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Article (Accepted version)
(Unrefereed)

Original citation: Loughlin, Martin (2017) *Hugo Preuss: his concept of the state and his position in German state theory, editorial introduction by Martin Loughlin.* History of Political Thought, 38 (2). pp. 345-370. ISSN 0143-781X

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Available in LSE Research Online: June 2017

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Hugo Preuss:
His Concept of the State and his Position in German State Theory

Carl Schmitt

Abstract: After the publication of *The Concept of the Political* (1927) and *Constitutional Theory* (1928), Carl Schmitt shifted the orientation of his work towards state theory. Unlike most leading public law scholars, he never published a general theory of the state. But in this lecture, delivered in 1930, Schmitt outlined his views of the general trajectory of German state theory from the early nineteenth century to the contemporary era and argued that the Weimar Constitution's conception of the state as a 'neutral state' cannot survive unless its leaders were prepared, like Hugo Preuss, actively to defend its substantive liberal-democratic values.

Editorial Introduction

In 1928, Carl Schmitt moved from his chair in Bonn to a professorship in state law (*Staatsrecht*) at the *Handelshochschule* (School of Business Administration) in Berlin. Having recently completed the first version of his work, *The Concept of the Political* (1927) and having just published his magnum opus, *Constitutional Theory* (1928), he indicated that he had accepted the appointment 'so that he could become familiar with the object of his discipline, namely the state, at close range'.[1] His move did in fact seem to signal a shift in the orientation of his work from constitutional theory to state theory, that is, from the legal form of constitutional ordering to the state-theoretical conditions that might sustain that legal form. But he recognized that, especially in the turbulent political conditions of the Weimar regime, state theory could not take the general and abstract form exemplified by Georg Jellinek's major study, *Allgemeine Staatslehre* (1900).[2] The emphasis had to be firmly placed on the specific, historically-contingent socio-political conditions that formed 'a people as a political unity' and shaped the nature of its governing arrangements.

One significant output resulting from this shift in orientation is Schmitt's essay on Hugo Preuss's status in the German tradition of state theory. Initially delivered as a

[1] Schmitt, letter to the journal *Beamtenbund*, 30 Jan 1933; cited in Reinhard Mehring, *Carl Schmitt: A Biography* D. Steuer trans. (Cambridge: Polity, 2014), 181.
[2] Georg Jellinek, *Allgemeine Staatslehre* [1900] (Berlin: Springer, 3rd edn. 1922).

lecture in January 1930 at an event to celebrate the founding of the Weimar Constitution, it was subsequently published by Mohr.[3] It is fitting that Schmitt took Preuss as his interlocutor since, in addition to his having been the principal drafter of the Weimar Constitution, Preuss had held the chair of state law at the *Handelshochschule* from 1906 until 1918, when he was appointed State Secretary of the Reich Ministry of Interior. The essay provides intimations of Schmitt's growing support for the Weimar Constitution; this follows his 1928 work on constitutional theory, which contained a detailed analysis of the provisions of the Weimar Constitution. But his positive assessment of the scholarly and political work of Preuss, who was not only a founding member of the left-liberal German Democratic Party (DDP) but also Jewish, caused him considerable embarrassment after he joined the Nazi party in 1933 and had made a pitch to become its 'Crown jurist'.[4]

In this essay, Schmitt presents an overview of the development of German state theory from the early nineteenth-century to contemporary debates in the Weimar Republic. His basic thesis is that since the establishment of the German Reich in 1871 there had been a progressive 'decline of consciousness in the field of state theory'[5] and this was attributable to the growing importance of legal positivist ideas. Under the influence of Albrecht, Gerber and Laband, a new conceptualization of public law held sway, one that expelled all matters of history and politics from juristic consideration and which conceived the state as a formal legal institution equipped with a special type of legal personality. In this conceptualization, the state was understood to have been created by, and regulated in accordance with, the operations of positive public law.[6]

Schmitt maintains that this development entailed the abandonment of the great German tradition of state theorizing that had evolved over the previous two or three hundred years and which, having focused on matters of substance and not simply form, placed the relationship between politics and law at its core. One consequence of its abandonment is that German university education had been reduced to that of 'an apolitical, technical training for civil servants' and 'an equally apolitical, obscure literary

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[3] Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre* (Tübingen: Mohr, 1930). Duncker & Humblot later acquired the rights to the paper. We wish to express our gratitude to Duncker & Humblot for permission to publish this English version of the paper.
[4] See Mehring above n.1, esp. chs 19, 20. Schmitt had also dedicated his book on *Constitutional Theory* 'to the memory of my friend Dr Fritz Eisler' who had been killed in the First World War, and who also was Jewish.
[5] Below, p. xx [to be inserted at proof stage – p13 of typescript].
[6] C.F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz,1865); Paul Laband, *Das Staatsrecht des deutschen Reiches* (3 vols. 1876-82; 5th edn. 4 vols. 1911-14). See Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn Books, 2001), ch.8.

education'.[7] This, he argues, obscured the political condition of the Wilhelmine state, which was marked by ambivalence over whether power ultimately was held by the monarch or the people, an ambivalence that remained hidden behind the workings of a smooth-functioning bureaucracy.

In these conditions of uncertainty, the great achievement of Hugo Preuss (1860-1925) was to have developed in a systematic manner the political implications of the organic theories of his teacher, Otto von Gierke. By doing so, Preuss had been able to overthrow the influence of monarchical authoritarian theories and present a logically defensible state theory that was able explicitly to reflect a compromise between rival claims of the monarchy and the bourgeoisie. And then in 1918, as the bourgeoisie 'anxiously maintained their silence', Preuss 'spoke out with great courage' and played a decisive political role in the establishment of the new liberal democratic republic.[8] Preuss's great achievement, Schmitt acknowledges, is to have recognized that the liberal democratic arrangements of the Weimar Constitution do not simply establish a set of formal procedures; they also express certain substantive normative commitments that needed explicitly to be defended.

In the final parts of the essay, Schmitt reconstructs the state theory that underpinned the Weimar constitutional settlement. Its basis, he suggests, is the 'neutral state', a state that offers every political movement an 'equal chance' not only of winning a parliamentary majority, but even (more contentiously) acquiring a constitution-altering majority. Preuss recognized that, to succeed, such a state needed to achieve 'class peace' and forge a common national purpose. But Schmitt contends that it is 'impossible … for a state to be neutral on the question of its own existence' and 'it is equally hard for a constitution to remain neutral on the political decisions which constitute its fundamental (positive) substance'.[9] Given the uneasy compromise between liberalism and democracy expressed by the Weimar Constitution, some 'neutral power' was required to protect that settlement if such a state was to be able to sustain its existence. In other writings of this period, Schmitt argued that the Reich President must take on the role of the 'guardian of the constitution' (contrary to Kelsen's argument that this role should be entrusted to the court).[10] In this essay, he focuses primarily on the question of whether there exists a

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[7] Schmitt, *Hugo Preuss*, 16
[8] Schmitt, *Hugo Preuss*, 18
[9] Below, n.29.
[10] See Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge: Cambridge University Press, 2015), chs 2 and 3 (reproducing the main sections of Schmitt, *Der Hüter der Verfassung* (Berlin: Duncker & Humblot, 1931). It might

powerful 'national spirit' or 'public opinion' that can rally to protect the Constitution and he doubts whether there exists in 1930 a sufficiently strong 'political intelligence independent of the organised political parties'. The fate of the Germany national spirit, he concludes, lies bound up in the future of the Weimar constitution.

The basic message of Schmitt's essay derives from his earlier works. It is that since the concept of the state presupposes the concept of the political, a state must be seen to be a political achievement,[11] and that its constitution must be understood to express certain substantive political commitments.[12] If a constitution is relativized, by which he means that 'the concept of the constitution is lost in the concept of individual constitutional law', then it loses its meaning.[13] Preuss understood this, but the legal positivists did not: in their view, the constitution of the 'neutral state' was to be interpreted as a formal legal text. And this meant, specifically, that, contrary to Schmitt's view that there must be substantive limits to the amendment power in Article 76, the only limits were those laid down in the text.[14] For Schmitt, this was tantamount to constitutional suicide.[15]

Schmitt later commented that his efforts to limit the power of revision had failed 'due to the partly sceptical, partly ironic approach of its other interpreters' and that this facilitated 'the destruction of those compromises necessary to the structure of the constitution'.[16] This lack of substantive political commitment to the Constitution was then available for Hitler to exploit. Having acquired the chancellorship in January 1933, Hitler quickly promoted 'consecutive legal revolutions': first by immediately dissolving the Reichstag, then ('without one word of protest from the guardians of the constitution') in February issuing the infamous emergency decree, and finally in March through a constitutional amendment enacting the so-called 'enabling act'.[17] When later

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be noted that, decades later, Schmitt regarded the Preuss essay as 'very important' and considered its republication in a volume together with his work on the guardian of the constitution (Mehring, 223). In 2016 Duncker & Humblot are planning to publish a new edition of these two works, edited by Reinhard Mehring.

[11] Schmitt, *The Concept of the Political*, 19.

[12] Schmitt, *Constitutional Theory*, 59-66.

[13] Ibid. 71.

[14] G. Anschütz and R. Thoma, *Handbuch des deutschen Staatsrechts* (Tübingen, Mohr 1932), vol 2, p. 154.

[15] Carl Schmitt, *Legality and Legitimacy* [1932] J. Seitzer trans. (Durham NC: Duke University Press, 2004), 'value neutrality here is pushed to the point of system suicide'. See further Olivier Beaud, *Les derniers jours de Weimar: Carl Schmitt face à l'avènement du nazisme* (Paris: Descartes & Cie, 1997), chs.3-4.

[16] Carl Schmitt, 'The Legal World Revolution' [1978] (1987) 72 *Telos* 73-89 at 83.

[17] Ibid.

that year Schmitt made his notorious pitch at establishing a new constitution for the Nazi regime, he at least maintained a consistency of argument. The Weimar Constitution, he contended, was no longer in force because 'the whole ideal, liberal-democratic world has collapsed' and 'all the principles and regulations that were essential to that constitution both from the ideological and the organizational standpoints are set aside along with their premises'.[18]

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[18] Carl Schmitt, *State, Movement, People: The Triadic Structure of the Political Unity* [1933] (Corvallis, Oregon: Plutarch Press, 2001), pp.4, 3.