Introduction

Carl Schmitt and the Problem of the Realization of Law

From Political Theory to Jurisprudence

The famous pithy aphorisms that Carl Schmitt used to open his major works – 'the sovereign is he who decides on the exception', 'the concept of the state presupposes the concept of the political', etc. – have become a part of the common discourse of contemporary scholarship on politics and the law. The theoretical framework that animates these slogans, however, has remained somewhat opaque. It has often been argued that there is no such framework – that Schmitt was a situational thinker whose works are best understood as interventions in concrete political debates that do not add up to a grand theoretical vision.[1]

This apparent lack of unity has encouraged a great variety of rather different appropriations. From the left, Schmitt is portrayed as a radical theorist of popular sovereignty, of constituent power and agonistic democracy who aimed to defend popular rule against liberal elitism.[2] Some commentators, by contrast, see Schmitt as a defender of a form of constitutional democracy,[3] even while others interpret him as the prophet of a politically authoritarian neoliberal capitalism.[4] It has been argued that Schmitt's views form the template for populist authoritarianism and that his ideas were, from the beginning, congenial to Nazism.[5] Other scholars have categorized Schmitt as an opponent of

[1] Löwith (1995).
[2] Kalyvas (2008); Mouffe (1997); Balakrishnan (2000); Rasch (2016).
[3] Schwab (1989); Bendersky (1983); Schupmann (2017).
[4] Cristi (1998).
[5] Scheuerman (2020); Dyzenhaus (1997), 38–101.

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legal positivism who rightly objected to a reduction of political legitimacy to mere positive legality.[6]

One reason why it has been so difficult to make sense of the structure and content of Schmitt's overall intellectual project is that its reception and interpretation has tended to focus on Schmitt's political theory and, to a lesser extent, on his constitutional ideas. As a result, the scholarly discussion of Schmitt's work, with some notable exceptions,[7] has lost sight of the fact that Schmitt's key political-theoretical and constitutional ideas grew out of a legal theory – one that forms the implicit background of the political and constitutional arguments one finds in well-known works such as *Dictatorship*, *Political Theology*, *Constitutional Theory* or *The Concept of the Political*.

Schmitt first expounded his legal-theoretical ideas in two early works published before the onset of the Great War – *Statute and Judgment* (1912)[8] and *The Value of the State and the Significance of the Individual* (1914)[9] – which are presented here, for the first time, in full English translation.[10] These texts show, we shall argue, that there is a degree of underlying thematic unity to Schmitt's oeuvre. This is not to say that all of Schmitt's central publications do, in the end, add up to one coherent theoretical edifice or that there is no significant development in Schmitt's thought; rather, Schmitt's early legal-philosophical writings introduce a jurisprudential problem that continued to drive Schmitt's later work, while giving rise to varying responses in different stages of Schmitt's career. To grasp the inner logic of the development of Schmitt's thought, it is necessary to understand how the young Schmitt conceived of that jurisprudential problem.

The problem Schmitt's early legal-theoretical works lay out and engage with is, to adopt Schmitt's own terminology, the problem of *Rechtsverwirklichung*, or of the realization of law. Our aim in this introduction is to

[6] Loughlin (2010); Loughlin (2018).

[7] The importance of Schmitt's legal theory is highlighted in some of the German literature on Schmitt. See Hofmann (2002), 34–77; Maus (1980); Kaufmann (1988). Important English-language discussion of Schmitt's legal theory includes Scheuerman (2020); McCormick (1997), 206–248; Croce and Salvatore (2013). On Schmitt's legal theory in the aftermath of the Second World War, see Maier (2019).

[8] Schmitt (1912).

[9] Schmitt (2015).

[10] For commentary on these two texts, see Scheuerman (2020), 19–44; Scheuerman (1996); Neumann (2015), 16–29; Kiefer (1990). There is valuable discussion of Schmitt (2015) in Baume (2003) and Galli (2013). For the biographical context of these two works, see Mehring (2009), 37–40 and 59–65.

lay out the contours of the problem of the realization of law, as Schmitt presented it in his early legal-theoretical works, and to illustrate how these texts can inform interpretation of Schmitt's mature legal, political and constitutional theory.

The Problem of Legal Indeterminacy

We commonly take it that one can meaningfully distinguish between the rule of law and arbitrary, legally unrestrained governance. It is true, of course, that rules of law are made and applied by specific human beings. There is nevertheless a difference between the rule of law and what a contemporary legal philosopher has called a 'system of pure discretion'[11] in which decision-takers are legally free to decide however they see fit. Where there are rules of law and where officials can be counted upon to be guided by those rules, individual subjects of the law will typically be in a position to anticipate how they will be treated by public authorities in the event that they engage in a certain course of action.

One can hold on to the claim that there is a meaningful distinction between the rule of law and a system of mere discretion without denying that general legal rules sometimes fail to determine outcomes in particular cases, whether because legal rules are bound to be confronted with unanticipated factual situations or as a result of the open texture of the terms of natural language that are used to formulate them. The view that general legal rules always allow for determinate solutions to particular cases by way of mechanical application – a view often referred to as 'formalism' – is almost universally rejected as inaccurate in contemporary jurisprudential debate.[12] The prevailing view nowadays is that law is limitedly indeterminate. According to H. L. A. Hart, legal indeterminacy, while undoubtedly real, is peripheral to legal practice. The phenomenon, Hart argued, should not 'blind us to the fact' that the operations of courts are 'unquestionably rule-governed [. . .] over the vast, central areas of the law'.[13]

The young Schmitt found himself in the midst of a heated debate concerning the problem of legal determinacy – one in which formalist

[11] See Raz (1999), 137–141.
[12] See Shapiro (2011), 234–258.
[13] Hart (1994), 154. On Hart's theory of adjudication, see Kramer (2018), 110–147. Further to the problem of indeterminacy, see Endicott (2000) and Leiter (2007).

accounts of adjudication still had significant purchase. The orthodox jurisprudential approach in Wilhelmine Germany (scholars usually refer to it as 'statutory positivism') was premised on the assumption of the perfect determinacy of statutory law. Statutory positivists argued that all law is the product of the sovereign will of the state, typically expressed in the form of statutory enactments.[14] What is more, they held that there are techniques of legal interpretation that will enable any trained jurist to decide any possible legal case without resort to teleological considerations that might import potentially contentious judgments of value into legal reasoning. The implications of this view for a theory of adjudication were vividly captured, and wittily satirized, by Hermann Ulrich Kantorowicz, a prominent critic of statutory positivism:

> The prevalent ideal conception of the jurist is the following: A higher officer of state with academic training, he sits in his cubicle, armed only with a thought-machine, but one of the very finest sort. The room's only furniture consists in a green table, on which we find the statute book lying in front of the official. One hands him some random case, an actual or perhaps an invented one. In accordance with his duty, the official is able to prove the decision that is predetermined by the legislator with absolute exactitude, with the help of purely logical operations and by the use of a secret technique which is comprehensible to him alone.[15]

By the time Schmitt started his career as a legal scholar, in the first and second decades of the twentieth century, this formalist account of adjudication had come under sustained criticism at the hands of the members of a loose group of legal scholars who referred to themselves as the *Freirechtsbewegung* (the 'free law movement').[16] Kantorowicz published a short monograph in 1906 (under the pseudonym 'Gnaeus Flavius') that was intended to be a manifesto of the free law movement. *Der Kampf um die Rechtswissenschaft* (*The Struggle for Legal Science*) both attacks the assumption of the perfect determinacy of statutory law as descriptively inaccurate and makes suggestions for how judges who have

[14] See Wieacker (1952), 430–468. For the political background of statutory positivism, see Caldwell (1997), 13–39. The standard understanding of statutory positivism is challenged by Paulson (2007), who argues that the view is neither wedded to the notion that all law is statutory nor to the claim that law is perfectly determinate, but only to the weaker thesis that statutory law is supreme.

[15] Kantorowicz (1906), 7.

[16] Other notable exponents of the free law school include Eugen Ehrlich and Theodor Sternberg. See Foulkes (1969); Herget and Wallace (1987). For Kantorowicz's theory of adjudication, see Paulson (2019).

abandoned it should go about their business if faced with problems of indeterminacy.

Although the free law movement was perceived as a radical assault on the self-understanding of legal officials, its views have a lot in common with the moderate-indeterminacy thesis espoused by Hart. Statutory rules, Kantorowicz points out, invariably contain terms that are affected by the vagueness of natural language.[17] The application of statute will, at times, have to deal with cases that Hart later described as 'penumbral'[18] – that is, with cases in which the established use of a term that has been employed in the formulation of a legal rule fails to determine whether some state of affairs is to be subsumed under the legal rule. Statutory positivists claimed that there are juristic techniques of interpretation that will enable a judge to deal with indeterminacies in statutory law arising from this problem of the open texture of natural language – but there are no objective criteria, Kantorowicz argues, for deciding which of the available techniques of interpretation (analogy, extensive interpretation, *argumentum e contrario*, etc.) ought to be used in a concrete case so as to remedy the problem.[19] The appeal to such techniques merely serves to rationalize judicial decisions that are driven, however unconsciously, by the will of the interpreter. The belief that decisions are always determined by statutory norms, Kantorowicz concludes, amounts to a kind of false consciousness among legal decision-takers – one that may engender bad decisions that are insensitive to the interests of society and its members.[20]

What would a more defensible approach to adjudication look like? Judges who are faced with statutory norms that fail to clearly determine decisional outcomes, Kantorowicz argues, must resort to normative standards that are not contained in statutory law and which cannot be sourced to the will of the state. Kantorowicz refers to these subsidiary standards as norms of the 'free law'.[21] What endows norms of the free law with legal status, according to Kantorowicz, is their factual acceptance among the members of a legal community.[22] It is here that jurisprudence connects with legal sociology: social-scientific research is needed to determine which expectations of proper conduct and appropriate

[17] See Kantorowicz (1906), 15.
[18] See Hart (1958), 606–615.
[19] See Kantorowicz (1906), 23–30.
[20] See ibid., 19–22 and 38–47.
[21] See ibid., 10.
[22] See ibid., 12.

ordering are in fact shared among the members of society.[23] It is to these that a judge is to refer, if possible, when statutory law fails to provide guidance. Even the free law, however, will at times fail to provide sufficient decisional guidance. In such cases, Kantorowicz admits, there is no legal solution to the case at hand[24] and a judge will consequently have to take a decision based on their individual moral opinion, although such opinions are not, in Kantorowicz's view, open to rational justification.[25]

The young Schmitt was clearly impressed by this challenge to statutory positivism. His own theory of adjudication, as developed in *Statute and Judgment*, concurs with the critical conclusions of Kantorowicz's attack.[26] Schmitt refrains, however, from fully endorsing Kantorowicz's response to the problem of the partial indeterminacy of statutory law. In particular, Schmitt rejects the view that there are cases in which the law fails to provide direction, as well as the corollary of this view that judges in such cases are free to make law rather than to apply it.[27] His reaction to the free law movement's challenge to statutory positivism, as a result, takes the form of an attempt to identify an alternative ground of legal determinacy.

A Turn to Legal Practice

Consider again the description of the process of adjudication that Kantorowicz attributes to the statutory positivist: it implies that all legal questions that might arise in a concrete case have a correct answer and that this answer is fully contained in statutory law, assuming that the latter is correctly interpreted. What a judge does, in deciding a specific case, is apply a general decision already taken by the legislator to the concrete situation at hand. This is a purely cognitive process – one that is guided by value-neutral logical techniques of statutory interpretation and which therefore does not require the judge to rely on their own practical judgment. Statutory law, in turn, is portrayed as an instruction or command to the judge – issued by the sovereign – that is binding on judges. The judge, in view of their subjection to the will of the sovereign legislator, is bound by

[23] See Kantorowicz (1911), 13–15.
[24] See Kantorowicz (1906), 16.
[25] See ibid., 40–41.
[26] See Schmitt (1912), 11–16, and compare Kantorowicz (1906), 23–32. Schmitt's critique of statutory positivism is also indebted to Sternberg (1904), 123–142.
[27] See Kantorowicz (1906), 42.

statute to decide in a particular way. Accordingly, a judicial decision is to be regarded as correct if and only if it exhibits conformity to statute (*Gesetzmäßigkeit*).[28]

Like the proponents of free law, Schmitt rejects this account of the correctness of judicial decisions as a misdescription of legal practice. His adaptation of the free law movement's critique of statutory positivism, however, emphasizes the question of where this critique leaves our understanding of judicial role. If we abandon the criterion of conformity to statute, how can judges still be said to be subject to the law – to be duty-bound to apply it? It might appear, Schmitt points out, that judges are free to decide for themselves whether to use a statutory norm to decide a particular case, as well as how to use it:

> According to the prevailing opinion, the judge, at each stage of his activity, is to pay obedience to a command whose content he has, in most cases, to determine for himself. This compels the conclusion that the evaluation of this determination, the question of its correctness, cannot be answered by appeal to the command itself. The content of the latter must first be identified through that determination. A 'will' that hovers above the judge is, in all cases, the result of an interpretation, one that therefore cannot, in turn, legitimize itself by appeal to its result.[29]

Note that Schmitt's claim in this passage is not that statutory norms do not bear, often significantly, on how particular cases ought to be decided; rather, the claim is that the process of the application of a statutory norm to a particular case must turn on factors that are not contained in statute itself – which do not themselves derive from a legislative instruction that binds judges. The statute itself, Schmitt points out, does not contain anything more than its 'manifest content'[30] and how the latter is to be understood is what is at issue in difficult cases. It would be futile, Schmitt observes, for a sovereign legislator to try to address this question by issuing a general command to the judiciary to decide in conformity with statute. Such a command would not obviate the need for the interpretation of statutory rules and it could not tell a judge what makes an interpretation correct. But if judges must decide that question for themselves, what difference is there between legislation and adjudication?

Although Schmitt endorses Kantorowicz's rejection of the traditional doctrine of statutory interpretation, he claims that theorists of free law

[28] Schmitt (1912), 5–6 and 21.
[29] Ibid., 31.
[30] Ibid.

fail to address the question. Kantorowicz, for one, argues that judges ought to follow statute for as long as it provides clear, unambiguous guidance, that they should plug gaps or resolve ambiguities in statutory law by appeal to the moral opinions factually prevalent among members of society, wherever possible, and that they ought to decide in accordance with their own moral views where conventional morality gives out. But he does not explain why a judge should be seen to be obligated to go down this precise decision tree.[31] The theory of free law, Schmitt argues, remains wedded to the idea that a legal decision, to be legally correct, must be determined by norms that judges can be assumed to have a duty to apply. It merely aims to widen the range of such norms, by attributing subsidiary legal force to conventional morality. But the doctrine of free law, much like the statutory positivist position that it attacks, fails to explain what accounts for the fact that judges and other legal officials are bound to apply the norms in question or to rank them in the suggested way.[32] Unless the question can be answered, even judicial decision-taking that follows the strictures outlined by Kantorowicz must remain a mere exercise of the will of the decision-taker.

To overcome this shortcoming, Schmitt goes on to suggest, we need a conception of the correctness of judicial decisions that lets go of the idea that correct judicial decisions are programmed by legal norms (of whichever kind). To arrive at an alternative, Schmitt turns his attention to the way in which legal practice in fact deals with problems of application. An analysis of legal practice shows, Schmitt claims, that judges approach difficult cases under the guidance of a 'postulate of legal determinacy', which demands of judges that they decide in the way that best fosters and preserves legal determinacy, understood as the 'calculability' and 'predictability' of judicial decisions.[33] As we have seen, Schmitt, like Kantorowicz, rejects the view that judicial decisions do nothing more than implement statutory law and he agrees that legal officials, insofar as they take themselves to be doing nothing more than implementing statutory law, are labouring under a form of false consciousness. But Schmitt also claims, in contrast to the proponents of free law, that existing legal practice is fundamentally sound. Although practitioners often adopt a mistaken self-description, their decision-taking is given sufficient orientation, however unconsciously, by the postulate of legal

[31] See Kantorowicz (1906), 41.
[32] Schmitt (1912), 19–20 and 38–40.
[33] See ibid., 44–67.

determinacy. 'Happily, the method of practice', Schmitt avers, 'is better than what practice takes to be its method.'[34]

Schmitt presents two major lines of argument to sustain the claim that legal practice is in fact governed by a postulate of legal determinacy. The first of these is a general reflection on the function of positive law, which introduces the problem of the realization of law. Schmitt observes that a statute is typically dependent upon established social practices and mores. It usually 'leans against existing orders of life and habits of intercourse', and 'makes use of the moral opinions of the time and the people, of cultural ideas'.[35] The contribution the positive law makes to social order, Schmitt goes on to argue, is to give legal specificity to a society's accustomed form of life. This explains, Schmitt claims, why many positive legal provisions are characterized by an element of indifference of content – why it is often more important that there be some determinate legal regulation, whatever its content may be, rather than none.[36] A society's form of life – the sense of justice shared by its members – may determine, for instance, that there ought to be punishment for murder, but it is unlikely to give an answer to the question of precisely what punishments are to be imposed in the particular circumstances of an individual case. At the limit, it matters more that legal order be capable of settling such questions than how exactly it settles them. This line of thought shows, Schmitt argues, that an appeal to substantive moral standards cannot, by itself, provide a criterion of the correctness of judicial decision. Such standards would fail to tell a judge how to decide in cases in which there are several possible ways of specifying or concretizing those standards.

The main reason why statutory law has gained prominence in modern societies, Schmitt claims, is that it typically (although not invariably) turns out to be a very efficient way of dealing with decisional problems of this sort.[37] As we have seen, Schmitt rejects the view that statutory law can by itself achieve the goal of complete legal determinacy. The claim that statutory law does not always provide clear guidance, however, does not entail that it never does: not all cases are hard. The reason, then, why a judge normally ought to decide in accordance with statute, in cases where statutory law does give clear guidance, is that doing so serves the

[34] Ibid., 43.
[35] Ibid., 44–45.
[36] See ibid., 45–53. The theme is likewise discussed in Schmitt (2015), 78–80, and it reappears in Schmitt (1922), 30–31.
[37] Schmitt (1912), 84–85.

aim of achieving legal determinacy. This interpretation of the point and purpose of statute, Schmitt holds, can be extended into a general account of the way in which legal officials deal with difficult problems of interpretation and application.

In this vein, Schmitt's second line of argument is to point out that many features of legal practice that would otherwise be difficult to account for – that judges are required to provide reasons for their decisions; that important cases are decided not by a single judge, but rather by a collegium of several judges; that there is usually a possibility of appeal to a higher instance; that judges are more likely to invoke conventional morality than their own ideas of justice as a subsidiary standard; that they show anticipatory deference to the judicature of higher courts – can plausibly be understood to serve the purpose of legal determinacy.[38] All of these practices enhance the predictability of judicial decision and thus serve to realize legal determinacy.

The claim that legal practice is governed by a postulate of legal determinacy is introduced as a descriptive claim about 'contemporary legal practice'. Schmitt's interpretation of legal practice is nevertheless intended to yield normative conclusions and practical effects. If judges were to self-consciously adopt the description of legal practice offered in *Statute and Judgment* and let go of the myth that they do nothing more than to implement decisions already contained in statute, their decision-taking would be more likely to achieve legal determinacy.[39] And that practice is, as a matter of fact, committed to the achievement of legal determinacy entails, Schmitt suggests, that an individual judge is duty-bound to decide in the way most conformable to the postulate of legal determinacy.

Schmitt's Criterion of Correctness

That assumption finds expression in Schmitt's aim to provide an alternative criterion of the correctness of judicial decision, which is intended to replace the criterion of conformity to statute (or of norm-conformity more generally). Schmitt formulates his practice-based criterion of the correctness of a judicial decision as follows: 'A judicial decision is correct, today, if it is to be assumed that another judge would have decided in the same way. "Another judge", in this context, refers to the empirical type of the modern,

[38] See ibid., 68–79.
[39] See ibid., 73.

legally trained jurist.'[40] Schmitt makes it clear that this criterion is not to be understood as an invitation to engage in sociological or psychological research that might allow judges to offer causal predictions of one another's behaviour.[41] The guiding idea behind the 'formula of correctness', as Schmitt calls it, is that the cause of legal determinacy is best advanced if a legal community's judges rely on the same reasons for their decisions and use them in the same way when they decide similar cases. An individual judge is to ask how another judge is likely to approach the task of arguing about the case at hand. To answer that question, the judge must know what reasons another judge would likely invoke, as well as how the other judge would likely interpret and apply them. In other words, Schmitt's claim is that legal practice will have formed customs and conventions as to how one is to interpret statute and to deal with gaps in the positive law, as to what subsidiary norms may be invoked apart from statute and in what order, as to what weight is to be given to precedent, and so forth. A correct decision is simply one that conforms to the prevailing customs and conventions of legal practice and which is, as a result, calculable and predictable.[42]

Schmitt argues that this approach adopts what is valuable in the free law movement's critique of statutory positivism, while avoiding what he sees as its shortcomings. Schmitt's practice-oriented theory of adjudication, like the doctrine of free law, dispenses with the idea that judicial decisions merely implement general decisions already taken by the legislator. Statutory rules retain their status as a paradigmatic form of law because an appeal to statute is often apt to render decisions predictable. But departures from or additions to statute are permissible – even required – on the condition that they are to be expected, given the established customs and conventions of legal practice. While collective practice determines how legislative input will be interpreted and used, the individual judge is duty-bound to make their decisions conformable to established practice – that is, to adhere to the postulate of legal determinacy.[43]

The rejection of statutory positivism, Schmitt concludes, will neither undermine the regularity of legal decision-taking nor improperly endow individual judges with a power to make law. The statutory positivists, in other words, were quite right, in Schmitt's view, to argue that legal

[40] Ibid., 68.
[41] See ibid., 17–19 and 74–75.
[42] See ibid., 79–114.
[43] Schmitt affirms this point repeatedly. See ibid., 40, 42, 75, 96 and 99.

decisions are (and ought to be) fully predictable and that legal officials ought, at all points, to be subject to the law – although they were wrong to portray legal determinacy as the result of a mechanical application of statutory law, imposed on legal practice from the outside by a sovereign legislative will. The proponents of free law, meanwhile, were correct to point out that legal practice is not exclusively governed by statute in the way statutory positivists claim. But they overlooked that legal practice has its own resources to bind judges and to achieve legal determinacy.

Homogeneity and Legal Determinacy

Schmitt is willing to go much further than Kantorowicz in loosening judicial subjection to statute. He demands, as we have seen, that judges rely on statutory rules as long as doing so will enhance the predictability of decisional output, but he argues that they may be justified in departing from the guidance of statutory law if the pursuit of the goal of legal determinacy so requires. Schmitt explicitly allows for, while Kantorowicz denies, the possibility that judicial decisions that go against a clear statutory provision may sometimes be correct – namely, in cases where a judge has reason to assume that other judges would likewise choose to decide *contra legem*.[44] Imagine a case in which statutory law appears to provide unambiguous guidance, but where it would strike participants in legal practice as patently unreasonable to apply statute, or where to do so would go against a sense of justice that is shared by the community of judges (and perhaps by society at large), so that an individual judge has strong reason to assume that other judges would take a decision *contra legem* if faced with a relevantly similar case. Given such circumstances, the judge, Schmitt argues, is required to take a decision that contravenes statute.

And yet, Schmitt defends a rather demanding understanding of legal determinacy: one that combines the claim that the law (as used in practice) speaks to every case that may have to be adjudicated with the view that it is always predictable, with a fair degree of accuracy, how a typical judge is going to decide. If legal determinacy, thus understood, is to obtain, judges must have arrived at a stable, undisputed and coherent set of customs and conventions of adjudicatory practice. What is more, they must share, and know that they share, a strong intuitive sense of how it would be proper to 'go on' in cases where grounds of decision that have

[44] See ibid., 106–109, and compare Kantorowicz (1911), 13.

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already been recognized in past legal practice either fail to pinpoint a unique solution or lead to outcomes that are perceived to be unacceptable. Schmitt concedes that, in such cases, judges may have to take resort to *Rechtsgefühl* – that is, to a sense or feeling of what decision would be just or appropriate in the circumstances of the case. But he adamantly denies that judges are permitted to decide difficult cases by appeal to their personal moral convictions; to preserve legal determinacy, they must instead rely on moral convictions they can assume to be prevalent among the members of the judiciary, even if these differ from their own.[45]

What is necessary for legal determinacy to obtain, Schmitt implies, is not merely that all participants in legal practice have mastered a scientific method of the correct interpretation and application of legal rules; it is also necessary that they form a sufficiently homogeneous group.[46] Only thus will judges share a *Rechtsgefühl* – or at least understand what *Rechtsgefühl* is shared in their community – and be enabled, as a result, to render predictable decisions even in difficult cases. Where homogeneity does not obtain, the determinacy of legal practice is bound to break down and the question of how another judge would decide will often have no clear answer. It would perhaps be too dramatic to describe such a situation as one in which there would no longer be any law. It is quite likely, after all, that there would still be legislative and adjudicative institutions, and that their decisions would still be enforced by the use of the organized power of society. But, at least from Schmitt's point of view, the decisions of judges could, under such circumstances, no longer be seen to be realizing the law as opposed to imposing the decision-taker's personal conception of proper social order.

Schmitt on the Idea of Law

Schmitt argues that modern legal practice is committed to achieving legal determinacy. He also argues that the insight that modern legal practice is

[45] See Schmitt (1912), 91–93.

[46] The importance of homogeneity in Schmitt has been emphasized by Scheuerman (2020), Scheuerman (1996) and Dyzenhaus (1997). Schmitt does not use the term prominently in *Statute and Judgment*, but there are passages, for instance, that argue that judges must share a common understanding of conventional morality for legal determinacy to be possible (see Schmitt [1912], 94), or that portray 'the judgment of the medieval juror, who was certain that his decision would find the agreement of all his legal associates' as a paradigmatic example of a correct decision (see ibid., 86).

so committed gives rise to a normative demand: judges ought to decide in the ways most conducive to the realization of legal determinacy. This normative demand cannot be defended, at the end of the day, by appeal to the mere fact that a concrete practice is committed to determinacy. It might be argued, after all, that the practice in question would be improved by loosening or shedding the commitment. Why, then, is the achievement of legal determinacy to be regarded as the paramount aim of judicial activity? What is the value of legal determinacy? Why should we take it that legal officials ought to consider themselves bound, when they apply the law, to submit to the postulate of determinacy?

Schmitt's understanding of legal determinacy is tied to the problem of the realization of law. In *Statute and Judgment*, both positive legal norms and judicial decisions, as pointed out above, are understood as elements of the legal concretization of an underlying form of social life. As far as judges are concerned, this concretization is to take place in accordance with firmly established customs and conventions of adjudication, so as to make judicial decisions predictable. However, Schmitt dismisses the view, which he associates with Bentham, that the predictability of judicial decisions is valuable merely because it serves individual economic interests.[47] What makes suitably determinate positive law authoritative or legitimate, Schmitt suggests instead, is that it gives legal specificity to a form of social life that is assumed to be valuable. Schmitt must explain, then, what would make a form of social life valuable, so that its authoritative legal concretization by officials will enjoy a presumption of legitimacy. The second of the two works translated here, *The Value of the State and the Significance of the Individual*, engages with this substantive normative question.

We need to begin with a terminological clarification. Schmitt's argument in *The Value of the State* focuses on the notion of *Recht*, which is best rendered as 'the law', in the sense that contrasts with 'a law', or alternatively as 'right', in the objective sense of 'what is right'. Schmitt also occasionally refers to the *Rechtsgedanke* ('the thought or idea of law/right'). The term *Recht*, although central in *The Value of the State*, is hardly ever used in *Statute and Judgment*. The terminological focus of *Statute and Judgment* is on *Gesetz* – that is, on positive statutory rules. Statutory positivists, as we have seen, held that the law, *Recht*, in the objective sense of the term, consists in large part of the statutory rules enacted by the sovereign will of the state. The use of the notion of *Recht* in

[47] See Schmitt (1912), 61–62.

The Value of the State is best understood as an implicit repudiation of this tendency to identify law with statute.[48] The primary reference of the term is to that which is concretized by the enactment of positive statutory rules and in judicial decisions. In other words, Schmitt's terminology in *The Value of the State* intimates that what gives legitimacy to positive legal decisions, whether they be legislative or judicial, is the fact that they implement a meta-positive idea of law. This suggests, in turn, that a form of life must conform to, or be structured by, that idea if its legal concretization is to carry a presumption of legitimate authority.

The core thesis of *The Value of the State*, accordingly, is that it is the state's essential function to realize *Recht*, the meta-positive idea of law – that is, to translate it into determinate and enforceable positive law. One telling passage in *The Value of the State* explicitly distinguishes, in this vein, between *Recht* as an abstract standard that pre-exists the state, and the positive law enacted by the state, which latter is described by Schmitt as a 'serving' and 'mediating' form of law whose sole purpose it is to make *Recht* effective in the empirical world.[49] The state's value and its authority, Schmitt argues, derive exclusively from this function of the realization of *Recht*. Indeed, Schmitt defines the state as the task (*Aufgabe*) of realizing law in the world.[50] These claims are expressed in a language that readers of Schmitt's later works might find quite surprising. Schmitt argues that the only principled way of giving content to the concept of state is to 'assign the state a place in a system of values, one from which its authority follows'. The state, Schmitt claims, 'is not the creator of law [*Recht*], but rather the law is the creator of the state: the law precedes the state'.[51] A little later, Schmitt's reader is informed that 'the law is not in the state, rather the state is in the law'.[52] Schmitt describes a *Rechtsstaat* – that is, a state committed to the rule of law – as one that 'wants wholly to become a function of the law' and recognizes that it should subject itself to its own positive norms only 'because they are law [*Recht*]' – that is, because they are right or correct.[53]

It seems difficult to imagine a more thoroughgoing disavowal of the idea – so prominent in Schmitt's *Political Theology* – that a sovereign

[48] On the distinction between *Recht* and *Gesetz*, see Berman and Zeitlin (2018), xiii–xiv.
[49] Schmitt (2015), 77.
[50] See ibid., 56: 'The state is accordingly the legal construct whose sense consists exclusively in the task of realizing law.'
[51] Ibid., 50.
[52] Ibid., 52.
[53] Ibid., 54.

does not have to have legal authority to make law.[54] But we should note that the notion of sovereignty makes an early appearance in *The Value of the State*. Schmitt points out that law as *Recht* must be 'formulated with precise content' if it is to be implemented and enforced in the empirical world: 'The legal idea . . . must become positive, that is, its content is set by an act of sovereign decision.'[55] The claim that Schmitt makes here, it would seem, is that the state must be guided, in making positive laws, by the meta-positive idea of law. But its decisions as to how to specify that idea are not only materially indifferent but also final and, in that sense, sovereign. The relation of the state to *Recht*, in other words, is somewhat akin to that of the Hobbesian sovereign to the practical standards that Hobbes refers to as the 'laws of nature'.[56] The sovereign, for Hobbes, is the sole interpreter of those laws, but the sovereign does not create them and the sovereign's decisions can be critically assessed in their light.

In contrast to Hobbes, however, who expended significant intellectual energy on the attempt to outline the content of the laws of nature, Schmitt does not offer an extended discussion of the content of *Recht*. *The Value of the State*, as Schmitt concedes in his introduction to the book, does not provide a full analysis of the content of the idea of law;[57] rather, Schmitt's main concern is to defend a negative claim about *Recht* – namely, that *Recht*, by contrast to the sanction-backed positive laws that implement it, cannot be a product of mere *de facto* power (and thus cannot derive from the will of the state understood as a mere *de facto* power).

There are some intimations that the young Schmitt understood *Recht* in religious terms. He describes *Recht* as a *Gebot*[58] – a term that, in the original German, evokes the idea of divine law in making implicit reference to the Ten Commandments. Later in the work, Schmitt, in discussing the Catholic Church as an exemplar of an institution that is given over to the realization of *Recht*, refers to the *ius divinum*, the divine law, as a form of *ius* or *Recht* properly so-called. Indeed, Schmitt asserts that the *ius divinum*, as Catholic doctrine understands it, is a 'true *ius*' – that is, a true law.[59]

[54] Schmitt (1922), 13.
[55] Schmitt (2015), 79.
[56] See Hobbes (1996), 91–111, and Dyzenhaus (2001).
[57] Schmitt (2015), 15: 'Should the legal-philosophic inquiry find a specific definition of the state, then this is a result, in any case, for scientific inquiry, even if the definition of law remains restricted, for the time being, to a few necessary [but] negative claims [. . .].'
[58] See ibid., 43.
[59] See ibid., 82: '. . . a *jus divinum*, which is a true *jus* and not an ethics.'

However these intimations are to be understood, what is clear is that Schmitt is once more opposing the statutory positivists, who argued not merely that law depends on the will of the state, but also that it is meaningless to ask where the state gets the authority to command. From the statutory positivist viewpoint, the state is seen to have the power to make law simply by virtue of its effective coercive control of the population of a certain territory. Whether such power is justified or exercised in ways deserving of the deference of subjects was not regarded, by the statutory positivists, to be a question jurisprudence is competent to ask or to answer.[60]

Schmitt's argument for the claim that the law cannot be the product of a *de facto* power starts out from the correct observation that any theory that portrays law as the product of the state's overwhelming *de facto* power will be unable to vindicate the claim that the positive law is essentially authoritative.[61] For some *de facto* power to be rightful, and thus to be able to generate binding rules or decisions, that power must be suitably related, Schmitt claims, to a prior legitimating standard. Schmitt goes on to identify *Recht* with that standard, whatever its precise content may be, and thus arrives at the conclusion that *Recht* cannot have been produced by the state's power. The positive rules enacted by a state, in turn, make out their claim to be law, and thus to be authoritative, only by serving the realization of *Recht* in the empirical world.[62] The statutory positivists stand accused, implicitly, of taking the view that the sanction-backed commands of a brute, but preponderant, power are invariably binding even if they fail to conform to any antecedent normative standard that carries legitimating force. This is the infamous reduction of legitimacy to legality – of *Recht* to *Gesetz* – of which Schmitt accused his positivist opponents.[63]

Such a reduction would clearly be confused, but there can be no doubt that the main proponents of modern legal positivism are not guilty of such confusion. Schmitt's argument about the reduction of legitimacy to legality arises from the concatenation of two theses: first, the claim that positive law is essentially authoritative or binding; and second, the claim that positive rules have the quality of law simply because they were enacted by a factually supreme power. The second of these two theses might be imputed to some positivist authors, but positivists, needless to

[60] See Anschütz (1933), 1–8.
[61] See Schmitt (2015), 22–43.
[62] See ibid., 44–56.
[63] See Schmitt (1932a).

say, invariably reject the first.[64] What positivists claim about the legitimacy or authoritativeness of positive law is simply that positive legal rules can or cannot be legitimate, depending on whether or not they happen to conform to the practical standards, whatever they may be, that properly ought to guide our critical moral assessment of laws. There is no reason whatsoever why a positivist should be disbarred from making the claim that some valid law is illegitimate or why a positivist should be disbarred from making the normative demand that positive laws ought to conform to the practical standards that are relevant for assessing the practical quality of those laws. One can, of course, decide, like Schmitt, to call these standards *Recht* and then claim that (a kind of) natural law theory has been vindicated against positivism.[65] But this is mere wordplay that does not mark any interesting difference from positivist conceptions of legality – at least if it is to say no more than that laws must conform to moral standards to be legitimate.

Schmitt on the Relation of Law and Morality

Might there be a way of interpreting Schmitt's claim that the state is 'in the law' in a more charitable way – a way that makes it out to be an interesting and distinctive jurisprudential thesis? When Schmitt proclaims that the state is 'in the law', he does not mean to argue that every observable state-like institution that exercises *de facto* control over some territory is credibly committed to the goal of the realization of law or successful in its pursuit; rather, Schmitt claims that a purely empirical concept of the state – one formed by simple abstraction of the common features of a large number of empirical instances of organized, large-scale social control – must be unsatisfactory. If one wants to explain why it is essential to the state to, say, have a territory or to exercise a monopoly of force, one must show, Schmitt argues, that these features are necessary for the state to fulfil its essential function or purpose. That purpose or function, Schmitt goes on to claim, can only be the realization of law.[66] To say that the state is in the law or that every state is wholly governed by the idea or by the thought of law, then, is to say that an institution that does not aim to realize *Recht*, or that is wholly

[64] See Kelsen (1934), 15–19; Hart (1994), 185–212.

[65] Schmitt (2015), 83, refers to this standard as *jus divino-naturale*, or that law which is natural and divine. For discussions of this view as being one that Schmitt affirmed repeatedly, see Taubes (2017); Meier (1994).

[66] Schmitt (2015), 77.

unsuccessful in the task, is a defective instantiation of statehood or no state at all and that its laws are defective or, in the extreme case, no laws at all.

An approach of this kind might come to something jurisprudentially distinctive and interesting, but only if more can be said about the content of *Recht* and about the state's relation to *Recht*.[67] What are the normative standards comprised in the idea of law and how do they differ from other, non-legal, normative standards? Why is the peculiar institution that we call the state necessary to realize *Recht* in the empirical world? While Schmitt does address the latter question about the state – by pointing to the inability of *Recht* to realize itself[68] – he has little to say, beyond the religious intimations mentioned above, about the content of *Recht*. In the text of *The Value of the State*, he rests content to remark that his theory of *Recht* is a theory of 'natural law without naturalism'.[69] Instead of further describing the content of *Recht*, Schmitt, besides claiming that *Recht* is prior to the state, merely offers a few additional negative clarifications as to what *Recht* is not.

One such clarification concerns the relation of law and morality. Although *Recht*, in its original form, is supposed to be a purely normative standard, it is nevertheless wholly distinct, Schmitt proclaims, from morality. The pure norms of law that are to be implemented by the state are to have nothing to do with the rules of morality. Schmitt's claim that *Recht* and morality are wholly distinct and unrelated practical standards is developed in a lengthy discussion of neo-Kantian conceptions of the relation of law and morality that cannot be analysed in detail here.[70] Suffice it to say that Schmitt opposes the Kantian view that legal duties concern external behaviour, and not inner motive, and are thus apt to be enforced by the coercive power of the positive law.[71] In this Kantian

[67] For a contemporary attempt to do just that, see Finnis (2011).

[68] Schmitt (2015), 40. Although neither *The Value of the State* nor *Statute and Judgment* make explicit mention of Hobbes, the argument has clear Hobbesian undertones. On Schmitt's (and Schmittian) interpretations of Hobbes, see Stanton (2011); Mastnak (2015); Zeitlin (2017); Freund (2017); Taubes (2017).

[69] Schmitt (2015), 76, Schmitt speaks of 'the element of originary, non-state law, the further determination of which is not the task of this treatise and of which (in order to be concise, for once, at the risk of paradox) we wish to say no more than that it must emerge as a natural law without naturalism'. The context makes it clear that 'naturalism', in Schmitt's terminology, designates the methods of empirical social sciences concerned to offer causal explanations of social phenomena.

[70] See ibid., 60–69. Schmitt discusses Stammler (1911); Natorp (1913); Cohen (1904).

[71] See Kant (1996b), 383–385.

picture, Schmitt complains, the role of positive law is merely to secure the 'external conditions for internal morality'.[72] For Schmitt, this amounts to an intolerable 'debasement of the law', in that it portrays the law as 'ideal housewife, who, by way of her circumspection and noiselessness, keeps the house in order and therewith fulfills the external conditions for the undisturbed professional activity of her husband'.[73] The proper approach, Schmitt proclaims, is not to derive morality and law from the same principle: 'They cannot come into contradiction with one another because they have nothing to do with one another.'[74]

Although Schmitt's distinction of *Recht* and morality remains rather opaque, it seems clear enough that it does not align with a Fullerian distinction between the internal and the external morality of law.[75] Schmitt's notion of *Recht* does not concern the way or form in which the state uses the positive law to pursue its substantive policies – that is, whether the state abides by principles of legality; rather, it would appear that *Recht*, for Schmitt, is to be understood as providing the outlines of a substantive conception of good social order. This comes out in several passages of *The Value of the State*, perhaps most clearly in a short discussion of the rights of the criminally accused at the end of the first chapter. Schmitt observes that any 'normal' person would rightly demand to be judged by their equals – that is, by other 'normal' people. He goes on to claim that everyone would, by contrast, reject a criminal's demand only to be judged by their equals – that is, by other criminals. The principle of equality before the law is itself premised, Schmitt claims, on the substantive content of *Recht* – that is, on a preference for non-criminal behaviour – and this entails, Schmitt rather brusquely concludes, 'that this right to equal treatment does not exist for those who', like the criminal, 'are abnormal in the legal sense'.[76]

At first glance, Schmitt's claims about *Recht* in *The Value of the State* appear to carry a Kelsenian flavour.[77] Like Schmitt, Kelsen claims that law is normative, but that its normativity is altogether distinct from

[72] Schmitt (2015), 67.
[73] Ibid., 70.
[74] Ibid
[75] See Fuller (1964), chs I and II.
[76] Schmitt (2015), 41. The claim that equality before the law assumes homogeneity recurs in Schmitt's later work. See Schmitt (1934), 48–52; Schmitt (1942), sections 1, 3 and 17.
[77] See Neumann (2015), 16–29. For a comparative analysis of Kelsen's and Schmitt's legal theories, see Paulson (2016), 510–546. Schmitt refers to Kelsen respectfully in both *Statute and Judgment* and *The Value of the State*: see Schmitt (1912), 53–55; Schmitt (2015), 78.

moral normativity. Like Schmitt, Kelsen rejects the view that law can be a product of brute *de facto* power. To interpret an exercise of *de facto* power as the exercise of a legal power, one must presuppose an empowering meta-positive *Grundnorm* that cannot be validated by psychological or sociological facts.[78] Despite these superficial similarities, the views of the young Schmitt on the relation of law and state differ fundamentally from those of Kelsen. Whereas Schmitt's *Recht* is a substantive ideal of good order, Kelsen's *Grundnorm* is a blanket authorization of the first legislator, and Kelsen consequently claims that the positive law can receive any content.[79] Like Schmitt, Kelsen affirms that every state is a *Rechtsstaat*, but he does not want to claim, in putting forward his thesis of the identity of law and state, that an institution of power must be committed to the realization of a substantive and legitimating idea of law to count as a state, but rather that any large-scale, rule-based organization that exercises a coercive monopoly of force in a territory is a *bona fide* state, irrespective of the content of its rules.[80] Kelsen rejects the idea, as has already been emphasized, that positive law is endowed with intrinsic practical authoritativeness.

Schmitt's Anti-individualism

The last chapter of *The Value of the State*, in which Schmitt presents his views on the 'significance of the individual', contains a final attempt to clarify the notion of *Recht* – one that helps to explain the motivation behind Schmitt's separation of law and morality. The claim that it is the task of the state to realize the law is not, in itself, a terribly surprising thesis. Schmitt is aware, of course, that authors who stand in the tradition of social contract theory – such as Hobbes, Locke, Rousseau or Kant – would have agreed with that view in the abstract, but he rejects the understanding of the content of the idea of law that prevails in the social contract tradition. That tradition, to paint with a broad brush, takes it that the task of the state consists in the realization and protection of individual rights or fundamental individual interests in – as a Lockean might have it – life, liberty and property. Schmitt repeatedly affects contempt for the idea that it could be the purpose of law to deal with such mundane and unedifying matters, and

[78] For a concise overview of these themes in Kelsen, see Paulson (1992).
[79] See Kelsen (1934), 55–60.
[80] See ibid., 97–106, and compare Kletzer (2018), 21–52.

that the value of the state could consist in being an instrument of the satisfaction of individual desires;[81] rather, Schmitt proposes a reversal of the view that the state's value derives from the way in which it serves individual interests (including the interest in the moral life). The value of the individual, at least from a legal point of view, he claims, depends on the way in which the state's positive law integrates the individual into the collective task of *Rechtsverwirklichung*. Individuals become valuable, from a legal point of view, by being instruments of the state, while the latter, in turn, derives its value from the fact that it realizes the meta-positive ideal of *Recht* in the empirical world.[82] The position of the individual towards the law is therefore one of heteronomous determination: the state, to which Schmitt refers as the 'only subject of the legal ethos',[83] imposes the task of *Rechtsverwirklichung* on individuals, thus giving the individual an opportunity to participate in a higher calling than the satisfaction of individual preference.[84] Whatever *Recht* (understood as *Gebot*, i.e. as commandment) may be, its realization, for Schmitt, must involve more than the provision of the institutional conditions that will delimit and protect individual rights.

Schmitt's arguments for the view that the legal value of individual human beings derives from the way in which they serve the purposes of the state are not entirely convincing. He points out, for instance, that it would be a mistake to think that value attaches to individuals as mere empirical creatures or biological particulars. Even Kant, Schmitt claims somewhat tendentiously, held that the individual human being has value only insofar as it conforms to the moral law, which has no regard for the empirical differences between individuals.[85] A more plausible reading might hold that, for Kant, the capacity to act on the moral law is sufficient to endow the human being with the dignity of a moral agent. Kant would certainly have rejected the claim that the individual carries that dignity only once it becomes the instrument of a purpose that stands above the individual's own law-giving practical reason. Schmitt's intent in putting forward his unorthodox interpretation of Kant, however, is apparent enough: he aims to separate the law

[81] See Schmitt (2015), 67, 86 and 99.
[82] See ibid., 85–93.
[83] Ibid., 10, 57, 86 and 100.
[84] This emphasis on heteronomy is equally present in Schmitt (1912), 73, in the context of a description of the individual judge's subjection to practice-based law.
[85] Schmitt (2015), 89.

from moral discourse because the latter might be taken to express a concern for individual human dignity, whereas the dignity of the law, for Schmitt, consists precisely in its repudiation of the inherent value of the individual.

Although the arguments offered in *The Value of the State* are at times inconclusive and gesture towards questions that the young Schmitt had not yet answered, the text is nevertheless of great interest for understanding Schmitt. It expresses a number of normative convictions that Schmitt will, in the further course of his scholarly career, repackage in several different ways, but never abandon. These convictions are best summarized by focusing on the deeply ambivalent conception of the state that emerges from *The Value of the State*. In one sense, the state is demoted from the paramount position that statutory positivists attributed to it. The sovereign, legislative will of the state as a positive institution endowed with de facto control of a certain territory and population, in Schmitt's account, is no longer the source of all law; rather, the state's legislative enactments can claim the quality of law (which Schmitt assumes to go along with normative authoritativeness) only as long as they realize a normative idea of *Recht* that is prior to the will of the state. The central case of a state is an institution that is wholly given over to the task of *Rechtsverwirklichung*, and empirical states can therefore fail to live up to their essential task and degenerate into illegitimate mechanisms of oppression that serve the partial interests of those who happen to control the levers of institutional power. And yet the state is elevated to a position far above its individual subjects or citizens. Individuals derive their own worth and significance from the service they render to the state. A state that does live up to its idea, by serving the purpose of the realization of law, is entitled to expect the absolute loyalty of its subjects to the point of denial of the individual's most fundamental interests. This claim is only made more ominous by the fact that the content of Schmitt's notion of *Recht* – of that which is to be realized by the state, and thus to legitimate the state's law-making and decision-taking – remains elusive. Those who hold the reins of power in the state are to make the final judgment, apparently, as to its content.

From Jurisprudence to Political Theory

In an influential study on Schmitt's legal and political theory, German legal scholar Hasso Hofmann argued that Schmitt's intellectual development was 'governed by the question of the legitimation of public

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power'.[86] *The Value of the State* answers, as we have seen, that the state draws its legitimacy from providing an authoritative and determinate concretization of a transcendent idea of law that is the sole source, as far as legal philosophy is concerned, of all practical value. We would now like to offer a very brief account of how this conception of the legitimacy of positive law came to be transformed in works that Schmitt published after the Great War.[87]

At first glance, the decisionist conception of legal order that Schmitt began to defend in *Dictatorship* and which is perhaps most clearly expressed in *Political Theology* seems to differ dramatically from the picture given in *Statute and Judgment* and *The Value of the State*. In *Political Theology*, Schmitt famously claims that the sovereign is the one who decides on the state of exception and he appears to portray sovereign power as unrestricted by any prior normativity.[88] Closer inspection, however, reveals clear elements of continuity with the early legal-theoretical works. Although Schmitt's terminology in *Political Theology* tends to conceal the fact, the thesis that sovereignty consists in the power to altogether suspend the law must obviously refer to the positive law, not to the idea of *Recht* that, according to *The Value of the State*, political authorities are called upon to realize. The claim that the sovereign decision is born of normative nothingness, then, need not be understood as a manifestation of normative nihilism. What Schmitt argues is simply that sovereign authority is neither constrained nor constituted by positive law. He clearly does not give up the view that it is the task of the state, in making law, to implement some principle of legitimacy that is antecedent to positive law.[89]

The thesis that any legal norm requires an 'homogeneous medium' – that is, 'a normal, everyday frame of life to which it can be factually applied'[90] – constitutes another clear element of continuity between the argument of *Political Theology* and the views expressed in Schmitt's early

[86] Hofmann (2002), 11.

[87] On Schmitt in Weimar, see Kennedy (2004). For an overview of the mature constitutional theory, see Vinx (2019a).

[88] See Schmitt (1922), 5–15.

[89] Schmitt accordingly describes dictatorship as the realization of law. See Schmitt (1921), xlii–xliii. The realization of law (*Rechtsverwirklichung*) likewise reappears in the German text of *Political Theology*: see Schmitt [1996], 35. The English translation (Schmitt [1922], 28), rather misleadingly, renders *Rechtsverwirklichung* as 'the self-evolving law', although Schmitt emphasizes that law needs the authority of the state to be implemented in the empirical world. See Schmitt (2015), 39–41.

[90] Schmitt (1922), 13.

legal-theoretical works. Schmitt observes, in effect, that legal decision-taking will necessarily lack calculability and foreseeability – it will fail to be guided in any meaningful way by the application of positive statutory norms – unless the social circumstances to which the norms in question are to be applied conform to the expectations – to the conception of normal social order – which the legislator had in mind in making them.

This observation is a perfectly natural extension of the argument of *Statute and Judgment*. Differences in emphasis and presentation result from the fact that Schmitt's early work, published before the Great War, speaks to a condition of normality, while the theory of the Weimar period responds to an experience of deep political and social upheaval. As a result, Schmitt now highlights the claim that it is the sovereign's task to reconstitute the social conditions of legal determinacy, of the predictable and calculable applicability of positive legal norms. What is more, we see the beginnings of an important shift in how that task is portrayed.

In *The Value of the State*, sovereign authority is to concretize a transcendent idea of law that is assumed to be beyond sovereign choice. At one point, Schmitt even describes *Recht* as timeless (*zeitlos*)[91] – although he declines, as we have seen, to offer an explicit account of its content. One might plausibly surmise that Schmitt felt entitled to defer that task because he believed that the form of life that had been successfully concretized by the legal practice of the Wilhelmine Empire did, at any rate, conform to the timeless idea of *Recht*.[92] *Political Theology*, by contrast, responds to a situation characterized by profound societal disagreement about the right or proper form of social life. It has now become a point of political contention what form of life, what notion of *Recht*, the state's positive law is to legally specify. The sovereign's authority, Schmitt suggests, must come to be correspondingly more capacious. In deciding to suspend the positive law so as to reconstitute a situation of normality, the sovereign of *Political Theology* does not merely respond to a perception of abnormality; rather, the sovereign decides what is to count as normal or abnormal in light of a prior choice for one or another of the competing and incompatible conceptions of social order that now have currency in society.[93] It might be argued that this portrayal of the sovereign's role does not yet leave the theoretical framework set up in *The*

[91] Schmitt (2015), 81.

[92] For nostalgic post-WWII remarks on 'the old [Wilhelmine] monarchy' in Schmitt's correspondence, see Schmitt's letter to Armin Mohler dated 14 April 1952, in Schmitt (1995), 119; Taubes (1987), 36.

[93] See Schmitt (1922), 6.

Value of the State behind. The sovereign, Schmitt could have claimed even now, is still morally (although not legally) bound to make a choice for the one form of social order that best conforms to the timeless idea of *Recht*. Schmitt rejected this option, however, and came to claim, in his *Constitutional Theory*, that any sovereign choice for one form of order or another is to be regarded as legitimate as long as it is successful in creating and maintaining the social underpinnings of a stable legal order.

Note that this move, although it discards the view that the state is bound to realize a transcendent idea of *Recht*, preserves the claim that the positive law is legitimated by the fact that it implements a conception of order that is prior to it – one that Schmitt, in his *Verfassungslehre*, somewhat confusingly, refers to as the 'positive constitution'. He describes the latter as the result of a fundamental political decision for a certain form of social life and distinguishes it sharply from constitutional laws – that is, from the positive legal norms contained in a written constitution.[94] In line with this basic idea, Schmitt's attacks on the constituted political system of the Weimar Republic typically boil down to some version of the claim that the legislative decisions produced by that system fail adequately to express the positive constitution.[95] But if *Recht* is not merely to be authoritatively concretized but also to be given content by a sovereign decision, we face the question of why the sovereign – the one who can decide on the exception – should be taken to have the power to define the content of *Recht*: what is it that gives legitimacy to that more radical form of sovereign decision?

Schmitt's answer to that question, throughout the Weimar years, is to appeal to the notion of the constituent power of the people.[96] The sovereign's decision for some form of social order must be supported by the people, Schmitt concedes, so as to prevail. In a democratic age, such support will be forthcoming only if the sovereign succeeds in presenting their choice as the people's choice – that is, if the people (or enough of them) affirm and are committed to the positive constitution chosen by the sovereign.[97] Successful exercises of sovereign authority that establish a situation of normality and validate a particular form of social order as the basis of positive law are legitimate, then, because they amount to exercises of the constituent power of the people. And Schmitt presents the view that a people is entitled, in a democratic age, to

[94] See Schmitt (1928), 75–88.
[95] See, e.g., Schmitt (1932a).
[96] See Schmitt (1928), 125–135; Rubinelli (2020), 103–140.
[97] See Schmitt (1928), 136–139.

determine its own form of life – the underlying substance of its positive law – as an unchallengeable bedrock assumption.[98]

Schmitt's theory of constituent power assumes that the sovereign's choice for one or another conception of *Recht* is not restricted by antecedent normative criteria. Whatever positive constitution the constituent power sees fit to endorse will, by virtue of that choice alone, have to be regarded as legitimate.[99] The constituent choice, as we have seen, is to settle disagreement about the proper form of social order. It does that in a rather peculiar way: not by arriving at a compromise between contending groups and their respective ideas, or by using some organized democratic procedure that gives voice and standing to all members of society, but rather through an act of exclusion. The constituent decision takes the form of an acclamation of a proposal put forward by a charismatic leader[100] and it is itself polity-defining: the constituent decision puts all those who support and identify with the positive constitution chosen by the sovereign on the inside of the political community, and all those who reject that choice on the outside, as enemies who are not to be granted the protection of the law.[101] A successful exercise of constituent power homogenizes society and thus creates the conditions for the determinate (and therefore legitimate) applicability of positive law.

We are as far away as we could be, then, from the view that the state draws its legitimacy from implementing a universal ideal of legality. A sovereign's task is no longer to make positive laws that give determinate and executable form to a transcendent idea of *Recht*, but to create and maintain a community – if necessary, by the use of dictatorial force – that is united by an homogeneous form of life and a shared attachment to a community-specific idea of law. Where legal governance does not rest on an antecedent social consensus, in belief and practice, the legislative and judicial decisions to which it gives rise cannot express a united will of the people. They must instead, Schmitt argues, reflect the rule, unaccountable and 'indirect', of one part of society over another.[102] Where legal determinacy obtains, on the other hand, the operation of the positive law expresses and concretizes an antecedent normative consensus, and it is only where this is the case that positive legality – whether in the form of

[98] See ibid., 75–77.
[99] See ibid., 139.
[100] See Schmitt (1927), 48–83.
[101] See Schmitt (1932b), 25–27 and 46–47.
[102] See Schmitt (1938), 65–77.

a formal constitution, of positive statutory enactments or of judicial decisions based thereon – can claim to be legitimate.

The thesis that the legitimate applicability of positive legal norms presupposes homogeneity makes understandable the otherwise puzzling position that Schmitt adopted, in the early 1930s, in the dispute with Hans Kelsen over who should be the 'Guardian of the Constitution' – a constitutional court or the head of the executive.[103] Schmitt, arguing against the former and for the latter option, was accused by Kelsen of putting forward a view inconsistent with the theory of adjudication he had defended in *Statute and Judgment*.[104] In *The Guardian of the Constitution*, Schmitt held that judicial decisions are legitimate only as long as they take the form of straightforward subsumption under statutory rules. What is more, Schmitt portrayed decisions in hard cases that give rise to problems of application, especially in constitutional matters, as inherently political and thus not fit for courts to adjudicate.[105] This position, as Kelsen pointed out, appears to stand in direct conflict with the theory of adjudication developed in *Statute and Judgment*, which had emphasized, as we have seen, that judicial decisions need not conform to statutory law to be correct.

The impression of inconsistency, however, can be dispelled easily enough once we pay attention to Schmitt's understanding of the problem of the realization of law. Schmitt is willing, in *Statute and Judgment*, to accord to judges a power to go beyond and against statutory law on the assumption that there exists a coherent practice of adjudication – one that is grounded in a homogeneous form of life and thus affords legal determinacy. Where this condition is satisfied, judicial decisions remain calculable and predictable, even if they are not always guided by statutory law, and judges need not decide upon politically contested questions. Where, by contrast, the conditions of legal determinacy fail to obtain and adjudication would consequently have to settle politically contested issues, judicial power ought to be restrained as much as possible, so as to make room for acts of sovereignty that restore a condition of normality and thus secure the legitimate applicability of statutory norms.[106] This

[103] See Schmitt (1931), 79–173; Paulson (2016).
[104] See Kelsen (1931), 189–191.
[105] See Schmitt (1931), 79–124.
[106] Schmitt's critique of parliamentary democracy proceeds along similar lines: parliamentary legislation is legitimate only if it expresses antecedent consensus; in all other cases, it amounts to a mechanism of arbitrary oppression at the hands of a mere numerical majority. The conditions of the possibility of legitimate legislation, in other words, are the same as those of legitimate adjudication. See Schmitt (1932a), 39–47, and compare Dyzenhaus (1997), 56–70.

pattern of argument continues through the subsequent stages of Schmitt's career. In the Nazi era, Schmitt is once again disposed to countenance judicial activism,[107] which is to creatively reinterpret or override inherited statutory law to give effect to the 'concrete order' of Nazi society, whereas he reacts to the natural law jurisprudence of the postwar West German Constitutional Court with vigorous denunciations of supposed judicial overreach.[108]

Homogeneity Restored

The idea that homogeneity functions as a condition of the possibility of legitimate governance is likewise central to Schmitt's work in the early years of the Nazi period. Schmitt's decision to support the National Socialist regime after its *Machtergreifung* in 1933 has often been portrayed as a purely opportunistic choice that amounted to a departure from the constitutional theory he had developed in the Weimar years.[109] It is true that Schmitt was not a Nazi before the *Machtergreifung* and that he had his apprehensions about National Socialism, like many German conservatives at the time. He expected the sovereign choice that would define Germany's constitutional identity more clearly than the Weimar Constitution to proceed from the President of the Republic.[110] But the claim that Schmitt's writings in the initial years of the Nazi regime stand in stark conflict with his earlier constitutional theory overlooks the flexibility of Schmitt's theoretical framework. Schmitt would hardly have been able to capitalize on the opportunities for the advancement of his career afforded by the demise of democracy if his jurisprudential approach had not been adaptable to the new circumstances.

One thing that Schmitt did have to offer was a reading of the transition from democracy to dictatorship that was eminently suitable for National Socialist purposes. At first glance, this claim might appear surprising. During Weimar, Schmitt, like some other legal scholars, had put forward the view that the Weimar Constitution contained material limits to amendment, although its text made no mention of any such limits.[111] This thesis, let us note, is an implication of Schmitt's account of the

[107] See Schmitt (1933), 42–46.
[108] See Schmitt (1967). On this text, see Zeitlin's editorial commentary and notes, ibid., 3–41.
[109] See Schwab (1989); Bendersky (1983); Balakrishnan (2000); Kalyvas (2008).
[110] See Berthold (1999); Seiberth (2001); Mehring (2009), 281–302.
[111] See Schmitt (1928), 150–154.

realization of law: if positive laws can be legitimate – that is, enjoy full legal quality – only if they express an underlying 'positive constitution', it follows that the constituted powers – the legislative authorities that operate under the rules of competence defined by a constitutional document – must lack the authority to enact laws that conflict with that positive constitution, even if they use the procedure for constitutional amendment to do so. Some scholars argue that it follows that the *Machtergreifung* must have been illegitimate, from the perspective of Schmitt's constitutional theory, and conclude that his willingness to throw in his lot with the Nazis could only have been a result of rank opportunism that has no bearing on the viability of his constitutional analysis. What lends a degree of superficial plausibility to this interpretation is the fact that the Enabling Act that endowed Hitler with dictatorial power was passed, by the *Reichstag*, in the form of an amendment to the Weimar Constitution, giving Hitler's rise to power an appearance of legality.[112] Since Schmitt had argued that the procedure of amendment could not validly be used to bring about a fundamental change in constitutional identity, his constitutional theory should be taken to entail, it is claimed, that the *Machtergreifung* was both illegal and illegitimate.[113]

Schmitt himself took a somewhat different tack. He adamantly denied that the validity of Nazi law was in any way dependent on the Weimar Constitution. The Enabling Act, Schmitt was only too happy to concede, did indeed violate the positive constitution, the constitutional identity of the Weimar Republic.[114] But since Schmitt had claimed that a successful exercise of constituent power has the authority to redefine a polity's constitutional identity and not merely to rewrite its constitutional laws – a point he emphasized in his *Constitutional Theory*, even while arguing that the authority of all constituted powers, of parliament and the judiciary, was constrained by material limits to amendment implied by the positive constitution[115] – the concession did not in any way commit Schmitt to the view that Hitler's seizure of power had been illegitimate.

[112] Whether this amendment was in fact passed in accordance with the relevant constitutional procedures is open to question: see Evans (2004), 552–558. For a (sceptical) assessment of the supposed legality of the *Machtergreifung*, compare Gusy (1997), 459–467.

[113] For a recent statement of this view, see Schupmann (2017), 201–220, who portrays Schmitt's Weimar constitutional theory as a staunch defence of 'constrained' democracy.

[114] See Schmitt (1933), 5–6.

[115] See Schmitt (1928), 75.

Instead, the claim that the positive constitution is subject to constituent power opened the door for a justification of the *Machtergreifung* that was entirely consistent with the constitutional theory Schmitt had developed in Weimar and Schmitt avidly embraced it. The passage of the Enabling Act, according to Schmitt, was part and parcel of an extended plebiscitary affirmation of a new constitutional founding that had supposedly been accomplished by what Schmitt was happy to refer to as the 'German Revolution'.[116] If the *Führer*, Schmitt argued, had chosen to have the Act passed under a procedure provided by the Weimar Constitution, he had done so for purely pragmatic reasons, to maintain administrative continuity.[117] But the process through which the Act was enacted, Schmitt claimed, had nothing to do with its legitimacy or, consequently, with the Act's standing as a fundamental constitutional law of the Third Reich. The laws enacted by Hitler pursuant to the Act did not, according to Schmitt, derive their legal validity from the Weimar Constitution, but from the fact that Hitler had succeeded, despite the legalistic appearances, in orchestrating an exercise of the constituent power of the German people.[118]

To be sure, Schmitt could have chosen to apply his theory in a different way. He might have denied, that is, that the supposed National Socialist Revolution was an authentic exercise of constituent power. But it is nevertheless hard to see how the way in which Schmitt adapted his views to the new regime can be said to have stood in deep conflict with his previous jurisprudential approach. Schmitt's notion of the positive constitution, as we have seen, was intended to impose material restrictions on legislative and judicial, but not on constituent, power. And it would be wrong to assume that constituent power, for Schmitt, is a form of legislative or judicial authority. As should be clear by now, Schmitt's theory of the realization of law implies a rejection of that view. Constituent power, for Schmitt, is not manifested in the

[116] See Schmitt (1933), 8.

[117] See ibid., 7–8.

[118] See ibid., 5–9. Schmitt claims that the enactment of the Enabling Act merely implemented the result of the elections of 5 March 1933; these elections, in turn, 'were in truth, regarded from a legal-scientific point of view, a popular referendum, a plebiscite, through which the German people recognized Adolf Hitler, the leader of the national-socialist movement, as the political leader of the German people' (ibid., 7). See also Huber (1939), 44–52. After the war, Schmitt changed his tune and claimed that an insistence on formal legality had been Hitler's 'strongest weapon' in taking power, while he blamed the supposed positivist reduction of legitimacy to mere legality for having made that weapon available. See Schmitt (1950a), 450; Schmitt (1954); Schmitt (1970), 202.

authoritative issuance of positive statutory rules or in their authoritative application, but rather in the successful production, by dictatorial means, of a situation of normality that makes legitimate legislation and adjudication possible in the first place. Schmitt argues that constituent power, so understood, nevertheless serves the task of the realization of law, since it produces the social conditions under which positive laws become legitimately applicable. Constituent power, however, is restrained neither by an objectively valid conception of the content of *Recht* – which Schmitt, as we have seen, was either unwilling or unable to deliver – nor by the idea of order that is expressed by an existing constitution. The restraints on a sovereign who claims to exercise constituent power, in Schmitt's mature theory, are purely political. They derive from the fact that the sovereign, to commit the polity to this or that 'concrete order', must find or generate sufficient political support to be factually successful.

Some scholars argue that Schmitt came to reject his decisionist theory of sovereignty, in the course of the 1930s, in favour of an institutionalist theory of law or, as Schmitt himself preferred to put it, a theory of 'concrete order'.[119] But the introduction of the term 'concrete order' was evidently little more than an attempt to rebrand the condition of social normality or homogeneity that Schmitt had always taken to be a precondition of the legitimate applicability of positive law.[120] From 1933 to 1936 (and indeed afterwards), Schmitt argued, in effect, that Hitler's sovereign decision had re-established a condition of normality capable of undergirding stable and legitimate legality.[121] The latter, in Schmitt's view, had come to be undermined by the chaotic disorder of a liberal and pluralist democracy that seemed to want to avoid a clear choice for one form of social life or another.[122] It is not surprising, then, that Schmitt's interest in the foundational capacity of sovereign decision should have receded in favour of a focus on the further implementation,

[119] See Croce and Salvatore (2013). Schmitt introduced 'concrete order thought' in Schmitt (1934). Croce and Salvatore's claim that this work constitutes a new departure in Schmitt's legal thought overlooks that all three elements of legal order Schmitt distinguishes in this work – positive norms, sovereign decisions that contravene such norms and a concrete order that underpins the legitimate applicability of norms – are already present in the early legal-theoretical works.

[120] The same holds for Schmitt's later talk of a 'nomos'. See Schmitt (1950b), 67–79; Schmitt (1942), 59–60. For an account of the systematic continuity of Schmitt's constitutional theory and his account of international law, see Vinx (2013).

[121] See Schmitt (1933).

[122] See Schmitt (1931), 125–160.

in legal practice, of the form of social order that had supposedly animated the National Socialist *Machtergreifung*.[123]

It was here that Schmitt's institutional jurisprudence – his 'concrete order thought' – was particularly useful to the Nazis, as Bernd Rüthers demonstrated in his landmark study on adjudicative practice in Nazi Germany.[124] Schmitt's institutionalism did not aim to restrict the extra-legal powers of the sovereign; rather, it was intended to facilitate the judicial reinterpretation of inherited statutory norms so as to make them conformable to the new regime's racist assumptions about the proper order of German society.[125] Schmitt's 'concrete order thought' was frequently invoked by the courts of Nazi Germany to justify decisions that were issued in clear contravention of statutory law, for example in cases that denied welfare benefits to Jewish claimants, cases that permitted landlords to terminate rental agreements with Jewish tenants, or cases that allowed 'Aryan' spouses to divorce Jewish husbands or wives.[126] In the light of this context, one cannot plausibly maintain that Schmitt's call to cleanse German legal scholarship of all Jewish influence was simply a morally regrettable personal lapse that need not deter us from accepting the substance of his jurisprudential ideas.[127] Schmitt's idea of the realization of law does entail that those who are (or are defined as) enemies of a society's 'concrete order', as affirmed by constituent power, must not be permitted to hold legal office or to participate in legal practice. To extend such permission would compromise the homogeneity that Schmitt regards as the indispensable prerequisite of legal determinacy and thus of the legitimate applicability of positive norms.[128] Once Schmitt had

[123] See Hofmann (2002), 172.
[124] Rüthers (2017); De Wilde (2018).
[125] See Schmitt (1933), 42–46, and compare for the context Pauer-Studer (2014); Meierhenrich (2018), ch. 5.
[126] See Rüthers (2017), ch. 3.
[127] See Schmitt (1936).
[128] Schmitt, using language that clearly echoes that of *Statute and Judgment*, is commendably explicit in Schmitt (1933), 43: 'The fiction that a judge is normatively bound to a statute has today become untenable, theoretically and practically, for key areas of legal life. Statute is no longer capable of assuring the calculability and security which, according the ideal of the rule of law, belongs to the definition of statute. Security and calculability are not grounded in normative regulation, but in a situation that is presupposed to be normal.' Schmitt then adds (ibid., 44): 'If adjudication by independent courts is to continue to exist, even while a mechanical and automatic subjection of the judge to norms determined in advance is no longer possible, then everything must depend on the kind and type of our judges and public servants. [. . .] The essential substance of [the judge's] "personality" must be secured with all rigour, and it consists in being bound to one's people and in the similarity in kind [*Artgleichheit*] that every human being

chosen to accept the legitimacy of the *Machtergreifung* and to describe it as an exercise of constituent power, his call for an expulsion of Jewish influence from German law was all but compelled by his account of the conditions of the possibility of legitimate legal order.

Homogeneity, Determinacy and the Legitimacy of Law

Does Schmitt, in the end, succeed in offering a compelling explanation for why legal determinacy, as it supposedly results from social homogeneity, should be regarded as the supreme condition of the legitimacy of law? To answer this question, we need to clarify how Schmitt conceives of the relationship between legal determinacy and social homogeneity. Is Schmitt's fundamental argument concerning the conditions of the legitimacy of positive law meant to run from legal determinacy to social homogeneity, or the other way around?

Let us consider the first possibility. The claim would then be that social homogeneity is desirable on instrumental grounds as the causal precondition of legal determinacy. Legal determinacy, in turn, ensures that addressees of the law are subject to the rule of law. Suppose that positive law was not determinate, as a result of the absence of homogeneity. Judges (or, for that matter, parliamentary legislators) would have to take decisions that are political, in the sense that they would have to appeal to judgments of value that might turn out to be controversial both within the judiciary and among addressees of the law. Such decisions, Schmitt argues, cannot legitimately be taken by judges (or parliamentary legislators) who are to apply the law (or the constitution) and not to make it. They are to be reserved to a sovereign who has the political authority to set aside the positive law in order to restore the social conditions of legal determinacy. A sovereign, in doing so, may of course resort to violence against those it declares to be enemies of the people, but an exercise of sovereignty cannot be accused of being an example of discretionary rule, hypocritically disguised by appeal to mere formal legality. One either identifies with the polity-defining choices of a sovereign or one does not. If one does, the sovereign's decisions will be in line with one's own view of the proper order of social life; if one does not, one is an enemy. The

entrusted with the exposition, interpretation and application of German law must exhibit.' The context makes it clear that Schmitt is calling for the expulsion of Jews from the legal profession. The German word *Artgleichheit* carries racial connotations: *Art* is the German term for a biological species. On Schmitt's use of this terminology, see Gross (2005); Zeitlin (2020).

powers a sovereign may use to deal with enemies are undoubtedly awesome (in the literal sense of the term), but they are justified, according to Schmitt, by the fact that acts of sovereignty are required to create the social preconditions of determinate, and therefore legitimate, legal order.

This is a rather quaint conception, to put it gingerly, of the rule of law and of its value.[129] It implies that any legal decision, whether it be judicial or legislative, that rests on a contestable judgment of value must always be illegitimate *vis-à-vis* all those who disagree with that judgment. There would be little reason, it seems, to embrace a conception of the rule of law that carries that radical, almost anarchic, implication or to accept the call for perfectly determinate positive law unless one were already committed to perfect homogeneity as one's real ideal of social order. Perhaps, then, Schmitt's argument about the legitimacy of law should be taken to run not from determinacy to homogeneity, but rather from homogeneity to determinacy. Determinacy is desirable, on that view, only because it is indicative of homogeneity, which is held to be intrinsically valuable. So understood, Schmitt's legal, constitutional and political theory boils down to a simple rejection of plurality and diversity, and of the political and legal compromises they might require. We have seen that the trajectory of Schmitt's thought lends some credence to this interpretation. The transcendent idea of law invoked in *The Value of the State* comes to be replaced with an exclusivist conception of political identity – the task of the realization of law shrinks to the coercive creation and preservation of homogeneity.

It is hard to avoid the conclusion that Schmitt tried to clothe what is in effect a call for social uniformity in the more genteel language of a concern with the creation and preservation of legitimate legal and constitutional order – a gambit that, as a piece of rhetoric, continues to be spectacularly successful.[130] But if Schmitt's master argument is really driven, at the end of the day, by a simple preference for homogeneity over plurality and diversity, it must be mistaken to portray that argument as a sober and insightful reflection on the conditions of the existence of legitimate legal order. Homogeneity is itself a contested ideal. And if homogeneity is a contested ideal, then attempts to bring it about through the use of extra-legal sovereign power cannot be justified by appeal to a conception of the rule of law – as perfect legal determinacy – which is

[129] For further discussion, see Vinx (2015) and Vinx (2019b).

[130] For studies of Schmitt as a political rhetorician, see Kahn (2003); Kahn (2014); Smeltzer (2018); Zeitlin (2015); Zeitlin (2018).

itself dependent on a prior endorsement of the ideal of homogeneity. Even if one were to grant that perfect social homogeneity does engender complete legal determinacy, one might prefer to embrace a conception of legal order that does not promise that legal decisions will always be perfectly predictable. One might, after all, be interested in having the opportunity to co-exist peacefully with others in a diverse society. If Schmitt's argument about the legitimacy of law is not to be regarded as blatantly circular, it must therefore be understood as a blunt call for social homogeneity. What remains of it, in that case, is little more than a distaste for social plurality, coupled with an educated contempt for legality. Although Schmitt presents his key works in the guise of reflections on the realization of law, they are really nothing of the sort.