

**Robert Schuman Centre
for Advanced Studies**

**The Maastricht Decision
Ten Years Later:
Parliamentary Democracy, Separation
of Powers, and the Schmittian
Interpretation Reconsidered**

**PETER LINDSETH
RSC No. 2003/18**

EUI WORKING PAPERS



EUROPEAN UNIVERSITY INSTITUTE

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Peter L. Lindseth

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Printed in Italy in December 2003
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

ABSTRACT

This paper takes advantage of the tenth anniversary of the *Maastricht Decision* of the German Federal Constitutional Court to revisit an influential interpretation of the Court's reasoning that emerged soon after the decision was handed down. In an article that appeared in the inaugural issue of the *European Law Journal* in 1995, it was suggested that the German Federal Constitutional Court based its claim of ultimate *Kompetenz-Kompetenz* on a *völkisch* criterion of democracy derived from Carl Schmitt, the notorious anti-liberal German constitutional theorist under Weimar and the "crown jurist" in the early years of the Nazi regime. This interpretation overlooked perhaps the most important dimension of the Court's opinion: its overall foundation in an entire body of separation-of-powers doctrine that had developed since 1945 *explicitly in reaction* to the constitutional disintegration of parliamentary democracy under the Weimar Republic in 1933. This was a development that Schmitt had welcomed and even in some manner facilitated through the propagation of his constitutional theories in the late 1920s and early 1930s. Schmitt's writings and actions in the interwar period reveal a theorist deeply hostile to the very idea of parliamentary democracy rooted in the separation of powers. The opinion of the German Federal Constitutional Court in the *Maastricht Decision* stands in contrast. The Court asserted, rather, that the delegation of legislative power outside the parliamentary realm (including now at the supranational level) could be reconciled with notions of democracy rooted in the separation of powers as long as the necessary constitutional oversight mechanisms – legislative, executive, and judicial – were preserved. The Court's reasoning sought to translate, in the context of the Community, the lessons of West German constitutional doctrine in the decades following the end of the Second World War. In upholding the Maastricht Treaty, the German Federal Constitutional Court built on the notions of "standardized" legislative delegation, executive oversight, and judicial review that were profoundly antithetical to Schmitt's hostility to what he termed "separation of powers regimes." The Court's reliance on these anti-Schmittian principles of separation of powers is difficult to square with an interpretation asserting that the ideas of Carl Schmitt provided the ultimate foundation for the Court's reasoning.

INTRODUCTION*

We have now reached the tenth anniversary of the *Maastricht Decision* of the German Federal Constitutional Court.¹ With all the commentary over the last decade devoted to this judgment's purported virtues and vices (mostly the later, apparently, according to the conventional wisdom), the utility of further academic discussion might be seriously questioned. The Court's opinion, of course, raised issues, which remain as pertinent as ever. These include the political and legal relationship of the EU to the nation-state, the possibility of an autonomous constitutional legitimacy at the supranational level, and the nature of the European "demos," among others. Still, the extensive literature on the *Maastricht Decision* has for the most part ably explored these issues, and thus I want to take advantage of the tenth anniversary for a different purpose.

The aim here is to reconsider a criticism directed at the *Maastricht Decision* that goes beyond the constitutional-theoretical issues it brought to the fore, a criticism which, even as it does not necessarily reflect the consensus position, has nevertheless influenced academic discussions ever since. In an article that appeared in the inaugural issue of the *European Law Journal* in 1995,² Joseph Weiler suggested that the German Federal Constitutional Court in the *Maastricht Decision* based its claim of ultimate *Kompetenz-Kompetenz* on a *völkisch* criterion of democracy derived from Carl Schmitt, the notorious anti-liberal German constitutional theorist under Weimar and the "crown jurist" in the early years of the Nazi regime. "[L]ooking backwards, like Lot's Wife," Professor Weiler wrote, the German Court had restricted its vision of democracy to "the tired old ideas of an ethno-culturally homogeneous [i.e. national] *Volk* and the unholy Trinity of *Volk-Staat-Staatsangehöriger* as the exclusive basis for democratic authority and legitimate rulemaking."³ The *Maastricht Decision* was so objectionable, in Professor Weiler's estimation, precisely because it was imbued with these Schmittian influences disguised in "the universal values of democracy."⁴

* I would like to thank Christian Joerges and Will Phelan for useful suggestions on earlier drafts of this paper. Comments are welcome at plindset@law.uconn.edu.

¹ *Brunner v. European Union Treaty*, BVerfGE 89, 155 (October 12, 1993), translated in English at [1994] 1 C.M.L.R. 57, and 33 I.L.M. 388 (1994) (the "*Maastricht Decision*").

² J.H.H. Weiler, "Does Europe Need a Constitution? Demos, Telos, and the German Maastricht Decision," 1 *European Law Journal* 219 (1995). Professor Weiler repeats the accusation in "The State 'über alles': Demos, Telos and the German Maastricht Decision," in *Festschrift für Ulrich Everling*, vol. II 1651 (Ole Due, Marcus Lutter and Jürgen Schwarze eds., Baden-Baden: Nomos, 1995).

³ Weiler, "Does Europe Need a Constitution?," (above n.2), 223-224.

⁴ *Ibid.*, 222.

From this perspective the decision was, as another commentator summarized, “little more than a product of a deep historical strand of pre-political illiberality within German constitutional thinking.”⁵ This reading of the decision was not, however, without irony. It overlooked perhaps the most important dimension of the Court’s opinion: its overall foundation in an entire body of separation-of-powers doctrine that had developed since 1945 *explicitly in reaction* to the constitutional disintegration of parliamentary democracy under the Weimar Republic in 1933. This was a development that Schmitt had welcomed and even in some manner facilitated through the propagation of his constitutional theories in the late 1920s and early 1930s. Schmitt’s writings and actions in the interwar period reveal a theorist deeply hostile to the very idea of parliamentary democracy rooted in the separation of powers. Indeed, in the interwar period Schmitt came to believe in the inevitable demise of such regimes in favour of a kind of executive dictatorship grounded in the broad delegation of normative power from the legislature, unconstrained by any judicial controls.⁶

The opinion of the German Federal Constitutional Court in the *Maastricht Decision* stands in sharp contrast. The Court asserted, rather, that the delegation of legislative power outside the parliamentary realm (including now at the supranational level) could indeed be reconciled with notions of democracy rooted in the separation of powers as long as the necessary constitutional oversight mechanisms – legislative, executive, and judicial – were preserved. The Court’s reasoning sought to translate, in the context of the Community, the lessons of West German constitutional doctrine in the decades following the end of the Second World War. In *upholding* the Maastricht Treaty – a sometimes overlooked fact – the Court built on the notions of “standardized” legislative delegation, executive oversight, and judicial review which were profoundly antithetical to Schmitt’s hostility to what he termed “separation of powers regimes.”⁷ In other words, if the *Maastricht Decision* was a vehicle for the

⁵ Michelle Everson, “Beyond the Bundesverfassungsgericht: On the Necessary Cunning of Constitutional Reasoning,” 4 *European Law Journal* 389, 391 (1998).

⁶ As Gopal Balakrishnan has pointed out, there was some evolution in Schmitt’s thinking during this period, in which Schmitt’s “earlier, increasingly disingenuous insistence on maintaining the balance-of-powers system within the Weimar Republic” gave way to arguments in which Schmitt “promot[ed] the transfer of legislative power to the executive.” Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London: Verso, 2000), 200.

⁷ Carl Schmitt, “Une étude de droit constitutionnel comparé: L’évolution récente du problème des délégations législatives,” *Introduction à l’étude du droit comparé: Recueil en l’honneur d’Edouard Lambert*, 3d and 4th parts (Paris: Sirey/L.G.D.J., 1938), 210. The article appeared originally in German as “Vergleichender Überblick über die neueste Entwicklung des Problems der gesetzgeberischen Ermächtigungen (Legislative Delegationen),” *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 6 (1936), 252-268.

infiltration of Schmittian conceptions of democracy into German constitutional doctrine, its reliance on conceptions of separation of powers developed after 1945 was an extremely curious means of doing so. This reliance, rather, would seem to cast doubt on the view that the *Maastricht Decision* was grounded in purportedly Schmittian conceptions of democracy.

THE SCHMITTIAN INTERPRETATION OF THE *MAASTRICHT DECISION*

Professor Weiler criticised the *Maastricht Decision* primarily on two grounds.⁸ The first related to the Court’s assertion that the democratic foundations of the Community legal order continued to be located at the national level, in the democratic-constitutional institutions of the Member States. Democratic legitimacy of Community regulatory norms, the German Court suggested, depended in the first instance on the national parliament’s delegation of normative power to Community institutions via an act of accession (not unlike the delegation via an enabling act in the administrative state). “The important factor,” the Court stated,

is that the Federal Republic of Germany’s membership and the rights and obligations which arise from it, in particular the legally binding direct activity of the European Communities in the domestic legal territory, have been defined foreseeably for the [national] legislator in the Treaty, and that the legislator has standardized them to a sufficiently definable level in the Act of Accession to the Treaty.⁹

Beyond this foundational legislative legitimation, the Court argued that the ongoing democratic legitimacy of the Community’s normative output flowed from oversight by the various national executives assembled in the Council of Ministers¹⁰ – just as hierarchical oversight or control mechanisms by the

⁸ In advancing this two-part critique, Professor Weiler did not wish to “mince words”: “I consider the Court’s decision as regards the existing Community embarrassing; as regards its future evolution, I find the decision sad, even pathetic.” Weiler, “Does Europe Need a Constitution?,” (above n.2), 222.

⁹ 33 I.L.M. at 422.

¹⁰ See 33 I.L.M. at 421-422 (“the exercise of sovereign powers is largely determined by governments. If Community powers of this nature are based upon the democratic process of forming political will conveyed by each individual people, they must be exercised by an institution delegated by the governments of the Member States, which are themselves subject to democratic control.”). The Court also relied on somewhat conventional notions of technocratic expertise, as well as the political incapacities of parliaments to rule on complex “technical” issues under electoral and interest group pressures, to justify the shift in normative power to an independent European Central Bank. *Ibid.*, 439. On the relationship of this thinking to German ordoliberalism of the Weimar period, see Christian Joerges, “The Law in the Process of Constitutionalising Europe,” in Erik Odvar Eriksen, John Erik Fossum, and

national executive helped to legitimise delegated legislative power in the administrative sphere at the national level. And beyond the initial legislative delegation and ongoing national-executive oversight, it was the national judiciary's ultimate responsibility to ensure that the normative power delegated to the supranational level remained within the "standardized" boundaries determined by the legislature:

If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding in the German territory. German institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany.

It was this conclusion that led the Court to its assertion of ultimate *Kompetenz-Kompetenz*:

Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions or governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds.¹¹

Explicit in the German Court's claim of *Kompetenz-Kompetenz* was, therefore, an assertion that the Community legal order was in some manner subordinate to national law as well as ultimately dependent on democratic and constitutional legitimacy flowing from national institutions. It was this claim – that democratic legitimacy in the Community must be "mediated through Member State structures and processes" – that Professor Weiler found "embarrassing."¹² The Court's reasoning seemed to ignore, he pointed out, the "very serious democratic deficiencies" in the Community system (and, implicitly, in national administrative states as well): "If a constitutional court of such prestige, a court which explicitly adopts the criterion of democracy gives the Community a passing bill of health (despite some critical rhetoric), why tamper with its basic institutional structures and decisional processes?"¹³

The second objectionable dimension of the decision, however, related precisely to the "criterion of democracy" on which the German Court grounded its claim to nationally mediated legitimacy. In Professor Weiler's view, the Court's notion of democracy demonstrated a distinct lack of "intellectual and

(contd.)

Augustín José Menéndez, eds., *Constitution-Making and Democratic Legitimacy* (ARENA: Oslo, 2002), 37-38.

¹¹ *Ibid.*, 422-423.

¹² Weiler, "Does Europe Need a Constitution?," (above n.2), 222.

¹³ *Ibid.*

moral leadership" on an issue which was critical to the future of European integration – the nature of the European "demos" – or the socio-political unit sufficient to support democracy at the Community level.¹⁴ The German Court's suggestion that no such European demos yet existed (leaving the Member States as the locus of democracy in the Community system) put into question the possibility for a fully autonomous, supranational democratic and constitutional legitimacy. To Professor Weiler, the German Federal Constitutional Court had bypassed a "historical opportunity . . . to rethink these issues in the context of Community and Member State."¹⁵ Rather, turning to allegedly Schmittian conceptions of *völkisch* democracy, the Court concluded that, for the time being, democratic and constitutional legitimacy remained at the national level, further supporting the need for national oversight of Community action, at least where democratic legitimacy was concerned.

Despite the vigour of his condemnation, however, aspects of Professor Weiler's argument suggested that even he recognized that the linkage between the Court's decision and Carl Schmitt was somewhat tenuous. (As is well known, the Court cited not Schmitt but rather Hermann Heller on the question of the "relative" social homogeneity needed to support democracy within a particular political community.¹⁶) In any case, the Court mentioned

¹⁴ *Ibid.*, 223.

¹⁵ *Ibid.*

¹⁶ See 33 I.L.M. at 421, citing H. Heller, *Politische Demokratie und soziale Homogenität, Gesammelte Schriften*, 2. Band, 1971, S. 421 [427 ff.]. Professor Weiler dismissed this as a rhetorical stratagem: "Why else choose Hermann Heller, Socialist, Anti-fascist, Jew, critic of Schmitt . . . ? Does this not suggest a certain concern to find, shall we say, a Kosher seal of approval for this late Twentieth Century version, albeit anaemic and racially neutral, of what in far away times fed the slogan of Blood (*Volk*) and Soil (*Staat*)." Weiler, "Does Europe Need a Constitution?," (above n.2), 223. Perhaps so, but one might also interpret this citation as evidence that other theorists aside from Schmitt – including Schmitt critics – queried about the socio-political and socio-cultural foundations for legitimate democratic government in a cohesive political community. As Heller wrote: "For the formation of political unity to be possible at all, there must exist a certain degree of social homogeneity," and he further elaborated that "[s]ocial homogeneity is always a social-psychological state in which the inevitably present oppositions and conflicts of interest appear constrained by a consciousness and sense of 'we,' by a community will that actualizes itself." Hermann Heller, "Political Democracy and Social Homogeneity," in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 260-261. Heller's queries along these lines suggests an affinity not with Schmitt – at least not necessarily – but rather with other perfectly legitimate social theorists like Max Weber, who spoke of "enduring emotional foundations" and a "particular pathos" (not an organic-racial-ethnic reality) as the necessary underpinnings of a stable "political community." Max Weber, *Economy and Society*, vol. 2, Guenther Roth and Claus Wittich, eds., and Ephraim Firschof et al., trans. (Berkeley: University of California Press, 1978), 902-903. For further discussion, see Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of

“homogeneity” only in passing (again, citing Heller) but left the substantive content of this assertion vague.¹⁷ More importantly, this passing reference was by no means central to the holding, which of necessity responded to a much more immediate constitutional concern: the legal character of the Act of Accession to the Treaty on European Union in German constitutional law. The Court’s inquiry necessarily had to focus on whether the Act of Accession did not violate critical elements of the national constitutional structure as had been established in the Basic Law of 1949. These included, inter alia (as set forth in Article 20 of the Basic Law), the continued existence of the Federal Republic as “a democratic and social federal state,” as well as the continued emanation of all public authority from the “people” exercised through elections, and the constitutional separation of powers between the executive, legislative and judicial branches. Indeed, under the so-called “eternity clause” in Article 79(3), none of these aspects of the German constitutional system described in Article 20 could be altered *even by constitutional amendment*,¹⁸ a provision inserted expressly in reaction to the degradation of the Weimar Republic into dictatorship through the vehicle of unchecked delegation of legislative authority outside the realm of parliament. The Court’s reconciliation of supranational delegation with the democratic requirements of the Basic Law is difficult to square with an interpretation asserting that the ideas of Carl Schmitt provided the ultimate foundation for the Court’s reasoning.

In coming to terms with the delegation of authority effectuated by the Act of Accession to the TEU, the German Federal Constitutional Court quite understandably looked to the jurisprudence which defined the permissible limits of delegating legislative authority which had developed in the decades after 1945. As a political matter, the Court recognized that European integration built on a kind of enabling legislation in a new guise – the various Community treaties and related agreements – which, like enabling legislation on the national level, did not specify most regulatory norms directly but rather delegated this normative power to executive and technocratic institutions, albeit ones which now extended beyond the strict confines of the nation-state. The German Court’s ultimate reservation of *Kompetenz-Kompetenz* in the *Maastricht Decision* was simply a recognition that, vis-à-vis constitutional government at the national level, Community institutions were (like domestic administrative

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Supranationalism: The Example of the European Community,” 99 *Columbia Law Review* 628, 677-683 (1999).

¹⁷ Helmut Steinberger was correct in characterizing the reference to Heller as “ambivalent,” although perhaps not for the reasons he advanced. See Helmut Steinberger, *Die Europäische Union im Lichte der Entscheidung des Bundesverfassungsgerichts vom 12. Oktober 1993*, in *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt 1325* (Ulrich Beyerlin, Michael Bothe, Rainer Hofmann, Ernst-Ulrich Petersmann eds., 1995).

¹⁸ Article 79(3) GG, incorporating by reference Article 20 GG.

bodies) products of delegation and lacked autonomous democratic and constitutional legitimacy of their own despite their extensive normative powers; therefore, they could not be the ultimate judge of the scope of their own delegated authority apart from forms of nationally-mediated democratic and judicial control.

In his critique of the “democratic deficiencies” in the Community which the German Court purportedly ignored, Professor Weiler in fact identified the central characteristic of administrative governance at both the national and supranational levels in the postwar era: the concentration of effective legislative power in the national executive. As Professor Weiler quite rightly pointed out, the national executives of the several Member States had (via the Council of Ministers) been “reconstituted in the Community as the principal legislative organ with . . . an ever widening jurisdiction over increasing areas of public policy.”¹⁹ Professor Weiler took this as an indication of how “Community and Union governance pervert the balance between executive and legislative organs of the State.” This “perversion thesis,” however, in fact reflects a basic misunderstanding of the historical relationship between European integration and the administrative state. The process of European integration was not the *cause* of the perversion of democracy, as Professor Weiler suggested, but rather it was the *beneficiary* of a preexisting transformation of national democracies in a decidedly executive and technocratic direction.²⁰ It was no coincidence, therefore, that several of the prime movers in the process of European integration in the 1950s – Jean Monnet, Robert Schuman, Konrad Adenauer, for example – had also been major players in the construction of their respective national postwar administrative states as well.

In analogising the Act of Accession to an enabling act on the national level, the Court was cognizant of the explicit openness of the German constitution to European integration (as set forth in the Preamble as well as elsewhere) and thus openly took a more lenient approach to the question of supranational delegation, at least as compared to purely national delegations under the relevant provision of the Basic Law: Article 80(1).²¹ Nevertheless, the

¹⁹ Weiler, “Does Europe Need a Constitution?” (above n.2), 233.

²⁰ See generally Peter Lincoln Lindseth, *The Contradictions of Supranationalism: European Integration and the Constitutional Settlement of Administrative Governance, 1920s-1980s* (Ph.D. dissertation, Department of History, Columbia University, 2002). See also William Phelan, “Does the European Union Strengthen the State? Democracy, Executive Power, and International Cooperation,” Center for European Studies Working Paper Series no.95, Harvard University (2002).

²¹ 33 I.L.M. at 422 (“in view of the fact that the text of a Treaty under international law has to be negotiated between the contracting parties, the demands placed upon the precision and

analytical categories deployed by the Court were drawn directly from Article 80(1) jurisprudence; hence the Court's query, quoted above: Had the German parliament, in adopting the Act of Accession, defined powers of the EU "foreseeably" and had it "standardized them to a sufficiently definable level"?²² In its emphasis on legislative "foreseeability" and "standardization," the Court drew directly from a conceptual vocabulary that had provided the constitutional foundations for the delegation under Article 80(1) in the years following 1945.²³ Both national and supranational delegations, the Court implied, depended on parliament's adoption of enabling legislation containing sufficiently precise "standards" which would allow the subsequent regulatory program to be "foreseeable," in some sense ensuring that the locus of legislative power ultimately remained with the national parliament, as the constitution demanded.

There is, in fact, a history behind this obligation to maintain the centrality of the parliament in the German constitutional system, even as power was increasingly transferred to executive and technocratic bodies. This history also relates to Carl Schmitt, but not in the way suggested by Professor Weiler. It is to that history we now turn.

SCHMITT ON DELEGATION, DEMOCRACY, AND DICTATORSHIP IN INTERWAR WESTERN EUROPE²⁴

In an article originally published in Germany in 1936 and then again in France in 1938, Schmitt directly addressed "the recent evolution of the problem of legislative delegations."²⁵ In this piece, Schmitt surveyed constitutional developments in every major industrialized country since the end of the First World War (he focused on the United States in addition to Germany, France, and Britain). In an obvious effort to normalize the Nazi regime relative to the political systems that prevailed elsewhere, Schmitt argued that developments in each of these countries fell into a common pattern, characterized by the

_____ (contd.)
solidity of the Treaty provisions cannot be as great as those which are otherwise prescribed for a law by the parliamentary reservation [*Parlamentsvorbehalt*"].

²² *Ibid.*

²³ See below n.80 and accompanying text.

²⁴ The discussion in this and the following subsections are drawn from Peter L. Lindseth, "The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s," 113 *Yale L. J.* ____ (forthcoming 2004); see also Peter Lindseth, "Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity," in Christian Joerges and Renaud Dehousse eds., *Good Governance in Europe's Integrated Market* (Oxford: Oxford University Press, 2002), 144-150.

²⁵ Schmitt, "L'évolution récente du problème des délégations législatives" (above n.7).

suppression of the constitutional distinction between legislative and executive power, to the obvious benefit of the latter.

Schmitt noted how "the majority of states" had found it increasingly necessary to "simplify" the legislative Process through delegation to the executive, in order to keep norm-production "in harmony with the constant changes in the political, economic and financial situation."²⁶ It was only in Germany, however, that this phenomenon had reached its logical conclusion, Schmitt asserted, in that it was the Germans who in 1933 had fully dispensed with conventional notions of "separation of powers" by instituting a system of genuine "governmental legislation."²⁷ Schmitt seemed well aware of his dependence on euphemism to soften the image of the National-Socialist dictatorship in Germany. It would be wrong, Schmitt claimed, to characterize the evolution of delegated legislative powers since the end of the war "by the pejorative word dictatorship,"²⁸ for that evolution represented instead the "triumph" of an older constitutional legality, one rooted in the thinking of Aristotle and St. Thomas Aquinas, "over the concepts of legislation and of constitution peculiar to separation of powers regimes."²⁹

Schmitt's evident purpose was to justify the Nazi regime as both a more genuine expression of purportedly traditional European precepts of governance, as well as a harbinger of things to come throughout the industrialized world. For Schmitt, there was simply "*an insurmountable opposition* between the concept of legislation in a parliamentary regime and the evolution of public life over the course of the last decades," which demanded, not the legislature's deliberation over general norms, but the leader's decisive action in concrete cases.³⁰ It was this requirement for decisive concrete action that had, in Schmitt's view, obliged the increasingly broad delegation of legislative and adjudicative power to the

²⁶ *Ibid.*, 200.

²⁷ *Ibid.*, 205. Of course, after 1940, France joined Germany in this camp. See Dragos Rusu, *Les décrets-lois dans le régime constitutionnel de 1875* (Doctoral Thesis, Université de Bourdeaux, 1942), 178 (citing Schmitt with approval).

²⁸ Schmitt, "L'évolution récente du problème des délégations législatives" (above n.7), 201.

²⁹ *Ibid.*, 210.

³⁰ *Ibid.*, 204 (emphasis added). Schmitt's assertions in 1936 regarding the inevitable decline of parliamentary democracy extended on the argument he articulated a decade before, in *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*: "Even if Bolshevism is suppressed and Fascism is held at bay, the crisis of contemporary parliamentarism would not be overcome in the least," Schmitt wrote, because that crisis "has not appeared as a result of the appearance of those two opponents; it was there before them and will persist after them." Carl Schmitt, "Preface to the Second Edition (1926): On the Contradiction between Parliamentarism and Democracy," in *The Crisis of Parliamentary Democracy*, Ellen Kennedy, trans. (Cambridge, Mass.: MIT Press, 1985), 17 (originally published in 1923 and 1926 as *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*).

executive and administrative spheres in the years since the end of the First World War.

Schmitt had made his career in the 1920s criticizing the parliamentary system for its purported endless discussion and indecisiveness.³¹ As Schmitt accurately noted, through the 1920s and into the 1930s, Britain, France and Germany experimented with ever-broader concentrations of legislative and adjudicative authority in the executive branch as a means of overcoming parliamentary blockages that made credible policy-making difficult if not impossible. In France and Germany especially, the emergency legislation adopted during the First World War served as a kind of constitutional model, and following this model, each successive enabling act (*Ermächtigungsgesetz*, *loi d'habilitation*) would transfer to the executive, in some degree or another, the necessary powers to address the perceived crisis of the moment (inflation, currency stabilization, economic depression).

Unlike Schmitt, many interwar observers in western Europe (of both the right and the left) viewed delegation in essentially Lockean terms, as fundamentally in conflict with the principles of parliamentary governance.³² In 1926, the French socialist Léon Blum argued that the emergent practice in France of *pleins pouvoirs* and *décrets-lois* (“plenary powers” and “decree laws”) was “not only a violation of the Constitution, but a violation of national sovereignty, of which you [the members of parliament] are the representatives but not the masters, and which you do not have the right to delegate to others.”³³ Coming from the other end of the spectrum, Lord Hewart, the Lord Chief Justice of England, published a book in 1929 provocatively entitled *The New Despotism*, which argued that delegation of legislative and adjudicative powers in the modern administrative state posed a grave threat to “the two leading features” of the British constitution, “the Sovereignty of Parliament and the Rule of Law.”³⁴

In Weimar Germany there was also a small group of constitutional theorists, most notably Heinrich Triepel and Fritz Poetzsch, who expressed

³¹ See generally George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 & 1936*, 2d ed. (New York and Westport, Conn.: Greenwood Press, 1989).

³² See John Locke, *The Second Treatise of Government* (1690), C.B. Macpherson ed. (Indianapolis: Hackett, 1980), § 141: “The power of the legislative, being derived from the people by positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not legislators, the legislature can have no power to transfer their authority of making laws, and place it in other hands.”

³³ *J.O., Chambre des députés, débats* (July 8, 1926), 2773.

³⁴ Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn, 1929), 17.

serious reservations about the increasing recourse to delegation. Both Triepel and Poetzsch recognized that one of the main challenges of modern governance was to define a workable distinction between legislative and executive power, and they were therefore critical of both the extraordinary scope as well as the substantive indeterminacy of the delegations under the Weimar enabling acts.³⁵ If the constitution assigned legislative competence to the people’s elected representatives, they reasoned, the Reichstag could not transfer that authority to another organ without calling into question both the constitution itself and its distribution of powers.³⁶ Weimar practice routinely allowed transfers to the executive of both general regulatory powers and, in extraordinary circumstances, full legislative powers in broad and unrestricted domains.³⁷ Triepel argued, by contrast, that the legislature should be constitutionally obligated to define with reasonable clarity a limited purpose (*Zweck*) for the delegated powers, thus constraining the executive’s discretion in the exercise of the delegated authority.³⁸ Poetzsch, for his part, was even more restrictive, arguing for a rigorous limitation of delegation to authorizing only implementing regulations.³⁹

Carl Schmitt argued that these views had only an indirect influence on constitutional practice in the 1920s, leading the Reichstag to adopt several early Weimar enabling acts (under the Cuno and Stresemann governments during the Ruhr Crisis of 1923, for example) by a supermajority sufficient to amend the constitution, thus removing any doubts as to their constitutionality.⁴⁰ However, because other commentators believed that the Weimar constitution conferred on

³⁵ See, e.g., Fritz Poetzsch, “Verfassungsmässigkeit der vereinfachten Gesetzgebung,” *Archiv des öffentlichen Rechts*, vol. 40 (1921), 156-172. For more on the Weimar background, see Ch. Möllers, “Das parlamentarische Gesetz als demokratische Entscheidungsform — Ein Beitrag zur Institutionenwahrnehmung in der Weimarer Republik,” in Ch. Gusy, ed., *Demokratisches Denken in der Weimarer Republik*, (Nomos, 2000), 415.

³⁶ Heinrich Triepel, “Bericht,” and Fritz Poetzsch, “Bericht,” in *Verhandlungen des 32. Deutschen Juristentages* (Berlin and Leipzig: Jansen, 1922), 34. Triepel and Poetzsch served the reporters for the proceedings of the German Lawyers Congress held in Bamberg in 1922, in which the central question on the agenda was whether it would “be advisable to include new rules in the Reich constitution on the boundaries between legislation (*Gesetz*) and regulatory ordinances issued by the government (*Rechtsvordnung*).” For a discussion, see Wilhelm Möhle, *Inhalt, Zweck und Ausmaß: Zur Verfassungsgeschichte der Verordnungsermächtigung* (Berlin: Duncker & Humboldt, 1990), 25.

³⁷ A comprehensive list for the early 1920s can be found in Fritz Poetzsch, “Vom Staatsleben unter der Weimarer Verfassung (vom 1. Januar 1920 bis 31. Dezember 1924),” *Jahrbuch des öffentlichen Rechts der Gegenwart*, vol. 13 (1925), 1.

³⁸ Triepel, “Bericht” (above n.36), 17, 26.

³⁹ Poetzsch, “Bericht” (above n.36), 57.

⁴⁰ See Schmitt, “L’évolution récente du problème des délégations législatives” (above n.7), 208.

the Reichstag “an unlimited competence, a *plenitudo potestatis* for constitutional change,”⁴¹ these enabling acts and their subordinate ordinances issued by the government were viewed as the unassailable expression of the state’s will, beyond the legal control of any court.⁴² Although in theory the power of the Reichstag to delegate was subject to a vaguely defined reserve (*Vorbehalt*) that must remain in the legislature,⁴³ it was left to the legislature alone, and not to some external body like a court, to define what the outer limits of that reserve precisely were.⁴⁴

Even with repeated recourse to delegation of legislative authority to the executive, over the course of the 1920s the Weimar Republic was unable to achieve sufficient political stability to develop credible long-term solutions to the myriad of problems confronting it. It is perhaps unsurprising, then, that the emergency powers of the Reich President under Article 48 of the Weimar constitution assumed an increasingly important role in the production of legislative norms over the course of the 1920s, at critical junctures being used as a mechanism to overcome blockages in the Reichstag concerning central issues

⁴¹ Richard Thoma, “Die Funktionen der Staatsgewalt,” in Gerhard Anschütz and Richard Thoma, eds., *Handbuch des Deutschen Staatsrechts* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1932), 2: 154, quoted in George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 & 1936*, 2d ed. (New York and Westport, Conn.: 1989), 70.

⁴² Gerhard Anschütz, a leading public law theorist under Weimar, aptly summarized the prevailing conception of parliamentary sovereignty in these circumstances when he stated, “The constitution does not stand above the legislature, but rather at its disposition.” Gerhard Anschütz, *Verfassung des Deutschen Reiches vom 11. August 1919*, 14th ed. (Berlin: Georg Stilke, 1933), 401, 403, quoted and translated in Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham, N.C.: Duke University Press, 1997), 69.

⁴³ See, e.g., Richard Thoma, “Der Vorbehalt der Legislative und das Prinzip der Gesetzmäßigkeit von Verwaltung und Rechtsprechung,” *Handbuch des Deutschen Staatsrechts*, vol. 2 (1932), 227; Paul Schoen, “Das Verordnungsrecht und die neuen Verfassung,” *Archiv des öffentlichen Rechts*, vol. 6 (1924), 133, 148-57; see also Mößle, *Inhalt, Zweck und Ausmaß* (above n.36), 26 & n. 78. Although scholarly contemporaries of Triepel and Poetzsch recognized theoretical limitations on the power of the Reichstag to delegate, these limitations were “so insignificant” as to be “rarely mentioned.” Uwe Kischel, “Delegation of Legislative Power to Agencies: a Comparative Analysis of United States and German Law,” *Administrative Law Review*, vol. 46 (1994), 229. The notable exception was Fritz Poetzsch.

⁴⁴ The Reichsgericht adopted a similar view in the midst of the stabilization crisis of the winter of 1923-24. See the decision of the Reichsgericht of Jan. 25, 1924, RGZ 107, 315, 317-18; for a discussion see Kischel, “Delegation of Legislative Power” (above n.43), 229 n.132. But see also the decision of the Reichsgericht of Feb. 1, 1921, RGSt 55, 246, 246-47, which opined that delegation had to be somehow limited in duration, subject matter, or persons affected.

of economic policy.⁴⁵ Schmitt, too, had written approvingly of this practice, particularly in its most extreme, anti-parliamentary manifestation under the cabinets formed by Franz von Papen, and more briefly Kurt von Schleicher in 1932-33, each of whom ruled without pretence of parliamentary support, post hoc or otherwise.⁴⁶ The claimed constitutional foundation for this anti-parliamentary and authoritarian form of presidential government was Carl Schmitt’s controversial theory of the president’s inherent dictatorial powers as the “protector of the constitution” under Article 48, free from the need for parliamentary support of any kind.⁴⁷

In the years after the Second World War, the earliest historiography of the disintegration of the Weimar Republic – led by Karl Dietrich Bracher’s seminal work, *Die Auflösung der Weimarer Republik*, published in 1954⁴⁸ – would view Hindenburg’s appointment of Hitler as chancellor in January 1933 primarily as the culmination of this transformation of the Weimar regime into the sort of presidential dictatorship advocated by Schmitt under Article 48.⁴⁹ On certain

⁴⁵ See, e.g., *Steuernotverordnung des Reichspräsidenten*, RGBl. I, 1177 (December 7, 1923). See also Ulrich Scheuner, “Die Anwendung des Art. 48 der Weimarer Reichsverfassung unter den Präsidentschaften von Ebert und Hindenburg,” in Ferdinand A. Mermens and Theodor Schieder, eds., *Staat, Wirtschaft und Politik in der Weimarer Republik. Festschrift für Heinrich Brüning* (Berlin: Duncker & Humboldt, 1964), 249-86. A list of presidential acts by emergency decree in the early Weimar period can be found in Poetzsch, “Vom Staatsleben unter der Weimarer Verfassung” (above n.37), 141-47.

⁴⁶ Under the chancellorship of Heinrich Brüning from 1930 to 1932, by contrast, presidential government in Germany could at least claim to possess a “semi-parliamentary” character that would persist until Franz von Papen’s installation as chancellor in 1932. By scrupulously submitting presidential decrees to the Reichstag for post hoc control as required by Article 48, the Brüning government enjoyed the “toleration,” indeed even the tacit support, of a negative parliamentary majority including the Social Democrats, which repeatedly refused to annul Brüning’s submitted decrees. See William L. Patch, Jr., *Heinrich Brüning and the Dissolution of the Weimar Republic* (Cambridge, Eng.: Cambridge University Press, 1998), ch. 2.

⁴⁷ See generally Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1931) (arguing that Article 48 implied an unlimited authority in the president to suspend the constitution during a state of emergency, as long as he restored the constitution when the emergency ended). For a succinct summary of the political influence that Schmitt’s theory attained in conservative and nationalist circles in the late 1920s and early 1930s, see Patch (above n.46), 52; see also Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983).

⁴⁸ Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik: Eine Studie zum Problem des Machtverfalls in der Demokratie* (Villingen/Schwarzwald: Ring-Verlag, 1955); see also Karl Dietrich Bracher, *The German Dictatorship: the Origins, Structure, and Effects of National Socialism* (New York: Praeger, 1970) (originally published as *Die deutsche Diktatur: Entstehung, Struktur, Folgen des Nationalsozialismus*, 1969).

⁴⁹ As Bracher has written, “Hitler gained ‘legitimate’ control of the Government not as the head of a parliamentary coalition, as misleading apologia still suggest, but through this

levels, this is a persuasive reading of the historical evidence.⁵⁰ But, as Schmitt himself well understood (as reflected in his writing on delegation in 1936), in March 1933 the decisive legal foundation for Hitler's dictatorship was not a presidential decree but an enabling act adopted by a Reichstag in which the Nazis still did not hold a majority. Although historians have recognized the critical importance of the Enabling Act of March 24, 1933 in "legalizing" the Nazi exercise of full dictatorial powers (thus obviating the need for further recourse to Article 48), they have generally not examined the Act itself as a manifestation of a profound flaw in Weimar constitutional practice on par with the potential for presidential dictatorship under Article 48. Bracher, for example, recognizes that the Enabling Act was of "enormous importance" because it reassured the civil service and the courts of the "apparently unexceptional legal foundations" for the Nazi regime.⁵¹ But one might fairly ask: How was it that administrative officials and the courts could regard the Reichstag's complete abdication of its constitutional functions in 1933 as "apparently unexceptional" legally? Bracher's choice of words suggests that there was a deeper flaw in Weimar constitutional practice that went beyond the potential for presidential dictatorship under Article 48.

Bracher's own *Die Auflösung der Weimarer Republik* provides a clue as to what that flaw was, even if this particular insight is overshadowed by his broader emphasis on Article 48 as the "authoritarian loophole" which ultimately destroyed German democracy. According to Bracher, the first instances of "the dismantling of parliamentary power" did not take place in "the end-phase of the

(contd.)

authoritarian loophole in the Weimar Constitution." Bracher, *The German Dictatorship* (above n.48), 194.

⁵⁰ Germany's slippage into a kind of presidential dictatorship after Brüning's fall in 1932 undoubtedly helped to pave the way for the Nazi seizure of power in 1933 (an event which of course would lead Schmitt to join the NSDAP and then to become one of the staunchest constitutional defenders – the "crown jurist" – for the new regime). Hitler, too, was able to use Article 48 decree powers to his advantage, particularly after the Reichstag fire and the suspension of individual liberties (precisely as Article 48 authorized), which enabled him to eliminate opponents and outmaneuver coalition partners in the March elections. Perhaps Schmitt's most famous celebration of the breakdown of separation of powers in the new regime would come after the Night of the Long Knives, when he justified the violence and terror of Hitler's dictatorship in this way: "The *Führer* protects the law against the worst abuse," Schmitt wrote in 1934, "when he, in the hour of danger, by virtue of his leadership, produces immediate justice . . . *The true leader is, at the same time, always judge*" [and, one might add, the legislature as well]. Carl Schmitt, "Der Führer schützt das Recht," 39 *Deutsche Juristen-Zeitung* col. 945, 946-47 (1934), quoted in Manfred H. Wiegandt, "The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt," 16 *Cardozo L. Rev.* 1569, 1589 (1995) (emphasis added).

⁵¹ Bracher, *The German Dictatorship* (above n.48), 197.

Weimar Republic."⁵² Rather, "the Reichstag had never been able to occupy its position as the *de facto* legislative power," however much it was expected to do so "as the crystallization point of democracy" under the constitution.⁵³ Bracher then alludes to a series of enabling acts of the early 1920s, suggesting that these pieces of legislation demonstrate how the parliament of the Weimar Republic saw its legislative powers dissipated "bit by bit," long before Hitler exploited the well-established mechanism of the enabling act to "legalize" his dictatorship.⁵⁴ Of course, what distinguished the March 1933 enabling act from its earlier Weimar counterparts was its purpose, which was to unify all executive and legislative power *permanently* in the hands of the chancellor-*Führer*, Adolph Hitler. This was, in Schmitt's estimation, the great German achievement in 1933: the establishment of a system of genuine "governmental legislation."⁵⁵ There was, as Schmitt recognized, no intention to return to parliamentarism rooted in separation of powers (despite cynical language contemplating the replacement of the Reich government by the legislature).⁵⁶

For Schmitt, it would not be until long after the disaster of the Nazi dictatorship had become apparent that he recognized the need to find some reconciliation between parliamentary democracy and the demands of delegation in the modern administrative state. Toward the end of 1944, Schmitt wrote another piece – "Die Lage der europäischen Rechtswissenschaft (1943/44)" (translated as "The Plight of European Jurisprudence"⁵⁷) – which, in certain respects, can be viewed as a companion to his earlier contribution on the subject of delegation from 1936. Schmitt traced some of the same ground he had in the

⁵² Bracher, *Die Auflösung der Weimarer Republik* (above n.48), 47.

⁵³ *Ibid.*

⁵⁴ The name given to the March 24, 1933 statute – the "Act for the Relief of the Distress of the People and the Reich" (Gesetz zur Behebung der Not von Volk und Reich, RGBl. 141 (March 24, 1933)) – intentionally used language from Section 1 of an earlier statute (that of December 8, 1923 enabling law which had authorized the Marx government "to take such measures that it regards as necessary and urgent in view of the distress of the people and Reich," RGBl. 1179 (December 8, 1923), § 1) in order to stress the continuity of constitutional practice over ten years.

⁵⁵ See above n.27 and accompanying text.

⁵⁶ The March 1933 act used essentially the same mechanism as another Weimar statute (that of October 13, 1923) to authorize the government to violate constitutionally-guaranteed rights but "checking" that authority politically, rather than judicially, by providing that the powers under the act would terminate "if the present Reich government is replaced by another," however no later than April 1, 1937. RGBl. 141, Artikel 5. The Nazis had the Reichstag adopt extensions of the enabling act in 1937 and 1939, in what appears now as a farcical effort to give Hitler's dictatorship the appearance of ongoing constitutional legality. RGBl. 105 (January 30, 1937) and RGBl. 95 (January 30, 1939). In 1943 the law was further extended, although this time by a decree of Hitler himself. RGBl. 295 (May 10, 1943).

⁵⁷ Carl Schmitt, "Die Lage der europäischen Rechtswissenschaft (1943/44)," translated by G.L. Ulmen as "The Plight of European Jurisprudence," *Telos*, no. 83 (Spring 1990).

earlier piece – the acceleration of legislation after 1914, the “ever new and broader” delegations of legislative power in the postwar period – and again he stressed how all industrialized countries had experienced a similar phenomenon: “[R]egardless of whether they were belligerents or neutrals, victors or vanquished, parliamentary states or so-called dictatorships,” Schmitt wrote, “the compulsion for legal regulations to accommodate the tempo of changing conditions was irresistible.”⁵⁸

Absent, however, from Schmitt’s 1944 essay was the smug self-confidence of the 1936 piece in the German solution to the problem of delegation, which is perhaps understandable in light of the disaster that Germany had brought upon millions of people in Europe and elsewhere as a result of the choices it made in 1933. Schmitt in 1944, surrounded by evidence of that German-inflicted catastrophe, now cited with approval Heinrich Triepel’s efforts in the early 1920s to bring attention to the dangers of unchecked delegation.⁵⁹ He also noted Lord Hewart’s “warning” in *The New Despotism* (although he claimed that it had been ignored, even in Britain),⁶⁰ and he wrote vaguely of the necessity for “a sense for the logic and consistency of concepts and institutions,” and for “the minimum of an orderly procedure, due process, without which there can be no law.”⁶¹ He even wrote of the need for “a recognition of the individual based on mutual respect.”⁶²

The constitutional challenge facing Europe after 1945 was indeed to learn the lessons of the interwar period, although we would be justified in our scepticism of Schmitt’s seeming reversal in 1944 in light of the hope he invested in the constitutional principles of the Third Reich in the 1930s. In some sense, by 1944 Schmitt had simply gone to the opposite extreme, sounding almost Hayekian in his warnings of the dangers of “the increasing motorization of the legislative machinery” and “of this dissolution of law under the avalanche of ever more legislation.”⁶³ He had not really let go of the view that delegation ultimately must lead to dictatorship, as he argued in 1936; rather, he simply no longer celebrated that process as the “triumph” of an older constitutional tradition in Europe.⁶⁴ Schmitt understood that the social and economic conditions of modern life did indeed require broader forms legislative delegation, and this would be as true after 1945 as it was after 1918. It was precisely for this reason, however, that postwar western Europe in general, and

⁵⁸ *Ibid.*, 52.

⁵⁹ *Ibid.*, 50.

⁶⁰ *Ibid.*, 52.

⁶¹ *Ibid.*, 67.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ Schmitt, “L’évolution récente du problème des délégations législatives” (above n.7), 210.

the Federal Republic in particular, was not going to abandon delegation as a form of governance altogether, as Schmitt now implicitly seemed to advocate. Instead, the challenge was to find way to make delegation work within the context of liberal-democratic institutions, to surmount what Schmitt had claimed in 1936 was “insurmountable”: the tension between delegation and parliamentary democracy.

THE POSTWAR CONSTITUTIONAL SETTLEMENT: “THE BASIC LAW REFLECTS A DECISION IN FAVOR OF STRICTER SEPARATION OF POWERS”

The Parliamentary Council (*Parlamentarischer Rat*), which met in Bonn in late 1948 and early 1949, was charged with drafting a new basic law for the western zones of occupation in Germany.⁶⁵ As Konrad Adenauer, the future Federal Chancellor who served as president of the Council, wrote in his memoirs: “We followed the general principle that we must learn the lessons of the mistakes of the Weimar Republic.”⁶⁶ Of course, central among those mistakes was the failure to establish an adequate legal system for the protection of individual rights. In light of the Nazi experience, the drafters of the Basic Law thus placed the substantive catalogue of *Grundrechte* – “basic rights” – at the very beginning of the document, in Articles 1 through 19, to emphasize their centrality in the postwar regime.⁶⁷

⁶⁵ The Parliamentary Council was preceded by a critically important meeting of constitutional experts in August 1948 at Lake Chiemsee (known as the “Herrenchiemsee Conference”), which assembled the initial draft which formed the basis of the Council’s subsequent work. See generally *Das Parlamentarische Rat, 1948-49: Akten und Protokolle*, 12 vols. (Boppard am Rhein: Boldt, 1975-), especially vol. 2, *Der Verfassungskonvent auf Herrenchiemsee*. See also *Documents on the Creation of the German Federal Constitution*, Civil Administration Division, Office of the Military Governor for Germany (US), 1 September 1949, 64-77 (Chiemsee Proposal, Draft of a Basic Law). Also important were the constitutions of the German Länder in the western occupation zones. For an overview, see Harold O. Lewis, *New Constitutions in Occupied Germany* (Washington, DC: Foundation for Foreign Affairs, 1948). For a succinct summary of the relationship between the constitutions of the Länder, the Herrenchiemsee Conference, and the Basic Law, see Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d ed. (Durham, NC: Duke University Press, 1997), 7-8.

⁶⁶ Konrad Adenauer, *Memoirs 1945-53* (Chicago: Henry Regnery, 1966), 122. The most comprehensive legal and political analysis of the Basic Law in light of the Weimar and Third Reich experiences remains Friedrich Karl Fromme, *Von der Weimarer Verfassung Zum Bonner Grundgesetz: Die verfassungspolitischen Folgerungen des Parlamentarischen Rates aus Weimarer Republik und nationalsozialistischer Diktatur* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1960).

⁶⁷ This contrasted with the placement of the catalogue of protected rights at the end of the Weimar constitution.

The Basic Law's other major innovation was the insertion of so-called "eternity clause" in Article 79(3). This provision set forth that the core principles enunciated in Article 1 (the inviolable "dignity of man"; the "duty of all state authority" protect that dignity; the inalienability of human rights; and the enforceability of the basic rights as positive law against all branches of government), along with those in Article 20 (the establishment of West Germany as "a democratic and social federal state"; the emanation of all public authority from the "people" exercised through elections; the separation of powers between the executive, legislative and judicial branches), could not be rescinded even by constitutional amendment.

As Article 79(3) made clear, the drafters of the Basic Law of 1949 recognized that there existed a basic constitutional connection between the democratic structure of the state and the protection of the "dignity of man" through some form of separation of powers. The purpose of Article 79(3) was to prevent a momentary political majority (following the practice of the Reichstag of the Weimar Republic) from authorizing the executive or any other body to abrogate the separation of powers or constitutionally-protected rights, even if that majority was of a sufficient magnitude to amend the constitution in order to grant such power. The Basic Law thus explicitly rejected the view, prevalent under Weimar, that parliament possessed "an unlimited competence, a *plenitudo potestatis* for constitutional change,"⁶⁸ even one that undermined the democratic character of the state itself through the abrogation of the separation of powers. Additionally, the Basic Law provided for the establishment of a Federal Constitutional Court (*Bundesverfassungsgericht*) to act as the ultimate judicial guarantor of constitutional requirements.⁶⁹

Among those requirements would be Article 80(1) of the Basic Law, which authorized the federal parliament to delegate the power to issue *Rechtsverordnungen* – regulatory ordinances with the force of law – subject, however, to one very important proviso: The "content, purpose and scope" (*Inhalt, Zweck, und Ausmaß*) of the delegation had to be specified in the enabling legislation itself, thus prohibiting indeterminate delegations of the Weimar type. According to a recent German constitutional history on the subject, this provision reflects the influence of the Office of the Military

⁶⁸ Richard Thoma, "Die Funktionen der Staatsgewalt" (above n.41), 2: 154.

⁶⁹ Grundgesetz Articles 92 and 93. Originally, the legal standing to seek constitutional review was limited to state and federal bodies (executive, legislative and judicial), but the organic statute adopted in 1951 establishing the Constitutional Court also extended standing to individual claimants as well, as long as they had exhausted all other judicial remedies. See *Gesetz über das Bundesverfassungsgericht*, BGBl. I 243 (March 12, 1951). In 1969, the Basic Law was amended (adding language to Article 93(1)) to recognize individual standing in the constitutional text as well. For a succinct summary, see Kommers (above n.65), 14.

Governor of the United States (OMGUS) on postwar West German constitutional politics, which had interjected American nondelegation principles into the West German constitutional debate via its supervision of the drafting of the Bavarian state constitution, which served as a model for the Basic Law.⁷⁰ These American principles highlighted the need for a specifically *constitutional* regularization of delegated legislative power – that is, its reconciliation with traditional notions of representative democracy embodied in the legislature – through the development of flexible constraints on the nature and scope of legislative delegation. The flexible principles of nondelegation that emerged in the decisions of the United States Supreme Court in the 1940s, even as they tolerated very broad transfers of authority to the executive, still reflected a residual belief in the elected legislature as the ultimate embodiment of the interest of the "people" as a whole, making that branch of government the presumptive locus of rulemaking power.⁷¹

As a reflection of these notions, the constitutional significance of Article 80(1) of the Basic Law usually receives little notice outside the German legal literature, having been relegated apparently to the status of "lawyers' law."⁷² This lack of general scholarly attention – and particularly historical attention – is unfortunate, given that the provision was specifically directed at a major flaw in the Weimar system (one which Schmitt well understood): the absence of legal or constitutional controls over the substance and process of legislative delegation. In some sense, the provisions of Article 80(1) can be understood as an effort to fuse the doctrine articulated by the German theorist Heinrich Triepel⁷³ with that

⁷⁰ For a detailed discussion, see Möble, *Inhalt, Zweck und Ausmaß* (above n.36), 55.

⁷¹ See, e.g., *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); and *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126 (1941). These wartime cases took a much more lenient approach to the question of delegation as compared to the leading decisions handed down during the New Deal. Since the 1940s, the "nondelegation doctrine" in the United States has largely served as a background constraint and an interpretive principle, allowing courts to read enabling legislation narrowly in order to avoid nondelegation concerns. See, e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

⁷² See, e.g., Möble, *Inhalt, Zweck und Ausmaß* (above n.36); Hermann von Mangoldt, *Das Bonner Grundgesetz* (Berlin and Frankfurt: Franz Vahlen, 1953), 430-31; Fromme, *Von der Weimarer Verfassung* (above n.66), 138-39; and Wolfgang Zoller, *Über die Bedeutung des Art. 80 GG: Gewaltenteilungsgrundsatz und Normsetzung durch die Verwaltung* (Frankfurt/M.: Peter Lang, 1971)(with extensive bibliography to the leading German constitutional commentaries). In English, see David P. Currie, "Separation of Powers in the Federal Republic of Germany," *The American Journal of Comparative Law*, vol. 41 (1993), 217-225; and Kischel, "Delegation of Legislative Power" (above n.43). For comparative analyses of delegation, see the contributions by Haibach, Picard, Tomkins, Türk in M. Andenas and A. Türk, eds., *Delegated Legislation and the Role of Committees in the EU*, (Kluwer, 2000), 53-181.

⁷³ See above nn.35-38 and accompanying text.

espoused by the United States Supreme Court in the interwar period.⁷⁴ Perhaps the most influential commentary on the question of delegation in the early 1950s, written by a leading professor of law and member of the Federal Constitutional Court until 1956 (Bernhard Wolff), made explicit reference both to the position articulated by Triepel at the German Lawyers Congress in 1921 as well as to the American nondelegation doctrine.⁷⁵ According to Wolff, in order to satisfy the requirements of Article 80(1), the enabling legislation must specify “the program, the state-political, legal-political, social-political goal [*das staatspolitische, rechtspolitische, sozialpolitische Ziel*], which in English is expressed by the difficult-to-translate terms *policy* or *standards*.”⁷⁶

The decisions of the German Federal Constitutional Court in the early and middle 1950s reflected the strong influence of Wolff’s interpretation.⁷⁷ As the Court stated in 1951, in its very first decision applying Article 80(1) to a proposed delegation:⁷⁸

The Basic Law in this as in other respects reflects a decision in favour of stricter separation of powers. The Parliament may not escape its lawmaking responsibilities by transferring part of its legislative authority to the Government without considering and precisely determining the limits of the delegated authority. The executive, on the other hand, may not step into the shoes of Parliament on the basis of indefinite provisions authorizing the promulgation of regulations.⁷⁹

What emerged in the postwar constitutional jurisprudence was not an inflexible, absolutist nondelegation doctrine – by its terms, Article 80(1) in fact

⁷⁴ See *Schechter Poultry v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The line of cases from the mid-1930s striking down major pieces of New Deal legislation in fact have been the only instances in which Congressional attempts to transfer legislative powers to the executive have been invalidated (and these involved very broad delegations of authority in the face of the economic emergency of the Depression).

⁷⁵ See Bernhard Wolff, “Die Ermächtigung zum Erlaß von Rechtsverordnungen nach dem Grundgesetz,” *Archiv des öffentlichen Rechts*, vol. 78 (1952/53), 194-227.

⁷⁶ *Ibid.*, 197; for a discussion see Mößle, *Inhalt, Zweck und Ausmaß* (above n.36), 32-33.

⁷⁷ See, e.g., BVerfGE 2, 334 (1953) (defining the *Selbstentscheidungsformel*, or the “self-decision test”) and BVerfGE 5, 77 (1956) (defining the *Programmformel*, or the “program test”); for further discussion, see Mößle, *Inhalt, Zweck und Ausmaß* (above n.36), 34.

⁷⁸ BVerfGE 1, 14 (1951). The decision arose out of a challenge to a provision authorizing the Minister of the Interior to adopt regulations “necessary for the execution” of a statute respecting the rearrangement (*Neugliederung*) of Länder in what is now Baden-Württemberg. For a discussion, see Currie (above n.72), 218-19.

⁷⁹ BVerfGE 1, 60. The translation of this excerpt was adapted from Currie (above n.72), 218-19. See also Mößle, *Inhalt, Zweck und Ausmaß* (above n.36), 31-32. The Court struck down the delegation on the grounds that the authorization was so indefinite that it was impossible to foresee when and how the delegated authority would be employed.

authorized delegation – but rather a more subtle approach. The Court generally tried to uphold regulatory statutes by interpreting their provisions in a manner which conformed with the constitutional requirements of Article 80(1) (an approach known in German as *verfassungskonforme Auslegung*). To discipline this inquiry, the Court relied on a series of analytical formulas to constrain the executive’s normative autonomy while nevertheless allowing the delegation to proceed. These included: the *Vorhersehbarkeitsformel*, which focused on whether the content of any future regulation was foreseeable from the statute itself; the *Selbstentscheidungsformel*, which focused on whether the legislature had itself decided the limits of the regulated area as well as the goals of the regulation; and the *Programmformel*, which focused on whether the statute had defined with sufficient clarity the regulatory program.⁸⁰ The Court also recognized the interconnection between individual rights and the “essential” functions of the people’s elected legislative representatives through the *Wesentlichkeitstheorie*, or “theory of essentialness.” As the Court would later make clear, the *Wesentlichkeitstheorie* was rooted directly in the constitutional guarantee of democracy:

The democratic legislature may not abdicate [its] responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests.⁸¹

There was of course a measure of elasticity and indeterminacy built into these formulas (for example, the question of what exactly was an “essential” function of Parliament was itself subject to debate and critique⁸²). Consequently, the Court was often forced to proceed pragmatically, attempting to make principled distinctions based on the facts before them and the importance of the

⁸⁰ See generally BVerfGE 55, 207, 225-44 (1980) (describing in detail the history and tradition that had developed since the 1950s in which the Court endeavored to find implicit limitations on legislative delegations which, on their face, open-endedly authorized the promulgation of regulations by the executive). The Court was also prepared to rely on provisions in regulatory statutes which often gave the Bundestag the post hoc power to veto regulations adopted by the executive – in effect, to engage in direct legislative oversight – viewing this veto power as compensation for the increase in executive authority brought about by the delegation itself. See, e.g., BVerfGE 8, 274, 319-22 (1958); for a discussion, see Currie (above n.72), 233. Where Länder interests are implicated, the Basic Law also directly gave the Bundesrat a right of veto that applied regardless of the terms of the enabling legislation. See Article 80(2).

⁸¹ BVerfGE 33, 125, 159 (1972). This translation is drawn from Currie (above n.72), 224.

⁸² For an overview, see Dieter C. Umbach, “Das Wesentliche an der Wesentlichkeitstheorie,” in Wolfgang Zeidler et al., eds., *Festschrift Hans Joachim Faller* (München: Beck, 1984), 111-31.

policy question at issue.⁸³ Nevertheless, regardless of whatever else one might say about elasticity and indeterminacy, the result over time was arguably a much firmer sense of the substantive reserve of normative power that belonged to the Parliament alone – the *Vorbehalt des Gesetzes* – about which German legal commentators had theorized for a half-century before 1933 but were unable to define except in the vaguest terms.

The difference in the emergent West German constitutional doctrine of the 1950s and later was that, armed with the principles of separation of powers found in the Basic Law – principles to which Schmitt had explicitly expressed hostility in the interwar period – lawyers, judges and politicians now possessed much superior analytical tools to define what precisely that reserve in fact included. Moreover, after 1949 there existed an institutional means to police the reserve’s boundaries – the Federal Constitutional Court – in a manner consistent with Germany’s recent and terrible political history, as well as with the necessities of executive and administrative governance in a modern welfare state.

THE POSTWAR CONSTITUTIONAL SETTLEMENT AND THE MEDIATED LEGITIMACY OF DELEGATED POWER, BOTH NATIONAL AND SUPRANATIONAL

The transformation in the nature of the modern democratic system in the immediate postwar decades – not just in Germany but in other countries of western Europe – was in direct reaction to the political and legal struggles of the interwar period over the nature and extent of executive power in a parliamentary system. In this struggle, the Schmittian position of legally and politically unconfined executive power clearly lost out, and its defeat is well reflected not only in the postwar separation-of-powers jurisprudence of the German Federal Constitutional Court (on which the *Maastricht Decision* directly drew), but also in the *Maastricht Decision* itself.

The constitutional settlement of delegated power in the postwar decades arguably contributed both to the stabilization of the postwar welfare state as well as to the process of European integration (two developments which were, in any event, inextricably intertwined).⁸⁴ This constitutional acceptance of delegation

⁸³ See, e.g., BVerfGE 58, 257, 268-76 (1981) (distinguishing between a school’s power to decide the circumstances in which a student must repeat a class – where broader delegation was permissible – and in which the student may be expelled – which was determined to be sufficiently grave as to implicate the legislature’s “essential” functions). For a discussion, see Kischel, “Delegation of Legislative Power” (above n.43), 231.

⁸⁴ See, generally, Alan S. Milward, *The European Rescue of the Nation-State* (London and New York: Routledge, 1993).

relied on all three traditional branches – the parliament, the government, and the courts – to legitimise the new distribution of authority in postwar western Europe, even as much of this authority, at least in the first instance, was concentrated in the executive branch. Although this concentration signified a “fusion” rather than a “separation” of powers in the traditional sense (as Carl Schmitt understood), historically-grounded notions of constitutional governance were, after a period of significant historical struggle, maintained through a separation of the *mechanisms of legitimation* – legislative, executive, and judicial. It was the persistence of the separation of mechanisms of legitimation that allowed the postwar state to surmount what Schmitt had asserted was “insurmountable,”⁸⁵ while also allowing it to claim a democratic-constitutional legitimacy in a historically recognizable sense.

In the postwar constitutional settlement, delegated norm-production did not possess autonomous constitutional legitimacy but rather its legitimacy was *mediated* through the traditional branches of government that were themselves historically endowed with constitutional authority, whether democratic (i.e., executive or legislative) or judicial. In the *Maastricht Decision*, the German Federal Constitutional Court attempted to establish the constitutional foundations of supranational authority on a similar basis of mediated legitimacy. However problematic one might find this effort given the demands of supranational coordination,⁸⁶ one thing is certainly true: It is difficult to maintain that this was a Schmitt-inspired undertaking. Rather, given the extent to which it emerged out of the postwar constitutional doctrine of separation of powers that was fundamentally hostile to Schmitt, this provides further basis to doubt that the Court’s ambiguous reference to “homogeneity” (citing Heller) should be seen as a covert effort to import Schmittian conceptions of democracy into German constitutional doctrine.⁸⁷ Moreover, much less than a “seemingly retrograde return to the legal rhetorics of the sovereign state,”⁸⁸ the doctrine articulated by the German Federal Constitutional Court in the *Maastricht Decision* was highly accommodating of the new distribution of normative authority both inside and beyond the nation-state, even as it struggled to maintain some semblance of constitutional democracy in a historically recognizable sense.

⁸⁵ Schmitt, “L’évolution récente du problème des délégations législatives” (above n.7), 204.

⁸⁶ See, e.g., Everson (above n.5).

⁸⁷ See above nn.16-17 and accompanying text.

⁸⁸ Everson (above n.5), 393.

Peter Lindseth
Jean Monnet Fellow,
Robert Schuman Centre for Advanced Studies,
European University Institute, Jan.-June 2003;
Associate Professor of Law,
University of Connecticut School of Law.

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