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Politonomy

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Abstract and Keywords

This chapter situates Schmitt as a jurist and specifically as a scholar occupying a distinctive position within German state theory. Schmitt's overall objective was to build a theory of the constitution of political authority from the most basic elements of the subject, and in this respect he sought to make a contribution to the discipline of politonomy. A concept first alluded to by Schmitt but one he never developed, politonomy concerns the inquiry into the most basic laws and practices of the political. The chapter examines Schmitt's ambivalent position in politonomy, which was rooted in his distrust of the scientific significance of general concepts. To the extent that Schmitt acknowledged the existence of a law of the political, this chapter argues that it is found implicitly within his embrace of institutionalism in the 1930s and later in his account of *nomos* as the basic law of appropriation, division, and production.

Keywords: Schmitt, politonomy, Staatslehre, institutionalism, concrete order thinking, nomos

Introduction

In his paper "*Nomos-Nahme*-Name," appended as the second of three concluding corollaries to the English translation of *The Nomos of the Earth*, Carl Schmitt comments that it seemed peculiar that when a new scholarly discipline emerged at the end of the eighteenth century it came to be known as *national economy* or *political economy*. How strange, he suggests, that with the extension of the concept of *nomos* from the household to the polity the term retained its linguistic relation to the household. Rather than being called *polito-nomy*, it was labeled *eco-nomy* (1957, 339). As Schmitt would have been aware, there were particular reasons for this nomenclature: this eighteenth-century extension was primarily a consequence of the process by which Cameralist methods of managing the prince's household resources were extended to the task of establishing and maintaining the well-ordered commonwealth (Raeff 1983; Bourdieu 2004; Tribe 2006; Loughlin 2010, ch. 14). Schmitt was nevertheless making an astute observation, and one that in the light of more recent studies has assumed a heightened significance.

Work by such scholars as Foucault (1978, 2007), Mann (1993), Gorski (2003), and Agamben (2011) has identified this extension as being of pivotal significance for understanding the character of modern government. The transition that took place in the eighteenth century, Foucault argues, was "from an art of government to a political science," otherwise understood as a change "from a regime dominated by structures of sovereignty to one ruled by techniques of government" (1978, 217–18). But he goes on to suggest that, far from it dissipating as a consequence of the emergence of political economy, the question of sovereignty is presented with an ever-greater force. That question involves "an attempt to see what juridical and institutional form, what foundation in the law, could be given to the sovereignty that characterizes a state" (218). This is the central question with which Schmitt was concerned. It is a specifically juristic question. It is also the central question of a more precisely specified

exercise of politonomy.

Politonomy, it is suggested, should not be taken to refer merely to the techniques of governmental management of the state's resources. In this more precise formulation, it is a broader science, one that seeks to specify the law by which the political manifests itself as a domain of reality. Schmitt is best known today as the quintessential theorist of the autonomy of the political (Bolsinger 2001; Schmitt 2007). Yet he also maintained that his entire scholarly contribution remained that of a jurist concerned to examine the constitution of modern political authority. In this respect, Schmitt can be placed within a line of political jurists who conceived public law broadly, as "an assemblage of rules, principles, canons, maxims, customs, usages, and manners that condition and sustain the activity of governing" (Loughlin 2003, 30).[1] I have previously referred to these jurists—a lineage including Bodin, Althusius, Lipsius, Grotius, Hobbes, Spinoza, Locke, and Pufendorf in the sixteenth and seventeenth centuries and extending to Montesquieu, Rousseau, Kant, Fichte, Smith, and Hegel in the eighteenth and nineteenth centuries—as engaging in an elaboration of public law as political jurisprudence (Loughlin 2010, ch. 6). This body of work seeks to elaborate the constitution of political authority.

Schmitt firmly situates himself within this lineage; he even claims to be its "last conscious representative" and "its last teacher and researcher in an existential sense" (1950, 75). This is significant, not least because at the core of these inquiries is the attempt to specify the law of the political. In this sense, these jurists can be understood to be engaged in politonomy. Schmitt recognizes that a "word bound to *nomos* is measured by *nomos* and subject to it," as is illustrated by the words *astronomy* and *gastronomy* (1957, 338). Following this logic, it seems evident that his various studies—which extend from an explanation of the autonomy of the political (2007) through to an analysis of the foundational concepts of sovereignty ([1922] 2005), legality ([1932] 2004), and constitutional order ([1928] 2008) and to his account of the order of ordering ([1950] 2006)—constitute a major contribution to the discipline of politonomy.

The objective of this chapter is to examine and evaluate Schmitt's scholarship as a contribution to politonomy. I begin by situating Schmitt as a jurist and especially as a Staatsrechtler, that is, as one who occupied a position within the distinctively German juristic tradition of state theory. Having situated him within that tradition, I consider whether Schmitt acknowledged a basic law of the political. I conclude that his position on this issue is ambivalent and that this ambivalence flows from his distrust of the scientific significance of general concepts. To the extent that he acknowledged any such law, I suggest that it is to be found implicitly within his embrace of institutionalism in the 1930s and later in his account of *nomos* as the basic law of appropriation, division, and production. Having focused on his jurisprudential arguments, I seek finally to situate Schmitt's work within the modern practice of political jurisprudence and to assess his general contribution to politonomy.

Schmitt the Jurist

On several occasions Schmitt comments that everything he published had been written as a scholarly contribution to jurisprudence and in particular as contributions to two fields of legal scholarship: constitutional law and international law. These disciplines, he explains, were the fields that were most directly exposed to "danger from 'the political'" (1950, 55). He goes on to argue that although no jurist working in these disciplines can escape this danger, the dominant legal philosophies of positivism and normativism that had emerged in the late nineteenth century seemed to have been devised as attempts to avoid this problem. Positivist public lawyers sought to exclude politics by the simple trick of presupposing the authority of the constitution as the fundamental law of the subject. And as its name suggests, normativism stands for the belief that law can be grasped as an autonomous discipline constructed according to, and bounded by, its own norms or laws.[2] Schmitt's essential point is that the prevailing tendency of lawyers to redefine the boundaries of their fields to exclude its political dimensions offered no scholarly solution. It could lead only to a skewed understanding of the nature of their discipline.

Rejecting the normativist claim about law's autonomous character, Schmitt contends that the modern concept of law is in fact derivative of the political. Positive law is, in other words, the product of political power. The modern jurist cannot avoid this fact; the most a jurist can do "is mitigate the danger [of exposure to the political] either by settling into remote neighbouring areas, disguising himself as a historian or a philosopher, or by carrying to extreme perfection the art of caution and camouflage" (1950, 55). Schmitt refused to retreat, pouring scorn on jurists who deployed techniques of caution and camouflage. His work sought directly to engage with the

relationship between the legal and the political: it constituted an exploration of the nature of public law elaborated from a perspective that asserts the primacy of the political.

Schmitt is sometimes regarded as an occasional writer (Löwith 1995), seen at his most incisive and stimulating when adopting a polemical argument in essay form. When his work is assessed as a contribution to political jurisprudence, however, he is revealed to be a more systematic thinker. Possessing an extensive knowledge of the historical and comparative study of the discipline, Schmitt's writing addresses the foundational questions in public law in a rigorous manner, and it displays an acute appreciation of the discipline's main points of tension. Viewed in its entirety, Schmitt's writing seeks systematically to elaborate on the nature of the relationship between the legal and the political and on that basis to build a concept of public law.

If correct, this assessment explains some of the confusion and controversy surrounding his work. In later life Schmitt writes, "I have always spoken and written as a lawyer and, accordingly, only to lawyers and for lawyers." (1991, 17). It was his particular misfortune, he contends, "that the lawyers of my time had become technical managers of positive law, profoundly uninformed and uneducated, at best Goetheans and neutralized humanitarians" (17).[3] Consequently, he elaborates, those political and social theorists who had followed the lead of the lawyers' criticisms "would stumble with every word and every formulation and tear me apart like a desert fox" (17). There is a considerable degree of self-serving pathos in those words. Yet his core point remains. Schmitt's work is in danger of being misunderstood if examined purely as a contribution to social or political theory. It should be understood as the work of a jurist seeking to grasp the nexus between the legal and the political for the purpose of specifying the nature of modern public law.

This point takes us only so far. If law is not to be treated as an autonomous discipline and if the legal is to be derived from the political, then the scientific inquiry is simply pushed back one stage further. The question becomes: how is the autonomy of the political to be explained? This is the deeper question that needs to be examined if Schmitt's contribution to politonomy is to be assessed. In what respect, it might be asked, does Schmitt offer an account of the law of the political?

State Theory

Schmitt's scholarship must first be situated within the German tradition of Staatslehre. During the eighteenth and nineteenth centuries, this doctrine of the state presented itself as a single discipline that embraced political theory, sociology, and law and aimed to offer a scientific understanding of the modern institution of the state (Kersten 2000). Schmitt acknowledges the importance of this movement but maintains that ever since the establishment of the German Reich in the 1870s there had been a progressive "decline of consciousness in the field of state theory" (1930, 14). This he attributes to the growing influence of positivist ideas in public law. Under the influence of positivist public lawyers such as Gerber and Laband, a new conceptualization of the subject held sway, in which all questions of history and politics were expelled from juristic consideration. The state was refashioned as a purely legal institution equipped with a special type of corporate personality; it was thus deemed to be an institution created by, and regulated in accordance with, the operations of positive public law (Gerber 1865; Laband 1876–82; Stolleis 2001, ch. 8). Schmitt argues that, under the pervasive influence of these ideas, by 1914 the great tradition of state theory that had been developed over the previous two or three hundred years had been lost (16). No longer could any systematic and scientific account of public law be offered if it started by postulating the authority of (the positivist conception of) the state.

For Schmitt, the state is a modern institution that came into existence through intense political struggle. "The state that came into being in the seventeenth century and prevailed on the continent of Europe," he explains, "differs from all earlier kinds of political units" ([1932] 2007, 34; see also 1941). Understood as an "organized political entity, internally peaceful, territorially enclosed, and impenetrable to aliens," he recognizes that the creation of this institution amounts to a specific historic achievement ([1932] 2007, 47). Conceived as the outcome of struggle, its authority could not be taken for granted. Consequently, in the specific context of a crisis such as existed in the Weimar Republic, in which conditions of internal peace had not been established, the account of that regime's system of public law could not commence by assuming the authority of the state. A scientific account of public law had to be constructed from more basic elements of political understanding.

It is for this reason that Schmitt famously proclaims that the "concept of the state presupposes the concept of the

political" ([1932] 2007, 19). In the political circumstances prevailing in the Weimar Republic during the 1920s, it was evident that the logic of friend–enemy—Schmitt's criterion of the political—not only manifested itself externally, that is, with respect to interstate conflicts, but also emerged as a feature of the internal dynamics of the political unit. In such circumstances, Schmitt argues, a scientific account of public law could not be constructed on a foundation that assumed the authority of either the constitution or the state. A foundational account must first offer an explanation of the relationship between the legal and the political.

The account Schmitt presents is arguably as systematic and as radical as that of Thomas Hobbes, who had given us an image of life in the state of nature—which he characterized as that of a "war of all against all"—as the platform on which he might devise a rational solution to the problem of order. Conscious of the conditions of life in a state of nature, where insecurity reigns and force and fraud are the cardinal virtues, we are impelled to see the necessity, as a matter of self-preservation, of giving up our natural liberties and trading them for the protections offered by an absolute sovereign (Hobbes [1651] 1996, ch. 13). For Hobbes, the bargain to be struck is that between living free in a world of interminable conflict and living in peaceful conditions under the protection of a sovereign authority. In Hobbes's estimation, this bargain constitutes the fundamental law of the political.

From Schmitt's perspective, however, the stark contrast Hobbes had drawn between life in a state of nature and life under civil order reveals his account to be a formal legal exercise. If the concept of the political is derived from the existence of a distinction between friend and enemy, then the transition Hobbes envisages from the state of nature, in which everyone is a potential enemy, to the civil state, in which all are bound to the sovereign's rule, is a transition that negates—or at least entirely externalizes—politics. Hobbes would appear to have given us a purely juristic concept of the state, in which the sovereign–subject relationship is conceived in entirely formal terms. Since all honor and all power are vested in the office of the sovereign, Hobbes evidently had no place for political struggle within the state. His theory is a juridical account that is antipolitical in character (Strauss 1932, 108n2).

For Schmitt, the contrast Hobbes drew between war (in a state of nature) and peace (in the state) is formal, abstract, and general. If political jurists are to acquire scientific knowledge of the institution of the state, they are obliged to have regard to the existential conditions under which the authority of the state is established and maintained. He asserts that in reality the state is able to assure "total peace within … its territory" and to establish itself as "the decisive political entity" only through a historic struggle involving violence and domination ([1932] 2007, 46). Only through such a process, argues Schmitt, could a "normal situation," which is "the pre-requisite for legal norms to be valid," be established (46). Since tensions and conflicts continue to exist even in a well-ordered state, he recognizes that "this requirement for internal peace compels it [the state] in critical situations to decide also upon the domestic enemy" (46). He gives this as the reason that the sovereign power of decision must be retained to ensure the preservation of a constitutional state (47). Sovereign, Schmitt declares, is "he who decides on the exception" ([1922] 2005, 5).

These political necessities are assumed to be of profound juristic significance. Any attempt to hide them behind abstract concepts or formal techniques leads only to a distortion of the nature of public law. Schmitt of course recognizes that within any well-ordered state law has "its own relatively independent domain" ([1932] 2007, 66). The critical point is that although positive law might indeed occupy a relatively independent domain, it loses that autonomy the closer it intrudes on political matters. This is because political conflicts "can neither be decided by a previously determined general norm nor by the judgment of a disinterested and therefore neutral third party" (27; see also 1931). Only the politically engaged parties can settle an extreme case of conflict. If there is a threat to political existence then, even in a constitutional state "the battle must then be waged outside the constitution and the law" ([1932] 2007, 47). This is because "unity and order lies in the political existence of the state, not in statutes, rules, and just any instrument containing norms" (65). For Schmitt, the most fundamental concept that grounds the modern understanding of law is neither the constitution nor the state: it is the concept of the political.

The Law of the Political

In *Political Theology*, Schmitt observes that "all law is situational law" ([1922] 2005, 13). Given that he also proposes that the concept of the political grounds the meaning of the modern concept of law, it is evident that whatever meaning might be ascribed to the law of the political it is not a reference to positive law. This notion can be addressed only in the context of the broader tradition of public law as political jurisprudence.

From this perspective, the concept of the law of the political must refer to the laws, rules, and conditions that express and sustain the autonomy of the political. As has been indicated, public law in its broader conception is concerned with the rules, principles, canons, and maxims that condition and sustain the activity of governing. These various rules might now be divided into two main parts: constitutive rules and regulative rules. The former are those that establish a conceptual understanding of the political as a distinctive way of gaining knowledge of the world, whereas the latter are those by which the power of this way of acting in the world is sustained. For Bodin, who Schmitt acknowledges as having given us "the first depiction of modern public law" ([1928] 2008, 101)," the constitutive rules are those that elaborate his concept of sovereignty, whereas the regulative rules are those that elaborate the principle that restraints on power generate power (Bodin [1576] 1962; Loughlin 2010, 62–70). The question is: does Schmitt acknowledge the existence of any such basic rules that constitute the political?

To address this question, Schmitt's understanding of the concept of the political must first be unpacked. Schmitt argues that the political acquires its specificity in contrast to other "relatively independent endeavours of human thought and action, particularly the moral, aesthetic and economic" ([1932] 2007, 25–26). The essential criterion of the political is found in a binary distinction that is not reducible to other contrasts. This is the friend–enemy distinction. Two aspects of this criterion might be emphasized. The first is that the friend–enemy distinction should not be understood metaphorically: it has an existential meaning. Second, the political does not have a substance. That is, the political is not located in some discrete sector of social life called the political sphere; it is capable of manifesting itself in any aspect of group existence. The autonomous character of the political is thus founded on two basic conditions: first, the fact that existential conflicts emerge and divide humans according to the criterion of friend–enemy; and, second, that this criterion is formed as a consequence of there existing a particular "intensity of an association or dissociation of human beings" (38).

The conjunction of an existential meaning given to the concept of the political when combined with the lack of any constituted sphere of this autonomous practice would appear to suggest that there is not much on which any basic law of the political might found itself. In Schmitt's analysis, conflicts can arise in any social situation: they arise for a variety of unpredictable reasons, and they draw on a wide range of sources—theological, economic, ethnic, or cultural. It is difficult to see how any form of predictability, let alone normative rationality, can apply to this dimension of human experience.

This would suggest that Schmitt treats friend–enemy conflicts simply as an existential condition on which no further intellectual energy need be expended. Before yielding to this position, it should be noted that Schmitt believes that the friend–enemy criterion has a distinctive meaning. It is, he states, an entirely collective matter and also a public matter. That is, the criterion should not be understood "in a private-individualistic sense as a psychological expression of private emotions and tendencies" ([1932] 2007, 28). The enemy "is solely the public enemy … The enemy is *hostis*, not *inimicus*…" (28). The enemy is not merely a competitor, nor is it a private adversary: "the enemy is solely the public enemy, because everything that has a relationship to such a collectivity of men, particularly to a whole nation, becomes public by virtue of such a relationship" (28). Elaborating, he explains that "an organized political entity"—that is, a state—must "decide for itself the friend–enemy distinction" (29–30).

Schmitt's account might be ambiguous, but it does indicate two things. It suggests, first, that the political is a bounded concept: it is bounded in that it is a distinction pertaining to a *group* and that this group has a *public* identity. The concept of the political must therefore, in some sense, be constituted by the criteria that enable us to identify a group as a group, as an organized political entity. It is also constituted by factors that enable us to distinguish between public and private concerns. These features suggest the formation of an institution (Searle 2005). If the constituent nature of this institution could be specified, then Schmitt's law of the political would be revealed. This, however, is not straightforward. This is so mainly because Schmitt doubts the capacity of general concepts to govern conduct, and he also doubts the value of undertaking general methodological inquiries (see Müller 1999, 63). Nonetheless, it should be emphasized that Schmitt treats the friend–enemy distinction as the essential criterion of the *concept* of the political.

Schmitt's political realism leads him to claim that political and legal concepts acquire meaning only when situated in a specific historical context. Concept formation is regarded as an immanent process that arises from an actual political situation. "All political concepts, images and terms," he suggests, "have a polemical meaning." By this he means primarily that they "are focused on a specific conflict and are bound to a concrete situation whose ultimate consequence (which manifests itself in war or revolution) is a friend–enemy grouping" ([1932] 2007, 30). As he

explains in *The Concept of the Political*: "words such as state, republic, society, class, as well as sovereignty, constitutional state, absolutism, dictatorship, economic planning, neutral or total state, and so on, are incomprehensible if one does not know exactly who is to be affected, combated, refuted, or negated by such a term" (30–31). His general point is that, devoid of reference to such antagonisms, concepts become meaningless abstractions. "The critical moment in the history of a concept," Schmitt suggests, "is the moment in which its adversary is forgotten" (1930, 17; see also 1931, 128; [1933] 1988, 191).

Schmitt therefore maintains that both the nature and content of a concept are determined by the existence of a concrete antithesis. Generalizations are deceptive since abstract concepts do not carry an independent authority. For Schmitt, it would appear, concepts are either somehow found in a concrete reality or are tools to be used as weapons in the struggle for power. In most cases, as Jan Müller explains, "the exigencies of ideological combat and a strategic politics of concepts (*Begriffspolitik*) tended to override Schmitt's *Wissenschaftlichkeit*" (1999, 62). Schmitt's method must of necessity extend to the concept of the political itself. Consequently, if there is a law of the political, it cannot be founded on the appeal of some concept, whether of sovereignty, universal right, or the elaboration of the general will. This line of analysis might suggest that Schmitt held to the crude realist notion that might makes right and that that is all there is to say about the law of the political.

That is a conclusion that should be resisted, however, on the ground that in other writings Schmitt adopted a more nuanced position. In these contributions, he rejects the claim that concepts are merely the products of an extant political reality. In various essays, he recognizes that political struggles are invariably fought out through concepts and that these conceptual struggles are not entirely derivative. That is, they "are not merely 'ideological' delusions serving only propaganda purposes" ([1932] 1988, 163). Rather, they are "only a case in point of the simple truth that all human activity bears a certain intellectual (*geistigen*) character" (163). Even in the context of political struggle, he acknowledges that there "has never in human history been an absence of such justifications and principles of legitimation" (163). Concepts, he seems to be saying, are drawn into conflictual struggle and used as weapons in those struggles, but they are not purely the product of these struggles. Rather, these power conflicts need to be legitimated through concepts at the level of political and constitutional theory (Bolsinger 2001, 37–40).

Schmitt thus seems not to be entirely consistent in his analysis of the significance of concepts and this makes it difficult to assess his stance on politonomy. He says both that "the content of world history … has always been a struggle for words and concepts" ([1933] 1988, 191) and that the "struggle over concepts is not a dispute about empty words but a war of enormous reality and presence" (198). But he also claims that the key point is "who interprets, defines and applies them" (1932, 179). Contrary to many political jurists, he asserts that in fact "*Caesar dominus et supra grammaticam*. The emperor is also ruler over grammar" (179; cf. Kant [1784] 1991, 58; see also Loughlin 2010, 178–180). If grammar is taken to be a metaphorical expression of the law of the political, then Schmitt appears to be saying that the sovereign determines not just the exception but also the political itself.

Our grasp of Schmitt's position with respect to the significance of concepts in understanding the phenomenon of the political might be advanced once his argument is situated within that of the German school of Begriffsgeschichte. This body of work, exemplified in the writings of Reinhart Koselleck, follows in the tradition of Schmitt. Their argument on the nature of concepts is insightful. Koselleck maintains that, whatever else it might be, a concept "bundles up the variety of historical experience together with a collection of theoretical and practical references into a relation that is given and can be experienced *only* through the concept" (2004, 85; emphasis added). Koselleck acknowledges that social and political concepts do not simply "define given states of affairs"; they aim in themselves to shape a state of affairs and thus to "reach into the future" (80). In this respect, he states, "a concept must remain ambiguous in order to be a concept," because a political concept is of necessity "the concentrate of several substantial meanings" (85). The claim that political concepts remain intrinsically contestable but have become the medium through which political struggles are fought out fits one strand of Schmitt's analysis. It also suggests that there is a conceptual frame through which the political is engaged.[4]

The ambiguous nature of Schmitt's position on the conceptual frame of the political casts a shadow over his work as an exercise of politonomy. Some believe this is an ambiguity he was content not only to maintain but also to exploit (see Müller 1999). From the juristic perspective, it might be said that this ambiguity flows from his reticence on whether there are in fact two different concepts of power at play in the domain of the political. In this domain, power not only signifies supremacy over the material means of rule (*potentia*) but also refers to the capacity to build unity through the establishment of authority (*potestas*) (Loughlin 2010, 164–177). Schmitt speaks mainly of

the former aspect of power, on which he maintains a realist position. But occasionally, as in an early work in which he suggests that "to the political belongs the idea, because there is no politics without authority and no authority without an ethos of belief" (1996, 17), he is alluding to the idea of power as *potestas*. And when he invokes the idea of power as *potestas*, it might be emphasized that Schmitt is obliged to acknowledge the power-shaping capacity of concepts.

Institutionalism

To take forward this analysis, it is necessary to shift register and directly address Schmitt's concept of law. As we have seen, he regarded all concepts of law as being historically situated. During the 1920s, Schmitt's primary task was to carry through a critique of the ahistorical abstractions of legal normativism. His basic thesis is that, by severing the norms of legal ordering from the facts of political existence, normativist jurists distort understanding of the true nature of law (see, e.g., [1922] 2005, ch. 2). In its place, Schmitt promotes a type of legal decisionism. Law, he argues, is essentially the product of will. In particular, the existence of a sovereign act of will can never be eliminated from the sphere of legal thought. In support of this argument, Schmitt seeks to show how normativist jurists, being interested only in the normal situation, are unable to account for exceptional circumstances. The norm may be destroyed in such exceptional circumstances, he explains, but the exception remains of juristic significance: "both elements, the norm as well as the decision, remain within the framework of the juristic" ([1922] 2005, 12–13).

In his Preface to the second edition of *Political Theology* in 1933, Schmitt begins to modify this claim. He writes, "I now distinguish not two but *three* types of legal thinking; in addition to the normativist and the decisionist types there is the institutional one" ([1922] 2005, 2). "Whereas the pure normativist thinks in terms of impersonal rules, and the decisionist implements the good law of the correctly recognized political situation by means of a personal decision," Schmitt explains that "institutional legal thinking unfolds in institutions and organizations that transcend the personal sphere" (3). It is evident that Schmitt's advocacy of institutionalism is designed to grasp "the stable content inherent in every great political movement" (3). If, as he is now claiming, there is an inherent element that provides stability to political unity, what might this be? And, most importantly, does this element provide the key to Schmitt's politonomy?

Schmitt's institutional argument is most clearly presented in his 1934 book *On the Three Types of Juristic Thought* ([1934] 2004). In this work, Schmitt explains that all legal theories comprise three basic elements: norm; decision; and concrete-order formation. Legal theories are thus to be categorized according to the emphasis they place on each of these elements. Further, the type of political regime envisaged in this theory is invariably linked to the predominance given to one or other of these elements. "Every form of political life," he maintains, "stands in direct, mutual relationship with the specific mode of thought and argumentation of legal life" (45). In this work, Schmitt again criticizes normativism, but he also argues against the decisionism he seemed to be advocating in *Political Theology*. He argues instead in favor of a type of institutionalism that he calls concrete-order thinking.[5]

Normativists promote a purely conceptualistic understanding of law, law as a set of rules. The arguments of decisionists, by contrast, are reduced ultimately to factual analysis. Institutionalism, or concrete-order thinking, is Schmitt's attempt to finesse the distinction between normativity and facticity ([1934] 2004, 53). Rules and decisions are integral parts of legal order, but they carry meaning only as formulations of concrete order. Law as norm does not yield sound jurisprudence because a norm "cannot apply, administer, or enforce itself" (51), and decisionism is not sustainable because a legal decision does not spring from a normative vacuum ([1922] 2005, 62). Legal order is maintained as an expression of the underlying concrete order. Rules and decisions achieve regularity by reliance on "concepts of what, in itself, is normal, the normal type and the normal situation" ([1922] 2005, 54). Schmitt is therefore arguing that political unity is maintained only if there is a stable institutional structure in place, that is, that there is a concrete order that determines the meaning of legal norms and guides the exercise of legal decision-making. The question is: How is a stable institutional structure established and maintained?

With this question in mind, we turn to Chapter 13 of Schmitt's *Constitutional Theory*, on the Rechtsstaat ([1928] 2008). His analysis of the nature of the Rechtsstaat follows what by now will be a familiar trajectory. He maintains that to invoke the idea of "the rule of law" is "an empty manner of speaking if it does not receive its actual sense through a certain opposition" (181). For Schmitt, the Rechtsstaat is a legislative state, that is, a state in which the

authoritative expression of will takes the form of legislation and the legislature is itself bound by this law. This makes sense, he explains, only when a statute is expressed in the form of a general norm. The idea of the rule of law thus gestures toward the notion that law is not to be understood as *voluntas* (i.e., will or decision) but as *ratio* (i.e., norms or rules). Schmitt contends that the problem with this claim is that within any actually existing constitutional order the Rechtsstaat concept of law must be situated alongside an alternative concept of law, what he calls a political concept of law. This political concept remains a juristic concept: both form essential elements in modern constitutional thought.

By a political concept of law, Schmitt means a concept of law that "results from the political form of existence of the state" and arises "out of the concrete manner of the formation of the organisation of rule" ([1928] 2008a, 187). In the Rechtsstaat concept, law is essentially a norm—a rule of a general character. In the political concept, law is the expression of a concrete will; it takes the form of a command and is conceived as an act of sovereignty. The Rechtsstaat, he argues, seeks to suppress this political concept and establish a sovereignty of law, but this is a vain hope: without this political expression of law as will the Rechtsstaat formulation cannot exist.

Schmitt's analysis in *Constitutional Theory* emphasizes the dependence of norm on will. But in the light of his later argument about concrete-order thinking, it can be said that law as norm and law as will both rest on institutional ordering. He alludes to this point in chapter 13 of *Constitutional Theory* when he states that those who promote the concept of law as norm find themselves in a contradictory and confused position because "that which is directly lacking is the nomos" ([1928] 2008, 184). Only in 1950, when he published *The Nomos of the Earth*, does he offer a systematic account of this crucial concept ([1950] 2006).

Nomos

Schmitt's objective in *The Nomos of the Earth* is to specify the original legal-constitutional meaning of *nomos* "in its energy and majesty" ([1950] 2006-, 67) to demonstrate how jurists who translate *nomos* simply as law or, if they try to differentiate it from written law by defining it as custom, do not get to the root of the matter. In this sense, he seeks to elaborate on the meaning of *nomos* for the purpose of exposing a concept of law founded in concrete-order thinking.

The Greek noun *nomos*, Schmitt explains, derives from the Greek verb *nemein,* and, in common acceptance, *nemein* has three main meanings (in German): *nehmen* (to appropriate), *teilen* (to divide) and *weiden* (to pasture). In its first meaning it signifies a taking, especially a land appropriation. This forms the basis of the history of every settled people and "not only logically, but also historically, land-appropriation precedes the order that follows from it" ([1950] 2006, 48). *Nomos* thus signifies the constitution of "the original spatial order, the source of all further concrete order and all further law" (48) The constitutive process of a land-acquisition "is found at the beginning of the history of every settled people, every commonwealth, every empire" (48). Schmitt contends that "all subsequent law and everything promulgated and enacted thereafter as decrees and commands are *nourished* … by this source" (48).

Nomos is an *ordo ordinans*, an order of ordering, that performs the constitutive act of establishing a spatially determined regime of rule. In the beginning, order was not established on the basis of consent or on some universal principle, or a basic norm. In the beginning, there was a land-grab, and only after the violence of that initial appropriation and division had been completed could "some degree of calculability and security" be achieved and *nomos* emerge as the expression of order ([1950] 2006, 341). This order evolves; it is not fully formed at the foundation, though it remains nourished by this source. *Nomos*, it would appear, holds the key to politonomy: it is an expression of the basic law of the political.

For Schmitt, the law of the political is revealed through the way the processes of appropriation, division, and production give rise to a substantive order of a political unity. Once this is grasped, the relation between *nomos*, state, and constitution becomes clear. For Schmitt, the state is "the concrete, collective condition of political unity" ([1928] 2008, 60); in modernity, it becomes the "master ordering concept" of this political unity (1941, 375).[6] It is similarly clear that Schmitt's concept of constitution (in its absolute sense) differs from the notion of constitutional law as that enacted in modern documentary form. Since the order that emerges within the state arises from "a pre-established, unified will" ([1928] 2008, 65), Schmitt argues that the state "does not *have* a constitution"; rather, "the state *is* constitution" (60). In this sense, the state/constitution is "an actually present condition, a *status* of

unity and order" (60). The basic law of the state finds its authoritative expression not in enacted legal norms but in "the political existence of the state" (65). Once brought into alignment it is evident that state (the political unity), constitution (the status of unity and order), and *nomos* (the order of a concrete spatial unity) are, for all intents and purposes, synonyms.

Schmitt recognizes that, like *nomos*, state and constitution continue to evolve: the state expresses "the principle of the *dynamic emergence* of political unity, of the process of constantly renewed *formation* and *emergence* of this *unity* from a fundamental or ultimately effective *power* and *energy*" ([1928] 2008?, 61). And he accepts that the "continuity of a constitution is manifest as long as the regress to this primary appropriation is recognizable and recognized" ([1950] 2006, 326n6). If state highlights unity and constitution the form of that unity, then *nomos* accentuates the motive forces that shape the form of that unity: it is "the full immediacy of a legal power not mediated by laws; it is a constitutive historical event—an act of *legitimacy*, whereby the legality of a mere law first is made meaningful" ([1950] 2006, 73). It is the law of the political.

Schmitt's institutionalism brings his legal thought much closer to Hegel's legal and political philosophy, in which "the state is a 'form (*Gestalt*), which is the complete realization of the spirit in being (*Dasein*)'; an 'individual totality,' a *Reich* of objective reason and morality" ([1934]2004, 78). This type of state, he emphasizes, is not an "order of a calculable and enforceable legal functionalism" (i.e., the product of decisionism), nor is it a "norm of norms" (normativism); instead, it "is the concrete order of orders, the institution of institutions" (78–79). But it should be emphasized that this is not Hegel's state in which the universal is willed; it more closely approximates his concept of Notstaat, the state based on necessity, an expression of the form within civil society "wherein the livelihood, happiness, and legal status of one man is interwoven with the livelihood, happiness, and rights of all" (Hegel, [1820] 1952, §183).

For Schmitt, then, it seems evident that politonomy is founded on the concept of *nomos*. In *The Nomos of the Earth* he shows the distinctive contribution that *nomos* makes to the establishment of political order. The most basic claim is that law is tied to space, that is, to a defined and bounded territory that distinguishes inside and outside. Without this boundary, there can be no domain of the political. In this respect, it might be said that *nomos* is constitutive of the political. This space—this territory—is not merely a geographical notion. It is also a legal and political concept that concerns "the space between individuals in a group whose members are bound to, and at the same time separated and protected from, each other by all kinds of relationships, based on a common language, religion, a common history, customs and laws" (Arendt 1965, 262). The establishment of these relationships creates the space of political freedom. This freedom is always spatially limited, always an achievement, and always ordered. *Nomos* gives expression to that concrete order: an order initiated by a taking (involving force) and subsequently harnessed through institutionalization.

Schmitt's Contribution to Politonomy

Schmitt's contribution to politonomy can now be specified. As already noted, he is to be situated within a tradition of understanding public law as political jurisprudence. This body of thought recognizes the necessity of addressing the relationship between the legal within the political for the purpose of explaining the constitution of modern political authority. Rather than postulating the autonomy of law, thereby cutting off inquiry into the nature of the relationship between law and politics, political jurisprudence insists on the necessity of undertaking an inquiry into the character of the fundamental laws of the political. In this sense, political jurisprudence is an alternative formulation of the discipline of politonomy.

The status of this discipline within Western political thought might now be briefly explained. This tradition of Western political thought has evolved because, in the face of the common historical experience of living in regimes built on conflict, domination, and the threat of disorder, scholars have felt the lingering power of an image of human community as an ordered and peaceable existence. One highly influential strand of political thought has devoted itself to the task of overcoming that gulf. Starting with the Stoics, embraced by medieval Christian scholars and eventually secularized in Enlightenment thought, this line of thought claims that the laws of reason and the laws of nature can be revealed to operate in harmony. Reconciliation is achieved through the realization of a type of human association made accessible to us through the power of reason. Initially expressing an overarching, divinely sanctioned unity of the world, in its post-theological phase it presents itself as a set of principles of

association that humans are impelled rationally to adopt and which they must strive to realize.

Politonomy, by contrast, is founded in opposition to this powerful strand of political thought. Expressing skepticism about the possibility of achieving reconciliation through transcendence, politonomy is born of a recognition of the essentially unbridgeable nature of this gulf (Hunter 2001). The power of "abstract universals" is to be acknowledged, but the "necessary conditions" cannot be ignored (Hegel 1952, §§29–33; see also Honneth 2010, 15). Politonomy appeals to reason but does not seek an escape from history. It often presents itself as a practical discourse that, although orientated to norms, always has regard to consequences. Rather than advocating reconciliation through the promotion of some overarching moral sensibility, politonomy seeks through phenomenological investigation to explain the immanent logic of political reason that sustains this distinctive way of ordering the world.

The first systematic exponent of this discipline was Jean Bodin. He laid its foundations through explication of the concept of sovereignty. This affirmed the absolute authority of the system of political rule and thereby asserted the autonomy of the political domain. But he proceeded to build on this foundation by carrying out an extensive comparative and historical inquiry into the governing practices of European states to elaborate a set of rules to be followed if the prince was to maintain his state. By bringing the concept of sovereignty establishing the *right* to rule into alignment with rules of civil prudence that maintained the *capacity* of rule, Bodin provided the basic template of the discipline of public law as political jurisprudence. Bodin's was a major contribution to politonomy.

In Bodin's framework, the concept of sovereignty outlined in Book I and underpinned by the claim that the prince possesses "the most high, absolute, and perpetual power over the citizens and subjects in a commonwealth" ([1576] 1962, 84) specified the essential constitutive rule of the political domain. It is sometimes contended that Bodin's account of sovereignty is incoherent, since he claims that the sovereign's authority is absolute but also subject to certain limitations. That view misconstrues his overall objective. Bodin recognizes two main types of apparent limitation: those that concern the fundamental laws establishing and maintaining the office of the sovereign; and natural laws, which condition the sovereign's treatment of his subjects. These, however, are not, strictly speaking, limitations: they are illustrative of the conditions that define the nature of the office. Bodin sees that the autonomy of the political domain is established as a consequence of a distinction being drawn between public and private.

It should also be noted that Book I forms only one aspect of Bodin's overall objective. While it seeks to establish the essential constitutive rules of the practice, the remaining five books outline the regulative rules. These are the rules that the prince must have regard if he is to maintain his state. Drawing on historical illustrations, Bodin sketches the political laws of governmental development. These include many regulative laws and practices that have become widely acknowledged: that the separation of the legislative and the executive power promotes liberty ([1576] 1962, 277); that relative equality in wealth distribution promotes the stability of the state (569); that wars sustain democracies (422); that most self-styled democracies are disguised aristocracies (705); and that "the less the power of the sovereignty is (the true marks of majesty thereunto still reserved), the more it is assured" (517). The claim of formal absolute authority (*potestas*) thus merely laid the foundation for the emergence of a new field of knowledge, the political knowledge that is needed to establish, maintain, and extend the powers of civil government (*potentia*).

From our examination of Schmitt's work, it is evident that within the discipline of politonomy he maintained a realist position. It is for that reason that, although recognizing that Bodin "stands at the beginning of the modern theory of the state" (2005, 8) and acknowledging that "Bodin's work had a greater and more immediate impact than had any other book by a jurist in the history of law" ([1950] 2006 127), he claims that Bodin's real achievement had been overlooked. Bodin's innovation, he argues, rests not so much in his definition of sovereignty as "the absolute and perpetual power of a republic" as on his recognition that the sovereign's defining characteristic is the ability, in an emergency, to rule contrary to the established laws. "When the time, place and individual circumstances demand it," Schmitt notes, Bodin accepted that "the sovereign can change and violate statutes" ([1928] 2008, 101). Rather than acknowledging the world-building character of the conjunction of Bodin's constitutive and regulative rules of politonomy, Schmitt emphasizes the decisionist quality of the sovereign's power to determine an issue that "cannot be settled normatively"—"that which advances the public good" (101).

Schmitt's reading of Bodin also signals his ambivalent relationship to Hobbes. Although praising Hobbes as "a great

and truly systematic political thinker" ([1932] 2007, 64), Schmitt was obliged also to acknowledge that Hobbes was "a spiritual forefather of the bourgeois law-and-constitutional state that materialized in the nineteenth century" ([1938] 2008 67). And it is for this reason that, in contrast to the liberal leanings of such jurists as Bodin and Hobbes, Schmitt sought to resurrect the importance within politonomy of the work of Joseph de Maistre and Juan Donoso Cortés ([1922] 2005, ch. 4). He thus explains how "with an energy that rose to an extreme between the two revolutions of 1789 and 1848," Maistre and Donoso Cortés, "thrust the notion of the decision to the center of their thinking" (53). Schmitt's decisionism once again reveals his essentially realist stance.

While it is not possible within the bounds of this chapter comprehensively to situate Schmitt's oeuvre within this discipline of politonomy, his general orientation might be thrown into relief by contrasting his thought with that of another great public lawyer—Montesquieu. Like Schmitt, Montesquieu believed that the law of the political is not discovered through normative inquiry: it could be exposed only through empirical study of the history of government. Only by immersion in the various particulars of government, Montesquieu notes, can "the principles on which they are founded" be revealed ([1762] 1989, xliii). This was the ambition of his most important work on *The Spirit of the Laws*. The aim of his study was not to classify the laws enacted in particular regimes; those—the positive laws—are merely the products of a regime. Rather, it was to discern the laws that have determined the formation of those regimes. Montesquieu sought to identify "the law of the political." This—"the work of twenty years" (xliii)—was an exercise in politonomy.

Montesquieu therefore examines the historical development of governmental institutions for the purpose of identifying their spirit. His great breakthrough was achieved by virtue of developing an entirely modern concept of law (Althusser 1972, ch. 2). Before the modern era, law was conceived as command. This expressed a belief that the universe was the product of a divine creator, and it was by virtue of his will that order was established. In defining law purely as the command of the sovereign—the "mortal God" (Hobbes 1996, 9)—Hobbes broke the medieval chain of being. Nonetheless, his concept of law was otherwise entirely orthodox. Montesquieu, by contrast, argues that law is not command: it is the expression "of the necessary relations deriving from the nature of things" ([1762] 1989, 3).

This modern conception of law as a relation applied to everything that exists, from God to the most basic units of physical existence (Montesquieu [1762] 1989, 3). The laws of the physical world, Montesquieu explains, are rules that express a fixed and invariable relation and although accepting that "the intelligent world is far from being so well governed as the physical world," he contended that the concept of law as relation was similarly applicable to human interaction (4).

Through his meticulous investigations into the history of government, Montesquieu ([1762] 1989) distinguishes between the objects of his studies—the laws and practices of regimes—and his findings: the laws that determine their form. He distinguishes in effect between *political laws*, the positive laws enacted to regulate government in particular regimes, and *politonomy*, the law of the political. Of particular importance is his claim that politonomy is directed toward causes rather than motives, and the main determining causes he identifies are those of climate and geography, customs and commerce, population and religion. These, he argues, are factors of which individuals might not be entirely conscious, but they invariably determine the type of regime that is established. The critical point is to locate a consonance of nature and principle. Each type of government (democracy, aristocracy, monarchy, and despotism) has both its nature, "that which makes it what it is," and its driving principle, "that which makes it act" (21). The power of any regime, he concludes, is determined by the degree to which nature and principle—the constitutive and the regulative—are united.

Montesquieu ([1762] 1989) orientates his studies in politonomy toward the attempt to specify the laws of political and governmental development. This is a line of inquiry that takes its cue from Book's II–VI of Bodin's *Six Books* and establishes an approach in which others, such as Hintze and Weber followed.[7] Especially with respect to his institutionalist work and the scheme of development laid down in *The Nomos of the Earth*, this is also a trajectory in which Schmitt can be situated. On the other hand, certain scholars have contended that this exercise in historical sociology provides only a partial account of politonomy, and this empirical orientation has the profound limitation, at least from a juristic perspective, of reducing the study of the political to that of an observa datum and of reducing the concept of political power to that of *potentia*. This type of claim derives mainly from the work of Rousseau.

Rousseau evidently grasps the difficulty of addressing the issue of political power in normative terms: in the *Discourse on Inequality*, for example, he recognizes that if we think of government as originating in a foundation, then the pact that might have been struck in the remote past was a deceptive and fraudulent device, drafted by the wealthy for the purpose of exploiting the poor ([1755] 1997). But he also claims that Montesquieu had created a great and useless science. The problem, he explains, was that Montesquieu did not really bury down to examine "the principles of political right." This type of exercise required a consideration of agency as well as structure. Montesquieu had remained "content to discuss the positive right of established governments," and this, Rousseau contends, is a rather different matter to that of revealing the principles of political right ([1762] 1979, 458).

It is not my task here to determine the correct orientation of politonomy. My point is that it has evolved as a conjunction of constitutive and regulative laws and that it involves the dialectical interaction between power as *potestas* and power conceived as *potentia*. Schmitt's original contribution is to have staked his position within politonomy by promoting an understanding of the political in existential rather than conceptual terms—that is, in accordance with the criterion of friend–enemy rather than sovereignty as a representation of an autonomous conceptual world—and in conceiving power essentially as a capacity to decide (*potentia*) rather than as a quality generated through institutional forms of representation (*potestas*). He evidently is able to do so only by suppressing aspects of the conceptual and the rightful, and in that respect doubts will persist about the cogency of his theory. But by virtue of the rigor, insight, and brilliant style of delivery of his argument, Schmitt stakes his claim to recognition as one of the leading modern scholars of political jurisprudence.

This is a double-edged compliment. The fact that the most powerful twentieth-century exponent of political jurisprudence made such a disastrous exercise of political judgment has been used by some scholars to reject—or at very least to marginalize—the significance of an entire tradition of thought. Normativism appears once again to be the dominant influence in legal thought, and legal scholars commonly ignore the insights of political jurisprudence. By raising Schmitt's status to that of the exemplary figure of political jurisprudence, normativists seek to ensure that his own vain boast of being the last representative of the tradition will in fact come to pass.

Conclusion

Carl Schmitt's primary scholarly contribution was that of a jurist. To understand the significance of that contribution, his writing should be situated within the lineage of political jurisprudence. Political jurisprudence is a modern movement driven by the objective of establishing a rigorous and compelling account of the constitution of political authority in circumstances in which a hierarchically organized, religiously constituted universe has been supplanted by a world differentiated into various domains of thought and action. Only in modernity do we see the emergence of discrete spheres of human activity operating according to their own criteria and necessities: these include the scientific, the technical, the aesthetic, the legal, and the political. The founding assumption of the political jurists is that the modern form of law (i.e., positive law) is essentially the product of political power. Their overriding objective has been to offer an account of the way the domain of the political is constituted to render that modern form of positive law authoritative. This, we might say, is an exercise in politonomy.

The political jurists have constructed their various accounts on certain foundational concepts, most commonly those of the state and sovereignty. Schmitt's particular contribution is to have deployed a realist method in analyzing the nature and significance of these foundational elements. This is exhibited mainly in his work on the concept of the political, the character of sovereign authority, the nature of institutional ordering, and the uses made of the concept of legality. Although Schmitt's writing was—and remains—highly controversial, it continues to offer great insight into the nature of the relationship between law and politics. Whether we are trying to make sense of the recent extension in the constitutional jurisdiction of courts, figuring out how the conflicting claims of duties and rights might be balanced with respect to the values of security and liberty, or determining the status of the sovereign nation-state in a globalizing world, having a clear grasp of the relationship between the legal and the political remains the critical factor. Today, that relationship is often expressed polemically, whether as a complaint about the legalization of the political or of the politicization of the legal. This in itself is symptomatic of its deep-seated and enduring character. Schmitt's work may not hold answers to all these questions. But compelling answers are unlikely to be found without having taken seriously Schmitt's distinctive contribution to the subject.

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Notes:

([1]) Operating under the influence of legal positivism, jurists today commonly define public law as a subset of positive law, treating public law as the law regulating relations between the institutions of government or between government and its subjects, in contrast to private law, which regulates relations between subjects. In this broader conception, public law includes a study of the juristic construction of public authority: it is concerned with the manner in which government is equipped with a rightful power (*potestas*) to rule through the instrumentality of positive law.

([2]) See, e.g., Hans Kelsen ([1934] 1992), 1: legal science must be "purified of all political ideology" and of "every element of the natural sciences."

([3]) Some sense of what Schmitt means by the term *Goetheans* is grasped from his comment in *Nomos of the Earth* (2006, 70 n10): "The German language today is largely one of theologians—the language of Luther's bible translation—as well as a language of craftsmen and technicians (as Leibniz observed). In contrast to French, it is not a language of jurists or of moralists. German gives a heightened, even sublime significance to the word *Gesetz*. Poets and philosophers love the word, which acquired a sacred tone and a numinous power through Luther's bible translation. Even Goethe's *Urworte orphisch* is nourished by this source: *Nach dem Gesetz, nach dem du angetreten* [According to the law by which you began]." On the humanitarians see Schmitt 1929.

([4]) This view of the nature and role of political concepts is now more widely accepted. Quentin Skinner acknowledges that in believing that concepts "not only alter over time, but are incapable of providing us with anything other than a series of changing perspectives on the world in which we live and have our being" (2002, 176) we are following in a tradition that stems from Nietzsche and Weber (and in whose company Schmitt would have felt at home). He joins with Koselleck (2004, 80) in maintaining that "we need to treat our normative concepts less as statements about the world than as tools and weapons of ideological debate" (Skinner, 2002, 176). In pursuing this line of argument about concepts, Skinner even prays in aid Foucault's (1980, 114) Nietzschean position that "the history which bears and determines us has the form of a war" (Skinner 2002, 177).

([5]) In the Preface to *Political Theology*, Schmitt (2005, 2–3) admits that he had arrived at institutionalism as a result of his studies of "the profound and meaningful theory of institutions formulated by [the French public lawyer] Maurice Hauriou." But in *Three Types* he seems to have recognized that, with the establishment of the Nazi regime, it would be politic to call this *concrete-order thought* to avoid any association with neo-Thomism exhibited in Hauriou's work: see Bendersky's note in Schmitt [1932] 2004 (112 n59). On Hauriou, see Gray 2010.

([6]) Cf. the claims of Geertz 1980; Skinner 1989. Geertz: "That master noun of modern political discourse, *state*" (121). Skinner: "The state is … the master noun of political argument" (123).

([7]) See Hintze 1970, 1975; Weber 1978, 1994. This line of inquiry has inspired a wide range of contemporary works including Ertman 1997; Mann 1986, 1993, 2012.

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