

## Book Reviews

Schachtschneider, Karl Albrecht. *Res publica res populi: Grundlegung einer Allgemeinen Republiklehre*. Berlin: Duncker & Humblot, 1994. xxxiii, 1203. Indices. DM 98, AS 765; SFr 98.

The discussion about liberalism and its discontents has characterized much of last decade's debates about political theory and constitutional law in the United States. Communitarianism and Civic Republicanism have turned out to be major challenges to liberalism, despite the alleged "End of History". It has taken a long time for the critique of rights, universalism, and autonomy to reach Germany – but finally it has arrived, even penetrating the usually hardly permeable boundary between German law and political theory. Habermas's concern with deliberative democracy comes to mind (*Faktizität und Geltung*, Frankfurt/M.: Suhrkamp 1992, now translated as *Between Facts and Norms*, Cambridge [Mass.]: MIT Press 1996). Now Karl Albrecht Schachtschneider's voluminous opus (1306 pages, around 6000 footnotes, and a bibliography that extends over 61 pages) focuses on "general republican theory".

Unlike Habermas, however, Schachtschneider, a public law professor at the University of Nürnberg-Erlangen, is hardly familiar with writing by US scholars in the field and ignores Civic Republicanism's most distinguished proponents (such as, for example, Sunstein or Michelman). He also pays no attention to the elaborate critiques of Kant, such as that by Sandel, although he bases much of his argument on Kantian ideas. Schachtschneider, concededly, focuses on the German polity. However, he also repeatedly underscores that his undertaking is the construction of a broader, general theory and philosophy of law, governance, and the state. In this light, these omissions do not only mar the overall impression but constitute a major weakness. I am convinced that Schachtschneider would have learned from the sophisticated Ameri-

can debate, and would have avoided some of the untenable positions that are characteristic of this book.

Schachtschneider deals with many subjects: among others, the distinction between state and society, the notion of freedom as understood in liberal and in republican terms, a theory of legislation, judicial review, a harsh critique of the role of political parties, and the necessity of homogeneity. Schachtschneider treats all of them in an original way that is far off the mainstream of German constitutional discourse. One thesis underlies his whole book: Within a republican polity, there is no justification for authority. The only order that is adequate under the principle of republicanism is a consensual order, based on the recognition of what is true and right. This insight can only be gained through rational, neutral discourse purged of all emotions, interests and ideologies.

The idea that authority and discourse are not reconcilable is not a new one, not even among law professors. Powerful statements of this idea include Robert Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative', 97 *Harvard Law Review* 4 (1982) and Paul Kahn, *Legitimacy and History* (New Haven: Yale UP 1992). What is new, however, is that Schachtschneider goes ahead and draws consequences that everyone else has avoided so far, and one may add, with good reason.

If I had to choose one phrase to characterize '*Res publica res populi*' it would be 'Schachtschneider by far overshoots the mark.' He projects a constitutional order into the Basic Law (the German Constitution) that has little in common with reality. He engages in unfettered political party-bashing and pulls pluralism, and interest politics in general, to pieces. He postulates a citizens' duty to participate in public affairs, guided by morality. Legislation is to be detached from subjective ends and thus, is to be far from coming close to a marketplace of interests and opinions. Political problems have to be approached scientifically by an educated, morally competent elite. Against this background, the current electoral system is "unrepublican" because it puts into place representa-

tives whose task, to Schachtschneider, is to espouse deals negotiated behind closed doors by committees and party organs. Political parties in general are superfluous in a republican polity because they constitute an obstacle to rational, deliberative discourse. A republican order also presupposes, according to Schachtschneider, homogeneity and the rootedness in a common political culture.

These are only some examples of the radical consequences Schachtschneider draws from his main thesis. Others are in abundance, and read together with Schachtschneider's scattered idiosyncrasies they may finally start to annoy you. For example, it is irritating that Schachtschneider persistently calls the eastern part of Germany (i.e. the former GDR) "Middle Germany" ("*Mitteldeutschland*"), thus openly defying the definitiveness of the Oder-Neisse boundary (he calls the amended Preamble of the Basic Law which talks about the completed German unification, a "forgery of history" ("*Geschichtsfälschung*"), p. 2 footnote 3). Also, after a while Schachtschneider's repeated mention of his own role in the constitutional complaint against the law ratifying the Maastricht Treaty (he represented the plaintiff) becomes redundant.

It is easy to see that Schachtschneider has serious problems with pluralist societies (he postulates that those Members of the Hamburg and Schleswig-Holstein Parliaments who voted for a law granting foreigners the right to vote on the non-federal level should lose their mandate, p. 947) and places unwarranted faith in the power of reasonable, rational discourse. Also, even if one could believe in the possibility of a good leadership through moral and scientific experts and elites, this is a good deal away from democracy which means, after all, governance by the people. It is peculiar how Schachtschneider, having established the oppositional character of discourse and authority, embraces the discursive solution, only to sometimes come dangerously close to the authoritarian side. The fact that he calls for a reinterpretation of fundamental rights as objective, not subjective rights will hardly leave the reader more reassured.

These critical remarks should not cloud the fact that Schachtschneider's book commands and deserves respect. It is highly original, well-written, clear in its message, and extremely well annotated. It constitutes a fresh look at old problems, and will doubtless inspire heated debate. The fact that it is controversial and, many times, goes too far, may thus be a virtue. The publishers priced the book at 98.- German marks, which makes it affordable to a wide readership. It deserves and needs extensive discussion.

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Winn, David B. *European Community and International Media Law*. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1994. Pp. xxxii, 594. Index. \$146; £90.

This is a very useful reference work containing an enormous amount of information. It is a valuable asset in understanding the many issues with which it deals. A large proportion of the work describes how the major parts of Community jurisprudence apply to the media industry. In this collection of chapters the work contemplates the impact of Community laws concerning intellectual property, free movement of goods, freedom to provide services, freedom of establishment and competition. Harmonization measures are mentioned in these chapters and are then described individually in a later chapter. The stated aim is to provide sufficient detail to engage practitioners whilst also providing the background essential to those new to the subject.

The work also contains an excellent study of how fundamental human rights may impinge upon the media. This chapter deals mainly with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms but also includes a description of the Convention's relevance in Community law. The broader international dimension is provided principally by a chapter which examines relevant international conventions, starting with the Berne Convention but including many that