Carl Schmitt and the problem of constitutional guardianship

Lars Vinx

Introduction

Carl Schmitt's constitutional theory argues for strong counter-majoritarian constraints on the powers of legislative majorities. In Schmitt's view, every constitution has a core of fundamental constitutional principles that are shielded not just from ordinary legislative majorities, but also from the power of constitutional amendment (Schmitt 2008a: 72–4, 79–81, 150–8). Schmitt does not argue, however, that the protection of certain individual interests against legislative interference is an indispensable part of a morally justifiable constitution (Dworkin 1978). Neither does Schmitt hold that strong constitutionalism will stop the people from taking rash and unconsidered decisions (Holmes 1995). His argument appeals to democracy and to popular sovereignty, although these notions are nowadays often deployed against entrenched constitutional restrictions on the legislative powers of a democratically elected parliament (Waldron 2006: 1348–406; Bellamy 2007).

According to Schmitt, basic constitutional principles express a self-determining people's fundamental decision on the concrete form of its political life. They must accordingly be protected against any constituted power, including the power of constitutional amendment (Schmitt 2008a: 150–1). To allow a constituted power to change the basic structure of a constitution, Schmitt argues, would amount to a usurpation of constituent power.

Although Schmitt advocated a constitution that fundamentally restricts the powers of the constituted legislator, he argued against the legitimacy of constitutional review (Schmitt 1958a: 63–109; 2015: 79–120). If the core of the constitution expresses the people's self-chosen political identity, authoritative interpretations of basic constitutional principles must be provided by the constituent power itself or by a political authority speaking in its name, not by a court (Schmitt 2008a: 126). Consequently, Schmitt advocated alternative forms of constitutional guardianship capable of protecting the constitution without resort to constitutional review (Schmitt 2004: 67–94; 2014: 180–226; 2015: 150–73).

This chapter explores whether Schmitt succeeded to develop a form of strong constitutionalism based on popular sovereignty. The question is obviously important: a successful combination of constitutional rigidity with popular sovereignty would solve the common objection that strong constitutionalism must necessarily violate the principle of democratic equality. It would open up the enticing prospect of a middle path between juristocracy and parliamentary sovereignty.

I argue that Schmitt's attempts to develop a democratic conception of strong constitutionalism that does without constitutional review were unsuccessful. The problem can be fleshed out by taking a closer look at Schmitt's conception of constitutional guardianship. As Schmitt would have recognized, talk of constitutional guardianship is ambiguous. It may either refer to the protection of a concrete form of social and political ordering, or it may refer to the protection of rights that are guaranteed by the legal norms contained in a written constitution.

Liberal constitutional theory has a tendency to veil this distinction. If a constitution is understood as a set of codified legal norms that safeguard certain individual or minority interests, the protection of constitutional rights must appear to be the core function of constitutional guardianship. But it is equally possible, as Schmitt's constitutional theory illustrates, to conceive of constitutional guardianship as the protection of a concrete form of social and political ordering. The protection of the constitution, so understood, is no longer tantamount to the protection of rights guaranteed by the written constitution. It may even require that constitutionally protected rights be disregarded (Schmitt 2008a: 156–8).

Schmitt gives the impression that there is a need for both forms of constitutional guardianship but he privileges the second, purely political understanding of constitutional guardianship over the first, even though he relies on a notion of constitutional guardianship as a protection of rights to attack the view that a democratically elected parliamentary majority should enjoy materially unrestricted legislative powers. As a result, Schmitt fails to offer an attractive middle path between judicial rule and unrestrained majority rule. The potential tyranny of a majority in a system with a sovereign parliamentary legislature is simply replaced with the potential tyranny of the Schmittian popular sovereign.

Schmitt's failure does not merely consist of a refusal to take rights seriously enough. The tendency to privilege a purely political understanding of popular sovereignty also undermines the democratic credentials of his constitutional theory. We should therefore be more sceptical towards contemporary attempts to base a democratic constitutional theory on Schmitt (Kalyvas 2008: 79–186; Loughlin 2010; Posner and Vermeule 2010; Kahn 2011; Colon-Rios 2012; Minkinen 2013).

Schmitt against the legislative state

Schmitt's argument for strong constitutionalism is based on a critique of the 'legislative state', of the liberal constitutional ideal of the nineteenth century (see Schmitt 1985; Schmitt 2004: 3–36; Schmitt 2008a: 181–96, 328–42). In a legislative state, the legislator is a representative assembly, democratically elected, whose members are responsible only to their conscience. The assembly enacts general laws, and only general laws, after careful discussion of legislative proposals. These general laws then govern all administrative and judicial activity. Proponents of the legislative state assume that the democratic election of parliament and the generality of law, together with a principle of administrative legality, are sufficient to protect citizens from arbitrary rule. Further material restrictions on legislative power, enforced by a guardian of the constitution extraneous to parliament, are seen as unnecessary and undemocratic.

Schmitt argues that the ideal of the legislative state has become obsolete. The liberal expectation that legislation by parliament would sufficiently protect individual rights had been based on a picture of parliamentary debate as high-minded, disinterested discussion about the public good. Members of nineteenth-century parliaments, as well as the bourgeois public that observed and discussed their performance, wrongly interpreted the prevalence of agreement among parliamentarians as the natural product of reasonable deliberation. In truth, it had been a function, Schmitt argues, of the shared opposition to a monarchical executive as well as of the social homogeneity of nineteenth-century parliaments.

A number of social and political trends of the later nineteenth and early twentieth centuries exposed the cracks in the ideology of liberal parliamentarianism. As a result of the extension of the franchise and the turn from constitutional monarchy to parliamentary republic, parliaments came to represent greater social diversity, while the absence of a monarch as a shared political adversary reduced the pressure on parliamentarians to find agreement. Consequently, parliament became a battleground for competing social groups that were organized around their own political parties and that tried to exploit the legislative process to impose their factional interests (Schmitt 2015: 125–46; Schmitt 2000). This trend was reinforced by the rise of the administrative state, which blurred the distinction between general laws and particular judicial or administrative decisions and thus eroded the protection afforded by the principle of legality (see Heidegren 2016, [Chapter 6](#) in this volume). Schmitt concludes that the legislative state, under modern social and political conditions, no longer suffices to protect individual citizens against arbitrary rule exercised by parliamentary majority.

Schmitt's ambiguous assessment of the Weimar Constitution finds its explanation in the fact that the Weimar Constitution did, to some extent,

depart from the constitutional framework of the legislative state. In his view, however, it did so too hesitantly and without proper concern for constitutional coherence. The prevailing constitutional doctrine of the 1920s and early 1930s, on the other hand, was still influenced by the ideal of the legislative state, and was therefore incapable, according to Schmitt, of making proper sense of the Weimar Constitution.

The Weimar Constitution did hold on to key elements of the legislative state. A parliament composed of elected representatives of the people was made dominant in the process of legislation. At the same time, the Weimar Constitution experimented with a number of institutional devices restricting the legislative power of parliament, such as the powers of the president to dissolve parliament or to refer a legislative proposal to a popular referendum. It also protected a lengthy list of rights-provisions against the ordinary legislator, by requiring a parliamentary supermajority for their repeal or amendment. Finally, it provided for the direct election of the president, who was to form a political counterweight to parliament. The Weimar Constitution thus marked a departure from the framework of the legislative state, but the departure was half-hearted, in Schmitt's view (Schmitt 2008a: 82–8), and was undercut by constitutional incoherence.

The clearest example of such incoherence appeared in the list of basic rights in the [second part](#) of the constitution. This list contained a number of provisions protecting classical liberal individual rights. These rights, however, though protected by the constitution's requirement of a legislative supermajority for constitutional change, were explicitly made subject to a *Gesetzesvorbehalt*; that is, they were granted subject to the possibility of restriction on the basis of ordinary statute. The framers of the constitution, in other words, still assumed that a simple principle of legality was sufficient to protect individual rights. At the same time, the constitution gave protection to a number of group privileges that were not made subject to a *Gesetzesvorbehalt*. As a result, the right of public officials to have access to their personnel files, for instance, enjoyed a higher degree of constitutional protection than any of the classical liberal individual rights.

Such absurdities, in Schmitt's view, undercut the constitution's aspiration to move beyond the legislative state. The move beyond the legislative state was also hampered by inadequate constitutional theory. The predominant constitutional theory in Germany at the time is often referred to as 'statutory positivism' (Caldwell 1997: 13–39, 63–84). Statutory positivism was closely wedded to the framework of the legislative state. Statutory positivists advocated a purely procedural and value-neutral conception of the constitution. Law was identified with statute and statute was regarded as the result of the legislative will of the state. The constitution, as a result, came to be understood as the set of laws that identify the legislative will of the state and determine how it is validly exercised. The question of the

legitimacy of these constitutional norms, in turn, was treated as a purely political issue of no jurisprudential concern.

Applied to the Weimar Constitution, the constitutional theory of statutory positivism led to the conclusion that the constitution's protections of the classical individual rights were *leerlaufend* or empty, owing to the fact that they were subject to a *Gesetzesvorbehalt*. Gerhard Anschütz, for example, denied that these rights enjoyed more protection under the Weimar Constitution than they had enjoyed in Wilhelmine Germany, since the constitution of the latter had already recognized a principle of administrative legality (Anschütz 1933: 517–20). The Weimar Constitution required a supermajority for the repeal or change of any constitutional provision. However, statutory positivists held that there were no material limits on the power of constitutional amendment exercised by a parliamentary supermajority. Given the requisite supermajority, the Weimar Republic was open to be transformed into a socialist state, even though the constitution appeared to have instituted a liberal-democratic state (Anschütz 1933: 400–8).

According to Schmitt, statutory positivism failed to reflect on the social and political presuppositions that had made the legislative state viable in the nineteenth century (Schmitt 2008a: 62–74). As a result, statutory positivism did not succeed in developing an account of the conditions of the legitimate applicability of constitutional laws and failed to recognize that the ideal of the legislative state, under modern social circumstances, is no longer able to live up to its promises. The refusal to acknowledge this failure, Schmitt argued, served to provide an ideological cover for the 'indirect rule' of parties and factions abusing the legislative mechanisms of the Weimar Constitution for their own partial ends (Schmitt 2008a: 65–77; 2008b). To prevent this reduction of legitimacy to mere legality a new constitutional theory was called for; one that would adequately reflect the constitution's aspiration to move beyond the legislative state and that would allow political practice to overcome the constitution's own deficiencies.

Schmitt's rejection of the legislative state, to sum up, purports to be based on the insight that parliamentary democracy wedded to a principle of legality is not a sufficient safeguard against arbitrary rule exercised by a parliamentary majority. Schmitt is committed, in other words, to the first of the two conceptions of political guardianship distinguished above; that is, to the claim that the constitution must protect individual rights against arbitrary legislative infringement.

As we see in this chapter, Schmitt's own conception of constitutional guardianship fails to follow through on this apparent commitment to the protection of rights, which exposes his critique of the legislative state to a charge of hypocrisy. Schmitt relies on a counter-majoritarian discourse of rights to argue against parliamentary sovereignty but he jettisons strong constitutionalism without hesitation once arguing on the plane of 'the

political'. Rights, as we will see, are not supposed to stand in the way of executive action, which raises the question why Schmitt thought it so important to protect them against the legislator in the first place.

Schmitt on the positive concept of constitution

Schmitt develops his alternative to the statutory positivist understanding of constitution, the 'positive concept of constitution', in the [first part](#) of the *Constitutional Theory* (Schmitt 2008a: 75–88). Schmitt argues that the shortcomings of the statutory positivist view can be overcome only if we acknowledge a fundamental distinction between the constitution itself and constitutional laws; that is, the particular legal norms contained in a written constitutional document. The constitution itself, according to Schmitt, is not a legal norm or a set of legal norms, but rather a fundamental form of concrete social and political ordering that results from a constituent decision (Schmitt 2008a: 75–6).

The Weimar Constitution, Schmitt's example, resulted from a decision of the German people, taken in the course of the revolution of 1918, for democracy, for a republican form of state, for a federal state, for a parliamentary and representative system of legislation, and for the rule of law; that is, for the protection of the classical liberal individual rights and for the principle of a separation of powers (Schmitt 2008a: 77–8). Schmitt regards the written constitution enacted by the national assembly as a derivative expression of this fundamental choice of the German people for a liberal democratic state. Constitutional laws take their legitimacy from the decision of the constituent power on the form of social and political ordering that they serve to implement (Schmitt 2008a: 78).

Schmitt emphatically insists that a people, in exercising its constituent power, does not alienate its constitution-making authority to the positive constitutional framework it creates. The constituent power always retains the option to initiate a new constitutional start (Schmitt 2008a: 140–1). As Schmitt points out, forms of social and political ordering can change fundamentally even while the state continues to exist. The identity and permanence of a constitution, in other words, is not to be confused with the identity and permanence of the political community whose constitution it is. The latter precedes the former.

A constitution continues to exist and to remain the same as long as a society's present form of social and political ordering continues to persist. Constitutional identity can be broken in a number of different ways, some legitimate and some illegitimate. A people could decide to give itself a new constitution and thus legitimately modify its form of social and political existence. More problematic, from Schmitt's point of view, are cases of constitutional change where a new constitution is imposed on a people by an external force or where a constitutional framework is gradually

transformed in such a way as to come to violate the people's original constitutional choice for a certain form of social and political ordering. In both of these cases, the constitution is destroyed illegitimately, since a fundamental constitutional change not brought about by the people itself indicates a loss of the people's constituent power and consequently of its political self-determination (Vinx 2013: 98–100).

The positive concept of constitution implies that a constitution cannot legitimately be changed in ways that violate the people's original choice for a certain form of social and political ordering. Statutory positivists were therefore wrong, in Schmitt's view, to hold that the procedure for amendment of the Weimar Constitution might license a fundamental change of the Weimar Republic, for instance from a liberal to a socialist democracy (Schmitt 2008a: 151–4). In the revolution of 1918, the German people, in Schmitt's view, had not simply initiated the process of the drafting of a written constitution. They had taken a conscious decision for a particular form of social and political ordering. The Weimar Constitution, hence, could not legitimately be used to turn Germany from a liberal democratic state into a state of a fundamentally different political character. Any attempt to employ the amendment procedure for such purposes would have amounted to a usurpation of constituent power on the part of constituted powers.

The ingredients for a democratic constitutionalism, it appears, are now in place. The restrictions that the positive constitution imposes on constituted powers, since they flow from the fundamental choice, on the part of a self-determining people, of its own form of political life, are not incompatible with democracy. Rather, they are the highest expression of the democratic self-determination of a people, which is only imperfectly realized, as Schmitt argues in his critique of the legislative state, in the sphere of constituted politics (Schmitt 1985: 1–17, 22–32; Schmitt 2008a: 302–7).

Schmitt's argument against judicial review

Schmitt's defence of strong constitutionalism, as outlined so far, might appear to provide the basis for a defence of the democratic legitimacy of constitutional review. If a constitutional court was endowed with the authority to preserve and to protect the substance of the constituent choice of the people against the encroachments of constituted powers acting on behalf of sectional interests, then its activity would apparently have to be regarded as democratically legitimate (Ackerman 1993: 9–10).

Schmitt, however, was vehemently opposed to the introduction of constitutional review during the Weimar years (Schmitt 2015: 79–120). In postwar West-Germany, Schmitt attacked the jurisprudence of the Federal Constitutional Court as a 'tyranny of values' (see Rentto 2016, [Chapter 4](#) in this volume). In arguing against the legitimacy of constitutional review,

Schmitt observes that a constitutional court would have to be endowed with the authority to invalidate laws enacted by the legislator, on the ground that these violate either written constitutional laws or the positive constitution. But the question of whether a particular law can really be said to violate the constitution in one of these two senses, Schmitt observes, will typically be open to reasonable disagreement. Constitutional review is therefore going to end up in a simple dilemma: either, a piece of legislation constitutes an obvious violation of a norm of the written constitution, and in this rare case, it will be permissible, Schmitt concedes, for any court not to apply that law, or a more common scenario, it will be claimed that it violates the spirit or integrity of the positive constitution while the question is legally and politically disputed. Here, a court would have to determine the meaning of the positive constitution in the face of political disagreement. Constitutional review would be unnecessary in the first instance, Schmitt argues, and democratically illegitimate, as usurping the constituent power of the people, in the second.

Schmitt's argument against judicial review anticipates arguments against strong constitutionalism that question the democratic legitimacy of judicial rule (Waldron 2006). These contemporary arguments, though, usually propose parliamentary sovereignty as the democratic alternative to judicial rule. Of course, this response to the alleged illegitimacy of judicial review is not open to Schmitt as a critic of the legislative state. So who is to guard the constitution, if it is neither to be the parliament nor the courts?

Schmitt's conception of constitutional guardianship

Schmitt argued that the role of the guardian of the constitution ought to fall to the popularly elected president of the Weimar Republic, or more generally, to the head of an executive endowed with plebiscitary legitimacy (Schmitt 2015: 150–73). This move may seem puzzling at first. If the guardian of the constitution is to enforce constitutional limits on the legislative powers of parliament, a court would appear to be a much more natural fit than the head of the executive. Here, we must remember that the idea of constitutional guardianship can be understood in two different ways: as the protection of the rights enshrined in a written constitution or as the protection of a form of social and political ordering. Schmitt's discussion of presidential guardianship focuses on the second of these two understandings, and it tends to subordinate the protection of constitutional rights to the protection of the positive constitution as a concrete social and political ordering.

This tendency can already be detected in *Constitutional Theory*. On the one hand, liberal rights are portrayed as an essential part of the specific form of social and political ordering – liberal democracy – that was chosen by the German people when it gave itself the Weimar Constitution. It would

therefore be unconstitutional, according to Schmitt, for the legislature to try to transform the political ordering of German society in a way that would permanently eliminate any of the classical liberal rights (Schmitt 2008a: 214–15). On the other hand, rights can of course be seen as protections of individual interests against the potentially dominating power of the executive. But as protections of individual interests, the rights enshrined in the Weimar Constitution are open, Schmitt argues, to almost limitless suspension by the executive (Schmitt 2008a: 80–1).

In the later Weimar years, Schmitt's tendency to read down the protective power of constitutional rights became even more pronounced. Schmitt put forward a theory of 'institutional guarantees', according to which many constitutional provisions that appear to protect individual rights merely protect the existence of certain social institutions, and thus do not give rise to legally enforceable individual claims (Schmitt 1958b; Croce and Salvatore 2013: 25–9).

Despite the fact that Schmitt's argument against the legislative state appeals to the liberal fear of a tyranny of the majority, Schmitt's own constitutional theory, on closer inspection, thus turns out to be surprisingly unconcerned with that danger. A genuine liberal constitutionalist would surely want to prevent the executive – as much as the legislature – from riding roughshod over individual interests that, in his view, deserve constitutional protection. Schmitt, by contrast, is more concerned with the danger that the pluralism of the legislative state may turn out to be 'state-destroying' (Schmitt 2015: 125–46). What is to be protected against a parliamentary majority, in imposing restrictions on the parliamentary legislator, is the political unity and identity of the people, as expressed in its constituent choice for a certain kind of social and political ordering. But that unity and identity, Schmitt now suggests, need not be defended against the executive. The latter, rather, is its proper guardian.

We thus arrive at the seemingly paradoxical conclusion that rights are to be shielded from any legislative transformation, even from an exercise of the power of amendment, while they are open, at the same time, to be freely disregarded by the executive, to hold down those who are considered to be inimical to the positive constitution. Schmitt, as other authors have pointed out, wants to preserve a liberal and bourgeois society against the danger of a legislative transformation initiated by a left-wing legislative majority. But he does not want those he perceives to be the constitution's enemies – social democrats and communists – to benefit from the protection afforded by liberal rights and the rule of law should they decide to challenge the content of a positive constitution that, in Schmitt's view, blocks their legislative ambitions (Maus 1980; Cristi 1998; Dyzenhaus 1997: 38–101).

This background explains why Schmitt aims to reserve the function of constitutional guardianship for the president of the Weimar Republic. If

the protection of the constitution does not primarily consist in the enforcement of legal norms protecting individual rights, but rather in the defence, against insurrectionary challenges, of a certain form of social and political ordering that has already been declared off-limits to peaceful legislative change, it obviously makes sense to argue that the task of defending the constitution must fall to executive and not to the courts. The head of the executive, after all, is typically the one constitutional organ that is best equipped to perform the task of securing public order.

Schmitt's leading article on presidential guardianship of the constitution confirms this interpretation (Schmitt 2014). Article 48, paragraph 2 of the Weimar Constitution, authorized the president of the Weimar Republic to take dictatorial measures to protect public security:

In case public safety is seriously threatened or disturbed, the President of the Reich may take the measures necessary to reestablish law and order, if necessary using armed force. In the pursuit of this aim he may suspend the civil rights described in articles 114, 115, 117, 118, 123, 124 and 154, partially or entirely.

On its face, the second sentence of this article claims that the president, in using extraordinary measures to restore public security and order, may infringe on the enumerated constitutional provisions, but not on other constitutional provisions that are not explicitly mentioned. In other words, the enumeration of rights that can be suspended seems to imply a limitation of the president's powers in a state of exception.

Schmitt proposes a different interpretation (Schmitt 2014: 188–200). According to Schmitt, it is necessary to distinguish between a suspension of constitutional provisions and their infringement in particular instances. If a constitutional provision is suspended, it no longer has any legal force. As a result, any administrative agency is entitled to disregard it. Constitutional provisions, however, can also be violated or infringed in particular instances without having first been suspended. There is a difference, Schmitt holds, between suspending a norm and making an exception from the norm. The latter violation implies that the norm is still in force, since the exception presupposes the rule. So what Article 48 really claims, in Schmitt's view, is that the constitutional articles listed in Article 48 are the only ones the president may suspend. But this does not imply that his action in a state of emergency must not infringe upon other, non-enumerated constitutional provisions. The point is merely, Schmitt claims, that infringements of non-enumerated constitutional rights cannot take the form of a suspension. They must, rather, take place in the form of exceptional measures that are directly authorized by the president himself.

This view implies that presidential dictatorship is all but unlimited in terms of the methods it might permissibly use. Schmitt makes a point to

cite a statement of one of the members of the constituent assembly to the effect that Article 48 would permit even the use of poison gas to put down public unrest (Schmitt 2014: 214). The protection of individual rights, then, is to be thrown overboard in a state of emergency. While liberal rights are to be preserved as elements of a certain kind of social and political ordering, they are not to stand in the way of dictatorial action in situations of crisis (cf. Dyzenhaus 2006: 35–54).

Schmitt's rejection of constitutional review implies, moreover, that it is up to the president alone to determine what counts as a threat to the positive constitution and to decide what extra-legal measures are necessary to remove any such threat. But these powers, as Schmitt knew well, are powers to authoritatively determine the meaning of the constitution in the face of reasonable disagreement. It would be highly naïve, from a decisionist point of view, to assume that presidential guardianship will be any less constitution making than constitutional review exercised by a constitutional court.

In effect, Schmitt's conception of constitutional guardianship does little more than to transfer the unjustified confidence of the proponents of the legislative state that a democratic parliament can do no wrong to the head of the executive, who – in virtue of his popular election – is uncritically portrayed as representing the unity of the people and as protecting the integrity of its constituent choice (Schmitt 2015: 150–73). Schmitt's concern, we can conclude, is not to protect constitutional rights. It is simply to empower an executive that is more reliably conservative than parliament or the courts to act as the sole arbiter of constitutionality and to employ extra-legal means, whenever it sees fit, to deal with those whom it judges to be enemies of the existing social order.

Democratic legitimacy and executive guardianship of the constitution

Schmitt's constitutional theory appears attractive because it promises to justify a strong constitutionalism on democratic grounds. The promise of the conception was that it would impose democratically legitimate restrictions on legislative majorities while avoiding the danger of judicial rule. It should be clear by now that the way in which Schmitt aims to accomplish this end is highly problematic.

Schmitt's positive concept of constitution, and the notion of executive guardianship that goes along with it, protect an established form of social and political ordering against violent, insurrectionary challenge. This protection, however, comes at a high price. Schmitt's argument for presidential guardianship no longer reflects any genuine concern for the protection of the freedom of the individual or the minority. Though individual rights are to be protected, as we have seen, insofar as they are elements of the social ordering chosen by the constituent power, Schmitt

aims to prevent their protective deployment against executive action. Non-trivial disputes about rights, or more generally about a society's form of social and political ordering, are to be settled in a state of exception, through executive dictatorship.

Defenders of Schmitt's constitutional theory are likely to be unimpressed by this critique. They are going to reply that Schmitt is right to give preference to politics over the rule of law, either because they agree with Schmitt's idea that the law is incapable to tame politics or because they think that the constituent decisions of the popular sovereign deserve to take precedence over the protection of individual or minority interests. This reply to the liberal objection to Schmitt, I submit, merely points towards another, equally serious problem with Schmitt's constitutional theory: its highly dubious democratic credentials.

Schmitt's constitutional theory rests on the assumption that the founding decision taken by a people acting as constituent power enjoys a higher degree of democratic legitimacy than any possible outcome of constituted politics. Without this assumption, Schmitt would not be able to defend the claim that the founding decision imposes limits not merely on simple parliamentary majorities, but even on the constituted constitutional legislator. Neither would he be able to justify his conception of constitutional guardianship, which is based on the view that the president's far-reaching dictatorial powers are legitimate because they represent the unity of the people more authentically than courts or parliamentary majorities. Schmitt must explain, then, why the legitimate power to take a decision affecting the identity of the constitution should reside exclusively with a formless constituent power – one that is, in practice, likely to be exercised by an executive that hangs on to the thin reed of plebiscitary legitimacy – and not at all with constituted legislative supermajorities, however inclusive, or with courts, however deeply embedded in a democratic constitutional tradition.

Schmitt's answer to this question is simple. Democracy, he argues, is to be defined as the 'identity of ruler and ruled', and such identity can only obtain under conditions of social and ideological homogeneity (Schmitt 2008a: 255–67). The founding decision, in contrast to any constituted decision, perfectly expresses the democratic identity of ruler and ruled. But the reason why the founding decision expresses identity is simply that it is a decision on the boundaries of political community. The founding decision, of course, is a political decision, in Schmitt's peculiar sense of the term (Schmitt 2007: 25–7; Schmitt 2008a: 76). It brands as enemies all those who do not acquiesce in the form of social and political ordering preferred by the group whose overwhelming power allows it to identify itself with the people. Constitutional guardianship, in turn, consists in using the power of the state to break the resistance of those who do not fully concur with the founding decision, and to do so before the procedural constitution comes into force or while it has been suspended.

The problem with Schmitt's conception of strong constitutionalism, then, is not just that it does not take individual rights seriously enough. Schmitt's strong constitutionalism also conflicts with the democratic principle that all members of a society ought to have an equal say in how it is governed. Schmitt, in effect, denies that the decision about a society's basic social and political ordering should be taken in a way that gives standing to all its members, since those who – in the context of the constituent decision – turn out to disagree with the majority's view are to be treated as aliens, to be silenced or removed by a plebiscitary dictatorship that acts outside of legal restraints. Schmitt confronts the procedural constitution of liberal democracy with a pseudo-democratic pre-legal constituent power precisely because that constitution has had a tendency, at least for the better part of the twentieth century, to politically enfranchise dissident groups, to empower them to contest the existing content of the constitution without having to fear a loss of legal protection, and thus to keep in abeyance the decision on the people's identity that Schmitt thinks must be antecedent to all legal order (cf. Lindahl 2007).

The issue is not merely of antiquarian interest. Schmittian understandings of constitutional guardianship have resurfaced, for example, in recent American discussions on the use of executive power in situations of crisis. Eric Posner and Adrian Vermeule have argued, with explicit reference to the authority of Schmitt (Posner and Vermeule 2010), that it would be futile to try to achieve full legal control of the executive power of the president of the United States. In the modern administrative state, all legal control of executive power exercised in situations of crisis inevitably comes too late, and attempts to impose such control in advance carry the danger of disabling the executive from providing efficient responses to crises. Processes of constitutional change, consequently, must be driven by precedent-setting executive action that can never be fully subject to antecedent legal control. But this is no reason to worry, Posner and Vermeule reassure us, since the exercise of executive power is still subject to political controls that arise from an executive-centred conception of 'popular constitutionalism':

In our approach, the elites who control the institutions of government effectively decide whether or not to engage in precedent-setting showdowns, but public constitutional sentiment – which may or may not be very popular, depending on circumstances – is both a major political constraint and a major variable in the elites' political calculations. The populace at large exercises an indirect influence over constitutional development, but as a filter that rules out certain elite positions and as an ultimate court of appeal, rather than as a frontline participant. The process of constitutional change is roughly plebiscitary: the people do not propose, but they do dispose.

(Posner and Vermeule 2010: 82–3)

The last sentence of this quote directly echoes Schmitt, who emphasized that the popular sovereign's capacity to act and decide presupposes plebiscitary leadership (Schmitt 1927: 31–54). But Schmitt at least aimed to restrict executive dictatorship to situations of openly declared emergency that were to be cabined off strictly from normal governance, so as to avoid a normalization of the emergency. Posner and Vermeule repudiate even this modest restriction of executive power. According to Posner and Vermeule, the administrative state has already made the emergency the new normality, a process they take to be justified by the plebiscitary legitimacy of the presidency.

Unlike Schmitt, Posner and Vermeule do not explicitly address the question of how it is decided who belongs to the people that is to dispose of presidential proposals. Presumably, they would not object to executive action that puts individual citizens *hors la loi* (see Posner and Vermeule 2007: 15–57). There is a danger, hence, that their conception of executive power will tend to be afflicted by the same problem of democratic legitimacy that haunts Schmitt's: if the executive is empowered to interfere with individual rights without being subject to legal control, and if the only safeguard against such interference is the presidency's need for the majority's continued political support, there is a standing threat that the rights of minorities that are perceived as alien to the identity of the community are going to be trampled upon in a way that infringes the integrity of the democratic process. The problem here is not merely that the interests of minority groups may not be given adequate weight in extra-legal executive decision-taking (Posner and Vermeule 2007: 87–129). The problem, rather, is one of domination. The effective exercise of democratic rights of participation, assuming they are not denied in the first place, surely requires that members of a dissident group must not be open to intimidation by the threat of arbitrary executive action that treats them as enemies.

These observations, I submit, cast a critical light on the current revival of Schmittian constitutional theory. The relevant literature typically portrays Schmitt as a heroic defender of popular sovereignty, while his 'normativist' opponents in legal and constitutional theory – who, like Hans Kelsen, refused to derive the constitution's legitimacy from the untrammelled choices of a legally formless constituent power – are painted as undemocratic for failing to recognize the foundational dimension of democracy (Kalyvas 2006; Loughlin 2010: 209–37). Schmitt's reflections on constitutional guardianship make it clear that such assessments rest on a superficial understanding of Schmitt's intentions as well as of the logic of his argument. Those who appeal to the authority of Schmitt in developing modern conceptions of democratic constituent power should be pressed harder to explain how their approaches can avoid the anti-democratic implications of Schmitt's development of the theme.

Bibliography

- Ackerman, B. (1993) *We the People 1: Foundations*. Cambridge, MA: Harvard University Press.
- Anschütz, G. (1933) *Die Verfassung des Deutschen Reiches vom 11. August 1919*. 14th edn. Berlin: Georg Stilke.
- Bellamy, R. (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.
- Caldwell, P.C. (1997) *Popular Sovereignty and the Crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism*. Durham, NC: Duke University Press.
- Colon-Rios, J. (2012) *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power*. Abingdon: Routledge.
- Cristi, R. (1998) *Carl Schmitt and Authoritarian Liberalism. Strong State, Free Economy*. Cardiff: University of Wales Press.
- Croce, M. and A. Salvatore (2013) *The Legal Theory of Carl Schmitt*. Abingdon: Routledge.
- Dworkin, R. (1978) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.
- Dyzenhaus, D. (1997) *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. Oxford: Oxford University Press.
- Dyzenhaus, D. (2006) *The Constitution of Law. Legality in a Time of Emergency*. Cambridge: Cambridge University Press.
- Heidegren, C.-G. (2016) 'Social Acceleration, Motorized Legislation and Framework Laws', Chapter 6 in M. Arvidsson, L. Brännström and P. Minkinen (eds), *The Contemporary Relevance of Carl Schmitt. Law, Politics, Theology*. Abingdon: Routledge.
- Holmes, S. (1995) 'Precommitment and the Paradox of Democracy', p. 134–77, in S. Holmes, *Passions and Restraint. On the Theory of Liberal Democracy*. Chicago, IL: University of Chicago Press.
- Kahn, P. W. (2011) *Political Theology. Four New Chapters on the Concept of Sovereignty*. New York: Columbia University Press.
- Kalyvas, A. (2006) 'The Basic Norm and Democracy in Hans Kelsen's Legal and Political Theory', *Philosophy and Social Criticism*, Vol. 32, No. 5: 573–99.
- Kalyvas, A. (2008) *Democracy and the Politics of the Extraordinary. Max Weber, Carl Schmitt and Hannah Arendt*. Cambridge: Cambridge University Press.
- Lindahl, H. (2007) 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood', p. 9–24, in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*. Oxford: Oxford University Press.
- Loughlin, M. (2010) *Foundations of Public Law*. Oxford: Oxford University Press.
- Maus, I. (1980) *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitt's*. 2nd edn. Munich: Wilhelm Fink.
- Minkinen, P. (2013) 'Political Constitutionalism versus Political Constitutional Theory: Law, Power and Politics', *International Journal of Constitutional Law*, Vol. 11, No. 3: 585–610.
- Posner, E. and A. Vermeule (2007) *Terror in the Balance. Security, Liberty, and the Courts*. New York: Oxford University Press.

- Posner, E. and A. Vermeule (2011) *The Executive Unbound: After the Madisonian Republic*. New York: Oxford University Press.
- Rentto, J.-H. (2016) 'Carl Schmitt and the Tyranny of Values', Chapter 4 in M. Arvidsson, L. Brännström and P. Minkinen (eds), *The Contemporary Relevance of Carl Schmitt. Law, Politics, Theology*. Abingdon: Routledge.
- Schmitt, C. (1927) *Volksentscheid und Volksbegehren. Ein Beitrag zur Auslegung der Weimarer Verfassung und zur Lehre von der unmittelbaren Demokratie*. Berlin: Walter de Gruyter.
- Schmitt, C. (1958a) 'Das Reichsgericht als Hüter der Verfassung' [1929], p. 63–109, in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*. Berlin: Duncker and Humblot.
- Schmitt, C. (1958b) 'Freiheitsrechte und institutionelle Garantien der Reichsverfassung' [1931], p. 140–173, in C. Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954*. Berlin: Duncker and Humblot.
- Schmitt, C. (1985) *The Crisis of Parliamentary Democracy* [1926]. Trans. E. Kennedy, Cambridge, MA: MIT Press.
- Schmitt, C. (2000) 'State Ethics and the Pluralist State' [1930], p. 300–12, in A. J. Jacobsohn and B. Schlink (eds), *Weimar. A Jurisprudence of Crisis*. Trans. B. Cooper. Berkeley and Los Angeles: University of California Press.
- Schmitt, C. (2004) *Legality and Legitimacy* [1932]. Trans. J. Seitzer. Durham and London: Duke University Press.
- Schmitt, C. (2007) *The Concept of the Political* [1932]. Expanded edn. Trans. G. Schwab. Chicago, IL: University of Chicago Press.
- Schmitt, C. (2008a) *Constitutional Theory* [1928]. Trans. J. Seitzer. Durham and London: Duke University Press.
- Schmitt, C. (2008b) *The Leviathan in the State Theory of Thomas Hobbes* [1938]. Trans. G. Schwab and E. Hilfstein. Chicago, IL: University of Chicago Press.
- Schmitt, C. (2014) 'The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution' [1924], p. 180–226, in C. Schmitt, *Dictatorship. From the Origins of the Modern Concept of Sovereignty to Proletarian Class Struggle*. Trans. M. Hoelzl and G. Ward. Cambridge: Polity.
- Schmitt, C. (2015) *The Guardian of the Constitution* [1931], p. 79–173, in L. Vinx (ed.), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Trans. L. Vinx. Cambridge: Cambridge University Press.
- Vinx, L. (2013) 'Carl Schmitt and the Analogy between Constitutional and International Law: Are Constitutional and International Law Inherently Political?', *Global Constitutionalism*, Vol. 2, No. 1: 91–124.
- Waldron, J. (2006) 'The Core of the Case against Judicial Review', *Yale Law Journal*, Vol. 115, No. 6: 1348–406.