

## The Soul of the State

### The Question of Constitutional Identity in Carl Schmitt's *Verfassungslehre*

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The state is constitution, in other words, an actually present condition, a *status* of unity and order. The state would cease to exist if this constitution, more specifically, this unity and order, ceased to exist. The constitution is its 'soul,' its concrete life, and its individual existence.

Carl Schmitt<sup>1</sup>

#### 2.1 INTRODUCTION

In this chapter I seek to contribute to the material study of constitutions by revisiting Schmitt's argument about constitutional identity – which he developed in *Verfassungslehre*. In his magnum opus, published in 1928, Schmitt took issue with liberalism's failure to take seriously the social requisites of constitutional democracy. His was a constitutional theory concerned with the 'soul' of the state. Like Hermann Heller on the left, Schmitt was keen to revive in Weimar Germany a tradition of political thought in which arguments from *sensus communis* were the constitutional norm. His was an attempt to stop the influx of 'mechanical and corpuscularian philosophies' into the theory and practice of law, a development that the publication, in 1637, of René Descartes's *Discourse on the Method of Rightly Conducting One's Reason and Seeking Truth in the Sciences*, had set off.<sup>2</sup>

By addressing the question of constitutional identity in Schmitt's political jurisprudence, I chart what I call *affective constitutionalism*. In my effort to relate mind to matter, I rely on Raymond Williams, the literary theorist, and develop an argument about constitutions as 'structures of feeling'.<sup>3</sup> Williams introduced this concept in *Marxism and Literature*. There, he laid the intellectual foundations for a cultural materialism by way of a trenchant critique of Karl Marx's theory of history.<sup>4</sup> By making this approach to materiality usable for constitutional theory, I hope to bring phenomenology – the philosophy of experience – to the study of constitutional law.<sup>5</sup>

<sup>1</sup> C. Schmitt, *Constitutional Theory*, J. Seitzer, trans. and ed. (Duke University Press, 2008), 60.

<sup>2</sup> R. Serjeantson, 'The Soul', in D. M. Clarke and C. Wilson (eds.), *The Oxford Handbook of Philosophy in Early Modern Europe* (Oxford University Press, 2011), 129.

<sup>3</sup> R. Williams, *Marxism and Literature* (Oxford University Press, 1977), 128–35.

<sup>4</sup> *Ibid.*, 5.

<sup>5</sup> For a broader argument about the phenomenology of the rule of law, see J. Meierhenrich, 'What the Rule of Law Is . . . and Is Not', in J. Meierhenrich and M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), 569–621.

## 2.2 AFFECTIVE CONSTITUTIONALISM

‘To Schmitt’s mind’, as John McCormick writes, ‘the formalism of liberalism’ was a technology of rule.<sup>6</sup> The way Schmitt saw it, the procedural constitutionalists in Weimar Germany were devaluing the ‘concept’ (*Begriff*) of the constitution. He faulted them, among other things, for avoiding the question of constitutional identity. By running roughshod over its soul, he was certain, they were failing the state.

Schmitt was a political existentialist par excellence. He had no patience for the excessive legalism en vogue in the 1920s. Everything was a question of identity for Schmitt. Constitutional life was about belonging – or not. In the dying days of the Weimar Republic, Schmitt’s constitutional theory, like his institutional theory more generally, was subject to a cumulative radicalisation. It became ever more exclusionary – and divisive.<sup>7</sup> Schmitt’s thought in the interwar period combined ‘existentialism’s “intensity” with militarism’s “struggle”’.<sup>8</sup> Because the *telos* of politics for Schmitt was the pursuit of an ‘intensive life’ (*intensives Leben*), any *Verfassungslehre* worthy of the name, or so he felt, had to be vitalist.<sup>9</sup> By flying the flag for facticity in Weimar Germany’s *Methodenstreit*, the jurisprudential debate in the 1920s among constitutional theorists over the separation of law and morals, Schmitt outed himself as a constitutional materialist, as Marco Goldoni and Michael Wilkinson use the term.<sup>10</sup>

In drawing our attention to ‘the underlying material context’, Goldoni and Wilkinson foreground ‘the basic political and social conditions of possibility of constitutionalism’ as well as ‘the dynamics of constitutional change’.<sup>11</sup> The material determinants of constitutions are various. Taking materiality seriously is *not* the same as being wise to the politics of constitutionalism, however. It requires *more* than ‘merely supplementing judicial with political analysis’.<sup>12</sup> Not *all* materialist critiques treat the political ‘as a superstructural phenomenon determined by productive relations’.<sup>13</sup> Goldoni and Wilkinson insist, as I do, that the study of the material constitution must not be reduced ‘to the study of the underlying economic base’.<sup>14</sup>

### 2.2.1 The Concept of the Material

That it is possible to reclaim the idea of materiality from Marxists – to think materially *without* reference to base and superstructure – Costantino Mortati showed in his constitutional thought. Inspired by Paul Laband’s disaggregation of the concept of law (*Gesetz*) in the nineteenth century, Mortati, in the 1930s, began to think about ‘the long arc of legality’ by bringing sociality

<sup>6</sup> J. P. McCormick, ‘Three Ways of Thinking “Critically” about the Law’ (1999) 93 *American Political Science Review* 413, 415.

<sup>7</sup> On the transformation of his institutional thought from ‘pragmatist institutionalism’ to ‘racial constitutionalism’ to ‘extremist institutionalism’, see J. Meierhenrich, ‘Fearing the Disorder of Things’, in J. Meierhenrich and O. Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016), 171–216.

<sup>8</sup> R. Slagstadt, ‘Liberal Constitutionalism and Its Critics: Carl Schmitt and Max Weber’, in J. Elster and R. Slagstadt (eds.), *Constitutionalism and Democracy* (Cambridge University Press, 1988), 115–16.

<sup>9</sup> C. Schmitt, *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* [1933] (Duncker & Humblot, 1994), 226.

<sup>10</sup> M. Goldoni and M. Wilkinson, ‘The Material Constitution’ (2018) 81 *Modern Law Review* 567. I hasten to add that Schmitt’s understanding of facticity was hardly straightforward. For an insightful discussion, see G. Meuter, ‘Zum Begriff der Transzendenz bei Carl Schmitt’ (1991) 30 *Der Staat* 483.

<sup>11</sup> Goldoni and Wilkinson, ‘The Material Constitution’, 568.

<sup>12</sup> *Ibid.*, 569.

<sup>13</sup> Chapter 3 from this handbook, 75.

<sup>14</sup> Goldoni and Wilkinson, ‘The Material Constitution’, 587.

into play.<sup>15</sup> Intrigued by Laband's idea of law 'in a material sense' ('im materiellen Sinne'), especially the German thinker's verbiage, he began to contemplate the analytical possibilities of this neologism – of theorising the interplay between formality and materiality. In 1940, Mortati shared the product of his intellectual labour. He called it '*la costituzione in senso materiale*'.<sup>16</sup>

With his theory of the material constitution, Mortati stood Laband on his head. He subverted the latter's quest for a *Staatsrechtswissenschaft*, a science of constitutional law. With Italy's constitutional order as his reference, Mortati argued *against* Labandian legal positivism – and that of like-minded theorists of public law such as Carl Friedrich von Gerber. The so-called Gerber–Laband School was intent on purging from the theory and practice of constitutional law 'all extraneous matters – history, politics, and ideas from private law'.<sup>17</sup> The ideology of its legalism was anti-materialist, which is what irked Mortati.

Laband and Gerber, not unlike Mary Wollstonecraft in England, imagined that the wheels of government – including the wheel of law – were turning 'like the wheels of any other machine', that is, autonomously.<sup>18</sup> This constitutional imagination did not convince Mortati. To him the imaginary constitutions it conjured were a little too perfect. They had little to do with the life of constitutional law he knew. Not unlike Eugen Ehrlich, whose 1913 treatise on the sociology of 'living law' ('*lebendes Recht*') a few decades earlier had shaken up pure theorists in the Kelsenian mould, Mortati wanted to explore the 'grey area of constitutional law'.<sup>19</sup> Like Schmitt and Heller, who – along with Rudolf Smend – provided the inspiration, Mortati felt that the value-free, logical method of jurisprudence was wanting. Constitutional law was not machine learning, he averred.

On Mortati's political conception of constitutional law, 'the *nomic* is intrinsic to the material', in the sense of 'a peculiar conformation of the latter that triggers the former'.<sup>20</sup> On this reading of Mortati's constitutional thought, 'a certain aggregate of social forces' created the conditions for constitutional law 'to emerge and work effectively'.<sup>21</sup> The 'social forces' Mortati had in mind, however, were not just – or even primarily – the productive forces so central to Marx's theory of history. Mortati was more realistic, in all senses of the term, about the material foundations of life – and so was Raymond Williams.

For Williams, culture *was* matter. He thought of it as 'practical consciousness', as 'a kind of feeling and thinking' that, rooted in everyday life, was 'social and material'.<sup>22</sup> Taking a leaf from Williams, I argue that constitutions, for Schmitt, were 'structures of feeling', affective parameters to choice:

The term is difficult, but 'feeling' is chosen to emphasize a distinction from more formal concepts of 'world-view' or 'ideology'. It is not only that we must go beyond formally held and

<sup>15</sup> Related, see D. Dyzenhaus, *The Long Arm of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press, 2021), whose phrase I have borrowed.

<sup>16</sup> P. Laband, *Das Staatsrecht des Deutschen Reiches* (Laupp, 1878), vol. II, 1; C. Mortati, *La costituzione in senso materiale* (Giuffrè, 1940).

<sup>17</sup> M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010), 191.

<sup>18</sup> M. Wollstonecraft, *An Historical and Moral View of the Origin and Progress of the French Revolution and the Effect It Has Produced in Europe* (J. Johnson, 1794), 404.

<sup>19</sup> E. Ehrlich, *Grundlegung der Soziologie des Rechts*, M. Rehbinder, ed. [1913], 4th ed. (Duncker & Humblot, 1989); L. Rubinelli, 'Costantino Mortati and the Idea of Material Constitution' (2019) 40 *History of Political Thought* 515, 516. The Kelsenian mould was still new at the time. Kelsen had only just presented it in H. Kelsen, *Hauptprobleme der Staatsrechtslehre* (Mohr, 1911). But, as Stanley Paulson has shown, Kelsen's early constructivism is indebted to the 'juridico-scientific' tradition of the Gerber–Laband School. S. L. Paulson, 'Hans Kelsen's Earliest Legal Theory: Critical Constructivism' (1996) 59 *Modern Law Review* 797, 798, 799–80.

<sup>20</sup> M. Croce and M. Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Stanford University Press, 2020), 6. Emphasis added.

<sup>21</sup> *Ibid.*, 6.

<sup>22</sup> Williams, *Marxism and Literature*, 130, 131.

systematic beliefs, though of course we have always to include them. It is that we are concerned with meanings and values as they are actively lived and felt, and the relations between these and formal or systematic beliefs [...].<sup>23</sup>

The question of constitutional identity was a material concern for Schmitt.<sup>24</sup> By reconstructing his cultural materialism, I lay bare the constitutional sentiments in *Verfassungslehre*.<sup>25</sup>

Throughout the 1920s, Schmitt was seized by the task of understanding the affective life of constitutions – of interpreting, to borrow from Oliver Wendell Holmes, Jr., ‘the feelings which make the content of logic’.<sup>26</sup> Whatever we make of Schmitt’s dangerous mind, he made great strides in studying constitutional sentiments. *Verfassungslehre* is a manifestation of cultural materialism *avant la lettre*. His constitutional thought is relevant to thinking about the material constitution in the twenty-first century. Why? Because arguments for – and from – affective constitutionalism shed light on the social origins of dictatorship and democracy. The illumination of material relations is apposite at a time when, as Goldoni and Wilkinson write, ‘formal constitutionalism is beginning to look divorced from constitutional reality, and constitutional order is, once again, threatened by radical change’.<sup>27</sup> By approaching constitutionalism phenomenologically – from the direction of culture – mine is a contribution to the debate over the state of constitutional democracy.

### 2.3 HERDER’S VOLK

Schmitt recognised that, for constitutional democracy to thrive and survive, it needed to be meaningful. Effective constitutions were *affective* constitutions. They required substance, not just form, as he insisted in *Verfassungslehre*. They needed to be vitalist, not voluntarist. Constitutions, to him, were life-affirming institutions. His was an argument for vernacular constitutionalism.<sup>28</sup> Pulsating with the lifeblood of a people, Schmitt thought of a constitution as the autochthonous product of an imagined community – and also its social glue. In his hopeful vision, constitutions turned citizens into soulmates.

Schmitt’s *Verfassungslehre* – like Hermann Heller’s *Staatslehre* – can be traced to the organicist tradition Johann Gottfried Herder established in the eighteenth century.<sup>29</sup> As Isaiah Berlin once put it, as if writing with our two protagonists in mind,

all defenders of the local against the universal, all champions of deeply rooted forms of life, both reactionary and progressive, both genuine humanists and obscurantist opponents of scientific advance, owe something, whether they know it or not, to the doctrines which Herder [...] introduced into European thought.<sup>30</sup>

<sup>23</sup> Ibid., 132.

<sup>24</sup> Goldoni and Wilkinson, ‘The Material Constitution’, 568.

<sup>25</sup> Space constraints disallow a closer engagement with Williams. For a comprehensive analysis, with particular reference to German history, see J. Meierhenrich, *The Sentimental Constitution*, Unpublished book manuscript, LSE, December 2021. For a different approach, see A. Sajó, *Constitutional Sentiments* (Yale University Press, 2011).

<sup>26</sup> Holmes’s formulation appeared in a critique of Christopher Columbus Langdell, the dean of Harvard Law School, whose formalism he regarded with disdain.

<sup>27</sup> Goldoni and Wilkinson, ‘The Material Constitution’, 597.

<sup>28</sup> On vernacular constitutionalism, see J. Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000* (Cambridge University Press, 2008), 249–64.

<sup>29</sup> On Heller’s *Staatslehre*, see Meierhenrich, *Sentimental Constitution*.

<sup>30</sup> I. Berlin, *Three Critics of the Enlightenment: Vico, Hamann, Herder*, H. Hardy, ed. [1976] (Princeton University Press, 2000), 201.

### 2.3.1 The Constitution of Peoples

The *Volk* makes the constitution, and the constitution makes the *Volk*, or so Schmitt's constitutional theory seemed to imply. His conception of constitutional democracy was exclusionary. It rested on the quality of belonging to a *particular* people ('*zu einem bestimmten Volk*').<sup>31</sup> What precisely facilitated belonging to this *Volk* – and thus the constitution of peoples – was, according to Schmitt, the stuff of culture, notably 'ideas of common race, belief, common destiny, and tradition'.<sup>32</sup> Schmitt was not the first thinker to draw attention to the matter of constitutional identity – and to its cultural determinants. We would also do well to remember that the concept of the *Volk* in German constitutional thought did not always have the racial connotations it took on during the Nazi debate about the *Rechtsstaat*.<sup>33</sup> It has been as fiercely contested as other essentially contested concepts. Indeed, Herder, who invented the *Volk* theorem, was 'an eighteenth-century humanitarian and liberal'.<sup>34</sup>

Schmitt's organicism – like Heller's and that of other thinkers who were disillusioned by the rise of formalism in the theory and practice of nineteenth-century constitutionalism – can be traced back to Herder, and to the German historicist tradition more generally. In Herder's Germany, there existed 'little evidence of a collective sense of national identity'.<sup>35</sup> Germans were still a proto-nation in the eighteenth century. Dispersed across 300 odd states – most of them micro-states, or *Kleinstaaten*, that belonged to the Holy Roman Empire – they did not think of themselves as possessed of a common identity.<sup>36</sup> A we-feeling, they did not have. Schmitt's 'status of unity and order' was inconceivable.

It was Herder, more than anyone else, who ushered in 'a new period of political consciousness'.<sup>37</sup> In thinking about the constitution of peoples, he turned the '*Volk*' into a social imaginary. While it was Ferdinand Tönnies who, in 1887, made the idea of community famous, it was Herder who first made it conceivable.<sup>38</sup> This involved an analytical two-step. The first step he took was theoretical, the second conceptual. Herder, as F. M. Barnard has shown, first 'established the principle that language was the most natural and hence indispensable basis of socio-political association'.<sup>39</sup> For him, a community of language was a major organ in the body politic. 'The organ of thought' is what he called it.<sup>40</sup> *Auch eine Philosophie der Geschichte*, Herder's 1774 tract, anticipated many of historicism's key themes: 'that we should not judge the

<sup>31</sup> C. Schmitt, *Verfassungslehre* (Duncker & Humblot, 1928), 227. Emphases omitted.

<sup>32</sup> Schmitt, *Constitutional Theory*, 258.

<sup>33</sup> On this little-known – but highly consequential – debate in Nazi jurisprudence, see J. Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford University Press, 2018), 95–158. On the *Volk* discourse more generally, see J. Retterath, 'Was ist das Volk?' *Volks- und Gemeinschaftskonzepte der politischen Mitte in Deutschland 1917–1924* (de Gruyter, 2016).

<sup>34</sup> C. J. H. Hayes, 'Contributions of Herder to the Doctrine of Nationalism' (1927) 32 *American Historical Review* 719, 734. On this point, see also I. Berlin, *Three Critics of the Enlightenment: Vico, Hamann, Herder* (Princeton University Press, 2013), 179–82; and, more specifically, F. M. Barnard, 'The Hebrews and Herder's Political Creed' (1959) 54 *Modern Language Review* 533.

<sup>35</sup> F. M. Barnard, *Herder's Social and Political Thought: From Enlightenment to Nationalism* (Clarendon Press, 1965), 29.

<sup>36</sup> On the institutional design of this sprawling empire, with particular reference to its German-speaking population, see, most recently, B. Stollberg-Rilinger, *The Holy Roman Empire: A Short History*, Y. Mintzker, trans. (Princeton University Press, 2018).

<sup>37</sup> Barnard, *Herder's Social and Political Thought*, 30.

<sup>38</sup> F. Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie* [1887] (Wissenschaftliche Buchgesellschaft, 1979).

<sup>39</sup> Barnard, *Herder's Social and Political Thought*, 30.

<sup>40</sup> Ibid.

past by the standards of the present; that each culture is an individual and unique whole; that each age has its own standards of happiness and virtue; that the past should be relived and *felt* rather than just described and explained'.<sup>41</sup>

Schmitt's variations on these themes make an appearance in many of his writings, also in his *Verfassungslehre*. Notwithstanding his moody critique, in *Political Romanticism*, of the oeuvres of Friedrich Schlegel and Adam Müller, Schmitt's debt to Herder and the organicist tradition is undeniable. We must not take Schmitt's dismissal of 'configurations of affect' at face value.<sup>42</sup> As so often, his polemic was rash and the analysis on which he based it perfunctory. As Guy Oakes, his translator, remarked about *Political Romanticism*, 'it is the most contentious of all Schmitt's books, the work in which he embraces the *j'accuse* role with an unqualified enthusiasm'.<sup>43</sup> The charge that Schlegel and Müller 'clothe affect with philosophical and scientific raiments and words rich in associations' applies equally to Schmitt.<sup>44</sup> He was no less guilty than Schlegel and Müller, to the extent that they were, of clothing affect, notably in his constitutional theory.

Herder was adamant that 'to empathize with the entire nature of a soul', one must 'enter into the age itself, follow the compass'.<sup>45</sup> To understand the constitution of peoples, he told his readers, 'feel your way into everything – only then will you be on your way to understanding the word' – and the world.<sup>46</sup> Herder's philosophy was of a subjective variety. It stressed the contingent influence of physical and historical circumstances upon national development. His cultural nationalism, in this sense, was a cultural materialism. For him, a *Volk* was made of mind *and* matter. '[S]o transfiguring the word *Volk* that it became the radiation-point in the nineteenth century for the new gospel of nationalism', as one of Schmitt's contemporaries put it just before the publication of *Verfassungslehre*, was Herder's 'most impressive contribution'.<sup>47</sup> It was also his most lasting. Of particular relevance to Schmitt's constitutional theory, however, is another aspect of Herder's cultural materialism: its exclusionary thrust. 'In clear antithesis to the patriotism of the Enlightenment, which on principle kept its borders open for communication, the Romantic concept of the nation', as Bernhard Giesen writes, closed 'the borders to outsiders. Here membership in a nation approaches a primordial significance'.<sup>48</sup>

## 2.4 SCHMITT'S VERFASSUNG

When Herder called his imagined community a *Volk*, he attributed to language the power of affect – the ability to constitute a people. By so doing, he laid 'the ideological foundations of a new dogma in the dialectic of argumentation', a dogma that Schmitt and Heller sought to better in the twentieth century. Both thought highly of the *Volk*, albeit in different ways. In his constitutional theory, Schmitt came at it from the right, Heller took a stab at the question of constitutional identity from the left.

<sup>41</sup> F. C. Beiser, *The German Historicist Tradition* (Oxford University Press, 2011), 132. Emphasis added.

<sup>42</sup> C. Schmitt, *Political Romanticism*, G. Oakes, trans. [1919] (MIT Press, 1986), 107.

<sup>43</sup> G. Oakes, 'Translator's Introduction', in Schmitt, *Political Romanticism*, xiii.

<sup>44</sup> Schmitt, *Political Romanticism*, 107. For a discussion, see J. Meierhenrich and O. Simons, 'A Fanatic of Order in an Epoch of Confusing Turmoil': The Political, Legal, and Cultural Thought of Carl Schmitt', in J. Meierhenrich and O. Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016), 3–70.

<sup>45</sup> J. G. Herder, 'Another Philosophy of History for the Education of Mankind', in *Another Philosophy of History and Selected Political Writings*, I. D. Erigenis and D. Pellerin, trans. [1774] (Hackett, 2004), 24. Emphases omitted.

<sup>46</sup> *Ibid.*, 24. See also J. G. Herder, *On World History: An Anthology*, H. Adler and E. A. Menze, eds. (Routledge, 1997).

<sup>47</sup> Hayes, 'Contributions of Herder to the Doctrine of Nationalism', 722.

<sup>48</sup> B. Giesen, *Intellectuals and the Nation: Collective Identity in a German Axial Age*, N. Levis and A. Weisz, trans. (Cambridge University Press, 1998), 96.

What galvanised them both was the crisis of parliamentary democracy. Then, as now, constitutional faith was on the wane.<sup>49</sup> However, during the 'twenty years' crisis' of the twentieth century, the situation was more dire, certainly in Europe, than it is today, haunted as the continent was by all kinds of collective violence, certainly in Germany.<sup>50</sup> The spectre of democratic breakdown hung in the air – and Schmitt was smelling constitutional rot.<sup>51</sup> By 1932, he recalled years later, this crisis 'already involved the concept of the constitution itself'.<sup>52</sup> His publication in that year of *Legality and Legitimacy*, Schmitt insisted after the war, 'was a despairing attempt to safeguard the last hope of the Weimar Constitution, the presidential system, from a form of jurisprudence that refused to pose the question of friend and enemy of the constitution'.<sup>53</sup> Although most of his contemporaries dismissed his argument from affective constitutionalism as 'political fantasy law', he still believed, in the 1950s, that his early constitutional writings possessed a desperately needed 'intensity' which they communicated 'in a constitutional history sense'.<sup>54</sup> This reminiscence is indicative, I believe, of Schmitt's preoccupation with constitutional affect. He remained convinced that constitutional effectiveness hinged on constitutional sentiments.

This conviction, this constitutional faith, Schmitt felt, had been lost in the nineteenth century. As always with Schmitt, legal positivism was the culprit. In the interwar period, '[t]his thoroughly dominant theory was no longer conscious of its own historical and theoretical presuppositions'.<sup>55</sup> To remedy this supposed failing, Schmitt's constitutional theory conceived of the constitution as 'a special type of political and social order'.<sup>56</sup> The adjectives are telling: 'special', 'political', 'social'. To repair the constitutional framework of Weimar's *Reichsverfassung*, and to reclaim the concept of the constitution from Kelsen in particular, he 're-mystifies the state as a polity that is instilled with the autonomous will of the people', the *Volk*.<sup>57</sup> Schmitt did 'not accept', as Jo Murkens shows, 'Kelsen's equation of the constitution with the normative legal order of the state, which ignores its factual, sociological side', which is to say: its materiality.<sup>58</sup> For Schmitt, 'all constitutional aspects, such as union, order, goals (*telos*), life, soul, are factual'.<sup>59</sup> This is the reason why, for Mortati 'Schmitt's institutional theory was the cradle of a compelling notion of materiality'.<sup>60</sup>

Re-enter Herder. In language that reminds of Schmitt's verbal fusillades in the twentieth century, Herder had in eighteenth-century Prussia complained about the 'dullness' and 'mechanical regimentation' of life.<sup>61</sup> In *Political Theology*, Schmitt took a leaf from Herder's book. This early treatise gives a clear indication of the nature – and the radicality – of Schmitt's

<sup>49</sup> M. A. Graber, S. Levinson and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018).

<sup>50</sup> For a recent account, see M. Jones, *Founding Weimar: Violence and the German Revolution of 1918–1919* (Cambridge University Press, 2016).

<sup>51</sup> The term is J. M. Balkin's. See J. M. Balkin, *The Cycles of Constitutional Time* (Oxford University Press, 2020).

<sup>52</sup> C. Schmitt, 'Afterword (1958)', in *Legality and Legitimacy*, J. Seitzer trans. and ed. [1932] (Duke University Press, 2004), 95.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> Schmitt, *Constitutional Theory*, 60.

<sup>57</sup> J. E. K. Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford University Press, 2013), 41.

<sup>58</sup> *Ibid.*, 45.

<sup>59</sup> *Ibid.* Emphasis added.

<sup>60</sup> Chapter 15 by M. Croce, 224.

<sup>61</sup> Barnard, *Herder's Social and Political Thought*, xii.

approach to materiality. Although his argument from constitutional identity found its most cogent expression in *Verfassungslehre*, his earlier book already foreshadowed Schmitt's affective constitutionalism. Already in 1922, he was romanticising 'the power of real life', an affective force so potent that it 'breaks through', as he put it, 'the crust of a mechanism that has become torpid by repetition', by which he meant the 'liberal constitutionalism' of Kelsen and other misguided 'neo-Kantians' with their 'juristic rationalism'.<sup>62</sup> He saw himself as a philosopher of 'concrete life'.<sup>63</sup> The reference to life in *Political Theology* is 'absolutely critical', according to David Bates.<sup>64</sup> It makes plain that, for Schmitt, a political community 'was very much like the organism in its self-justifying, purely existential orientation'.<sup>65</sup> We can take Schmitt's reference to Søren Kierkegaard as further evidence of the proposition that he was on a mission to make affect safe for constitutionalism.<sup>66</sup> 'Endless talk about the general becomes boring', Schmitt opined, in a swipe at Kelsen.<sup>67</sup> Why? '[B]ecause the general is not thought about with passion but with a comfortable superficiality'.<sup>68</sup> Kierkegaard, as is sometimes forgotten, was not just an existentialist, he was also a social realist – and a cultural materialist. And so, if my argument is correct, was Schmitt.

Schmitt's concept of the constitution is *both* ideational *and* material. It is rooted, as Murkens writes, in a sphere 'that lies beyond the positive, written constitutional text'.<sup>69</sup> In the year following the publication of *Verfassungslehre*, Schmitt inveighed against 'the age of neutralizations and depoliticizations'.<sup>70</sup> In hyperbolic prose, he elaborated an argument from cultural materialism. Invoking Oswald Spengler's dystopian account of *The Decline of the West*, Schmitt lamented that the interwar period was 'a soulless age of technology in which the soul is helpless and powerless'.<sup>71</sup> He blamed this state of affairs on the 'torpid religion of technicity'.<sup>72</sup> As he put it, 'Once everything had been abstracted from religion and theology, then from metaphysics and the state, everything appeared to have been abstracted above all from culture, ending in the neutrality of cultural death'.<sup>73</sup> This diagnosis of 'cultural decline' is one of many material traces in Schmitt's constitutional theory, another example of the attention he paid – in *Verfassungslehre* and beyond – to what Goldoni and Wilkinson think of as 'the underlying material context'.<sup>74</sup>

#### 2.4.1 The Materiality of Identity

Inspired by Herder, but also by Rousseau and especially Emmanuel Joseph Sieyès, Schmitt assumed that the people – the *Volk* – existed 'before and above the constitution'.<sup>75</sup> He regarded

<sup>62</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, G. Schwab, trans. [1922] (MIT Press, 1986), 14, 15.

<sup>63</sup> Ibid., 15.

<sup>64</sup> D. Bates, 'The Political Theology of Entropy: A Katechon for the Cybernetic Age' (2020) 30 *History of the Human Sciences* 109, 113.

<sup>65</sup> Ibid., 113.

<sup>66</sup> Related, see P. Markell, 'Making Affect Safe for Democracy? On "Constitutional Patriotism"' (2000) 28 *Political Theory* 38.

<sup>67</sup> Schmitt, *Political Theology*, 15.

<sup>68</sup> Ibid.

<sup>69</sup> Murkens, *From Empire to Union*, 45.

<sup>70</sup> C. Schmitt, *The Concept of the Political*, G. Schwab, trans. and ed. [1929] (University of Chicago Press, 2007), 80–96.

<sup>71</sup> C. Schmitt, 'The Age of Neutralizations and Depoliticizations', in *The Concept of the Political*, G. Schwab, trans. and ed. [1929] (University of Chicago Press, 2007), 93.

<sup>72</sup> Ibid., 95.

<sup>73</sup> Ibid., 93.

<sup>74</sup> Ibid., 92; Goldoni and Wilkinson, 'The Material Constitution', 568.

<sup>75</sup> Murkens, *From Empire to Union*, 107.

the *demos* 'in romantic and organic terms' as the prerequisite of the nation-state.<sup>76</sup> This 'Volk-centric, monist reading' of constitutional democracy is further evidence that the Germanic discipline of *Staatsrecht* – which Schmitt hoped to reimagine with his *Verfassungslehre* and Heller to standardise with his *Staatslehre* – stood for a distinctly socio-legal habitus, one that 'searches for and finds answers also outside the discipline of law'.<sup>77</sup> This habitus, to be sure, was *neither* the sole preserve of the right *nor* of the left. In the early twentieth century, the question of constitutional identity, rather, was a concern common to many of Germany's public lawyers. More than a few were ready to break with *Staatsrechtslehre*, that is, the scientific approach to law they felt was a burdensome legacy of 'Labandism'.<sup>78</sup>

As per the quote from *Verfassungslehre* with which I opened this chapter, the state, according to Schmitt, does not 'have' a constitution; the state 'is' the constitution.<sup>79</sup> He held the unity of people, state and constitution to be indivisible. The constitution was the state's 'soul', the people its body politic, the embodiment of Sieyès's *pouvoir constituant*. Schmitt accused statutory positivists of destroying this soul. It was impossible to think about constitutional matters scientifically, he argued. Abstraction, for him, was no substitute for concreteness. As far as the meaning of the constitution was concerned, Schmitt deemed it important to think about the concept phenomenologically. For him a constitution, to count as a constitution, had to have a material existence, it had to be 'actually present in the world', as McCormick puts it.<sup>80</sup> According to Schmitt, a constitution, properly defined, derived from the will of a *pouvoir constituant*. This will, because it is 'existentially present' ('existentiell vorhanden'), he regarded as a material fact.<sup>81</sup> Its materiality lies in its 'being' ('Sein'), which, for Schmitt, was the source of sovereign authority.<sup>82</sup>

Schmitt's *Verfassungslehre* was, he proclaimed, 'an attempt at a *system*'.<sup>83</sup> It was an exercise in 'categorical ordering', one of many.<sup>84</sup> Any constitution to be deserving of the name, Schmitt maintained, had to achieve a structural unity of people, state and constitution. 'The concept of the constitution is *absolute* because it expresses a (real or reflective) *whole*', he wrote.<sup>85</sup> The cohesiveness and coherence of a legal order, in Schmitt's argument, derived from a constitutional existence, 'an actually present condition, a *status* of unity and order', as he put it.<sup>86</sup> This supposition is a material claim. Schmitt's second claim, which he tied to the first, was cultural. It adds a twist to his argument about constitutional identity and speaks to his idea of the state: 'The constitution is its "soul," its concrete life, and its individual existence'.<sup>87</sup> This aphorism cuts to the heart of Schmitt's constitutional theory, summing it up succinctly – all the while leaving much to the imagination, as was his wont.

Ellen Kennedy is right: *Verfassungslehre* was 'unlike any contemporary work on the Weimar constitution'.<sup>88</sup> It was not 'an interpretation of that one constitution, nor was it a general theory

<sup>76</sup> Ibid.

<sup>77</sup> Ibid., 108.

<sup>78</sup> H. Heller, *Gesammelte Schriften*, vol II. [1926], 2nd ed. (Mohr, 1992), 16.

<sup>79</sup> Schmitt, *Constitutional Theory*, 60. Emphases omitted.

<sup>80</sup> J. P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, 1997), 231.

<sup>81</sup> Schmitt, *Constitutional Theory*, 64; Schmitt, *Verfassungslehre*, 9.

<sup>82</sup> Schmitt, *Verfassungslehre*, 9.

<sup>83</sup> Schmitt, *Constitutional Theory*, 53.

<sup>84</sup> Meierhenrich and Simons, 'A Fanatic of Order in an Epoch of Confusing Turmoil', esp. 12–21.

<sup>85</sup> Schmitt, *Constitutional Theory*, 59.

<sup>86</sup> Ibid., 60.

<sup>87</sup> Ibid.

<sup>88</sup> E. Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004), 119.

of the state'.<sup>89</sup> Schmitt's take on the material constitution, which is what I believe it was, upended conventional wisdom about the question of constitutional design. Indeed, by mobilising the substance of the constitution 'against its functional elements', as Ulrich Preuß once put it, Schmitt's was an argument *against* constitutionalism, conventionally understood.<sup>90</sup> Schmitt's *Verfassungslehre* was a genre-bending publication, one entirely in keeping with the 'trinity' of his thought, which is why it is entirely fitting to bring phenomenology to legality.<sup>91</sup> An awareness of the interplay of Schmitt's political, legal and cultural thought is useful, and perhaps indispensable, for grasping what the materiality of identity was all about in Schmitt's constitutional theory – where it came from and what it meant.

Schmitt's *Verfassungslehre* is an argument for, and from, 'communitarian existentialism'.<sup>92</sup> Conventional wisdom has it that he conceived constitutional identity in ethnic terms. Many, Jürgen Habermas foremost among them, have portrayed *Verfassungslehre* as an outgrowth and manifestation of Schmitt's 'militant ethnonationalism'.<sup>93</sup> Andreas Kalyvas begs to differ, as do I. Habermas's interpretation of Schmitt's constitutional theory is clouded by outcome knowledge. As are similar interpretations by Ulrich Preuß and Michel Rosenfeld, who influenced the reception of Schmitt's constitutional thought in the English-speaking world early on. In the process, they distorted Schmitt's argument about the question of constitutional identity. Schmitt may well have been 'the most influential theoretical antipode' of liberal constitutionalism in the early twentieth-century, but neither was he the only constitutional theorist to think phenomenologically about the *pouvoir constituant*, nor did he reinterpret the concept of the constitution 'in an ethnicist manner'.<sup>94</sup> It is inaccurate to claim, as Preuß has, that Schmitt regarded 'ethnic and national sameness' as the *sine qua non* of a 'constitutionally unalienated people'.<sup>95</sup> Schmitt may well have *thought* as much, but he did not say so in *Verfassungslehre*.

To be sure, Schmitt was a lifelong anti-Semite, and he *did* play handmaiden to dictatorship. Indeed, he was a voluble advocate of 'racial legalism'.<sup>96</sup> This notwithstanding, in 1928, Schmitt's constitutional theory, like Heller's, was *völkisch*, but not yet racial. The radicalisation of his institutional theory was in the offing – but not complete.<sup>97</sup> Homogeneity mattered to Schmitt; it was meaningful to him. But there is no evidence that he, prior to 1933, glorified ethnic identity, neither in *Verfassungslehre* nor in his other writings. As William Scheuerman writes, Schmitt, in what was a liminal period for self and country, 'does leave open the possibility that homogeneity can take distinct forms'.<sup>98</sup> Kalyvas goes even further. On his interpretation, Schmitt 'did not posit ethnicity or race as the fixed essence of identity. On the contrary, political identities and shared conceptions of the "we" are constituted through struggles, antagonisms, and differential relations

<sup>89</sup> Ibid.

<sup>90</sup> U. K. Preuß, 'The Critique of German Liberalism: Reply to Kennedy' (1987) 71 *Telos* 97, 99; see also U. K. Preuß, 'Carl Schmitt and the Weimar Constitution', in J. Meierhenrich and O. Simons (eds.), *The Oxford Handbook of Carl Schmitt* (Oxford University Press, 2016), 471–89.

<sup>91</sup> Meierhenrich and Simons, 'A Fanatic of Order in an Epoch of Confusing Turmoil'.

<sup>92</sup> I borrow the moniker from D. Dyzenhaus, *Legality and Legitimacy* (Oxford University Press, 1999) 2.

<sup>93</sup> J. Habermas, 'On the Relation between the Nation, the Rule of Law, and Democracy', in J. Habermas, *The Inclusion of the Other: Studies in Political Theory*, C. Cronin and P. de Greiff ed. (MIT Press, 1998), 148.

<sup>94</sup> U. Preuß, 'Constitutional Powermaking for the New Polity', in R. Bellamy (ed.), *Constitutionalism and Democracy* (Routledge, 2017), 153.

<sup>95</sup> Ibid., 154.

<sup>96</sup> See J. Meierhenrich, 'Racial Legalism' (2023) 19 *Annual Review of Law and Social Science* (forthcoming).

<sup>97</sup> On the temporal dimensions of this radicalisation, see Meierhenrich, 'Fearing the Disorder of Things'.

<sup>98</sup> W. E. Scheuerman, *Carl Schmitt: The End of Law* (Rowman and Littlefield, 1999), 280, fn. 30.

among groups'.<sup>99</sup> Kalyvas has a point. A close reading of *Verfassungslehre* reveals a thinker who cared passionately about preserving the sanctity of the *pouvoir constituant*, but one who was not yet hung up on the essence of constitutional identity. The 'alternative constitutional theory' Schmitt presented in the late 1920s was about preventing the decline of the constituent power of the sovereign *Volk*, whatever its make-up.<sup>100</sup> It is a misreading of *Verfassungslehre* to suggest, as Preuss and others have done, that it contains an argument for substituting 'the *ethnos* for the *demos*' as a category of constitutional theory and practice, for it does not.<sup>101</sup> What it *does* contain, to stay with the Greek nomenclature, is an argument for the *nomos* taking the place of the *demos*. This brings us back to the question of cultural materialism.

Robert Cover, to invoke another genre-bending constitutional theorist, used the concept of *nomos* as a shorthand for the normative universe from which 'legal worlds' derive their meaning. The creation of legal meaning – what he called 'jurisgenesis' – was for Cover 'an essentially cultural' process.<sup>102</sup> According to him, a *nomos* was ideational *and* material, 'a present world constituted by a system of tension between reality and vision'.<sup>103</sup> This normative universe, Cover argued, was 'as much' of our world as 'the physical universe of mass, energy, and momentum'.<sup>104</sup> Schmitt thought similarly, though not identically, about the constitution of constitutional law. In *Verfassungslehre*, he presented a case for taking the *nomoi* of constitutions seriously, both theoretically *and* practically. Schmitt's was a normative case for doing justice to material culture, viz., the 'pre-political identity' of a *pouvoir constituant*.<sup>105</sup> His concept of constitutional identity, at this point in his life at least, was still permissive. He was agnostic regarding its substance, as long as this constitutional substance was organically grown. Schmitt was an existentialist in 1928, not yet the institutional extremist he would become. For him even an economically-stratified 'class' ('*Klasse*') was, theoretically speaking, capable of growing into a *Volk* as long as it behaved like a 'genuine friend-and-enemy grouping' ('*echte Freund- und Feindgruppierung*').<sup>106</sup>

Schmitt was a prophet of extremity, but his constitutional thought in *Verfassungslehre* was reactionary – not yet racial. His break from previous thought was less radical – and far less original – than it is often made out to be. We may want to think of Schmitt as one of several 'reactionary modernists', as a sharp-tongued intellectual who, in law and in life, detested the rise of machine politics, regarding it 'as a threat to the German soul'.<sup>107</sup> However, these 'romantic anticapitalists', as Jeffrey Herf has shown, were 'no less hostile to reason' than 'their contemporaries in the political Center and Left'.<sup>108</sup> What set them apart was an uncanny ability 'to articulate a set of cultural symbols', to which the constitutional sentiments that Schmitt conjured in *Verfassungslehre* belonged, 'in which technology', including constitutional engineering, 'became an expression of that soul, and thus of German *Kultur*'.<sup>109</sup> That Weimar's

<sup>99</sup> A. Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt* (Cambridge University Press, 2008), 122.

<sup>100</sup> Ibid., 129.

<sup>101</sup> Preuss, 'Constitutional Powermaking for the New Polity', 153.

<sup>102</sup> R. M. Cover, 'Nomos and Narrative' (1983) 97 *Harvard Law Review*, 1, 11.

<sup>103</sup> Ibid., 9.

<sup>104</sup> Ibid., 5.

<sup>105</sup> M. Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Routledge, 2010), 153.

<sup>106</sup> Schmitt, *Verfassungslehre*, 234.

<sup>107</sup> J. Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (Cambridge University Press, 1984), 46.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

republicans failed to do the same – that they neglected the question of constitutional affect – was one of Heller's major regrets.

#### 2.4.2 Völkisch Materialism

Schmitt's argument from cultural materialism, as I have presented it here, differed from comparable arguments on the left. For all his talk of cultural homogeneity, Heller, for example, was a prophet of solidarity. His progressive constitutionalism was about the supply of dignity.<sup>110</sup> By contrast, Schmitt's *reactionary constitutionalism*, to coin a phrase, was about the demand for difference. Consider the following passage from *Verfassungslehre* in which Schmitt articulated the meaning of representation as a constitutional principle, a recurring theme in his 1928 book. In this instance, he repudiated liberal constitutional theory by insisting that the act of representation was 'something existential' ('etwas Existentielles'), which is why, he argued, it could not be reduced to a procedure.<sup>111</sup> Schmitt maintained that it only made sense to speak of representation in relation to a *Volk* already possessed of 'political unity' ('politische Einheit').<sup>112</sup> Only an existential community could be represented, a random group of individuals ('eine irgendwie zusammenlebende Menschengruppe') could not.<sup>113</sup> A community worthy of representation, as far as Schmitt was concerned, had to meet certain requirements: 'Anything dead, anything worthless (*Minderwertiges*) or of little value, anything lowly (*Niedriges*)' could not be represented, he was certain, because such an inferior kind of being was inherently incapable of a political existence.<sup>114</sup> This Schmittian standard of civilization recalls Herder. Yet Schmitt's variation on Herder's theme has a ruthless ring to it that was largely absent from the *völkisch* materialism – this peculiar brand of German nationalism – that preceded it. Given Schmitt's penchant for verbal harshness, and his willingness to countenance constitutional violence, it is easy to see why Habermas and others likened *Verfassungslehre* to the 'steel-like romanticism' ('stählerne Romantik') of which Joseph Goebbels dreamt.<sup>115</sup>

Weimar constitutionalism, according to Schmitt, was order-producing, but not in a constitutive sense, only in a regulatory sense. The constitutional design of 1919, he repeatedly opined, was soul-destroying: mechanical, not meaningful. This constitutional effect he diagnosed as a pathology of liberal constitutionalism. Schmitt reasoned that it presented whenever the *pouvoir constituant* becomes the *pouvoir constitué*. When the constituting people in a constitutional founding becomes the constituted people, it loses a part of itself – its sovereign visibility, or so he argued. 'With the creation of a stable constitution, the sovereign moves from a situation of concrete and physical public prominence to a state of invisibility. It exits the political and retreats to the social'.<sup>116</sup> A constitutional founding makes the people invisible – the very people without whose existence the constitution would not have been conceivable. For Schmitt, this transformation of sovereignty was to be expected – and a wellspring of apathy.

<sup>110</sup> More recently, see also D. Cornell and N. Friedman, *The Mandate of Dignity: Ronald Dworkin, Revolutionary Constitutionalism, and the Claims of Justice* (Fordham University Press, 2016).

<sup>111</sup> Schmitt, *Verfassungslehre*, 209.

<sup>112</sup> Ibid., 210.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> As quoted in Herf, *Reactionary Modernism*, 47.

<sup>116</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, 133.

Schmitt worried about the proportion of 'fundamental' to 'circumstantial' elements of a constitution.<sup>117</sup> The more oblique the references to the constitutional sentiments of the *pouvoir constituant* – its constituent will and values – the less expressive of 'the identity and *eidos* of a political community' a given constitution will be.<sup>118</sup> As Schmitt wrote, the 'constituent will of the people' ('*verfassungsgebende Wille des Volkes*') is an 'unmediated will' ('*unmittelbarer Wille*'), one that exists 'prior to and above' constitutional law.<sup>119</sup> Constitutional democracy, according to Schmitt's *völkisch* materialism, is a non-starter without constitutional ethics (*Verfassungsethik*).<sup>120</sup> The substantiality (*Substantialität*), univocity (*Eindeutigkeit*) and the authority (*Autorität*) of this affective code of ethics will determine whether constitutionalism is meaningful (and thus potentially democratic) or mechanistic (and thus merely liberal).<sup>121</sup> Schmitt was for constitutionalism as long as the crafting of a constitutional framework proved capable of stirring *feelings*, the kind that inspired what John Adams, the world's most famous constitution-builder, in his marginalia of Wollstonecraft's 1794 treatise, called 'attachment'.<sup>122</sup>

Schmitt detested, and viscerally so, the kind of constitutionalism that cared more about creating contractual obligations than achieving constitutive identifications. In *Verfassungslehre*, he put it thus: '[O]ne must insist that a constitution, which rests on an act of the constitution-making power of the people, must be something *essentially different* than a social contract'.<sup>123</sup> If constitutionalism is about nothing more than codifying rules of the game, an understanding that Schmitt dismissed as '*Ethik des fair play*', he thought it of no use to democracy, as he used that term.<sup>124</sup> 'A constitutional contract', he maintained, 'does not establish the political unity' of a people.<sup>125</sup> 'It presupposes this unity'.<sup>126</sup>

Schmitt's was an argument from the logic of appropriateness. For him, an effective *Verfassungsethik* was affective: it inspired constitutional sentiments. Yet, prior to 1933, to reiterate an earlier point, Schmitt did not call for 'an attachment to any particular country, state, or *ethnos*'.<sup>127</sup> Although Germany was foremost on his mind when he wrote *Verfassungslehre*, his references to, say, '[t]he constitution of the American state of Massachusetts, drafted by John Adams', suggest that Schmitt, prior to throwing his lot in with the Nazis upon their seizure of power, had not yet embraced the 'racial institutionalism' that almost immediately became a hallmark of his scholarship.<sup>128</sup> In his Weimar years, Schmitt still reasoned – and sounded – like a run of the mill anti-positivist. He argued that 'a constitution is stable and efficient when it depends on a population's conscious affection for a set of higher political values, when the citizens recognize the constitution as their constitution – that is, when through the constitution,

<sup>117</sup> C. J. Friedrich, *Constitutional Government and Democracy: Theory and Practice in Europe and America* (Little, Brown, 1941), 144.

<sup>118</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, 131.

<sup>119</sup> Schmitt, *Verfassungslehre*, 84; Schmitt, *Constitutional Theory*, 132.

<sup>120</sup> C. Schmitt, 'Staatsethik und pluralistischer Staat', in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* [1930], 3rd ed. (Duncker & Humblot, 1994), 151–65.

<sup>121</sup> Schmitt, 'Staatsethik und pluralistischer Staat', 164.

<sup>122</sup> John Adams, *Marginalia in Mary Wollstonecraft, an Historical and Moral View of the Origin and Progress of the French Revolution; and the Effect It Has Produced in Europe* (J. Johnson, 1794), 404, available at: <https://archive.org/details/historicalmoralvoowoll/mode/1up?q=constitution&view=theater>, last accessed 20 July 2022.

<sup>123</sup> Schmitt, *Constitutional Theory*, 112. Emphasis added.

<sup>124</sup> Schmitt, 'Staatsethik und pluralistischer Staat', 164.

<sup>125</sup> Schmitt, *Constitutional Theory*, 113. Emphases omitted.

<sup>126</sup> Ibid.

<sup>127</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, 161.

<sup>128</sup> Schmitt, *Constitutional Theory*, 113; Meierhenrich, 'Fearing the Disorder of Things', esp. 192–98.

as through a mirror, they see themselves as the constituent power'.<sup>129</sup> Although Schmitt was *primus inter pares* among constitutional materialists in Weimar Germany, Heller started from the same assumption.

To tackle the question of constitutional identity, in other words, was unusual – but innocuous. In many respects, Schmitt, Heller and Mortati thought alike. *Unlike* Heller and Mortati, Schmitt was an anti-humanist, however.<sup>130</sup> Hastened by the rise of constitutional dictatorship in the Weimar Republic – and the breakdown of democracy that it facilitated – Schmitt's affective constitutionalism eventually turned sinister.<sup>131</sup> His constitutional sentiments became violent sentiments.

## 2.5 VIOLENT SENTIMENTS

As I have previously shown, in his 1933 pamphlet *Staat, Bewegung, Volk*, Schmitt

imbued the idea of the emergent racial state with *völkisch*, that is, racial values. What previously had been 'just' an example of extremist institutionalism he retrofitted with the trappings of National Socialism, including some of the ideological tenets that combined with the regime's 'eliminationist racism.' This was easily done because Schmitt's institutional theory was largely agnostic about the content of the form.<sup>132</sup>

Whereas Schmitt, in 1928, was still agnostic about the *kind* of identity that was required for making constitutional democracy work, in *Staat, Bewegung, Volk* he let rip.<sup>133</sup> In his theory of racial sentiments, he insisted that 'Artgleichheit', or racial equality, was essential for bringing Hitler's constitutional revolution to fruition.<sup>134</sup> The cultural materialism – the affective interplay of legality and materiality – in Schmitt's constitutionalism was front and centre. 'National Socialism does not think abstractly and rigidly (*schablonenhaft*)', Schmitt declared with evident pride.<sup>135</sup> National Socialism, he predicted, would tend to the *Volk's* 'real' substance wherever the movement encountered it, whether in 'landscape, tribe, or guild' ('*Landschaft, Stamm, oder Stand*').<sup>136</sup> A year later, in the Nazi mouthpiece *Völkischer Beobachter*, Schmitt marvelled at the latest 'new constitutional law' the dictatorship had given itself.<sup>137</sup> Taking stock of the constitutional revolution that ushered it in, he congratulated the movement for having dispensed with a constitutional document ('*Verfassungsurkunde*') à la Weimar and Philadelphia in constitutionalising the *Führerstaat* and for having adopted instead, in rapid succession, 'grand constitutional laws' ('*große Verfassungsgesetze*').<sup>138</sup> Their passage, Schmitt gloated, had laid a new

<sup>129</sup> Kalyvas, *Democracy and the Politics of the Extraordinary*, 161.

<sup>130</sup> For a recent discussion, see J. Meierhenrich, 'Thinking against Humanity: Carl Schmitt's Critique of Human Rights', in D. Gosewinkel and A. Weinke (eds.), *Menschenrechte und ihre Kritiker: Ideologien, Argumente, Wirkungen* (Wallstein, 2019), 67–95.

<sup>131</sup> See, e.g., F. M. Watkins, *The Failure of Constitutional Emergency Powers under the German Republic* (Harvard University Press, 1939). I have traced the cumulative radicalisation of Schmitt's institutional thought in Meierhenrich, 'Fearing the Disorder of Things'.

<sup>132</sup> Meierhenrich, 'Fearing the Disorder of Things', 194.

<sup>133</sup> C. Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* [1933], reprinted in C. Schmitt, *Gesammelte Schriften 1933–1936 mit ergänzenden Beiträgen aus der Zeit des Zweiten Weltkriegs* (Duncker & Humblot, 2021), 67–115.

<sup>134</sup> Ibid., 115.

<sup>135</sup> Ibid., 103.

<sup>136</sup> Ibid.

<sup>137</sup> The constitutional law in question was the *Gesetz über den Neuaufbau des Reiches vom 30. Januar 1934*. C. Schmitt, 'Das Neue Verfassungsgesetz' [1934], in C. Schmitt, *Gesammelte Schriften 1933–1936 mit ergänzenden Beiträgen aus der Zeit des Zweiten Weltkriegs* (Duncker & Humblot, 2021), 127–30.

<sup>138</sup> Ibid., 130.

'Verfassungsboden'.<sup>139</sup> It was an evocative, carefully chosen term. Although its deeper meaning is lost in translation, the composite noun smacked of cultural materialism. To Schmitt, the laying of new constitutional soil represented the beginning of the end of the 'groundless existence' he – and his country's constitution – had led during the Weimar years.<sup>140</sup>

### 2.5.1 Blood and Soil

The new constitutional order was extraordinarily meaningful for Schmitt, which may explain his odious defence of the indefensible. A few months before the Nazi revolution, Schmitt, in a lecture to chemical industry executives, had complained that 'all fundamental institutions of the Weimar Constitution' were 'completely denatured'.<sup>141</sup> The successful repoliticisation of the Nazi constitution therefore represented a substantive turnaround – a *volte face* that he greeted with racial fanfare.

It stands to reason that the arrival of sovereign dictatorship also assuaged, at least initially, Schmitt's personal fear of disorder. This may account for the radicalisation of his constitutional sentiments, especially the *speed* of their racialisation. Be that as it may, Schmitt's version of racial legalism bears out Robert Cover's observation that '[r]evolutionary constitutional understandings are commonly staked in blood', that in them 'the violence of law takes its most blatant form'.<sup>142</sup> *Staat, Bewegung, Volk* was full of violent sentiments. And it was one of *many* writings in which Schmitt advocated, justified, or otherwise legitimated constitutional violence to help establish the Nazi *Volksgemeinschaft*.<sup>143</sup> We know, and not only from his diaries and *Glossarium*, that Schmitt welcomed the death of *parliamentary* representation that Nazi rule brought. The arrival of Germany's racial order, he reckoned, would usher in a living constitution, one staked in blood and soil. The material constitution, he prophesised, would be *truly* representative.

Already in *Verfassungslehre*, Schmitt had bemoaned the limits of representation – as liberals were using the term. For Schmitt, delegation was *not* a form of representation. Sending representatives to assemblies was anathema to his understanding of politics. Representation, for Schmitt, was an inherently political act – and thus not one that could be regulated by 'general norms' ('generelle Normen'), electoral and otherwise.<sup>144</sup> Representation, he wrote in *Verfassungslehre*, was 'something existential' ('etwas Existentielles').<sup>145</sup> Schmitt's problem with liberal understandings of representation related to their conception of the *Volk* as an aggregate phenomenon of loosely associated individuals ('einer irgendwie zusammenlebenden Menschengruppe').<sup>146</sup> For him, a *Volk* was represented only to the extent that its 'political unity as a whole' ('politische Einheit als Ganzes') was expressed.<sup>147</sup> A representation merely of its members, Schmitt implied, was not enough. He wanted to see the *Volk* represented as a unitary

<sup>139</sup> Ibid.

<sup>140</sup> For the background of my argument, see also M. Marder, *Groundless Existence: The Political Ontology of Carl Schmitt* (Continuum, 2010).

<sup>141</sup> C. Schmitt, *Konstruktive Verfassungsprobleme: Rede des Professors Dr. Carl Schmitt gehalten auf der Hauptversammlung des Vereins zur Wahrung der Interessen der chemischen Industrie Deutschlands e.V. am 4. November 1932* (Maurer & Dimmick, 1932), 5.

<sup>142</sup> R. M. Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal*, 1601, 1607.

<sup>143</sup> Sixty-five others are collected in Schmitt, *Gesammelte Schriften 1933–1936 mit ergänzenden Beiträgen aus der Zeit des Zweiten Weltkriegs*.

<sup>144</sup> Schmitt, *Verfassungslehre*, 211–12.

<sup>145</sup> Ibid., 211.

<sup>146</sup> Ibid., 210.

<sup>147</sup> Ibid., 212. To get across the importance of this point, Schmitt rendered the formulation in italics.

phenomenon. Paradoxically, for someone who railed so much against abstraction, an author who fetishised the virtue of concreteness, the object of representation, for Schmitt, was about the idea of the *Volk*, not its grubby reality. He saw no upside in representing the *Volk* ‘in its natural state’ (*in seinem natürlichen Vorhandensein*).<sup>148</sup> The locus of representation was the ideal, not the real.

Schmitt thought a great deal about the principle of representation in the 1920s, first in *Römischer Katholizismus und politische Form*, one of his least-read contributions to institutional theory. In it, he warned that ‘the capacity for representation’ (*das repräsentative Vermögen*) was becoming extinct.<sup>149</sup> The Catholic Church, Schmitt suggested, was the only truly representative figure still standing. All others, from *Kaiser* to *Ritter*, from emperor to knight, no longer commanded authority. That sovereignty only existed in fragments, Schmitt blamed on liberals and libertarians, on savants and merchants. The way he saw it, the rise of ‘economic thought’ (*ökonomische[s] Denken*) spelled the death of representation because it was causing individuals to care more about themselves than the imagined communities to which they belonged.<sup>150</sup> The logic of instrumental choice, Schmitt lamented, was prioritising costs and benefits, not norms and values. For him, nothing could be further removed from the idea of representation (*des Prinzips der Repräsentation*) than what constitutional theorists in the second half of the twentieth century called ‘the calculus of consent’.<sup>151</sup>

For Schmitt, the life of the law was experience. He believed that ‘the economical’ (*das Ökonomische*), especially in combination with ‘the technical’ (*dem Technischen*), demanded a ‘real presence of things’ (*Realpräsenz der Dinge*).<sup>152</sup> Such a materialism was anathema to his cultural materialism, however. Bodily representation was not what he thought desirable. For Schmitt, the translation of votes into seats – this central conceit of parliamentary democracy – was not the highest form of representation but its nadir. He wrote dismissively of ‘*Stellvertretung*’, or deputising, in castigating the practice.<sup>153</sup> As far as he was concerned, the mechanisation of politics had turned the principle of representation into a technology of rule. Schmitt regarded the institutions of liberalism – Weimar’s parliamentary assembly, the *Reichstag*, foremost among them – as inorganic, inauthentic and immaterial. He derided them as ‘automata and machines’, inherently incapable of facilitating representation: ‘*Vor Automaten und Maschinen kann man nicht repräsentieren, so wenig wie sie selber repräsentieren oder repräsentiert werden können*’.<sup>154</sup> Schmitt was not, in any meaningful sense, interested in the political economy of constitutions, which is why *Verfassungslehre* was an argument for a moral economy of constitutions – one that foregrounded the question of constitutional identity. What he delivered was a sentimental manifesto.

### 2.5.2 A Sentimental Manifesto

The spectre of individualism with which Schmitt found fault in *Römischer Katholizismus und politische Form* was also the target of his constitutional theory. In *Verfassungslehre*, Schmitt

<sup>148</sup> Ibid., 212.

<sup>149</sup> C. Schmitt, *Römischer Katholizismus und politische Form* [1923], 5th ed. (Klett-Cotta, 2008), 32.

<sup>150</sup> Ibid., 34.

<sup>151</sup> Ibid., 14. Cf. J. M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1962).

<sup>152</sup> Schmitt, *Römischer Katholizismus und politische Form*, 35.

<sup>153</sup> Ibid., 36.

<sup>154</sup> Ibid.

returned to the concept of representation. He was convinced that the principle, liberally understood, 'endangered' all affective attachments – that it stood in the way of an organic order of equals.<sup>155</sup> Schmitt longed for an age of *deneutralisations* and *repoliticisations*, a cultural materialism that would restore in Germany an affective way of law.

*Verfassungslehre* was a blueprint for affective constitutionalism. For Schmitt, commonality was a *sine qua non* of equality. He reimagined the ideal of equality as a 'political' concept – and thus in existential terms.<sup>156</sup> 'The equality that is part of the essence of democracy', he wrote, 'orients itself *internally* and not externally'.<sup>157</sup> Equality stops, he suggested, at democracy's edges – on the border of order. On a state's territory, within a democratic body politic ('*Staatswesen*'), all citizens ('*Staatsangehörige*') are equal.<sup>158</sup> Whoever did not belong to this imagined community, however, was out of luck. Schmitt was adamant: 'the other, the stranger' was not entitled to partake of democratic equality.<sup>159</sup> 'A form of equality without the possibility of an inequality, an equality that one has exclusively and that cannot be at all lost, is without value or significance'.<sup>160</sup> For Schmitt, who craved 'intensity', it was precisely the possibility of exclusion that made constitutionalism affective and democracy meaningful.<sup>161</sup> In Schmitt's existentialism, 'the devaluation of all traditional values meant that human existence, in its brute factivity [sic], became a value in and of itself'.<sup>162</sup>

This marks the spot where the cultural and the material in Schmitt's constitutional thought are enjoined. As a founding authority, the *pouvoir constituant*, according to Schmitt, becomes invisible in the course of constitutional democracy, but *not* immaterial. It continues to exist and 'is no mere conceptual fiction'.<sup>163</sup> Schmitt believed, as William Scheuerman writes, that 'we need to take the idea of the inalienability, indivisibility, and absoluteness of the *pouvoir constituant* seriously'.<sup>164</sup> At the same time, Schmitt insisted that a *real* representative was needed to ensure the sanctity of the political unity of the *Volk*. To him the personification of sovereignty – its embodiment – mattered. Schmitt's constitutionalism was always katechontic.<sup>165</sup> For he was, as Hans-Ulrich Wehler, the eminent historian, once put it, 'a fanatic of order in an epoch of confusing turmoil' ('ein *Ordnungsfanatiker* in einer *Epoche turbulenter Wirren*').<sup>166</sup> However misguided Schmitt's prescriptions, staving off chaos was the *telos* of his constitutional theory – and of his practice.<sup>167</sup>

Faith in constitutional law, which Schmitt took to mean 'a multitude of individual constitutional laws' ('eine *Vielheit von einzelnen Verfassungsgesetzen*'), he deemed insufficient.<sup>168</sup> As he noted in his *Glossarium*, on 3 October 1947, faith in law (*Gesetzesglaube*) was a sign of the

<sup>155</sup> Schmitt, 'The Age of Neutralizations and Depoliticizations', 94.

<sup>156</sup> Schmitt, *Constitutional Theory*, 258; Schmitt, *The Concept of the Political*, 27.

<sup>157</sup> Schmitt, *Constitutional Theory*, 258.

<sup>158</sup> Schmitt, *Verfassungslehre*, 227. The translation of 'Staatswesen' as 'state system' in the English edition of *Verfassungslehre* does not do justice to the vitalist and organicist connotation in the German original. As a result, it conceals Schmitt's anthropomorphisation of the state. Cf. Schmitt, *Constitutional Theory*, 258.

<sup>159</sup> Schmitt, *The Concept of the Political*, 27.

<sup>160</sup> Schmitt, *Constitutional Theory*, 258.

<sup>161</sup> See, for example, Schmitt, *Political Theology*, 15; Schmitt, *The Concept of the Political*, 26.

<sup>162</sup> R. Wolin, 'Carl Schmitt, Political Existentialism, and the Total State' (1990) 19 *Theory and Society*, 389, 394. Emphasis omitted.

<sup>163</sup> Scheuerman, *Carl Schmitt*, 70.

<sup>164</sup> *Ibid.*

<sup>165</sup> See also J. Meierhenrich, 'The Dictatorship of the *Kaiser*: Carl Schmitt's Theory of Monarchy', in C. Armenteros and I. Zarikos (eds.), *The Making of Modern Atlantic Monarchy* (Bloomsbury, forthcoming), vol. II.

<sup>166</sup> H. Wehler, *Deutsche Gesellschaftsgeschichte* (C. H. Beck, 2003), vol. IV, 491.

<sup>167</sup> Meierhenrich, 'Fearing the Disorder of Things'.

<sup>168</sup> Schmitt, *Verfassungslehre*, 20.

‘instinctlessness of a life-form condemned to decline’ (*‘Instinktlosigkeit der zum Untergang verurteilten Lebewesen’*).<sup>169</sup> Schmitt contrasted this unsentimental approach to law, the kind he abhorred, with that of Hitler, which he still, even after war’s end, endorsed. Paraphrasing Seneca’s *De Providentia*, Schmitt recalled reverentially the Nazi dictator’s ‘method of legality oaths’ (*‘Methode der Legalitätseide’*), the legal performances that, starting in September 1930, put paid to the idea of law’s sovereignty.<sup>170</sup> Schmitt implied that Hitler’s deception deserved not revulsion but respect – for the cunning with which the wannabe dictator had exposed the degenerate law of the Weimar Republic.

The two entries in the *Glossarium* speak to my argument about affective constitutionalism. They attest to Schmitt’s ‘visceral reaction to “the law”, as Helmuth Lethen put it.<sup>171</sup> Or, as Schmitt himself wrote, on 19 January 1948, ‘the word’ and ‘the concept’ of law caused in him ‘shudder and outrage’ (*‘Schauder und Entsetzen’*).<sup>172</sup> Appreciating Schmitt’s visceral reaction to the law is key to seeing *Verfassungslehre* for what it was – a sentimental manifesto. Schmitt’s was an argument for nurturing the soul of the state. In his moral economy, the cultural production of value mattered more than anything else. Schmitt wrote more passionately than most about the affective life of constitutions, which is one of the reasons why his constitutional theory remains a touchstone in the twenty-first century.

The spectre of violence was key to Schmitt’s understanding of constitutional identity. Schmitt stated his position especially bluntly in 1926, in his preface to the second edition of *The Crisis of Parliamentary Democracy*. Several of his observations about ‘the substance of equality’ in that monograph resurfaced almost verbatim in *Verfassungslehre* two years later.<sup>173</sup> One passage I want to single out goes like this: ‘Democracy requires’, according to Schmitt, ‘first homogeneity and second – if the need arises – elimination or eradication of heterogeneity’.<sup>174</sup> To illustrate his principle of constitutional identity, Schmitt invoked the case of Turkey, ‘with its radical expulsion of the Greeks’, as an example of a ‘modern democracy’ and a nation that knows how to ‘keep at bay something foreign’ which ‘threatens its homogeneity’.<sup>175</sup> The passage recalls twenty-first century debates about the crisis of constitutional democracy which also revolve around the accommodation – and annihilation – of difference. The passage is also testament to the radicalisation of Schmitt’s constitutional thought in the years 1933–36, when the material requirement of racial equality replaced political equality as the constitutional *eidos* for which he advocated.

## 2.6 CONCLUSION

*Verfassungslehre*, for all its flaws, was a pioneering achievement. In 1931, Eric Voegelin had mostly praise:

Those who move within the circle of ideas of modern constitutions of the Weimar type find there such concepts as: constitution, constitutional law, constitution-giving power, bearer of constitution-giving power, continuity of state and constitution, validity of the constitution, constitutional changes, constitutional breach, and so on. And, if it can be done, it is doubtless

<sup>169</sup> C. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, E. F. von Medem, ed. (Duncker & Humblot, 1991), 23.  
<sup>170</sup> Ibid., 23.

<sup>171</sup> H. Lethen, *Cool Conduct: The Culture of Distance in Weimar Germany*, D. Reneau, trans. (University of California Press, 2002), 179.

<sup>172</sup> Schmitt, *Glossarium*, 85.

<sup>173</sup> C. Schmitt, *The Crisis of Parliamentary Democracy*, E. Kennedy, trans. [1926] (MIT Press, 1988), 9.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid.

a task of extraordinary importance to order this conceptual world according to its immanent sense. Only one scholar has risen to the task [...].<sup>176</sup>

Voegelin lauded Schmitt's phenomenological approach, especially the 'perspective on the totality of the experience of the state' that *Verfassungslehre* afforded. But he was not persuaded by the universalising claims that it also contained.<sup>177</sup> 'Throughout the whole book', complained Voegelin, Schmitt let it be known 'that the world of ideas is itself politics, yet he makes statements about the reality of the state as though politically immanent concepts were at the same time scientifically transcendent ones'.<sup>178</sup> That Schmitt advanced his opinions 'in the tone of scientifically objective statements' Voegelin found problematic, and rightly so.<sup>179</sup> For all its erudition, *Verfassungslehre* is less learned than it appears to be. Like all of Schmitt's books, it 'provides little more than formulas'.<sup>180</sup> Nonetheless, Schmitt's sentimental manifesto has stood the test of time.

I presented Schmitt in this chapter as a protagonist of *affective constitutionalism*. I took the term to refer to a quest for a constitutional order – a constitutional ideology – that eschews, in Schmitt's parlance, the 'dead hand of abstraction'.<sup>181</sup> Because *Verfassungslehre* addresses the sentimental life of constitutional law, it is uniquely capable of informing the debate about the crisis of constitutional democracy in our time – a debate in which the expressive function of constitutional law has taken a backseat to its instrumental function. Constitutionalism today, as it did then, turns 'on the contradiction between representation and identity'.<sup>182</sup> In the 1920s, Schmitt, alongside Heller, recognised the importance of thinking about the affective life of constitutions – of toning down the neo-Kantian rhetoric of rationality. His was an argument *against* constitutionalism as technology, an argument that resonates in the 2020s.<sup>183</sup>

Like Heller on the left, Schmitt regarded the constitution as the 'soul' ('Seele') of the state.<sup>184</sup> Both thought about the constitution of peoples, specifically about the constitutional embodiment of the German *Volk*. Both raised the question of constitutional identity as a practical response to the crisis of parliamentary democracy in Weimar Germany. Both developed answers from cultural materialism. And both gave pride of place to constitutional affect. The key difference between Schmitt and Heller was *where* they located the soul of the state. Schmitt was convinced it lay in the purity of the *Volk*, Heller that it revealed itself in the solidarity of the *Volk*. Heller was consumed by 'civil passions', especially the integration of marginalised groups, and thus the eradication of difference.<sup>185</sup> Schmitt's 'sentiments and desires' revolved around the intensification of difference. This decidedly uncivil passion will forever be a stain on his constitutional theory.<sup>186</sup>

<sup>176</sup> E. Voegelin, 'Die *Verfassungslehre* von Carl Schmitt', in *The Collected Works of Eric Voegelin*, vol. XIII: *Selected Book Reviews*, J. Cockerill and B. Cooper, trans. and ed. [1931] (University of Missouri Press, 2000), 63.

<sup>177</sup> Ibid., 66.

<sup>178</sup> Ibid., 65.

<sup>179</sup> Ibid.

<sup>180</sup> Ibid., 50.

<sup>181</sup> As quoted in Kennedy, *Constitutional Failure*, 96.

<sup>182</sup> Ibid., 98.

<sup>183</sup> More generally, see McCormick, *Carl Schmitt's Critique of Liberalism*. For a neo-Schmittian critique of liberal constitutionalism, see M. Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).

<sup>184</sup> Schmitt, *Verfassungslehre*, 4.

<sup>185</sup> Sharon R. Krause, *Civil Passions: Moral Sentiment and Democratic Deliberation* (Princeton University Press, 2008).

<sup>186</sup> The stain became indelible when Schmitt put his argument about the material constitution in the service of an authoritarian regime intent on the annihilation of difference.