Chapter 3:
Democracy in Disagreement (1928–1931)

In 1928, independently of one another, Kirchheimer and Schmitt moved from the small provincial town of Bonn to Berlin, the capital of the Reich at the time. They were both familiar with Berlin from their student days. Schmitt had studied law there from 1907 to 1909 and then Kirchheimer had done the same almost two decades later. Whereas Schmitt had to establish new social circles for himself in Berlin in 1928, Kirchheimer had political friends there as well as the Rosenfelds, his partner's family. When the two arrived in Berlin, Weimar democracy seemed more stable at last. The SPD was the strongest party by far after the May 1928 Reichstag elections and formed a Grand Coalition led by Chancellor Hermann Müller with the Catholic Center Party and the two liberal parties, the left-liberal DDP and the right-liberal Deutsche Volkspartei (DVP) or German People's Party. The coalition had a comfortable majority in the Reichstag and, initially, it was able to find compromises for various major reform projects. Adolf Hitler's NSDAP had remained marginal with support from only 2.5% of the electorate and, at this stage, the communists had lost votes, too. Yet stability was soon to prove elusive.

1. The changing political *Lage*

Only a year later, the political lull of 1928 was a thing of the past. The Grand Coalition went into a tailspin in the second half of 1929. Because they had had to take their parties' wishes into consideration, members of the government had not had much leeway for political compromises from the outset. Now the bourgeois parties, including the Center Party, were moving ever further to the right, making compromises with the SPD even more difficult. In the winter of 1929/30, the economic and financial crisis in Germany rapidly came to a head as a direct consequence of the global economic crisis following the New York stock market crash in October 1929. The previous bourgeois governments had used up all the Reich's financial reserves in 1926/27, leaving behind a barely concealed budget deficit and thus making a fundamental overhaul of the Reich's finances necessary. Nonetheless, the bourgeois parties categorically opposed any tax increases. The economic crisis exac-

erbated these conflicts, and Social Democratic Finance Minister Hilferding was forced to resign on 20 December 1929 after a new fiscal plan had failed. On the social democratic side, Hilferding was considered a guarantor of a socially just reform policy; Kirchheimer knew him, but not well, through a discussion group around the social democratic theory journal *Die Gesellschaft*. Hilferding's successor was a politician from the right-liberal DVP. The conflicts between the parties in the Grand Coalition reached a crisis in 1930. The key sticking point was financing unemployment insurance, which had only been introduced a few years previously. Influenced by industrial and agricultural interest groups, the DVP refused to allow higher financial burdens on businesses. The SPD called for increasing unemployment insurance contributions in order to raise the necessary funds. Leading politicians of the DVP and the Center Party, which was moving to the right, were already aware that President Paul von Hindenburg and his advisors intended to remove the SPD from the government as soon as the law on the Young Plan, planned to regulate the Reich's debts following the Versailles Peace Treaty was adopted by the Reichstag on 12 March 1930. Then the SPD no longer had any opportunities to find further compromises for funding unemployment insurance. The Grand Coalition collapsed on 27 March 1930.

In this new political *Lage*, the differences between Kirchheimer and Schmitt now became more pronounced. To understand what questions and issues sparked their theoretical conflicts from then on, we need to look at the political events that followed. President of the Reich Hindenburg appointed Heinrich Brüning, a politician from the right wing of the Center Party, as the new Chancellor in early April 1930. Brüning was installed to govern against the Social Democrats and thus without the parliament, if necessary, using emergency decrees as provided for in Article 48 of the Weimar Constitution. This is precisely what he did and he pursued an all-out policy of austerity. When the Reichstag refused to agree to Brüning's budget, as expected, the President of the Reich implemented it nonetheless by means of an emergency decree. According to Article 48, the parliament had the right to overturn emergency decrees with a simple majority. The Reichstag did so, with a considerable majority. In return, the President of the Reich made use of his competence to dissolve the Reichstag, with the support of a legal opinion by Schmitt (see Schmitt 1930d). The President and his advisors thus sabotaged the opportunity to enable the parliament to form a new government, which would continue to be able to act and assemble democratic majorities, in favor of establishing a presidential dictatorship.

On 12 September 1930, during the worsening economic and social crises, the SPD suffered slight losses in the new elections but it still gained the most votes by far. Votes for the NSDAP skyrocketed from 2.6% to 18.3%. The other right-wing political parties that had supported Brüning's policies had to accept losses, some of them massive. Brüning could still have approached the SPD to form a joint government. Hindenburg's informal circle of advisors refused to make any concessions to the Social Democrats and supported Brüning continuing to govern on the basis of Article 48. Although this decision spared the SPD a presumably agonizing internal discussion, it did put the party in a precarious position. The Social Democrats wanted to keep the NSDAP out of political power by all means available. At the same time, they depended on a certain amount of cooperation by Brüning's Center Party in order to keep the SPD-led government of "Red Prussia" in power unimperiled. In light of this constellation, the SPD party leadership agreed with Brüning in several confidential talks in late September 1930 to tolerate his government. In

other words, the SPD would not support a no-confidence vote in the Reichstag against the government. In return, the SPD expected Brüning to make certain informal allowances for its political goals. Brüning now governed solely by emergency decree on the basis of Article 48. His government managed to hold on to power for over two years, up until 30 May 1932.

Not surprisingly, the policy of toleration was controversial within the SPD. There was resistance against the party leadership's strategy particularly among the younger members and in the leftist wing. Kirchheimer joined these critics, expressing his opinions in multiple speeches and articles in newspapers and journals. At the opposite end of the political spectrum, Carl Schmitt provided legal support and backup to the cabinet with legal opinions, a number of publications, as well as personal conversations and meetings. Kirchheimer and Schmitt were often in touch and exchanged views during this politically turbulent time. Their differences, which they had only discussed in person up until this point, deepened and now saw the light of day in published articles.

2. Two jurists move to Berlin

Carl Schmitt had accepted his appointment to the vacant general professorship for law at the Berliner Handelshochschule as of the summer semester 1928. This chair had first been held by Hugo Preuß and thus, somewhat ironically, Schmitt became the successor of the father of the Weimar Constitution. The Handelshochschule did not enjoy the same status and reputation as a university because it trained businesspeople and vocational school instructors, not jurists. Schmitt was willing to accept this loss of reputation because he hoped that moving to Berlin would enable him to gain access to the political power centers of the Reich. He was now a direct local competitor of the leading jurists Rudolf Smend, Heinrich Triepel, and Erich Kaufmann at the University of Berlin. With his advanced seminar, which had already been successful in Bonn and which he opened to external participants at the Handelshochschule, he offered an alternative forum to the University of Berlin for discussions on public law and legal theory. Kirchheimer was one of these external participants from the beginning, and while he was serving as a *Referendar* (legal trainee) in Erfurt, he traveled to Berlin multiple times specifically to attend.[1]

Carl Schmitt and his wife moved into an apartment in the Tiergarten district, northwest of the center. After completing *Constitutional Theory*, which immediately became a standard work in academia, he plunged into the world of politics, going beyond academic legal studies. He was not interested in reaching the cultural critical, literary, and Catholic circles as in previous years, but rather the readers of the daily newspapers. He made it clear right in his first publications after moving to Berlin that he was now willing to play a directly political role.

Now interested in economic policy, he gave public lectures and wrote essays on various issues of the day, including, among others, property law, emergency law, and the remuneration of civil servants. He sent reprints of his publications to a large circle of

1 Henry W. Ehrmann in a conversation with the author on 7 June 1988. Ehrmann participated in Schmitt's seminar in Berlin between 1930 and 1932, see Schmitt (2010, 61 and 197).

recipients, targeting potential contacts close to the President of the Reich (see Mehring 2014a, 228–229). He came into contact with Johannes Popitz, who held a top position in the ministry of finance, through his work at the Handelshochschule. Popitz helped him gain access to the political stage (and it was also Popitz who encouraged Schmitt to work for the Nazi regime after Hitler had taken power).[2]

Schmitt attended social events and lectures at the city's leading conservative clubs such as the Herrenhaus and the Deutsche Gesellschaft, and he became acquainted with some of the Reich's conservative elite there. Yet it took him longer than he had hoped to meet highly influential individuals at the center of political decision-making. In contrast, his university teaching in Berlin was highly successful, as it had been in Bonn. His lectures at the Handelshochschule were very popular, drawing a mixed audience of business and vocational teaching students and numerous external guests. As Hans Mayer, later a literary scholar, recalled, "Schmitt was brilliant at putting ideas into words." (Mayer 1988, 148)

Conversely, Kirchheimer's career in Berlin developed more slowly and arduously. After successfully completing his law degree in Bonn with the First State Examination and then his doctorate, Kirchheimer was initially determined to seek a career in politics for the Social Democratic Party (see Herz 1989, 13). Yet he was much more attracted to the world of academia. In light of the difficult career prospects on the academic labor market, he decided to complete the Second State Examination in Law, which would fully qualify him as lawyer, in order to give him more opportunities in the future. He applied for the *Referendariat* (a mandatory post-graduate legal training period) and was appointed *Referendar* on 29 March 1928.[3] This made him a Prussian civil servant with a temporary appointment for the following three years, with a secure, albeit low, income. Hilde Rosenfeld had also successfully completed her law degree in Bonn and had applied for the *Referendariat*. The two married in Berlin on 31 March 1928.[4] Kirchheimer's father-in-law, Social Democratic member of the Reichstag Kurt Rosenfeld, lived in Berlin's affluent Grunewald district in the family's house. Rosenfeld helped his daughter and her husband begin the *Referendariat* by putting them in contact with the relevant agencies in his constituency in Erfurt (which at the time belonged to the province of Saxony, and now to Thuringia).

Berlin remained the city to which Kirchheimer retained the strongest ties, and he sought to keep his contacts to academia there alive. He began his *Referendariat* in Erfurt in April 1928, working first in the *Staatsanwaltschaft* (public prosecutor's office), followed by stints at the *Arbeitsgericht* and finally the *Landgericht* (see List of German Courts).[5] He moved back to Berlin in September 1929 and worked in the *Arbeitsgericht* in the district of

2 See Pyta and Seiberth (1999, 430–432). On Popitz's leading role in the transformation of the Reich Ministry of Finance into a loyal pillar of the Nazi regime, see Middendorf (2022).

3 This information is to be found in a letter from the President of the *Oberlandesgericht* to the Prussian Minister of Justice, 14 October 1929. Bundesarchiv Berlin, R 3001/6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 5.

4 A copy of the marriage certificate can be found in Kirchheimer-Grossman (2010, 60).

5 The individual periods of Kirchheimer's *Referendariat* are documented in the files of the Bundesarchiv (Bundesarchiv Berlin, R 3001/63222, Ministry of Justice file concerning Dr. Otto Kirchheimer, pp. 5, 10). I would like to thank Simone Ladwig-Winters for making me aware of these records.

Spandau for six months. Then he began working in a labor court in Berlin headed by his friend Otto Kahn-Freund. Through Kahn-Freund, he made two other legal contacts from the generation of Young Socialists, Franz L. Neumann and Ernst Fraenkel, who were five and seven years his senior, respectively. They and Kahn-Freund had studied with the social democratic labor law expert Hugo Sinzheimer in Frankfurt. Kirchheimer soon made friends with Neumann, whereas his personal relationship with Fraenkel was not as close. Kirchheimer's legal training during the *Referendariat* also included periods of working with criminal defense lawyers from the leftist socialist political milieu, including in the law firm of Wilhelm Liebknecht, a son of the eponymous founder of the SPD and confidant of Marx's in London and younger brother of Karl Liebknecht, the KPD co-founder who had been murdered. Kirchheimer's final training period was at Berlin's *Kammergericht*. On 2 June 1931, he passed the *Große Juristische Staatsprüfung* (bar exam) and received the title *Volljurist*.[6]

After Kirchheimer had returned from Erfurt to stay in Berlin full time, he immediately began to re-establish his connections to academia. He stayed in touch with Schmitt and Smend in particular, who both received him positively. Smend invited Kirchheimer to his seminar at the University of Berlin as a speaker and assigned his essay on the socialist and Bolshevik theory of the state alongside texts by Schmitt and Leon Trotsky (see Schmitt and Smend 2011, 80). Kirchheimer also continued to see Schmitt on a regular basis and audited his permanent seminar *Contemporary theories of the state* at the *Handelshochschule*. It was Kirchheimer who brought two more auditors to the seminar, Neumann and Fraenkel, piquing Schmitt's interest in their work, too.[7]

Another law professor Kirchheimer became closer to in Berlin was Hermann Heller. The non-Marxist Social Democrat Heller represented a third approach of critical positivism in Weimar legal theory, alongside Schmitt and Smend. Heller had been teaching at the University of Berlin from 1928 on. He propounded a sociological approach in his theory of the state and so was a precursor of political science, which was not established in Germany until after 1945.[8] Both politically and methodologically speaking, Kirchheimer was much closer to him than to Schmitt and Smend, but after Heller accepted a chair in Frankfurt am Main in 1931, they met less frequently.[9]

Kirchheimer's and Schmitt's family constellations developed in parallel over these years. Hanna, the daughter of Hilde and Otto Kirchheimer, was born on 16 December 1930. Schmitt and his wife had a daughter eight months later; Anima was born on 31 August 1931 (see Tielke 2020, 18). Kirchheimer's marriage, but not Schmitt's, broke down after a short time. Hilde Kirchheimer-Rosenfeld turned away from the SPD and directed her attention to the KPD, and their increasingly frequent political disputes contributed considerably to their separation in 1931. They did not file for divorce so as to be able to retain joint custody of Hanna, and Hilde and her daughter moved in with her parents (see Kirchheimer-Grossman 2010, 60). Hilde joined her father's law firm as a lawyer in 1932.

6 Bundesarchiv Berlin, R 3001/6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 14.

7 Henry W. Ehrmann in a conversation with the author on 7 June 1988. On the exchanges between Fraenkel, Neumann, and Schmitt, see Breuer (2012, 111–142).

8 On Heller's approach, see Henkel (2011).

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

She worked for the Rote Hilfe, defending the leader of the Central Europe section of the Comintern Georgi Dimitroff and KPD party leader Ernst Thälmann, among others (see Ladwig-Winters 2007, 195–196), and rapidly gained a reputation as a brilliant criminal defense lawyer.

3. Trouble with political justice

Schmitt had devoted a section of *Constitutional Theory* to political justice (see Schmitt 1928b, 176–180). Kirchheimer experienced the issue first-hand a year after completing his doctorate. Even during his *Referendariat* in Erfurt in 1928, he had occasionally written commentaries on legal policy for the local socialist daily press, and he continued to do so in Berlin. His article "50 Jahre Deutsches Reichsgericht" [50 years of the *Deutsche Reichsgericht*] was published in two regional social democratic newspapers in Thuringia on 1 October 1929.[10] Kirchheimer castigated the highest German court in this piece on the occasion of its anniversary; his criticism was as brief as it was vehement.

Kirchheimer wrote that the decisions of the *Reichsgericht* (see List of German Courts) provided "a faithful reflection of the views and notions of Germany's ruling classes" (187). The *Reichsgericht* had never attempted to break away from this worldview or considered its responsibility for social justice. Kirchheimer thought that the positioning of the *Reichsgericht* in Leipzig with respect to the question of the judicial review of laws was particularly hypocritical. During the imperial period, the court had steadfastly refused to review the constitutionality of laws with negative social impacts on the lower classes. In its criminal jurisprudence, it had also actively helped suppress the right of the labor movement to form coalitions and had permitted the unconstitutional Anti-Socialist Laws to stand. Conversely, under the Weimar Constitution, it was now torpedoing social legislative projects, suddenly claiming the right to judicial review of laws, thereby elevating its own status to a "highly dubious guardian of the constitution" (187).[11]

Kirchheimer strongly criticized the decisions of the *Reichsgericht*. As high treason offenses fell within its jurisdiction, it sentenced a large number of socialist activists in the workers' and soldiers' councils to heavy fines and long jail terms. Later, it had meted out disproportionately severe sentences to supporters of the KPD, whereas it had been nothing less than obsequious to supporters of right-wing terrorist groups from the Black Reichswehr and the Organisation Consul.[12] "The enemy of the state from the right," Kirchheimer wrote, "is seen […] as a decent person by the *Reichsgericht*; after all, he is not an

10 See Kirchheimer (1929a). The following page numbers refer to this text.

11 At an event hosted by the Vereinigung Sozialdemokratischer Juristen (Association of Social Democratic Jurists) in Berlin, Kirchheimer explained the claim to the right to judicial review with the "bourgeoisie's calls for security" (*Vorwärts* of 18 October 1929, Berlin edition, p. 14). I would like to thank Detlef Lehnert for making me aware of this source.

12 Black Reichswehr was the name of the illegal paramilitary units supported by the German Reichswehr in violation of the Versailles Peace Treaty. They included the antisemitic and right-wing extremist secret unit Organisation Consul that attacked and murdered former Reich Finance Minister Matthias Erzberger (1921) and Reich Foreign Minister Walther Rathenau (1922), among others. See Sabrow (1998).

enemy of the bourgeois order" (190). Kirchheimer's criticism of this kind of jurisprudence lacked nothing in terms of critical acuity:

> The technique applied in political trials at the *Reichsgericht* is tantamount to that of Soviet Russia in this matter. Punishment on the basis of active Communist Party membership, medieval-style punishment for printers of newspaper articles, punishment for reciting revolutionary poems are all in the same spirit as the work so successfully supporting the camouflaging of the Black Reichswehr (190).

At the same time, the *Reichsgericht* had succeeded "with an amount of courage and determination admirable from the bourgeois perspective" (189) in summarily declaring unconstitutional the new laws of the *Länder* that sought to put limits on private property in accordance with Article 153 of the Weimar Constitution. In its decisions, the court had protected private property from any and all interventions through lawmaking far more than it had during the German Empire. Kirchheimer summed up the past ten years of *Reichsgericht* decisions laconically: "The 'guardian of the constitution' guards the constitution as it sees fit" (190). To remedy the situation, he called on the social democratic politicians in the *Länder* of the Reich to replace the personnel at the *Reichsgericht* with new judges loyal to the constitution and the republic.

It would not have taken much for this article to put an end to Otto Kirchheimer's career as a jurist. It was only thanks to the social democratic influence in the Prussian Ministry of Justice that he was permitted to continue his *Referendariat*. Two weeks after publication of his piece, the President of the Prussian *Oberlandesgericht* in Naumburg wrote an outraged letter to the Prussian Minister of Justice in which he demanded disciplinary measures against Kirchheimer.[13] He claimed that Kirchheimer's "most highly outlandish, superficial, and one-sided criticism of the highest court" was "in conflict with his duties as a civil servant" and might "undermine the authority [of the court] in his profession." In light of the momentousness of this violation of the political restraint required of a *Referendar*, it was essential to "take measures against the author."

On 22 October 1929, the President of the Prussian *Kammergericht* was asked to prepare a legal opinion, and he presented his four-page analysis of the newspaper article just two days later.[14] Its intention is clear: to protect Kirchheimer. For example, although its author also identified a number of objectionable phrasings and took exception in particular to comparing the jurisprudence of the *Reichsgericht* in political trials with that of Soviet courts, stating that this and other parts of the article proved a "regrettable lack of restraint and factualness," he advised against further disciplinary measures against Otto Kirchheimer. For one thing, he had only been a civil servant for a short time, for which reason he had not yet had the opportunity to adjust to the spirit of the civil service. For

13 The following quotations are taken from the letter from the President of the *Oberlandesgericht* to the Prussian Minister of Justice dated 14 October 1929. Bundesarchiv Berlin, R 3001/6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 3.

14 The following quotations are taken from the legal opinion by the President of the *Kammergericht* to the Prussian Minister of Justice dated 24 October 1929. Bundesarchiv Berlin, R 3001/6322 Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 5.

another, the article had appeared in an insignificant press publication. The strongest argument against disciplinary measures, however, was that they would provide grounds to fear that Kirchheimer would then "attempt to go into his deliberations factually and prove the truth of his assertions, thereby becoming overly absorbed in those views, and might put on airs of a political martyr."

Kirchheimer was not quite out of the woods, though. He was summoned to his supervising judge at the labor court to explain himself on 2 December. In this situation, Kirchheimer decided to distance himself from the polemical wording in his commentary. According to the files, his supervisor urgently recommended that he exercise his "general civic rights" with "greater restraint" in the future.[15] No further disciplinary measures were ordered, and Kirchheimer was permitted to continue his *Referendariat* after this affair. He disregarded the well-meaning advice to exercise political restraint as a civil servant with a temporary appointment and immediately published opinion pieces on legal policy again under his own name. At the same time, as of 1930, he sought out public confrontations with Schmitt concerning his prominent role as a legal advisor and supporter of the presidential dictatorship.

4. Structural changes of parliamentarism

Carl Schmitt's relatively short book *The Crisis of Parliamentary Democracy* is probably the most famous (and most notorious) of his works to this day. Schmitt wrote it in 1923, the Weimar Republic's turbulent and crisis-ridden year. In January, Belgian and French troops occupied the Ruhr. The Rhineland threatened to secede from the Reich. The government of the Reich used military force to remove the socialist-communist governments in Saxony and Thuringia from power. Adolf Hitler's attempted coup in Munich failed. Hyperinflation rattled the country and its economy. The new Chancellor Gustav Stresemann proclaimed the need for a dictatorship and new emergency decrees in accordance with Article 48 of the constitution. Thereupon, the SPD left the multiparty coalition government in protest. The Reichstag was no longer able to form a government, and the country's military brass openly planned the transition to a presidential dictatorship. In 1923, Weimar parliamentarism was mired in its first major crisis. It was not until the end of the year that the republic began to stabilize.

Opposition to parliamentary democracy in the Weimar Republic came from three different political groups: the extreme nationalists such as Hitler's small party; the monarchical circles and political parties such as the right-wing DNVP; and the radical communist left, which preferred a Soviet-like dictatorship of the proletariat. Schmitt wrote his book on parliamentarism in the midst of these months of crisis and the debates about the point and pointlessness of parliamentarism. As a starting point, he used an essay by Smend from 1919, the year in which the constitution for the Weimar parliamentary democracy was drafted (see Schmitt 1923a, 34).

15 Letter from the Prussian Minister of Justice to the President of the *Kammergericht* dated 2 December 1929. Bundesarchiv Berlin, R 3001/6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 4.

Smend distinguished two phases of parliamentarism: an initial one in which the parliament had been the institution for finding political truth as independent dignitaries exchanged arguments and a second one, now underway, in which it had become a kind of instance for registering preconceived political tendencies represented by stable party blocks. Smend considered this transformation to be a loss. The "actual creative political dialectic" (see Smend 1919, 64) of the process of political integration had been sacrificed. He attested that the newly established parliamentarism had become a "facade […] behind which the decisive party discussions took place in secret." (see Smend 1919, 62) The establishment of stable party blocks had made the rationalistic justification of parliamentarism an ideology: "One can hardly say anymore of our parliamentarism that it is still government by talking." (Smend 1919, 62)

Smend believed the structural transformation was caused by the strengthening of the political parties, which had led to them becoming monopolists in a limited pool of potential of electoral candidates. At the end of this article, Smend did not consider Weimar parliamentarism to be dead, but instead focused on the opportunities for the new democratic state which might emerge from the transformation. He called for a "sociological turn" as the basis of a "new constitutional theory" to put the ongoing transformation into perspective (see Smend 1919, 67). This was a methodological demand that Kirchheimer, with his Marxist views, was immediately able to support.

In contrast, Schmitt decided on a different and politically far more radical conclusion based on a similar ideal-typical model of the historical development of parliamentarism.[16] He, too, spoke of a first historical phase of parliamentarism whose "essence [had been] public deliberation of argument and counterargument, public debate and public discussion" (34). This original parliamentarism functioned "without taking democracy into account" (35). Its social basis was a homogeneous social stratum, namely the bourgeoisie. However, as soon as parliamentarism was merged with democracy, this triggered a dual process of transformation. In place of strong individual personalities, it was candidates from democratic mass organizations who were running for office. And in place of a socially homogeneous class, the elected parliament now represented the heterogeneity of society. In Schmitt's opinion, parliament was thus transformed from a place of common exchange of arguments to a place where party-line proclamations were simply read aloud.

Unlike Smend, Schmitt drew two negative conclusions from his descriptive model. First, he inferred that parliamentarism has lost its original ideological essence, its ultimate core, its fundamental principle, and that purely pragmatic reasons were now the only way to justify it. Thus, parliamentarism was missing its intellectual foundation and its legitimacy as a major political institution. Although Schmitt's criticism assumed a discrepancy between the idea and the reality of the modern parliament that had become evident, he did not measure its reality using the idea as the yardstick—as others have often understood and, consequently, criticized his work. He was only concerned with the determination that the great principles of the great institution—public debate and independent political representation—were no longer credible at the time. For this reason, it was relatively unimportant to Schmitt whether or not the same discrepancy between idea

16 See Schmitt (1923a). The following page numbers refer to this text.

and reality had already existed in the nineteenth century. He was concerned solely with the fact that citizens had lost their belief in the reasons legitimizing the great institution (see Hofmann 1995, 96–101). His second negative conclusion was that a parliamentarism in which the social inequalities of a society collided was only able to function temporarily and would certainly have to end in civil war sooner or later. It was logical for Schmitt to call for overcoming parliamentary democracy not only in the agonizing phase of the Weimar Republic from 1930 on, but even during its stable phase in 1928: "A solution outside of these democratic-political methods must be sought." (Schmitt 1928d, 49)

It was in keeping with Schmitt's line of argument that the attempt to establish a parliamentary democracy based on the Weimar Constitution was necessarily doomed to failure from the outset. This failure was not—as Ellen Kennedy has argued—due to any specific "constitutional failure" of the Weimar Constitution (see Kennedy 2004, 154–182); instead, Schmitt thought that it was inherent to any constitution in which parliamentarism and democracy had been merged. To Schmitt, this conclusion was imperative from the moment when he had made a sharp distinction between liberalism and democracy in his small 1923 book at the latest. Liberalism as a "metaphysical system" (35) necessarily included the belief in reasonable discussion, parliamentarism, the balance of political powers, and the *Rechtsstaat*. Democracy was contrary to this, and—as he added in 1928—he sought to "rescue [it] from being concealed by liberal attributes" (see Schmitt 1928d, 47).

Schmitt defined democracy as the total "identity of governed and governing" (26). It was an identity that was never entirely real because the masses were never completely heterogeneous, but always "sociologically and psychologically heterogenous" (25). It was all the more imperative to produce "identifications" (27) through political action. The liberal constitutional state with its parliamentarism and its division of powers aimed to prevent the populace from melding at the emotional level with those governing them in the sense of creating total identity freed from the liberal shackles; a democratic people could express its political will through acclamation with everyone physically assembled in the same place. Schmitt's ideal was a kind of "soccer stadium democracy," in Stephen Holmes's words (Holmes 1993, 93). Schmitt believed that acclamation was the natural and necessary political expression of the life of a people, whereas parliamentary democracy amounted to ignoring the assembled people. The liberal security of the secret ballot destroyed this publicly proclaimed unanimity of a people's political will.[17]

To Schmitt, assenting to a dictator was a genuinely democratic act. In his introduction to the second edition of his book in 1926, he added the following to explain his views on homogeneity: "Every actual democracy rests on the principle that not only are equals equal, but that unequals will not be treated equally. Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity." (Schmitt 1926b, 9) Initially, it made no difference here whether democratic homogeneity was based on common religious, ethical, and cultural convictions or on racial characteristics or socioeconomic equality. In the final analysis, this meant that class societies or multicultural or multiethnic societies could never be democracies.

17 On Schmitt's fundamental critique of the secret ballot, see Buchstein (2000, 597–600) and (2002).

Schmitt had used these hypotheses to declare that the young parliamentary democracy established only four years previously was stillborn and the Weimar Constitution was an anachronism that was misguided from the outset. He thought the constitution contained two antagonistic principles, one liberal and the other democratic. In other words, precisely at the historic moment when liberalism and democracy had come together in the Weimar Constitution, Schmitt not only separated them again but played them off against each other. He identified the two antagonistic principles with two competing institutions of the republic, the Reichstag (parliamentary vs. liberalism) and the President (plebiscitary vs. democracy).

If parliamentarism was a political project doomed to fail, what were the political alternatives? Schmitt discussed two radical alternatives in his book. One was Marxism and its approach of scientific socialism. According to Schmitt, traditional Marxism still argued within the metaphysical system of liberal rationalism. The "irrationalist theories of the direct use of force" (65) such as George Sorel's theory of the myth were more promising. Sorel stated that within Marxism, radical leftist theorists such as Lenin and Leon Trotsky had learned from the myth of class struggle described by Pierre-Joseph Proudhon and Mikhail Bakunin as well as from counterrevolutionaries such as Donoso Cortés. The theory of the myth had discovered "a new belief in instinct and intuition" (66). The great mythical heroic and warlike enthusiasm sprang out of the depths "of a genuine life instinct" (68), not out of reason or pragmatism.

To Schmitt, the decisive political question arising at that point was, "Who, then, is the vehicle of the great myth today?" (68). It could not be found in the bourgeois ideal of peaceful exchanges of arguments and parliamentary deliberation. Believing in parliamentarism was "cowardly intellectualism" (69). With their appeals to the instinct for class struggle, George Sorel and Russian Bolshevism had taken a more promising direction. Yet they remained half-hearted and in the grip of bourgeois rationalism because they sought to organize the socialist economy using methods of rational planning.

Schmitt also discovered in Bolshevism elements of a second myth: the Russian national myth. Only the proletarian use of force had brought the country back to its deeper traditional cultural roots and made Russia Moscovite again, despite Bolshevism's internationalist propaganda. Schmitt added to these comments a decisive hypothesis that expressed all his political thinking throughout his life: whenever it comes to an open confrontation of the socialist and nationalist myths, such as in Italy 1922, the "irrational power of the national myth" will "always be victorious." (75) At the end of his book, Schmitt quoted extensively from a speech Benito Mussolini gave in Naples in 1922 in which he proclaimed the superiority of the national myth in fascism over that in socialism. To Schmitt, the theory of the myth was "the most powerful symptom of the decline of the relative rationalism of parliamentary thought." (76). He saw the serious disturbances of 1923, the year of crisis, as confirmation of his criticism of an anemic liberal parliamentary democracy.

Not surprisingly, Schmitt's fundamental critique of parliamentary democracy triggered a heated debate immediately upon its first publication, provoking numerous responses from contemporaries, among others the legal scholars Hans Kelsen, Richard Thoma, Rudolf Smend and Moritz J. Bonn, and the sociologist Ferdinand Tönnies. This debate has continually entered new rounds and has not been concluded to this day. I

mentioned Smend's considerations on this topic above, not least because they evidence that many of the ideas in Schmitt's work on parliamentarism were by no means as original as the frequent references to this text might suggest. Smend's considerations also substantiate that describing the development of parliamentarism reflecting a theory of decline does not necessarily have to lead to a vigorous rejection of parliamentarism and a glorification of the fascist myth.

Against this background, as Otto Kirchheimer worked on his reflections on parliamentarism in the late 1920s, he saw himself confronted with the task of finding his own position coming from the Marxist side between the alternatives offered by Smend and Schmitt, his two conservative right-wing mentors. Kirchheimer began publishing on parliamentary democracy immediately after completing his dissertation. At this point, Schmitt had published further essays with variations of his hypotheses as well as his book *Constitutional Theory* in which he had laid out his considerations on liberalism, parliamentarism, and democracy more systematically and in more detail (see Schmitt 1928b, 253–378). Up until 1931, Kirchheimer used some of the ideas from Schmitt's theory of parliamentarism in various articles as a key to understanding the current political situation in order to promote the cause of socialism.

His essay "Bedeutungswandel des Parlamentarismus" [The Transformation of the Meaning of Parliamentarism] was published in the October 1928 issue of the journal *Jungsozialistische Blätter*, the theoretical organ of the leftist wing of the Young Socialists in the SPD.[18] The Young Socialists were split into various wings, the majority of which took positions to the left of the party leadership. In this essay, Kirchheimer described the development of modern parliamentary democracy in historical sequence. It is a stage model clearly inspired by Schmitt's theory. Right at the outset, Kirchheimer disallowed the widespread panegyric that it had been only the constitution of the Weimar Republic that had created the democratic form of government and introduced the parliamentary system in Germany. Such language, he wrote, used the terms "parliamentary" and "democratic" together and side by side, inadvertently conveying the impression that they were indivisible and that they had always meant the same thing over the course of history. This, however, was a "theoretical error with far-reaching consequences" (157); not only had Karl Marx and Friedrich Engels treated it with contempt in various writings, it had also resulted in catastrophic mistakes in political practice time and again.

Like Schmitt, Kirchheimer distinguished between democracy and parliamentarism conceptually and historically. In its classical form, parliamentarism was a political institution through which the bourgeoisie exercised its rule over other classes of society, and its details were negotiated exclusively by the bourgeoisie. Classical parliamentarism was distinguished by three components: first, the claim to political power on the part of the bourgeois social strata enjoying property ownership and access to education; second, the belief that what was sensible for the nation could be identified through public parliamentary discussions; and third, adherence to the principle of the *Rechtsstaat*, whereby Kirchheimer also emphasized that the essence of the principle of the *Rechtsstaat* had changed alongside the societal changes from the nineteenth century on. Kirchheimer contrasted classical parliamentarism with an understanding of democracy he ascribed to Marx and

18 See Kirchheimer (1928b). The following page numbers refer to this essay.

Engels: "They considered 'democracy' to be the rule of the entire, the working people, in contrast to the rule of a parliament constituted by census suffrage" (159).

Kirchheimer then outlined how the three components of classical parliamentarism had successively crumbled during the second half of the nineteenth and the first quarter of the twentieth century. The electoral law reforms had afforded all societal strata political access to parliament. Creative political discussions in parliament had been replaced with the representation of class interests, and the parliament had also lost political power to the executive. The principle of the *Rechtsstaat* no longer served the interests of the bourgeoisie alone and was instead caught "between the proletariat and the bourgeoisie" (161). Kirchheimer assigned the *Rechtsstaat* in modern parliamentary democracy the active function of "creating an equilibrium" (162) between the proletariat and the bourgeoisie, thus fighting the social struggles between the classes with legal means and "neutralizing questions of social power by transforming them into problems of finding justice" (162).

Kirchheimer's deliberations in this article could be characterized as a kind of historical semantics of key political concepts founded in materialism. His thoughts again clearly show the influence of Max Adler's writings and seek to borrow from Marx and Engels but his choice of words occasionally displays parallels to Schmitt's writings on parliamentarism, too. Yet, in contrast to Schmitt, who described the transformation of the meaning of parliamentarism as a historical downfall, Kirchheimer welcomed this transformation. In his view, the structural transformation of parliamentarism to an institution of mass democracy, organized by competing political parties, was a thrust toward political and social emancipation. He even considered—again in contrast to Schmitt—that the neutralization of social conflicts by legal means certainly could be successful, at least in principle. Essentially, Kirchheimer contradicted Schmitt in his normative evaluation of the transformation of parliamentarism and was more optimistic than Smend about its potential progressive force.

5. Fascism and socialism as alternatives

Hermann Heller had spent time in Italy in the summer of 1928 to lay the groundwork for a book on fascism. In the spring of 1929, Schmitt also traveled to Italy for eight days. He visited the Senate and various tourist sights in Rome and called on the Italian political theorist Gaetano Mosca at the university. On the fourth day of his stay, he went to Piazza Venezia. It was one of the Duce's major reconstruction projects, including a broad avenue crossing the Forum Romanum to the Colosseum. Schmitt met the Kirchheimers, who were also vacationing in Rome, there. He noted in his diary: "met Kirchheimer and his wife, we chatted at Café Venezia for more than an hour, about socialism, the state, etc."[19] Regardless of all the differences that had emerged, the conversational tone between him and Kirchheimer apparently continued to be unconstrained and friendly.

Schmitt pointedly reiterated the hypotheses presented in his work on parliamentarism in multiple publications. He found his approach to an anti-liberal interpretation

19 Carl Schmitt, diary entry of 14 April 1929 (Schmitt 2018, 283).

of the Weimar Constitution in the fundamental differentiation between liberalism and democracy. While he was working on *Constitutional Theory*, he had written to Smend in October 1927 that the book's essence was "to remove liberalism's death mask."[20] In his lecture "Der bürgerliche Rechtsstaat" [The bourgeois rule of law] a year later, he asserted that the Weimar Constitution was dependent on the Treaty of Versailles and proclaimed the "posthumous" character of Weimar parliamentarism and liberalism. He formulated his creed on constitutional policy: "What matters for the development of the constitution in the near future is to rescue democracy from being concealed by liberal attributes" (Schmitt 1928d, 47). In a book review on Italian fascism, he affirmed the "democratic" character of Mussolini's rule, which was legitimized by acclamation "by plebiscite" (Schmitt 1929b, 110). The fascist state in Italy achieved "political unity of the people," he claimed, and ultimately served the "socialist interests of the workers" (Schmitt 1929b, 113). Readers of this review who were familiar with Schmitt, for example Heller and Schmitt's former Bonn student Waldemar Gurian, considered these statements unequivocally supportive of fascism.[21] Such clear words were not yet to be found in Kirchheimer's publications at that time.

In August 1929, about six months after he and Schmitt had both spent time in Italy, Kirchheimer published a new piece on the issue of acceptance of parliamentary democracy in which he also touched on the fascist option. The article appeared in the journal *Der Klassenkampf* [Class struggle], which was published by followers of Rosa Luxemburg from the leftist wing of the SPD. The article was titled "Verfassungswirklichkeit und politische Zukunft der Arbeiterklasse" [Constitutional reality and the future of the working class].[22] Kirchheimer took the tenth anniversary of the adoption of the Weimar Constitution on 11 August 1919 as an occasion to look back on constitutional policy and to diagnose the current situation. He thought that without much ado, the mass of war-weary soldiers had entrusted the political power they had received following the November Revolution of 1918 to the social democrats forming the majority. When the SPD then sought to begin implementing the social promises made to the working class, "the bourgeoisie had already come back out of the woodwork" (180). Both sides agreed to a compromise and created the constitution for a parliamentary democracy the following year, which, however, lacked a principle "that would have formed the people into a community based on political will in the long term" (180). Here, Kirchheimer meant that the Weimar Constitution had not come to a decision about the question whether the future German republic was to be a capitalist or a socialist democracy. With this assessment, he followed Schmitt's derisive words in *Constitutional Theory* about the Weimar Constitution as a "*dilatorischer Formelkompromiß*" (dilatory formulaic compromise) (Schmitt 1928b, 85).[23]

Kirchheimer then elucidated how the power relations in society had changed over the past ten years. The bourgeoisie's concerns about an expansion of socialism in Western industrial societies had disappeared. Thus, "Europe's bourgeoisie [is now] no longer required to conceal its true face behind a social and democratic mask" (182). After the

20 Letter from Carl Schmitt to Rudolf Smend dated 17 October 1927 (Schmitt and Smend 2010, 65).

21 See Heller (1929, 489 and 541–542) and Gurian (1929, 508).

22 See Kirchheimer (1929b). The following page numbers refer to this text.

23 See the Translator's Preface regarding the translation of "*dilatorischer Formelkompromiß*."

constitution had been adopted, the bourgeoisie in Germany had launched a counterattack and begun to dismantle the social advances in the Weimar Constitution step by step. Here, he referred to the elimination of the constitutionally guaranteed eight-hour working day, the ailing education system, and lacking implementation of the Works Council Act mentioned in the constitution. In light of these developments, only "dreaming socialists" (183) could hope that the current-day bourgeois state could be overturned legally.

Considering these general tendencies, Kirchheimer called his SPD's involvement in the parliamentary government of the Grand Coalition its "share of patronage" (183), which could accomplish little against the increased power of the conservative state bureaucracy. Large sections of the bourgeoisie were unwilling to settle even for that. They wanted to go a step further and abolish the present situation of the constitution in favor of a bourgeois dictatorship following the pattern of Mussolini's fascist rule in Italy. That was a clear reference to the option of an authoritarian state as promoted by Schmitt. At the moment, Kirchheimer believed, the bourgeoisie was struggling to ensure that the decision that had not been made in 1919 was not postponed any longer and that it was made one-sidedly in its favor. The SPD leadership was unaware of this danger, instead seeking to continue avoiding such a decision. Yet avoiding it was impossible: "The only choices are forward or backward" (185): in other words, either major steps toward a socialist democracy on the basis of the Weimar Constitution or authoritarian rule in the interest of the bourgeoisie. Kirchheimer knew from his numerous conversations with Schmitt that he and others had strong sympathies for transitioning to an authoritarian state.

Against the background of this diagnosis, Kirchheimer advocated a socialist approach to policy, making it necessary to fight "from below, following a plan" (184) within the party to "replace an old body of functionaries with one in a new spirit" (184). Up until this point, social democratic realpolitik had done more to block than to enable the path toward socialism. The Weimar Constitution continued to be "the book of opportunities" (186). To that end, it was necessary to have the courage to imagine utopias and the strength to follow through with political mobilization. Kirchheimer used words that were as passionate as they were vague to appeal to his readership: "we must again want to learn" (185) and "we must be prepared for the great tomorrow that we can win or irretrievably lose in these years" (186).

Kirchheimer's article is full of verve and polemic power. Both its content and its style fit seamlessly into the general line of the journal *Der Klassenkampf*: presented in the style of a sober analysis of class struggle, with vehement criticism of the SPD party establishment, based on a concept of socialism as a comprehensive cultural movement, and concluding with appeals using pointed and voluntaristic vocabulary in the style of Rosa Luxemburg. Kirchheimer did not see the parliament as having any progressive role. He believed socialist mobilization had to take place outside of parliament. Kirchheimer seemed to have lost the optimism about the possibilities of parliamentary democracy he had expressed a year earlier, and precisely during the brief phase in which the Grand Coalition under Social Democratic Chancellor Hermann Müller was successful. In historical retrospect, however, his warnings proved prophetic.

6. Weimar—and what then?

In his book *Constitutional Theory*, Schmitt had introduced the fundamental distinction between *Verfassung* and *Verfassungsgesetz* (which he defined as "unified constitution in its entirety" and "the individual constitutional law") (Schmitt 1928b, 67). He believed a unified constitution in its entirety was always the expression of a "single instance of decision" by the political unit "in regard to its peculiar form of existence" (Schmitt 1928b, 75). Schmitt analyzed the Weimar Constitution against this theoretical background in his *Constitutional Theory* and concluded that, in many of its individual constitutional laws, it consisted of compromises where the maker of the constitution had attempted "to evade a decision." (Schmitt 1928b, 82) In addition, "the great choice, bourgeois or socialist order, was seemingly settled only through a compromise." (Schmitt 1928b, 83) In the following years, he used this hypothesis to assert the notorious fragility of the Weimar democracy. Schmitt sought potential anchors of stability as counterweights, initially within the framework of the constitution. Ultimately, he found them in the presidential dictatorship based on Article 48.

Competing with Schmitt's analysis of the constitution, Otto Kirchheimer published a short book titled *Weimar—and What Then? An Analysis of a Constitution* in May 1930.[24] Four weeks earlier, the Grand Coalition under the leadership of the SPD had collapsed, and the era of the presidential dictatorship had begun with Chancellor Brüning. The skeptical and radical essay-like book was to make Kirchheimer—who was only 24 at the time—known beyond his previous circles overnight. The literary scholar Hans Mayer reported in his memoirs that it was "eagerly quoted and commented on" in the discussions among the young socialist and communist intellectuals (see Mayer 1988, 128). The book was published in the *Jungsozialistische Schriftenreihe* [Young Socialists' publication series] that was edited by Max Adler in collaboration with the socialist activists Engelbert Graf and Anna Siemsen in the Laubsche Verlagsbuchhandlung publishing house in Berlin. The series had a first print run of 4,000. It published works by its three editors mentioned above, prominent names such as Ernst Toller and Leon Trotsky, and authors from the younger generation of socialists including Franz L. Neumann, Ernst Fraenkel, and Arkadij Gurland.

Kirchheimer introduced his essay in a coolly sober manner, stating he would generally limit himself to presenting "the facts" (33). He described his project as a "socialist analysis of the constitution" (33), drawing a strict distinction between this and the errors of a purely legal and liberal analysis of the constitution. Whereas liberal analysis of the constitution, which often appeared in a democratic guise, gave the false impression of nonexistent societal unity, a socialist analysis of the constitution had to reveal all those contradictions associated with the current-day organization of society and its political form. He began with a longer quote from Rosa Luxemburg's 1899 polemic pamphlet *Sozialreform oder Revolution?* [Social reform or revolution?] which clearly states: "Every legal constitution is the product of a revolution. In the history of classes, revolution is the act of political creation, while legislation is the political expression of the life of a society that has already come into being." (33).

24 See Kirchheimer (1930e). The following page numbers refer to this text.

In the nine sections of the work, Kirchheimer discussed the emergence of the Weimar Republic, the relationship between democracy and dictatorship, electoral law, parliamentarism, fundamental rights, government formation and governance, the *Rechtsstaat* and the status of government officials, the position of President of the Reich, and finally his general characterization of the Weimar Constitution. His analysis culminated in the hypothesis that the Weimar Constitution was fundamentally a "constitution without decision" (71), echoing Schmitt's analysis. In line with Rosa Luxemburg's words quoted above, he made his statements even more pointed by categorically declaring that it was the purpose of all constitutions "to proclaim a specific program of action in whose name the organization of a new social order [was] to proceed" (72).

This sounds very similar to Schmitt in his *Constitutional Theory*. However, Kirchheimer's aspiration that a new constitution had to be creative like this and that it had to change society went far beyond Schmitt's understanding which required a constitution to make an overall decision about the type and form of political unit. Schmitt had demonstrated that the Weimar Constitution certainly had made some fundamental decisions (*Rechtsstaat*, parliamentary democracy), but had left many other controversial issues unresolved. In his critical diagnosis, Kirchheimer focused on a single question: capitalism or socialism? The constitution had become bogged down at this point. He stated that the fact that it had been impossible to come to a clear decision in favor of a socialist society during the course of the revolution was "the basic and irreparable error of this constitution" (72).

Kirchheimer criticized that the concept of "democracy" had lost any and all concrete meaning, thereby repeating his plea for a narrow concept of the term following Max Adler's social democracy. Such a social democracy, however, could not exist in a society divided by class. Moreover, democracy in capitalism entailed "a considerable portion of bourgeois dictatorship" (41). Since Kirchheimer was in contact with Schmitt on a regular basis, he was aware of the latter's friendship with Johannes Popitz, State Secretary in the Reich Ministry of Finance, and knew that the two of them agreed on many political issues.[25] He used this knowledge to take a swipe against Schmitt in his book by quoting an essay by Popitz in which he bitterly complained that the mass of the less well-to-do electorate was plundering the rich.[26] The bourgeoisie now wanted to put an end to this situation.

Kirchheimer considered Article 48 of the Weimar Constitution to be the instrument with which the ruling classes in Germany could manage "to achieve by means of a dictatorship what the will of large segments of the people prevent them from achieving in a legal manner" (41–42). He referred to Schmitt's distinction between provisional and sovereign dictatorship and applied this terminology to two different forms of exercising bourgeois dictatorships: the temporary measures to suppress the leftist opposition in Saxony and Thuringia in 1923 and fascism in Italy, which had been established indefinitely. He thought that it was impossible to accurately predict when the political democracy of the bourgeoisie would suddenly transition into one of the bourgeois forms of dictatorship since the bourgeoisie considered such a regime change to be purely a question

25 The close relationship between Schmitt and Popitz is explored in Kennedy (2004).

26 See Kirchheimer (1930e, 64–65). The following page numbers again refer to this text.

of expedience and of the opportunities for enacting it. As a defender of Brüning's presidential cabinet, Schmitt is portrayed as an ideologist for the authoritarian wing of the bourgeoisie.

Against the background of his hypothesis of a systematic destruction of the order of legality laid down in the constitution, Kirchheimer presented a diagnosis and structural analysis of the republic's political institutions. It included the democratic right to vote which had been introduced at the same time as the republic. Here, Kirchheimer appealed to his readers that even the most perfect electoral law could only support an intense political will but could not replace it. It also included a parliament, the Reichstag that had transformed from an assembly for common discussions to a place for class struggles. At this point, Kirchheimer explicitly rejected calling the list of fundamental rights a "compromise"; he also considered Schmitt's talk of a dilatory formulaic compromise unhelpful because it lacked any conceptual and political clarity. The fundamental rights in the Weimar Constitution "are in their essentials not a compromise but constitute rather a unique linking and acknowledgement of the most varied value systems, which is without precedent in constitutional history" (54).

Kirchheimer concluded his structural analysis of the political institutions with the office of the President of the Reich. The entire section is directed against the "erroneous perception" (68) that the President of the Reich was far removed from the interests of parties and special interests and was thus the only true representative of the nation; a critique directly aimed at Schmitt. Kirchheimer thought that the election of the President of the Reich was also dominated by the political parties. The Schmittian notion that his office was beyond classes was a politically misleading "fiction" (71). Kirchheimer also indirectly countered Smend's monarchy-like concept of the office of the President by stating that a President could not generate an integrating ideal overall will in the absence of the societal and political preconditions it required, namely a classless society. Kirchheimer's short book *Weimar—and What Then?* ended with a negative conclusion concerning the accomplishments claimed by the SPD party leadership after a decade of the Weimar Republic. Its tone was unmistakably ominous about the prospects for such optimism about reforms.

Shortly after its publication, Kirchheimer's book was met with spirited criticism and animated approval alike. It is one of Kirchheimer's most often quoted works to this day.[27] But even the people closer to him responded in very different ways. Franz L. Neumann wrote that Kirchheimer's analysis of the Weimar Constitution was "very [close] to communist trains of thought." (Neumann 1930, 76) He accused Kirchheimer of trivializing the significance of fundamental rights and not going further than denouncing them as a hodgepodge of incompatible value judgments instead of resolutely taking up the jurist's toolbox and attempting to achieve a unifying legal systematization. The general antithesis to Kirchheimer that Neumann's criticism entailed was that the constitution was not to be understood as contradictory, but rather as open; therefore, the labor movement could help push it toward its socialist goals. His prompt riposte to the question Kirchheimer had posed in the title of the book was the imperative: "Erst einmal Weimar!" (First of

27 On the later receptions and debates about this piece, see Schale (2006, 42–46) and Buchstein (2017a, 68–73).

all Weimar!).[28] Hermann Heller's response was negative too. To him, it was part of the cheap criticism by "our aesthetic-heroic revolutionary romantics from the left and the right" who "in extraordinary agreement" lambasted the constitution instead of defending it against all ideologies of violence—"if necessary, arms in hand." (Heller 1930, 376 and 377)

Another critical piece was written by Arkadij Gurland. He had just published a book on the dictatorship of the proletariat in which he also made use of Schmitt's theory. Gurland was an outstanding voice of the left wing of the Young Socialists of the SPD (see Buchstein, Emig, and Zimmermann 1991, 9–22). His review in the left-socialist *Bücherwarte* was the strongest rejection of any author from the left. He started by praising Kirchheimer for pointing out that all constitutional questions were ultimately questions of power. After this introductory remark, he criticized him all the more sharply for limiting his deliberations "to unfortunately more summary statements" rather than specifically illustrating such interconnections from the sociology of law. Gurland identified Schmitt as Kirchheimer's inadequate teacher for such abstractions. Since Kirchheimer had followed Schmitt, his thinking resulted in the dangerous supposition that Weimar parliamentarism had too little potential for the labor movement. Gurland thought that "what was alarming about this piece" was its political finding; he concluded by stating that Kirchheimer's book "was not fitting for an educational library, which the *Jungsozialistische Schriftenreihe* is supposed to be" (Gurland 1930b, 136). Gurland's strong criticism was the beginning of his life-long close friendship with Kirchheimer.

In contrast to the criticism from the left authors, Carl Schmitt's reaction to *Weimar—and What Then?* was much more positive. He sent a copy of Kirchheimer's book to Ferdinand Tönnies, the sociologist and prominent interpreter of Thomas Hobbes,[29] and told him he "understood the sentiment" of Kirchheimer's short book. Tönnies had recently become a member of the SPD and appealed to the public to defend the republic against attacks from the right. Schmitt explained to him that the book "begins with the hypothesis that the Weimar Constitution does not contain any political decision at all" and added: "What should one do, as a teacher of positive constitutional law, when faced with such confusion?"[30] Tönnies reacted similarly to Neumann: his response was that the claim that the constitution did not contain any political decision was "surely untenable."[31]

Schmitt, however, did not distance himself in this way in his publications. On the contrary. He quoted the piece in a positive light as a paradigmatic socialist interpretation of the constitution (see Schmitt 1932d, 182). In 1932, he praised it as a "highly interesting piece" (Schmitt 1932d, 195), referring mostly to Kirchheimer's hypothesis of a constitution without decision. One year later, Rudolf Smend took up this praise when he criticized Schmitt publicly in a ceremonial lecture on 18 January 1933, affirming that

28 Neumann (1930, 74). Neumann repeated his critique two years later (Neumann 1932, 39). On his criticism of Kirchheimer, see Rückert (1993, 446–448).

29 On Tönnies and Schmitt on Hobbes, see Chapter 9, p. 227–228.

30 Letter from Carl Schmitt to Ferdinand Tönnies dated 10 July 1930 (Schmitt and Tönnies 2016, 112).

31 Letter from Ferdinand Tönnies to Carl Schmitt dated 18 July 1930 (Schmitt and Tönnies 2016, 115).

Kirchheimer had performed a "logical execution" (Smend 1933, 319) of Schmitt's decisionism. He continued, directing his criticism toward both Schmitt and Kirchheimer: "It is, however, not the purpose of a constitution to be a 'decision' in the sense of any objective and logical political system of thought, but to bring living people together to form a polity in an orderly way." (Smend 1933, 320)

The reception of Kirchheimer's piece reveals a curious constellation. Public criticism came from his socialist comrades and from Smend, a conservative. Public praise came from Schmitt alone. Yet such praise should not be misunderstood as agreement. To Schmitt, Kirchheimer's piece served as incontrovertible evidence that on the left, social democrats called the constitution into question, too.

7. Property rights and expropriation

If, according to Kirchheimer, the Weimar Constitution was a constitution without decision, how open was it to policies with socialist goals? This question placed the interpretation of property rights and expropriation in the constitution at the center of the struggle for positions regarding the constitution.

The text of the constitution of the Weimar Republic is a synthesis of socialist and capitalist ideas about the economic and social order (see Gusy 1997, 342–352). This synthesis was based on two fundamental decisions: one in favor of a fundamentally private economic system and against a planned state economy, and one against an entirely free play of market forces in an unregulated liberal market. This hypothesis also included Article 153 on property. Paragraph 1 of Article 153 guaranteed the right to private property but left it to the future parliamentary legislator to precisely define the concept of property and the limits of property. Paragraph 2 permitted expropriation for the common good if provided for by law, and only with appropriate compensation. If a law adopted by the Reichstag stipulated this, compensation would not be mandatory. In addition, Article 156 enabled the socialization of businesses. These provisions had been included in the constitution in the founding phase of the Weimar Republic as a compromise for the socialists who could then hope that they would be able to realize some of their economic policy ideas in a manner consistent with the constitution.

The *Reichsgericht* in Leipzig very soon thwarted this calculation by the socialists. Two decisions were key here: first, the court claimed its right to judicial review of laws under Article 153, thus disempowering the parliamentary legislator, and second, the court broadened the scope of that guarantee of private property to such an extent that even monetary losses due to inflation were considered expropriations by the state. Other court rulings expanded property rights and the state's obligations to compensate in cases of expropriation even further. This even applied to the protection of historic buildings, which was guaranteed in Article 150. The courts' decisions had transformed property law, potentially an instrument for reforms inspired by socialism, into a wall protecting existing legal positions regarding property. The text of the constitution and the decisions of the *Reichsgericht* provoked socialist, liberal, and conservative legal scholars to influence the

entire political development of the republic by interpreting Article 153 to suit their own ends. Schmitt and Kirchheimer were on the front lines of these debates.[32]

Again, it was Schmitt who tossed the first pitch. In a 1926 legal opinion on the expropriation of princes, he had declared expropriation without compensation to be unconstitutional (see Schmitt 1926d). In *Constitutional Theory*, he explained his position on property rights more systematically. He viewed the Weimar Constitution as a constitution of a state with a bourgeois *Rechtsstaat*. The "fundamental decision" in favor of the bourgeois *Rechtsstaat* included a fundamental sociopolitical decision: "the decision must already have been made to go with the existing social *status quo*, in particular the retention of the bourgeois social order." (Schmitt 1928b, 84) By defining the constitution as a bourgeois *Rechtsstaat*, property law attained an outstanding legal position in the fabric of constitutional norms in the classical liberal sense and became an "institutional guarantee" (Schmitt 1928b, 208).

Since Schmitt defined the Weimar Constitution as having a one-sided bias toward the *Rechtsstaat* and ignoring the social aspects that were also enshrined in other articles, it was only logical that he prioritized the protection of private property in his interpretation of Article 153. Its wording was "contradictory and unclear" (Schmitt 1928b, 210), yet the absolute guarantee of private property was imperative against the background of the alleged primacy of the bourgeois *Rechtsstaat* in the constitution. Schmitt also discussed the possibility of expropriation mentioned in Paragraph 2 of the article against the background of the alleged primacy of the *Rechtsstaat*. The *Rechtsstaat* implied the general character of the legal norm, i.e., the ban on making laws targeted only at individual people or groups of people. This would mean falling back into "absolutism" (Schmitt 1928b, 190) albeit under the premise of democracy. Following this logic, laws that concerned individual cases and directly enabled specific cases of expropriation were a priori unconstitutional.

In 1929, Schmitt stated his views specifically on the question of expropriation in another essay. He criticized the courts' practice of interpreting practically every limitation of property rights as expropriation. He considered this to be *Auflösung* (Schmitt 1929c, 110), a misguided, overly broad application of the concept of expropriation to the extent that it no longer meant anything. However, he insisted that general legal norms never gave anyone a right to compensation. He also deemed undertakings to conduct expropriations through laws adopted by parliament to be examples of inappropriate application of the concept. These attempts were "an abuse of the form of legislation for the purpose of specific acts of expropriation" (Schmitt 1929c, 116). In contrast, he reminded readers that "the protection of private property under Article 153 was fundamentally determined by the legal situation of the year 1919." (Schmitt 1929c, 116) The device Schmitt used for his constitutional theory consisted of considering the revolution of 1918/19 as being a mere change of political institutions, while the continuity of the bourgeois system since the German Empire was retained at the same time. The political thrust of the narrowing of expropriation law arising from this is obvious: Schmitt's purpose was to prevent socialist aspirations to potentially carry out expropriations without compensation.

This legal position was unacceptable to the socialist left, whereas the communists saw their position, namely agitating against the bourgeois capitalist system, borne out. From

32 On the debate between Kirchheimer and Schmitt on expropriation, see Klein (2022).

a socialist perspective, the constitution had stipulated in Article 153 that property did not enjoy absolute protection as a fundamental right, but that its protection was at the disposal of the parliamentary legislator in terms of its substance and scope.[33] To them, Schmitt's position meant erosion of the social basic rights and an amputation of the competences of the legislature. Ernst Fraenkel and Franz L. Neumann, and other younger socialist legal experts followed Hermann Heller in taking critical aim at the factual nullification of expropriation law. The most extensive and thorough works on expropriation in Article 153 were by Otto Kirchheimer who had already complained in *Weimar—and What Then?* that the original purpose of Article 153 had been perverted into its opposite (see Kirchheimer 1930e, 57). For one thing, Kirchheimer was responding to the judicial review conducted by the *Reichsgericht*, which Schmitt had already criticized; Kirchheimer agreed with Schmitt on this point. For another, he formulated a clear position opposing Schmitt's attempt to block potential expropriations without compensation.

Kirchheimer wrote three larger pieces on this subject: two essays and one monograph. In the essays, he attacked the decisions of the *Reichsgericht* with polemic verve.[34] The target group of his main contribution to this subject, an academic book on the limits of expropriation, was exclusively legal experts. The book was published a few months after *Weimar—and What Then*? and can also be read as his answer to the question as to how open the Weimar Constitution was to socialist policies. All these pieces have the same thrust in criticizing ideology. Kirchheimer believed that the legal terms "property" and "expropriation" were not neutral concepts but were embedded in certain traditions. Using them uncritically in the legal context would convey the sociopolitical values of the past along with the terms and concepts themselves. With these three pieces, he aimed to overcome the sociopolitical persistence of these legal concepts.[35]

The weightiest of these publications is the 75-page monograph *The Limits of Expropriation*.[36] Kirchheimer thanked two mentors in the preface of the book: Carl Schmitt "for the research question itself as well as for some of its aspects" and Hermann Heller for the "interest he showed in the work."[37] Schmitt and Heller's positions served as the two points of reference forming the basis for the structure and argument of Kirchheimer's study. In his interpretation of the fundamental rights under the Weimar Constitution, Heller, unlike Schmitt, had explicitly deemed the competence granted the legislature to expropriate in order to create a social democracy to be necessary.[38] However, Kirchheimer also emphasized that "the only critical analysis" (207) of the conceptual expansion of the term "expropriation" was that by Schmitt.

In his line of argument in the first part of the book, Kirchheimer did not follow a purely legal methodology but argued along lines of the sociology of law by discussing the transformation of the meaning of property since John Locke. The function of the article in

33 See Neumann (1930, 68–73). On this debate see also Ridder (1977, 174–177).

34 See Kirchheimer (1930b) and (1930g).

35 See Bumke (2002, 189–203), Meinel (2011, 196–200), and Buchstein (2017a, 57–65).

36 See Kirchheimer (1930h). The following page numbers refer to this text. On Kirchheimer's writings on expropriation see also Simard (2023, 52–60).

37 Unfortunately, the preface is omitted in the English translation of the text.

38 See Heller (1924, 310–316) and Heller (1926, 375–409). On Heller's concept of democratic socialism, see Henkel (2012, 454–482) and Buchstein and Jörke (2023).

the constitution concerning property could only be recognized in the social and political context of a particular case. Kirchheimer gave a rough outline of the theory of property in terms of its intellectual history from Locke to Montesquieu to Ferdinand Lassalle, Karl Marx, and Austro-Marxist Karl Renner. The liberal view with its orientation toward private law could no longer be sustained in the age of industrialization since the large number of infrastructure measures at the time made expropriations necessary. The Weimar Constitution had recognized this fact in Article 153 and had developed it qualitatively.

In the second part of his book, Kirchheimer turned to the debate among legal scholars about interpreting Article 153. He conceded that it was indeed possible to speak of an institutional guarantee with respect to property. Referencing deliberations in Schmitt's *Constitutional Theory*, he argued against the author that the significance of such an institutional guarantee was only minor, in contrast to the institutional guarantee regarding the status of civil servants in Germany[39] since the potential substance of property was ultimately always subject to determination by the legislature. Kirchheimer criticized the theories championed by other legal scholars such as Martin Wolff, Gerhard Anschütz, Heinrich Triepel, and Walter Schelcher as attempts to turn the intentions of the legislator of the constitution upside down. These leading legal scholars, he claimed, expanded the area of expropriation in their theories, thus creating "the convenient possibility to characterize every act of intervention as expropriation" (115). Their reinterpretation of Article 153 negated the fundamental essence of legislation in a democratic state and also weakened the legislature by introducing a material right to judicial review. To Kirchheimer, this was driven by openly expressed anti-socialist and anti-parliamentarian resentment and was an expression of altered societal power relations. Since, at the time, the bourgeoisie feared that parliament would enact legislation on property that was contrary to its private interests, legislation on this matter was to be subject to a new authority the bourgeoisie believed was more favorably disposed to it, namely the courts.

Kirchheimer again named Carl Schmitt as a key supporter of his hypotheses, stating that Schmitt's interpretation could be explained against the background of his general framework of analysis for understanding the current state of the constitution as the result of the interplay of the bourgeois state under the *Rechtsstaat* on the one hand and democracy on the other. Kirchheimer thought this type of interplay would become problematic long-term. He asked Schmitt the rhetorical question as to how far the mass democracy of the twentieth century could retain bourgeois *rechtsstaatlich* elements without in the long run suffering severe damage to its basic democratic character (116). Explicitly directed against Schmitt, he wrote:

> The Constitution has, however, directed established rights and their incorporation in the state into the sphere of legislation. Since it is a democratic constitution, this has been done not only, as Schmitt argues, to generally restrict property but to give Legislature a free hand in the initiation of individual acts of expropriation. (115)

39 To this day, the status of civil servants (*Beamte*) in Germany differs from that of civil servants in the US in two ways: for one thing, it requires civil servants to exercise a special duty of loyalty toward the state (for example, they do not have the right to strike), and for another, civil servants enjoy certain privileges (such as a tenured position, and additional health insurance and pensions).

Although a general right to property continued to exist, Kirchheimer thought the legislature had the power to define its "substance and limits": "As long as there is a category of property, then property signifies an absolute right of domination, although this 'absolute' quality is only valid for the sphere of private law and is subordinate to the sovereignty of the state and hence the Legislature" (111). In other words, a socialist majority in the parliament would have considerable leeway when carrying out expropriations without compensation.

Kirchheimer repeated his main objections to Schmitt in another article on property titled *Eigentumsgarantie in Reichsverfassung und Rechtsprechung* [The right to property in the constitution of the Reich and in jurisprudence] in the August 1930 issue of the journal *Die Gesellschaft*. Kirchheimer began with a reference to Karl Renner's book on the functional transformation of the legal institution of private law (see Renner 1929).[40] He added a compilation of Catholic voices critical of property—a clear swipe at Schmitt, who even after his excommunication portrayed himself as a Catholic intellectual. Again, Kirchheimer accused Schmitt of overlooking the "democratic origin" (Kirchheimer 1930g, 343) of the legislation on expropriation and making overly great concessions to liberal theory for this reason.

At their core, the differences in argument between Schmitt and Kirchheimer can be traced back to their assessments of the 1918 revolution relating to constitutional policy (see Klein 2022, 47–49). To Schmitt, the 1918 revolution had ultimately changed nothing about the bourgeois system; the only change was to its political form. Kirchheimer saw the events of 1918 as the beginning of a dual revolution: the transition from the bourgeois capitalist system to a balance of capitalist and socialist elements and the transition from the bourgeois *Rechtsstaat* to a social *Rechtsstaat*. In contrast to Schmitt, Kirchheimer emphasized the revolutionary aspect of the upheavals of the societal structures in the founding of the Weimar Republic as well as the democratic sources of parliamentary lawmaking. The practical political consequences arising from Kirchheimer's reading of the revolution of 1918/19, the opposite of Schmitt's, were just as evident: it was necessary to turn to the political struggle for parliamentary majorities in order to harness Article 153 for socialist ends.

Schmitt was unruffled by Kirchheimer's criticism and responded with friendly and even appreciative words. When Kirchheimer applied to the Rockefeller Foundation for a one-year research stipend in the US in December 1930, Schmitt praised Kirchheimer's book in his letter of recommendation as "one of the best German works on the concept of expropriation."[41] He praised the book in an essay published in 1931 because Kirchheimer had made clear that the idea of socially responsible use of property was actually "directed against property" (Schmitt 1931d, 161). He agreed with Kirchheimer that the institutional guarantee of property rights under purely democratic auspices would become precarious and could even "be accepted by the most extreme communists" (Schmitt 1931d, 162). In that essay, he thanked Kirchheimer and Franz L. Neumann for acquainting him with Austro-Marxist Karl Renner's socialist doctrine of property in his university seminar (see

40 The first edition of Renner's book was published in 1904.

41 Letter of recommendation by Carl Schmitt for the Rockefeller Foundation concerning Otto Kirchheimer's application dated 4 December 1930. Carl Schmitt Papers, RW 265–13422/1-2.

Schmitt 1931d, 168). To Schmitt, Kirchheimer's book was instructive for the simple reason that he saw his view of the vitality of the socialist threat confirmed.

A response along the same political lines, but less friendly, came from Ernst Rudolf Huber, Schmitt's student and Kirchheimer's classmate in Bonn. Huber regularly published articles under the pseudonym Friedrich Schreyer in *Der Ring*, the journal of the Deutsche Herrenklub, in which authors of the Conservative Revolution sounded out the political situation. Huber attacked Kirchheimer for providing the ideology to support "creeping toward socialization through the back door" (Huber 1931b, 163).[42] From Kirchheimer's perspective, Huber's assessment was only partly correct. He would have granted "creeping toward socialism." But not the "through the back door"—he thought Article 153 provided the opportunity for socialism to enter through the front door.

8. Presidential dictatorship

Shortly after the collapse of the Grand Coalition in March 1930, rumor had it in Berlin that Hindenburg's camarilla had long been planning Chancellor Müller's overthrow and had already selected Brüning as his successor. The SPD saw itself once again relegated to the opposition at the Reich level. It was also leaked that Schmitt had been asked informally in advance to write a legal opinion for the new government. Schmitt had personally met Brüning in early 1928 and had noted in his diary how much he looked forward to working with him in Berlin.[43] As things stood, Brüning and his cabinet could not rely on a majority in the Reichstag but depended completely on the support of the President of the Reich. This posed a problem for them inasmuch as Article 85 of the constitution stated expressly that budgetary powers rested with the Reichstag alone. Even before Brüning took office, the wily advisors in Hindenburg's circle had already come up with the following idea: in the event that parliament rejected the government's legislative proposals, they would all be declared essential emergency measures so they could be enacted in the form of emergency decrees applying Article 48 of the Weimar Constitution. This course of action was politically controversial, and it was the biggest topic of constitutional law of the day.[44] In the summer of 1930, Schmitt was at the center of creating constitutional legitimacy for this existential basis of Brüning's presidential dictatorship; a few years earlier, however, he had championed the opposite position on Article 48 (see Kennedy 2011).[45]

Article 48, paragraphs 1 and 2 of the Weimar Constitution reads as follows:

> [1] If public order and safety are substantially disturbed or endangered in the German Reich, the Reich President may take the requisite measures to restore public safety and order, if necessary, with the help of armed forces. [2] To this end, he may temporarily

42 The reference to Huber as the author of this article is to be found in Breuer (2012, 182–183).

43 See Carl Schmitt, diary entry of 4 January 1928 (Schmitt 2018, 193).

44 For an overview of the contemporary debate on the applicability of Article 48 before the Brüning era, see Gusy (1997, 107–109) and Stolleis (1999, 114–116).

45 For a comparison of presidential emergency power in the Weimar Constitution and the constitution of the United States see Kronlund (2022).

> annul, completely or in part, the basic rights laid down in Articles 114, 115, 117, 118, 123, 124, and 153.[46]

The third paragraph stated: "[3] The Reich President must immediately inform the Reichstag of all measures taken" and: "[4] The measures must be revoked by the at the request of the Reichstag." The second paragraph of Article 48 had been one of the most hotly debated provisions during consultations about the constitution. On the one hand, the young republic was to be protected effectively against uprisings. On the other, sufficiently clear limits were to be placed on the state's security agencies. The intended balance between these two goals did not find its way into the text of the constitution because the majority in the constitutional convention favored the political system's ability to act. The law provided for in Article 5, paragraph 5 regulating the competencies of the President in more detail was never enacted because of the resistance by President Hindenburg and the *Reichswehr* (the armed forces). The predominant interpretation of Article 48, paragraph 2 was that in exceptional cases, the President had the competency to suspend the seven fundamental rights mentioned. It followed from this that all the other provisions of the constitution were considered untouchable. The logical consequence of this predominant interpretation was that the constitution did not permit the President and the Chancellor appointed by him to adopt the budget without the consent of the Reichstag.

Kirchheimer's prompt criticism of the new government followed this logic, too. On 4 April 1930, five days after Brüning took office, he reacted to the change of government in a newspaper commentary. Brüning had announced in his government policy statement that he would present a package of measures to the parliament and that it would be his only attempt to solve the current problems in collaboration with the Reichstag. This could be interpreted as a publicly declared threat to establish a presidential cabinet. Kirchheimer's commentary was printed in the socialist *Tribüne* under the title "Artikel 48 – der falsche Weg" [Article 48—the wrong course].[47] He focused on the question whether the future course of lawmaking announced by Brüning was in line with the constitution. In terms of substance, Kirchheimer characterized the measures in economic, financial, and social policy proclaimed in the government policy statement as systematically implementing business associations' programs to one-sidedly shift as many costs as possible to blue-collar workers and the unemployed in the "struggle for internal distribution of the burdens" (202). He vehemently opposed applying Article 48 in order to do this, not least for procedural reasons. He quoted the text of the constitution in his argument. According to the constitution, Article 48 could be applied only in cases in which "public order and safety are substantially disturbed or endangered." Yet it was apparent that such disturbances or endangerments of public order and safety were not substantial. Kirchheimer referred equally to liberal, conservative, and German-nationalist constitutional law professors and described the difference between how former President of the Reich, Social Democrat Friedrich Ebert, had applied Article 48 "temporarily" only for brief and limited periods of time and how Brüning's Presidential Cabinet planned to do so permanently.

46 The translation of the Weimar Constitution is taken from Tribe (2020, 195).

47 See Kirchheimer (1930c). The following page numbers refer to this text.

Kirchheimer also referred the newspaper's social democratic readership to an article by the "well-known German constitutional law professor Carl Schmitt" (204) from 1924 on this issue. Schmitt had made the important distinction between a measure that would remain temporary and could be covered by Article 48 and a legislative procedure that was not covered. Schmitt spoke of an "abuse" of Article 48 if it was applied to expand the right of the President of the Reich to put a budget into effect (see Schmitt 1924c, 208–221). To Kirchheimer, it was clear that the actions threatened by Chancellor Brüning and President of the Reich Hindenburg were unequivocally "outside the constitution" (204). He even used Schmitt's theory of dictatorship to declare Brüning's entire government unconstitutional as a matter of principle:

> Schmitt's definition of the nature of dictatorship illuminates in a flash who upholds the constitution and who violates it: 'Dictatorship is like the act of self-defense: never just action, but also reaction. Therefore, implicitly, the enemy will not conform to legal norms that the dictator regards as a binding legal norm' [Schmitt 1921, 118] (204).

The legal basis for Brüning's dictatorship could only be found in the constitution. If Brüning enforced his government program against the Reichstag, then this had nothing to do with Article 48; in fact, his course of action was outside the constitution. Readers should be reminded that there was no constitutional court in the Weimar Republic to resolve such conflicts. For that reason, Kirchheimer conceded that it was virtually impossible to prevent such unconstitutional actions on the part of the Presidential Cabinet through such a channel. He placed his hopes in other courts. He encouraged the financial and revenue courts of Prussia and other German states and also the *Reichsfinanzhof* (see List of German Courts) to rain on the Brüning government's parade. However, the only options were protest and political mobilization against the government dictatorship and its "entrepreneurial ideology" (202). In his article, Kirchheimer referred mainly to Schmitt and his criticism of Brüning's regime of emergency decrees. Not only did he draw on Schmitt's book on dictatorship and the 1924 article he quoted, but also on Schmitt's plea two years later for a limitation of the President's extensive dictatorial power. In light of the danger of a "boundless dictatorship," Schmitt had argued along the lines of Article 48, paragraph 5 for a solution "based on the *Rechtsstaat*," namely adopting a law including "a detailed list of the preconditions" and the "substance of all dictatorial powers." (Schmitt 1926c, 38 and 41)

While Kirchheimer referred to Schmitt as the key witness for the unconstitutionality of Brüning's actions, Schmitt had already long begun to take the opposite position. In the summer of 1930, Schmitt wrote a legal opinion for Brüning about the existential question for the government whether the President had the competence to determine the budget by emergency decree on the basis of Article 48, paragraph 2. Schmitt now stated that he did. He delivered his legal opinion on 28 July 1930, when it was already apparent there would be new elections, and he had made his support for the government's strategy and its austerity policies clear in preliminary talks. Brüning needed a legal opinion supporting his position because he assumed he would not have a majority in the Reichstag after the new elections, either.

At its core, Schmitt's complex argument[48] was based on four steps.[49] First, he disputed the predominant interpretation according to which only the seven fundamental rights listed in Article 48, paragraph 2 could be suspended. This made no sense, he claimed, if other measures were necessary to prevent an emergency. Second, he asserted that practical experience, court decisions, and also the academic literature had long recognized that emergency decrees could be applied in economic and financial matters, too. Third, Schmitt declared the President's decrees to be equivalent to laws adopted by a parliament. Fourth, Schmitt introduced his particular definition of a commissarial dictatorship (see Schmitt 1921, 1–19) in order to grant the President all measures he deemed necessary. Since the commissarial dictatorship was the temporary limited negation of the norm that was to be protected, a dictator who was to preserve the constitution had to have the power to disregard the constitution to this end. Schmitt concluded his deliberations with a political statement of allegiance: "The state of emergency reveals, if I may say so, the core of the state as such." (Schmitt 1931c, 259) The modern state was a state driven by the economy and finance, and it would be an anachronism to desire to turn the development back to the nineteenth century— in order to limit the instruments available to the modern state as a last resort—to those of the traditional state of emergency governed by the military and the police.

Pointing out the fact that the state had transitioned to become a modern *Wirtschaftsstaat* (state committed to promoting economic development) was not controversial under Weimar constitutional law; after all, there were a number of articles in the second part of the constitution regulating this new reality (see Gusy 1997, 342–369). What was controversial was the extensive expansion of the competencies of the President of the Reich contrary to the wording of the constitution. Schmitt's position on granting the President of the Reich competencies derived from Article 48 was the most far-reaching of the Weimar constitutional law scholars. Applying the authority of the dictatorship, which he had supported in his 1930 legal opinion and later in his articles, was not just a continuation of the earlier practice of applying the article of the constitution. Brüning's emergency decrees differed from the previous ones in their scope, their period of validity, and ultimately also in their intent regarding constitutional policy.

Just a few days after Schmitt's legal opinion supporting Brüning, Kirchheimer published an incensed attack on the new emergency decree regime. It was published in the socialist journal *Der Klassenkampf*, titled "Artikel 48 und die Wandlungen des Verfassungsystems" [Article 48 and the transformations of the constitutional system]; Gurland was one of the journal's editors.[50] The title of the article expresses part of Kirchheimer's diagnostic hypothesis: the emergency decrees of Brüning's government had transformed the system of the Weimar Constitution in a move toward an authoritarian state in the interest of the bourgeoisie. The previous system of parliamentarism with its search for compromises between the various social groups had been replaced by an "independent representation of the bourgeoisie alongside their parliamentary parties"

48 Schmitt incorporated parts of his legal opinion (which has not been published in full to this day) in several publications, see Schmitt (1931b), (1931c) and (1932a).

49 For a detailed discussion of Schmitt's position, see Neumann (2015, 174–198).

50 See Kirchheimer (1930d). The following page numbers refer to this text.

(351). What was "fundamentally different" (351) about this form of government was that the "method of giving ground reciprocally [had] finally been abandoned" (351). It was no longer necessary to take the interests of the labor movement into account at all. In this situation, the extensive interpretation of Article 48 had the function of safeguarding the new power relations by constitutional means. Kirchheimer criticized this extensive interpretation using arguments from constitutional law. For one thing, the preconditions for applying the article on dictatorship, namely that public safety was seriously threatened or disturbed, had not been met. And for another, these were not temporary emergency decrees but permanent laws.

Kirchheimer considered what Schmitt had presented as his new ingenious interpretation of Article 48 to be simply unconstitutional. He felt that besides this finding, "one more thing [must be] added" (352): the previous cases in which Article 48 had been applied under Social Democratic President Friedrich Ebert, who had been in office until February 1925, had remained within the realm of tacit or open compromises between the Social Democrats and the bourgeoisie. For the first time, this was no longer the case now. Article 48 was going to be applied not only without regard for the interests of social democracy, but explicitly against the interests of workers. The bourgeoisie was thus undermining the founding document of the Weimar Republic. The republic was built on the foundation of social compromises: "The democracy of compromise has transformed into the democracy of hostile (*feindliche*) military camps" (353). The extensive interpretation enabled the bourgeoisie to revoke the class compromise with the working class without risk and to depart from the parliamentary basis of Weimar democracy. In this transformation of the republic into authoritarian rule by the bourgeoisie, Schmitt had the role of the constitutional law ideologue.

Kirchheimer hoped that the outcome of the new election would make it impossible to form a government without the Social Democrats. But this was not to be. In the elections on 12 September 1930, the SPD suffered slight losses, and the communists gained some votes. There were dramatic changes on the bourgeois side. The right-wing parties that had supported Brüning had to weather serious losses. The biggest winner of the election was Hitler's NSDAP, coming in second at 18.3 percent. It would have been theoretically possible for a majority to form a Grand Coalition in the Reichstag. The Social Democratic Prime Minister of Prussia, Otto Braun, came out in favor of such a "coalition of the reasonable" directly after the election. Yet Brüning invoked Hindenburg's "mission" to make sure the SPD would not be part of a government again and rejected the proposal. He was intent on continuing his policy of austerity on the basis of Article 48.

In this situation, Schmitt's legal opinion provided the legitimation—based on constitutional law and urgently needed by Brüning—for a system of emergency decrees that also abolished the parliament's right to adopt budgets and take out loans. The expanded system of emergency decrees remained highly contested among scholars of Weimar constitutional law. The majority of legal scholars opposed it and renewed demands for a law in which the dictatorial competences of the president were to be clearly regulated—a demand that Schmitt had abandoned by this point. At the Tagung der Deutschen Staatsrechtslehrer (Conference of German Constitutional Lawyers) in Halle in October 1931, the conflict broke out into the open. The majority of attendees voted for a resolution urging the government of the Reich to monitor the situation more closely and ensure that the

President did not continue to abuse Article 48. Schmitt received only two votes from others supporting his opposing position (see Huber 1981, 729–730). He was in the absolute minority with his extensive interpretation and complained in his diary of "the nastiness and malice"[51] of Smend and others who had contradicted him in Halle. The next day, he noted about his stay in Halle: "bought Nazi writings; informational booklets."[52]

By quickly accomplishing what Chancellor Brüning had asked him to do, Schmitt had hoped to be included in his circle of advisors and to enjoy direct access to the center of political power in the Reich from then on (see Neumann 2015, 174–175). Yet, after his initial rapid rise, his contact with the ruling political elite came to an end for the time being. The circle around Brüning did not approach him again, leaving Schmitt to lick his wounds. During the almost two years of Brüning's term as Chancellor, Schmitt noted his personal "infuriation about Brüning"[53] in his diary multiple times after hearing how the latter was maligning him. The failure of Schmitt's first attempt to attain a greater political role did not frustrate his pleas for a presidential dictatorship, however. He now sought new contacts with confidants of politically influential Reichswehr General Kurt von Schleicher (see Pyta and Seiberth 1999, 430–432). When Brüning had been forced to resign in late 1932, Schmitt supported Franz von Papen, who had been selected as his successor in the presidential dictatorship.

Kirchheimer continued to pursue the strategy of argumentation he had taken in the spring of 1930 to play the "old" Schmitt off against the "new" Schmitt. For example, he referred to an essay by Schmitt from 1925 to argue against overly far-reaching competencies of the Reichstag to dissolve (see Kirchheimer 1932c, 399 and 405). Elsewhere, he cited Schmitt's *Constitutional Theory* which mentioned certain limits to changing the constitution (see Kirchheimer 1932d, 411). He attacked the presidential dictatorship with ever sharper words, consistently polemicizing against Schmitt as its proponent. He avoided using the term "fascism" to characterize the political system preferred by Schmitt. Instead, he chose "authoritarian state" as an umbrella term that included all dictatorial alternatives to the political system of the Weimar Republic. Kirchheimer's choice of terms also illustrates that his political language was quite different from the vocabulary of the Communist Party that accused Mussolini's Partito Nazionale Fascista, Hitler's NSDAP, German conservative parties and the SPD alike of being fascists.

9. Who is the guardian of the constitution?

Despite their disagreements about presidential dictatorship, the personal relationship between Kirchheimer and Schmitt was obviously still positive, at least until the summer of 1932. There are 18 entries about Kirchheimer in Schmitt's diaries between November 1930 and November 1932. These include notes about regularly going out to eat after the seminar, going on walks and traveling by *S-Bahn* (commuter rail) with him, as well as about brief visits to Schmitt's house, and Schmitt visiting Kirchheimer and his wife and

51 See Carl Schmitt, diary entry of 29 October 1931 (Schmitt 2010, 141).

52 See Carl Schmitt, diary entry of 29 October 1931 (Schmitt 2010, 141).

53 Carl Schmitt, diary entry of 26 September 1931 (Schmitt 2010, 138).

their baby. The entries from this period are almost identical to those from his time in Bonn. The discussions with Kirchheimer in the seminar were "quite nice" and he went for a walk with him afterwards.[54] Kirchheimer came over to his place in the evening "and drank a bottle of wine again"[55] and they had a three-hour conversation about Soviet foreign policy and the repression by the German police. A number of times, the two of them walked to the railway station together after the seminar while they continued their discussions. When Kirchheimer visited him in March 1931, Schmitt wrote in his diary "I like him" and that he had bought chocolate for Kirchheimer's baby Hanna.[56] In June 1931, Schmitt and his wife Duška came over to Kirchheimer's place to visit little Hanna. On this particular occasion, the adults talked about the chances of having new national elections. Schmitt noted in his diary that Kirchheimer was "smart and sympathetic."[57] He praised his wit and intelligent contributions again in an entry about his seminar session on fundamental rights and the *Rechtsstaat*.[58] All that was soon to change during the dramatic political events of 1932.

To grasp the complexity of the personal relationship between the two men during the growing crises of the republic, we must not forget Schmitt continued to support Kirchheimer. In December 1930, when Kirchheimer applied to the Rockefeller Foundation for a one-year research stipend in the US, Schmitt endorsed his plans as a reviewer. In his letter of recommendation, Schmitt praised the "particular merits of Kirchheimer's way of working and producing", stating he had a "good eye for the sociological and historical circumstances and developments from which he derived both the legal concepts and the theoretical arguments."[59] However, in contrast to the young philosopher Leo Strauss, whose application Schmitt had also supported, Kirchheimer was unsuccessful.

According to Schmitt's diary entry, Kirchheimer was disappointed after learning about the decision and became desperate.[60] He decided to follow two tracks at the same time for his future career. One the one hand, he still tried to obtain a position in academia. On the other hand, he had to make living and so started working as a lawyer. On 2 June 1931, he passed the *Große Juristische Staatsprüfung*, completing his *Referendariat*; he received the grade "sufficient" on the first day of examinations and "good" on the second; his overall grade was "fully satisfactory."[61] After passing his exams, he was unsure about what career path to pursue. His dream job was to be an academic but he considered opportunities at German universities to be hardly realistic at the time. He gained some experience teaching occasionally at the Gewerkschaftsschule (Trade Union School) in Berlin. This had been established by the Räte (council) movement of 1919 and had evolved from a revolutionary educational institution into an institution for

54 Carl Schmitt, diary entry of 6 November 1930 (Schmitt 2010, 53).

55 Carl Schmitt, diary entry of 28 November 1930 (Schmitt 2010, 62).

56 Carl Schmitt, diary entry of 14 March 1931 (Schmitt 2010, 97).

57 Carl Schmitt, diary entry of 13 June 1931 (Schmitt 2010, 116).

58 Carl Schmitt, diary entry of 30 July 1931 (Schmitt 2010, 128).

59 Letter of recommendation by Carl Schmitt for the Rockefeller Foundation concerning Otto Kirchheimer's application dated 4 December 1930. Carl Schmitt Papers, RW 265–13422/1-2.

60 Carl Schmitt, diary entry of 13 March 1931 (Schmitt 2010, 97).

61 An excellent grade at the time. Bundesarchiv Berlin, R 3001, 6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 9.

industry-specific training for employee representatives in preparation for their work as functionaries.[62] Kirchheimer taught courses in labor law and modern European history.[63]

He also applied for a job in the Prussian public service in late 1931 because he desperately needed work, but this was also unsuccessful.[64] He had to earn money somehow. There was nothing left of his inheritance, partly because his brothers had lost money speculating on the stock market. He was now expected to contribute to the family's living expenses. After a visit to his place, Schmitt noted in his diary: "Kirchheimer was depressed because he isn't earning any money."[65] His father-in-law Kurt Rosenfeld, with whom Kirchheimer still had a good relationship despite separating from his daughter in late 1931, not least because of their political differences, advised him to open a law firm. Kirchheimer followed this advice and decided to try his professional luck as one of more than 3,000 lawyers in Berlin. According to his long-time friend Eugene Anschel (see Anschel 1990, 101), his overall personal situation and unclear professional prospects plunged him into a deep personal crisis, which may explain the pause in publications in 1931.

For Schmitt, conversely, 1931 was another golden year of enormous productivity. He wrote essays on international law and the League of Nations.[66] He published articles on a reform of the Reich and the constitution and completed a major commentary on the fundamental rights and duties of citizens according to the Weimar Constitution. He gave several lectures on the competencies of the President of the Reich and wrote pieces defending the system of emergency decrees that Chancellor Brüning was using on an ongoing basis to govern. In addition, in May 1931, he published the book *Der Hüter der Verfassung* [The guardian of the constitution], in which he summarized his criticism of all forms of judicial review and highlighted its political consequences.

The debate about judicial review in Weimar constitutional law had been triggered by a *Reichsgericht* decision in November 1925. That decision asserted that every court in the Reich had the competence to review laws adopted by the parliament with respect to their substantial constitutionality, in other words, to reject them as unconstitutional. The decision divided scholars on Weimar constitutional law along a political front line. Those constitutional law professors who were reserved toward the Weimar Constitution or even rejected it—and they were in the majority—welcomed the broad interpretation of judicial review because they saw it as a fitting check on parliamentarism, which they rejected. The smaller group of jurists who were liberal, leftist, and loyal to the republic rejected the broad interpretation of judicial review just as emphatically. They feared it would bring about a shift of the Weimar class compromise that would disadvantage the working class. Their fears were not unfounded since the *Reichsgericht* decision pertained to problems of inflation that affected not only the working class but especially the middle

62 On the history and development of the Trade Union School in Berlin, see Feidel-Mertz (1972, 70–86) and Olbrich (2001, 185–192).

63 Otto Kirchheimer, Curriculum Vitae (undated, ca. 1939). Emergency Committee in Aid of Displaced German/Foreign Scholars, Public Library, New York. I, A Grantees 1933–46, Box 18, Folder 13 (Kirchheimer, Otto).

64 See Bundesarchiv R 3001, 6322, Ministry of Justice file concerning Dr. Otto Kirchheimer, p. 14.

65 Carl Schmitt, diary entry of 21 November 1931 (Schmitt 2010, 146).

66 On this subject, see Chapter 4.

classes who held their savings in the banks. Since the Weimar judges also belonged to the middle class, their critics called judicial review a method of class justice. The most vocal critics of this judicial review on the side of the Social Democrats included Franz L. Neumann, Ernst Fraenkel, and Otto Kirchheimer.

Only two prominent professors of constitutional law took positions unconnected to this political front line. One was liberal Hans Kelsen, the father of the Austrian Constitutional Court. He argued against granting judicial review to all courts in Germany and in favor of establishing a special constitutional court instead.[67] The other legal theorist deviating from this political front line was Schmitt. In *Der Hüter der Verfassung*, he attacked Kelsen and rejected any form of judicial review, including the establishment of a special constitutional court. Up until that point, Schmitt's position on this question had fluctuated somewhat (see Wendenburg 1984, 175–179). In his 1925 legal opinion on the expropriation of the princes, he had still granted the courts substantial judicial review of laws adopted by the parliament. He was able to protect the German nobility against expropriation with this opinion. In his *Constitutional Theory* of 1928, he had mentioned arguments on both sides concerning judicial review but had himself not taken a consistent position on its desirability. This changed from 1929 on when Schmitt began to voice his view in several publications directed against Kelsen that a constitutional court would be pointless and impossible. He developed his arguments systematically in the book *Der Hüter der Verfassung* and combined them with conclusions about necessary changes to the political system.[68]

Schmitt's key objection to a constitutional court was that settling political issues in the courts would automatically have the problematic consequence of a "politicization of the judiciary" (22). He substantiated this objection with two arguments. The first was methodological. Schmitt believed that the way a constitutional court worked was to apply a general legal norm to another general legal norm. This contradicted the judiciary's characteristic way of working, namely to subsume a matter under a general legal norm. In a case before a constitutional court, "nothing is subsumed; all that happens is that a contradiction is stated, and then a decision is made about which of the norms contradicting each other holds and which one is not to be applied" (43). His second argument was that every real decision by a judge occurs *post eventum*, in other words, "always too late, politically speaking" (33). This was all the more true the more carefully the proceedings were conducted, following judicial procedure and the *Rechtsstaat*.[69]

Both arguments boil down to Schmitt's assertion that, on closer examination, constitutional jurisdiction was not part of the judicial system. Decisions about disputes or doubts pertaining to constitutional law were not matters to be settled by the courts but were always highly political. Taking this assertion as a starting point, Schmitt set out in the following chapters of *Der Hüter der Verfassung* to identify a functional equivalent of the role that Kelsen and others assigned to a constitutional court. He found this equivalent, for Germany, in the role of the President of the Reich. Schmitt preceded this finding

67 On Kelsen's view, see Olechowski (2020, 507–513). On the controversy between Schmitt and Kelsen on this subject, see Vinx (2015) and Olechowski (2020, 507–513).

68 See Schmitt (1931b). The following page numbers refer to this text.

69 On the critical analysis of these two arguments of Schmitt's, see Neumann (2015, 229–232).

with a political diagnosis of "the specific situation of the constitution in the present time" (70), an unequivocal criticism of parties, pluralism, and federalism. The political parties and the "polycracy" of interest groups had caused the parliament to degenerate to nothing more than a stage on which the pluralist state would perform. German federalism made it more difficult to reach uniform political decisions. An "unstable coalition-party-state" (88) had destroyed the "unitary, indivisible unity of the entire German people" (89), which was required by the constitution. In this situation, the composition of a constitutional court would merely reflect the splintering of state unity because of the pluralistic system and would be unable to make decisions with pacifying effects.

Schmitt believed that only a truly independent institution could remedy the situation: a "*pouvoir neutre et intermédiaire*" (132) following Benjamin Constant. This could only be the President of the Reich. For he alone represented neutrality and independence of party politics. The reasons Schmitt gave were the position of the President according to the constitution, i.e., direct election by plebiscite, his long seven-year term of office, his independence from the parliament, and the difficult procedure to remove him from office. He also listed the President's special powers: to represent the Reich in matters of international law, to promulgate laws, to dissolve the Reichstag at any time, and to appeal to the German people directly, bypassing parliament. Of the powers assigned to the office of the President, the most important were ultimately those under Article 48 of the constitution. It authorized the president to declare a state of siege in times of crisis and to rule by emergency decree. Schmitt interpreted the strong constitutional position of the President of the Reich as an "error in terms of legal theory" because it provoked a breach with the organizational principle of the bourgeois state under the *Rechtsstaat*. This breach could have dangerous consequences and tear the constitutional order apart from within. Yet this danger could be averted if the doctrine of *pouvoir neutre* was "developed further" (137). And this was precisely Schmitt's goal.

In his view, the President of the Reich was the only possible true guardian of the Weimar Constitution. Not only would a special constitutional court be entirely superfluous but it would be impossible in the framework of the Weimar system. At the end of the book, Schmitt did not mince words in his explanation of the role he ascribed to the President in the current political situation: only the democratically legitimized President of the Reich could be an effective "counterweight against the pluralism of social and economic power groups" (159). He alone could act as the "guardian and upholder of the constitutional unity and integrity of the German people" (159). He alone had the "authority" (159) to make state politics "capable of taking action" (159) in the midst of all conflicts and to maintain that capability. In this piece, Schmitt elevated the role of the President in constitutional policy by adding a further component: he liberated his political preference for the President of the Reich from the odium of dictatorship and also distanced himself from the monarchist doctrine of a "superior third party."

Kirchheimer had already criticized hypotheses like this previously. It was an "erroneous conception" (Kirchheimer 1930e, 68) to assume that a President of the Reich could liberate himself from all political ties and act completely independently of special interests, and he declared that such an assumption was sociologically uninformed nonsense.

10. Conclusion: The art of quoting each other

One of the special features of Schmitt's theory was that it equated popular sovereignty with the constituent power of the people, thus devaluing all firmly institutionalized elements of democracy. Schmitt consistently played the people, which he asserted was not bound by law, off against all established institutions of democratic decision-making: the people "remains the *Urgrund* (origin) of all political action, the source of all power, which expresses itself in continually new forms, producing from itself these ever renewing forms and organizations" (Schmitt 1928b, 128). He rejected domesticating, as it were, "the people" itself, which would make it a "state body." This concept of the people does not presuppose an ontologizing *völkisch* (of the *Volk*, chauvinistic-nationalistic, antisemitic; see Glossary) mysticism. But it ontologizes something else: the element of non-organization. Kirchheimer did not agree with this anti-institutional core of Schmitt's theory, as can be seen clearly in his defenses of parliamentarism and democracy.

During the four years from 1928 to 1931, the personal relationship between Kirchheimer and Schmitt continued to be good, and they often met and went for walks in Berlin; after a very short time, the constellation of teacher and student was a thing of the past. They now exchanged manuscripts and reprints frequently so that they could even quote from the other's as yet unpublished texts.[70] Kirchheimer, who was only twenty-three when he arrived in Berlin, self-confidently produced a number of publications on various topics. Schmitt began to quote Kirchheimer as early as 1929. Not surprisingly, Kirchheimer quoted from Schmitt's writings much more often. Even in the absence of a precise quantitative analysis of citations in Kirchheimer's works from 1928 to 1931, it is easy to detect that he quoted no other expert on Weimar constitutional law as often as Schmitt. After he had moved to Berlin, Schmitt's political positions became more radical. The more openly he advocated for a presidential dictatorship after 1930, the more often Kirchheimer cited him in order to almost address him directly.

Ellen Kennedy's statement that Kirchheimer had only begun to criticize his former teacher Schmitt in the summer of 1932 (see Kennedy 1986, 399 and 416)[71] is incorrect in light of the many differences between them described above. The assertion by Stephen Turner about Kirchheimer's "dependence on Schmitt," which was hidden "under a layer of dismissive references to Schmitt" (Turner 2011, 120) in his writings of this time, is also inaccurate. A summarizing comparison of their writings after the end of the period when they were both in Bonn through the end of 1931 shows that their differences extended across the entire spectrum of the topics they worked on: the purpose of parliamentarism, the role of political parties in modern democracies, the potential of the Weimar Constitution for stability and development, the function of Article 48 and the presidential dictatorship, property rights and expropriation, and their assessments of Italian fascism. Regardless of these substantive differences, Volker Neumann has rightly

70 For example, in his book on expropriation, Kirchheimer quoted from an unpublished legal opinion of Schmitt's on a German-Polish agreement dated October 1929 on regulating questions relating to property. In *Legality and Legitimacy*, Schmitt quoted from the manuscript of the eponymous essay by Kirchheimer, without indicating page numbers.

71 Following Kennedy, see also Bavaj (2007, 44–49).

pointed out that there are some similarities between their writings at the formal level (see Neumann 1981, 236–239). Both preferred the format of shorter works inspired by topical political events, revealing an intention to intervene politically; this may explain why neither left an oeuvre with a systematically developed theory. Both emphasized style and rhetoric in their works. Both used strong words and prized new terms to bring things to a head. Their texts often resound with bold sentences that assert radical acts of will. And both occasionally argued in an openly agitational manner. Each in their own way, Kirchheimer and Schmitt represented a type of political thinking in which theoretical analysis and political intervention were inseparable.

The pattern of communication was almost always the same in their publications from these years: Schmitt took the first step by formulating a position on a particular question and then Kirchheimer grappled with it in his criticism. Yet he did so in five different ways. One was to take up Schmitt's concepts and theorems and frame them differently in social theory, thus arriving at a different assessment. The best example of this is the hypothesis of the structural change of parliamentarism. To Schmitt, it was proof of the historical demise of parliamentarism; Kirchheimer interpreted it in a positive light, as a new phase of mass democracy. In a way, Kirchheimer exploited Schmitt's outstanding reputation for his own purposes. He borrowed the authority of a constitutional law professor recognized across all political camps to support his own argument as long as it seemed to fit. A second way was to present Schmitt's hypotheses and then formulate them more pointedly in the next step of the argument. The best example is Kirchheimer's *Weimar—and What Then?* In his *Constitutional Theory*, Schmitt referred to "dilatory formulaic compromises" and Kirchheimer to a "constitution without decision." A third way was to present Schmitt himself as a witness against Schmitt. The best example of this was Kirchheimer's criticism of Schmitt's extensive interpretation of Article 48 to justify the presidential dictatorship. Kirchheimer reminded readers of earlier works by Schmitt on the subject in which he had promoted strict regulation of emergency powers, a position Kirchheimer agreed with. The fourth was to "expose" Schmitt, either as a bourgeois ideologist as in the case of property rights and expropriation or as an anti-constitutional supporter of authoritarianism in his interpretation of Article 48. A fifth way, finally, was to go on the offensive and attack Schmitt and his positions as naive nonsense—for instance, in Kirchheimer's critique of Schmitt's panegyric on the nonpartisanship of the President of the Reich.

Schmitt's reactions to this barrage of criticism did not follow a uniform pattern, either. He usually ignored it—at least in public; it is not difficult to imagine that they spoke about these topics in their frequent conversations. When Schmitt felt it incumbent upon himself to respond publicly, he heaped great praise on Kirchheimer. He extolled Kirchheimer's book on the problem of expropriation, and even more his analysis of the constitution in *Weimar—and What Then?* But using a similar tactic to Kirchheimer, who had done so on occasion, he placed Kirchheimer's hypotheses in the context of a completely different theoretical frame of reference. He considered Kirchheimer's book on expropriation particularly instructive, not least because he could use it as proof of the socialist threat. In Schmitt's view, the pointed analysis of the constitution in *Weimar—and What Then?* became evidence of the socialist movement's vitality and determination to fight.

Visualizing the cascade of the fundamental differences described in this chapter, we wonder once again what drove the socialist jurist Kirchheimer—and *cum grano salis* also the leftist trade union attorneys Franz L. Neumann and Ernst Fraenkel—to seek such proximity to Schmitt during these years. It is easy to become lost in speculation when attempting to answer this question. Yet one of the reasons is certainly fascination with Schmitt's personality, which has been widely discussed. One facet of it was that although he reacted to the Young Socialists' criticisms in a friendly manner, he simultaneously gave them the impression that he considered their opposing views to be taken seriously because they were dangerous. They were political enemies, but following *The Concept of the Political*, this did not necessarily mean they had to become personal enemies, too. Another reason was certainly that Kirchheimer and the two other Young Socialists hoped their academic careers could be promoted by Schmitt since the latter had the reputation of being very tolerant in those days.

In my opinion, there were another three even more important reasons. First, Kirchheimer and Schmitt shared the diagnosis that the tensions in the constitution would not be tenable for long but would have to be resolved in one political direction or the other. This diagnosis of the crisis was easier for Kirchheimer to formulate if he was in contact with Schmitt, who was a master of evoking ever new crises. Second, Schmitt was a widely known critic of the Weimar parliamentary democracy. Proximity to him offered the opportunity to observe firsthand, as if in the lion's den, which new lines of argument he was devising to support his positions. Third, Kirchheimer (as well as Neumann and Fraenkel) found Schmitt to be one of the very few German legal scholars—besides Hermann Heller—who were genuinely interested in socialist theory, albeit, in Schmitt's case, as a form of observing the enemy.

When reconstructing the influence of Schmitt's writings on Kirchheimer, we must not forget how much Schmitt benefited from Kirchheimer. Schmitt had no deeper knowledge of the work of Marx and Engels. He was familiar with some writings by Lenin and Trotsky but had only limited knowledge of the debates among the different strands of current-day Marxism. It was in particular through Kirchheimer that he gained insights into Marxist discussions and the radical leftist groups' worlds of ideas to which he would otherwise have had no access.[72] Not only did Kirchheimer convey valuable information from the socialist debating circles but later, in Berlin, he also facilitated Schmitt's personal contact with his father-in-law, socialist lawyer Kurt Rosenfeld, whom Schmitt met a couple of times. He also connected Schmitt to Franz L. Neumann and Ernst Fraenkel. Kirchheimer, Neumann, and Fraenkel as a group had their own significance for the development of Schmitt's legal theory. As he argued with this younger generation of socialist jurists, he was able to readjust and substantiate the positions he considered appropriate for the changing political *Lage* of the republic at the time.

72 See Neumann (1981, 239) and Breuer (2012, 111–140).