

Chapter 6:

The Methodological Debate and Weimar's Final Days (1933)

Even before Schmitt's first political fall from grace in late 1932, his political activities and his book on legality and legitimacy prompted Kirchheimer to present his criticism of Schmitt more extensively and systematically in an article written for *Archiv für Sozialwissenschaft und Sozialpolitik* [Archive for social sciences and social policy], the leading socio-logical journal during the Weimar Republic. This time, Kirchheimer expanded the field of conflict to include fundamental methodological questions in legal studies as they related to the social sciences. During the entire time of the Weimar Republic, the German debate on constitutional law was immersed in methodological questions concerning positivist and anti-positivist approaches.¹ The three major protagonists of the schools of thought decidedly critical of positivism were Carl Schmitt, Rudolf Smend, and Hermann Heller. Their alternative approaches were limited to their common thrust against the legal positivism driven to greater heights by Hans Kelsen. They shared a plea to expand the methods of constitutional law used to gain insights in order to include other scientific disciplines. Smend and Schmitt had the humanities in mind, and Heller also the empirical social sciences.

At the end of the Weimar Republic, Kirchheimer also participated in this methodological debate, focusing his criticism on Schmitt. In contrast to other critical arguments with Schmitt, he linked his methodological criticism to the question about the status of the empirical social sciences for legal and political theory. Kirchheimer became a precursor of the discipline of political science because of his methodological program, which offered an alternative to Schmitt.

¹ For an overview, see Gusy (1997, 427–447) and Stolleis (1999, 153–186).

1. Schmitt on his method

Schmitt said comparatively little about his own methodological approach. His texts were intended to speak for themselves with their succinct terms and concepts, the suggestive power of their language, their rich imagery, and either by surprising and overwhelming readers or by horrifying and disgusting them. It was his opinion that theories of constitutional law were developed through specific political debates, with the result that the academic discussion took on the tensions of the political struggle. Referring to specific political situations like this made it impossible to conceive of legal science as methodological and systematic work in order to gain universally valid insights. Every insight was an insight into the present; there was no insight that could be understood intersubjectively by everyone but only statements about specific situations that were always the objects of dispute. Schmitt's terms, concepts, and theorems were designed less to be rationally reconstructed and more to be directly self-evident.²

One exception to Schmitt's methodological abstinence was a programmatic section in his 1922 book *Political Theology*. Using the concept of sovereignty as an example, he called his own method the "sociology of legal concepts."³ His aspiration was to surpass both the sociological explanatory approach put forward by Max Weber and that of historical materialism by Karl Marx and his successors. Schmitt argued against Weber by stating that he was merely seeking "the typical group of persons" (44) for certain ideas and intellectual constructions and then relating them to the "peculiarity of their sociological situations" (44). However, this was the determination of a certain kind of motivation of human action, hence psychology and not sociology of a juristic term. Schmitt criticized the Marxist explanation for making "separate consideration of ideology impossible" (43) since all it saw was "reflexes," "disguises," or "reflections" of economic relations. Marxism worked "with suspicion" (43) toward individuals and their ideas. Paradoxically, it was precisely because of its massive rationalism that historical materialism could easily turn into an irrationalist conception of history "since it conceives all thought as being a function and an emanation of vital processes" (43). To Schmitt, the theory of George Sorel was evidence of such a switch from rationality to irrationality.

Neither Weber nor Marx were sufficiently radical in their thinking. Compared with theirs, his approach "transcend[ed] juridical conceptualization oriented to immediate practical interest" (45). Schmitt was aiming not at the individual representatives and bearers of certain ideas but, rather, at a transpersonal level. The target of his sociology of concepts was not, as its name might suggest, the relationship between concept and social reality. Instead, Schmitt conceived of the sociology of concepts as their "basic, radically systematic structure" (45) related to the "social structure of a certain epoch" (45). Schmitt sought to find analogies between the semantic fields of the individual sciences and the conceptual form they shared. His approach consisted of two steps. First, it aimed to discover the basic and radically systematic structure of a certain type of legal thought. In a second step, this conceptual structure was "compared with the conceptually represented" (45) social structure of a certain historical situation. Schmitt

2 See Neumann (1981, 236–238) and Hofmann (1995, XIII).

3 Schmitt (1922, 42). The following page numbers refer to this text.

thought it made no difference for his approach—in contrast to those of Weber and Marx—whether the idealities produced by conceptualization were a reflection of social reality or whether social reality was the result of a particular kind of thinking. The only presupposition of his approach was “a radical conceptualization,” i.e., “a consistent thinking that is pushed into metaphysics and theology” (46). According to Schmitt, “the metaphysical image that a definite epoch forges of the world has the same structure as what the world immediately understands to be appropriate as a form of its political organization” (46).

In Schmitt's view, the metaphysical image in question was—as a rule, but not always—theology. Schmitt explained this idea in *Political Theology* for the concept of sovereignty. When it was developed, the analogy to Christian theology was evident. In the seventeenth century, the absolute monarchy had corresponded to Western Europeans' state of consciousness because the position of the absolute monarch corresponded to the Cartesian concept of God prevailing at the time. Then, in the eighteenth century, the theoreticians of democracy had replaced God with the people, coining the term “sovereignty of the people.” The metaphysical system of the legal positivism emerging in the nineteenth century and the liberal theory of parliamentarism consisted of “a political relativism and a scientific orientation that are liberated from miracles and dogmas” that were “based on human understanding and critical doubt” (42). Schmitt was of the opinion that modern scientific thinking was just one of multiple metaphysical systems. The purpose of legal theory had to be to reveal the metaphysical fundamentals of the sets of concepts pertaining to various ideologies. This applied both to socialism with its belief in science and to liberal parliamentarism with its belief in deliberative reason. Against the background of this methodological credo, it is easy to understand why, in his book *The Crisis of Parliamentary Democracy*, published one year after *Political Theology*, Schmitt insisted that an “ultimate core of the institution of modern parliament” and/or “ultimate intellectual foundations” (Schmitt 1923a, 20 and 33) of parliamentarism had to exist as part of a more comprehensive metaphysical system.

Now this begs the question which metaphysical image Schmitt thought that the immediate present constructed from the world and its political organization. His answer in *Political Theology* was brief and inconclusive but a line of thought can still be discerned. The development of constitutional law since the nineteenth century, he asserted, was characterized by two paradigmatic changes. For one thing, the traditional monarchical legitimacy had lost its persuasiveness. For another, all theistic concepts had disappeared from legal thought. Therefore, “legitimacy no longer exists in the traditional sense” (51). It had been replaced by “decisionist thinking” (51) that did not explain its rationale, and thus the political option of “dictatorship” (52).

In just over ten pages in the third chapter of *Political Theology*, Schmitt formulated an ambitious program for a conceptual history that has similarities to the later approaches by both Reinhard Koselleck and Quentin Skinner and was widely received.⁴ He contrasted concepts expressing a complex subject matter antithetically with a *Gegenbegriff* (counterconcept); for example, democracy vs. parliamentarism; constitution as decision

4 See Mehring (2006); Müller and Schmieder (2016).

vs. dilatory formulaic compromise; *Rechtsstaat* vs. democracy. In relation to parliamentary democracy: since democracy implied the identity of those governing with those governed (and not their representation of the governed), the representative parliament was automatically and always in contradiction to democracy.

The antithetical contrasts were to express an irreconcilable contradiction for which Schmitt had identified the following well-known formula in *The Concept of the Political*: "All political concepts, images, and terms have a polemical meaning" (Schmitt 1932a, 30). These were bound to a specific situation and focused on a specific conflict. The result was "a friend-enemy grouping" (Schmitt 1932a, 30). Schmitt was of the opinion that concepts distinguished themselves in polemical (i.e., combative) usage through friend-enemy distinctions to such an extent that they firmly established a certain semantic meaning. Accordingly, succinct concepts in Schmitt's combative sense were concepts that were fixed for a certain period of time and with which political actors identified in order to guide their actions. Schmitt's activist concept of a concept was directed against the notion of value-neutral terminology, as Max Weber had asserted for his ideal types. Even in its form, his conceptual thinking was directed against allegedly liberal neutralizations and/or depoliticizations. Not only the concrete substance of the concepts but even the approach itself of his "radical conceptualization" was an expression of Schmitt's combative understanding of politics.

2. The Weimar debate about Schmitt's method

Kirchheimer was not the first to critically examine Schmitt's method and his combative use of concepts. Besides numerous substantive analyses of Schmitt's work, there had also been a few objections concerning methodological aspects. Publicist and writer Hugo Ball was the first to pick up the issue of Schmitt's method. In 1924, he praised Schmitt highly and called him an "ideologue of unusual conviction" (Ball 1924, 263) for whom ideas emerged and entered life where extremes gathered around them: "The extreme is the starting point for his concepts" (Ball 1924, 278). Schmitt's concepts were illuminating because they followed on from extreme, final decisions.

Not all of Schmitt's readers agreed with this positive verdict, however. The first criticism of Schmitt's politics of concepts was formulated by positivist legal theorist Richard Thoma in 1925. In his review of Schmitt's book on the crisis of parliamentary democracy, Thoma accused him of "overemphasizing the literary appearance of things" (Thoma 1925, 80) in his definition of parliamentarism. If one sought to examine the foundations of an institution in intellectual history, he stated, one could not limit oneself to the study of a single coherent ideology that had been used to justify it. Thoma also reminded Schmitt that ideological justifications of an institution might change over time because of new social realities. Political institutions underwent "metamorphoses of purpose and changes in structure" (Thoma 1925, 80). Such changes were simply changes and were not necessarily to be understood as degeneration of a previous ultimate core ideal. There was no reason to stop idealizing parliamentarism as a government by discussion and, instead, to justify it on the basis of purely practical considerations. It was not an ideology but, rather, its usefulness, its vitality, and its adaptability that would make or break a politi-

ical institution. In his riposte to Thoma, Schmitt insisted that like “every great institution,” parliament “presupposes certain characteristic ideas,” an “intellectual foundation of a specifically intended institution” (Schmitt 1926b, 2 and 3), and more than practical considerations or justifications regarding its social and technical usefulness.

Anti-positivist Rudolf Smend joined this debate two years later with a brief critique of Schmitt’s methodology. In his long-awaited book *Verfassung und Verfassungsrecht* [Constitution and constitutional law], he commented on the debate between Thoma and Schmitt. He agreed with Schmitt where he accused Thoma of thinking technically about constitutions. And he insisted, as did Schmitt, that modern parliamentarism must not be decoupled from the principle of public debate and shifted to clandestine backroom deals. The details of the institutional organization of the relationship to public debate, however, were subject to historical transformations. Smend accused Schmitt of a lack of understanding of the changeability of institutions and their justifications: “In parliamentarism, the original ideology is only a moment of integration [...]—the belief in the exclusive significance of ideology is rationalism or (in C. Schmitt’s writings) conceptual realism.” (Smend 1928, 153) Smend did not explain the significance of conceptual realism to his readers in more detail, and this would have been superfluous because it was already an established term in the philosophical discussion of the day. Since the beginning of the twentieth century, the term had served in Germany to denote philosophical theories in the tradition of Plato according to which general terms were assigned real existence. In other words, the term was meant from the outset as a delimitation from the various strands of philosophical idealism and their metaphysical presuppositions.

The same year, Georg Lukács also complained from a Marxist perspective about Schmitt’s method. He criticized the fact that Schmitt did not transcend the usual methods of *Geistesgeschichte* (intellectual history) in his book *Political Romanticism*. A “social analysis and explanation” (Lukács 1928, 308) of romantic occasionalism was missing. The sociologist Hans Speier, whom Kirchheimer knew from Berlin from the Deutsche Hochschule für Politik (German Academy for Politics), attacked Schmitt with a similar objection. He called his *Concept of the Political* a “witty treatise” but saw the problem precisely in this wittiness. Speier asserted that Schmitt considered the formal distinction between friend and enemy to be an “ontological” one that could not be derived further, and he thought that Schmitt was completely wrong. He was of the opinion that any political theory that deserved to be taken seriously required “sociological considerations” (Speier 1932, 203 and 204) of conflicts and their causes.

The most far-reaching criticism of Schmitt’s methodology prior to the essay by Kirchheimer was published by the young philosopher Eric Voegelin in *Zeitschrift für öffentliches Recht* in 1931. It was a detailed analysis of Schmitt’s *Constitutional Theory* against the background of Hans Kelsen’s legal theory.⁵ On the last two pages of the essay, Voegelin addressed Schmitt’s “style of thinking” (Voegelin 1931, 106) and “categorical tone” (Voegelin 1931, 108). He stated that Schmitt did not approach the constitutional problems from the perspective of an external observer but deliberately from the internal perspective of a person who was involved. Even if Schmitt operated with a “conceptual apparatus bound by tradition” (Voegelin 1931, 107), all the terms he coined were creative interpretations

5 On Voegelin’s various points of criticism, see (Heimes 2004) and Henkel (2005, 44–51).

driven by political intentions. Voegelin did not find fault with this but, rather, with the fact that Schmitt left his readers in the dark about the role he had assumed and that he also confused the two different roles himself. "The standpoints of the politically creative thinker and the external observer are always confused, and the categorical tone arises from this confusion" (Voegelin 1931, 108).

Interpretations emerging from Schmitt's political views were presented as scientifically objective ideal types in such a categorical tone. Voegelin was critical of the way that Schmitt reversed things, as it were: "No facts in reality correspond to any these concepts, they are not fulfilled by any sensory perceptions, yet they themselves are part of political reality as beliefs and as political motives." (Voegelin 1931, 109) Even if Voegelin did not use sharp words, his criticism ultimately amounted to accusing Schmitt's state and constitutional theory of being founded on ideological constructs and therefore being unsuitable for grasping the real structure of Weimar statehood. Schmitt reacted to Voegelin's criticism, and in a friendly manner. Voegelin had sent him the proofs of his article prior to publication. In his response to Voegelin, Schmitt conceded that "for the first time, [I] encountered a criticism that moves me to the greatest personal and factual respect."⁶ After reading the essay, he had already noted "very good"⁷ in his diary. He did not react to Voegelin's criticism publicly, however.

3. Against conceptual realism

It was in 1932 that Schmitt's fellow legal experts commented critically on his methodology, too. Johannes Heckel found fault with the "tension between theoretical construction and historical reality" (Heckel 1932, 284) that Schmitt constantly created. Richard Grau accused Schmitt of deriving specific legal consequences from the "concepts he created himself" (Grau 1932, 279). Both authors thus also opposed Schmitt's theory of presidential dictatorship.

Kirchheimer's criticism went far beyond the cursory remarks from Schmitt's fellow legal experts. His long 30-page article combined sharp political criticism of Schmitt's work with a fundamental methodological attack on his legal thinking. He joined forces with Nathan Leites, a sociology student at the Berlin University from Saint Petersburg who was aged only 21.⁸ Most of their text, however, was authored by Kirchheimer himself. It rose above the multitude of other voices critical of Schmitt during the Weimar Republic by sagaciously placing Schmitt's *Legality and Legitimacy* within his oeuvre. In contrast to previous arguments with Schmitt, Kirchheimer and Leites linked their criticism to the essence of the debate on methodology in legal studies as they related to the empirical social sciences. Not only did they reject the results of Schmitt's book but, above all, his methodology. Thus, they connected the previous leftist criticism of Schmitt about his lack of sociological perspectives with that of conservative authors regarding Schmitt's conceptual realism.

⁶ See letter from Carl Schmitt to Eric Voegelin dated 30 March 1931 (Schmitt and Voegelin 2014, 186).

⁷ Carl Schmitt, diary entry of 27 March 1931 (Schmitt 2010, 101).

⁸ On Leites's biography see the memoir essays in Rand Corporation (1988).

The substance of this article concerning methodological criticism has strangely remained largely ignored in the literature to date.⁹ This is all the more astounding because a number of authors raised similar objections about his methodology after 1945. No other contribution on Schmitt during the Weimar Republic reached the level of the essay co-authored by Kirchheimer and Leites in terms of criticism of methodology. The authors had completed their manuscript within a very short timeframe. Schmitt's *Legality and Legitimacy* had been published in August 1932 and then Kirchheimer informed Smend in early November that their text had been already accepted for publication and would appear in the January 1933 issue of the journal *Archiv für Sozialwissenschaft und Sozialpolitik*.¹⁰ The *Archiv* had been established by Max Weber, Werner Sombart, and Edgar Jaffé. Now it was edited by Emil Lederer in collaboration with Joseph Schumpeter and Alfred Weber. At the time, it was considered the most prestigious publication in Germany for the social sciences. The journal already had a reputation for discussing Schmitt. An initial version of Schmitt's *Concept of the Political* had been published in the *Archiv* in 1927, as had Leo Strauss's critical comments on Schmitt's concept of politics (see Strauss 1932).

The essay by Kirchheimer and Leites is titled "Remarks on Carl Schmitt's *Legality and Legitimacy*".¹¹ At the beginning of their article, the two authors directly linked up with the final passages of Eric Voegelin's essay. In *Legality and Legitimacy*, Schmitt was attempting to prove that there was "a contradiction between democracy's underlying justification and specific elements contained in the Weimar Constitution or arising from its application" (64). Once again, the authors identified Schmitt not as a concerned defender of the Weimar Constitution but as its fundamental opponent. This time, however, they shifted the attack on Schmitt to the methodological level. Kirchheimer and Leites reconstructed Schmitt's legal theory as an artifact of methodologically inadequate deliberations and stated that Schmitt "fail[ed] to discriminate sufficiently between providing a justification for a particular system of normative ideals [...] and an examination of specifically political forms" (64). They accused him of ignoring the question about empirical political reality, thus not even considering the possibility that a system of normative ideals "[could] 'function' properly when put into effect" (64).

The authors claimed that Schmitt conflated two different tasks—a logical analysis of normative political ideas and an empirical examination of political forms—and that he implicitly championed the assumption that the contradictory nature of a system of political norms would result in a reality that would not function properly if this system of political norms were applied. Kirchheimer and Leites called this implicit supposition "signs of a strand of conceptual realism" (64) in Schmitt's theory. At this point, they referred to Voegelin's essay; Smend, from whom they apparently had borrowed the term "conceptual realism," was not mentioned at this point although he, too, had placed the

⁹ See Blau (1980, 457–460), Neumann (1981, 243–245), Scheuerman (1994, 87–89), Scheuerman (2000, 9–11), Schale (2006, 78–81), Breuer (2012, 129–130), and Olson (2016). Mehring (2021, 199–204) is something of an exception, yet this author's defense of Schmitt's position is hardly convincing.

¹⁰ See letter from Otto Kirchheimer to Rudolf Smend dated 7 November 1932. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

¹¹ See Kirchheimer and Leites (1933). The following page numbers refer to this text.

“function” of political institutions for the integration of the state at the center of his legal theory. Kirchheimer and Leites attempted to prove in detail how Schmitt’s approach based on conceptual realism took its suggestive power from selectively combining theoretical postulates and empirical examples.

They continued their criticism of Schmitt, which took a methodological approach, by addressing his concept of democracy. The basic error in his *Constitutional Theory*, they wrote, lay in the idea that social homogeneity had to be both the prerequisite of democracy and its outcome. Only by overstating the postulate of equality was Schmitt able to conclude that the modern constitutional state was entirely unable to function in political practice. The two authors argued against Schmitt’s one-sided derivation of democracy from the postulate of equality and the conceptual strategy arising from it used to play democracy and freedom off against each other. Following Hans Kelsen, they pointed out that the political norms of equality and freedom had the same origins. Criticizing Schmitt’s postulate of homogeneity, they also drew on intellectual history to object that even Rousseau had recognized that special interests always exist in any society. “The total transcendence of all differences in opinion has to be seen as constituting a utopian idea because it would imply the destruction of individuality itself” (66).

Kirchheimer and Leites also attacked Schmitt’s concept of liberty. Schmitt’s definition of liberty placed a special emphasis on the liberty of the individual. In addition, he distinguished between the liberty of the isolated individual and the liberty of individuals interacting with other individuals. Since Schmitt conceived of the sphere of liberty in terms beyond the scope of the state, he failed to relate individual liberty to the process of democratic will formation. Thus, Schmitt was “incapable of acknowledging the distinction between the rights of citizenship and private rights” (66). Schmitt’s concept of liberty obscured “the dual character” of liberty in modern democratic states. Contrary to Schmitt’s views, it was this dual concept of liberty that was “the basis for the Weimar Constitution” (67). It also formed the basis for the justifications for all the other modern democratic systems. It followed from this concept of liberty that there would always be a certain amount of heterogeneity and differences of opinion in a society. Total homogeneity would lead to the total destruction of everything individual and ultimately of individuals. In order to protect people from such homogenization, a political order that realized equality and liberty “as fully as possible” (66) was all the more important.

Above all, however, the two authors insisted that Schmitt should have had the courage in *Legality and Legitimacy* to take an open empirical look at real-existing modern democracies. In contrast to Schmitt, Kirchheimer and Leites noted that, indeed, all populations were by necessity heterogenous. They also observed that there appeared to be a trend in all modern societies toward increased heterogeneity. They countered Schmitt’s hypothesis that democracy in a heterogeneous society was not only unjustifiable but in fact dysfunctional with empirical findings pointing “to a whole series of phenomena that are difficult to square with his [Schmitt’s] thesis” (68). A large part of the article is filled with a comparative view of the political systems in France, Belgium, the United Kingdom, and the US. An “ongoing trend toward heterogeneity” (69) was to be seen in all four countries, without democracy suffering any losses of function. In Belgium, which was extremely heterogeneous in national and social terms, they observed a trend toward a “transformation of political parties into typical integrative parties” (69). Kirchheimer and Leites

had borrowed the term “integrative parties” from Berlin scholar of political parties Sigmund Neumann, who had recently described this new type of party with reference to Smend’s theory of integration in a study on the German party landscape.¹² Schmitt’s description completely ignored such empirical findings. His epitaph to modern democracy was based on an “inadequate inductive basis for the argument and significant empirical evidence to the contrary” (69). Owing to a lack of empirical evidence, Schmitt’s proclamation of the end of the Weimar Constitution could not be taken seriously intellectually.

Not only was Schmitt’s empirical diagnosis incorrect but he was also deluded by ideology. His yearning for authority blinded him to “new potential solutions” (76) with which modern parliamentary democracies were able to respond to social changes. In the US, a “new prosperity” could already be discerned as an “instrument of social integration” (69). The two authors stated that the US was using a skillful policy of an “instrumental view” (70) to stabilize democracy. Such an instrumental approach had also been adopted at the beginning of the Weimar Republic in the form of the Stinnes-Legien Agreement, an accord concluded by German trade unions and industrialists on 15 November 1918, before the bourgeoisie had withdrawn from it. Kirchheimer and Leites stated that this withdrawal from the agreement was a more significant factor in the current crisis of the republic “than those factors described by Carl Schmitt” (70) in his *Legality and Legitimacy*.

A larger section of the article “Remarks on Carl Schmitt’s *Legality and Legitimacy*” consisted of an extensive explanatory analysis of types of legal norms and of the interpretation of fundamental rights and individual articles of the constitution in Schmitt’s book. The authors interpreted the elements Schmitt had described as unresolvable contradictions of the construction of the Weimar Constitution as potentially integrative bridging principles which could help lead to more effective social compromises and thus stabilize parliamentary democracy. Schmitt had made the point that introducing material standards in the second section of the constitution altered the organizational core of parliamentary democracy in such a way that parliamentary sovereignty was abrogated in favor of a system based on the primacy of judicial review. Kirchheimer and Leites agreed with the criticism of this development in legal practice, adding that these trends “emerge[d] where the causes Schmitt identifie[d] [were] not present” (72). Schmitt was of the opinion such a structural change occurred if a constitution included special material clauses. Again, the two authors countered this statement with an empirical finding: “The most significant example of a ‘jurisdictional state’ is the United States” (72), and its constitution included virtually no material clauses.

Kirchheimer and Leites also took up Schmitt’s distinction between the constitution and constitutional laws in his *Constitutional Theory* (see Schmitt 1928b, 80–82) where he claimed that some constitutional norms were unalterable. They agreed but deviated from Schmitt’s views in terms of what exactly was included in the unalterable elements of the constitution. “If we identify democracy’s basis with an ultimate decision in favor of the principles of liberty and equality, [then we would arrive at a] very different assessment of the constitution’s unalterable core [than Schmitt]” (75). The universal, equal, secret, and proportional right to vote was untouchable. All norms that “contribute[d] to an unrestrained process of political will-formation,” and the “rights to citizenship” (76), were

¹² See Neumann (1932, 108–110) and Raulet (2000, 55–58).

unalterable, too. In contrast, all other personal liberties could be the object of changes to the constitution: "All 'private' rights can be amended" (76). Readers of the day understood that this wording declared drastic limitations of private property rights through changes to the constitution permissible without Kirchheimer and Leites having to say this explicitly.

The two authors then analyzed Schmitt's criticism of parliamentary democracy. The advantage of parliamentary democracy, they asserted, was that it was "the only political system [...] that provides an institutional guarantee that even the most decisive transitions of power need not threaten the continuity of the legal order" (82). Parliamentarism deserved democratic legitimization because of this unique feature. Schmitt, conversely, substituted the democratic legitimacy of the parliament with what he believed to be a superior democratic legitimacy, namely direct democracy. Kirchheimer and Leites took into account the empirical fact that the previous liberal justifications of parliamentarism that Schmitt had laid out in *The Crisis of Parliamentary Democracy* had long been "on a decline" (87). At that point, the parliament was justified primarily as a "plebiscitary intermediary" (84). For this reason, there was no longer a fundamental contradiction between democracy and parliamentarism. This change in beliefs concerning what constituted legitimization, which could be observed empirically, had to also include a legal theory about parliament and political parties.

Readers of this essay were left to conclude that Schmitt simply refused to acknowledge this reality. He divided the distinction between legality and legitimacy, which he considered decisive, between two institutions and played them off against each other. To him, legality referred to the underlying justification of parliamentary lawmaking, whereas legitimacy referred to the justification of direct plebiscitary lawmaking. In contrast, Kirchheimer und Leites argued that the institutional difference consisted merely of "different organizational forms of the same type of legitimacy" (86) and that Schmitt followed his incorrect "diagnostic thesis" with the "prognostic thesis" (87) according to which a "caesaristic modification" of the constitution was politically more stable than parliamentary democracy. They declared this prognosis to be a question to be decided empirically—regardless of the normative desirability of such a regime change—and added a number of historic examples where political regimes had stood the test of time despite all the negative prognoses. Kirchheimer and Leites were convinced that such questions could not be answered on the basis of constitutional theory alone:

We need to take every conceivable extra-constitutional factor into consideration. It seems that only if constitutional theory tackles this task by working in close cooperation with all those disciplines concerned with social experience will it gradually be able to convey general solutions to such problems (88).

They referenced John Dewey's book *The Public and Its Problems* (see Dewey 1927) for the interdisciplinary approach to the social sciences they were promoting.

The continued accusation of conceptual realism in the version spelled out by Kirchheimer and Leites in their essay against Schmitt amounted to the complete destruction of his approach. Schmitt was a conceptual thinker. This meant that not only did he think in certain concepts but he also made the conceptions the subject of his own reflection

within their substantial and historical sets of problems.¹³ When Schmitt defined terms and concepts, he coined them in his own way to an extent that they became a specific vocabulary, for instance, the concepts of democracy, of *Rechtsstaat*, and of dictatorship in his *Constitutional Theory*. Schmitt saw himself as a participant in a battle for the authority to interpret terms and concepts. Terms and concepts were tools in political struggles and, following Reinhard Mehring, Schmitt considered himself a “military technologist of terms and concepts” (Mehring 2014b).¹⁴ In his ideological struggle, staking out a concept semantically was as important to him as conquering a fortress in war (see Quaritsch 2018, 20). In 1941, Schmitt’s student Ernst Rudolf Huber summarized Schmitt’s approach to the politics of terms and concepts similarly to Kirchheimer and Leites, the difference being that he considered his summary to be praise:

The method of this struggle consists in the fact that the device of definition determines the genuine concept of a political institution, and it is precisely thereby that the deterioration of the factual institutions compared to their own essence is made clear. This makes the *Entartung* [degeneration or decline due to biological or cultural factors; see Glossary] of political institutions visible (Huber 1941, 4).

The confrontation of a “genuine” concept with dismal reality was inseparable from Schmitt’s methodological approach. The study by Kirchheimer and Leites was corroborated by a report presented by ancient historian Christian Meier during a colloquium in honor of Schmitt in 1988. On the basis of his numerous personal encounters with Schmitt from the 1960s on, Meier observed that Schmitt believed he could “veritably see” concepts and that, to him, they “represented realities” (Meier 1988, 605). Meier also claimed that “it was possible to completely hamstring [Schmitt in discussions] by using terms and concepts in a way contradictory to his.” (Meier 1988, 607) If a term or concept that he believed did not fit cropped up in a political debate, “then the entire web of order with which he generally overlaid things fell apart. [...] Then he could be quite desperate.” (Meier 1988, 607–608) It appears that Kirchheimer had similar experiences in his conversations with Schmitt much earlier than Meier. He concluded that it was easy to attack Schmitt at the methodological level and to point out that terms and concepts such as democracy and liberty had an idiosyncratic meaning in Schmitt’s vocabulary.

Referring to Schmitt’s way of dealing with political and legal terms as conceptual realism was accurate in the sense that he gained knowledge about reality exclusively by explaining the inner logic of an essential idea inherent to the concept in question. Empirical evidence on functional processes (and their problems) was irrelevant at this level of argument. Schmitt did not confront political institutions with their pragmatic justifications, either; conversely, he understood them as the embodiment of principles free of contradictions. To be precise, his *Constitutional Theory* was a theory of constitutional

¹³ See Meier (1988) and Kraus (1998).

¹⁴ In his inaugural lecture in Cologne in June 1933, Schmitt stated: “Terms and concepts [...] are not nominalist labels. [...] They are immediate carriers of political energies, and part of their real power is that they are capable of forming convincing juristic terms and concepts. That is why the struggle for them is not an argument about empty words, but a war of terrific reality and presence” (Schmitt 1933I, 198).

terms and concepts.¹⁵ Really existing political institutions, which as a rule fulfill multiple different functions in practice and have various justifications, some of which were in tension, could only fail in the face of the doctrinaire purity of a Schmittian concept. For this reason, Schmitt's method must not be confused with the process of critiquing ideology (see Preuß 1987, 407–409).

Schmitt's conceptual realism placed virtually all of the Weimar Republic's political institutions in an unbridgeable dichotomy of abstract principles. His method of conceptual realism proved so explosive during this time not least because he transferred his polemic conceptual juxtapositions, which he expressed in apodictic formulas, to specific institutions in the Weimar Republic. Anyone who, like Schmitt, traced every important element of the constitution back to a single, pure, and inherent idea destroyed the inner rationality of any constitution. At the same time, this methodological operation opened up the potential for existential political decisions that could not be contained rationally.

The methodological criticism of conceptual realism formulated by Kirchheimer and Leites struck at the heart of Schmitt's entire oeuvre from the era of the Weimar Republic. At the same time, it offered a methodological alternative to the triad of methods following Weber, Marx, and himself that Schmitt had outlined in his *Political Theology*. Kirchheimer and Leites retraced the steps leading back to Weber and Marx. They took on these two authors' guiding principles of situating political terms, concepts, and theories within social history. In contrast to Schmitt, however, their next step was not to seek concealed metaphysical systems, but to argue—now closer to Weber than to Marx—for empirical social sciences to take on an interdisciplinary direction following the American pragmatism of John Dewey.

At this point in the essay, the transition from legal studies to political science—as propagated by Hermann Heller the same year (see Heller 1933b)—was palpable. Kirchheimer did not yet take this step while he was still in Germany. This hesitation was presumably due to the way in which political science, a new scientific discipline at the time in the country, presented itself. In a book review published in the February 1933 issue of *Die Gesellschaft*, he still rejected the idea. The book in question was the first attempt to present a textbook in German for the emerging discipline of the “Science of Politics.” Its author Adolf Grabowsky had taught at the Deutsche Hochschule für Politik in Berlin since 1921 and was part of the nationalist conservative group among the faculty. Kirchheimer denied the *raison d'être* of the new scientific discipline that Grabowsky was promoting. The reason he gave was: “it is common knowledge that the character of the ‘political’ cannot be determined unambiguously and that quite different opinions exist about this in various countries.” (Kirchheimer 1933a, 511) In particular, he criticized the overemphasis of a foreign policy perspective in the description of political systems and the overestimation of ideological factors in the presentation of political processes. It was only in exile, after he had become familiar with other books in the field, that Kirchheimer found a positive relationship to political science—and that had nothing to do with Grabowsky's ideas.

To return to Carl Schmitt: In the following years, the label of conceptual realism that Kirchheimer and Leites had attached to him stuck in three ways. First, through Kirchheimer, who repeated this accusation many times both in his writings in exile and in his

15 See Muth (1971, 141) and Gusy (1997, 439).

correspondence with and about Schmitt after 1945.¹⁶ Second, through authors of the secondary literature, beginning with the entry on Schmitt in the encyclopedia *Meyers Lexikon* during the Nazi period in 1942 stating that he had "worked too much with conceptual templates at the expense of clarifying his worldview" (Meyer 1942, 1176). Conceptual realism became a standard accusation against Schmitt in the 1950s and 1960s.¹⁷ Third, however, Schmitt himself finally adopted this label, too. He never responded to Kirchheimer's fundamental criticism in an article or even a footnote. Yet, after 1945, he accepted the methodological label selected for him, but not the methodological criticism it entailed. Looking back in his diary-like *Glossarium* in March 1948, he praised his own work on *Legality and Legitimacy* as an outstanding academic testimony from the end of the Weimar Republic and explained his supposed masterly achievement as "properly applied conceptual realism as it is part of the science of public law."¹⁸ He noted "my pride in my conceptual realism."¹⁹ Schmitt, the seasoned politician of terms and concepts, had repackaged Kirchheimer's verdict into an honorary title without further ado.

Just like Voegelin had done a year earlier, Kirchheimer had given Schmitt the proofs of his article prior to its publication. He also gave a copy to Smend. Both received their copies in late October 1932. A week later, on 6 November, Kirchheimer met Schmitt at his home to discuss the article over coffee and cookies for a few hours. They sat together the entire morning without reaching an understanding about Kirchheimer's criticisms of Schmitt's book and its political conclusions. Unlike his response to Voegelin, Schmitt's reaction this time was negative and furious. His diary entry about the conversation with Kirchheimer read: "there's no point in talking with him, he simply doesn't want to see a thing." Followed directly by: "Scheußlich, dieser Jude" ("Vile, this Jew").²⁰ It was the first time Schmitt had noted an antisemitic slur in his diary in reference to Kirchheimer. And it was the last time that Kirchheimer was mentioned at all in Schmitt's diary during the Weimar Republic.²¹

¹⁶ See Chapters 11, 15, and 16.

¹⁷ See Schneider (1957, 29–26) and Sontheimer (1962, 78–82).

¹⁸ *Glossarium* entry of 2 March 1948 (Schmitt 2015, 81).

¹⁹ *Glossarium* entry of 2 March 1948 (Schmitt 2015, 81).

²⁰ Carl Schmitt, diary entry, 6 November 1932 (Schmitt 2010, 231).

²¹ After this entry in October 1932, Schmitt did not mention Kirchheimer in his diaries through the end of 1934; these have been published. Attempts have been made since 2020 to decrypt parts of Schmitt's extensive handwritten texts from 1939–45, written in difficult-to-decipher Gabelsberger stenographic script, in the research project "Transkription und Hybridedition der Tagebücher Carl Schmitts aus der Zeit des Zweiten Weltkrieges" [Transcription and hybrid edition of Carl Schmitt's diaries during WW II] under the direction of Philip Manow and Florian Meinel, funded by the German Research Foundation (DFG). See <https://gitlab.com/arbeitsgruppe-carl-schmitt/tagebuecher>, accessed 2 March 2024. At the time of writing, it is impossible to say whether Schmitt mentioned Kirchheimer in his diaries from this period. He did mention Kirchheimer after his visit to Schmitt's home in November 1949 (see Chapter 15).

4. The intense final days of the republic

As regards his professional work, Kirchheimer continued to keep various irons in the fire during these politically turbulent weeks of late 1932. For one thing, he continued his untiring efforts to gain a foothold as a lawyer. He also had a small income from the fees for his essays in *Die Gesellschaft*. And he continued to pursue his unwavering academic ambitions. His goal was to gain a *habilitation* in constitutional law with Smend at Berlin University's Faculty of Law.²² He submitted an application to this end to the Notgemeinschaft der deutschen Wissenschaft (Emergency Foundation for German Science), the precursor of the German Research Foundation (DFG), in November 1932, aiming to obtain funding for "work on some broad questions of democracy," as he wrote when asking Smend for a reference.²³

At the same time, he turned to Schmitt for support as a reviewer, informing him that he was interested in researching the legal theory and legal sociology of the American authors Oliver Wendell Holmes, Felix Frankfurter, and Charles Beard.²⁴ Schmitt supported him despite the conflicts they had had just a few days earlier. Nevertheless, Kirchheimer's application was unsuccessful and he began to consider new ways to finance his academic work. Together with Franz L. Neumann, he had started to take private classes in English conversation to improve his prospects to work abroad.²⁵ He also kept providing Schmitt with bibliographical references from leftist US writings. He recommended, for example, the 1928 book *American Foreign Policies* by the leftist US political scientist James W. Garner and, on 16 November 1932, the new book *Government by Judiciary* by the American Marxist Louis Boudin.²⁶

During the Christmas holidays of 1932, Kirchheimer sat down at his typewriter to write a third piece on the debate about constitutional reform. It was published in the January 1933 issue of *Die Gesellschaft*.²⁷ After Schleicher had assumed the position of Chancellor on 3 December, Berlin was buzzing with rumors about an imminent reform of the Reich by means of a government coup. Kirchheimer's essay had the same title as one by Fraenkel the previous month in the same journal, *Verfassungsreform und Sozialdemokratie* [Constitutional reform and social democracy]. Kirchheimer rejected all proposals coming from social democratic circles, addressing Fraenkel's proposal in particular detail. This time, his criticism was considerably sharper, both in tone and in substance. He began to come to Fraenkel's defense against Peter Stein, the author who claimed in the

²² Memo, Academic Assistance Council (AAC) of 4 March 1934. The AAC file from London is to be found in: Emergency Committee in Aid of Displaced German/Foreign Scholars, Public Library, New York. I, A Grantees 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

²³ See letter from Otto Kirchheimer to Rudolf Smend dated 7 November 1932. Rudolf Smend Papers, Cod. Ms. R. Smend A 441.

²⁴ See letter from Otto Kirchheimer to Carl Schmitt dated 7 November 1932. Carl Schmitt Papers, RW 265–7595.

²⁵ See the account by Neumann's later partner Helge Pross in Erd (1985, 59).

²⁶ See letter and postcard from Otto Kirchheimer to Carl Schmitt dated 24 December 1931 and 16 November 1932. Carl Schmitt Papers, RW 265–7596 and RW 265–7597.

²⁷ See Kirchheimer (1933d). The following page numbers refer to this text.

December issue of the KPD publication *Roter Aufbau* to have detected “theoretical interconnections” between Fraenkel and the “fascist constitutional theorist Carl Schmitt.”²⁸ Kirchheimer called this a “deliberate distortion” (500), based on an easily recognizable communist debunking strategy.

Nevertheless, his analysis of Fraenkel’s bundle of proposals lacked the sympathetic tone he had used a few weeks earlier in his article “Die Verfassungsreform” [The constitutional reform].²⁹ Kirchheimer accused Fraenkel of not taking an appropriate approach to the question, of making a fetish of the value of a constitution, of adapting the constitutional norms to the constitutional reality, and of thus ultimately legalizing rule by the bureaucratic and military apparatus. Fraenkel, he claimed, did not go beyond “constitutional deduction” (499), which was legally tenable but “sociologically irrelevant in the decisive point” (500). He disregarded the fact that the theory of emergency or *Lückentheorie* (gap theory), which was an integral part of constitutional law at the time, “could sociologically speaking certainly represent a usurpation of power by a societal class that would otherwise remain insignificant” (500). Here, Kirchheimer emphasized that it was only possible to fully understand the 20 July coup against the Prussian government by not taking the one-sided view that its initiators sought to shake off the SPD but by appreciating that they also sought to secure the republic against the NSDAP taking over power.

In voicing his opposition to those positions arguing exclusively on the basis of constitutional law, Kirchheimer used a broader Marxist approach and vocabulary incorporating socioeconomic factors and methods. He first quoted from the polemic by Friedrich Engels and Karl Kautsky against “lawyers’ socialism” (see Engels and Kautsky 1887), at the time a classic in the eyes of Marxist jurists. Kirchheimer was of the opinion that only a “reordering of the distribution of economic power” (499) could potentially resolve the current tension between the Weimar Constitution and the social power relationships, not a change of the constitution. In this sense, Germany at the time was a case in which the ideological superstructure of the legal order was “hobbling ahead” (499) of the actual social relationships. Kirchheimer argued that when proposals for revising the constitution were discussed, it was essential to review what effects they would trigger in the specific society. In this regard, he was convinced that everything pointed to retaining the constitutional status quo. At the moment, any feasible reform, as well-intentioned as it may be, would be instrumentalized against the labor movement in light of the existing social power relationships. Kirchheimer thus provided quasi-materialistic reasons for a conservative stance toward the constitution. Accordingly, he considered it pointless to deal with the question of a future constitution under democratic socialism.

Chancellor Kurt von Schleicher’s fundamental plan to secure his chancellorship was based on the success of his efforts to achieve tolerance of his policies across a majority of the party factions in the Reichstag, in particular the Center Party and the SPD, and to split the NSDAP. Yet his attempt to reach an agreement with Gregor Strasser, the leader of the “leftist wing” of the Nazi party, failed. Schleicher then resorted to the previous year’s “September plan” that Schmitt, among others, had prepared for Papen. Again, the core of

28 *Unsere Zeit*, No. 24, December 1932, p. 1144.

29 See Kirchheimer (1932f). See Chapter 5, p. 139–141.

this project was to suspend new elections to the Reichstag indefinitely.³⁰ Schmitt himself, however, was no longer asked to participate in the preparatory discussions about this new attempt.³¹ His proposal in a letter to the Minister of the Interior that the President was to publicly declare that he would not recognize a future no-confidence vote of the Reichstag against the Chancellor did not produce a response.³² Hindenburg rejected the unconstitutional and more far-reaching proposal to suspend elections with reference to his oath to the constitution; he feared he would be indicted before the *Reichsgericht* in Leipzig for breach of the constitution.

Meanwhile ex-Chancellor Papen had sought and found an agreement with Hitler behind Schleicher's back. Schleicher resigned on 28 January 1933 after Hindenburg had again rejected his alternative proposal to establish a temporary dictatorship. Papen was able to convince Hindenburg to accept Hitler as the Chancellor of an NSDAP/DNVP coalition government. On 30 January 1933, Hindenburg appointed the new government and swore it in. On Hitler's demand, the Reichstag was dissolved again on 1 February. The elections on 5 March already suffered manifold forms of state repression as well as terrorist action by the NSDAP and its combat units. Even though the Weimar Constitution formally remained in force, the Enabling Act of 24 March 1933 ensured that the Nazi regime was safeguarded.

Prior to 1933, Schmitt was in fact not a Nazi. As part of the educated bourgeoisie, he initially felt a good deal of contempt for the party and its troops of thugs, and especially for Hitler himself. The authoritarian transformation of the Weimar Republic that Schmitt desired did not include an important role for Hitler. It should be noted, however, that Schmitt's rejection of social democracy and of a return to a functioning parliamentary legislative state, which he often expressed in venomous words, were far greater than his reservations about Hitler. This was also, and in particular, true of the final days of the Weimar Republic. When it seemed for a short time in January 1933 that Chancellor Schleicher might succeed in organizing a parliamentary majority for his policies including the Social Democratic Party, the Center Party, and the right-wing parties, Schmitt vented about this prospect in his diary without restraint: "Saw the disgusting swamp of parliamentarism and social despotism rise again. Braun and Kaas are triumphing."³³ Two days before Hitler was appointed Chancellor, Schmitt noted: "Fear of the political things to come. Disgust for the social democrats and for what will return, foul liberalism."³⁴ In his view, returning to democratic parliamentarism was an option to be thwarted under any circumstances.

The only remaining alternative was to involve Hitler and the NSDAP in a new authoritarian government of the Reich, however possible. Schmitt's published writings from before 1933 do not include any explicit comments about Hitler or his party. Ernst Rudolf

³⁰ See Huber (1984, 1227–1230), Berthold (1999, 25–31), and Seiberth (2001, 156–160).

³¹ See Huber (1988, 47–49) and Blasius (2001, 62–66).

³² See Berthold (1999, 38–40) and Pyta and Seiberth (1999, 607–608).

³³ Carl Schmitt, diary entry of 22 January 1933 (Schmitt 2010, 254). Ludwig Kaas was the leader of the Center Party; Social Democrat Otto Braun was Prime Minister of Prussia until the coup of 20 July 1932.

³⁴ Carl Schmitt, diary entry of 28 January 1933 (Schmitt 2010, 256).

Huber reported in his memoirs that he had heard only derogatory remarks from Schmitt about Hitler in the second half of 1932 (see Huber 1988, 60). Other published sources concur that Hitler's person did not appear decisive for Schmitt favoring Nazism. His diaries reveal increasingly friendly statements about the Nazi movement overall from 1931 on. He praised the bullying NSDAP walkout from the Reichstag in February 1931 as a "magnificent"³⁵ move. He considered his fellow legal expert Erwin Jacobi "a fine fellow" because he sympathized with the NSDAP.³⁶

In the run-up to the presidential elections, a plebiscite between Hindenburg, the incumbent, and his challengers, Schmitt recorded in his diary: "[I will] vote for Hitler in the first round of voting."³⁷ When the NSDAP did very well in the Landtag elections in April 1932, he felt downright euphoric for several hours.³⁸ On the evening of 30 January 1933, when the President of the Reich had appointed the new government under Hitler's leadership, Schmitt wrote in his diary: "Then to Café Kutschera, where I heard that Hitler had become Chancellor of the Reich and Papen Vice Chancellor." And he added: "Excited, glad, delighted."³⁹ The following day, he wrote: "Angry about stupid, ridiculous Hitler."⁴⁰ In those days, there were numerous entries about enjoying good conversations with party members and SA men. Whatever one might think about these and other diary entries, they reveal two things. First, that Schmitt definitely rejected a return to parliamentarism as provided for in the Weimar Constitution. And, second, that he considered overcoming Weimar parliamentarism to be so important that entering into an alliance with the Nazis to this end was acceptable, although he certainly did not favor the option of appointing Adolf Hitler Chancellor.

It is not without irony that Kirchheimer was attacked as a fascist collaborator by the communists at this very time when the SS and SA (see Glossary) had started to terrorize the political opposition. In response to his defense of Fraenkel against the accusations in *Roter Aufbau*, an attack against Kirchheimer appeared in the communist newspaper *Unsere Zeit* [Our era] in mid-February 1933. Under the headline "Mister Carl Schmitt's Key Witness," an anonymous author accused him of left social democratic "uniformity in the political direction"⁴¹ along with Schmitt. The author finished their article with the rhetorical question whether Kirchheimer had plagiarized Schmitt or whether Schmitt had plagiarized the fascist coup plans from Kirchheimer. The author used the references to Schmitt in Kirchheimer's writings as evidence of the communist narrative that the SPD was to blame for the establishment of the authoritarian state in Germany.

35 Carl Schmitt, diary entry of 9 February 1931 (Schmitt 2010, 88).

36 Carl Schmitt, diary entry of 10 March 1931 (Schmitt 2010, 97).

37 Carl Schmitt, diary entry of 27 February 1932 (Schmitt 2010, 181).

38 Carl Schmitt, diary entry of 25 April 1932 (Schmitt 2010, 189). The NSDAP emerged as the strongest party in the elections to the Landtag in four German *Länder*—including Prussia.

39 Carl Schmitt, diary entry of 30 January 1933 (Schmitt 2010, 257). The transcript of the excerpt of his diary for this day, which Schmitt prepared himself and which his first biographer Paul Noack referred to (Noack 1993, 160), had been deliberately falsified by Schmitt in that he had left out the last three words quoted here.

40 Carl Schmitt, diary entry of 31 January 1933 (Schmitt 2010, 257).

41 *Unsere Zeit* (15 February 1933, 244).

The last article Kirchheimer was able to publish while he was still in Germany, before emigrating to Paris, appeared in mid-March 1933, a week before the Enabling Act entered into force. It was the essay “Marxismus, Diktatur und Organisationsform des Proletariats” [Marxism, dictatorship, and the proletariat’s form of organization] in the March issue of *Die Gesellschaft*.⁴² Some of the wording in the first sentence and the footnotes indicate that Kirchheimer had completed the article a few days before Hitler’s cabinet had taken office. This means he could not have known at the time that Hitler would take over the government or what position Schmitt would publicly adopt with respect to this decisive political event.

Once more, he devoted his attention to an important element of Schmitt’s work, the theory of dictatorship. In his book *Dictatorship*, Schmitt had examined Marx’s concept of dictatorship of the proletariat (Schmitt 1921, xxxix–xlv). Kirchheimer had quoted this book multiple times. In this latest article, however, he conducted a debate entirely internal to Marxism and did not mention Schmitt’s name or his book at all, not even where it would have been appropriate with regard to the differentiation between commissarial and sovereign dictatorship. The article addressed readers from the leftist spectrum who were seeking political orientation between reformist social democracy and the communists in the fight against fascism. Kirchheimer’s text was mostly exegetical and embedded his arguments in socialist and communist interpretations of classical texts. He first explained the Marxist concept of dictatorship found in the work of Rosa Luxemburg and Paul Levi: dictatorship as the circumstance of actual social rule of one class or group over the others, irrespective of the legal forms within which it evolved. He then discussed the understanding of democracy in the Marxist tradition including Arkadij Gurland’s book on proletarian dictatorship. Kirchheimer stated that there were no indications at all in the works of Marx and Engels that democracy as a form of government necessarily had to be the antecedent of the proletarian dictatorship. Of course, the greatest chances of peaceful transformation of the bourgeois state to a proletarian one were to be found wherever there was a democracy that the proletariat had been involved in fighting for.

This, however, was no longer an option due to the emergence of “phenomena commonly summarized under the term fascism” (517). The fascists were recruited mostly from the “lumpenproletariat” (518) which Marx had identified as the social group supporting Bonapartism eighty years previously. Under the current political conditions in Germany, an “independent armed private political army which considered [itself] not primarily a party, but an armed combat troop” (518) had been added to the social groups of capital, the military, the Junkers, and the bureaucracy, with the goal of gaining political power. This type of rule would no longer permit the labor movement any political freedoms at all so as not to lose ground: “Fascism has no choice here. Following the law under which it came to power, it must keep these forces down using the harshest bureaucratic coercive apparatus” (519). Kirchheimer argued for a precise sociological understanding of the concept of fascism, referring approvingly to a distinction made by Franz Borkenau—a communist member of the early Frankfurt School—between “true fascism” (519) as the forcible transition of backward countries to industrial capitalism on the one hand and Nazism as the form of government in a country with fully developed

42 Kirchheimer (1933b). The following page numbers refer to this text.

capitalism on the other hand (see Borkenau 1932). The latter form of fascism blocked the democratic path to socialism for the labor movement in Kirchheimer's view.

In this last publication of Kirchheimer's during the Weimar period, he doubted whether the form of government preceding the rule of the proletariat must necessarily be bourgeois democracy. There were two reasons for him to shatter the expectation that history followed a certain stage model. First, there was the seriousness of the challenge of fascism, which was victorious in various European countries. Second, there were the voluntaristic elements of Kirchheimer's political theory, which he shared with Schmitt. In the current historical situation, maintaining bourgeois democracy's emancipatory potential was becoming a combat mission of the working class. However, the fascist offensive of the bourgeoisie demanded a redefinition of the means of struggle. The defense of constitutional legality was not to be limited to blind trust in the automatic mechanisms of the legal system. Kirchheimer considered this to be the dawning of a constellation similar to that mentioned in the Austrian Social Democratic Party's Linz party platform of 1926 in which "the working class can seize government power only through a civil war forced upon it" (520).

Despite the bellicose language in his article, there was no indication that he was particularly optimistic about the prospect of winning or even starting a civil war in order to defend democracy. His long exegetical analysis of Lenin's concept of the party and his "primitive" (521) understanding of democracy were pointedly critical; its authoritarian orientation was comprehensible against the background of repressive Russian absolutism but in the further course of the Russian Revolution, its hostility to democracy and freedom had had dire consequences. In contrast, he recalled Rosa Luxemburg's criticism of Lenin and the democratic potential of her belief in the spontaneity of the masses but also faulted her for underappreciating that hierarchies took on a life of their own, which was always necessary to a certain degree. Kirchheimer called on his readership to find a reasonable "middle ground" (526) between these two traditions for the ongoing and upcoming political struggles. The vague wording at the end of the article mirrored the extent to which most German leftist intellectuals had lacked orientation when political power was handed over to Hitler's coalition government.

5. Conclusion: Two politically active legal theorists taken by surprise

Nothing in Kirchheimer's writings indicates that he could have expected Schmitt to enthusiastically join the Nazis in 1933. More than fifty-five years later, Henry W. Ehrmann reported in a conversation that Kirchheimer was "perplexed" about this but had also commented laconically that Schmitt had "always been good for a surprise."⁴³ In other words, in late 1932, he could not yet accuse him of collaborating with the Nazis. What he did accuse him of, however, was that the Weimar Republic had been transformed with Schmitt's support into an authoritarian regime long-term. And this was the kind of transformation that Kirchheimer had wanted to prevent. But his attempts to rescue the parliamentary democracy of the Weimar Republic seemed nothing less than desperate.

43 Henry W. Ehrmann in a conversation with the author on 7 June 1988.

Kirchheimer propagated a dual strategy relying on the defensive on the legal level and the offensive on the social policy level. Hermann Heller pursued a similar dual strategy and was even more direct than Kirchheimer about Schmitt by unceremoniously calling him a fascist in February 1933, even before he had joined the Nazis: "For all intents and purposes, he [Carl Schmitt] acknowledges just a single 'authoritarian state,' namely the fascist dictatorship following the pattern of Mussolini." (Heller 1933a, 647)⁴⁴

It is hardly surprising that in the volatile political situation at the end of 1932, neither Kirchheimer nor Schmitt were successful in convincing the other of their own political positions. Their convictions were anchored too deeply for that to be possible. In particular, their normative theories of democracy showed the high level of their substantial differences at the end of the Weimar Republic. Schmitt repeated the sharp conceptual difference between democracy and *Rechtsstaat* that he had asserted from 1923 on and then took sides for a dictatorship on behalf of democracy. Kirchheimer's understanding of democracy and *Rechtsstaat* had a different conceptual structure. Against Schmitt's deriving of democracy from the postulate of equality, Kirchheimer thought that the norms of equality and freedom were mutually dependent. With this understanding of democracy, he was a forerunner of Jürgen Habermas's theory of the constitutional state in *Between Facts and Norms* with the normative "co-originality" (Habermas 1996, 122) of democracy and the rule of law.

There was no longer any prospect of rapprochement between Kirchheimer and Schmitt on the seemingly more abstract level of methodological questions, either. Kirchheimer failed in his attempt to persuade Schmitt of his methodological criticism. Yet Kirchheimer still agreed to Schmitt's overarching idea of reconstructing the ways in which political concepts were transformed and used by theorists and actors, and how they helped to mobilize actors and construct their goals. Concepts were created in specific historical situations and by specific actors with shifting and antagonistic motives and aims. Kirchheimer's analyses of different stages of parliamentarism and *Rechtsstaat* and of different types of dictatorship in his Weimar writings indicate that he too kept an eye on the ways in which the original meaning of a concept changed over time as a result of historical events. However, he attempted to connect such re-semanticizations of political concepts with particular social settings and struggles between groups in society with different socioeconomic interests. Here, he followed the Marxist tradition of historical materialism. In contrast, Schmitt appeared to be an idealist in the sense that he emphasized the active role and power of intellectuals to redefine terms and to create re-semanticizations.

Schmitt's antisemitic sentiments against Kirchheimer were no longer distinguishable from his substantial differences with his former student. Of course, Kirchheimer did not know about Schmitt's antisemitic notes in his private diary. Nevertheless, these notes raise the question to what extent he was aware of Schmitt's antisemitism prior to 1933.⁴⁵ This question is difficult to answer because there is no original source material of

44 On Heller's astute critique of Schmitt's authoritarianism see Malkopoulou (2023) and Buchstein and Jörke (2023).

45 See Chapter 10 for more details on Schmitt's antisemitism.

Kirchheimer's about it from that period. He had often experienced Schmitt in the classroom, at lectures, and in private conversations. Schmitt was well-known for his outspoken language in personal conversations.

There is, however, an indirect indication of how Kirchheimer may have experienced Schmitt in situations with direct oral communication. Eugene Anschel, who participated with Kirchheimer in some of Schmitt's classes in Bonn in 1927, said it was obvious that Schmitt was an antisemite. He reported that Schmitt had linked the allegedly specific mentality of English and American merchants and shopkeepers with a denigrating characterization of Jews in his lectures on international law (see Anschel 1990, 85). Another piece of evidence supports the likelihood that Kirchheimer had a similar perception of Schmitt during the Weimar Republic. In 1962, during a doctoral defense at Columbia University, an argument erupted between Kirchheimer and the doctoral candidate George D. Schwab about Schmitt's stance toward Jews before 1933.⁴⁶ Schwab, who is also Jewish, told the dissertation committee that he was fully convinced that Schmitt's attitude toward Jews was not based on Nazi notions of *Rasse* (see Glossary) but derived from Catholic and Protestant teachings. Schwab reported in his memoirs that Kirchheimer had insisted during the debate in the defense that Schmitt "was already an anti-Semite during the Weimar period" (see Schwab 2021, 175).

It was in keeping with the logic of the development beginning with the coup against Prussia that preventing a supposedly looming civil war—as Schmitt conjured up dramatically in 1932—would be the first step toward conducting a permanent civil war against the purported enemies of the Reich. The leaders of neither the SPD nor the KPD had a clear vision of the fact that the actions of Hitler's new government had been a turning point, in March 1933 at the latest. Most leftists thought they had been driven back only temporarily by a fascist government. They were under the illusion that they had not suffered a permanent loss because the labor movement's actual struggle had not yet taken place.

Kirchheimer did not analyze Nazism as a militant and growing mass movement even once prior to 1933, incidentally in contrast to his fellow Berlin lawyer Fraenkel (see Fraenkel 1930). In the only, and brief, passage about Hitler—in a 1932 review of a book by Italian fascist leader Curzio Malaparte—Kirchheimer depicted him as "un dictateur manqué" (a would-be dictator) (Kirchheimer 1932i, 372) and otherwise praised the strength of the German proletariat as an opponent of Nazism with words full of enthusiasm. What a grotesque error of judgment. This blind spot in Kirchheimer's political analyses is astounding inasmuch as he had emphasized time and again in his Weimar writings how important determined political action was. He shared this political voluntarism with Schmitt. Kirchheimer of all people, who in his dissertation in 1928 had accused the Social Democrats of succumbing to the illusion of believing in twofold progress, now himself had illusions about how prepared the working class was for battle. Just as he had overestimated the defensive capacity of the workers' movement, he underestimated the determination and ruthlessness of Hitler and his ilk—determination and ruthlessness that conversely profoundly impressed Schmitt.

46 On this subject, see Chapter 17, p. 454–456.

Kirchheimer's underestimation of the Nazis was also due to reasons immanent to his theories. He thought the main danger to the parliamentary republic stemmed from a bureaucracy that had taken on a life of its own with a presidential dictatorship—in other words, precisely what Schmitt had declared to be his political ideal prior to 1933. So, ironically, it was presumably partly because Kirchheimer knew Schmitt very well that he lost sight of the danger of a successful Nazi mass movement. Similar to his friend Gurland (see Gurland 1931, 120–124) and many other Marxists of the day, he interpreted Italian fascism as a phenomenon that could prevail only in industrially backward societies. What had distinguished some of Kirchheimer's analytical acuity in the years 1930 to 1932—his view, inspired by Marxism, of the social functions of the state and politics—no longer helped him. He, too, was one of the leftists who after the end of the Brüning era apparently perceived only minor differences between Papen and Schleicher on the one hand and Hitler on the other. Kirchheimer underestimated the residual protective function of bureaucratic state institutions. It was only after he was forced to emigrate that he and many other socialists fully realized the rupture of civilization caused by the Nazi regime.