

THE EXILE OF THE *NOMOS*: FOR A CRITICAL PROFILE OF CARL SCHMITT

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I. A JURIST ON THE FRINGES OF THE LAW

Carl Schmitt represents one of the most significant and controversial figures in European political and legal philosophy in this century. His name and work have long been associated—from an ideological-political aspect—with his compromise with the Nazi regime and, from a strictly doctrinal aspect, with the alternating fortunes of “decisionism”—a theoretical position in which the foundation of the state’s sovereignty would not rest on the impersonality of the law or on a norm, but rather on a primal decision. Schmitt’s assumption, expressed, above all, in his controversy with the “normativism” of Hans Kelsen (but more generally with all “proceduralistic” and “pluralistic” ways of viewing the state, whether liberal-conflictive or consociative-corporative) has caused some interpreters to consider Schmitt’s thought equivalent to a realistic “politology” outside legal science—or, according to the argumentative judgment of an authoritative Italian jurist,¹ a “degeneration” of the great thread of German legal positivism expressed by the line that stretches,

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Among his chief works translated into various languages are: POTERE E SECULARIZZAZIONE [Power and Secularization] (2d ed. 1985) (revised German edition: MACHT UND SÄKULARISIERUNG (1989)); MINIMA TEMPORALIA. TEMPO, SPAZIO, ESPERIENZA [Minima temporalia. Time, Space, Experience] (1990) (revised and expanded German edition: MINIMA TEMPORALIA. ZEIT, RAUM, ERFAHRUNG (1992)); KAIRÓS. APOLOGIA DEL TEMPO DEBITO [Kairós. Apology for Time Owed] (2d ed. 1993); DOPO IL LEVIATANO. INDIVIDUO E COMUNITÀ NELLA FILOSOFIA POLITICA [After Leviathan. Individual and Community in Political Philosophy] (1995); DIE SÄKULARISIERUNG DER WESTLICHEN WELT [The Secularization of the Western World] (1996).

¹ See Massimo Severo Giannini, *La concezione giuridica di Carl Schmitt: un politologo datato? (The Legal Conception of Carl Schmitt: a dated politologist?)*, in QUADERNI COSTITUZIONALI 447-59 (1986).

beginning with von Gerber and Laband, to Jellinek and Kelsen.

However, such a judgment clashes with the understanding of his own work that Schmitt offered on several occasions: he always—up to the end—identified himself as a jurist. In spite of his documented “ignorance” of private law and his “particularly argumentative attitude toward any pandectistic and neo-pandectistic view of public law from Laband to Kelsen,”² Schmitt—according to his autobiographical testimony in *Ex Captivitate Salus*, which he wrote while in prison between 1945 and 1947—was familiar with “two areas of legal science, constitutional law and international law.”³ These two disciplines, both of which include a grasp of public law, are exposed to “danger from ‘the political.’”⁴ From this danger, Schmitt specified, obviously arguing against any form of legal “purism”:

[N]o jurist in these disciplines can escape, not even by disappearing into the nirvana of pure positivism. The most he can do is mitigate the danger either by settling into remote neighboring areas, disguising himself as a historian or a philosopher, or by carrying to extreme perfection the art of caution and camouflage.⁵

The track of Schmitt’s theoretical reflections began, ideally, in 1919, with *Politische Romantik*⁶ (Political Romanticism), his first important work, then continued with his famous slim volume, *Die Diktatur*⁷ (Dictatorship). *Die Diktatur* had considerable effect on the whole theoretical-political debate in the twenties, not only on the side of the so-called “conservative revolution,” but also on the side of the Marxists. The volume’s subtitle—“From the Origins of the Modern Idea of Sovereignty to the Struggle of the Proletarian Class”—constituted an indicator of Schmitt’s broad and complex approach to the problem, one aimed at an unbiased confrontation between historical-ideal components that are different, or even opposed (as was recognized at the time by intellectuals coming from different camps, from Walter Benjamin to Ernst Robert Curtius). It is, in fact, in this text that he first introduced the distinction between a “commissioned” or transitional dictatorship (contemplated in the Roman legal system) and an “institutional” or “sovereign” dictatorship, which Schmitt would take up again

² *Id.* at 447.

³ CARL SCHMITT, *EX CAPTIVITATE SALUS: ERFAHRUNGEN DER ZEIT 1945-47*, at 55 (1950).

⁴ *Id.*

⁵ *Id.*

⁶ CARL SCHMITT, *POLITISCHE ROMANTIK* (1919).

⁷ CARL SCHMITT, *DIE DIKTATUR. VON DEN ANFÄNGEN DES MODERNEN SOUVERÄNITÄTS GEDANKENS BIS ZUM PROLETARISCHEN KLASSENKAMPF* (1921).

later in the framework of his pitiless diagnosis of the constitutional dispositions of the Weimar Republic (the beginning of which was signaled by his 1923 work, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*⁸ (The Spiritual-Historical Situation of Today's Parliamentarianism)). Other key texts in Schmitt's reflections during the twenties include: *Politische Theologie*⁹ (Political Theology) of 1922, the essay *Der Begriff des Politischen*¹⁰ (The Concept of the "Political"), which appeared for the first time in 1927 in the *Archiv für Sozialwissenschaft und Sozialpolitik*, and *Verfassungslehre*¹¹ (Constitutional Doctrine) of 1928, in which Schmitt tries to give a propositional outlet for the themes of the antiformalistic polemics of the preceding years. His works dating from the early thirties can be placed along this same track: *Der Hüter der Verfassung*¹² (The Guardian of the Constitution) from 1931, *Legalität und Legitimität*¹³ (Legality and Legitimacy) from 1932, and *Staat, Bewegung, Volk*¹⁴ (State, Movement, People) from 1933. A further settling of his thought process is attested to by *Über die drei Arten des rechtswissenschaftlichen Denkens*¹⁵ (On the Three Kinds of Legal Thought) from 1934, and by his 1940 collection of essays, *Positionen und Begriffe*¹⁶ (Positions and Concepts). It should not be forgotten, however, that Schmitt, again during the thirties, assiduously measured himself against the work of Thomas Hobbes, with his 1937 essay, *Der Staat als Mechanismus bei Hobbes und Descartes*¹⁷ (The State as Mechanism in Hobbes and Descartes), and with the volume he published in the following year, *Der Leviathan in der Staatslehre des Thomas Hobbes*¹⁸ (The Leviathan in the State Doctrine of Thomas Hobbes).

Beginning with the years of World War II, Schmitt's approach

⁸ CARL SCHMITT, DIE GEISTESGESCHICHTLICHE LAGE DES HEUTIGEN PARLAMENTARISMUS (1923).

⁹ CARL SCHMITT, POLITISCHE THEOLOGIE. VIER KAPITEL ZUR LEHRE VON DER SOUVERÄNITÄT (1922).

¹⁰ CARL SCHMITT, DER BEGRIFF DES POLITISCHEN (1933).

¹¹ CARL SCHMITT, VERFASSUNGSLEHRE (1928).

¹² CARL SCHMITT, DER HÜTER DER VERFASSUNG (1931).

¹³ CARL SCHMITT, LEGALITÄT UND LEGITIMITÄT (1931).

¹⁴ CARL SCHMITT, STAAT, BEWEGUNG, VOLK. DIE DREI GLIEDERUNG DER POLITISCHEN EINHEIT (1933).

¹⁵ CARL SCHMITT, ÜBER DIE DREI ARTEN DES RECHTSWISSENSCHAFTLICHEN DENKENS (1934).

¹⁶ CARL SCHMITT, POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR-GENÈVE-VERSAILLES, 1923-1939 (1940).

¹⁷ Carl Schmitt, *Der Staat als Mechanismus bei Hobbes und Descartes*, 30 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 622-32 (1937).

¹⁸ CARL SCHMITT, DER LEVIATHAN IN DER STAATSLHRE DES THOMAS HOBBS. SINN UND FEHSCHLAG EINES POLITISCHEN SYMBOLS (1938).

to the problem undergoes a significant shift: the themes related to the genesis-structure and to the parabolic path of the modern state are increasingly absorbed within a cosmic-historical circumstance, hinged on the earth-sea binomial, whose alternating circumstance would mark the destinies of the *Nomos*, understood as the countersign of a universal law of “appropriation,” and, for that reason, the point of origin of every “law.” This phase of his thought, which began in 1942 with the slim volume, *Land und Meer*¹⁹ (Land and Sea), culminated in 1950 with what represents Schmitt’s *magnum opus* and one of the greatest books of the century: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*²⁰ (The *Nomos* of the Earth in the International Law of the *Jus Publicum Europaeum*).

In the following thirty-five years of his long life, Schmitt dedicated himself to a deeper understanding and a precise definition, rather than to a true development, of the categories underlying his conception, not for the purpose of systematizing it (since his thought is characterized by a conspicuously antisystematic attitude), but as if wanting to establish its cardinal points. Of this final phase, it is sufficient to mention the relevant passages: Schmitt’s 1953 essay, *Nehmen/Teilen/Weiden*²¹ (Appropriation/Division/Production), conceived as a corollary to the theory of the *Nomos*; the 1960 article, *Die Tyrannei der Werte*²² (The Tyranny of Values); the slim 1963 volume, *Theorie des Partisanen*²³ (The Theory of the Partisan), which presented a kind of intertextual integration of the “concept of the political”; and, finally, *Politische Theologie II*²⁴ (Political Theology II) of 1970, which constituted a significant defense of the “secularization” category, engaging in controversy with the thesis of the “legitimacy” or “self-affirmation” of the modern advanced by Hans Blumenberg.²⁵

¹⁹ CARL SCHMITT, *LAND UND MEER. EINE WELTGESCHICHTLICHE BETRACHTUNG* (1942).

²⁰ CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950).

²¹ Carl Schmitt, *Nehmen/teilen/weiden, in VERFASSUNGSRECHTLICHE AUFSÄTZE AUS DEN JAHREN 1924-1954* (1958).

²² Carl Schmitt, *Die Tyrannei der Werte, in SÄKULARISATION UND UTOPIE. EBRACHER STUDIEN, ERNST FORSTHOFF ZUM 65. GEBURSTAG* (1967).

²³ CARL SCHMITT, *THEORIE DES PARTISANEN. ZWISCHENBEMERKUNG ZUM BEGRIFF DES POLITISCHEN* (1963).

²⁴ CARL SCHMITT, *POLITISCHE THEOLOGIE II. DIE LEGENDE VON DER ERLEDIGUNG JEDER POLITISCHEN THEOLOGIE* (1970).

²⁵ To put this controversy in its context, I take the liberty of referring to my works: GIACOMO MARRAMAO, *POTERE E SECOLARIZZAZIONE* [Power and Secularization] (1983), and GIACOMO MARRAMAO, *DIE SÄKULARISIERUNG DER WESTLICHEN WELT* [The Secularization of the Western World] (1996).

To provide a methodical compass suited to orienting oneself in the vast and tight weave of these works—today the subject of a significant, though ambiguous, revival in various countries—it is necessary to use as reference points the three fundamental nuclei that run throughout the itinerary of Schmitt's thought: (1) political theology; (2) the concept of the “political”; and (3) the theory of the *Nomos* as concrete order. These three items are gathered simultaneously, both in their specificity and distinctiveness, and in their interactive co-presence, into an “epochal” vision of the modern state and its parabolic path. They will be addressed, albeit separately, to bring about their confluence—at the end of a deconstructive/reconstructive process—into a large diagnostic framework which brings the “crisis of the state” into the more general circumstance of what Schmitt defines—following Max Weber—as “Western rationalism” (*okzidentaler Rationalismus*).

II. POLITICAL THEOLOGY: DECISION, NORM, CONSTITUTION

“The Sovereign is the one who decides on the state of exception”: with this peremptory statement begins the *Politische Theologie* of 1922.²⁶ The text has, therefore, as its central theme the concept of sovereignty; for this reason, many jurists have wondered why the title was chosen. The reason for their surprise is to be found, very evidently, in their failure to observe the category to which Schmitt gave the task of interconnecting the problem of sovereignty as a “decision” (*Entscheidung*) about the “state of exception” (*Ausnahmestand*) with the context of political theology: the “secularization” category. This connecting function is made explicit only in the *incipit* of the third chapter of the volume, with the statement that “the most pregnant concepts of the modern doctrine of the State are secularized theological concepts.”²⁷ Thus, the secularization category provides the key to accessing not only the historical development of those concepts, passing from theology into public law,²⁸ but also their “systematic structure.” The “constructive” analogy running between theology and jurisprudence allows Schmitt to read the entire development of the doctrine of the state in the last four centuries from the point of view of the antithesis between “deism” and “theism.” Here, Schmitt neatly outlined his opposition—which will remain, from this point on, a constant in Schmitt's thought—to the “deistic” theological-metaphysical presupposition of the “modern State of law,” which “eliminates the violation of the laws of nature

²⁶ SCHMITT, *supra* note 9, at 11.

²⁷ *Id.* at 49.

²⁸ “[F]or example, the omnipotent God . . . has become the omnipotent legislator.” *Id.*

contained in the concept of miracles, [and] produces, by means of direct intervention, an exception, in the same way it excludes the direct intervention of the sovereign in the current legal system.”²⁹ The case of an exception, repudiated by “illuministic rationalism” in any form whatsoever, “has a significance for jurisprudence that is analogous to that of the miracle for theology.”³⁰

The bridge between *Political Theology* and the *Theory of Sovereignty* has thus been cast. Schmitt did not, in fact, limit himself to declaring *sovereignty* a limit-concept to be applied in a limit-case. Rather, above all, he underlined the “systematic reason, of legal logic,” which makes the state of exception “eminently appropriate to the legal definition of sovereignty.”³¹ The nonrhetorical and non-occasional attitude of this insistence on the properly legal character of the definition of sovereignty is newly and exactly verified by Schmitt’s refusal to adopt the sociological equivalents of the concept (like Weber’s *Herrschaft*, for example, or dominion in the sense of “legitimate power,” countered by *Macht*, or “de facto power”): “It would be a gross transposition of the schematic disjunction between sociology and the science of law to maintain that the exception has no legal significance and is, consequently, ‘sociological.’”³² Sovereignty is, for Schmitt, a *conceptus terminator*. It is precisely the *terminus* of every normative system, in the double sense of its *border* and the *line* that defines it. But precisely as the line that defines it, that delimits it, sovereignty cannot be expressed in normative language, but must instead be correlated to what the *decision* requires: sovereignty, therefore, as the power to decide *about* the state of exception.

However, it is necessary to pay attention to an essential detail of this defining formula, if one does not want to run the risk of misunderstanding the meaning of the entire discourse: the dimension of *Entscheidung* is certainly “extra-normative,” but *not* extralegal. Thus, the function of the case of exception is precisely that of making manifest “in absolute purity a *specifically legal formal element*: the decision.”³³ It is, for Schmitt, precisely illuministic rationalism that does not take into account the crucial nature of the distinction between “legal” and “normative”: it “proceeds from the presupposition that a decision in a legal sense

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 11.

³² *Id.* at 19.

³³ *Id.*

must be peacefully derivable from the content of a norm.”³⁴ If, on one hand, only the limit-case “makes actual the issue concerning the subject of sovereignty, which is then the issue of sovereignty itself,”³⁵ on the other hand, such a subject is qualified by its limit-position, which places it, paradoxically, both outside and within the legal system, in effect: *outside*, because otherwise it could not be the subject of a decision; *within*, because it has the “competence” of deciding to suspend the constitution in toto.

Access to the paradoxical ambivalence of sovereignty would be inexorably precluded for the “deistic” mechanism, which is a presupposition of the doctrine of the state of law: from Locke, through Kant, up to its “normativistic” dissolution accomplished in the theories of Krabbe and Kelsen. Schmitt countered this “degenerative” process with his own decisionistic definition of sovereignty, tracing it back to an alternative line which, beginning with Jean Bodin (whose merit consists precisely of having “introduced decision into the concept of sovereignty”³⁶), would reach the “theistic conviction” of Catholic philosophy in the Counter-Revolution, represented by the classic names of de Maistre, de Bonald, and Donoso Cortés.

It is hardly necessary to point out the enormous interpretive strain Schmitt undertook in his attempt to fabricate a genealogical tree for “decisionism.” First, with respect to Bodin: if it is true, in fact, that we are in debt to the *Six livres de la République*³⁷ for the first legally accomplished definition of the *summa legibusque soluta potestas* as an “irreducible unit” of the prerogatives of absoluteness, perpetuity, and indivisibility, and as a *puissance de donner et casser la loi* (“the power to make and to abrogate the law”), it is at least as true that such *puissance absolue* is anything but “unlimited” (as Schmitt maintains), since it must be exercised both in keeping with the natural laws imprinted on the world by the supreme authority of God, and in observance of the fundamental (today we would say constitutional) laws of the state—for example, the law of the crown—which exist to safeguard the continuity of the bureaucratic-administrative complex upon which sovereignty stands. Second, with regard to the thought of the Counter-Revolution: if it is true, in fact, that it supports the “personal sovereignty of the monarch”³⁸ theologically, it is at least as true that such support cannot be arbitrarily expunged, setting

³⁴ *Id.* at 11.

³⁵ *Id.* at 12.

³⁶ *Id.* at 14.

³⁷ JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE* 10 (1576).

³⁸ SCHMITT, *supra* note 9, at 43.

aside the controversial legitimist call for tradition, the ethical-religious appeal to providence and to ecclesiastical authority, which for these theoreticians always represents—as Schmitt himself is forced to admit—“the ultimate unappealable decision.”³⁹

Beyond the historical-philological strain (which, incidentally, also affects an early attempt by Schmitt to give a decisionistic interpretation to Hobbes), what matters, nevertheless, in this context is his isolation of the fundamental theoretical nucleus of “political theology”: it lies in defining sovereignty *legally*, not as a monopoly of “sanctions” or of mere “power,” but as “a monopoly of the final decision.”⁴⁰ The decision is thus rendered “free from any normative constraint and becomes absolute in the true sense.”⁴¹ Therefore, Schmitt’s wager rests on the chance that the case of exception, too, will remain “accessible to legal knowledge, since *both elements, the norm and the decision, remain within the realm of the legal given.*”⁴²

It has already been said that the character of the decision is paradoxical: it transcends the norm, while it is, at the same time, the presupposition of every norm. Through decision, “authority demonstrates that it does not need law to create law.”⁴³ The paradox now seems to reverberate on the very category of exception, conferring on it an ambivalent status. The exception stands in relation to “normality” in exactly the same way the decision stood in relation to the norm. Its status would seem, therefore, eminently methodological: only by carrying problems to their extreme, to a limit-concept, is it possible to manifest the truth or essence of the “normal situation,”⁴⁴ made routine by procedure, and neutralized by the automatic order of norms. This would seem to be the tone in which Schmitt’s proposition must be understood, in which the exception is “more interesting” than the “normal case”: while the latter “proves nothing,” the former “proves everything.”⁴⁵ This is why the exception proves the rule, and not vice versa. However, Schmitt does not limit himself to that; instead, he tends to hook the “primality” of the *Ausnahmezustand* (or of the *Ernstfall*, or of the *Grenzfall*) to a

³⁹ *Id.* at 71. For these aspects, and more generally for Schmitt’s “Catholic” positions, one should see his reflections on “representation” and on the *complexio oppositorum* contained in a work that appears marginal and stands alone in his production during these years: the essay, *Römischer Katholizismus und politische Form* [Roman Catholicism and Political Form] (1923).

⁴⁰ SCHMITT, *supra* note 9, at 20.

⁴¹ *Id.* at 19.

⁴² *Id.* (emphasis added).

⁴³ *Id.* at 20.

⁴⁴ *See id.* at 19.

⁴⁵ *Id.* at 22.

metaphysical *lebensphilosophisch* assumption—derived, that is, from a “philosophy of life”: “Only a concrete philosophy of life is able not to retreat before the exception or the extreme case; indeed, it must take the highest degree of interest in it.”⁴⁶ And again: “In the exception, the force of real life breaks through the crust of a mechanism that has become rigid through repetition.”⁴⁷

The ambivalence of status mentioned above now seems to translate itself into an indelible ambiguity in Schmitt’s entire theoretical construction: the existential and antinormative dimension assigned to the decision—with Nietzsche and, perhaps, even Stirner as guides—tends, on one hand, to assume a “negativity” and “groundlessness” that puts it in a drastic break with all the traditional substantialist views of order; on the other hand, Schmitt’s “positive” radicalness aimed at reaffirming the supremacy of the state’s existence and of its “right to self-preservation.”

In the first perspective, Schmitt—contrary to those interpretations that aim to confirm him as homologous to the stereotypes of a “reactionary” Statism, which dramatizes the problem of order and institutional stability—seemed to emphasize the innovative aspect, the beneficially “catastrophic” break, of the decision with respect to the constitutional equilibrium in effect and, from a general theoretical point of view, to share with Max Weber (the author who is closer to Nietzsche in this than is commonly believed) an element of substantial discontinuity with the European political tradition: the crisis of foundations which supported the classical subject of sovereignty.⁴⁸ This is the root of the caesura which separates Schmitt from the reactionary German Statism of the nineteenth and twentieth centuries, in which he perceives a return to that regressive utopia where conflicts are resolved, reposing on the pretext of refounding the state’s identity in an organicist-corporative mode. Here also lies the reason for his constant polemic with the different variants of corporativism, from the Romantic-reactionary version of an Othmar Spann to the very differently formulated one of an Otto von Guericke, and up to the same “pluralism” of G. D. H. Cole and of H. J. Laski. But, at the same time, the decision’s character as a break, “founded on nothing” (*auf Nichts gestellt*), neatly tends to distinguish itself from

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Moreover, the German term, *Ent-scheidung*, indicates the same act of cutting, of breaking away, expressed by the Latin *de-caedere*, and of distinguishing in order to make a choice expressed by the Greek term *krísis*, from *krínein*—“to separate,” “to discern,” the meaning which underlies its derivatives “criticism” and “criterion.”

any sort of aestheticizing and Romantic “occasionalism,” with which Schmitt, in any event, had settled his accounts, almost as a preliminary to his political-theological treatment of sovereignty in *Politische Romantik*. The decision is not a *coup de théâtre*—a mere arbitrary “gesture” for its own ends, a sort of *art pour l’art*—but the cut, the innovative schism, which is the origin of every concrete, actually existing legal system.

The *Entscheidung*, on the contrary, is nondeducible from the form of the legal system, since it never is the effect or the result of a formational-constitutional process. Yet it is, nevertheless, *constitutive* of it. Conversely, the fact that the decision always gives way to a new constitution (*Verfassung*) in no way means that it depends on it: in fact, it is precisely the point at which the constitution itself occurs. On this scheme rests the formulation Schmitt gives to a classic problem of constitutional law, that of *legality-legitimacy* relationships (treated in an important text of 1932). From this point of view, there is no radical difference between Schmitt’s and Weber’s positions. Schmitt’s criticism of Weber—that Weber reduced, as did normativism, legitimacy to legality—is largely imputable to the forced assimilation of Weber’s theses made by Kelsen in 1922, in *Der soziologische und der juristische Staatsbegriff*⁴⁹ (The Sociological Concept and the Legal Concept of the State). If it is true that, for Weber, the legitimization of power cannot descend mechanically—as happens in Kelsen’s “pure doctrine of the law,” exposed in this sense to the “naturalistic fallacy” of leveling the law with the fact—from the simple empirical encounter with *effectiveness* (with the continuity of a coactive legal system that receives obedience), it is equally true that, for Weber, as for Schmitt, legality and the legal system are not the *cause* of legitimacy, but only its *necessary form*.

However, beyond the threshold of this statement of the non-self-sufficiency of the criterion for legality, Schmitt’s thought seemed to run into an aporia even greater than Weber’s. On the other side—the propositional side—as mentioned earlier, the decision seems to be constituted in its “absolute,” and therefore *unrelated*, autonomy as the symmetrical reverse side of the general and indeterminate nature of the liberal scheme:

The decision is made free of any normative constraint and becomes absolute in the proper sense. In the case of exception, the State suspends the law by virtue, as is said, of the right to self-preservation. The two elements of the concept of a “legal system” here are placed in opposition and find their respective

⁴⁹ HANS KELSEN, *DER SOZIOLOGISCHE UND DER JURISTISCHE STAATSBEGRIFF* (1928).

conceptual autonomy. Just as the autonomous moment of the decision can be reduced to a minimum in the case of normality, in the same way the norm is annulled in the case of exception. Nevertheless, even the case of exception remains accessible to legal knowledge, since both elements, the norm and the decision, remain within the realm of the legal given.⁵⁰

Where, then, does the reason lie for the theoretical “preference” for the *decision* instead of the *norm*? Schmitt answered that it is to be sought in the “existential” priority of the state: “The existence of the [s]tate here demonstrates an indubitable superiority over the validity [*Geltung*] of the legal norm.”⁵¹ Therefore, it is the entrance of the *existential* dimension that interrupts the vicious circle of decision and norm, in which one of the most representative figures of the “public philosophy” of Weimar had felt it necessary to see a sterile game of mirrors ensnared in formalism: “Schmitt’s will without norm [*normloser Wille*],” Hermann Heller had written in his book, *Die Souveränität*, “resolves the problem as little as Kelsen’s norm without will [*willenlose Norm*].”⁵²

But, through the folds of the existential dimension, we now glimpse the emergence of the other categorical polarity characteristic of Schmitt’s thought: the “political.”

III. THE CONCEPT OF THE “POLITICAL”: UBIQUITY AND LOCALIZATION

For Schmitt, the concept of the “political” constitutes the *presupposition* for the concept of the state, understood—according to the tradition of civil law, rooted in Roman law—as the *status* of “a people organized on a closed territory.”⁵³ All the possible characterizations of the definition of state (machine or organism, person or institution, society or community) take on meaning only in light of the “political,” and become incomprehensible if the essence of this term is misunderstood—an essence which, for Schmitt, is to be found in its irreducible autonomy by breaking the *circulus vitiosus* of “political” and “of-the-state.” The fact that the “political” is the inescapable presupposition for what is “of-the-state” does not mean in any way that it is to be identified with it (as the modern mythology and jurisprudence of the state, however, would have it). The “political” cannot be circumscribed, confined, or topologically delimited, even if the spatial dimension

⁵⁰ SCHMITT, *supra* note 9, at 19.

⁵¹ *Id.*

⁵² HERMANN HELLER, *DIE SOUVERÄNITÄT* 62 (1927).

⁵³ *Id.*

constitutes, as we will see, one of its chief correlatives. It can only be temporarily “localized” in those set dimensions or forms in which, from time to time, it manifests itself historically. It is, in fact, a “criterion” *stricto sensu*, an attitude that is explained—like the decision, which provides its countersign as the extreme border of the “legal”—not by refounding or recomposing, but by *settling*, by *dividing*. This criterion is to be taken in its peculiar specificity and “distinction” (this is an extremely important point, in which someone thought he saw—and not without the complicity of Schmitt himself—some analogies to Benedetto Croce’s “philosophy of distincts”⁵⁴ with respect to the other “concrete, relatively independent, sectors of human thought and action, in particular [to the] moral, aesthetic, and economic sector”⁵⁵) Now, once it is assumed that the distinctive criterion of the moral is provided by the pair of opposites “good-bad,” that of the aesthetic by the pair “beautiful-ugly,” and that of the economic by the pair “useful-harmful” or “profitable-nonprofitable,” the problem of the *essential definition* of the “political” coincides with identifying a set pair which cannot be reduced to the preceding couplets.

The “specific political distinction” consists, for Schmitt, of the “distinction between friend [*Freund*] and enemy [*Feind*].”⁵⁶ It represents the autonomous, irreducible “criterion” to which “it is possible to retrace political actions and motives.”⁵⁷ The two indispensable correlatives of this specific distinction are its *existentiality* and its *public nature*, a fact that leads to two unavoidable consequences. In the *first* place, the concepts of friend and enemy must be assumed, not as metaphors or symbols, but in their concrete, “existential” meaning. In the *second* place, not only must they not be confused with other criteria (according to which, for example, the enemy would be morally bad, or aesthetically ugly, or economically disadvantageous), but neither must they be “understood in an individualistic-private sense, as a psychological expression of private feelings and tendencies.”⁵⁸ Friendship and enmity, therefore, must be conceived exclusively *in a public sense*: “The enemy is only the *public* enemy . . . it is the *hostis*, not the *inimicus* in a broad sense.”⁵⁹

For the aspect of the “political” as well, as had already

⁵⁴ Carl Schmitt, *Das Zeitalter der Neutralisierungen und Entpolitisierungen*, in *DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* 78, 79 (1963). Benedetto Croce is quoted by Schmitt in this 1929 lecture.

⁵⁵ *Id.* at 26.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 29.

happened for that of the decision, Schmitt activates the methodical criterion of the “extreme” as truth for normal cases: the closer a grouping comes to the extremity and purity of the friend-enemy antithesis, the more political it is. This produces the definitive detachment of political acting from any topological referent, which has led some to see in Schmitt a definition of politics that mirrors, and is the opposite of, the relational, functionalist, or systematic models of *power-influence*: “The ‘political’ . . . does not indicate a particular concrete sector but only the *degree of intensity* of an association or of a dissociation of men.”⁶⁰ Since “purity” and “autonomy” are part of the criterion, not the realm in which it is made explicit, it follows that any aggregation of intensity close to the friend-enemy antithesis itself acquires an exquisitely political character, excluding the fact that it is manifested in religious (confessional civil wars), national (interethnic conflicts), or economic (class conflict) areas.

Given this state of affairs, how is the concept of the “political” related to the “political-theological” dimension of state sovereignty? This is a crucially important question, due to the double order of consequences that it brings to developments in Schmitt’s thought. The question *directly* affects Schmitt’s polemic with regard to the constitutional arrangements of the Weimar Republic,⁶¹ and also *indirectly* affects the way in which his diagnosis of the parabolic path of the modern state is inserted into the framework of a general vision of that alternating succession of law and power, order and conflict, earth and sea, which spans the developments of “Western rationalism,” from its beginnings in classical Greece up to its current expansion on a planetary scale. Therefore, let us proceed to an examination of these aspects, treating them in the order we have just stated them.

IV. AGAINST WEIMAR: DEPOLITICIZATION AND THE ASCENDANCY OF TECHNIQUE

If one looks closely, Schmitt’s definition of the criterion for the “political” is characterized by an unmistakable trait: it institutes a drastic caesura between *the essence of the “political”* and *the form of the exchange-contract*. However, a caesura of this type included within itself—for the years in which it was formulated (between 1927 and 1932)—a violent polemic implication with regard to the Weimar Constitution: it was a

⁶⁰ *Id.* at 38.

⁶¹ For a historical-conceptual appraisal of the Weimar political and constitutional debate, see GIACOMO MARRAMAO, *IL POLITICO E LE TRASFORMAZIONI* (1979).

“Constitution without decision” (*Verfassung ohne Entscheidung*),⁶² as Otto Kirchheimer, a militant pupil of Schmitt in the ranks of the Social-Democrats, would define it), since it had passively accepted the euthanasia of the “political” in negotiation and the translation of the “enemy” into “competitor.” The effects of such passiveness, for Schmitt, were deadly in their inexorable automatism: the “pluralistic” dynamics of conflicts and transactions between various pressure groups and institutional “bodies” appeared, to his eyes, as the reemergence, from a long state of dormancy, of those *potestates indirectae* which had once been “neutralized” by the affirmation of the modern state and which now threatened to take their revenge by undermining the sovereign unit at its root. The legal and constitutional literature generally has dwelt on the “therapeutic” aspects of Schmitt’s contributions in the years bridging the twenties and thirties, beginning with his argumentative exegesis of Article 48,⁶³ in which Schmitt, in open disagreement with Hans Kelsen’s proposal, identified the guardian of the “true” constitution as the president of the Reich, “the legislator in extreme case of necessity,”⁶⁴ rather than as a jurisdictional collegial body, such as the Constitutional Court, which remained, in his opinion, an eminent expression of the pluralistic split. Beyond these technical-juridical aspects, the background for the Schmitt-Kelsen polemic consisted of a genuine axiological and political-ideal antithesis—which, moreover, emerges in full relief from the confrontation between these two great intellectual figures assembled by Hans Mayer in his memoirs⁶⁵—between a position which considered political parties a disintegrative element of the political system and one that aimed, instead, at fully legitimizing them as constitutive factors in modern democracy. The theoretical indicator of the stakes was, in the final analysis, represented by the diametrically opposed assessments that the two authors supplied for the concept of “the people”: for Kelsen, this was nothing more than a “totemic mask,” a “metapolitical illusion” aimed at concealing or dissimulating a “pluri-verse” of interests, ethnic groups, and cultures; while for Schmitt, the self-identification of the *Volk* constituted, instead, the

⁶² OTTO KIRCHHEIMER, *Weimar-und was dann? Entstehung und Gegenwart der Weimarer Verfassung*, in POLITIK UND VERFASSUNG 9-56 (1964).

⁶³ See OTTO KIRCHHEIMER, *Bemerkungen zu Carl Schmitts “Legalität und Legitimität”*, in VON DER WEIMARER REPUBLIK ZUM FASCHISMUS 113-51 (1976); CARL SCHMITT, *supra* note 13.

⁶⁴ Carl Schmitt, *Der Hüter der Verfassung*, in 16 ARCHIV DES ÖFFENTLICHEN RECHTS 161-237 (1929).

⁶⁵ 1 HANS MAYER, EIN DEUTSCHER AUF WIDERRUF ERINNERUNGEN 140-51 (1982).

existential presupposition for every political unit.⁶⁶ Hence, the singular pastiche represented by Schmitt's *Verfassungslehre* was his attempt—paradoxically, to say the least—to bring Rousseau's "democracy of identity" together with the doctrine of *pouvoir neutre* from Benjamin Constant, Rousseau's historical adversary.

Beyond these technical-juridical and constitutionalistic aspects, it is important to underscore the philosophical outlines of Schmitt's reflection. They concern, at this point, the relation that is instituted between the concept of the "political" and "political theology," which hinges on the concept of sovereignty. The text in which the interconnection between these two fundamental coordinates is expressed most coherently and suggestively is his 1929 lecture, *Das Zeitalter der Neutralisierungen und Entpolitizierungen*⁶⁷ (The Epoch of Neutralization and Depoliticization). Here, the historical-ideal succession in modern Western civilization is described as a sequence of stages in which the political essence of the will to power has been secularized: the stations along this path—which Schmitt cautions us not to confuse with the traditional schemes of a "philosophy of history" on the rise—go from the "theological" to the "metaphysical," from the "moral" to the "economic," up to the current "era of technique." The process of secularization, therefore, unfolds by means of a gradual shift in the center of gravity,⁶⁸ in which, from time to time, the "political" settles and is "normalized." Modern secularization is thus characterized by an alternation between contrasts that are determined by the actualization of the friend-enemy antithesis and its successive "neutralizing" settings. The *innovation eruption* of the "political" and the *neutralization* represent, therefore, a nonmodular polarity in the secularization process: "European humanity is constantly migrating from a field of conflict to neutral ground, and the neutral ground, as soon as it is conquered, is immediately transformed, once again, into a battlefield, and it becomes necessary to seek new neutral spheres."⁶⁹ The contemporary epoch, marked by the ascendancy of technique, is nothing more than the landing place of "a series of progressive neutralizations"⁷⁰ of areas where, in the course of modern European history, the center has successively shifted, from the "theological" (the theater of the wars of religion between the

⁶⁶ On this point, see GIACOMO MARRAMAO, *DOPO IL LEVIATANO. INDIVIDUO E COMUNITÀ NELLA FILOSOFIA POLITICA* (1995).

⁶⁷ Schmitt, *supra* note 54, at 78-95.

⁶⁸ Schmitt calls it the *Zentralgebiet*, the "central realm," or "center of reference." *Id.* at 81.

⁶⁹ *Id.* at 89.

⁷⁰ *Id.* at 88.

sixteenth and seventeenth centuries), to the “metaphysical” (the space of scientific-political conflicts in the fifteenth century), to the “moral” (the ground for cultivating the rationalism of the Age of Enlightenment and its revolutionary outlet), to the “economic” (the pedestal for the doctrine of the “neutral and agnostic state” of the nineteenth century and its overturn in the Marxist theory of the classes). However, technique, as the final derivative of the process of neutralization, does not permit further depoliticizing shifts. In fact, it is “culturally blind”; it does not, in itself, possess the criterion for its possible uses: “it can be revolutionary and reactionary; it can serve freedom and oppression, centralization and decentralization.”⁷¹

Technique, then, awaits a legitimate subject to use it. Yet this cannot be an impersonal and abstract subject, such as the “state of law,” which, since it reduces politics to a bureaucratic-administrative machine, is itself technical, a neutralizing and depoliticizing form. It must be, then, a subject capable of reviving the specifically political criterion for identification. In this way, Schmitt links the concept of the “political” to the theme of the decision, which—even if, as we have seen, it leads to the attribution of every innovative dynamic to the extranormative sphere of existence and of “concrete life”—in no way should be confused with a romantic refusal of technique. Technique is accepted not only because it represents, at this point, an irrevocable destiny, but also because it is precisely to the process of disintegrative secularization of the metaphysical, culminating in the ascendancy of a technical-conventional order, that the decision owes its own characteristic of *groundlessness*, of the “bottomless abyss” of a freedom capable of producing the state of exception which suspends the norm, of determining, in complete autonomy, a new friend-enemy grouping.

Setting aside the burning controversies raised by Schmitt’s category of “decision” (which would later be placed in its proper relation, in the framework of a comparative conceptual analysis, with those of Jünger and Heidegger⁷²), here it must be underscored once more that the thesis of successive secularizing neutralizations is detached from the framework of traditional philosophies of history because of two decisive aspects. First, it reduces progress, as does Weber’s thesis of the continuum of “Western rationalism,” to a “progressing rationality of means”⁷³ which gives admittance to

⁷¹ *Id.* at 91.

⁷² *Cf.* CHRISTIAN VON KROCKOW, DIE ENTSCHEIDUNG. EINE UNTERSUCHUNG ÜBER ERNST JÜNGER, CARL SCHMITT, MARTIN HEIDEGGER (1958).

⁷³ On Weber’s theory of “Western Rationalism,” compare GIACOMO MARRAMAO,

formalism *without foundations*, to a purely conventional order. Second, the succession of *Zentralgebiete* in no way fits into a new doctrine of “stages,”⁷⁴ since, far from denoting a rising motion, it is limited to underlining the points of crystallization for the “pluralistic” dynamics of Western *Kultur*, whose presuppositions are “existential and not normative.”⁷⁵ In other words, the “centers of reference” never resolve in themselves the multiplicity of the phenomena in each epoch, but they only polarize the dynamic contexts within which the neutralization and control of conflictive tensions is determined. Therefore, the passages do not occur in the dialectic form of an *Aufhebung* (in which the final step “takes away” and includes in itself all those that preceded it), but rather in terms of a “lateral” shift from one context to another. It should not be surprising, therefore, that this paradoxical status of the “political” as an *a-topical* criterion—but one mysteriously capable, at the same time, of “giving place” from time to time to very concrete topographies of order—could appear to some as a veritable philosophical aporia: “Schmitt,” wrote Karl Löwith in a 1935 essay, “cannot in reality say . . . where the ‘political’ is located, if not in a totality that goes beyond every determinate sector of reality, *neutralizing them all in the same way, even if in a direction inverse to that of depoliticization.*”⁷⁶

The philosophical kernel implied in Löwith’s drastic judgment—in which the concept of the “political” would only specularly restore the empty formalism of neutralization, thus giving admittance to an indeterminateness that is fungible “on occasion” in every content and purpose—would center the target, however, on only one condition: that of ignoring the overall historical design in which Schmitt inscribes all these moments, including the concepts of politics and the state.

The theoretical scheme which forms the presupposition of this design is represented by his conception of the *Nomos* as a concrete order.

V. THE THEORY OF THE *NOMOS* AS A “CONCRETE ORDER”

The parabolic path of the modern state, born out of the civil wars of religion in the sixteenth and seventeenth centuries, takes place, for Schmitt, in perfect parallelism with that of its doctrinal

DIE SÄKULARISIERUNG DER WESTLICHEN WELT 57-64 (1996).

⁷⁴ Later, if anything, Schmitt appears to lean toward Arnold Toynbee’s “rhythmic” theory of cultures, based on the *challenge-answer* scheme.

⁷⁵ SCHMITT, *supra* note 10, at 84.

⁷⁶ Hugo Fiala [Karl Löwith], *Politischer Dezisionismus*, 9 INTERNATIONALE ZEITSCHRIFT FÜR THEORIE DES RECHTS 69 (1935).

apparatus, the *ius publicum europaeum*. As a “specifically European phenomenon,” legal science is “deeply involved in the adventure of Western rationalism”:⁷⁷ the authority that it assigned to the sovereign functions of the new lay state transferred, originally with a faithfulness that was even obsessive, the entire range of theocratic attributes. The absolute nature of the appropriation of those attributes on the part of the secular sovereign was thus guaranteed precisely by this perfect formal correspondence with the matrix. As a “translation,” as rigorous as Hobbes could want, of theological prerogatives into “mortal” and “worldly” prerogatives, the secularization originally performed by public law still was not a “profanation”; rather, it neutralized religious conflict by means of the installation of a new order, no longer based on creed, but wholly civil and political. Here lies the key to Alberico Gentili’s warning, taken by Schmitt as the inaugural formula of the modern state: “*Silete, theologi, in munere alieno!*”⁷⁸ Except that, in the course of secularization, the structure of the state has become ever greater, transforming itself into an inanimate machine and neutral apparatus from which the “representative-sovereign person” was first relegated to the background and then definitively removed. With the age of technique, this profanation has reached its natural conclusion, and, in the presence of the “new objectivity of pure technicalness,” it now is the jurists’ turn “to receive the injunction to be silent.” Thus *Silete, theologi!* is replaced by *Silete, iurisconsulti!*:

Behold two singular orders to be silent, at the beginning and at the end of an epoch. At the beginning there is an injunction to be silent that comes from the jurists and is addressed to the just war theologians. At the end there is the injunction, aimed at the jurists, to follow a pure, that is totally profane, technicalness.⁷⁹

The pessimistic tone of *Ex captivitate salus* echoes in many of the motifs of Schmitt’s thought after the Second World War. “The epoch of the great systems has now been surpassed,” we read in the preface to the 1963 re-publication of *Der Begriff des Politischen*.⁸⁰ Today only two styles of thought are possible: a retrospective historical glance, which reflects the great epoch of continental public law, or the aphoristic style; but, since it is impossible for a jurist to make the “leap into aphorism,” the first

⁷⁷ For these questions, see both 1950 works, *EX CAPTIVITATE SALUS*, *supra* note 3, at 75, and *DER NOMOS DER ERDE*, *supra* note 20 and *passim*.

⁷⁸ Cf. SCHMITT, *supra* note 20, at 92, 131; SCHMITT, *supra* note 3, at 70.

⁷⁹ SCHMITT, *supra* note 3, at 75.

⁸⁰ Carl Schmitt, *Vorwort*, in *DER BEGRIFF DES POLITISCHEN. TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN* 17 (1963).

“way out” becomes obligatory. This is what Schmitt tried to do in *Der Nomos der Erde*, generally considered his greatest work.

The supporting concepts of Western legal science, both of the “political” and of the state, are framed and relativized in the general circumstance of the *Nomos*. With his theory of the *Nomos*, Schmitt offers to delineate the primary prerequisites of the appropriation mechanism that lies at the foundation of every law. It is no longer, however, a matter of the positive law of modern legal science, but a kind of primitive law, which is accessible through a viewpoint that is meta-legal and tends toward the anthropological. The essential coordinates of this primordial law are represented by the pair *Ordnung-Ortung* (order-localization): in other words, there is no law without land (the *iustissima tellus*), since every law rests on the hinge-presuppositions of territorial acquisition and spatial order.⁸¹ Based on a radical etymological hypothesis stated in his 1959 essay, *Nomos Nahme Name*, Schmitt has the Greek noun *nómos* derive from the verb *némein*, in its triple meaning of “to take/conquer,” “to partition/divide,” and “to cultivate/produce.”⁸² These three meanings would correspond to as many primary modes of acting and of social existence as can be found in all the phases and all the systems of history. In this way the existential reason for the concrete order presents itself once more, seeming to take shape, in the development of Schmitt’s thought, as a problem even more primary and profound than the “polemological” one centered on the concept of the “political,” and the “nihilistic” one turning on the category of “decision.” Furthermore, Schmitt, in his 1934 essay on the “three kinds of legal thought,” had already greatly relativized the “decisionistic” type, ending by considering it a “normativistic” kind of interface and by tracing it back to the seabed of an institutionalistic and “orderly” vision. It is interesting to note how, anticipating a *leitmotiv* of antidecisionistic criticism, he had lucidly stated in this text: “pure decisionism presupposes a *disorder* which is transmuted into *order*, due only to the fact *that* a decision is made (it does not reveal *how* that decision is formed).”⁸³

The theme that it is important to emphasize here, looking at the results of Schmitt’s complex—and not always consistent—iterary, is the one underlying, in a specific way, the pair which supports the diagnosis of the *globale Zeit*, or “planetary era,”

⁸¹ Cf. SCHMITT, *supra* note 20, at 1.

⁸² Cf. Carl Schmitt, *Nomos Nahme Name*, in *DER BESTÄNDIGE AUFBRUCH. FESTSCHRIFT FÜR ERICH PRZYWARA S.J 92-105* (Siegfried Behn ed., 1959).

⁸³ SCHMITT, *supra* note 15, § 2.

contained in *Der Nomos der Erde*: the earth-sea dualism. It is in the light of the eternal circumstance of earth and sea that an explanation can, in fact, be found, not only for the landing point of the *ius publicum* (which runs aground in the ascertainment of the technical-neutral euthanasia of the “mortal God,” the Leviathan-State), and in the underlining of its punctual retaliation (which consists of “disseminating” the friend-enemy polarity and giving rise to new figures of the “political,” such as the “partisan”), but also for the very course of the modern and of its greatest manifestation, the Industrial Revolution. The global picture brought about by this revolution—the conforming of the world under the domination of planet-wide technique—is, for Schmitt, understandable “only if it is considered from the point of view of the contraposition between sea and earth.”⁸⁴ The true cosmic-historical turn to modernity took place when, at the end of the sixteenth century, the British island detached itself in ideal terms from the destinies of the continent to undertake its own adventure on the seas. The effect of this detachment is that the “ancient, purely terrestrial *nomos*”⁸⁵ was replaced by a “new *nomos* that engulfed the oceans in its own order.”⁸⁶ From then onward, all “further pushes towards the cosmos by an unstoppable technique,” Schmitt would write on the occasion of an important argument with Ernst Jünger in 1955, have had “the sole significance of turning the star where we live, the Earth, into a spaceship.”⁸⁷

It is certainly true that, despite its ostentatious, and at times self-satisfied, radicalness, this diagnosis is anything but resigned with respect to the possibility of relaunching the classical themes of the “political” and order in the heart of the *globale Zeit* (Global Age), perhaps in the form of a new historical-dialectical synthesis of earth and sea. Such a possibility has been made real by the circumstance that technique has now definitively saturated the space; for that reason, today’s “appeal to history” would no longer be “identical to that of the epoch in which the oceans were opened wide.”⁸⁸

Yet the underlying tone of Schmitt’s thought remains pessimistic, in the final analysis. It is basically no different from the psychological attitude that had taken shape thanks to the “cell wisdom” of his years in prison. This attitude, between pride and

⁸⁴ Cf. SCHMITT, *supra* note 19; SCHMITT, *supra* note 20, at 3.

⁸⁵ Carl Schmitt, *Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West*, in FREUNDSCHAFTLICHE BEGEGNUNGEN. FESTSCHRIFT FÜR ERNST JÜNGER ZUM 60. GEBURTSTAG 135-67 (1955).

⁸⁶ *Id.* at 165-67.

⁸⁷ SCHMITT, *supra* note 3, at 75.

⁸⁸ Schmitt, *supra* note 85, at 165-67.

nostalgia, was dictated by his acute understanding that he was the “last” in a great tradition, the final witness and spokesman for a greatness that was inexorably nailed to the past:

Every situation has its secret, and every science bears in itself its own *arcanum*. I am the last conscious representative of the *ius publicum Europaeum*, the last to have taught and investigated in an existential sense, and I am living out the end just as Benito Cereno lived out his voyage on the pirate ship. Here it is well and it is time to be silent. We must not be frightened of it. By being silent, we remember ourselves and our divine origin.⁸⁹

⁸⁹ SCHMITT, *supra* note 3, at 75.