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Emancipation from the Legal Order: Carl Schmitt and Hans Kelsen on the Use and Misuse of the Miracle Analogy

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Introduction

Analogies between the state and the Church are widely present in Carl Schmitt's work, most notably in *The Value of the State and the Significance of the Individual*, *Dictatorship*, *Political Theology I* and *II*, and in *Political Romanticism*. In that context, the notion of the miracle occupies a central place, although it remains paradoxically underconceptualized in his work.[1] During the interwar period, the notion of the miracle distinctly appears in *Political Theology* on four occasions.[2] In that book, Schmitt indicates that he envisions a detailed elaboration of this notion at a later stage, which, to my knowledge, has never occurred:

> I have for a long time referred to the significance of such fundamentally systematic and methodical analogies. A detailed presentation of the meaning of the concept of the miracle in this context will have to be left to another time.[3]

Paradoxically, Hans Kelsen offers a better articulation of the notion of the miracle, although he attempts to refute its transposition into

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the political-legal order. He presents two distinct components of the miracle: On the one hand, the miracle constitutes a violation of natural laws, and on the other hand, the miracle results from a specific agent—in this case, a divine power: "God's freedom in regard to natural laws is expressed in the concept of '*miracle*.'"[4] These two components belong to the classical definition of the miracle evoked by Hume: "A miracle may be accurately defined, *a transgression of a law of nature by a particular volition of the Deity, or by the interposition of some invisible agent*."[5]

In 1938, Schmitt makes a different, nonanalogous use of the notion of the miracle when he discusses the distinction between inner belief and outer confession in Thomas Hobbes's *Leviathan*.[6] Hobbes assumes that no one can know for sure whether an event is a miracle. It is therefore up to the state—in this case, the Leviathan, as the embodiment of public reason—to decide whether something is a miracle.[7] If this consecrates the state as the supreme power, it also provides the conditions of its collapse. Even if the state has the power to publicly decide whether something is a miracle,[8] it cannot affect intimate conviction. Hobbes thus dissociates belief from confession. Whereas the former remains the domain of the individual, the latter is the domain of the state. According to Schmitt, the opposition between public and private reason bears the seeds of a certain form of individualism and primacy of conscience. In his opinion, the liberal doctrine will be engulfed by this individualistic breach.[9] Schmitt often attributes responsibility for this interpretation to Jewish thought, particularly that of Spinoza, which Schmitt accuses of having sapped the Leviathan's vitality.[10] One cannot ignore the book's obvious anti-Semitism, which is notably illustrated by this quote:

> Only a few years after the appearance of the *Leviathan*, a liberal Jew [Spinoza] noticed the barely visible crack in the theoretical justification of the sovereign state. In it he immediately recognized the telling inroad of modern liberalism, which would allow Hobbes's postulation of the relation between external and internal, public and private, to be inverted into its converse.[11]

In this paper, I focus on Schmitt's analogical use of the notion of the miracle, especially in its ability to justify the emancipation of political power from the legal order. This analogy serves to revive the related notions of the exception and the decision, which remain alive within the Church and which deserve, in Schmitt's view, to be rehabilitated at the very heart of the state. His discussion of the analogical use of the notion of the miracle is unintelligible if it is not related to his *disputatio* with Kelsen on that subject. Unsurprisingly, Kelsen's use of the term "miracle" is depreciatory and in no way legitimizes this order's emancipation. For Kelsen, any external intervention that interferes with a legal order is synonymous with heteronomy, which is incompatible with both his legal positivism and his conception of democracy.[12] The notion of the miracle—in its analogical claims—both exacerbates and synthesizes the dispute between Schmitt and Kelsen: For Schmitt, it is the foundation of a political order, whereas Kelsen rejects it as a deleterious fiction.

Here I first review the main lines of Schmittian political theology, in which the notion of the miracle is embedded. However, its political theology acquires its true significance only if placed in a conflicting dialogue with Kelsenian political theology, also examined in this section. I then demonstrate how the rehabilitation of the miracle is situated within a more general discourse on the valorization of transcendence and the devaluation of immanent representation. I next examine the institutional translation of the miracle, which requires that the prerogatives of neutral power be placed, in the context of the Weimar Republic, in the hands of the president of the Reich. I also examine Kelsen's objections to Schmitt's analogical transposition. Finally, I conclude by returning to the paper's main theses.

The Analogical Dimension of Political Theology

The notion of the miracle takes its meaning only when related to the particular meaning Schmitt assigns to his political theology. In 1970 he offered a retrospective explanation of the ultimate meaning of his *Political Theology*, published half a century earlier. Schmitt defends an identity of structure between ecclesiastical and

state powers and dismisses theological speculation: "The book [*Political Theology*, 1922] does not deal with theological dogma, but with problems in epistemology and in the history of ideas: the structural identity of theological and juridical concepts, modes of arguments and insights."[13] Schmitt's political theology is not meant to be theological; it is juridico-political. He insists on the distinction that must be made between these two registers. In this respect, it is appropriate to recall the numerous instances where Schmitt refers to the famous phrase of the jurist Albericus Gentilis, "*Silete Theologi in munere alieno*,"[14] which means "be silent, theologians, in a task that does not belong to you." In the Schmittian analogy between the state and the ecclesiastical spheres, no role is assigned to the Church in the state's organization. Ernst-Wolfgang Böckenförde convincingly sets out this interpretation by distinguishing between three conceptions of "political theology": juridical, institutional, and appellative.[15] Doing so allows him to identify the one that is most appropriate to describe the Schmittian point of view. In its legal sense, political theology presupposes an analogical transposition of theological concepts into the state-legal field. These transpositions can be seen in the notions of sovereignty, omnipotence, and absolute power. In its institutional sense, political theology leads to the legitimacy of a given political order. This kind of political theology has been highly prevalent in the history of Western Christianity. Böckenförde mentions here Hegel's political theology. Finally, the appellative conception of political theology expresses a Christian commitment to the transformation of a social and political order. Böckenförde mentions liberation theology as an example of this category. In his threefold distinction, he rightly places Schmitt's political theology within the first category, which is thought of as an analogy between the state-legal and religious fields.

The Schmittian analogy between the Church and the state does not violate the separation between these two spheres.[16] The Church is a supremely political institution and, in this case, a visible one,[17] but it remains in a parallel universe to that of the state and in no way affects the latter's sovereignty. This makes it possible

to preserve the Church as an ideal model of the state without restricting the state's political monopoly. This perspective leads Schmitt to reject any *potestas indirecta*. If the Church were to claim *potestas indirecta*, it could demand control—by the infallible pope—of the state's execution of the law. In other words, *potestas indirecta* implies the recognition of two irreducible principles in the execution of a norm: on the one hand is the state, whose task it is to execute the norm; on the other, a second (religious) authority that ensures the proper and just application of norms. The acceptance of *potestas indirecta* would lead the infallible pope to reject state laws if he considered them contrary to the Church's doctrine.[18]

The Schmittian political theology as it unfolded in the early 1920s is an integral part of Schmitt's conflicting dialogue with Kelsen. Despite their divergences, Schmitt recognizes Kelsen's "merit of having stressed since 1920 the methodical relationship of theology and jurisprudence. In his last work [*Der soziologische und der juristische Staatsbegriff*, 1922] on the sociological and the juristic concepts of the state, he introduced many analogies."[19] If we can certainly speak of a Schmittian political theology, we can also consider that Kelsen establishes one. State theory and theology, in the problems they face and in the solutions they offer, have, for Kelsen, a disturbing affinity.[20] Although Schmitt and Kelsen use similar analogies between God and the state or between theology and jurisprudence, they pursue diametrically opposed goals: if Schmitt's transposition pertains to a highly valued institutional resemblance between the Church and the state, for Kelsen this analogy is based on the examination of two hypostases[21]—namely, that of God and that of the state—the latter being likely to lead to a dualism between law and the state (i.e., what he condemns).[22]

The analogy between theology and (dualist) doctrines of the state plays a significant role in Kelsen's work. The main instances where this analogy is sketched out appear in "Über Staatsunrecht,"[23] "Der Begriff des Staates und die Sozialpsychologie,"[24] "Gott und Staat,"[25] *Der soziologische und der juristische Staatsbegriff*,[26] and

Allgemeine Staatslehre.[27] Also devoted to this is a substantial space in his autobiographical letter of 1927.[28] The analogies between theology and state doctrine are developed far from theological considerations—as is the case for Schmitt—and, ultimately, serve only to show the dangers of an understanding of the state as transcending the law (i.e., being independent of the legal sphere). Whether they appear in these texts from 1914, 1922, 1925, or 1927, Kelsen's considerations all conclude with the impossibility of justifying a clear distinction between the spheres of law and the state.

How, then, does Kelsen use this analogy between theology and state doctrine to reaffirm his opposition to dualist theories? For him, God and the state represent in their own ways personifications of two abstract ideas. In one, the order of the world finds a concrete expression through its personification—in this case, God. In the other, the state can be conceived of as a legal person, which is nothing other than a personified legal order. It is the personification of the legal system that allows for the process of imputation, whereby an act is imputed to the state—if and only if it is determined by a normative system.[29] The diversity of interindividual legal relations falls within the state's sphere only if the state personifies the legal order (i.e., executes this order).[30] Kelsen is unopposed to personifications useful for heuristic purposes, but he rejects all that become hypostases. Although personification remains a means of knowledge, as a metaphorical principle that makes an abstract idea intelligible, hypostasis, in contrast, presupposes that idea as concretely existing. For Kelsen, hypostasizing the state presupposes that it is perceived as an entity in itself, independent of or preexisting the legal order. Just as theology can exist only if it is distinguished from morality and natural science, if it presupposes a transcendent, supernatural God, the dualist theory of the state—as opposed to the monist theory—is possible only if one presupposes a state that transcends law, if one admits the idea of a supralegal state. Thus, with such admissions, Kelsen equates dualistic doctrines with animistic superstitions (i.e., those that attribute a soul to natural phenomena). By analogy, the proponents of dualist doctrines

imagine that at the source of law there is a spirit—in this case, a hypostasized state.[31]

Therefore, how does the notion of the miracle fit into the Schmittian and Kelsenian political theologies? According to Kelsen, the intervention of God in the laws of nature and the intervention of the state in the legal order are thought of and treated in a similar way. These issues are resolved by theology and dualist state theory, using the concept of the miracle. On the one hand, theology recognizes that the world is governed by the laws of nature. On the other hand, it cannot admit that God is also subject to those laws. For Kelsen, theology guarantees God's freedom from nature through the concept of the miracle, which is nothing more than the manifestation in the world of an action that results from the will of a superhuman power. Through the miracle, God abstracts himself from natural laws without denying the rules that govern nature. So, how does the miracle express itself in the theory of the state? To describe situations in which state theory makes legally intelligible what would be inconceivable from this point of view, Kelsen introduces the notion of a "legal miracle."[32] Although he does not explicitly mention this, Kelsen is presumably referring to everything that does not follow from the hierarchy of the legal order, which is legally unintelligible. If acts emanating from the state but not strictly within the legal order are not considered illegal, we are, according to Kelsen, in the presence of a "legal miracle": we have gone beyond legality—which is, metaphorically, the counterpart of the laws of nature—without this event being considered illegal. Because Kelsenian normativism remains hostile to everything that breaks into the legal order, the expression "legal miracle" is depreciative and in no way legitimizes emancipation from this order. For Kelsen, any external intervention that interferes with a legal or juridical order is synonymous with heteronomy, which clashes with both his legal positivism and his conception of democracy.

It is of note that Schmitt has the same understanding as Kelsen of the meaning that should be assigned to a miracle. It is an irruption into a legal-political order that the miracle transcends and from which it abstracts itself. According to Schmitt, exceptional

powers attributed to the sovereign are analogous to miracles and allow for a momentary suspension of the legal order. This ability is, not insignificantly, his distinctive criterion for sovereignty.[33] The extralegal intervention of the sovereign—whether monarch or Reich president—is a metaphor for God's intervention in the world, freed from the constraints of physical and natural laws. God's intervention in the laws of nature is thought of and treated similarly.[34] In the context of the Weimar Republic, emergency measures were the responsibility of the top executive, the president of the Reich, an entity that transcended the other institutions because of its higher mission—in this case, to guarantee political unity.[35] It is worth noting that for Schmitt, political unity requires the ability of the sovereign to distinguish friend from foe and to impose this distinction on the whole community.[36]

If Kelsen and Schmitt share the same understanding of what constitutes a miracle, including its consequences on the legal-political order,[37] their evaluations of the notion diverge diametrically. For Schmitt, the very image of the miracle serves to reintroduce exceptional powers into the heart of his political theology, whereas for Kelsen this notion of miracle is a culmination of the dualism he condemns throughout his work. *Political Theology* echoes their conflictual perspectives and is used by Schmitt to condemn the Kelsenian positivist,[38] normativist,[39] immanent,[40] and relativist[41] conception of the state. Against this perspective that he abhors, Schmitt rehabilitates a transcendent conception of sovereignty oriented toward not only exceptional powers[42] but also uniqueness[43]—not plurality—in the exercise of power, which would take the form of the Reichspräsident in the Weimar Republic.

An Erasure of Transcendence and the Devaluation of Representation

Schmitt's defense of transcendence in the exercise of power, as embodied in the highest-ranking authority of the state empowered to resort to extralegal measures, is accompanied by a discourse that devalues immanent forms of power. The rise of immanence in the

political-legal order is a constant feature of Schmitt's understanding of the history of ideas:

> The monarch, situated above and outside the state, is then torn from his transcendence and thrust back into the state; he becomes an organ of the state; it is in this sense that the word supports the attempt—general in the history of ideas and successful in the 19th century—to explain the state and the world based on their immanence.[44]

In *Political Theology*, Schmitt highlights the erasure of the notion of the miracle, as it occurs in deistic perspectives, from the modern constitutional state.[45] For him, the renunciation of a transcendent referent coincides with the negation of power because there is no longer any room for the expression of sovereignty, which asserts itself in situations involving exceptions and the suspension of ordinary legality. In a purely immanent system of reference, the sovereign cannot suspend the legal order or handle exceptions, which are the equivalent of miracles in the natural order. To legitimize the suspension of the legal order, a higher principle must be invoked. For Schmitt, this is the sacredness of the unity of the state or that of the public order, both of which, for him, are equivalent. According to Schmitt, the Kelsenian theory of the state is emblematic of an immanent representation of the exercise of power, devoid of a referent that could be described as transcendent. Schmitt and Kelsen's dispute, as it unfolded in the 1920s and 1930s, could be summed up as a confrontation concerning this opposition between the immanent and transcendent perspectives on power:

> In Kelsen's justification for his commitment to democracy, the constitutionally mathematical-scientific nature of his thinking is openly expressed . . .: Democracy is the expression of a political relativism and a scientificity free of miracles and dogmas and based on human understanding and the doubt of criticism.[46]

The rehabilitation of transcendence greatly influences Schmitt's doctrine of representation. In his view, the concept of representation has its roots simultaneously in the Catholic Church and in absolute monarchy,[47] whose enemies are normativism and democratic doctrines. If normativism proceeds from a presupposition of the autonomy of law, which is hostile to any external or transcendent reference, democratic doctrines pervert, in Schmitt's view, the notion of representation because that which is represented is not a higher authority but instead a civil society. To him, "in a democracy state power must derive from the people and may not be set in motion by person or from a position that is outside of the people and standing above it."[48] These two forms of immanence embodied in normativism and democratic theories are doctrinally compatible; this is notably the case with Kelsen. In *Roman Catholicism and Political Form*, Schmitt returns to the devaluation of the notion of representation, which took place from the nineteenth century onward and lead to the erasure of any reference to transcendence.[49] The denial of transcendence is all the more regrettable for Schmitt because it coincides with the renunciation of a true position of command. In his view, this external reference or transcendence, in the political sphere, serves to rehabilitate the case of the exception in the use of power and, thus, to revive the notion of sovereignty in this particular sense.[50]

The Guardian of the Constitution as the Repository of the Miracle

I hypothesize that Schmitt's political theology, especially the notion of the miracle, is deployed institutionally without explicit reference to it in the notion of neutral or preserving power that Schmitt develops in *Der Hüter der Verfassung*. In his words, neutrality must be understood "as the expression of a unity and wholeness that encompasses the opposing groupings and therefore relativises all these opposites."[51] Schmitt calls, then, for a power that is external to the competition between opposing parties. This neutral power is embodied by the Reich president and assumes its full meaning when exercised during periods of crisis and instability,

precisely when the prerogatives of the Reich president should be increasing. This is particularly the case through recourse to Article 48 of the Weimar Constitution, which provides that "if public safety and order in the German Commonwealth is materially disturbed or endangered, the National President may take the necessary measures to restore public safety and order, and, if necessary, to intervene by force of arms."[52] Schmitt considers Article 48 an essential safeguard in a state governed by the rule of law. This provision ensures, in the last resort, the maintenance of order and the preservation of institutions. In his view, ordinary legality does not allow this.[53] The use of Article 48 of the Weimar Constitution becomes, analogously, the expression of a miracle in that it facilitates emancipation from ordinary legality and the irruption of a preserving gesture, which only the Reich president can use. In *Der Hüter der Verfassung*, the Reich president's prerogatives result from the position of independence Schmitt confers on him.[54] Consequently, Schmitt's entire argument tends to convince his reader of the Reich president's ability to extricate himself from power games and, to use the language of political theology, to ensure his own transcendence. This perspective is debatable, though. As it was further developed, Kelsen refuted the position of the Reich president's independence and consequently rejected his very role as *Hüter der Verfassung*.

The preeminent position of the Reich president seems largely based on Schmitt's supposed independence from party politics as a whole and on a supposedly unmediated relationship between him and the people. This is supported, according to Schmitt, by the facts that the Reich president is elected by the German people as a whole, that he can block the parliament by calling a referendum, and that he has the power to dissolve the parliament. His independence from all party politics thus makes the Reich president a guarantor of unity, order, and democracy, not in its liberal meaning, but rather in its plebiscitary meaning. If, for Schmitt, plebiscitary democracy rests on a presupposition of unity and is best established in an unmediated relationship between the people and the Reich president based on acclamation,[55] liberal democracy

enshrines plurality and discord and blurs the command relationship between citizens and the government. Plebiscitary democracy is fulfilled not in the parliamentary arena but between the Reich president and the German people. The expression "*Appel an das Volk*" (appeal to the people), which Schmitt uses in *Der Hüter der Verfassung*, characterizes both the plebiscitary election and the referendum initiated by the Reich president. The "appeal to the people" underlines the unmediated relationship between the head of state and the German citizens that Schmitt so highly values. He sees plebiscitary legitimacy as a shield against the destructive powers of the party state:[56]

> The fact that the Reich President is the guardian of the Constitution also corresponds solely to the democratic principle on which the Weimar Constitution is based. The Reich President is elected by the entire German people, and his political powers vis-à-vis the legislative bodies (in particular, dissolution of the Reichstag and bringing about a referendum) are, in substance, only an "appeal to the people." By making the Reich President the centre of a system of plebiscitary as well as party and politically neutral institutions, the current Reich constitution seeks to counterbalance the pluralism of social and economic power groups precisely on the basis of democratic principles and to preserve the unity of the people as a political whole.[57]

Schmitt's conception of the Reich president as a representative of unity and as a counterweight to the power of the Reichstag, around which Schmitt weaves his concept of the guardian of the constitution, does not constitute a very original doctrinal perspective, even if he radicalizes it. In fact, this perspective is held by some members of the Constituent Assembly, particularly Hugo Preuss.[58] The distrust of a preeminent parliament, unbalanced by the executive, was tangible in the Weimar Republic not only in conservative circles but also, albeit in a more moderate way, among some democrats, such as Max Weber. In Weber's view, the doctrine of the

Reich president overcomes the flaws in the liberal doctrine of the balance of powers and avoids the danger of an "acephalous polycracy."[59] The head of state, by removing itself from the competition among the state organs, provides a lasting counterforce to pluralism, parliamentarianism, and the party state. Weber's concern is best illustrated in "Der Reichspräsident," published in 1919.[60]

In *Der Hüter der Verfassung*, Schmitt consciously prolongs a reflection that arose immediately after the end of the empire and that was at the very heart of the debates of the Constituent Assembly, seeking to minimize the risk of acephalous polycracy. What distinguishes Schmitt from this current debate, however, is how he anchors the preeminent position of the sovereign (i.e., the individual with exceptional powers) in his political theology. Schmitt draws a dividing line between the transcendent and the immanent exercise of power. If exceptional powers belong to an independent, transcendent position, partisan politics is attached to an immanent exercise of power, with no reference other than the defense of particular interests.

The Flaws in Schmitt's Analogy: Kelsen's Approach

God's transcendence in the face of the laws of nature and his ability to countermand them with miracles are analogously expressed, in Schmitt's view, through the use of exceptional powers, which in the Weimar Republic are a prerogative exclusive to the Reich president. This raises the question of what justifies the Reich president's independence and exteriority in relation to the other state organs. In the organization of powers, as provided for in the Weimar Constitution, can the Reich president really claim the independence Schmitt confers on him,[61] thus justifying his exceptional powers? This independence is crucial, since it legitimizes the Reich president's use of emergency powers.

In *Wer soll der Hüter der Verfassung sein?*, Kelsen questions the Reich president's independence and the fictions on which it is built. First, Kelsen denounces Schmitt's recourse to Benjamin Constant's doctrine as a theoretical basis for the Reich president's neutral power.[62] Transposing the neutral power of the monarch as

defined in *Cours de politique constitutionnelle*[63] to the preservative power of the Reich president of the Weimar Republic is, in his opinion, unscrupulous. Constant distinguished between active and passive powers; a neutral power should belong to the latter category, not to the former. At this point, the aforementioned transposition becomes questionable because Schmitt grants the role of neutral power to the Reich president, who is himself endowed with a highly extensive and active executive power; Schmitt furthermore demands the role's extension:

> When B. Constant claims that the monarch is the bearer of a "neutral" power, he bases this assertion essentially on the assumption that the executive is divided into two powers, one passive and the other active, and that the monarch only holds the passive power. Only as a passive power is it a "neutral" power. The fiction that lies in making the power of the monarch, to whom the Constitution entrusts the external representation of the state, particularly the conclusion of state treaties, the sanctioning of laws, the supreme command over the army and the navy, the appointment of civil servants and judges, and many other things, appears to be merely "passive" and to oppose it as such to the rest of the executive, as an active power, is unmistakable.[64]

For Kelsen, the head of state's highly important powers as enshrined in the Weimar Constitution—dissolving the Reichstag, calling a referendum, and appointing and dismissing officials—do not demonstrate his position of political independence; they make him, not a *Hüter* (guardian) of the Constitution, but its *Vollzieher* (enforcer), in accordance with the task of an executive.[65] In *Wer soll der Hüter der Verfassung sein?*, Kelsen repeatedly denounces Schmitt's attempts to make distinctions that have no constitutional basis and are intended only to single out presidential powers and demonstrate their independent character. Indeed, Schmitt dissociates the functions of the Reich president from those of all other constitutional state bodies, starting with the Reichstag. Furthermore,

Kelsen points out that Schmitt unjustifiably detaches the tasks of the president from those of his government, whereas they rarely function independently but rather tend to operate in collaboration necessitated by the organization of powers. Isolating the presidential function in this way contradicts Schmitt's analysis in *Constitutional Theory*, in which he points out that one of the characteristic features of the Weimar Republic's institutional arrangements was the dualist, or two-headed, executive.[66] This feature can be seen in the mutual neutralization of prerogatives between the Reich president and the Reich chancellor, as well as the Reich chancellor's ministers: the president of the Reich appoints and dismisses the Reich chancellor and his ministers, in return for which the president must obtain ministerial countersignatures in all official acts. This dualism, which is substantially characteristic of strong interdependence, in no way enables isolation of the presidential function, which Kelsen places in the interplay of active powers, none of which can claim a preeminent position conferred by the Weimar Constitution.

Moreover, if the Reich president fails to gain independent status in the exercise of his office, he also fails to gain it by election, which Schmitt describes as plebiscitary. General will (*Gesamtwille*) is irrelevant to characterizing the Reich president's election, which is at most guaranteed by a majority that leaves a minority, and therefore a political divergence, in place. In contrast with Schmitt's assertions, the president cannot claim a more eminent legitimacy than that which results from any popular election, including that of parliamentarians, who also are elected by universal suffrage. Here, Kelsen touches on the critical weakness of the Schmittian claim; he weakens the position of the independence of the Reich president, tears him away from his transcendence, places him back in the state, and makes him an organ of the state like any other.[67] This process undermines Schmitt's entire construction, which links the Reich president's exceptional power with his independent position.

Kelsen's criticism of Schmitt's conception of the Reich president is part of a larger controversy between the two, which is

reflected in the two books *Der Hüter der Verfassung* and *Wer soll der Hüter der Verfassung sein?*, over the guardian of the constitution. Their dispute notably concerns the organ to which the role of guardian of the constitution should be entrusted. For Kelsen, this role should be entrusted to a judicial body, in particular a constitutional court, whereas for Schmitt, it is a role required of the top executive, the president of the Reich, whose task, as we have seen, is to preserve public order and—when the situation requires it, in his eyes—to proclaim a state of emergency.[68] In radical opposition to Schmitt, Kelsen conceives of the guardian of the constitution as being constantly concerned with ensuring the greatest possible conformity of state acts with the constitution.

Conclusion

This paper has focused on the special place of the notion of the miracle in Schmitt's political theology and in his theory of the state, particularly as it emerged during the interwar period. As indicated in Table 1, that transcendence is transposed into the political order as a form of independence from the organs of the state and from partisan politics. The position of exteriority authorizes miracles that circumvent natural laws and exceptional measures that emancipate themselves from ordinary legality.

Table 1: The Schmittian analogical transposition of theological concepts into the state-legal field

Theological	**Political**
God's transcendence of the natural order	The Reich president's independence from other state bodies or branches and from partisan rivalries
Miracle (emancipation from the laws of nature resulting from a single divinity)	Decision of exception (abstention from the legal order made by a single powerful figure)

The transcendence Schmitt defends in the exercise of power against secularized politics is institutionally translated, during the Weimar Republic, into the figure of the guardian of the constitution, who receives the powers of exception because of his superior mission, which is the preservation of public order. The Reich president, in Schmitt's controversial interpretation, represents the only means for embodying transcendence in a democratic order. In my hypothesis, the guardian of the constitution, as elaborated in *Der Hüter der Verfassung*, represents the institutional translation of his political theology in the particular context of the Weimar Republic. During the interwar period, Schmitt was not isolated in his desires to avert the risk of an acephalous polycracy and to justify the practice of emergency government. However, Schmitt's recourse to his political theology to justify a preeminent position in the political-legal order is more unique. It is concerning this particular articulation of ideas that Kelsen criticizes Schmitt most severely. Strikingly, Kelsen intervenes with the same commitment and ferocity regarding Schmitt's political theology and the supposed independence of the Reich president that gives him extensive emergency powers and legitimizes the use of *Rechtwunders*. Kelsen observes the continuity between these two statements, even if Schmitt does not make it explicit in *Der Hüter der Verfassung*. Political theology and the doctrine of the guardian of the constitution are two sides of the same coin, serving to rehabilitate emergency measures and to identify a legitimate body authorized to use them. The aim of Schmittian political theology is to identify an organ in the democratic political order that can claim transcendence and use the exceptional powers that this position confers upon it.

In *Wer soll der Hüter der Verfassung sein?*, Kelsen's criticism of Schmitt builds on the organization of power as reflected in the Weimar Constitution and the resulting institutional practices. As Kelsen points out, the Weimar Republic's institutional arrangements, which are characterized by a high level of interdependence among the organs, do not allow Schmitt's analogical transposition to function credibly in a democratic order. According to Kelsen, Schmitt's attempt to demonstrate the independence and, by

analogy, the Reich president's transcendent position in relation to the other state organs and to civil society is unsuccessful. Schmitt's use of the Weimar Constitution as a basis for this demonstration is flawed. According to Kelsen, the organization of power in the Weimar Republic provides no legitimate reason to abstract the position of the Reich president from the other organs. Interdependence is the norm, as Schmitt recalls and protests in *Constitutional Theory*.[69] Consequently, and from a Kelsenian perspective, the Reich president cannot represent the independent figure Schmitt envisions as being embodied within the Weimar Republic.

However, Kelsen's objections to the Schmittian conception of the guardian of the constitution, vested in the Reich president, who is the depositary of exceptional prerogatives (miraculous, in that sense), do not address head-on the fundamental question that is continually reemerging in our democracies: that of how to treat exceptional situations that "cannot be circumscribed factually and made to conform to a preformed law."[70] In Schmitt's words, can we banish the miracle from our world?[71] If it cannot be banished—because some decisions cannot be absorbed by democratic processes, especially in situations of imperiled security—what legitimacy do the state's top decision-makers have in such circumstances? One is forced to acknowledge the centrality of this question; however, Kelsen does not even put it on the agenda, and Schmitt's answer to it suffers from unproven presuppositions.

Notes

1. Among the few authors who have paid attention to Schmitt's notion of the miracle, it is worth mentioning Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, trans. and ed. Marcus Brainard and Robert Berman (Chicago: Chicago University Press, 2011), 188–89.
2. I have identified four occurrences of the notion of a miracle in Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre der Souveränität*, 10th ed. (1922; repr., Berlin: Duncker & Humblot, 2015). Citations of the German text refer to the tenth edition. Hereafter, I give the English translation—based on the 1934 revised edition—of only three, but all

four are examined in the context of this paper. I chose to keep the fourth as it appears in the original version because its English translation does not render the term "miracle":
(1) "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development—in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts. The exception in jurisprudence is analogous to the miracle in theology. Only by being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries." Carl Schmitt, *Political Theology: Four New Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: MIT Press, 1985; Chicago: University of Chicago Press, 2005), 36. Citations refer to the University of Chicago Press edition.
(2) "The idea of the modern constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world. This theology and metaphysics rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of a miracle, but also the sovereign's direct intervention in a valid order." Schmitt, *Political Theology*, 36–37.
(3) "I have for a long time referred to the significance of such fundamentally systematic and methodical analogies. . . . A detailed presentation of the meaning of the concept of miracle in this context will have to be left to another time. What is relevant here is only the extent to which this connection is appropriate for a sociology of juristic concepts." Schmitt, *Political Theology*, 37.
(4) "In der Begründung, die Kelsen seinem Bekenntnis zur Demokratie gibt, spricht sich die konstitutionnel mathematisch-naturwissenschaftliche Art seines Denkens offen aus (Arch. f. Soz.-W. 1920, S. 84): Die Demokratie ist der Ausdruck eines politischen Relativismus und eines wunder- und dogmenbefreiten, auf den menschlichen Verstand und den Zweifel der Kritik gegründeten Wissenschaftlichkeit." Schmitt, *Politische Theologie*, 47. The English translation does not seem accurate here: "Today, on the contrary, such a well-known legal and political philosopher of the state as Kelsen can conceive of democracy as the expression of a relativistic and impersonal scientism. This notion is in accord with the development of political

theology and metaphysics in the nineteenth century." Schmitt, *Political Theology*, 49.

3. Schmitt, *Political Theology*, 37. See also note 2 above.
4. "God's freedom in regard to natural laws is expressed in the concept of the *miracle*. The latter is a happening which cannot be brought under natural laws and for whose determination it is necessary to have recourse to the supernatural system of the divine will. However, the concept of God as a being distinct from the world stands or falls with the concept of *miracle*. Both are made possible solely through the unrelated juxtaposition of two systems independent of each other. It is precisely in this excursion beyond nature, in this assumption of a supernatural order of the divine will distinct and independent from the order of nature, that the characteristic motive of theology lies; this is what constitutes the *theological method*. It is the method of the state-theory, which, with its supralegal system of a meta- or supralegal state distinct from the system of law, endeavours to render the legally *unintelligible* intelligible nonetheless—in a legal manner—and to secure belief in a legal miracle, exactly as theology does with a natural one. And just as the other-than-legal state—whose will is positive law, and which yet can operate above this law and outside this legal order, and thus work legal miracles—was recognised to be merely the expression of certain political postulates extending beyond the positive legal order, so Feuerbach recognised God—the supernatural God distinct from the world, who is not bound by the restraint of natural laws, though they are merely what he wills—as an expression of human desires extending beyond the bounds of what is actual and necessary, as a product of wish-fulfilling fantasy. And just as he declared the concept of a God who ruled in adherence to the laws of nature, and only according to those laws, to be wholly superfluous, so a concept of the state whose acts are possible only as legal acts, likewise proves to be superfluous; unless it be that we are willing to let it exist as an expression for the unity of the legal order." Hans Kelsen, "God and the State" (1922/23), in *Essays in Legal and Moral Philosophy*, ed. Ota Weinberger, trans. Peter Heath (Dordrecht: D. Reidel, 1973), 77–78, footnotes omitted. "*Rechtswunder*," in Kelsen's original text, has here been rendered as "miracle." See Hans Kelsen, *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses zwischen Staat und Recht* (Tübingen: J. C. B Mohr, 1922; repr., Aalen: Scientia, 1962), 245-47. See also Sandrine Baume, "On Political Theology: A Controversy between Hans Kelsen and Carl Schmitt," *History of European Ideas* 35, no. 3 (2009): 369–81.

5. David Hume, *An Enquiry concerning Human Understanding*, ed. Tom L. Beauchamp (1748; repr., Oxford: Oxford University Press, 1999), 173n23, Hume's italics. See George Mavrodes's interpretation of Hume's definition, which highlights its two constituent parts: "The first part is Hume's attempt to put into a more precise language the idea that the miracle is an event that would not have happened in the ordinary course of affairs. It happens in the world of nature, but the actions, forces, and so on, of the world of nature, acting alone, would not have brought it about. The miracle goes beyond nature in some way. Perhaps it is even something that goes contrary to the ordinary course of nature. Hume's way of putting that is that the miracle is a transgression of a law of nature. . . . The second part of Hume's definition ascribes this transgression to an agent of a certain sort, 'the deity,' or some other 'invisible agent.'" George I. Mavrodes, "Miracles," in *The Oxford Handbook of Philosophy of Religion*, ed. William J. Wainwright (Oxford: Oxford University Press, 2005), 305. See also Hobbes's definition of the miracle, which underlines both of these components as well: "To understand therefore what is a Miracle, we must first understand what works they are, which men wonder at, and call Admirable. And there be but two things which make men wonder at any event: The one is, if it be strange, that is to say, such, as the like of it hath never, or very rarely been produced: The other is, if when it is produced, we cannot imagine it to have been done by natural means, but only by the immediate hand of God." Thomas Hobbes, *Leviathan: The English and Latin Texts (ii)*, ed. Noel Malcolm, vol. 5 of *The Clarendon Edition of the Works of Thomas Hobbes* (1651; repr., Oxford: Oxford University Press, 2012), 5:682.
6. The notion of the miracle also appears, under the term "wonder," later in Carl Schmitt, *Land and Sea: A World-Historical Meditation*, ed. Russell A. Berman and Samuel Garrett Zeitlin, trans. Samuel Garrett Zeitlin (Candor, NY: Telos Press, 2015), 25. First published 1942: "Here, I must first say a word in praise of the whale and in honor of the whale hunters. It is not possible to speak of the great history of the sea, and of the human decision for the element of the sea, without commemorating the fabled Leviathan and its equally fabled hunter. This is, admittedly, an enormous theme. My weak praise measures up neither to the whale nor to the whale-fish hunter. How can I dare tell, in an adequate way, of two *wonders* of the sea, of the most powerful of all living beasts and of the most cunning of human hunters?" See also Carl Schmitt, "Der Staat als Mechanismus bei Hobbes und Descartes" (1937), in *Staat, Grossraum, Nomos: Arbeiten aus den Jahren 1916–1969*, ed. Günter Maschke

(Berlin: Duncker & Humblot, 1995), 140: "Wer ist dieser Gott, der den angstgequälten Menschen Frieden und Sicherheit bringt, die Wölfe in Staatsbürger verwandelt und sich durch dieses Wunder als Gott erweist, allerdings nur als "sterblicher Gott," als *deus mortalis*, wie Hobbes ihn nennt? Wenn irgendwo, so gilt hier der Ausspruch des Newton: deus est vox relationis. Das Wort vom "sterblichen Gott" hat zu großen Mißverständnissen und Mißdeutungen geführt." I thank Samuel Garrett Zeitlin for drawing my attention to these references.

7. Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab and Erna Hilfstein (Westport, CT: Greenwood Press, 1996), 54. First published 1938. See also Hobbes, *Leviathan*, 5:696: "In which question we are not every one, to make our own private Reason, or Conscience, but the Publique Reason, that is, the reason of Gods Supreme Lieutenant, Judge; and indeed we have made him Judge already, if wee have given him a Soveraign power, to doe all that is necessary for our peace and defence. A private man has alwaies the liberty, (because thought is free,) to believe in his heart, those acts that have been given out for Miracles, according as he shall see, what benefit can accrew by mens belief, to those that pretend, or countenance them, and thereby conjecture, whether they be Miracles, or Lies. But when it comes to confession of that faith, the Private Reason must submit to the Publique; that is to say, to Gods Lieutenant. But who is this Lieutenant of God, and Head of Church, shall be considered in its proper place hereafter."
8. "In essence, whether something is to be considered a miracle is decided by the state in its capacity as the exemplar of the public reason in contrast to the private reason of subjects. Sovereign power has thus achieved its zenith. It is God's highest representative on earth." Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 55.
9. "The distinction between private and public, faith and confession, *fides* and *confessio*, is introduced in a way from which everything else was logically derived in the century that ensued until the rise of the liberal constitutional state. The modem 'neutral' state, derived from agnosticism and not from the religiosity of Protestant sectarians, originated at this point." Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 56. See also ibid., 83: "Although Hobbes defended the natural unity of spiritual and secular power, he opened the door for a contrast to emerge because of religious reservation regarding private belief and thus paved the way for new, more dangerous kinds and forms of indirect powers."
10. Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 57.

11. Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, 57. Other passages could be quoted, such as ibid., 9: "But the Jews stand by and watch how the people of the world kill one another. This mutual 'ritual slaughter and massacre' is for them lawful and 'kosher,' and they therefore eat the flesh of the slaughtered peoples and are sustained by it." I assume that Schmitt's anti-Semitism extends to Kelsen himself. See also Samuel Garrett Zeitlin, introduction to *Land and Sea: A World-Historical Meditation*, by Carl Schmitt, trans. Samuel Garrett Zeitlin (Candor, NY: Telos Press, 2015), lix, n77.
12. It is worth noting that Kelsen characterizes positivism as dispensing "with any such religious justification of the legal order." Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, MA: Harvard University Press, 1949), 116.
13. Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, trans. and intro. Michael Heolzl and Graham Ward (Cambridge, MA: Polity Press, 2008), 42. First published 1970. The expression "structural identity," used here by Schmitt to characterize his political theology, allows one to speak of it as an analogy.
14. Albericus Gentilis, "Vtrum sint caussæ naturales belli faciendi," chap. 12 in *De Jure Belli*, Book I (Coloniae Agrippinae: Joannem Gymnicum, 1598), 92, https://gallica.bnf.fr/ark:/12148/bpt6k93707w, quoted in Schmitt, *Political Theology II*, 114, 118; Carl Schmitt, *Ex Captivitate Salus: Experiences, 1945–47*, ed. Andreas Kalyvas and Federico Finchelstein, trans. Matthew Hannah (Cambridge, MA: Polity Press, 2017), 56. First published 1950; Carl Schmitt, *The "Nomos" of the Earth in the International Law of the "Jus Publicum Europaeum,"* trans. G. L. Ulmen (New York: Telos, 2006), 121, 126, 159, 239. First published 1950; Carl Schmitt, "Vorwort (1963)," in *Der Begriff des Politischen: Synoptische Darstellung der Texte*, ed. Marco Walter (Berlin: Duncker & Humblot, 2018), 45; Carl Schmitt, *Glossarium: Aufzeichnungen aus den Jahren 1947 bis 1958*, ed. Gerd Giesler and Martin Tielke (Berlin: Duncker & Humblot, 2015), 79–80, 214; and Carl Schmitt to Reinhart Koselleck, n.p., [beginning 1973?], in *Der Briefwechsel, 1953–1983*, ed. Jan Eike Dunkhase (Berlin: Suhrkamp, 2019), 242.
15. Ernst-Wolfgang Böckenförde, "Politische Theorie und politische Theologie. Bemerkung zu ihrem gegenseitigen Verhältnis," in *Der Fürst Dieser Welt: Carl Schmitt und die Folgen*, ed. Jacob Taubes (Munich: Wilhelm Fink, 1983), 19–21.
16. See Zeitlin's comments on the academic exchanges within Taubes and Schmitt's *Briefwechsel*, underlining the importance of boundaries

between the spiritual and the worldly realms: "Die Grenzziehung zwischen geistlich und weltlich mag strittig sein und ist immer neu zu ziehen (ein immerwährendes Geschäft der politischen Theologie), aber fällt diese Scheidung dahin, dann geht uns der (abendländische) Atem aus, auch dem Thomas Hobbes, der wie immer power ecclesiastical and civil unterscheidet." Zeitlin, Samuel Garrett. "Interpretation and Critique: Jacob Taubes, Julien Freund, and the Interpretation of Hobbes," *Telos*, no. 181 (2017): 32n79. In *Political Theology II*, 48, Schmitt mentions Hans Barion's comments—without contradicting him—according to which the new teaching of the Church, which developed in the wake of Vatican II, does not have a foundation in the dogma.

17. According to Schmitt, in "Die Sichtbarkeit der Kirche: Eine scholastische Erwägung," *Summa* 2 (1917): 71–80, the Church and the state share the common characteristic of visibility in that they endow themselves with material attributes that also allow them to ensure institutional continuity. The visibility (*Sichtbarkeit*) of the Church is an important theological and political issue because it coincides, in Schmitt's mind, with a juridical constitution and a recognition of the Church as a "formed institution."
18. Hans Barion systematizes the distinctive features of the concept of *potestas indirecta*: First, in a conflict between the Catholic Church and the law, the former prevails. The first characteristic leads to the second: all Christians must obey God more than they obey men. Third, the Church's doctrine is an objective "norm of conscience" (*Gewissensnorm*). Fourth, the Church as an independent and visible community must ensure the external and effective realization of its doctrine. Fifth, the Church evaluates how the state or party politics follow the Church's prescriptions, and the Church examines the situations in which the believer, in cases of conflict, must follow the instructions of the Church rather than those of the state or the party. See Hans Barion, "Potestas Indirecta," in *Kirche und Kirchenrecht*, ed. Werner Böckenförde (Paderborn, Germany: Ferdinand Schöningh, 1984), 509–10. The proximity between Schmitt and Barion can be perceived in the fact that Barion coedited the "*Festschrift*" dedicated to Schmitt on the occasion of his seventieth birthday: Hans Barion, Ernst Forsthoff, and Werner Weber, eds., *Festschrift für Carl Schmitt zum 70. Geburtstag* (Berlin: Duncker & Humblot, 1959). See also Hans Barion, Ernst-Wolfgang Böckenförde, Ernst Forsthoff, and Werner Weber, eds., *Epirrhosis: Festgabe für Carl Schmitt (zum 80. Geburtstag)* (Berlin: Duncker & Humblot, 1968), published on the occasion of Schmitt's eightieth

birthday. I thank Samuel Garrett Zeitlin for drawing my attention to this aspect.

19. Schmitt, *Political Theology*, 40–41.
20. "Die vollkommene Parallelität in der logischen Struktur des Staats- und des Gottesbegriffes manifestiert sich in einer verblüffenden Gleichartigkeit der Probleme und Problemlösungen in Staatslehre und – Theologie, wobei deren Hauptproblem: Das Verhältnis von Gott und Welt (oder Gott und Natur) in vollkommenster Weise der Kernfrage der Staatslehre nach dem Verhältnis von Staat und Recht entspricht. " Hans Kelsen, *Der soziologische und der juristische Staatsbegriff*, 222.
21. "Hypostasis" means the substitution of one category for another—in this case, an abstraction for a real entity.
22. By *dualism*, I mean the doctrines that reject the identity between law and the state.
23. Hans Kelsen, "Über Staatsunrecht" (1914), in *Hans Kelsen Werke*, vol. 3, ed. Matthias Jestaedt (Tübingen: Mohr Siebeck, 2010), 447.
24. Hans Kelsen, "Der Begriff des Staates und die Sozialpsychologie. Mit besonderer Berücksichtigung von Freuds Theorie der Masse," *Imago: Zeitschrift für Anwendung der Psycho-analyse auf die Geisteswissenschaften* 8 (1922): 97–141.
25. Hans Kelsen, "Gott und Staat," *Logos: Internationale Zeitschrift für Philosophie der Kultur* 11 (1922/23): 261–84. In this article, I refer to the English translation: Kelsen, "God and the State." See note 4 above.
26. See note 4 above.
27. Hans Kelsen, *Allgemeine Staatslehre* (Berlin: Julius Springer, 1925).
28. Hans Kelsen, "Selbstdarstellung" (1927), in *Hans Kelsen Werke*, ed. Matthias Jestaedt, vol. 1 (Tübingen: Mohr Siebeck, 2007), 19–27.
29. Hans Kelsen, *General Theory of Law and State*, 191.
30. Hans Kelsen, *General Theory of Law and State*, 191.
31. "A typical example of this tendency we found in the animistic interpretation of nature, that is, primitive man's idea that nature is animated, that behind everything there is a soul, a spirit, a god of this thing: behind a tree, a dryas, behind a river, a nymph, behind the moon, a moon-goddess, behind the sun, a sun-god. Thus, we imagine behind the law, its hypostatized personification, the State, the god of the law. The dualism of law and State is an animistic superstition." Hans Kelsen, *General Theory of Law and State*, 191.
32. Hans Kelsen, "God and the State," 77–78.
33. "Sovereign is the one who decides on the exception." Schmitt, *Political Theology*, 5.

34. For a similar interpretation, consider the following: "For Schmitt, as we know, the exception in jurisprudence is analogous to the miracle in theology—and the sovereign is the one who decides on the exception. Hence, sovereignty refers to the power of performing juridical and political miracles over against the (enclosed) system of law. First and foremost, such miracles entail momentary suspensions of the law, statutory violations of the constitution, as Schmitt writes in *Constitutional Theory*. These 'statutory ruptures' (*Durchbrechungen*) are, as Schmitt writes, 'the criterion of sovereignty.'" Mika Ojakangas, "*Potentia Absoluta et Potentia Ordinata Dei:* On the Theological Origins of Carl Schmitt's Theory of Constitution," *Continental Philosophy Review* 45, no. 4 (2012): 511. See also Arkadiusz Górnisiewicz, "Totemism of the Modern State: On Hans Kelsen's Attempt to Unmask Legal and Political Fictions and Contain Political Theology," *Ratio Juris* 33, no. 1 (2020): 51: "God's omnipotence, personal nature, transcendence to the world order, and the possibility of acting against the laws of nature through miracles have their respective analogies in the state's sovereignty, personality, non-overlapping with the legal order, and its ability to waive the rules of law (legal miracle or *Rechtswunder*)."
35. For a convergent interpretation, see Michael Hoelzl and Graham Ward, introduction to *Political Theology II*, by Carl Schmitt, 13.
36. "*The political more accurately describes the degree of intensity of a unity.* Thus political unity can have and encompass various types of content. But it always describes the most intensive degree of unity, from which, therefore, the most intensive differentiation, grouping into friend and enemy, is determined. Political unity is the supreme unity, not because it allpowerfully dictates or levels all other unities, but because it decides and can, within itself, prevent all other opposing groups from dissociating to the point of extreme hostility (i.e., to the point of civil war)." Carl Schmitt, "State Ethics and the Pluralist State (1930)," in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson and Bernhard Schlink, trans. Belinda Cooper (Berkeley: University of California Press, 2000), 307, emphasis in the original.
37. See Schmitt, *Political Theology*, 36 and note 2 above.
38. "The characteristic of so-called legal positivism is, however, that it dispenses with any such religious justification of the legal order. The ultimate hypothesis of positivism is the norm authorizing the historically first legislator. The whole function of their basic norm is to confer law-creating power on the act of the first legislator and on all the other acts based on the first act. To interpret these acts of human beings as legal

acts and their products as binding norms, and that means to interpret the empirical material which presents itself as law as such, is possible only on the condition that the basic norm is presupposed as a valid norm. The basic norm is only the necessary presupposition of any positivistic interpretation of the legal material." Kelsen, *General Theory of Law and State*, 116.

39. In Carl Schmitt, *On Three Types of Juristic Thought*, trans. Joseph W. Bendersky (Westport, CT: Praeger, 2004), 48, we find Schmitt's own definition of normativism, one that would "reduce every concrete order to rules of law and define all *Recht* and every order as the 'epitome of legal rules' or the like." In *Political Theology II*, 120, he opposes "legal normativity" to the recognition of exceptions and miracles in the political order: "If everything is strictly regulated by legal normativity, exceptions are condemned, mutations suspect, and miracles are seen almost as acts of sabotage."
40. In *Political Theology*, 49–50, Schmitt equates immanence notably with "the democratic thesis of the identity of the ruler and the ruled" and "Kelsen's theory of the identity of the state and the legal order."
41. When Schmitt talks about relativism, he often proposes an epistemic conception of it. See Carl Schmitt, *Tagebücher 1925 bis 1929*, ed. Martin Tielke and Gerd Gielser (Berlin: Duncker & Humblot, 2018), 336.
42. "That a neo-Kantian like Kelsen does not know what to do with the exception is obvious." Schmitt, *Political Theology*, 14.
43. Note that his characterization of the sovereign is presented in the singular. See note 33 above.
44. Carl Schmitt, "Le contraste entre communauté et société en tant qu'exemple d'une distinction dualiste. Réflexions à propos de la structure et du sort de ce type d'antithèses," trans. Piet Tommissen, *Res Publica* 17, no. 1 (1975): 109, my translation. First published 1960. See also Schmitt, *Political Theology*, 50: "The main line of development will undoubtedly unfold as follows: Conceptions of transcendence will no longer be credible to most educated people, who will settle for either a more or less clear immanence-pantheism of a positivist indifference toward any metaphysics."
45. See Schmitt, *Political Theology*, 36–37. See also note 2 above.
46. Schmitt, *Politische Theologie*, 47, my translation. See also note 2 above.
47. See Hasso Hofmann, *Legitimität gegen Legalität: Der Weg der politischen philosophie Carl Schmitts*, 6th ed. (Berlin: Duncker & Humblot, 2020), xxxiv.

48. Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 266. First published 1928.
49. "Jurisprudence lost both its meaning and the specific concept of representation during the popular struggle with the king for representation in the nineteenth century. The German theory of the state, in particular, developed a scholarly mythology at once monstrous and confused: parliament as a secondary political organ represents another, primary organ (the people), but this primary organ has no will apart from the secondary organ, unless it be by 'special proviso'; the two juridical persons are but one, constitute two organs but only one person, and so on." Carl Schmitt, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, CT: Greenwood Press, 1996), 26.
50. See note 33 above.
51. Carl Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot, 1996), 115, my translation. First published 1931.
52. William B. Munro and Arthur N. Holcombe, trans. "English Translation of the German Text of the Constitution of 1919 as Amended to 22 September 1919 (1919)," in *Representative Modern Constitutions*, ed. Charles E. Martin and William H. George (Los Angeles: Times-Mirror Press, 1923), 81–82.
53. "Für die Lehre von der neutralen Gewalt ist das von besonderem Interesse, weil die eigenartige Funktion des neutralen Dritten nicht in fortwährender, kommandierender und reglementierender Aktivität besteht, sondern zunächst nur vermittelnd, wahrend und regulierend, und nur im Notfall aktiv ist." Schmitt, *Der Hüter der Verfassung*, 136–37.
54. The element of independence is constitutive in the Schmittian definition of the guardian of the constitution: "Damit ist nämlich die einzige, in einer demokratischen Verfassung denkbare Möglichkeit einer unabhängigen Instanz geschaffen, ohne welche es keinen Hüter der Verfassung geben kann. 'Unabhängigkeit' ist die fundamentale Voraussetzung, und sämtliche Vorschläge eines Hüters der Verfassung beruhen auf dem Gedanken, eine unabhängige und neutrale Instanz zu schaffen." Carl Schmitt, *Der Hüter der Verfassung*, 150.
55. Acclamation here is opposed to the electoral, mathematical, and aggregative procedure: "The will of the people can be expressed just as well and perhaps better through the statistical apparatus that has been constructed with such meticulousness in the last fifty years. The stronger the power of democratic feeling, the more certain is the awareness that democracy is something other than a registration system for secret ballots. Compared to a democracy that is direct, not only in the technical

sense but also in a vital sense, parliament appears an artificial machinery, produced by liberal reasoning, while dictatorial and Caesaristic methods not only can produce the acclamation of the people but can also be a direct expression of democratic substance and power." Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy (1988; repr., Cambridge, MA: MIT Press, 2000), 16–17. For excellent developments of Schmitt's elaboration of acclamation, see Lars Vinx, "Carl Schmitt on the Limits of Direct Democracy," *History of Political Thought* 42, no. 1 (2021): 157–83.

56. See also Schmitt, *Der Hüter der Verfassung*, 143.
57. Schmitt, *Der Hüter der Verfassung*, 159, my translation.
58. "What protection is there then for individual freedom and against the recourse to a pluralistic, feudal or corporate state (*Ständestaat*)? This is an old question. In the first draft of the Weimar Constitution, Preuss had already included some organizational limitations on the party state, building up the capacities of the plebiscitary president of the Reich, in particular, to counter-balance the system, so that the organization of the Constitution of the Reich would form a balance between parliamentary and plebiscitary democracy." Carl Schmitt, "Hugo Preuss: His Concept of the State and His Position in German State Theory," trans. Frances Foley, *History of Political Thought* 38, no. 2 (2017): 367. First published 1930.
59. Wolfgang J. Mommsen, *Max Weber und die Deutsche Politik, 1890–1920*, 2nd ed (Tübingen: J. C. B. Mohr, 1974), 409.
60. Max Weber, "Der Reichspräsident," *Berliner Börsenzeitung*, February 25, 1919.
61. See note 54 above.
62. "In der Verfassungsgeschichte des 19. Jahrhunderts erscheint eine besondere Lehre vom *pouvoir neutre*, *intermédiaire* und *régulateur* bei *Benjamin Constant* im Kampf des französischen Bürgertums um eine liberale Verfassung gegen Bonapartismus und monarchische Restauration. Diese Lehre gehört wesentlich zur Verfassungstheorie des bürgerlichen Rechtstaates und hat nicht nur auf die zwei Verfassungen eingewirkt, in die sie ziemlich wörtlich übernommen wurde. Vielmehr geht auf sie der für alle Verfassungen des 19. Jahrhunderts typische Katalog von Prärogativen und Befugnissen des Staatshauptes (Monarch oder Staatspräsident) zurück, die sämtlich als Mittel und Einwirkungsmöglichkeiten eines solchen *pouvoir neutre* gedacht sind: Unverletzlichkeit oder wenigstens privilegierte Stellung des Staatshauptes, Ausfertigung und Verkündung der Gesetze,

Begnadigungsrecht, Minister-und Beamtenernennung, Auflösung der gewählten Kammer." Schmitt, *Der Hüter der Verfassung*, 132–33.

63. "Le vice de presque toutes les constitutions a été de ne pas créer un pouvoir neutre, mais d'avoir placé la somme d'autorité dont il doit être investi dans un des pouvoirs actifs. Quand cette somme d'autorité s'est trouvée réunie à la puissance législative, la loi, qui ne devait s'étendre que sur des objets déterminés, s'est étendue à tout; il y a eu arbitraire et tyrannie sans bornes." Benjamin Constant, *Cours de politique constitutionnelle, 1818–1820* (Geneva: Slatkine, 1982), 179.
64. Kelsen, *Wer soll der Hüter der Verfassung sein?*, 10, my translation.
65. "So die Zuständigkeit nach Art 45f. RV., das ist Vertretung nach aussen, Kriegserklärung, Friedensschluss, Beamtenernennung, Oberbefehl usw., Reichstagsauflösung nach Art. 25, Herbeiführung eines Volkentscheids nach Art. 73, und insbesondere alles, wozu Art. 48 – und nicht nur dessen Abs. 1 – das Staatsoberhaupt (in Verbindung mit den Ministern) ermächtigt. Wenn der Reichspräsident mit allen diesen ihm von der Verfassung übertragenen Funktionen die Verfassung 'hütet', dann heisse 'Hüter der Verfassung': Vollzieher der Verfassung" Kelsen, *Wer soll der Hüter der Verfassung sein?*, 48–49.
66. Carl Schmitt, *Constitutional Theory*, 233.
67. See note 54 above.
68. I assume that the *katechon,* as defined by Schmitt in 1942, could be a justification of the need to preserve public order by the decision of the sovereign: "In der Spätantike und im Mittelalter glaubten die Menschen an eine geheimnisvoll aufhaltende Macht, die mit dem griechischen Wort 'kat-echon' (Niederhalten) bezeichnet wurde und die es verhinderte, daß das längst fällige apokalyptische Ende der Zeiten jetzt schon eintrat." Carl Schmitt, "Beschleuniger wider Willen, oder: Problematik der westlichen Hemisphäre," (1942) in *Staat, Grossraum, Nomos: Arbeiten aus den Jahren 1916–1969*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 436.
69. Carl Schmitt, *Constitutional Theory*, 220–34 (sect. 15, "Separation [So-Called Division] of Powers").
70. Schmitt, *Political Theology*, 6.
71. Schmitt, *Political Theology*, 36–37.