themes

As a young adult, Schmitt witnessed the destruction of both his generation and the dynasty to which he had sworn allegiance during the First World War.

28. See id. at 88-96, 116 (providing a synthetic overview of Kelsen's explication of the basic norm).
30. See CALDWELL, supra note 2, at 116-18.
31. SCHEUERMAN, supra note 8, at 10-11.
32. Id. at 17 (citing CARL SCHMITT, STAAT, BEWEGUNG, VOLK: DIE DREIGLIEDERUNG DER POLITISCHEN EINHEIT 45 (1933)) [hereinafter SCHMITT, STAAT, BEWEGUNG, VOLK].
It is thus not surprising that his writings consistently reveal an obsession with order and a commitment to the preservation of the security of the existing state. After World War II, Schmitt turned his attention to global political issues and his thought expanded to encompass even broader topics. For the purposes of this essay, however, I shall focus on the central themes of Schmitt’s early writings, those that have attracted the attention of contemporary political and legal theorists.

Most contemporary commentators on Schmitt focus on his critique of liberalism and his rejection of pluralism. By “pluralism,” Schmitt means the theories of society that focus on the multiplicity of associations that any particular individual might value. For Schmitt, only the state can serve as the decisive and sovereign association. What distinguishes the state from other forms of social organization, and what makes it a uniquely political entity, is its authority to decide that an enemy exists and that it must be fought with all of the society’s resources. By contrast, a political association whose unity consists of an agglomeration of changing alliances among heterogeneous groups yields a constitutional ethic that, according to Schmitt, must eventually dwindle to the proposition *pacta sunt servanda* [contracts must be observed]. Such a political association is based on a simple contract, and when that contract is breached, the result must be civil war.

The quintessential political distinction for Schmitt is that between friend and enemy. When states fail to make that distinction, other inequalities come to the fore, since there will always be some form of inequality in a group of people. Thus the community is ultimately divided against itself if it does not unite against its enemies. “Political unity is the highest unity . . . because it decides, and has the potential to prevent all other opposing groups from dissociating into

33. Bendersky, supra note 4, at 19.

35. The majority of the works by Schmitt that have been recently translated into English date from the 1920s and 1930s. These translations must be credited with a major role in the revival of interest in Schmitt in the English-speaking academic world. The most significant translations include Carl Schmitt, The Crisis of Parliamentary Democracy (Ellen Kennedy trans., 1996) (1923) [hereinafter Schmitt, Crisis]; Carl Schmitt, Political Romanticism (Guy Oakes trans., 1985) (1925) [hereinafter Schmitt, Political Romanticism]; Carl Schmitt, Political Theology (George Schwab trans., 1985) (1922) [hereinafter Schmitt, Political Theology]; Schmitt, The Concept, supra note 17.


38. Id. at 45. According to Schmitt, a family or the head of a household may also be empowered to make life or death decisions about members of that family or household, but only a state can make the decision that an enemy of the community must die. Id. at 47.


40. “In the background of this kind of contractual ethic, an ethic of civil war always lurks.”

a state of extreme enmity — that is, into civil war."\(^{42}\) Accordingly, the power to authorize war is the essence of Schmitt’s state. Schmitt justifies the recourse to war in straightforward, amoral terms: a state does not enter a war in order to further moral, economic, or religious principles. War is a response to an existential threat to the state and its people.\(^{43}\)

Schmitt’s focus on the power to authorize war must be understood in the context of his theories of sovereignty and democracy. Schmitt’s model of democracy is, at best, plebiscitory, drawing on Rousseau’s concept of the general will, but stressing that a minority may well express “the true will of the people.”\(^{44}\) The people cannot be expected to form policy; they can only perform acts of acclamation, vote yes or no to questions posed to them by the sovereign.\(^{45}\) Schmitt did not consider parliamentarism to be a form of democracy because members of parliament are not directly answerable to the people.\(^{46}\) Consequently, parliament does not always embody the popular will, and it cannot speak for the people in the way that Schmitt’s ideal sovereign can.

Schmitt’s theory of sovereignty is linked to his theory of decisionism — that is, his focus on the moment of crisis when the sovereign makes a crucial decision and, in exercising its will, removes from the populace not only other possible choices, but the very possibility of choices.\(^{47}\) As Schmitt put it in the opening sentence of his 1922 work, *Political Theology*, “[s]overeign is he who decides on the exception.”\(^{48}\) Schmitt’s focus on the importance of the strong and irrevocable act of political will makes sense in the context of Germany’s first attempt at parliamentary republicanism, an attempt that teetered colorfully on the brink of disaster for the entirety of its brief existence. Having struggled, along with others, to provide the fledgling Weimar Republic with a legal theory that could guarantee its stability, Schmitt arrived at the conclusion that the Sovereign needed, in certain situations, to become the exception that cannot be bound by law.\(^{49}\)

Like J.G. Herder, Wilhelm von Humboldt, G.W.F. Hegel and the German social scientists whom they influenced, Schmitt takes state-building to be the

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43. “If such physical destruction of human life is not motivated by an existential threat to one’s own way of life, then it cannot be justified.” SCHMITT, CRISIS, supra note 35, at 49. Schmitt’s rhetoric clearly reflects German disappointment with the punitive Versailles Treaty and what Germans regarded as the hollow pieties of President Wilson’s rhetoric during World War I.
44. Id. at 27.
46. SCHMITT, CRISIS, supra note 35, at 34.
47. Mouffe, *Introduction*, supra note 1, at 4-5.
key development of modern European history.\textsuperscript{50} The influence of Hegelian thought is especially pronounced in Schmitt’s treatment of the state as the individual expression of a particular people.\textsuperscript{51} As he put it famously in the opening line of \textit{The Concept of the Political}, “[t]he concept of the state presupposes the concept of the political;”\textsuperscript{52} the state can only exist where a cohesive political community exists.

Although Schmitt would allow the state to act outside the law only in exceptional circumstances where such actions were necessary in order to ensure political stability, his theory is incompatible with liberalism because, for Schmitt, the sovereign state’s power to engage in exceptional, extra-legal acts is its very essence.\textsuperscript{53} Furthermore, Schmitt’s definition of politics is inextricably linked to the possibility of exceptional state action. “What always matters is the possibility of the extreme case taking place, the real war, and the decision whether this situation has or has not arrived.”\textsuperscript{54}

Specifically, to Schmitt, war discloses the essence of every political idea: the distinction between friend and enemy.\textsuperscript{55} In most circumstances, he considers wars motivated by religion, morality, law or economics to be “senseless.”\textsuperscript{56} The political may “derive its energy” from one of these antitheses,\textsuperscript{57} but if an antithesis is strong enough to divide people into opposed groups of friends and enemies, it is transformed into the political.\textsuperscript{58} But if the political does not consist of some combination of these antitheses, how does a society tell its friends from its enemies? In order to give some content to his concept of the political, Schmitt needs to describe the nature of the community that unites against a foe, but he is elusive on this point.\textsuperscript{59} Drawing on classical and religious sources, Schmitt argues for the importance of the distinction between private and public enemies, between \textit{inimicus} and \textit{hostis}.\textsuperscript{60} The New Testament, according to Schmitt, told us to love our private enemies, not marauding Saracens and

\textsuperscript{50.} On the state-centered German tradition of political theory, see \textsc{Leonard Krieger}, \textit{The German Idea of Freedom} (1973).

\textsuperscript{51.} “In its literal sense and in its historical appearance the state is a specific entity of a people.” \textsc{Schmitt, The Concept, supra note 17, at 19}.

\textsuperscript{52.} \textit{Id.} at 19. George Ananidias, in his contribution to Mouffe’s collection, presents the interesting thesis that Schmitt’s concept of the political derives from his concept of sovereignty. Ananidias thus calls into question one of the fundamental building blocks of Schmitt’s theory. See Grigoris Ananidias, \textit{Carl Schmitt and Max Adler: The Irreconcilability of Politics and Democracy}, in \textit{Challenge of Carl Schmitt, supra note 1, at 118}.

\textsuperscript{53.} As John McCormick has shown, after 1922, Schmitt’s political theory tended to justify permanent dictatorship by blurring the lines between exception and normal circumstances. See discussion \textit{infra} accompanying notes 168-175.

\textsuperscript{54.} \textsc{Schmitt, The Concept, supra note 17, at 35}.

\textsuperscript{55.} \textit{Id.}

\textsuperscript{56.} \textit{Id.} at 36.

\textsuperscript{57.} \textit{Id.} at 38.

\textsuperscript{58.} \textit{Id.} at 37. The Crusades were thus political, not religious wars for Schmitt. \textit{Id.} at 48.

\textsuperscript{59.} “The question of what this substantial homogeneity should consist of is deliberately left open. One may think of common tradition, language, ethnic origin, religion, or ideology.” \textsc{Heiner Bielefeldt, Carl Schmitt’s Critique of Liberalism: Systematic Reconstruction and Countercriticism, in Law as Politics, supra note 1, at 27}.

\textsuperscript{60.} \textsc{Schmitt, The Concept, supra note 17, at 28 (citing \textsc{Plato, The Republic} V:XVI, 470)}. See also \textsc{Ellen Kennedy, Hostis Not Inimicus: Towards a Theory of the Public in the Work of Carl}
In short, the essence of the political for Schmitt is that people form national groupings. Enmities inevitably arise among these groupings, and the state exists so that national groupings can protect themselves via warfare when their national existence is threatened. However, Schmitt never specifies the sources of national unity. He merely emphasizes the need for homogeneity.

Schmitt’s insistence on homogeneity is one of the more alarming aspects of his approach to politics. His notion of homogeneity differs from the blood-based racism of the Nazis and their völkisch forerunners, but it may be just as sinister. For Schmitt, functioning democracy requires an existential unity of individuals who can work together as one political unit. Since the 19th century, he notes, national homogeneity has been the basis of that existential unity. Schmitt thus recognized that it might at times be necessary for a polity to exclude heterogeneous elements. “A democracy demonstrates its political power by knowing how to refuse or keep at bay something foreign and unequal that threatens its homogeneity.” Enemies tend to be foreigners for Schmitt, but, as his later career would demonstrate, an enemy can also be a fellow national whose political ideas are considered a threat to the state.

Accordingly, Schmitt rejected liberalism as a political system in which individual rights are prized and government is limited, and he rejected liberalism as a cultural system that prefers compromise to conflict and privileges individual interests over the group. In his view, liberals do not understand the essence of politics, that is, that “[t]he specific political distinction to which political actions and motives can be reduced is that between friend and enemy.” One may debate or compete with enemies, but Schmitt’s concept of the political enemy emphasizes the “ever-present possibility of combat.” Schmitt is not being metaphorical: “The friend, enemy, and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.” One does not compromise with enemies; one seeks their annihilation.

Schmitt, in *Law As Politics*, *supra* note 1, at 92, 101-04 (stressing that the distinction between friend and enemy in Schmitt’s work is always a public matter).


62. In fact, the Nazi law professor, Otto Koellreutter, attacked Schmitt on the ground that his theories lacked the proper biological and völkisch foundations. See OTTO KOELLREUTTER, VOLK UND STAAT IN DER WELTANSCHAUUNG DES NATIONALSOZIALISMUS 6-11 (1935).


64. See, e.g., *id.* at 14 (adapting Rousseau and arguing that those who do not belong to the nation must be excluded from the polity). Ulrich Preuß credibly argues that Schmitt’s notion of homogeneity still exercises some influence over German constitutional discussions; for example, in debates regarding the eligibility of long-term non-citizen residents to vote in local elections. Ulrich K. Preuß, *Political Order and Democracy: Carl Schmitt and His Influence*, in *CHALLENGE OF CARL SCHMITT*, *supra* note 1, at 171.


66. See McCORMICK, SCHMITT’S CRITIQUE, *supra* note 1, at 6 (stating his thesis that Schmitt associated this type of liberalism with the use of technology as a neutral force that suppresses the political).


68. *Id.* at 32.

69. *Id.* at 33.
Schmitt contrasted his concept of the political with liberal pluralism, which he associated with "political romanticism."\textsuperscript{70} The political romantic places nothing above her own individual interests and thus preserves an ironic detachment from any serious political engagement. Political romantics engage in the endless discussion and formation of committees that are the essence, for Schmitt, of liberalism.\textsuperscript{71} They do this because they confuse politics with economics and debate. They treat political opponents as competitors or as worthy adversaries,\textsuperscript{72} and they attempt to adopt a neutral standpoint in the face of religious, ideological, and political conflicts.\textsuperscript{73}

Schmitt also associated liberalism with parliamentarism and, in his major work on the subject, he attributed the failure of modern parliamentary governments to the incompatibility of liberalism and parliamentary democracy.\textsuperscript{74} The tension between liberalism and parliamentarism derives from that between equality and democracy.\textsuperscript{75} Liberalism values the former over the latter, and by seeking to level all differences within a population, it ultimately blinds itself to the one difference that for Schmitt really matters, the distinction between friend and enemy. Schmitt insisted that equality is always achieved by establishing an attendant inequality, but a democracy "can exclude one part of those governed without ceasing to be a democracy."\textsuperscript{76} Schmitt thus considered universal suffrage to be a liberal, not a democratic idea,\textsuperscript{77} and he treated Bolshevism and fascism as anti-liberal but not necessarily anti-democratic movements.\textsuperscript{78}

Schmitt attacked not only the idea of liberal parliamentarism but also its practice.\textsuperscript{79} One of the central themes of his \textit{Crisis of Parliamentary Democracy} is the extent to which parliamentarism no longer conforms to the principles it espouses.\textsuperscript{80} Assuming a position that has endeared him to the political left, Schmitt viewed liberal parliamentarism as a means of safeguarding the interests of the liberal bourgeoisie. Such government in the service of one sector of the population is incompatible with Schmitt's conception of sovereignty resting in

\textsuperscript{70} See generally Schmitt, \textit{Political Romanticism}, supra note 35.
\textsuperscript{71} According to Schmitt, faced with the question, "Christ or Barrabas?" liberals would set up a committee of inquiry. Schmitt, \textit{Politische Theologie}, supra note 22, at 78.
\textsuperscript{72} Schmitt, \textit{Concept}, supra note 17, at 28.
\textsuperscript{73} Biefeledt, supra note 59, at 24.
\textsuperscript{74} Schmitt, \textit{Crisis}, supra note 35.
\textsuperscript{75} See Chantal Mouffe, \textit{Carl Schmitt and the Paradox of Liberal Democracy} [hereinafter Mouffe, \textit{Schmitt and the Paradox}], in \textit{Challenge of Carl Schmitt}, supra note 1, at 38, 40 ("The liberal conception of equality postulates that every person is, as a person, automatically equal to every other person. The democratic conception, however, requires the possibility of distinguishing who belongs to the demos and who is exterior to it . . . .").
\textsuperscript{77} Id. at 11.
\textsuperscript{78} Id. at 16.
\textsuperscript{79} See Reinhard Mehring, \textit{Liberalism as a "Metaphysical System": The Methodological Structure of Carl Schmitt's Critique of Political Rationalism}, in \textit{Law as Politics}, supra note 1, at 131, 132 ("What interested Schmitt was thus not the liberal worldview as such . . . but the political idea of liberalism as it emerged through its actual institutionalization.").
\textsuperscript{80} See Kennedy, \textit{Carl Schmitt}, supra note 2, at 41-42 (summarizing Schmitt's criticisms of functioning parliamentarism).
the will of the people. Schmitt could tolerate no impediments to the exercise of sovereignty in accordance with the popular will, not even constitutional principles. The purpose of the political in Schmitt’s system is the protection of the particular existence and identity of the nation. To the extent that formal legal rules prevent the state from embodying the will of the people, constitutionalism undermines the exercise of democratic authority.

Schmitt developed his legal and political ideas in response to the crisis in Weimar constitutionalism. As elections yielded no consensus on a desirable form of government, paramilitary organizations affiliated with various political parties took to the streets. Political violence rose, and faith in the rule of law declined. Schmitt despaired of the ability of legal positivism to provide a foundation for a stable system of law. He theorized that the proper basis for such stability was in national homogeneity and in a leap of faith. The state, embodying the popular will, must be empowered to act on that will in emergency situations, even if such action contradicts the established rule of law.

C. The Rediscovery of Schmitt by the Academic Left

Before he joined the Nazi Party, and even for a time thereafter, Schmitt was widely read and often cited with approval by political theorists from across the political spectrum. Schmitt’s reputation revived, first in Germany, and then in the United States, as political theorists on the left searched for new perspectives from which to attack the dominant liberal paradigm in a world in which Marxist critique seemed increasingly beside the point. Although Schmitt’s name was already familiar to some American academics, the current American interest in Carl Schmitt really took off after the (then) leftist-oriented political journal, Telos, published an exchange between Ellen Kennedy and scholars with expertise in the Frankfurt School. Kennedy emphasized the extent of Schmitt’s importance to heroes of the academic left such as Walter Benjamin and Jürgen Habermas. The interest of Schmitt’s contemporaries on the left in his theories provided the grounds for the current interest in Schmitt’s work.

Schmitt’s leftist contemporaries, including representatives of the neo-Marxist Frankfurt School, took Schmitt very seriously and attempted to make use of his criticisms of liberalism, although they were certainly aware of Schmitt’s political orientation. However, in assessing Schmitt’s influence on leftist thinkers, we should keep in mind that the Weimar Republic produced some of this century’s most eclectic thinkers, thinkers who could not help but be influenced

81. Bielefeldt, supra note 59, at 27.
82. Id. at 28.
83. See Kennedy, Carl Schmitt, supra note 2 (noting citations with approval of Schmitt by Carl Friedrich and by numerous members of the Marxian Frankfurt School); Strong, supra note 19, at x-xii (same).
84. See Kennedy, Carl Schmitt, supra note 2, at 42-45, 56-64.
85. Ellen Kennedy shows not only that Frankfurt School members Franz Neumann, Otto Kirchheimer, and Walter Benjamin acknowledged their indebtedness to Schmitt’s political theories but also that, at least in Benjamin’s case, later editors attempted to destroy the evidence of this influence. Id. at 44.
by the politics of the times, in which radical leftists and the anti-democratic forces on the right borrowed tactics and rhetoric in their separate attacks on the forces of liberal parliamentarism. Walter Benjamin’s works reflect numerous influences ranging from Theodor Adorno’s and Max Horkheimer’s critical theory, to Bertolt Brecht’s more straightforward materialism, to Gershom Scholem’s version of Jewish mysticism.\(^8^6\) It is not surprising – and not necessarily very significant – that Schmitt’s works informed Benjamin’s analysis of 17\(^{th}\)-century sovereignty in his first book, The Origins of German Tragic Drama.\(^8^7\)

Otto Kirchheimer and Franz Neumann incorporated Schmitt’s theory of politics into more central aspects of their own political theories, but they adapted Schmitt in ways that clearly served their radical materialist politics. Neumann accepted Schmitt’s concept of the political as involving the recognition of friends and enemies. For Neumann, however, the “fundamental contradiction in Germany today is the economic contradiction, . . . that of labor and property . . .”\(^8^8\) Otto Kirchheimer replaced Schmitt’s idealist notion of homogeneity with his own materialist version, calling for social and economic homogeneity in order to eliminate sources of conflicts within a democracy.\(^8^9\) However, representatives of the Frankfurt School stopped offering positive assessments of Schmitt’s work after the Nazi seizure of power, when the dangers of Schmitt’s theories became clear and the chances of their successful incorporation into leftist theory accordingly diminished.\(^9^0\)

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\(^8^6\) See, e.g., Hannah Arendt, Introduction, in WALTER BENJAMIN, ILLUMINATIONS (1968) (providing both a sympathetic account of Benjamin’s work and a discussion of the numerous influences on his thought). Benjamin’s tour-de-force essay on “The Work of Art in the Age of its Technical Reproduction” takes as its central theme the need to respond to the fascist aestheticization of politics by politicizing aesthetics. Walter Benjamin, Das Kunstwerk im Zeitalter seiner technischen Reproduzierbarkeit, in 2 WALTER BENJAMIN, WERKAUSGABE 736 (1980).

\(^8^7\) WALTER BENJAMIN, URSPRUNG DES DEUTSCHEN TRAUERSPIELS (1928). See Kennedy, Carl Schmitt, supra note 2, at 43-44 (pointing out Benjamin’s use of Schmitt). Kennedy’s evidence of Schmitt’s influence on Benjamin is not overwhelming. Both were influenced by George Sorel’s Reflections on Violence, id. at 43, but that does not mean that Benjamin followed Schmitt. Benjamin sent Schmitt a sycophantic letter, announcing the publication of his Origins of German Tragic Drama. This act tells us more about academic politics more than it does about Schmitt’s influence. In any case, Schmitt appears to have been unimpressed with Benjamin’s appropriation of his theories. Id. at 44 and n. 22.

\(^8^8\) Id. at 47 (citing Neumann’s letter to Schmitt of Sept. 2, 1932, in REFORM UND RESIGNATION: GESPRÄCHE ÜBER FRANZ L. NEUMANN 79 (Rainer Erd ed., 1985)).

\(^8^9\) Kennedy, Carl Schmitt, supra note 2, at 48. Kennedy acknowledges that, after von Papen’s coup in 1932, Kirchheimer concluded that parliamentary democracy was the only form of government that could function in a time of social and national heterogeneity. Id. at 53.

\(^9^0\) See, e.g., id. at 54 (noting Herbert Marcuse’s denunciation of Schmitt’s anti-liberalism and the shift in the Frankfurt School’s focus towards a critique of fascism). Although German political theorists approached Schmitt critically after his collaboration with the Nazis, they did not neglect him entirely. See generally DIRK VAN LAAK, GESPRÄCHE IN DER SICHERHEIT DES SCHWEIGENS: CARL SCHMITT IN DER POLITISCHEN GEISTESGESCHICHTE DER FRÜHEN BUNDESREPUBLIK (1993) (discussing the influence of Schmitt’s legal and political theory on the founders of Germany’s post-war constitutional democracy). Kennedy and Ulmen make much of Habermas’ frequent acknowledgment of Schmitt’s importance. See e.g., Ulmen, supra note 2, at 1127 (sharing Habermas’ assessment of Schmitt as a legitimate pupil of Weber); Kennedy, Carl Schmitt, supra note 2, at 56-64 (arguing that Schmitt’s influence on Habermas’ early work is especially strong). But it should be obvious that Habermas’ communicative action theory represents precisely the brand of liberalism
It is easy to see why leftists committed to class struggle would be attracted to Schmitt’s politics of antagonism. It is harder to explain Schmitt’s appeal to a generation of scholars who fight their battles in lecture halls and academic journals rather than at the barricades and in the streets. Moreover, in their enthusiasm for Schmitt’s theories, Schmitt’s promoters engage in a certain degree of willful blindness to his faults. In Mouffe’s collection, Paul Hirst explains Schmitt’s three-year collaboration with Nazism as motivated by his preference for order over chaos. “[P]olitical thought should not be evaluated on the basis of an author’s personal political judgements. Thus the value of Schmitt’s work is not diminished by the choices he made.” Hirst’s statement is both conclusory and wrong. Schmitt’s biography does not require that the left refuse to investigate the possibility of using Schmitt’s theories to attack an ossified version of liberal democracy, but the value of Schmitt’s work is defined by the political choices he made, especially since he always justified his personal political decisions in terms of his own theory.

The revival of interest in Schmitt among scholars today, many of whom are influenced by both post-modern and Marxist theory, indicates a search for new ways to challenge the liberal political model whose dominance over political theory has never been more secure. For Ellen Kennedy, the first question is that Schmitt abhors, and Habermas’ comments on Schmitt have been largely critical. He denounced the renewed American interest in Schmitt as evidence of a new conservatism. Jürgen Habermas, Die Schrecken der Autonomie: Carl Schmitt auf Englisch, in HABERMAS, EINE ART SCHADENSABWICKLUNG 103 (1987).

91. It is thus not surprising that Schmitt’s theories never held an attraction for the most traditionally academic representatives of the Frankfurt School, Theodor Adorno and Max Horkheimer. See Jay, supra note 2, at 73-74 (discussing Adorno’s rejection of Schmitt as “undialectical”).

92. Hirst, Schmitt’s Decisionism, supra note 19, at 8.

93. Ernst-Wolfgang Böckenförde adopts a more understandable position that one can focus on the “work” rather than the “person.” Ernst-Wolfgang Böckenförde, The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory, in Law As Politics, supra note 1, at 37. However, the editor of that volume points out that it is not so easy to separate the person from the work in the case of Carl Schmitt. Dyzenhaus, Introduction, supra note 1, at 3.

94. See Maus, supra note 22, at 200 (warning against trying to explain all of Schmitt’s work in terms of his changing political viewpoints).

95. Oren Gross provides a fine corrective to Hirst in a “personal note” that he appends to his discussion of Schmitt:

There are times when academics do not enjoy the privilege of not taking sides and not expressing positions. And when they do, their words and actions matter and they stand accountable for them. Carl Schmitt expressed his positions clearly and acted upon them. All those who continue to debate his legacy must remember at all times that this is not some exercise conducted in the ivory towers of academia with which we are involved. It is a matter of life, and even more so, of death. “[T]heoretical discussions never take place in a vacuum and there can be no philosophical thought without political consequences.”


96. See Hirst, Carl Schmitt’s Decisionism, supra note 19, at 7 (“Political argument has been virtually reduced to contests within liberal-democratic theory.”).
whether the left can make positive use of Schmitt's critique of liberalism.97 However, implicit in the invocation of Schmitt's concept of the political is a critique not only of contemporary liberalism, but of contemporary critical theory. Thus in introducing a special issue of Telos devoted to Schmitt, the editors attack the "lame socialism of Suarez, Mitterand, and Craxi,"98 and the "obsessive left-liberal pursuit of egalitarianism as a super-legal norm [with] debilitating consequences both in theory and in practice."99 To the extent that critical theory is unable to "articulate a meaningful political theory," the Telos editors argue, it has been "stymied by precisely those issues raised by Schmitt."100

However, the scholars who seek to use Schmitt today are no longer committed to class struggle as the engine of social transformation. They therefore cannot reproduce the materialist surgery that Kirchheimer and Neumann performed. Indeed, while the Frankfurt School sought to use Schmitt's critique of liberalism to smash liberalism, Mouffe seeks to use Schmitt to foster liberal self-critique.101 The essays on Schmitt that appeared in Telos used his work to highlight weaknesses in critical theory.102 Mouffe finds Schmitt especially useful in problematizing the pluralistic view of democratic citizenship: he challenges liberals to formulate the "commonality" that underlies a political community in such a way as to preserve religious, moral and cultural pluralism.103 While Scheuerman's work indicates ways in which Schmitt's theories can contribute to a leftist critique of liberal jurisprudence, and Law as Politics indicates Schmitt's historical significance as well as his lingering influence on German law and politics, The Challenge of Carl Schmitt demonstrates that political theorists have yet to articulate the ways in which Schmitt's attacks on liberalism can contribute to a revival of radical politics, or even foster liberal self-critique in ways that liberalism cannot on its own.

II.
INSERTING CARL SCHMITT INTO THE AMERICAN DISCUSSION OF POLITICAL AND LEGAL THEORY

The three books under review here present three very different views on the question of Schmitt's relevance to contemporary theory. Mouffe's authors approach Schmitt, in Mouffe's words, as "one of the great political and legal theo-

97. Kennedy, Rejoinder, supra note 2, at 102. Kennedy believes that the question should be answered in the affirmative, as there is no other way to explain the attraction of Schmitt's theories to "some of this century's most influential leftist theorists . . ." Id.
98. Piccone and Ulmen, supra note 1, at 4.
99. Id. at 5.
100. Id. at 3. Telos' role as the chief disseminator of Schmitt's ideas to an English-language audience, together with its attacks on both liberalism and critical theory, has led many of its readers to conclude that the turn to Schmitt reflects the editors' decision to transform Telos into a neo-conservative journal.
101. Mouffe, Schmitt and the Paradox, supra note 75, at 38, 52, n.2.
102. Kennedy, Carl Schmitt, supra note 2; Kennedy, Rejoinder, supra note 2; Ulmen and Piccone, supra note 1.
103. Mouffe, Schmitt and the Paradox, supra note 75, at 50.
rists of this century." Many of the essays do not directly discuss Schmitt's ideas or his influence but simply treat him in relation to other leading political theorists. The authors collected in Dyzenhaus' collection offer a narrower assessment of Schmitt's relevance to contemporary political and legal theory. However, as Dyzenhaus writes in summary of the essays he has edited, the writers tend to fault Schmitt, especially for "the paucity of his own positive thought." Scheuerman offers the most focused assessment, inserting Schmitt's analysis of the problem of underdetermination into the North American debate regarding underdetermination and its consequences.

Because the authors in Mouffe's collection generally accept that Schmitt's importance has been established, they do not discuss why it is important to read him today. Four essays that create a central section of this compilation treat Schmitt in relation to other thinkers. Jorge Dotti's essay is an explication of Marx as read by Schmitt. Grigoris Ananiadis' contribution explains the attraction Carl Schmitt had for the Austro-Marxist, Max Adler, one of the first to use Schmitt in order to criticize the political mainstream from the left. Catherine Colliot-Thélène's essay compares Schmitt with Max Weber. These essays are solid pieces of the traditional variety of intellectual history that assesses the impact of one body of work on another. However, readers who are not already convinced of Schmitt's contemporary significance might wonder why they should care how the fascist Schmitt interpreted Marx and Weber. Only David Dyzenhaus' essay in The Challenge of Carl Schmitt, which focuses not on Schmitt but on John Rawls and Hermann Heller, assesses Schmitt's significance as a political theorist. Dyzenhaus concludes that, while there is some value in Schmitt's diagnosis of the ills of the modern parliamentary system, his solutions must be rejected. As a result, Dyzenhaus recommends that we focus our attention on Schmitt's contemporary, the social democrat, Hermann Heller. Ulrich Preuß also seems to think that the focus on Schmitt is inappropriate. Surveying the recent revolutions in Eastern Europe, he concludes that Schmitt's "significance is clearly bound to a particular historical epoch which is about to vanish.'
In the introduction to *Law as Politics*, Dyzenhaus explains the recent interest in Schmitt in the United States in terms of an attempt by North American scholars to understand the traditional German academic field of study, *Staat­

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slehre*, a discipline that analyzes the development of states bound by the rule of law.¹¹³ Dyzenhaus nonetheless finds it “perplexing” and “disturbing” that Schmitt is the practitioner of *Staatlehre* whose writings have received the most attention.¹¹⁴ Still, the choice of Schmitt is not without its justifications. To the extent that contemporary liberal theory builds on John Rawls’ works on political theory,¹¹⁵ liberal theory endeavors to establish overlapping values on which all members of society can agree regardless of their individual conceptions of the good life.¹¹⁶ Schmitt rejected the notion that values could be established in the abstract. Rather, values express the essence of a specific community. Schmitt thus makes possible an attack on Rawlsian liberalism that begins by questioning its basic assumptions. ¹¹⁷

Scheuerman begins helpfully by pointing out the basic ingredients of the liberal conception of the rule of law. “According to the mainstream of modern liberal theory, the rule of law at a minimum requires that legal norms be (1) general in character, (2) relatively clear, (3) public, (4) prospective, and (5) stable.”¹¹⁸ Liberal theory struggles to reconcile these principles with the increasing realization that necessary forms of state economic intervention inevitably result in the exercise of discretionary powers by judges and administrators.¹¹⁹ Consequently, the law is underdetermined, and contemporary legal theorists debate both the extent and the consequences of this underdetermination. The most common response to the challenge of legal underdeterminacy is the formalist approach, which recognizes that certain “hard cases” will be decided in the interstices between formal rules but is satisfied that legal rules can guide administrators in the vast majority of cases.¹²⁰ More troubled by the underdeterminacy of legal rules, legal realists argue that legal rules provide inadequate guides to political decision-makers.¹²¹

According to Scheuerman, thinkers as diverse as Richard Posner and Ronald Dworkin reach the same conclusion as the legal realists, but they look to external sources of objectivity and uniformity in order to regularize legal decision-making processes. For Posner, the laws of economics guide legal reasoning; for Dworkin, judges apply the law coherently when they interpret the law to accord with the political morality of the community.¹²² Critical legal theorists are so suspicious of the discretion exercised by the government that they find

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¹¹⁴. *Id.* at 1. Dyzenhaus touts Hermann Heller as the Weimar legal theorist whose positive program might provide more clues about the solutions to the kinds of problems facing liberal theorists today. *Id.* at 17, 19, n.38.  
¹¹⁸. *Id.* at 5.  
¹¹⁹. *Id.* at 6.  
¹²⁰. *Id.* at 6-7.  
¹²¹. *Id.* at 7.
legal indeterminacy to be the inescapable rule. For legal theorists wrestling with the problem of underdetermination, Scheuerman argues, Schmitt provides both a useful analysis of the problem and an object lesson in the dangers that can arise when one concludes that liberalism cannot provide a mechanism for avoiding arbitrary uses of legal authority.

A. Schmitt and Political Theory

1. Schmitt’s Critique of Liberalism and Contemporary Political Theory

One virtue of The Challenge of Carl Schmitt is that it includes a number of contributions by scholars whose writings on Carl Schmitt have not, to my knowledge, been hitherto available in English. Jean-François Kervégan, an expert on Hegelian philosophy and the importance of Hegel’s work to an understanding of Schmitt, provides a synoptic overview of Schmitt’s corpus, focusing on his post-war “geopolitical” writings. Kervégan’s work is informative, focusing on themes to which North American scholarship has been largely inattentive. To the extent that Kervégan explicates texts that are not widely available in English, his essay will prove valuable to political theorists interested in Schmitt but unable to read him in the original. Although Kervégan finds Schmitt’s critique of globalization and imperialism illuminating, however, he does not present Schmitt’s analysis as either a model or a challenge for left-wing politics. Consequently, his essay does not really advance the discussion of Schmitt’s relevance to contemporary critical theory, as the collection’s title and Mouffe’s introduction suggested.

Unfortunately, the remaining essays in Mouffe’s compilation also do not illuminate the challenge of Carl Schmitt – or why we should regard him as an especially useful critic of contemporary liberal theory. Mouffe’s own contribution comes closest. Mouffe finds compelling Schmitt’s illumination of the tension between democracy and liberalism. Schmitt illuminates this tension by stressing the demos at the heart of democracy. Based in the people, democracy requires both homogeneity, and, “if the need arises,” the eradication of heterogeneity. Mouffe wants to use Schmitt in order to develop a more realistic approach to a pluralistic view of democratic citizenship. In her view, liberals have chosen simply to disregard the problem of how a pluralistic society decides on principles of inclusion and exclusion. Mouffe cautions liberals to heed Schmitt’s warnings regarding the need to have a substantive basis for the demos. She fears that liberals tend to favor globalized citizenship and that, stripped of

122. Id. at 7-8.
123. See Kervégan, supra note 22.
124. The grounds for Mouffe’s decision to include in this collection re-prints of Hirst’s 12-year old essay and Preuß’ seven-year old essay are mysterious.
125. Mouffe, Schmitt and the Paradox, supra note 75, at 38.
127. Mouffe, Schmitt and the Paradox, supra note 75, at 50-51.
their roots in a _demos_, liberals will lose their democratic rights. ¹²⁸ In short, Mouffe thinks that liberalism requires the nation-state. ¹²⁹ She accepts Schmitt’s insights regarding the tension between liberal and democratic conceptions of equality, but argues that “[t]he democratic logic of constituting the people, and inscribing rights and equality into practices, is necessary to subvert the tendency towards abstract universalism inherent in liberal discourse.”¹³⁰ Mouffe argues that Schmitt has not found the fatal flaw in liberal theory. Rather, she treats Schmitt as having discovered a productive tension at the heart of liberalism. The tension is not easily resolved, but “[l]iberal-democratic politics consists, in fact, in the constant process of negotiation and renegotiation – through different hegemonic articulations – of this constitutive paradox.”¹³¹

It is undeniable that liberal theory has struggled to establish the framework within which the liberal doctrine of equality applies. But contemporary liberal theory ably addresses the difficulty of reconciling liberal nationalism with liberal cosmopolitanism.¹³² Mouffe posits that democracy is endangered because of modern liberalism’s “incapacity to conceptualize” a frontier between “us” and “them,”¹³³ but this need not be the project of liberalism or of any political ideology. Mouffe argues that liberalism needs to confront Schmitt’s call for homogeneity. She simply states: “[Schmitt] is right to say that a political democracy cannot be based on the distinctionlessness of all mankind, and that it must be rooted in a specific people.”¹³⁴ The resurgence of 19th-century nationalisms in the late 20th-century provides us with ample evidence that a far more promising project is that of eradicating irrelevant or mythical distinctions among people who can be united in the service of common political goals.¹³⁵

¹²⁸. Mouffe begins her contribution to _The Challenge of Carl Schmitt_ by criticizing the advocates, such as David Held and Richard Falk, of “cosmopolitan citizenship.” Mouffe, _Schmitt and the Paradox_, supra note 75, at 39.
¹²⁹. _Id._ at 41–42.
¹³⁰. _Id._ at 43.
¹³¹. _Id._ at 44.
¹³². For example, compare the very interesting writings of Will Kymlicka, who struggles to reconcile liberal and national goals, WILL KYM LiCKA, STATES, NATIONS AND CULTURES (1997) (arguing that tensions rarely arise between individual rights and group rights); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1995) (attempting to reconcile a theory of minority group rights with the liberal focus on individual rights) with Kwame Anthony Appiah, _Cosmopolitan Patriots_, 23 _CRITICAL INQUIRY_ 617 (1997) (attempting to reconcile cosmopolitanism with nationalist patriotism).
¹³³. Mouffe, _Schmitt and the Paradox_, supra note 75, at 43.
¹³⁴. Chantal Mouffe, _Carl Schmitt and the Paradox of Liberal Democracy, in Law as Politics, supra_ note 1, at 159, 161. This is the same essay that appears in _The Challenge of Carl Schmitt_, but Mouffe tempered the language when she re-printed her essay. In the re-printed version, the line reads, “[Schmitt] is right to say that a political democracy cannot be based on the generality of all mankind, and that it must belong to a specific people.” Mouffe, _Schmitt and the Paradox, supra_ note 75, at 40. Mouffe must have noticed that her invocation of “rootless” cosmopolitanism brought her political theory uncomfortably close to that of völkisch nationalism.
¹³⁵. Jürgen Habermas has promoted the idea of constitutional patriotism to supplant more traditional forms of national identification. In the light of the on-going integration of the western European states into the European Union, there is reason to think that Habermas’ idea is no mere pipedream. See, e.g., JÜRGEN HABERMAS, A BERLIN REPUBLIC: WRITINGS ON GERMANY (Steven Rendall trans., 1997) (including a number of essays on German unification and the specter of a renewal of German nationalism). In contrast to Mouffe, John McCormick argues that we need to be
Given that even some of the authors she collects reject Schmitt as a theoretician from whose insights the left can profit, Mouffe’s introduction is intellectually bullying. Mouffe treats as a foregone conclusion Schmitt’s importance to her readership. For Mouffe, if not for the authors she has assembled, it is clear that Schmitt is to be read and is to be read for one purpose – in order to “bring the crucial deficiencies of the dominant liberal approach to the fore.”

In his contribution to Mouffe’s collection, Ulrich Preuß insists that Schmitt’s work “still has some significance for us.” Unlike Mouffe, however, Preuß supports his argument for Schmitt’s significance with an analysis of post-war Germany’s constitutional system in which he highlights that system’s indebtedness to elements of Schmitt’s thought. Preuß’ essay also demonstrates Schmitt’s peculiar relevance to discussions of German constitutional theory.

Slovej Žižek’s essay epitomizes the main problem with The Challenge of Carl Schmitt: its authors tend to use the occasion of a collection of essays purportedly on Carl Schmitt to write on other topics. Žižek’s begins helpfully enough, informing us that Schmitt is a “modern” thinker because of “the gap between the act of decision and its content.” Conservative modernism is grounded for Žižek on a paradox in that it requires a return to unconditional authority, but that authority cannot be grounded on positive reasons. While Žižek’s analysis is not inappropriate as a description of Schmitt’s thought and its problems, it is not clear why Žižek thinks these tendencies and problems are unique to modern thought or to conservative modernism.

In any case, after this brief introductory commentary on Schmitt, Žižek returns to his more familiar
themes—Derrida’s and Lacan’s analyses of religion and theater—and the first stream-of-consciousness burst of his essay culminates in the singularly unedifying insight that Antigone is a bad model for anti-fascist resistance.144

Žižek suggests that reference to Carl Schmitt is “crucial in detecting the deadlocks of post-political liberal tolerance.”145 Schmitt would have us re-insert real political antagonisms into our political systems. Žižek approves of this gesture but also seeks to control it by equating the universal with the “militant, divisive position of one engaged in a struggle.”146 Žižek’s universalism does not entail universal tolerance but the “passionate struggle for the assertion of the Truth which compels . . .” that struggle.147 While Schmitt’s position is conservative, Žižek insists that his own is radical. Be that as it may, in Žižek’s essay, the problems posed by Schmitt serve as little more than a point of departure for a discussion of the theories of Freud, Lacan, and Derrida. Although Žižek returns to Schmitt periodically in the remainder of his essay, he does so in order to remind his readers, since they have probably forgotten, that the topic at hand is Carl Schmitt. Ultimately, Žižek does not really write about Schmitt at all. He uses the space allotted to him to further develop his own philosophical system. Žižek’s system is a world unto itself, and this is not the place in which to assess it. In any case, Žižek’s contribution does little to illuminate the thought of Carl Schmitt. It is hard to avoid the conclusion that the purpose of including an essay by Žižek in The Challenge of Carl Schmitt was not to improve our appreciation of Schmitt but to move merchandise by capitalizing on the current popularity of Žižek’s brand of theorizing.

The Challenge of Carl Schmitt thus fails to clarify why Schmitt’s critique of liberalism should be of especial interest to us today. In her earlier collaboration with Ernesto LaClau, Mouffe embraced a Gramscian model of politics that synthesized theory and real political developments into a stimulating alternative to liberalism.148 No longer interested in pursuing a Gramscian approach, Mouffe looks to a right-wing thinker to provide a perspective on liberalism that she could easily have found, in her pre-post-Marxist days, in the writings of left-wing thinkers. Nowhere is this more obvious than in her critique of Habermasian deliberative democracy, in which she faults communicative action theory for replacing an economic model of politics with a moral one.149 While Mouffe previously wrote as a radical critic of liberalism, she now seeks to use Schmitt’s diagnosis in order to cure liberalism. But Schmitt’s critique, to the extent that it is not based on a distorted perspective on liberalism, tells liberals only about weaknesses that they could have discovered without Schmitt’s aid.

144. Id. at 20-21.
145. Id. at 35.
146. Id.
147. Id.
149. Mouffe, Schmitt and the Paradox, supra note 75, at 44-46.
2. The Flaws and Limitations of Schmitt's Critique of Liberalism

Schmitt criticizes parliamentarism on the ground that actual parliaments do not exemplify the values of liberalism. He despairs of parliamentary government because the parliaments he has studied do not engage in the sort of informed, disinterested, unconstrained political debate that is, according to liberal theory, to result in reasoned governance and the rule of law. Schmitt thus despairs of the possibility of the rule of law based on such "empty formalism." However, Scheuerman points out that liberalism thrives despite the limitations of working parliaments because liberal society gives rise to a public sphere in which the values of free exchange and debate can be realized. Schmitt's critique of liberalism is not irrelevant; parliamentary government would be improved if parliamentary deliberation were more respectful of the principles of liberalism. However, the technical imperfections in the functioning of liberal democracy do not undermine the aims of liberal parliamentarism. Schmitt underestimates both the resiliency of the parliamentary system and the power of the extra-parliamentary public sphere to hold in check the illiberal excesses of parliament.

Several of the essays collected in Law as Politics provide helpful characterizations as well as commentaries on Schmitt's critique of liberalism. What differentiates these commentaries from those of many of the authors collected in The Challenge of Carl Schmitt is the historical specificity with which they approach the question of Schmitt's significance. The essays in Law as Politics treat Schmitt as a thinker confronting the legal and political issues of his day. They stress both the brilliance of Schmitt's analysis and the limited applicability of his approach.

According to Heiner Bielefeldt, Schmitt's critique of liberalism can be divided into two contradictory parts. First, liberals cannot simultaneously adopt the normative principle of neutrality and embrace the rule of law and constitutional democracy. Second, liberals are hypocrites because they hide behind their universal principles in order to promote their own economic goals. Schmitt criticizes liberals for having no values and for promoting the values associated with their economic interests. But Bielefeldt points out that liberal theory distinguishes between neutrality as to norms (Wertneutralität) and neutrality as to world-views (Weltanschauungsneutralität). The state is not permitted to discriminate among people on the basis of their world-views – that is, on the basis of their particular religious or non-religious convictions. Thus while liberalism preserves the normative idea of "respect for the dignity of every human being as a morally autonomous subject," liberal democracy, at least in the Kantian

150. Scheuerman, supra note 8, at 60.
151. Id. at 57.
153. Id. at 29.
154. Id. at 30.
variant that Bielefeldt defends, does not embrace \textit{Wertneutralität} because the morally autonomous individual is still subject to the categorical imperative.\footnote{155}

As to liberal hypocrisy, as Scheuerman repeatedly points out, Schmitt relies on an idealized version of 19th century liberalism in order to contrast modernity with 19th-century models and to demonstrate the inadequacy of those models for the purposes of modern governance. Schmitt posits that state intervention in technological and economic fields represents a new encroachment by the state into the private sphere. But no state was ever neutral with regard to economic developments in the way liberal theory conceived that it ought to be. Central European economies in the 19th century were driven by state interventions, and, while the welfare state was not yet fully developed, the provision of basic social welfare was already a well-established function of the state.\footnote{156}

Dominique Leydet provides a slightly different characterization of Schmitt’s critique of liberal parliamentarism, dividing it into a refutation of the liberal conception of politics and a demonstration of the obsolescence of parliamentarism in the face of the development of mass democracy.\footnote{157} While Leydet recognizes that Schmitt wrote with the various crises of the Weimar Republic in mind, she treats his critique of pluralism as a more generalized response to “the transformation of the nineteenth-century state toward the ‘total state.’”\footnote{158} Schmitt believed that the problems of pluralism could be resolved only by either recognizing the superior authority of the state over pluralistic associations or by subordinating the state to those organizations and thus leaving political outcomes to be determined by the compromises among opposing interests. Leydet points to a possibility that Schmitt did not consider: that the process of reconciling diverse interests is the foundry in which the common will is forged.\footnote{159}

Schmitt did not consider this possibility because of two assumptions in his analysis of pluralism. First, Schmitt assumes that political parties are simply the mouthpieces of sectional interests.\footnote{160} Second, Schmitt assumes that parliament only seeks to mediate among divergent interests through rational public discussion.\footnote{161} For Leydet, Schmitt’s first assumption is inaccurate as an empirical matter. Parliamentary governments differ from corporatist bodies precisely because political parties act with a certain degree of autonomy from the economic interest that they seek, in part, to represent.\footnote{162}

Leydet counters Schmitt’s second assumption with reference to Kelsen, whose analysis of the workings of parliamentary democracy she prefers.\footnote{163} Cit-

\begin{footnotes}
\footnote{155. Id.}
\footnote{156. \textit{Scheuerman}, supra note 8, at 109-110.}
\footnote{158. Id. at 110.}
\footnote{159. Id.}
\footnote{160. Id. at 118.}
\footnote{161. Id. at 119.}
\footnote{162. Id. at 118-19. Schmitt’s analysis of the problems of parliamentary governments does not work well with respect to the major political parties of the United States. These parties do not purport to represent particular sectoral interests, but seek to represent the same sectoral interests.}
\footnote{163. Id. at 119-20.}
\end{footnotes}
Leydet notes that majority parties cannot simply ignore the interests of minority parties and still expect the minority parties to participate in the parliamentary game. Thus, even if there were a perfect overlap between political parties and economic interests, that overlap would not produce the results that Schmitt predicted. Parliamentary government survives because it provides many means through which different social groups can air their views, confront their political opponents, and promote the implementation of policies that serve their interests. Schmitt argues that because political liberalism does not promote rational decision-making, it must devolve into an irrational struggle among competing interests. Leydet finds a logic in modern parliamentarism and concludes that the rationality of discussion is preserved because “parliamentary debates serve as a public test for policies” and because policies still must be “justified on the basis of certain shared principles.”

In his very focused commentary on the development of Schmitt’s idea of dictatorship, John McCormick proposes that Schmitt came to accept the need for a permanent dictatorship in response to the threat of communism. In his 1921 book on dictatorship, Schmitt had traced the idea of dictatorship back to its Roman origins and advocated temporary dictatorship as an efficient response to a temporary state of emergency. Schmitt called this form of dictatorship “commissarial.” Schmitt criticized liberals for treating all dictatorship as permanent – that is, as synonymous with Caesarism – and he admired the Bolsheviks for their understanding of dictatorship as a temporary stage on the road to communism. In his work of the following year, Politische Theologie, Schmitt embraced the notion of the dictator as a sovereign, capable of embodying the will of the people. This same concept of sovereignty embodied in a dictator, informed Schmitt’s writings throughout the Weimar Republic. Increasingly, as the crisis of the Weimar Republic deepened, Schmitt muddied the distinctions he had made between normal and extraordinary constitutional oper-

164. HANS KELSEN, VOM WESEN UND WERT DER DEMOKRATIE (1929).
165. Leydet, supra note 157, at 119.
166. Id. at 126.
167. Id. at 120-23.
168. McCormick, Dilemmas of Dictatorship, supra note 22, at 234.
169. SCHMITT, DIE DIKTATUR, supra note 22.
171. Id. at 220.
172. SCHMITT, POLITISCHE THEOLOGIE, supra note 22; McCormick, Dilemmas of Dictatorship, supra note 22, at 226, 229.
173. McCormick specifically discusses the role of dictatorship in CARL SCHMITT, VERFASSUNGSLERRE (1928); CARL SCHMITT, DER HÜTER DER VERFASSUNG (1931), CARL SCHMITT, LEGALITÄT UND LEGITIMITÄT (1932). McCormick, Dilemmas of Dictatorship, supra note 22, at 230. In the context of the Weimar constitutional scheme, the role of dictator fell to the President, in this case, the increasingly senile General Paul von Hindenburg.
The state of emergency came to define the essence of sovereignty for Schmitt.

McConnell concludes that three lessons can be drawn from Schmitt’s theory of dictatorship: (1) liberal constitutional theory has been inadequately attentive to the problem of exceptional situations; (2) the notion of sovereignty ought to be uncoupled from constitutional provisions for emergency powers; and (3) there ought to be a constitutional distinction between who determines that a state of emergency exists and who is empowered to act in such emergency situations. These are indeed problems that liberal theory ought to confront. In the United States, for example, courts often invoke the “political question” doctrine and thus avoid addressing questions of judicial limitations on the exercise of executive powers in crisis situations. Ultimately, however, McConnell rejects Schmitt’s reduction of the question of sovereignty to the exceptional situation. The exception reveals, according to McConnell, only that classical liberalism was naive about constitutional emergencies. If emergency powers endure, the constitution will not.

Jeffrey Seitzer, in his contribution to Law as Politics, joins Scheuerman, Dyzenhaus, McCormick and other political theorists who encourage us to read Schmitt in order to avoid repeating his mistakes. Seitzer argues that Schmitt’s approach to legal theory is primarily concerned with compensating for the specific defects of Weimar constitutionalism, and he recommends that we be wary lest the new constitutions being devised for Central and Eastern Europe be implemented in accordance with Schmitt’s legal theory. Seitzer’s essay concludes Law as Politics, and it is a fitting way for the collection to end. It summarizes the general approach taken in that volume: treating Schmitt as a serious but dangerous thinker whose writings should not be ignored, both because they challenge liberal theorists to strengthen their defenses of their principles and because Schmitt articulates the unspoken premises of anti-democratic constitutionalism.

B. Schmitt in Conversation with Contemporary American Legal Theory

One of the weaknesses of Mouffe’s collection is that it repeatedly addresses a liberal orthodoxy without specifying the contours of the liberal credo. William Scheuerman, by contrast, places Schmitt into a useful conversation with contemporary liberal legal theory by specifying the challenges that liberal legal theory faces and by pointing out Schmitt’s relevance to those challenges in his work.

175. Id. at 237.
177. McCormick, Dilemmas of Dictatorship, supra note 22, at 239-240.
178. Jeffrey Seitzer, Carl Schmitt’s Internal Critique of Liberal Constitutionalism: Verfassungslehre as a Response to the Weimar State Crisis, in Law as Politics, supra note 1, at 281.
179. Id. at 281.
180. Id. at 282.
Carl Schmitt: The End of Law. Scheuerman understands the attraction of Schmitt to contemporary legal theorists based on Schmitt’s attention to problems that contemporary liberalism needs to address. But he also points out that too many of those responsible for the recent revival of interest in Schmitt overlook that for Schmitt the crisis of parliamentarism was part of a broader crisis of legal indeterminacy. Schmitt’s political theory needs to be viewed in the context of his legal theory.

Schmitt identified legal underdeterminacy as the Achilles heel of liberal legal theory, and he attempted to exploit that weakness to undermine liberalism entirely. Scheuerman acknowledges the force of Schmitt’s anti-liberal critique, but he also provides two important caveats. First, while Schmitt demonstrates the difficulties involved in trying to resolve the problem of underdeterminacy, his writings only ought to have relevance for those who share his conclusion that underdeterminacy is widespread and unavoidable. Second, Scheuerman points out that Schmitt “consistently relied on idealized and downright misleading interpretations of classical liberal political and legal ideals as instruments for mocking contemporary liberal democratic aspirations.” Whether or not Schmitt’s critique of the liberalism of his time is convincing, Scheuerman asserts that it certainly falls far short of doing justice to the idiosyncracies of post-Cold-War politics. Furthermore, it is difficult to see how the left can make use of Schmitt’s solution to the problem of underdeterminacy, which was to guarantee legal regularity through the promotion of homogeneity in the judiciary and acquiescence in the exceptional decisions of the sovereign. While grappling with the problem of indeterminacy, Schmitt abandoned hope for democratic governance and developed a theory of dictatorship that he believed was the only means of resolving that indeterminacy. However, Scheuerman reminds us that Schmitt’s concept of the political focuses on the crisis situation and thus underemphasizes the everyday politics of negotiation and peaceful interchange. If Antigone is a bad model for anti-fascist resistance, Schmitt may be an equally bad model for a critique of a functioning liberal democratic government.

181. Scheuerman, supra note 8, at 39.
182. Id. at 18.
183. Id. at 24. According to Scheuerman, this theme was recognizable even in Schmitt’s earliest writings.
184. Id. at 34. Scheuerman agrees with John McCormick that Schmitt acknowledged the utility only of temporary dictatorships in 1921 but fully embraced authoritarianism one year later. See discussion supra accompanying notes 168-175.
185. Scheuerman, supra note 8, at 46. In his contribution to Law as Politics, Ernst-Wolfgang Böckenförde points out that Schmitt’s friend/enemy distinction has relatively little application to domestic politics. In any case, Schmitt’s concept of the political was descriptive rather than normative. Ernst-Wolfgang Böckenförde, The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory, in Law as Politics, supra note 1, at 37, 38. However, Böckenförde acknowledges that Schmitt allowed his theory to be applied as a normative theory of domestic politics throughout his lifetime, and that those who seek to make use of his theories today clearly have domestic politics in mind.
1. Temporal and Theoretical Limitations of Schmitt's Critique

Schmitt's jurisprudential writings in the 1920s culminated with a book on constitutional theory, *Die Verfassungslehre*, in which he attempted to show that liberal, parliamentary government is incapable of giving rise to the rule of law because the parliament itself is arbitrary and unregulated. Scheuerman follows Leo Strauss in pointing out that Schmitt's "critique of liberalism takes place within the horizon of liberalism," but Scheuerman provides further specificity: the liberalism in question is that of Hans Kelsen's legal positivism. Schmitt's demolition of liberal theory extends only to liberalism as theorized by Kelsen. Classical liberalism boasted lofty normative goals, but Kelsen split legal norms off from moral norms, and liberalism consequently devolved into a mode of "bourgeois relativism." Schmitt's attempt to use Kelsen's theory as a metonym for the entirety of the liberal political tradition lacks historical grounding. Schmitt presents a jurisprudential/philosophical critique of liberalism, but he does not and cannot show that liberalism has historically devolved into the sort of anti-normative system that he associates with Kelsen. Ultimately, Scheuerman concludes, because Schmitt is trapped within Kelsen's model of constitutional theory, he cannot get beyond the principles of liberal constitutionalism. However, because Schmitt replaces Kelsen's pure theory of law with a pure theory of will that ultimately gives rise to a form of authoritarianism legitimized through plebiscititarianism, Schmitt abandons the best features of the liberal model.

In the 1930s Schmitt began to develop his critique of liberalism into a theory of the total state. Schmitt traces the tension in nineteenth-century European governments as legislative bodies, run by career administrators, came to usurp executive power. As the legislative state increasingly supplants the executive state, the divide between state and society is eliminated, and the state increasingly intervenes in economic and social functions previously within the realm of an autonomous civil society. In the modern technological age, the state must master economics and technology in order to retain its political power. But as the legislative state, subject as it is to the influence of antagonistic interest groups, gains control over the economy and technology, the indeterminacy of its legal decisions becomes increasingly threatening to the rule of law. Rather than attempting to theorize a revival of the rule of law, Schmitt chooses to discard the liberal model, as "inconsistent with the structural imperatives of our times."
Schmitt finds dictatorship better suited to modernity because in that form of government arbitrary action is taken as a given. 196

Schmitt arrived at his position through a number of steps, all of which are subject to criticism. The first step is the position that Schmitt shares with contemporary radicals, that is the position that the law is underdetermined and that judges and administrators are unavoidably empowered to make arbitrary decisions. Scheuerman expresses no view as to whether or not this is correct, but he points out that while contemporary theorists accept underdetermination as the inevitable outcome of the administration of laws, Schmitt treated underdetermination as a problem that could be solved. 197 Instead of addressing the accuracy of Schmitt’s assessment of the extent of the problem of legal underdetermination, Scheuerman criticizes the second step, Schmitt’s solution to that problem. Seeing pluralism as the source of the failures of modern parliamentarism, Schmitt concluded that legal determinacy could be re-established only by a caste of ethnically homogeneous “judicial experts dedicated to an equally homogeneous worldview.” 198 For Schmitt, writing after 1933, this meant that all laws were to be interpreted according to the intellectual spirit of National Socialism. 199 Although Scheuerman acknowledges Schmitt’s complicity in the successful introduction of legal determinacy in Germany through the imposition of Nazi values on the law, 200 he also points out that Schmitt was a victim of the limitations of his theory. Ethnic homogeneity does not guarantee legal determinacy. His ethnic brethren ousted Schmitt from his leadership positions within the Nazi hierarchy, in part because they disagreed with his ideas about the law. 201

Scheuerman concludes that, with respect to contemporary legal theory, Schmitt is most useful as a case study: “[t]he case of Carl Schmitt clearly contradicts the naive assumption shared by some jurists today that ‘liberating those who wield legal power from the ‘mistaken’ belief that legal doctrine constrains their actions will have progressive effects.” 202 I agree with Scheuerman that both legal and political theorists should derive from their study of Schmitt a heightened awareness of the dangers of certain theoretical possibilities that left-wing legal theory has explored. Scheuerman does not treat Schmitt’s critique of liberalism as a source that can be mined in the interests of a new approach to political theory. Rather, he focuses on pointing out the dangers of following Schmitt’s approach to its logical conclusions. But those who advocate a return

196. Id.
197. Id. at 137-38. Scheuerman characterizes the position that “all cases are hard” as “problematic in its own terms” and notes that “[l]egal nihilism and liberal democracy hardly make good bedfellows.” Id. at 138.
198. SCHEUERMAN, supra note 8, at 126-27 (explicating CARL SCHMITT, STAAT, BEWEGUNG, VOLK, supra note 32).
199. Id. at 131.
200. Id. at 136-37.
201. Id. at 134-35.
to Schmitt do not adopt his conclusions. They see in Schmitt a novel approach to problems confronting contemporary theory, and they seek to use his insights to address weaknesses in liberal theory.

2. Schmitt and the Internationalization of Law

Schmitt’s writings on international law expand on his critique of underdeterminacy. Because Schmitt believed that international law could never represent a functioning international political community, Schmitt believed that no form of international law could ever win recognition as a legitimate and determine system of adjudication. Consequently, Schmitt believed international law to be either impossible or to be a mask for liberal imperialism. As Scheuerman points out, Schmitt’s writings on international law suffer from a fundamental internal tension. On the one hand, Schmitt criticizes the hypocrisy of U.S. foreign policy and of international law as practiced through the liberal League of Nations. On the other hand, Schmitt clearly envies the successes of American imperialism. Ultimately, Scheuerman concludes that Schmitt’s writings during the Third Reich on international law were part of his attempt to revive his career as the leading theorist justifying Nazi imperialism.

Schmitt’s preference for the state system over international regimes seems uniquely dated and should make him especially unattractive to the left. Despite the horrific revival of 19th century style nationalisms in the Balkans and in the former Soviet Union, developed countries are increasingly sacrificing powers once considered inseparably bundled with national sovereignty in order to participate in multinational treaty organizations and international regimes. Carl Schmitt simply does not speak to our time when he says “rationally speaking, it cannot be denied that nations continue to group themselves according to the friend and enemy antithesis, [and] that the distinction still remains actual today...” The Hobbesian model of international relations that Schmitt adopts cannot account for the European Union, for the World Trade Organization, or for the remarkably peaceful way in which the Cold War reached its conclusion. I do not mean to indicate that violent national antagonisms have disappeared; rather, I merely point out that political progress can be made precisely by setting aside the antiquated friend/enemy model that Schmitt recommends and that the left-wing Schmittians seem to endorse. Whether the left-Schmittians like it or not, the world does not seem bound to return to an age where states alone make

203. See id. at 141-73 (summarizing Schmitt’s writings on international law).
204. Id. at 162.
205. Id. at 161.
206. For discussions of the extent to which national states have agreed to sacrifice their sovereignty and participate in international organizations, see THOMAS FRANCK, SOVEREIGNTY AND LEGITIMACY IN INTERNATIONAL RELATIONS (1995); CHAYES and CHAYES, THE NEW SOVEREIGNTY (1994). Although the United States’ federal system complicates its participation in international regimes, it too has shown signs of a new willingness to participate. For a discussion of this development and the continuing problems the United States faces in reconciling its dual sovereignty with participation in international regimes, see the essays collected in DELEGATING STATE POWERS: THE EFFECT OF TREATY REGIMES ON DEMOCRACY AND SOVEREIGNTY (Thomas Franck ed., 2000).
207. SCHMITT, THE CONCEPT, supra note 17, at 28.
politics and where politics is ultimately defined by the possibility of war. If such a return were to occur, one can only wonder how the left would profit from it.

III.

CONCLUSION: POSSIBILITIES FOR A NON-SCHMITTIAN LEFTIST CRITIQUE OF LIBERALISM

Ulrich Preuß puts his finger on the peculiarity of the sudden love affair some "political theorists identified with the Left" have taken up with Carl Schmitt. Schmitt's "intellectual originality consisted in the uncompromising and unrivalled radicalism with which he tried to preserve the values of nineteenth-century bourgeois order under conditions of mass democracy and its social and political struggles during the first half of the twentieth century."208 I find Preuß' analysis persuasive in two ways. First, he identifies Schmitt's long-term political interests with materialist specificity. Second, he comprehends that Schmitt's theories are time-bound and cannot be ripped from their proper context and mechanistically applied to address the problems facing contemporary liberal democracies.209

Should we read Carl Schmitt today? I think law students and legal scholars can benefit from his writings in a number of ways. First, Schmitt's theory of the exception relates to a problem to which liberal theory has given inadequate consideration. Liberal theory recognizes that there are gaps in the law and that decision-makers sometimes have to act in the interstices between clearly established laws. However, liberal theory has little to say about those exceptional circumstances when the law may be suspended or where legal precedents cannot properly apply. As John McCormick points out, here Schmitt poses the question, but his proposed solution, replacing parliamentary democracy with a dictatorship, is not one that liberalism can accept.

Second, Schmitt forces liberals to theorize the substance underlying our political community. There is no need to define this community in terms of Schmitt's friend/enemy distinction, but the law ought to be an expression of the political community that it governs. Liberal theory strives for tolerance and inclusiveness, but there are clearly areas, such as national security law and the laws affecting naturalization and citizenship, in which the law makes crucial distinctions between those who are included and those excluded from the polity.

208. Preuß, supra note 64, at 178.
209. G.L. Ulmen, one of Schmitt's most energetic apologists, shares Preuß' assessment:

The lessons to be learned from European constitutional crises always must be circumscribed and qualified by this fundamental distinction [between the continental European tradition of codified law and the English tradition of common law], even as one must distinguish between continental European and North American concepts of liberalism and conservatism, both of which have changed over time. In short, the crisis of German constitutional law during the Weimar Republic is a very precarious and problematic paradigm for considering and criticizing either American or Canadian legal and political matters.

Ulmen, supra note 2, at 1121.
Liberal theory would do well to take up the Schmittian challenge and justify the principles of exclusion that underlie these laws. To use Schmitt in this way is to work within the liberal paradigm and, as Mouffe suggests, to use an anti-liberal critique in an effort to strengthen democratic institutions.

Such a project is very different from Schmitt’s and from the earlier attempts by the left to appropriate Schmitt’s theories in an attempt to replace liberal democracy with a radical alternative. While Schmitt’s writings can be used to inform a radical critique of liberalism, they make far more sense when read in their proper historical context, which means, among other things, that Schmitt must be read in conjunction with the German legal theorists to whom he was responding. Not only does such an intertextual reading of Schmitt illuminate his writings, it indicates his specificity and his limitations. Schmitt’s constitutional theory was a response to a genuine crisis in the German republic. It is important to know why a brilliant conservative legal theorist came to see National Socialism as a preferable alternative to Weimar’s imperfect republicanism. It is also important to know that many of Schmitt’s contemporaries saw those imperfections with the same clarity that Schmitt did but chose professional disgrace and exile over collaboration with Nazism. The choices they made were not merely personal; they derived from deeply-held beliefs about constitutional theory.

The left has nothing to gain from the abandonment of civility in politics in favor of the brutality of Schmitt’s friend/enemy distinction. This does not mean that the left need accept modes of pluralism that are too prone to degenerate into unprincipled horse-trading. Rather, especially in the face of the over-the-top individualism of identity-politics, the left must adopt a strategy of forceful but respectful disagreement, not only because the left undoubtedly would come out on the losing end of a politics of antagonism but, more fundamentally, because people on the left cannot demonize those who do not share their political views without betraying leftist principles regarding the ontological equality of all persons. More specifically, Mouffe’s recommendation that the left use Schmitt in order to develop a notion of homogeneity that can form the basis for a pluralistic demos seems especially inappropriate for countries such as the United States and Canada in which the state has always been conceived as a political idea capable of uniting heterogeneous groups. It is especially hard to apply Schmitt’s emphasis on homogeneity in a country such as the United States, in which the independent judiciary serves to protect minority rights and to guarantee the rights of citizenship to members of heterogeneous groups.

In the United States, there is an additional problem facing the left that is quite different from the problem of underdetermination that Scheuerman emphasizes. The trend in federal statutes in the areas of criminal and immigration law, including laws governing the writ of habeas corpus, is to establish very clear and draconian rules and to eliminate both discretion and, in many cases, judicial review in an Article III court. These laws prevent the federal courts from

performing their role as the guardians of the constitutional rights of protected minority groups. Left-wing critics of legal indeterminacy must also confront the fact that unjust laws that are clear and leave no room for discretion can also pose a threat to the social values leftists seek to protect. Legal positivism may provide insights into how one might formulate a left-wing critique of recent legislative decisions that have curtailed the powers of courts to protect the rights of individuals. In order to discover such insights, however, legal scholarship must look beyond Carl Schmitt.

(1996) (rendering numerous categories of "criminal aliens" ineligible for discretionary relief from deportation and largely eliminating federal judicial review of decisions committed to the discretionary power of the Attorney General).