

Introduction

It is somewhat ironic that this book publishes with the centenary of *Political Theology*, first published in 1922. In the end, one of the main claims we shall make here is that Carl Schmitt's celebrated essay has been unduly overemphasised and that it formulated a theory of law and a conception of normality that he himself dismantled a few years after its publication. A related claim will be that interpretations that identify a connection between *Political Theology* and successive works such as *The Concept of the Political* (1928) and *Constitutional Theory* (1928) are wrong in at least one important respect: through those works, Schmitt tried to pull himself out of the quagmire in which he was bogged down in 1922 – namely, the problematic conception that we shall dub 'exceptionalist decisionism'. But we shall have to go further. Works that are coeval with *Political Theology*, such as *Dictatorship* (1921) and *Roman Catholicism and Political Form* (1923), offer much leeway for criticising exceptionalism, either because the notions of exception and decision are thinner and more tenable (as is the case with *Dictatorship*), or because there is no room at all for any of them (as is the case with *Roman Catholicism and Political Form*). In sum, as a celebration of *Political Theology*, this book cuts a poor figure.

Nevertheless, this book is not a celebration of any specific Schmitt's text but an exploration of his work with a view to unearthing his theory of law and its bearings on his conception of politics. We shall soon see that it is pointless to look for a theory of law in Schmitt's overall oeuvre. As is the case with almost all great authors, most often his changes of mind are more enlightening than his firm points – and indeed we shall see that his firm points are the most hideous, such as his unshakeable conviction that the homogeneity of the social justifies political exclusion and the reduction of pluralism through administrative policies. We shall then be on the trail of Schmitt's smaller or greater amendments to his own theorising as he himself came to realise that

he was on the wrong track. For there is little doubt that his chief theoretical objective was to understand how a state could secure the stability of the political community and make sure that a fixed set of loyalties and allegiances bind the populace to the state government. Yet, he explored different ways of thinking about the means whereby the state could achieve this. While most interpreters in the last hundred years have concentrated on the theoretical framework that he developed between 1922 and 1928, we shall contend that Schmitt could only get his project off the ground in between 1928 and 1934, when he elaborated on an institutional theory of law.

This book will not specifically focus on that span of years, since we have already offered our take on (what we called) Schmitt's 'institutional turn'.¹ Rather, we will discuss various interpretations of his writings and will put them to the test of his own rethinking of a few substantial points. In short, our central thesis can be summarised as follows. Schmitt is generally considered as the father of exceptionalist decisionism – that is, the theory that the heart of politics lies in the sovereign power to suspend the legal order and to create a new one *ex nihilo*. However, he held an exceptionalist view for a very limited period, and even in that period his thinking cannot be regarded as unwaveringly exceptionalist. By contextualising *Political Theology* and by looking at his output from the 1910s through to the 1950s, we shall make the case that Schmitt's is a *juristic theory of the legal order* that attaches special importance to the activity of the jurists and portrays jurisprudence as a vital complement of legislative power in the making of the law. Schmitt's most consistent view, after some overhauling, is an institutional theory of law and politics that exalts legal science as a jurisgenerative practice that shelters a community's institutional practices and its historical identity.

Needless to say, this will not amount to a defence of Schmitt's theory, let alone to an attempt to tease out a democratic residue in his thinking. Both routes are tortuous and hazardous. Schmitt was a highly conservative thinker who lent support to revolting ideas – such as the ethical and ethnic identity shared by the people and the Leader, which he defended in the hope of winning the sympathy of the Nazi regime. No liberal or democratic views can be advocated based on the conceptual resources Schmitt provided us with. However, this hardly makes his theory useless. Quite the contrary, he is an excellent case study to investigate the relation of the legal order to social practices, for his moving away from exceptionalist decisionism can be

¹ See, among other things, Croce and Salvatore, *The Legal Theory of Carl Schmitt*; Croce and Salvatore, 'After Exception: Carl Schmitt's Legal Institutionalism and the Repudiation of Exceptionalism'.

interpreted as the recognition of the foundational role of social life in the production and the maintenance of the legal order. To put it another way, between the 1920s and the 1930s Schmitt realised that the law is grounded on social practices and that therefore jurisprudence cannot disregard them as they endeavour to identify, reconstruct and describe the order; nor can law-making and law-applying officials. To make this point we shall examine a few crucial junctures in his extensive output. It is worth isolating the main steps of our overall argument.

The point of departure (Chapter 1) will be the deployment of a *jurisprudential reading* of *Political Theology*. It is jurisprudential in the sense that we consider such a key text first and foremost as an exercise in legal theory. More than this, many of the issues raised in *Political Theology* remain obscure unless one considers that Schmitt's main concern was with an answer to the question of what makes the legal order legible and intelligible as a unitary legal order. In other words, *Political Theology* tackled one of the perennial questions in the domain of jurisprudence, one that still haunts contemporary debates. To answer this question, Schmitt argued, jurisprudence cannot afford to set aside the issue of the genesis of law, because no legal norm or legal document can confer unity on the legal order – more generally, nothing that lies within its boundaries. Put another way, the legal order can be cognised and recognised as an order that derives from the decisional act whereby it was founded. If that is the case, it is part of the nature of the legal order to be suspended and abolished by that very decisional act if the circumstances dictate it – circumstances that are circularly established by the one who makes the decision.

It is not necessary to go into the details of our reading here. What matters is that it debunks the *exceptionalist reading* that centres on the sovereign decision as the unfounded foundation of modern politics. The exceptionalist reading deems *Political Theology* to be the nihilistic celebration of an impossibility: no rational justification for political authority is available once transcendence has ceased to lend legitimacy to secular power. While this is certainly a line of thought that crossed Schmitt's mind, we believe this argument was instrumental in the more vital thesis that sovereignty – or better, a personal sovereign in flesh and blood – is the normative acme of the legal domain. The exceptionalist reading, we shall hold, misses this point. It takes *Political Theology* to provide a portrayal of politics in late-modern settings once metaphysical resources have dried out and rational justifications seem to have run out of steam. But Schmitt was onto something different. He wanted to justify the notion of sovereignty as a jurisgenerative act, an essentially legal act; for the law exceeds the legal order, since the highest law is the activity whereby the sovereign forges and issues the legal order, and thereby ensures

legal normality. This foundational act hovers over the formal constitution as well as all legal codes and all legal procedures.

Part of this book will be devoted to showing that this conception of law and its relation to politics were a sudden development of the early 1920s (Chapter 2). The jurisprudence of *Political Theology* effected a break with Schmitt's theorising in the 1910s. While he hardly ever inclined to normativism – that is, the theory that puts norms at the centre of the legal life – he certainly did not think that a personal sovereign brings about the law. For example, in *The Value of the State and the Significance of the Individual* (1914) political authorities are called upon to *realise* the law through decisions. Nonetheless, the law is not as much the positive legal order as it is a *Rechtsgedanke*, a meta-positive idea of law. Accordingly, the decision is a mediatory device whereby political power turns the meta-positive idea of law into positive statutory norms. By analysing other occurrences of the (thinly) decisionist lexicon in the 1910s, we shall spotlight the several differences between Schmitt's theorising in those years and his abrupt conversion to exceptionalist decisionism in 1922. This analysis of Schmitt's works in the 1910s along with our jurisprudential reading of *Political Theology* will provide the ground for rejecting the exceptionalist reading (Chapter 3).

A parallel and complementary line of inquiry will be the account of what we shall name the *pan-institutional reading* (Chapter 4). For in the last two decades some scholars have advanced alternatives to the exceptionalist reading to dig out Schmitt's enduring interest in the issue of institutions. While this interpretation sits easily with our own, we shall pinpoint what we see as a defect: it tends to obfuscate the difference between Schmitt's writings prior to 1928 and his later institutional writings. We regard this analysis as an important complement to our preceding account, because it shines some more light on the distinctive features of Schmitt's concept of institution after he encountered the works of the initiators of classic legal institutionalism, French jurist Maurice Hauriou and Italian jurist Santi Romano. The core of our argument will be the vindication of what we dubbed a *concretist reading*. We will maintain that after Schmitt's adhesion to institutionalism, his notion of institution changed in a few important respects. While before the early 1930s by institution Schmitt meant an organised agency carrying out public tasks, from the early 1930s it came to include the element of *concrete practice*. For he became concerned with the actual models of behaviour and the exemplary figures that are produced within established institutional settings. As we shall elucidate (Chapter 5), this effected a major change in his thinking. Let us linger on this aspect.

In the 1910s the law was a meta-positive idea to be realised within the empirical world through a decision, but the decision did not create the law. In the early 1920s, Schmitt revised this conception in that he came to believe that the decision brings about the legal order. In both theoretical scenarios, though, the law is removed from social practice. In the 1910s it is an ideal, in the early 1920s it is the creation of a sovereign. At the end of the 1920s and more clearly in the early 1930s, Schmitt changed his mind again. His novel conception had it that the law is grounded on the concrete models of behaviour and the exemplary figures that unfold within tradition-bound institutions. Unlike his preceding works, he affirmed that the law *is to be extracted from institutional practices*. This new conception involved a major amendment to how Schmitt conceived the normal. While in his earlier phases he regarded normality as that which is brought about by the realisation of the law or the making of a sovereign decision, at the end of the 1920s and especially at the onset of 1930s, normality became the seedbed of those models and figures that positive legal norms have to incorporate and make binding. The normal is the source of law, though it is not *ipso facto* legal.

The analysis of Schmitt's fresh institutional view will be the entry point to his novel account of how the law secures the homogeneity of the social. This is the crux of his ultraconservative political theory (Chapter 6). Contrary to the shared pluralist inclination of institutional paradigms, Schmitt employed institutionalism as a conceptual resource to make sense of the legal guardianship over normality. The law is the filter that allows extracting normative resources from social institutions – those institutions that are considered to be consonant with the history and tradition of the German people – and makes them binding for the whole population. What is normal within the social realm is turned into legal norms via an activity of selection and exclusion. It is no coincidence that in the 1930s Schmitt insisted that this filtering activity should be performed in compliance with the Leader's design of the German community and his idea of the public good. Even if we bracket off such a despicable assumption, the political theory that is coupled with Schmitt's institutionalism is essentially exclusionary – 'essentially' because the effacement of alternative institutions and their models and figures is (alleged to be) foundational to the subsistence of the community as an ethical and ethnic unity. Despite this, we shall argue two points. First, though abundantly objectionable, this theory did remedy the shortcomings of Schmitt's erstwhile exceptionalist decisionism. Second, it contributes to deciphering the tendency of state law – even within liberal states – to determine the substantive contents of the normal and to make the emergence of alternatives more difficult.

Our journey will conclude by illustrating Schmitt's most mature version of institutionalism, which we shall claim is a *juristic* one (Chapter 7). While he never abandoned the institutional conception of law that he espoused in the early 1930s, in the post-World War Two period he watered down the role of political authority and attached more weight to the role of legal science and its specialists. In *The Plight of European Jurisprudence* (1950), the political is pushed to the background while the salvaging activity of the jurists is brought to the forefront. For the first time in Schmitt's intellectual history, the juristic practice is completely detached from political tutelage and severed from domestic politics. The jurists are deemed to play a compositional activity as the guarantors of the unity of the whole European tradition in that jurisprudence is the only type of knowledge that can neutralise centrifugal forces. Quite the opposite, political authorities are described as the holders of a disruptive power and as a source of uncertainty insofar as they grow insensitive to the actual needs of traditional institutions and their members. To counter the weakness of politics, Schmitt held, jurisprudence should always remain conscious of its primary function as a repository of knowledge that provides the legal order with coherent and harmonious contents – those that are derived from the historical and cultural context – and should stand up against any attempts to reduce the legal order to a purely technical machinery.

In summary, Schmitt's subscription to an institutional theory of law in the 1920s and the 1930s had a durable impact on his subsequent work. It left a mark that visibly distinguishes his work prior to 1928 from that after this date. From the 1930s onwards, he certainly recovered some of the themes that he had mused on in the 1910s, but he relocated them in a different conceptual terrain, hallmarked by a notion of institution that was highly indebted to the institutionalist tradition – though tainted by illiberal features that are alien to that tradition. On this reading, the exceptionalist decisionism of *Political Theology* appears as a transitory response to a jurisprudential problem which he had to abandon shortly after 1922. To repeat, our reading does not make Schmitt's theory any more acceptable to those who think – as we do – that the exclusionary effects of legal frameworks and policy measures are an undesirable tendency to be counteracted. It does not make Schmitt's theory any more acceptable to those who think – as we do – that pluralism is the seedbed of alternatives for the construction of new bodies of law based on the normative resources of law-users themselves. However, it tells us something salient about the relationship between law and social practice. Effacing the political nature of law as it selects some models of life and backs them up with coercive force risks cloaking the exclusionary potential of the legal order. Paradoxically,

Schmitt's arguments for a bold politics of normality serve as a warning for those who are not alert to the normalising tendencies of the law.

Sure enough, to make the law more sensitive to its own normalising tendencies and to make sure that it remains open to the contributions of those law-abiders who are not comfortable with existing models of conduct, one can hardly pin one's hopes on Schmitt's legal and political theory. But this book is not meant to address this concern. Its more limited objective is to explain why and how he came to espouse his institutional theory and how he remained loyal to it until his last works. This comes with the modest invitation not to use the lexicon of exceptionalism to understand the present – as has happened in these latter times of truly exceptional crisis – because Schmitt himself realised that exceptionalist decisionism does not stand on its own feet. Yet, a modest objective is likely to be more promising than any Grand Theory, especially when it comes to the controversial figure of Carl Schmitt. For this book is an invitation to demythologise Schmitt's thinking and to lessen his enduring allure. He was a talented jurist and a shrewd thinker who was concerned with context-specific problems. He was intelligent (or strategic) enough to revise his previous positions as these contexts altered. And at the end of the day all that we can get from this is an interesting version of juristic institutionalism that grasps some (certainly not all) vital traits of the legal phenomenon. We suggest looking elsewhere if readers are searching for a fully fledged theory of the exception or a comprehensive conception of modern politics, and even more so if they hope to obtain any hints on how to revise today's constitutional orders. On the contrary, if readers are interested in how a leading jurist, sometimes wisely, other times myopically, conceptualised the exceedingly conservative role of law in the consolidation of a homogeneous institutional setting, Schmitt will do.²

Some of the material included in this book has appeared in earlier forms elsewhere. A version of Chapter 4 was published as Mariano Croce, 'The Enemy as the Unthinkable: A Concretist Reading of Carl Schmitt's Conception of the Political', 43 *History of European Ideas* 1016–28 (2017).

² Although this book is the outcome of a joint effort and ongoing collaboration, Mariano Croce is the author of this Introduction and Chs. 1, 4, 5, and 6, while Andrea Salvatore is the author of Chs. 2, 3, and 7 and the Conclusion.

1

What Is Exceptionalist Decisionism?

Reinterpreting *Political Theology*

This chapter begins with a caveat: its approach is deliberately reductionist. It dwells on one of the most debated issues of Schmitt's theory – the exception – in a way that falls short of an accurate study of the issue. For our goal is to set up an inquiry that will substantially downplay the role of the exception. In part, this reflects our own perspective on the matter – one that admittedly tends to minimise the role of the exception within Schmitt's overall thinking. Yet, the reductionism we pursue in this chapter does not ensue from this perspectival inclination. Rather, it has to do to with the main interest lying behind our investigation in the following pages. We shall pinpoint questions that, within Schmitt's intellectual biography, only became salient a few years after the publication of *Political Theology* in 1922. Accordingly, we shall treat this latter text – arguably the most debated along with *The Concept of the Political* (1928) – as the seedbed of ideas that he revised shortly after 1922.¹ This will undoubtedly affect the way this chapter unfolds.

Despite this, we believe such an 'oriented' reading is likely to uncover a few telling clues on *Political Theology*. In our account, this key essay puts forward a *jurisprudential* argument, more than a political, theological or metaphysical

¹ A most influential book on political theology and its impact on Schmitt's theorising is Meier, *The Lesson of Carl Schmitt*. There will be no opportunity to consider and discuss Meier's interpretation as much as it would deserve, and yet, as will soon become clear, we mostly disagree with him. For a more comprehensive account of Schmitt's political theology, see Nicoletti, *Trascendenza e potere*. On the relevance of political theology to Schmitt's conception of law, see Herrero, *The Political Discourse of Carl Schmitt*, especially Chs. 7 and 8. On the recent reappraisal of Schmitt's political theology, see various contributions in the third part of Arvidsson, Brännström and Minkinen, *The Contemporary Relevance of Carl Schmitt*. A significant book that interrogates political theology with specific reference to US politics is Kahn, *Political Theology*.

one.² Accordingly, all of Schmitt's references to non-legal subject matters are ancillary. They are meant to corroborate the particular type of jurisprudential answer he thought he had found to the core question of his essay, that is: what allows one to describe a set of different norms and procedures as a uniform legal order? In other words, we take *Political Theology* to be an inquiry into the identity and the unity of the legal order in the first place. As we shall argue, Schmitt's mobilising theology and theological concepts was intended to bemoan the scant attention that coeval legal theorists afforded to the origin of law. This explains why a few pages of the present chapter will be devoted to Schmitt's disagreement with Hans Kelsen, as the latter was resolute in expunging the issue of the foundation of law from the domain of legal science. The scientific study of the legal order, Kelsen held, should not concentrate on anything that oversteps the law's formal structure – and this puts the law's original foundation out of the picture.

Our discussion of Kelsen's thinking in this chapter will come in handy for two further reasons. First, it will shine a light on how close Schmitt and Kelsen were to one another when they accounted for the unity of the legal order. Despite the obvious methodological clash, they both thought there is a privileged vantage point from which jurists can describe the law as a self-consistent whole. Doubtless, they disagreed on what this vantage point is. And yet, there is one – and this is a stunning point of contact between these two scholars. Second, our jurisprudential reading of *Political Theology* will help bring out the frictions between Schmitt's theorising in 1922 and some telling revisions that he made a few years later, as he drew his attention to other areas of legal knowledge and moved away from the issue of the origin of law. But at that point, the divergence with Kelsen's thinking became unbridgeable.

² Contrary to the argument we are deploying here, some interpreters identify a fundamental connection between *Political Theology* and Schmitt's later institutional writings. See e.g. Brännström, 'Carl Schmitt's Definition of Sovereignty as Authorized Leadership'. Though this claim somehow resonates with our main thesis, we think Brännström's analysis is exegetically too liberal when it traces Schmitt's fascination with the concrete order back to the early 1920s: 'Quite consistent with the concrete-order approach, Schmitt establishes in *Political Theology* that order must be present for "a legal order to make sense"' (26). It is just as exegetically liberal when, based on the former claim, she writes that 'from the concrete-order perspective, the decision is not "new and alien" but guided by the normative parameters, behavioural patterns and expectations that are attached to the relevant normal situation. In other words, the decision is faithful to the legal substance of the concrete order in which the case unfolds' (25). Contrary to this interpretation, we believe that the kind of concreteness Schmitt had in mind in the early 1920s concerned the effectiveness of legal norms in normal times and hence is not comparable to the concreteness of Schmitt's later concrete-order thinking.

POLITICAL THEORY OR JURISPRUDENCE? THE EXCEPTIONALIST VS
 THE JURISPRUDENTIAL READING

There are many ways of interpreting such an emblematic work as *Political Theology*. Yet two readings look to us as the most compelling³ – two readings that lead to scarcely reconcilable views of Schmitt's core claims in 1922.

The first reading can be dubbed *exceptionalist*. It takes the state of exception to be the main thread not only within *Political Theology*, but more generally within Schmitt's work as a whole. The exceptionalist reading alleges *Political Theology* to be both the epitome and the epilogue of the inner logic of modern politics. The form and function of politics in the modern era only come to the surface if they are observed through a theological-political lens. Therefore, on the exceptionalist view, Schmitt's political theology is not meant to revive the role of the divine within the secular. Quite the opposite, it intends to secularise the law and at the same time to emphasise the persistence of a political transcendence *within* the secular order. 'Transcendence' in this context entails the idea that politics is meant to impose a constraint on an always incipient, underlying chaos, one that is destined to remain unmanageable. Following in the footsteps of Thomas Hobbes, a constant reference point for him, Schmitt thought politics should mould, or even produce, the social world by domesticating the asocial, even antisocial, nature of human beings. However, the persisting risk of a re-emerging chaos implies that no political rationality can thoroughly purge itself of the fundamental irrationality of human nature. The pillar of state power, therefore, is the monopoly on the political whereby all individuals and groups give up the right to self-defence and entrust the state to ensure peaceable sociality.⁴

On this exceptionalist interpretation, the 'exceptional case' (*Ausnahmefall*) cannot be investigated, let alone justified, in the light of any existing legal norms or procedures. The exception conjures up a sovereign who is called on

³ As anticipated, owing to space limits, this chapter will not explore Meier's 'theological' interpretation of *Political Theology*, which emphasises the political relevance of religious faith. See Meier, *Carl Schmitt and Leo Strauss*; and Meier, *The Lessons of Carl Schmitt*. In support of Meier's argument, see Rae, 'The Theology of Carl Schmitt's Political Theology'. For a critique of the so-called 'theological turn' inaugurated by Meier's works, see Lievens, 'Theology without God', and Roberts, 'Carl Schmitt: Political Theologian?'. On Schmitt's conviction that theology is ill-equipped to deal with jurisprudential issues, also see Hoelzl, 'Ethics of Decisionism'.

⁴ Amongst the most illustrious advocates of this interpretative line, see Galli, *Genealogia della politica*.