Schmitten in the USA

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04.04.2020 doi: 10.17176/20200404-131214-0

Michael Taggart, the late great New Zealand public lawyer, once described a colleague as '*Schmitten*', a customarily brilliant way of expressing his puzzlement at how Carl Schmitt's 'dangerous mind' seems so alluring to some Anglo-American lawyers. I doubt that even Mike was capable of imagining the extent to which Adrian Vermeule, a prominent constitutional US lawyer, teaching at Harvard Law School, has not only been Schmitten, but has even surpassed his master in some respects with his essay in the Atlantic, 'Beyond Originalism: The dominant conservative philosophy for interpreting the Constitution has served its purpose, and scholars ought to develop a more moral framework'.

This article does not mention Schmitt. Its argument is presented as a conservative alternative to Dworkinian liberal constitutionalism different from and superior to the versions of originalism favoured by the right of the American legal academy. In a way the argument should appeal to those who have criticized originalists for using implausible claims about what as a matter of fact the legal meaning was at the time the Constitution was written as a disguise for a political agenda for dealing with contemporary issues that no one at that earlier time could have envisaged. But in suggesting that conservative judges should now embrace 'illiberal legalism', a deliberate riff off Victor Orbán's 'illiberal democracy', Vermeule advocates abandoning the Constitution altogether as an agreed basis for legal argument.

It is significant in this regard that the Hungarian Parliament has just enacted a law, on the pretext of responding to the pandemic, that gives Orbán indefinite authority to rule Hungary by decree. As Kim Lane Scheppele commented in *Verfassungsblog*, just prior to the enactment, 'In short, it doesn't matter what any law in Hungary says today. .., [I]f this pending bill become law, any existing Hungarian law could be overridden at Orbán's whim'. It is perhaps the closest legal analogue to Hitler's Enabling Act of 1933, enacted by a thoroughly cowed *Reichstag*, that made his whims the source of all law and constitutional value.

The Fuehrer is the Guardian of the Law

In 1934, Schmitt celebrated with his article 'The Fuehrer is the Guardian of our Law' ('Der Führer schützt das Recht') the retroactive legalization of the murders of Hitler's rivals within his ranks that took place during the Night of the Long Knives – (In Carl Schmitt, *Positionen und Begriffe in Kampf mit Weimar-Genf-Versailles 1923-1939* (Berlin: Duncker & Humblot, 1988) 199.) That required Schmitt also to celebrate the murder in the same purge of General Schleicher and his wife, and thus of the man to whom Schmitt had been close from the conservative cabinet that had hoped to contain Hitler prior to 1933.

This kind of paean to Hitler and the Nazi Party was part of a two-pronged strategy by which Schmitt hoped to protect himself, given his deep association with the conservatives opposed to Hitler, and further his desire to rise to power in the new order. He succeeded in both, becoming for a while 'crown jurist' to the Nazis. But he fell out of favour because he was never a Nazi by conviction and was never able to bring himself to the point of entirely abandoning the idea that there is something more to law than the mere instrument of the political ideology that has achieved ascendancy, whatever its content.

More important, though, is that Schmitt's hatred of secularism, humanism, and individualism led him to view legitimate law as the law that is the instrument of an ideology opposed to these 'isms', whatever its content. At the same time, he recognized that in a secular age the only accepted legitimating principle is the popular support of a significant proportion of the

population, which is why he was an 'illiberal democrat' *avant la parole*. However, any mechanism would do for gauging the acclaim of 'the people' — the *Ja* of the *Volk* — so periodical elections under the grip of an Orbán-like figure would do the trick. Prior to 1933, Schmitt argued that in a time of fractious pluralism and political partisanship, only the chief executive can rise above the political fray, the secular equivalent of a monarch, and only he can articulate to what to we would now call his 'base' a vision of substantive homogeneity which excludes the existentially different 'other'. Once this unity of 'friends' is achieved the leader can govern by law, loyally interpreted by a homogeneous group of judges.

This marriage of 'illiberal legalism' to 'illiberal democracy' is precisely what Orbán has achieved in Hungary and is probably far closer to what Schmitt envisaged as the ideal political society than Nazi Germany. But once Hitler had seized power, Schmitt had no principled basis for resisting giving his own acclaim to the new order, radically opposed as it was to all the 'isms' he hated and that it was determined to eradicate its internal enemies.

Vermeule's authoritarian theory

Vermeule, I'm sure, is even more opposed to Nazism than Schmitt. But the position he articulates in the Atlantic reproduces all the elements of Schmitt's pre-1933 position, including a hankering after some idea of legality, evidenced in his claim that he is advocating a kind of interpretive theory of the sort Dworkin developed, albeit one with a different illiberal content. He also proclaims his allegiance to the idea of legality developed by Harvard Law professor Lon L. Fuller.

One might think these claims are disingenuous. But they are more naïve or ignorant and show the radical tensions in his Schmitten theory. Vermeule's substantive constitutionalism does not engage with Dworkin's interpretive theory which, like originalism, seeks to show that it satisfies a dimension of 'fit' with the law of the constitution, as he requires the imposition of a vision of the conservative good that is determined outside of the legal order. And it is a complete mystery why he thinks that one can have an illiberal legalism that is not 'content to play … within the procedural rules of the liberal legal order' and yet is at the same time Fullerian, when Fuller's theory is of the liberal virtues of such rules.

I alluded to the fact that Vermeule does not mention Schmitt in this piece. But I am not finding his Schmitten theory in between the lines. He has long proclaimed his allegiance to Schmitt's legal theory – and, more strikingly, has gone well beyond Schmitt's largely vacuous musings about political theology in his express commitment to re-establishing, in a way that he claims to be inspired by Schmitt, Christian theocratic rule. In addition, his Atlantic article, published the day after Orbán enacted his version of the Enabling Act, articulates the kind of argument that Schmitt felt able to publish only after 1933.

We will at some point surface from the current public health crisis. How and when and what the new normal will look like, no one knows. But we do know that autocrats around the world are using the epidemic as a pretext to gather even more power unto themselves. In this light, the fact that a Harvard Law Professor has published an article at this time with this kind of viral load in the pages of a respectable journal is perhaps more scary than the virus itself.

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SUGGESTED CITATION

Dyzenhaus, David: Schmitten in the USA, Verfassungsblog, 04.04.2020, doi: 10.17176/20200404-131214-0.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20200404-131214-0.