

The Nazi Jurist Who Haunts Our Broken Politics

A contempt for compromise. An expansive vision of executive power. Both owe much to Carl Schmitt.

By [Jennifer Szalai](#)

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It was a curious line, not just for what it said, but also because of who was saying it. In [an interview last month](#) with the New York Times Opinion columnist Ross Douthat, [J.D. Vance, the Republican senator](#) from Ohio who is [vying](#) to be Donald Trump's running mate, declared: "The thing that I kept thinking about liberalism in 2019 and 2020 is that these guys have all read [Carl Schmitt](#) — there's no law, there's just power. And the goal here is to get back in power."

Vance was referring to the political theorist and Nazi jurist who provided much of the intellectual ballast for the Third Reich. [Schmitt despised liberalism](#). Yet according to Vance, [liberals are in thrall to this adamantly illiberal thinker](#), a man who extolled the dictatorial use of executive power to defeat one's enemies.

That, at least, is what I think Vance was saying. His examples of Schmittian liberalism involved not jackboot autocracy but political correctness — an "absolutely tyrannical" force that meant "there was nothing you were allowed to say."

In the rest of the interview, Vance seemed to have few qualms about wielding power to defeat enemies, as long as conservatives were the ones doing it. Asked about the 2020 election and the Jan. 6 attack on the Capitol, Vance defended Trump (who, of course, talks incessantly about [crushing his enemies](#)). "I think that challenging elections and questioning the legitimacy of elections is actually part of the democratic process," Vance said. "When they say, 'He's threatening the foundation of American society,' I can't help but roll my eyes."

Vance's comment about Schmitt, law and power acquired new resonance on July 1, when two events took place that happened to be connected with Trump's attempts to overturn the 2020 election. Each captured an element of politics that Schmitt would have recognized — and endorsed.

In Danbury, Conn., the former Trump adviser Steve Bannon entered a low-security prison to serve a [four-month sentence](#), having defied a subpoena from the House committee investigating Jan. 6. Standing before a noisy gathering of supporters, the ever-confrontational Bannon [railed](#) against the "corrupt, criminal D.O.J.," called himself a "martyr" and told a priest to "pray for our enemies" because "they're the ones who are going to need the prayers." He kept the fury turned up for nearly half an hour, signing off with "Victory or death!" It was a show of contemptuous, uncompromising fanaticism — and a faithful embodiment of Trump's own scorched-earth, us-versus-them instincts.

That same day, 300 miles away, in the hushed building of the Supreme Court, a 6-to-3 ruling granted Trump considerable immunity from prosecution for trying to overturn the election. Chief Justice John Roberts, in his majority [opinion](#) in *Trump v. United States*, solemnly declared a duty to rise above the pesky specifics of the case, explaining that to “fixate” on such “transient results” would distract from the loftier task at hand. “Our perspective must be more farsighted,” he wrote. A president’s “official acts” were effectively entitled to “absolute immunity.” Roberts said that the court’s conservative majority was merely appealing to “enduring principles”; [legal scholars pointed out that the decision amounted to a sweeping expansion of executive power](#).

What happened in Danbury certainly looked very different from what happened in Washington. Bannon bragged about bucking the law; Roberts wrote about upholding it. Bannon reveled in chaos and partisan warfare; Roberts insisted that the court was keeping such forces at bay. Bannon has long fulminated against the conservative establishment; Roberts has long identified as [an establishment conservative](#). (And unlike some of his fellow justices, Roberts isn’t married to someone [“fond” of flying provocative flags](#) or who [tried to help overturn the 2020 election](#).)

But spiteful extremism and high-minded legalism don’t have to be incompatible. Instead of acting as a restraint on abuses of power, the law can also become an enabler. Presumably Vance, a graduate of Yale Law School, knows this. After all, the thinker who both yearned for and justified the fusion of a country’s legal system with mass radicalization was none other than Carl Schmitt, the Third Reich’s “crown jurist.”

The ‘Friend-Enemy’ Distinction

Born in Plettenberg, Germany, in 1888, Schmitt described himself in a memoir as “an obscure young man from a modest background.” His [biographer](#) Reinhard Mehring says that he was frequently consumed by “intimate passions and tragedies” and craved the deliverance of “redemption.” Schmitt was excommunicated from the Catholic Church for a second marriage when he failed to get an annulment for his first. But God would remain a core part of his political theories. [Schmitt’s idea of a divine sovereign merged with his idea of a state sovereign: Each was a figure of absolute authority, who provided the foundation for everything, including truth.](#)

“I am a theologian of jurisprudence,” he wrote in his notebooks, someone dedicated to “a real Catholic intensification (against the neutralizers, the aesthetic decadents, against the abortionists, corpse burners and pacifists).” When Schmitt joined the Nazi Party in 1933, he was already a middle-aged law professor, and he would go on to write his most brutal and antisemitic rationalizations for the regime he served. In 1935, he praised the Nuremberg Laws for dispensing with the commitment to “treat aliens in species and Germans equally.” By then, he had already defended the Night of the Long Knives — Hitler’s murderous 1934 purge of his rivals — as “the highest justice.” Schmitt’s apologia for Hitler’s death squads bore the title “The Führer Protects the Law.”

But it was Schmitt’s earlier work that laid the foundations for the Third Reich. [Disgusted by the political impasses of the Weimar Republic, Germany’s post-World War I experiment with democracy, he constantly assailed liberalism for being overbearing and hypocritical, for trying to ram pluralistic tolerance down people’s throats.](#) At the same time, he scorned it for

being “torpid” and ineffectual, for forever postponing decisions in favor of “everlasting discussion.” As the intellectual historian Mark Lilla has observed in [a classic essay](#), Schmitt was never able to resolve whether liberalism was too powerful or too weak. Either way, he viewed it as “contemptible.”

In books like “Dictatorship” (1921), “Political Theology” (1922), “The Crisis of Parliamentary Democracy” (1923) and “The Concept of the Political” (1932), Schmitt elaborated on the ideas that would make his name, including the “friend-enemy” distinction, “decisionism” and the “state of exception.” Genuine politics, he maintained, was not a matter of negotiating among different interests and compromising accordingly. Politics was about distinguishing between friend and enemy. Every group wants power, but only the delusional liberal places faith in the possibility of a harmonious *modus vivendi*. Much better — and more realistic — to think in terms of “enmity”: “The friend, enemy and combat concepts receive their real meaning precisely because they refer to the real possibility of physical killing.”

Given such apocalyptic thinking, Schmitt scorned the endless haggling of “the liberal constitutional tendency” and venerated the decisionism of an unencumbered sovereign. A “state of exception,” or a state of emergency, “is principally unlimited authority,” he wrote. The sovereign has the right to total power — and gets to decide when to claim it: “Sovereign is he who decides on the exception.”

But this credo was not, Schmitt averred, an anti-democratic power grab. A real democracy requires, as he chillingly put it — a full decade before Hitler became Germany’s chancellor — “elimination or eradication of heterogeneity.” Then it could dispense with liberalism, with all of its onerous rules and procedures, which only served to thwart a homogeneous people’s will. “Thus democracy and dictatorship could become not only perfectly compatible,” Jan-Werner Müller writes in [“A Dangerous Mind,”](#) his critical study of Schmitt; but dictatorship could in fact be democracy’s “most authentic expression.”

Giving Extremism a Patina of Respectability

Schmitt’s embrace of dictatorship wins few (overt) admirers, but even leftist scholars have been drawn to his exposure of liberal hypocrisies and blind spots. In [“The Challenge of Carl Schmitt,”](#) a volume of essays by various authors published in 1999, the political theorist Chantal Mouffe proposed that it was possible to learn from his “insights” in order to “rethink liberal democracy with a view to strengthening its institutions.” She suggested that the friend-enemy distinction was useful for conflict-averse liberals and that it could be tempered, stripping it of Schmitt’s intemperate antagonism.

But the intemperateness is the point — the extremist source from which Schmitt’s legal theories flowed. A watered-down version of the “friend-enemy” distinction gets mentioned a lot because issues of conflict and power are everywhere in politics. Yet “you don’t really need Schmitt to discover that,” Müller told me. “I think many references to him have been banal.” Vance’s accusation, of liberals loving Schmitt, was designed to generate outrage, not to illuminate anything. Müller characterizes it as “trolling.”

Where Schmitt may actually be useful is as a guide to the implications of the Supreme Court’s ruling in *Trump v. United States*. In [a blistering post](#), the philosopher Elizabeth

Anderson argued that the majority’s reasoning “leads it down the path to utter lawlessness, and opens the door to dictatorship.” Schmitt, she said, “offers some insight into the court majority’s mind-set” by showing how Schmittian assumptions about politics as a zero-sum struggle between friends and enemies can lead to a refusal to accept the other side as legitimate and, ultimately, to a Schmittian expansion of executive power.

Justice Sonia Sotomayor, in her scathing dissent, warned that the majority had granted presidents enormously broad discretion to call something an “official act” (shades of Schmitt’s “state of exception”) and therefore behave with legal impunity. Roberts, deriding Sotomayor’s dissent as “short on reasoning,” accused her of “fear mongering on the basis of extreme hypotheticals.” What Roberts deemed the “more likely prospect” was “an executive branch that cannibalizes itself, with each successive president free to prosecute his predecessors, yet unable to boldly and fearlessly carry out his duties for fear that he may be next.”

In other words, the majority decided that the greatest danger was a timid, hamstrung president who was fearful of prosecution — not, say, the “extreme hypothetical” of an emboldened president who compulsively looks for ways to consolidate his power and punish his enemies.

It’s a safe bet that Trump wasn’t even aware of Schmitt when he [promised](#) to start his second term as president by being a dictator for a day. Or when he [tweeted](#), while in office, “I have the absolute right to PARDON myself.” Or when he [announced](#), in early 2020, that a president’s “authority is total.”

But the thing about Schmitt is that invocations of his name are less enlightening than the strange and terrifying story of the Third Reich’s legal regime that is embedded in his life and work. Here is how you use your power to crush your enemies. Here is why your democracy needs to be homogeneous. Here is how that democracy finds its proper form in a dictatorship. And here is the legal theory that will give far-right extremism a patina of respectability.

Vance [supports](#) Trump’s vow to appoint a special prosecutor to investigate Joe Biden. Yet he [called](#) “completely preposterous” the idea that “Trump becomes the dictator of America.” After all, Vance reasoned, when Trump tried to overturn the election, “he was using the constitutional procedures.”

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