Democracy and Its Matter. Juxtaposing Carl Schmitt and John Rawls

Mariano Croce

A*bstract*. According to critics, the adjective 'political' of John Rawls's political liberalism indicates an unexpected convergence with the thought of Carl Schmitt. Rawls is said to offer a justification for liberalism that presupposes many of the substantive commitments he sought to avoid. Nor did he ever address the pressing question of how to contain doctrines that do not support the content of the overlapping consensus. Based on this critique, Schmitt's political theory emerges as a complement to the gaps in political liberalism. Alessandro Ferrara has recently taken up this argument to refute it once and for all. It is true, he maintains, that Schmitt discussed issues that resonate with some Rawlsian themes, but the reasons that make these two leading authors incomparable seem to him stronger than any similarity. This article makes two claims that seek to strengthen the above critique. First, if one believes, as I do, that the comparison is plausible, it should be with Schmitt's most robust constitutional theory, which he completed between 1928 and 1934. Second, if one looks at Schmitt's scholarly production in those years, the points of convergence appear more significant than those Ferrara is prepared to accept.

Keywords: constitution, constitutional essentials, decisionism, pluralism, Rawls, Schmitt.

1. I*ntroduction*

Most probably any attempt to carve out a democratic core in Carl Schmitt's political thinking is doomed to failure. While I believe that no trace of Nazi ideology can be found in his pre-1933 works, it is undeniable that he was a staunch supporter of the most traditional and conser-

vative right. He advocated a firm and energetic presidential government, directly elected by the people and almost completely free from parliamentary control. It was his inner conviction that a presidency reinforced by special powers could be the foundation and the point of greatest stability for the dying Weimar Republic. I am convinced that such a political view did not stem from Schmitt's belief in the salvific virtues of a sovereign decision-maker endowed with demiurgic powers. Rather, he believed that a stable political community should be founded on a tight core of fundamental values and principles, already present in the normative repertoires of the dominant social groups, and enshrined in an extremely rigid constitution, whose supreme interpreter was the holder of the executive power.

I do not know how democratic this is, and certainly, none of it can be called liberal. Yet there is a curious convergence between the constitutional theory underlying this political perspective and one of the most remarkable and influential theories of the 20th century: John Rawls's political liberalism. In a liberal democracy, according to Rawls, a constitution establishes certain fundamental rights and freedoms, fixes the basic structure of society, and regulates the interaction between the various state agencies it creates. These are the «constitutional essentials» which determine the content of rights and freedoms and impose normative constraints on the general structure of government. The specifically 'political' element of Rawls's liberalism lies in the fact that these constitutional essentials, of a substantive nature, represent the ultimate infrastructure of a society characterised by the "fact of pluralism" – which is to say, the inescapable fact that in liberal political communities the heterogeneity of beliefs flourishes and so-called "comprehensive doctrines" proliferate.

As far as I am concerned, Alessandro Ferrara (2014; 2022; 2023) has proposed the most robust interpretation of Rawls's constitutionalism. According to him, constitutional essentials represent the yardstick for assessing the legitimate exercise of political authority. This is because in a liberal-constitutional society, citizens cannot be expected "to endorse all the details of the legislative, executive and judicial activity of democratic institutions. […] there will always be groups of citizens for whom some verdict, statute, or executive order is unjust and coercive" (Ferrara 2022, 82). Citizens are only expected to agree on the content and

normative priority of constitutional essentials. In this regard, Rawlsian liberalism stands out as a liberal theory of the constitution that emphasises some of its material aspects, including primary goods, polity-specific political values, and certain general political virtues. These are substantive contents, enshrined in the constitution, which can be used as a procedural constraint, in particular through constitutional review.

Underlying this interpretation of political liberalism is the notion of «legitimation by constitution» developed by Ferrara and Frank Michelman (see Michelman 2019; Ferrara, Michelman 2022). It bends Rawls's theorising in a decidedly constitutional sense. If one takes the fact of pluralism seriously as well as the institutional complexity of contemporary societies, reasonableness comes down to the best possible interpretation of fundamental values and principles in the light of both the present circumstances and the constitutional history of a country. This interpretation also implies that it is essential to identify an ultimate *pro-tempore* final interpreter of the constitution in the highest courts. In this framework, justice as fairness is no longer the outcome of a thought experiment, as in the early Rawls, but the most reasonable political conception of justice, that is, the one that best realises constitutional values in the light of the most significant political and cultural characteristics of a historical community.

It is certainly not my intention to establish how Rawlsian this reading of political liberalism is. Certainly, it is a reading that seems to me to be utterly convincing because it offers a concrete and operational translation of the theory of justice advanced in P*olitical* L*iberalism*. Rather, I will try to show that it precisely highlights the numerous convergences between Schmitt's and Rawls's political views – even broader and more remarkable than those Ferrara is prepared to accept. To this end, I will proceed as follows. I will commence by briefly illustrating the view of critics who claim that their theories do dovetail. I will then examine the few aspects which, according to Ferrara, indicate some kind of proximity concerning a few circumscribed issues.

I will then argue that, if the question of proximity is to be taken seriously, the account of Schmitt's theory needs to be clarified and refined. In this framework, I will stress that Schmitt advanced a theory of "material democracy" which bears even more striking resemblances to political liberalism. In the wake of my revised account, I will scrutinise Ferrara's discussion of the

various elements of differentiation between Schmitt's and Rawls's political theories which, in his view, prevent any hypothesis of complete convergence. I will conclude by further explaining why it is exactly Ferrara's interpretation of Rawls that brings the two authors closer together.

2. *The unexpected proximity*

According to some critics, the adjective 'political' in 'political liberalism' betrays something more than a Schmittian nuance. For example, Miguel Vatter (2008, 259) argues that, just like Schmitt, "Rawls asserts that the extraordinary is always superior to the ordinary. But what is extraordinary in Rawls is not the authority of the sovereign's judgment, as much as the power of every ordinary citizen's judgment in so far as he or she is recognized by all others as an equal and free member of a revolutionary, constituent people". Arguably, Vatter's case could turn out stronger if, rather than looking, as he does, at *Political Theology* (Schmitt [1922] 2005), one took into consideration *Constitutional Theory* (Schmitt [1928] 2008). In this latter book, the fundamental decision is no longer for a personal decision-maker, but for the people, who are revolutionary and constituent when they decide on the form of their political existence.

More convincingly, David Dyzenhaus (1996) has pointed to a possible Schmittian drift in the Rawlsian conception of the «fact of pluralism». As is well known, Rawls rejects the idea that a just society can be based on a *modus vivendi* and claims that it must be justified on moral grounds. But this morality is to be thoroughly political since it is not to be grafted onto any particular comprehensive doctrine. The liberal political conception of justice, which is the most reasonable conception from the point of view of free and equal citizens, regardless of the doctrines they espouse, articulates the «basic structure» of a modern constitutional democracy. For Dyzenhaus, the Schmittian feature lies in the «containment» of unreasonable doctrines. Although not directly addressed in *Political Liberalism*, this is an inescapable corollary of the theory. He writes:

> [A]lthough Rawls argues that political liberalism is neutral in the sense that it does not prefer any comprehensive doctrine to any other, it is not neutral in other senses. Most important, it is not neutral in its consequences. For instance, unreasonable doctrines will be un-

> dermined by a public culture which exposes them to the constitutional conditions of liberal democracy. Indeed, Rawls says that even doctrines which are not unreasonable but which are merely illiberal will be so undermined (Dyzenhaus 1996, 19).

Benjamin Schupmann (2017) takes up and expands on Dyzenhaus's critique. Not only has Schmitt anticipated Rawls's political liberalism, since he strenuously asserted that democracy is to be founded on a set of basic values and fundamental rights, shared by all citizens regardless of their different worldviews. More than that, he offered a truly *political* version of it, which required taking «action against existential threats to the foundation of that order, so that it will endure stably over time» (Schupmann 2017, 216). Put another way, Schmitt not only made explicit the *political* nature of democracy, just as Rawls was to do a few decades after him. He also clearly illustrated the urgent need to contain those comprehensive doctrines that threaten the existence of the constitutional order.

In summary, according to Dyzenhaus and Schupmann, the convergence between Schmitt and Rawls takes place at 'the political' level. Their case is strong, especially if one does away with a caricatured picture of Schmitt's political theory, which is still widespread even in the academic literature. I will try to rearticulate this case as follows. Not even in his most thunderous statements did Schmitt ever argue that the constitutional order should be founded on enmity as a dynamic principle that mobilises and unites the people against a polemical target (presented as) an existential threat. The basic notion underlying *The Concept of the Political*, first published in 1927 and extensively revised between 1928 and 1963, reads that for a political community to exist and subsist, the pluralism of social groups and their worldviews should be contained. This is because worldviews are just like Rawls's comprehensive doctrines. They claim to determine the ultimate truths about nature and human life and, in so doing, risk creating stronger forms of allegiance and loyalty between individuals *qua* group members and their group than between individuals *qua* citizens and the state (see Böckenförde 1997; Croce 2017). Schmitt ([1927] 2007, 41) wrote:

> [A given citizen] is a member of a religious institution, nation, labor union, family, sports club, and many other associations. These con-

> trol him in differing degrees from case to case, and impose on him a cluster of obligations in such a way that no one of these associations can be said to be decisive and sovereign. On the contrary, each one in a different field may prove to be the strongest, and then the conflict of loyalties can only be resolved from case to case. It is conceivable, for example, that a labor union should decide to order its members no longer to attend church, but in spite of it they continue to do so, and that simultaneously a demand by the church that members leave the labor union remains likewise unheeded.

In this sense, the peremptory incipit that «[t]he concept of the state presupposes the concept of the political» (Schmitt [1927] 2007, 19) is intended to convey a very simple message: it is up to the state, and by no means to any other normative entity, to decide the conditions under which citizens can legitimately use violence and risk their lives in the fight against the enemy. The considerable danger, in his view, was that this kind of eminently political decision could end up in the hands of the various associations and organisations that emerged in the first decades of the 20th century.

The Weimar Republic was on the verge of collapse, weakened by internal divisions and lacking strong political leadership. Seditious groups promoted worldviews that sought to replace the ethics of the state and abolish the constitutional order. In Schmitt's view, the German political community could regain its strength by relying on a narrow set of fundamental values and basic rights as a point of intersection between all constitutionally loyal social groups. By the same token, the state should restrict the rights and freedoms of groups that could potentially undermine the Republic. In what follows, I would like to resume this claim and justify it more robustly. As a preliminary step, however, I will need to build on Ferrara's important considerations on the parallelism between Schmitt and Rawls.

3. *Slightly Schmittian, but not too much*

In chapter 3 of *Sovereignty across Generations*, Ferrara (2023, 93-136) adroitly reconstructs some basic tenets of Schmitt's legal and political thought. The cardinal virtue of his account is that it centres on the latter's in-

fluential theorisation of the *materiality* of the constitution, that is, those substantive elements that exceed the form of the constitution and give it ordering force.[1] This, according to Ferrara, is the genuine point of contact between Schmitt and Rawls. In doing so, he partly rejects a stereotypical view of Schmitt as an extoller of the exception and the advocate of political agonism[2] and rather focuses on the most meaningful elements of his constitutional theory. As I will clarify below, however, he does not do so all the way and therefore does not get to the point where one can appreciate Schmitt's most robust and coherent theory – one that, importantly, gets closer to political liberalism.

To commence, a major problem with Ferrara's examination of the differences between Schmitt and Rawls is that it begins with a discussion of the personality of the political decision-maker. He is supposed to be a flesh-and-blood person who has a kind of demiurgic power over the political community. This is undoubtedly a theme that runs through Schmitt's work, especially, but not only, between 1918 and 1924. Moreover, according to Ferrara (and admittedly many others), the sovereign's demiurgic activity takes place in the realm of the political, because the decision-maker is said to be the one who, by his constitution-making decision in certain exceptional circumstances, determines the enemy who threatens the community's way of life. Now, while it is undoubtedly true that, as Ferrara (2023, 103) points out, one of Schmitt's fundamental assumptions is that the legal order can neither establish itself nor suspend itself and that it always requires a concrete political actor, at the beginning of his reconstruction he brings together Schmitt's assertions that belong to different phases of his scholarly production.

It is not for the sake of philology that I raise this point, but because it is key to the parallelism between Schmitt and Rawls. Without wading into Schmitt's prolific output, I think Ferrara is right to claim that, for Schmitt in 1927-1928, the production of the constitutional order is the foundational moment in which the group of friends is brought into be-

[1] See Goldoni, Wilkinson 2020; Goldoni 2024. On Schmitt's constitutional theory and the materialist approach, see Meierhenrich, 2023.

[2] As to why this is a stereotypical view that should be left behind, see Croce, Salvatore 2013; Croce, Salvatore 2022.

ing. This is the natural result of bringing together such works that are so close in time as *The Concept of the Political* of 1927 and *Constitutional Theory* of 1928. Far more problematic, however, is the reference to the exceptional moment and the sovereign decision. For these are themes that Schmitt dealt with especially in *Political Theology*, published in 1922, in which he put forward an extreme and ultimately untenable thesis that he would never take up again, at least not in such a radical form. Unfortunately, Schmitt is still known to the public for that incongruous short-circuit that reads *Political Theology* and *The Concept of the Political* as if they were two faces of the same work. This misguided interpretation leads to a position that Schmitt never advocated, viz., that the sovereign performatively creates the enemy when he decides on the suspension of the legal order[3]. To avoid such an interpretative pitfall, in the subsequent pages, I will separate the issue of the sovereign and her/his exceptional powers from the issue of the materiality of the constitution, which is much more relevant to the juxtaposition with political liberalism.

Let me return to the notion of materiality. Ferrara captures it succinctly when he writes that, for Schmitt, a state *does not have* a constitution by which the state is formed and operates, but *is* the constitution, that is, a concrete condition of unity and order. Put otherwise, the constitution is by no means a mere set of norms and principles. It is an activity that gathers and implements a concrete order rooted in a historical tradition. Therefore, there is no constitutional structure that is not the context-specific and content-dependent project of a community that, at a given moment, gives itself a concrete configuration to shape its own political future. For example, a state is not a liberal democracy because it adopts a particular set of fundamental norms and a particular set of freedoms and rights. Rather, it is a liberal democracy because it is the result of an overall historical experience that has led state institutions to take on a particular concrete configuration, resulting in particular freedoms and rights, as well as particular mechanisms for the protection thereof.

According to Ferrara, this material approach to the constitution looks relevant for three basic reasons. The first is that it emblematically articulates the distinction between *the constitution* and *constitutional norms*. In the

[3] For a sounder vindication of this critique, see Croce 2017.

interwar period, the German debate revolved around the vexed question of Article 76 of the Weimar Constitution, stating that the constitutional text could be amended by legislation with a two-thirds majority of the Reichstag. According to positivist jurists, this article *de facto* made the Parliament a genuine and legitimate constituent power that had neither formal nor material limits other than the qualified majority constraint (see Loewenstein 1931). Schmitt objected to this. In his reading, even though no formal limits were to be seen, a material limit could be detected in the difference between *making* and *amending* the constitution – one that was logically connected to the further distinction between the overall constitution and constitutional norms (see Colón-Ríos 2020, 203-225).

Hence the second reason which, according to Ferrara, explains the relevance of Schmitt's materialist approach. The conceptual separation between the constitution and constitutional norms was conditional on the even more fundamental distinction between those who have the power to produce the basic law, namely the people, and those who have the power to amend it, namely the parliament. As Ferrara nicely points out, the constitution, according to Schmitt, is the foundational moment in which the people are structured as a concrete unity. Only then, and not at any later moment, does the constituent power manifest itself. The third reason, which in my view has no structural connection with Schmitt's constitutional theory, relates to his firm conviction of the need for a strong presidency. This should be a neutral power for the protection of the democratic constitution (where 'neutrality' stands for 'superior to parliamentary politics'). Faced with the blatant ineffectiveness of representative politics, which proved incapable of providing strong and coherent political leadership, Schmitt believed that the only solution was the political leadership of a strong President of the Republic, with a popular mandate and endowed with the permanent power to appoint a presidential government almost completely unaccountable to parliament (see Schmitt [1931] 2015).

Rawls gets into the picture as far as the 'substance' is concerned as opposed to an exclusive focus on democratic procedures. As I mentioned above, goodness as rationality, primary goods, the polity-specific 'political values' and certain general 'political virtues' are among the material normative elements explicitly mentioned in *Political Liberalism*. Yet, Ferrara notes, it is above all the notion of an overlapping consensus that

elicits material considerations which come very close to Schmitt's political friendship in *The Concept of the Political*. For the overlapping consensus is such that some comprehensive doctrines «support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. Thus, all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion» (Rawls [1997] 2005, 482-483). Doctrines that do not converge on such a political conception are not reasonable and cannot support a democratic society.

Ferrara claims that the consensus so conceived can hardly be said to be content-independent. It has an unquestionable material side ingrained in the specific historical tradition and concrete experience of a political community. Despite this, he warns against a criticism that he deems unfounded, one that envisages «a deep rift» in political liberalism: an opaque Schmittian residue lying beneath its luminously democratic character. A lengthy quotation will be of help:

> On one hand, there are constituencies that endorse comprehensive conceptions very diverse but not so diverse as to prevent them from converging on a modular political conception of justice (hopefully, but not necessarily, 'justice as fairness') thick enough for sustaining constitutional essentials shared from diverse angles by all these citizens. The overlapping consensus on that political conception of justice, on certain political values, ideas of the good, and ultimately on a robust core of constitutional essentials, allows for the 'stability for the right reasons' of the just and stable liberal-democratic polity. On the other hand, and this is the Schmittian flipside of political liberalism emphasized by these commentators, there is an 'inner periphery' of the well-ordered society, populated by citizens who embrace unreasonable or partially unreasonable conceptions, are not party to that overlapping consensus, are protected by rights they have not concurred in shaping, are the object of policies resting on principles they do not endorse, and are not even owed 'political justification'. (Ferrara 2023, 115).

In the following pages, I will not try to establish whether the idea of a rift is tenable. Rather, I will discuss the arguments advanced by Ferrara to refute it and will elucidate why they do not increase the distance be-

tween Schmitt and Rawls but reduce it. To put it better, in Schmitt's view, the containment of unreasonable doctrines would be illegitimate without stability for the right reasons, rooted in a solid core of constitutional essentials. To make this point, in the subsequent section I would like to tease out his most relevant contribution as a political theorist. In my reading, this was to show that friendship over constitutional essentials is an indispensable condition for the survival of a constitutional regime, especially, but not only, when it is challenged by internal enemies. Let me now briefly outline the textual basis for my reading.

4. *Schmitt's material democracy*

It is not for this contribution to offer a detailed reconstruction of Schmitt's theory and its various developments between the 1920s and the 1930s. What I do want to argue, however, is that if there is a convergence, however asymptotic, between Schmitt and Rawls, the juxtaposition between them should be based on those works in which Schmitt took up the question of political stability vis-à-vis constitutional essentials. He did so in a controversial period of the agonising Republic, not long before the Nazi seizure of power in 1933. In this problematic phase of German history, Schmitt, along with a whole generation of political and legal scholars, was struggling to understand how the Weimar Constitution could be saved from ruinous capitulation.

To repeat: in those years Schmitt had lost his faith in the idea of a sovereign decision-maker with salvific powers. Suffice it to recall that the second edition of P*olitical Theology*, dated November 1933, contained a kind of initial disavowal. Decisionism was treated as a limited type of legal thought that needed to be supplemented by a more concrete and realistic theory of the material features of law. No sovereign decision could miraculously create the legal order and make it effective, as he seemed to believe at an earlier stage. But the process of dismantling the more bombastic theses of P*olitical Theology* had begun early on. In 1924 Schmitt downgraded the role of a sovereign decision-maker who could exercise unbound power through emergency decrees. In an important constitutional essay, "The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution" (written in 1924, with

a few additions before publication in 1927) (Schmitt ([1924]2014), he unequivocally denied the article in question conferring legislative powers on the President, even when the state of exception was declared. He then identified material limits, though far from clear, that restrained the emergency powers of the executive.

As I noted above, Schmitt's concern at the time of writing *The Concept of the Political*, in 1927-1928, was with social pluralism and the multiplication of comprehensive views. Pluralism encouraged antagonism between social organisations and the central state. This is one of the main reasons why he made the Anglo-Saxon pluralist theory of the state his main polemical target. For him, authors such as G.D.H. Cole and Harold Laski were right in their diagnosis of an intensifying pluralism of political allegiances. However, they were drastically wrong to argue that such a process should be encouraged because it paved the way for the reform of the state. Quite the contrary, pluralism had to be tamed. To this end, an executive with unbound prerogatives could have little effect, since the basis for political stability in normal times cannot be the exceptional measures which are issued in times of crisis. This explains Schmitt's abandonment of his earlier decisionism in the second half of the 1920s, when he embraced the institutionalist thinking of Maurice Hauriou and Santi Romano.

At this stage, however, he had not yet completed his proposal for a substantive democracy based on the constitution, because his theory was still contaminated by a thick decisionist residue. This was the idea that a constitution is a fundamental decision. Importantly, though, it is a constitution-making decision since it is taken by the people who give themselves a political form, and not because it revolves around specific contents. For this reason, not even *Constitutional Theory* can be regarded as the site of a Rawlsianism *avant la lettre*. Schmitt himself emphasised that the real turning point came in 1931-1932. As noted by Schupmann (2017, 173-200), an interpreter who has paid due attention to the writings that Schmitt himself considered as key, one can find the most robust articulation of what I would like to call 'material democracy' in two essays published close to each other. These are "Freiheitsrechte und institutionelle Garantien der Reichsverfassung" ("The Liberty Rights and the Institutional Guarantees of the Reich Constitution") (Schmitt [1931] 2003) and "Grundrechte und Grundpflichten" ("Basic Rights and Basic Duties") (Schmitt [1932] 2003).

What deserves attention here is a crucial gap between the constitutional theory that emerges in these two essays and that presented in *Constitutional Theory*. In 1928, Schmitt, like most fellow jurists, saw the Weimar Constitution as the result of a compromise between very different political conceptions and value orientations. It was a «hodgepodge of programs and positive provisions, which provides the foundation for the most diverse political, social, and religious matters and convictions. Bourgeois guarantees of personal freedom and private property, all of an individualistic variety, socialist programmatic principles, and Catholic natural law are frequently jumbled together in an often somewhat confused synthesis» (Schmitt [1928] 2008, 83). At this stage, Schmitt certainly saw this as an intolerable defect, but one that could not be remedied. On the contrary, in 1931-1932, Schmitt argued with determined jurisprudential pragmatism that the task of jurisprudence was to rid the Weimar Constitution of its compromise character. The life of the Republic depended on this crucial task. The constitution had to be made consistent with its original intentions so that it could provide clear political guidance where parliamentary politics had failed.

As he illustrated in less technical terms in *Legality and Legitimacy* (Schmitt [1932] 2004), in those years it had become clear that the Weimar Constitution was riven with an overt conflict that it was up to legal science to settle[4]. In its first part, the constitution embodied the model of the legislative state, in which constitutional norms are meant to regulate how laws are enacted, promulgated, and applied. The content-independent nature of this type of constitutional norms merely ensured that the organs of the Republic followed formal procedures whose outcomes depended entirely on the legislative activity of Parliament. This first part of the constitution guaranteed the legislature ample room for manoeuvre, as it allowed it to draft and amend the content of ordinary laws and, with a qualified majority, even the contents of the constitution itself. But the second part of the constitution, Schmitt argued, had an opposite purpose. It was entirely content-dependent, designed to protect a set of substantive contents from legislative procedures.

[4] As attested by another, later key text, *The Plight of European Jurisprudence*, Schmitt ([1950] 1990) did not change his mind on the leading role of jurisprudence.

Schmitt stated that the second part enjoyed a stronger normative force because it was the most precious sediment of the German historical and spiritual tradition. In Schmitt's words ([1932] 2004, 79): «It would be in itself conceivable and in no way an intrinsic logical contradiction to declare all substantive guarantees of the Second Principal Part sacred and inviolable. Only that would be a different state form than a parliamentary legislative state, which, indeed, the Weimar Constitution is still considered». He thought that bringing out the core of the constitution could change the situation of the Weimar Republic for the better. By conjuring Hauriou, he called this «superlégalité constitutionnelle» (Schmitt [1932] 2004, 57) – the idea that the constitution enjoys the status of higher law in that it expresses the basic principles of the political society (see Loughlin 2017, 163).

This sums up Schmitt's view of material democracy, which seems particularly close to political liberalism. The Weimar Republic was based on a consensus among the various segments of the majority population around a set of basic values. These were already present in the normative repertoire of the sub-state communities recognised by the state. The substance at the heart of the consensus was encapsulated in a few constitutional essentials in the form of fundamental rights and duties over which the legislature had no power. In this framework, the kind of constitutional allegiance that Schmitt theorised could indeed be described in terms of an overlapping consensus: the various comprehensive doctrines that populated the social world cultivated a notion of the good of their own, but they converged on a subset of principles and values that were embodied in the constitution and provided the material content for the latter. Needless to say, Schmitt did not adopt the notion of 'reasonableness', let alone 'justice as fairness'. Nor could one expect the German social fabric of the late 1920s to support the same principles and values as those found in late 20th-century American society. Nevertheless, Schmitt's material democracy and Rawls's political liberalism seem to agree both on what underpins the basic structure of society and on what secures institutional legitimacy.

5. *Closer than it seems*?

I would now like to address the numerous aspects that, according to Ferrara, separate Rawls from Schmitt so clearly that their conceptions of politics

can be unequivocally distinguished. First, however, a preliminary remark is in order. Ferrara's juxtaposition, as I have pointed out elsewhere in this text, conflates Schmitt's writings in a way that somewhat compromises the analysis and undermines its results – as if one were to conflate A T*heory of* J*ustice* with P*olitical* L*iberalism*. For reasons of exposition, which I can certainly understand, Ferrara isolates and brings together theoretical pieces from different phases, such as the sovereign decision in exceptional times of P*olitical* T*heology*, the friend-enemy distinction of T*he* C*oncept of the* P*olitical*, and the fundamental decision of C*onstitutional* T*heory*. As in the previous sections, however, I will refer to Schmitt's theory from 1928 to 1934. Again, this is not due to any exegetical preference. Rather, it was during this period that Schmitt developed a vision of politics which bears significant family resemblances to Rawls's political liberalism.

Another preliminary consideration is that I do not consider as structural all the various differentiating elements identified by Ferrara. Rather, some of the most relevant, as I will detail, look to me as the result of the different political orientations of Schmitt and Rawls. In other words, unless one wants to claim that Rawls is the only theorist of political liberalism as well as its designated interpreter, there can be more progressive and more conservative understandings of it, depending on how one wants to translate it into a complex of procedures and institutional agencies. If this is the case, Schmitt can be said to lean towards the more conservative end of the spectrum.

Having said that, I can now turn to Ferrara's analysis. He singles out and discusses seven aspects which, in his view, undermine any attempt to charge Rawls with a hidden Schmittianism. I will not address them in the order in which they appear in *Sovereignty Across Generations*, because some are interrelated, while others require separate discussion. In this respect, I will omit the seventh aspect for the reasons given above. Ferrara argues that, when the appropriate exceptional circumstances arise, the sovereign is the person who draws the line between friend and enemy, while her/his decision is as free from any form of institutional control as any activity of the constituent power. Such a constitutive act, like the exception in which it occurs, is claimed to be above the law, even above the higher law of which I spoke in the previous section. This reading, however, merges various Schmitt's claims over time. As far as this exceptional source of law is concerned, in the period of his overall re-

thinking of decisionism, he espoused two basic theses: (1) any power to make laws or to amend the constitution is in any case bound by the latter; (2) the constitution, as the supreme source of legitimacy, must be made impermeable, at least in its minimum organisational content, to the action of any political body, including the President of the Republic during emergencies. As an illustration of this, it is worth recalling Schmitt's words ([1932] 2004, 75) when, in *Legality and Legitimacy*, he discussed the risks of an unfettered conception of the powers conferred on the President by Article 48:

> The organizational provisions of the Weimar Constitution are not merely impinged on through this interpretation, which is supported by the prevailing reading in legal theory and practice. They are, rather, essentially changed. [...] All these organizational provisions are now no longer (according to G. Anschütz's coinage) 'dictator-proof', because one finds in Article 48, 2, an extraordinary lawmaker equivalent to the simple legislature. In this case, one should at least acknowledge that an organizational minimum must remain inviolable both for the federation and for the preservation of the Land governments, if the entire constitution is not to be overturned by Article 48.

In short, for Schmitt, first came the constitution, then the executive power of the President, and finally the legislative power. But neither the presidency nor the parliament could be considered free from any form of institutional control, while both bodies were forbidden to tamper with the founding core of the constitution on pain of the collapse of the state as the institution of institutions. If in the early 1920s, Schmitt had entertained the idea that there could be a truly sovereign power, superior to any constitutional constraint, from the mid-1920s he distanced himself from such a naive position. Based on this, I would like to discuss the remaining elements of differentiation identified by Ferrara, starting with the first.

With unquestionable philosophical dexterity, Ferrara (2023, 116) grasps Schmitt's notion that «constitution-making is the product of a constitution-making power that needs no authorization and by establishing a form of government or regime unifies the polity – which has already come together by virtue of a contract, pact, or covenant – around a political order responsive to some substantive values». So far, Ferrara's reconstruction nicely reflects Schmitt's take on the matter. However, I

strongly disagree with him when he maintains that the constituent process "occurs against the background of a shared conception of politics, the state, and government, which is comprehensive and enjoins the consociates to partake of some 'cultural artefact' (a philosophical doctrine, a popular ideology, a politicized religious message) purportedly enclosing 'the whole truth'" (Ferrara 2023, 117). I think this juncture combines what Schmitt argued as a constitutionalist lawyer with what he believed as a conservative right-winger.

While it is true that, in line with his deep-seated political convictions, Schmitt hoped for the highest degree of social homogeneity as the most reliable guarantee of political stability, as a constitutional lawyer he adopted an approach inspired by jurisprudential pragmatism. In this regard, he was fully aware that pluralism is an inescapable fact of social life, such that it profoundly affects the dynamics of constitution-making and its material results[5]. P*ace* Ferrara, in Schmitt's legal analysis, political unity begins with an unavoidable division between the worldviews of the various social forces – a division that must be gradually reduced for the sake of long-term political stability. To this end, the progressive consolidation of constitutional values and principles must be achieved through the political leadership of the executive and the corrective intervention of a judiciary loyal to the constitution.

Even more importantly, the very definition of the Weimar Constitution as the outcome of a compromise between different political programmes and conflicting value orientations indicates that Schmitt was looking for a firm homogeneity around certain constitutional essentials, not around ultimate truths – on which he did not believe that any political institution, however sovereign, could have a say. His theoretical aim was to show how, in the Weimar constitution-making process, the major social groups converged on a set of fundamental values and general principles that were embodied in the second part of the constitution. Nor, on the other hand, did he ever claim that the prior overcoming of the epistemic and ethical divide was a necessary condition

[5] That pluralism is an inextinguishable feature of the social, and certainly a source of danger to the state, is a Schmittian thesis clearly inferable from what he wrote in a short but decisive 1930 essay, *State Ethics and the Pluralistic State* (Schmitt [1930] 2000).

for constitution-making to take place. For this reason, concerning his political theory in the years 1928-1934, I think it can be argued that: (1) it is far from comprehensive since it is limited to the principles and substantive values of the second part of the constitution; (2) it is internally pluralised in a non-trivial sense since the core of consensual matters emerges from the overlap of a constellation of broader, comprehensive, often rival conceptions (such as the Lutheran and Catholic churches, or the Christian Centre and the centre-left social democratic party).

The second element of differentiation has to do with the political: while Rawls considered it to be a special domain with specific features, Schmitt saw it as ubiquitous since it can potentially manifest itself in any other domain, such as religion, morality, or economics. However, despite all appearances, I do not see this as an element of conflict with Rawls. I cannot prove this in detail, but the fact of the matter can be easily summarised as follows. The power to decide as to who the enemy is, or rather, when it is legitimate for civilians to kill and be killed, lies with the state, and must never be left to the disposal of the various sub-state groups. Should any non-state collective actor decide to resolve a conflict, e.g., a religious or an economic one, by resorting to violence, the entire scaffolding of the state would collapse. According to Schmitt, in societies characterised by a high degree of differentiation, the danger of the political manifesting itself in the guise of a violent struggle between groups is so high that the state is called upon to exert an even more inflexible and capillary action of internal depoliticisation. In a way, one could say that, for Schmitt, precisely insofar as the political is potentially ubiquitous, it must remain a special realm with specific features. This is to say that the state must be the only actor legitimised to declare both external and internal enemies. His heartfelt warning in *The Concept of the Political* is that the political must be kept firmly anchored in the hands of state authorities if it is to remain within a specific and legally circumscribed realm.

This leads us to the sixth element of differentiation identified by Ferrara. He claims the political in Schmitt is eminently subjective. It is the sovereign decision that 'elects' a given collective entity as the public enemy, whose mere existence poses a threat to the existence of the friend. He then continues to say:

> [T]he only key to assessing a given sovereign act of line-drawing which separates these 'friends' from those 'enemies' is its actual success (i) in rallying a people around a given representation of the line separating it from its public enemy and (ii) in mobilizing political energy in defending that line. There is no normative foothold, in the Schmittian paradigm, for raising the question whether a certain enmity should be declared in existence or another denied any real import (Ferrara 2023, 121).

Without a shadow of a doubt, Ferrara is right on the money here. The only criterion for judging the success of this act of line-drawing lies in its performative effect, whereby the friend begins to see a given collective entity as the enemy. Nevertheless, one must bear in mind what I have just argued. For Schmitt, the greatest danger is that the political could be revived within the boundaries of the state and that a group hostile to legitimate institutions could take it upon itself to instruct its members as to who their enemy is and when they can go to war to protect the existence of the group. Nor should it be forgotten that, in the inter-war period, pieces of revolutionary syndicalism, subversive organisations, irregular armies, and extremist parties from the right and the left could out of the blue proclaim themselves the fundamental political entity and declare war on the state. Schmitt's warning was about the ever-present danger that antagonism within the state could bring about its demise – antagonism which, for him, was and should remain a peculiar and ineradicable feature of the international political scenario.

I can now turn to the two elements of differentiation, the third and fourth, which I find more convincing. However, as I anticipated, I do not think they amount to structural differences, since they depend on the divergent political orientations of Schmitt and Rawls, although they continue to agree on the core of a common theoretical-political view. According to Ferrara (2023, 118), the political is permanently divisive, thus tending towards a 'static divisiveness'. The dividing line between friends and enemies "may shift at any time, but it shifts as an effect of the happenstance modification of the sovereign will that commands constituent power, not as the likely, though by no means necessary, outcome of a dynamic intrinsic to the political". This characteristic of the political is undeniable. Certainly, as I emphasised above, the political can hardly shift by dint of a sovereign act, since a much more complex dynamic is

required for the relationship between sub-state groups and the state to be altered. Despite this, Ferrara is right to say that for Schmitt politics is certainly not a process of progressively closer adherence to liberal values and a broadening of the base of the overlapping consensus.

Likewise, on the comprehensive doctrines that do not fit into the constitutional framework, Schmitt is rather blunt: they must be excluded. As he made clear in the first corollary to *The Concept of the Political*, originally written in October 1931, the state cannot afford to be neutral. While discussing "Neutrality in the sense of parity, i.e. equal admission of all eligible groups and orientations" (Schmitt 2018, 263), he unhesitatingly stated that "neutrality in the sense of parity is only feasible vis-à-vis a relatively small number of entitled groups and only with a relatively undisputed distribution of power and influence among the partners entitled to parity. Too large a number of groups claiming equal treatment, or even too great an uncertainty in the assessment of their power and importance, i.e. uncertainty in the calculation of the quota to which they are entitled, prevents both the implementation of the principle of parity and the evidence of the principle on which it is based" (Schmitt 2018, 263).

Undeniably, the decisionist element of Schmitt's view reappeared in the early 1930s under the guise of straightforward exclusion. It is no longer the miraculous decision of the demiurgic sovereign, but it still bears traces of decisionism in a properly Schmittian sense: the decision needs no justification whatsoever, nor would it become justifiable if one tried to find a normative basis for it. It behoves the state to decide which groups are admissible and to exclude the inadmissible ones – naturally, not by sheer violence, but, for example, by denying them the public-law advantages and benefits that are guaranteed to state-sponsored groups. A main criterion for inclusion remains the groups' support for the material content of the consensus reached during the constitution-making process on fundamental principles and values.

Nevertheless, as I have suggested, these two elements of differentiation between Schmitt and Rawls do not depend on core aspects of their political theories, but on the divergence of their political convictions. Neither of them offered a clear treatment of the so-called "containment" of unadmitted or unreasonable doctrines. Schmitt believed that the state should pivot on the convergence of few societal groups

on constitutional essentials because the disproportionate pluralisation of worldviews is fated to generate conflict. And yet he never bothered to justify such an unwarranted position. Rawls believed in the possibility of increasing the scope of the overlapping consensus, as the conditions for fair cooperation are gradually accepted even by the most reluctant and sceptical citizens. But, as the critics mentioned above pointed out, it is unclear what should happen to those who stubbornly refuse to converge on the ultimate normative value of constitutional essentials.

6. *Concluding remarks*

Schmitt was a deeply conservative thinker who distrusted parliamentary representation and saw pluralism as a permanent threat to political stability. In this respect, no one could reasonably say that he shared Rawls's interest in understanding how to accommodate the plurality of worldviews in a free society. I am convinced, however, that they shared a primary concern: they feared the potential clash of religious and moral views claiming to express the ultimate epistemic and pragmatic truths. To this end, they both theorised that the political should be defined negatively, as a space that is 'depoliticised' in a Schmittian sense, in contrast to other domains of values and judgements which are the concern of religion, economics or practical reason.

In addition, both believed that the stability of a constitutional democracy basically depends on citizens and their political officials sharing a conception of political justice in terms of which constitutional essentials could be understood, evaluated, and reformed by constitutional means. Like Rawls, Schmitt too thought that the government and the political process must honour and express a commitment to basic freedoms and fundamental principles – though he probably had a different idea than Rawls about what their content should be. But again, this has to do with Schmitt's political leanings towards the conservative right, not with any structural theoretical discrepancy with political liberalism.

In the end, there is nothing to stop anyone who wants to take up Schmitt's burdensome legacy from saying that, once legal scholars have juristically purged the constitution of its contradictions as a compro-

mise, it can be described as the most reasonable political conception of justice in that particular society. The most reasonable of all the available conceptions, which the state allows only on the basis of the existing constitution and its material content. Thus, once one rejects the flawed popularisation of Schmitt that makes his theory a mishmash of unbounded decisionism and political antagonism, Ferrara's convincing interpretation of Rawls's constitutional thought is an arrow in the quiver of those who see these towering figures of 20th century political theory in the same mould.

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