

## **LEGALITY AND LEGITIMACY** (CARL SCHMITT)

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It is frequently said, and it is entirely true, that the Regime which rules us is illegitimate. But what does that precisely mean? No surprise, Carl Schmitt lights the way to an answer, in one of his lesser-known works, *Legality and Legitimacy*. This book should be more talked about—it was published in Berlin in 1932, when and where everyone knew that matters could not continue as they were, and that dramatic change was sure to come. As with the Germans of 1932, so with the Americans of 2023. Thus, studying and reflecting on this work is worth the effort.

Schmitt was a lawyer by training, and this book, more so than his better-known books, is a work of legal theory. That does not mean, however, that its purpose was abstract. Given the ambiguities and internal contradictions of the Weimar Constitution, and the stakes in the Germany of the time, with the post-World War I state existentially threatened both by Communists and National Socialists, Schmitt meant his work as having immediate political application. Unlike today's America, moreover, 1930s Germany was a serious society where major political decisions were influenced by such works, and in fact the most prominent leaders of the time sought out men such as Schmitt as advisors. Finding a path through the thicket, rather than offering legal analysis of narrow, academic interest, was Schmitt's primary aim—though his secondary aim, as always, was advancing himself. What his own political goals were precisely remains unclear; he had no use for “democratic” forms of government, but neither did he desire the destruction of the existing state by worse evils.

As usual with Schmitt, this book is not easy to read. It was only translated into English in 2004, and would be very difficult to comprehend, even for someone with reasonable historical knowledge of the Weimar period, without the extensive notes provided by the translator, Jeffrey Seitzer. In particular, Schmitt assumes the reader's familiarity both with the details of the Weimar Constitution, and with the then-current controversies surrounding it, all of which would be opaque without the notes. Also helpful is John P. McCormick's long and erudite, though often tendentious, Introduction, which spends too much time

trying to figure out what Schmitt “really thought,” meaning whether his aim in writing the book was a concealed effort to assist the National Socialists. As I’ve said before, nobody should care at all, except as a matter of minor historical interest, what Schmitt’s relationship with the National Socialists was, at this point or later.

Schmitt’s focus here is narrower than in his other works such as *The Concept of the Political* and *The Crisis of Parliamentary Democracy*, which survey a broader landscape, both in time and space. His interest in *Legality and Legitimacy* is the constitutional system immediately before him, and in how that serves, or does not serve, the German people. He addresses many questions and problems, but the core matter on which he focuses is whether it can be, under the Weimar Constitution as well as abstractly, that a legislature can change the core norms underlying a constitution that establishes that legislature. By “norms,” Schmitt means expressions of the substantive values of a people, which pre-exist a constitution drafted by that people. If such norms exist, this implies that any law promulgated by a parliament which contradicts those values is, or should be, inherently suspect. It also implies that to the extent a parliament’s power is fragile or dubious, and a crisis of authority therefore results, examination of those substantive values by a legitimate alternative decisionmaker is a possible path out of the deadlock.

To an American, all this talk of norms and values sounds like Warren Court-type judicial review, Left judges implementing legislation pleasing to them, untied to any written document, while chanting “our values.” But this is not what Schmitt means at all. The American system of judicial supremacy, that is, the one created out of whole cloth by judges in 1803 in *Marbury v. Madison*, not found anywhere in the Constitution itself but used for decades to advance the Left, bears almost no relation to the structure of the Weimar Constitution, or for that matter to most European constitutions before the advent of postwar Left dominance. Still, one problem with Schmitt’s framework, is that he did not anticipate this, that enemies of a society would arrogate to themselves the power to impose new values on a society, while claiming to not be changing anything. In retrospect, it’s obvious why the Left, in political systems where the popular will is represented in the halls of power, loves rule by judges—it allows them to evade the popular will, wrapped in a mantle of false neutrality. But nowhere does Schmitt talk about this

risk; he instead seems to think that a society's values can always be objectively derived by those charged with interpreting a constitution (which, again, in Schmitt's frame does not mean judges—what it does mean, we will see).

Schmitt divides modern political systems into a typology of four: legislative state, jurisdiction state, governmental state, and administrative state. In a legislative state, of which a parliamentary legislative state such as Weimar is one, "norms intended to be just are the highest and decisive expression of the community will," and all else is subordinated to those norms. "There is no ruling and mere power at all anymore. Whoever exercises power and government acts 'on the basis of law' or 'in the name of the law.'" The legislature establishes these norms, which are executed by officials who are permitted to exercise state power, a separation that is crucial to the legislative state. And because "only invalid, impersonal norms are being applied," this is "a closed system of legality" which "justifies the suspension of every right to resistance." (Schmitt never fully fleshes out this "right of resistance," but it lurks in the background of everything he says. He implies that it is inherent in all polities, though the right may be temporarily suspended in an ideal system, so long as it remains ideal. McCormick, no dummy, notices the danger in this line of thought to today's leftist Western governments, and shrieks in horror that whatever Schmitt meant, he certainly didn't mean that the citizenry should be allowed weapons.)

A jurisdiction state, by contrast, is one "in which the deciding judge in a legal dispute has the last word." What Schmitt means is common law states, presumably primarily England, though neither the common law nor England is mentioned, where (prior to the modern era) judges formed a body of law by directly mediating a society's norms, of "law and justice," outside of the law formed by a legislature. But this only works in societies where "law and justice have unambiguous content"—in other words, in homogenous, united societies, a point to which we will return. A governmental state is, in essence, any authoritarian state with a ruling head. Finally, by administrative state Schmitt does not mean what we mean when we say administrative state. He means a state where "things administer themselves," without reference to either norms or men, through "an administrative decree that is determined only in accordance with circumstances, in reference to the concrete

situation, and motivated entirely by considerations of factual-practical purposefulness.”

All states, to be sure, are a mix of these types, and each may be more or less appropriate or useful for any given society’s situation, but “it remains for the most part self-evidently clear where the focal point of the deciding will lies.” Schmitt means decisions “at the key moment,” echoing his famous philosophy of decisionism (not that he called it that), but exploring this broad avenue further is not his current purpose.

The legislative state differs from the other three types in that it focuses on legality, in the form of generally applicable and properly formed legislative acts, rather than legitimacy. By legitimacy, which he never precisely defines, Schmitt appears to mean the justification of a state form. In a legislative state, legitimacy follows legality. If legislative acts are not legal, the state has no legitimacy (although, as we will see, the converse is not true—if legislative acts are legal, that does not always mean the state is legitimate). By contrast, the acts of a jurisdictional, governmental, or administrative state are acts of will, rather than of form, and their lack of legal justification does not call into question the legitimacy of the state in the same way as can occur in a legislative state.

All this is run up to Schmitt’s main set of claims—that legality, and therefore legitimacy, in the Weimar state, a legislative state, is determined by adherence to its constitution, and thus interpretation of that constitution is the key to determining legitimacy. And if that constitution can be interpreted to open “the legal process to all conceivable aspirations, goals, and movements, even the most radical and revolutionary,” then no goal or movement which gains power through the constitution can be denied to be legitimate, whatever may result for the state, including its destruction. This glaring contradiction is what Schmitt tries to solve.

The heart of *Legality and Legitimacy* is Schmitt’s thoughts on what he calls “equal chance.” Beyond ensuring that legislative acts are legal, what makes a legislative state legitimate, what suspends the right of resistance, is the right of every political movement to have a real, not fake, opportunity to win power. The skeleton key to Schmitt’s thoughts on equal chance is his cogent analysis that majority rule, direct or indirect, only can ever work “when an essential similarity among the entire people can be assumed.” Only in that case is the result of a vote not the mere suppression of the minority, but the revealing of an agreement

and consensus among the people. He repeatedly claims that “every democracy rests on the presupposition of the indivisibly similar, entire, unified people.” (This claim is tied to his implication, in *The Concept of the Political*, that a people with no common way of life, who thus have no common enemy, no longer exist as a political entity.)

But such a situation most definitely did not hold in Weimar, and probably never holds, except perhaps for brief times in small states (it most definitely does not hold in 2023 America). Schmitt, therefore, sees a fatal problem with equal chance, one that will always arise in a legislative state, and not only with “radical and revolutionary” goals and movements. A majority that comes to power, if its achievement is merely the suppression of the minority rather than the revealing of an agreement, will inevitably entrench itself, using the devices that are necessarily available to those in power. This will invalidate the equal chance of others to rule. And it cannot be the case that gaining fifty-one percent of a vote justifies tyranny. “The parliamentary legislative state, which today rests on the rule of temporary majorities, can deliver the monopoly of the equal exercise of power to the majority parties and can demand that the minorities renounce the right to resistance only so long as the equal chance of achieving a majority really remains open.”

But the tendency of the majority is always to close this door, usually by using the excuse of emergency. “Every critical moment endangers the principle of the equal chance because it reveals the inevitable opposition between the premium on the legal possession of power and the preservation of the availability of the equal chance for the achievement of domestic political power.” Every time there is an “emergency,” when there is some resultant call for “public security and order,” those holding the premium, the extra powers that result from holding power, will tend to honor the principle of equal chance only in the breach. Thus, the minority party will in response tend to view the majority party as behaving illegally, as violating the principle of equal chance. “So at the critical juncture, each denounces the other, with both playing the guardian of legality and the guardian of the constitution. The result is a condition without legality or a constitution.” In short, the “entire, primary effect [of the premium given by power] eliminates any thought of the equal chance and becomes manifest in the proper use of the extraordinary powers in the state of exception.”

Even though this is a principle of general applicability and Schmitt never says so explicitly, his objection is in practice quite clearly aimed at the Communists and National Socialists, whose mere existence put the lie to Germany being a unified country. Both groups, in theory and in practice, openly supported both illegal methods of seizing power as well as legal methods, that is, working within the system. But as to the latter, they were equally explicit that once power was achieved, it would never be given up. (This is encapsulated in the old joke that the Communist political principle was “One man, one vote, once.” In fact, interestingly, this would be a sovereign dictatorship in Schmittian terms, although Schmitt himself does not here draw the parallel to his earlier work, *Dictatorship*.) Were such a group to obtain the premium, not only would they certainly and immediately use that to ensconce themselves, they would then change the constitution itself, as the text of the constitution permitted, a permission which was something legal positivists, such as Hans Kelsen, a frequent target of Schmitt’s ire, held could not be changed or overridden. This is the nut that Schmitt tries to crack.

His solution is to view the Weimar Constitution’s two parts, the first one procedural, the second one a discussion of rights, as schizophrenic, and to grant primacy to the second part. He uses this textual reading to conclude that even under the Weimar Constitution, whatever the first part may say, “equal chance” can only apply to those who themselves support equal chance, not to Communists, and not to National Socialists. But the Weimar Constitution itself contained no obvious vehicle to reify this proposed limitation, which, again, was affirmatively denied as possible by legal positivists. Hence Schmitt’s writing of this book, to argue for his proposed resolution to the crisis of the German state.

To implement his solution, Schmitt fell back on the extremely broad, but somewhat vague, powers granted in the Weimar Constitution to the Reich President to rule by decree—more specifically, to insist that he decree that a party not willing to maintain the principle of equal chance be forbidden from modifying, on paper or in practice, the fundamental norms of the constitution (a provision made explicit after World War II in the new German constitution). The second half of the book is a long, technical, and complex analysis of “extraordinary lawgivers” under the constitution, which boils down to how the President might do this, and more importantly, how it might be textually and philosophically justified.

Schmitt never says exactly that he advocates such rule by decree, but it's an obvious application of his core philosophy of decisionism, it's pretty clear in the book at what he's pointing, and he makes the claim explicit in an Afterword he wrote in 1958.

It is evident, however, that Schmitt thought of his resolution not as the necessary consequence of textual analysis, but as the cutting of a Gordian Knot. He ends the book: "The core of the [second, values-specific, part of the Weimar Constitution] deserves to be liberated from self-contradictions and compromise deficiencies and to be developed according to its inner logical consistency. Achieve this goal and the idea of a German constitutional work is saved. Otherwise, it will meet a quick end along with the fictions of neutral majority functionalism that is pitted against value and truth. Then, the truth will have its revenge." So it came to pass.

The problem created by Schmitt's proposed solution is that in his own analysis a legislative state can only be legitimate if equal chance exists. This means that when equal chance is removed by a decision-maker such as the Reich President, whatever the sound grounds of necessity behind such a decree, the legislative state is *ipso facto* no longer legitimate. Schmitt never says this, but no doubt this logical inevitability is the ground of the accusation against him that his purpose was to undermine the Weimar state. Maybe it was, or maybe he was just trying to find the least bad alternative, jumping from ice floe to ice floe and hoping something would turn up. That's usually a bad strategy in practice, and so it proved.

What does this mean for us, nearly a hundred years later? To start, our own Regime, a form of legislative state, is wholly illegitimate in Schmittian terms, because it denies the principle of equal chance, which is the only possible legitimating principle of so-called liberal democracy. This is not as obvious as Communists or National Socialists pulling up the ladder, but that's mostly because Democrats and Republicans constitute the Uniparty, the party of the Left, and what is denied equal chance is not Republicans winning, but any person or persons being elected who might in any way actually threaten the ever-advancing power of the Left. The combined forces of the Regime—the federal legislature, the federal judiciary, the federal bureaucracy, all large businesses, nearly all media, and now so-called AI in the form of language models—unite

to ensure this result (although it is worth noting, and hoping, that the unique American federal system may yet undermine this, not through voting harder, but through sheer defiance backed by force). Moreover, this illegitimacy is now baked in the cake, with no constitutional way around it, because we don't have the constitutional escape valve, a higher decisionmaker, that Schmitt identified, though that escape valve didn't turn out to have the value Schmitt hoped. Even if we did, as we have seen in America over the past seventy years, allowing unwritten "norms" to limit legislative capacity only ever benefits the Left, who control the narrative through their chokehold on the so-called mainstream media and other organs of propaganda. Thus, in the Schmittian frame, the right of resistance is now fully operational along all axes.

Of course, Schmitt's analysis is not the only reason our Regime is illegitimate. For some time, I have been drawing a distinction between substantive and procedural legitimacy, and pointing out that the Regime is illegitimate on both counts. It is substantively illegitimate because it does not rule for the common good, but in pursuit of Left ideology combined with lining the pockets of a corrupt oligarchy. It is procedurally illegitimate because it has corrupted the electoral process (which is a claim closely related to the denial of equal chance). It is not that elections are required for legitimacy. Quite the contrary; a system with no public participation can be entirely legitimate, and in fact excellent and preferable. But as a result of all of overt voter fraud; quasi-fraud such as ballot harvesting (funded by billions from cretins such as Mark Zuckerberg); and information manipulation and propaganda, no election won by the NPCs of the Regime can be considered legitimate in the least.

Ironically, given the facts, it is the Left that, always and everywhere, claims that its opponents are illegitimate, while much of the Right foolishly clings to begging for an equal chance, rather than responding to reality as it is. The Left's universal premise has always been that any Right political victory, electoral or otherwise, is inherently illegitimate, and must be immediately reversed with any and all means, including violence. We can see the next iteration of this forming, to be on even fuller display in 2024, in descriptions of Right political progress, especially on the state level or outside the formal electoral process, as "white supremacy" or "white nationalism," and therefore worthy of suppression by armed force. It will end where it always ends, in blood.



We should not shrink from the truth that this implies, or rather leads to the necessary conclusion, that the Regime is not entitled to the loyalty of any American citizen. The Regime knows this, which is why it has, of late, ramped up its terror machine, wielding it against anyone who is perceived to be a threat. It does this because, in terms of possible solutions, our current American problem is really the inverse of the situation Weimar faced, where Schmitt's solution was an internal political decisionmaker exercising his will to declare a state of exception. For us, in contrast, it is those in power, the Regime, rather than those outside the halls of power as it was in Germany, who deny equal chance, and modify structures to ensure this denial. The wolf is already inside the sheepfold; it is no different here in terms of political structure than 1934 in Germany, or 1918 in Russia. Thus, following Schmitt's line of thought, what we would need to resolve the problem is not a decisionmaker who can deny equal chance to those who would seize the state, but rather a decisionmaker who removes from power those currently in power. This is more commonly known as a coup d'état, and this inevitable logical chain no doubt frightens the Regime, as it should, though I expect its own fracture and collapse is much more likely than any kind of traditional coup. But whatever the specifics, we can be sure that once again, truth will have its revenge.