Pluralism and the Crisis of Parliamentary Democracy

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Carl Schmitt levels two kinds of criticism against liberal parliamentarism. First, Schmitt seeks to refute the liberal conception of politics (which assumes the possibility of rational will formation) on the basis of his own existential view of the political (which employs the distinction between friend and foe). Second, Schmitt attempts to show why and how the evolution of our political system, specifically the development of mass democracy, has made parliament an obsolete institution. This approach is both more dangerous and plausible, because it does not presuppose an acceptance of Schmitt’s own controversial conception of politics, and relies on observations about the parliamentary system that are shared and deplored equally by many liberals. In The Crisis of Parliamentary Democracy, Schmitt does not confront directly what he considers to be fundamental principles of the parliamentary system—rational and public discussion—but rather shows that since these principles are unrealizable given the changes which the system has undergone, parliamentary institutions remain an empty shell, devoid of any justification and credibility.

Schmitt also pursues this second strategy in writings such as Der Hüter der Verfassung (The Guardian of the Constitution), although here the focus is changed from the question of legitimacy to the problems raised by pluralism. This concept is defined by Schmitt as a situation in which the state has become dependent upon, or subordinate to, the various social and economic associations that make up contemporary industrial societies. The state thus appears as nothing more than the aggregate of compromises between heterogeneous groups, as the sum total of their agreements. In such a situation, not only are the integrity and unity of the state undermined, but parliament, according to Schmitt, loses its ability to rationally mediate and integrate divergent interests. It is in this context that parliamentarism is the object of Schmitt’s criticism. Here again it is not its underlying principles we see him criticize, but the impossibility of their realization.

3. Carl Schmitt, Der Hüter der Verfassung, 2nd ed. (Berlin: Duncker & Humblot, 1931).
4. In “Staatsethik und pluralistischer Staat” (1930) XXXV Kant-Studien 28 at 31, Schmitt writes that: “Der Staat erscheint tatsächlich in weitem Maße von den verschieden sozialen Gruppen abhängig, bald als ein Opfer, bald als Ergebnis ihrer Abmachungen.” In Der Hüter der Verfassung, ibid. at 71, Schmitt defines pluralism in the following way: “Pluralismus dagegen bezeichnet eine Mehrheit festorganisierter, durch den Staat ... sozialer Machtkomplexe, die sich als solche der staatlichen Willensbildung bemächtigen, ohne aufzuhören, nur soziale (nicht-staatliche) Gebilde zu sein.” Schmitt’s definition here is clearly polemical. Pluralism entails, by definition, a situation in which social forces overtake the state.
Schmitt’s arguments, especially in writings such as *Der Hüter der Verfassung*, are directed primarily towards the specific situation of Weimar Germany. Yet his criticism of pluralism and the resulting inadequacy of the parliamentary system is clearly of a more general nature. He sees pluralism as the consequence of historical factors common to most industrial states, and related to the transformation of the 19th century neutral state towards the “total state.” Distinctions between varieties of pluralist states can be one of degree only, and the polarized pluralism which characterized Weimar Germany represented simply its fullest realization. In other words, Weimar displayed an extreme situation in which a decision could not be eluded: either the state itself collapsed because of centripetal pressures, or its unity was reaffirmed through an authoritarian presidential rule, based not on parliamentary support but on plebiscitary acclamation. What Germany’s predicament shows clearly for Schmitt is that liberal parliamentarism is not the way of the future.

Schmitt’s analysis of pluralism thus leads to a dire dilemma: either the state enjoys undisputed supremacy over associations, meaning that the state has the authority to determine the common will, independently of their claims, or it is subordinate to them, in which case such decisions will be the result of compromises between opposing interests. In other words, either the common will is arbitrarily determined by the state, embodied in a strong executive, or it is reduced to whatever uneasy agreements are reached between particular interests. Even in this latter case, the common will remains devoid of any principled rationality. Excluded here is the possibility that the common will could be formed by conciliating the diverse interests present in contemporary society, and at the same time ensure the integrity of the state and reflect the common good.

This third alternative brings us back to liberal parliamentarism. It is here that Schmitt’s criticism of parliament in a context of pluralism is significant. Schmitt’s main argument is premised on his assumption that what makes parliament into an institution that allows for rational political decision-making is the process of public


6. I use the notion of polarized pluralism as defined by Giovanni Sartori in his book *Parties and Party Systems. A Framework for Analysis*, vol. I (Cambridge: Cambridge University Press, 1976) at 132ff. Sartori identifies two defining characteristics: first the presence of anti-system parties which undermine the legitimacy of the ruling regime; second the “existence of bilateral oppositions,” which are mutually exclusive, so ideologically distinct as to be unable to join in their opposition. This precludes the formation of a viable alternative to government parties. In his book, Sartori uses Weimar Germany as an illustration of polarized pluralism.

7. Schmitt describes this alternative in *supra* note 3 at 147-49.

8. The distinction I make here between principled and unprincipled compromises mirrors the distinction made by Jon Elster between the thin theory and broad theory of collective rationality. The former only requires formal consistency and goes no further than the aggregation of preferences, while the latter implies a normative requirement, that is that rational discussion be conducted in reference to the common good, which may entail the transformation of preferences. See Jon Elster, *Sour Grapes. Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1983) at 26-43. As Bernard Manin notes, it is clear that “lorsque les fondateurs du gouvernement représentatif réfléchissaient sur le type d’échange auquel ce régime devait conférer un rôle crucial, ils avaient manifestement à l’esprit une communication faisant appel à la raison en un sens particulier et éminent.” Bernard Manin, *Les principes du gouvernement représentatif* (Paris: Calmann-Lévy, 1995) at 254 fn. 8.
deliberation and consensus formation. In order to reach the conclusion that parliament cannot mitigate the problems of pluralism, he must simply demonstrate that the evolution of political parties from loose associations to bureaucratized organizations has made a farce of deliberation.

The strength of Schmitt’s argument turns on the undeniable fact that strict enforcement of party discipline makes it difficult, if not impossible, for real public deliberation to occur in parliament. Excluding a fundamental change in the way the political game is played, the only viable strategy, therefore, must be to reexamine the central premise of his argument. The question is whether his strict definition of public deliberation must be met in order to make parliament an institution which fosters the rational formulation of common interests. This exercise might prove helpful in light of the importance attached to the deliberative model in current theories of democracy. More specifically, it might indicate how the concept of public discussion must be reformulated in order to remain relevant to contemporary politics.

The following discussion is divided into two parts. First, I will examine Schmitt’s historical analysis of why parliamentarism could only work in the context of the 19th century neutral state, and how the development of pluralism and the “total state” transformed parliament into a “showplace for pluralist interests.” Schmitt’s analysis of the ways in which pluralism produces an inherently unstable situation that leads to extreme fragmentation will also be discussed. Second, I will sketch an alternative description of how the parliamentary game might work in a way that encourages the formulation of principled compromises between the divergent interests that make up of heterogeneous societies.

1.

Schmitt’s arguments are premised on his supposition that the effectiveness of parliament during the first three quarters of the 19th century was based on the dualism of constitutional monarchy, and its associated series of tensions between prince and people, state and society, government and parliament, executive and legislative powers. This dualism was implied in the view that the constitution was a pact between prince and people, wherein parliament stood as the representative of society, and of the people itself. Since the representative assembly was the stage upon which society appeared before the state, parliament could plausibly be seen to stand for society’s interests against those of the Crown. This meant essentially that parliament’s job was to defend society’s autonomy against executive power, thus minimizing the intervention of the state in social and economic matters.

For Schmitt, this goes a long way to explain how the dual system encouraged a non-interventionist or neutral state. According to this analysis, most economic and social questions were resolved through the free workings of the market and the free competition of ideas, which formed public opinion and determined the common will. Both society and parliament were understood by most 19th century liberals to be coterminous with the bourgeoisie, whose members shared basic

9. For this section see supra note 7 at 73-91.
assumptions about the market, society and the state. The existence of such shared understandings\textsuperscript{10} was an essential precondition for the open, rational discussion of policies that were carried out in 19th century parliaments.

The distinction between state and society, and the concomittant state neutrality, allowed for the existence of a plurality of social forces in a way that did not threaten the state’s integrity. According to Schmitt, the state was strong enough to confront, on its own terms, these social forces. Thus, it could play the role of a standard in reference to which the various currents that ran through society could be validated and integrated. On the other hand, the state’s neutral stance towards religion and the economy meant that those different domains enjoyed a significant degree of autonomy.\textsuperscript{11}

It is the final victory of parliament over the Crown which, paradoxically, sealed parliament’s own fate, by undermining the dualism which was its own condition of possibility. Shorn of its role as the counterweight of the Crown, parliament could no longer stand as the representative both of society and of the people. Although Schmitt does not make this point here, one can see how democratic demands for the expansion of the suffrage, and the final success of these demands, could fit in this account. What Schmitt does emphasize is that the separation of state and society is now replaced by their fusion, meaning that potentially all social and economic questions that were not the object of state intervention become political. This spells the end of the neutral state and heralds the turn towards the “total state,” in which the totality of life is opened to state intervention. If the fusion of state and society entails that society, and all the diverse groups that compose it, are potentially the object of state action, it also implies the converse: that the state becomes the focus of those groups’ claims and pressures. In this context, the state is to be equated with the self-organization of society, meaning that the various social forces will come to constitute the state, primarily through the action of political parties.

Since the state has become fused with society, political parties become completely determined by various social and economic interests. Instead of being the loose associations of individuals sharing similar opinions on a given issue, as was presupposed by liberal theories and constitutions, most major parties have become stable organizations with their own bureaucracy. They may even be seen as part of a whole social power complex which, through its various organizations, ministers to all the needs (spiritual, social and economic) of a given segment of the population. Such political parties thus realize the conditions of the total state, though limited to the segment of the population which they control.\textsuperscript{12}


\textsuperscript{11} Supra note 7 at 73.

\textsuperscript{12} In his reply to Schmitt, Hans Kelsen correctly notes that the ideas of the total state and pluralism are contradictory. “Wie kann dieser Zustand sozusagen einen Gipfpunkt des «Pluralismus» und zugleich eine «Wendung zum totalen Staat» darstellen, wenn Pluralismus nur möglich ist, sofern die staatliche Willensbildung aus einer sozialen, nicht-staatlichen Sphäre her beeinflußt wird, in deren Aufhebung und Verstaatlichung gerade die «Wendung zum totalen Staat» besteht?” Furthermore, as Kelsen notes, Schmitt’s claim that the contemporary state and society have merged is a crude overstatement. See Hans Kelsen, “Wer soll der Hüter der Verfassung sein?” (1931/32) Die Justiz at 603-05.
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Political parties, representing different and often opposed social and economic interests, invest parliament. Yet they also rob it of its ability to function as spelled out in classical parliamentary theory. Since parties enforce discipline, there can be no public deliberation. Representatives are not free to change their minds upon hearing what they might consider to be a better argument. They are but party delegates, and through their parties, representatives of interests to which they must remain faithful. Moreover, the basic homogeneity that existed in the 19th century parliament has disappeared, and with it those shared understandings that made up the unquestioned common basis of discussion. Because of the distance between the various parties, there can be no common deliberation. Publicly, parties express opposing demands, while in secret negotiations, they jockey for possible advantages that may be won through the state’s actions. Far from being the scene upon which divergent interests may be expressed, mediated and integrated into a common will, the representative assembly is nothing but “the showplace for pluralist interests.”

This is how the legislative state, that is, the state dominated by the legislative power, becomes in fact subordinate to the groups which control parliament. This is what Schmitt calls a situation of pluralism, closely tied to the evolution away from the \textit{status mixtus} of constitutional monarchy, characterized by a balance between the legislative and the executive states, towards parliamentary supremacy.

Pluralism so defined necessarily constitutes a threat to the state’s integrity and unity. It can only be inherently unstable, so that the difference between, for example, England and Germany is simply a question of where each falls on the slippery slope that leads to complete fragmentation. In “Staatsethik und pluralistischer Staat,” Schmitt distinguishes between three possible versions of the pluralist state, representing three distinct points on that slope. He points out that in conditions of pluralism, the unity of the state can only last so long as the various parties share certain premises. Unity, then, rests primarily upon the constitution, which spells out common principles.

Such a constitutional ethic produces a more or less stable and effective unity, depending on the constitution’s clarity, authority and substantial character. Thus, a constitution that clearly expresses a substantial consensus on fundamentals between the parties would indicate a condition of stable unity. On the other hand, if the consensus is a weak one, and the constitution merely states the rules of the game by which the parties agree to abide, then the parties’ commitment to those rules creates a situation, characterized by Schmitt, as an ethic of \textit{fair play}. Yet this situation is an inherently unstable one, which eventually leads to the pluralistic dissolution of the state, where the state is reduced to an ‘aggregate of the changing agreements made between heterogeneous groups.’ This is followed by a further step in the process of fragmentation, governed by what Schmitt calls the ethic of \textit{pacta sunt servanda}, which is incompatible with state unity.

The main difference between the ethics of \textit{fair play} and \textit{pacta sunt servanda} is that in the former the unity of the state is presupposed in the rules which govern the pluralist game. However, in the latter case, the various social groups, as the

contracting parties, are themselves the seats of authority and make up the rules as they go, in a process of mutual accommodation. In such a context, what is left of unity is no more than the result of a temporary and tenuous alliance between competing social forces. The result is little more than a truce, implying the possibility of war. In fact, the ethic of the *pacta sunt servanda* is an ethic of civil war. In a situation of extreme fragmentation, when the state cannot secure the normal situation in which ethical and legal norms alone are possible, there is, for Schmitt, a clear duty to reestablish the state’s unity against centripetal forces.

What should be stressed is that, for Schmitt, the difference between a country enjoying the stability afforded by an effective constitutional ethic, and the same country sliding into the *pacta sunt servanda* version of the pluralist state, cannot be explained on the basis of differences between the political institutions themselves. This can be illustrated by considering the case of England, as a more stable version of the pluralist state. The point here is that, for Schmitt, this stability is not due, in any essential way, to some feature of the English parliamentary system, but rather to the resilience and strength of the English sense of national unity. There can be no working (viz., stable) pluralist political system.

Evidence of this can be found in a few remarks that Schmitt makes about the English parliamentary system in the *Verfassungslehre*. In the section concerning the evolution of the parliamentary system, Schmitt writes that even “friendly compromises and the loyal alternating rule of the two parties can only take place if they do not try to eliminate or annihilate each other but seek to abide by rules of fair play.”14 This remains possible only so long as the opposition between parties is not so radical as to endanger the framework of national and social unity. However, as soon as “religious, class or national differences become decisive inside parliament, this prior condition is not met anymore.”15

In England, the ethic of fair play prevailed until the appearance of the Labour Party, which introduced a new social element and, potentially, “a real class opposition.”16 In fact, the new party had already upset the bipartisan political system, demonstrated in the 1923 elections which led to the development of a three-party system. The 1924 elections, won handsomely by the Conservative Party, can be explained, according to Schmitt, “through the necessity in which one found oneself, confronted with a socialist conception of class, to express clearly the fundamental prior condition of English parliamentarism, that is political unity on a national basis.”17

Two points can be made here. First, the development and success of the Labour Party shows, for Schmitt, that fundamentally the same forces are at work inside England as they are in the rest of Europe, and that they put a stress on the

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16. *Ibid.* at 470. According to Schmitt, although the constitution of an Irish nationalist party, for the first time, did politically express a true heterogeneity, it did not have lasting consequences for two reasons. First, it did not have the strength to break the bipartisan system; and, second, the creation of a free Irish state diffused the problem.
parliamentary system. Further, the fact that the English state has resisted these centripetal forces more successfully than the German Republic is not the result of any particular virtue inherent in the English political system. Rather, it depends upon the stronger sense of unity felt by the people of England, a feeling confirmed and reasserted by the results of the October 1924 elections. In fact, the only specific institutional feature which has helped to resist the divisive tendencies represented by Labour has nothing to do with parliament itself, and everything to do with the \textit{first past the post} electoral system.\textsuperscript{18} As opposed to proportional representation, which Schmitt severely criticizes in \textit{Der Hüter der Verfassung},\textsuperscript{19} the \textit{first past the post} system allows significant distortions between the number of votes expressed and the seats won by a given party. This constitutes a bulwark against third parties.

Schmitt notes that the 1924 elections have not eliminated Labour’s hold on a significant part of the electorate. The social divisions which explain Labour’s continued existence remain a source of instability. The question of whether English national unity can resist the divisiveness of class remains open.

What is at stake here is the unity of the people when confronted with possibilities of division along religious, national and especially class lines. The question is what should be done to effectively alleviate class divisions, so that they do not threaten state stability? In his 1928 article “\textit{Politische Demokratie und soziale Homogenität},” Hermann Heller presented an analysis of the difficulties facing parliamentary democracy that was in many ways similar to Schmitt’s analysis. He too emphasizes the importance of a shared basis of discussion as a necessary condition of parliamentarism, and considers the radical nature of the opposition between left-wing and right-wing parties as a grave threat. For Heller, the crux of the issue is the problem of what he calls social homogeneity, that is “the social-psychological state in which the inevitably present antitheses and conflicts of interest appear constrained by a consciousness and sense of the We, by a community will which brings itself into being.”\textsuperscript{20} For Heller, social homogeneity has very concrete conditions of possibility, notably conditions of relative economic equality. Political democracy may survive class divisions only if radical economic changes provide a greater degree of economic and social equality between classes.

To put it mildly, this is not the approach favoured by Schmitt. In “\textit{Staatsethik und pluralistischer Staat},” he briefly delineates the various possible types of unity:\textsuperscript{21} there can be unity from above, through command and power, unity from below, through the “substantial homogeneity of a people,” or unity through continuous compromises between social groups, meaning unity through consensus-making. Here Schmitt insists on the importance of power as the means to produce consensus. The crucial issue is who will control the processes through which consensus is

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\item[18.] \textit{Ibid.}
\item[19.] \textit{Supra} note 7 at 85-87.
\item[21.] “Staatsethik und pluralistischer Staat,” \textit{supra} note 4 at 35.
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achieved. In stark contrast to the British pluralists, Schmitt affirms that these means must belong to the state, as the embodiment of the political union of a people. To deprive the state of those means, and allow the various social groups to dispose of them, would result in the ethic of *pacta sunt servanda*.

For Schmitt, when the “substantial homogeneity of the people” is endangered by divisions in society, the state must reassert its unity by identifying a public enemy. Once the fundamental distinction between friend and foe is made, remaining tensions in society lose their force and the integrity of the state is safeguarded. In other words, existing social divisions are not to be alleviated through economic changes, but rather disqualified through a decision by the ruling elite. The authoritarian character of this rule is reconciled with democratic principle through the use of plebiscitary elections. In Weimar Germany, the illustration of extreme pluralism, this implies that power must be wrested away from parliament and transferred to the executive, that is, to the directly elected president, who will dictate the common will. Schmitt’s way out of what he calls the “ethic of civil war” is not to address, head on, the underlying issues and try to construct a viable peace. It reads very much like a declaration of war.

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Schmitt’s solution amounts to the following: given conditions of pluralism, the only way to maintain the unity and integrity of the state, subject to ever-increasing centripetal pressures, is to strengthen the state’s hand by establishing an authoritarian government with democratic legitimacy. The only alternative to this is a process by which the common will is reduced to a series of compromises negotiated between various interest groups. Schmitt denies that these compromises amount to anything more than the results of unprincipled bargains struck by rival interest groups. The parliamentary system cannot offer anything better.

Schmitt’s main argument is straightforward. The development of an interventionist state, most striking in economic matters, has greatly increased the number of issues which directly touch the interests of various social groups. These groups, in turn, have organized themselves into political parties that, far from being loose associations of individuals sharing similar ideas, are stable and bureaucratized organizations. These parties are permanent representatives of the interests of particular segments of the electorate, and elected members are expected to vote along party lines.

The first consequence of this development is that discussion disappears from parliament. Because of party discipline, the force of a given party on a particular issue corresponds simply to its numerical strength in parliament. As Schmitt notes, no public parliamentary debate can influence a delegate who is voting according to the position of his party, which is itself determined strictly by the interests it serves. Even discussions inside parliamentary committees are really nothing more than business negotiations.

In such circumstances, the public character of parliamentary debate also disappears. The plenary session of parliament is not the place where decisions are
made rationally as a result of public discussion. Parliament becomes an authority which reaches decisions through bargaining and makes known the result of such horse-trading by staging formal votes. The various speeches that precede the vote are nothing but staged-managed remnants of a bygone era.  

Before considering Schmitt’s conception of public deliberation, I must object to two assumptions that are central to his argument. First, in the context of the interventionist state, political parties are simply the mouthpieces of different social groups and interests. This robs parties of the ability to mediate between different sectional interests, for this ability presupposes some degree of distance between political parties and interests. This is a significant point. If political parties, and their parliamentary wing, were wholly directed by the interests and social forces which they purport to represent, parliament would be no more than a corporatist assembly. The problem with corporatist representation, as Hans Kelsen showed in his Wesen und Wert der Demokratie (Nature and Value of Democracy), is that an assembly, constituted along professional lines, does not have the means to integrate clashing interests. In fact, members of a corporatist assembly are like the delegates of the Ancien Régime’s Estates-general who, as representatives of their estate in a given region, were only carriers of particular grievances. As such they lacked the legitimacy to articulate a position on issues for which they had received no mandate. In this context, the King was the only true representative of the whole realm, and was thus empowered to determine autocratically the common will.

This is precisely why Schmitt characterizes the parties as delegates of interests or social forces, stripped of all autonomy. We are presented here with another difficult dilemma: either parties are loose associations, as in the early 19th century, or they are politically organized social and economic forces. The first option is obviously unrealistic, the second one distinctly undesirable. Two arguments can be made to extricate ourselves from this apparent dilemma. One is to simply deny Schmitt’s empirical assertion that political parties are identical to certain social forces. This poses no great difficulty, since it seems as much an overstatement as Schmitt’s thesis that the contemporary state and society have merged. The fact is that parties which were closely associated with certain social forces always maintained a degree of autonomy. A notable example of this is the Labour Party, which traditionally was closely linked to trade unions, while still maintaining a significant freedom of movement.

The second argument starts from Kelsen’s characterization of that which distinguishes the modern representative system from a corporatist assembly. The modern system, writes Kelsen, “considers each voter, not only as a member of a particular profession, but as a member of the state as a whole and ... consequently supposes the elector to be interested, not only in professional questions, but in

22. These two consequences are spelled out by Schmitt in Carl Schmitt, Théorie de la Constitution, supra note 10 at 466.
principle in all those issues that may become the object of state regulation.”

In principle then, what gives political parties the room to maneuver and allows them to integrate different interests, and reach compromises, is, first, the varied nature of the questions that they have to address, some of which raise issues quite foreign to the concerns of their electoral basis. This gives them a flexibility that interest groups do not have. Second, the elections themselves give political parties the legitimacy to act on this flexibility in a way which may not always please their backers, but is key to their relative autonomy.

Schmitt’s second assumption is that rational public discussion is the only process by which parliament can mediate and integrate divergent interests. This focus imposes an overly narrow view of how the machinery of parliament might encourage compromises. This point does not concern the question of how parliament may foster principled agreements, but of how the parliamentary game, as such, imposes constraints which constitute the basic framework in which the more demanding conditions of rational discussion become realizable. In making this point, I will once again borrow from Hans Kelsen’s own defense of parliamentary democracy, and more particularly his analysis of the majority principle.

In *Wesen und Wert der Demokratie*, Kelsen starts by criticizing two extreme views of the majority principle which can be stated in the form of a false alternative. Either the majority is assumed also to represent the minority, which entails that its will is equivalent to that of the entire group, or alternatively the majority dominates the minority. Kelsen makes the point that the true nature of minority-majority relations is not one of domination, but of reciprocal influence, since numerical inequality between majority and minority is tempered by their respective political and social importance. The majority has no real interest in using its superior strength to constantly and completely dominate the minority, because the latter would lose all incentive to persist in playing the parliamentary game. If the minority were to quit altogether, the majority would not be a majority any longer, but would appear despotic, and consequently lose the legitimate basis of its power. It is this need of the majority to keep the game going which ensures, for Kelsen, the possibility for the minority to exercise some influence upon policy making. This also explains why the majority principle implies a certain guarantee of minority rights.

This shows how playing the parliamentary game imposes certain constraints on the majority which serve to discourage extremism, and favour a coming together,

26. It is worthwhile to note that Schmitt himself resorts to this alternative. He posits that the will of the majority is equivalent to that of the whole group as a fundamental axiom of democratic theory. Unless one accepts this axiom, the majority principle then appears as the principle of majority domination. See for instance supra note 7 at 145.
27. Proportional representation is the best electoral system, according to Kelsen, precisely because it allows even minority interests to be represented in Parliament and be subjected to the integrative effect of the majority principle. See *La démocratie: sa nature, sa valeur*, supra note 22 at 60-63. Concerning minority rights, it is difficult to see how the majority principle could, in itself, provide a satisfactory guarantee. See Peter Koller, “Zu einigen Problemen der Rechtfertigung der Demokratie” in Werner Krawietz, Ernst Topitsch & Peter Koller, eds., *Ideologiekritik und Demokratiekritik bei Hans Kelsen* (Berlin: Duncker & Humboldt, 1982) at 324-25.
of sorts, between minority and majority. Kelsen’s point is that the majority principle will have integrating effects on the parties themselves. In this case, it is not the quality of public discussion which is the issue, but rather the fact that participating in the game, even if it is mostly staged, imposes constraints on partisan behaviour.

Obviously, Kelsen’s description only holds as long as the various players are committed to the game. As Schmitt argued, it is quite possible to imagine that a party gaining a majority of seats could use its democratic legitimacy to close the door behind itself. Moreover, the majority principle can only operate in the way described by Kelsen if there is a working majority, of sorts. But the point here is not that the parliamentary machinery can function effectively even in conditions of polarized pluralism, where there is a breakdown of the political system, but rather to show how the parliamentary system builds upon such existing commitments, and thus promotes compromise.

Still, we must agree with Schmitt that the notion of rational public discussion is central to any account of parliamentary institutions, for it is in reference to this idea that the rational character of collective decision-making in representative democracy is usually justified. Therefore, to demonstrate that deliberation has definitely disappeared from parliaments, given fundamental conditions of contemporary politics, certainly constitutes a serious challenge to our commitment to this form of government. We can respond by showing that the classical idea of public deliberation is not the only way to think through the rationality of the democratic political process. Here, I will simply indicate how it might be possible to reformulate the notion of rational public discussion in a way that avoids such pitfalls, while still ensuring the principled character of political decisions.

In *The Crisis of Parliamentary Democracy*, Schmitt states that the specificity of parliamentary rule rests on a particular kind of public discussion which he defines as: “an exchange of opinion that is governed by the purpose of persuading one’s opponent through argument of the truth or justice of something, or allowing oneself to be persuaded of something as true and just.” This rational exchange must be the determining factor in political decisions, if it is to be meaningful: “Parliament is in any case only «true» as long as public discussion is taken seriously and implemented.” Schmitt’s definition thus implies two conditions that may prove unnecessarily strict given our objective. The first one concerns the link between deliberation and decision, the second one the understanding of impartiality. In the following, I will examine each condition in turn.

The first condition is that decisions must be the product of the exchange of arguments through which one attempts to convince the adversary of the truth of one’s own position. This definition of public deliberation is in itself non-controversial and resembles an understanding of deliberation commonly found in contemporary political theory. If public deliberation is a process of collective will formation,

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31. See, for instance, *supra* note 24 at 22-23.
then the collective decision must be the result of an exchange of arguments, and
deliberation must precede decision. But is this the only way to conceive of the dis-
cursive rationality of parliamentary debates?

To answer yes may be to fall into Schmitt’s trap, for it seems that, given the funda-
mental conditions of politics in the democratic context, the deliberative model
cannot be realized or even approached. As we have seen, Schmitt insists mainly
upon party discipline to guarantee that parliament’s vote will not be the result of
public deliberation. Yet, another factor should be stressed here. As Schmitt
remarked, and as contemporary critics like Habermas have insisted, public speeches
made in parliament are directed much less to the political adversary than to the
electorate.32 For the opposition, the goal is to embarrass the government as much
as possible, to convince the electors of its incompetence, and to express alternative
policies that might prove popular. On the government’s side, the point is to defend
legislative proposals and, more generally, to defend and extol the government’s
record. Again, in all of this the main interlocutor is not one’s political adversary,
but the body of the electorate.

This is a feature of our political system that is not about to change, because it
is not a reflection of party discipline, which could be relaxed, but is fundamental
to the workings of contemporary politics. The extension of the suffrage has changed
parties into vote-seeking organizations33 and has made the general electorate into
the first interlocutor of political parties. This means that substantially weakening
party discipline would not be enough to change the fact that during parliamentary
debates, representatives of the different parties would keep talking past each other
with their eyes on their respective constituencies. This fact implies that the positions
of the parties on a given legislative issue are determined by the competition for
the electorate’s favour, rather than by the exchange of arguments within parliament.
Political decisions, translated in the final vote on a legislation, are thus not the result
of public deliberation but of party strategy.

If the reality of politics makes deliberation unrealizable in the strict sense of
the term, that is, as a collective process of will formation, this does not necessarily
render meaningless parliamentary exchange of rational arguments. What it means
is that we should understand its significance differently. One possibility would be
to consider such exchange as what Bernard Manin has called the “épreuve de la
discussion publique.”34 According to Manin, it is a mistake to consider representative
government as an indirect form of people’s self-government. This entails that the
function of public discussion is to generate a decision. Rather, we should conceive
of representative democracy as a system whereby “everything that concerns gov-
ernment is submitted to public judgement.”35

Manin sees “public judgement” as consisting of two allied processes: first, the
people become the judge of policies, in as much as it is “through their retrospective

32. See The Crisis of Parliamentary Democracy, supra note 2 at 6 and Jürgen Habermas, L’Espace
33. See supra note 6 at 21.
34. Manin, supra note 8 at 234ff. For a similar understanding of deliberation, see Cass Sunstein,
35. Manin, supra note 8 at 245.
appreciation of the government’s relatively autonomous initiatives that they control the conduct of public affairs.” Here, Manin is simply focussing upon elections as the main way for citizens to have an impact on politics, by using the electoral process as the occasion for a retrospective judgement on the government’s performance. Secondly, and more important for our purposes, Manin notes that parliament, as the “discussing authority” (instance discutante) also plays the role of a judge, in that all proposals must be submitted for its approval, even though they may not all emanate from it.

I want to use this concept as a point of departure and expand on it. The idea of public judgement seems to be an improvement over the concept of deliberation, because it does not presuppose a real exchange between participants—be it between MPs belonging to different parties, or even between electors and candidates. In the following, I would like to reformulate the concept of public judgement in a way that helps us better understand the significance of the public exchange of arguments inside parliament. What I will argue is that if today’s parliament is not a deliberative body in the strict sense of the word, it is the arena in which government policies are to be justified before the public.

In other words, debates do not have to be deliberative in nature to be worthwhile. Parliamentary debates on proposed legislation can be considered as a kind of public screening which must precede enactment. Such screening makes possible the public disclosure of potential sources of injustice and/or injudicious spending of public monies. In responding to the opposition, the government party must justify its choices and clarify its purposes. Although today, such questioning of government policy is far from limited to parliament (in that the media and interest groups play a role that is equally important, if not more important, in conducting that test and shaping its outcome), it is still true that parliamentary debates serve as a focus around which this public testing takes place. It is inside parliament that the government has to disclose the content of its proposed policies, and it is on the basis of this disclosure, relayed by the media, that public discussion takes place. The opposition party sometimes takes the lead in this, and sometimes simply uses arguments first formulated by outside players. This public testing can result in the amendment or even the withdrawal of certain projects. If the government decides that a given policy is too important to its program to be abandoned, though it has provoked substantial opposition, then it must accept the political costs of such a decision, and its possible effect on the next electoral results.

This suggests that it would be more useful to think of the public expression of arguments in parliament not as a process of collective deliberation per se, but as a key moment in the process of public justification of government policies, on the basis of which the electorate can perform its own function as judge. Can this process be called a discussion? Between opposing parties, there is an exchange of arguments of sorts, in the sense that, for instance, the majority party has to answer claims made by the opposition, and vice versa. Yet it is not a discussion in a substantial sense,

36. Of course, it is not at all clear that such retrospective judgement is what actually motivates the electors’ choice.
since the participants direct their arguments mainly to a third party that is not present. Could we not say then, as Bernard Manin sometimes does, that the discussion takes place between the candidates and the electorate? This seems to be misleading since the notion of discussion implies that interlocutors are participants in the same fashion, which of course does not hold here. Thus the exercise of public justification can only be called a discussion in a weak sense. A question remains, however, concerning the quality of the arguments made to justify or criticize government policies. In other words, what makes an argument into a good reason?

This question brings us back to the second condition implied in Schmitt’s definition of deliberation, concerning the notion of impartiality or disinterestedness. This concept can be used in two different ways to characterize rational discussion. First, it can refer to the quality of the arguments themselves, meaning that the reasons given to support a position should be general or impersonal and refer, for instance, to principles of justice. Second, impartiality may refer to the disinterestedness of the participants. Are they moved by selfish interests or by the sincere desire to find the best solution to a given problem? Those two versions of impartiality are present in Schmitt’s conception of deliberation. This is clearly shown by the way in which he distinguishes between rational discussion and deal-making. This distinction is an important one that remains central to current democratic theory. It allows us to differentiate between principled and unprincipled compromises, between a decision that can be publicly justified and one that can’t. The question is not whether we should dispense with this distinction, but rather whether we formulate it in the way chosen by Schmitt. We can accept as uncontroversial that, in a rational discussion, arguments should be impartial. But the requirement that participants should be disinterested seems exaggerated. In fact, as Moritz Julius Bonn remarked, even in the heyday of 19th century parliamentarism, it is very difficult to believe that representatives in parliamentary debates always fulfilled this strict requirement and that their “rational” discussions were so clearly different from negotiation. In the following, I want to examine whether this requirement of disinterestedness does not impose an unnecessarily strict condition on the concept of rational discussion.

Schmitt’s definition of deliberation presupposes that the shared objective of participants is not to win, but to find the true answer to a given policy issue. This implies the independence from partisan links and “freedom from selfish interests.” But today, adds Schmitt, very few would consider such disinterestedness to be at all possible. This skepticism forms part of the crisis of parliamentarism. Bargaining is defined by Schmitt as entailing partiality, as being governed by the will to win:

By contrast conduct that is not concerned with discovering what is rationally correct, but with calculating particular interests and the chances of winning and with carrying these through according to one’s own interests is also directed by all sorts of speeches and declarations. But these are not discussions in the specific sense.... Openness is

37. See Ellen Kennedy’s introduction to The Crisis of Parliamentary Democracy, supra note 2.
38. Ibid. at 5.
39. Ibid. at 6.
just as inappropriate in this kind of deliberation as it is reasonable in a real discussion.40

The problem is that if we consider disinterestedness as what distinguishes discussion from mere deal-making, this clearly imposes a condition that may well prove to be impossible to satisfy, even in the best of possible political worlds. To avoid this trap, we will follow Jon Elster who understands argumentation in a way that allows for the strategic use of impartial arguments.

In “Argumenter et négocier dans deux Assemblies constituantes,”41 Elster notes that it is often in the interest of participants in a debate to invoke the impartial equivalent of their selfish interest. Instead of justifying their support of a given policy by admitting point-blank that it falls within their own best interests, it may often be advantageous to justify the same policy by the use of general principles and by referring to the common good. This may be so because there is a social norm which discourages individuals from expressing positions that cannot be justified as advantageous to the collectivity. Alternatively, an individual may in fact convince neutral parties to support her position by invoking general reasons.

That participants in a public debate may hide their selfish interest behind appeals to the common good is well known. The question is whether the obligation to do so has any substantial effect. Does the need to give a principled justification of one’s position on a given issue impose any real constraint on its content? If not, then saying that participants in a political debate must make use of principled justification would be no more than asking politicians to change their rhetoric. Constant references to the common good may make political speeches sound grand, but need not alter the reality of politics as a contest between competing particular interests. Elster’s point is to indicate how the use of general reasons does impose certain constraints. The thrust of his argument is that it is not to the advantage of a participant wishing to disguise his selfish interest to choose an impartial argument which perfectly coincides with it, for then his real intention would become transparent, greatly undermining his credibility. The optimal impartial equivalent to a selfish interest is not its perfect equivalent. It must be an “argument which is sufficiently different from their selfish interest to be accepted by others, but not so distanced that they would not get any benefit from its acceptance.”42

If this is true, then it shows that rational discussion, even when loaded with the strategic use of impartial arguments, still ensures fairer results than negotiation: “argumentation, especially in the context of public debates, will prevent the powerful from using their negotiating power to its fullest. The optimal impartial equivalent will be the one that compensates their selfish interest with the consideration of the interests of the weaker.”43

Elster’s point is plausible, although its practical significance cannot be easily ascertained. What it indicates is the value of the constraints that the exercise of

40. Ibid. at 5-6.
42. Ibid. at 241.
43. Ibid. at 248.
public justification imposes on participants. It also shows that it is not necessary to appeal to the existence of disinterested motives in order to distinguish, in a significant way, between rational discussion and deal-making. The use of impartial arguments as opposed to the use of promises or threats would be enough to characterize rational argumentation as essentially different from negotiation.

Can we claimed to have shown that rational, public discussion is still possible within our contemporary parliamentary system? And does this amount to a successful response to Schmitt’s criticism of parliament as an obsolete institution? It is clear that the proposed description implies a substantial weakening of the original idea of parliament as a public arena for rational discussion. We have had to accept that the ties between deliberation and political decision are not as tight as we might hope. In fact, we have had to acknowledge that contemporary parliamentary debates can be considered discussions only in a weak sense. We have also had to let go of the idea that the substantial rationality of discussion depends upon the disinterestedness of its participants. What we are left with is that, first, parliamentary debates serve as a public test for policies. Second, this exercise in public justification and criticism must rest on the use of impartial arguments.

The crucial question is whether or not what remains ensures that the end result of the political process is more than unprincipled compromises between divergent interests. Here, we can only answer this question tentatively. To the extent that parliamentary debates involve a public screening of policy, which can result in certain options being abandoned or modified because they would prove unacceptable to public judgement, we can say that these debates impose significant constraints on participants. Although the decision to choose a particular policy option may not have been reached in a principled way, the test of public discussion demands that it be justified on the basis of certain shared principles.

This result would surely not satisfy Schmitt. His criticism of parliamentary democracy is premised upon a conception of collective rationality which is extremely demanding, and to which there seems to be no other alternative than an irrational, existential conception of politics. For those of us with the goal of seeing how our societies could be made more rational, Schmitt’s alternative is not acceptable. But what it tells us is that there is not much to gain from clinging to a overly idealistic conception of collective rationality. What we must do is reflect upon the means that could help us achieve our more modest objective, and this we can only do by gaining a better understanding of the meaning and significance of our political institutions.