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INDIVIDUALISM, THE TOTAL STATE AND RACE IN THE VIEWS OF CARL SCHMITT

By

EVA REGINA IMBSWEILER

Under the Direction of Andrew Altman, PhD

ABSTRACT

The jurist Carl Schmitt's views on the total state and race need further clarification as long as the English language edition of his *Concept of the Political* presents an apologist commentary. The questions are to which degree Schmitt's works written during the Weimar Republic are tainted with totalitarian and racist ideas and whether Schmitt gave up fundamental principles during Nationalist Socialism. This thesis examines writings by Schmitt between 1913 and 1940 to reconstruct a coherent anti-individualistic legal viewpoint and its arguments. The first part finds that Schmitt undermines the individual rights of the Weimar Constitution. The second part discusses Schmitt's role as a theorist of totalitarianism. The third part considers Schmitt's anti-Semitism as underlying motivation for his political theory and analyzes his racism in light of his anti-individualism. Schmitt frequently argues by invoking the necessity of history and by justifying political action as necessary. These arguments should be rejected.

INDEX WORDS:

Carl Schmitt, Anti-individualism, Totalitarianism, Racism, Concept of the Political.

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EVA REGINA IMBSWEILER

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

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2016

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May 2016

DEDICATION

This thesis is dedicated to those who have been victims of totalitarianism and racism.

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Introduction

The jurist Carl Schmitt's rejection of individualism, a coherent line throughout his work, is key to his philosophical and political position. An entry in the *Encyclopedia of the Social Sciences* from 1930 states that

[a]ll modern political theory, except the theory of Bolshevism and of Fascism is individualistic in that it seeks to find room for and encourage the individual moral judgement and is based on toleration and the maintenance of a system of rights.¹

If that characterization is correct, there are several ways to locate Schmitt's position, which does not incorporate any of those features. The first would be to consider him to be not modern at all.

The second interpretation is that Schmitt is fascist, in consideration of his theoretical and practical engagement in Hitler's Nationalist Socialist party. Another concern regarding

Schmitt's position is his anti-Semitism. One way to explain Schmitt's endorsement of laws against Jews and his comments on race during his Nazi engagement is to isolate that time and explain his behavior as "opportunistic."² According to George Schwab, Schmitt adopts

"overnight...his accommodation to some extent to the central vogue of Nazism, anti-Semitism..." and is "prepared to sacrifice a fundamental principle for an opportunistic reason."³

If Schmitt were merely an opportunist during the time in question, between 1933 and 1936, one could hold the rest of his work, both before and after, to be unaffected by anti-Semitism.

According to Schwab, Schmitt remains "one of the foremost legal and political thinkers that Germany has produced in [the twentieth] century"⁴ and "has never entertained the thought of a totalitarian state."⁵ Schwab's views on Schmitt are still prominent in the English language

¹ A.D. Lindsay, "Individualism", *Encyclopedia of the Social Sciences*, New York, 1930-35, Vol. VII, 676. Quoted in Lukes, *Individualism*, 42.

² George Schwab, "Carl Schmitt: Political Opportunist?" *Intellect* (February 1975):334-337.

³ Ibid. 336.

⁴ Ibid. 334.

⁵ George Schwab, Footnote P. 39 in Carl Schmitt, *The Concept of the Political*.

edition of *The Concept of the Political*,⁶ which Schwab has translated, introduced and annotated. Because there is now evidence to the contrary, in English accessible through Reinhard Mehring's newly translated biography⁷, Schmitt's views on the total state and on race should be thoroughly reassessed.

My aim is to find out whether Schmitt's critique of individualism can provide an underlying principle from which we can understand his works to be coherent, without resorting to the charge of opportunism. If anti-individualism is one of Schmitt's underlying principles, can it help explain his Nazi period? The historian Paul Bookbinder suggests that Schmitt's early work already contains the "roots of totalitarianism."⁸ Maybe it also contains roots of racism. If that is so, how does Schmitt's subsequent writing during the Weimar Republic cohere with the earlier as well his Nazi period work? Coherence does not entail that Schmitt does not change his positions over time. Demonstrating the coherence of Schmitt's anti-individualism points to an underlying unity in his thought, which makes it plausible that Schmitt meant what he wrote in support of the Nazi regime and its ideology.

Establishing coherence does not establish a necessary development. Schmitt is an established university professor in 1933, known for his national conservatism. He could have remained in his teaching position in Bonn, instead of advancing his career at Berlin University as a member of the NSDAP, the Prussian state council (*Staatsrat*), Hans Frank's *Akademie für Deutsches Recht* and as the head of the German Association of Nationalist Socialist Jurists. Not every anti-individualist becomes a Nazi. But Schmitt is an anti-individualist legal scholar who is

⁶ Carl Schmitt, *The Concept of the Political*, Expanded Edition, Translated by George Schwab (Chicago: University of Chicago Press, 2007), 96.

⁷ Reinhard Mehring, *Carl Schmitt: A Biography*, trans. Daniel Steuer (Malden, MA: Polity Press, 2014).

⁸ Paul Bookbinder, "Roots of Totalitarian Law: The Early Work of Carl Schmitt," *Social Science*, 56:3 (1981), 135-145, Stable URL: <http://www.jstor.org/stable/41884716>, accessed on Sep. 3, 2015.

determined to replace the modern individual-based law system of the Weimar Republic with a Germanic law system based on hierarchical order. After his prescription for a presidential dictatorship under Hindenburg is not realized, Schmitt sees in the Nazi state a real chance for establishing his goal: a system of law based on inequality. My thesis is that anti-individualism is the organizing argumentative principle in Schmitt's political theory that underlies his endorsement both of the total state and of racism.

In the first section, I look at how Schmitt's opposition to individualism draws from Bonald's and Maistre's reaction to the French revolution, how he insists on social order and argues against the Kantian or Hegelian principles of autonomy, subjectivity and political participation, with special attention to Schmitt's early and still untranslated work, *Der Wert des Staates und die Bedeutung des Einzelnen*.⁹ After establishing Schmitt's theoretical point of departure, I discuss his position against individual rights in *Legalität und Legitimität*.¹⁰ The second section examines Schmitt's concept of the total state, which he develops between 1927 and 1933. An analysis of *The Concept of the Political*, several essays and Schmitt's first large Nazi publication, *Staat, Bewegung, Volk*,¹¹ reveals Schmitt's inclinations toward Italian fascism and his justification and enforcement of Nationalist Socialist law. From those findings, the view of Schmitt as a theorist and supporter of totalitarianism emerges. The third section traces Schmitt's anti-Semitic sentiments and pre-1933 Nazi sympathies through his diaries, provides historical data and finally tries to show what Schmitt's view of race means for his political theory, and how race is related to his anti-individualism.

⁹ Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (1913), Third, corrected edition (Berlin: Duncker & Humblot, 2012).

¹⁰ Carl Schmitt, *Legalität und Legitimität* (1932), Eighth, corrected edition (Berlin: Duncker & Humblot, 2012).

¹¹ Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg: Hanseatische Verlagsanstalt, 1933).

1. Individualism

Schmitt's view of individualism is negative. In his early texts, the critique is directed against the political claims of the French Revolution and the political philosophies of Kant and Hegel. He rejects the role of the individual in the justification of the state, rejects individual rights and develops a theory of "democracy" based on the people as a whole. In the course of Schmitt's repudiation, political individualism comes to stand in for political liberalism. "Liberal individualism" becomes an antithesis against which Schmitt justifies his own theory of law that rejects parliamentarism, the rule of law, division of power, equality and individual rights. In the following, I am going to look at the background of Schmitt's anti-individualism and its various expressions. I argue that Schmitt coherently rejects individual rights, even in the legal theory that he presents during the Weimar Republic. Demonstrating the rejection of individual rights as a coherent position through several stages of Schmitt's work helps to establish anti-individualism as an underlying principle that justifies totalitarianism and racism.

1.1 Bonald and Maistre

In his critique of individualism, Schmitt builds on the French philosophers Joseph de Maistre and Louis de Bonald. In reaction to the French Revolution of 1789, in which the bourgeoisie, as the third estate after the nobility and the clergy, declares universal human and civil rights, the two noblemen Bonald and Maistre aim to restore monarchy in France. The term "individualism" is first used by Maistre in 1820 as a pejorative, and refers to putting individual freedom above the state and traditional society.¹² In Maistre's theological perspective, the single human being is meaningless in the face of providential powers. Even though more than one hundred years pass before Schmitt molds his critiques after Bonald's *Théorie du pouvoir*

¹² Lukes, Stephen, *Individualism*, New York, 1973: Harper & Row, 3-5.

from 1796, the theorists' historical situations are similar. Schmitt's work during the Weimar Republic, 1918 to 1933, can be interpreted as a reaction to the sudden end of German monarchy at the loss of World War I and a desire to restore hierarchical order.

Similar to Maistre and Bonald, Schmitt hopes to undermine liberty and equality with his anti-individualist arguments. Schmitt especially endorses Bonald's early sociological approach that considers the individual to be a product of society:

Bonald...declares with great definiteness, already in 1796, what [the reaction] is about: the contrast of liberal individualism and social solidarity. Not the individual human or the mass of individuals is, according to him, the carrier of historical activity, but instead the society...that constitutes the individual human.¹³

Bonald is acknowledged for his early theories about individuation and language. He is supposed to have influenced the French sociologists Comte and Durkheim. According to his early sociological theory, the process of individualization "consisted...in the conversion of an organic society into a rabble of disconnected atoms,"¹⁴ accompanied by the loss of religious and monarchical authority. Schmitt praises Bonald's contribution to political philosophy in the production of a system that incorporates "ideals of social solidarity that can be characterized as just as new as those of liberal individualism."¹⁵ The important question that Bonald raises is whether the individual makes itself and makes society, or whether "society makes itself" and creates the individual. Schmitt endorses Bonald's answer that society, rather than the individual, is the new central category of historical development, even though the central category of Schmitt's own legal and political orientation will be the people as a whole, the *Volk*.

¹³ Carl Schmitt, *Political Romanticism* (1919), trans. Guy Oakes (Cambridge, MA: MIT Press 1986), 114-15.

Schmitt refers to Bonald's *Théorie du pouvoir* (1796, no page number).

¹⁴ Nesbitt, Robert. *Prejudices: A Philosophical Dictionary*. Cambridge, 1982: Harvard UP, 185.

¹⁵ *Political Romanticism*, 154.

1.2 Social Order against Individualism

The opposition of individualism and social order is prominent throughout Schmitt's work. In *Political Romanticism*, first published in 1919, he defends order and hierarchy against the individualistic attitudes and political claims of the so-called "political romantics," a variety of writers who express their hopes and ambitions for political participation, during the aftermath of the French Revolution. He finds they lack political substance with their exaggerated self-importance that, in his view, can only be the product of an "individualistically disintegrated society."¹⁶ According to Schmitt, the loss of authority and the newly gained liberties result in a

...bourgeois world that isolates the individual in the domain of the intellectual, makes the individual its own point of reference, and imposes upon it the entire burden that otherwise was hierarchically distributed among different functions in a social order.¹⁷

In 1934, Schmitt rejects liberal political theories in favor of re-establishing a political system based on "concrete order." He names the German adoption of liberal constitutionalism in the nineteenth century as one of the "two great invasions of foreign law," after the introduction of Roman law at the end of the Middle Ages. In the rational law (*Vernunftrecht*) of the seventeenth and eighteenth centuries,¹⁸ Schmitt finds elements of both normative and decisionist thought that have replaced what he calls the thought of "concrete order,"¹⁹ a hypothesized non-abstract mode of Germanic thinking from the Middle Ages that he wants to reintroduce after constitutional democracy in the Weimar Republic ends. Instead of following rules and statutes, the "orders and forms of communal life"²⁰ should be free of the "artificial superstructure of

¹⁶ Carl Schmitt, *Political Romanticism*, 20. Oakes's term 'disintegrated' has a more negative connotation than Schmitt's term 'aufgelöst' (dissolved), which is also the term that Hegel uses to describe the individualization of society.

¹⁷ Ibid.

¹⁸ Carl Schmitt, *Drei Arten des rechtswissenschaftlichen Denkens* (1934), Berlin: Duncker & Humblot, 2006, 7.

¹⁹ Carl Schmitt, "Unsere geistige Gesamtlage und unsere juristische Aufgabe," *Zeitschrift der Akademie für Deutsches Recht*, ed. Hans Frank, 1 (1934): 11.

²⁰ Ibid. 12.

universal concepts and general norms,” and instead correspond to the “authentic, essential order of a people.”²¹ Schmitt’s example is the family, which forms a concrete institution within the patriarchal order that he sees challenged by the “normativist dissolutions” of the nineteenth century.²²

The establishment of a new, anti-individual order is an unwavering principle throughout Schmitt’s work. While it is unclear how a feudal order in Germany could also be a new order, it becomes evident that Schmitt does have a new world order in mind. His essay from 1929, “The Age of Neutralizations and Depoliticizations,” predicts a new order coming out of intellectual and political conquest, in which “spirit struggles with spirit, life with life.”²³ At the end of the essay, Schmitt places the motto *Ab integro nascitur ordo*, in his translation: from “the power of an integral understanding of this [struggle] rises the order of human things.”²⁴ In 1940, he explains how parallel intellectual and physical struggle can lead to a new world order that makes the existing—in Schmitt’s view liberal and individualist—international law obsolete:

When empires collapse and new orders are fought over, the structures of the international law systems attributed to the old empires appear in graspable clarity. Then the positivist whitewash falls away from the core question which is always also a question of space.²⁵

Schmitt’s supports the claim to an authentic German space with his claim to a new legal order, which becomes known as the “German Monroe Doctrine”:

[T]oday, a powerful German Empire has risen. From a weak and powerless center of Europe came a strong...one that is able to let its great political idea, the recognition of each people as a living actuality that is determined by *Art* [kind, race], origin, blood and soil, radiate into the Middle and Eastern European space

²¹ Ibid.

²² Ibid. 17.

²³ Carl Schmitt, “The Age of Neutralizations and Depoliticizations” (1929). *The Concept of the Political*, Expanded Edition, Translated by George Schwab (Chicago: University of Chicago Press, 2007), 96.

²⁴ Ibid.

²⁵ Carl Schmitt, “Reich und Raum: Elemente eines neuen Völkerrechts,” *Zeitschrift der Akademie für Deutsches Recht*, ed. Hans Frank 7:1 (1940: Beck’sche Verlagsbuchhandlung): 201 The publication of his article in the journal of Hans Frank’s Academy for German Law provides evidence for Schmitt’s continued collaboration and influence after 1936.

and is able to reject the meddling of powers that are foreign to the space or not ethnic [*völkisch*]. The deed of the *Führer* has given the thought of our empire political actuality, historical truth and a great future under international law.

*Ab integro nascitur ordo.*²⁶

Whether Schmitt's vocabulary merely accommodates Nazi ideology, and if so, to what degree, is an open question. But the right to space of a people is for Schmitt a basic right resulting from concrete order. It also results from the freedom to fight for a new order of masters and slaves.

1.3 The Individual in the State—Plato against Kant and Hegel

In his 1913 habilitation, *Der Wert des Staates und die Bedeutung des Einzelnen*,²⁷

Schmitt sets the task for a social re-ordering in which rights are not universal or general, but apply only to privileged groups:

The ancient philosophers divided humanity into two halves, into masters and slaves, those who were able to hold rights and those who were not... Today, we praise ourselves that we don't acknowledge such external factors anymore and don't make a difference between persons before the law. But we should know that the meaning of our universal human freedom can only be, to work out the dualism in greatest objectivity, undeterred by the given social power relationships between groups, so that it is not external contingencies that decide.²⁸

Schmitt writes against the equal treatment before the law for all citizens of the second German empire, including Jewish emancipation, granted in its constitution of 1871.²⁹ But Schmitt goes further and denies that anyone should hold rights in the form of individual civil liberties. He argues that “[i]t is misleading to speak of the freedom of the individual as a boundary for the

²⁶Carl Schmitt, “Der Reichsbegriff im Völkerrecht.” *Positionen und Begriffe: im Kampf mit Weimar—Genf—Versailles 1923-1939* (Hamburg: Hanseatische Verlagsanstalt, 1940), 313. The Latin motto is missing in the reprint, “Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte,” *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969*. Ed. Günter Maschke (Berlin: Duncker & Humblot, 1995). Schmitt includes this motto in several works.

²⁷ Carl Schmitt, *Der Wert des Staates und die Bedeutung des Einzelnen* (1913), Third, corrected edition (Berlin: Duncker & Humblot, 2012).

²⁸ *Ibid.* 92-93. My translation.

²⁹ Gesetz betreffend die Verfassung des Deutschen Reiches vom 16. April 1871, online <http://www.verfassungen.de/de/de67-18/verfassung71-i.htm>, accessed on Jan. 20, 2016

state.”³⁰ Civil liberties, which would guarantee specific freedoms in the form of individual rights, violate Schmitt’s understanding of law (*Recht, right*) as a privilege of the state. He further argues that “[s]peaking of freedom would mean to conceive of the individual as the bearer of rightful claims. Such concrete political demands would presuppose that the state was not a pure state of law (*Rechtsstaat*) but a means for material ends.”³¹ This claim opposes the social welfare legislation enacted under Bismarck as well as much older property rights.

From a philosophical perspective, Schmitt turns explicitly against Kant. He proclaims that “no individual has autonomy in the state.”³² According to Reinhard Mehring, Schmitt largely ignores the philosophical importance of Kant and “dismissed the rationalist project of philosophical autonomy and reason altogether.”³³ Schmitt does not ignore Kantian philosophy completely, however; he uses its idea of individual freedom as a caricature, in order to promote his own conception of law. In a polemical comment on Kant’s view of *Enlightenment*, as the exit from one’s self-inflicted immaturity, Schmitt writes:

In this society, it is left to the private individual to be his own priest. But not only that. Because of the central significance and consistency of the religious, it is also left to him to be his own poet, his own philosopher, his own king, and his own master builder in the cathedral of his personality.³⁴

The comment is particularly aimed at the self-absorption of the political romantics, but Schmitt also dismisses Kant’s claim that human dignity is based on the capacity for moral reasoning.³⁵

³⁰ WdS, 98.

³¹ WdS, 99. In his argument, he turns the concept of *Rechtsstaat* against its established use. *Rechtsstaat* means a state that follows the rule of law and acts towards its citizens within a constitutional framework, but Schmitt defines “pure” *Rechtsstaat* through its relationship to a super-positive law and excludes the individual from that relationship. See also p. 12.

³² WdS, 101.

³³ Ibid. 304.

³⁴ Ibid.

³⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785), translated and edited by Mary Gregor (NY: Cambridge, 1998), 42-43. “...morality, and humanity insofar as it is capable of morality, is that which alone has dignity.”

For Schmitt, dignity belongs to the state, and it can be conferred on an individual only insofar as the individual becomes a servant of the state. His model is Plato's ideal state in which "everyone becomes an official, and nothing remains of his particular importance. Rather, all his dignity depends on his devotion to the state."³⁶ Moral autonomy is not completely denied but delegated to the private realm, whereas the "meaning (or value) of the individual within the state is only measured according to a task."³⁷ Such a task, however, differs from Kantian duty, which is self-imposed. "The state is...the only one who has a duty to law in the eminent sense; the concrete individual, on the other hand, is forced by the state, and its duty as well as its justification are only the reflex of a compulsion."³⁸ By placing morality and autonomy outside the spheres of law and state, Schmitt also ignores Kant's claim that autonomous individuals have political participation rights.

Schmitt's rejection of an active and significant role for the individual in the state is also an attack on Hegel's philosophy:

The antithesis is that of right and state, not of right and individual, and the *Hegelian* theorem, that right is the unity of impersonal rule and the individual, is to be altered to the effect that positive law is the unity of the impersonal, super-empirical rule and the state.³⁹

Hegel, in the *Elements of the Philosophy of Right*, conceives of the state as an institution of "ethical life." That means that the state actualizes "concrete freedom," which requires "that personal individuality and its particular interests should reach their full *development* and gain *recognition of their right* for itself."⁴⁰ As an example, Hegel emphasizes that it is part of one's freedom to choose one's own profession and therefore criticizes Plato's republic, in which

³⁶ WdS, 92.

³⁷ WdS, 87. Schmitt uses the term *die Bedeutung des Individuums*, in accordance with the title of the book.

³⁸ WdS, 86.

³⁹ WdS, 86.

⁴⁰ Georg Friedrich Wilhelm Hegel, *Elements of the Philosophy of Right* (1820), Ed. Allen Wood, Trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991), §260.

“subjective freedom is not yet recognized, because individuals still have their tasks assigned to them by the authorities.”⁴¹ The relationship between individual and state is for Hegel characterized by the duality of duties and rights: “In the process of fulfilling his duty, the individual must somehow attain his own interest and satisfaction...and from his situation within the state, a right must accrue to him whereby the universal cause becomes *his own particular* cause.”⁴² Schmitt’s state, on the other hand, is overbearing: “The state’s organization of power stands above any subjectivity, and in its totality uses every individual, even the mightiest despot, as a tool.”⁴³ Because of this discrepancy, for Schmitt to draw support from Hegel for the conclusion that the state is the “highest ethical authority”⁴⁴ is highly inappropriate. The problem with Schmitt’s state is that it is exactly not ethical in Hegel’s sense.

Before turning to Paul Bookbinder’s important question whether Schmitt’s anti-individualism in *Der Wert des Staates* lays “the basis for his later work and for totalitarian law,”⁴⁵ I would like to investigate Schmitt’s position on individual rights in his critique of the liberal democracy of the Weimar Republic.

2.4 Individual Rights—For or against Weimar?

During the Weimar Republic (1919-1933), Carl Schmitt becomes one of the foremost critics of the new parliamentary democracy and the proponent of an alternative presidential system. As a professor of public law in Berlin, he becomes an expert on the first democratic constitution, the *Weimarer Reichsverfassung* (WRV) of August 11, 1919.⁴⁶ Because of his

⁴¹ Ibid. § 262, Addition.

⁴² Ibid. § 261.

⁴³ Ibid.

⁴⁴ WdS, 108.

⁴⁵ Bookbinder, 133.

⁴⁶ *Die Verfassung des Deutschen Reiches* („*Weimarer Reichsverfassung*“) online, <http://www.verfassungen.de/de/de19-33/verf19-i.htm>, accessed Jan. 23, 2016.

earlier endorsement of an authoritarian state, which also implies the rejection of the Prussian Constitution of 1871, a question arises about Schmitt's support for the Weimar constitution and his position on its political system and its protection of individual rights. In the following, I aim to demonstrate that Schmitt did not support individual rights. Schmitt might have "extolled the Weimar state,"⁴⁷ but he condemns its political system.

Schmitt criticizes the parliamentary system as an individualistic element. The secrecy and isolation of the voting individual is a direct expression of individualist liberalism. Schmitt's distrust of the individual is already prominent in *Wert des Staates*, where he assumes that claims for individual freedom result in material claims against the state, as he takes the citizens to be solely interested in their material welfare.⁴⁸ The individual, rather than uniting both personal and universal interests, as Kant and Hegel assume, is in Schmitt's view dangerous and pursues its unlimited freedom against the state. On the other hand, the work of the state should inspire awe—to a degree that the state is able to dam "a sea of unbridled and narrow-minded egoism and rawest instincts,"⁴⁹ with which humans, as individuals or as a mass, aim at "hastily rescuing their singular happiness."⁵⁰ In the pluralistic parliamentary system, Schmitt sees the political parties as mere extensions of individual interests that weaken the state on the outside by pulling it into different directions on the inside. This constellation supposedly results in the end of the division between political state and non-political civil society: "The state turns into society,"⁵¹ and at the same time loses power over the individual by allowing the proliferation of ideologies

⁴⁷ Schwab, 335.

⁴⁸ WdS 99.

⁴⁹ Ibid. 85.

⁵⁰ Schmitt quotes Theodor Däubler, *Nordlicht* (no page citation). WdS, 85.

⁵¹ Carl Schmitt, *The Concept of the Political*, 72.

such as humanitarianism and consumerism, technology, social programs, and cultural interests.⁵² For Schmitt, the problem with this development is that

[t]hese dissolutions aim with great precision at subjugating state and politics, partially into an individualistic domain of private law and morality, partially into economic notions. In doing so they deprive state and politics of their specific meaning.⁵³

Schmitt's critique of liberal individualism thus leads him to reject the parliamentary system as a remnant of the nineteenth century that served bourgeois interests. This critique, already prominent in 1927's *The Concept of the Political*, culminates in 1932's *Legality and Legitimacy*, where Schmitt rejects the legality of the parliamentary system in favor of a presidential system that is dictatorial but also "democratically" legitimized by the people, through direct vote.

Schmitt's attitude towards individual rights is controversial. In *Legalität und Legitimität*, he argues that the Weimar constitution's first section, the organizational part that stipulates individual vote and the parliamentary system, is not compatible with the second part, which contains both basic individual rights and institutional guarantees. He would drop the first part:

If now, in the knowledge that the Weimar Constitution consists of *two* constitutions, one of the two constitutions is up for choice, the decision has to fall for the principle of the *second* constitution and its attempt at a substantial order. The core of the second main part of the Weimar Constitution deserves to be liberated from its internal contradictions and faulty compromises and to be developed according to its inner logic. If that succeeds, the thought of a German constitution is rescued. Otherwise, it will soon be over with the fictions of a majority functionalism that is neutral against value and truth.⁵⁴

Hasso Hoffmann, whose *Legitimität gegen Legalität* is a widely acknowledged account of Schmitt's work, interprets this proposal to the effect that Schmitt considers the substance of the

⁵² Ibid.

⁵³ Ibid.

⁵⁴ L&L, 91

second part that should be preserved to be the “traditional civil liberties, which Schmitt had previously discredited.”⁵⁵ This view is surprising, because Schmitt does not explicitly state any support for civil rights, and also because it is not consistent with Hoffmann’s understanding of Schmitt’s doctrines as an attempt to assert an “anti-individualistic...idea of the state.”⁵⁶ A smaller text from 1931 sheds light on what Schmitt might mean in *Legalität und Legitimität*.

In *Freiheitsrechte und institutionelle Garantien der Reichsverfassung*,⁵⁷ Schmitt declares his preference of institutional guarantees over individual rights. He shows that the second part of the Weimar constitution contains “two separate ‘principles’ or ‘systems’”:⁵⁸ basic rights and institutional guarantees.⁵⁹ Institutional guarantees provide protections, for example for religious institutions, the civil service, and for communal self-administration. Schmitt argues that since the constitution requires a two-thirds majority to change institutional guarantees, those guarantees have a higher legal status than basic rights, which can be changed with a simple majority.

Being subject to simple law means that those rights can be limited by the legislature, albeit not eliminated. Schmitt argues further that historically (i.e., in the older constitutions), basic rights faced the dilemma of being merely programmatic and thus “meaningless with regard to positive law” or they needed to be rendered positive by simple statutes. In the first case, they would be merely well-meant proclamations or good wishes and not fundamental principles. In the second case, they would have only the same priority as other simple statutes

⁵⁵ Hasso Hoffmann, *Legitimität gegen Legalität: Der Weg der politischen Philosophie Carl Schmitts*, 5th ed. (Berlin: Duncker & Humblot, 2002), 115.

⁵⁶ *Ibid.* XXXI.

⁵⁷ Carl Schmitt, *Freiheitsrechte und institutionelle Garantien der Reichsverfassung* (Berlin: Verlag von Reimar Hobbing, 1931), 20.

⁵⁸ *Legalität und Legitimität*, 57.

⁵⁹ The basic rights include freedom of person (§114), privacy of the home (§115), secrecy of mail and telephone (§117), freedom of speech (§118), freedom of assembly (§123), freedom of association (§124) and the right to property (§153).

and be therefore pointless in terms of constitutional protection.⁶⁰ Schmitt uses support from the jurist Gerhard Anschütz's commentary, according to which the dilemma that arose in guaranteeing basic rights in the Prussian constitution was transferred to the Weimar constitution. Schmitt's quotes Anschütz, who points out that the constitutional rights of Weimar do not legally bind the legislator, for instance they do not forbid emergency laws. Schmitt quotes another colleague, Hans Carl Nipperdey, as saying that the guarantees of personal freedom, inviolability of the home, and freedom of expression (Articles 114, 115, and 118) "don't effect much anyway."⁶¹

On the other hand, according to Schmitt, institutional guarantees, such as for the civil service or religious institutions, are subject to a guarantee by constitutional law (*verfassungsgesetzliche Garantie*),⁶² because their change requires a super-majority. Schmitt finds the disparity between individual rights and institutional guarantees to be paradoxical and "utterly impossible."⁶³ His argument, however, does not aim at elevating the status of basic rights. Instead, he aims to subsume basic rights under institutional guarantees. He claims that

...in a democratic constitution, there cannot be privileges for individual rights by constitutional law, but that rather each guarantee of subjective rights⁶⁴ by constitutional law can only be thought of within the framework and the limits of an institutional guarantee.⁶⁵

Schmitt thereby denies the special status of individual rights. In the Weimar parliamentary democracy, they can be changed by a simple majority and suspended in a state of exception, but in a non-parliamentary system, there would be constitutional guarantees only for institutions.⁶⁶

⁶⁰ *Freiheitsrechte*, 2.

⁶¹ *Freiheitsrechte*, 3.

⁶² *Ibid.*

⁶³ *Freiheitsrechte*, 4.

⁶⁴ Subjective rights can apply to individuals or groups.

⁶⁵ *Ibid.* 20.

⁶⁶ *Ibid.*

Schmitt argues that property and freedom are not “institutes”: property has only limited institutional character; it is only considered an “institute” if it is tangible (*Sacheigentum*), and it is not immune from dispossession. Freedom is not an institute, and therefore is not subject to an institutional guarantee, only to a “guarantee of the traditionally typical degree of legal norm.”⁶⁷ Such vague regulations should apply to detention, arrest, search of home or confiscation of mail.

Another consequence of Schmitt’s suggested transformation of individual rights to institutional guarantees might be that only members of protected institutions have privileged rights. Thereby Schmitt opens the door to inequality before the law. Contrary to Hoffmann’s charitable interpretation, *Freiheitsrechte und institutionelle Garantien* shows that what Schmitt means when he speaks of “rescuing” the German constitution is to eliminate civil liberties, insofar as they are *individual* basic rights.

Schmitt undermines the liberal principles of the Weimar Constitution. According to his own interpretation of the constitution in *Verfassungslehre* from 1928,⁶⁸ basic rights within the Weimar Constitution are components of the “general political decision of the German people about its kind of existence”⁶⁹ as a constitutional democracy. The Weimar state is a “constitutional state, modified by the principles of the ‘civil-rights state’” (*bürgerlicher Rechtsstaat*),⁷⁰ in which basic rights, even though they can be modified by legal statutes, “can neither be eliminated by simple statutes nor by a constitution-changing law, but only by a new constitutional act of the German people.”⁷¹ Schmitt’s strategy is to drive a wedge between the

⁶⁷ *Freiheitsrechte*, 27.

⁶⁸ Carl Schmitt, *Verfassungslehre* (München/Leipzig: Duncker & Humblot, 1928)

⁶⁹ *Ibid.* 163.

⁷⁰ *Ibid.* 163.

⁷¹ *Ibid.*

two principles of democracy and the civil-rights state of liberal individualism. The underlying idea might be to put a new constitution out for a referendum, once a presidential system is installed by an emergency plan. In any case, Schmitt aims at a major revision.

In 1928, Schmitt states that the civil-rights state “is today generally still prevalent.”⁷² But this form “should not be elevated to a dogma;” its “historical contingency” and its “political relativity”⁷³ should not be ignored. Instead, it should be the task of a constitutional theory “to prove how much some traditional formulas and concepts are completely dependent on former situations.”⁷⁴ At the time, those formulas and concepts are for Schmitt “not even old bottles for new wine any more, but only outdated and false labels.”⁷⁵ In his critique of Weimar and its liberal and individualist constitution, Schmitt comes to a conclusion that is coherent with his theses on the value of the state and the meaninglessness of the individual in *Wert des Staates*. How this position is coherent with Schmitt’s theoretical development of the total state and his support of the Nationalist Socialists’ racist ideology will be the topic of the following two sections.

2. The Total State

Schmitt’s idea of the total state is strongly modeled after Italian fascism. The first section’s result, that Schmitt supports a strong state in which the individual is insignificant, does not by itself imply that Schmitt supports a fascist system. The encyclopedia entry cited in the introduction speaks, after all, of *modern* theories. Schmitt’s political theory could therefore be not modern, but rather reactionary, in support of, for example, conservative nationalism,

⁷² Ibid. IX.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

absolutism or feudalism. But Schmitt considers his theory to be fit for “modern mass democracy.”⁷⁶ This section examines the degree to which the total state is a totalitarian state. The scholarly opinions on these question differ widely. George Schwab asserts that Schmitt “has never entertained the thought of a totalitarian state,”⁷⁷ whereas Herbert Marcuse credits Schmitt with giving “the best portrayal of liberalism from the standpoint of totalitarian political theory.”⁷⁸ Anthony Court argues that Schmitt “deserves to be acknowledged as the seminal theorist of totalitarianism.”⁷⁹ I will argue that Schmitt anticipated a totalitarian German state, modeled after Italian fascism, before 1933 and actively supported a totalitarian German state that exceeded the totalitarianism of Italian fascism after 1933. The forms of totalitarianism may differ in degree, but not in principle. The less secure individual rights are, the more totalitarian the state becomes.

2.1 The Concept of the Political and the Total State

Schmitt introduces and develops the concept of a politically strong total state, similar to Italian fascism, into the German political discussion between 1927 and 1933. In *The Concept of the Political*, the total state denotes “the identity of the state and society.”⁸⁰ Schmitt is critical of the division between the state and civil society, under which religion, culture, education and the economy, as neutral spheres, are separated from state and politics and, in Schmitt’s view,

⁷⁶ Carl Schmitt, „Der Gegensatz von Parlamentarismus und moderner Massendemokratie,“ *Hochland*, 23:4 (June 1926), 17-270.

⁷⁷ George Schwab, CP, fn. 39.

⁷⁸ Herbert Marcuse, “Struggle against Liberalism in Totalitarianism,” *Negations: Essays in Critical Theory* (Boston: Beacon Press, 1968), 270, fn.10. First published in: *Zeitschrift für Sozialforschung*, 6:3, Paris (1934).

⁷⁹ Anthony Court, *Hannah Arendt’s Response to the Crisis of her Times* (Amsterdam/Pretoria: Rozenberg Publishers/UNISA Press, 2008), 96. Online, accessed on November 18, 2016.
<https://books.google.de/books?id=s8VaZd5KjwsC&pg=PA88&lpg=PA88&dq=schmitt+and+gentile&source=bl&ots=acMaz7JEIO&sig=YF8A6bttAtf5NJ7XyorV8EOjK7I&hl=de&sa=X&ved=0CCMQ6AEwBWoVChMI4avzvfWZyQIVgoIaCh3ENgIf#v=onepage&q=schmitt%20and%20gentile&f=false>

⁸⁰ *The Concept of the Political*, (CP), 22.

governed by “liberal individualism.” We have also seen that he is critical of the identity of society and state as a consequence of pluralism. In contrast, the total state “potentially embraces every domain”⁸¹ and renders “everything...at least potentially political.”⁸² Because the political is for Schmitt defined by the friend/enemy relationship, he wants society to be organized accordingly. Under the premise of historical necessity, Schmitt proclaims the “total state” as the political form of the 20th century. He sees the necessity of that development as the result of the changes from the absolutism of the 18th century to the liberalism of the 19th to the new situation of the 20th century, which must accommodate the political integration of all the people. The concept of the total state appears as a “polemical concept against such neutralizations and depoliticalizations”⁸³ of the obsolete liberal bourgeois state. Because the total state is inevitable, Schmitt thinks that for Germany, the form that the total state should take is decisive.

While *The Concept of the Political* does not explicitly state its fascist inclination, two lesser known essays that Schmitt publishes in the early 1930s clarify the background of the total state. They appear in the journal *Europäische Revue*, whose publisher, Karl Anton “Prince” Rohan, is also the founder of the *Europäischer Kulturbund*, an organization that stands out for its “contribution to the preparation of the conservative revolution and its affinity to Italian fascism and German National Socialism.”⁸⁴ Schmitt contributes two pieces about the total state, the first in 1931 and the second in early 1933.

⁸¹ Ibid.

⁸² Ibid.

⁸³ CP, 22.

⁸⁴ Matthias Schulz: Der Europäische Kulturbund, in: Europäische Geschichte Online (EGO), ed. Institut für Europäische Geschichte (IEG), Mainz 2010-12-03. URL: <http://ieg-ego.eu/de/threads/europaeische-netzwerke/politische-netzwerke/europa-netzwerke-der-zwischenkriegszeit/matthias-schulz-der-europaeische-kulturbund> [accessed on Nov. 6, 2015].

In the first essay, “Die Wendung zum totalen Staat,”⁸⁵ Schmitt affirms, as the title states, the “turn towards the total state.” Schmitt observes the total claims of some political parties on their members, by means of youth organizations, cultural clubs etc. Thereby, society becomes politicized. Schmitt also finds an indication for the disappearance of the separation between state and society in the state’s use of its economic power. By controlling the majority of gross income, the government exercises a large economic influence. Old principles of non-intervention are no longer valid. Yet Schmitt regrets that, despite this development, the division into separate parties in Germany prevents the total state from “assert[ing] itself as such”⁸⁶ with the same force as in the “so-called one-party states,” Soviet Russia and Italy. The turn towards the total state should, according to Schmitt, be seen as a part of the historical development of the twentieth century, in reference to Ernst Jünger’s slogan of “total mobilization.”⁸⁷ Evoking historical necessity, Schmitt claims to “scientifically” observe the development towards the total state. He favors abandoning party pluralism in Germany, but does not directly endorse the one-party state.

The second essay on the total state, “Weiterentwicklung des totalen Staates in Deutschland,”⁸⁸ is dedicated to the further development of the total state in Germany. Schmitt undertakes a comparison between the “current” and the “genuine” total state, in order to analyze the “actual situation” in 1932.⁸⁹ Because the German state remains pluralistic and is being drawn in five different directions by the main political parties, Schmitt calls it a “quantitative” total state. The political parties penetrate into all spheres of human life, economic, cultural, and

⁸⁵ Carl Schmitt, “Die Wendung zum totalen Staat,” *Europäische Revue*, 7:1 (1931): 241-250.

⁸⁶ *Ibid.* 247.

⁸⁷ *Ibid.* 242.

⁸⁸ Carl Schmitt, “Weiterentwicklung des totalen Staates in Deutschland,” *Europäische Revue*, 9:1 (1933), 65-70.

⁸⁹ *Ibid.* 66. The article is published in early 1933, but written in late 1932.

social and exploit the weakened state with their demands. In contrast, Schmitt praises the “genuine” total state and its qualitative intensity. He points to the high political energy of the Italian fascist state, which calls itself “*stato totalitario*.”⁹⁰ The Italian fascist state has an exclusive grip on the new technologies of power—military technology as well as the new media, film and radio. Schmitt demands that Germany, in which freedom of the press still obtains, also put its hand on the new technologies, practice censorship and control radio and cinema, in order to shape public opinion into collective opinion. The second lesson for the German state is that a genuine total state can distinguish friend from enemy and does not allow any hostile or divisive powers to rise within. In that sense, “each genuine state is a total state,” for “the political is the total.”⁹¹ The proposal for Germany is a “very strong state”⁹² that does away with the system of multiple parties. Schmitt considers the strengths of the German state to be its independent bureaucracy, the military and the presidential power to call for the state of exception under §48 of the Weimar Constitution.

2.2 Stato Totalitario

Despite Schmitt’s praise of the Italian fascist state, it is controversial whether he actually endorses totalitarianism. Schwab states that a totalitarian Germany is “something incommensurable” with Schmitt’s political thinking.⁹³ In Schwab’s view, “Schmitt has consistently maintained [the] idea” that a political grouping need not “necessarily determine every aspect of a person’s life.”⁹⁴ If Schmitt said that, it would not distinguish his position from Italian fascism. In a similar fashion, Mussolini’s (or his philosopher Giovanni Gentile’s)

⁹⁰ Ibid. 67.

⁹¹ Ibid. 67.

⁹² *Starker Staat*, 77. The presentation to the Langnam Verein and “Weiterentwicklung” overlap to a large degree.

⁹³ Schwab, “Carl Schmitt: Political Opportunist?” 337.

⁹⁴ Ibid. 38. No textual support. I have not found a statement by Schmitt to that effect.

account of fascism states that “[t]he Fascist State organizes the nation, but it leaves the individual adequate elbow room. It has curtailed useless or harmful liberties while preserving those which are essential.”⁹⁵ Before trying to determine whether of Schmitt endorses a totalitarian German state, it is useful to look at how close his own political theory comes to fascist totalitarianism.

Before 1933, Schmitt tries to justify a modern form of “democracy.” In 1926, he writes that “Bolshevism and Fascism are, like any dictatorship anti-liberal, but not necessarily anti-democratic.”⁹⁶ They can “form the popular will and create homogeneity.”⁹⁷ Schmitt explores the alternative “democratic” method of acclamation and even considers the “self-evident, non-dissenting being there of the people” (*selbstverständliches, unwidersprochenes Dasein*)⁹⁸ to be a valid political legitimation of the dictator. He appeals to the power of a “democratic feeling,” through which “dictatorial or Caesarist methods can be immediate expressions of democratic substance and power.”⁹⁹ Mussolini likewise rejects parliamentary democracy, but uses the term “democracy,” calling fascism “an organized, centralized, authoritarian democracy,” in which “the masses are not driven back to the margin of the state”¹⁰⁰ but instead organized by it. Other parallels to Schmitt’s doctrine that can be found in the fascist manifesto are the “rejection of

⁹⁵ Benito Mussolini, “The Doctrine of Fascism” (1932), last accessed on Nov. 12, 2015.

<http://www.worldfuturefund.org/wffmaster/Reading/Germany/mussolini.htm>

“Far from crushing the individual, the Fascist State multiplies his energies, just as in a regiment a soldier is not diminished but multiplied by the number of his fellow soldiers. The Fascist State organizes the nation, but it leaves the individual adequate elbow room. It has curtailed useless or harmful liberties while preserving those which are essential.” Gentile wrote the first part of “The Doctrine of Fascism,” officially assigned to Mussolini as author. Compare Juergen Charnitzky, *Giovanni Gentile und der Faschismus: Ein Verhältnis zwischen Kohärenz und Ambivalenz*. (Frankfurt: Frankfurter Stiftung für deutsch-italienische Studien, 1995) and Renzo De Felice, *Mussolini il Duce I: Gli anni del consenso 1929-1935*, Torino 1974, 35-38, quoted in Charnitzky, fn. 52.

⁹⁶ “Der Gegensatz von Parlamentarismus und Massendemokratie,” 269.

⁹⁷ Ibid.

⁹⁸ Ibid. 270. See Goering’s reply in Nuremberg. Michael Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (Boston: Bedford, 1997), 104-7.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

individualism and the importance of the state,” the “definition of fascism as real democracy,” the “rejection of economic liberalism” and the “fascist totalitarian vision of the future.”¹⁰¹

At the end of 1932, Schmitt seems to favor a presidential dictatorship. His proposal for a strong civil service that is independent of the political parties is an indication for that. His support for an emergency plan that would extend presidential power under the state of exception beyond the legal sixty days, and that would include the use of military power, is documented.¹⁰² But Schmitt’s support for a presidential dictatorship includes a radicalized administration with its own powers of taking extraordinary measures. In *Legalität und Legitimität*, Schmitt lays out how, against a powerless legislature, “the executive state and the administrative state are better suited as an instrument of radical change, whether revolutionary or reactionary.”¹⁰³ He predicts that the use of institutional state force by an executive, administrative and juridical state against the legislative state becomes “inevitable.”¹⁰⁴

That the installation of a drastically different order counts as a rescue of the Weimar state, as Schwab charitably assumes, is questionable. The means which the radicalized administrative state can employ, in order to undermine the rule of law, include “objective necessity, the circumstances, the force of the conditions, the emergency of the time and other justifications that are not determined by the norm but by the situation.”¹⁰⁵ In such conditions and situations, the concrete order—in the sense of institutional structure—can be directly transformed into an enforceable order—in the sense of a command.

¹⁰¹“The Doctrine of Fascism,” (all quotes).

¹⁰² Detlef Junker, *Die Deutsche Zentrumspartei und Hitler 1932/33: Ein Beitrag zur Problematik des politischen Katholizismus in Deutschland* (Stuttgart: Klett, 1969).

¹⁰³ Ibid. 12.

¹⁰⁴ Ibid. 57. The final version of the book is supposed to have been complete ten days before von Papen’s strike against Prussia.

¹⁰⁵ L&L, 13.

They bring an end to the advocates' pleas that accompany the juridical state, as well as the likewise endless discussions of the parliamentary legislative state and recognize in decisionism a positive legal value. Here counts: "The best in the world is an order."¹⁰⁶

So the total state works in executing power from the top down, with the help of a radicalized administration that can disrespect individual rights and the rule of law whenever it decides that a situation calls for extraordinary measures. As a result of his efforts to mobilize the means for a qualitative total state, Schmitt anticipates the *Führer* state quite well and provides a justification for any future regime to use arbitrary means for totalitarian ends.

2.3 Totalitarian or not?

Nationalist Socialism brings a break to Schmitt's efforts for a presidential system. Hindenburg names Hitler as chancellor on January 30, 1933, and the emergency decree of February 28, 1933, suspends all basic rights of the Weimar constitution¹⁰⁷ Schmitt affirms the legality of the Enabling Act of March 23, 1933 as his reason to join the NSDAP in April and fully immerses himself in the legitimization of the new regime by using his earlier ideas.

Arguments for a major change in Schmitt's position come from Anthony Court who emphasizes "Schmitt's abandonment of his doctrine of the sovereign state and his embracing of the political primacy of the Nazi political movement."¹⁰⁸ In *Staat, Bewegung, Volk*, three elements form the political unity: state, movement and people. Schmitt states that now the party, i.e. the dynamic movement, is the foundation of political leadership, and permeates both the

¹⁰⁶ L&L, 13.

¹⁰⁷ Hindenburg's emergency decree from February 28, 1933, *Reichstagsbrandverordnung* suspended all civil rights. <http://www.zum.de/Faecher/G/BW/abbl/nationalsozialismus/ermaechtig.htm>

¹⁰⁸ Ibid.

state and the people.¹⁰⁹ The state remains as the “politically static”¹¹⁰ part of the three elements, with the people as the apolitical part. Thus the state loses “the monopoly of the political”:¹¹¹

The state’s system of agencies and offices by itself is therefore no longer identical with the political whole and with an authority that rests in itself. Today, the political cannot be determined by the state, but the state must be determined by the political.¹¹²

In Court’s view, Schmitt acknowledges the takeover of the state by the party. Court also credits Schmitt with recognizing the totalitarian parties’ complete seizure of their members and considers *Staat, Bewegung, Volk* to be “one of the most extraordinary and prescient texts of the 20th century,”¹¹³ a “new theoretical departure”¹¹⁴ toward a more virulent form of totalitarianism than in Mussolini’s state. According to Court, Hannah Arendt also recognizes this departure. Arendt quotes Schmitt, “The movement...is state as well as people, and neither the present state nor the present German people can even be conceived without the movement,”¹¹⁵ from *Staat, Bewegung, Volk*. The institutional structure of the state is not separable from the party. Those qualities are, according to Court, “novel ideological and structural features.”¹¹⁶ Schmitt explains the difference from the Italian system as the identity of party and state in Germany. While in Italy the party is an “organ of the state,” in Germany the party is “the body of

¹⁰⁹ *Staat, Bewegung, Volk*, 14.

¹¹⁰ *Ibid.*, 12.

¹¹¹ *Ibid.*, 15

¹¹² *Ibid.*

¹¹³ Anthony Court, *Hannah Arendt’s Response to the Crisis of her Times* (Amsterdam/Pretoria: Rozenberg Publishers/Unisa Press, 2008), 90.

https://books.google.de/books?id=s8VaZd5KjwsC&pg=PP3&lpg=PP3&dq=anthony+court,+hannah+arendt&source=bl&ots=acN8v8DxiS&sig=4cHxVEgMtZF22eS5jGKaeZXYSCg&hl=en&sa=X&ved=0ahUKEwipub_xmffKAhXFwxQKHWSxBPEQ6AEIVDAJ#v=onepage&q=new%20theoretical%20departure&f=false

¹¹⁴ *Ibid.*

¹¹⁵ Quoted by Court from Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1971), 226, quoted in Court, 90. German: Hannah Arendt, *Elemente und Ursprünge totaler Herrschaft* (München: Piper, 1986), 421.

¹¹⁶ *Ibid.*, 61

leadership,”¹¹⁷ so that party officials automatically obtain state functions. According to Schmitt, “Hegel dies”¹¹⁸ on January 30, 1933, when the Hegelian state of the nineteenth century, whose pillar was the civil service (*Beamtentum*), ends.

Court agrees with Arendt that the Nazi state is more totalitarian than Italian fascism. In Court’s view, the Italian *stato totalitario* is, despite its dynamic beginnings, in comparison to the Nazis, tame and statist because it changes from a revolutionary movement before 1925 to “Mussolini’s personal dictatorship of an ideologically ‘fascist’ but institutionally conventional authoritarian state dictatorship.”¹¹⁹ Arendt agrees that Mussolini’s dictatorship does not “carry essential totalitarian characteristics, as long as it remain[s] relatively independent from the dictatorship of the Nazis, until 1938.”¹²⁰ Arendt finds that the mark of totalitarianism, besides the claim to absolute power, secured by propaganda, lies and terror, is that the leadership constantly moves power around different organizations.¹²¹ In this manner, outside opponents are confused, and inside groups compete among themselves, so that the leaderships has options and control. Also, the ultimate locus of decision is hidden.¹²²

In contrast to Arendt’s essentialist perspective, Jürgen Charnitzky views totalitarianism as being actualized in stages. He highlights Schmitt’s active role in the development of a higher stage of totalitarianism. In his book on Emilio Gentile, Charnitzky argues that Italian fascism should not be considered to be “the most radical theory of the totalitarian state,”¹²³ and that Schmitt’s systematic juridical and historical justification of the total *Führer* state surpasses

¹¹⁷ SBV, 20.

¹¹⁸ Ibid. 32.

¹¹⁹ Court, 60

¹²⁰ Arendt, 409.

¹²¹ Ibid. 623.

¹²² Ibid. 624.

¹²³ Emilio Gentile, *Le origini dell’ideologia fascista (1918-1925)*, Milano, 1972. Quoted in Charnitzky, 16.

Gentile's abstract schematic theory.¹²⁴ In response to Arendt's criteria, that "total domination cannot allow free initiative in any area of life"¹²⁵ and every action needs to be "absolutely predictable,"¹²⁶ it seems more plausible, as Schmitt has already brought forth in *The Concept of the Political*, that the state must *potentially* take hold of every *sphere* of life. Without a division of power and individual rights that protect the individual, there is nothing to stop the state (or party) from asserting its power.¹²⁷

Court's criticism of Schwab is that he "does not explain why we should not take Schmitt at his word."¹²⁸ Schwab's apology for Schmitt is for Court a "thinly veiled attempt to absolve Schmitt of his responsibility for a dictatorship he understood only too well."¹²⁹ The implication is that Schmitt makes a decision to support Hitler even though he fully understands the destructive dimensions of Nazi power. Court claims that Schmitt's complicity in Nazism should not detract from his theoretical achievements: "Schmitt's theorization of the Nazi dictatorship in 1933 is so original and insightful that he deserves to be acknowledged as the seminal theorist of totalitarianism."¹³⁰ In support of Court, I can add that *The Concept of the Political* contains the signposts for this radical departure, as diagnosis or as program.

¹²⁴ Juergen Charnitzky, *Giovanni Gentile und der Faschismus: Ein Verhältnis zwischen Kohärenz und Ambivalenz*. (Frankfurt: Frankfurter Stiftung für deutsch-italienische Studien, 1995)

¹²⁵ Arendt, 544.

¹²⁶ Ibid.

¹²⁷ For the ensuing debate about the total state, see *Rechtfertigungen des Unrechts: Das Rechtsdenken im Nationalsozialismus in Originaltexten*, ed. Herlinde Pauer-Studer and Julian Fink (Berlin: Suhrkamp, 2014).

¹²⁸ Ibid., 92.

¹²⁹ Ibid., 96.

¹³⁰ Ibid., 96.

Schmitt is not merely a diagnostic, but actively helps to enforce Nationalist Socialist rule. Of particular importance for totalitarian practice are his five basic principles for legal practice, *Fünf Leitsätze für die Rechtspraxis*¹³¹ from 1933. The fourth principle states:

For the application and handling of the general clauses by the judge, attorney, jurist and teacher of law, the principles of National Socialism are immediately and exclusively authoritative.¹³²

According to Schmitt, the ruling values, according to which common legal terms are to be interpreted, are always the values of a leading and authoritative group or movement. Thus the meaning of terms such as “good faith,” “good morals,” “reasonableness,” and “public order and safety” are to be determined according to Nazi principles.

Dirk Blasius documents one of the effects of Schmitt’s broadly distributed publication on the enforcement of the race laws passed in the same year. The “Law for the Prevention of Genetically Diseased Offspring,”¹³³ stipulating involuntary sterilizations and specifically permitting the use of force,¹³⁴ and the “Law against Dangerous Criminals and the Measures for Safeguarding and Amelioration,”¹³⁵ requiring castrations, are enforced with explicit reference to Schmitt’s fourth principle. According to Blasius, Falk Ruttke, one of the laws’ authors, refers to Schmitt in front of 120 psychiatrists of the German Association for Psychological Hygiene and Racial Hygiene: “He cited verbatim the complete Fourth Principle, and saw in it the critical lever to enforce the practical application of the legislation to race hygiene.”¹³⁶ The result is a total of 360,000 forced sterilizations and about 1,800 castrations. For Blasius, this example of an intervention, which affected many individual lives, shows that Schmitt does not merely adapt

¹³¹ Carl Schmitt, *Fünf Leitsätze für die Rechtspraxis* (Berlin: Deutsch Rechts- und Wirtschafts-Wissenschaft Verlags-Gesellschaft, 1933,

¹³² *Ibid.*, 2.

¹³³ “Gesetz zur Verhütung erbkranken Nachwuchses,” passed on Jan 1, 1934.

¹³⁴ Blasius, 158.

¹³⁵ “Gesetz gegen gefährliche Gewohnheitsverbrecher und über Maßregeln der Sicherung und Besserung.“

¹³⁶ Blasius, 161-2.

opportunistically to Nazism, but formulates extremely effective positions.¹³⁷ The re-interpretation of general clauses is pioneering in the history of German law.¹³⁸ Schmitt's contribution provides the means to overcome the hurdle of the civil code (*Bürgerliches Gesetzbuch, BGB*), which remains nominally in force during the whole Nazi period. It means that application of the law can be completely changed without the need to change one single positive statute, as soon as the general clauses are not interpreted according to the individualistic civil society, but to the "interests of the people as a whole."¹³⁹

The racial identity of the German people is, according to Schmitt, basic to Nationalist Socialist law. The term preferred by Schmitt and other legal experts is *Artgleichheit*, in which *Art* is vague enough to connote the neutral *kind* or the biological *species* or *genus*. On the difference between Italian fascist and Nationalist Socialist law, Schmitt states that "in Italy, the problem of race (*Rasse*) is ignored."¹⁴⁰ In Germany, the "problem" of race makes totalitarianism more thoroughly totalitarian. The next section takes a closer look at Schmitt's view of race.

3. Race

Schwab's apology that Schmitt accommodated the anti-Semitism of the Nazis "to some extent" out of "opportunism" is falsified with the publication of Schmitt's diaries.¹⁴¹ Contrary to the claim that "[p]rior to Hitler's accession to power, one never finds any anti-Semitic utterance

¹³⁷ Ibid.

¹³⁸ Ulrich Eisenhardt, *Deutsche Rechtsgeschichte, 6th ed.* (München: C.H. Beck, 2013), Sec. 870, pp. 398-9.

¹³⁹ Carl Schmitt, *Juristische Wochenschrift* (1934): 717, Quoted in Ulrich Eisenhardt, *Deutsche Rechtsgeschichte, 6th ed.* (München: C.H. Beck, 2013), Sec. 870, pp. 398-9.

¹⁴⁰ Carl Schmitt, "Faschistische und nationalsozialistische Rechtswissenschaft," *Deutsche Juristen-Zeitung*, 10 (1936): 619-20.

¹⁴¹ Carl Schmitt, *Tagebücher: Oktober 1912 bis Februar 1915*, ed. Ernst Hüsmert (Berlin: Akademie-Verlag 2003). --, *Der Schatten Gottes: Introspektionen, Tagebücher und Briefe 1921 bis 1924*, ed. Gerd Giesler (Berlin: Duncker & Humblot, 2014). --, *Tagebücher 1930-1934*, ed. Wolfgang Schuller (Berlin: Akademie-Verlag 2010).

in any of Schmitt's writings,"¹⁴² the diaries reveal Schmitt's ongoing hostility to Jews, which comes to a culmination in the early 1930s, when Schmitt engages with Nationalist Socialist and other racist ideas. In Hitler's first year of power, Schmitt declares race to be one of the basic principles of new state's law. In 1936, Schmitt presents a racial theory at the conference *Judaism in Jurisprudence*. Because the correspondence of Schmitt's views on race with some of his earlier writings, race can possibly be seen as a coherent theme and organizing factor that traverses Schmitt's work from early on. If Schmitt's anti-Semitism has "deep emotional and cognitive roots,"¹⁴³ his writings before 1933 need to be examined and possibly re-interpreted, as Raphael Gross suggests. Among the topics of this thesis, for example, Schmitt's discussion of individual rights and institutional guarantees in 1931 could be read as an attempt to exclude Jews from constitutional rights. In the following, I aim to show how Schmitt's concept of race develops from his early anti-Jewish sentiment to an anthropological concept of *Artgleichheit* that functions as the opposite of a liberal, individualistic concept of equality.

3.1 The Diaries

In Schmitt's view of "the Jews" in his early diaries, his perception of their overbearing power and intellectual superiority is prominent. In 1914, he notes that he has a "violent rage" against the Jews

who bother with art, the counterfeiters, who falsify all genuine growth and distort the concepts of the humans, the intermediaries and nimble monkeys, who can imitate everything so quickly, that one often believes it for months, the agents and traders, who consistently confuse applied arts with art, invoke power opposite taste and taste opposite power and thereby achieve and use an irrefutable position, and, if necessary, even appear as guardians of good tradition.¹⁴⁴

¹⁴² George Schwab, "Carl Schmitt: Political Opportunist," 336 (all quotes).

¹⁴³ Raphael Gross, *Carl Schmitt und die Juden* (Frankfurt: Suhrkamp, 2005), 41.

¹⁴⁴ Carl Schmitt, *Tagebücher: Oktober 1912 bis Februar 1915*. Ed. Ernst Hüsmert (Berlin: Akademie-Verlag, 2003), 245-6, entry Nov. 8, 1914.

Besides the plain insults, one of the themes in Schmitt's ongoing hostility to Jews is their intellectual power. In an experience recorded in 1915, Schmitt feels inferior when he visits a library with his Jewish friend Fritz Eisler. Later that day he notes:

He read psychology. Amazed and frightened about the power of the Jews. Psychoanalysis is the purest expression of Judaism.¹⁴⁵

Schmitt transfers his hostility toward his friend onto the Jews as a group. Between 1930 and 1933,¹⁴⁶ the entries frequently express antipathy or disgust against individuals of Jewish origin with whom Schmitt comes in contact at the School of Business Administration in Berlin, where he teaches. He notes an "interesting exam of a rather brash Jew"¹⁴⁷ and a "[n]ice lecture in front of the likeable gentlemen. Not a single Jew."¹⁴⁸ His ambiguous attitude about the Jewish legal philosopher Hans Kelsen evokes the same generalization as the Eisler experience earlier:

Read Kelsen, was pleased with his courage, but then I became frightened about the power of the Jews in Germany.¹⁴⁹

Schmitt becomes increasingly familiar with Nationalist Socialist and other anti-Semitic ideas. He discusses politics with his friend Heinrich Oberheid, who has joined the NSDAP in 1928.¹⁵⁰ He reads Ludendorff's book about "the coming world war, with great emotion."¹⁵¹ In it, Ludendorff "declares the Jews, Freemasons and the Roman Catholic Church are planning the destruction of the Germans, Austrians, Hungarians and English, and the securing of world domination."¹⁵² He reads Goebbels' *Der Angriff*,¹⁵³ in which Goebbels writes about "[t]he

¹⁴⁵ Ibid. 314, entry Feb. 9, 1915.

¹⁴⁶ Carl Schmitt, *Tagebücher: 1930 bis 1934*, 26, entry Jan. 3, 1930.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid. 27, entry 3 Mar. 1930.

¹⁴⁹ Ibid. 59, entry 22 Nov. 1930.

¹⁵⁰ Ibid. 50, entry 29 Oct. 1931.

¹⁵¹ Ibid. 62, entry Nov. 29, 1930. CS refers to Erich Ludendorff, *Weltkrieg droht auf deutschem Boden* (München: Ludendorffs Verlag, 1930). Ludendorff led the anti-Semitic Deutschvölkische Freiheitspartei (DVFP).

¹⁵² "The Coming War: Ludendorff's prophecies," *The Daily News*, (Perth, W.A., 27 May 1931). Online, accessed Feb 5, 2016. <http://trove.nla.gov.au/ndp/del/article/83928914>

¹⁵³ *Tagebücher: 1930 bis 1934*, 67, entry Dec 10, 1931.

spaceless powers, which stand opposite from us as relentless adversaries,”¹⁵⁴ i.e. “the eternal enemy of the people, the Jew, democracy and capitalism—all only paraphrases for the same spirit of denial.”¹⁵⁵ According to Goebbels, “The Jew is not smarter than we are, but only more refined and more cunning. His system cannot be broken economically, only politically.”¹⁵⁶ Goebbels demands that one must say yes or no to anti-Semitism and quotes Mussolini, to the effect that taking Jewish individuals out of circulation it is social hygiene.

Increasingly, Schmitt maintains contacts in right wing circles that help him alleviate his racial anxieties. December of 1931 marks the beginning of a long friendship with Werner Sombart, sociologist and author of an anthropological study that correlates the spreading of “the Jews” in Western Europe with the emergence of capitalism.¹⁵⁷ During the same month, Schmitt socializes with Albrecht Günther, the editor of the radical journal *Deutsches Volkstum*.¹⁵⁸ A few days later, Schmitt meets with economist Alexander Rüstow and notes their discussion about the unconstitutionality of the political fight against the National Socialists.¹⁵⁹ Finally, in late December, Schmitt notes: “Disgust of the Jew shit Kelsen, no fear at all anymore.”¹⁶⁰ The diary entries explain why Schmitt is in full support of the anti-Jewish laws after 1933, and also show how he was involved in anti-Semitism in the last year of the Weimar Republic.

¹⁵⁴ Joseph Goebbels, “Gegen den Volksfeind“ (1928) in: *Der Angriff: Aufsätze aus der Kampfzeit* (München: Zentralverband der NSDAP, 1935), 110.

¹⁵⁵ Ibid.

¹⁵⁶ Joseph Goebbels, “Der Jude“ (1929), op. cit.

¹⁵⁷ Werner Sombart, *Die Juden im Wirtschaftsleben* (München und Leipzig: Duncker & Humblot, 1920).

¹⁵⁸ Tagebücher 1930-1934, 66, entry Dec 7, 1931.

¹⁵⁹ Ibid. 68, entry Dec 12, 1931.

¹⁶⁰ Ibid. 73, entry Dec 29, 1931.

3.2 Historical Change

Several reasons may account for the fact that Schmitt, despite sympathies with racist ideas, does not yet officially align himself with the Nationalist Socialist Party or include anti-Semitic statements in his public writing. As a university professor, he has sworn on the Weimar constitution. In his publications, he keeps a high academic profile until he starts to publish for radical journals such as the *European Revue* and *Deutsches Volkstum* around 1931. Anti-Semitism was not limited to the NSDAP. “Ethnically chauvinist and racist ideas...had been spreading in Europe since the nineteenth century.”¹⁶¹ According to the Munich Documentation Centre for the History of National Socialism, the adoption of racist and anti-Semitic elements by ethnic-chauvinistic thinking

made membership in the German *Volk* into a preeminent virtue. The result was a campaign of agitation for racial homogeneity and authoritarian order, with the people taking priority over the individual. Liberal and individualistic values were to be expunged from the ‘body’ of the German people.¹⁶²

The connection of racism with anti-individualism, as well as the demand for homogeneity and authoritarian rule in German society from the early 1920s on, supports my argument that Schmitt’s anti-individualism helps to explain his racism. It also suggests the possibility that Schmitt’s critique of liberalism and individualism, for example in *The Concept of the Political*, already shares in the racist views of its times. Yet according to Mehring, it is “to a large extent assured that Schmitt wanted to prevent Hitler’s coming to power.”¹⁶³ Evidence for that can be seen in Schmitt’s professional support for the Weimar state under the Hindenburg presidency.

In 1932, the final year of the Weimar Republic, Schmitt officially and unofficially supports the minority governments of Papen and Schleicher who are appointed chancellors by

¹⁶¹ *Exhibit Guide* (Munich Documentation Centre for the History of National Socialism), 21.

¹⁶² *Ibid.*

¹⁶³ Mehring, *Biography*, 301.

Hindenburg. Schmitt, as the leading German expert on emergency law, supports Hindenburg's ruling by decree and on several occasions prepares secret emergency plans, according to which the minority government could stay in power without new elections, beyond the sixty days permitted by the constitution. Schleicher's plan, the *Querfront*, is supposedly a militarily enforced coalition between left, center and part of a split-up NSDAP, under a ban of the Communists. Having already worked on plans for constitutional reform, Schmitt has the prospect of realizing some of his proposals in a new government. According to Schmitt's diary, Eugen Ott, Schleicher's negotiator and Erich Marcks, Schleicher's press chief, visit and consult with him frequently from Dec. 2, 1932 until Schleicher's resignation Jan. 28, 1933, when Hindenburg decides against the Schleicher plan and in favor of a Hitler/Papen coalition. Johannes Popitz, secretary without special area and Prussian treasurer of state from 1933, is also part of the Schmitt's circle of friends. In a later interview, Popitz explains how the growing national opposition against the lack of totality in the German state was partly traditional, partly military, and partly oriented towards Hitler. A substantial constitutional reform could only be tied to the president. According to Popitz, the choice for Hitler results from the failure of the presidential reform, which means that only the path of revolution remains.¹⁶⁴

After January 30, 1933, Schmitt remains ambivalent about Hitler, discusses openly his anti-Semitic views and is finally swayed. On the day of Hitler's appointment, he writes, "Excited, glad, cheerful."¹⁶⁵ On the next day: "Rage about the stupid, ridiculous Hitler."¹⁶⁶ A few weeks later, he discusses the hopelessness of the one-party system for Germany.¹⁶⁷ In

¹⁶⁴ Lutz-Arwed Bentin, *Johannes Popitz und Carl Schmitt: Zur wirtschaftlichen Theorie des totalen Staates in Deutschland* (München: C.H. Beck, 1972), 39.

¹⁶⁵ Diary 1930-34, entry Jan 30, 1933.

¹⁶⁶ Ibid, entry Jan 31, 1933.

¹⁶⁷ Ibid, entry Feb 27, 1933.

March, Schmitt notes the “shamelessness of the assimilation”¹⁶⁸ of the Jews, “rage attack against the Jew Kaufmann and the vulgar doings of those assimilators”¹⁶⁹ and then discussions about the “question of Jewish university professors.”¹⁷⁰ On April 4, 1933, the law that removes Jewish officials from government positions¹⁷¹ is enacted. The same night, Schmitt has “fear for Germany because of the revenge of the Jews.”¹⁷² He refuses to sign a petition for Kelsen and comments, “wretched company, to campaign like that for a Jew, while they cold-bloodedly let thousands of decent people starve and be deprived. This power of the Jews.”¹⁷³ Effective May 1, 1933, Schmitt joins the NSDAP.

In a little over six months, Schmitt rises to a powerful professional position. He becomes the leader of the group of university teachers in the association of NS jurists.¹⁷⁴ This honor follows his appointment by Goering to the Council of State (*Staatsrat*) for Prussia,¹⁷⁵ his call to Berlin University, his membership in Frank’s Academy for German Law, and his appointments to be co-editor of the *German Jurist News (Deutsche Juristen-Zeitung)*¹⁷⁶ and scientific consultant to the Institute for International Law.¹⁷⁷ In early October, Schmitt hears a “[w]onderful speech by Hitler on the total state. Very consoled.”¹⁷⁸

¹⁶⁸ Ibid, entry Mar 18, 1933.

¹⁶⁹ Ibid, entry Mar 19, 1933.

¹⁷⁰ Ibid. Entry Mar. 25, 1933.

¹⁷¹ *Gesetz über die Wiederherstellung des Berufsbeamtentums*

¹⁷² Ibid. Entry Apr. 15, 1933.

¹⁷³ Ibid. Entry Apr. 18, 1933.

¹⁷⁴ Reichsgruppenleiter der “Fachgruppe Hochschullehrer” in BNSDJ, later Rechtswahrerbund

¹⁷⁵ Bio 330

¹⁷⁶ Ibid. 332

¹⁷⁷ Ibid. 334

¹⁷⁸ Diaries, entry Oct. 3, 1933.

3.3 Racial Identity

In *Staat, Bewegung, Volk*, his first large publication for the Nazis, Schmitt aims to establish “[l]eadership and racial identity (*Artgleichheit*)”¹⁷⁹ as basic concepts of Nationalist Socialist law.”¹⁸⁰ The requirement of unity in a strong one-party state entails giving up all liberal democratic methods, such as elections and the separation of legislative and executive powers. According to Schmitt, the concept of leadership entails duties that are “inaccessible to the legalistic thought of individualist liberalist law.”¹⁸¹ Such duties are those of loyalty and obedience and apply both to civil servants and the ethnic German “comrades” (*Volksgenossen*). Schmitt distinguishes leadership from dictatorship and from the NS governance that he deems an outflow of the concrete and substantial thought of the movement (i.e. the party). The concept of leadership “contains the positive requirement of a necessary racial identity (*Artgleichheit*) between leader and following.”¹⁸² Not naming Jews directly, Schmitt refers to the liberal and Marxist enemies as “at times criticizing in a superior way, at times submissively assimilating.”¹⁸³ The task of law should be to distinguish between the racially identical and the racially alien. In his view, the liberal-democratic legal system has the flaw that, so as not to make racial distinctions,

one spoke of “personality” only in a universal sense, and that the word connoted, in the service of a liberal individualism, only the “human” and not the concrete German people.¹⁸⁴

Instead of being bound to deceptive legal statutes (i.e. those postulating equality before the law and individual rights), German law should be bound to the requirement of an absolute racial

¹⁷⁹ Carl Schmitt, *Staat, Bewegung, Volk* (Hamburg: Hanseatische Verlagsanstalt, 1933), 32.

¹⁸⁰ Schmitt uses the term “race” (*Rasse*) only twice. P. 42 In reference to Hitler and Frank. “If the thought of race was again and again put in the center...it was not a theoretical postulate.”

¹⁸¹ *Ibid.* 36.

¹⁸² *Ibid.* 42.

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.* 44. Here Schmitt relates to the “concrete order thinking” in law.

identity. In 1935, Schmitt praises the Nuremberg Race Laws, co-authored by his former student Ernst Rudolf Huber,¹⁸⁵ as German liberation from the alien domination of liberalism, which, in Schmitt's estimation, resulted in a way to think of law and constitution that was "completely entangled into the conceptual net of un-German systems."¹⁸⁶ Against the liberal concept of *Gleichheit* (equality), the concept of *Artgleichheit* (racial identity) works ingeniously and polemically to replace individual identity with group identity. It works to support the argument that German Jews are not members of the German people, even though they hold citizenship. Schmitt's endorsement of institutional guarantees over individual rights in case of a reform of the Weimar constitution could have been intended to effect exclusion.

In *Verfassungslehre*, Schmitt postulates that democracy depends on the unity of a people and that that unity depends on the homogeneity of a people. Against the liberal idea of equality, he holds that

(p)olitical democracy cannot rest on the lack of difference between people, but only on the belonging to a certain people, where this belonging to a people can be determined by very different moments (ideas of common race, belief, common fate or tradition).¹⁸⁷

Race is one of several possible factors. For the case of national minorities, Schmitt considers several solutions, first of all peaceful assimilation, under contemporary minority protection of the rights of individuals, such as equality, freedom, property, and the use of one's own language. But he also describes the alternative:

The other method is faster and more violent: disposal of the alien component by oppression, resettlement of the heterogeneous population and similar radical means.¹⁸⁸

¹⁸⁵ Philipp Gessler, "Carl Schmitt und Ernst Rudolf Huber: NS-Juristen und ihre Rolle nach 1945" (Deutschlandfunk, Jan 27, 2016). Online, accessed Feb.2, 2016, http://www.deutschlandradiokultur.de/carl-schmitt-und-ernst-rudolf-huber-ns-juristen-und-ihre.976.de.html?dram:article_id=343758

¹⁸⁶ Carl Schmitt, "Die Verfassung der Freiheit," *Deutsche Juristen-Zeitung* (40:19, 1 Oct 1935): 1133-35.

¹⁸⁷ Carl Schmitt, *Verfassungslehre*, 228.

¹⁸⁸ *Ibid.* 232.

The United States' immigration control is one of Schmitt's examples. He also mentions new practices in citizenship laws, the possibilities of expatriation, denaturalization, etc. The central concept should be the people, not the individual and not humanity. Schmitt's thesis for democracy is the same as for the total *Führer* state: the necessary condition is homogeneity—the “identity of ruler and ruled, those commanding and those following.”¹⁸⁹ In another text from 1926, Schmitt writes:

Each actual democracy rests not only on treating the same in the same way, but also with inevitable consequence, in treating the different differently. Therefore, to democracy belongs necessarily, first homogeneity, and second—if necessary—the elimination or annihilation of the heterogeneous.¹⁹⁰

A closer look at the argument shows that he uses historical examples for support, such as the Greek-Turkish conflict and the Australian white-only immigration policy. Thus Schmitt makes an inductive argument but claims that his conclusion follows with necessity, which is not correct for an inductive argument. In the German case, Schmitt thinks that peaceful assimilation has been unsuccessful.¹⁹¹ Because various factors can account for heterogeneity, Schmitt's postulate of homogeneity does not require any proof of biological differences. Nevertheless, it is important to ask what Schmitt's conception of race is, and why he thinks that Jewish people meet such a criterion of difference. Even after the Nazi period, Schmitt maintains that “Jews

¹⁸⁹ Ibid. 234.

¹⁹⁰ Schmitt, Carl, “Der Gegensatz von Parlamentarismus und moderner Massendemokratie.“ *Hochland*, 23:2 (1926):263. “Jede wirkliche Demokratie beruht darauf, daß nicht nur Gleiches gleich, sondern, mit unvermeidlicher Konsequenz, das Nichtgleiche nicht gleich behandelt wird. Zur Demokratie gehört also notwendig erstens Homogenität und zweitens--nötigenfalls--die Ausscheidung oder Vernichtung des Heterogenen.” Translated in: --. *The Crisis of Parliamentary Democracy*. Ed. Thomas McCarthy. Trans.by Ellen Kennedy. Cambridge, MA: MIT Press, 1988. Kennedy's mistranslates the last phrase as “eradication of heterogeneity.”

¹⁹¹ Mehring, Biography, 316.

always remain Jews. While the communist can better and change himself, that has nothing to do with Nordic race etc. Just the assimilated Jew is the true enemy.”¹⁹²

3.4 Against the Jewish Spirit

Schmitt’s concept of race is vaguely formulated, but mostly focused on correlating race with a specific Jewish “spirit,” i.e. a specific way of thinking. In *SBV*, comments focus on different meanings and interpretations of the same words in different languages as the “spheres of organic, biological and ethnic (*völkischen*) differences.”¹⁹³ The way of thinking that enables someone to “see facts correctly, hear statements correctly” depends on the existential belonging to the community that creates the law.”¹⁹⁴ Even though he claims to be strictly scientific, Schmitt remains vague about the relation between biology and ethnicity. Because of his indeterminate account of race, I think that it could be characterized as anthropological.

Schmitt’s account is close to that of his friend Werner Sombart, one of Germany’s prominent sociologists of the early twentieth century. Sombart views Jews to be neither a biological race nor an “only religious community.”¹⁹⁵ Sombart claims:

The Jew is politically individualistic. The “constitutional state” complies with his sense, in which all relationships are deduced from clearly circumscribed law relationships. He is born representative of a “liberal” world view.¹⁹⁶

¹⁹² Carl Schmitt, *Glossarium: Aufzeichnungen aus den Jahren 1947 bis 1958*. Expanded Edition, ed. Gerd Giesler and Martin Tielke (Berlin: Duncker & Humblot, 2015), 14. Entry from 25 Sep, 1947.

¹⁹³ *SBV*, 45.

¹⁹⁴ *Ibid.*

¹⁹⁵ Werner Sombart, *Die Juden im Wirtschaftsleben* (München und Leipzig: Duncker & Humblot, 1920), 353.

¹⁹⁶ *Ibid.*, 318.

Sombart uses a non-biological conception of race in his thesis that “the Jews are of an anthropologically different kind.”¹⁹⁷ Even “if no somatic common property can be found,”¹⁹⁸ Sombart thinks that the term “race” is the most suitable and concludes that “the anthropological homogeneity of the Jewish tribe is securely established.”¹⁹⁹ How strictly scientific this approach, which both Schmitt and Sombart take, is questionable. Sombart claims scientific authority for his anthropological study of the Jews. According to him, his “book does not contain value judgments.”²⁰⁰ This authority is supposed to prove counter-examples wrong. Sombart admits that almost everyone has a Jewish friend to whom the book’s generalizations do not apply. But for Sombart, those counter-examples from personal relationships would contain value judgments and be “unmasked by a scientific investigation as un-scientific.”²⁰¹ While in the correct application of the scientific method, counter-examples falsify a theory, Sombart practically claims that his theory is not falsifiable. Schmitt’s concept of race is, similarly to Sombart’s, anthropological, and thereby related to intellectual features.

In a text from 1936, which Mehring ascribes to Schmitt,²⁰² the “systematic undermining of a healthy ethnic German thinking about the state” is put into the “general context of the invasion of the Jewish people.”²⁰³ By pointing out the similarity of this critique, made during the conference *Judaism in Jurisprudence*, to Richard Wagner’s critique in his *Judaism in Music*, Mehring affirms a claim made by Raphael Gross—that Schmitt’s anti-Semitism reaches beyond traditional anti-Judaism that is argued on the basis of religion. Gross argues that, within

¹⁹⁷ Ibid, 353.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid, 346.

²⁰⁰ Sombart, XV.

²⁰¹ Ibid.

²⁰² Reinhard Mehring, “Carl Schmitt und der Antisemitismus. Ein unbekannter Text.” *Forum Historiae Iuris*, online, accessed Feb. 2, 2016, <http://www.forhistiur.de/legacy/debatte/CarlSchmitt/0603mehrning2.htm>

²⁰³ Ibid.

Catholic tradition, “good, catholic” anti-Semitism is set against “bad, anti-Christian” anti-Semitism.²⁰⁴ Mehring, however, disagrees with Gross’s interpretation of Schmitt’s anti-Semitism as biological, and argues that Schmitt’s anti-Semitism is neither biological nor religion-based, but grounded in the history of ideas. Mehring’s interpretation makes sense in context: Schmitt organizes the 1936 conference in order to eliminate Jewish intellectual influences from the German philosophy of law.

But does an intellectual conception of race exhaust Schmitt’s racism or does he ascribe that particular way of thinking to all Jews? In *The Concept of the Political*, Schmitt foreshadows his argumentation from 1933 and 1936, by claiming an epistemological difference in the distinction of friend and enemy

The possibility to recognize and understand, and with it also the competence to have a say and to judge is here only given by the existential participation.²⁰⁵

Here the epistemological difference applies to all existential participants, and suggests a friend/enemy constellation between groups on a large scale. This suggests that Schmitt does not apply his thesis merely to intellectuals, but considers the difference in thinking and judging to be a phenomenon that extends to someone by virtue of being part of a group.

These examples from Schmitt’s Weimar Republic-era texts and the anti-Semitic content of his diaries provide support for Gross’s thesis that Schmitt’s theoretical work is permeated and significantly shaped by his anti-Semitism. Schmitt’s racism is also coherent with his anti-individualistic arguments, in particular his refusal to acknowledge individual rights and his affirmation of a total state.

²⁰⁴ Ibid.

²⁰⁵ Carl Schmitt, *The Concept of the Political*, 27. *Der Begriff des Politischen*, 27. My translation is more correct than Schwab’s. The German text: “Die Möglichkeit richtigen Erkennens und Verstehens und damit auch die Befugnis mitzusprechen und zu urteilen ist hier nämlich nur durch das existenzielle Teilhaben und Teilnehmen gegeben.“ Schwab’s translation: “Only the actual participants can correctly recognize, understand and judge the concrete situation.”

Conclusion

My investigation of Carl Schmitt's concepts of the individual, race, and the total state shows the coherence of Schmitt's positions along several lines. In the first section, I have demonstrated how Schmitt persistently takes a stand against individualism as a constituting component of political liberalism. He thereby undermines individual rights and equality before the law as stipulated in the Weimar constitution. The second section has shown that Schmitt endorses a total state, modeled after Italian fascism, as a modern political form in the 20th century and as a historical necessary. Beyond mere diagnostics, Schmitt actively helps to enforce the Nationalist Socialist views on race. The third section has shown that Schmitt maintains a cultural and geographical conception of race that claims to be scientific but generalizes stereotypes without taking evidence to the contrary into account. Schmitt's argument for homogeneity uses empirical support and therefore cannot soundly claim necessity. Because of Schmitt's rejection of individual rights, the totalization of the state and its exclusionary practices have no limits.

As for Schmitt's principles, there may be a change in his conception of the state, but against Schwab's claims, I have not found a single principle that Schmitt would have to give up in his endorsement of racism. The state's duty to actualize law, postulated in *Wert des Staates*, becomes in the Nazi period the duty to actualize ethnic law, and maybe Schmitt would say that the law includes a right to racism. Anti-individualism is an organizing principle for Schmitt's argumentation. Racism is possible only through the rejection of individualism; that is also the case for totalitarianism. But possibly racial hostility and the quest for hierarchical order precede

and motivate Schmitt's arguments against individualism. In light of Schmitt's privately expressed views on the Jews, one can reevaluate a passage in *Wert des Staates* quoted earlier:²⁰⁶

The ancient philosophers divided humanity into two halves, into masters and slaves, those who were able to hold rights and those who did not... Today, we praise ourselves that we don't acknowledge such external factors anymore and don't make a difference between persons before the law. But we should know that the meaning of our universal human freedom can only be, to work out the dualism in greatest objectivity, undeterred by the given social power relationships between groups, so that it is not external contingencies that decide.²⁰⁷

As often as Schmitt expresses his perception of overbearing Jewish power, it is possible to infer that Schmitt already has a racial dualism in mind in 1913. The external contingencies could be the equality before the law stipulated by the 1871 constitution, so that Schmitt would return the Jews in Germany to subservient status. Schmitt's political justification of violence against minorities, whether racial, religious, or national, as the existential right of a people, contributes to the continuing danger of his theory. Schmitt's examples point to exclusionary practices in nominally liberal states, such as the United States and Australia, which find reference again today. His ideas become relevant again as Europe moves anew toward nationalist orders. Therefore we should keep in mind that Schmitt's claims for necessity are wrong. Whatever the historical evidence might be, neither racism nor any other forms of discrimination can be proven necessary.

²⁰⁶ p.9.

²⁰⁷ *Wert des Staates*, 92-93.

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