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Carl Schmitt on Culture and Violence in the Political Decision

David Pan

Though he has become known to his detractors as a theorist who has replaced rational discourse with pure power in his theory of the decision, Carl Schmitt's notion of politics is, on a fundamental level, culturally and ethically based. This cultural and ethical conception of politics permeates his work, not only in texts about explicitly cultural issues, such as his 1916 study of Theodor Däubler's Expressionist *Nordlicht* or his meditation on the connection between politics and art in Shakespeare in *Hamlet oder Hekuba*,¹ but also in *Political Theology*, one of the key texts of his theory of decisionism. While commentators have tended to focus on his understanding of how violence has a determining role in structuring society, he understands this role within a framework in which values and ideas mediate the human relation to violence. He develops a complex understanding of the ways in which both culture and ethics, the realm of symbolic meaning and the determination of ultimate values for guiding human action, shape political structures.

1. Carl Schmitt, *Theodor Däublers "Nordlicht": Drei Studien über die Elemente, den Geist und die Aktualität des Werkes* (Munich: Georg Müller, 1916); Carl Schmitt, *Hamlet oder Hekuba: Der Einbruch der Zeit in das Spiel* (Düsseldorf: E. Diederichs, 1956), partially translated into English as "The Source of the Tragic," *Telos* 72 (Summer 1987): 133–51. His early interest in Expressionism was no isolated event but was significant for his later work to the extent that he continued throughout his career to emphasize the spiritual concerns also crucial to this movement. For a discussion of his engagement with German Expressionism, see Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham, NC: Duke UP, 2004), pp. 38–47. On his reading of Shakespeare, see Johannes Türk, "The Intrusion: Carl Schmitt's Non-Mimetic Logic of Art," in this issue of *Telos*; and David Pan, "Political Aesthetics: Carl Schmitt on Hamlet," *Telos* 72 (Summer 1987): 153–59.

Commentators who overlook the centrality of the cultural and ethical element in Schmitt's theories inevitably take a hostile stance toward his work. Jan-Werner Müller, for instance, regards Schmitt's decisionism as a type of thinking that understands the world in terms of pure and unmediated violence and leaves out any ethical component, thus paving the way for the rise of the Nazi dictatorship.² Müller supports his critique by referring to the stark pronouncements about the foundational power of the decisionist act described in *Political Theology*. Similarly, John McCormick indicates that the particular decisionism of this text established the idea of a "sovereign dictatorship" in Schmitt's thinking, a dictatorship that was not meant to be a temporary measure for restoring the constitution but a more permanent situation that seeks to establish a dictatorial order.³ Slavoj Žižek considers the Schmittian decision to be "an abyssal act of violence (violent imposition) which is grounded in itself" and emphasizes that the decision "is not a decision for some concrete order, but primarily the decision for the formal principle of order as such." Consequently, for Žižek, the content of the resulting order is arbitrary, and Schmitt's conservatism depends upon a dissolution of traditional values and authorities.⁴

Yet, Schmitt's work leads inexorably to the idea that cultural and ethical ideals are inseparable from the decisionist moment. The sovereign violence that suspends an entire legal order is not just a pure, mechanical violence but is based on spiritual ideals. Though Schmitt's key statement in *Political Theology* that the sovereign makes the decision on the state of exception is indeed framed as a purely political insight in which no other cultural or ethical considerations play a role, Schmitt's critics have been mistaken in assuming that he takes unmediated violence to be the basis of order. Though specific power relations define the circumstances of the political decision, these power relations cannot be "pure." Rather, they are always expressed in terms of cultural assumptions about the final goals of a society.⁵ Even if violence and power relations provide the limiting factors that determine the parameters for a decision, the ultimate decision

2. Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought* (New Haven, CT: Yale UP, 2003), pp. 22–23.

3. John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge UP, 1997), pp. 121–56.

4. Slavoj Žižek, "Carl Schmitt in the Age of Post-Politics," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (London: Verso, 1999), pp. 18–19.

5. Kennedy gestures in this direction when she writes that for Schmitt "the political is the existential" (Kennedy, *Constitutional Failure*, p. 8).

is not an example of arbitrary power but is in fact overdetermined by the context given by a culture's self-understanding of its values. This fuller understanding of decisionism links it back into a cultural context and an ethical framework for determining the enemy. Far from reducing politics to unmediated violence, the political decision for Schmitt is founded on the underlying ethical assumptions that predominate within a particular people.

Order vs. Chaos as Background to the Decision

Schmitt provides many indications that he does not adhere to a reductive idea of decisionism in which it is simply an expression of violence. In arguing that the theological origins are not just important because of their historical development "but also because of their systematic structure" and that "the exception in jurisprudence is analogous to the miracle in theology,"⁶ Schmitt emphasizes that his understanding of decisionism includes a notion of legitimacy that grounds the decision within a larger political and theological tradition. Schmitt never adheres to the idea of decisionism as violence, as proposed by Giorgio Agamben. Instead, he distinguishes his idea of decisionism, which establishes the legitimacy of the sovereign, from an alternative "absolute" decisionism that would be completely unmediated. In attributing the idea of "an absolute decision created out of nothingness" to Joseph de Maistre and Juan Donoso Cortés, Schmitt further notes that "this decisionism is essentially dictatorship, not legitimacy" and is the product of a withering of monarchy rather than its revival.⁷ Schmitt's form of decisionism, by contrast, is an attempt to explain monarchy as a form of government that is based not on arbitrary violence but on some type of popular consent.⁸

6. Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Chicago: Univ. of Chicago Press, 2005), p. 36.

7. Schmitt, *Political Theology*, p. 66. Tracy Strong also points to Schmitt's differentiation in order to argue that "the point of the analysis of the centrality of the exception for sovereignty is precisely to restore, in a democratic age, the element of transcendence that had been there in the sixteenth and even the seventeenth centuries." See Tracy B. Strong, "The Sovereign and the Exception: Carl Schmitt, Politics, Theology, and Leadership," in Schmitt, *Political Theology*, p. xxv. Though he is correct in pointing out that Schmitt's interest was to understand legitimacy in a democratic age, it is important to remember that Schmitt also distinguished between monarchy and dictatorship in terms of their forms of legitimacy.

8. This reading is consistent with Joseph Bendersky's reading of Schmitt's efforts during the final days of the Weimar Republic as an attempt to support the constitution

Schmitt is reticent in *Political Theology* about the cultural and ethical framework within which this decision stands. However, he describes this dimension more explicitly in a text published one year later, *Roman Catholicism and Political Form*. Here he states quite emphatically that politics is not about violence but about ideas: “No political system can survive even a generation with only naked techniques of holding power. To the political belongs the idea, because there is no politics without authority and no authority without an ethos of belief.”⁹ If, as G. L. Ulmen points out, the arguments in this text are intimately connected to those of *Political Theology*,¹⁰ then Schmitt’s decisionism does not reduce law and politics to a mechanics of violence. Rather, since the political is fundamentally linked to the idea, the decision is also founded on both an idea and an ethos of belief, which together form the basis of political authority.

This emphasis on the idea as the basis of politics provides the key to understanding Schmitt’s arguments in *Political Theology*. Schmitt develops his theory of the decision in this text as a counter to the idea of the norm, and the centrality of the state of exception is a result of its importance for understanding the mechanism embedded in the decision. Schmitt differentiates between decision and norm as two opposing ways of coming to a judgment on a particular issue: “The assertion that the exception is truly appropriate for the juristic definition of sovereignty has a systematic, legal-logical foundation [*systematischen rechtslogischen Grund*]. The decision on the exception is a decision in the true sense of the word. Because a general norm, as represented by an ordinary legal prescription, can never encompass a total exception, the decision that a real exception exists cannot therefore be entirely derived from this norm.”¹¹ Schmitt here describes a fundamental difference between an assertion with “a systematic legal-logical foundation” and a “decision,” laying out

against the threat of a Nazi seizure of power through the use of a temporary state of exception that would allow a later reinstatement of the constitution. See Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, NJ: Princeton UP, 1983), pp. 145–91. Yet, Schmitt’s willingness to grant the popular will such a central place also explains his willingness to support Hitler’s rule once Schmitt felt that this rule had gained popular support.

9. Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, CT: Greenwood, 1996), p. 17.

10. G. L. Ulmen, introduction to Schmitt, *Roman Catholicism and Political Form*, p. xiv.

11. Schmitt, *Political Theology*, pp. 5–6. Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität* (1934; Berlin: Duncker & Humblot, 2004), p. 13.

the two situations in which each mode of justification is appropriate. The former mode explains *why* the state of exception is suited for defining sovereignty. But this legal-logical reasoning, in which logical arguments can accurately describe the functioning of political processes, has to do in this case with the recognition of those situations in which such logical reasoning is useless. The state of exception lies outside the purview and capacities of a general norm, and, as a result, the decision on whether a state of exception exists cannot itself be grounded through legal-logical foundations. This decision is then a pure decision, without a norm to which it refers and without a logical and systematic framework to guide it.¹²

As Paul Hirst points out, however, the unsystematic nature of the decision does not mean that it is totally arbitrary.¹³ It has its own form of legitimacy that is the foundation for the validity of the norm as well. This ordered character of the decision is the key idea that sets Schmitt's theory apart from Agamben's interpretation of the decision. The latter argues, for example, that the state of exception is a situation of anomie and pure violence without order, and he uses this argument to reject Schmitt's invocation of the state of exception as the place of a decision that prefigures law:

The state of exception is not a dictatorship (whether constitutional or unconstitutional, commissarial or sovereign) but a space devoid of law, a zone of anomie in which all legal determinations—and above all the very distinction between public and private—are deactivated. Thus, all those theories that seek to annex the state of exception immediately to the law are false; and so too are both the theory of necessity as the originary source of law and the theory that sees the state of exception as the exercise of a state's right to its own defense or as the restoration of an originary pleromatic state of the law ("full powers"). But fallacious too are those theories, like Schmitt's, that seek to inscribe the state of exception indirectly within a juridical context by grounding it in the division between norms of law and norms of the realization of law, between

12. Schmitt's distinction between legal-logical reasoning and the decision recalls Max Weber's understanding of objectivity in the social sciences, in which the values that define a research project cannot be determined objectively but can only be arbitrarily decided. Rational methods are limited to providing information about the likely consequences of particular choices. Max Weber, *The Methodology of the Social Sciences*, trans. and ed. Edward A. Shils and Henry A. Finch (Glencoe, IL: Free Press, 1949), pp. 1–5, 18, 21, 61.

13. Paul Hirst, "Carl Schmitt's Decisionism," *Telos* 72 (Summer 1987): 20.

constituent power and constituted power, between norm and decision. The state of necessity is not a “state of law,” but a space without law (even though it is not a state of nature, but presents itself as the anomie that results from the suspension of law).¹⁴

Agamben argues against Schmitt’s idea that the state of exception already contains the preliminary order out of which a legal order is established. Instead, Agamben wants to define the state of exception as a “space without law” and a “space devoid of law.” He does not offer any alternative to the two poles of command or anomie because he remains committed to concepts based on norms, whose only opposite is a total lack of order. By contrast, Schmitt’s critique of the norm is not an affirmation of the primacy of chaotic violence but of a type of legitimacy that precedes laws and norms.

The difference between Agamben’s focus on an opposition between norm and anomie, on the one hand, and Schmitt’s attempt to think through how legitimation functions in the absence of norms, on the other hand, becomes evident in Agamben’s comparison of Schmitt with Walter Benjamin. As Agamben points out, they both see the state of exception as the moment of an undecidability. But whereas Benjamin affirms the ultimate undecidability of the situation, Schmitt attempts to imagine how this situation then leads to a final decision that reintroduces a legal order. Agamben’s critique of Schmitt, then, is that he forecloses the anomie of the situation by means of a sovereign decision without precedent:

The sovereign violence in *Political Theology* responds to the pure violence of Benjamin’s essay with the figure of a power that neither makes nor preserves law, but suspends it. Similarly, it is in response to Benjamin’s idea of an ultimate undecidability of all legal problems that Schmitt affirms sovereignty as the place of the extreme decision. That this place is neither external nor internal to the law—that sovereignty is, in this sense, a *Grenzbegriff* [limit concept]—is the necessary consequence of Schmitt’s attempt to neutralize pure violence and ensure the relation between anomie and the juridical context. And just as pure violence, according to Benjamin, cannot be recognized as such by means of a decision (*Entscheidung*), so too for Schmitt “it is impossible to ascertain with complete clarity when a situation of necessity exists, nor can

14. Giorgio Agamben, *State of Exception*, trans. Kevin Attell (Chicago: Univ. of Chicago Press, 2005), pp. 50–51.

one spell out, with regard to content, what may take place in such a case when it is truly a matter of an extreme situation of necessity and of how it is to be eliminated"; yet, with a strategic inversion, this impossibility is precisely what grounds the necessity of sovereign decision.¹⁵

Agamben argues, first, that Benjamin's idea of divine violence is also "Benjamin's affirmation of a wholly anomic human action"¹⁶ and, second, that this divine violence (which Agamben refers to here as "pure violence") brings with it an ultimate undecidability. From this perspective, Schmitt's emphasis on the decision in spite of a fundamental undecidability seems to be a defense of an arbitrary sovereign will in a situation of chaotic violence.

But Agamben's interpretation is flawed in two ways. First, he is mistaken in ascribing to Benjamin the argument that divine violence occurs as "anomic human action." Though Benjamin's divine violence does have this "anomic" element, he also insists that it is based on justice: "Justice is the principle of all divine end making, power the principle of all mythical lawmaking."¹⁷ He designates divine violence as "pure immediate violence" when he distinguishes it as a political and revolutionary violence from violence based on existing law.¹⁸ But then he also emphasizes immediately afterward that this pure divine violence provides an access not to chaos but to eternal forms: "Once again all the eternal forms are open to pure divine violence, which myth bastardized with law."¹⁹ Agamben's reading smooths over these tensions in Benjamin's argument in order to make him into a defender of the value of this "anomie" as such.

Agamben is indeed correct in pointing out that both Benjamin and Schmitt agree that it is difficult to decide when this type of violence is taking place. But Schmitt's response to this undecidability—the affirmation of the importance of the sovereign decision—is not simply a violent, unprecedented gesture. Rather, Schmitt's recognition of the lack of clarity

15. *Ibid.*, pp. 54–55.

16. *Ibid.*, p. 54.

17. Walter Benjamin, "Critique of Violence," in *Reflections: Essays, Aphorisms, Autobiographical Writing*, trans. Edmund Jephcott (New York: Schocken, 1978), p. 295.

18. Writes Benjamin: "But if the existence of violence outside the law, as pure immediate violence, is assured, this furnishes proof that revolutionary violence, the highest manifestation of unalloyed violence by man, is possible, and by what means" (*ibid.*, p. 300).

19. *Ibid.*

concerning the existence of and the reaction to a state of exception is also a recognition that the response to this situation is not an affirmation of chaos but a decision about ultimate values. The undecidability in both Benjamin's and Schmitt's arguments arises from the situation that such ultimate values that determine the foundations of an entire culture cannot be conceptually predetermined nor legally prescribed. Instead, there is an element of Kantian "reflective judgment" (which Agamben recognizes but reduces to a "merely logical operation"²⁰) in which the decision contains a type of judgment that has an aesthetic form.²¹ As William Rasch points out, sovereignty "involves the generalization and extension of the domain of reflective judgment beyond the system (aesthetic) in which it first found its theoretical articulation. A political judgment—a *decision*—is called for precisely at the moment where 'knowledge' fails."²² In contrast to the anomie of the state of exception for Agamben, Schmitt sees the state of exception as the sphere in which reflective judgment must play a crucial and defining role. If Schmitt emphasizes the need to make a decision in the face of undecidability, he is not necessarily contradicting Benjamin at this point, but extending Benjamin's insight that the decision is indeed one about eternal forms.

Forces in the State of Exception

The linking of Schmitt's decision to reflective judgment is based partly on its epistemological value in determining for the political community its situation within a broader complex of forces that can affect its survival. The exception lurks behind the rule, according to Schmitt, because it makes clear the lines of force that also exist in the normal situation. The exception thus provides information about the political situation out of which the rule develops. Rather than being an apparatus "whose purpose," according to Agamben, "is to make the norm applicable by temporarily suspending its efficacy,"²³ the state of exception brings into clear relief the lines of political force that exist in the normal situation and serve to

20. Agamben, *State of Exception*, p. 39.

21. Though the decision is based on a type of judgment without "legal-logical foundations" and is thus similar to Kant's idea of reflective judgment, Schmitt is also careful to distinguish legal form from aesthetic form, because the latter contains no decision. See Schmitt, *Political Theology*, p. 35.

22. William Rasch, "Conflict as Vocation: Carl Schmitt and the Possibility of Politics," *Theory, Culture, and Society* 17, no. 6 (2000): 9.

23. Agamben, *State of Exception*, p. 58.

legitimate the rule but are hidden from clear view because there is no concrete threat. The content and stability of the norm depend, for Schmitt, on the political forces that only emerge into the foreground during the state of exception, though they are always present as the underlying guarantors of a state of affairs: "The exception is more interesting than the rule. The rule proves nothing; the exception proves everything: It confirms not only the rule but also its existence, which derives only from the exception. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition."²⁴ In this passage, often cited to demonstrate Schmitt's irrational and reactionary belief in the basic violence of reality, Schmitt relates the state of exception to a Nietzschean realm of forces that governs life and establishes the basis upon which the normal situation exists. He then sees the normal situation as the solidification or stabilization of a certain constellation of forces. The stability of the normal situation only continues as long as the set of forces determining it remains stable. Once there is a change in this constellation of forces, the stability of the normal situation breaks down, giving way to the state of exception in which those forces enter into open conflict, leading eventually to a new constellation of forces and the resultant revised order.

The difficulty here is that Schmitt designates these forces as the "power of real life" and suggests thereby that they form part of an irrational, primal reality that is inaccessible to normal life yet determining for it. He wants to set normal life against the seriousness of the state of exception by indicating that this state involves existential decisions rather than superficial ones. But in this passage, he has not developed any criterion except a note of violence and disaster in order to understand what this seriousness could mean. These forces of "real life" cannot be an expression of naked violence, however, if one follows the logic of Schmitt's conception of the state of exception. Schmitt's portrayal of the state of exception contradicts his reference to a kind of primal violence of forces, because his state of exception understands these forces as existing within a certain order. He insists that the state of exception is not a situation of total chaos, but one in which normal order and the law can recede even though the state remains: "What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes. Because the exception is different from anarchy and chaos, order in the juristic sense still prevails

24. Schmitt, *Political Theology*, p. 15.

even if it is not of the ordinary kind.”²⁵ The state of exception, for Schmitt, is not simply anarchy or chaos. Instead, there is still an order, even if it is not a legal order.

The continuing existence of order in the state of exception indicates for Schmitt that laws are not the source of order. Rather, there is an alternative basis for order that derives from the decision:

The existence of the state is undoubted proof of its superiority over the validity of the legal norm. The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation, as one would say. The two elements of the legal order are then dissolved into independent notions and thereby testify to their conceptual independence. Unlike the normal situation, when the autonomous moment of the decision recedes to a minimum, the norm is destroyed in the exception. The exception remains, nevertheless, accessible to jurisprudence because both elements, the norm as well as the decision, remain within the framework of the juristic [*im Rahmen des Juristischen*].²⁶

In attempting to explain this aspect of the decision, Schmitt designates the norm and the exception as two independent elements of the legal order. While each of the elements has its own particular sphere, there is an imbalance in their range of influence. In the normal situation, the norm predominates while the exception recedes. In the state of exception, however, the norm is destroyed while the decision “frees itself from all normative ties and becomes in the true sense absolute.” This absolute dominance of the decision with the disappearance of the norm in the state of exception is not just an expression of the arbitrary violence of the sovereign. Since Schmitt insists that both the norm and the decision still remain “within the framework of the juristic,” the “superiority” of the state over the “validity of the legal norm” is an indication of the type of order that prevails in the state of exception.

But because Schmitt’s invocation of the state does not provide a clear sense of the form of this order within the state of exception, Agamben can interpret the political forces that manifest themselves in the state of exception as forces of violence, in which the force of law acts as a kind of legal “mana” or in which there is a permanent state of exception where rule and

25. *Ibid.*, p. 12.

26. *Ibid.*, pp. 12–13; Schmitt, *Politische Theologie*, p. 19.

exception cannot be distinguished. In this situation, in which “violence without any juridical form acts,” there is no law, but only “civil war and revolutionary violence, that is, a human action that has shed [*deposto*] every relation to law.”²⁷ Agamben imagines here a total disappearance of law at the same time as violence is completely unbridled and chaotic. The basic problem, as Agamben sees it, is that, in spite of the total anomie and chaos of the state of exception, the juridical order still wants to try to maintain a relation to it: “On the one hand, the juridical void at issue in the state of exception seems absolutely unthinkable for the law; on the other, this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost.”²⁸ The key point for Agamben is that the state of exception is a state of total anomie, while for Schmitt this state, though a suspension of law, is still a political space and, therefore, a cultural space, one that is still defined by cultural ideals. Agamben denies the existence of such ideals in the state of exception and instead postulates a “force-of-law” that constitutes a kind of free-floating violence that is released from any type of specific determination: “The idea of a force-of-law is a response to this undefinability and this non-place. It is as if the suspension of law freed a force or a mystical element, a sort of legal mana . . . that both the ruling power and its adversaries, the constituted power as well as the constituent power, seek to appropriate.”²⁹ This “legal mana” becomes a “mystical element” without any conceptual or linguistic determination and must be “appropriated” in order for some agency to establish order through command and control.

Yet, if human action had really shed every relation to law, then the type of ideological conformity necessary for drawing up sides in a civil war would not exist. Instead, unbridled violence and total lawlessness would result in an outbreak of criminal or mob violence that could not be aligned with any specific political agenda.³⁰ Whereas Agamben does not seem to believe that a government needs to have the consent of public opinion in order to establish order and rule, Schmitt points out that the process of building this consent is as much a part of the decision as the ability to enforce the decision against detractors. What Schmitt perceives

27. Agamben, *State of Exception*, p. 59.

28. *Ibid.*, p. 51.

29. *Ibid.*

30. On this distinction between political violence and criminal violence, see Carl Schmitt, *Theory of the Partisan*, trans. G. L. Ulmen (New York: Telos Press, 2007), pp. 14–15.

in the state of exception, and what Agamben ignores, are the lines of political force that come to the fore as clear expressions of specific ideological and political commitments that people must make explicitly in times of war and which are the hidden basis of law in times of peace. By insisting on the existence of a mystical “legal mana,” Agamben obscures the social and cultural commitments that lie at the foundation of what he sees as an independent “force-of-law.”

The People’s Sense of Right

Schmitt explains the hidden source of order underlying the forces at work in the state of exception when he describes the link between the decision and the collective will in his discussion of the form of law. He begins this discussion by citing Hugo Krabbe’s argument about the source of law in public opinion: “The basis, the source of the legal order, is ‘to be found only in men’s feeling or sense of right.’ He [Krabbe] concludes, ‘Nothing can be said further about this foundation: It is the only one that is real.’”³¹ Schmitt points out here that in Krabbe’s conception the form of law is limited to the “declaratory but by no means constitutive act of ascertaining” the “people’s feeling or sense of right.”³² Though Schmitt is ultimately critical of Krabbe, he accepts the argument that the source of law lies in this popular dimension of a people’s “sense of right.” Schmitt’s critique only concerns the process by which law is able to integrate this sense of right into its structure. As Schmitt points out, for Krabbe, “it is not the state but law that is sovereign,” for the state “does nothing but ascertain the legal value of interests as it springs from the people’s feeling or sense of right.”³³ Schmitt objects here, not because he is insisting *a priori* on a state’s monopoly on violence, but because he sees a problem of form or of representation where Krabbe assumes a direct and transparent translation of the people’s sense of right into the law. At this point, Schmitt turns to Kurt Wolzendorff’s development of Krabbe’s idea of the law itself as sovereign, in which Wolzendorff argues that the “state should preserve law” and act merely as a “guardian, not master.” In subordinating the state to the law yet still keeping the state as the “ultimate guarantor” of the law, Wolzendorff is forced to delegate to the state a mediating authority

31. Schmitt, *Political Theology*, p. 22. Citation from Hugo Krabbe, *Die moderne Staatsidee*, 2nd ed. (The Hague: M. Nijhoff, 1919), p. 39.

32. Schmitt, *Political Theology*, p. 23.

33. *Ibid.*, pp. 21, 23.

between the people's sense of right and the law.³⁴ It is in this mediation that Schmitt sees the problem of form: "The authority of the order is valued so highly, and the function of guarantor is of such independence, that the state is no longer only the ascertainer or the 'externally formal' transformer of the idea of law. The problem that arises is to what extent, with legal-logical necessity, every ascertainment and decision contains a constitutive element, an intrinsic value of form."³⁵ The argument here depends, first, on the assumption that the source of law is in the people's sense of justice but also, second, on the consequence that this sense cannot attain form through a direct and immediate translation into law because the people in general cannot directly make a decision in a particular time and place. This process of attaining form will always require some kind of mediating element, that is, a person or specific group of people who will make a particular decision. This mediation cannot be neutral because, in constituting the form of law, the agent who creates the form of law must also make a decision about the specific effects of law in the world, a decision that is grounded in the people's sense of justice but that necessarily incorporates a representational supplement to this popular grounding, even in the case of the most democratically constituted legislative body. The translation of popular feeling into law contains a moment of constitutive form, which must have an agent, the sovereign, to carry it out. The pre-judicial order is grounded then in the combination of the people's sense of right and the sovereign's decision as the representation of this sense. This representation is the aesthetico-political source of law.

Krabbe's and Wolzendorff's vision of sovereignty sees the law itself rather than the state as both originary and sovereign and does not recognize a constitutive moment in the translation of popular feeling into legal decisions. This understanding obscures the role of an agent in creating juridical form. Instead, both Krabbe and Wolzendorff rely on a schema in which law is simply the natural and uncriticizable direct expression of popular

34. On this point, Wolzendorff's argument prefigures Jürgen Habermas's similar arguments about the state's proper use of a monopoly of violence to support a legal system whose ultimate justification lies in a universal morality. But where Wolzendorff and Krabbe refer to the people's sense of right as the ultimate authority, Habermas, in appealing to a universal morality as an authority that is higher than popular judgment, maintains a liberal, yet undemocratic element in his theory. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: MIT, 1996), pp. 30–32, 37.

35. Schmitt, *Political Theology*, p. 26.

will. It is for this reason that Schmitt accuses Wolzendorff of harboring a hidden “dictatorial” impulse when he sees the law as sovereign yet maintains that the state should be the guarantor of this sovereignty.³⁶ Because the state is supposedly carrying out the sovereign will of the people as it is objectively and unequivocally manifested in law, there can be no disputing either the law or the state’s role in enforcing the law. By contrast, if the decision on the state of exception that constitutes the state is deemed to have a constitutive formal moment that supplements the people’s sense of right but does not replace it, then the sovereign retains both a moment of freedom and, as a consequence, a measure of responsibility that allows for legitimate criticisms.

In this sense, the state of exception is just an extreme example of the type of judgment that occurs in all legal decisions. According to Schmitt, the legal decision will always be an independent, determining moment, whose functioning cannot be reduced to a deduction from a set of prior principles: “Every legal thought brings a legal idea, which in its purity can never become reality, into another aggregate condition and adds an element that cannot be derived either from the content of the legal idea or from the content of a general positive legal norm that is to be applied. Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment.”³⁷ Because the circumstances requiring a decision will always be unique, the law itself can never fully determine its application. It will always be necessary for a particular judge to make a decision about how to apply the law in each particular case, and this decision will always contain a supplement to the letter of the law. However, the legal idea does not say anything about who is to apply the law, even though, Schmitt insists, “[w]hat matters for the reality of legal life is who decides.”³⁸ The question of which individual person or concrete office can claim this authority to decide is essential for Schmitt, not because of the primacy of violently imposed order over justice, but because the authority’s ability to maintain order in the normal situation depends upon the formal element in the constitution of law. The presence of the authority that can make judgments is, for Schmitt, not just

36. *Ibid.*, p. 23.

37. *Ibid.*, p. 30.

38. *Ibid.*, p. 35.

a manifestation of violence but an indication of the unity of public opinion and its support of the legal authority, on the one hand, and the formal, representational moment of judicial decision, on the other hand. As a result, the question of who decides is both the question of whether one can speak of a collective will at a particular moment and the question of who has the implicit authority to carry out the final forming of popular feeling into a concrete decision.

Decisions and Values

There is a certain optimism in Schmitt's account to the extent that for him justice is a possibility in every legal system, whose very existence is a testament to the grounding of its authority in a unified popular will. This optimism about the popular support required for the continuation of any legal order also leads, however, to a justification for the legitimacy of any legal order, as long as it exists. Schmitt's willingness to accept the authority of any sovereign able to consolidate the people's will led him, on the one hand, to accept the legitimacy of Nazi rule in the 1930s and, on the other hand, to admire the genius of Lenin and Mao in *Theory of the Partisan*.³⁹ Given his tendency to accept the authority of a ruling power, it is all too easy to interpret the priority of the decision as evidence that Schmitt believed that laws are subject to the whims of the sovereign and that he was therefore undermining the rule of law in his decisionism. Richard Wolin writes, for instance, that "the emphasis on the exception to the exclusion of all normativism, proceduralism, and institutional checks allows him to degenerate into an advocate of charismatic despotism."⁴⁰ While Schmitt, in designating norm and decision as two essential elements, each with its own sphere, is clearly not excluding all normativism, he certainly privileges the decision as the more fundamental element: "After all, every legal order is based on a decision, and also the concept of the legal order, which is applied as something self-evident, contains within it the contrast of the two distinct elements of the juristic—norm and decision. Like every other order, the legal order rests on a decision and not on a norm."⁴¹ Yet, in spite of Wolin's view that the "non-normative nature of decisionism" means that "the decision must be made ex nihilo—in total disregard of the dominant

39. Schmitt, *Theory of the Partisan*, pp. 48–61.

40. Richard Wolin, "Carl Schmitt, Political Existentialism, and the Total State," *Theory and Society* 19, no. 4 (August 1990): 399.

41. Schmitt, *Political Theology*, p. 10.

value paradigms,⁴² Schmitt's privileging of the decision actually results from his focus upon values as the key motivator in politics. If the decision is primary, it is not because a dictator should exercise despotic rule, but because values, though primary, cannot be decided once and for all but are subject to a dynamic in which different value systems can end up confronting each other.⁴³ The decision in this situation is not one that imposes an arbitrary will, but one that decides in favor of one value system over other competing ones.

In contrast to a perspective in which the state should be based on a set of universal norms and values, Schmitt begins with the idea that any political entity, including the state, must establish itself in a situation of competing value systems. The state then becomes the embodiment not just of norms but of a particular set of norms that are to be differentiated from an alternative set of norms. If order in the modern world, for Schmitt, is based on the continuing existence of a state, this is not so much because the state embodies power rather than truth, but because the state establishes a specific perspective on morality and metaphysics, which is then formalized and institutionalized in a set of norms once the sovereign has made the decision for a particular understanding of order. Consequently, if the sovereign suspends the law in the state of exception by the force of a right to self-preservation, what is being preserved is not the life of the individual, not bare life itself, but a particular set of ideals around which the state is built. In contrast to both those, such as Wolin, who would criticize him for privileging "human existence in its brute factivity," and Agamben, who argues that modern politics is indeed grounded in this "factivity" of bare life, Schmitt argues for the primacy of values in political conflicts. His admiration for Donoso Cortés is based upon the conviction that, instead of being either a philosophical deduction of the one true good or an existentialist issue of survival and the body, politics is about morality and theology as contested terrain: "Donoso Cortés always had in mind the final consequences of the dissolutions of the family resting on the authority of the father, because he saw that the moral vanished with the theological, the political idea with the moral,

42. Wolin, "Carl Schmitt," p. 394.

43. G. L. Ulmen describes how Schmitt's understanding of a conflict of values arose as a reaction to the nineteenth-century nihilism debate and especially to Weber's theory of values. G. L. Ulmen, *Politischer Mehrwert: Eine Studie über Max Weber und Carl Schmitt* (Weinheim: VCH Acta Humaniora, 1991), pp. 259–90.

and all moral and political decisions are thus paralyzed in a paradisiacal worldliness of immediate natural life and unproblematic ‘corporal’ity [einem paradiesischen Diesseits unmittelbaren, natürlichen Lebens und problemloser ‘Leib’haftigkeit].”⁴⁴ Schmitt designates here the realm of “immediate natural life” and “corporal’ity” as incapable of containing the political. Rather, politics develops as a consequence of moral ideas, which are in turn based on a particular theology. This theological aspect of the political means that the political is opposed to the purely biological. That is, politics only develops when symbolic systems oppose each other, as in theological disputes. Without the symbolic dimension, conflicts could not constitute themselves into political oppositions but would remain on the level of biological survival, without any type of ethical distinctions around which political conflicts could develop. When he argues that the state “suspends the law in the exception on the basis of its right of self-preservation,”⁴⁵ Schmitt seems to be invoking a realm of existential violence and bare survival in order to demonstrate the seriousness of the situation. Yet, his arguments about the central role of values and ideals in politics contradicts this appeal to bare survival. Accordingly, it is important that he does not refer to the people’s survival but rather to the *state’s* “right of self-preservation.” The state does not seek in the first place to preserve the lives of its citizens, for Schmitt, but to preserve *itself* as a particular symbolic order grounded on one specific theology that is in active competition with one or more other theological perspectives.⁴⁶

It is from this specifically political-theological orientation that Schmitt develops his specific understanding of the state of exception. Contrary to an interpretation of the state of exception that sees it as a realm of pure violence in which every party is seeking to defend its own interests against the interests of others, Schmitt denies that the issue of self-interest even comes up. Instead, he sees the *bellum omnium contra omnes* as a

44. Schmitt, *Political Theology*, p. 65, translation modified; Schmitt, *Politische Theologie*, p. 68.

45. Schmitt, *Political Theology*, p. 12.

46. Although Alexandre Lefebvre recognizes, in citing Schmitt’s *The Concept of the Political*, that “[w]hat is at risk here appears not to be ‘life’ itself, but *lifestyle*, a way of life under siege and not necessarily brute annihilation,” he prefers to see this symbolic aspect as just an attenuation of the primary argument by Schmitt that “the fundamental purpose of the political entity—its necessary condition—is the protection of its members.” Alexandre Lefebvre, “The Political Given: Decisionism in Schmitt’s Concept of the Political,” *Telos* 132 (Fall 2005): 95, 97.

struggle to determine what the general interest is: “Everyone agrees that whenever antagonisms appear within a state, every party wants the general good—therein resides after all the *bellum omnium contra omnes*.”⁴⁷ If every party wants the *general* good in this conflict of all against all, then the core of the conflict is the definition of this general good. Assuming that the issue of self-interest is not a legal or political issue at all, Schmitt contends that “sovereignty (and thus the state itself) resides in deciding this controversy, that is, in determining definitively what constitutes public order and security, in determining when they are disturbed, and so on.”⁴⁸ Because the sovereign must decide when order is disturbed (i.e., it is not self-evident), the main issue is to define and defend what the general interest should be and thus when this general interest is threatened. The decision of the sovereign concerning the state of exception is not an attempt to violently establish personal rule, but rather to decide between competing conceptions of the general good, and the political decision is a decision for one particular theological perspective. Because there is no rational way to decide on a set of ultimate values, a particular notion of order and morality can only establish itself against competing notions in a decision: “Public order and security manifest themselves very differently in reality, depending on whether a militaristic bureaucracy, a self-governing body controlled by the spirit of commercialism, or a radical party organization decides when there is order and security and when it is threatened or disturbed.”⁴⁹ The decision on when order has been threatened or disturbed is at its foundation a decision about what ultimate values are embodied in a particular political order in contrast to other possible orders.

Without theological disputes, politics would never arise, because there would be no competing notions of the good but rather just one true way. Since Schmitt assumes an agnostic stance toward what would constitute the general good, he insists that law is not an objective and absolute truth but a contingent and relative one, which results from the victory of one value system. The state of exception becomes central for Schmitt, because it is a situation in which the conflict of values is unresolved and there are multiple value systems that are competing against one another. As a consequence, the state of exception for Schmitt is not characterized by a

47. Schmitt, *Political Theology*, p. 9.

48. *Ibid.*

49. *Ibid.*, pp. 9–10.

lack of order but by a surplus of orders: the state of exception begins when there is a multiplicity of orders that are in conflict.

Decision as Constitutive of Law

Schmitt describes the connection between politics and theology as a congruence of metaphysical image with political form: “The metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization.”⁵⁰ Though it is sometimes inferred from such statements that Schmitt sees a subjugation of morals and metaphysics to particularistic political interests and thus a destruction of morality, his understanding of the political in fact excludes this possibility. If Schmitt’s decisionism is not at all about self-interest but about establishing the outline and possibility for the general good, then this construction of the general good as a political issue means that the good will have a different structure in every distinct metaphysical/political order. When Schmitt argues that “the legal order rests on a decision and not on a norm,”⁵¹ he recognizes this contingent character of norms and the foundational character of decisions in establishing a legal order and the morality that goes with it. The basis of morality and theology will not have an absolute and universal foundation, and the sovereign must decide which competing notion of the general good will serve to define the presence of order and security. As a result, morality and theology, on the one hand, are the foundation of politics but, on the other hand, can only establish their political significance once the sovereign has made a decision between competing value systems.

This insight into the link between metaphysics and politics leads to a new way of understanding metaphysics based on the reversal of the roles of exception and norm. The logic of a political system is not determined by some preconceived absolute ideal that is constructed outside of this system. Rather, it is the political decision on the exception that establishes the ultimate values in terms of which the norms of a particular polity will unfold. The decision is not a violent and chaotic act that negates order, but the constituting *form* of law that establishes the first set of distinctions and value judgments upon which the law itself is based. In arguing for the primacy of the decision, Schmitt also establishes the framework for thinking

50. Ibid., p. 46.

51. Ibid., p. 10.

about the origins of values, while recognizing competing metaphysical standpoints.

When Schmitt claims that the decision precedes the norm, he is establishing a new approach to values and meaning that begins from the assumption that any metaphysical system will always be a specific one and not a universal one. As Sarah Pourciau lays out, instead of adhering to an Aristotelian understanding of identity and difference that “presupposes a bird’s eye” view and results in an objective, universal hierarchy of categories, Schmitt insists on the “realities of human rootedness” and “the necessarily fictional nature of the objective standpoint.” Beginning with the assumption of the perspectival nature of human existence, Schmitt creates a reversal of the universalist approach, “so that, in place of an initially undifferentiated universe parceled into ever-smaller territories by the negative power of difference, he offers a confrontational event, which first makes thinkable the notion of relational, divisible space. Negation precedes identity as the precondition for all substance, and familial similarity becomes the consequence of the oppositional relation with an external other.”⁵² Difference precedes identity in Schmitt’s schema, because identity can only be established within the bounds of a particular perspective on the world. Identity cannot exist until this perspective has been established in the decision that creates difference.

Schmitt demonstrates this primacy of the legal decision before the law by pointing to the example of a faulty decision, which, because of its falsity, becomes independent of the legal idea. To the extent that it still has a binding effect in spite of its falsity, this faulty decision demonstrates that every legal decision also has a constitutive moment:

The decision becomes instantly independent of argumentative substantiation and receives an autonomous value. The entire theoretical and practical meaning of this is revealed in the theory of the faulty act of state. A legal validity is attributed to a wrong and faulty decision. The wrong decision contains a constitutive element precisely because of its falseness. But what is inherent in the idea of the decision is that there can never be absolutely declaratory decisions. That constitutive, specific element of a decision is, from the perspective of the content of the underlying norm, new and alien. Looked at normatively, the decision

52. Sarah Pourciau, “Bodily Negation: Carl Schmitt on the Meaning of Meaning,” *MLN* 120 (2005): 1074–75.

emanates from nothingness. The legal force of a decision is different from the result of substantiation. Ascription is not achieved with the aid of a norm; it happens the other way around. A point of ascription first determines what a norm is and what normative rightness is. A point of ascription cannot be derived from a norm, only a quality of a content.⁵³

The validity of the faulty decision can only hold if the judge still maintains the authority to pass judgment and if the people accept this authority in spite of the bad decision. In this case, however, the faulty decision is an extreme case that demonstrates that all decisions are independent and defining. The decision establishes an initial “point of ascription” from which normative rightness can then flow. If the decision is faulty, this can only be corrected by another decision in the future. That is, in the event that the faulty decision leads to unwanted consequences, future decisions would have to be adjusted to avoid a repetition of the bad decision. Alternatively, if it turns out that the faulty decision is later on generally acclaimed to be a good one, even though it may contradict the law or earlier decisions, the “faulty” decision would then lead to a revision of law and a new precedent for future decisions. In either case, the decision is not calculated with the help of a norm. Rather, the opposite is the case. Each decision is independent and defining and becomes the initial point of ascription from which the norm can be derived. The sequence of specific decisions can then establish a tradition upon which a more or less stable set of norms can be based.⁵⁴

At the time of the first edition of *Political Theology*, Schmitt had not yet developed this understanding of the significance of decisions for the building of a tradition as opposed to their purely “decisionistic” quality. However, he does emphasize this distinction in his preface to the 1934 edition, where he distinguishes the political decisionism of the sovereign from the institutional legal thinking that “unfolds in institutions and organizations that transcend the personal sphere.”⁵⁵ In the political decision in the state of exception, there is no clear tradition in cases where the sovereign

53. Schmitt, *Political Theology*, pp. 31–32.

54. This understanding of decisions as the basis of a tradition would be Schmitt’s response to Jacques Derrida’s critique of Schmitt’s lack of consideration for the continuity of identity in a tradition. See Jacques Derrida, *The Politics of Friendship*, trans. George Collins (London: Verso, 2005), pp. 92–100.

55. Schmitt, *Political Theology*, p. 3. See also Carl Schmitt, *On the Three Types of Juristic Thought*, trans. Joseph Bendersky (Westport, CT: Praeger, 2004), pp. 60–61.

must choose from a variety of competing metaphysical standpoints. It is in this case that all law must flow from a decision that establishes a particular understanding of an ultimate political value that must establish itself in competition with alternative understandings. This state of competition between value systems, rather than a state of anomie, is what comes to the fore in the state of exception, and the end of this state of exception can only arrive when competing notions of order have been ruled out in the decision.

This decision is primary in that no determination about the character of a system can be made until it has been founded on the particular decision that establishes the common basis upon which law can function. The homogeneity that Schmitt sees as the prerequisite for the rule of law is then the inner consequence of the fact that the decision establishes the specific perspective from which a particular set of values can make sense: “The norm requires a homogeneous medium. This effective normal situation is not a mere ‘superficial presupposition’ that a jurist can ignore; that situation belongs precisely to its immanent validity. There exists no norm that is applicable to chaos. For a legal order to make sense, a normal situation must exist, and he is sovereign who definitely decides whether this normal situation actually exists. All law is ‘situational law.’ The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision.”⁵⁶ As this passage’s linking of homogeneity to the “situational” character of law attests, homogeneity within a legal order is the flip side of the possibility of maintaining differences of perspective in the world. This homogeneity does not have to be a totalizing homogeneity that eradicates all difference, but rather only a homogeneity from the perspective of the one crucial point that structures political identity and provides the basis for order. For example, we can understand the Bill of Rights in the United States as the basis for a political homogeneity that is required of all citizens, even though they may be heterogeneous with respect to other aspects of their identity. It is on the basis of this one element of political homogeneity, however, that U.S. foreign policy has tended to define its enemies and thereby its own specific difference in the world.⁵⁷

56. Schmitt, *Political Theology*, p. 13, translation modified; Schmitt, *Politische Theologie*, p. 19.

57. Though Schmitt does not develop this argument with respect to the United States, he sets it up in his insistence that the constitution of Weimar Germany required a substantive aspect in addition to its formal, procedural aspect. See Carl Schmitt, *Legalität und Legitimität* (Berlin: Duncker & Humblot, 1988), pp. 97–98.

Conclusion

The cultural significance of Schmitt's decisionism has both an external aspect and an internal aspect. The external aspect concerns the way in which a particular legal order must establish itself against competing legal orders in the state of exception. A legal order only gains legitimacy once order has been established in the decision, not because order is imposed by force but because, for Schmitt, order is not neutral but implies a particular way of understanding order, as opposed to alternative ways. Otherwise, there would be no need to decide when order and the normal situation are present.

Though the decision to defend one particular understanding of order comes from the sovereign, Schmitt emphasizes that this is the only capacity of sovereignty: "Therein resides the essence of the state's sovereignty, which must be juristically defined correctly, not as the monopoly to coerce or to rule, but as the monopoly to decide."⁵⁸ The role of the sovereign is only to decide on whether there is a normal situation and not to violently impose it. But if the sovereign only has a monopoly on the decision rather than on violence, then the sovereign's authority must be based on an implicit support from those who would agree with and carry out the decision. Because the sovereign only decides on the state of exception and does not in fact have a monopoly on violence or domination, the sovereign decision that establishes ultimate values is constrained by the capacity of the political entity to embrace this decision.

Herein lies the internal aspect of culture in Schmitt's decisionism, which is not a justification for the sovereign's dictatorial domination of the people, but rather an argument for how a collective constitutes the metaphysical foundation of its identity out of the decision. According to this argument, every collective must make a decision as a group about its identity in order to exist as a political entity. This decision is not one about self-interest but about the values that define the general good. As a consequence, such a decision cannot be objectively or rationally justified but must be established as a choice between competing value systems. Finally, this decision cannot be a direct translation of the collective will. Instead, any such translation will include a formative moment, and Schmitt's emphasis on the role of the sovereign takes into account the representational aspect of the decision.

58. Schmitt, *Political Theology*, p. 13.

Though it may be objected that the sovereign's decision is not an adequate reflection of a popular will, this objection does not touch on the basic premises of decisionism but only on the mechanics of how the popular will can be translated into specific decisions and actions. Schmitt's insistence on the sovereign's active role in this translation indicates a consciousness that this process of translation will never be a transparent and immediate one. In any case, an alternative schema for understanding the building of a collective will must still face the question of the metaphysical grounding of a political system in a world that includes various and conflicting political/metaphysical perspectives.

While we can criticize Schmitt for assuming that any existing stable order is justified by the mere fact of its ability to establish and maintain itself, this criticism is facile if it does not confront the issue of the plurality of metaphysical systems that exist in the world as the result of fundamental cultural differences. Schmitt's concept of the decision, therefore, remains compelling as a way of understanding how the foundations of a political order begin as the manifestation in the world of a particular idea of the general good that must establish itself against competing ideas. Though his own politics may have been fatefully guided by his ideological and metaphysical preferences, Schmitt's decisionist framework remains valuable to the extent that, in spite of its implicit bias toward a nation-state perspective on the political,⁵⁹ it still provides tools for approaching the contingent character of political identity in a world of conflicting cultures.⁶⁰

59. Since Schmitt focuses on seeing the political as divided up into nation-states, each with its own territory, his understanding of the state of exception as a situation of competing systems can be read as part of his own polemic (made clear, for instance, in his objections to liberalism in *The Concept of the Political* and to Leninism and Maoism in *Theory of the Partisan*) against anti-nationalist understandings of the political that would privilege a universalist ideology (based for example on religion or economics or morality) cutting across territorial divisions.

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