

# Carl Schmitt, the chameleon

Philosophy and Social Criticism

2021, Vol. 47(2) 158–162

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DOI: 10.1177/0191453720974735

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## Abstract

This comment focuses on part III of the book, ‘Carl Schmitt’s 21st Century’, by William Scheuerman. It raises two points. The first point concerns the author’s continuity thesis. According to Scheuerman, Schmitt’s ideas ‘exhibit more continuity than widely asserted’. This has consequences both for how we should read Schmitt and for how we should approach authors who use his concepts (such as in the US counterterrorism debate Scheuerman discusses in chapter 10). This comment wants to question this view and instead wants to propose what might be called a chameleon thesis. Schmitt’s thinking contains repeated shifts that are not accidental (1). This may also have implications for how we view attempts to use Schmitt in contemporary thought (2).

## Keywords

Carl Schmitt, Schmitt reception, state of exception, Weimar Republic, William E Scheuerman

William Scheuerman’s book<sup>1</sup> on Carl Schmitt offers a wealth of insights, not only because it succeeds in both giving a clear-sighted moral assessment of Carl Schmitt’s persona and taking his jurisprudential thought seriously, but because it explains how intricately both – Schmitt’s political positions and his jurisprudential thought – are connected. In my comment, I want to focus on part III of the book, ‘Carl Schmitt’s 21st Century’, not least because it is this part that is entirely new to the second edition. I want to raise one large and one small point. The first point concerns the author’s continuity thesis. According to Scheuerman, Schmitt’s ideas ‘exhibit more continuity than widely asserted’ (p. 270). This has consequences both for how we should read Schmitt and for how we should approach authors who use his concepts (such as in the US counterterrorism debate Scheuerman discusses in chapter 10). I want to question this view and instead want to propose what might be called a *chameleon thesis*. To my mind,

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Schmitt's thinking contains repeated shifts that are not accidental (1). This may also have implications – this is my second, smaller point – for how we view attempts to use Schmitt in contemporary thought (2).

## I. Continuous or situational thinking?

*The End of Law* rests on a continuity thesis. This is on display, for instance, in chapter 9 in the third part of the book, where Scheuerman convincingly points out certain continuities in Schmitt's thinking on the state of exception. Yet, I want to suggest that Schmitt's overall thinking is still essentially 'situational', not continuous, and that this has deep roots in his philosophical position.

To illustrate my point, let us consider as an example Schmitt's views on Article 48 of the Weimar Constitution, its emergency constitution. In his early work on dictatorship (*Die Diktatur*, 1921), Schmitt drew a famous distinction between commissarial and sovereign variants of dictatorship: While a commissarial dictator receives his or her extraordinary powers through the constituted power to protect or restore a constitutional order in times of crisis, a sovereign dictator's powers are given to him by the unconstrained constituent power (in a republic, the people) to erect a new constitutional order.<sup>2</sup> The commissarial dictator's powers are thus limited, the sovereign dictator's powers unlimited.

The interesting part is how Schmitt applied these concepts to Article 48 over the years. In his 1924 lecture for the German Association of Public Law Teachers, Schmitt used his concept of a commissarial dictatorship to develop a remarkably broad interpretation of the Reichspräsident's powers that went considerably beyond the more restraint interpretation in the academic mainstream.<sup>3</sup> In his reading of the lecture (pp. 275–79), Scheuerman goes even one step further; he argues that the ambiguity in Schmitt's concepts not only led to a remarkably broad interpretation of Article 48 but effectively started blurring the lines between commissarial and sovereign dictatorship already at this point, allowing him later, in Weimar's final years, to read Article 48 as an instance of sovereign dictatorship and legitimate any attempts by the Reichspräsident (then the authoritarian conservative Hindenburg) to undo the liberal Weimar Constitution. The argument has a textual basis in the 1924 lecture. While Schmitt explicitly denies the Reichspräsident the powers of a sovereign dictator,<sup>4</sup> he does suggest at one point that the president had kept a 'residual' of the sovereign dictatorship that the constitutional assembly had exercised at Weimar.<sup>5</sup> This is indeed one of those ambiguities in Schmitt's writing – one that Hermann Heller picked up on at the time<sup>6</sup> – that make him such a problematic thinker.

But there is a deeper reason why Schmitt at the time believed that the Reichspräsident's power remained commissarial. For one, his emergency powers were checked by the Reichstag. More fundamentally, Schmitt at the time (still) considered the Weimar Constitution a stable and intact constitutional order which rested on a clear sovereign decision by the people,<sup>7</sup> leaving no room for the exercise of sovereign power (as he puts it in his lecture: 'Either constitution or sovereign dictatorship; one excludes the other'<sup>8</sup>). To the contrary, in the third part of his lecture, Schmitt himself expressly designed final limits to what the Reichspräsident could do under Article 48: While he was empowered,

under Schmitt's interpretation, to restrict the constitution's provisions in considerable ways, he was not allowed to change or to replace the constitution itself ('Turning the German Reich from a republic into a monarchy in a constitutional manner through Article 48 is impossible'), as his power derived from it. These arguments are difficult to reconcile with Schmitt's characterisation of sovereign dictatorship as precisely the unlimited exercise of power, the *plenitudo potestatis*.<sup>10</sup>

Schmitt's view on Article 48 only changed when his perception of the political situation changed.<sup>11</sup> In 1929, the body representing the people, the German parliament, had ceased to function properly. In the same year, Schmitt himself had begun to analyse the political situation as a fragile 'pluralist' order that lacked a clear political centre. And not least, Hindenburg had replaced, in 1925, the social democrat Ebert as president. In this new political situation, Schmitt began to re-evaluate the Reichspräsident's role. First, in *Hüter der Verfassung* (1929 and 1931), he began to describe the President as the actual political centre of the Weimar order, resting his legitimacy within the pluralist decay around him on the plebiscitary acclamation from the people, which – after the failure of first monarchic and then parliamentary rule – remained the last legitimating principle of any credibility to Schmitt. With this move, which was directed politically against the parliament, the Reichspräsident could now be identified with the sovereign people; at this point, the boundary between commissarial and sovereign dictatorship began to collapse. At the same time, second, Schmitt decided to split, in *Legalität und Legitimität* (1932), the constitution in two: To him, its first, organisational part had irredeemably ceased to function properly, leaving room for sovereign dictatorship. The dictatorship was limited, however, by the constitution's second part, containing its constitutional rights – its 'substance' as opposed to the 'value-neutral' political procedures laid down in the first part. This separation was meant to legitimise an authoritarian bourgeois order under a strong Reichspräsident, which, on the one side, replaced the now defunct Reichstag and, on the other, could hold the anti-system forces – the Communists and the National Socialists – at bay (a common misconception on the old authoritarian right during Weimar's final years).<sup>12</sup> This 'protective strand' in Schmitt's thought went back to the limits on Article 48 he set out in his 1924 lecture. In 1928, in his *Verfassungslehre*, he had expanded the idea to describe substantive limits to any constitutional reform, in an attempt to protect the constitution's 'core', that is, the conservative parts of its constitutional rights protections, against hostile takeovers. The 1932 idea that even a quasi-sovereign dictator could be bound to uphold a protected, substantive part of the constitution marked the final point in this line.

It might be interesting to ask to what extent Schmitt's positions after 1928 followed logically from his earlier theory: At the moment he considered the Weimar Constitution a failed order, his theory – put so famously as 'Sovereign is he who decides on the exception' (the first line from his *Political Theology*, published in 1921) – required him to identify the sovereign actor. But only the political crisis in the final Weimar years led him to the dual decision to upgrade the Reichspräsident and to endorse constitutional change. Even at this time, his view was not connected to his later stance under Hitler.

These constant shifts in Schmitt's view are not just on display in his position on Article 48 but are a distinctive feature of how he perceived himself as a thinker. This is why I want to put forward a *chameleon* thesis on Schmitt. Schmitt thrives on the fact that

his views constantly change and that he can react to new political situations, or *Lagen*. This has a deeper foundation in his meta-ethical thought: To Schmitt only a dominant political decision can legitimate a political order. This makes it the task of the constitutional thinker to identify this decision and to make it explicit conceptually. When the dominant decision loses its political force and the order ceases to be stable, the constitutional concepts must change with it.<sup>13</sup> This explains the constant ambiguity and malleability of Schmitt's concepts: They serve at the same time as perpetual ideal-types and highly politicised and context-dependent tools.<sup>14</sup> It also makes it a potentially unresolvable task to identify continuities and breaks in his thinking. Lastly, this may also have a larger normative implication: It makes it a fraught enterprise to read the early Schmitt in light of the later Nazi Schmitt – though it remains important to note that this does not mean that we should believe Schmitt's own attempts after the Nazi years to depict himself as a tragic defender of the Weimar order (as some interpreters have); accepting the chameleon thesis leaves ample room for normative judgement.

## 2. Is a liberal reception of Schmitt really impossible?


This leads to my second, smaller point. One normative consequence of the continuity thesis may be that a liberal reception of Schmitt is practically impossible. Under this view, his continuity goes back to fundamental tendencies in his philosophical position that can potentially affect any of his constitutional concepts. This seems to be one motivating factor in Scheuerman's discussion, in chapter 10, of the US debate on counterterrorism, where some authors have used Schmittian ideas to legitimate far-reaching executive power. Under the continuity thesis, this connection between a reception of Schmitt and a potentially unbound executive is not accidental but necessary and eventually unsurprising.

The view faces the problem that there are famous counterexamples in German intellectual history, such as *Ernst-Wolfgang Böckenförde* (or, indeed, *Jürgen Habermas*).<sup>15</sup> Böckenförde was, as is well known, probably Schmitt's most famous student and, at the same time, one of Germany's most influential constitutional theorists, as well as a judge on the Federal Constitutional Court. Although being heavily influenced by Schmitt, Böckenförde managed to transpose Schmitt's ideas into a social democratic key, making it compatible with the Federal Republic's Basic Law.

Perhaps there remains an inherent danger in such a reception. Schmitt's thought might contaminate even liberal attempts to use him in a systematic way. Böckenförde's writings on the state of exception are among the more disturbing of his work. Yet, if my counter-thesis is correct, the connection between a Schmitt reception and objectionable argumentative outcomes may not be a necessary one. When he still considered the Weimar Constitution as a stable liberal constitution, Schmitt's own philosophical position led him to conceptualise many of its features in a way that many of his positivistic contemporaries could not. To be sure, he continuously opposed its order rhetorically, but this opposition does not preclude an attempt to isolate his concepts and use them in a productive fashion – as long as the interpreter is aware of the shifting and ambiguous intellectual context and trajectory in the background.

Be that as it may, one thing is certain: Any modern interpreter will have to consult *The End of Law* if he or she wants to understand today's debates around Schmitt – debates such as this one, which was only made possible through William Scheuerman's acuity and generosity as a scholar.

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## Notes

1. William Scheuerman, *The End of Law: Carl Schmitt in the Twenty-First Century*, 2nd ed. (London: Rowman & Littlefield, 2020).
2. Carl Schmitt, *Die Diktatur*, 2nd ed. (Munich and Leipzig: Duncker & Humblot, 1928), 139, 145.
3. See generally Anna-Bettina Kaiser, *Ausnahmeverfassungsrecht* (Tübingen: Mohr Siebeck, 2020), 218.
4. Carl Schmitt, "Die Diktatur des Reichspräsidenten nach Artikel 48 der Reichsverfassung," *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 1 (1924): 85–87.
5. See the passage quoted in Scheuerman, *End of Law*, 278 and footnote 33.
6. Hermann Heller, *Die Souveränität* (Berlin: Walter de Gruyter, 1927), 67, now in English as Hermann Heller, *Sovereignty*, trans. David Dyzenhaus (Oxford: Oxford University Press, 2019).
7. This is the main idea in his *Verfassungslehre* of 1928, Carl Schmitt, *Verfassungslehre*, 11th ed. (Berlin: Duncker & Humblot, 2017), § 3.
8. Schmitt, "Die Diktatur des Reichspräsidenten," 87.
9. Schmitt, "Die Diktatur des Reichspräsidenten," 91.
10. Schmitt, "Die Diktatur des Reichspräsidenten," 86.
11. This is where my interpretation parts ways with the author's: Scheuerman assumes that Schmitt viewed the Weimar order as unstable as early as 1924. It is true that there are many passages in his work, most famously his book on the demise of parliamentary rule, that betray his doubts about Weimar's overall stability. But this view runs the risk of underestimating the qualitative shift in Schmitt's political assessment of the situation after 1929 and the impact it had on his own position.
12. See Dieter Grimm, "Verfassungserfüllung – Verfassungsbewahrung – Verfassungsauflösung," in *Die Deutsche Staatskrise 1930–1933*, ed. Heinrich August Winkler (Munich: Oldenbourg, 1992), 193–96.
13. A connection that Schmitt himself illustrated through the title he gave an essay collection that collected his smaller writings between 1923 and 1939: 'Positionen und Begriffe', positions and concepts.
14. This is the guiding heuristic in Hasso Hofmann's early work from 1968 on Schmitt, Hasso Hofmann, *Legitimität gegen Legalität*, 5th ed. (Berlin: Duncker & Humblot, 2010).
15. Ellen Kennedy, "Carl Schmitt and the Frankfurt School," *Critical Theory of the Contemporary* 71 (1987): 37.