Carl Schmitt's Defense of Sovereignty

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H.L.A. Hart once remarked that a sovereign, according to the classical doctrine of sovereignty, is "as essential a part of a society which possesses law, as a backbone is of a man."[1] Not least as a result of Hart's own attack on Austin's theory of sovereignty, analytical legal theorists today agree that a sovereign is not just unnecessary for but even incompatible with the existence of legal order. To explain the variety and persistence of legal norms, the continuity of legal order, as well as the evident possibility of legal constraints on legislative power, so the contemporary legal-theoretical consensus, legal order must be regarded as rule-based. As a result, sovereignty can at best be an office defined by positive law. There can be no meta-legal, purely political power that is legally illimitable and yet functions as the source of all positive law.[2]

Nevertheless, the doctrine of sovereignty is not without its contemporary defenders. The authors in question, though, rarely address the legal-theoretical worries about sovereignty head on. Rather, they argue that sovereignty is essential to the legitimacy of a modern democratic constitution. To be democratically legitimate, it is claimed, a constitution must be the product of an exercise of a constituent power that is

[1] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) 49.

[2] See Hart (n. 1 above) 18-76; Joseph Raz, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (Oxford: Oxford University Press, 1970) 27-43; Pavlos Eleftheriadis, 'Law and Sovereignty', in *Law and Philosophy* 29 (2010) 535-569.

prior to all positive law (including positive constitutional law) and that functions as the legitimating source of all positive legality.[3] A popular sovereign that stands above all positive law, hence, is the cornerstone, according to Martin Loughlin, of any modern public law.[4]

However, if the doctrine of sovereignty conflicts with key features of legal order, a constitutional theory based on the concept of sovereignty must be flawed. And if the idea of a sovereign authority as the source of legal order can't possibly make any sense, we will have to let go of the claim that a constitution must be legitimized by reference to constituent power. Those who want to hold on to the notion of sovereignty, because they think it essential to a democratic constitutional theory, must first establish that the concept of sovereignty is jurisprudentially meaningful.

Carl Schmitt's theory of sovereignty is the obvious place to look for a defense of the continuing jurisprudential relevance of the concept of sovereignty. Schmitt's famous definition of sovereignty - sovereign is he who decides on the state of exception[5] - offers a surprisingly sophisticated response to the legal-theoretical challenge to sovereignty. Schmitt managed to show, I will argue, that the presence of a legally illimitable sovereign whose decisions condition the applicability of law is not incompatible with the existence

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[3] See for example: Dieter Grimm, *Souveränität. Herkunft und Zukunft eines Schlüsselbegriffs* (Berlin: Berlin University Press, 2009) 99-123; Olivier Beaud, *La puissance de l'état* (Paris: Presses Universitaires de France, 1994) 199-491; Paul W. Kahn, *Political Theology. Four New Chapters on the Concept of Sovereignty* (New York: Columbia University Press, 2011).

[4] See Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010).

[5] Carl Schmitt, *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, 2nd edition (Berlin: Duncker&Humblot, 1996) 13.

of rule-based legal order. Still, Schmitt's theory of sovereignty falls short of a full rehabilitation of the classical doctrine of sovereignty. His argument does not establish that a sovereign is as necessary to law as a backbone is to a man. Like his contemporary followers in constitutional theory, Schmitt claims instead that a sovereign is necessary for the existence of a *legitimate* legal order.[6]

To assess Schmitt's theory of sovereignty, as well as contemporary efforts to defend the relevance of sovereignty for democratic constitutional theory, we therefore have to ask whether there is good reason to hold that a legal order can only be legitimate if it derives from a sovereign power above the law. I will argue that there is not. Schmitt's defense of sovereignty, despite its partial success against the legal-theoretical criticism of sovereignty, is a dead end for the doctrine of sovereignty.

The aims of Schmitt's theory of sovereignty will remain opaque unless they are situated in the context of the history of the doctrine of sovereignty. I will therefore begin by offering a brief discussion of the classical doctrine of sovereignty in the work of Thomas Hobbes, and then go on to outline the criticism of the doctrine of sovereignty in the legal theories of Hart and Kelsen.

I. Hobbes and the Sovereignty of the State

In explaining how a social contract is made, and what its effects are, Hobbes talks about the state before he talks about the sovereign. The state, we hear in chapter 17 of *Leviathan*, is "One Person, of whose Acts a great Multitude, by mutuall Covenants one

[6] See Hasso Hofmann, *Legalität gegen Legitimität. Der Weg der politischen Philosophie Carl Schmitts*, 4th edition (Berlin: Duncker&Humblot, 2002); David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1997) 38-101.

with another, have made themselves every one the Author,"[7] in the expectation that the artificial person thus created will use the united power of all to give protection from the dangers of the state of nature to each. The sovereign, in turn, is introduced in the next sentence as "he that carryeth this Person."[8] The sovereign, in other words, is a representative, the representative of the person of the state. Consequently, the powers that Hobbes attributes to the sovereign are not the private property of the natural person or group of natural persons who are sovereign. They are essentially public powers.

Hobbes's discussion of essential powers of sovereignty in the next chapter reinforces this point.[9] In order to arrive at a list of the powers that are "inseparably annexed"[10] to the office of sovereignty, Hobbes asks what powers a sovereign must be able to wield in order to secure the survival of the artificial person of the state. Hence, it is the interest of the state, not the interest of the person or group of persons who hold sovereign power, that determines the material content of the power of sovereignty.

Of course, Hobbes was an absolutist and an authoritarian political thinker. The list of essential sovereign powers that Hobbes offers in chapter 18 of *Leviathan* includes an impressive array of competences. Hobbes is insistent, moreover, that the state will be able to provide peace and security to its subjects only if all these powers are united in the hands of one person or one group of persons. Any form of separation or division of powers, in Hobbes's view, would raise the danger of an irresolvable conflict between

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[7] Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge: Cambridge University Press, 1996) 121.

[8] Ibid. 121.

[9] Ibid. 121-9.

[10] Ibid. 127.

different organs of state.[11] Finally, Hobbes puts strong emphasis on the claim that the sovereign is not legally accountable to his subjects in any way. Not being a party to the social contract, the sovereign cannot rightfully be deposed, accused of injustice in a court of law, or be punished.[12]

It would nevertheless be mistaken to infer that the powers of Hobbes's sovereign are legally unlimited. Throughout *Leviathan,* Hobbes repeatedly emphasizes the claim that the sovereign lacks the legal power to alienate any of the essential rights of sovereignty. In particular, Hobbes is very anxious to hammer home the point that a sovereign cannot possibly be bound to decisions of previous sovereigns that appear to have granted away sovereign powers, such as the power to tax without seeking consent. Any such grant, in Hobbes view, is to be regarded as void, unless it went along with an explicit renunciation of sovereignty.[13]

Needless to say, an individual person holding the office of sovereignty may well have a private interest in alienating a power of sovereignty. The sovereign's legal incapacity to alienate any essential power of sovereignty results from the fact that such an alienation would endanger the survival of the collective person that we call the state. A sovereign power cannot be alienated, in other words, because a sovereign person, in taking the decision to alienate it, could never be understood to act in the name of the state. It follows that Hobbesian sovereignty must be an attribute of the state, and not the private property of those who hold the office of sovereignty.

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[11] Ibid. 127.

[12] Ibid. 122-4.

[13] See ibid. 127, 153, 222.

The inalienability of sovereign power in Hobbes illustrates an important feature of Hobbes's theory of the state, a feature that is also evident in the claim that one can draw up a list of essential powers of sovereignty, or in the claim that no system of government can possibly accommodate a separation of powers and still fulfill its essential function. In Hobbes's view, the social institution that we call the state has an essence or nature that is determined by its function. The function of the state is to provide peace and security to its members, by ending the state of nature between them, and by protecting them against external enemies. Any institution that could possibly serve this purpose with a degree of success sufficient to deserve to have its claim to authority recognized must, according to Hobbes, instantiate the constitutional framework laid out in *Leviathan*. Both the sovereign and the parties to a social contract are bound, according to Hobbes, to what I will call a 'constitution in natural law.'

Hobbes's constitution in natural law is concerned, in large part, with the organization of the institutional structures through which political power is to be exercised. It primarily aims to enhance the efficiency of the exercise of power, and to brush aside the relics of a feudal constitutionalism that Hobbes believes must frustrate the sovereign's ability to secure peace and order. Thus, Hobbes famously claims that all positive laws or laws 'properly so called' are sovereign commands, which implies that a sovereign's legislative power cannot be restricted by positive law.[14] Still, the dependence of positive legality on sovereign authority is only one aspect of the relationship between law and sovereignty embedded in the constitution in natural law. The second key aspect

[14] See ibid. 184-5.

of that relationship is given by the tight connection that Hobbes forges between the function of the state and the ideal of the rule of law.[15]

Hobbes clearly believes that it is one of the sovereign's primary tasks to use his legislative power to concretize the laws of nature discussed in chapters 14 and 15 of *Leviathan*, and to make the moral code expressed in the laws of nature applicable, through adjudication and enforcement, to the solution of concrete social conflict. Hobbes goes so far as to claim that the laws of nature have legal force in every possible state, regardless of whether the sovereign took care to incorporate them explicitly into the positive law.[16] He suggests, moreover, that a sovereign lacks the authority to enact an explicit legislative ouster of judicial recourse to the laws of nature, though his understanding of the laws of nature will, of course, prevail against anyone else's.[17] The sovereign's attempts to govern his subjects, finally, are bound to the rule of law and to principles of natural justice, in the sense that his authority over subjects who are not treated in accordance with the rule of law must necessarily lapse.[18]

The laws of nature, though they are not proper laws without the sword of the sovereign, provide the concrete content to Hobbes's conception of peace and security, and

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[15] For some recent work affirming the importance of the rule of law for Hobbes see chapters 6-10 in *Hobbes and the Law*, ed. by David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2012); Perez Zagorin, *Hobbes and the Law of Nature* (Princeton: Princeton University Press, 2009) 84-98.

[16] See Hobbes, *Leviathan* (n. 7 above) 185.

[17] See ibid. 190-5; David Dyzenhaus, 'Hobbes and the Legitimacy of Law', in *Law and Philosophy* 20 (2001) 461-98.

[18] See the discussion of punishment in Hobbes, *Leviathan* (n. 7 above) 214-21.

thus to his understanding of the essential functions of the state. The Hobbesian state, therefore, is necessarily committed to the goal of creating a stable and dependable legal order, and a sovereign cannot openly disavow the pursuit of that goal, or constantly act in ways evidently incompatible with it. Hobbes would have resisted the idea that exceptional exercises of extra-legal power reveal the true essence of sovereign power. That essence is defined by the function of the state, which is to provide for peace and security through the creation and maintenance of legal order.

Hobbes bears a degree of responsibility, though, for the fact that the limitative consequences of his constitution in natural law have often been overlooked by commentators. His obsession with the prevention of internal political discord has made it difficult to recognize the sovereignty of the state in the powers attributed by Hobbes to the sovereign person or group of persons. Hobbes argued that a state can be sovereign (or, what amounts to the same thing, that it can exist) only if it is represented by a sovereign organ, by a person or group of persons who hold all the essential powers of the state in their own hand. For all practical intents and purposes, Hobbes identified the sovereignty of the state with the authority of the sovereign person, so as to rule out any internal dispute about who is to speak in the name of the state.

This identification is based on a number of empirical assumptions that have turned out to be false. Historical experience has shown that Hobbes was wrong to believe that a state, in order successfully to pursue the goals of providing a rule of law, public security, and protection against external enemies, must be represented by a sovereign authority that unifies all powers of the state in the hands of one person or group of persons. A latter day Hobbesian would have to argue, presumably, that modern states

whose constitutional structures do not fit Hobbes's constitution in natural law are not really states at all, that they merely conceal a continuing state of war among different social groups. Such a claim is too preposterous to merit refutation.

It does not follow, however, that it is wrong to think that the state has essential purposes - including the purposes of providing peace, security, and the rule of law - or to hold that it must claim an authority that can reasonably be called 'sovereign' to be able to achieve those purposes. Arguably, a state, to create peace and security, must still take itself to be the supreme arbiter of all social conflict in a certain territory, it must still successfully monopolize the use of legitimate coercive force in that territory, and its decision-taking must still be organized in such a way as to ensure that there is a clear and unambiguous procedural path towards the final settlement of any potential dispute.[19] The dismissal of the Hobbesian sovereign, I conclude, does not establish that the state cannot or need not be sovereign. Rather, it should help us to put the focus of the doctrine of sovereignty where it belongs: on the state.[20]

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[19] See for more detailed discussion Lars Vinx, 'Constitutional Indifferentism and Republican Freedom', in *Political Theory* 38 (2010) 809-37.

[20] Hobbes, at any rate, is not the only author who developed an idea of a constitution in natural law. As Martin Loughlin has shown in his magisterial study on the foundations of public law, many early modern authors tried to develop theories of a constitution in natural law or, to use Loughlin's terminology, a 'science of public right'. See Loughlin, *Foundations of Public Law* (n. 4 above) 91-180. In Loughlin's view, however, the failure of early modern natural law theorists to agree on a particular conception of the constitution in natural law suggests that the project of a science of public right is doomed to fail. See ibid., 157-64. Public law, Loughlin concludes, must be based on a prudential and not on a scientific discourse of politics. I am not convinced that we should dismiss the idea of a constitution in natural law so quickly. The mere fact that authors have put forward different accounts of a constitution in natural law (or, what amounts

II. Austin, Hart, and the Problem of Legislative Sovereignty

John Austin's theory of sovereignty is too well-known to require a lengthy rehearsal. Austin's most fundamental assumption is that all laws are general commands. Austin understands a command as a mandatory directive, issued by a superior to a less powerful inferior, and backed by the threat of a sanction in case of non-compliance. He distinguishes commands that are proper laws from other general commands by reference to their enactment by a sovereign, who is defined as a person or group of persons habitually obeyed by the majority of the members of a society and not paying habitual obedience to anyone else.[21]

Though Austin presents his legal theory as a development of Hobbes's ideas, his approach is much narrower in its focus and in its concerns than Hobbes's theory of the state. Take the view that there must be a sovereign wherever there is law, or the view that a sovereign's authority is not limitable by positive law. For Hobbes, these claims are grounded in substantive claims about the essential function of the state, and the necessary institutional means of their attainment. In Austin, by contrast, they are reduced to implications of stipulative definitions of ‘law' and ‘sovereignty.' Austin, for instance, declares limited sovereignty to be a "flat contradiction in terms" [22] for the simple reason

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to the same thing, different accounts of the nature of the state) hardly suffices to show that the project of a science of public right is bound to fail. It may as well be the case that its concepts have yet to be elevated to the requisite level of generality.

[21] See John Austin, *The province of Jurisprudence Determined*, ed. Wilfrid Rumble (Cambridge: Cambridge University Press, 1995) 18-37, 164-241.

[22] Ibid. 212.

that a sovereign, by definition, does not pay habitual obedience to anyone else and thus cannot be subject to laws that are conceived as commands of a superior power.

Of course, the point here is not that Hobbes would disagree with the view that sovereignty limited by positive law is a contradiction in terms. The point is that Hobbes's theory of the state attempts to explain why all positive laws or laws 'properly so-called' must be sovereign commands, and why subjection to positive law would destroy sovereignty (and thus all orderly government); by arguing that the state must take a certain institutional form - a form structured by the principle of sovereignty - in order to be able to provide peace and security. Such a substantive explanation of the need for sovereign authority in a theory of the state is nowhere to be found in Austin.

What is more, Austin's reductive account of the sovereign as a natural person or group of natural persons receiving habitual, *de facto* obedience from the bulk of a population makes it impossible to conceive of the sovereign as a representative of the state. Austin's legal theory, as Kelsen rightly observed, simply lacks the conceptual resources to draw the distinction between the sovereignty of the state and the *de facto* power of a sovereign person.[23] As a result, Austin fails to recognize the legal limitations of sovereign authority that might flow from a constitution in natural law.

As Hart has shown with admirable clarity, Austin's theory of sovereignty cannot account for the continuity of legal system, and the persistence of laws, in cases where a sovereign is succeeded by a new sovereign. It also mistakenly assimilates all laws to sovereign commands and thus fails to acknowledge the diversity of legal rules, and in

[23] See Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence', in Hans Kelsen, *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley: University of California Press, 1957) 266-87.

particular the existence of secondary rules that determine how mandatory legal rules are to be introduced, changed, or authoritatively applied.[24] The fact that all legal systems contain secondary rules, and most importantly a rule of recognition setting out the criteria for the validation of law, serves to explain, in Hart's theory, how even the legal powers of a legislator who is not subject to sanction-backed legal duties can come to be limited: a rule of recognition may withhold from a legislator the authority to legislate in certain ways and thus create limitations of legal authority in the form of legal incapacities.[25] Austin's sovereign, a legislator who can legislate in whatever way it pleases, now appears as only one of many possible forms of legislative authority under a rule of recognition.

I do not wish to take issue with the cogency of Hart's criticisms of Austin. What I would like to suggest, though, is that Hart's critique of Austin remains beholden to the narrowing of jurisprudential perspective that is implicit in Austin's reduction of the theory of the state to a mere theory of legal system. As I pointed out, Austin's theory lacks the conceptual resources to recognize that sovereignty is an attribute of the state, and this limitation carries over into Hart's legal theory. Hart established that if sovereignty is understood exclusively as legislative authority that inheres in a particular natural person or group of natural persons, in virtue of overwhelming *de facto* power, the appeal to sovereignty must fail to explain certain key features of legal system. But Hart, like Austin, does not address the substantive claims of Hobbes's theory of public law, which, as we have seen, conceives of sovereignty as an attribute of the state that is grounded in the essential functions of the state.

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[24] See Hart, *The Concept of Law* (n. 1 above) 18-76.

[25] See ibid. 64-9.

As a result, Hart's criticisms of the doctrine of sovereignty are not as general in their jurisprudential bearing as may appear at first glance. They do not apply to versions of the doctrine of sovereignty that conceive of sovereignty as an attribute of the state, and that allow for the possibility of a sovereign state not governed by a sovereign person or group of persons. Likewise, they do not apply to versions of the doctrine of sovereignty that do not understand sovereignty as a legislative power. Consequently, Hart's attack on sovereignty fails to show that the doctrine of sovereignty is no longer jurisprudentially meaningful in any of its possible forms.[26]

III. Kelsen on the Sovereignty of the State and the Sovereignty of Law

Kelsen's reflections on sovereignty engage the problem of the sovereignty of the state much more directly than Austin's or Hart's. In his major work on sovereignty - *Das Problem der Souveränität und die Theorie des Völkerrechts* - Kelsen did not reject the doctrine of sovereignty. Rather, he tried to work out the constitutional consequences of the view that sovereignty is an attribute of the state.[27]

Kelsen's reconstruction of the doctrine of sovereignty starts out from the observation that all variations of the doctrine of sovereignty - despite their lack of agreement on a clear conception of sovereignty - concur that the subject to which sovereignty is attributed is to be regarded as a highest or a supreme authority to which all other persons or agents are subject, while it is not itself subject to any other authority.

[26] The same holds for Eleftheriadis, 'Law and Sovereignty' (n. 2 above).

[27] Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre* (Tübingen: J.C.B. Mohr-Paul Siebeck, 1920) 1-101.

Consequently, if the state is regarded as sovereign, then the state must be "something that occupies a highest position."[28]

Kelsen points out that the concept of sovereignty, so understood, is ambiguous.[29] It could be taken to refer to an empirical fact of domination, i.e. to the psychological or sociological fact that the will of a sovereign state (or rather of those who exercise its *de facto* power) is sufficient to motivate the will of its subjects, and thus to cause them to act in a certain way. Kelsen associates this view with Georg Jellinek, who claimed that the state can be regarded under two aspects: as a social fact of power and as a normative order under law. Jellinek gave priority to the first of these two aspects, and argued that the state as a fact of power creates a legal order, and then proceeds to bind itself to the law, though not irrevocably, through its own free decision.[30]

A conception of the sovereign state as a fact of power, in Kelsen's view, must end in failure. To say that the state is sovereign as a fact of power, Kelsen argues, is to say that the will of the state determines the motivations of its subjects without being itself determined by antecedent causes. But such a claim is meaningless, since any psychological or sociological description of the causal relationships between, for instance, the will of the state and the will of its subjects is committed to the assumption that the will of the state (or of those who exercise its powers) must itself be caused by

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[28] Ibid., 5.

[29] See ibid. 4-9.

[30] See Georg Jellinek, *Allgemeine Staatslehre*, 3rd edition, ed. Walter Jellinek (Berlin: O. Häring, 1914) 367-75. For a very interesting and unduly neglected criticism of Jellinek's theory see Leonard Nelson, *Die Rechtswissenschaft ohne Recht. Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts* (Leipzig: Veit&Comp., 1917) 6-76.

some antecedent causal factor or set of factors. It is a condition of the intelligibility of the causal world that every event has a cause.[31]

The claim that the sovereign state is something that occupies a position of supremacy, however, can be understood in a fundamentally different way that does not lead into incoherence. The supremacy of the will of the sovereign state over that of its subjects can be interpreted normatively.[32] To say that the will of the state is supreme must then mean that its decisions are binding or obligatory for its subjects, whereas the will of the state itself is not bound to conform to the decisions of any yet higher will. To assume that the decisions of the will of the state are binding on its subjects is to assume that the will of the state has normative authority. Such authority could not be a result, Kelsen argues, of a mere *de facto* power of coercion. Rather, it must result from the fact that the state is empowered by an antecedent norm to issue binding directives to its subjects.

Since we cannot derive ought from is, a norm can only be validated by another norm, and not by recourse to a social or psychological fact. To avoid an infinite regress of validation, there must, therefore, be a fundamental norm that is the source of the validity of all other norms of any complete legal order. This fundamental norm, Kelsen will later call it the ‘basic norm', is not itself derived from any other norm. Its validity, rather, is presupposed by legal science, as a necessary condition of the normativity of law. Sovereignty can now be understood as a property of a complete legal order. A legal order

[31] See Kelsen, *Das Problem der Souveränität* (n. 27 above) 6-7.

[32] See ibid. 8-9.

is supreme if and only if its normative authority is not derived from an external source, but rather from its very own basic norm.[33]

What we call the sovereignty of a state, from a normative point of view, simply is the normative independence of the state's legal system. The state, from a legal point of view, is to be regarded as identical with its legal system.[34] The state, Kelsen argues, is not a real person. It can act only where it is possible to attribute acts performed by natural persons to the state. Such attribution, however, requires that the natural persons in question be legally authorized to act in the name of the state. Since Kelsen rejects the idea of a constitution in natural law, at least in its narrow, Hobbesian form, which claims that all the authority of the state must always be concentrated in the hands of one person or group of persons, such legal authorization must now be based on positive law. Kelsen concludes that there can be no such thing as an illegal act of state. An act not authorized by positive law simply could not be recognized as an act of state. The sovereignty of a state, therefore, can be no more than the personification of the unity of its positive legal order in which we picture the normative independence of its legal system.[35]

This view of the relation of law and state implies that the state cannot be a transcendent creator of law. In order for anyone to exercise legislative powers in the name of the state, there must already be a foundational norm that confers legislative authority, but that norm cannot itself be the result of an exercise of a power to make laws. Jellinek's view that the sovereign state is a fact of power prior to law that creates a legal

[33] See ibid. 9-16.

[34] See ibid. 12-3. For further discussion of the identity thesis see Lars Vinx, *Hans Kelsen's Pure Theory of Law. Legality and Legitimacy* (Oxford: Oxford University Press, 2007) 78-98.

[35] See Kelsen, *Das Problem der Souveränität* (n. 27 above) 16-21.

system out of legal nothingness is therefore false.[36] Though Kelsen continues to regard the state as sovereign, his claim that the sovereignty of the state is the normative independence of its legal order implies that organs of state will be in a position invoke the sovereignty of the state to justify their acts only as long as what they do turns out to be authorized by the positive law.[37] The sovereignty of the state, hence, is internally related to a principle of legality. The view that sovereignty is an attribute of the state, taken to its logical conclusion, leaves no room for a sovereign above the positive law.

Kelsen's argument is often subjected to criticisms that, in my view, echo Schmitt's polemics against Kelsen[38] somewhat too uncritically. In preparation for our discussion of Schmitt, it might be helpful to briefly discuss a recent example. Martin Loughlin claims that the question of how the "sovereign entity of the state" can "be subject to law" "simply evaporates" if "the state is the legal order *tout court*".[39] Kelsen would be well within his rights to object to this assessment. In his view, the problem does not at all disappear. Rather, it transforms into the question of how to make sure that those who (claim to) act on behalf of the state do not violate or exceed the legal boundaries imposed by the positive norms that authorize their activity, a question that is plainly analogous in

[36] See ibid. 40-7.

[37] See ibid. 16-7, 24-7.

[38] See Schmitt, *Politische Theologie* (n. 5 above) 26-9; Carl Schmitt, *Verfassungslehre*, 8th edition (Berlin: Duncker&Humblot, 1993) 8-9; Carl Schmitt, *Der Hüter der Verfassung*, 4th edition (Berlin: Duncker&Humblot, 1996) 38-40, n. 2.

[39] See Loughlin, *The Foundations of Public Law* (n. 4 above) 217.

form to the question of how a Hobbesian sovereign person can be made to stick to the constitution in natural law. Kelsen had quite a lot to say about that issue.[40]

The mistaken claim that Kelsen defined the problem of the legality of acts of state out of existence seems tied to a questionable interpretation of modern legal positivism. According to Loughlin, "the public realm now presents itself as autonomous, it cannot be anchored in either divine law or natural law. The public realm must function according to laws that we have given ourselves". It would be tempting but wrong, Loughlin goes on to argue, to "to follow Hobbes" and to infer from this that "law means simply the command of the established law-making authority". To do that, Loughlin holds, would imply that "the conditions under which [...] law-making authority is exercised are matters of politics that lie beyond juristic knowledge". [41]

As I have tried to show, this claim goes wrong even as an interpretation of Hobbes, for the reason that Hobbes acknowledges that the valid exercise of legislative authority is conditioned by a constitution in natural law that, in Hobbes's view, surely is not beyond juristic knowledge. But it is also wrong as a charge leveled against the legal positivism of Kelsen (or, for that matter, of Hart), notwithstanding the fact that the assessment can appeal to the authority of Schmitt. According to Kelsen laws are not mandatory commands issued by an un-commanded commander. They are rules that authorize organs of state to employ legitimate force. As such, they lay down the conditions, among other things, of the rightful exercise of legislative power. It is therefore

[40] See for instance Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit', in *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, Heft 5, Berlin and Leipzig 1929, 30-88.

[41] Loughlin, *Foundations of Public Law* (n. 4 above) 158.

plainly false to claim, with Schmitt, that the conditions of the rightful exercise of political power lie beyond juristic knowledge for Kelsen.[42]

What seems to be going on here is that Loughlin wrongly attributes an Austinian view of law to Kelsen (and to positivists and 'normativists' in general), in order to chastise Kelsen for not recognizing that there is a law that enables and conditions the exercise of political power. This maneuver is made all the less convincing by the fact that Loughlin himself seems implicitly attached to an Austinian picture of law. While he attacks Austin's claim that all law is sovereign command, Loughlin at times seems to express his agreement with the view that, in a modern legal order, all *positive* law is sovereign command.[43] He also holds that 'droit politique', the meta-positive law that is said to constitute the state, is not judicially enforceable and that its content, since it cannot be drawn from a science of public right, is wholly subject to the unrestricted choices of the (popular) sovereign.[44] In substance, this is an Austinian picture of the

[42] For an overview of Kelsen's treatment of these issues see Vinx, *Hans Kelsen's Pure Theory of Law* (n. 34 above) 78-100. Kelsen's most elaborate reply to the Schmittian criticisms of 'normativism' is to be found in Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' in Die Wiener rechtstheoretische Schule. Schriften von Hans Kelsen, Adolf Merkl, Alfred Verdross, vol. 2, ed. by Hans R. Klecatsky, Rene Marcic, and Herbert Schambeck (Wien: Verlag Österreich, 2010) 1533-73.

[43] See Loughlin, *Foundations of Public Law* (n. 4 above) 186, 196, 209-16.

[44] For instance ibid. 229: "Political power is absolute, in the sense that the authority of the people to fashion the political world is unbounded: the authority exercised through the public sphere cannot be limited by claims of history, custom, or inherited religious beliefs. The only constraints are immanent, those that the people or their representative governors determine to be in the public interest." Loughlin's argument, here and elsewhere in *Foundations of Public Law*, seems to me to misunderstand the idea of an immanent constraint. Let us assume for the purpose of argument that Hobbes's conception of a constitution in natural

relation between the sovereign and the law, veiled by the rhetorical choice to refer to what Austin would have called constitutional morality as 'droit politique'.

This rhetorical choice, however, begs the question why 'droit politique' deserves to be recognized as a species of law. The most convincing answer I can think of (pace Schmitt) is that it consists of rules that – while they are not mandatory, sanction-backed directives to do or not do something or other for whose disregard one can be punished in criminal court – condition the valid exercise of public power. But if that is what makes 'droit politique' into law, it is perfectly possible, as Kelsen has shown, to conceive of it as part and parcel of the system of positive law - since the system of positive law as a whole is best understood as a system of authorizations for the use of force - and to make it judicially enforceable, by giving judges the power to void purported acts of public power that lack adequate legal authorization.

The real issue here, I submit, is not that positivists like Kelsen have nothing to say about the foundations of public law or the problem of the legality of acts of state. What really bothers Loughlin (and others) about Kelsen's thesis of the identity of law and state

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law is sound. It will follow that it is an immanent constraint of the activity of state-building that the institution that is to be created must contain a sovereign person. This restriction is not based on 'history, custom, or inherited religious beliefs'. But it is not a restriction that the people, i.e. those who embark together on the project of building a state, can simply choose to waive if they want to be successful. According to Hobbes, one cannot create a state without sovereign just as one cannot create a house without walls or a roof. Similar conclusions will result for any conception of a constitution in natural law or of the nature of the state. Hence, it doesn't follow from the rejection of tradition, custom, or religious belief that the people, in creating a state, are subject only to 'constraints' that they 'determine to be in their interest'. There may be (and very likely in fact are) constraints that flow from the nature of the activity of state-building, whether a people determines that to be in its interest or not.

is that it appears to leave no room for a certain kind of popular sovereign: If there can be no sovereign person who is a transcendent creator of the law, and yet completely unbound from it, then there can be no people that acts as a transcendent creator of its own law, and thus, according to Hans Lindahl, no collective freedom, understood as a group's absolutely unrestricted power to determine the conditions of its communal life as it sees fit.[45]

Turning to Schmitt, I will argue that a conception of popular sovereignty as a power transcendent to law is not necessarily incoherent, inconceivable, or fictional, as its legal positivist critics like Hart and Kelsen have claimed. The normative arguments that Schmitt as well as his contemporary followers put forward on its behalf, however, will turn out to be unconvincing.

IV. Sovereignty as the Power to Decide on the Exception

We are now in a position to outline the aims of Schmitt's theory of sovereignty, as well as to understand the challenges it had to face. The discussion so far suggests that any attempt to conceive of sovereign authority as a source of positive law will drive us towards the view that sovereign authority, if there such a thing, must itself be legally constituted.

Though Hobbes conceives of the sovereign person as a transcendent source of all positive law, he takes sovereignty to be an attribute of the state, and he holds that the authority of the sovereign is defined and limited by a constitution in natural law. For Hobbes, there was no tension between the claim that sovereignty is an attribute of the

[45] See Hans Lindahl's contribution to this volume.

state and the claim that there must be a sovereign person who is above all positive law. Hobbes held, after all, that a state can exist only where it is represented by a sovereign who unites all the powers of the state in his hand, and he thought that his constitution in natural law could supply criteria of the validity of a sovereign's claim to represent the state, even in the absence of enforceable constraints on sovereign power in positive law.

Hobbes theory of sovereignty, however, is an unstable synthesis. We know, though Hobbes didn't, that a state can exist and be successful without being represented by a sovereign authority that stands above all positive law and that concentrates all the powers of the state in its hands. If, like Hart, we take the doctrine of sovereignty to claim that, wherever there is law, there must be a sovereign person or group of persons whose legislative decisions are the sole source of law, the failure of Hobbes's constitution in natural law will lead us to reject the doctrine altogether. The alternative is to follow Kelsen and to adopt a depersonalized reading of sovereignty, as the normative independence of a state and its law. But in the absence of a Hobbesian constitution in natural law, the state, as we have seen, cannot be prior to the positive law. Under either option, hence, there is no room for a meta-legal sovereign authority that creates all positive law. Hart and Kelsen both concede, or course, that a positive legal system could be structured in such a way as to confer wide-ranging, materially unlimited powers of lawmaking on one person or group of persons. However, such a power could not, in either approach, be regarded as transcendent to positive law. It would depend, rather, on the contingent content of a particular rule of recognition or basic norm.[46]

[46] See Hart, *The Concept of Law* (n. 1 above) 66-8; Kelsen, *Das Problem der Souveränität* (n. 27 above) 27.

So here is the challenge that Schmitt took up in developing his theory of sovereignty: Is there a way, without taking resort to a Hobbesian constitution in natural law, to conceive of positive law as grounded in the decisions of a sovereign person or group of persons, while avoiding the legal constitution of sovereign authority?[47]

At first glance, the chances of meeting that challenge appear very slim indeed. It seems that to meet the challenge, one will have to deny - in order to avoid the legalist conclusion of Kelsen's analysis - that sovereignty is an attribute of the state, and to conceive of sovereign authority as an attribute of a sovereign person or group of persons. The only way to do that, presumably, is to understand sovereignty as an overwhelming *de facto* power of that person or group of persons to compel obedience. But then one will

[47] Adrian Vermeule and Eric Posner suggest that Schmitt's theory of sovereignty can be interpreted as a less ambitious, more pragmatic project. See Adrian Vermeule and Eric Posner, 'Demystifying Schmitt', forthcoming in the *Cambridge Companion to Carl Schmitt*. In their reading, Schmitt's point is simply that any legal order stands in need of a residual decision taker, due to the limited foresight of rule-makers, who can iron out conflicts of rules, deal with problems of over- and under-inclusiveness, or overcome decisional paralysis. I agree that Schmitt might have found an authority of that sort useful, or perhaps even pragmatically necessary. But Schmitt would not have described it as sovereign. Schmitt refers to a residual decision-taker within an already existing constitution as a commissarial dictator or a guardian of the constitution, offices that Schmitt aims to distinguish from full-blown sovereignty. See Carl Schmitt, *Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf*, 6th edition (Berlin: Duncker&Humblot, 1994); Carl Schmitt, *Der Hüter der Verfassung* (n. 38 above) chapter III. As the discussion in Schmitt's *Verfassungslehre* makes clear, the sovereign is clearly supposed to do more than just to stabilize an already existing constitution. He is to be its legitimating source, the bearer of constituent power. In this capacity, Schmitt's sovereign is to decide on the fundamental structure of the constitution, and to create the situation of social normality or homogeneity that makes constitutional law applicable in the first place. These tasks go far beyond the powers of, say, a Lockean prerogative.

have to face the criticisms that Hart leveled against Austin. If it is the mere possession of *de facto* power to issue general commands and to compel obedience that endows a person or group of persons with sovereign authority, it will become impossible, if Hart's argument against Austin is sound, to explain the continuity of legal system, as well as the permanence and diversity of legal norms.

Schmitt avoids the first horn of this dilemma by conceiving of sovereignty in personal terms. His famous definition of sovereignty states that the sovereign is he who decides on the state of exception.[48] This defines sovereign authority as the power to take a decision on the exception. In addition, the definition carries the implication that there must be a personal sovereign, a real or concrete will capable of taking an actual decision on the exception. A rule-bound, impersonal institution cannot be the primary bearer of sovereignty. The power of sovereignty, according to Schmitt, ultimately belongs to him or to them who can in fact take the decision on the exception, not to a legally constituted artificial person of the state.[49]

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[48] See Schmitt, *Politische Theologie* (n. 5 above) 13.

[49] To be sure, Schmitt suggests, in *Politische Theologie*, that sovereignty is an attribute of the state. For instance, he says that in the state of absolute exception, "the state remains, while the law recedes" and that it is "the state that suspends the law" (ibid. 18). But the term ‘state', in this context, cannot refer to an institution structured by any kind of law, if, as Schmitt makes clear, the decision on the exception is at least potentially a decision that suspends absolutely all law, perhaps with the view of establishing an altogether new constitution. In his *Verfassungslehre*, Schmitt defines the state as “the political unity of a people”, which manifests itself in legally unregulated acts of constituent power. See Schmitt, *Verfassungslehre* (n. 38 above) 21. Schmitt’s talk of the state, then, is perhaps best understood as referring to a Schmittian political community, i.e. to a group of people united only by a shared disposition to distinguish between friend and

One might object here that it does not follow from the claim that the power of sovereignty is vested in the person who can take the decision on the exception that sovereignty can't be an attribute of the state. A Hobbesian would argue, after all, that the sovereign person is he who holds all essential powers of sovereignty in his hands, without thereby intending to imply that sovereignty is not attributable to the state.

This objection fails, due to unavailability of a Hobbesian constitution in natural law. In Schmitt, the content of sovereign authority is reduced to the power to take a decision on the absolute exception. Schmitt's definition of the power of sovereignty no longer contains any reference to a positive list of essential rights of sovereignty derived from an account of the function of the state. As a result, Schmitt's sovereign can no longer play a role defined by a constitution in natural law and be publicly recognized to do so. In the absence of such a role, there is simply no basis for attributing the decisions of the sovereign person to the artificial person of the state. Schmitt was perfectly aware of this fact. During the 1920's, he came to argue explicitly that the state-as-institution is nothing but a derivative expression of a group's willingness to draw a distinction between friend and enemy.[50]

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enemy in the same way. See Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker&Humblot, 1963) 20-6. However, to call such a group a state is misleading at best, if it is essential to the state to be an artificial person or an organized community.

[50] See n. 49 above. I do not think that it makes a difference to claim that the state, for Schmitt, is a concrete order. The term ‘concrete order’, which Schmitt didn’t use before 1934, is just another name for what Schmitt, in his earlier works, refers to as the situation of normality that, allegedly, is a condition of the legitimate applicability of legal norms. Schmitt’s decisionist approach during the Weimar period reflects the perception that there is no uncontested concrete order, and that a conscious sovereign decision is necessary

Schmitt holds that the power to take a decision on the absolute exception is not to be understood as a power conferred by law, but rather as a *de facto* power. Constitutional law, to be sure, may contain acknowledgments of the existence of such a power (or it might, for that matter, try to deny the existence of such a power). But the power exists wherever there is someone who can in fact take a decision on the total exception.[51] It is a misinterpretation of Schmitt's definition of sovereignty to read it as though it claimed that one ought to look to who is made competent by a positive constitution to decide on the state of emergency to find out who is sovereign. The existence of such a constitutional provision, for Schmitt, is neither a necessary nor a sufficient condition for sovereignty: It is not necessary since there may obviously be an agency that can bring about a decision on the total exception even without being formally authorized to do so. It is not sufficient, because constitutional emergency-provisions, for rather obvious reasons, will typically fail to confer a power to declare an absolute exception. Their point, as Schmitt points out,

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to determine, in the first place, which concrete order is to form the substance of German political life. Schmitt's shift to 'concrete order thought' in 1934, as Hofmann pointed out, is therefore not a rejection of the decisionist theory of sovereignty. It is premissed on the assumption that the sovereign decision as to what is to count as normal is no longer open. See Hasso Hofmann, *Legitimität gegen Legalität* (n. 6 above) 68-78. The identification of the state with concrete order, in any case, runs into the difficulty that it is hard to see how a concrete order could have a capability to act. Hans Lindahl's suggestion (see the contribution to this volume) that 'concrete order' refers to a form of collective agency in Margaret Gilbert's sense would solve that problem. But one would have to add that, for Schmitt, a political community is a collective agent of a rather specific kind, namely one that can draw a friend-enemy distinction, which takes us right to the interpretation of Schmitt's understanding of 'state' proposed here.

[51] See Schmitt, *Verfassungslehre* (n. 38 above) 75-6.

is to tame and to domesticate the power to decide on the exception.[52] What is more, the claim that Schmittian sovereignty is a competence conferred by a positive constitution obviously conflicts with Schmitt's theory of popular sovereignty. If the people are to be sovereign, and if this sovereignty is to include the power to determine the content of their own constitution as they see fit, and to continue to do so in the future, popular sovereignty (or sovereign dictatorship exercised on behalf of the people) can't be a power or an office or a competence conferred by a positive constitution. [53]

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[52] See Schmitt, *Politische Theologie* (n. 5 above) 18.

[53] Loughlin claims that when Schmitt's sovereign takes a decision on the exception, "positive law recedes, but *droit politique* remains" (Loughlin, *Foundations of Public Law* [n. 4 above] 401). He goes on to argue (ibid., p. 402) that *droit politique* manifests itself, for instance, in the fact that "in the Weimar Republic that power [to take a decision on the exception] was vested in the president under Article 48 of the Constitution, a common arrangement under modern constitutions." Schmitt, however, explicitly denies that the dictatorship of the president under article 48 is a power of sovereignty, precisely because the former, but not the latter, is a competence allocated (and limited) by positive constitutional law. See Carl Schmitt, 'Die Diktatur des Reichspräsidenten nach Artikel 48 der Weimarer Verfassung', in Schmitt, *Die Diktatur* (n. 47 above) 212-57. Hence, the positive constitutional rules that confer circumscribed powers of dictatorship to a president (or some other constitutional office) cannot be the order that Schmitt, in *Politische Theologie*, claims will remain even in a state of total exception. What remains in the state of total exception, according to Schmitt, is not a legal order, but the distinction between friend and enemy.

In George Schwab's English translation of *Politische Theologie* (Chicago: University of Chicago Press, 2005), Schmitt is made to say, on p. 12, that in a state of exception "order in the juristic sense still prevails, even if it is not of the ordinary kind." However, what Schmitt really wrote (in my translation) is that "since the state of exception is still something other than a mere anarchy or chaos, an order in the juristic sense still exists, *though not a legal order*" (Schmitt, *Politische Theologie* [n. 5 above] 18: "Weil der Ausnahmezustand immer noch etwas anderes ist als eine Anarchie oder ein Chaos, besteht im juristischen

Note as well that the power to take a decision on the total exception is not a legislative or adjudicative authority, in any accustomed sense of these terms. It does not create legal norms or modify legal relationships between legal persons, and neither does it apply norms. All it does, so to speak, is to switch the law as a whole on and off.[54] Despite its nature as a *de facto* power, however, the power to take a decision on the total exception is a power that affects the law, as it conditions the law's applicability. The decision on the exception, then, is jurisprudentially relevant, even though it does not legislate or adjudicate: Every ordinary application of the law, according to Schmitt, presupposes a prior decision to the effect that the situation is normal and not exceptional and that it is therefore possible and appropriate to rely on legality for the solution of social conflict.[55]

These observations explain how Schmitt avoids the second horn of the dilemma outlined above. Hart's attack on Austin's notion of sovereignty, as we have seen, is an attack on the claim that a mere *de facto* power can become the source of all positive legal norms by assuming the role of an un-commanded commander. Schmitt, however, is

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Sinn immer noch eine Ordnung, *wenn auch keine Rechtsordnung*.") What Schmitt wants to say here is clear enough. What still exists in the state of exception is the state, understood as a political community (see the discussion in n. 49 above), which, according to Schmitt, is a subject of juristic thought, but not the law, political or otherwise. Schwab's translation simply drops Schmitt's explicit statement that there is no longer a legal order in the state of exception, and replaces it with the invented claim that there is still a legal order, but that it is not 'of the ordinary kind'. Loughlin's view that, according to Schmitt, '*droit politique* remains' in the state of exception appears to be based on Schwab's faulty translation. See Loughlin, *Foundations of Public Law* (n. 4 above) 401.

[54] See Schmitt, *Politische Theologie* (n. 5 above) 18.

[55] See ibid. 18-9.

clearly not guilty of the mistake of conceiving of laws as sovereign commands. A sovereign who does not legislate obviously does not issue commands that claim legal authority. Hart convincingly argues, as we have seen as well, that Austin's theory fails to explain the continuity of legal system and the permanence of legal norms. But since Schmitt's sovereign is not a legislator and does not enact positive legal norms Schmitt's theory simply does not give rise to the puzzles concerning continuity and permanence that Hart so successfully deploys against Austin.

Let me explain these claims in a little more detail. Schmitt's sovereign is perfectly able to coexist, in times judged non-exceptional, with a working positive constitutional order, perhaps even a liberal-democratic one.[56] Such an order would determine a procedure of legislation for the production of individual legal norms, norms which in turn guide the activity of the courts and of administrative agencies. Hence, no positive legal norm, under circumstances of normality, need be validated by recourse to sovereign authority. A norm's validity, rather, will rest on the fact that it has been enacted in accordance with the rule of recognition determined by the constitution. Since there is no need for Schmitt to portray positive laws so validated as commands, his theory is well able to accommodate Hart's insights into the importance of rules and rule-following and into the diversity of legal norms.

Of course, Schmitt argues that all this presupposes that the sovereign judges the general situation to be non-exceptional, so that law can apply. He also takes it that legal norms, though validly enacted, will not apply as long as the sovereign judges the situation to be exceptional. So perhaps a Hartian might argue that there is still room for a

[56] See Carl Schmitt, *Verfassungslehre* (n. 38 above) 98-9.

continuity-puzzle of the sort that Hart deploys against Austin to arise. Imagine that the sovereign suspends legality altogether, in a global state of emergency, and that legality is later re-established, after the sovereign, through the use of *de facto* force, has managed to produce a situation he judges to be normal. Should we say that the legal system after the state of emergency is the same as the one that was in force before the emergency? Or should we say that a new legal system has been created? Questions of this sort will not embarrass Schmitt, for the simple reason that Schmitt will answer such questions in line with the criteria that a Hartian would apply to judge of questions of continuity.

A sovereign's actions in a state of exception, presumably, could lead to two different results. A sovereign might re-establish the social condition that underpinned the old constitution, so as to make it possible, once again, to apply the law of the old constitution. Else, a sovereign's actions could lead to the establishment of a new constitution. This, presumably, will tend to happen if the old constitution has been made obsolescent by social change, so that it is no longer possible to preserve the condition of normality that underpinned it.[57] In the first of these two scenarios Schmitt would claim that there is legal continuity, while he would deny continuity in the second.[58] Hart will arrive at exactly the same result, since, in the first case, judges and officials are going to continue to apply the old rule of recognition, while in the second they will follow a new.

Let me draw a preliminary conclusion of our discussion of Schmitt's theory of sovereignty so far. Schmitt's theory of sovereignty seems to offer a coherent response to the legal-theoretical claim that a sovereign authority above the positive law, an authority

[57] See Schmitt, *Verfassungslehre* (n. 38 above) 21.

[58] Of course, Schmitt thinks that the continuous existence of political community is not tied to legal continuity. See ibid. 91-9.

that conditions the law's applicability, is incompatible with legal order. However, Schmitt's argument clearly does not establish that a meta-legal sovereign authority is as necessary to the existence of legal order as a backbone is to a man. There would appear to be no good reason to deny that a society characterized by the absence of a Schmittian sovereign could have a functioning positive legal system. Schmitt, then, has fought the legal-theoretical criticism of sovereignty to a standstill. But where does that leave us?

It is crucial to Schmitt's argument, as we have seen, that the power of deciding on the exception - though it is not legislative or adjudicative - be seen as a power that conditions the applicability of positive law. If sovereign power is not interpreted as conditioning the applicability of positive law, Schmitt's conception of sovereignty risks becoming purely political and jurisprudentially irrelevant.

A Kelsenian would press Schmitt on precisely this point. The Kelsenian will admit that a society might contain a person or group of persons who have a *de facto* power altogether to suspend legality, to completely interrupt the normal operation of the law. But why should this fact be jurisprudentially significant? As long as the law does not recognize the power to take a decision on the exception, the existence of that power, or its successful exercise, will be no more than a mere fact of political sociology. In making this claim, one does not have to deny that politically powerful groups attempt, from time to time, to interrupt the application of law, and that they sometimes succeed in breaking legal continuity. Neither does one have to contest that a legal system can exist and operate only where it is sufficiently effective, i.e. where its operation is not successfully challenged by *de facto* powers aiming to suspend or block its application. If the view that

the power to take a decision on the exception conditions the applicability of law boils down to the banal insight that law must be sufficiently effective to exist, how can that power be portrayed as any kind of legal power, as a power that is of jurisprudential concern?

To meet this challenge, Schmitt adds an important qualification to the view that the sovereign decision conditions the applicability of law. He claims that it is the *legitimate* applicability of the norms that belong to some positive legal system that presupposes a sovereign who can decide on the exception.[59] This response, if defensible, opens a way out of the impasse we just pressed on Schmitt. The power to take a decision on the exception must obviously be regarded as jurisprudentially relevant if the existence of that power is indeed a necessary condition of the legitimate applicability of positive law. But of course, Schmitt will now have to explain why a sovereign who can take a decision on the exception is necessary for the existence of legitimate positive law.

Schmitt's answer to this question, in a nutshell, is that the sovereign's decision on the exception expresses the political existence of a people. The sovereign decision, in other words, is the only form in which popular sovereignty can be actualized, and popular sovereignty, Schmitt argues, is the only modern basis for the legitimacy of law.[60] It is to the assessment of this normative claim that we must now turn to resolve the standoff.

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[59] See ibid. 87; Carl Schmitt, *Legalität und Legitimität*, 6th edition (Berlin: Duncker&Humblot, 1998).

[60] See Schmitt, *Verfassungslehre* (n. 38 above) 77-82.

V. Schmitt's Sovereign and the Legitimacy of Legal Order

Schmitt's claim that a sovereign authority is necessary to secure the legitimate applicability of law makes a first appearance, at least implicitly, in Schmitt's early work *Gesetz und Urteil*, which was published in 1912.[61] In this book, Schmitt is concerned to outline the conditions of legal determinacy in judicial decision-taking. The starting point of the argument is a rejection of a formalist picture of adjudication. The application of statutes to particular cases by the courts, Schmitt argues, cannot be portrayed as a process of logical deduction, in which general statutory rules clearly determine their applicative instances. Rather, application will, in many instances, require a judgment to the effect that a case can be brought under a concept, a judgment which is not itself guided by the legal rule that is to be applied.[62]

Schmitt does not think, however, that the rejection of formalism should lead a judge to embrace the self-conscious use of judicial authority as an instrument of social reform. Schmitt holds that judicial decision-taking is legitimate only as long as it is not dependent on potentially controversial moral or political judgments on the part of the judge.[63] The fact that legal determinacy cannot be ensured by a judicial commitment of fidelity to statute does not imply, in Schmitt's view, that legal determinacy cannot be achieved at all. Judicial practice, Schmitt claims, has developed an alternative means of assuring legal determinacy: a shared sense of appropriateness, grounded in the common

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[61] Carl Schmitt, *Gesetz und Urteil. Eine Untersuchung zum Problem der Rechtspraxis*, 2nd edition (München: C.H. Beck, 1969).

[62] See Schmitt, *Verfassungslehre* (n. 38 above) 21-43.

[63] See ibid. 42, 99.

educational background of legal officials, in the common experiences of those who hold judicial office, and in the convergent ethical assumptions of members of the judiciary.[64]

If it is the social homogeneity of the judiciary that ensures legal determinacy, and if legal determinacy is desirable, we will have to conclude that a justifiable judicial decision is one that conforms to the expectations of other legal officials. This is why Schmitt claims that a legal decision is correct if and only if we can assume that another judge would have taken the same decision.[65]

Schmitt's argument in *Gesetz und Urteil* does not yet explain why legal determinacy is desirable; so desirable, in fact, as to be declared the sole basis of a standard of the correctness of judicial decision, and more desirable, apparently, than the moral betterment of the law that might result from a less constrained use of judicial authority in cases not determined by statute. It is possible, however, to gather an answer to this question from Schmitt's later works. A legal decision not determined in advance by a shared practice would amount to an instance of domination or, as Schmitt prefers to put the point, to a form of 'indirect rule'.[66] The authority and institutional independence of the judiciary, Schmitt frequently insists, depends on the presupposition that it does no more than to apply the law. A judge who takes decisions conditioned by his personal moral or political judgment, under the guise of applying the law, exercises a form of arbitrary and unaccountable political rule. Not surprisingly, Schmitt harbors a strong

[64] See ibid. 68-114.

[65] See ibid. 68-9.

[66] See for the notion of 'indirect rule' Carl Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes. Sinn und Fehlschlag eines politischen Symbols* (Stuttgart: Klett-Cotta, 1982) 99-118.

suspicion against judicial review.[67] But at the same time, he argues that an unrestrained parliamentary legislator is in danger of becoming a mere instrument of the illegitimate rule of partial interests that have found ways to corrupt the legislature.[68] From Schmitt's point of view, both of the fundamental positions in contemporary normative constitutional theory - a rights-oriented constitutionalism arguing for judicial review as well as a political constitutionalism concerned to protect the democratic legislature from judicial interference - fall equally short of preventing domination.

The reason, according to Schmitt, is that both these positions overlook the importance of legal determinacy as a condition of the legitimate applicability of law, including constitutional law. Liberal constitutionalism will have to admit that judicial decisions that enforce constitutional rights have the character of undemocratic judicial impositions, as they will often turn out to be controversial, unexpected, and not grounded in an established judicial practice that is already accepted as appropriate by the community at large.[69] Political constitutionalism, or what Schmitt calls the legislative state,[70] must own up to the fact that parliamentary decision-taking, especially in a

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[67] See Carl Schmitt, *Der Hüter der Verfassung* (n. 38 above) 22-48; Carl Schmitt, 'Das Reichsgericht als Hüter der Verfassung', in Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker&Humblot, 1958) 63-109.

[68] See Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 2nd edition (Berlin: Duncker&Humblot, 1926) 41-63; Schmitt, *Der Hüter der Verfassung* (n. 38 above) 73-91; Schmitt, *Legalität und Legitimität* (n. 59 above) 19-37.

[69] See Carl Schmitt, 'Grundrechte und Grundpflichten', in Schmitt, *Verfassungsrechtliche Aufsätze* (n. 67 above) 181-231, at 217-24; Carl Schmitt, 'Die Auflösung des Enteignungsbegriffs', in Schmitt, *Verfassungsrechtliche Aufsätze*, 110-23.

[70] See Schmitt, *Legalität und Legitimität* (n. 59 above) 19-28.

pluralist society, need not reflect the will of the people and that it may well come to benefit partial interests over the common good. In either case, the appeal to the constitutionality of the decision - be it judicial or legislative - is merely going to paper over the fact that genuine democratic self-determination remains unrealized.

Schmitt does not hold that such failure of self-determination is an inevitable result of judicial review or of parliamentary legislation. But if there is no failure, he argues, the reason must be that the judicial or legislative decision takes place in the context of a shared social understanding of what is appropriate that makes decisions both expectable and acceptable. Legal determinacy, in other words, indicates the absence of conflict between social groups, and hence the absence of domination of one social group by another. Determinacy, however, is based on the presupposition of social homogeneity, a presupposition that cannot be taken for granted under modern social conditions and that cannot be guaranteed or protected by the law itself.[71] Once a decision is controversial, we must conclude that determinacy, as the condition of the legitimate applicability of the law, no longer obtains. And whenever the condition of homogeneity is unfulfilled, decision-taking under legal or constitutional procedures must turn out to be dominating to some. The rule of law will become an instrument of the indirect rule of a part over the whole and veil it at the same time. Where decisions that take place within the constitutional system have become deeply controversial, social homogeneity must first be restored in order to make the law legitimately applicable. This restoration, Schmitt argues, requires a

[71] See Schmitt, *Politische Theologie* (n. 5 above) 13-21.

sovereign decision on the exception as well as dictatorial action in the state of exception.[72]

We already know what the sovereign decision on the exception does. It declares the law as a whole to be non-applicable. As Schmitt makes clear, the decision on the exception thereby opens the space for a sovereign dictatorship that operates without any legal restraints of any kind and that uses its unbounded discretion to create a situation of normality or homogeneity; if necessary by the use of force that eliminates dissent.[73] This activity need not be conservative. It may well turn out to be revolutionary. He who decides on the absolute exception also decides what is to be regarded as normal or exceptional, and thus defines what kind of homogeneity is to be brought about.[74]

It would be wrong, however, to think of the sovereign's decision as a one-way imposition of authority. For the sovereign to be successful in the attempt to define normality, the decision must express some widely shared substantive identity that is prior to the law and to the state as a legal expression of community. This identity will become political, as Schmitt argues in *The Concept of the Political*, only if a sufficient number of members of a society are willing to fight and die for the defense of that identity against those whom they perceive as its internal and external enemies.[75]

Schmitt's famous criterion of the political is clearly motivated by the aim to portray the constitution of political community as a process that does not involve legality.

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[72] See Schmitt, *Die Diktatur* (n. 47 above) 95-167.

[73] See ibid.

[74] See Schmitt, *Politische Theologie* (n. 5 above) 19.

[75] See Schmitt, *Der Begriff des Politischen* (n. 49 above) 26-8.

Schmitt insists, in *The Concept of the Political*, that we cannot define 'the political' with reference to the state, for example as the fight for control over the state.[76] The state, as we have seen, is inextricably bound up with law. If sovereignty and political community are to be prior to law, then sovereignty and political community must be explicable in terms that do not make reference to the state. It must be possible to explain what a political community is, what distinguishes it from other kinds of community, without taking resort to the implicitly legal notions that are the building blocks of our idea of the state: representation, authorization, or the idea of a social contract. This is why Schmitt claims that political community is defined by a pre-legal distinction between friend and enemy.[77] In successfully dividing society into those who support or reject a decision on the exception, and the definition of normality implied by it, the decision on the exception proves that some shared identity has political quality. It does that by forcing people to take sides; to reveal themselves as friends or enemies, in a space outside the law, relative to the identity highlighted by the sovereign as a marker of political community.[78]

A group exists as a political community, Schmitt concludes, as long as (and only as long as) it remains capable of taking a decision on the exception and thus to determine its own political identity.[79] The decision must be the group's own, not one imposed on the group, whether by force or fraud, by its internal or external enemies. Since every decision on the exception draws a boundary between insiders and outsiders, we can also conclude

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[76] See ibid. 20-6.

[77] It is also why Schmitt emphasizes that an exercise of constituent power isn't bound to any particular legal form. See Schmitt, *Verfassungslehre* (n. 38 above) 82-7.

[78] See Schmitt, *Der Begriff des Politischen* (n. 49 above) 46-7 on the internal enemy.

[79] See ibid. 51-4.

that a group will enjoy existence as a political community only as long as it has the power to determine its own membership. It follows that those who would attempt to subject a political community to some normative standard of inclusion must be seen as attacking its very existence. And a political community, Schmitt argues, must take itself to have a right to reject and to repel their proposals.[80]

In making this claim Schmitt does not put forward a view about the instrumental value of political community to its members. He does not argue, say, that membership in a political community that enjoys unrestricted self-determination, including the right to redraw its boundaries as it sees fit, is necessary to realize the good life of individuals, and that we should therefore recognize each political community's right to determine its own identity. Any such argument would raise the obvious question why it should be morally permissible for the decision on the exception to preemptively exclude those who are defined by the sovereign as internal enemies from the community.

Schmitt addresses himself only to those who already see each other as the true members of some pre-legal political community, or who can be brought so to see themselves, and who already accept the claim that nothing should be allowed to thwart that group's political existence.[81] Schmitt's aim is simply to raise awareness, amongst readers or listeners who fit that description, of the danger that an unconditional commitment to legality may threaten the existence of the political community to which they take themselves to belong, and which they hold to be supremely valuable. Or to put the point slightly differently: Schmitt is trying to stop his audience from confusing their

[80] See ibid. 45-51.

[81] See ibid. 27.

political community with their state. The latter is a legally constructed entity whose rules are likely to give some sort of standing, perhaps even citizenship, to some who do not truly belong to the political community, and who undermine the homogeneity that is the necessary condition of legal determinacy.[82] Hence, one should recognize that the concrete will of political community, as manifested in the decision on the exception, must have the power to prevail against the rule-based authority of the state.

In raising awareness of the conditions of the preservation of political community, Schmitt takes himself to be defending democracy. Pretending to take his cues from Rousseau, Schmitt defines democracy as the identity of ruler and ruled, and he argues that the successful sovereign decision on the exception is the most perfect realization of that identity.[83] In taking a decision on the absolute exception, a pretender to sovereign authority proposes to a group of people to define their political identity in a certain way. But he will be successful, as already pointed out, only if a sufficient number of the addressees concur with the sovereign's distinction between friends and enemies, and are motivated to draw the requisite practical conclusions from it. Hence, the sovereign decision on the exception, if successful, is really a communal decision. Through that decision a group manifests its existence as a political community, in the willingness of its members to treat some characteristic that they share as a political identity, an identity for which one must fight and die.

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[82] See Schmitt, *Der Leviathan* (n. 66 above) 61-78.

[83] For Schmitt's theory of democracy see Schmitt, *Die geistesgeschichtliche Lage* (n. 68 above) 13-20, 30-41; Schmitt, *Verfassungslehre* (n. 38 above) 223-38.

A successful sovereign decision on the exception, Schmitt suggests, is the paradigm case of collective self-government.[84] The sovereign, in taking the decision on the exception, is not a representative whose will is imputed by fiction to all those who are regarded as members of an artificial social body, though their individual wills may differ from that of the sovereign. The successful sovereign decision, rather, is the concrete manifestation, according to Schmitt, of the real, the unanimous will of a people; the only one there can be.[85] And it is only as long as the identity that finds political expression in it is preserved, in the day-to-day business of constituted, legally regulated politics, that the law remains legitimately applicable.[86]

We are now in a position to offer an assessment of Schmitt's normative claim. Does Schmitt present a convincing argument for the claim that the legitimate applicability of law requires the existence of a sovereign authority?

It is not difficult to see why Schmitt's theory of popular sovereignty is problematic. Schmitt claims that the sovereign's decision on the exception perfectly realizes the democratic identity of ruler and ruled. But this is so only for the trivial reason that any successful decision on the exception draws the boundaries of political

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[84] See Schmitt, *Verfassungslehre* (n. 38 above) on the contrast between exercises of constituent power and constituted politics.

[85] See ibid. 20-23, 76, 84, 87; Schmitt, *Der Begriff des Politischen* (n. 49 above) 27.

[86] Schmitt's critique of the Weimar constitution claims that the revolution of 1918 had failed to bring about homogeneity. See Schmitt, *Verfassungslehre* (n. 38 above) 28-36, 106-9. Once the Weimar Republic entered its political crisis, Schmitt argued that a renewed exercise of sovereign authority might be called for to solve the problem. See Schmitt, *Legalität und Legitimität* (n. 59 above) 82-91.

community in such a way as to remove from the polity all those who do not follow and support the sovereign's interpretation of its identity. The identity of ruler and ruled that manifests itself in the successful decision on the exception is an artifact of antecedent exclusion, in a space outside of law, of all interesting political difference and all deep dissent.

The view that democracy is the identity of ruler and ruled is normally understood to raise a more interesting claim. Rousseau, for instance, argues that democratic institutions, attitudes, and practices will allow citizens who differ in their private interests and their social identities, to benefit from the realization of common interests, and to do so in a way that ensures a proper respect for the individual freedom of each. For Rousseau, democratic identity results from the reasonable acceptability to all of laws produced by a legal and constitutional system that successfully implements the ideal of civic equality.[87] In Schmitt's view, on the other hand, the identity of ruler and ruled is no longer a goal to be pursued through the instrumentality of settled democratic political practice. Rather, a democratic legal and constitutional system is said to presuppose a political identity that it cannot itself establish or protect, and that must therefore be created through the prior dictatorial homogenization of society. The identity of ruler and ruled is no longer realized in a general will but in a particular will that is opposed to the ‘encrustations' of rule-based legality.[88] For Schmitt, democratic politics in the state of normality does little more than to raise a danger of the corruption of the people's antecedent identity. The most that we might ever be able to claim in its favor, in

[87] See Joshua Cohen, *Rousseau: A Free Community of Equals* (New York: Oxford University Press, 2010).

[88] See Schmitt, *Politische Theologie* (n. 5 above) 20-1.

circumstances where the sovereign sees no need to take a decision on the exception, is that it does no harm.

What seems to start with the laudable aim to achieve non-dominating law thus turns into a paean for a collectivist version of the right of the stronger. It may well be true that judicial or legislative decisions, in a society that has been made perfectly homogeneous by sovereign dictatorship, would no longer imply a danger of a domination of the ruled, for the simple reason that judicial and legislative decisions could no longer be very controversial among the rulers and the ruled. But this result, to repeat, is achieved only through the prior violent repression and exclusion of all ethical and cultural diversity in the space of exception. The determinacy that results from perfect homogeneity does not make law legitimate as much as it turns the legitimacy of law into something that can now be dispensed with, for the reason that all those who are addressed by law, as well as those who make it, share a political identity and will never disagree about the wisdom of any important decision. All others, by definition, are enemies who are outside the polity. The question of how to treat them is not one of legitimacy but of power-politics.

Let me emphasize that this critique of Schmitt's theory of popular sovereignty is not primarily a moral critique. The point is not that Schmitt's conception of popular sovereignty is to be regarded as morally incorrect because it licenses disregard of individual rights or minority rights, however true that may be. The point is that Schmitt's argument, though it claims to ground the legitimacy of law in an appeal to popular sovereignty, is self-defeating as an account of the legitimacy of law.

Imagine you question the legitimacy of the laws of your society, laws that the sovereign, together with the majority of the members of your community holds to be

legitimately applicable. It would be useless, presumably, for someone to tell you that the laws are legitimate because they express the identity of the people. The fact that you raise a complaint already establishes that you do not belong to the people. If you did belong to the people, on the other hand, you would not raise the complaint, and no explanation of the legitimacy of the law would have to be given to you. Appeals to the legitimacy of the law or the constitution, even if based on the notion of constituent power, become meaningless in Schmitt's framework. So whatever Schmitt thinks he has shown, he cannot have shown that the existence of a sovereign authority is a condition of the legitimate applicability of law.[89]

It will likely be objected that this criticism misunderstands Schmitt's claim that the legitimate applicability of law requires a sovereign authority. Schmitt, it might be argued, is not concerned with a situation in which the positive law does express the people's identity, but with a case where it does not. If law does not express the identity of the people it will run counter to and frustrate the people's collective self-determination, and thus be illegitimate. This is what happens, for instance, where a parliamentary legislature is captured by partial interests that have the power to bring about legislative decisions which frustrate the true will of the people, as expressed in a past decision on the exception. The claim that the legitimate applicability of law requires the existence of a

[89] For a fuller statement of this argument see Lars Vinx, 'The Incoherence of Strong Popular Sovereignty', in *International Journal of Constitutional Law* 11 (2013) 101-24.

sovereign authority is to be understood as the claim that such a situation can only be prevented where there is a sovereign who can switch the law off.[90]

This reinterpretation of the claim that sovereignty is a precondition of the legitimate applicability of law concedes that Schmitt is not concerned to offer reasons to a dissenting minority why it should defer to the law though it rejects the law's content. He is now portrayed as concerned, rather, to warn the majority against accepting the deliverances of the positive legal system's procedures as final. In doing so, the majority would alienate its collective autonomy to a positive legal system that provides legal and perhaps political standing and influence to minorities or interest groups that do not share the majority's political identity. The reason why a sovereign authority is needed, then, is not that a sovereign is necessary for the constitution of authoritative law, of law that binds even those who criticize its content. Rather, a sovereign authority is necessary to make sure that the results of legal procedures cannot prevail against the will of the majority, of those who claim that they truly belong to the people.

One is inclined to reply that, strictly speaking, it makes no sense for Schmitt to argue that the positive law might frustrate the political self-determination of a people. According to Schmitt, a political community exists if and only if it has the capacity to take a decision on the exception. But in that case the law can not be an impediment to self-determination, because the sovereign's decision on the exception can switch it off. If, on the other hand, a group is unable to bring about a decision on the exception it simply does not exist as a political community or a people and it consequently can not make any sense to complain that the group's self-determination is impeded by law.

[90] For this perspective see Paul W. Kahn, *Political Theology* (n. 3 above).

Admittedly, this reply is a little too quick. Schmitt's writings on sovereignty during the Weimar-era address a situation in which it is unclear, not least to Schmitt himself, whether there still is a sovereign authority. Put differently, they address a situation in which it is unclear whether the German people still exists as a political community in Schmitt's sense. The answer to these questions must depend on whether the German people, suitably led, are still capable of bringing about a decision on the exception that will, if necessary, prevail against the corrupted positive legality of the Weimar constitution. And whether the German people are still capable of bringing about a decision on the exception depends, in turn, on whether they are willing to support such a decision, in light of the conviction that to do so is a precondition of the preservation of their collective autonomy. Schmitt's theory of sovereignty, then, is perhaps best seen as an exhortation to Germans to be willing to take the decision on the exception.[91]

This alternative reading of Schmitt's claim that the existence of sovereign authority is a condition of the legitimate applicability of law, in contrast to the one we already rejected, is not self-defeating. But it is also devoid of jurisprudential interest.

We can admit that if political existence is understood in Schmitt's way, it will follow that a political community must always be ready to put aside its commitment to legality if it wants to preserve itself. We can also admit that if political existence, as Schmitt defines it, is desirable, we should fight against an ideology of legalism that wishes to make the law out to be the final arbiter of all social disputes. But what is all that to the law? Why should the law, faced with Schmitt's conception of political existence,

[91] See Schmitt, *Die geistesgeschichtliche Lage* (n. 68 above) 77-90 on the need for a nationalist political myth.

abandon its own claim to normative finality? Why should it recognize the Schmittian sovereign's decision on the exception as a legally relevant decision, as a decision about the legitimate applicability of the law? The law, as far as I can see, would have to recognize the sovereign's decision as legally relevant only if the existence of an authority that can take a decision on the absolute exception was necessary for the law to be able to achieve its own essential purposes. That, however, does not seem to be the case.

Arguably, a system of law must be backed up by a state to be sufficiently effective to achieve whatever essential purposes it might have. That was one of the key claims of the classical doctrine of sovereignty. But as should be clear, the law may very well have the backing of a state even where there is no sovereign capable of taking a decision on the absolute exception. The presence of a sovereign, moreover, is not just unnecessary to secure the law's effectiveness. It is also likely to frustrate the laws essential purposes, on some of the most plausible accounts of what these might be. In recognizing the sovereign's decision as legally relevant, the law would, for example, have to betray the aim that is peculiarly its own according to the classical discourse of sovereignty: namely the aim to subject social conflict to peaceful arbitration and to suppress the employment of violence not licensed by the law.[92] We arrive at the same result, obviously, if we follow Fuller and take the law's essential purpose to be the establishment of an inviolable rule of law that will make exercises of power predictable to those affected.[93] To maintain the claim that the existence of a Schmittian sovereign is necessary to allow the law to achieve its essential purposes one would, it seems, have to adopt the rather silly view that the

[92] See Hobbes, *Leviathan* (n. 7 above) 117-21.

[93] See Lon L. Fuller, *The Morality of Law*, revised edition (New Haven: Yale University Press, 1964).

essential purpose of law consists in not getting in the way of the decision on the exception.

Legal positivists who question the view that the law has essential purposes are unlikely to arrive at a different conclusion. In recognizing the legal relevance of the Schmittian sovereign, the law would, for instance, betray its claim to Razian authority, since the law, to claim authority, must take its own decisions to be final.[94] And if we deny that the law necessarily claims authority, or perhaps that it has any nature at all, there is simply nothing left to build on in trying to establish the jurisprudential relevance of the decision on the absolute exception. Schmitt is not in a position to adopt an instrumental conception of law and to argue that the law's essential purpose is to serve whatever goal the sovereign decides to pursue. The sole purpose of sovereign action, according to Schmitt, is to create homogeneity, and Schmitt is firmly committed to the view that this goal can only be achieved through dictatorial action freed of all legal restraints. Schmitt's conception of sovereignty, I conclude, turns out to be too purely political to be of any jurisprudential relevance.

Schmitt's basic claim is that legality can never make any positive contribution to the legitimate settlement of profound social conflict. He holds, as we have seen, that whenever the answer to a political question is not determined by a background of social agreement, its arbitration in a legally regulated form must involve a hidden exercise of domination under the guise of the rule of law. The liberal idea that suitably constructed

[94] See Joseph Raz, 'Authority, Law, and Morality', in Joseph Raz, *Ethics in the Public Domain. Essays in the Morality of Law and Politics*, revised edition (Oxford: Oxford University Press, 1995) 210-37.

legal procedures could ever lead to the fair settlement of political conflict must consequently be a form of false consciousness; a consciousness that must be fought because it might stop the majority, those who truly belong to the people, from asserting their identity against a minority that relies on the rule of law to thwart the strong and to subject them to the 'indirect rule' of the weak. Schmitt's point, of course, is not that the rule of the strong is more justifiable, from a moral point of view, than the rule of the weak. His point is simply that, as a member of the majority, one should reject the constraints of legality on the majority's power once one has seen them for what Schmitt thinks they are: the impositions of alien groups whose members ought to be regarded as enemies, and be done away with, in the interest of securing substantive homogeneity.

I hope it is clear that it would be a grave mistake to regard Schmitt's purported rehabilitation of the doctrine of sovereignty as a continuation of the classical discourse of sovereignty. In that discourse, sovereignty and law are seen as essentially arbitrative. Hobbes's sovereign creates unity, and thus peace and security, through representation, not through antecedent exclusion. His will displaces the wills of those who enter into a social contract, it must be owned, as Hobbes says, even by those who disagree with the wisdom of the sovereign's decisions.[95] But this displacement, as Schmitt himself loudly complained in his book about Hobbes, does not destroy the individual will, to fuse it into a true collective identity based on a friend-enemy distinction.[96] It only excludes or preempts it for the time being, for as long as an individual has reason to prefer sovereign protection to the danger of the state of nature. Sovereign representation, thus, turns

[95] See Hobbes, *Leviathan* (n. 7 above) 120, 124.

[96] See Schmitt, *Der Leviathan* (n. 66 above) 79-97.

plurality into unity without eliminating difference. A modern liberal-democratic state, despite the fact that it does not contain a personal sovereign, does much the same, provided it has the capacity to finally settle all social conflict.

In Schmitt's theory of sovereignty, by contrast, sovereign representation, as a principle of political unity, is replaced with pre-legal exclusion, and the very possibility of political difference within a legally constituted and pacified political unity is denied. Or to be more precise: Schmitt's legal theory deliberately attempts to create an attitude, in those to whom it addresses itself, that will make political difference within legal unity impossible. This political project, if I am correct, has little to teach us about the nature of law and the conditions of its legitimacy.

The critique of Schmitt presented in this paper does not imply that we ought to abandon the doctrine of sovereignty. My conclusion is more limited: After the breakdown of Hobbes's unstable synthesis of personal and institutional sovereignty, the doctrine of sovereignty must take its start from the insight that sovereignty is an attribute of the state or perhaps of the state's law, as Kelsen claimed. Whether the doctrine of sovereignty is still jurisprudentially relevant as a doctrine about the state or about the law is a question that remains to be answered. As I suggested above, I do not think that Hart's criticism of Austinian sovereignty even addresses the issue. Perhaps a general *Staatsrechtslehre* is still possible, if we make the effort to free our understanding of sovereignty of the theological and anthropomorphic baggage that, as Kelsen argued, has tended to force it into an inadequate theoretical straightjacket. What I have tried to show is that Schmitt's attempt to conceive of sovereignty as a personal or ‘concrete’ authority that is prior to both state and law is a dead end. Contemporary defenders of popular sovereignty, and

those searching for foundations of modern public law, are well advised to look for a different source of inspiration.