In their zeal to discredit Carl Schmitt because of his political beliefs scholars often overlook the fact that Schmitt was both a highly regarded constitutional scholar and a brilliant legal theorist. Lars Vinx’s volume clearly reveals that Schmitt was ranked high among the constitutional theorists in Germany during the late 1920s and early 1930s and Volker Neumann’s book convincingly demonstrates that Schmitt was one of Germany’s most impressive legal thinkers of the twentieth century. The first book argues that Carl Schmitt ranks alongside such legal scholars as Gerhard Anschütz, Hermann Heller, Erich Kaufmann, Rudolf Smend, and Richard Thoma and the second demonstrates that Schmitt was the equal to Hans Kelsen. While Kelsen is Schmitt’s main antagonist in Vinx’s book, he figures prominently in Neumann’s as well; accordingly, Hans Kelsen is a major presence in both books. In Vinx’s introductory and explanatory material as well as in Neumann’s entire book, Carl Schmitt is shown to be a serious and thoughtful legal thinker. As a result, the reader receives a full and factual account of Schmitt’s legal thought, free from personal polemics and from political diatribes. Anyone wishing to understand Carl Schmitt’s opinions regarding the Weimar Constitution and wanting to comprehend his legal thinking should read these two books. Anyone hoping to find denunciations of Schmitt’s political opinions and criticisms regarding his Nazi leanings should look elsewhere.
CARL SCHMITT, HANS KELSEN, AND THE WEIMAR CONSTITUTION

The Weimar Constitution was conceived, implemented, and replaced during fourteen years of an almost continuous state of emergency in Germany. Political upheaval, labor unrest, and economic stress all took its toll on Germany’s citizens between 1919 and 1933. The loss of the war and the following revolution served as the background to the writing of the Weimar Constitution and help to explain why the president was given rather sweeping powers and particularly why Article 48 was included. Paragraph 1 of Article 48 indicated that if at any time a Land was unable or unwilling to carry out its constitutional duties or its legal or official obligations, that the Reichspräsident shall use all necessary means, including force, to ensure that these were carried out. Paragraph 2 of Article 48 indicated that in times of unrest and insecurity, the Reichspräsident shall use all necessary measures, including force, to reestablish order and security (Gesammelte Schriften, p. 598). The collapse of the United States stock market in October 1928 sent shock waves throughout much of the world but it had an even bigger impact on Germany.1 While the hyperinflation of the early 1920s had mostly subsided, Germany continued to struggle with war reparations. This struggle had both economic and political ramifications; economic because it was a massive drain on Germany’s economy and political because many Germans resented the imposition of what they believed were unfair and intolerable conditions. The year 1930 was particular contentious and Parliament was dissolved in March. Successive parliaments were instituted but were unable to stem the rise of unemployment or to stop the decline of income.2 The results included increasing polarization and radicalization on both the Left and the Right. March 1932 saw increasing disorder and street battles. All of this helps set the stage for the account of the constitutional crisis in Lars Vinx’s volume The Guardian of the Constitution. Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law. As the subtitle suggests, this volume is devoted to the constitutional crisis which began on July 20, 1932 when the chancellor of the Weimar Republic, Franz von Papen, utilized a recent decree from the Reichspräsident, Paul von Hindenburg. This decree was based upon Article 48 and was ostensibly being used to restore order. As Vinx points out, much of the fighting in the streets was instigated by the Right and the SA (Sturmabteilung) and not by the Left. Vinx clarifies that the SA was the paramilitary wing of the Nazi Party. Unfortunately, Vinx does not explain that the Left was made up of members of several parties, including the SPD (Sozialdemokratische Partei Deutschlands) (Guardian pp. 1-4). Vinx does explain that ‘the real goal was to wrest control’ of Prussia from the SPD. Thus, the so-called Preussenschlag (‘the strike against Prussia’) was designed to take over all of the Prussian ministries. The decree was based upon both paragraphs of Article 48, stating first, that the Prussian officials were not carrying out their duties and second, that they were unable to restore order and security, therefore, the Reich would do so. Vinx also notes that von Papen’s government was largely responsible for allowing the street fights, if for no other reason than it had lifted the ban on the SA in the hopes of attracting Nazi support. Unfortunately, the Preussenschlag did not work as intended and, furthermore, it caused a constitutional crisis (Guardian 2-3).

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1 For an excellent general history of the Weimar years see Aufstieg und Untergang; for an excellent history of some of the major economic and political crises of the last three years of the Weimar government, see Aufstieg und Untergang, pp. 355-382 and pp. 531-591.

2 The Weimar government was not very stable as indicated by the fact that between February 1919 and January 1933 there were 21 cabinets, most of which lasted under twelve months. The last cabinet prior to Hitler’s was dissolved after only 58 days (December 3, 1932 to January 30, 1933). See Aufstieg und Untergang, pp. 643-649.
The Prussian government realized that politically and legally, it was unlikely to survive. The governing coalition was precarious and its legal standing was doubtful. Even the Prussian government had considered allowing the Reich to take over most responsibilities, but as Vinx points out, the Preußenschlag was not only the demand by the Reich to take over all government offices but that it would not be a temporary but rather a permanent assumption of duties. In fact, it was the total submission to the Reich which led to the complete dissolution of Prussia. The Prussian government believed that it had to contest this decree, which it did before the Staatsgerichtshof.3 The decision was delivered on October 25, 1932 and was a mixed one. On one hand, the court ruled that Prussia had been fulfilling its responsibilities, hence the decree was wrongly enforced; but on the other hand Prussia was unable to maintain order, hence the decree was justified (Guardian pp. 4-5). Vinx points out that the decision led to the demise of the Weimar Republic and it helped the rise of the Nazi Party. Furthermore, the crisis involved debates regarding two crucial constitutional issues: one, the nature and limits of executive power and two, the legitimacy and ‘desirability’ of constitutional decisions (Guardian p. 5).

Carl Schmitt was part of the Reich’s legal team and argued that the head of government must have the authority to make decisions, especially in times of emergency. Hence, the executive was guardian of the constitution. In contrast, Hans Kelsen, who was not part of any legal team, argued that the guardian of the constitution was the constitutional court (Guardian p. 5). The Guardian of the Constitution is a partial account of these two debates and it has six chapters, three of which contain complete translations of three of Kelsen’s writings. The three other chapters contain some of Schmitt’s writings; one is a complete translation of one short work while the other two chapters contain partial translations of another of Schmitt’s longer writings.

Schmitt was part of the team which argued that the Reich had the power and the duty to invoke Article 48. He was convinced that it was necessary to maintain the security of the ‘Reich’ and he suggested that the Staatsgerichtshof should rule in its favor. What he did not say was that he thought the Staatsgerichtshof was unnecessarily involved because this was a matter for the executive and not the judiciary. This is partially because of his conviction regarding the strong and decisive leader and in his belief that the leader represents the ‘will of the people.’ But, it is mostly because Schmitt believed that these questions were not legal questions, but political ones and that the real ‘guardian of the constitution’ was not the Staatsgerichtshof but the President of the Reich (Guardian pp. 222-227). In contrast, Kelsen was not part of the opposing legal team but, as the theorist for the development of the Austrian constitutional court as well as a judge on it, he was convinced of the need for a strong constitutional court in Germany to resolve such critical legal crises. Furthermore, he objected to Schmitt’s notion of the ‘will of the people’, which he believed was nothing less than reverting to a metaphysical foundation for the state. More specifically, he insisted that the ‘Reich’ was maintaining

\footnote{The Staatsgerichtshof (‘State Court’) was different from the Reichsgericht (Reich court); the latter was made up of a number of courts and dealt with thousands of relatively normal court cases. In contrast, the Staatsgerichtshof was designed solely to adjudicate special cases, such as those involving constitutional issues. However, it was not designed to be a ‘true’ constitutional court. Peter C. Caldwell provides a brief but informative account of it. See Popular Sovereignty, pp. 145-148. It is unfortunate that Vinx does not offer anything like Caldwell’s account, nor does Vinx refer to this part of Caldwell’s book. For Caldwell’s discussion of the Staatsgerichtshof and its decisions regarding the cases leading up to and including the Preußenschlag see Popular Sovereignty, pp. 160-170.}
that Prussia was not fulfilling its duties, but it did not specify which ones. (Guardian pp. 228-230). Kelsen concluded that the Staatsgerichtshof offered a confusing and an unsatisfactory compromise, but this compromise was not a ‘golden middle’ that the judges hoped was going to save the Weimar constitution (Guardian pp. 250-252). Whereas Kelsen wanted the Staatsgerichtshof to do its legal duty and protect the constitution, Schmitt was interested in it becoming even more political, thereby subverting it in order to serve the interests of the President of the Reich.

The book does have some failings but they are not so much errors as they are omissions. Vinx does not explain why he chose the particular sections from Der Hüter der Verfassung nor does he explain why he does not make use of other critically important constitutional scholars such as Richard Thoma, Gerhard Anschütz, and Rudolf Smend. Schmitt did not often agree with them, but he frequently makes references to them. For some examples, see Guardian p. 84, Schmitt’s Note 13, p. 98, Schmitt’s Note 38, p. 101, Schmitt’s Note 40, p. 111, Schmitt’s Note 58, p. 129 and Schmitt’s Note 4. One would think that Vinx would have either referred to them or would have explained why he chose not to. Similarly, in his use of secondary sources, Vinx uses some important ones (Diner and Stolleis, Dyzenhaus), lists some but makes little or no use of them (Caldwell, Scheuerman), and leaves out a number of others (Kennedy, McCormick, and Schlink). Vinx’s Introduction is rather short and his Notes are nowhere near comprehensive; nonetheless, the Introduction is clearly written and most of the Notes are quite helpful. His translations are excellent—they appear correct and they are very readable. In comparison the complaints are rather minor, especially given how important this book is. Vinx has drawn attention to an important constitutional crisis that is not just important historically but has continuing relevance; that is, the enduring conflict between law and politics.

**Schmitt, Kelsen, and Legal Theory**

If the Guardian of the Constitution leads one to conclude that Schmitt was a power-seeking political type and not a competent and influential legal scholar, Neumann’s Carl Schmitt als Jurist shows that this conclusion is rather misleading. Neumann wrote his dissertation on Schmitt and it appeared in 1980; thirty-five years later he published Carl Schmitt als Jurist. One of the major points that Neumann makes early on is that while many scholars have written on Schmitt, they have concentrated primarily on Schmitt’s political thinking and not on his legal writings. However, as Neumann points out, as much as Schmitt moved beyond the confines of law, he was trained as a jurist, held professorships in law, and published numerous legal works (Jurist pp. 1-3).

Neumann divides Schmitt’s life into four parts. The first one covers Schmitt’s beginnings as a legal theorist; that is, from roughly 1910 until 1922. Neumann does not spend much time on this period because during this time Schmitt had moved away from law and towards political

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4 One minor but glaring error is in the Bibliography. Hans Mommsen is erroneously listed as the author of Max Weber and German Politics 1890-1920 whereas the correct author is Wolfgang J. Mommsen, Hans Mommsen’s twin brother (Guardian p. 270).

5 These include Dan Diner and Michael Stolleis, Hans Kelsen and Carl Schmitt, David Dyzenhaus, Legality and Legitimacy, Peter C. Caldwell, Popular Sovereignty and the Crisis of German Constitutional Law, William E. Scheuerman, Between the Norm and Exception, Ellen Kennedy, Constitutional Failure, John P. McCormick, Carl Schmitt’s Critique Of Liberalism, and Bernhard Schlink, “Why Carl Schmitt?”.
thinking. Neumann spends considerably more time on the second period in Schmitt’s life; namely, from 1922 until 1932. However, he also focuses mostly on the years that Schmitt spent teaching in Bonn (1922-1928). They were the years in which he became a legal scholar and were among the most productive regarding constitutional law (Jurist pp. 77, 561). It was during his years in Bonn that Schmitt published two of his most important and most famous works—the article Der Begriff des Politischen (1927) and Verfassungslehre (1928). It is in the first that Schmitt argued for the need for state’s unity and proposed his ‘enemy/friend’ distinction to ensure it. Neumann not only explains why Schmitt developed this distinction, he explains what it is, and how it was received. He does much the same with the Verfassungslehre but to an even greater extent. Given that Der Begriff des Politischen was mostly political, it is understandable that Neumann finds Verfassungslehre to be more relevant. He notes that it may not be a theory of the constitutional in an ordinary sense and that it is both negative and positive. Schmitt criticizes Kelsen at length but as Neumann points out, he took issue with Kelsen’s early writings as Kelsen was just developing his ‘Pure Law’ theory. Neumann suggests that many scholars criticized Verfassungslehre, including Hermann Heller and Otto Kirchheimer, but he pays the most attention to Richard Thoma’s various attacks (Jurist pp. 114-117, 121-127, 132-137). It is to Neumann’s credit that he provides rather careful and relatively complete accounts of Schmitt’s critics, thereby avoiding the temptation to be defensive about the subject of his book.

Neumann’s account of the Preußenschlag is especially good—it is as clear as it could possibly be and it is thorough6. He not only provides a good account of the legal conflict but he also offers a concise account of the historical and political conditions which led up to it (Jurist pp. 264-266, 270-272). He also suggests that when discussing the Preußenschlag we should consult Legalität und Legitimität because Schmitt finished it only ten days before it, thus it offers a theoretical defense for Schmitt’s legal strategy (Jurist pp. 272-273). Neumann is also good at debunking theories, and one in particular—why the Preußenschlag is connected with Schmitt when the ‘first guard’ of the Weimar constitutional theorists were involved—including Gerhard Anschütz, Hermann Heller, Hans Nawiasky, and Hans Bilfinger (Jurist p. 264). It seems that Schmitt offered a defense of the indefensible whereas the others were far more reasonable in their arguments. However, Neumann concentrates most of his attention on the debate between Schmitt and Kelsen. Neumann notes that Kelsen objected that the decision by the ‘Staatsgerichtshof’ was full of inconsistencies and contradictions. He also observes that Kelsen’s critique was a penetrating analysis but that Kelsen either could not, or would not, consider the political dimensions of the debate, something which Schmitt was happy to do (Jurist pp. 279-281).

Neumann is rather thorough in his coverage of Schmitt’s life between 1933 and 1945. While it is rather obvious that he personally finds Schmitt’s allegiance to, and support of, the Nazi regime to be self-serving, he maintains his scholarly distance and offers a carefully nuanced account of this period in Schmitt’s life. The final 65 pages are devoted to Schmitt’s life after World War II. He was incarcerated and interrogated but was let go. He lost his professorship and retreated to his home town of Plettenberg. But, as Neumann recounts, Schmitt did not remain isolated for long (Jurist pp. 493-499). Friends and former students rallied around and Schmitt resumed publishing. However, Schmitt mostly tried to deflect blame for his contribution to the legal justifications of the Nazi regime and to steer the reception of his works (Jurist p. 539). Neumann notes that the war dead numbered between 50 million and 56 mil-

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6 In contrast to Vinx, Neumann uses the German spelling of ‘Preußenschlag’.
lion people and many countries were ruined, including Germany (Jurist p. 533). Neumann also points out that no one compelled Schmitt to write the legal foundations and that he did so in order to gain favor, if not fame. Numerous scholars objected to Schmitt and some insisted that his reputation as a legal scholar was overestimated (Jurist p. 559). Neumann demonstrates that those who objected did not fully appreciate Schmitt’s legal mind and they should not claim that he was not a first-rate legal theorist based upon his politics. Neumann closes his book on Schmitt’s role in law by mentioning that he always found it troubling that no one has yet written a book on Carl Schmitt’s contribution to the founding of the science of politics in Germany (Jurist p. 564). Scholars are frequently too eager either to refute or defend Carl Schmitt; but Neumann wisely chose to understand him. We have him to thank for providing us with a fair and nuanced account of Carl Schmitt’s legal philosophy.

Although Neumann introduces each section with a short biographical account, Carl Schmitt als Jurist is not a biography of Schmitt. If one wants a genuine biography, then one should still read Reinhard Mehring’s Aufstieg und Fall. Neumann’s stated goal was to write a book on Schmitt’s legal philosophy and his method was to remain as faithful as possible to Schmitt’s texts (Jurist p. 3). Neumann has admirably achieved his goal and has remained true to his method; however, this book is not a dry scholarly tome, but is one which offers a full picture of Schmitt. Neumann reveals how often Schmitt’s personal insecurities and complexities color his legal and political thinking. Neumann departs from his account of Schmitt as jurist to discuss Schmitt’s rather difficult relationships with various colleagues. These include Rudolf Smend, Erich Kaufmann, and Kelsen. Neumann suggests that it is ‘astonishing’ that Schmitt and Kaufmann engaged in a public feud when Kaufmann had supported Schmitt’s call to Bonn and they had a collegial, indeed, friendly relationship for some time (Jurist p. 171). Neumann does not state it, but it seems that everything was personal with Schmitt. This appears true regarding his fights with Kaufmann and others, but it seems especially true regarding Kelsen. Neumann writes at the beginning of his book that Kelsen would be appearing throughout it and indeed he does. Given Schmitt’s continuous feud with Kelsen, it is a testament to Neumann’s knowledge and convictions that he is able to discuss Kelsen in a fair and unbiased manner. He makes it clear that Kelsen remained impersonal and polite, whereas Schmitt clearly took offense and was often impolite, if not sometimes rather nasty. There have been a few scholars who have suggested that Weber is the intellectual father of both Schmitt and Kelsen, but while it is easy to see where Kelsen learned from Weber and then parted ways, it is not so clear that Schmitt owed much to Weber, either intellectually or personally. If there are complaints about Neumann’s book, there will not be many; however, one might be that he is relatively silent about Weber. In contrast to Kelsen who is mentioned hundreds of times, Weber is referred to in less than a dozen instances. Carl Schmitt als Jurist is not a short book (618 pages) nor an easy one to read. Part of the blame may be laid on Neumann’s style, but most of it has to be blamed on the difficulty of the topic. Nonetheless, this book is a comprehensive account of Schmitt as a jurist and as such, is likely to remain as a standard work on this topic for decades to come.

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CONCLUDING COMMENTS

Lars Vinx’s edition and translation of some of the key texts regarding the 1932 constitutional crisis in Weimar is rewarding because it provides a readable introduction to the legal crisis and provides a proper context for an understanding of that. This is beneficial because this volume offers the English-reading audience access to a number of important texts regarding this constitutional crisis. Vinx also does an excellent job by showing that Carl Schmitt was the intellectual equal to Hans Kelsen and Vinx should be commended for refraining from siding with one scholar over the other. Anyone wanting to comprehend the complex legal and political considerations revolving around this final Weimar constitutional crisis would be well-advised to start with Vinx’s *The Guardian of Constitution*.

Volker Neumann’s book is one of the best books available on Carl Schmitt. This is because of several factors: 1) Neumann himself has a first-rate legal mind as well as having the ability to explain difficult and complex legal thinking, 2) he focuses on Schmitt as jurist but brings in biographical and political considerations when necessary, 3) like Vinx, Neumann is objective and he reveals Schmitt’s strengths as well as his weaknesses; that is, he provides a complete portrait of Schmitt as a complex and often troubled individual without condemnation or pity. Finally, Neumann offers a balanced picture of the competition and even rivalry between Schmitt and Kelsen; while his subject is the former, Neumann never shows the latter in anything close to an unflattering light. Thus, Neumann offers an account of Schmitt and Kelsen which is rather complete and quite judicious, with the result that the reader gets an understanding of the complex legal problems that both men tackled as well receiving sympathetic portraits of both individuals. Vinx’s *The Guardian of the Constitution* is an excellent introduction to Carl Schmitt’s role in the constitutional crisis of 1932 and Neumann’s *Carl Schmitt als Jurist* is an excellent biography of Schmitt as legal scholar. Read together they provide a rich and fascinating account of Carl Schmitt as constitutional scholar and legal theorist. For anyone who is seriously interested in Carl Schmitt’s legal thinking, these books should be placed high on a must-read list.

REFERENCES


