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The *History of Philosophy Quarterly* welcomes articles in English on any aspect of the history of philosophy. However, only self-sufficient articles will be published, and not news items, book reviews, critical notices, or "discussion notes" (short or long). The journal specializes in papers of a particular sort, those manifesting a strong interaction between contemporary and historical concerns. Either historical material should be exploited to deal with matters on the agenda of current discussion, or present-day concepts, methods, distinctions, arguments, etc., should be used to illuminate historical questions.

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members of the Nocturnal Council may have a "more accurate" kind of wisdom by receiving higher order education, it is noteworthy however that even the many are made to share in wisdom as long as they are meant to have reasoned understanding of the ordinances that they follow, and trained so that their emotions agree with such a reasoning (cf., e.g., IV 721e ff., VII 789d ff., 817e ff.). For an interpretation along these lines cf. Irwin (1995: 350–3), and C. Bobonich, "Reading the *Laws*," in C. Gill and M. M. McCabe, *Form and Argument in Late Plato* (Oxford, 1996), pp. 249–282.

33. For more discussion on the unity or disunity of the virtues cf. Irwin (1995, pp. 347–353), Stalley (1983, pp. 56–58). For discussions of the role of wisdom with regard to complete virtue in the *Laws* see C. Bobonich, "Plato's Theory of Goods in the *Laws* and the *Philebus*," *Proceedings of the Boston Area Colloquium in Ancient Philosophy* 11 (1995), pp. 101–39; and J. Gentzler, "Commentary on Bobonich," *ibid.*, pp. 141–151.

34. In fact, already the *Timaeus* seems to believe that certain practices (which are necessary to attain the balance that will make a person worthy of being called both "beautiful" and "good") are sufficient to prevent illness: see 87c–88c, and compare, e.g., with *Laws* II 654e ff., VII 788c ff., 807d–e.

35. See n. 15 above and my *Mind and Cosmic Order: Plato's Cosmology and Its Ethical Dimensions* (book manuscript).

36. This situation seems to present a contrast with *Phaedo* 61d–62e, where the argument is presented that suicide is *not* permitted, as we are the possession of the gods. However, Cooper has argued that the *Phaedo* text is non-committal, thus opening an avenue for consistency with the *Laws*. See J. Cooper "Greek Philosophers on Euthanasia and Suicide", in B. Brody (ed.), *Suicide and Euthanasia* (Dordrecht, 1989), pp. 9–38, at pp. 14–19.

37. This is in turn contrasted with suicide due to cowardice or laziness, which is legally forbidden—and thus, we may infer, morally condemnable, if the laws of this state are rooted in nature (cf. *Laws* IV 713e–721e). Cooper (1989, p. 19) takes the disgrace mentioned at IX 873c to be one that is "perhaps intentionally, perhaps not—think of Oedipus!" brought about by one's actions. But nothing in the text necessitates this restriction: such a disgrace could befall someone independently, as conceivably with Priam (cf. Aristotle, *N.E.* I 9, 1100a4–8).

38. See Williams (1976, p. 115).

39. See Nussbaum (1986, p. 20).

40. See B. Williams, "Philosophy," in *The Legacy of Greece: A New Appraisal*, ed. M. I. Finley (Oxford, 1981), pp. 202–255, esp. p. 253, and Nussbaum, *ibid.*

41. I wish to thank audiences in Jerusalem, Boulder, and Oxford, and in particular Christopher Rowe, Christopher Shields, and Richard Sorabji for helpful comments on previous drafts of this paper.

LOCKE'S MILITANT LIBERALISM A REPLY TO CARL SCHMITT'S STATE OF EXCEPTION

Vicente Medina

INTRODUCTION

Carl Schmitt, like Hobbes, is a political decisionist because he contends that only an unbound Leviathan who renders decisions of last resort can settle serious political crises.¹ Unlike Hobbes and Schmitt, John Locke supports popular consent to establish a legitimate constitutional order.² Thus, while Schmitt's political theory offers an apology of state authority at the expense of civil and political liberties, Locke's political theory offers a defense of a legitimate constitutional order against tyranny. Consequently, one can plausibly argue that Locke's liberalism has inspired and contributed to the widespread support that the rule of law enjoys nowadays, while Schmitt's political decisionism has been tainted by his collaboration with National Socialism.

There are several reasons for juxtaposing two antithetical political theorists such as John Locke and Carl Schmitt. First, Schmitt does engage Locke in an attempt to undermine Locke's liberal constitutionalism, so there is substantial textual evidence for my project.³ Second, since most Schmittian scholars focus on the influence of Hobbes on Schmitt's political outlook, and I contend that his concept of the political resembles Locke's state of war, I am exploring a neglected aspect of Schmitt's political theory. Last, and more importantly, I am presenting a plausible reading of Locke's liberal politics as sufficiently robust to disarm one of the most virulent attacks from the right against classical liberal constitutionalism. By focusing on the role that both the state of war and extremists (i.e., enemies, aggressors

and/or intolerant groups)⁴ play in Locke's politics, I am offering a militant interpretation of his liberalism.

Locke's liberalism is militant by virtue of allowing a legitimate constitutional order to defend itself from extremist groups that try to use the protection of such an order to subvert it by forcibly imposing or threatening to impose their views on the rest of society. He distinguishes clearly between license (the freedom to harm others) and liberty (the ability to act compatibly with natural law). For him, liberty always trumps license. To allow extremists to enjoy equal civil and political rights to compete for political power, as reasonable citizens do, is to rank the freedom to harm others equally with the freedom to protect the foundation of a legitimate constitutional order. Such a position is not only incoherent, but also suicidal.⁵ One can reasonably argue that liberal constitutionalism must exclude extremists, if not, it would be self-defeating. Ironically, by advocating a concept of constitutional self-defense, Schmitt adopted a similar position during the Weimar Republic. Yet he paradoxically chose to embrace National Socialism.⁶

My paper is divided into three parts. First, I will show how Schmitt overstates his case against liberal constitutionalism by ignoring Locke's distinction between natural and civil liberty, and license. Second, I will argue that Schmitt's attack against Locke's liberal constitutionalism is ironic because they both imbue their politics with a friend/enemy distinction. And third, I will argue that Locke's liberal constitutionalism rather than neglecting the political presupposes it. Therefore, his liberalism is militant rather than neutral.

I

Schmitt's political theory can be construed as an onslaught against two different strands of liberalism: (1) liberal constitutionalism or the rule of law, and (2) liberal democracy or parliamentarism.⁷ Schmitt, however, uses the term "liberalism" loosely, so it is sometimes unclear when he refers to liberal constitutionalism and/or to liberal democracy. Yet his archenemy is the liberal component present in the rule of law and in parliamentarism rather than the constitutional and/or the democratic component.⁸ According to him, the liberal component of both strands of liberalism entails a commitment to obviate the friend/enemy distinction. Moreover, since Schmitt refers to Locke as "the true father of the liberal constitutional state,"⁹ I shall

focus on his argument against the rule of law rather than on his arguments against parliamentarism. As conceived by Schmitt, the rule of law is based on three principles: (1) protection of the fundamental rights of individuals such as their rights to liberty and property; (2) the balancing and division of powers; and (3) the conception of laws as standing laws and as general norms (i.e., normativism).¹⁰ For Schmitt, normativism refers to any legal theory or way of thinking that justifies (or subsumes) the validity of specific rules or practices according to hierarchically arranged principles in order to minimize the role of personal decisions.¹¹

According to Schmitt, the rule of law assumes that individual liberty precedes the foundation of the state, and, as such, it is in principle unlimited, while the capacity of the state for restricting such liberty is in principle limited.¹² Yet this is an unwarranted assumption. In his *Second Treatise*, Locke states that although the state of nature is a state of liberty, it is not a "state of licence" to do as one pleases regardless of other people's well-being or regardless of natural and positive law.¹³ Indeed, Locke distinguishes clearly between natural and civil liberty, and license. Natural liberty is the ability that people enjoy in the state of nature to act only according to natural law. Civil liberty, however, is the ability that people enjoy in society to act only according to a legislative power established by their own consent and trust.¹⁴

Schmitt criticizes Locke for embracing the concept of political power based on right rather than might. He emphasizes that might has no role to play in Locke's politics because, according to Locke, the exercise of power without right is the way of beasts. Still, he acknowledges the presence of prerogative in Locke's *Second Treatise*. But, as he explains, the Lockean prerogative does not confer authority because, for Locke, only "the law gives authority."¹⁵ And the authority of law issues from its rightness (being compatible with natural law) and from the consent and trust of the majority. According to Locke, the majority confers a power of prerogative on the executive to act during serious political crisis only if the latter does not transgress the public good because "*Prerogative is nothing but the Power of doing publick good without a Rule.*"¹⁶ Schmitt, however, indicates that Locke admits that those commissioned with the power of prerogative must have discretion to act even against the law itself to do what is necessary to preserve the well-being of the community. If that is so, then Locke's uses the term "commission" in a

classical sense: meaning that those commissioned to act on behalf of a commissioning authority have discretion to do what is necessary to fulfill their commission.¹⁷ Consequently, Schmitt tacitly admits that the Lockean prerogative resembles the concept of commissarial dictatorship. That is, one commissioned to act according to a constituted power (an existing constitutional order) to preserve and/or to restore such an order.¹⁸

Lockean prerogative is conditioned by the consent and trust of the majority and by natural law, which aims at the public good. For Locke, only a legitimate constitutional order can preserve the public good, namely a legal order that respects the natural rights of citizens to life, liberty, and property. Hence, the Lockean prerogative differs from the concept of sovereign dictatorship. That is, one commissioned to act according to a constituent power (e.g., the people) to establish a new legal order.¹⁹ According to Schmitt, a paradigmatic case of sovereign dictatorship is Hobbes's *Leviathan*.²⁰ Even though originally *Leviathan's* authority issued from the constituent power of the people, once he is instituted, he is virtually unbound to act according to his own decisions.²¹

A significant difference exists between the Lockean prerogative and the Schmittian state of exception. For Schmitt, the state of exception resembles the role of miracles in natural theology.²² But, for him, the dictatorship that supervenes upon a state of exception is not like a miracle whereby the laws of nature are suspended, as Donoso argued.²³ What resembles a miracle is the state of exception itself that ruptures the juridical continuity of an established constitutional order. Like God's power to perform miracles, when faced with an unforeseen challenge to an established constitutional order, the Schmittian sovereign may temporarily choose to suspend the constitution to restore order or he can simply choose to abrogate the constitution altogether to establish a new constitutional order. Unlike a Lockean magistrate, however, a Schmittian sovereign is unconstrained by natural law. For Locke, the prerogative of a magistrate provides no right to determine the content and/or the validity of divine or natural law.²⁴ But, like Hobbes's *Leviathan*, a Schmittian sovereign has supreme power over any contentious issues that polarize groups in political society, including those pertaining to religion.²⁵

Unlike Schmitt, Locke grounds the validity of law not only on its general nature, but also on a political theology whereby

unconditional sovereignty rests solely with God.²⁶ Since he conceives God as an omnipotent, omnibenevolent, and necessarily just Supreme Being, it follows that God's commands are necessarily good, and people have an absolute obligation to obey them. As a result, it seems that Locke espouses a divine command theory of obligation.²⁷ Thus, for him, the ultimate principle of justification in morals and politics is an appeal to God's laws or what is commonly known as natural law.²⁸ One discovers the content of natural law by using one's faculty of reason and/or by revelation.²⁹ Because, for Locke, the general content and validity of natural law are independent of anyone's decision, he would argue that legal indeterminacy is conceivable only in regard to the specific content and/or validity of human law. Yet natural law remains underdetermined: no uncontested way exists to establish its content and/or its validity.

Schmitt contends that Locke opposes the generality of law to the personal commands of a sovereign. But, for Schmitt, the validity of a legal order emanates from a sovereign's decision rather than from general moral or legal principles. For him, "the sovereignty of law means only the sovereignty of men who draw up and administer this law."³⁰ That is why he opposes his political decisionism to any kind of normativism. In the spirit of Hobbes, he maintains that authority rather than truth makes the law.³¹ While the generality of a given law may be necessary for its validity, it is insufficient, so Schmitt argues, to fix the locus of authority. If this is the case, then "anybody can refer to the correctness of the content."³² Still, if anyone can do so, then, in the absence of a specific authority that can render decisions of last resort, the content and validity of law will be underdetermined.³³ In the event there is a serious clash of views regarding the content and/or validity of law political instability may ensue.

Unlike Locke, Schmitt argues for the value of legal order above all.³⁴ According to him, the preservation of a stable legal order is necessary although not sufficient to overcome legal indeterminacy. This is so because for Schmitt legal norms and concepts are always open-ended and therefore in need of interpretation and enforcement.³⁵ That is why for him the Achilles heel of any liberal legal order is precisely its commitment to the generality of legal norms. Under normal circumstances, so Schmitt argues, legal indeterminacy can be overcome, e.g., by a relatively homogenous judicial system.³⁶ But if there is a substantive challenge to a given legal order, then, according to him,

only the supreme decisionist power of a Leviathan can forestall serious political conflicts. As a result, Schmitt's argument for legal indeterminacy allows for the possibility of dictatorship.³⁷ Whether he actually favored commissarial or sovereign dictatorship remains an open question.³⁸

II

To understand the irony behind Schmitt's virulent attack against Locke's liberal constitutionalism one needs first to come to grips with his contestable concept of *the political*, namely politics viewed first and foremost as a friend/enemy distinction.³⁹ According to him, it is the intensity of a conflict that makes it political.⁴⁰ That is, when a group of people is predisposed to use lethal force against another group to defend their specific conception of the world (moral, religious, economic, or otherwise), the conflict becomes political. Still, for Schmitt, no moral, religious, or utopian ideals exist that can reasonably justify the killing of people. Only the actual perception of a threat to one's community's physical existence by foreign or domestic enemies justifies their annihilation. Apparently, self-defense is the only justification that he accepts for a group of people to kill another group.⁴¹ Yet if the mere perception of a threat to one's community's physical existence invests one group of people with a license to kill another group, then there is no substantial difference between acts of aggression and self-defense.

The radical subjectivity of Schmitt's infamous friend/enemy distinction taints his notion of self-defense. For example, a group of people may feel an intense but unjustified hatred for a different group of people while simultaneously perceiving them as a threat to the extent that they may use violence to try to annihilate the latter group. Such arbitrary hatred and perceived threat could be based, e.g., on a group's race or on any other irrelevant characteristic.⁴² Once we allow radical subjectivity to condition politics, as Schmitt does, we are surrendering our capacity to make reasonable distinctions between, e.g., just and unjust conflicts, and between morally permissible and morally impermissible acts. In such a normative vacuum, morally despicable acts can become legally or politically expedient.⁴³

Assuming, as Schmitt does, that one cannot eliminate human conflict from the world, he concludes that the state is necessary for regulating it.⁴⁴ As Leo Strauss maintains, the political looms up in Hobbes's state of nature conceived as a state

of war of all against all.⁴⁵ Hobbes describes the state of nature as a state of constant fear and insecurity devoid of any trace of culture.⁴⁶ Therefore, he posits an anarchical state of nature in order to overcome it. By instituting an all-powerful Leviathan as the last public court of appeal to settle conflicts among people in society, Hobbes supersedes the insecurity and anarchy of the state of nature.⁴⁷ Like Hobbes, Schmitt presupposes human contentiousness to argue for the necessity of instituting a public authority to secure public order. Yet he rejects Hobbes's individualist conception of the state of nature.⁴⁸ For him, the possibility of war exists not between one person and another, but between friend and enemy groupings whether among nation-states or among different groups within a specific nation-state.⁴⁹ Unlike Hobbes, however, Schmitt denies the possibility of permanently abandoning the state of nature. Therefore, for him, the political is equivalent to destiny.⁵⁰

Ironically, despite Schmitt's objections to Locke's liberal constitutionalism, his understanding of the conflictual nature of politics resembles Locke's view of the state of war. Locke distinguishes between the state of nature and the state of war. He writes, "But force, or a declared design of force upon the Person of another, where there is no common Superior on Earth to appeal to for relief, is *the State of War*."⁵¹ He conceives the state of nature as a state in which no political authority exists to settle disputes among people. According to him, "Men living together according to reason, without a common Superior on Earth, with Authority to judge between them, is *properly the State of Nature*."⁵² Yet, for him, the state of war obtains only if a person or group actually uses or threatens to use violence against others, and no political authority exists to settle their dispute regardless of whether they be in the state of nature or in civil society. His conception of the state of war presupposes a friend/enemy distinction analogous to Schmitt's conception of politics, since Locke describes the possibility of this belligerent state not only between individuals, but also between friend and enemy groupings. Indeed, for Locke, the state of war can occur between an individual or a group and a despotic power.⁵³

Although one can argue that Locke and Schmitt operate with a concept of enmity, the arbitrariness with which Schmitt uses this concept to deal with domestic enemies differs from the way that Locke uses it. Since their political theories respond to issues in different historical epochs, one needs to be cautious with their use of such a highly contestable concept. According to

Meier, Schmitt operates with two different models of the political: a defensive one and an offensive one. In the first model, he conceives of political enemies as foreign enemies, whereas in the latter he allows for the possibility that political enemies may also be domestic ones.⁵⁴ Likewise, Locke's concept of the state of war presupposes the possibility that political enemies may be domestic or foreign enemies. Even though, for Locke, the possibility of the state of war cannot be eradicated from the world, it is normally the case that the law usually protects people living in civil society. Still, for him, commonwealths are in a permanent state of nature *vis-à-vis* one another where the possibility of the state of war always looms up. Given people's natural duty of self-preservation and the precarious condition of the international community, it seems that Locke must be committed to the view that one's concern with foreign policy and hence foreign enemies often takes precedence over one's concern with domestic policy and hence domestic enemies.⁵⁵ This Lockean view seems compatible with Schmitt's defensive model of the political: Both recognize people's right to defend themselves from foreign aggressors.

But the problem with the distinction between an offensive and a defensive model is remarkably similar to the problem that one finds with Schmitt's friend/enemy distinction. Both distinctions occur in a normative vacuum. Given Schmitt's political decisionism, whether an act is an offensive or a defensive one, or whether someone is a friend or an enemy will ultimately depend upon a sovereign's decision. Since Schmitt contends that a sovereign's decision during a serious political crisis appears to emerge *ex nihilo*, his decision transcends normative evaluation. If this is so, then people must comply with a sovereign's decision not because it is morally or legally binding, but because the sovereign has the power to enforce it.

By highlighting the role of enemies in Schmitt's politics and the role of extremists in Locke's, one can begin to see a resemblance between their otherwise different conceptions of politics. Like most political terms, however, the term "extremist" is a rather plastic and therefore contestable term. But for Locke an extremist is anyone who actually infringes or will likely infringe on people's natural rights, and in doing so undermines by legal or extra-legal means the stability of a legitimate constitutional order. Evidently, to the extent that there are degrees and modalities of violations of rights within communities there are degrees and modalities of extremism as well. If that is so, then

from the three categories of extremist that can be identified in Locke's politics the first two (i.e., enemies and aggressors) are the ones that resemble Schmitt's friend/enemy distinction.⁵⁶

In assessing the role of both enemies and/or aggressors, the strength of Locke's militant liberalism *vis-à-vis* the arbitrariness of Schmitt's political decisionism is evident. For Schmitt, any group of people subjectively and contextually identified by a sovereign's perception of it as constituting a threat to his community's way of life is an enemy. His conception of enmity implies the ever-present possibility of combat with the intention to kill.⁵⁷ Locke argues specifically in the *Second Treatise* that since people have no right to destroy their own lives, they have no despotic power over the lives of others unless the others become aggressors. By using violence against members of a community, aggressors forfeit their own right to life. Therefore, the injured person and/or the community may rightfully destroy them.⁵⁸ Consequently, both Schmitt and Locke justify the destruction of enemies and/or aggressors by appealing to the right of self-defense.

Yet a substantive difference exists between Schmitt's subjective view of enemies and Locke's objective view of enemies and/or aggressors. For Schmitt, to be an enemy is to be perceived as such by another who is willing to engage the enemy in mortal combat, while for Locke to be an aggressor is to violate the natural rights of others unjustifiably. In doing so, the aggressor violates simultaneously the law of nature that generates both a natural duty of self-preservation and a duty of preserving others, including civil society itself. An aggressor could be a thief, a criminal, an absolute monarch, an unjust conqueror, a usurper, or a tyrant.⁵⁹

Unlike Schmitt, Locke operates with an objective and therefore normative view of enemies and/or aggressors. He not only uses the terms "enemy" and "aggressor" in his writings, but, more importantly, his discussion of a state of war presupposes them. That is, a state of war occurs only if a group of people or collectivity views another group as an enemy and/or as an aggressor.⁶⁰ Locke argues that whoever takes away the right of redress to appeal to the law to settle conflicts among people and/or between people and their sovereign should be declared an enemy of humanity. According to him, absolute sovereigns fail to recognize this right of redress. Therefore, they should be declared enemies of humanity.⁶¹ Likewise, by using force without

right any person or group that aims at harming others by infringing on their natural rights, whether in the state of nature or in political society, becomes an enemy and/or an aggressor.⁶² One can interpret the concept of enemies and/or aggressors in Locke as encompassing those individuals or groups that can be viewed as extremists. Among extremists he identified aggressors, intolerant groups and potentially disloyal citizens—who may owe fealty to different sovereigns, and those who openly reject the precepts of natural law.⁶³

Still, some of the groups that Locke portrayed as extremists, e.g., atheists and Catholics, are not viewed as so nowadays. Evidently, from our contemporary perspective a political theory that excludes so many people from enjoying equal civil and political rights can hardly be called liberal. Yet to do justice to Locke's politics one should focus not only on the letter, but also on the spirit of his writings. If that is the case, then one should interpret his views on toleration with hindsight. It seems that the spirit of Locke's conception of toleration is as valid today as it was in the seventeenth century. Ultimately, he based toleration upon a reasonable belief that extremists must not enjoy the same civil and political rights that reasonable citizens enjoy to compete for political power in society. To allow extremists to do so would be self-defeating. Thus, in order to preserve and therefore enjoy the benefits of a legitimate constitutional order, it is reasonable to assume that one should be precommitted to it.⁶⁴ Yet the extent of one's precommitment to such an order remains an open question.

III

Since Schmitt ignores the militant nature of Locke's liberal constitutionalism, he argues that, as a political theory, liberalism fails because it negates the antagonism between friend and enemy.⁶⁵ Yet by affirming the possibility of a state of war that already presupposes a friend/enemy distinction, Locke circumvents Schmitt's objection. Moreover, like the Schmittian sovereign, the Lockean magistrate is an "umpire" that settles disputes among citizens.⁶⁶ If so, the magistrate has the power of *prerogative*, which resembles the Schmittian sovereign power to act during a state of exception. Therefore, the magistrate's prerogative entails having the right to distinguish between friend and enemy, and hence the right to declare war on the latter. Unlike liberals who defend the principle of political neutrality, Locke acknowledged that sometimes the survival of a

legitimate constitutional order depends on the exercise of prerogative to deal effectively with extremists. But, unlike Hobbes's and Schmitt's concept of sovereign dictatorship, the Lockean prerogative resembles the concept of commissarial dictatorship whose authority is limited by the consent and trust of the majority and by natural law, which aims at the preservation and/or restoration of a legitimate constitutional order.

Although Locke's and Schmitt's political theories presuppose a friend/enemy distinction, and their theories appear to be influenced by their theistic beliefs, they nonetheless arrive at radically different conclusions. Since Locke conceives political sovereignty as fiduciary, the notion of *trust* is fundamental in the development of his political ideas.⁶⁷ For example, Locke argues that a magistrate can be authorized to be sovereign in two ways: (1) by God's commission and/or (2) by the consent of the majority.⁶⁸ However, since it is practically impossible to ascertain who God's commissioner is, Locke argues that political sovereignty resides with the majority. Consequently, in his *Two Treatises*, he abandons the divine commissarial theory of sovereignty.

For Locke, the people are the constituent power for establishing a legitimate constitutional order. But once such an order is established, their power to alter its constitutional foundation is limited by the aim of political society itself, which is to promote the public good by respecting people's natural rights. Thus, if the government attempts to alter a legitimate constitutional order by betraying the consent and trust of the majority, the people have a natural right to resist it and therefore to try to change it. Unlike Locke, Schmitt conceives sovereignty as a species of political decisionism. Consequently, Schmitt, like Hobbes, contends that citizens have no right to resist their sovereign. Although, in the spirit of Hobbes, he argues, "if protection ceases, the state too ceases, and every obligation to obey ceases."⁶⁹ Still, Schmitt's agreement with Hobbes regarding protection is only apparent. Hobbes contends that people have not only an unconditional natural right to protect their lives, but also a natural duty to do so.⁷⁰ That is not so for Schmitt. He criticizes Hobbes's distinction between "inner faith" and "outer confession" because by allowing for a subtle fissure between private and public reason, Hobbes, so Schmitt argues, will undermine the absolute decisionist power of Leviathan.⁷¹ By conceding the obvious, namely that people are free to believe in private what they may not profess in public, Hobbes, according to Schmitt,

allows liberal constitutionalism to "put a hook into the nose of the Leviathan."⁷² Once Leviathan is hooked, Schmitt contends, any group in society may try to capture Leviathan's power.⁷³ If that were to happen, then the likelihood of violent conflict among groups competing for political power in society would increase.

Schmitt's arguments against Locke's concept of the rule of law fail on several counts. By assuming that the rule of law conceives the nature of liberty as license, Schmitt overlooks Locke's nuanced conception of liberty, such as his distinction between natural and civil liberty, and license. As a result, Schmitt offers a straw man argument against the tradition of the rule of law. By ignoring Locke's concept of the state of war, Schmitt criticizes a distorted view of Locke's politics. And by neglecting Locke's view of those who can be conceived as extremists, Schmitt disregards the militant nature of Locke's liberalism.

By focusing so intensely on the state of exception while simultaneously trying at all cost to prevent anarchy, Schmitt, like Hobbes, allows for the advent of a tyrannical Leviathan. While one may agree with Schmitt that the rule of law can fail to deal effectively with a serious political crisis so anarchy may ensue, one may also contend that his political decisionism can fail as well to deal effectively with a serious political crisis so tyranny rather than anarchy may prevail. An important insight of Locke's politics is precisely his view that legitimate political authority is essentially fiduciary and therefore conditional rather than decisionist. Locke clearly understood that to prevent tyranny Leviathan must be bound. Because once Leviathan is unbound, most likely tyranny will prevail. This Lockean insight may partly explain why Locke's political theory can be viewed as inspiring and contributing to the success of the Glorious Revolution in seventeenth-century England and as a triumph of the rule of law over tyranny, while Schmitt's political theory can be viewed as contributing to the infamous success of National Socialism in twentieth-century Germany and as a triumph of tyranny over the rule of law.⁷⁴

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NOTES

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1. For his recognition of Hobbes as a decisionist thinker, see Schmitt (1922) 1985, pp. 33–35; see also idem (1938) 1996, p. 55. Although he criticized Hobbes, there is no reason to think that he ceased admiring Hobbes's political decisionism. For a fair evaluation of the role that Hobbes plays in Schmitt's politics, see Strauss (1932) 1996, pp. 83–107, secs. 11, 12, and 13. For an unsympathetic reading of Schmitt's interpretation of Hobbes, see Holmes (1993), pp. 50–53; see also Habermas (1992), chap. 5, especially pp. 130–134.

2. For the role that consent plays in Locke's politics, see Gough (1956), Chap. 3; see also Dunn (1971), pp. 129–161; Tarcov (1984), p. 7. For criticisms of these views, see Simmons (1993), especially chaps. 7 and 8.

3. See note 9.

4. I am describing a relationship between the genus extremist and the other three terms as species of the same genus so that enmity, aggressiveness, and intolerance can be viewed as modalities of extremism in Locke's political theory.

Extremist = ₁ Domestic or foreign persons or groups who actually infringe or will likely infringe on people's natural rights, and in doing so they undermine by legal or extra-legal means the stability of a legitimate constitutional order.

Enemy = ₂ Domestic or foreign persons or groups who actually infringe or will likely infringe on people's right of redress to appeal to the law to settle conflicts among themselves and/or between themselves and their sovereign. Or they forcibly attempt to impose their despotic power without people's consent. As a result, they can be viewed as extremists. See, e.g., Locke (1689) 1980, book 2, chap. 3, secs. 16 and 17; see also book 2, chap. 7, sec. 93.

Aggressor = ₃ Domestic or foreign persons or groups who actually infringe or will likely infringe on people's natural rights thereby forfeiting their own natural rights. In doing so they take away from the people a right of redress to appeal to the law. As a result, they can be viewed as

enemies of the people. See, e.g., Locke (1689) 1980, book 2, chap. 3, sec. 18; chap. 15, sec. 172; see also chap. 16, secs. 176 and 181.

Intolerant person = „ Domestic or foreign persons or groups who actually infringe or will likely infringe on people's natural right to liberty by forcibly attempting to impose their religious and/or secular beliefs on dissenters. As a result, they can be viewed as aggressors. See, e.g., Locke (1689) 1991, p. 46.

5. Murphy (1993), especially pp. 180–181.

6. In his book, *Legalität und Legitimität* (1932), Schmitt argued that the Weimar Constitution could not be interpreted as a value-neutral document that would allow extremist parties an equal chance to compete for political power. See, e.g., Bendersky (1983), pp. 145–148, and p. 153. For Schmitt's view on the Weimar Constitution, see Bendersky (1983), pp. 111–113; see also Caldwell (1997), pp. 114–116; Dyzenhaus (1997a), pp. 125–127; idem (1997b), pp. 70–85; and Schwab (1989), pp. 80–86. It is tragically ironic that, after Hitler was named Chancellor (January 30, 1933), Schmitt, who had been critical of the Nazis in the past, became an advocate of National Socialism. For Schmitt's about-face see Cristi (1988), pp. 38–45.

7. For his arguments against liberal democracy, see Schmitt (1926) 1988, especially chap. 1 and 2.

8. For his arguments against liberalism in general, see Schmitt (1932) 1996, pp. 28, 60–61, and 69–71; idem (1938) 1996, chap. 5. For his specific arguments against the rule of law, idem (1922) 1988, chap. 1, see idem (1928) 1992, sec. 2, caps. 12, 13, 14, 15, 16.

9. Schmitt (1938) 1996, p. 71. See also idem (1921) 1985, cap. 6, pp. 256–257; idem (1922) 1985, pp. 13–14; idem (1926) 1988, p. 42; idem (1928) 1992, sec. 2, cap. 13, pp. 150–151.

10. For the protection of the fundamental rights of individuals, see Schmitt (1928) 1992, sec. 2, cap. 12, pp. 137–138; idem (1932) 1996, p. 70. For the balancing and division of powers, idem (1921) 1985, cap. 3, pp. 138–140; idem (1926) 1988, pp. 39–41; idem (1928) 1992, sec. 1, cap. 2, pp. 39–41; idem (1932) 1996, p. 61. For the conception of laws as general norms, idem (1922) 1985, p. 32; idem (1928) 1992, sec. I, cap. 2, pp. 42–44; idem (1938) 1996, chap. 6, p. 65.

11. For his notion of normativism, see Schmitt (1931) 1983, I sec. 3, footnote 58, pp. 80–83, and footnote 60, p. 86 and pp. 87–89. For criticisms of Schmitt's notion of normativism, see Scheuerman (1999), pp. 75–77; see also idem (1996a).

12. Schmitt (1928) 1992, sec. 2, cap. 12, p. 138.

13. Locke (1689) 1980, book 2, chap. 2, sec. 6, p. 288.

14. *Ibid.*, book 2, chap. 4, sec. 22.

15. Schmitt (1921) 1985, cap. 1, p. 73.

16. Locke (1689) 1980, book 2, chap. 14, sec. 166.

17. Schmitt (1921) 1985, cap. 1, p. 74.

18. *Ibid.*, cap. 1, pp. 26–28 and pp. 33–34; also cap. 4, pp. 180–181.

19. Schmitt contends that sovereign dictatorship is a modern creation presaged in Machiavelli and Hobbes, and that it is embodied in the French and Bolshevik Revolution. See Schmitt (1921) 1985, pp. 21–22, pp. 26–29, and cap. 1. For the distinction between commissarial and sovereign dictatorship, see idem, cap. 4, especially pp. 181–183. See also McCormick (1997b).

20. McCormick (1997a), pp. 132–133.

21. Hobbes (1651) 1991, chap. 18, sec. 89, pp. 121–123.

22. Schmitt (1922) 1985, p. 36.

23. Donoso Cortés (1849) 1952, especially p. 164.

24. Locke (1661) 1967, p. 126.

25. Schmitt (1935) 1995, pp. 138–139. See also Hobbes (1651) 1991, chap. 43, sec. 322, p. 404.

26. For Locke, God is the fountainhead of morality, and therefore the foundation of natural law and political legitimacy, see Locke (1667) 1997, p. 137; idem (1689) 1979, book 4, chap. 3, sec. 18, p. 549, and also book 4, chap. 10, sec. 7, p. 622; idem (1695) 1989, sec. 242, pp. 63–64. For the foundational role that God plays in Locke's politics, see, e.g., Ashcraft (1986), chap. 10; Dunn (1969), chap. 18; and Spellman (1997), chaps. 2 and 5.

27. Adams (1987), chap. 7, especially pp. 109–110. For Locke's conception of God's perfections, see Goldie (1997), pp. 277–278.

28. Locke (1689) 1980, book 2, chap. 2, secs. 6 and 8.

29. For Locke, natural law denotes a system of rules and principles commanded by God to guide human conduct. Therefore, for him, these rules and principles are valid because God commands them. Thus, they are both imperatives and norms. See Locke (1689) 1979, book 1, chap. 3, sec. 12; idem (1695) 1989, secs. 242–243, pp. 62–67 and p. 84. For a voluntarist interpretation of Locke's concept of natural law, see Mabbott (1973), pp. 120–128. For an opposing rationalist interpretation of Locke's concept of natural law, see Tully (1993), pp. 291–294. For an attempt to reconcile both interpretations, see Ryan (1986), pp. 22–23.

30. Schmitt (1932) 1996, p. 67.

31. Schmitt (1922) 1985, p. 33. See also Hobbes (1681) 1971, sec. 4, p. 55; see also idem (1651) 1991, chap. 26, sec. 142, p. 55.

32. Schmitt (1922) 1985, p. 33.

33. For legal indeterminacy, see Scheuerman (1996b); idem (1999), chaps. 1, 5, and 6. See also McCormick (1999).

34. For the supremacy of order in Schmitt's political theory, see Herrero (1996); see also Hirst (1987), p. 16.
35. Scheuerman (1999), p. 16.
36. *Ibid.*, p. 24.
37. *Ibid.*, pp. 32–35.
38. After 1932 Schmitt opted for sovereign dictatorship. See McCormick (1997b), p. 180; see also Cristi (1998), p. 45.
39. Schmitt (1932) 1996, pp. 30–32.
40. *Ibid.*, p. 26. "Intensity" may be necessary for a conflict to become political in the Schmittian sense, but it is insufficient to explain the nature of politics. "Intensity" is a Janus-like term: it could mean intensity of conflict, as Schmitt uses it, or intensity to avoid conflict, as, e.g., Giovanni Sartori uses it. See Sartori (1989a); see also the reply by Gottfried (1989), and the rejoinder by Sartori (1989b).
41. *Ibid.*, p. 49.
42. For Schmitt's collaboration with the Nazis and his anti-Semitism, see Wiegant (1995).
43. For Schmitt's defense of ethical relativism, see Schmitt (1959) 1996, pp. 17–28. For a contemporary argument against ethical relativism in foreign affairs, see Rawls (1999), especially part 3, sec. 14.5.
44. For a discussion of this issue, see Strauss (1932) 1995, pp. 124–126.
45. Strauss (1932) 1996, (11), pp. 89–90.
46. Hobbes (1651) 1991, chap. 13, p. 89.
47. Strauss (1932) 1996, (12), p. 90.
48. Dyzenhaus (1997b), pp. 88–91.
49. Strauss (1932) 1996, (12), p. 90.
50. Meier (1995), pp. 16, 70–71. See Schmitt (1932) 1996, p. 78.
51. Locke (1689) 1980, book 2, chap. 3, sec. 19.
52. *Ibid.*, book 2, chap. 3, sec. 19, and also chap. 7, secs. 90–91.
53. *Ibid.*, book 2, chap. 3, sec. 17.
54. Meier (1995), pp. 17–29.
55. For the priority of foreign over domestic policy in Locke, see Cox (1960), pp. 171–175.
56. See my taxonomy of extremists in note 4.
57. Schmitt (1932) 1996, pp. 32–33.
58. Locke (1689) 1980, book 2, chap. 15, sec. 172; chap. 16, secs. 178, 179, 180, 181.

59. See, e.g., Locke (1689) 1980, book 2, chap. 2, secs. 8, 11, 17, 18, 19; chap. 15, sec. 172; chap. 16 and chap. 17.
60. *Ibid.*, book 2, chap. 3, secs. 16, 17, and 18.
61. *Ibid.*, book 2, chap. 7, sec. 93.
62. *Ibid.*, book 2, chap. 3, secs. 16, 17, and 18. See also Wootton (1993), p. 40.
63. Locke (1689) 1991, pp. 46–47.
64. For a defense of constitutional precommitment, see Holmes (1995) chap.5.
65. Schmitt (1932) 1996, p. 70.
66. Locke (1667) 1997, p. 137.
67. Dunn (1990), chap. 3, especially pp. 33–44. For an exegesis of how Locke used the concept of *trust*, see Gough (1956), chap. 7, especially pp. 143–46; see also Simmons (1993), pp. 70–72.
68. Locke operates with two different theories of authorization: (1) commissional and (2) consensual. See Locke (1661) 1967, especially intro. by Abrams, pp. 23–24, and pp. 125–126. See also Locke (1667) 1997, pp. 134–136.
69. Schmitt (1938) 1996, chap. 6, especially p. 72 and p. 96.
70. For his notions of natural right and natural law, see Hobbes (1652) 1991, chap. 14, sec. 64.
71. Schmitt (1938) 1996, pp. 56–57 and 65–68.
72. *Ibid.*, chap. 6, p. 65.
73. *Ibid.*, chap. 6, p. 74. For Schmitt's objections to Hobbes, see Dyzenhaus 1994, pp. 8–10.
74. Some scholars find continuity in Schmitt's legal and political thought before and after 1933, and hence they argue that his works were congruent with National Socialism. See, e.g., Scheuerman (1999), pp. 1–2; Cristi (1998), pp. 27–28; and Wolin (1995), pp. 106–107. Others find discontinuity in his works and hence they contend that his collaboration with the Nazis can be explained as a failure of character. See, e.g., Gottfried (1990), pp. 28–30; Schwab (1989), pp. 101–107; and Bendersky (1983), pp. 280–282. This is an interesting controversy beyond the scope of my paper.