Carl Schmitt's Historicity between Theology and Technology

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To my loving parents, Penny and Rex

Declaration

I hereby declare that except where specific reference is made to the work of others, the contents of this dissertation are original and have not been submitted in whole or in part for consideration for any other degree or qualification in this, or any other university. This dissertation is my own work and contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and Acknowledgements. This dissertation contains fewer than 80,000 words including appendices, bibliography, and footnotes, and has fewer than 150 figures.

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Abstract

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This thesis interprets the work of the German jurist and state theorist Carl Schmitt through the lens of a 'double-historicism' by using unpublished archival materials – journal entries, letters, manuscripts, and marginalia. Not only were Schmitt's ideas and writings shaped by his intellectual and political context, but he himself viewed legal and political concepts as historically contingent. The first chapter reconstructs the 'canonization' of Carl Schmitt in the field of political theory, focusing on the reception and sanitization of his work in English language scholarship. The second chapter excavates Schmitt's concept of 'historicity' and his turn to the founder of the Historical School of Law, Friedrich Carl von Savigny, in lectures given in 1943 and 1944. I then argue this historical turn is the key to understanding Schmitt's postwar work, connecting four major monographs published concurrently in 1950.

The following chapters show how Schmitt mobilizes historicity as a critique of natural law theories and the right of resistance against tyrannical regimes (chapter 3), the appropriation of Scholastic just war doctrines in the postwar period (chapter 4), Marxism's weaponization of legality (chapter 5) and utopianism as a form of annihilation of law and the 'de-localization' of both nature and man (chapter 6). Schmitt saw both legal positivism and natural law theories as posing an existential crisis to the future of jurisprudence, one that could only be overcome by recourse to a self-reflexive history of the discipline.

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Trinity Hall College supported me with an Atlantic Fund scholarship, without which this dissertation would not have been possible. I have benefitted from grants from the Institute of Philosophy at the Hungarian Academy of Sciences, the Deutscher Akademischer Austauschdienst (DAAD), the Fulbright Commission, the European Society for the History of Political Thought, the Department of Politics and International Studies' travel fund, and

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Finally I would like to thank my husband, Caspar Schwalbe, for convincing me to apply to Cambridge and for putting up with the consequences.

A Note on Translations

All translations of German texts are my own unless stated otherwise. When quoting Schmitt directly, I have chosen to include the original German text in the footnotes for two reasons: first, in the interest of transparency such that my translations can be verified and criticized, particularly when citing unpublished sources otherwise unavailable to the reader; and second, to maintain the wordplay and conceptual repetition across disparate texts and time periods. I hope the reader will forgive my cumbersome footnotes.

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Chapter 1

Carl Schmitt in the Anglosphere: The Canonization of a Political Theorist

Shortly after the end of the Second World War, the German jurist and political theorist Carl Schmitt found himself arrested by the American occupying authorities.[1] Imprisoned first in a camp in Berlin-Litcherfelde-Süd and then again in Berlin-Wannsee,[2] the Prussian State Councilor and Professor at the University of Berlin reached his nadir as an odious figure in the history of German political and legal thought for his association with and support of the National Socialist dictatorship. Even his closest former students, Ernst Rudolf Huber and Ernst Forsthoff, did not write to their former mentor.[3]

During this period of imprisonment, Schmitt turned his gaze towards the history of political thought, finding parallels in his historical situation to that of Thomas More, or as Schmitt describes him, 'the patron saint of intellectual freedom.'[4] Like Schmitt, More was a lawyer and councilor at the center of political power. In the end, however, the two suffered different fates: More was also imprisoned, though unlike Schmitt, he was executed by the very powers that he had served. And yet Schmitt complains that More had 'made astounding concessions to the tyrant before the time had come that he became a martyr and a saint.'[5]

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1 Schmitt's arrest was individually arranged by Karl Loewenstein and not part of the automatic arrests as both Schmitt himself and his interrogator at Nuremberg, Robert Kempner, would later characterize it. See Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall* (Frankfurt: C.H. Beck, 2009), p. 442; Carl Schmitt, *Ex Captivitate Salus: Erfahrungen der Zeit 1945/47* (Berlin: Duncker & Humblot, 2010 [1950]), p. 96; Carl Schmitt, *Antworten in Nürnberg* (Berlin: Duncker & Humblot, 2000), p. 21.

2 Schmitt, *Antworten in Nürnberg*, p. 11.

3 Mehring, *Carl Schmitt*, p. 444.

4 Schmitt, *Ex Captivitate Salus*, p. 21. 'Der Schutzheilige der geistigen Freiheit.'

5 Schmitt, *Ex Captivitate Salus*, p. 21. 'Dem Tyrannen erstaunliche Konzessionen gemacht, ehe es soweit war, daß er zum Märtyrer und Heiligen wurde.'

That Pope Pius XI could still canonize More in 1935 as a symbol of resistance to totalitarian regimes despite these 'astounding concessions' demonstrated to Schmitt that even the saint of intellectual freedom himself did not engage in resistance at all costs. For Schmitt, if such a standard held for the exceptional case of a saint, then certainly Schmitt himself had been under no obligation to resist the tyranny of the National Socialist regime, as the same rule applies in all times of the concentration of political power: '*non possum scribere in eum qui potest proscribere*.'[6] *It is not possible to write about that which has the power to proscribe.*

Held within an American internment camp in 1945/6 and held once again as a potential defendant at the Nuremberg Trials,[7] a future rehabilitation of Schmitt's academic reputation would have appeared absurd; and yet, today, Carl Schmitt has been canonized in the Anglosphere. Such proclamations are ubiquitous: whether it is the 'canon of twentieth-century political theory in America,' the 'canon of IR's most influential critical figures,' or the 'late modern canon' of political theology, Carl Schmitt figures as a towering intellectual figure, the newest political thinker to be elevated to the status of an academic saint.[8] If not the person, then we are told that Carl Schmitt's work, fully autonomous from its author and its historical context, belongs in the canon: 'The great breadth and erudition of what is, in a self-evident sense, Schmitt's magnum opus appears destined to guarantee a place for Nomos of the Earth in the canon of essential IR reading.'[9] The extent of Schmitt's veneration, particularly among the self-identified political left, raises a simple question: how is it that an influential National Socialist jurist became canonized in Anglophone literature?

This chapter argues that Schmitt's reception underwent two constitutive processes: in the first phase, Schmitt was introduced to an Anglophone audience as a historical figure, one whose reputation could be salvaged by myopically rewriting his history. To make Schmitt into a saint, this first process relied on what I describe as 'the Myth of 1936,' or the belief that Schmitt's persecution by the *Schutzstaffel* in 1936 provides sufficient evidence to establish that he was in fact an opponent of National Socialism, a position more radical than even Carl Schmitt himself would attempt during his Nuremberg interrogations.

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[6] Schmitt, *Ex Captivitate Salus*, p. 21. Contained as well in 'Stellungnahme I' in Schmitt, *Antworten in Nürnberg*, p. 73. On Schmitt's repeated usage of this phrase in the context of the right of resistance, see Chapter 3, Section 3.

[7] Mehring, *Carl Schmitt*, pp. 448-450; Helmut Quaritsch, 'Carl Schmitt im Nürnberger Justizgefängnis,' in Carl Schmitt, *Antworten in Nürnberg*, pp. 11-13, 15.

[8] Andrew Norris, 'A Mine that Explodes Silently. Carl Schmitt in Weimar and After,' *Political Theory* 33(6) (2005), 887-898, p. 887; Benno Gerhard Teschke, 'Fatal Attraction: A Critique of Schmitt's International Political and Legal Theory,' *International Theory* 3(2) (2011), 179-227, p. 182; Rocco Rubini, 'Review: The Future of Illusion: Political Theology and Early Modern Texts,' *Modern Philology* 113(1) (2015), E53-E55, p. E53.

[9] William Hooker, *Carl Schmitt's International Thought: Order and Orientation* (Cambridge: Cambridge University Press, 2009), p. 3.

Furthermore, this first phase, while superficially historical, depicts Schmitt as a passive participant in German history, one whose writings did nothing more than describe a series of contemporary political situations. I argue that this passive historicism in fact contradicts Schmitt's own understanding of his texts: Schmitt saw himself as engaged in a form of intellectual warfare no less significant than physical war. The second phase, taking place after Schmitt's canonization, concerns the political left's contemporary appropriation of his writings. While Schmitt had Marxist students and admirers such as Otto Kirchheimer, Franz Neumann and Walter Benjamin, the new generation of self-identified 'left-Schmittians' has little in common with these previous thinkers. Instead, the 'left-Schmittians' – primarily represented by Andreas Kalyvas and Chantal Mouffe – have further eroded the historical elements of Schmitt's thought in their attempt to formulate a critique of liberalism through what they describe as Schmitt's 'radical democracy.'

1.1 The Myth of 1936: The Beginnings of the Schmitt Renaissance

This section focuses on two early texts that shaped the reception of Carl Schmitt for Anglophone audiences: George Schwab's *The Challenge of the Exception* (1970), the first major monograph devoted to Schmitt's work available in English, and Joseph Bendersky's *Carl Schmitt: A Theorist for the Reich* (1983), the first English language intellectual biography. As both monographs were published at a time when few of Schmitt's texts were available in English translation and the secondary literature was correspondingly small, these monographs were in a position to establish their own narrative for Schmitt's rise and fall and thereby shape the Schmittian renaissance in the Anglosphere.[10] This section corrects a number of their factual and interpretive inaccuracies while tracing the diffusion of these inaccuracies in the broader wave of literature on Carl Schmitt.

[10] By the time of Bendersky's biography, only the 1932 edition of *Der Begriff des Politischen* (translated by George Schwab in 1976) was available in English. The introduction and foreword both fail to mention the revised third edition of the text published in 1933. Alain de Benoist, *Carl Schmitt: Bibliographie seiner Schriften* (Berlin: Akademie Verlag, 2003), p. 14. Further, this narrative fits with Telos' largely self-congratulatory interpretation of the Schmitt Renaissance. Gary Ulmen, 'Review of Joseph Bendersky, Carl Schmitt: Theorist For the Reich,' *Telos* 59 (1984), 201-212, p. 203; Joseph Bendersky, 'Schmitt and Hobbes,' *Telos* 109 (1996), 122-129 p.122; Joseph Bendersky, 'New Evidence, Old Contradictions: Carl Schmitt and the Jewish Question,' *Telos* 132 (2005), 64-82, p. 64. See as well Matthew Specter, 'What's "Left" in Schmitt? From Aversion to Appropriation in Contemporary Political Theory,' in eds. Jens Meierhenrich and Oliver Simons, *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2014), 426-455, p. 448.

As George Schwab wrote in the preface to his *The Challenge of the Exception*, his study of Schmitt's work would begin in 1921, with the publication of *Die Dikatur*, and end in 1936, just three years after Hitler's *Machtergreifung*. The year 1936 is a carefully chosen bookend to his study: Schwab justifies the abrupt break in his monograph due to 'an attack on [Schmitt] in 1936 by the Gestapo newspaper, *Das Schwarze Korps*,' after which '[Schmitt] ceased writing on problems pertaining to jurisprudence and politics (with few exceptions) until the end of World War II.'[11] Schwab's statement constitutes the first articulation of a foundational myth in Schmitt scholarship, one which will here be termed 'the myth of 1936.'

That Schmitt was indeed attacked in the pages of *Das Schwarze Korps* in 1936 is a documented fact[12]; however, every other assertion contained in the above quotation is false. First, *Das Schwarze Korps* was not a Gestapo newspaper but was rather run by the *Schutzstaffel* (SS) and issues of the newspaper carried the subtitle '*Zeitung der Schutzstaffeln der NSDAP – Organ der Reichsführung SS*.' Second, in no way did Schmitt cease writing on 'problems pertaining to jurisprudence and politics' in the nine years between 1936 and 1945. Even if one were to forget that Schmitt was not a legal dualist[13] and adopt a relatively narrow understanding of 'jurisprudence and politics,' Schmitt published extensively on both of these topics during the time period Schwab identifies: for example, a monograph on *Der Leviathan in der Staatslehre des Thomas Hobbes* (1938); individual essays on 'der Staat als Mechanismus bei Hobbes und Descartes' (1937), 'Stellungnahme der Wissenschaftlichen Abteilung des NS.-Rechtswahrerbundes zum Entwurf einer Strafverfahrensordnung' (1937), 'Neutralität und Neutralisierungen' (1939), 'Über das Verhältnis von Völkerrecht und staatlichem Recht' (1940), 'Das "allgemeine deutsche Staatsrecht" als Beispiel rechtswissenschaftlicher Systembildung' (1940), 'Die Stellung Lorenz von Steins in der Geschichte des 19. Jahrhundert' (1940), 'Reich – Staat – Bund' (1940), 'Der Staat als ein konkreter, an eine geschichtliche Epoche gebundener Begriff' (1941), 'Die Formung des französischen Geistes durch den Legisten' (1942), and 'Behemoth, Leviathan und Greif – Vom Wandel der Herrschaftsformen' (1943); further, the numerous essays on jurisprudence and politics edited, curated, and republished in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles* (1940); and lastly, a series of public lectures on *Die Lage der europäischen Rechtswissenschaft* (1943/44).[14] The sheer volume of publications in this period can hardly constitute '[ceasing] writing on

[11] George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker & Humblot, 1970), pp. 7-8.

[12] Mehring, *Carl Schmitt*, pp. 378-380; Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum 'Kronjuristen des Dritten Reiches'* (Darmstadt: Wissenschaftliche Buchhandlung, 1995), pp. 671-677.

[13] See, from the time period under consideration, Carl Schmitt, 'Die Lage der europäischen Rechtswissenschaft (1943/44)' in Carl Schmitt, *Verfassungsrechtliche Aufsätze* (Berlin: Duncker & Humblot, 2003 [1958]), 386-429. This text is discussed further in the following chapter.

[14] Benoist, *Carl Schmitt: Bibliographie seiner Schriften und Korrespondenzen*, pp. 26, 29, 32, 80-92.

problems pertaining to jurisprudence and politics' in any meaningful sense of the phrase. However, the intern and function of Schwab's claim is clear: after there years of trying to gain influence with the National Socialist regime, Schmitt himself became a target of that very regime.

In Joseph Bendersky's subsequent intellectual biography, *Carl Schmitt: Theorist for the Reich*, the Myth of 1936 undergoes a slight mutation. Bendersky corrects the first error, noting that *Das Schwarze Korps* was indeed an organ of the SS, and substantially expands on the extent of the *SS-Sicherheitsdienst* (SD) campaign against Schmitt using contemporaneous archival documents.[15] At the same time, however, the Myth of 1936 becomes the cornerstone of an exculpatory account of Schmitt's involvement with National Socialism, one that has spread throughout Schmitt literature.[16] Bendersky uses the existence of an SS campaign against Schmitt to justify his most vitriolic anti-Semitic attacks at the 1936 conference on 'Judaism in Jurisprudence,' claiming that Schmitt was merely 'trying to sound like a devoted National Socialist' in order to protect himself from persecution.[17] That Schmitt needed to try is itself a puzzling assertion given that he had more than enough practice in his writings on National Socialist jurisprudence between 1933 and 1936 – he certainly did not need to try then, nor did he in 1936. Moreover, Bendersky uses the severity of the SS campaign against Schmitt to construct an even stronger version of Schwab's second argument, writing 'to avoid further complications, [Schmitt] *never again* dealt with domestic or party politics, but turned his attention to the study of international relations, and soon passed into obscurity.'[18] Just six pages later, and Bendersky repeats again, 'with the exception of his Hobbes studies, all of Schmitt's publications between 1937 and 1945 dealt with international law and politics.'[19] Thus, while Schwab had at least relativized his claim by noting the existence of some exceptions – admittedly an understatement – Bendersky transformed it into an absolute statement and moved even further away from an accurate representation of Schmitt's intellectual output during this period.

[15] Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983), p. 232.

[16] From the pages of *Telos* alone, see Ulmen, 'Review of Carl Schmitt: Theorist for the Reich,' p. 209; Paul Hirst, 'Carl Schmitt's Decisionism,' *Telos* 72 (1987), 16-26, p. 16; Joseph Bendersky, 'Carl Schmitt at Nuremberg,' *Telos* 72 (1987), 91-96, p. 91; Joseph Bendersky, 'Carl Schmitt as Occasio,' *Telos* 78 (1988), 191-208; George Schwab, 'Carl Schmitt Hysteria in the US: the Case of Bill Scheuerman,' *Telos* 91 (1992), 99-107, p. 104; Gary Ulmen, 'Schmitt as Scapegoat: A Reply to Palaver,' *Telos* 106 (1996), 128-138, p. 135; Bendersky, 'Schmitt and Hobbes,' p. 128; Paul Gottfried, 'Ostracizing Carl Schmitt,' *Telos* 109 (1996), 95-97, p. 95; Joseph Bendersky, 'Carl Schmitt's Path to Nuremberg,' *Telos* 139 (2007), 6-34, p. 18.

[17] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 235.

[18] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 242. Emphasis added. Bendersky repeats the same argument in 'Carl Schmitt at Nuremberg,' p. 93.

[19] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 248. Emphasis added.

Bendersky's characterization of the events of 1936 raise two further problems. The first problem is that he treats National Socialism as monolithic and ideologically uniform. Such a characterization, however, fails to note the academic and ideological debates between members of the *Bund Nationalsozialistischer Deutscher Juristen* (BNSDJ) over an appropriate legal theory for the newly formed Third Reich. Moreover, the rhetorical function of Bendersky's assertion is that Schmitt was not a true or convinced National Socialist if the SS in particular did not consider him to be one. However, following Bendersky's logic would lead to the absurd conclusion that Ernst Röhm was not a National Socialist because the SS publicly denounced him. Indeed, in a recent publication, Bendersky summarizes the 1936 events by noting that Schmitt was under 'Nazi attack for his lack of racial theory,' attributing the specifically SS attack on Schmitt to the Nazis as a unified entity.[20] This follows Bendersky's previous characterization of 'the Nazi rejection of [Schmitt],' implicitly equating the SS with 'Nazi true believers.'[21] This raises the first problem: should contemporary scholars defer to the judgment of the SS?

This first problem can be articulated in Schmitt's own vocabulary as *quis judicabit* – who decides? In subsequent publications defending his thesis, Bendersky repeatedly attributes this authority to the SS. For example, in a review of Scheuerman's *The End of Law*, Bendersky criticizes Scheuerman for asserting that Schmitt remained a National Socialist after 1936. Bendersky writes, 'contrary to an abundance of evidence that Schmitt was a mere figurehead temporarily tolerated by the Nazis, Scheuerman insists that Schmitt really was an influential Nazi theorist and remained so even after the SS attacked him in 1936.' He continues to chastise Scheuerman, noting that he 'neglects, among others, the most crucial set of evidence: the extensive SS file on Schmitt detailing the purge of him on the grounds that he was an opportunist and former anti-Nazi with Weimar Jewish affiliations.'[22] Schwab as well turned to the Myth of 1936 to criticize Scheuerman's interpretation.[23] However, such an argument only makes sense if one holds that only the SS could decide who was a National Socialist. In that sense, Scheuerman was correct in responding, 'if a Prussian *Staatsrat* (State Councilor), editor of the crucial *Die Deutsche Juristenzeitung*, leader in the Nazi professors' guild, prominent Berlin professor, author of a flurry of anti-Semitic pamphlets, and organizer of the infamous 1936 Conference on Judaism in Jurisprudence is not a "real" Nazi, who is?'[24]

[20] Joseph Bendersky, 'On the road to Damascus: The Telos Engagement with Carl Schmitt,' *Telos* 183 (2018), 69-94, p. 85.

[21] Bendersky, 'Carl Schmitt's Path to Nuremberg,' p. 18.

[22] Joseph Bendersky, Review of David Dyzenhaus, *Law as Politics*, and William Scheuerman, *The End of Law*, in *Central European History* 34(1) (2001), 116-120, p. 119.

[23] Schwab, 'Carl Schmitt Hysteria,' p. 102.

[24] William Scheuerman, 'The Fascism of Carl Schmitt: A Reply to George Schwab,' *German Politics and Society* 29 (1993), 104-111, p. 105.

It is worth noting that the Bendersky and Schwab interpretation of 1936 is even more exaggerated than the version Schmitt himself gave during his interrogation as a potential defendant at Nuremberg. During the interrogation, Schmitt is much more specific than those who would later interpret him. For example, he notes that 'in the year 1936, I was openly defamed by the SS.' He notes further that 'Frank's position was not strong enough to protect me from the SS.'[25] These statements undermine Bendersky and Schwab in two ways: in the first sense, they show that Schmitt himself knew that it was specifically the SS that publicly attacked him in 1936, not 'the Nazis' as a whole; and second, they show that, far from being a critic of the National Socialists, Schmitt was reliant on Hans Frank, founder and head of the BNSDJ, Reichminister and later Governor General of Occupied Poland, for protection. Thus, the claim that Schmitt himself makes is much narrower: 'I was an opponent of the SS.'[26]

In subsequent publications, the Myth of 1936 is presented as a contextual fact, one that is necessary for any historically accurate reading of Schmitt's work. For example, Nevil Johnson repeats that 'after three years of unconvincing contortions to justify the new regime he fell into disfavor and retreated into what he hoped would be the safety of silence.'[27] It appears in the 1996 translator's foreword to *The Concept of the Political* with no supporting citation.[28] In Schwab's introduction to his 1996 translation of Schmitt's *The Leviathan in the State Theory of Thomas Hobbes*, he notes 'the thesis advanced here is one shared by Schmitt scholars, namely that 1936 constitutes a watershed for Schmitt.'[29] Upon closer inspection, the 'Schmitt scholars' Schwab cites are himself and Bendersky, thereby passing off a highly controversial claim as a widely accepted fact in scholarly literature; indeed, this is made all the more dubious given that Bendersky, prior to publishing his Schmitt biography, praised Schwab in a review of his works for drawing attention to precisely this point.[30]

Leaning on the Myth of 1936 has thus allowed George Schwab, Joseph Bendersky, and those who follow their interpretation[31] to perpetuate two claims in the Schmitt literature. The first is that Carl Schmitt, although a member of the National Socialist party, was not a

[25] Schmitt, *Antworten in Nürnberg*, pp. 75-76, 86. 'Ich war im Jahre 1936 durch die SS öffentlich defamiert worden'; 'Die Stellung Franks war nicht stark genug, mich vor der SS zu schützen.'

[26] Schmitt, *Antworten in Nürnberg*, p. 65. 'Ich war Gegner der SS.'

[27] Nevil Johnson, 'Review of Carl Schmitt: Theorist for the Reich,' *The English Historical Review* 101(398) (1986) 301-302, p. 302.

[28] Tracy Strong, 'Foreword: Dimensions of the New Debate around Carl Schmitt,' in Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996), p. x. Strong also limits Schmitt's anti-semitism to the years 1933-1936, a position that was neither then nor now tenable. p. xxv.

[29] George Schwab, 'Introduction,' in Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes*, trans. George Schwab (Westport, CT: Greenwood Press, 1996), p. ix.

[30] Joseph Bendersky, 'Carl Schmitt Confronts the English-Speaking World,' *Canadian Journal of Political and Social Theory* 2(3) (1978), p. 130.

[31] See for example, Paul Piccone and Gary Ulmen, 'Introduction to Schmitt,' *Telos* 72 (1987), 1-14, p. 11.

convinced National Socialist, and, in fact, only 'when threatened by the ideological purists in the party' did Schmitt '[take] up the anti-Semitic cause as a means of proving his ideological conversion.'[32] This forms the opportunist or 'lip-service' thesis.[33] Bendersky takes his argument so far as to argue that, by 1935, '[Schmitt] found himself articulating ideas about race and the Jews which he thought were truly absurd,' a description of Schmitt's cognitive state that is supported with no evidence.[34] Bendersky's opportunism thesis directly echoes George Schwab's interpretation of the same events: 'to avoid renewed failure, Schmitt joined the National-Socialist bandwagon of anti-Semitism,'[35] or as he phrases it in a later text, 'Schmitt turned to traditional antisemitism as a means of displaying his loyalty to the regime.'[36] Indeed, Schwab proposes an entirely exculpatory – and indeed incredulous – interpretation of Schmitt's practice of 'marking' Jewish authors after 1933. Schwab writes, 'concerned with the widespread practice of plagiarizing Jewish authors, Schmitt insisted, however, that if a Jewish author had to be cited at all, he must not be ignored but mentioned as a "Jewish author." By insisting on this Schmitt had hoped to raise the respectability of German scholarship which had received mortal blows since 1933.'[37] Thus, marking Jewish authors – for example, referring to Friedrich Julius Stahl as 'Stahl-Jolson,' using his pre-Christian name – was merely an attempt at curbing rampant academic plagiarism among aspiring lawyers at German universities. Schwab's only evidence for this interpretation? 'On

[32] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 281.

[33] William Scheuerman, Review of Bernd Rüthers, *Carl Schmitt im Dritten Reich*, in *German Politics and Society* 23 (1991), 71-79, p. 72; Bendersky, 'Carl Schmitt at Nuremberg,' p. 95; Ulmen makes the same argument in Ulmen, Review of *Carl Schmitt: Theorist for the Reich*, p. 209.

[34] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 228.

[35] Schwab, *The Challenge of the Exception*, p. 107.

[36] Schwab, 'Schmitt Studies in the English-Speaking World,' p. 453. The argument is repeated in Schwab, 'Carl Schmitt Hysteria,' p. 102.

[37] On this practice, see Raphael Gross, *Carl Schmitt und die Juden* (Frankfurt: Suhrkamp, 2005), p. 129. Unfortunately, Schwab either did not realize the function of appending '-Jolson' to Stahl's name or he simply did not care, as Schwab himself adopts Schmitt's practice of referring to 'Friedrich Stahl (Jolson)' and simply 'Jolson.' Schwab, *The Challenge of the Exception*, p. 119. Bendersky has likewise repeated the marking in Bendersky, 'Schmitt and Hobbes,' p. 128. Referring to 'Stahl-Jolson' is surprisingly common in literature on Schmitt. For a non-exhaustive list, see Hooker, *Carl Schmitt's International Thought*, p. 48n51; David Boucher, 'Schmitt, Oakshott and the Hobbesian Legacy in the Crisis of Our Times,' in *Law, Liberty and State* eds. David Dyzenhaus and Thomas Poole (Cambridge: Cambridge University Press, 2015), p. 138; Christiano Grottanelli, 'Mircea Eliade, Carl Schmitt, René Guénon, 1942,' *Revue de l'histoire des religions*, 219(3) (2002), 325-356, p. 335; Christoph Schmidt, 'Der häretische Imperativ: Gershom Scholems Kabbala als politische Theologie?' *Zeitschrift für Religions- und Geistesgeschichte* 50(1) (1998), 61-83, p. 68n24; Johan Tralau, 'Order, the Ocean, and Satan: Schmitt's Hobbes, National Socialism, and the Enigmatic Ambiguity of Friend and Foe,' *Critical Review of International Social and Political Philosophy* 13(2), 435-453, 438; Srinivas Aravamudan, "'The Unity of the Representer': Reading Leviathan against the Grain,' *South Atlantic Quarterly* 104(4) (2005), 631-653, p. 637; Carmelo Jiménez Segado, 'Carl Schmitt and the "Grossraum" of the "Reich": A revival of the Idea of Empire,' paper presented at the colloquium 'The International Thought of Carl Schmitt,' The Hague, 2004, p. 6.

this information I rely on my conversations with Carl Schmitt.'[38]

Over thirty years later, Bendersky has been forced to retreat from his defense of Schmitt's anti-Semitism in the face of numerous examples both before and after the Third Reich,[39] particularly illuminated in Raphael Gross' *Carl Schmitt und die Juden*.[40] With the publication of additional archival resources, such as Carl Schmitt's private notebooks and his *Glossarium*,[41] the evidentiary basis for Schmitt's anti-Semitism has only been strengthened.[42] Thus, as Bendersky now claims, 'the diaries now categorically refute interpretations of Schmitt's anti-semitism as an opportunistic compromise limited to the Nazi years.'[43] With the 'lip-service' thesis in ruins, Bendersky's new alternative interpretation is that Schmitt was merely an 'unusual' anti-Semite, one whose 'relationships with and attitudes towards Jews was nuanced, complex (often vague) and certainly inconsistent as well as contradictory.'[44]

The second problem arising from the Myth of 1936 is the claim that Schmitt's publications after the SS attacks were not National Socialist or anti-Semitic – in other words, while it was possible to criticize Schmitt for his 'reprehensible compromises between 1933 and 1936,' those three years were the extent of his intellectual corruption and opportunism.[45] Such an argument is meant to limit the contagion of what were blatantly propagandistic texts published immediately after the *Machtergreifung*. In an early review article, Bendersky held

[38] Schwab, *The Challenge of the Exception*, p. 136n7. In contrast, see the highly textual reading of the same episode in Gross, *Carl Schmitt und die Juden*, p. 129. Schwab's reliance on Schmitt's ex post recollections is characteristic of this period in Schmitt literature, particularly within the pages of *Telos*, during which Schmitt gave interviews and granted access – though ostensibly selective access – to his personal records. See Schwab, 'Introduction,' in Carl Schmitt, *The Leviathan*, p. xiv; Schwab, 'Carl Schmitt Hysteria,' pp. 104-105, 106; and Bendersky, *Carl Schmitt: Theorist for the Reich*, pp. xi, xiii, 289, 290; Bendersky, 'Schmitt and Hobbes,' pp. 125, 128; Gary Ulmen, 'Continuity in Carl Schmitt's Thought,' *Telos* 119 (2001), 18-31, p. 29n39. For Stefan Breuer, reliance on Schmitt's recollections means that even a nominally historical work is doomed to repeat Schmitt's self-interpretation. See Stefan Breuer, Review of Joseph Bendersky, *Carl Schmitt: Theorist for the Reich*, in *Kritische Justiz* 17(1) (1984), 110-113, p. 111.

[39] Curiously, despite making this point himself, Bendersky does not cite his own work, but rather the work of the *Telos* editors, Paul Piccone and Gary Ulmen. See Bendersky, 'On the road to Damascus,' *Telos* 183 (2018), 69-94, pp. 85-88.

[40] Gross, *Carl Schmitt und die Juden*.

[41] Richard Faber, 'Es gibt einen antijüdischen Affekt! Über Carl Schmitts "Glossarium,"' *Zeitschrift für Religions- und Geistesgeschichte* 46(1) (1994), 70-73. The initial *Telos* response to these notebooks was to downplay the comments as 'easily distorted' and to note that they were never intended to be published. See Ulmen, 'Schmitt as Scapegoat,' p. 132. Another attempt to downplay the contents was to characterize them as 'the bitterness of an aging former celebrity.' See Gottfried, 'Ostracizing Carl Schmitt,' p. 95.

[42] See Gross' restatement in Raphael Gross, 'The "True Enemy": Antisemitism in Carl Schmitt's Life and Work,' in *The Oxford Handbook of Carl Schmitt* eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2017), 96-116.

[43] Joseph Bendersky, 'Schmitt's Diaries' in *Oxford Handbook of Carl Schmitt*, p. 119.

[44] Bendersky, 'Schmitt's Diaries,' p. 135.

[45] George Schwab, 'Schmitt Studies in the English-Speaking World,' in *Complexio Oppositorum: Über Carl Schmitt* (Berlin: Duncker & Humblot, 1988), p. 448.

that Schmitt began a period of 'inner-emigration' after the SS attacks, entirely neglecting Schmitt's writings between 1936 and 1945.[46] For George Schwab, the texts after 1936 do not warrant discussion; instead, he skips from *Das Schwarze Korps* article in 1936 to the July 20 plot to assassinate Hitler in 1944, curiously linking Schmitt's fall from grace to a famous example of internal resistance and arguing that Schmitt's invocation of the Benito Cereno myth was as 'an individual's desperate situation in a totalitarian system. It symbolizes an utter helplessness to communicate this specific situation to the outside world.'[47] The underlying justification for Schwab's argument is that the texts after this period all dealt with international law and international politics, and thus could not be tainted by National Socialism. Instead, as Bendersky presents Schmitt, after the events of 1936, he became a critic of 'Nazi totalitarianism,' one who 'cautiously [cloaks] his dissatisfaction in erudite pieces of scholarship.'[48]

Bendersky has never retreated from the Myth of 1936. In a recent article commemorating thirty years of *Telos*' engagement with Schmitt, Bendersky cites Samuel Garrett Zeitlin's introduction to his translation *Land and Sea* as evidence of the journal's reconsideration of the persistence of Schmitt's anti-Semitism; however, Bendersky noticeably ignores the main thrust of Zeitlin's argument: published in 1942, *Land and Sea* 'was written as a work of National Socialist propaganda.'[49] Indeed, Bendersky chastises others for perpetuating 'the erroneous notion, that [Schmitt] was a Nazi thinker' and for attempting to 're-Nazify' Schmitt.[50] Instead, he characterizes opposition to the Myth of 1936 as indicative of academic elitism: 'Such hysterical inferences emanating from professors at major research universities and the most prestigious presses (with accolades in eminent scholarly journals) offered yet another validation of *Telos*'s broader scrutiny of New Class intellectuals.'[51] That such an attack on the academic position of scholars such as William Scheuerman, David Dyzenhaus, and John McCormick – characterized by Bendersky's fellow travelers as 'self-appointed

[46] Bendersky, 'Carl Schmitt Confronts the English-Speaking World,' p. 126. Bendersky has recently repeated this claim in Bendersky, 'Schmitt's Diaries,' p. 137. Ulmen repeats this uncritically in Ulmen, Review of *Carl Schmitt: Theorist for the Reich*, p. 209; Ulmen, 'Continuity in Carl Schmitt's Thought,' p. 30.

[47] Schwab, *The Challenge of the Exception*, p. 143.

[48] Bendersky, *Carl Schmitt: Theorist for the Reich*, pp. 244-245. See as well Ulmen, 'Schmitt as Scapegoat,' p. 135.

[49] Samuel Garrett Zeitlin, 'Propaganda and Critique: An Introduction to Land and Sea' in Carl Schmitt, *Land and Sea* trans. Samuel Garrett Zeitlin (Candor: Telos Press, 2015), xxxi-lxix, p. lxix.

[50] One might respond that it is difficult to 're-Nazify' someone who refused denazification. Joseph Bendersky, 'The Definite and the Dubious: Carl Schmitt's Influence on Conservative Political and Legal Theory in the US,' *Telos* 122 (2002), 33-47, pp. 34, 36.

[51] Bendersky, 'On the road to Damascus,' p. 82; Paul Piccone and Gary Ulmen, 'Uses and Abuses of Carl Schmitt,' *Telos* 122 (2002), 3-32, p. 6; for the broader *Telos* critique of 'New Class intellectuals,' see Paul Piccone, 'Ten Counter-theses on New Class Ideology: Yet Another Reply to Rich Jonstone,' *Telos* 119 (2001), 145-155, p. 146; Paul Piccone, 'Ostracizing Carl Schmitt,' *Telos* 109 (1996), 87-91.

ideological gate-keepers'[52] – is the only counter-argument Bendersky can present is itself a telling admission of the crumbling evidentiary support for the Myth of 1936 and, more broadly, the thirty years of engagement with Schmitt within the pages of *Telos*.

The second chapter of this thesis on Schmitt's turn to historicity refutes both aspects of the Myth of 1936: first, the chapter is centered on a series of speeches Schmitt delivered in 1943/44, published after the war as *Die Lage der europäischen Rechtswissenschaft*. This text, written and delivered during Schmitt's supposed period of 'inner-emigration,' shows that Schmitt in fact continued to write and speak on issues of jurisprudence and domestic politics well after 1936 – indeed, this was a text about the current state of European jurisprudence, one which was delivered across the continent. In addition, chapter two also seeks to depict a more complicated relationship between Schmitt and National Socialism at the end of the war. Zeitlin was correct to note that Hitler's violation of the Hitler-Stalin pact marked a turning point for Schmitt's view of the Third Reich[53]; speaking after the Pact was broken, Schmitt's text demonstrates a continued reliance on National Socialist texts and thinkers while at the same time a critical approach to the National Socialist leadership.

1.2 Historicism or Apologetics?

In a parallel movement to constructing the Myth of 1936, both Schwab and Bendersky advanced a particular methodological approach to Schmitt's texts: historicism. While this approach is never explicitly formulated, it nevertheless is consistently applied in their interpretation of Schmitt's ideas. For example, Schwab warns the reader at the start of his monograph that 'no answers to universal philosophical questions will be forthcoming,' as Schmitt was only ever a lawyer, bound to the political configurations of a specific historical moment.[54] Schwab continues, '[Schmitt's] ideas should not be separated from specific constitutional events that were fraught with political overtones and that occurred during these sixteen years.'[55] Understanding Schmitt thus means reading him historically as a commentator of the political and legal events unfolding around him.

Bendersky's subsequent monograph follows the same line, noting that 'there is an important interrelationship between [Schmitt's] ideas and the changing political circumstances he confronted.'[56] Bendersky presents Schmitt's texts within the shifting historical contexts and

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[52] Piccone and Ulmen, 'Uses and Abuses of Carl Schmitt,' p. 15.
[53] Zeitlin, 'Propaganda and Critique,' pp. xxxviii-xli.
[54] Schwab, *The Challenge of the Exception*, p. 7.
[55] Schwab, *The Challenge of the Exception*, p. 8.
[56] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. x.

state structures of the German Kaiserreich, the Weimar Republic, and the Third Reich. This approach can be seen, for example, in Bendersky's argument that Schmitt's theory of the *Ausnahmezustand* – the state of exception – developed while Schmitt served at the Prussian general staff headquarters where 'he had been assigned to the state-of-war section involved in administering martial law. The practical and legal problems this entailed stirred within him an abiding interest in dictatorship and in the *Ausnahmezustand*.'[57] Thus, Schmitt's personal biography, in addition to the broader context of German political and constitutional history, forms an essential component for interpreting Schmitt's texts.

While this dissertation advances a historical approach, there are two problems with the method applied by Schwab and Bendersky. The first problem is that while both authors routinely invoke 'historical context' as a bludgeon against their critics, their own framing of the historical context and selective use of sources is inadequate to that standard. Bendersky accuses his critics of 'distorting Schmitt's ideas either by taking certain selections out of context or by analyzing them in a historical vacuum,' reducing them to 'blatant example[s] of such an ahistorical approach.'[58] He disparages another of his critics as presenting 'another ahistorical, distorted picture painted by selectivity.'[59] Moreover, in condemning the use of Schmitt's *Glossarium* as an interpretive device, Bendersky laments that 'no one has systematically examined these notes in situational or historical context.'[60]

At the same time, however, Bendersky's use of Schmitt's postwar recollections as exculpatory evidence for his actions under National Socialism undermines any pretense of an accurate historical construction. For example, while distancing Schmitt from the Nazi leadership due to the latter's anti-intellectualism, Bendersky quotes Schmitt as having later recounted to him, 'Besides, what would I say to [Hitler]? …I would have to sit him in a chair and deliver a lecture.'[61] While an amusing anecdote, such a story is at best evidence of Schmitt's postwar characterization of his previous attitudes, not evidence of those attitudes themselves. Such a problem is, however, a problem of praxis, of Bendersky and Schwab failing to adhere to their own methodological standards, not a problem of those standards themselves.

There is a larger, theoretical problem looming in Schwab and Bendersky's historical

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[57] Bendersky, *Carl Schmitt: Theorist for the Reich*, pp. 19, 22.

[58] Joseph Bendersky, 'Carl Schmitt and the Conservative Revolution,' *Telos* 72 (1987), 27-42, pp. 29-30, 32; Joseph Bendersky, Review of David Dyzenhaus, *Law as Politics*, and William Scheuerman, *The End of Law*, p. 119.

[59] Bendersky, Review of David Dyzenhaus, *Law as Politics*, and William Scheuerman, *The End of Law*, p. 119; Bendersky, 'Carl Schmitt as Occasio,' p. 203.

[60] Bendersky, 'New Evidence, Old Contradictions,' p. 71.

[61] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 220.

approach. For both authors, historicism means that Schmitt was a passive participant in German history, one who was merely describing the political and legal contexts in which he found himself. For example, Schwab euphemistically describes Schmitt's National Socialist constitutional theory, *Staat, Bewegung, Volk* as 'a keen observation and approbation of the emerging political situation in 1933 and, as it turned out, it was to an extent in accord with the facts thereafter.'[62] Such a description of the text renders Schmitt quite literally as an observer, not a participant in history. Piccone and Ulmen claim that Schmitt's 'work was always inextricably rooted in problematic historical contexts' and that they are thus 'primarily historical and . . . tied to immediate political problems.'[63] In such an account, Schmitt is reduced to being merely a diagnostician; his texts, precisely because they are bound to a specific historical context, can only describe that context. Schwab's interpretation of historicism assumes that Schmitt has no agency, that his words exist apart from reality, and that his writings were never intended to exert political influence.

Once again, Schwab's arguments mirror those made by Schmitt during his Nuremberg interrogations. As the transcripts reveal, Robert Kempner, his interrogator, was specifically interested in Schmitt's 'participation [*Mitwirkung*], direct and indirect, in the planning of wars of aggression, of war crimes and crimes against humanity.'[64] That Kempner uses the word '*Mitwirkung*' is important as it implies that Schmitt had to have some sort of effect [*Wirkung*] on the planning. However, this accusation is precisely what Schmitt denies in his subsequent interactions with Kempner, remarking that he 'did not strive' for a policy, 'but rather made a *diagnosis*.'[65] Or, as he says later, 'I went the way of steadfast scholarly *observation*.'[66] If Schmitt were in fact merely commenting on shifts occurring in the world around him, Kempner's accusations of '*Mitwirkung*' would fall flat: a diagnostician cannot be blamed for the disease he identified. As a result, Schmitt's invocation of passive historicism during his interrogation is designed to shield him from the specific accusations raised by the prosecution; indeed, it is precisely this characterization of Schmitt's work that is reintroduced to Schmitt scholarship through George Schwab.

Bendersky's writings fall victim to the same false equivalence of historicism and helplessness. Excusing Schmitt's support of the National Socialists, Bendersky writes 'Faced with the realities of Nazi power, he attempted to make his ideas compatible with National

[62] Schwab, *The Challenge of the Exception*, p. 112.
[63] Piccone and Ulmen, 'Uses and Abuses of Carl Schmitt,' pp. 3, 13.
[64] Schmitt, *Antworten in Nürnberg*, pp. 52, 59. 'an Ihrer Mitwirkung direkt und indirekt an der Planung von Angriffskriegen, von Kriegsverbrechen und Verbrechen gegen die Menschlichkeit.'
[65] Schmitt, *Antworten in Nürnberg*, p. 53. 'nicht erstrebt, sondern eine Diagnose gestellt.' Emphasis added.
[66] Schmitt, *Antworten in Nürnberg*, p. 68. 'Ich bin den Weg unbeirrter wissenschaftlicher Beobachtung gegangen.' Emphasis added.

Socialism.'[67] Gary Ulmen adopts this line, claiming that 'when it was all said and done, Schmitt was forced to recognize that National Socialism had become the dominant force in German politics.'[68] Such an interpretation effectively gives Schmitt a carte blanche for his texts published after 1933 – his writings merely described 'the realities of Nazi power' without themselves having any effect.

Adopting a passive historicism has allowed for a radical sanitization of Schmitt's writings on the *Großraumtheorie* published in 1941. If the Myth of 1936 holds, then the texts – written after Schmitt's supposed 'inner-emigration' – cannot be National Socialist texts, as Schmitt was already a 'subtle critic' of the regime. Schwab, Bendersky, and Ulmen all mobilize a form of passive historicism to interpret and ultimately rehabilitate this text. For example, Ulmen follows Bendersky in arguing that 'after the Nazis were in control of most of Europe, Schmitt expanded his concept accordingly . . . he analyzed changes only after they had taken place.'[69] Schmitt's theory of Großraum is accordingly described as 'his diagnosis and prognosis'[70] of the changing configuration of international politics, merely describing the formation of political blocks already underway. In a rather fantastical turn, George Schwab claims that 'Schmitt pointed out that the new political realities in Europe were outpacing developments in international law,' and as a result of this new political context, Schmitt 'argued for the need to subject the German politics of Großraum to scholarly investigation and to international law.'[71] Thus, by neutralizing Schmitt's texts as purely a descriptive account of changing political realities, Bendersky, Schwab, and Ulmen can simultaneously maintain the Myth of 1936, portray Schmitt as merely a passive observer to the National Socialist dictatorship, and sanitize the origins of the *Großraumtheorie*.[72]

Such an interpretation of passive historicism violates Schmitt's own understanding of the polemical function of political and historical texts. Already in Schmitt's Weimar writings, he is clear that writing a passive description is itself impossible, as 'all political concepts, ideas and words have a *polemical* meaning. They have a concrete opposition in mind and are bound to a concrete situation.' [73] Indeed, political concepts are themselves part of Schmitt's

[67] Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 207.
[68] Ulmen, Review of *Carl Schmitt: Theorist for the Reich*, p. 209.
[69] Ulmen, Review of *Carl Schmitt: Theorist for the Reich*, p. 210.
[70] Gary Ulmen, 'Toward a New World Order: Introduction to Carl Schmitt,' *Telos* 109 (1996), 3-28, p. 27.
[71] Schwab, 'Carl Schmitt Hysteria,' p. 106. For a counter-reading of the same text, see Smeltzer, 'Reich, Imperium, Empire.'
[72] Sanitizing the *Großraum* concept is important for Schwab, as his foreign policy texts on the 'open-society' block is directly inspired by it as a *Großraum* formed by 'shared values.' Schwab makes this connection explicit in *Complexio Oppositorum*, p. 417.
[73] Carl Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1963 [1932]), p. 31. 'Alle politischen Begriffe, Vorstellungen und Worte [haben] einen *polemischen* Sinn; sie haben eine konkrete Gegensätzlichkeit im Auge, sind an eine konkrete Situation gebunden.' Emphasis in original.

friend/enemy distinction: they are formed in concrete oppositions. To argue that Schmitt's own work could have been the only exception to an absolute claim and could have functioned as a politically neutral description of historical events, is a categorical misreading of his work.

Schmitt's analysis of Hobbes' *Leviathan* frontispiece delivers the clearest rejection of Schwab and Bendersky's passive historicism. Although the frontispiece is famous, Schmitt's commentary and its implications for his own work remains overlooked.[74] There, Schmitt reads the frontispiece through the conceptual lens of the friend/enemy distinction. Under the famous depiction of the leviathan as constituted by a number of small individuals, the frontispiece contains a series of five images on the bottom left and another five images on the bottom right. The left side falls under the sword held in the Leviathan's hand, a symbol of 'worldly' conflict; on the right side, a bishop's crook, symbolizing the spiritual world. For Schmitt, the five symbols on each side represent parallel 'means of power and conflict.' For example, 'the castle and the cannons correspond to institutions and intellectual methods on the other side, the combat value of which is not any less.'[75] Just as one might fight a war with rifles, Schmitt sees political concepts as a means of fighting intellectual warfare; and, as he makes clear in the previous quotation, this form of combat can be just as significant. Thus,Schmitt credits Hobbes with 'the great realization, that concepts and distinctions are political weapons, that is specifically weapons of indirect authority.'[76]

Although this position is articulated most clearly in Schmitt's interpretation of *Leviathan*, it remains a consistent position within his broader work. Indeed, even those texts which Schmitt himself describes as a history, such as *Staatsgefüge und Zusammenbruch des zweiten Reiches* are themselves polemical, meant at making a particular intervention in contemporary politics.[77] Thus, Bendersky and Schwab's historicism only generates half of the double-historicity necessary to interpret Schmitt's work: while emphasizing the role of historical context is correct, it needs to be extended to give an account of what Schmitt was doing with his publications. One need not reach to *Meaning and Understanding* to arrive at such a conclusion; rather, the polemical function of texts arises organically within Schmitt's work:

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[74] For example, Victoria Kahn discusses the frontispiece in an article on Schmitt, seemingly unaware that Schmitt himself had commented on it. See Victoria Kahn, 'Hamlet or Hercuba: Carl Schmitt's Decision,' *Representations* 83(1) (2003), 67-96, p. 87.

[75] Carl Schmitt, *Der Leviathan In der Staatslehre Thomas Hobbes* (Cologne: Hohenheim Verlag, 1982 [1938]), p. 26. 'Den Festungen und Kanonen entsprechen auf der anderen Seite Einrichtungen und intellektuelle Methoden, deren Kampfwert nicht geringer ist.'

[76] Schmitt, *der Leviathan*, p. 26. 'Die große Erkenntnis, daß Begriffe und Waffen "indirekter" Gewalten sind, wird auf diese Weise gleich auf der ersten Seite des Buches anschaulich gemacht.'

[77] See Joshua Smeltzer, "'Germany's Salvation": Carl Schmitt's Teleological History of the Second Reich,' *History of European Ideas* (2018) and Zeitlin, 'Propaganda and Critique.'

if 'all political concepts, ideas and words have a *polemical* meaning,' then one only need ask which 'concrete opposition [they have] in mind' and 'to which concrete situation [they are bound].'[78] This dissertation thus adopts an approach of active historicism: rather than treating Schmitt's publications as academic exercises informed by – but nevertheless incapable of influencing – shifting political contexts, it views these publications as themselves political interventions. Furthermore, while the precise polemical target is not always identified in the published text, unpublished sources can help to identify the intended object of his critique.

At a historiographical level, Bendersky and Schwab should be treated as one line in the Schmitt literature, one that is echoed in the works of Paul Piccone and Gary Ulmen.[79] The question that has long dominated Schmitt literature is the question of a cordon sanitaire between Schmitt's works before and after 1933: could Schmitt's texts after Hitler's *Machtergreifung* be read as a logical consequence of the positions he sketched during the Weimar Republic?[80] This sub-section has instead focused on a second posited 'break' in Schmitt's work occurring in 1936. It has argued that maintaining a clear distinction is impossible, itself based on limited evidence and exaggerated claims related to Schmitt's defamation at the hands of the SS in 1936. It is not the blatant apologetics propagated by Günter Maschke; rather, it is a subtle alteration of facts to limit Schmitt's personal responsibility. As William Scheuerman has quipped, Schmitt literature underwent something resembling a 'societal "unlearning"' in the 1980s at the hands of the 'Young Schmittians' – the first-hand knowledge of Schmitt's defense of National Socialism became slowly distorted until the image of Schmitt no longer matched historical reality.[81] Although this process of 'unlearning' was popularized within the pages of a relatively small academic journal, *Telos*, its impact continues to haunt contemporary Schmitt scholarship.[82] As such, the first stage of Schmitt's canonization was

[78] Quentin Skinner, 'Meaning and Understanding in the History of Ideas,' *History and Theory*, 8(1) (1969), 3-53; Carl Schmitt, *Der Begriff des Politischen*, p. 31.

[79] Contra Roger Chickering, Review of *Carl Schmitt: Theorist for the Reich* by Joseph Bendersky, *The History Teacher* 18(2) (1988), 311-312, p. 311. In agreement, see Martin Jay, Review of *Carl Schmitt: Theorist for the Reich* by Joseph Bendersky, *The Journal of Modern History* 56(3) (1984), 558-561, p. 559. Bendersky has argued that he remains committed to a different political ideology than Schwab; this may be true, but their interpretation of 1936 is almost identical. See Bendersky, 'Carl Schmitt as Occasio,' p. 204.

[80] Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus: Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (Munich: Fink Verlag, 1976); a condensed, English version of the argument in Ingeborg Maus, 'The 1933 "Break" in Carl Schmitt's Theory,' in *Law as Politics* ed. David Dyzenhaus (Durham: Duke University Press, 1998), 196-216. This line is advanced in William Scheuerman, *The End of Law* (Lanham: Rowman and Littlefield, 1999); the influence of Maus on Scheuerman, particularly on the 'indeterminancy' thesis, is documented in William Scheuerman, 'Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt' in *Law as Politics*, 252-280, pp. 274-275; See as well Jay, Review of *Carl Schmitt: Theorist for the Reich*, p. 560.

[81] Scheuerman, Review of *Carl Schmitt im Dritten Reich*, p. 71.

[82] See most recently Udi Greenberg,'Revolution from the Right: Against Equality,' in *The Cambridge History of Modern European Thought*, eds. Peter Gordon and Warren Breckman (New York: Cambridge University

complete: the newest saint of political theory appeared where a National Socialist had once stood. Carl Schmitt had become, in the words of Gary Ulmen, 'The modern equivalent of Hobbes.'[83]

1.3 Left-Schmittiana: Radical Democracy or Radical Delusion?

From its moment of inception, the Schmitt Renaissance led by George Schwab was aimed at undercutting the image of Schmitt articulated by one German émigré in particular: Otto Kirchheimer. Kirchheimer plays no prominent role in Schwab's *The Challenge of the Exception* – he appears in a single footnote[84] – and yet the book's publication history reveals the antagonism between Schwab and Kirchheimer. In 1962, George Schwab submitted his dissertation on Schmitt, what would later become the book, while at Columbia University.[85] Kirchheimer, as a member of Schwab's doctoral committee, exercised his veto power over the dissertation.[86] To quote Schwab's own recollection, Kirchheimer rejected Schwab's dissertation because Schmitt was a 'trailblazer of National Socialism': Kirchheimer found Schwab's thesis to be nothing less than 'an apologia' for Schmitt's actions.[87] In a retrospective account offered by Piccone and Ulmen, Schwab's thesis was an early victim of the "'politically correct" climate of Columbia University in the 1960s.'[88] Schwab was only be able to pass his dissertation following Kirchheimer's death by submitting a doctoral thesis on a different subject.[89] As the previous section has shown, both Schwab and subsequently Bendersky have worked to neutralize Kirchheimer's thesis by arguing that Schmitt was never anything more than an opportunist – there could be no substantial linkages between his work and his actions.

Press, 2019), 233-258, p. 225. On *Telos'* impact on Schmitt's popularity, see Matthew Specter, 'What's "Left" in Schmitt?' p. 426.

83 From the title of a paper given in 1980 at the annual meeting of the American Political Science Association. Cited in Schwab, 'Schmitt Studies in the English-Speaking World,' p. 451.

84 Schwab, *The Challenge of the Exception*, p. 125n48.

85 Schwab, 'Introduction to the Second Edition,' *The Challenge of the Exception* (Berlin: Duncker & Humblot 1989 [1970]), p. v.

86 See Marcus Llanque and Herfried Münkler, "'Vorwort" von 1963 (9-19),' in *Carl Schmitt: Der Begriff des Politischen: Ein kooperativer Kommentar* ed. Reinhard Mehring (Berlin: Akademie Verlag, 2003), p. 12.

87 See the transcribed discussion between Volker Neumann, George Schwab, and Günter Maschke in *Complexio Oppositorum*, p. 462.

88 Piccone and Ulmen, 'Uses and Abuses of Carl Schmitt,' p. 10n12

89 Ulmen, Review of Bendersky, *Carl Schmitt* 203; Gary Ulmen, 'Return of the Foe,' *Telos* 72 (1987), 187-193, p. 187n3.

This dissolution between Schmitt as an individual in history and the texts that he has produced allowed for the rise of a second wave of scholarly literature on Schmitt by those who define themselves as 'Left-Schmittians.' While there had been previous Schmitt students on the political left, particularly Kirchheimer and Neumann, and Schmitt had played the role of an intellectual foil to figures such as Jürgen Habermas,[90] this new generation of 'Left-Schmittians' had no aversion to drawing concepts from the 'Crown Jurist of National Socialism.' This section considers two of its most esteemed exponents: Chantal Mouffe and Andreas Kalyvas.[91] I argue that while the first constituitive process allowed for a sanitization of Schmitt's involvement with National Socialism, the second meant a complete severance between Schmitt the historical person and his work. In so doing, I am not criticizing normative democratic theory as such; rather, my interest in this section is to show how left-Schmittians have deployed the German jurist in the pursuit of their own agendas. Once Schmitt is taken as a precursor to radical democratic theory, it is clear that the Schmitt reception has entered the realm of the 'extraordinary.'

Chantal Mouffe uses Schmitt primarily as an interlocutor for thinking through what she identifies as 'the democratic paradox.' For Mouffe, 'it is the incapacity of democratic theorists and politicians to acknowledge the paradox of which liberal-democratic politics is the expression which is at the origin of their mistaken emphasis on consensus and sustains their belief that antagonism can be eradicated.'[92] The primary target of her critique is a particular form of deliberative democracy and consensus building articulated in the postwar theories of John Rawls and Jürgen Habermas, with contemporary adherents to be found in Seyla Benhabib and Joshua Cohen.[93] Against these theories, Schmitt delivers a potent weapon by locating a paradox in the component elements of liberal democracy, liberalism and democracy. Democracy, for Mouffe, always requires some sort of aspect of belonging, and equality of the demos in contrast to non-equal treatment of those on the outside; at the same time, however, liberalism requires the equality of mankind as such, without reference to categories of belonging. The first portion of Mouffe's Schmitt appropriation uses his diagnosis of this paradox without following Schmitt's conclusion that democracy inherently negates liberalism, while liberalism inherently negates democracy. Instead, Mouffe insists that the site of the democratic paradox has a productive potential, namely in 'the category

[90] Specter, 'What's "Left" in Schmitt?' p. 427.

[91] Kalyvas has positioned his work as transending the 'Right and Left Schmittian' divide; however, Kalyvas is generally considered a Left-Schmittian and maintains a similar position as Mouffe. See Andreas Kalyvas, *Democracy and the Politics of the Extraordinary* (Cambridge: Cambridge University Press, 2008), p. 85.

[92] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), p. 8.

[93] See for example the frequent discussions in Mouffe, *The Democratic Paradox*, pp. 46-49, 85-90, 132-133, 137; Chantal Mouffe, 'Politics and Passions: the Stakes of Democracy,' in James Martin and Chantal Mouffe, *Hegemony, Radical Democracy, and the Political* (London: Routledge, 2013), pp. 182-183, 228.

of the "adversary" as the key to [envisaging] the specificity of modern pluralist democratic politics, and it is at the very centre of [her] understanding of democracy as 'agonistic pluralism."'[94] Thus, for Mouffe, 'if we accept Schmitt's insights about the relations of inclusion–exclusion which are necessarily inscribed in the political constitution of the people . . . we have to acknowledge that the obstacles to the realization of the ideal free speech situation . . . are inscribed in the democratic logic itself.'[95]

Without judging the validity of her conclusion – it may or may not be true that democratic logic precludes the ideal free speech situation envisaged by Habermas – it would seem that Schmitt cannot deliver the theoretical foundation for Mouffe's critique. The primary text relied upon by Mouffe is titled *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, a commentary on the *intellectual-historical situation* of *contemporary* parliamentarism. In other words, in the first instance, Schmitt delivered a thoroughly historical critique, not a commentary on the eternal nature of liberal democracy as Mouffe reads him.[96] For Mouffe, one of the primary problems facing the political is its negation in the "'post-political" vision' of the post-Cold War period and the creation of a 'world "beyond left and right."' Mouffe argues that this 'negation of antagonism . . . is not only conceptually mistaken, it is also fraught with political dangers.'[97] However, the historical context of Mouffe's own writings and her stated political impetus are irreducible to Schmitt's time and his historical analysis: Mouffe sees herself as delivering a critique of New Labour and the Democratic party under Bill Clinton.[98] However critical one may be in regards to Third Way politics, neither the United States under Clinton, nor the United Kingdom under Blair can be conceivably compared to the political situation of the Weimar Republic. Indeed, the fixation of using the Weimar Republic as a catch-all depiction of democratic failure does more to obscure theoretical analysis than it does to illuminate.[99]

At the same time that Mouffe radically ahistoricizes Schmitt's work, she simultaneously commits a misreading of his concept of enmity, or *Feindschaft*. A central aspect of Mouffe's theory is to insist on the possibility of a productive 'agonistic pluralism,' one which constructs "'them" in such a way, that it is no longer an enemy to be destroyed, but as an 'adversary,' that is, somebody whose ideas we combat but whose right to defend those ideas we do not put into question.'[100] As she explains further, 'adversaries fight each other because they

[94] Mouffe, *The Democratic Paradox*, p. 14.
[95] Mouffe, *The Democratic Paradox*, p. 48.
[96] Mouffe, *The Democratic Paradox*, p. 57.
[97] Mouffe, *On the Political*, p. 2
[98] Mouffe, *The Democratic Paradox*, p. 113; Mouffe, 'Politics and Passions,' p. 232.
[99] See David Runciman, *How Democracy Ends* (London: Profile Books, 2018), pp. 2, 4, 9.
[100] Mouffe, *The Democratic Paradox*, p. 102.

want their interpretation to become hegemonic; but they do not question their opponent's right to fight for the victory of their position.'[101] This means that 'an adversary is an enemy, but a legitimate enemy, one with whom we have some common ground because we have a shared adhesion to the ethico-political principles of liberal democracy: liberty and equality.'[102] The problem with this interpretation, however, is that it contradicts Schmitt's stated understanding of enmity. In *Der Begriff des Politischen*, Schmitt criticizes pacifist theorists for 'transcending the limits of the political framework' and '*[degrading] the enemy into moral and other categories ... [making] of him a monster not only be defeated but also utterly destroyed.*'[103] Later in the same text, he says those who claim to fight for humanity are those who 'deny the enemy the quality of being human' which allows for 'war to be driven to he most extreme inhumanity.'[104] Instead, the drive to annihilation comes with the dissolution of the jus publicum europaeum and the criminalization of war – the enemy is no longer an equal but rather becomes a criminal, one who has committed a crime against humanity, and must therefore be punished. It would seem that Schmitt criticizes the very view of enmity Mouffe ascribes to him. As a result, the self-description of Left-Schmittians as delivering a 'form of "tamed" or "sublimated" antagonism,' her translation of the German *Feindschaft*, is instead more of a simple repetition of the original Schmittian idea in disguise than a 'tamed' version.[105]

Lastly, Mouffe champions the idea of engaging with Carl Schmitt's ideas, rather than Carl Schmitt himself as the author of those ideas. In a particularly direct passage defending her use of Schmitt, she argues that 'I believe that it is the intellectual force of theorists, not their moral qualities, that should be the decisive criteria in deciding whether we need to establish a dialogue with their work.'[106] However, as I have already hinted at above, and will continue to elaborate over the course of this dissertation, at the core of Schmitt's intellectual thought lies a commitment to historicity, without which his writings remain unintelligible. Instead, by reading Schmitt how he himself read other authors, by following his own commentary on the significance of the history of political and legal thought, and by tracing his turn to the philosophy of history – all of these aspects point towards the necessity of engaging with Schmitt the historical person simultaneously with his ideas. In other words, it is impossible to separate the 'intellectual force' of Schmitt's writings from their historical context because

[101] Mouffe, 'Politics and Passions,' p. 186.
[102] Mouffe, *The Democratic Paradox*, p. 102.
[103] Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 2007), p. 36. Emphasis added.
[104] Schmitt, *The Concept of the Political*, p. 54.
[105] James Martin and Chantal Mouffe, *Hegemony, Radical Democracy, and the Political*, p. 231, repeated again p. 232.
[106] Mouffe, *On the Political*, pp. 4-5.

Schmitt's ideas were themselves historical.

Like Mouffe, Andreas Kalyvas engages with Schmitt in the name of furthering democratic theory. To that end, Kalyvas issued a call in 1999 for a new wave of Schmitt scholarship, contrary to the work of John McCormick, William Scheuerman, and David Dyzenhaus, that would be deliberately '*reconstructive* and *selective*' in engaging with Schmitt's work as 'a comprehensive theoretical framework [for articulating] the relationship between constituent power, sovereign decision and democracy.'[107] A reconstructive approach would mean, for Kalyvas, '[removing insights] from their broader theoretical context, philosophical underpinnings, and political intentions.'[108] The concept of constituent power, for example, could be lifted out of Schmitt's broader oeuvre and the historical context in which he mobilized it in the pursuit of radically different ends.[109] By freeing concepts from their historical, theoretical, and political contexts, Kalyvas aimed towards 'a new reconfiguration, streeted this time explicitly in the direction of a radical democratic project.'[110] Indeed for Kalyvas, the point of studying Carl Schmitt is to derive normative answers to contemporary questions of political theory, thus using the German jurist to think through questions such as 'What can Schmitt's theoretical framework tell us about the possibility of a democratic constitution? How can his work generate those conceptual resources for the redefinition of a substantive idea of political freedom?'[111]

These are certainly some of the biggest questions of democratic theory; however, Kalyvas' approach is even more ahistorical and problematic than Mouffe's, preferring to 'productively appropriate' components of Schmitt's theory for their application in contemporary debates. For Kalyvas, the primary task is to 'rethink the extraordinary dimension of politics from the perspective of democratic theory,' and Schmitt's work is a mere tool for that end along with Max Weber and Hannah Arendt.[112] However, in doing so, Kalyvas is no longer considering why and to what end Schmitt was considering 'the extraordinary,' or even the function of concept within Schmitt's broader collection of writings. In other words, if Mouffe took an ahistorical approach by separating the person from his work, Kalyvas takes this a step further,

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[107]Andreas Kalyvas, 'Who's afraid of Carl Schmitt?' *Philosophy & Social Criticism* 25(5) (1999), 87-125, p. 89. See also Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 11.

[108]Kalyvas, *Democracy and the Politics of the Extraordinary*, pp. 293, 81.

[109]For a historical approach to Schmitt and constituent power, see Duncan Kelly, 'Carl Schmitt's Political Theory of Representation,' *Journal of the History of Ideas* 65(1) (2004), 113-134; Duncan Kelly, 'Egon Zweig and the Intellectual History of Constituent Power,' eds. K. Grotke and M. Prutsch, *Constitutionalism, Legitimacy and Power: Nineteenth-Century Experiences* (Oxford: University Press, 2014), 332-350.

[110]Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 293.

[111]Kalyvas, 'Who's afraid of Carl Schmitt?' p. 89.

[112]Kalyvas, *Democracy and the Politics of the Extraordinary*, p. 8.

removing concepts from the very works in which they were written.[113] As Matthew Specter has correctly pointed out, 'the new Left-Schmittians ... use intellectual history when it suits their purpose and dispute its relevance when it does not.'[114] This, however, does not go far enough: Left-Schmittians in fact begin with the belief that Schmitt has something to contribute to contemporary discussions in political theory and reshape the historical context to fit that narrative. As a result, Kalyvas could argue, for example, that Schmitt was a forerunner of 'anticolonial and postcolonial thinkers,'[115] even though Schmitt lamented that Versailles had 'robbed Germany of its colonies' – hardly the language of an anticolonial thinker.[116] However, once concepts have been ripped out of a broader body of work, and their historical context has been deemed a priori irrelevant, Schmitt can be made to articulate any number of disparate and contradictory positions. In the process, the term 'Schmittian' ceases to have any meaning.

1.4 The Afterlives of Saints

To pose an oft-repeated question in contemporary political theory, why study Carl Schmitt today? Is the point, in the words of Jeffrey Herf, that we are 'now to go in search of "tough Germans" like Carl Schmitt to counterbalance the Habermasian softies who talk too much about talking?'[117] Certainly this route has been taken to critique Rawlsian deliberative democracy and the work contemporary theorists such as Seyla Benhabib from the 'Left-Schmittian' perspective.[118] However, is there something more to be gained from thinking and writing about the infamous twentieth century jurist?

Benjamin Schupmann's 2017 monograph, *Carl Schmitt's State and Constitutional Theory*, provides one possible alternative: instead of locating the continued value of engaging with Schmitt in the critique of theories of deliberative democracy, Schupmann sees Schmitt's work as a 'theoretical foundation for liberal democrats today to conceive of themselves, and their states, politically and as something worth defending in the face of today's illiberal and

[113]For my broader criticism of Kaylvas, see Joshua Smeltzer, Review of Carl Schmitt, *Ex Captivitate Salus*, eds. Andreas Kalyvas & Federico Finchelstein, in *History of Political Thought* 39 (2) (2018), 369-372.

[114]Specter, 'What's "Left" in Schmitt?' p. 428.

[115]Andreas Kalyvas, 'Carl Schmitt's Postcolonial Imagination,' *Constellations* 25 (2018), 35-53, p. 36

[116]Schmitt, *Völkerrechtliche Großraumordnung*, p. 73.

[117]Jeffrey Herf, 'Reading and Misreading Schmitt: An Exchange,' *Telos* 74 (1987), 133-136, p. 136; Peter Uwe Hohendahl, *Perilous Futures: On Carl Schmitt's Late Writings* (Ithaca: Cornell University Press, 2018), p. 120.

[118]For example Chantal Mouffe, 'Carl Schmitt and the Paradox of Liberal Democracy,' in *Law as Politics*, 159-178, pp. 165-168

antidemocratic forces.'[119] Such a position is quite novel. While Left-Schmittians deploy Schmitt's writings to critique the tenuous alliance of liberal democracy in favor of radicalizing the democratic element, and a previous generation of Frankfurt School legal theorists such as Ingeborg Maus characterized Schmitt as a bourgeois liberal for the sake of condemning his theories,[120] Schupmann combines aspects of both of these positions. He argues first that Schmitt 'believed liberal democratic states must commit politically to liberalism and individual property rights,' thereby prioritizing liberalism over democracy, and, second, that Schmitt himself argued for a 'commitment to individual liberty' in his texts.[121] Once Schmitt has been recast as an ardent defender of political liberalism, Schupmann argues that Schmitt's theory provides 'a normative basis and the institutional framework to halt the systematic erosion of liberal constitutionalism from within.'[122] To follow Schupmann, the purpose of studying Carl Schmitt is therefore to mobilize his theories for the sake of liberalism's reinvention, legitimation, and salvation.

Schupmann's interpretation is only possible as a result of a radical and explicit commitment to ahistoricism. As he explains, 'this book engages with Schmitt's pre- and post-Weimar writings and argues that a coherent theoretical core can be extrapolated from them.'[123] This premise is strikingly apparent in the footnotes: texts written during the Weimar Republic appear side by side with those published under National Socialism and the Federal Republic. In a chapter on 'Basic Rights,' Schupmann leaps from the *Preußenschlag* of 1932 to Schmitt's 1949 commentary on the West German *Grundgesetz* to arrive at the conclusion that Schmitt was a defender of individual liberties, omitting any discussion of his National Socialist era texts.[124] This leap of twenty-seven years is justified by Schupmann's 'continuity thesis' that Schmitt's writings form a 'coherent theoretical core'; however, the appearance of continuity is only achieved by omitting outlying texts, shifts in Schmitt's arguments, and possible caesurae. The resulting image of Schmitt is one in which the Weimar era's fiercest critic of liberal democracy has been turned into its patron saint.

At the same moment that Schmitt is wheeled out as a defender of liberalism, he is increasingly seen as a source of theoretical inspiration in the fields of International Relations theory

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[119]Benjamin Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2017), p. 220.

[120]Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus. Zur sozialen Funktion und aktuellen Wirkung der Theorie Carl Schmitts* (Munich: Wilhelm Fink Verlag, 1980). For an excerpt in English, see Ingeborg Maus, 'The 1933 "Break" in Carl Schmitt's Theory,' in *Law as Politics*, 196-216. For the intellectual background of this argument, see Franz Neumann, *Behemoth*.

[121]Schupmann, *Carl Schmitt's State and Constitutional Theory*, pp. 219, 200.

[122]Schupmann, *Carl Schmitt's State and Constitutional Theory*, p. 219.

[123]Schupmann, *Carl Schmitt's State and Constitutional Theory*, p. 27.

[124]Schupmann, *Carl Schmitt's State and Constitutional Theory*, p. 200.

and critical geopolitics. As one scholar posed the question, 'Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?'[125] William Hooker's *Carl Schmitt's International Thought* (2009) remains the single most sustained attempt at systematizing Schmitt's international political and legal thought for International Relations theory. However, there are two major issues in Hooker's contribution that reflect both the sanitization of Schmitt's involvement with National Socialism, as well as an acceptance of the passive historicism of Bendersky and Schwab. Thus, Hooker claims that 'I have tried in so far as it is possible to emphasize the more major monographs, utilizing Schmitt's essay pieces only to clarify ambiguity, or to trace particular lines in the development of his thought.'[126] The problem with this approach is two-fold: first, it assumes that the monograph is the definitive statement on a given subject, while all shorter publications were merely building blocks or first attempts to work out an idea. If one approaches Schmitt's texts in that fashion, one cannot help but ignore the changing historical circumstances surrounding the publications. This approach is particularly problematic given that *Nomos of the Earth* – the central text for Hooker's analysis – was largely conceived before 1945 but published only after the end of the Second World War. As a result, it was scrubbed of the more overtly National Socialist elements prior to publication. In other words, Hooker starts with a sanitized version of Schmitt's thought without accounting for the particular textual history that accompanies it. Secondly, by only emphasizing major monographs – leaving aside the question of which texts fall into that category – the themes and concepts which appear in smaller publications remain neglected. In Hooker's analysis, Schmitt's entire contribution to the law of nations and international politics 'prior to the late 1930s,' consisting of a number of essays but not a single monograph, is condensed into a single paragraph, clearing the way for a discussion of Schmitt's attempt to ingratiate himself with the National Socialist party and his subsequent fall from grace. In so doing, Hooker seems to follow Antaki's prior claim that 'Schmitt's turn to international law began after 1936,' a claim attributed to Bendersky's biography but which I have shown above is demonstrably false.[127] This distorted periodization culminates in Hooker's claim, once again following Bendersky, that 'partly due to . . . limitations to the practice of constitutional law, and the frustrations of academic life in Nazi Germany, Schmitt

[125] David Chandler, 'The Revival of Carl Schmitt in International Relations: The Last Refuge of Critical Theorists?' *Millennium* 37(1) (2008), 27-48. See the ensuing responses in *Millennium*: Louiza Odysseos & Fabio Petito, 'Vagaries of Interpretation: A Rejoinder to David Chandler's Reductionist Reading of Carl Schmitt,' *Millennium* 37(2) (2018), 463-475; David Chandler, 'Textual and Critical Approaches to Reading Schmitt: Rejoinder to Odysseos and Petito,' *Millennium* 37(2) (2018) 477-481. See also Stephen Legg, *Spatiality, Sovereignty, and Carl Schmitt: Geographies of the Nomos* (London: Routledge, 2011).

[126] William Hooker, *The State in the International Theory of Carl Schmitt*, (Dissertation submitted at the London School of Economics and Political Science, 2008).

[127] Mark Antaki, 'Carl Schmitt's Nomos of the Earth,' *Osgoode Hall Law Journal* 42(2) (2004), 317-334, p. 319.

turned his attention to broader questions in international law' and furthermore that 'it does seem that Schmitt was moved by a genuine desire to examine how the radically new Nazi regime might transform the structures of international law.'[128] Hooker effectively quarantines the National Socialist elements of Schmitt's thought to the period between 1933 and 1936, while simultaneously asserting that this international texts were merely 'an examination' of National Socialist politics. As a result, Hooker both perpetuates the 'myth of 1936' and transfers the neutralizing, passive historicism of the Bendersky-Schwab interpretation to the international level.

This dissertation follows a markedly different methodological approach and provides a different answer to the question, 'Why Carl Schmitt today?' The purpose of returning to Carl Schmitt is not to reveal an eternal characteristic of liberalism, or to advance the cause of democratic theory; nor is it to provide a new theory of international politics. Instead, the point is to understand and interpret a pivotal figure in the history of twentieth century political thought, one who influenced an entire generation of post-war intellectuals on both sides of the Atlantic.[129] In calling for a historically accurate reconstruction of Schmitt's ideas, this dissertation certainly not alone among recent scholarship. Günter Maschke has argued that Schmitt's work must be read within their 'historical circumstances,' and that Schmitt was part of a broader conservative discourse of the Weimar period: 'Schmitt was not a soloist, rather he was a – sometimes superlative – voice in a vast choir.'[130] As such, Maschke laments the 'de-historicization,' the 'de-concretization,' and the 'de-politicization' in the current Schmitt reception.[131] Likewise, Peter Uwe Hohendahl has recently urged 'return to Schmitt's historical roots' through '[explicating] Schmitt's late work as part of a specific historical constellation.'[132] This dissertation goes further, however, than these recent calls by recovering the justification for a historical approach within Schmitt's own work – indeed, ahistoricism is a contradiction to his theory, not a consequence of it. To that end, the following chapter begins with Schmitt's turn to the founder of the historical school of law, Savigny, and the beginnings of his concept of historicity which serves as the foundation for

[128] Hooker, *The State in the International Theory of Carl Schmitt*, p. 162.

[129] Matthew Specter, 'Grossraum and Geopolitics: Resituating Carl Schmitt in an Atlantic Context,' *History and Theory* 56(2) (2017): 398-406; Jan Werner Müller, *A Dangerous Mind* (New Haven: Yale University Press, 2003).

[130] Günter Maschke, 'Zur vorliegenden Ausgabe,' in Carl Schmitt, *Frieden oder Pazifismus* (Berlin: Duncker & Humblot, 2005), p. xix. 'Schmitt [war] kein Solist, sondern eine – manchmal überragende – Stimme in einem ausgedehnten Chore.'

[131] Günter Maschke, 'Vorwort,' in Carl Schmitt, *Frieden oder Pazifismus* (Berlin: Duncker & Humblot, 2005), p. xxvi.

[132] Hohendahl, *Perilous Futures*, p. 3. For my broader criticism of the historical inaccuracies in Hohendahl's work, see Joshua Smeltzer, 'Carl Schmitt in and out of History,' London School of Economics Review of Books (2019).

the subsequent chapters of the dissertation.

Furthermore, as I discussed in relation to William Hooker's monograph, this dissertation does not place an interpretive priority on Schmitt's major published monographs. Instead, it draws material from Schmitt's essays, reviews, correspondences, diary entries, unpublished lecture manuscripts, and marginalia from his private library. There are two reasons for taking this wider approach. First, Schmitt claimed in the postwar period that 'it is not possible to write about that which has the power to proscribe [to death],' and praised Ernst Jünger for coding his commentary on National Socialism such that only insiders would understand the true message.[133] Given that Schmitt perceived – with more than a bit of dramatic flair – that his life was in danger if he spoke candidly, he applied the same self-censorship to his published texts. As a result, unpublished manuscripts, correspondences, and diary entries can act as an 'interpretive key,' revealing his polemical targets and the underlying intended function of his texts. Second, minors texts represent more than the artist's sketch leading to a later masterpiece. As the 'Synoptic Edition' of *The Concept of the Political* has shown, Schmitt revised and updated his texts depending on the historical context and intended audience. As I argue in the following chapter, this tendency towards revision is particularly acute with regards to texts originally composed before 1945 but published thereafter. This corresponds to Schmitt's invocation of Heraclitus's dictum that 'you cannot step into the same river twice,' a 'truth to which all the speeches and essays [in his edited volume, *Positionen und Begriffe*] are subjected.'[134] Likewise, in the foreword to his *Verfassungsrechtliche Aufsätze*, Schmitt notes 'all of [the essays] stem from concrete situations and observations.'[135] Minor texts, in their changing iterations, can help locate and clarify Schmitt's specific interventions.

By recovering the historical elements within Carl Schmitt's own work, and using historicity as an interpretive tool for his political and legal theories, this dissertation aims to offer a new interpretation of Schmitt as a historian of political thought, as well as to correct both the passive historicism originating in Bendersky and Schwab and the ahistoricism of the Left-Schmittians. Chapter 3 of this thesis considers Schmitt's postwar critique of natural law theories as a type of law 'without history': its claim to universal and eternal validity stood in stark contrast to the historicity of law. Against this, Schmitt would pursue a strategy of historicizing the origins of natural law, showing that it was merely one age of the historical development of law, not the uncovering of its true principles. Rejecting natural law theories

[133]For a discussion of this dictum in the context of Schmitt's writings on natural law, see chapter 3 of this thesis.

[134]See Carl Schmitt, *Positionen und Begriffe* (Berlin: Duncker & Humblot, 2014 [1939]). 'Die folgenden Reden und Aufsätze aus den Jahren 1923 bis 1939 sind dieser Wahrheit in vollem Maße unterworfen.'

[135]Carl Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954* (Berlin: Duncker & Humblot, 2003 [1958]), p. 8. 'alle aber gehen in ihren Thesen und Begriffen auf konkrete Situationen und Beobachtungen zurück.'

also allowed Schmitt to reject the so called 'obligation of resistance' against tyrannical regimes, a constitutional obligation discussed – and implemented – after the defeat of the Third Reich. In chapter 4, I turn to a parallel development in international law: the movement to outlaw war. I argue that Schmitt's intervention into the reception of Vitoria's writings in his *The Nomos of the Earth* ought to be read as a polemical response to the American international lawyer, James Brown Scott, and his attempt to reconstruct a liberal international law based on the principles he uncovered in the Spanish Dominican Francisco de Vitoria. Schmitt mobilized his concept of historicity to argue that Vitoria's teachings were historically bounded to the context of the *Respublica Christiana* and therefore could not serve as the foundations of a new, liberal world order. Taken together, chapters 3 and 4 represent two examples of Schmitt's rejection of the intrusion of theology into the domain of law.

The following two chapters demonstrate two elements of Schmitt's critique of technology's corrosive effects on politics and law. I first consider Schmitt's critique of Marxism, particularly Leninism, as a form of political acceleration: in locating itself as the teleological end-point of the 'organic' unfolding of history, revolutionary action is legitimated as a means of clearing any inorganic obstacles such as the counter-revolutionary efforts of the Bourgeoisie. I then show that Schmitt saw Liberalism and Socialism as two sides of the same coin, joined by a common faith in human progress and in technology as the means of its attainment. Finally, in chapter 6, I turn to utopia and utopianism as the 'dis-placement' of space and human nature, as well as the 'annihilation' of law. Similar to Schmitt's criticism of natural law doctrines, I begin by showing that Schmitt historicizes the emergence of the concept of utopia to the 'British maritime appropriation of the world' and the subsequent Industrial Revolution in order to condemn utopianism as a simultaneously British and a deterritorialized theory. I then show that Schmitt's rejection of utopianism is based on its inherent philosophy of history: utopianism uses technology as the mechanism for its achievement within a preordained telos. For Schmitt, however, this process means systematically cutting off man's relation to his past for the sake of achieving the future.

Chapter 2

The Turn to Historicity

In the foreword to his postwar history of the law of nations, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, Carl Schmitt warned of an 'existential question' confronting jurisprudence, 'which today is being crushed between theology and technology, if it does not assert the ground of its own existence [*Dasein*] in a correctly recognized and fruitful historicity [*Geschichtlichkeit*].'[1] The invocation of an 'existential question' demonstrates the significance of this assertion, as it concerns nothing less than the continued existence of jurisprudence as a discipline. With this concrete dilemma in mind, Schmitt speaks in the opening line of the text of 'placing this book on the altar of jurisprudence' – an offering meant to rescue the discipline from its impending obliteration. Indeed, Schmitt considered himself first and foremost a jurist[2]; *Der Nomos der Erde* concerns the future of his own discipline. Faced with a looming existential crisis, Schmitt asserted the concept of historicity as the potential site for jurisprudence's salvation, an escape from the dual forces of theology and technology. However, despite the significance of historicity and its prominence in the foreword of *Der Nomos der Erde*, there has been virtually no discussion of the concept in the rapidly expanding scholarly literature on Schmitt.

This chapter excavates Schmitt's concept of *Geschichtlichkeit*, or historicity, as a methodological principle for studying legal history, a principle that can be similarly deployed as an interpretive key for understanding Schmitt's own work within the broad tradition of the

[1] Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 5 ed., (Berlin: Duncker & Humblot, 2011 [1950]), p. 6. Translations of German texts are my own unless stated otherwise. 'Es betrifft die Existenzfrage der Rechtswissenschaft selbst, die heute zwischen Theologie und Technik zerrieben wird, wenn sie nicht in einer richtig erkannten und fruchtbar gewordenen Geschichtlichkeit den Boden ihres eigenen Daseins behauptet.'

[2] See for example his explicit self-identification in the subtitle of *Die Tyrannei der Werte. Überlegungen eines Juristen zur Wert-Philosophie*.

German *Staatslehre*.[3] The concept of historicity emerges in Schmitt's writings at the same moment as his turn to the Historical School of Law as a 'paradigm' for the future of European jurisprudence. The resulting depiction of Carl Schmitt as a deeply historical thinker – one who draws his methodological inspiration from Friedrich Carl von Savigny – forms the basis of the following chapters of this dissertation in a form of double-historicism: not only did Schmitt historicize the sources of law and the contributions of individual jurists such as Francisco de Vitoria and Hugo Grotius, but his own contributions were deeply imbricated in his political and historical context. Recovering the concept of historicity is thus the first step towards understanding Schmitt's interpretation of law as inseparable from the history of its cognition in jurisprudence.

At the same time, historicity provides an internal justification within Schmitt's published work for historicizing his contribution to the legal discipline. That theorists of political thought are best understood in terms of their historical contexts is, by itself, a well-accepted proposition[4]; however, it is not always the case that the thinkers under consideration would themselves view their work as historical, nor that they themselves would historicize the contributions of previous theorists. Instead, this chapter employs a hermeneutic approach to reconstructing Schmitt's concept of historicity, uncovering the methodological principles while at the same time using them to aid in the interpretation of the very same concept. The structure of this chapter follows Schmitt's own rhetorical strategy of coupling prognosis and solution – the historical narrative, constructed as a form of prognosis of crisis, generates the normative solutions that follow. The first section situates Schmitt's prognosis of a crisis confronting jurisprudence following the Revolutions of 1848 with reference to the historical rise of legal positivism as the dominant form of jurisprudence; the second section deals with Schmitt's historicization of the Historical School of Law as confronting both natural law and the rise of legal positivism, yielding a 'paradigm' for the future of jurisprudence. The conclusion then speaks to the reception of *Die Lage der europäischen Rechtswissenschaft* and its significance for the subsequent chapters.

2.1 Crisis and Prognosis

In the foreword to *Der Nomos der Erde*, framing a discussion of nearly 500 years of the history of the law of nations, Schmitt constructs a genealogy of the concept of historicity

[3] On Carl Schmitt and the German *Staatslehre*, see Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (Oxford: Oxford University Press, 2003).

[4] See, for example, Skinner, 'Meaning and Understanding in the History of Ideas.'

running through Johann Jakob Bachofen back to Friedrich Carl von Savigny, the intellectual father of the Historical School of Law. Savigny's central position at the outset of *Der Nomos der Erde* is striking within the broader context of Schmitt's oeuvre – Savigny is not once mentioned in Schmitt's key jurisprudential texts of the Weimar Republic such as his *Verfassungslehre*; nor is Savigny cited in *Politische Theologie* and *Der Begriff des Politischen*. Nevertheless, Schmitt chose to begin his post-war history of the law of nations with a discussion of the nineteenth century jurist of Roman law and international private law, a jurist who plays no central role in the rest of the text.[5] Why would Schmitt invoke the name of the great Prussian legal historian in such a cursory manner?

Beyond establishing a distinguished pedigree for the concept of historicity, pointing back to a famed jurist such as Savigny as its progenitor frames the concept as belonging solely to the discipline of jurisprudence, 'a scholarship,' Schmitt notes, 'which I have served for over forty years.'[6] Schmitt continues, emphasizing once again that he is a jurist, noting that 'the connection with the mythical sources of legal-historical knowledge go much deeper than the connection with geography,' rejecting the notion that his text is to be understood with direct reference to the work of political geographers.[7] Furthermore, it is significant that Schmitt specifies 'legal-*historical* knowledge' in the previous quotation, a direct reference to Savigny's specific intellectual project. Once again drawing a distinction with geographers, Schmitt claims that 'juristic intellectual work remains something different than geography. Jurists did not gain their knowledge of object and soil, of reality and territoriality from geographers.'[8] This is not to say that Schmitt was unaware of the works of geographers; rather, the subject of Schmitt's text remains the history of jurisprudence and of legal thinking, and he approaches both of these subjects as a jurist. Indeed, reading the text as a contribution to geography or German *Geopolitik* would only exacerbate the central problematic posed in the foreword through other means: the collapse of jurisprudence as a distinct discipline.[9]

[5] The exception is a single sentence dealing with property and marriage laws in Europe. See Schmitt, *Der Nomos der Erde*, p. 210.

[6] Schmitt, *Der Nomos der Erde*, p. 5. 'einer Wissenschaft, der ich über vierzig Jahre gedient habe.' On Savigny's distinguished reputation in German jurisprudence, see Hermann Kantorowicz, 'Savigny and the Historical School of Law,' *The Law Quarterly Review* 111 (1937): 326-343, p. 330; Joachim Rückert, 'The Unrecognized Legacy: Savigny's Influence on German Jurisprudence after 1900,' *The American Journal of Comparative Law*, 37(1) (1989): 121-137, p. 121.

[7] Schmitt, *Der Nomos der Erde*, p. 5. 'Viel tiefer als mit der Geographie geht die Verbindung mit den mythischen Quellen rechtsgeschichtlichen Wissens.'

[8] Schmitt, *Der Nomos der Erde*, p. 5. 'Trotzdem bleibt die juristische Denkarbeit etwas anderes als Geographie. Die Juristen haben ihr Wissen von Ding und Boden, von Realität und Territorialität nicht von den Geographen gelernt.'

[9] Schmitt's frank statements setting himself apart from geopolitics have been overlooked by a series of recent commentators, eager to frame Schmitt as a political geographer on par with Halford Mackinder, Alfred Mahan, or Karl Haushofer. See Stephen Legg and Alex Vesudevan, 'Introduction: Geographies of the

Instead of relying on geopolitical precursors, Schmitt turns to Johann Jakob Bachofen as an intellectual intermediary, passing down the ideas of Savigny to the next generation of legal historians. For Schmitt, '[the mythical sources of legal-historical knowledge] have been opened up to us through Johann Jakob Bachofen ... the legitimate heir of Savigny.'[10] More than intervening into the historiography of the German Historical School of Law and its succession after Savigny's death, Schmitt is instead constructing a narrative of the historical roots and fundamental shifts in the concept of historicity that he himself will employ in the text. In that sense, Schmitt claimed that Bachofen 'continued and made unendingly fruitful that which the founder of the Historical School of Law understood by historicity.'[11] To understand, then, the concept of historicity and its function as the salvation of jurisprudence in the post war era – indeed, to understand Schmitt's post-war writings on law – elucidating Schmitt's intellectual relationship to Savigny is a necessary first step.

While Schmitt opens *Der Nomos der Erde* with reference to Savigny in order to establish a disciplinary boundary with geographers, the invocation of the Prussian jurist has a second, more important function: it signals an internal connection between *Der Nomos der Erde* and a short pamphlet, titled *Die Lage der europäischen Rechtswissenschaft* [The Situation of European Jurisprudence].[12] The pamphlet appeared simultaneously with three other texts in German, and is Schmitt's only publication that provides a sustained treatment of Savigny and the Historical School of Law.[13] Originally written as a lecture, Schmitt delivered versions of the speech six times in five countries and in three languages between February 16, 1943

Nomos,' in *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos*, ed. Stephen Legg, (Oxon: Routledge, 2011). See in particular Matthew Specter, 'Grossraum and Geopolitics: Resituating Schmitt in an Atlantic Context,' *History and Theory* 56(3) (2017), 398-406.

[10] Schmitt, *Der Nomos der Erde*, p. 5. 'Sie sind uns durch Johann Jakob Bachofen erschlossen worden ... Bachofen ist der legitime Erbe Savignys.'

[11] Schmitt, *Der Nomos der Erde*, pp. 5-6. 'Er hat das, was der Begründer der historischen Rechtsschule unter Geschichtlichkeit verstand, weitergeführt und unendlich fruchtbar gemacht.'

[12] The only English translation of this text modifies the title by translating 'Lage' as 'Plight.' There are three issues with this: first, it is in itself inaccurate; second, 'Lage' has a connotation of positionality and corresponds to jurisprudence's position between theology and technology, a connotation erased with 'plight'; and third, 'plight' obscures the connection to Schmitt's other texts with a similar title, for example *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1923), 'die politische Lage der entmilitarisierten Rheinlande' (1930), and 'Die geschichtliche Lage der deutschen Rechtswissenschaft' (1936). See Carl Schmitt, 'The Plight of European Jurisprudence,' trans. Gary Ulmen, *Telos* 83 1990, 35-70. Moreover, the French version of the typescript, prepared by Schmitt, is titled 'La situation présente de la jurisprudence europóene,' giving a clear cognate for translation. I have used the cognate in this text. See NRW 0265-20925.

[13] Carl Schmitt, 'Die Lage der europäischen Rechtswissenschaft (1943/44).' In 1950, Schmitt published four texts concurrently: 1) *Der Nomos der Erde*, 2) *Ex Captivitate Salus*, 3) *Donoso Cortes in gesamteuropäischer Interpretation. Vier Aufsätze*, and 4) *Die Lage der europäischen Rechtswissenschaft*. The first three texts appeared with Greven-Verlag, while the last appeared with Serge Maiwald's Tübinger Universitätsverlag. The reason for their simultaneous appearance is that Schmitt was banned on publishing until the formation of the Bundesrepublik in 1949. See Mehring, *Carl Schmitt*, pp. 470, 472-474.

and December 1, 1944.[14] Before the end of the war, the text would appear in Hungarian, its only official publication prior to the 1950 edition.[15] While this Hungarian text no longer appears within the Schmitt *Nachlaß*, a thirty-five page French language typescript of the lecture, given in Coimbra, Portugal on May 16, 1944, still survives,[16] along with three personal copies of the 1950 publication[17] and a copy of the 1958 republication in his volume on constitutional law, *Verfassungsrechtliche Aufsätze*.[18] The French typescript is largely identical to the German publication of 1950, but its divergences in key areas – namely, Schmitt's intellectual identification with Savigny – add a further contextual layer to the text: it is the only version that can offer insight into the content of Schmitt's lectures during the war and help to explain the origins of Schmitt's turn to historicity in 1943/44.

The state of jurisprudence was, according to Schmitt, a state of acute crisis, one which haunted the discipline in the contemporary moment: Schmitt's lectures were titled 'die *heutigen* Lage' or 'la situation *présente*,' a temporal modifier dropped in the postwar German publication.[19] This is the first indication that the text, largely a treatment of the history of jurisprudence in the nineteenth century, was intended to speak to a specific context present in 1943/44 that subsequently no longer applied in the post-war period. The context was, first and foremost, the state of jurisprudence. Despite giving his lecture in 1943/44, well after Schmitt sensed the German war effort would be defeated,[20] he nevertheless notes that 'I do not wish to speak here of the obvious topic of the consequences of the world war' but instead wants to discuss an 'internal and immanent problem of jurisprudence.'[21] Although Schmitt

[14] Mehring, *Carl Schmitt*, pp. 433-434. The dates and locations of Schmitt's lecture tour is corroborated in the 1958 afterword to the text in *Verfassungsrechtliche Aufsätze*, p. 426. In addition, they are recorded in Schmitt's handwritten notes on the cover of his personal copy of *Die Lage der europäischen Rechtswissenschaft*, NRW 0265-27591.

[15] See the letter from Schmitt's translator, Dr. Kuncz Ödön, dated June 1, 1944. NRW 0265-8567. The Hungarian text appeared as Carl Schmitt, 'Az európai jogtudomány mai helyzete,' *Gazdaságyjog*, 5 (1944), 3-16. For a brief publication history, see de Benoist, *Carl Schmitt: Bibliographie seiner Schriften und Korrespondenzen*, p. 32.

[16] Contained in the Schmitt *Nachlaß* in a folder labeled, in his handwriting, 'Drei Arten,' a direct reference to the title of his 1934 essay *Über die Drei Arten rechtswissenschaftlichen Denkens*. See NRW 0265-20925. A modified version appeared in the Boletim de Faculdade de Direito da Universidade de Coimbra, 1945 (20), 603-621. See Benoist, *Carl Schmitt: Bibliographie*, p. 32.

[17] Only the copy labeled NRW 0265-27591 contains marginalia from Schmitt; the other two are clean copies, NRW 0265-27277 and NRW 0265-28672.

[18] See NRW 0265-28282.

[19] Emphasis added. See for example the formal invitation to his lecture held in Budapest, 11. November 1943, in NRW 0265-21554 and glued to the inside cover of his personal copy of the publication, NRW 0265-27591. See the French typescript, NRW 0265-20925.

[20] Zeitlin, 'Propaganda and Critique,' pp. xxxvii-xli, particularly the reflections by Nicolaus Sombart and Julien Freund in footnote 25.

[21] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 398. 'Ich möchte hier weder über das naheliegende Thema der Auswirkungen des Weltkrieges sprechen'; 'innere und immanente rechtswis-

will conclude his speech by undermining the distinction between the war in Europe and jurisprudence with which he opens, this distinction is nevertheless important in elaborating the correct situation, or *Lage*, of European jurisprudence – the situation is defined by internal considerations, within the history of the discipline itself. Schmitt's text is an attempt at both diagnosing this problem facing jurisprudence as well as finding its solution within a study of the history of European jurisprudence.

In part, Schmitt's historical project means defending the notion of a common 'European jurisprudence,' a proposition that would perhaps appear absurd in the context of a second world war. The absurdity, he notes, is due 'not only [to] the political fracturedness of Europe, which has torn itself apart in two world wars,' once more inviting his audience to look beyond the obvious political context. Instead, Schmitt shifts from politics into legal history, arguing that the rise of legal positivism had fractured European jurisprudence even more than the impact of the world wars.[22] Thus, at the outset, legal positivism constitutes the target of Schmitt's polemic, the force that denies not only the possibility of a unified European jurisprudence, but also that which forecloses law from legal history.

It is not surprising that Schmitt polemicizes against legal positivism given his well-documented hostility towards legal positivism in the *Methodenstreit* of the Weimar Republic,[23] and yet scholarly treatments of *Die Lage der europäischen Rechtswissenschaft* have overlooked its polemical function. More broadly, the text itself remains neglected in Schmitt scholarship. For example, in a passage comparing Schmitt to the Historical School of Law, Jeffery Seitzer relies on the implied divergences in their work, overlooking that Schmitt in fact wrote directly on Savigny and his views need not be inferred.[24] Additionally, Reinhard Mehring's magisterial Schmitt biography devotes just two paragraphs to the text.[25] In discussing the text's history, Mehring notes, 'it is not verifiable what exactly Schmitt said before 1945 on the role of jurisprudence'[26]; however, this claim overlooks the existence of the French language typescript of Schmitt's speech delivered on May 16, 1944, which Mehring himself cites but makes no use of.[27] Perhaps it is impossible to know what exactly

senschaftliches Problem.'

[22] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 386. 'Nicht nur wegen der Zerrissenheit Europas, das sich in zwei Weltkriegen selbst zerfleischt hat.'

[23] On the *Methodenstreit* of the Weimar Republic, see Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland, Bd. III* (Munich: C.H. Beck, 1999), p. 153.

[24] Jeffrey Seitzer, 'Carl Schmitt's Internal Critique of Liberal Constitutionalism,' in *Law as Politics: Carl Schmitt's Critique of Liberalism* ed. David Dyzenhaus (Durham: Duke University Press, 1998), pp. 291-292.

[25] Mehring, *Carl Schmitt*, p. 434.

[26] Mehring, *Carl Schmitt*, p. 434. 'Es ist zwar nicht nachweisbar, was genau Schmitt vor 1945 zur Rolle der Rechtswissenschaft sagte.'

[27] Mehring, *Carl Schmitt*, p. 693n44.

was *said*, but it is easily verifiable what Schmitt *wrote*. Furthermore, given that the French language typescript contains Schmitt's handwritten pronunciation aids, it is highly probable that he intended to speak the very words on the page.

Despite the 'tsunami' of secondary literature on Schmitt,[28] there are only two sustained treatments of *Die Lage der europäischen Rechtswissenschaft*. The first is an introduction to the English translation of Schmitt's text, written by Paul Piccone and Gary Ulmen. In their interpretation, the text forms Schmitt's last 'testament,' written as 'a subtle apology for [his] earlier political mistakes.'[29] By 'political mistakes' the authors ostensibly mean Schmitt's support of National Socialism after 1933, though this assertion is shrouded in a euphemistic and apologetic reconstruction of his scholarship during the Third Reich. Indeed, by only examining the 1950 German publication of the text, it is natural that Piccone and Ulmen would reach such a conclusion – anything overtly National Socialist would have been scrubbed from the text prior to its publication, especially given Schmitt's concerted effort to rehabilitate his reputation in Germany and abroad after the war. Piccone and Ulmen justify refusing to consider earlier versions of the text by arguing that 'it was not Schmitt's way to alter texts . . . his customary practice was merely to append comments to a given text.'[30] Piccone and Ulmen's claim will be shown to be false with reference to this specific text and its French language predecessor; however, it is important to note that this claim is generally false in reference to a number of the republications of his texts.[31] In fact, Schmitt both appended commentaries *and* modified the texts themselves in order to recontextualize his arguments.

The second treatment comes from an article and book chapter by William Scheuerman, who reads Schmitt's text normatively through the concept of the motorized legislator.[32] This reading then allows, in the last section of Scheuerman's argument, for a discussion of contemporary Anglo-American 'common-law correctives to statutory legislation.'[33] Regarding the target of Schmitt's polemic, Scheuerman writes, 'in Schmitt's account its [liberal democ-

[28] Specter, 'What's "Left" in Schmitt,' p. 426.

[29] Paul Piccone and Gary Ulmen, 'Schmitt's Testament and the Future of Europe,' *Telos* 83 (1990), 3-34, pp. 15-16.

[30] Piccone and Ulmen, 'Schmitt's "Testament,"' p. 14n25.

[31] See most famously the varying editions of *Der Begriff des Politischen* which has now produced a 'synoptic' presentation in Carl Schmitt, *Der Begriff des Politischen. Synoptische Dartellung der Texte*, ed. Marco Walter (Berlin: Duncker & Humblot, 2018); Schmitt's truncation of 'Die Rheinlande' which omits all reference to Catholicism after the encyclical 'Mit brennender Sorge' appeared in 1937; and the long, vitriolic anti-Semitic passages removed between editions of *Völkerrechtliche Großraumordung*. See RW 0265-20064.

[32] William Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Baltimore: Johns Hopkins University Press, 2004); William Scheuerman, 'Motorized Legislation? Statutes in an Age of Speed,' *Archives for Philosophy of Law and Social Philosophy* 88(3) (2002): 379-397.

[33] Scheuerman, 'Motorized Legislation,' p. 391.

racy's] preference for the separation of powers, the supremacy of elected legislatures, and the rule of law allegedly render it incapable of dealing with the necessities of the economic state of emergency.'[34] Elsewhere, Scheuerman writes, 'we should interpret Schmitt's comments about motorized legislation as part of his life-long quest to discredit liberal democracy.'[35] In the very last sentence of the article, Scheuerman concludes, 'by developing models of regulatory law properly suited to the temporal imperatives of the new century, we can rob Schmitt's hostile attack on modern liberal democracy of those empirical correlates that misleadingly imply its plausibility.'[36] Each of these three quotations establishes that Scheuerman believes Schmitt to be attacking liberal democracy in this text.

The problem, however, with Scheuerman's characterization is that Schmitt's criticism is not directly aimed at liberal democracy; instead, it is aimed at the dominance of legal positivism as a form of jurisprudence – after all, the text is about a crisis in jurisprudence and not one of caused by a form of state.[37] There are at least four textual objections to Scheuerman's interpretation. First, Schmitt himself kept a summary of the text, unpublished but contained within his *Nachlaß*, in which he writes '[jurisprudence] suffers ... from a particular inner problematic, the crisis of state-law legality [*der gesetzesstaatlichen Legalität*].'[38] From Schmitt's other writings, the phrase of 'state-law legality' is a direct reference to legal positivism[39]; moreover, *gesetzesstaatlich* is meant as a pejorative description of the positivist alternative to *rechtsstaatlich*.[40] In addition, Schmitt specifically refers to an 'inner-problematic' facing 'jurisprudence,' and liberal democracy is not itself not a form of jurisprudence. Second, in the French language typescript, Schmitt says 'I believe that this is actually a crisis of the purely positivist method, rather than a crisis of jurisprudence itself.'[41] Noting a 'crisis of the purely positivistic method' indeed squarely lays the blame at the feet of legal positivism and not liberal democracy. Third, Schmitt notes that 'the crisis of European jurisprudence started over a hundred years ago with the victory of legal positivism,' a phrase which is also contained in the French manuscript.[42] And finally, Schmitt only uses derivations

[34] Scheuerman, *Liberal Democracy and the Social Acceleration of Time*, p. 107.
[35] Scheuerman, 'Motorized Legislation,' p. 380.
[36] Scheuerman, 'Motorized Legislation,' p. 397.
[37] See Schmitt's theory of state forms in *Verfassungslehre*, pp. 221-359.
[38] Quoted from materials in NRW 0265-20925. 'sie [die Rechtswissenschaft] leidet auch noch an einer besonderen inneren Problematik, der Krisis der gesetzesstaatlichen Legalität.'
[39] For roughly contemporaneous usage in Schmitt's work, see Carl Schmitt, 'Das Problem der Legalität (1950)' in *Verfassungsrechtliche Aufsätze*, pp. 442, 447.
[40] See, for example, Carl Schmitt, 'Nationalsozialismus und Rechtsstaat,' *Juristische Wochenschrift* 63 (12-13) (1934), 713-718. On Friedrich Hayek's use of this distinction, drawn from Schmitt, see Quinn Slobodian, *The Globalists* (Cambridge: Harvard University Press, 2018), p. 205.
[41] In NRW 0265-20925, Manuscript, 20. 'Mais je crois, qu'il s'agit ici en réalité d'une crise de la méthode purement positiviste, plutôt que d'une crise de la jurisprudence elle-même.'
[42] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 398. 'Die Krisis der europäischen Rechtswis-

of the word 'liberal' in the essay in a passing comment on 'Savigny's liberal enemies.'[43] Although legal positivism and liberal democracy can and often do dovetail, Schmitt himself does not hold that they are necessarily identical.[44] As a result, maintaining this distinction is important not only for an accurate reconstruction of Schmitt's argument but also for engaging with it normatively as Scheuerman proceeds to do. In summary, Scheuerman's reconstruction of Schmitt's argument misses the fundamental target of Schmitt's polemic and, as a result, the normative implications Scheuerman draws are similarly extraneous to Schmitt's text.

Indeed, legal positivism is central to Schmitt's narrative precisely because he blames it for precipitating a fracture of European jurisprudence into distinct national spheres: the 'formal ground for the validity of positive law is here always only enactments [*Setzungen*], behind which stands a state will to enact [*setzten*] ... For the purely state-based concept of such a legal positivism there is, as a result, only German, French, Spanish, Swiss and further single-state law.'[45] With its exclusive focus on enacted law as a valid object of legal study, and in the absence of a 'European legislative will' or 'European central state,' legal positivism foreclosed the possibility of a common European jurisprudence because it could only conceive of law in terms of enacted laws within each individual state.[46]

Operating at a parallel level, Schmitt notes that legal positivism transformed the monism underpinning the 'European law of nations,' identical with the *jus publicum europaeum*, into legal dualism. In *Der Nomos der Erde*, Schmitt lays out a longer justification for legal monism based on his understanding of land appropriation. This act of land appropriation, as a 'legal-historical fact' and a 'great historical event,' is fundamental for Schmitt's concept of *nomos*, as it 'establishes law' 'towards the exterior (in relation to other peoples) and towards the interior.'[47] This understanding of law as a unified system was undone by the rise of legal positivism. As a result, 'the separation of internal and external, of intrastate and interstate law is so absolute, that ... there is a complete and pure unrelatedness, such that, formally

senschaft beginnt vor hundert Jahren mit dem Sieg des gesetzlichen Positivismus.' See also NRW 0265-20925, Manuscript, p. 11.

[43] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 418. 'Die liberalen Feinde Savignys.'

[44] Daniel Dyzenhaus. *Legality and Legitimacy: Carl Schmitt, Hans Kelsen, and Hermann Heller in Weimar* (Oxford: Oxford University Press, 1999), p. 39.

[45] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 386. 'Formaler Geltungsgrund des positiven Rechts sind hier immer nur Setzungen, hinter denen ein staatlicher Wille zur Setzung steht ... Für die rein staatsbezogenen Begriffe eines solchen Gesetzespositivismus gibt es infolgedessen nur deutsches, französisches, spanisches, schweizerisches und weiteres einzelstaatliches Recht.'

[46] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 386. 'mangels eines europäisches Gesamtstaates und eines europäischen Gesetzeswillens.'

[47] Schmitt, *Der Nomos der Erde*, p. 17. 'eine rechtsgeschichtliche Tatsache,' 'großes historisches Ereignis,' 'begründet Recht,' 'nach Außen (gegenüber anderen Völkern) und nach Innen.' See as well Chapter 5, Section 2 of this thesis on the domestic constitutional aspect of Schmitt's nomos concept.

seen, it is not even possible for a conflict between the two legal circles.'[48] The ultimate consequence of this version of legal positivism at the international level, with its emphasis on the contractual basis of international law, was that

> after the European spirit had developed a particularly European law of nations from the seventeenth to the nineteenth century, now, at the turn of the nineteenth to the twentieth century, the law of nations was dissolved into countless and undifferentiated interstate relationships of fifty or sixty states of the entire earth, i.e. dissolved into a spaceless universality.[49]

Thus, the rise of legal positivism meant the fracturing of a common European law of nations into two distinct spheres at the domestic and the international level: each state enacted its own domestic laws, while interstate treaties replaced the common *jus publicum europaeum*. Recovering a monist conception of law would necessarily be a historical project, one that would involve excavating the common principles that had been placed under erasure by legal positivism's dominance.

Such an erasure, however, was not total. For Schmitt, a genealogy of European legal history would reveal an overarching unity in European jurisprudence and correct the fracturing effects of positivism: 'The entire legal history and legal development of European peoples [is] a history of reciprocal receptions.'[50] In other words, to understand the laws of any European country, one must look beyond the present day borders of that national legal system, beyond the codified laws of the present moment, to trace the dispersion and interpenetration of legal arguments and structures across the continent. However, even if one were to deny the existence of an ongoing exchange of legal ideas in Europe, Schmitt asserts that every European country is united in the origins and paradigms of its legal thought. The reception of Roman law remains the central event in the development of European legal history, affecting those countries that adapted the system as well as those that did not. Put succinctly, 'the history of European jurisprudence over five centuries was in fact the history of the science of Roman law.'[51] Even countries which did not adopt Roman law –

[48] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 387. 'Die Trennung von Innen und Außen ist so absolut, daß . . . zwischen Innen und Außen volle und reine Beziehungslosigkeit besteht, so daß, formal gesehen, nicht einmal ein Konflikt zwischen den beiden Rechtskreisen möglich ist.'

[49] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 388. 'Nachdem der europäisches Geist vom 17. bis zum 19. Jahrhundert ein spezifisch europäisches Völkerrecht entwickelt hatte, wurde jetzt, um die Wende des 19. zum 20. Jahrhundert, das Völkerrecht in zahllose und unterschiedslose zwischenstaatliche Beziehungen von fünfzig bis sechzig Staaten der ganzen Erde, d.h. in eine raumlose Allgemeinheit aufgelöst.'

[50] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 391. 'Die ganze Rechtsgeschichte und Rechtsentwicklung der europäischen Völker [ist] eine Geschichte von gegenseitigen Rezeptionen.'

[51] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 392. 'In Wirklichkeit ist die Geschichte der europäischen Rechtswissenschaft durch fünf Jahrhunderte hindurch eine Geschichte der Wissenschaft des Römischen Rechts gewesen.'

and here Schmitt specifically includes England – were still inescapably influenced by its reception: the English had incorporated Roman law in the form of the law of the seas and the doctrine of 'ex aequo et bono [law of equity]' even if they ultimately diverged in the practice of common law.[52] Roman law had thereby established a common legal tradition with a 'common vocabulary' which had in turn become the 'language of the legal community' across Europe.[53] Locating a common origin and vocabulary of European jurisprudence generated by the reception of Roman law in Europe pointed to the possibility of conceiving the European legal tradition differently than the fractured version enacted by legal positivism. Or, put differently, legal positivism was itself a historically contingent phenomenon, and as such, could be challenged by reconstructing historical alternatives such as the legal monism of the *jus publicum europaeum*.

Finding a solution to the crisis of jurisprudence was important not just for the future of jurisprudence but also for the formation and solidification of a common European identity. As Schmitt claims, the impact of Roman law was nothing short of creating a common European culture: 'The cultural edifice, erected by the European spirit [*Geist*], stands on the common basis established by a common European jurisprudence.'[54] The crisis of European jurisprudence was thus simultaneously a crisis of the European 'cultural edifice,' explaining why Schmitt would focus on the history of legal thought at the same time that World War II seemed to provoke a larger geopolitical crisis. Indeed, for Schmitt, by cutting jurisprudence off from its own history, legal positivism negated cultural commonalities.

If there was a moment in European legal history when it was possible to speak of a common European jurisprudence, when precisely did the fragmentation into national traditions take place? One might look to codification efforts, particularly following the Napoleonic *code civile* and subsequent iterations in different national contexts, as well as attempts at revising Prussian codified law by none other than Savigny. However, Schmitt is clear that fragmentation instead began as a direct consequence of the 1848 Revolutions, one of Schmitt's frequent targets for the responsibility of decline of the German state, culture, and intellectual life.[55] While the reception of Roman law was the first formative moment for the establishment of a Europe-wide legal science, the Revolutions of 1848 spread

[52] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 395. 'Billigkeitsrecht.'

[53] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 396. 'zu einem gemeinsamen Vokabularium, zur Sprache rechtswissenschaftlicher Gemeinschaft.'

[54] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 396. 'Das kulturelle Gebäude, das der europäische Geist sich hier errichtet hat, steht auf dieser gemeinsamen, durch eine gemeinsame europäische Rechtswissenschaft geschaffenen Basis.'

[55] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 397. On the significance of 1848 in Schmitt's thought, see Joshua Smeltzer, "'Germany's Salvation": Carl Schmitt's Teleological History of the Second Reich,' *History of European Ideas* (2019).

across the continent 'and finally spread to the entire world' establishing 'an entire system of concepts and institutions' that appeared universal in their scope.[56] The revolutions cemented commonalities in national legal traditions and the written constitutions of European peoples came to resemble one another in their structure. New fields of law, such as administrative law, corporate law, and labor law could be seamlessly transposed onto the legal systems of neighboring states, and it became possible for the 'educated jurist of a European state . . . to find his way in the legal world of another state.'[57]

Schmitt's argument mobilizes the history of legal positivism in order to generate his normative criticism: the Revolutions of 1848 caused both a fragmentation into national legal spheres at the same time that it created commonalities across them. This interconnected and shared cultural heritage of the European legal tradition allowed legal positivism to spread into every legal system and led to the overarching crisis defining jurisprudence at the time of Schmitt's writing in 1943/44. Less than five years prior, Schmitt's contemporary Paul Koschaker – an editor of the *Zeitschrift der Savigny-Stiftung* from 1936 until 1944 and the holder of Savigny's chair in the Faculty of Law at Berlin University where Schmitt also taught – had diagnosed a 'crisis in Roman law' in 1939.[58] Like Schmitt, Koschaker sought the origin of this crisis beyond the present moment, beyond the marginal position given to Roman law under National Socialism. However, Koschaker's diagnosis differed from Schmitt's, ascribing the fatal moment as the German *Bürgerliches Gesetzbuch* in replacing the significance of the Digest in 1900, both in terms of the instruction of private law at German universities as well as the flight of Romanists away from contemporary jurisprudence to a purely historical study of Roman law. For Koschaker, Savigny and his successors were themselves partly to blame:

> Regardless of Savigny's own plea for the study of legal history . . . the main thrust of his endeavor and that of the German Pandect science had led to the instrumental use of the Justinian code for the construction of a systematic German science of private law rather than a historical study of the development of private law from the Roman Era to the nineteenth century.

This process of disjunction between legal history and contemporary law culminated in the *Bürgerliches Gesetzbuch* as a definitive break with Roman law.

[56] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 397. 'schließlich auf die ganze Erde ausgedehnt'; 'ein ganzes System von Begriffen und Institutionen.'

[57] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 397. 'Die jeden wissenschaftlich gebildeten Juristen eines europäischen Staates in den Stand setzt, sich in der Rechtswelt eines anderen Staates zurechtzufinden.'

[58] Koschaker is first listed as an editor in the *Zeitschrift der Savigny-Stiftung*, Volume 56, (1936); by volume 65 (1947), the first post war publication, he had been removed

Schmitt shares Koschaker's diagnosis of a collapse in Roman law, but instead locates the trigger of the collapse half a century prior: 'the victory of legal positivism' over other forms of jurisprudence in 1848.[59] Here, Schmitt claims 'Our fathers and grandfathers cast aside an outlived natural law and saw in the transition to that which they called "Positivism" a great advance from illusion to reality.'[60] In so doing, legal positivism banished the doctrine of natural law to the confines of theology. As Schmitt quotes Bernhard Windscheid, the nineteenth century jurist instrumental in early attempts at drafting the *Bürgerliches Gesetzbuch*, 'the dream of natural law has come to an end.'[61]

Vanquishing natural law, in Schmitt's view, is undoubtedly to positivism's credit, though the victory would turn out to be pyrrhic: at the same moment that legal positivism celebrated its victory over natural law, Schmitt argues it simultaneously opened an abyss in reformulating 'the relationship between jurisprudence and the modern method of legislation.'[62] Quoting from a lecture by the nineteenth century jurist Julius Hermann v. Kirchmann on 'the Worthlessness of Jurisprudence as Science,' Schmitt sees legal positivism as establishing a condition in which 'the stroke of the legislators' feather and entire libraries become wastepaper [*Makulatur*].'[63] Behind this apocalyptic statement is a temporal claim that 'science will never catch up with the law,' or put another way:

> What remains of a discipline whose sense and purpose is nothing other than the commentating and interpretative accompaniment [*Begleitung*] of continuously shifting, positive regulations from government agencies, who for their part can themselves best know and say what their genuine will is and what the meaning and purpose of their regulations are?[64]

As long as jurists were concerned with interpreting the Digests or divining the eternal principles of natural law, the object of their discipline remained relatively stable: interpretations might shift, historical documents might emerge, but the source of law was itself relatively

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[59] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' pp. 394, 398.

[60] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 398. 'Unsere Väter und Großväter warfen ein überlebtes Naturrecht beiseite und sahen in dem Übergang zu dem, was sie "Positivismus" nannten, einen großen Fortschritt von der Illusion zur Wirklichkeit.'

[61] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 398. 'Der Traum des Naturrechts ist ausgeträumt.'

[62] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 399. 'das Verhältnis von Rechtswissenschaft und moderner Gesetzgebungsmethode.'

[63] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 399. 'Ein Federstrich des Gesetzgebers und ganze Bibliotheken werden Makulatur.'

[64] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 400. 'Was bleibt von einer Wissenschaft übrig, deren Sinn und Zweck nichts anderes ist als die kommentierende und interpretierende Begleitung fortwährend wechselnder, positiver Anordnungen von staatlichen Stellen, die ihrerseits doch wohl selber am besten wissen und sagen können, was ihr eigentlicher Wille und was der Sinn und Zweck ihrer Anordnungen ist?'

fixed. However, the crisis confronting European jurisprudence is not necessarily due to the changing relationship of jurisprudence to its object of study, but rather the pace at which positive law could be written, amended, or discarded. Drawing on the temporal claim made above, Schmitt notes, 'the European jurists of the nineteenth century could . . . still feel seemingly safe, as the method and tempo of legislation . . . remained in a close relationship with jurisprudence even after 1848, during the second half of the nineteenth century.'[65] Thus, in the early period of legal positivism, the acceleration characteristic of the 'motorized legislator' had not yet taken hold, though the decoupling between law and jurisprudence and established the conditions of its possibility. While the stroke of a feather could now render everything written on the law into wastepaper, such shifts rarely occurred in the decades following the Revolutions of 1848. Indeed, legal positivism necessitated a distinction between 'the objective law' and 'the subjective opinion of the creator of the law,' which meant that jurisprudence could take the text of the law as its object of study and draw interpretations that would be antithetical to the subjective opinion of the legislator.[66] Thus, it was possible to quip, following a quotation from Max Ernst Eccius, that 'the law is smarter than the legislator.'[67] In fact, Schmitt notes that the distinction 'gave the jurist . . . a new, separate authority and an almost legislative dignity.'[68] In Schmitt's typed notes of Eccius' text, it is clear that he agreed on another level as well: that, under positivism, 'legal life will lose its firm basis.'[69]

However, the brief moment of legislative dignity afforded to jurists under legal positivism disappeared in the twentieth century with the introduction of what Schmitt terms 'the motorized legislator.' The term 'motorized' refers here to the pace at which laws are enacted, a pace so rapid that jurisprudence could no longer follow changes in the law. For Schmitt, the 'motorized legislator' is a phenomenon of the twentieth century: while the Revolutions of 1848 had laid the path for the spread of legal positivism into European legal thought, the year 1914 – marking the beginning of the Great War – symbolized the rise of the 'motorized legislator.' Here, Schmitt claims

[65] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 401. 'Die europäischen Juristen des 19. Jahrhunderts konnten sich . . . noch ziemlich sicher fühlen, denn die Methode und das Tempo der Gesetzgebung . . . blieben auch nach 1848, während der zweiten Hälfte des 19. Jahrhunderts, in enger Verbindung mit der Rechtswissenschaft.'

[66] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 402. 'von objektivem Gesetz und subjektiver Meinung der Urheber des Gesetzes.'

[67] Schmitt kept a typed note of Eccius' extended quotation together with his materials for *Die Lage* in a folder labeled 'Drei Arten.' The phrase 'Das Gesetz ist stets klüger als der Gesetzgeber' is underlined. See RW 0265-20925.

[68] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 403. 'Das Gesetz ist klüger als der Gesetzgeber'; 'Sie gab den Juristen . . . eine neue, eigene Autorität und eine fast legislatorische Würde.'

[69] See RW 0265-20925; the phrase 'eine feste Grundlage verlieren' is underlined.

> Since 1914, all great historical events and developments in European countries have contributed to the process of legislation becoming constantly quicker and constantly in a more summary manner, the path of materialization of a legal provision becoming constantly shorter, and share of jurisprudence becoming constantly smaller.[70]

For Schmitt, this process of motorization and acceleration is grounded in the history of the European states in the twentieth century: the crisis of jurisprudence was deeply imbricated in the 'war and post-war, mobilization and demobilization, revolution and dictatorship, inflation and deflation,' all of which have 'led to the same result in all European countries, that the process of legislation became increasingly simplified and increasingly accelerated.'[71] During the course of the war, 'the "decree," the "ordinance," displaced the law [*Gesetz*].'[72] Schmitt points to the exact moment in German history when this process of displacement was unleashed: August 4, 1914, the date of the *Gesetz über die Ermächtigung des Bundesrats zu wirtschaftlichen Maßnahmen und über die Verlängerung der Fristen des Wechsel- und Scheckrechts im Falle kriegerischer Ereignisse* at the start of the World War. This law enabled government agencies to issue decrees and administrative ordinances with the force of law. The reliance on decrees and ordinances only intensified after the war as a deeply fractured Reichstag could not pass an *Ermächtigungsgesetz*, instead relying on the 'dictatorial measures of the Reichspräsident' contained in Article 48 of the Weimar constitution.[73]

As a result of this motorization, jurisprudence could no longer keep up with the rapid pace of decrees and ordinances meant to counter moments of acute political crisis, themselves emerging at ever increasing rates. As Schmitt notes, 'the legislative machine increased its tempo to an unforeseen extent, and the positivist-legal commentary and interpretation could barely manage to keep up.'[74] Thus, jurisprudence became disjointed from its own subject matter – the discipline of law, as a product of human labor, could not become

[70] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 404. 'Seit 1914 haben alle großen geschichtlichen Ereignisse und Entwicklungen in allen europäischen Ländern dazu beigetragen, daß das Verfahren der Gesetzgebung immer schneller und summarischer, der Weg des Zustandekommens einer gesetzlichen Regelung immer kürzer, der Anteil der Rechtswissenschaft immer kleiner wurde.'

[71] Schmitt, 'Die Lage der europäischen Rechtswissenschaft, p. 404. 'Krieg und Nachkrieg, Mobilmachung und Demobilmachung, Revolution und Diktatur, Inflation und Deflation . . . in allen europäischen Ländern zu dem gleichen Ergebnis geführt, daß das Verfahren der Gesetzgebung immer mehr vereinfacht und immer mehr beschleunigt wurde.'

[72] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 404. 'Das "Dekret", die "Verordnung", verdrängte das Gesetz.'

[73] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 405. 'Diktaturmaßnahme des Reichspräsidenten.' Schmitt does not acknowledge his own role as a proponent of Article 48 powers of the Weimar Constitution. See in particular Carl Schmitt, 'Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung,' in Schmitt, *Die Diktatur*. See Dyzenhaus, *Legality and Legitimacy*, 70-85.

[74] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 406. 'Die Gesetzgebungsmaschine steigerte ihr Tempo in ungeahntem Ausmaße, und die positivistisch-rechtswissenschaftliche Kommentierung und Interpretierung vermochte ihr kaum zu folgen.'

'motorized' in the same way that law itself had become motorized. At the same time, however, the acceleration of law became a recursive process, as the law moved into administrative mechanisms such as ordinances, orders, and measures with legal force: 'Just as the ordinance [*Verordnung*] could be called "motorized law," so could the order [*Anordnung*] be called a "motorized ordinance."'[75] For Schmitt, 'the statutory law [*Gesetz*] transformed into a means of planning, the act of administration into an act of intervention.'[76] The ultimate consequence of this shift from motorized law to motorized ordinance was that it was no longer possible to distinguish between the law and the legislator, as Schmitt had argued could still be done in the decades following 1848. For Schmitt,

> It can make sense to say that the law is smarter than the legislator; however, it is something entirely different to assert that a steering measure [*Lenkungsmaßnahme*] enacted according to the situation of the matter is smarter than the steering regulator [*Lenkungsstelle*], who is best informed on the state of the matter.[77]

Thus, the dominance of legal positivism put jurisprudence in the impossible position of being permanently outpaced by the rate of changing laws. Moreover, the rate of acceleration would only increase.[78] Jurisprudence, by virtue of the changing nature of the object of its study, could no longer produce commentaries on its own subject matter. The shift into rapid ordinances and orders, into rapid measures designed to combat technical problems – echoed in Schmitt's choice repetition of 'steering measures' and 'steering agencies' – had finally widened the abyss between jurisprudence and the law.

Jurisprudence found itself confronted by an existential crisis: as long as law was motorized, designed to be rapidly enacted to respond to rapidly unfolding technical crises, the discipline could not overcome the temporal acceleration of its object of study. Indeed, one might frame this in terms of 'law's abnegation,' the rise of administrative and bureaucratic control over technical issues.[79] In forming his prognosis of the existential crisis facing

[75] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 407. 'Wie die Verordnung ein "motorisiertes Gesetz", so konnte die Anordnung eine "motorisierte Verordnung" genannt werden.'

[76] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 407. 'Das Gesetz verwandelt sich in ein Mittel der Plannung, der Verwaltungsakt in einen Lenkungsakt.'

[77] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 408. 'Es kann einen guten Sinn haben, zu sagen, daß das Gesetz klüger ist als der Gesetzgeber; es ist aber etwas ganz anderes, zu behaupten, daß eine nach Lage der Sache ergangene Lenkungsmaßnahme klüger sei als die anordnende, über die Lage der Sache am besten informierte Lenkungsstelle.'

[78] Even after 1950, Schmitt maintained that he was correct regarding the accelerated pace of legislation. On the front cover of his personal copy, Schmitt has taped a newspaper clipping from 1958 reviewing Franz Schlegelberger's *Zur Rationaliserung der Gesetzgebung*. Schmitt has underlined 'Es seien zuviel Beamte unrationell mit Gesetzgebungsarbeiten beschäftigt' – a diagnosis that fits within the domain of his essay. See NRW 0265-27591.

[79] Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State* (Boston: Harvard University Press, 2016).

jurisprudence, Schmitt turned to the history of legal thought, constructing a genealogy that connected the rise of legal positivism following the Revolutions of 1848 to the exacerbated crises of 'the present situation' of 1943/1944. Legal positivism's list of crimes in Schmitt's account was long: it had fractured jurisprudence into national legal spheres, transformed the monism of the *jus publicum Europaeum* into a system of interstate treaties, and unwittingly unleashed the motorized legislator. To combat the existential crisis created by legal positivism, Schmitt will follow the same strategy as he used to diagnose it: only by searching within its own history could jurisprudence save itself.

2.2 Historicizing the Historical School of Law

In giving an answer to the crisis confronting European jurisprudence, Schmitt points to the work of Friedrich Carl von Savigny as a historical 'paradigm' for combatting the hegemonic position of legal positivism. Drawing on two of Savigny's most famous texts – *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* of 1814 [On the Vocation of our Age for Legislation and Jurisprudence] and *Stimmen für und wider neue Gesetzbücher* of 1816 – Schmitt lays out a vision of a unified European jurisprudence grounded in an historical approach inspired by the foundational thinker of the Historical School of Law. This historicism means, however, that Schmitt cannot simply announce a 'return to Savigny,' as doing so would violate his oft-repeated dictum: 'a historical truth is only true *once*.'[80] Instead, Schmitt mobilizes the Prussian legal historian as a paradigmatic thinker whose commentary on the sources of law could be revised and reapplied to 'the present situation' of European jurisprudence.

To reclaim Savigny's historical approach, Schmitt reads his intellectual predecessor within the historical context of the development of German legal thought in the nineteenth century. For Schmitt, this is necessarily a critical endeavor, as the rise of legal positivism after Savigny's death inspired a revisionist account in which the Historical School of Law was at best an distraction and at worst a retrogression on the path towards positivism's ascendance. According to this conception, '[Savigny] simply stood on the wrong side in the historical development of law; his "historical" tendency only had a quixotic, antiquarian, and reactionary meaning because it stood impedingly in the way of the urgently historical development towards the codification of state law.'[81] For Schmitt, such a conception of

[80] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 415. Emphasis in the original. 'Zurück zu Savigny'; 'Eine geschichtliche Wahrheit ist nur einmal wahr.' Schmitt repeats this formulation in Schmitt, *Dialogues*, p. 72.

[81] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 410. 'Demnach hätte er in der rechts-

Savigny's significance in the history of legal thought could itself only emerge during a period of hegemonic legal positivism, in which the object of legal studies was exclusively limited to positive law. Thus, in this conception, Savigny was on the wrong side of history in his polemic against Thibaut and early attempts to create a codification of German law.[82]

Schmitt's text offers a counter-reading of this historical narrative – while positivism still ultimately wins, the historical element of Savigny's thought is nevertheless worth saving. As Schmitt claims, one needs to keep in mind that Savigny's work of 1814 'was an existential reflection of jurisprudence on itself, that it was a great call to jurisprudence as the guardian of not only enacted law [*gesetzten Rechts*], while his critique of codifications of state law had only the sense of clarifying the profession of jurisprudence, of saving the dignity of a legal class, and of evoking an entirely specific threat.'[83] Over the course of the following section of his text, Schmitt emphasizes that Savigny's work arose in the context of an 'existential struggle' facing jurisprudence, one which took place in Savigny's time but is refracted forward into the contemporary crisis of European jurisprudence.

The French language manuscript of Schmitt's text of 1944 reveals a second historical parallel between Schmitt and Savigny, entirely omitted in the published 1950 version: both thinkers are writing at a moment of war. As Schmitt notes, 'this [intellectual] strength [shown by Savigny] was not just the private affair of a great man. These were the intellectual and moral energies of the Napoleonic wars ~~of German liberation~~ . . . It is within the alliance of the scientific spirit and the conscience, awakened by war, of a new spiritual strength, that resides the true secret of Savigny's great appeal to European jurisprudence.'[84] In the first instance, Schmitt's commentary displays the extent to which he identifies his own fate with that of Savigny's: both urge a return to legal history at a moment of intense war and the fracturing of Europe. A second striking feature of Schmitt's conclusion is the claim that war is in fact conducive to the 'awakening' of the 'scientific spirit.' This argument as well could

geschichtlichen Entwicklung einfach auf der falschen Seite gestanden; seine "historische" Tendenz hätte nur einen lebensfremden, antiquarischen und reaktionären Sinn, weil sie der zur staatsgesetzlichen Kodifikation drängenden geschichtlichen Entwicklung hemmend in den Weg trat.'

[82] Klenner, 'Savigny's Research Program,' p. 72.

[83] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 411. 'Man achtete nicht darauf, daß eine Abhandlung eine existentielle Besinnung der Rechtswissenschaft auf sich selbst, daß sie ein großer Aufruf zur Rechtswissenschaft als der Hüterin des nicht nur gesetzten Rechts war, während seine Kritik der gesetzesstaatlichen Kodifikation nur den Sinn hatte, den Beruf zur Rechtswissenschaft klarzustellen, die Würde eines Rechtsstandes zu retten und eine ganz bestimmte Gefahr zu beschwören.'

[84] NRW 0265-20925, 34. Strikethrough in the original text. 'Cette force n'était pas uniquement l'affaire privée d'une homme génial. C'étaient les énergies intellectuelles et morales de l'époque des guerres napoléon ~~"allemandes de libération"~~ . . . C'est dans l'alliance de l'esprit scientifique et de la conscience, éveillée par la guerre, d'une force spirituelle et neuve, que réside la véritable secret du grand appel de Savigny à la jurisprudence européenne.'

be reflected onto the present moment: Schmitt believed his work was similarly granted a level of intellectual 'elevation' by virtue of the unfolding world war and the clarity it provided.

However, the French typescript reveals a third reason for drawing on Savigny in 1944, one that forms the very last paragraph of Schmitt's lecture and the last impression he would have left with his audience.

> In the suffering and horrors of the present world war, new germs of the scientific spirit will be born; these germs will find, even in the noise of the battles and under the terror of aerial bombardments, the mysterious calm indispensable to their growth, and they will eventually flourish. Such is the faith I draw from Savigny's call to jurisprudence. With increased intensity, the European spirit becomes aware of itself, and the genius that has never abandoned Europe during the terrible periods it has gone through in the past will also save us from the present misfortune.[85]

Referencing the 'terror of aerial bombardments' points to Schmitt's own life: Schmitt's house in Dahlem, Berlin was struck by a bomb on August 23, 1943, forcing him to relocate first to Schlachtensee and then to his family home in Plettenberg.[86] However, Schmitt's closing lines also point to the possibility of a sustained future of jurisprudence – not despite the war, but rather precisely because of it, new possibilities were emerging to save jurisprudence from the twin forces of theology and technology. That Schmitt concludes with 'the present misfortune' or 'du malheur présent' allows him to maintain a critical ambiguity: while Schmitt framed his lecture as a discussion of the present situation of jurisprudence, even saying in the introduction that he does not wish to speak of the 'horrible world war,' he nevertheless closes the lecture with precisely the war in mind. Schmitt's intervention in 1944 was to demonstrate a level of historical self-consciousness of the European 'spirit' – in the course of his speech, European jurisprudence – embodied in Schmitt – becomes aware of its historical position.

Schmitt's turn to a historical jurisprudence follows from Savigny's sources doctrine in opposition to the legality-oriented legal positivism: 'The law as concrete order cannot be separated from its history. True law is not enacted [*gesetzt*], but rather emerges in an unintentional development.'[87] This brief statement illuminates three further aspects of

[85] NRW 0265-20925, p. 34. 'Dans les souffrances et dans les horreurs de la guerre mondiale actuelle, naîtront de nouveaux germes de l'esprit scientifique; ces germes sauront trouver, même dans le bruit des batailles et sous la terreur des bombardements aériens, le calme mystérieux indispensable à leur croissance, et ils finiront par s'épanouir un jour. Telle est la foi que je puise dans l'appel de Savigny à la jurisprudence. Ave une intensité accrue, l'esprit européen prendre conscience de lui-même, et le génie qui n'a jamais abandonné l'Europe au cours de périodes terribles qu'elle a traversées dans la passé nous sauvera aussi du malheur présent.'

[86] Villinger, *Verortung des Politischen*, p. 35. Mehring, *Carl Schmitt*, p. 414.

[87] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 411. 'Das Recht als konkrete Ordnung läßt

Schmitt's appropriation of Savigny: first, Schmitt attempts to reclaim Savigny's legacy for his own methodological project, recasting him as the first jurist to correctly grasp the relationship between legality and legitimacy and even uses the term 'concrete order' in this connection; second, Savigny is credited as the first to understand that law does not develop along a preordained teleology, that its future cannot be given in advance precisely because it unfolds 'unintentionally,' an essential element of their common anti-rationalism[88]; and third, Savigny's emphasis on the relationship between history and law is one that Schmitt will carry forward into his own analysis. For 'what true law is, determines itself today therefore in the concrete historical form of existence of jurists [*Juristentum*], in which the growth arises to consciousness.'[89]

The pivotal distinction in Savigny's thought turns on three sources of law: first, in the sense of 'legal institutions and valid rules'; and second, in the sense of 'a purely historical' source of law. However, the third source poses Savigny's radical significance for Schmitt's project: '*jurisprudence is precisely itself the real source of law*.'[90] Laws themselves are, in this interpretation, 'only material, which [jurisprudence] shapes and refines where possible,' thus leaving it to jurists to develop systematic interpretations of law. Indeed, Schmitt writes 'Savigny knows the value of a good law, but he knows first, that the law is only one of many manifestations of concrete orders, and second, that the essence and value of the law lay in its stability and longevity.'[91]

Schmitt's third claim, that '*jurisprudence is precisely itself the real source of law*,' follows closely Savigny's source doctrine in *Vom Beruf unsrer Zeit*. In Schmitt's personal copy of Savigny's text, acquired in 1935, he has underlined the exact passage wherein Savigny describes the intellectual division of labor allowing jurists to refine the law: 'In an advanced

sich nicht von seiner Geschichte loslösen. Das wahre Recht wird nicht gesetzt, sondern entsteht in einer absichtlosen Entwicklung.'

[88] On Savigny as an anti-rationalist, see Ernst Rothacker, 'Savigny, Grimm, Ranke. Ein Beitrag zur Frage nach dem Zusammenhang der Historischen Schule,' *Historische Zeitschrift* 128(3) (1923), 415-445, p. 441; See as well Max Weber, 'Roscher and Knies and the Logical Problems of Historical Political Economy'; Gary Ulmen misreads this commonality between the two thinkers as a result of reading Schmitt's earliest critiques of Political Romanticism nearly thirty years forward into this text. See Gary Ulmen, 'The Sociology of the State: Carl Schmitt and Max Weber,' *State, Culture and Society* 1(2) (1985), 3-57, p. 21.

[89] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 411. 'Was wahres Recht ist, bestimmt sich demnach heute in der konkreten geschichtlichen Existenzform des Juristentums, in welchem das Wachstum zum Bewußtsein kommt.'

[90] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 412. Emphasis added. 'Die Rechtswissenschaft ist eben selbst die eigentliche Rechtsquelle.'

[91] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 412. 'Savigny kennt den Wert eines guten Gesetzes, aber er weiß erstens, daß das Gesetz nur eine von mehreren Erscheinungsformen des Rechts konkreter Ordnungen ist, und zweitens, daß Wesen und Wert des Gesetzes in seiner Stabilität und Dauer liegen.'

culture all activities of the people become specialized to an ever increasing extent, . . . as such a specialized class now appear jurists as well.'[92] Such an interpretation of Savigny's sources doctrine radically differed with the standard interpretation during the Third Reich, which read the concept of Volksgeist as belonging solely to the German people, not a particular class within it.[93]

The law's stability and longevity was ensured by its embeddedness in legal science as the 'genuine guardian of the law [*Rechtswahrerin*].'[94] Central to this conception is that the law is based in the idea of a jurisprudence that would 'bring [the law's] development to consciousness' as a 'carrier and guardian of the law and to raise it to the core of a genuine legal class [*Rechtsstand*].'[95] Here, Schmitt once again echoes the language he found in Savigny's *Vom Beruf*, emphasizing the legal class as the source of law in an advanced and specialized culture. Even if Savigny's attempt was ultimately unsuccessful, Schmitt nevertheless viewed it as a central development in the history of European jurisprudence and a paradigm for its future development.

Confined to a footnote, Schmitt cites the central passage from Savigny's method for his text, defining a 'strictly historical method of jurisprudence' in the following way:

> Its endeavor is much to follow every given subject matter to its roots and to discover an organic principle, whereby that which is still living will necessarily differentiate itself from that which has died off and belongs to history.[96]

This brief description of a historical jurisprudence conforms to Schmitt's own approach in his the history of the law of nations, *Der Nomos der Erde*. Thus, it is no surprise that the immediately following paragraph contains the same language as the foreword to *Der Nomos der Erde*: Schmitt claims that 'the true successor of Savigny in the nineteenth century was neither Puchta nor Ihering, but rather Johann Jacob Bachofen,' once again claiming to

[92] NRW 0265-27061, *Vom Beruf unsrer Zeit*, p. 12. Underlining follows Schmitt's own handwritten markings. 'Bei steigender Cultur nämlich sondern sich alle Thätigkeiten des Volkes immer mehr, und was sonst gemeinschaftlich betrieben wurde, fällt jetzt einzelnen Ständen anheim. Als ein solcher abgesonderter Stand erscheinen nunmehr auch die Juristen.' I have kept Savigny's antiquated orthography.

[93] In agreement, see Andreas Rahmatian, 'Friedrich Carl von Savigny's Beruf und Volksgeistlehre,' *Journal of Legal History* 28(1) (2007), 1-29, p. 5.

[94] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 414. 'der eigentlichen Rechtswahrerin.' It should be noted that *Rechtswahrer* is a NS legal term.

[95] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 415. 'die Entwicklung zum Bewußtstein bringende Rechtswissenschaft zur Trägerin und Hüterin des Rechts und zum Kern eines echten Rechtsstandes zu erheben.'

[96] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 415. This same passage is quoted in Böckenförde, 'Die Historische Rechtsschule,' p. 11n7. 'Ihr Bestreben geht vielmehr dahin, jeden gegebenen Stoff bis zu seiner Wurzel zu verfolgen, und so ein organisches Prinzip zu entdecken, wodurch sich von selbst das, was noch Leben hat, von demjenigen absondern muß, was schon abgestorben ist und auch noch der Geschichte angehört.'

find Savigny's true successor in Bachofen.[97] The linguistic parallels extend further, with Schmitt referring to making jurisprudence 'fruitful' once again.[98] While all references to Bachofen do not appear in the French typescript of 1943, their presence in the 1950 published edition suggests that Schmitt was consciously attempting to link each of his works into a coherent argument. In this regard, Schmitt praises Bachofen for '[ignoring] the current affairs of the positivistic age and went his own way in the fruitful depth and stillness of mythological research.'[99] By following in the footsteps of Savigny and Bachofen and taking a turn to history and the mythological, Schmitt declares that '[we are allowed] to let the dead positivism of the nineteenth century bury its deceased.'[100]

Schmitt's declaration of triumph over positivism comes not as a result of the specific substantial conclusions of Savigny's texts, which Schmitt declares as full of 'contradictions of the most obvious type.'[101] Furthermore, Schmitt is anxious to gloss over Savigny's role in the codification of Prussian law, as that would run contrary to Schmitt's preferred interpretation of Savigny as an archetype of anti-positivism.[102] Instead, Savigny's work forms an effective weapon against positivism because of the 'intellectual situation, which the historical value is given to his main argument, his theory of the unintentional development of law, because it makes jurisprudence into the antithesis of a merely de facto law of enactment, without throwing law into the civil war slogans of natural law.'[103] Thus, Savigny's contribution, for Schmitt's narrative, is not his analysis of Roman Law in itself, nor is it his contribution to private law, as Schmitt would lament in his notebooks.[104] Rather, Savigny's contribution to the development of jurisprudence lies in the strategy of turning to legal history, specifically of turning to Roman law as a bulwark against the advance of positivism and the resurgence of natural law theories. For Schmitt, this same strategy could be replicated in the face of the contemporary crisis with a return to historicity as the foundation of law; however, this would

[97] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 416. 'Der wahre Erbe Savignys im 19. Jahrhundert war weder Puchta noch Ihering, sondern Johan Jacob Bachofen.'

[98] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 416; Schmitt, *Der Nomos der Erde*, p. 6.

[99] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 416. 'Freilich ließ er die Aktualitäten des positivistischen Zeitalters links liegen und ging er einen Weg in die Fruchtbare Tiefe und Stille mythologischer Forschung.'

[100] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 416. '[Wir dürfen] den toten Positivismus des 19. Jahrhunderts seine Toten begraben lassen.'

[101] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 416. 'Widersprüche auffälligster Art.'

[102] Matthias von Rosenberg, *Friedrich Carl von Savigny im Urteil seiner Zeit* (Frankfurt: Verlag Lang, 2000).

[103] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' pp. 417-8. 'Seine Bedeutung liegt nicht in einer Argumentation, sondern in der geistigen Situation, die seinem Hauptargument, seiner Lehre von der absichtslosen Entstehung des Rechts, erst die geschichtliche Größe gibt, weil sie die Rechtswissenschaft zum Gegenpol des bloß faktischen Setzungsrechts macht, ohne das Recht in die Bürgerkriegsparolen des Naturrechts zu werfen.' On the relationship between civil war and natural law, see chapter 3, section 2 of this dissertation.

[104] Schmitt, *Glossarium*, p. 80.

require that the current position of jurisprudence to be correctly understood in relation to its historical development.

Thus, when Schmitt ultimately answers the question posed by the title of his lecture – what is the situation of European jurisprudence? – he once again uses identical language to the foreword to *Der Nomos der Erde*, placing its position as between two opposing forces: 'the position of European jurisprudence has namely . . . always been defined through two oppositions, that of jurisprudence to theology, metaphysics, and philosophy on the one hand, and to a purely technical science of norms [*Normenkunde*] on the other hand.'[105] This bifurcation directly mirrors the language used and the problematic posited in the opening of *Der Nomos der Erde*, where Schmitt warns of an existential threat facing jurisprudence, 'which today is being crushed between theology and technology.'[106] Indeed, Schmitt goes on in *Die Lage der europäischen Rechtswissenschaft* to characterize Savigny as laying the groundwork for an attack against theology and 'secularized theology' in the form of natural law; likewise, Savigny is credited with understanding the potential danger of a pure '*Setzung von Setzungen*' ['Enactment of Enactments'] emerging as a result of positivism and of 'Napoleonic Codification.'[107] In a critical moment, Schmitt argues for a separation between law and theology, writing that 'in the self-surrender to theology and philosophy, jurisprudence would cease, in a particular way, to be its own, autonomous science.'[108] At the same time, however, technology exposes law to all of the pitfalls of legal positivism: 'In the subjugation under the mere legality of an only enacted [*gesetzten*] Ought, it would completely lose its dignity as a science [*Wissenschaft*] and would degenerate into a no longer particularly useful instrument of a technical prosthesis operation, which treats the earth as a *tabula rasa* of a spaceless and lawless planning.'[109] For Schmitt, technology produces the motorized legislator and, as I will argue in chapter 6 of this dissertation, ultimately the negation of law through utopian thought.

[105] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 420. 'Die Lage der europäischen Rechtswissenschaft ist nämlich, . . . immer durch zwei Gegensätze bestimmt gewesen, den der Rechtswissenschaft zur Theologie, Metaphysik und Philosophie auf der einen und zu einer bloß technischen Normenkunde auf der anderen Seite.'

[106] Schmitt, *Der Nomos der Erde*, p. 6.

[107] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 421. 'Eine Setzung von Setzungen' is one of Schmitt's favorite pejorative terms for legal positivism, used frequently in his postwar writings. See Schmitt, *Ex Captivitate Salus*, p. 58, as well as Schmitt, *Glossarium*, p. 65.

[108] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 421. 'In der Selbstauslieferung an Theologie und Philosophie würde die Rechtswissenschaft aufhören, in spezifischer Weise eine eigene, autonome Wissenschaft zu sein.'

[109] Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 421. Emphasis in original. 'In der Unterwerfung unter die bloße Legalität eines nur gesetzten Sollens würde sie ihre Würde als Wissenschaft überhaupt verlieren und zu de nicht einmal mehr besonders nützlichen Instrument eines technischen Prothesen-Betriebes herabsinken, der die Erde als *tabula rasa* einer raum- und rechtlosen Planung behandelt.'

Bracketing for a moment the exact nature of the dual oppositions to jurisprudence in theology and technology, which forms the basis of the subsequent chapters of the thesis, a number of issues arise in Schmitt's thinking: aside from being published in the same year, the repeated language and identification of the dual forces confronting jurisprudence posits a close relation between the two texts, one that has been entirely overlooked due to the scant attention paid to *Die Lage der europäischen Rechtswissenschaft*, let alone the French unpublished manuscript, in Schmitt scholarship. One might argue that such similarities are to be expected given the texts were simultaneously published and composed during roughly the same period; however, this similarity has been overlooked, and the nature of their interaction with one another in Schmitt's thought has similiarly not been explored. The relationship between the two texts is specifically one of method and application – *Die Lage* excavates a historical approach to the study of law uncovering Savigny as a paradigm for the future of jurisprudence, while *Der Nomos der Erde* applies this method to writing a history of the law of nations.

Indeed, as Schmitt continues in his description of the dangers facing European jurisprudence, 'the danger, which today threatens the legal spirit [*Geist*] of Europe, comes no longer from theology and still only occasionally from a philosophical metaphysics, but rather from an unchained technicism [*Technizismus*], which serves state law as its instrument.'[110] To prevent any misinterpretation, by Schmitt declaring that theology no longer poses a threat, he does not mean that jurisprudence should forget the progress made after Gentili's '*silete theologi!*' and flee once more into the stability afforded by natural law; rather, Schmitt is offering a historical argument that the 'unchained technicism' of the twentieth century has effectively neutralized the argumentative force of natural law doctrines, reflected in his use of temporal modifiers such as 'no longer,' 'only still occasionally,' and 'today.' This should be taken as a warning against reading Schmitt deterministically through the lens of his earlier writings on political Catholicism and *Politische Theologie*, as Schmitt explicitly aims to limit the influence of theology on jurisprudence. Indeed, Schmitt clarifies this relation, noting that 'the scholarly jurist is not a theologian and not a philosopher; he is however also not a mere function of a somehow "enacted" ought and of its enactment of enactments [*Setzung von Setzungen*].'[111] It was Savigny's great achievement that the opened a third path for jurisprudence through legal history, one that Schmitt thought could serve once again as the

[110]Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 422. 'Die Gefahr, die heute dem rechtswissenschaftlichen Geist Europas droht, kommt nicht mehr aus der Theologie und nur noch gelegentlich aus einer philosophischen Metaphysik, sondern aus einem entfesselten Technizismus, der sich des staatlichen Gesetzes als seines Werkzeuges bedient.'

[111]Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 422. 'Der wissenschaftliche Jurist ist kein Theologe und kein Philosoph, er ist aber auch keine bloße Funktion eines irgendwie "gesetzten" Sollens und seiner Setzung von Setzungen.'

foundation of jurisprudence.

2.3 The Past Futures of Jurisprudence

Upon publication of *Die Lage der europäischen Rechtswissenschaft*, Schmitt made sure to send his newest text to his Spanish contacts – after his extended period of 'exile' in Spanish academia following the war – as well as former students such as Ernst Forsthoff, and German academics such as Werner Weber, Hans Barion, Gustav von Schmoller, and Carl Bilfinger.[112] And yet, it was through Joseph Kaiser's outreach to émigré Germans in the United States that Schmitt found one of his most supportive readers: the political scientist Eric Voegelin. After receiving his copy, Voegelin wrote directly to Schmitt on two separate occasions regarding the text. In the first, dated July 3, 1950, he claimed 'your study shows ... the old mastery.' Voegelin continued, 'I ask myself ... if the attempt should be made, to publish this in an American journal.'[113] In the second letter, nearly a year later, Voegelin laments that American publications do not favor the length of Schmitt's typical pamphlets – too long for a journal and yet too short for a book – but nevertheless still hopes to see its publication in the United States.[114] Such plans would only come to fruition after Schmitt's death with an English translation appearing in the journal *Telos* in spring of 1990.[115]

Perhaps the most significant reaction to the text came from Schmitt's former student, Ernst Rudolf Huber. Schmitt wrote to Huber on March 24, 1950 indicating he had enclosed a copy of *Die Lage der europäischen Rechtswissenschaft* dedicated with his frequent dictum, '*Der Feind ist unsere eigene Frage als Gestalt*.'[116] Huber's response, dated nearly three months later, contains a detailed commentary on the text. In the first instance, Huber notes that the text shows 'the continuity of your scholarly thought, which manifests itself so clearly for the expert of your oeuvre.' Huber's praise for his former teacher continues, noting that 'your old theses on the existential situation and on concrete order are advanced here, stronger than in previous publications, under a secular aspect.'[117]

[112] See Miguel Saralegui, *Carl Schmitt pensador español* (Madrid: Trotta 2016). See Forsthoff's brief discussion of the text in *Briefwechsel Ernst Forsthoff-Carl Schmitt 1926-1974*, eds. Dorothee Mußgnug, Reinhard Mußgnung und Angela Reinthal (Berlin: Akademie Verlag, 2007), p. 68.

[113] Eric Voegelin to Carl Schmitt, July 3, 1950. NRW 0265-17335. 'Ihre Studie zeigt ... die alte Meisterschaft.'

[114] Eric Voegelin to Carl Schmitt, May 8 1951. NRW 0265-17336.

[115] Carl Schmitt, 'The Plight of European Jurisprudence.'

[116] Carl Schmitt and Ernst Rudolf Huber, *Briefwechsel 1926-1981*, ed. Ewald Grothe (Berlin: Duncker & Humblot, 2014), p. 359n1678.

[117] Schmitt and Huber, *Briefwechsel*, p. 362. 'die Kontinuität Ihres wissenschaftlichen Denkens, die sich in ihm für den Kenner Ihres Gesamtwerkes so deutlich manifestiert'; 'Ihre alten Thesen von der existentiellen Situation und von der konkreten Ordnung sind hier starker noch als in früheren Schriften unter einen

While Huber agrees with Schmitt on the danger of legal positivism, he nevertheless criticizes his former mentor's turn to Savigny. Huber argues 'I am not at all sure whether Savigny's doctrine of the "unintentional formation of law" is adequate ... and if it is sufficient as a counter-position.'[118] His argument is that Schmitt's primary example of a unity of European jurisprudence – the reception of Roman law – was itself not unintentional, but rather a deliberate effort. However, Huber's claim is in fact more general: 'that all legal crises can only be overcome in a determination for conscious reform.'[119] Thus, even the choice to return to Roman law was itself a rational decision, one that reveals the 'source of the logical contradictions' of the Historical School of Law.[120] This presents a rebuttal of Schmitt's specific mobilization of Savigny as an anti-rationalist and the potential effectiveness of that mobilization for defending jurisprudence from legal positivism.

But Huber also pushes back on Schmitt's attempt to bind the 'decomposition visible in the crisis of legality' with 'the modern concept of statutory law [*Gesetz*].'[121] Here, he chastises Schmitt, arguing 'with every polemic against the legalistic instrumentalization, it cannot be forgotten, that in the end phase of this decomposition, not only the "statutory law" [*Gesetz*], but also "natural law" [*Naturrecht*] was made into a tool of despotism, discrimination, and terror.'[122] Huber's response to Schmitt was a direct criticism of his former mentor's own involvement with National Socialism: 'The appeal to "concrete order," to a "healthy legal and popular sentiment," to irrational energies, to nature or reason, to justice and humanity, to Christian natural law and divine commandment, all of this became just like "statutory law" [*Gesetz*] a weapon for systematic discrimination, the deprivation of rights, annihilation.'[123] As a result, Huber's second line of attack establishes two related claims: first, that legal positivism was not solely responsible for the horrors of National Socialism, as other doctrines such as natural law were also mobilized when advantageous; and second, that Schmitt's

säkularen Aspekt gebracht.'

[118] Schmitt and Huber, *Briefwechsel*, p. 363. 'so wenig ist mir sicher, ob Savignys Lehre von der "absichtslosen Entstehung des Rechts" der Situation adäquat ist ... und ob sie als Gegenposition ausreicht.'

[119] Schmitt and Huber, *Briefwechsel*, p. 363. 'Jede Rechtskrise aber kann nichts anderes als im Entschluß zur rationalen und bewußten Reform überwunden werden.'

[120] Schmitt and Huber, *Briefwechsel*, p. 363. 'die Quelle der logischen Widersprüche.'

[121] Schmitt and Huber, *Briefwechsel*, p. 363. 'die in der Krise der Legalität sichtbar gewordene Degeneration ... mit dem modernen Begriff des Gesetzes.'

[122] Schmitt and Huber, *Briefwechsel*, pp. 365-366. 'Bei aller Polemik gegen die legalitäre Instrumentalisierung darf dann wohl auch nicht vergessen werden, daß in dieser Endphase der Dekomposition nicht nur das "Gesetz", sondern auch das "Naturrecht" zu einem Werkzeug der Willkür, der Diskriminierung und des Terrors wird.'

[123] Schmitt and Huber, *Briefwechsel*, p. 366. 'Die Berufung auf "konkrete Ordnung", auf "gesundes Rechts- und Volksempfinden", auf irrationale Energien, auf Natur oder Vernunft, auf Gerechtigkeit und Menschlichkeit, auf christliches Naturrecht und auf göttliches Rechtsgebot wird so gut wie das "Gesetz" zu einer Waffe der planmäßigen Diskriminierung, Entrechtung, Vernichtung.'

own earlier work on concrete order thinking, and even Savigny's texts, were themselves implicated in this critique.

Schmitt never answered Huber's critique, instead ignoring Huber for six months and beginning a period of only sporadic communication between the two. Nevertheless, Huber's commentary provides a significant contextual insight into the reception of Schmitt's text by one of his closest students. This commentary sought to pull Schmitt's previous work into his critique and thereby undercut its normative function. This chapter has avoided a normative evaluation of Schmitt's arguments, instead placing *Die Lage der europäischen Rechtswissenschaft* within its historical and political context and within Schmitt's wider body of works. I have argued that Schmitt was a deeply historical thinker, seeing Friedrich Carl von Savigny as providing a paradigm for the future of jurisprudence and a possibility of escape from the dual forces of theology and technology. Schmitt's concept of *Geschichtlichkeit*, or historicity, provides the basis of the critiques laid out in the following chapters: the history of legal and political thought will be Schmitt's chosen field of battle.

Chapter 3

Law without History? Carl Schmitt contra Natural Law

In the words of the Austrian legal positivist Hans Kelsen, Carl Schmitt's text *The Guardian of the Constitution* (1931) revealed him to be a 'natural lawyer': his thought mobilized a 'natural law ideal of "unity" based upon wishful thinking [in] the place of the constitution as a piece of positive law.'[1] Such a characterization was undoubtedly meant pejoratively. Following Kelsen's separation thesis, the '*Trennungsthese*,' this meant that Schmitt had made an unacceptable appeal to a moral, 'metaphysical,' and therefore non-legal category.[2] In interpreting Schmitt as a natural law theorist, Kelsen was hardly alone. Another of Schmitt's contemporaries, Ludwig Waldacker, had reviewed *Der Wert des Staates* (1914) in 1916 claiming that Schmitt was a 'constructivist conceptual legal theorist of the natural law school.'[3] John Herz, the influential German émigré and scholar of international law, likewise included Schmitt in a list of National Socialist legal scholars who 'attempt[ed] to furnish a natural law foundation for international law' after 1933.[4] For Herz, National Socialism

1 Hans Kelsen, 'Who ought to be the Guardian of the Constitution?' in *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, ed. Lars Vinx (Cambridge: Cambridge University Press, 2015), 174-221, p. 218.

2 On Kelsen's separation thesis, see Lars Vinx, *Hans Kelsen's Pure Theory of the Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007), pp. 30-41; Peter Langford and Ian Bryan (eds.), *Hans Kelsen and the Natural Law Tradition* (Leiden: Brill, 2019); on Kelsen and Natural Law, see Hans Kelsen, 'Naturrechtslehre und Rechtspositivismus,' *Politische Vierteljahresschrift* 3(4) (1962), 316-327.

3 Quoted in Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), p. 73. Beyond reconstructing the intellectual history of natural law theories preceding the rise of legal positivism in Germany, natural law theories do not play a role in Kennedy's analysis of Schmitt's thought.

4 John Herz, 'The National Socialist Doctrine of International Law and the Problems of International Organization,' *Political Science Quarterly* 54(5) (1939), 536-554, p. 542n17. Other National Socialist lawyers identified along with Carl Schmitt include Viktor Bruns, Carl Bilfinger, and Ernst Wolgast.

relied upon natural law as a 'weapon in the battle against the existing state of law,' and it was Schmitt's mobilization of the interrelated concepts of the Reich and *Großraum* that had advanced this cause the furthest.[5]

The depiction of Schmitt as a natural lawyer still survives in the contemporary reception of his ideas. One scholar has recently rendered '*Nomos der Erde*' as simply 'natural law,' implying the text advanced a natural law theory.[6] In Volker Neumann's magisterial study *Carl Schmitt als Jurist* (2014), Schmitt is described as having rejected 'the second front of [Kelsen's] pure theory of the law, specifically against the strict distinction between positive law and natural law.' This leads Neumann to argue that Schmitt's writings on international law 'must work with natural law anachronisms' in the absence of an international authority capable of taking a sovereign decision.[7] According to Gerhard Donhauser, 'Carl Schmitt can be recognized as one of the most prominent and powerful representatives of the twentieth century natural law tradition' because 'the presence [of] theological sources . . . constitute[s] an essential orientation for his position.'[8] In addition, Benjamin Schupmann, in his *Carl Schmitt's State and Constitutional Theory* (2017) has argued that Schmitt 'believed valid law rested on an at least quasi-natural law foundation' and that he has a 'quasi-natural law orientation.'[9] Although what precisely makes it 'quasi' remains undefined, Schupmann nevertheless sees Schmitt's state theory as presenting a form of 'quasi-natural law' because 'when . . . only positive laws were recognized as valid law, Schmitt's theoretical solutions would appear arbitrary and irrational, especially his theory of dictatorship or his arguments about exceptions to positive legal order.'[10] Here, however, Schupmann makes two untenable assumptions regarding Schmitt's legal theory: first, and symptomatic of his broader study, that Schmitt's thought is meant to form a coherent and non-contradictory system across time, and that rationality is an important criterion of this system[11]; and second, that theories of

[5] Eduard Bristler, *Die Völkerrechtslehre des Nationalsozialismus* (Zurich: Europa-Verlag, 1938), p. 77. Eduard Bristler is a pseudonym for John Herz. On the polemical function of Schmitt's concept of the Reich, see Joshua Smeltzer, 'Reich, Empire, Imperium: Carl Schmitt and the "Overcoming of the Concept of the State,"' in Edward Cavanagh (ed.), *Empire and Legal Thought: Ideas and Institutions from the Ancients to the Moderns* (Leiden: Brill, forthcoming).

[6] Clint Goodson, 'About Schmitt: Partisans and Theory,' *The New Centennial Review* 4(3) (2004), 1-7, p. 6.

[7] Volker Neumann, *Carl Schmitt als Jurist* (Tübingen: Mohr Siebeck, 2015), pp. 423, 507. 'gegen die zweite Frontstellung der reinen Rechtslehre gerichtet, nämlich gegen die strikte Unterscheidung von positivem Recht und Naturrecht'; 'Schmitt [muss] mit naturrechtlichen Anachronismen arbeiten.'

[8] Gerhard Donhauser, 'Nomos or Law? Hans Kelsen's Criticism of Carl Schmitt's Metaphysics of Law and Politics,' in *Hans Kelsen and the Natural Law Tradition*, p. 372.

[9] Benjamin Schupmann, *Carl Schmitt's State and Constitutional Theory* (Oxford: Oxford University Press, 2017), pp. 18-20.

[10] Schupmann, *Carl Schmitt's State and Constitutional Theory*, p. 20.

[11] For a criticism of Schupmann's 'continuity thesis' of Schmitt's work, see Joshua Smeltzer, 'Carl Schmitt In and Out of History,' review of Schupmann, *Carl Schmitt's State and Constitutional Theory* and Peter Uwe Hohendahl, *Perilous Futures*, London School of Economics Review of Books (2019).

jurisprudence must fall on a scale between positive law and natural law, and as it is clear that Schmitt is vehemently against legal positivism, he must therefore present some type of 'quasi-natural law.'

A separate reading of Schmitt as a straightforwardly Catholic theorist of politics and law would likewise lead one to the assumption that he stands in a long tradition of Catholic natural law theorists, from Augustine through Aquinas to the School of Salamanca and contemporaries such as John Finnis. For example, Peter Uwe Hohendahl claims that Schmitt identifies in the post-war period with Francisco de Vitoria and that his work underwent a 'Catholic revival' with an increasing emphasis on theology in relation to law.[12] Such interpretations largely rely upon Heinrich Meier's reading of *Political Theology* and the 'theological twist' he instigated, arguing that 'whoever wishes to confront Schmitt's thought ... must enter into the self understanding of the political theologian so as to not miss the decisive question from the outset.'[13] However, Meier does not claim that Schmitt was a *natural lawyer*; rather, this is a misrepresentation of his argument. Instead, Meier argues 'Political theology names the core of Schmitt's theoretical enterprise. It characterizes the unifying center of an oeuvre rich in historical turns and political convolutions, in deliberate deceptions and involuntary obscurities.'[14] For Meier, political theology means '[denying] the possibility of a rational justification of one's own way of life' and 'believing in the *truth of faith*.'[15] Neither of these propositions are synonymous with natural law as a form of jurisprudence, certainly not in its later manifestation as *Vernunftsrecht*. Indeed, previous scholars have pointed out that Schmitt cannot be classified as a natural lawyer,[16] while others have noticed that Schmitt in fact viewed natural law doctrines critically.[17] As Reinhard

[12] Peter Uwe Hohendahl, *Perilous Futures: On Carl Schmitt's Late Writings* (Ithaca: Cornell University Press, 2018), pp. 33, 57-8.

[13] See Donhauser, 'Nomos or Law?', p. 372n1. On the 'theological twist,' see Heinrich Meier, *Carl Schmitt and Leo Strauss* (Chicago: University of Chicago Press, 1995), p. xiv.

[14] Heinrich Meier, *Was ist Politische Theologie? What is Political Theology?* (Munich: Carl Friedrich von Siemens Stiftung, 2017 [2006]), p. 19.

[15] Meier, *Was ist Politische Theologie? What is Political Theology?*, p. 30; Heinrich Meier, *Die Lehre Carl Schmitts. Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie* (Stuttgart: J.B. Metzler'sche Verlag 2009 [1994]), p. 40.

[16] See for example Stefan Breuer, 'Nationalstaat und pouvoir constituant bei Sieyes und Carl Schmitt,' *Archiv für Rechts- und Sozialphilosophie* 70(4) (1984), 495-517, p. 511; Martin Rhonheimer, "'Autoritas non veritas facit legem': Thomas Hobbes, Carl Schmitt und die Idee des Verfassungsstaates,' *Archiv für Rechts- und Sozialphilosophie* 86(4) (2000), 484-498, p. 493; William Scheuerman, 'Carl Schmitt's Critique of Liberal Constitutionalism,' *The Review of Politics* 58(2) (1996), 299-322, p. 307.

[17] See Martti Koskenniemi, 'Carl Schmitt and International Law,' in *The Oxford Handbook of Carl Schmitt* eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2017), 592-611. p. 597; Reinhard Mehring, 'Macht im Recht: Carl Schmitts Rechtsbegriff in seiner Entwicklung,' *Der Staat* 43(1) (2004), 1-22, p. 2; Reinhard Mehring, 'Der "Nomos" nach 1945 bei Carl Schmitt und Jürgen Habermas,' *Forum historiae iuris* (2006); Graham McAleer, 'Introduction to the Transaction Edition,' in Carl Schmitt, *Political*

Mehring has argued, 'his positions on jurisprudence and the political did not correspond to church doctrine either. Schmitt profoundly rejected Catholic natural law and its juridical representatives.'[18]

The question still remains, however, on what grounds Schmitt rejected natural law doctrines, and why they became a frequent polemical target in the post-war period. In this chapter, I offer two related explanations: first, natural law was fundamentally incompatible with Schmitt's increased focus on the historicity of law as drawn from Savigny. The basic characteristic of natural law doctrines to which Schmitt objected was its claim to universality and eternal validity; or, to follow the natural lawyer John Finnis' later characterization, that natural law claimed to form a type of law that 'has no history.'[19] Instead, Schmitt would pursue a strategy of historicizing the origins of natural law, showing that it was merely one age of the historical development of jurisprudence, not the uncovering of its true principles. In particular, the first section examines Schmitt's reading of Hegel's early treatment in *Über die Wissenschaftlichen Behandlungsarten des Naturrechts* (1802/3), a text Schmitt considered required reading for any commentary on natural law. I then turn towards a set of contextual explanations for Schmitt's criticism of natural law: first, the role of natural law in unleashing civil war and 'world civil war' [*Weltbürgerkrieg*], a condition Schmitt felt had been on display in the war against Nazi Germany and the treatment of war criminals after 1945; and second, that Schmitt argued that the supposedly eternal principles of natural law were evolving at a rapid pace in relation to the right of resistance, or *Widerstandsrecht*. For Schmitt, the emergence of a new 'duty' or 'obligation' to resist tyrannical regimes, a so-called *Widerstanspflicht*, meant that he personally would have been culpable for failing to actively resist the National Socialist *Gewaltherrschaft*.

The arguments presented in this chapter form only one half of the discussion of natural law: Schmitt's criticism of natural law doctrines is intimately linked to the subject of the following chapter of this thesis, his account of the revival of the Spanish Scholastics and particularly the work of Francisco de Vitoria. In the index for *Der Nomos der Erde* (1950), which Schmitt himself created and modified over the years for later editions, the entry for '*Naturrecht*' instructs the reader to 's. Vitoria,' or 'see Vitoria.'[20] The subsequent chapter thus focuses on the origins of the Vitorian renaissance in the work of the American jurist James Brown Scott, as well as Schmitt's bitter polemic over the interpretation of Vitoria's work

Romanticism (New Brunswick: Transaction Publishers, 2011), p. xviii.

[18] Reinhard Mehring, 'A "Catholic Layman of German Nationality and Citizenship"? Carl Schmitt and the Religiosity of Life,' in Jens Meierhenrich, *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2017), 73-95, p. 79-80.

[19] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), p. 24.

[20] Schmitt, *Der Nomos der Erde*, p. 306.

as one of the first texts he published (anonymously) after 1945. To frame that subsequent discussion, however, I first focus in this chapter on Schmitt's criticisms of natural law doctrines more broadly, in order to turn back to the specific dispute over Vitoria's place in the history of international law and his significance for the just war tradition in the following chapter.

3.1 Defining Natural Law

That Schmitt would take seriously natural law doctrines in the second half of the twentieth century might appear at first glance as an anachronism – after all, Schmitt had approvingly cited Windscheid's dictum in 1943/4 that the 'dream of natural law' had come to an end at the hands of legal positivism before the end of the nineteenth century. However, Schmitt's historical narrative of the discipline is at odds with what the legal historian Michael Stolleis has termed the 'turn to natural law' after the end of World War I in German jurisprudence, embodied in figures such as Erich Kaufmann and Gustav Adolf Walz, and, later, the Austrian international lawyer Alfred Verdross.[21] Such authors joined a chorus of calls for a renewal in natural law, for example Hermann Kantorowicz's 1906 '*Der Kampf um die Rechtswissenschaft*,' published under the pseudonym 'Gnäus Flavius,' which had urged a 'resurrection of natural law' suitable 'for the 20th century,' albeit one that had replaced its faith in universally valid claims with culturally specific supra-positive legal propositions.[22] At the same time, Jesuits and other Catholic jurists such as Viktor Cathrein sought to undermine legal positivism by showing that it in fact relied upon natural law principles such as *pacta sunt servanda*, which individuals and states had an obligation to uphold 'whether or not statutory laws recognize it.'[23] Writing in the same issue of *Archiv für Rechts- und Wirtschaftsphiloso-*

[21] Michael Stolleis, *History of Public Law in Germany*, Vol. III, pp. 159-160. On Verdross' turn to natural law, see Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law,' *European Journal of International Law* 6(1) (1995), 33-54, pp. 33-5; Bruno Simma, 'Alfred Verdross (1890-1980),' in eds. Peter Häberle, Michael Kilian, & Heinrich Wolff, *Staatsrechtler des 20. Jahrhunderts* (Berlin: De Gruyter, 2015), pp. 342-5; Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (Cambridge: Cambridge University Press, 2010), pp. 281-3.

[22] Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft* (Berlin: Berliner Wissenschafts-Verlag, 2002 [1906]).

[23] Viktor Cathrein, 'Naturrechtliche Strömungen in der Rechtsphilosophie der Gegenwart,' *Archiv für Rechts- und Wirtschaftsphilosophie* 16(1) (1922), 54-67, pp. 65-6. Cathrein was the most prominent defender of natural law at the turn of the twentieth century. See for example the contemporaneous review of the field in Fritz Berolzheimer, 'Die deutsche Rechtsphilosophie im zwanzigsten Jahrhundert (1900-1906),' *Archiv für Rechts- und Wirtschaftsphilosophie* 1(1) (1907), 130-148, pp. 141-4.

phie in which Schmitt's essay on '*Zur Staatsphilosophie der Gegenrevolution*'[24] appeared, such Catholic authors argued that 'Catholic natural law is therefore not to be confused with the natural law of the so-called Enlightenment, which believed it could derive a complete legal system through mere human reason.'[25] However, the natural law renewal extended beyond purely Catholic authors. To the sociologist Franz Oppenheimer, writing in 1909, 'it is obvious that natural law is the correct form of law,' one need only to determine its correct principles.[26] By 1932, Walther Schönfeld would claim, in a modification of Windscheid's dictum, 'the dream of positive law has come to an end.'[27] The natural law tradition was therefore still present throughout the Weimar Republic, although it had lost much of its significance as *the* dominant form of jurisprudence.

Twentieth century natural lawyers consciously drew upon the natural law doctrines of the early modern period, a period of revival beginning in the mid-sixteenth century with contributions from the Spanish Scholastics, through to Hugo Grotius, Christian Wolff, and Samuel Pufendorf, among others.[28] Natural law doctrines, however, remained in the plural: as contemporary historians such as Annabel Brett have argued, one can distinguish clearly between Catholic and Protestant conceptions in the early modern period, though the latter is itself in no sense a unified doctrine.[29] Growing out of the reception of Aquinas' teachings, natural law provided a form of legal monism, as well as a framework through which 'confessional and colonial conflicts' in the early modern period could be adjudicated.[30]

The abundance of diverse and, at times, contradictory doctrines appearing under the label of 'natural law' from the early modern period onwards makes it into a moving target, particularly by the time of Schmitt's writing; however, we can still turn to Schmitt's earlier publications to help define his specific understanding of natural law and its sources in the

[24] Carl Schmitt, 'Zur Staatsphilosophie der Gegenrevolution,' *Archiv für Rechts- und Wirtschaftsphilosophie* 16(1) (1922), 121-131; republished as Chapter 4 of *Politische Theologie* (1922) and Chapter 1 of *Donoso Cortés in der gesamteuropäischer Interpretation* (1950).

[25] Johann Haring, 'Recht und Gesetz nach katholischer Auffassung,' *Archiv für Rechts- und Wirtschaftsphilosophie* 16(1) (1922), 67-73, p. 70.

[26] 'Diskussionsbeiträge zu den Referaten über Rechtsphilosophie und Allgemeine Rechtslehre,' *Archiv für Rechts- und Wirtschaftsphilosophie* 3(4) (1909), 579-594, p. 589.

[27] Walther Schönfeld, 'Der Traum des positivien Rechts,' *Archiv für civilistische Praxis* 135(1) (1932), 1-66, p. 1.

[28] Michael Stolleis & Lorraine Daston, 'Introduction,' in *Natural Law and Laws of Nature in Early Modern Europe: Jurisprudence, Theology, Moral and Natural Philosophy* (Aldershot: Ashgate, 2008), p. 3. See also T.J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2006).

[29] Annabel Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton: Princeton University Press, 2011), p. 10.

[30] Knud Haakonssen, *Natural Law and Moral Philosophy* (Cambridge: Cambridge University Press, 1996), p. 61.

passing references and discussions he provides on the doctrine, and in the process, provide a point of comparison to his post-war writings. In his 1921 article on '*Politische Theorie und Romantik*,' Schmitt discusses natural law in conjunction with contractualism in the work of Jean Jacques Rousseau and his reception through Fichte, Feuerbach, Schlegel, and Schelling. For Schmitt, all of these authors are committed to the belief that both 'the law and the state are explained by the coexistence of man, by the realization of the necessity of self-limitation which arises when free and autonomous men desire to live together.'[31] For example, he notes that Fichte 'always held onto the idea of the natural law foundation of the state through contract.'[32] Such interpretations emphasized the free individual existing prior to both society and the state, using natural law as a tool for explaining why individuals would choose to restrict their own freedom.

In *Die Diktatur* (1922), Schmitt examines natural law jurists of the previous century, for whom natural law 'separated into two completely different systems' which he labels as 'justice' natural law and a 'scientific, i.e. natural science-exact' natural law.[33] The former, which he associates with Grotius, views 'law with a particular content as arising prior to the state,' while the latter is associated with Hobbes, 'whose system is based on the proposition that prior to the state and beyond the state there is no law; and the value of the state consists precisely in that it creates law.'[34] Schmitt's interpretation of Hobbes emphasizes the conclusion of chapter 13 of *Leviathan* – 'where there is no common Power, there is no Law' – over the following two chapters, which enumerate a list of 'the Lawes of Nature [which] are Immutable and Eternall.'[35] However, Schmitt also points to chapter 26, where Hobbes notes that natural laws are 'not properly laws' until the creation of the Common-wealth, as 'it is the Soveraign Power that obliges men to obey them.'[36] In *Politische Theologie* (1922), he notes that 'for the authors of natural law in the seventeenth century,' and for Pufendorf in particular, 'the question of sovereignty was understood as the question of

[31] Carl Schmitt-Dorotic, 'Politische Theorie der Romantik,' *Historische Zeitschrift* 123(3) (1921), 377-397, p. 379. 'Recht und Staat werden hier überall aus der Koexistenz der Menschen erklärt, aus der Einsicht in die Notwendigkeit der Selbstbeschränkung, die sich ergibt, wenn freie und selbstständige Menschen zusammenleben wollen.'

[32] Schmitt-Dorotic, 'Politische Theorie der Romantik,' p. 379. 'Immer an der naturrechtlichen Begründung des Staates durch Vertrag festgehalten.'

[33] Schmitt, *Die Diktatur*, p. 21. 'In zwei völlig verschiedene Systeme trennt'; 'Gerechtigkeits- und wissenschaftlichem (d.h. naturwissenschaftliche-exaktem) Naturrecht.'

[34] Schmitt, *Die Diktatur*, p. 22. 'Daß ein Recht mit bestimmten Inhalt als vorstaatliches Recht besteht ... Daß es vor dem Staate und außerhalb des Staates kein Recht gibt und der Wert des Staates gerade darin liegt, daß er das Recht schafft.'

[35] Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 2016), pp. 90, 110. For the contrasting interpretation, see Noel Malcom, 'Hobbes's Theory of International Relations,' in Noel Malcolm, *Aspects of Hobbes* (Oxford: Oxford University Press, 2002), 432-456, pp. 437-439.

[36] Hobbes, *Leviathan*, p. 186.

the decision over the state of exception.'[37] This conception then disappears with the rise of Lockean doctrines and Kant in the German context, after which 'the vivid awareness of the meaning of the exception that was reflected in the doctrine of natural law of the seventeenth century was soon lost on the eighteenth century.'[38] Such a blindness extends, for Schmitt, from Kant all the way to the key neo-Kantian jurist of the twentieth century, Hans Kelsen. However, Schmitt's criticism of Kelsen's positivism for its neglect of the exception does not mean that Schmitt urged a return to natural law; rather, he presented a historical narrative of the development of jurisprudence, at the end of which stood the dictum of decisionism: 'all law is "situational law."'[39]

In *Verfassungslehre* (1928), Schmitt specifically includes 'Catholic natural law' as one of several ideologies to have influenced the basic rights included in the Weimar Constitution without defining which rights or how in particular.[40] At the same time, however, he notes that natural law has 'lost its evident quality,' and in the process problematized the basic concept of the *Rechtsstaat*: justice, or *Gerechtigkeit*.[41] To follow Schmitt, it was in the seventeenth and eighteenth centuries that 'the bourgeoisie found the force of an actual system, namely the individualistic reasoned and natural law [*Vernunft- und Naturrecht*] and formed norms valid in themselves out of concepts such as private property and individual liberty. [These norms] were valid before and above any political existence.'[42] As a consequence of the loss of 'belief in the metaphysical presuppositions of bourgeois natural law,' Schmitt argues that the idea of a unified constitution had dissolved into a series of 'positive constitutional laws' characteristic of Kelsen's legal positivism.[43] Individual norms were still held to be absolute and above the power of the state, but they had lost their metaphysical justification. As a result, their validity was only guaranteed by virtue of their inclusion in the constitution, despite any rhetorical protestations to the contrary.

One might expect to find that natural law forms one of the 'Three Types of Juridical Thinking' Schmitt outlined in 1934 in front of the Association of National Socialist German Jurists (BNSDJ); however, the three types are in fact normativism, decisionism, and concrete

[37] Schmitt, *Politische Theologie*, p. 16. 'Auch bei den Autoren des Naturrechts im 17. Jahrhundert [wurde] die Frage der Souveränität als die Frage nach der Entscheidung über den Ausnahmefall verstanden.'

[38] Schmitt, *Politische Theologie*, End of ch 1.

[39] Schmitt, *Politische Theologie*, Ch. 1.

[40] Schmitt, *Verfassungslehre*, p. 30.

[41] Schmitt, *Verfassungslehre*, p. 142. 'Seine Evidenz verloren hat.' On this point, see Dyzenahus, *Legality and Legitimacy*, p. 63.

[42] Schmitt, *Verfassungslehre*, pp. 8-9. '[Das Bürgertum] fand die Kraft zu einem wirklichem System, nämlich zu dem individualistischen Vernunft- und Naturrecht, und bildete aus Begriffen wie Privateigentum und persönliche Freiheit in sich selbst geltende Normen, welche vor und über jedem politischen Sein gelten.'

[43] Schmitt, *Verfassungslehre*, p. 11. 'die metaphysischen Voraussetzungen des bürgerlichen Naturrechts Glauben fanden.'

order thinking. Instead, natural law is a subordinate conception of law which can be classed within the tripartite structure depending on the specific version of natural law under consideration. Thus, Schmitt explains that 'the Aristoltelian-Thomistic natural law of the middle ages for example is legal order thought [*rechtswissenschaftliches Ordnungsdenken*], while law based on reason [*Vernunftsrecht*] of the seventeenth and eighteenth centuries in contrast is partially abstract normativism and partially decisionism.'[44] The categorization depends on whether there is a norm, a decision, or an (institutional) order from which the law proceeds.

Regardless of its categorization as a type of legal thought, Schmitt rejects natural law as a foundation for a National Socialist conception of the law of nations in his short essay, '*Nationalsozialismus und Völkerrecht* [National Socialism and the Law of Nations].' Here, Schmitt argues against both legal positivism's emphasis on pure legality, and at the same time, natural law or "'meta-juristic" morality' as a foundation of law, which he equates with delivering a type of 'lawless morality [*Moral*].'[45] The charge is that natural law proceeds from the moral sphere to the legal, thereby subverting the legal order. Instead, Schmitt posits that National Socialist international law must remain 'inseparably bound' to both 'justice and ethical life [*Sittlichkeit*].'[46] In so doing, Schmitt maintains a distinction between *Moral* as the domain of natural law doctrines, and *Sittlichkeit* as the proper emphasis of a National Socialist jurisprudence of the law of nations. Emphasizing *Sittlichkeit* is, in part, a continuation of the emphasis in Hitler's address to a Leipzig Conference of Jurists of October 3, 1933, which Schmitt explicitly cites as part of his practice in this period of referring to Hitler's speeches as authoritative for the formation of 'German law.' On the other hand, distinguishing between *Sittlichkeit* and *Moral* while expressing a preference for the former maps onto Hegel's distinction in *Philosophie des Rechts*, in which *Sittlichkeit* is the domain of the state and the 'idea of freedom,'[47] as well as the site of obligations of individuals towards their community. As Charles Taylor has summarized Hegel's position, 'the common life which is the basis of my *sittlich* obligation is already there in existence . . . in *Sittlichkeit*, there is no gap between what ought to be and what is, between *Sollen* and *Sein*.'[48] As such, the Hegelian notion stood in direct contrast to Kelsen's *Pure Theory of the Law*, while at the

[44] Schmitt, *Über die Drei Arten*, p. 8. 'Das aristotelisch-thomistische Naturrecht des Mittelalters z.B. ist rechtswissenschaftliches Ordnungsdenken, das Vernunftrecht das 17. und 18. Jahrhunderts dagegen teils abstrakter Normativismus, teils Dezisionismus.'

[45] Schmitt, 'Nationalsozialismus und Völkerrecht,' in *Frieden oder Pazifismus*, p. 398. 'eine "metajuristische" Moral'; 'rechtlose Moral.'

[46] Schmitt, 'Nationalsozialismus und Völkerrecht,' p. 398. 'untrennbar Gebunden'; 'Gerechtigkeit und Sittlichkeit.'

[47] G.W.F. Hegel, *Gesammelte Werke Bd 14,1, Philosophie des Rechts* (Hamburg: Felix Meiner Verlag, 2009), p. 201. This is opposed to the equivalence of the two terms in Fichte and Kant.

[48] Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), p. 376.

same time rejecting claims of a universal validity in (moral) natural law.

After the end of World War II, Schmitt's dairy entries contain a sustained commentary on the development of natural law doctrines: there are at least fifteen entries in which he explicitly discusses natural law. These entries demonstrate something between contempt and dismissiveness towards the theory. For example, Schmitt characterizes natural law as 'dozens of completely contradictory postulates, a heap of vague general clauses, the supposed concepts of which – the concept of nature and that of law are at the fore – remain undefined and offer the impression of a hundred different faces with a hundred wax noses [ed. '*wächsernen Nasen*' means here 'fools' or 'jesters'].'[49] In a letter to Ernst Forsthoff dated 26. September 1955, Schmitt takes much the same approach: 'Gradually, every respectable jurist must have had enough of the infiltration of natural law rambling – an insidious rambling.'[50] It is then clear that Schmitt held an exceptionally low view of natural law doctrines as 'a heap of vague general clauses' – hardly the words of someone who himself might be a 'quasi-natural lawyer.'

Beyond revealing his distain for natural law, the entries in *Glossarium* reveal which texts Schmitt was reading, when he was reading them, and what arguments he would make against them. Only one of the entries on natural law was important enough for Schmitt to include in the index he created for his diaries under the term '*Naturrecht*.'[51] This entry, dated April 12, 1950, begins with a common complaint of many academics that no one had read or taken seriously an aspect of his work:

> In 1926 I wrote and published: that one can recognize in every work concerning constitutional questions whether the author knows the text of the young Hegel. 25 years later I see how childish this appeal was to the education of German legal professors. I am writing this today under the effect of reading once again the *Wiss. Behandlung des Naturrechts*. To think, that I published a book, *The Guardian of the Constitution* in 1931 with a long reference to Hegel – how naïve! That today natural law is still being discussed by people who have not once familiarized themselves with this essay from Hegel. Speaking of the *Rechtsstaat* without knowing the passage on the towering *Erdengeist*.[52]

[49] Schmitt, *Glossarium*, p. 142. 'Einige Dutzend völlig entgegengesetzter Postulate, ein Haufen vager Generalklauseln, deren supponierte Begriffe – der Begriff der Natur und der des Rechts an der Spitze – unbestimmt bleiben und ein Bild von hundert verschiedenen Gesichtern mit hundert wächsernen Nasen bieten.'

[50] Carl Schmitt to Ernst Forsthoff, *Briefwechsel*, No. 83, p. 114. 'Allmählich muß doch jeder anständige Jurist von der Unterwanderung durch das naturrechtliche Geschwafel – ein hinterlistiges Geschwafel – genug bekommen.'

[51] Schmitt, *Glossarium*, p. 398.

[52] Schmitt, *Glossarium*, p. 228. '1926 schrieb und veröffentlichte ich: daß man jeder Arbeit über Verfassungsfragen einsieht, ob der Autor die Schrift des jungen Hegel kennt. 25 Jahre später sehe ich, wie kindlich dieser Appell an die Bildung deutscher Rechtslehrer war. Ich schriebe das heute unter einer nochmaligen

Already on December 23, 1947, Schmitt had referred to Hegel's text, writing that 'with every discussion of natural law, I look to see if the author is familiar with Hegel's *Über die Wissenschaftlichen Behandlungsarten des Naturrechts (1802/3)*.[53] If the author is not familiar, I recommend him the reading, unless the author has shown himself to be Hegel-inept [*Hegel-unfähig*]. In this unfortunately most common case, I switch off.'[54] This text, which Schmitt viewed as required reading on the subject of natural law, and which appears in the diary entry indexed as '*Naturrecht*,' can help to elucidate Schmitt's views on the subject.

Hegel's essay, published as part of the *Kritisches Journal der Philosophie*, sets out two conceptions of natural law which he holds to be insufficient – the empirical and formal (*a priorism*) versions of natural law. Following Hegel's reconstruction, the empirical treatment of natural law seeks the validity of its claims in observations of human nature, for example in the anthropology set out in Hobbes' *Leviathan*, and uses these characteristics as the basis for deriving a legal theory. As Hegel explains, 'to explain the relation of marriage, procreation, the holding of goods in common, or something else is proposed [as the determinant] and, from such a determinate aspect, is made prescriptive as the essence of the relation.'[55] For Hegel, the Hobbesian view is arbitrary in selecting a series of characteristics that it holds to be determinate, ultimately selecting an attribute in order to derive a desired outcome.[56] These empirical treatments of natural law proceed in the first instance by '[thinking] away everything that someone's obscure inkling may reckon amongst the particular and the transitory as belonging to particular manners, to history, to civilization, and even to the state, then what remains is man in the image of the bare state of nature, or the abstraction of man with his essential potentialities.'[57]

In contrast, Hegel viewed the formalist approach, associated with Kant and Fichte,

Lektüre der Wiss. Behandlungsarten des Naturrechts. Zu denken, daß ich 1931 ein Buch 'Der Hüter der Verfassung' mit einem langen Hinweis auf Hegel veröffentlichte – wie naiv! Daß heute immer noch über Naturrecht geredet wird, von Menschen, die nicht einmal diesen Aufsatz Hegels kenne! Von Rechtsstaat reden, ohne die Stelle über den sich emporrichtenden Erdengeist zu kennen.'

[53] Schmitt's *Nachlaß* contains a 1927 edition of this essay, and an annotated version of Hegel's *Philosophie des Rechts* published in 1911. See respectively NRW 0265-24637; NRW 0265-24730.

[54] Schmitt, *Glossarium*, p. 50. 'Jeder noch so flüchtigen und beiläufigen, erst recht aber jeder eingehenden und vertieften Erörterung des Naturrechts sehe ich an, ob der Autor Hegels Aufsatz über die "Wissenschaftlichen Behandlungsarten des Naturrechts" (1802/03) kennt oder nicht. Kennt er ihn nicht, so empfehle ich ihm die Lektüre, es sei denn, daß die Erörterung den Autor als Hegel-unfähig erkennen läßt. In diesem leider häufigsten Fall stelle ich ab.'

[55] G.W.F. Hegel, 'The Scientific Ways of Treating Natural Law,' in G.W.F. Hegel, Natural Law (Pittsburg: University of Pennsylvania Press, 1976), p. 60.

[56] Kenneth Westphal, 'Context and Structure of Philosophy of Right,' in ed. Frederick Beiser, *The Cambridge Companion to Hegel* (Cambridge: Cambridge University Press, 1993). See also Schlomo Avineri, *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1972), p. 82.

[57] Hegel, 'The Scientific Ways of Treating Natural Law,' p. 63.

as being 'a complete abstraction from all content.'[58] Yet law must have some content, thus leading to an inevitable 'self-contradiction' articulated in the language of universal applicability. This is Hegel's critique of the categorical imperative: 'every specific matter is capable of being clothed with the form of the concept and posited as a quality; there is nothing whatever which cannot in this way be made into a moral law.'[59] Instead, it is only through the community – and not the powers of reason belonging to the abstract individual – that the content of moral laws can be established. As Charles Taylor explains, through the Hegelian *Sittlichkeit*, 'the state which is fully rational will be one which expresses in its laws the institutions and practices the most important ideas and norms which its citizens recognize and by which they express their identity.'[60]

Hegel's concept of *Sittlichkeit* as a historically conditioned and community-based foundation of law appealed to Schmitt, as it denied both the pure legality of positivism while still emphasizing an organically achieved particularity. To follow Hegel, 'the ethical vitality of the people lies precisely in the fact that the people has a shape in which a specific character is present . . . as something absolutely united with universality and animated by it.'[61] As such, Hegel attributes to history a corrective role in the study of law:

> If something has no true ground in the present, its ground lies in a past; and so we must look for a time in which the specific feature, fixed in law but now dead, was a living ethos and in harmony with the rest of the laws. But beyond precisely this aim to know, the effect of a purely historical explanation of laws and institutions cannot go. It would exceed its function and truth if it were used to justify, for the present time, *the law which had truth only in a life that is past*. On the contrary, this historical knowledge of the law, which can exhibit the ground of the law only in lost customs and a life that is dead, proves precisely that now in the living present the law lacks understanding and meaning, even though it still may have power and force on the strength of the form of law, owing to the fact that parts of the whole are still in its interest and survive because of it.[62]

As Frederick Beiser has argued, 'instead of seeing natural law as an eternal law above the process of history, Hegel historicizes it, so that it becomes the purpose of history itself.'[63] This strategy mirrors Schmitt's own in relation to natural law: to historicize its origins as part of the development of jurisprudence, and to show that natural law – to follow Hegel – 'had truth only in a life that is past.'

[58] Hegel, 'The Scientific Ways of Treating Natural Law,' p. 76.
[59] Hegel, 'The Scientific Ways of Treating Natural Law,' p. 77.
[60] Taylor, *Hegel*, pp. 377, 388.
[61] Hegel, 'The Scientific Ways of Treating Natural Law,' p. 126.
[62] Hegel, 'The Scientific Ways of Treating Natural Law,' p. 130. Emphasis added.
[63] Frederick Beiser, 'Hegel's Historicism,' in *The Cambridge Companion to Hegel*, p. 279. See as well the claim that Hegel's theory of natural law is 'fundamental' to his theory in Beiser, 'The Puzzling Hegel Renaissance,' in *The Cambridge Companion to Hegel and Nineteenth-Century Philosophy*, pp. 13-4.

Such a reading of Hegel would follow from the work of one of Schmitt's favorite professors while in Berlin, Josef Kohler, an expert on Hegel's legal philosophy.[64] In an unpublished manuscript titled 'Autobiographical Sketches' dated to 1946/7, Schmitt describes Kohler as 'the only professor of law in Berlin who rose above the cul-de-sac of legal positivism and above the heaped materials of legal historians; who spoke of Hegel and Bachofen and who appeared to us to open a window to the world.'[65] For Kohler, Hegel had made a crucial breakthrough in identifying the historical development of culture as 'the scientific principle of our entire humanities' including jurisprudence – laws are part of the cultural development of a specific community and a specific moment. This neo-Hegelian jurisprudence rejected the idea that history would proceed along a rational path, leading to Hegel's owl of Minerva taking flight; rather, history was often 'illogical and absurd' in its progression.[66] Nevertheless, Kohler's Hegel appropriation was intended as a direct challenge to the revival of natural law doctrines, which threatened a form of 'regression, that one recedes from the historical Hegel to the ahistorical natural lawyer Kant.'[67] Natural law was thus a doctrine which, for Kohler, had been surpassed or overcome in the historical development of jurisprudence with Hegel's historicism.[68]

In Schmitt's earliest entry on natural law, dated November 24, 1947, he likewise dismisses natural law as an anachronistic form of jurisprudence. His entry begins by referring to the exact text he was reading: Otto Viet's essay on natural law, published in the journal *Merkur*. He notes that while Otto Viet creates a list of antitheses which features the opposition of natural law to positive law, that such a distinction is in fact confused. He says, 'I consider such concepts as legal-historical, if not anachronistic restorations of helplessly philosophizing jurists; the contemporary concept and distinction is of legality and legitimacy.'[69] This is a direct reference to the title of his 1932 piece *Legalität und Legitimität*, borrowed from the essay with the same title by Georg Lukács. Schmitt asks why it is the case that Viet neglects to include the opposition of legality and legitimacy 'in an otherwise so complete list of

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[64] See NRW 0579-760. For a listing of the courses Schmitt took with Kohler, see Mehring, *Carl Schmitt*, pp. 8, 17.

[65] See NRW 0579-760. Carl Schmitt, 'Autobiographische Skizze.' 'Dieser Mann war für mich der einzige Berliner Rechtslehrer, der sich über die Sackgasen des staatlichen Gesetzespositivismus und über die Materialhaufen der Rechtshistoriker erhob, der von Hegel und Bachofen sprach und uns ein Fenster in die grosse Welt zu öffnen schien.'

[66] Josef Kohler, 'Lehrbuch der Rechtsphilosophie,' *Archiv für Rechts- und Wirtschaftsphilosophie* 2(1) (1908), 30-42, p. 38.

[67] Kohler, 'Lehrbuch der Rechtsphilosophie,' p. 41.

[68] See Rudolf Leonhard, 'Kohler und Hegel,' *Archiv für Rechts- und Wirtschaftsphilosophie* 15(1) (1921/2), 1-11, p. 7.

[69] Schmitt, *Glossarium*, p. 37. 'Ich halte solche begriffe für rechtshistorische, wenn nicht anachronistische Repristinationen hilflos philosophierender Juristen; der zeitgemäße Begriff und Distinktion ist Legalität und Legitimität.'

antitheses.' His answer is that 'the distinction natural law-positive law has been superseded; it no longer deals with "nature" (which would result in the best case in a biological law, which we've all already had enough of); it is about history, whether that is the *Heilsgeschichte*, whether it is the human made history, constantly more deliberate, more planned, and with increasing intensity of historical consciousness (and of total planning).'[70] This shows once again that Schmitt's criticism of natural law turns on the relationship of history to law along two lines: first, the doctrine itself belonged to legal history as it had been surpassed; and second, natural law doctrines denied their own historical and cultural specificity. Indeed, less than a month later, and Schmitt repeats the same argument in a letter to Freda Winckelmann, the wife of Johannes Winckelmann, an editor of Max Weber's work in German. This time, he notes that 'I am sure, that the great problem today should no longer be dealt with under the antithesis of law-natural law (that belongs to legal-history), but rather under the antithesis of legality-legitimacy, which, since 1848, is much more current.'[71]

For Schmitt, the overcoming of natural law as a form of jurisprudence was a done deed – the 'dream of natural law' was over even if some jurists still professed their faith in it. Such a realization, to follow Schmitt's view, was so obvious that even the criminal mastermind of Bertolt Brecht's *Dreigroschenroman*, a classic of the late Weimar Republic, had understood it:

> 'Macheath explains to his people ... you must work legally. The whole speech ... is an incredible, uncanny illustration of my thesis of the distinction between legality and legitimacy. Whoever doesn't understand that now and proceeds with natural law, belongs to the *êtres destinés à périr*. "Brutal violence is over. Today, one doesn't send out murderers when one can send a court marshal."'[72]

The lesson understood by even a common gangster was that more could be achieved through the instrumentalization of legality than through brute force and violence. However, the revival of natural law doctrines threatened potentially two separate forms of violence: the

[70] Schmitt, *Glossarium*, p. 38. 'Weil die Distinktion Naturrecht – positives Recht überholt ist; es handelt sich nicht mehr um 'Natur' (das ergäbe heute bestenfalls ein biologisches Recht, von dem wir ja alle genug haben); es handelt sich um die Geschichte, sei es die Heilsgeschichte, sei es die von Menschen gemachte, immer bewußter, immer planvoller, mit steigender Intensität des geschichtlichen Bewußtseins (und der totalen Planung) gemachte Geschichte.'

[71] Schmitt, *Glossarium*, p. 48. '[Ich] bin sicher, daß das große Problem heute nicht mehr unter der Antithese positives Recht – Naturrecht (das gibt nur Rechts-Historie), sondern unter der seit 1848 viel aktuelleren: Legalität – Legitimität behandelt werden wollte.'

[72] Schmitt, *Glossarium*, p. 229. 'In Bertolt Brechts Dreigroschenroman ... belehrt der Führer der Verbrecherorganisation, Macheath, seine Leute: Man muß legal arbeiten; das ist ebenso guter Sport. Die ganze Rede, die er bei dieser Gelegenheit hält, ist eine ungeheuerliche, unheimliche Illustration zu meiner These von der Unterscheidung Legalität und Legitimität. Wer es jetzt noch nicht versteht und jetzt noch mit Naturrecht kommt, gehört zu den êtres destinés à périr. "Die grobe Gewalt hat ausgespielt. Man schickt keine Mörder mehr aus, wenn man den Gerichtsvollzieher schicken kann."'

bloodshed of civil war and the introduction of a duty of resistance against tyrannical regimes. To each of these I will turn in the next subsections.

3.2 Natural Law and World Civil War

By the end of World War II, Schmitt became focused on the concept of 'world civil war' or '*Weltbürgerkrieg*' as a description of the changing nature of war,[73] particularly as a description of the emerging Cold War as 'the contemporary global world civil war.'[74] Schmitt's Heidelberg students appropriated, harnessed, and reformatted this description: Nicolaus Sombart's recollections of his time in Heidelberg, titled *Rendevous mit dem Weltgeist*, describes the aspiration of starting a journal on the subject together with Reinhart Koselleck and Hanno Kesting. The imagined journal would have carried the title *Das Archiv für Weltbürgerkrieg und Raumordnung*, two concepts which pay homage to Schmitt's influence.[75] While the journal itself never came to fruition, Kesting would eventually title his doctoral dissertation *Geschichtsphilosophie und Weltbürgerkrieg*, while Koselleck's *Kritik und Krise* also made use of the concept.[76]

Weltbürgerkrieg is a compound concept, implying a process of expansion and larger scale than traditional civil wars. What is it, however, that makes civil wars unique for Schmitt in contrast to simply war? For Schmitt, one of the key characteristics of civil war is that it displays a heightened degree of violence among participants. Civil wars, he claims, 'are the worst type of war, which also bring with them the worst type of defeats.'[77] However, the distinction is not merely to do with the degree of violence; rather civil wars are constitutive moments for political concepts. As Schmitt explains, 'everything that one says about war unfortunately receives its last and bitter meaning only in civil war,' a thought Schmitt finds in the writings of Heraclitus: 'War is the father of all things. Few, however, dare to think about civil war.'[78] It is clear, then, that Schmitt attaches a particular importance to civil

[73] For an earlier use, see Carl Schmitt, 'die letzte Globale Linie [1943],' in Schmitt, *Staat, Großraum, Nomos,* 441-52.

[74] Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation* (Berlin: Duncker & Humblot, 2009 [1950]), pp. 7, 21. 'der globale Weltbürgerkrieg der Gegenwart.'

[75] See Niklas Olsen, 'Carl Schmitt, Reinhart Koselleck, and the Foundations of History and Politics,' *History of European Ideas* 37(2) (2011), 197-208, p. 199.

[76] Reinhart Koselleck, *Kritik und Krise* (Frankfurt: Suhrkamp, 2017); Niklas Olsen, *History in the Plural* (New York: Bergbahn, 2014), p. 72; see as well the letter from Koselleck to Schmitt discussing his appropriation of *Weltbürgerkrieg*, in Olsen, 'Carl Schmitt, Reinhart Koselleck and the Foundations of History and Politics,' p. 202n28.

[77] Schmitt, *Ex Captivitate Salus*, p. 30. 'Der schlimmsten Art von Krieg, die auch die schlimmste Art von Niederlagen mit sich bringt.'

[78] Schmitt, *Ex Captivitate Salus*, p. 26. 'Leider erhält alles, was man vom Kriege sagt, erst im Bürgerkrieg

wars not only for the heightened level of violence they instigate, but equally because civil wars are moments of 'concrete oppositions' in which the meaning of political concepts is established.[79] It is precisely in this moment of concrete opposition that civil war is connected to natural law doctrines, and the connection is drawn directly from Schmitt's self-styled 'intellectual brother,' Thomas Hobbes: natural law doctrines are merely 'slogans of civil war,'[80] a tool for denying authority to the sovereign by appealing to a higher source of law.

If it is true, as Benno Teschke has claimed, that 'Schmitt's texts on war have received very little explicit attention,' this applies even more so for the concept of civil war.[81] Indeed, Teschke spares not a single sentence for considering the concept, even though civil war occupies a privileged position within Schmitt's wider oeuvre. As one of Schmitt's editors, Günter Maschke has noted, 'particularly within civil war, the famous "formula" [of friend/enemy] functions like a flash of lightning, illuminating the scene, and which marks the most important condition of victory. Whoever fails to make this distinction is doomed.'[82]

Schmitt establishes the connection between natural law and civil war in the titular essay of his 1950 monograph, *Ex Captivitate Salus*. Civil war has two characteristics: first, that it is fought within the same 'political unity, and therefore the same legal order'; and second, that 'both sides simultaneously absolutely assert and absolutely deny this political unity.'[83] Schmitt continues, asserting that 'to the essence of civil war belongs the subjugation under the jurisdiction of the enemy.' The explicit relationship between natural law and civil war is that 'one side applies a legal law [*legales Recht*], the other a natural law. One side a right of obedience, the other a right of resistance.'[84] In other words, natural law is the means by which one party can assert a right of resistance or revolution, and thereby deny the legitimacy of the laws issued by the sovereign. In such a moment, the unity of the state becomes

seinen letzten und bitteren Sinn. Viele zitieren den Satz des Heraklit: Der Krieg ist der Vater aller Dinge. Wenige aber wagen es, dabei an den Bürgerkrieg zu denken.' This point has been taken up by David Armitage in *Civil Wars: A History in Ideas* (New Haven: Yale University Press, 2017), p. 12.

[79] Carl Schmitt, *Der Begriff des Politischen*, p. 92.

[80] Mehring, *Carl Schmitt*, p. 212.

[81] Benno Teschke, 'Carl Schmitt's Concepts of War: A Categorical Failure,' in *The Oxford Handbook of Carl Schmitt* eds. Jens Meierhenrich and Oliver Simons, *The Oxford Handbook of Carl Schmitt* (Oxford: Oxford University Press, 2014), 367-400. p. 367.

[82] Günter Maschke, 'Freund und Feind – Schwierigkeiten mit einer Banalité Supérieure. Zur neueren Carl Schmitt-Literatur,' *Der Staat* 33(2) (1994), 286-306, p. 286. 'Besonders im Bürgerkrieg wirkt die berühmte "Formel" wie ein die Szene erhellender Blitzstrahl, der wie wichtigste Bedingung des Sieges markiert. Denn wem diese Unterscheidung nicht gelingt, der ist verloren.'

[83] Schmitt, *Ex Captivitate Salus*, p. 56. 'weil er innerhalb einer gemeinsamen . . . politischen Einheit und innerhalb derselben Rechtsordnung geführt wird . . . und weil beide kämpfenden Seiten diese gemeinsame Einheit gleichzeitig absolut behaupten und absolut verneinen.'

[84] Schmitt, *Ex Captivitate Salus*, p. 57. 'Zum Wesen des Bürgerkrieges gehört die Unterwerfung unter Jurisdiktion des Feindes.'

fragmented, and those who once belonged to the same political unit of a people now view one another as enemies. However, the character of their conflict is qualitatively different from that of an inter-state war, as both sides accuse the other of illegitimacy – either in violating positive law or in violating natural law. It is this categorization of the enemy as a 'criminal' that changes the nature of a war into a civil war, leading to the heightened degree of violence Schmitt feared. Indeed, in appealing to natural law, civil wars become wars of annihilation: 'the enemy must be *annihilated*,' Schmitt wrote, 'he is *no longer an enemy who can be forced back within his own territory*.'[85]

In the postwar period, Schmitt sees 'world civil war' [*Weltbürgerkrieg*] as a return to a previous era of conflict – natural law was itself an anachronism and its reintroduction led to a regression to an already superseded form of warfare. Elsewhere, he notes that 'in many ways, the type of civil war of the confessional wars of the sixteenth and seventeenth centuries in Europe and in colonial territories repeats itself today.'[86] This claim of repetition operates on the level of personal identification as well, as Schmitt experiences a 'new connection with the past, a personal coexistence with the thinkers whose situation corresponds to our own position.'[87] Such a statement does not reflect the cyclical philosophy of history of Oswald Spengler; rather, it is about intellectual identification with thinkers of the past and of reconstructing the 'intellectual-historical lines' which 'explain where we actually are, from where we came, and to where our *Leidensweg* proceeds.'[88] These thinkers thus act as guideposts as they have experienced similar, though not identical, historical situations. Thus, the immediately following section identifies the thinkers closest to him as Jean Bodin and Thomas Hobbes – thinkers who he refers to as his 'brothers' – because these are 'names that [have arisen] from the period of confessional civil wars' in Europe, which in turn match his diagnosis of his own period as one characterized by a new type of world civil war.[89] These thinkers had lived through 'civil wars fermented by theologians and sectarians,' and Schmitt would claim to live through the same process on a larger scale.[90]

Once again, Schmitt's *Glossarium* provides an additional layer of context for interpreting

[85] Schmitt, *Begriff des Politischen*, p. 114. '[er muss] definitiv *vernichtet* werden, *also nicht mehr nur rein in seine Grenzen zurückzuweisender Feind* ist.' Emphasis in original.

[86] Schmitt, *Ex Captivitate Salus*, p. 14. 'In mancher Hinsicht wiederholt sich heute, mit säkularisierten Parolen und in globalen Dimensionen, die Art von Bürgerkrieg, die in den konfessionellen Kriegen des 16. Und 17. Jahrhunderts in Europe und auf kolonialem Boden ausgetragen wurde.'

[87] Schmitt, *Ex Captivitate Salus*, p. 61. 'eine neue Verbindung mit der Vergangenheit, eine persönliche Koexistenz mit den Denkern, deren Situation unser eigenen Lage entspricht.'

[88] Schmitt, *Ex Captivitate Salus*, p. 68. 'Belehrt uns darüber, wo wir eigentlich sind, woher wir kommen und wohin unser Leidensweg geht.'

[89] Schmitt, *Ex Captivitate Salus*, p. 64. 'Diese beiden Namen aus dem Zeitalter der konfessionellen Bürgerkriege.'

[90] Schmitt, *Ex Captivitate Salus*, p. 68. 'Der von Theologen und Sektierern geschürte Bürgerkrieg.'

his statements on the inter-relation of natural law and civil war. In his very first entry, dated August 28, 1947, he discusses a new mixture of war and civil war: 'State = sovereignty = decision = end of civil war within the (newly constituted) state. World government likewise the end of civil war? No, rather the combination of war and civil war.'[91] Later that day, he adds in a separate entry that this combination introduced the 'indistinguishability of war and peace.'[92] In Schmitt's broader historical narrative, the state emerges as 'essentially the product of religious civil war,' or what he elsewhere terms 'confessional civil war.'[93] He describes this process as one of 'de-theologization [*Ent-theologisierung*]' or 'secularization' as the decisive step in preventing future civil war; however, one that stopped short of collapsing into 'positivization' and 'technologization' of the law.[94] This is, once again, a direct parallel to the foreword of *Der Nomos der Erde*, in which Schmitt claims that jurisprudence is being crushed by theology and technology. For Schmitt, the re-emergence of natural law doctrines was precisely the re-encroachment of theology into the field of law.

This mirrors Schmitt's first journal entry to use the compound term '*Weltbürgerkrieg*,' dated October 8, 1947. Here, he notes:

> Just war, that is, depriving the opponent of rights and the self-empowerment of the just party; that means: transformation of state war (that is of war in the law of nations) into a war, which is both colonial and civil at the same time . . . War becomes world civil war and ceases to be war between states.[95]

There are two aspects of this entry that deserve closer attention. First, the original German contains a play on words that elucidates Schmitt's position – the waging of just war as *gerechter Krieg* leads to the deprivation of rights of the enemy, as *Entrechtung*. In other words, the appeal to natural law theories in fact leads to the elimination of rights of the enemy, rather than securing them. The second aspect is that in Schmitt's historical narrative, the age of confessional civil wars only came to an end as a result of separating law from theology. This is the famous dictum from Gentili, *Silete Theologi*, a phrase that Schmitt repeats several

[91] Schmitt, *Glossarium*, p. 3. 'Staat = Souveränität = Dezision = Beendigung des Bürgerkrieges innerhalb des (eben da erst entstehenden) Staates. Weltherrschaft ebenfalls Beendigung des Bürgerkrieges? Nein, sondern Kombination von völkerrechtlichem Krieg und Bürgerkrieg.'

[92] Schmitt, *Glossarium*, p. 4. Schmitt had already used this same formulation in his writings on the Rheinland in 1924. See Joshua Smeltzer & Duncan Kelly, 'Carl Schmitt on the Theory and Practice of Occupation and Dictatorship' in *International Law and History*, eds. Annabel Brett, Megan Donaldson and Martti Koskenniemi (Cambridge: Cambridge University Press, forthcoming).

[93] Schmitt, *Glossarium*, p. 15.

[94] Schmitt, *Glossarium*, p. 15.

[95] Schmitt, *Glossarium*, p. 22. 'Der gerechte Krieg, d.h. die Entrechtung des Kriegsgegners und die Selbst-Ermächtigung des gerechten Teiles; das bedeutet: Verwandlung des Staaten-Krieges (d.h. des völkerrechtlichen Krieges) in einen Krieg, der Kolonial- und Bürgerkrieg zu gleicher Zeit ist . . . Der Krieg wird ja Weltbürgerkrieg und hört auf, zwischenstaatlicher Krieg zu sein.'

times in the works published in 1950.[96] In so doing, the 'jurists established themselves as the guardians of their own tradition,' one that had its own 'not spiritual but intellectual authority.' This 'authority was secularized, but not yet profane,' an attribute that Schmitt only comes to ascribe to secular law after the rise of 'positivism and pure technicity.'[97] The point of this oft-repeated dictum is two-fold: first, that the separation of law from theology was an essential historical moment because it rendered ineffective natural law claims against the state; and second, that this division was essential for the creation of the profession of the jurist, with which Schmitt himself identifies. The re-emergence of natural law, however, had undermined the cordon sanitaire between law and theology, and transformed interstate warfare back into a type of civil war on the global stage.

Scholars such as Peter Uwe Hohendahl have expressed confusion over the origins of the concept of global civil war in Schmitt's work. He writes 'Schmitt did not explain why the first half of the twentieth century can or must be understood as an age of civil war. There is no explanation of how the civil war started or who was responsible.'[98] Such a view is myopic, as Schmitt addresses this question directly within *Glossarium*, claiming that the responsibility for the reintroduction of 'world civil war' as being firmly in the hands of the United States and Russia. Thus, in one entry, Schmitt notes 'America + Russia. Colonial War + Civil War. That is the reality of the reintroduction of just war.' On the following day, he expands, 'What was the core of the inter-state jus publicum europaeum? The overcoming of civil war and the exclusion of colonial wars. What is the significance of the reintroduction of just war brought about by America and Russia? The reversion of state war back into colonial and civil war!'[99]

Although these entries date from after the war, they refer back to Schmitt's commentary at the end of World War II, and not, as he would later use the term world civil war, for the origins of the Cold War. In a 1943 lecture, delivered in Spanish under the title '*Cambio de estructura del Derecho Internacional*,' and published only posthumously in German under the title '*Strukturwandel des Internationalen Rechts*,' Schmitt associates the term 'world civil war' with the United States and the Soviet Union in opposition to the National Socialists.

[96] See Schmitt, *Der Nomos der Erde*, repeated on pp. 92, 96, 212; repeated in Schmitt, *Ex Captivitate Salus*, pp. 70, 75.

[97] Schmitt, *Ex Captivitate Salus*, p. 72, repeated again p. 75. 'Sie bleiben Hüter einer eigenen Tradition und Autorität . . . Ihre Autorität war säkularisiert, aber bei weitem noch nicht profaniert.'

[98] Hohendahl, *Perilous Futures*, p. 47.

[99] Schmitt, *Glossarium*, p. 189. 'Amerika + Rußland; Kolonialkrieg + Bürgerkrieg. Das ist die Wirklichkeit der Wiedereinführung des gerechten Krieges.'; 'Was war der Kern des zwischenstaatlichen jus publicum Europaeum? Die Überwindung des Bürgerkrieges und die Ausgrenzung des Kolonialkrieges. Was bedeutet die von Amerika und Rußland bewirkte Wiedereinführung des gerechten Krieges? Die Rückverwandlung des Staatenkrieges in Kolonial- und Bürgerkrieg!'

He argues that, due to the 'pan-interventionism' of the US, 'the discrimination of other regions lays in [its] hands ... they also maintain the right to appeal to peoples against their governments and to transform a state war into a civil war. Thus, the discriminating world war in the American style becomes a total and global world civil war.' This, Schmitt continues, is 'the key to the connection between western capitalism and eastern Bolschevism, which appears at first glance to be highly unlikely.'[100] While I will discuss Schmitt and Bolschevism in detail in chapter five of this thesis, it is sufficient to point out here that it was the enemies of National Socialism who Schmitt holds responsible for the reintroduction of natural law doctrines. While in published texts after the war, Schmitt refers to the Cold War as a type of world civil war, he is in fact protesting the treatment of National Socialist Germany as a criminal state and its highest officials as war criminals at the Nuremberg tribunals.[101] Moreover, it is the Nazis who, according to Schmitt, in this comparison were acting within the existing legal order, while it was the Allied Powers who had appealed to an anachronistic conception of natural law.

The National Socialist thread runs deeper when one looks at Schmitt's rather idiosyncratic comments on civil war and suicide. Part of the reason civil wars are so horrible, he argues, is that they lead to a higher rate of suicide, taking Condorcet as his example.[102] Suicide is similarly present on the dedication page of *Ex Captiviate Salus*: dedicated to Wilhelm Ahlmann, who committed suicide after the failed 20. July assassination attempt on Hitler.[103] In Schmitt's notebooks he argues that in times of civil war, suicide even becomes justified: 'If my name is on a proscription list,' then 'I kill myself in order to remove the triumph of my murder from my enemies. I don't take my own life – the enemy takes my life. I merely define the modus moriendi ... This is the particularity of this type of self-killing in acute civil war. It is the last expression of the free self-determination of man.'[104] The parallel to Herman Göring's own suicide, which Schmitt had discussed in *Ex Captivitate Salus* and *Glossarium*, is unmistakable.[105] And here as well, the dating of Schmitt's diary entry is crucial, as the entry was composed within two days of the anniversary of Göring's suicide. In such a reading, Göring was not a war criminal, but rather merely another casualty of the

[100] Carl Schmitt, 'Strukturwandel des Internationalen Rechts,' in *Frieden oder Pazifismus*, p. 669.

[101] Jan-Friedrich Missfelder, 'Die Gegenkraft und ihre Geschichte: Carl Schmitt, Reinhart Koselleck und der Bürgerkrieg,' *Zeitschrift für Religions- und Geistesgeschichte* 58(4) (2006), 310-336, p. 328.

[102] Schmitt, *Ex Captivitate Salus*, p. 43.

[103] Schmitt, *Ex Captivitate Salus*, p. 5.

[104] Schmitt, *Glossarium*, p. 25. 'Wenn mein Name auf der Proskriptionsliste steht ... Ich töte mich ja nur, um dem Feind nicht den Triumph meiner Ermordung zu lassen. Nicht ich nehme mir das Leben – das nimmt der Feind. Ich bestimme nur den modus moriendi ... Das ist doch die Besonderheit dieser Art Selbsttötung im akuten Bürgerkrieg. Sie ist der letzte Ausdruck der freiheitlichen Selbstbestimmung des Menschen.'

[105] See Smeltzer, Review of Schmitt, *Ex Captivitate Salus*, eds. Kalyvas and Finchelstein, in *History of Political Thought*.

world civil war waged by the allied forces.

3.3 Natural Law, the Right of Resistance, and Collaboration

At the very center of the twentieth century 'awakening of natural law' lies the right of resistance, or *Widerstandsrecht*, against tyrannical regimes.[106] Against the backdrop of twelve years of National Socialist *Gewaltherrschaft*, such a right appeared as an imperative check against injustice. However, the debate extended beyond the question of a right of resistance to ask whether there was a positive duty or obligation of citizens to resist incursions on the basic rights contained within the constitution. Thus, Article 21 of a draft constitution supported by the French Communists and Socialists, and put to popular vote in France in 1946, proposed 'When the government violates these freedoms and rights guaranteed by the constitution, resistance in all its forms is the most sacred of rights and *the most imperative of duties*.'[107] To the *Ministerialrat* Adolf Arndt, a constitutionally guaranteed right of resistance formed something like the mirrored image of Article 48 of the Weimar Constitution: while in Weimar the *Reichspräsident* had been empowered to suspend statutory law in times of emergency, Article 21 made the people into the guardians of the constitution, creating a check from below rather than above.[108]

In the German states under allied occupation, a right of resistance was written into state and federal constitutions, and where it was not, it was still an integral point of discussion. For example, the German *Grundgesetz*, enacted in May 1949, dictates 'all Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available,' neglecting to to enshrine a positive duty or obligation into the basic law.[109] However, in the German state of Baden-Württemberg, a member of its constitutional committee proposed 'in the case that the government or another institution violates constitutionally guaranteed rights, every citizen has the right and the duty to use all means to restore the constitutionally guaranteed condition.'[110] Likewise, the constitution of the state of Hessen

[106] F. Wieacker, 'Zur Erweckung des Naturrechts,' *Süddeutsche Juristen-Zeitung* 4(4) (1949), 295-302. This is in direct contrast to the early modern period, see Richard Tuck, *Natural Rights Theories*, p. 43: 'the Calvinists were not putting forward a theory of natural rights.'

[107] 'Quand le gouvernement viole les libertés et les droits garantis par la constitution, la résistance sous toutes ses forms est le plus sacré des droits et le plus impérieux des devoirs.' Emphasis added.

[108] Adolf Arndt, 'Grundfragen des Verfassungsrechts im Spiegel des französischen Entwurfs,' *Süddeutssche Juristen-Zeitung* 1(4) (1946), 81-84, p. 82.

[109] Grundgesetz Art. 20 Abs. 4.

[110] Richard Schmid, 'Umschau,' *Deutsche Rechts-Zeitschrift* 1(6) (1946), 176-178, p. 176.

in 1946, still in effect today, includes in Article 147 an explicit 'duty for the protection of the constitution' as well as a 'duty to resist': 'resistance against unconstitutional exercise of public authority is the right and duty of every person.'[111] Although Schmitt lived in neither of these states, he was nevertheless a keen observer of the Hessen state constitution, drafting a legal opinion for the Buderus Iron company on Article 41 of the Hessian constitution on the immediate socialization of key industries and which mentions Article 147 in passing.[112]

Discussions of the right of resistance in legal circles after the war extended beyond constitutional framing to questions over the very meaning of what constituted resistance. For example, the American occupying authorities push for and achieved legislation within their occupation zone that vacated the sentences of any Germans found to have resisted the National Socialist regime.[113] The answer settled upon in the judgment was that resistance required some sort of action: it was not enough to merely 'have shared your inner and true convictions with an inner circle,'[114] nor was fleeing from the National Socialist regime sufficient.[115]

However, for the intellectual development of a duty of resistance, it was Karl Jaspers' 1946 series of lectures and subsequent book on *Die Schuldfrage* that brought the discussion to a broad audience.[116] Appearing at the beginning of the Nuremberg Trials, the series had made Jaspers into 'the most famous – or perhaps most notorious – intellectual in Germany' after the war by arguing that 'every German, without exception, is obligated to look clearly into the question of our guilt.'[117] While he rejected the notion of collective criminal or moral guilt, 'each of us has culpability, insofar as he remained passive' and tolerated Hitler's policies.[118] Although Jaspers' claim regarding the obligation to resist the Nazi regime remained a form of moral culpability and not criminal, political, or metaphysical, *Die Schuldfrage* was nevertheless a highly influential text for clarifying the types of guilt in the immediate postwar period. Schmitt was aware of this text, and refers to Jaspers in connection

[111] Article 147, Hessische Verfassung.

[112] Carl Schmitt, 'Rechtsstaatlicher Verfassungsvollzug (1952)' in Schmitt, *Verfassungsrechtliche Aufsätze*, 452-488, p. 461.

[113] 'Die Gesetzgebung der Länder (Amerikanische Zone),' *Süddeutsche Juristen-Zeitung* 1(4) (1946), 99-102, p. 101.

[114] 'Das Recht der politischen Säuberung,' *Süddeutsche Juristen-Zeitung* 2(5) (1947), 281-284, p. 281.

[115] O. Küster, 'Wiedergutmachungsrecht,' *Süddeutsche Juristen-Zeitung* 6(6) (1951), 180-1, p. 180.

[116] See for example Carl Haensel, 'Zum Nürnberger Urteil: 2. Beitrag: Schuldprinzip und Gruppenkriminalität,' *Süddeutsche Juristen-Zeitung* 2(1) (1947), 19-26, p. 25.

[117] Mark Clark, 'A Prophet without Honour: Karl Jaspers in Germany, 1945-48,' *Journal of Contemporary History* 37(2) (2002), 197-222, p. 211; Hermann Lübbe, 'Moralische Entscheidung, politische Option und der Lauf der Welt. Karl Jaspers als politischer Denker,' *Zeitschrift für Politik* 46(4) (1999), 367-388, p. 374. Karl Jaspers, *Die Schuldfrage* (Munich: Piper Verlag, 2016 [1965]), p. 17.

[118] Karl Jaspers, *Die Schuldfrage*, p. 53. Hennig Ottmann, *Geschichte des politischen Denkens, Bd. 4* (Stuttgart: J.B. Metzler Verlag, 2012), p. 25.

to the right of resistance, though his engagement with Jaspers remains superficial at best: 'A preacher such as Jaspers, who was not once beaten up, deserves no interest.'[119]

In a series of now famous interventions published in the *Süddeutsche Juristen-Zeitung*, Gustav Radbruch and his interlocutors debated the extent to which National Socialist law was indeed law. Pinning much of the blame on legal positivism, Radbruch claimed that the 'fundamental proposition "law is law"' had enabled judges to apply harsher penal statutes to criminal cases during the Third Reich.[120] While the appeal to natural law was in part based on 'de-politiciziation' of the law and an attempt to shield 'the independence of judges from interventions by the occupying powers,'[121] it also sought to assert justice – *Gerechtigkeit* – as the highest value of law, and one that could be used to judge whether a positive law was in fact law. Thus, to follow Radbruch, 'where justice is not even striven for . . . there the statute is not just incorrect law, but it loses its legal nature.'[122]

Helmut Coing, in his response to Radbruch, explicitly took up the question relating to the culpability of judges during National Socialism who applied unjust positive law, even to the extent that they issued death sentences.[123] For Coing, the only way there could be a question of culpability is if the judges are held to a standard originating in natural law: under legal positivism, judges were merely following the law as it had been enacted. He continues, 'Natural law . . . commands a refusal of obedience for specific laws which violate these values, there is a right of resistance against them; however, it demands no punishment of he who does not follow this command, of he who makes no use of this right.'[124] Thus, judges had a right to ignore the unjust laws, but could not have been held culpable for following them.

This debate over the culpability of judges went to the very heart of questions of jurisprudence and the role of legal positivism in enabling National Socialism. Furthermore, it gave new traction to natural law theories, a development that was in no way lost on contemporaries.[125] After all, if it was a 'blindness to values' in legal positivism that had enabled National Socialist rule, then a substantive conception of justice and morality in conjunction

[119]Schmitt, *Glossarium*, p. 126. 'Ein Bußprediger wie Jaspers, der nicht einmal verprügelt worden ist, verdient kein Interesse.'

[120]Gustav Radbruch, 'Gesetzliches Recht und übergesetzliches Recht,' *Süddeutsche Juristen-Zeitung* 1(5) (1946), 105-108, pp. 105, 107. See as well Clara Maier, 'The Weimar Origins of the West German Rechtsstaat, 1919-1969,' *The Historical Journal* (Online First), 1-23, pp. 4-5.

[121]Michael Stolleis, *Nahes Unrecht, Fernes Recht* (Göttingen: Wallstein Verlag, 2014), p. 81.

[122]Radbruch, 'Gesetzliches Recht,' p. 107.

[123]On Helmut Coing, the Frankfurt legal historian, see Klaus Luig, 'Helmut Coing (28.2.1912-15.8.2000),' *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (119) (2002), 662-678.

[124]Helmut Coing, 'Zur Frage der strafrechtlichen Haftung der Richter für Anwendung naturrechtswidriger Gesetze,' *Süddeutsche Juristen-Zeitung* 2(2) (1947), 61-64, p. 63.

[125]Heinrich Herrfahrdt, 'Der Streit um den Positivismus in der gegenwärtigen deutschen Rechtswissenschaft,' *Deutsche Rechts-Zeitschrift* 4(2) (1949), 32-3.

with the law could form a bulwark against further violations by recognizing a right and a duty of resistance against unjust laws. After 1945, Schmitt appears at first glance to rely on natural law arguments, particularly in reference to the right of revolution; however, Schmitt is instead working within the logic of his opponents to show the contradictions internal to their arguments. For example, when he denies that he was under any moral obligation to oppose the National Socialist regime, he writes in Latin that 'it is not possible for me to write directly about those who are able to directly proscribe [to dictate death].'[126] Schmitt uses this phrase on at least two separate occasions: in *Ex Captivitate Salus*, and in *Glossarium*. Its use in *Ex Captiviate Salus* is perhaps the most revealing due to its context, as Schmitt argues that in the absence of an external power that can 'protect . . . against the terror' unleashed within the state, it is up to the individual to set the 'boundaries of their own loyalty' to the regime. Thus, he argues that 'the duty to unleash a civil war, to commit sabotage, and to become a martyr has its limits. Here, one must leave [this decision] to the victim [*dem Opfer*] of such situations and not judge from the outside.'[127] For Schmitt, writing in a passage after 1945, it is quite clear that by 'the victim,' Schmitt means himself, and he even refers to the 'the danger of these twelve years [1933-1945] which *we* experienced,'[128] seemingly ignoring the victims of the Shoah. The passage concludes with reference to Plato and Thomas More as examples of great philosophers who worked with tyrants and who receive no contemporary condemnation. Indeed, Schmitt thinks that there is a type of 'oppositional force of remaining silent,'[129] or in a type of veiled criticism, as he characterizes Ernst Jünger's *Marmorklippen* (1939). As one might expect, Schmitt's active support of the regime is entirely omitted in this post-war apologia, and it seems that describing a period in which one is elevated to the honorary position of *Preußischer Staatsrat* can hardly be considered as one in which he felt direct danger.

The key to understanding the above passage is the shift from a *Widerstandsrecht* to *ein Pflicht, Widerstand zu leisten* – a shift from a right of resistance to a duty to resist unjust regimes. Turning back for a moment to one of Schmitt's last writings in the Weimar Republic, *Legalität und Legitimität*, one of Schmitt's central arguments is that the drive to total legality, and the transformation of legitimacy into pure legality, had the primary function of denying

[126]Schmitt, *Glossarium*, p. 280. 'Non possum directe scribere de eo qui potest directe proscribere.' This phrase is attributed to Schmitt in Ernst Jünger's diary entry of October 16, 1941. See Ernst Jünger, *Strahlungen I: Das erste Pariser Tagesbuch* (Stuttgart: Klett-Cotta, 1979[1949]); for a discussion of the phrase in Schmitt's work, see Samuel Zeitlin, 'Propaganda and Critique,' in Carl Schmitt, *Land and Sea*, p. xxxvii.

[127]Schmitt, *Ex Captivitate Salus*, pp. 20-21. 'Die Pflicht, einen Bürgerkrieg zu entfesseln, Sabotage zu treiben und zum Märtyrer zu werden, hat ihre Grenzen. Hier wird man einiges dem Opfer solcher Situationen überlassen müssen und nicht nur von Außen urteilen dürfen.'

[128]Schmitt, *Ex Captivitate Salus*, p. 23. Emphasis added.

[129]Schmitt, *Ex Captivitate Salus*, p. 23. 'Die Gegenkraft des Schweigens.'

the right of resistance. The 'rule of statutory law [*Herrschaft des Gesetzes*]' meant that 'the state is statutory law; statutory law is the state.' This presupposed a melting of the distinction between *Recht* and *Gesetz*: 'the guardian of right [*Recht*]' became the legislator, literally the *Gesetz*geber. Only by collapsing this distinction could one 'remove the right of resistance ... and concede the unconditional priority of statutory law.'[130] As a consequence, what was once asserted as a fundamental individual right became a form of 'illegality': so long as statutory laws were procedurally valid, 'only the statutory law is demanded obedience.'[131] Thus, in a short book review published in 1955, he praises Hebert von Borch's *Obrigkeit und Widerstand* for its conclusion that 'in the centralized executive apparatus of the modern state, it is only the position of a free and, at the same time, strong professional civil service that allows for an effective protection of freedom.'[132] To be clear, Schmitt's approval is not a normative statement as to how he thinks the right of resistance ought to be constructed; rather, he agrees with von Borch's historical diagnosis of the most recent transformation of resistance as only being possible through legal means.

Even in the later years of National Socialism, Schmitt seemingly endorsed the view that there could be no such thing as a right of resistance against the state. In reference to Hobbes, he argues that 'In Hobbes' absolutist state, a right of resistance as a "right" on the same level as state law would be, in every aspect, factual as well as legal, illogical and absurd.'[133] In Schmitt's reading, either it is the case that the state provides 'tranquility, security, and order,' in which case he has 'all objective and subjective law on his side'; or it is the case that state does not provide the function of 'securing the peace,' in which case there is no state present against which one could revolt.[134]

The pivotal moment in Schmitt's narrative of the right of resistance comes after the execution of Robert Brasillach in France, on February 5, 1945, after a trial by the liberation government.[135] Brasillach was an enthusiastic and vocal supporter of French collaboration,

[130]Schmitt, *Legalität und Legitimität*, p. 276. 'Das Widerstandsrecht ... entfernte, und dem Gesetz jenen unbedingten Vorrang zubilligte.'

[131]Schmitt, *Legalität und Legitimität*, p. 276, p. 286. 'Nur dem Gesetz wird Gehorsam geschuldet.'

[132]Carl Schmitt, Review of Herbert von Borch, *Obrigkeit und Widerstand. Zur Politischen Soziologie des Beamtentums*, in *Das historisch-politische Buch* 3 (1955), p. 72. ''in dem zentralisierten Vollzugsapparat des modernen Staates sei es nur die Haltung eines freien und zugleich starken Berufsbeamtentums, die einen wirksamen Schutz der Freiheit ermögliche.' For Schmitt's copy of von Borch's text, with marginalia, see NRW 265-24900

[133]Schmitt, *Leviathan*, p. 71. 'Im absoluten Staat des Hobbes ist ein Widerstandsrecht als "Recht" auf einer Ebene mit dem staatlichen Recht in jeder Hinsicht, faktisch wie rechtlich, widersinnig und eine Absurdität.'

[134]Schmitt, *Leviathan*, pp. 71-2. 'Ruhe, Sicherheit und Ordnung ... alles objektive und alles subjektive Recht auf seiner Seite ... Funktion der Friedenssicherung.'

[135]On Brasillach and his trial, see Alice Kaplan, *The Collaborator: The Trial and Execution of Robert Brasillach* (Chicago: University of Chicago Press, 2000).

publishing numerous articles in his journal, *Je suis partout*. For Schmitt, Brasillach's execution signalized a shift such that now 'non-resistance is itself a form of collaboration,' and an elimination of the 'Right of non-resistance.'[136] For Schmitt, who himself had been a cheerleader of Vichy France, and, as Sam Zeitlin has drawn attention to in a forthcoming article, a contributor to the Vichy journal *Deutschland-Frankreich* to which Brasillach also regularly contributed,[137] Schmitt certainly would have read the trial transcript. Of particular interest was the prosecutor, Reboul, invoking '*le crime intellectual, la trahison des clercs.*' For Schmitt, this signaled a shift to non-resistance itself being a crime.[138]

On November 25, 1949, Schmitt turns the Latin phrase cited above – 'it is not possible to directly write about that which has the power to directly proscribe [to death]' – into his verdict on the Federal Republic of Germany. He claims that Ernst Jünger has shown that it is still possible to write about Jews, Nazis, and the SS by simply labeling them Parsis, Demos, and Mauratanians respectively.[139] Thus, 'it is all wonderfully non-binding, and the curious reader, who wants to know what the author thinks about Jews and Nazis, remains just as led on [*gefoppt*] as the author remains free . . . In a Lizenzstaat, this is the right method to publish on current affairs.'[140]

This repeated usage of the exculpatory Latin phrase is important because Schmitt's diary entry is at almost exactly the same moment that he publishes the phrase in connection with the National Socialist dictatorship. The implication of this double usage is one of equivalence between National Socialist Germany and the Federal Republic, one of Schmitt's favorite rhetorical tactics not just in the postwar period.[141] For example, Schmitt had declared, 'Genocide – moving concept. I have experienced the concept with my own body: extermination of the Prussian-German *Beamtentum* in 1945. Automatic Arrest. They were pushed into suicide.'[142] He laments that 'German bureaucrats are not a protected group,'

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[136]Schmitt, *Glossarium*, p. 126. 'Nicht-Widerstand ist von selbst collaboration.'

[137]Samuel Zeitlin, 'Politics and the History of Political Thought: Carl Schmitt's Bodin in Nazi-Occupied Paris' (forthcoming). The reference to Brasillach is also owed to correspondence with Zeitlin.

[138]For CS, who was still under a ban on publication, the idea of the 'licensees of 1945' in Germany being able to force publication was enough for him to imagine Gustav Radbruch as a 'Maquis' or resistance fighter against National Socialist occupation in France and Spain. See Schmitt, *Glossarium*, p. 126.

[139]Schmitt, *Glossarium*, p. 213.

[140]Schmitt, *Glossarium*, p. 213. 'Es ist alles wunderbar freibleibend und der eifrige Leser, der nur wissen möchte, was der Autor über die Juden oder die Nazis denkt, bleibt ebenso gefoppt wie der Autor freibleit . . . aber wahrscheinlich ist das doch die richtige Methode, in einem Lizenzstaat über aktuelle Dinge zu publizieren.'

[141]See Samuel Zeitlin's unpublished article on 'The Rhetoric of Tyranny.'

[142]Schmitt, *Glossarium*, p. 201. 'Genocide, Völkermorde, rührender Begriff; ich habe ein Beispiel am eigenen Leibe erlebt: Ausrottung des preußisch-deutschen Beamtentums im Jahre 1945 Automatical Arrest. Man triebt sie in den Selbstmord.'

and that he has been the subject of 'ideocide.'[143] He also noted 'there are crimes against humanity and crimes for humanity. Crimes against humanity are committed by Germans. Crimes for humanity are committed against Germans.'[144] Such comments are shameless in their equivocation. But it perhaps has even more significant consequences regarding the correct methodical approach for Schmitt's work, namely that what Schmitt has published should not always be taken at face value; rather, it is precisely the unpublished documents that can provide the true meaning and intent of his texts.[145] Not only does this solidify the significance of the approach developed in this dissertation, but it also implies that non-contextual approaches, the vast majority of contemporary secondary literature on Schmitt, would miss the specific intent behind his writings.

3.4 An Isolated Perspective

When Schmitt criticizes natural law, he is referring to something altogether different than the contemporary Anglo-American understanding of the concept. A contemporary scholar of jurisprudence would likely associate the theory with Lon Fuller's *The Morality of Law* (1964). There are certain key differences, however, that must be kept in mind: first, Fuller describes his understanding of natural law as a secular concept, which has 'nothing to do with any "brooding omnipresence in the skies."'[146] In contrast, Schmitt critiques both divine natural law as well as *Vernunftrecht*, or natural law based on reason, for their claim to universal and eternal validity. Second, Fuller's theory is meant as a procedural or institutional account of natural law with his eight desiderata for the internal morality of the law.[147] On the internal morality of law, Schmitt is largely silent. Here, however, Fuller returns to the fundamental question of the postwar period, the question of whether Nazi law was in fact law: Fuller explicitly refers to National Socialism and the law on at least seven occasions, including the infamous Röhm Putsch, which was justified by only one public law professor in Germany – Carl Schmitt – and Fuller is quite familiar with German language sources, although he includes no word on Schmitt himself. While Fuller's text advances the conclusion that the laws under National Socialism were no laws at all, he nevertheless argued that ex post

[143]Schmitt, *Glossarium*, p. 201. 'die deutschen Beamten sind keine geschützte Gruppe etc'; 'Ideocide.'

[144]Schmitt, *Glossarium*, p. 214. 'Es gibt Verbrechen gegen und Verbrechen für die Menschlichkeit. Die Verbrechen gegen die Menschlichkeit werden von Deutschen begangen. Die Verbrechen für die Menschlichkeit werden an Deutschen begangen.'

[145]Although today *Glossarium* has seen two editions, it was almost certainly not intended for publication given both its unpolished style and content. See Giesler & Tilke, 'Einleitung,' in *Glossarium*, p. x.

[146]Lon Fuller, *The Morality of Law* (New Haven: Yale University Press,1964), p. 98.

[147]Fuller, *The Morality of Law*, pp. 98, 184.

facto criminal statutes were a clear violation of his theory of the internal morality of law – something Schmitt would have emphatically agreed with at Nuremberg.[148]

Indeed, Carl Schmitt was first and foremost a jurist.[149] *Der Nomos der Erde*, as he notes, was an offering placed at the alter of jurisprudence, a field which he claimed to have served for over forty years. Reading Schmitt as advancing a theory of 'quasi-natural law' obfuscates the extent to which he sought to prevent the re-encroachment of theology into jurisprudence. This is one sense of Schmitt's oft-repeated dictum that 'I am the last conscious representative of the *jus publicum europaeum*' – an epoch of the law of nations that Schmitt claims began with the demand to theologians to be silent.[150] This is not to say that religion had any role to play in Schmitt's thought over the many decades in which he was intellectually active; rather, this chapter has made the claim that, in the period after 1945, Schmitt emphatically rejected any intrusion of theology into the domain of law, the domain with which Schmitt would identify and characterize his own work. In a diary entry dated September 23, 1947, Schmitt writes, 'I have only ever spoken and written as a jurist, and as a result, only ever to and for jurists.'[151] Similarly indicative is the cover of book three of *Glossarium*, which is inscribed in Schmitt's own handwriting with the words 'Materials for the clearing of a (juristic) existence.'[152] On this matter, Schmitt could not have been clearer: 'I am however a jurist and not a theologian.'[153] Perhaps it is time, then, to take Schmitt at his word and stop reading his Catholicism as determinate of his writings on jurisprudence.

Furthermore, Schmitt's entries on natural law are temporally proximate to his writings on utopia and legal positivism.[154] Indeed, some entries contain discussions (and criticisms) of both theories. While utopianism and legal positivism will be the subjects of chapters 6, it is important to note here that Schmitt was waging a two-front war against both the dominance of legal positivism and the rebirth of natural law doctrines using legal history as his weapon of choice. Schmitt is clear about the terrain of conflict: 'Ernst Jünger thinks ... that the philosophers of history are today more important than atomic physicists. I, the diagnostician of the discriminating concept of war and the transformation of state war into civil war, am not surprised.'[155] It should thus come as no surprise that Schmitt turned precisely to the

[148]Fuller, *The Morality of Law*, pp. 59, 107.
[149]On this point, see Günter Maschke, 'Carl Schmitt in den Händen der nicht-Juristen,' *Der Staat* 34(1) (1995), 104-129.
[150]Schmitt, *Ex Captivitate Salus*, p. 75. 'Ich bin der letzte, bewußte Vertreter des jus publicum europaeum.'
[151]Schmitt, *Glossarium*, p. 13. 'Ich habe immer nur als Jurist gesprochen und geschrieben und infolgedessen eigentlich auch nur zu Juristen und für Juristen.'
[152]Schmitt, *Glossarium*, p. 395. 'Materialien zur Lichtung eines (juristischen) Daseins.'
[153]Schmitt, *Ex Captivitate Salus*, p. 89. 'Ich bin aber Jurist und kein Theologe.'
[154]See for example Schmitt, *Glossarium*, p. 65.
[155]Schmitt, *Glossarium*, p. 95. 'Ernst Jünger meint ... daß die Geschichtsphilosophen heute wichtiger sind

foundational figure of the historical school of jurisprudence, Savigny, as a way of challenging both positivism and natural law, a jurist who had launched a challenge against codification and positivism 'without recourse of the civil war slogans of natural law.'[156]

One might object to this interpretation of Schmitt's work by arguing that his 1950 *Nomos der Erde* in fact perpetuates the distinction between Christian and non-Christian peoples, as well on its focus of the '*hostes perpetues*' of the (Catholic) Church.[157] This objection holds that Schmitt views colonialism as justified on the grounds that it spreads Christianity to non-Christian peoples. Furthermore, this objection argues that Schmitt's 1942 *Land and Sea*, republished in 1954 and 1981, advances the view that Papal arbitration of colonial land disputes is legitimate and constitutive of peace, particularly in regards to the Treaty of Tordesillas of 1494. As this volume was republished multiple times through to the end of Schmitt's life, and without substantive changes, this objection holds that Schmitt consistently acknowledged papal authority as constitutive of international law until the end of his life.

The objection is vulnerable on two levels. First, and more generally, one should not interpret republication of a text as itself evidence of a specific intent on behalf of an author, and certainly not in Schmitt's case. As he wrote in the introduction to *Positionen und Begriffe*, Schmitt follows Heraclitus' dictum that it is not possible to step into the same river twice, and then stated that the essays in the collection were republished merely as historical documents. Second, however, the underlying claim regarding papal authority in relation to international law is itself not sufficiently historicized. The relevant passage appears in section 14 of *Land und Meer*:

> 'As long as Portugal and Spain, two Catholic powers, were alone among themselves [in the New World], the Pope in Rome could intervene as the creator of legal titles, as the order ordaining new land-appropriations, and as claims judge between the two land-appropriating powers . . . The papal line of partition from 1493 stands at the beginning of the battle for the new fundamental order, for the new nomos of the earth.'[158]

Papal arbitration was possible for Schmitt only so long as both of the powers were Catholic and recognized papal authority; however, Schmitt acknowledges that this period came to a close 'through the Reformation, [because] the peoples who became Protestant openly withdrew from any authority of the Pope.'[159] In a parallel argument in *Nomos der Erde*,

als die Atom-Physiker. Natürlich. Ich, der Diagnostiker des diskriminierenden Kriegsbegriffs und der Verwandlung des Staatenkrieges in den Bürgerkrieg, bin davon nicht überrascht.'

[156]Schmitt, *Die Lage der europäischen Rechtswissenschaft*, p. 418 See also the letter from Ernst Forsthoff to Schmitt, *Briefwechsel*, Nr. 35.

[157]I owe these objections to previous correspondence with Samuel Zeitlin.

[158]Schmitt, *Land and Sea*, pp. 65-66.

[159]Schmitt, *Land and Sea*, p. 66.

Schmitt locates the origins of the *jus publicum europaeum* to the ‘dissolution of the medieval spatial order borne by imperial rule [*Kaisertum*] and the papacy [*Papsttum*].’[160] Thus, while papal arbitration is central to the *Respublica Christiana* as evinced in the Treaty of Tordesillas of 1494, it is nevertheless a historicized concept within Schmitt’s history of the law of nations. As such, it does not establish that Schmitt continued to believe in papal authority as a mechanism for solving international disputes, nor does it imply a theological basis for the validity of law. Rather, the opposite conclusion follows from the text: all law, including that underwritten by the Pope himself, is historically bounded.

In some ways, Schmitt’s criticism of natural law doctrines remains disappointing, as his commentary appears too fragmented and stunted by bitter polemics against his contemporaries. For example, one might expect at least some engagement with Radbruch’s formula, discussed above, given its centrality in the history of twentieth century jurisprudence and its particular origins as a response to National Socialism and the law.[161] It is clear that Schmitt was aware of Radbruch’s publication, but chose not to engage with it at a substantive level. Instead, Schmitt merely provides the thoughts of a bitter man – ‘Homo homini Radbruch!’, a phrase Schmitt would repeat well after Radbruch’s death.[162] Later, writing in English, Schmitt claims that Radbruch is a master of ‘character assassination,’ specifically the assassination of Schmitt’s character,[163] and that Radbruch’s ‘indignation in relation to me is intellectually identical to that of Hitler’s fury towards degenerate art.’[164] Equally, Schmitt’s correspondents during his period of ‘inner-exile’ – ‘*exul in patria mea*’ as he described it[165] – were equally dismissive of Radbruch’s formula: Ernst Forsthoff, in a letter from 1950, writes ‘those who today ramble on about natural law are merely failed positivists who are now helpless; this applies in my opinion above all for Radbruch.’[166] A substantive rejection was not forthcoming.

Instead of directly challenging his enemies, Schmitt would publish his single longest commentary on natural law doctrines anonymously in the year 1949 as an interpretation of the Spanish Scholastic, Francisco de Vitoria. For Schmitt, this was a way of cutting off the renaissance of natural law doctrines at its origins: historicizing the origins of the law of

[160] Schmitt, *Nomos der Erde*, p. 25. ‘Aus der Auflösung der mittelalterlichen, von Kaisertum und Papsttum getragenen Raumordnung entstanden.’

[161] See Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford: Oxford University Press, 2018), pp. 3-5.

[162] Schmitt, *Glossarium*, p. 103. Repeated again, p. 235, twice on p. 298, and again on p. 299 and p. 302.

[163] Schmitt, *Glossarium*, p.257, repeated p. 261.

[164] Schmitt, *Glossarium*, p.18. ‘ihre Entrüstung über mich geistig identisch ist mit der Wut Hitlers über die entartete Kunst.’

[165] Carl Schmitt to Ernst Forsthoff, *Briefwechsel*, No. 24, p. 52.

[166] Ernst Forsthoff to Carl Schmitt, *Briefwechsel*, No. 35, p. 68.

nations would protect against the reemergence of claims of universal and eternal validity of natural law. In so doing, Schmitt had a particular enemy in mind: the work of James Brown Scott, and through him, Robert Jackson. Before Jackson came to sit on the United States Supreme Court, he was the chief American prosecutor at Nuremberg, and Schmitt makes clear the association in several of his diary entries. As he writes on June 29, 1948,

> 'I now worry that my chapter on Vitoria in "Nomos" is far too sparing, considerate, and almost shrouded, and therefore it loses its power. What is said very discretely there about Nys, James Brown Scott (and thereby also Jackson), implies just the same as Augustin Cochin, Valléry-Radot ... and others.'[167]

To relocate Schmitt's Vitoria interpretation as a response to the American jurist James Brown Scott, then, is the task of the following chapter.

[167]Schmitt, *Glossarium*, p. 130. 'Ich fürchte jetzt, daß mein Kapitel über Vitoria im Nomos viel zu schonend, rücksichtsvoll und fast verschleiernd ist, und dadurch seine Kraft verliert. Was dort sehr unauffällig über Nys, James Brown Scott (und damit über Jackson) gesagt ist, bedeutet doch in der Sache ebensoviel wie da, das Augustin Cochin, Valléry-Radot ... ' The same connection is made on p. 80.

Chapter 4

On the Use and Abuse of Francisco de Vitoria: James Brown Scott and Carl Schmitt

In *Der Nomos der Erde*, Carl Schmitt devotes more pages to discussing the Spanish Scholastic Francisco de Vitoria than any other theorist of the law of nations. Originally published anonymously the year prior in the Catholic journal *Die Neue Ordnung* under the title '*Francisco de Vitoria und die Geschichte seines Ruhmes* [Francisco de Vitoria and the History of His Renown],'[1] Schmitt sought to 'purify [Vitoria's] portrait from false overpaintings [*Übermalungen*] and to return to his words their true sense.'[2] In this chapter, I argue this intervention into the reception of Vitoria's writings ought to be read as a polemical response to the American international lawyer, James Brown Scott, and his attempt to reconstruct a liberal international law based on the principles he uncovered in the Spanish Dominican. For if Schmitt was concerned with 'overpaintings,' there was only one person who had become so identified with Vitoria that his face was substituted for Vitoria's: when the artist in charge of painting murals of the founding fathers of jurisprudence in the new United States Department of Justice building could not locate a portrait of Vitoria,

> The artist returned to his mural and painted the figure of Vitoria garbed true to life as a Dominican friar but with an excellent likeness of the head and hands of James Brown Scott. So there in the halls of justice at Washington . . . is a good portrait of Dr. Scott

[1] Schmitt changes the title of the section in *der Nomos der Erde* to '*Die Rechtfertigung der Landnahme einer Neuen Welt (Francisco de Vitoria)*.' See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 2011), p. 69.

[2] Schmitt, *Der Nomos der Erde*, p. 96. 'Unsere eigene Intention ging dahin, sein Bild von falschen Übermalungen zu reinigen und seinen Worten ihren wahren Sinn zurückzugeben.'

> disguised in the habit of the Dominican theologian who expounded the law of nations one hundred years before the classic treatise of Grotius.[3]

In the first section of this chapter, I provide an overview of James Brown Scott's role in leading a renaissance of scholarship on Vitoria in the interwar period as well as the principles for the law of nations he derives from Vitoria's teachings. In short, I aim to show how Scott came to conceive of Vitoria as a liberal internationalist *avant la lettre* and how Vitoria became linked to developments in twentieth century international law such as the Treaty of Versailles (1919), the Kellogg-Briand Pact (1928), and even the Nuremberg Charter (1945). In the second section, I explore Schmitt's reconstruction of Vitoria's thought in relation to Schmitt's theory of the pre-modern nomos of the *Respublica Christiana* and then present what Schmitt claims to be the exploitation of Vitoria's writings after 1919 in the Versailles legal order. Using Schmitt's journal entries from the period immediately prior to publication, I argue that Schmitt sought to undercut liberal internationalist just war theory by denying the origin of its principles in the Spanish scholastics. Instead, Schmitt argued that Vitoria's thought was intrinsically linked to its origins in the *Respublica Christiana*, and therefore could not form the foundations of contemporary liberal internationalism. By locating Schmitt as a respondent to James Brown Scott, this paper offers a historicist reading of Schmitt's 'discriminatory concept of war,' and, in so doing, reveals Schmitt as a thinker engaged in constructing an alternative narrative for the history of legal and political thought.

4.1 James Brown Scott and the Vitorian Renaissance

In 1931, the prestigious *Institut de droit international* held its annual meeting at Emmanuel College, Cambridge, bringing together a group of influential international lawyers to debate matters ranging from the conflict of criminal law to the issuing of mandates by the League of Nations. Over lunch, members of the institute agreed to found an International Association of Francis of Vitoria and of Suarez, in honour of the 400th anniversary of the former's landmark lectures, *De indis recenter inventis* and *De jure belli*. Following the founding of an *Asociación Francisco de Vitoria* in 1926 and the establishment of a Francisco de Vitoria Chair at the University of Salamanca in 1927, Vitoria had emerged as the 'voice of humanity' in the shadow of the Great War.[4] Members of the society, dedicated to the study of the

[3] George Finch, 'James Brown Scott, 1866-1943,' *The American Journal of International Law* 38(2) (1944), 183-217, p. 199. See also John Hepp, 'James Brown Scott and the Rise of Public International Law,' *The Journal of the Gilded Age and Progressive Era* 7(2) (2008), 150-179, p. 171.

[4] James Brown Scott, 'Asociación Francisco de Vitoria,' *The American Journal of International Law* 22(1) (1928), 136-139, p. 138.

two Spanish scholastics, were to present manuscripts the following year at the first official meeting in Oslo. Four monographs would be prepared, each detailing one step in the gradual development of what James Brown Scott called the 'modern temple of international justice': Jan Kosters would write on Augustine, 'who laid the first stones of the modern temple of international justice'; Louis Le Fur would write on Aquinas, 'who built on the foundation of St. Augustine'; James Brown Scott would write on Vitoria, 'in whose constructive hands the temple of international justice took definite form'; and Alfred Verdross would provide the final volume on Francisco Suarez, who 'furnished the temple of international justice with its philosophy, which, through the masterly description of Grotius, is known to the world at large.'[5] These four greats of international law in the interwar period would thereby attempt to rewrite the foundations of international law in which Hugo Grotius, author of *De jure belli ac pacis* would play only a supporting role to the seminal thought of the Spanish.

As Scott recounts in an article summarizing the meeting's proceedings, the purpose of such a historical study of the Spanish was not a benign curiosity for the past, but rather history's relevance for present: 'the more we study the international law of the past, the more we understand the international law of the present and, strange as it may seem, the international law of the future.'[6] The implication of this statement was that international law's past had normative implications for the present; however, the meaning of these implications could only be drawn after conducting an archaeology of the normative propositions contained in the works of the 'founder of the modern school of international law,' Francisco de Vitoria.[7] Scott undertook this project in his 1934 monograph, *The Spanish Origin of International Law* and his subsequent *Law, the State, and the International Community* published in 1939.[8]

By the time these two monographs were published, Scott himself was something like an omnipresent figure in the early decades of American international law.[9] Scott founded the

[5] For a discussion of Le Fur's life and 'l'affaire Scelle' see Martti Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2007), pp. 317-327. Verdross held the position of general secretary of the Vitoria-Suarez society and would later profess the influence of the Spanish Scholastics on his work in the first edition of the Spanish translation of *Völkerrecht*. See Ignacio de la Rasilla del Moral, 'Francisco De Vitoria's Unexpected Transformations and Reinterpretations for International Law,' *International Community Law Review* 15(3) (2013), 287-318, p. 289; Hans Wehberg, 'James Brown Scott 70 Jahre Alt,' *Die Friedens-Warte* 36(2) (1936), 72-75, p. 75. James Brown Scott, 'The Two Institutes of International Law,' *The American Journal of International Law* 26(1) (1932), 87-102, p. 97.

[6] Scott, 'The Two Institutes of International Law,' p. 97.

[7] Scott, 'The Two Institutes of International Law,' p. 92.

[8] An earlier version of this monograph was published in 1928, as McKenna cites it in an article dated in 1932, prior to the official publication date. Charles McKenna, 'Francisco De Vitoria: Father of International Law,' *An Irish Quarterly Review* 21(84) (1932), 635-648, p. 647. Schmitt, however, cites the 1934 edition.

[9] In some respects, the best overviews of Scott's life were his obituaries. See the obituary written by Hans Wehberg, 'Zum Gedanken an James Brown Scott,' *Die Friedens-Warte* 44(4) (1944), 169-174. Additionally,

American Society for International Law (ASIL) in 1906, year before serving as a delegate to the Second Hague Conference under Secretary of State and later President of the ASIL, Elihu Root.[10] Starting in 1911, Scott would oversee the Division of International Law at the Carnegie Endowment for International Peace, a deeply internationalist organization that played a central role in the formation of international law as a discipline in the United States until the mid-1920s.[11] In addition, he would serve as the president of the *Institut de droit international* between 1925 and 1929, thereby attaining an almost hegemonic position within the early period of American international law.[12]

Parallel to these professional achievements, Scott devoted over twenty-five years to establishing Francisco de Vitoria as the foundational figure in the history of international law. Already in 1927, he was awarded a doctor *honoris causa* by the University of Salamanca in recognition of his work on Vitoria.[13] By 1932, it was recognized that Scott – along with a handful of other scholars such as Ernest Nys, Thomas Alfred Walker, Coleman Phillipson, and Camilo Barcia Trelles – had successfully popularized Vitoria's work 'within recent years' to the extent that it was now common to acknowledge Vitoria's foundational role beyond being merely a predecessor to Grotius.[14]

Scott's grew interested in Vitoria during the deliberations leading to the United States' declaration of war in April of 1917 and the search for a just cause of war. Scott parses Wilson's address before Congress in seeking a declaration of war as providing a just war

see the obituary written by Scott's successor, Finch, 'James Brown Scott, 1866-1943' 183-217; Hepp, 'James Brown Scott and the Rise of Public International Law,' 50-164. Although Finch never finished his planned biography, the fragments were published posthumously as George Finch, *Adventures in Internationalism: a Biography of James Brown Scott* (Clark: The Lawbook Exchange, 2012). For an intellectual biography, see Christopher Rossi, *Broken Chain of Being: James Brown Scott and the Origins of Modern International Law* (The Hague: Kluwer Law International, 1998), pp. 1-37.

[10] For an overview of the founding of the ASIL and Scott's role as a foundational member, see Frederic Kirgis, 'The Formative Years of the American Society of International Law,' *The American Journal of International Law* 90(4) (1996), 559-589, pp. 562-566. For Scott in the context of pan-Americanism, see Juan Pablo Scarfi, *The Hidden History of International Law in the Americas* (Oxford: Oxford University Press, 2017). Frederic Kirgis, 'Elihu Root, James Brown Scott and the Early Years of the ASIL,' *Proceedings of the American Society of International Law* 90 (1996),139-143, p. 139. It should be added that Scott wrote effusive praise of Root and posthumously ascribed to Root Vitorian ideals. See James Brown Scott, 'Elihu Root – an Appreciation,' *Proceedings of the American Society of International Law* 31 (1937), 1-33, p. 4.

[11] Katharina Rietzler, 'Fortunes of a Profession: American Foundations and International Law, 1910-1939,' *Global Society* 28(1) (2014), 8-23, pp. 10, 22.

[12] Finch, 'James Brown Scott,' p. 206. For a discussion of the founding of the *Institut de droit international*, see Koskenniemi, *The Gentle Civilizer of Nations*, pp. 41-42, 47-48.

[13] McKenna, 'Francisco De Vitoria: Father of International Law,' p. 647; Rossi, *Broken Chain of Being*, p. 7.

[14] McKenna, 'Francisco De Vitoria: Father of International Law,' pp. 647-648. This interpretation is still to be found in contemporary discussions of Vitoria in the history of international law. See, for example, Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), pp. 13n3, 14n5.

argument: Wilson argued that the Zimmerman letter declaring unrestricted submarine warfare, in combination with a series of previous acts, constituted a just cause. As a result, Scott writes, 'we believe that the reasons given are causes, not pretexts, that the motives and purposes are sincere and sufficient.' Thus, the United States' entrance into the war was declared just and the purpose – 'to secure the repudiation of the Prussian conception of state and government, which could force a people to commit such acts' and, as a result, 'to secure some form of international organization calculated to guarantee peace among nations through the administration of justice' – was just as well.[15] Scott ends his endorsement of Wilson's speech by endorsing the concept of a world court: writing in German, the only sentence in German in the article, Scott quotes Friedrich Schiller by declaring '*die Weltgeschichte ist das Weltgericht* [World history is the world court].'[16] The message, ostensibly directed at the Germans, was that history would ultimately vindicate the United States' entry into the war while condemning Prussian aggression and even 'the Prussian concept of the state' as a whole.

After the war, Scott posited the creation of the Permanent Court of International Justice – fulfilling the role of Schiller's *Weltgericht* – as ensuring that international disputes of the future would be settled by recourse to a universal conception of justice no different from that which the Supreme Court of the United States exercises over disputes involving individual states of the union.[17] Such an international court 'is not a dream, or something superimposed upon nations, it is a matter of mere growth under well known lines.' For the American international lawyer, 'history is with us, and we cannot fail, although realization of our hopes and expectations may be slower than we may like.'[18] In Scott's view, this vision seems to have been confirmed by the result of the success of the Alabama arbitration in avoiding military confrontation.[19] Scott took action to secure the existence of a world court in the aftermath of the First World War, and was instrumental for the establishment of the Permanent Court,[20] which would be later dubbed the 'Root Court' in reference to his mentor, Elihu Root.[21] In Scott's vision of a new international order, the Permanent Court, on the model of the United States Supreme Court, would lead to the replacement of war by legal mechanisms.

[15] James Brown Scott, 'The United States at War with the Imperial German Government,' *The American Journal of International Law* 11(3) (1917), 617-627, p. 618.

[16] Scott, 'The United States at War,' p. 627. The Schiller poem in question is 'Resignation.'

[17] James Brown Scott, *Law, the State, and the International Community, Volume I* (New York: Columbia University Press, 1939), p. 36.

[18] Quoted in Hepp, 'James Brown Scott and the Rise of Public International Law,' p. 161.

[19] Kirgis, 'The Formative Years of the American Society of International Law,' p. 561.

[20] Paolo Amorosa, 'James Brown Scott's International Adjudication Between Tradition and Progress in the United States,' *Journal of the History of International Law* 17 (2015), 15-46, p. 19.

[21] Benjamin Allen Coates, *Legalist Empire* (Oxford: Oxford University Press, 2016), p. 170. See also Kirgis, 'Elihu Root, James Brown Scott and the Early Years of the ASIL,' p. 142.

Thus, Scott could declare 'the judicial power of the United States ... renders the use of force against the States a stranger to the American system.'[22] By exporting and universalizing the same mechanism of judicial power over states, the use of force would be similarly removed from the international sphere as well. Published in 1939, Scott ultimately failed to anticipate both the war that would erupt that year and the extent to which international law would be powerless to stop it; however, his text can be read as delivering a set arguments for the establishment of an international court based on the belief that 'justice is universal, whether applied between individuals or between groups of individuals.'[23]

This universal concept of justice, which animates Scott's understanding of the 'international community' of the book's title, is explicitly derived from his reading of Francisco de Vitoria. Vitoria, as the founder of what Scott calls 'modern international law,' established the principles of justice applicable to the problems of the present. Scott's underlying methodological assumption, then, is that it is possible to ascertain the true principles of international law through an archaeology of the teachings of its founding author. Thus, the origins and history of international legal thought – which Scott sought to recover, curate, and interpret through the *Carnegie Classics of International Law* – would serve as the normative foundations for his contemporary position.[24]

The aim of the Carnegie project, under which Scott published *The Spanish Origin of International Law* in 1934, was to show that 'international law is not a thing of treaties or conventions, but the result of centuries and centuries of experience, and that it comes to us from the Golden age of Spain as a result of the discovery of America.' This meant, in turn, that 'to understand the law of nations as it exists and is applied today, it is necessary to understand its past.'[25] However, the goal of this project was not merely to show the Spanish influence on contemporary international law; instead, Scott aimed to show that the Spanish had uncovered a set of eternal moral principles for the law of nations to be recognized and upheld in the 1930s. Here, a single sentence suffices to show the intent of Scott's project:

> The publicists of today ... are leaving the paths marked out by false prophets of international law and turning to Vitoria's law of nations and the Victorian principles which for four hundred years have pointed the path to an international law still of the future, in which law and morality shall be one and inseparable, in which states are created by and for human beings, and every principle of international law and of international conduct is to be tested by the good of the international community and not by the selfish

[22] Amorosa, 'James Brown Scott's International Adjudication,' p. 36.
[23] Scott, *Law, the State, and the International Community*, p. 35.
[24] Wehberg, 'Zum Gedanken an James Brown Scott,' p. 172.
[25] James Brown Scott, *The Spanish Origin of International Law: Francisco De Vitoria and the Law of Nations* (Oxford: Clarendon Press, 1934), pp. 11a-12a.

> standards of its more powerful and erring members.[26]

By positing a return to Vitoria as both the founder of the modern law of nations – mediated through Grotius' subsequent works – and also as the author of eternally true and universalizing propositions in the law of nations, Scott sought to align the development of international law in the 1930s with the principles of liberal internationalism radiating from Vitoria's work.

To be clear, Scott did not claim to find a concept of 'liberty before liberalism' in the Spanish Scholastic; rather, he portrayed Vitoria himself as a liberal international lawyer. In a chapter titled 'The Liberalism of Vitoria,' Scott reminisces, 'for many years past I have wondered why it is that Francisco de Vitoria was so liberal that even in our day his views seem ahead of our time.'[27] The answer to his musing was that Vitoria's intellectual inspiration, Aquinas, was himself a liberal and 'international-minded.' As a result, Scott concludes that 'Vitoria was a liberal. He could not help being a liberal. He was an internationalist by inheritance. And because he was both, *his international law is a liberal law of nations*.'[28] Concretely, Vitoria's liberalism meant adherence to two propositions: first, that there was a firm commitment to 'the equality of states, applicable not merely to states of Christendom but also do the barbarian principalities in the Western World of Columbus'; and second, that 'force between states could only justly be used to redress a wrong' and only if there is no higher court to adjudicate disputes.[29]

To establish the first proposition regarding the equality of states, Scott claimed that Vitoria's *De indis* amounted a 'proclamation of a new international law' which would '[begin] with the individual [and] end with the international community.'[30] Within the international community, Scott maintained that there is a fundamental equality, as 'it is Vitoria's judgment that the American principalities – as equals to the Christian states – should not be excluded from this international community.'[31] As a result of the equality between the Americans and the Europeans, Scott claims 'the international community, composed of states without reference to geography, race, religion, replaced the large but still limited international community coextensive with Christendom.'[32] If it is true that all individuals and nations were formally equal, then it follows for Scott that international law would have

[26] Scott, *The Spanish Origin*, p. 11a. Emphasis added.
[27] Scott, *The Spanish Origin*, p. 280.
[28] Scott, *The Spanish Origin*, p. 280. Emphasis added.
[29] Scott, *The Spanish Origin*, pp. 281-282.
[30] Scott, *The Spanish Origin*, p. 95.
[31] Scott, *The Spanish Origin*, p. 282. On Scott's elevation of the Americas as a diplomatic maneuver, see Mark Somos & Joshua Smeltzer, 'Vitoria, Suárez, and Grotius: James Brown Scott's Enduring Revival,' *Grotiana* (forthcoming).
[32] Scott, *The Spanish Origin*, p. 283.

to be governed by 'universal principles' or 'generalities' which did not take into account their source or their object of application. Scott writes,

> by treating a concrete question affecting in its different relations not merely Christendom but the international community, [Vitoria] was not only furnishing an example of the way in which an international situation should be treated but was showing that the rules of law derived from universal justice – whether it be called natural law, divine law, human law, or all three – *were then as now an acceptable and adequate standard for the affairs of nations*.[33]

Thus, Scott conceives of the first proposition as positing a truth about the nature of international affairs, extending from Vitoria's teachings to the present day.

Scott's second proposition deals with the revival of just war theory, particularly the Vitorian question 'What may be a reason and cause of just war?'[34] to which he gives the answer '[there is] a single and only just cause for commencing a war, namely a wrong received.'[35] According to Scott, Vitoria allows for punishment for wrongs 'according to the scale of their wrongdoing.'[36] Scott locates the authority of this argument in Vitoria's de jure belli based solely on a quotation from Augustine: just wars are those 'wars which are waged in order to avenge a wrong done, as where punishment has to be meted out to a city or state' due to the fact that 'it has itself neglected to exact punishment for an offense committed by its citizens or subjects or to return what has been wrongfully taken away.'[37] According to Vitoria's seventh proof, the aim of offensive war was the 'good of the whole world' as 'there would be no condition of happiness for the world, nay, its condition would be one of utter misery, if oppressors and robbers and plunderers could with impunity commit their crimes and oppress the good and innocent.'[38] Thus it would be necessary for a state to seek redress in the event of suffering a wrong at the hands of an opponent. This redress would be justified under the Vitorian conception of just war, but only to the extent that the redress does not exceed the initial wrong, as 'no war is just . . . the conduct of which is manifestly more harmful to the state than it is good and advantageous.'[39] No Carthaginian peace could be justified.

[33] Scott, *The Spanish Origin*, p. 195. Emphasis added.
[34] Scott, *The Spanish Origin*, p. 207.
[35] Scott, *The Spanish Origin*, p. 208.
[36] Scott, *The Spanish Origin*, p. 153.
[37] In Scott, *The Spanish Origin*, p. 201. Francisco de Vitoria, *Political Writings* (Cambridge: Cambridge University Press, 2017 [1991]), p. 298.
[38] Scott, *The Spanish Origin*, p. 201.
[39] Scott, *The Spanish Origin*, p. 229. On the necessity of wars of sanction within pacifist theories of just war, see the work of James Brown Scott's collaborator, Hans Wehberg. Joshua Smeltzer, ''Hans Wehberg and the jus belli ac pacis in Interwar International Law', *Global Intellectual History* (2019).

For Scott, Vitoria's theory was only applicable in the absence of a world court such as the Permanent Court of International Justice – it would be superseded by the establishment of a court in which '[contending parties] would be obliged to refer the dispute.'[40] This is because, for Vitoria, the sovereign prince 'engaged in a just war is to be regarded as a judge, with the rights and duties of a judge in all matters . . . the prince is therefore in fact, if not in form, a judge.' Scott continues, noting 'the doctrine of Francisco de Vitoria is in its entirety that of a judicial system for the entire world,' one that meant that 'the princes or sovereign authorities of the States' would act as 'as judges of the violation of rights under the law of nations until there should be a court between, and therefore, above, the nations.'[41] In the absence of such a world court to adjudicate disputes between formally equal sovereigns, the individual prince must decide when he has suffered wrong.[42]

Scott then derives the significance of Vitoria's 'liberal' teaching on formal equality and just war for their effect on state sovereignty: 'The simple truth is that the Victorian conception is entirely incompatible with the doctrine of sovereignty, by which, in its baldest form, each so-called sovereign nation claims the absolute right to do as it pleases in so far as its strength permits,' and according to which each state has the right to do so 'without reference to the rights of any other nation or to the international community and its rules.'[43] Instead, nations were bound to respect the equality of nations and were bound by the principles of the law of nations. This abrogation of absolute sovereignty nowhere more noticeable than subjecting the nation to the jurisdiction of a world court, able to settle disputes through acts of arbitration and punish acts of aggression.

Over the course of the interwar period, Vitoria came to be increasingly cited as the inspiration for a number of international agreements. For example, the German international lawyer and emigre Joachim von Elbe connects the reemergence of just war theories – and therefore by necessity the work of Francisco de Vitoria – to the settlement arising out of World War I. He writes

> The Treaty of Versailles recognized the war guilt in its twofold form as entailing the civil liability of the vanquished for damages and his punishment for international crimes committed, although international law, as generally accepted in 1914, did not support the idea that a state, by resorting to war, commits an international delinquency involving such liability. Its revival by the Versailles Treaty became the starting-point for a movement once more to distinguish between just and unjust wars.[44]

[40] Scott, *The Spanish Origin*, p. 153.
[41] Scott, *The Spanish Origin*, p. 221.
[42] Compare with Scott, *The Spanish Origin*, p. 212.
[43] Scott, *The Spanish Origin*, p. 212. This argument is echoed in B. Wortley, 'Vitoria and International Law Today,' *Blackfriars* 27(319) (1946), 368-78, p. 370.
[44] Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law,' *The American*

Crucially, Scott himself had been sent to Versailles as legal counsel to the Secretary of State, Robert Lansing. The two prepared *The Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, with Memorandum of Reservations, submitted as a part of their work in Versailles.[45] At the time, Scott believed the Treaty of Versailles would lead to a period of sustained peace, writing only later that 'the statesmen have . . . made a peace that renders another war inevitable.'[46]

Likewise, Scott came to see the League of Nations as embodying the ideals set forth by the Spanish scholastics. Writing in 1931, he claims that the thought of the Spanish scholastics acted like a germ and 'little by little the germ, like the grain of mustard seed, has grown until the nations of the world can rest themselves under its ample branches and we find ourselves living under the covenant of the League of Nations.'[47] In so doing, Scott draws a direct line of historical, organic growth between the ideals of the equality of nations and 'the inherent right of protecting itself . . . and punishing violations of the law of nations' and their embodiment in the Covenant of the League of Nations. Thus, the teachings of the Spanish scholastics acted as the historical basis upon which the new international order rested.

Nowhere did Vitoria's thought on war play a larger role than in modern theorists' interpretation of the Kellogg-Briand pact of 1928.[48] Central to this connection was the first canon of Vitoria's *de jure belli*, which held that 'Assuming the prince has authority to make war, he should first of all not go seeking occasions and causes of war, but should if possible live in peace with all men.' Vitoria goes on to note that '*But only under compulsion and reluctantly should he come to the necessity of war*.'[49] As one contemporary argued, 'Compare the principle of Vitoria's first canon with that of the General Pact for the Renunciation of War.' Using the language of the Kellogg-Briand pact, he asks, 'What can his [Vitoria's] words mean if not that war is renounced "as an instrument of national policy" and that the settlement of disputes "shall never be sought except by pacific means?"'[50]

Furthermore, after the signing of the Nuremberg Charter in 1945, theorists once again took to Vitoria as the source of their legal theory.[51] Writing in 1946, Wortley cites Scott's interpretation of Vitoria as providing content for a moral theory of international justice to

Journal of International Law 33(4)(1939), 665-688, p. 687.

[45] Rossi, *Broken Chain of Being*, pp. 29, 34.

[46] In del Moral, 'Francisco De Vitoria's Unexpected Transformations,' p. 298. This report earned Scott a hostile reception in Heidelberg in 1928 – his hosts spent over three hours demanding Scott recant the report. See Finch, 'James Brown Scott, 1866-1943,' p. 213.

[47] In Finch, 'James Brown Scott, 1866-1943,' p. 202.

[48] McKenna, 'Francisco De Vitoria: Father of International Law,' p. 646.

[49] In McKenna, 'Francisco De Vitoria: Father of International Law,' p. 646. Emphasis in McKenna's translation.

[50] McKenna, 'Francisco De Vitoria: Father of International Law,' p. 646.

[51] Wortley, 'Vitoria and International Law Today,' pp. 374, 371.

Truman's words that 'the world has experienced a revival of an old faith in the everlasting formal force of justice.' As Wortley explains, 'Vitoria made it clear then that the laws of a sovereign are of no avail if they transgress the fundamental human rights protected by the law of nations. This is brought out by article 6c of the Charter of the Military Tribunal for the trial of major war criminals of the European Powers.'[52] The text of that article provides that there is individual responsibility for 'murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war ... whether or not in violation of the domestic law of the country where perpetrated.'[53] In this passage, the Charter made reference to a type of moral natural law that existed above and regardless of the law enacted by the state. This, in turn, declared universal applicability of the propositions of natural law that extended to humanity as a whole. Wortley then connects Vitoria with the Nuremberg tribunal, writing 'those Vitoria calls the "magnates who are admitted to the council of the Prince" are those indictable at Nuremberg' under article 6A for 'planning, preparation, initiation or waging a war of aggression.'[54]

In the aftermath of World War II, it was precisely this interpretation of Vitoria as the liberal internationalist founder of modern international law which had gained traction through the work of James Brown Scott and the collections published by the Carnegie Endowment for international peace.[55] By the time Carl Schmitt would have published his anonymous essay on Vitoria in 1949, the Spanish Scholastic would have been synonymous with the formal equality of states, the outlawing of war, and the limitation of state sovereignty. And Scott, the six-time nominee for a Nobel Peace Prize, would have been widely known to international lawyers as Vitoria's messenger.[56]

Given Scott's historiographical turn to the foundations of international law, it is possible to read him as a distinctly American variant of the German *Historische Rechtsschule* of Savigny and his disciples with his emphasis on the 'organic' and 'progressive growth' of the law.[57] After having completed his doctoral studies in Heidelberg under Georg Jellinek,[58] Scott sought to trace the 'growth of law as an outcome of American national spirit.'[59] He

[52] Wortley, 'Vitoria and International Law Today,' pp. 370-371.
[53] Wortley, 'Vitoria and International Law Today,' p. 371.
[54] Wortley, 'Vitoria and International Law Today,' p. 373.
[55] Wortley, 'Vitoria and International Law Today,' p. 369.
[56] del Moral, 'Francisco De Vitoria's Unexpected Transformations,' p. 293.
[57] Amorosa, 'James Brown Scott's International Adjudication,' p. 27. See also del Moral, 'Francisco De Vitoria's Unexpected Transformations,' pp. 298-300; Hepp, 'James Brown Scott and the Rise of Public International Law,' p. 162.
[58] Hepp, 'James Brown Scott and the Rise of Public International Law,' p. 155; Wehberg, 'Zum Gedanken an James Brown Scott,' p. 170.
[59] Amorosa, 'James Brown Scott's International Adjudication,' p. 27.

found principles of universalism in the thought of Grover Cleveland, Abraham Lincoln, and Francis Lieber,[60] thereby giving a historical grounding to the liberal internationalist aspirations during the interwar years. Indeed, Scott articulated a belief in the 'unfolding *telos of history*' which would ultimately lead to

> a single law, with a single and impersonal application in every one and all of the states forming the international community, and the citizens or subjects of these states will be co-terminous and identical with humanity, which always has, which is and ever should be above and beyond any nation or any group of nations, however great, however powerful, however civilized.[61]

For Scott, it was ultimately the American *Volksgeist*, echoing the internationalist impulses he found in the work of the Spanish Scholastics, that would come to furnish the principles of a new international community.

4.2 Carl Schmitt Goes to Salamanca

Carl Schmitt and James Brown Scott – diametrically opposed in their conception of the international order – find a moment of unexpected convergence in the figure of Savigny. There is, however, a crucial difference in how the two thinkers appropriate Savigny's thought: while Scott saw a 'progressive growth' of international law whereby its true principles would raise to consciousness through a study of its foundations, Schmitt saw Savigny as rejecting a rationalist development of law in favor of its historical contingency. As I have argued in Chapter 2, Schmitt's foreword to *Der Nomos der Erde* claims that it is Savigny's concept of historicity [*Geschichtlichkeit*] which 'concerns the existential question of jurisprudence, which today is being crushed between theology and technology if it does not claim the ground of its own existence [*Dasein*] in a correctly recognized and fertile historicity.'[62] Thus, Schmitt's stated self-understanding of the monograph is of entering into a conversation on the history of the law of nations, with the intention of using historicity as a mechanism for ensuring the survival of jurisprudence from the onslaught of both theology and technology.[63] To do this, he will wage a historicist polemic against the interpretation of Vitoria offered by

[60] James Brown Scott, 'The American Conception of International Law,' *Proceedings of the American Society of International Law* 33 (1939), 1-11, pp. 7, 9,10.

[61] In Amorosa, 'James Brown Scott's International Adjudication,' p. 42.

[62] Schmitt, *Der Nomos der Erde*, p. 6: 'Es betrifft die Existenzfrage der Rechtswissenschaft selbst, die heute zwischen Technologie und Technik zerrieben wird, wenn sie nicht in einer richtig erkannten und fruchtbar gewordenen Geschichtlichkeit den Boden ihres eigenen Daseins behauptet.'

[63] Cf. Martti Koskenniemi, 'International Law as Political Theology: How to Read Nomos Der Erde?,' *Constellations* 11(4) (2004), 492-511. For a discussion of technology in Schmitt's larger oeuvre, see John McCormick, *Carl Schmitt's Critique of Liberalism* (Cambridge University Press, 1997).

James Brown Scott, arguing that Vitoria cannot be read outside of the *nomos* formed by the *Respublica Christiana*.

Although Schmitt first published his commentary on Vitoria anonymously in the Catholic Journal *Die Neue Ordnung* in 1949, his journal entries from the period reveal that he was working an interpretation of Vitoria's work from at least 1947 and possibly earlier.[64] In winding passages alternating between self-pity and vitriolic criticism, Schmitt identifies Scott as the leading representative of an entire movement in the interwar years to bring back Vitoria and just war theories to the law of nations. On 29 June 1948, copying the text of a letter he wrote to Günther Krauss, Schmitt writes 'in accordance with my experience up to now, nine-tenths of all of that which is today written about Vitoria is an unabashed hoax.'[65] Schmitt dismisses these writings, as, 'seen from a scholarly viewpoint, it is pure trash and only the most wretched conformism [*Mitläufertum*]. Precisely in the booming environment [*Konjunktur*] that James Brown Scott created. It is a great disgrace.'[66] Schmitt's journal from the period thereby reveals Scott as the ideological enemy, the leader of an entire body of scholarship that Schmitt dismisses as 'wretched conformism.' This provides the first interpretation of Schmitt's analysis of Vitoria as a corrective to the narrative offered by liberal international lawyers of the interwar period in their reading of Vitoria as represented by Scott.

However, Schmitt's journal entries from the period reveal a second and more expansive intention of his writing on Vitoria: to discredit the 'beginning of the epoch of the law of nations which orchestrated its four-year epiphany in October 1945 in Nuremberg.'[67] In other words, Schmitt sought to attack the foundations of the Versailles legal order through the resuscitation of Vitoria's teachings of just war and, *in concreto*, the Nuremberg tribunals, for which the 'Crown Jurist of the Third Reich' was identified as a potential defendant. For Schmitt, the 'the birthday of the modern just war and the connection its particular type of justice with weapons of mass destruction, its place of birth (the modern Bethlehem), where the storm of steel is prepared' – all of this Schmitt claims to have found in a letter from

[64] Carl Schmitt, *Glossarium. Aufzeichnungen der Jahre 1947 bis 1958*, eds. Gerd Giesler & Martin Tielke (Berlin: Duncker & Humblot, 2015), p. 19. The index of *Glossarium* incorrectly dates Schmitt's first discussion of Vitoria as 5.10.47.

[65] On Krauss and Schmitt, see Mehring, *Carl Schmitt*, pp. 229, 362-365; Neumann, *Carl Schmitt als Jurist*, pp. 402, 412; Günther Krauss, 'Erinnerungen an Carl Schmitt,' *Schmittiana* 2 (1991), 73-101.

[66] Schmitt, *Glossarium*, p. 173. 'Nach meinen bisherigen Erfahrungen ist neun Zehntel alles dessen, was heute über Vitoria geschrieben wird, ein unverschämter Schwindel, wissenschaftlich gesehen reiner Schund und nur elendestes Mitläufertum. Gerade in der Konjunktur, die James Brown Scott geschaffen hat. Es ist eine große Schande.'

[67] Schmitt, *Glossarium*, p. 140. 'Der Beginn der Epoche des Völkerrechts, die ihre 4jährige Epiphanie im Oktober 1945 in Nürnberg organisiert hat'.

Andrew Carnegie in December of 1910 addressed to the Trustees of the Carnegie foundation. In it, Carnegie is quoted as saying, with Schmitt's sardonic interjections in parentheses,

> war is in its essence criminal (*la guerre est essentiellement criminelle*, so not just a war of aggression!). "Why is it *essentiellement criminelle*?" Answer: Because it ensures its success not through the law but rather through power. It is a crime (yet again something new!) when a people declines arbitration proceedings. (There also the sentence: *le juge qui siège dans une cause où il est intéressé est discrédité jusqu'à sa mort*.)[68]

And at the heart of this movement towards the criminalization of war stood the father of the Vitorian Renaissance: Schmitt exclaims 'the general secretary of this *foundation for the criminalization of war* was James Brown Scott!'[69] Thus, by attacking Scott's interpretation of Vitoria, Schmitt was simultaneously attacking the intellectual foundations of what he had previously labelled the 'discriminatory concept of war.'[70] Put differently, the history of legal and political thought, and specifically the interpretation Vitoria, provided the tools with which Schmitt sought to discredit liberal internationalism and the discriminating concept of war.

Schmitt's journal entry on Carnegie, Scott, and Vitoria is couched in the language of biblical allegory: 'Here is the cradle of Fr. de Vitoria's new fame, here is the source of the new, modern teaching of just war, here in the steel mills of Bethlehem. Here the shepherds were not singing.'[71] It is precisely through this parallel to the birth of Jesus that Schmitt connects his discussion of the interwar years with what seems to be his much deeper aim in writing about Vitoria, namely to explain why Germany was defeated in the Second World War: 'Destruction of the *Justus hostis* from both sides, from Bethlehem as from Moscow; in between, a German baboon' – here, Schmitt means Hitler – 'with injections from the West, who believed himself able to wage a two-front war and two-types of war, namely in the west a non-discriminatory and in the east a discriminating war.'[72] In the process, Schmitt reveals the United States as the modern Bethlehem, the birthplace of a concept of war that would

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[68] Schmitt, *Glossarium*, p. 141. Schmitt's translation of the Carnegie letter into German substantially changes the text, accessible online through the Carnegie foundation at http://carnegieendowment.org/about/pdfs/CarnegieLetter.pdf

[69] Schmitt, *Glossarium*, p. 186. 'Und der Generalsekretär dieser Foundation zur Kriminalisierung dies Krieges war James Brown Scott!' Emphasis added.

[70] Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin: Duncker & Humblot, 2007 [1938]).

[71] Schmitt, *Glossarium*, p. 141. 'Hier steht die Wiege des neuen Ruhmes von Fr. de Vitoria. Hier ist die Quelle der neuen, modernen Lehre vom gerechten Krieg, hier in den Stahlwerken von Bethlehem. Hier sangen nicht die Hirten.'

[72] Schmitt, *Glossarium*, p. 187. 'Vernichtung des justu hostis von beiden Seiten, von Bethlehem wie von Moskau her; dazwischen ein deutscher Tölpel mit Injektionen vom Westen her, der glaubte, einen Zwei-Fronten- und einen Zwei-Arten-Krieg führen zu können, nämlich nach Westen einen nicht-diskriminierenden und nach Osten einen diskriminierenden Krieg.'

ultimately check Hitler's ability to maintain the so-called '*Großdeutsches Reich*.'

However, Schmitt did not acknowledge the link between Vitoria, Hitler, and the discriminating concept of war in his published work in 1949/50: as he wrote in a later journal entry immediately before turning to a discussion of Vitoria, '*non possum directe scribere de eo qui potest directe proscribere*.'[73] His interpretation remained coded out of fear of retribution. Instead, Schmitt begins his interpretation of Vitoria by describing the 'overpainting' that he seeks to correct: a modern reader finds in the theologian 'the first impression ... of an extreme impartiality, objectivity, and neutrality,' the first demonstration of a truly 'modern' approach to the study of the law of nations.[74] Echoing the first proposition maintained by Scott, this interpretation of Vitoria is owed, in the first instance, to his statements on the treatment of Native Americans. By emphasizing that Native Americans, despite being barbarians, are still humans and therefore still have a soul, Vitoria is positioned as a progressive scholar in relation to his contemporary, Juan Gines Sepulveda.[75] Particularly on the question of land ownership – seminal to Schmitt's understanding of the law of nations and his concept of *nomos* – Sepulveda and Vitoria held diametrically opposing views: Sepulveda held that barbarians could not hold a legal title to land while Vitoria is positioned as positing the Native Americans as still retaining a minimal set of rights including land ownership given to humans as such. As a result, Vitoria extends set of rights to the native inhabitants, claiming

> the rulers of barbaric, non-Christian territories have just as much authority [*Herrschaftsgewalt, jurisdictio*], and the native inhabitants have just as much possession of the land [*Eigentum am Boden, dominium*] as the rulers and peoples of Christian territories have of their land.[76]

The resulting picture is of a theorist of humanity and of the formal equality of nations who

[73] Schmitt, *Glossarium*, p. 280. 'It is not possible for me to write directly about those who are able to directly proscribe [to dictate death].' As Zeitlin has shown, Schmitt used a version of this motto in a conversation with Ernst Jünger to describe his situation in 1941 in the context of writing his *Land und Meer*. Jünger recalls Schmitt saying '*non possum scriber contra eum, qui potest proscribere*,' ostensibly lamenting Hitler's violation of the Molotov-Ribbentrop Pact. See Samuel Zeitlin, 'Propaganda and Critique,' in *Land and Sea* (Candor, NY: Telos Press, 2015), p. xxxvii. Schmitt echoes the same line once again in his *Ex Captivitate Salus*, writing in the context of arguing that intellectuals have no absolute duty to 'become martyrs' by opposing the terror of political regimes. Writing in 1946, Schmitt meant more specifically that he had no duty to oppose the National Socialist regime, so long as 'no one from outside would protect him from the terror on the inside.' Carl Schmitt, *Ex Captivitate Salus* (Berlin: Duncker & Humblot, 2002), pp. 20-21.

[74] Schmitt, *Der Nomos der Erde*, p. 71. 'Der erste Eindruck ... ist der einer ganz außerordentlichen Unvoreingenommenheit, Objektivität und Neutralität.'

[75] In a journal entry from October 3, 1947, Schmitt compares himself with Sepulveda, and praises them both for following the 'inner force of your thoughts' as opposed to merely trying to 'become popular.' Schmitt, *Glossarium*, p. 19.

[76] Schmitt, *Der Nomos der Erde*, p. 74. 'Die Fürsten jener barbarischen, nicht-christlichen Länder haben ebenso Herrschaftsgewalt (jurisdictio), und die eingeborenen Bewohner haben ebenso Eigentum am Boden (dominium) wie die Fürsten und Völker christlicher Länder an ihrem Boden.'

opposed the exploitation and misery inflicted by the Spanish Conquista through extending equal protection under the law.

For Schmitt, however, this interpretation of Vitoria's thought is dismissed as arising from 'superficiality [*Oberflächlichkeit*]' for two reasons.[77] The first deals with Vitoria as a historical individual and his position within society: such a reading fails to capture Vitoria's 'existential position' as a Spanish Dominican theologian.[78] For Schmitt, this is an inseparable part of Vitoria's identity, as 'Vitoria is a theologian, he does not want to be a jurist and he even less wants to deliver arguments in the inter-state dispute of state governments'; instead, 'the Spanish Dominican speaks as a spiritual advisor [*Gewissensberater*] and a teacher, who trains future theologians and above all theological spiritual advisors for politically active persons.'[79] As a theologian – and not as a legal advisor to a secular, state authority – Schmitt argues 'we must see the Spanish Dominican in his historical situation and in his entire existence, in his entire concrete thinking as an organ of the Roman Catholic Church, that is to say, as an organ of the concrete authority in the law of nations.'[80] In other words, it is impossible to separate Vitoria's arguments from his vocation as a Catholic theologian, as he is first and foremost a faithful servant of the Church. As such, any interpretation of Vitoria which portrays him as a secular theorist of modern international law fundamentally misunderstands Vitoria's position in society and therefore the intention and meaning of his argument as well.

Secondly, Schmitt argues this reading is superficial because it fails to take into account the 'concrete historical problem' which Vitoria was addressing, namely 'the European land-appropriation of the non-European New World, as justified by papal *Missionsaufträge*.'[81] For Schmitt, depicting Vitoria as a liberal international lawyer is only possible when a modern reader abstracts Vitoria from the epoch of the *Respublica Christiana*, of the period in which papal authority and stately power were deeply intertwined.[82] Key to his reading of Vitoria is

[77] Schmitt, *Der Nomos der Erde*, p. 77.

[78] For Schmitt, the profession, nationality, and religious affiliation of an author are all essential components of interpreting their work. See his treatment of Jean Bodin in Carl Schmitt, 'Die Formung des französischen Geistes durch den Legisten,' in *Staat, Großraum, Nomos*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 184-217.

[79] Schmitt, *Der Nomos der Erde*, p. 79. 'Vitoria ist Theologe, er will kein Jurist sein, und noch weniger will er im zwischenstaatlichen Streit der staatlichen Regierungen Argumente liefern.'; 'Der spanische Dominikaner spricht als ein Gewissensberater und ein Lehrer, der künftige Theologen, vor allem theologische Gewissensbetrater von politisch handelnden Personen, erzieht.'

[80] Schmitt, *Der Nomos der Erde*, p. 80. 'Wir müssen auch den spanischen Dominikaner in seiner geschichtlichen Situation und in seiner ganzen Existenz, in seinem ganz konkreten Denken als ein Organ der römisch-katholischen Kirche, d.h. als ein Organ der konkreten völkerrechtlichen Autorität sehen.'

[81] Schmitt, *Der Nomos der Erde*, p. 85. 'von der durch päpstliche Missionsaufträge gerechtfertigten europäischen Landnahme einer nicht-europäischen Neuen Welt.'

[82] In a short essay published four years after *Der Nomos der Erde* titled 'Der neue Nomos der Erde,' Schmitt

that the latter was not opposed to the Spanish Conquista in itself, but rather that discovery and occupation could not provide a legal justification for land appropriation and because they were concepts 'entirely foreign to the Christian Middle Ages.'[83] Instead, legal justification could only be found in a theory of just war based on the papal authority to issue *Missions- und Kreuzzugsmandate* to the secular authorities of Christian peoples. For Schmitt, the *Respublica Christiana* – or, alternatively, the *Populus Christianus* – is the first distinct *nomos*, characterized by a fundamental division between Christian and non-Christian peoples: 'the land of non-Christian, heathen peoples is Christian missionary territory' and as a result, '[this land] can be granted to Christian rulers through papal order [*Auftrag*] for Christian missions.'[84] Instead of recognizing the equality of states, as James Brown Scott reads Vitoria, Schmitt insists the scholastic maintained a distinction between Christian and non-Christian peoples. Thus, Schmitt argues that secular power to appropriate land in this period was derived from papal authority and thus belonged to one and the same unity, in which the Kaiser and Pope, the *Imperium* and *Sacerdotium* could be integrated in '*diversi ordi*.' This unity represents the fundamental ordering principle in which to understand Vitoria's contribution to the law of nations: the authority of the pope to issue *Missionsaufträge* to secular authorities as the legal title for land appropriation and for the bracketing of war within the *Respublica Christiana* both constitute the fundamental characteristics of a distinct historical and spatial order within the law of nations.

Schmitt's two historicizing arguments – that Vitoria can only be understood as a Spanish Dominican theologian in the context of the *Respublica Christiana* – are related to one another: as a Dominican, Vitoria was a 'protector and executor of the spiritual *Missionsauftrag*' which operated alongside secular colonial authorities under the broader conceptual framework of the *Respublica Christiana*. Indeed, during this epoch, Schmitt argues that the supposed conceptual opposition between 'Kaiser and Pope, Reich and Church formed an inseparable unity,' complementing one another. Vitoria, as a Dominican, was bound to uphold this spatial ordering and therefore could not have posited a different source of the legal title for land appropriation using modern concepts such as occupation and discovery. Thus, Vitoria's texts are inextricable from the 'concepts of spatial order of the *Respublica Christiana* of

changes his periodization of the epochs of the law of nations: the *Respublica Christiana* is collapsed into the second and 'Eurocentric Nomos of the Earth,' which began with the discovery with America and extended until the outbreak of the First World War. Carl Schmitt, 'Der neue Nomos der Erde (1954),' in *Staat, Großraum, Nomos*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 518-22, p. 519.

[83] Schmitt, *Der Nomos der Erde*, p. 36. 'dem christlichen Mittelalter aber völlig fremd waren.'

[84] Schmitt, *Der Nomos der Erde*, p. 27. Schmitt believes the emergence of this new nomos is due to a mixing of Germanic tribes as land appropriators with Roman landowners. 'Der Boden nicht-christlicher, heidnischer Völker ist christliches Missionsgebiet; er kann einem christlichen Fürsten durch den päpstlichen Auftrag zur christlischen Mission zugewiesen werden.'

the Christian Middle Ages,' which would only be superseded by the coming *Jus publicum europaeum* of territorially sovereign nation-states.[85] As such, Vitoria's work is deeply imbricated in the *nomos* in which he was writing, and a fundamental aspect of that nomos was the distinction between Christian and non-Christian peoples.

In the second half of his chapter on Vitoria, Schmitt pivots towards the reception history of Vitoria's thought – or, as Schmitt refers to it, 'the jurisprudential exploitation of [Vitoria's] oft-cited *Relecciones*, the interpretation of which has its own history'[86] – in two distinct periods: on the one hand, in the 17th and 18th centuries as exemplified by Hugo Grotius and Christian Wolff; and on the other, in the period after 1918, based on the earlier reception of Vitoria by Ernest Nys and James Lorimer and epitomized by the work of the American lawyer James Brown Scott.[87] Tracing this reception history, Schmitt argues that Vitoria's thought has been decontextualized and stripped of its meaning within the frame of his historical concrete situation, and thereby exploited in the Versailles legal order to justify the turn towards a discriminatory concept of war in the name of abstract humanity.

The first phase of the Vitoria reception is identified with the work of Hugo Grotius, who Schmitt claims 'entirely appropriated Vitoria's argumentation of the *libercum commercium* and of the *Missionsfreiheit*.'[88] Schmitt charges Grotius with appropriating Vitoria's Catholic thought for Protestant purposes: Grotius attempts to repurpose the argument for the sake of confessional politics. 'A line of thought,' Schmitt laments, 'which a Spanish theologian delivered as an thoroughly internal, Spanish-Catholic matter in the fixed frame of his religious order and of the political unity of the Spanish-Catholic Empire' – in short, an idea bounded by its specific historical context – 'was used by a jurist from a polemical jurist of a hostile territory for the battle of propaganda in a European trade war against Spain.'[89] By appropriating Vitoria's argument for a Protestant purpose, Grotius is guilty of 'neutralizing the specifically Catholic character of Vitoria's intentions' and thereby sending the reception of Vitoria's ideas thereafter down the false path.[90]

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[85] Schmitt, *Der Nomos der Erde*, p. 82. See also Schmitt's more esoteric text on the birth of the territorially sovereign state, *Der Leviathan in der Staatslehre des Thomas Hobbes* (Köln: Hohenheim Verlag, 1982). 'Eine Fortsetzung der Raumordnungsbegriffe der Respublica Christiana der christlichen Mittelalters.'

[86] Schmitt, *Der Nomos der Erde*, p. 70. 'Die rechtswissenschaftliche Verwertungen seiner vielgenannten Relecciones, deren Interpretation ihre eigene Geschichte hat.'

[87] Cf. Martti Koskenniemi, 'Empire and International Law: the Real Spanish Contribution,' *University of Toronto Law Journal* 61(1) (2011), 1-36, p. 4.

[88] Schmitt, *Der Nomos der Erde*, p. 86. Nys offers a similar genealogy in Ernest Nys, 'Introduction,' in *De Indis De Jure Belli* (New York: Wildy & Sons Ltd., 1917), p. 5. '[er hat] Vitorias Argumentation des liberum commercium und der Missionsfreiheit vollständig übernommen.'

[89] Schmitt, *Der Nomos der Erde*, p. 86. Cf. Johannes Thumfart, 'On Grotius's Mare Liberum and Vitoria's De Indis, Following Agamben and Schmitt,' *Grotiana* 30(1) (2009), 65-87.

[90] Schmitt, *Der Nomos der Erde*, p. 86. 'Die Verwertung der Argumente durch Protestanten neutralisierte den

However, Schmitt sees the second reception period – referred to as a 'Renaissance' of Vitoria's thought – as a 'particularly interesting phenomenon in the history of the law of nations,' namely the sudden popularity of the Spanish thinker over 300 years after his death: Vitoria went from being described as a 'precursor of Grotius' to being 'world-famous' in his own right.[91] Schmitt credits this resurgence to the work of Ernest Nys, the Belgian historian of the law of nations who 'often encountered Vitoria in his legal historical research into the law of nations of the Middle Ages and the 16th century' and who published an influential translation of Vitoria's '*de Indis et de jure Belli*' in 1917.[92] In the introduction to this translation, Nys claims that in Vitoria's thought 'were united the spirit of research and of innovation, the tendency toward progress, the love of his neighbour, and the sentiment of solidarity' and in so doing, it 'bore the imprint of moderation and humanity.'[93] In Nys' interpretation, 'Vitoria repudiates all theories, based on the alleged superiority of the Christians, or on their right to punish idolatry or on the mission which might have been given them to propagate the true religion.'[94]

In presenting Vitoria as a humanitarian and seeking to resurrect his thought in the modern context, Nys both systematically removes the distinction between Christian and non-Christian peoples in his reconstruction of Vitoria and pivots towards what Schmitt labels 'a discriminatory concept of war.'[95] Here, Nys claims that for Vitoria, there is only one just cause of war – that is, 'the injury suffered . . . serious and atrocious ills, such as death, burning, devastation, must have been inflicted.' In other words, one can only wage a defensive war, or retaliate for a wrong suffered. Once one has broken the peace, however, Nys' version of Vitoria holds that 'it is lawful to go even further to bring about peace and security,' and that 'the victor may exact vengeance for the wrong done to him and may punish his enemy.'[96] The resulting vision is one in which war itself has been outlawed, as all transgressions, all acts of aggression are causes of injury and thus give just cause of war to the victim. For Schmitt, this interpretation of Vitoria is only possible when one replaces the division of Christian and

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spezifisch katholischen Charakter der Intentionen Vitorias.'

[91] Schmitt, *Der Nomos der Erde*, p. 87. Schmitt attributes this view to the 'great authors of the 19th century, such as Kaltenborn and Rivier'; however, it is still present in the last paragraph of Nys' introduction to '*De Indis et De Jure Belli*' where he writes 'we have tried to relate the life and activity of one of the great precursors of Hugo Grotius.' See Nys, 'Introduction,' p. 27.

[92] Schmitt, *Der Nomos der Erde*, pp. 87-88.

[93] Nys, 'Introduction,' p. 9.

[94] Nys, 'Introduction,' p. 19.

[95] In an earlier text, Schmitt argues that the theory of just war from the Scholastics had been employed by Woodrow Wilson to justify a 'crusade' [*Kreuzzug*] against Germany. In the same text, Schmitt claims that the National Socialist jurist Norbert Gürke has provided an acceptable interpretation of just war based on the concept of '*gerechter Lebensausgleich*,' which is in turn citing Schmitt's Concept of the Political. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff*, p. 8.

[96] Nys, 'Introduction,' p. 24.

non-Christian peoples with an abstract notion of humanity; in short, it is only possible when one ignores the historical context of the *Respublica Christiana*.

From there, Schmitt argues that Nys' misinterpretation of Vitoria – based on his faith in 'humanitarian civilization and progress' – is extended and popularized through the work of James Brown Scott, whom he describes as a 'Zealous *Präkonisator*' of Vitoria's thought. Earlier in the text, Schmitt explicitly equates this 'exploitation' [*Verwertung*] of Vitoria with 'the theorists of the Geneva League of Nations,' which is in turn linked to a series of Scott's publications in the interwar years as well as the work of German pacifists such as Walther Schücking and Hans Wehberg.[97] In Vitoria, Scott claimed to find an antidote to catastrophic spectre of war after 1919, namely through Vitoria's doctrine of 'free commerce (*liberum commercium*), of free propaganda, and of just war.'[98] In particular, Schmitt castigates Scott for attempting to banish war as a legally recognized instrument and maintaining instead that 'there should once again be just war, in which the attacker, the aggressor, is declared as such a criminal [*Verbrecher*] in the full, criminal sense of the word.'[99] As a result, Vitoria's thought – written in the context of the *Respublica Christiana* – is thus repackaged and deployed against the concept of war established and stabilized under the *jus publicum europeaum*. In so doing, Schmitt is engaged in challenging the second proposition found in the work of Vitoria, that force could only be used to redress a wrong.

Schmitt once again criticizes James Brown Scott for his exploitation of Vitoria, as Scott confuses the two epochs' understanding of 'just' in the just war tradition, as '*both concepts of just have entirely different formal structures*.'[100] This criticism similarly turns on historicizing Vitoria's thought. Under the interpretation of the *Respublica Christiana*, 'crusades and missionary wars were, without difference of attacking or defending, *eo ipso* just wars.' Furthermore, 'rulers and peoples, which persistently removed themselves from the authority of the church, such as Jews and Saracen were *eo ipso hostes perpetui*. This all assumes the *international legal authority of a potestas spiritualis*.'[101] Thus, a war is

[97] Cf. Richard Tuck's claim that 'The scholars funded by the Carnegie endowment from the time of the First World War onwards, working under the influence of James Brown Scott, left us with a very misleading picture of the pre-Grotian ideas about the laws of war and peace.' Richard Tuck, *The Rights of War and Peace* (Oxford: Oxford University Press, 1999), p. 11.

[98] Schmitt, *Der Nomos der Erde*, p. 89. 'Vom freien Verkehr, von der freien Propaganda und vom gerechten Krieg.'

[99] Schmitt, *Der Nomos der Erde*, p. 89. In the original text, 'aggressor' is not capitalized despite being a noun, likely to indicate the Anglo-American use of this term in the Versailles order as opposed to the German word 'Aggressor.' 'Es soll wieder ein gerechter Krieg werden, indem der Angreifer, der aggressor, als solcher zum Verbrecher im vollen, kriminellen Sinn des Wortes erklärt wird.'

[100] Schmitt, *Der Nomos der Erde*, p. 90. '*Die beiden Gerechtigkeitsbegriffe haben demnach eine völlig verschiedene formale Struktur*.' Emphasis in original.

[101] Schmitt, *Der Nomos der Erde*, p. 90. 'Fürsten und Völker, die sich der Autorität der Kirche hartnäckig

considered justified if it has just cause, as determined by the spiritual authority of the Roman Catholic Church; this theory has no role for concepts of aggression or hostility, as the justness of a war can only be derived on the basis of papal declaration.

In contrast, Schmitt argues that the *jus publicum europaeum* 'repressed' the theory of *justa causa* and its reliance on papal authority to reflect the changing role of the state as a sovereign territorial unit. Rejecting the ultimate authority of the Roman Catholic Church, the *jus publicum europaeum* instead posited the equal sovereignty of states and shifted from *justa causa* to *justis hostis*: as the legalization of a non-discriminatory form of war between equals.[102] This transition is credited with 'bracketing' the effects of war, as well as a 'doubled separation' between the law of nations in the Middle Ages and the Modern period: on the one hand, 'in the final removal of moral-theological-churchly argumentation from juridical-stately argumentation,' and, on the other hand, in the 'separation of natural law and moral question of the *justa causa* from the typically juridical-formal question of the *justus hostis*, which is differentiated from the criminal, that is, from the object of punitive action.'[103] It is precisely this transition that allowed Alberico Gentili to declare '*Silete theologi in munere alieno*!'[104]

Despite the repression of the doctrine of *justa causa* and the separation of moral-theological arguments for juridical-stately arguments, Schmitt argues that Scott resurrects Vitoria's teachings and presents them in a chimerical form. As a result of Scott's exploitation of the Spanish Scholastics, 'the injustice of aggression and of the aggressor lies not in a materially or neutrally identifiable guilt [*Schuld*] for war in the sense of the cause of war [*Kriegsursache*]' but instead 'in the *crime de l'attaque*, in *aggression as such*.'[105] What Scott presents as a return to a previous position held in the history of political thought is in fact a decontextualized and therefore fundamentally altered position; while maintaining the same conceptual vocabulary of enemy, war, and justice, these terms have been given a new meaning in the new spatial configuration of the earth. While Vitoria 'never once ... denied a non-Christian opponent of a Christian the designation of *justus hostis*,' the function of the modern understanding of just and unjust war is precisely to discriminate against the enemy,

entzogen, wie Juden und Sarazenen, waren eo ipso hostes perpetui. Alles das setzte die *völkerrechtliche Autorität einer potestas spiritualis* voraus.' Emphasis in original.

[102] Schmitt, *Der Nomos der Erde*, p. 91.

[103] Schmitt, *Der Nomos der Erde*, p. 91. 'in der endgültigen Ablösung der moraltheologisch-kirchlichen von der juristisch-staatlichen Argumentation ... Ablösung der naturrechtlichen und moralischen Frage der justus hostis, der vom Verbrecher, d.h. von dem Objekt einer punitiven Aktion, unterschieden wird.'

[104] Schmitt, *Der Nomos der Erde*, p. 92. Gentili's quip is repeated again four pages later as marking 'the beginning of the new European law of nations.'

[105] Schmitt, *Der Nomos der Erde*, p. 92. Emphasis in original. 'Doch soll das Unrecht der Aggression und des Aggressors nicht in einer materiell und sachlich festzustellenden Schuld am Kriege im Sinne der Kriegsursache liegen, sondern im *crime de l'attaque*, in der *Aggression als solcher*.'

to declare him a 'criminal' and thus to justify using police-like measures against him.[106] As a result, 'war is eliminated, but only because enemies no longer mutually recognize one another as on the same moral and juridical levels. This may be a return to an older position; in some ways, it is also the return from a juridically thought concept of *justus hostis* to a quasi-theological conception of the enemy.' However, it is also 'the opposite of that position, which extended to the extreme, of a non-discriminating reciprocity, which emerged with Vitoria in such a strong and Christian way.'[107] Thus, for Schmitt, the Vitorian Renaissance and the attempt to use his Catholic theological line of argumentation to resurrect the classical *justa causa* in fact leads to a set of positions diametrically opposed to those actually held by Vitoria.

In turning to the scholastic origins of the law of nations, Schmitt's concern was not only with the content of Vitoria's arguments read in light of his historical (Spanish Conquista) and discursive (debate with Sepulveda) context, but also to challenge the reception of these ideas in fundamentally different epochs in the history of the law of nations. For Schmitt, the stakes of challenging this interpretation is nothing less than combatting the justification of the modern means to annihilation through the use of Vitoria's teachings. For with the discriminating concept of war came an answer to Vitoria's question 'how much is permitted in just war?' To this, jurists after Versailles can only give one answer: 'Everything is permitted in just war!'[108] For Schmitt, what is at stake in the interpretation of Vitoria is more than academic – it is about survival.

4.3 Writing the Origins of International Law

Near seventy years after the publication of James Brown Scott's *The Spanish Origin of International Law*, contemporary scholars are once again engaged in a debate over the origins of international law as a discipline and the role ascribed to Vitoria within that narrative.[109]

[106] Schmitt, *Der Nomos der Erde*, p. 95.

[107] Schmitt, *Der Nomos der Erde*, p. 95. 'Der Krieg ist abgeschafft, aber nur deshalb, weil die Feinde sich gegenseitig nicht mehr auf der gleichen moralischen und juristischen Ebene anerkennen. Das mag eine Rückkehr zu einem älteren Standpunkt sein; in mancher Hinsicht ist es auch die Rückkehr von einem juristisch gedachten justus-hostis-Begriff zu einem quasi-theologischen Feindbegriff'; '[es ist] das Gegenteil der bis zum äußersten gehenden Haltung einer nicht-diskriminierenden Reziprozität, die bei Vitoria so stark und christlich hervortritt.'

[108] Schmitt, *Der Nomos der Erde*, p. 299. 'Tantum licet in bello justo!'

[109] See Anghie, *Imperialism, Sovereignty, and the Making of International Law*; Martti Koskenniemi, 'Vitoria and Us,' *Rechtsgeschichte* 22 (2014), 119-138; Martti Koskenniemi 'Histories of International Law: Dealing with Eurocentrism,' *Rechtsgeschichte* 19 (2011), 152-176, p. 175. Most recently, Paolo Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott made Francisco de Vitoria the Founder of*

Echoing the debate between Scott and Schmitt, this contemporary iteration is as much about the Spanish Scholastic himself as it is about methodology, context, and anachronism. As Martti Koskenniemi framed the issue in an article on 'Vitoria and Us,' 'How to write (international) legal histories that would be true to their protagonists while simultaneously relevant to present audiences?'[110] For Anne Orford, the pursuit of contemporary relevance means engaging in anachronism – or, at the very least, rejecting the 'policing of anachronism' – for the sake of postcolonial critique,[111] while others such as Andrew Fitzmaurice and Lauren Benton have defended a more historical approach.[112] This debate forms the mirror image of the debate between Scott and Schmitt: instead of asserting the timeless validity of Vitoria's teachings against historicism for the sake of uncovering the true principles of international law, Orford and others have sought to deconstruct the bulwark of context in order to open an avenue for critique.

At the centre of Schmitt's polemic against James Brown Scott are two diametrically opposed visions of how the history of the law of nations should be written, as well as the purpose of such a history for the present. For Scott, a return to Francisco de Vitoria meant a return to the true law of nations, unfiltered through centuries of interpretation and commentary. Indeed, the *Asociación Francisco de Vitoria* established an international community of scholars united in their belief that Vitoria's work could illuminate the forgotten foundations of the law of nations. In the face of the unprecedented destruction of the Great War, Vitoria symbolized the 'voice of humanity,' an ideal to which James Brown Scott and his contemporaries aspired.[113] Instead of grounding international law on treaties or conventions, Vitoria's moral teachings would provide a set of objectively true principles for international conduct.[114] Thus, in this interwar vision of international law, its origins in Spanish Scholasticism were to serve as its future.

In contrast, Carl Schmitt insisted on a radical historicity [*Geschichtlichkeit*] encapsulated in his theory of the *nomos* – Vitoria's contribution to the law of nations was only intelligible within the context of the *Respublica Christiana* and its corresponding conception

International Law (Oxford: Oxford University Press, 2019).

[110]Koskenniemi, 'Vitoria and Us,' p. 118.

[111]Anne Orford, 'On International Legal Method,' *London Review of International Law* 1(1) (2013), 166-197, pp. 170-177; Anne Orford, 'International Law and the Limits of History,' in *The Law of International Lawyers: Reading Martti Koskenniemi*, eds. Wouter Werner, Marieke de Hoon, Alexis Galan (Cambridge: Cambridge University Press, 2017), 297-320, p. 301.

[112]Andrew Fitzmaurice, 'Context in the History of International Law,' *Journal of the History of International Law* 20 (2018), 5-30; Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics,' *Journal of the History of International Law* 21 (2019), 1-34.

[113]Scott, 'Asociación Francisco De Vitoria,' p. 138.

[114]Scott, *The Spanish Origin of International Law*, pp. 11a-12a.

of a spatial ordering of the world. Schmitt's historicism functioned both as a criticism of previous attempts to construct a liberal history of the law of nations as well as a criticism of contemporary doctrines of just war theory that relied on an ahistorical reading of the Spanish Scholastic. James Brown Scott became the focus of Schmitt's critique precisely because he, more than any other theorist in the interwar period, mobilized a liberal history of the law of nations to ground a corresponding liberal theory of just war, one which would animate discussions pertaining to the Treaty of Versailles and the Kellogg-Briand Pact.

Indeed, Schmitt's intervention posits an explicit link between the methodology used in writing a history of the law of nations and the political character of the lessons that result from it. Schmitt's method in analysing Vitoria demands that the historian of the law of nations ask against whom legal concepts are targeted. In that sense, he carries forward his famous dictum of *The Concept of the Political*, that 'all political concepts, images, and terms have a *polemical* meaning. They are focused on a specific antagonism [*Gegensätzlichkeit*] and are bound to a concrete situation.'[115] For Schmitt, the failure to identify the polemical target of a concept is itself an ideological deception of liberalism. And James Brown Scott, precisely in his invocation of Vitoria as the 'voice of humanity,' is revealed as a great deceiver: 'he who says humanity wants to deceive.'[116]

[115]Carl Schmitt, *Der Begriff des Politischen. Synoptische Darstellung der Texte*, ed. Marco Walter (Berlin: Duncker & Humblot, 2018), p. 92. 'Erstens haben alle politischen Begriffe, Vorstellungen und Worte einen *polemischen* Sinn; sie haben eine konkrete Gegensätzlichkeit im Auge, sind an eine konkrete Situation gebunden.' Emphasis in original.

[116]Schmitt, *Der Begriff des Politischen*, p. 55. 'Wer Menschheit sagt, will betrügen.'

Chapter 5

Schmitt's Socialisms

Speaking shortly before the end of his life in 1987, Jacob Taubes, the West German philosopher, rabbi, and scholar of Judaism, recounted discovering a letter from the late Walter Benjamin addressed to Carl Schmitt. The letter from December 1930, which described Benjamin's intellectual 'indebtedness' to Schmitt's early Weimar writings, particularly *Die Diktatur*, was however nowhere to be found in the first edition of Benjamin's published correspondence, published under the editorship of Theodor Adorno and Gershom Sholem in 1966. When Taubes confronted Adorno over the letter's exclusion, the latter reportedly responded 'A letter like that doesn't exist.'[1] The omission was likely intended to limit Schmitt – persona non grata and 'dangerous mind' of the Federal Republic – from contaminating one of the seminal figures of the Frankfurt School at the very moment in which Adorno and Sholem were trying to cement his legacy.[2] As Taubes would phrase it, the letter was a 'mine' that could 'disrupt our conception of the intellectual history of the Weimar Period': the saga perhaps says more about the insecurities of the post-war German left and Schmitt's odious reputation than it does to explain how Schmitt himself conceived of Marxist theory and his intellectual relationship to it.[3]

Writing on the relationship between Carl Schmitt and Marxism could take one of two

[1] Jacob Taubes, *Die politische Theologie Paulus* (Berlin: Wilhelm Fink, 2003), p. 98. See as well Marc de Wilfe, 'Meeting Opposites: The Political Theologies of Walter Benjamin and Carl Schmitt,' *Philosophy & Rhetoric* 44(4) (2011), 363-381; Samuel Weber, 'Taking Exception to the Decision: Walter Benjamin and Carl Schmitt,' *Diacritics* 22(3/4) (1992), 5-18; Horst Bredekamp, 'Walter Benjamin's Esteem for Carl Schmitt,' in *The Oxford Handbook of Carl Schmitt*, 678-704. On Schmitt and Taubes, see Samuel Garrett Zeitlin, 'Interpretation and Critique: Jacob Taubes, Julien Freund, and the Interpretation of Hobbes,' in *Telos* 181 (2017), 9-39; Mehring, *Aufstieg und Fall*, pp. 477, 555, 571-573; Jamie Martin, 'Liberalism and History after the Second World War: The Case of Jacob Taubes,' *Modern Intellectual History* 14(1) (2014), 131-152.

[2] Jan Werner Müller, *A Dangerous Mind* (New Haven: Yale University Press, 2003).

[3] Quoted in Bredekamp, 'Walter Benjamin's Esteem for Carl Schmitt,' p. 682.

approaches. The first would be biographical: a reconstruction of Schmitt's decades-long personal interactions and exchanges with a laundry list of eminent Marxist theorists such as Franz Neumann, Otto Kirchheimer, Alexandre Kojeve, and Georg Lukacs.[4] The nature of these relationships could then reveal Schmitt's broader attitude towards Marxism. As the conservative German historian Ernst Nolte quipped, 'if Schmitt saw in Marxism the enemy, then this enmity must have been of a very special type if it did not exclude such personal and business-like relationships with so many and such important Marxists.'[5] It would thus seem exceedingly odd that Schmitt would have taken on so many Marxist students in the Weimar Republic and, decades later, would participate in a cordial radio interview with the self-described West German Maoist Joachim Schickel in 1969.[6] However, Nolte's analysis confuses hostis and inimicus within Schmitt's Friend/Enemy distinction – personal relations (inimicus) are not the subject of enmity as a specifically public category (hostis) but rather a type of antagonism.[7] The fact that Schmitt had such relationships with Marxists should not be taken as a definitive indicator of his analysis of Marxist ideology itself as a theoretical body of thought – merely that, excluding the period between 1933 and 1945, Schmitt maintained a wide network of academic contacts that also included Marxists.

Instead, this chapter follows the historical approach outlined in chapter two of this dissertation by focusing on what Schmitt actually wrote in published and unpublished texts. More than his personal relationships, it is what Schmitt committed to paper that counts for reconstructing his view of Marxism. To do so, I consider Marxism in the broadest sense: not only Schmitt's commentary on Marx and Engels, but also influential contemporaries such Vladimir Lenin, as well as the manifestation of Marxism in the Soviet Union as a political entity in international politics. While a contemporary historian would note there are significant theoretical distinctions among the varieties of Marxist thought, this chapter follows Schmitt's own practice of considering these varieties as part of a coherent whole. Indeed, for Schmitt, any internal Marxist debates over revolutionary strategy are subordinated to 'the social question,' the defining feature of Marxist thought. Admittedly, Schmitt's writings on

[4] See for example Ellen Kennedy, 'Carl Schmitt and the Frankfurt School,' *Telos* 71 (1987), 37-66; Martin Jay, 'Reconciling the Irreconcilable? Rejoinder to Kennedy,' *Telos* 71(1987), 67-80; William Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1997); Mehring, *Aufstieg und Fall*, pp. 197, 202, 222, 229, 271, 313-316, 380, 493, 514-515, 527.

[5] Ernst Nolte, 'Carl Schmitt und der Marxismus,' *Der Staat* 44(2) (2005),187-211, p. 191. Nolte's account of Schmitt's friendship with Marxists appears over-exaggerated, listing for example his relationship with Ernst Bloch. However, in *Glossarium*, Schmitt describes Bloch representative of the 'stultification of emigres' and the 'poor Jews . . . who don't want to be Zionists' – hardly the description of a friend. See *Glossarium*, p. 234.

[6] See Carl Schmitt and Joachim Schickel, 'Dialogue on the Partisan, 1969' in Carl Schmitt, *The Tyranny of Values and Other Texts*, trans. Samuel Garrett Zeitlin (New York: Telos, 2018), p. 175.

[7] Schmitt, *Begriff des Politischen. Synoptische Darstellung*, pp. 84-91.

Marxism are rather scarce given the historical context of his writings: the Russian Revolution of 1917, the Independent Social Democratic Party (USPD) in the Weimar Republic, the Soviet Union, the Cold War, and the German Democratic Republic. However, part of this relative neglect is itself a function to Schmitt's biographical circumstances. The Treaty of Versailles, the Rhineland Occupation, the Morgenthau Plan and the Nuremberg Tribunals – in each of these cases, Schmitt felt himself (and the German state) to be the victim of Western liberalism and not Eastern bolshevism.

Relative neglect towards Marxism, however, does not mean, as James Furner has claimed, that after 1931, 'Schmitt writes relatively little on Marxism until *The Theory of the Partisan*' in 1963.[8] Rather, many of Schmitt's essays and journal entries from the period deal explicitly with Marxist theory and Schmitt had a much more sustained commentary than has been previously acknowledged. Focusing on this engagement yields three conclusions: first, using Lenin as his primary example, Schmitt viewed Marxism as the ideology that most thoroughly comprehended – and exploited – the bifurcation between legality and legitimacy, with the Bolsheviks pursuing a two-track strategy in both parliamentary and revolutionary politics. Lenin's understanding of revolutionary legitimacy was based on the promise of a better future, one that could only be achieved by using violence and revolution to remove any obstacles to the progression towards a pre-established telos to history. Second, Marxism can be articulated within the tripartite definition of *nomos* as seeking to find in division and distribution [*teilen*] the answer to challenges of both appropriation [*nehmen*] and production [*weiden*]. However, as Schmitt argues, a *nomos* free of appropriation is merely a mirage: the necessity of 'expropriating the expropriators' reveals Marxism to be just as reliant upon an originary act of appropriation as Western liberalism.[9] The chapter concludes with a discussion of Bolshevism as the intellectual successor to Western liberalism, showing that Schmitt viewed both parties of the bi-polar world of the Cold War as in fact unified in their approach towards the philosophy of history.

5.1 Legality and Legitimacy Redux: Marxist Revolutionary Strategy

During Schmitt's incarceration at Nuremberg, the assistant US chief counsel and interrogator, Robert Kempner, requested the former Prussian State Councillor provide a written answer

[8] James Furner, 'Carl Schmitt's "Hegel and Marx,"' *Historical Materialism* 22(3/4), 371-387, p. 373.

[9] Karl Marx, *Capital Vol. I* (London: Penguin, 1990), Ch. 32: The Historical Tendencies of Capital Accumulation.

to the following question: 'Why did the State Secretaries follow Hitler?' In his response, submitted to Kempner on 13. May, 1947 and republished with minor alterations in the Catholic journal *Die Neue Ordnung* in 1950, Schmitt focused on 'the problem of legality' – namely that 'Hitler's seizure of power was not illegal in the eyes of the German bureaucracy,' as the Enabling Act [*Ermächtigungsgesetz*] of 24. March, 1933 had effectively given Hitler a legal carte blanche: Article 1 allowed for laws to be enacted by the government as opposed to the Reichstag.[10] For Schmitt, the German bureaucracy followed Hitler after the Enabling Act precisely because 'Hitler's power was, for every positivist conception of legality, more than just itself legal, *it was also the source of all positive legality* [*positiv-rechtlichen Legalität*].'[11] In effect, Hitler was able to come to power and command the state bureaucracy by maintaining the appearance of acting in accordance with the procedural boundaries of the law, which was why Hitler would ensure the Enabling Act was renewed in 1937 and 1941, well after Hitler had consolidated power.[12] Although the legal validity of the Enabling Act would be subsequently challenged by figures such as Franz Neumann on the grounds that KDP deputies were arbitrarily detained and thus could not oppose the bill, the act nevertheless offered the pretense of legality.[13] The acceptance of such a view was only possible, in Schmitt's analysis, as a result of the triumph of legal positivism, as 'the transformation of right into legality is a consequence of positivism.'[14]

While Schmitt did seek to pin the blame for Hitler's rise to power on legal positivism and its transformation of legality into the sole source of legitimacy, Schmitt indicted Marxism as a precursor in the weaponization of legality for political ends, arguing that Hitler had merely made use of the weapons crafted by Marxist revolutionaries.[15] Schmitt places Lenin at the center of his narrative, crediting him with 'proclaiming with great pungency' the transformation of 'legality into a weapon of civil war': Lenin's *'Left Wing' Communism:*

[10] Richard Evans, *The Third Reich in Power, 1933-1939* (London: Penguin, 2006). On the *Ermächtigungsgesetz*, see Michael Stolleis, *Die Geschichte des Öffentlichen Rechts in Deutschland, Bd. III* (Munich: C.H. Beck, 2002), pp. 316-7, 320, 326; and Michael Stolleis, *Recht im Unrecht* (Frankfurt: Suhrkamp, 1994), pp. 8, 19.

[11] Schmitt, 'Das Problem der Legalität,' p. 442. Emphasis added. 'Damit nämlich war Hitlers Macht für jede positivistische Legalitätsvorstellung noch weit mehr als nur selber legal, sie war auch die Quelle aller positiv-rechtlichen Legalität.'

[12] Stolleis, *Die Geschichte des Öffentlichen Rechts*, p. 317.

[13] Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (Chicago: Ivan R. Dee, 2009), pp. 51-54.

[14] Schmitt, 'Das Problem der Legalität,' p. 447. See also Chapter 2 of this thesis on Schmitt's account of the historical rise of legal positivism. One ought to note as well that, in 1933, Schmitt himself thought the Ermächtigungsgesetz had invalidated the Weimar Constitution. See Carl Schmitt, *Staat, Bewegung, Volk* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 5. 'Diese Verwandlung des Rechts in Legalität ist eine Konsequenz des Positivismus.'

[15] Schmitt, 'Das Problem der Legalität,' p. 450. On Schmitt's critique of Kelsenian legal formalism, see McCormick, *Carl Schmitt's Critique of Liberalism*, pp. 213-223.

An Infantile Disorder (1920) had made 'every consideration of the problem of legality without awareness of this text seem anachronistic.'[16] In this text, written after the Russian Revolution, Lenin polemicized against the 'Dutch-left' arguments of Herman Gorter and Antonie Pannekoek for refusing to participate in a 'bourgeois' parliament.[17] For Lenin, these theorists had mistaken their 'desire' to see parliaments become 'politically obsolete' with the 'objective reality' of the political situation: parliament still existed and could be mobilized for counter-revolutionary purposes if revolutionaries did not challenge it from within. Thus, Lenin argued for a two-fold strategy of a 'combination of mass action outside a reactionary parliament with an opposition sympathetic to (or, better still, directly supporting) the revolution within it.'[18] In other words, legal means should be used alongside illegal means to further the cause of the revolution.

In terms of revolutionary tactics, Lenin dismissed the demands of the 'infantile left' as akin to 'any army which does not train to use all the weapons, all the means and methods of warfare that the enemy possesses, or may possess,' which would be either 'an unwise or even criminal manner' of preparation for war. Moreover, 'this applies to politics even more than it does to the art of war,' as the revolutionary cannot predict which form of resistance he will encounter from reactionary forces. At the same time that Lenin criticized the 'left-socialists' for refusing to engage in parliamentary politics, he simultaneously objected to the social democratic abstention from illegal means of obtaining power – faith in mass democracy alone would not would not achieve socialist ends. Instead, revolutionary proletariat parties ought to mimic the Bolscheviks' strategy for success.[19] Indeed, if one were to follow Georg Lukács, it was Lenin's willingness to compromise that formed a type of 'revolutionary realpolitik' which sought the 'final elimination of all utopianism' in Marxist theory.[20] Schmitt perceives precisely this element of Lenin's text as marking a transformation in the weaponization of legality, quoting Lenin's conclusion that 'Revolutionaries who do not understand combining illegal means of struggle with *all* (underlined by Lenin himself) legal forms are extremely bad revolutionaries.' [21] For Schmitt, the basic lesson of Lenin's writings is that 'the goal

[16] Schmitt, 'Das Problem der Legalität,' p. 447. 'Die Verwandlung der Legalität in eine Waffe des Bürgerkrieges';'Jede Erörterung des Legalitätsproblems ohne Kenntnis dieser Schrift [wirkt] anachronistisch.'

[17] On Dutch left wing communism, and Lenin's criticisms, see Philippe Bourrinet, *The Dutch and the German Communist Left, 1900-1968* (London: Brill, 2017), pp. 3-5.

[18] Lenin, *Infantile Disorder*, Ch. 8.

[19] Lenin, *Infantile Disorder*, 'Several Conclusions.' See also Neil Harding, *Lenin's Political Thought Volume 2* (London: Macmillan Press, 1981), pp. 241-3; James White, *Lenin: The Practice and Theory of Revolution* (London: Palgrave, 2001), p. 161.

[20] Lukács, *Lenin*, pp. 74, 82. On Schmitt and Lukács, see John McCormick, 'Transcending Weber's Categories of Modernity? The Early Lukács and Schmitt on the Rationalization Thesis,' *New German Critique* 75 (1998), 133-77. See as well the following chapter of this thesis.

[21] Schmitt, 'Das Problem der Legalität,' p. 447. Emphasis in original. 'Revolutionäre, die es nicht verstehen,

is a communist revolution in all the countries of the world; *whatever serves this goal is good and just*.'[22] As he had phrased it in *Die Diktatur*, it is clear from the answers to Kautsky's 'Terrorism and Communism' that Lenin and Trotsky both view democratic politics 'as the relation between legality and illegality, that is they they must be answered differently according to the specific country, and are only a moment in the strategic and tactical measures of the communist plan.'[23]

Schmitt's postwar discussion of 'The Problem of Legality,' which contains the above analysis of Lenin, builds upon his Weimar text *Legalität und Legitimität*, written in 1932 in advance of the *Preußenschlag*.[24] In this text, Schmitt set out legality and legitimacy as two opposing categories, modifying Max Weber's construction of legality as a sub-category of legitimacy. As Weber had argued, 'today, the most common form of legitimacy is the faith in legality.'[25] For Schmitt, the rise of parliamentarism coincided with the foreclosure of extra-legal sources of legitimacy, intended to suppress 'radical and revolutionary' movements; instead, there would be a 'legal path and process' for these movements to gain power paired with a guarantee of political neutrality.[26] In the Weimar Republic, this was manifested in the 'liberal principle of absolute non-intervention,' of granting an 'equal chance' to political parties to form a governing majority in the parliament even if these parties were openly hostile to the constitution itself.[27] Legal positivism in Weimar had, in Schmitt's retrospective afterword, 'declined to inquire as to the friend and enemy of the constitution' by granting all parties an equal chance.[28]

Marxist revolutionaries, however, did not play by the rules of legal positivism. In *Critique of the Gotha Programme* (1891), Marx had argued that 'law can never be higher than the

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die illegalen Kampfformen mit *allen* (von Lenin selbst unterstrichen) legal zu verbinden, sind äußerst schlechte Revolutionäre.'

[22] Carl Schmitt, *Theorie des Partisanen* (Berlin: Duncker & Humblot, 1963), pp. 54-55. Emphasis added.

[23] Schmitt *Die Diktatur*, p. xiv. 'Daß diese Frage, wie jede andere, namentlich auch die von Legalität und Illegalität, nach den Verhältnissen des einzelnen Landes verschieden beantwortet werden muß und nur ein Moment in den strategischen und taktischen Maßnahmen des kommunistischen Planes ist.'

[24] McCormick, 'Identifying or Exploiting the Paradoxes of Constitutional Democracy?' p. xix. On Schmitt's role in the *Preußenschlag*, see Kennedy, *Constitutional Failure*, pp. 13, 165-166; David Dyzenhaus, 'Legal theory in the Collapse of Weimar: Contemporary Lessons?,' *American Political Science Review* 91(1) (1997), 121-134; Mehring, *Carl Schmitt*, pp. 289-290, 320-321.

[25] Max Weber, quoted in Schmitt, *Legalität und Legitimität*, p. 269; McCormick, 'Identifying or Exploiting the Paradoxes of Constitutional Democracy?' p. xxvii. Duncan Kelly, *The State of the Political*, pp. 20, 242-245; Kennedy, *Constitutional Failure*, pp. 164. 'Die heute geläufigste Legitimitätsform ist der Legalitätsglaube.'

[26] Schmitt, *Legalität und Legitimität*, pp. 270, 283-4. On parliamentarism and the right of resistance, see Chapter 3, section 3, 'Natural Law, the Right of Resistance, and Collaboration.'

[27] Kennedy, *Constitutional Failure*, p. 7; Schmitt, 'Das Problem der innerpolitischen Neutraliät des Staates,' in *Verfassungsrechtliche Aufsätze*, p 41; Schmitt, *Legalität und Legitimität*. p. 285.

[28] Schmitt, *Legalität und Legitimität*, p. 345; see also Neumann, *Carl Schmitt als Jurist*, pp. 242-245. 'die es ablehnte, nach Freund oder Feind der Verfassung zu fragen.'

economic structure of society.'[29] Lenin then took up this view in *State and Revolution* (1918), arguing that the state as such was 'the product and the manifestation of the irreconcilability of class antagonisms ... an organ of class domination, an organ of oppression; its aim is the creation of 'order' which legalises and perpetuates this oppression.'[30] As a result, the existing state and the legal system were themselves 'reactionary' tools in class conflict, wielded by the bourgeoisie. Thus, the laws of a bourgeois state would merely reflect bourgeois class dominance and lack legitimacy in the eyes of the revolutionaries, who demanded nothing less than the 'smashing' of the (currently existing) 'state machine' through an extra-legal revolution[31] As such, while liberal state theorists and legal positivists systematically asserted legality as the sole form of legitimacy, Marxist theorists cut in the opposite direction, positing a form of revolutionary legitimacy standing above legality.

In Schmitt's postwar writings, he characterized Lenin as the apotheosis of the historical bifurcation of legitimacy into two distinct forms: dynastic and revolutionary. Dynastic legitimacy was coupled with the tradition notion of a monarch as the subject of constituent power – the monarch acts as the author of the constitution on whose authority it ultimately rests.[32] This distinction represents a slight modification from the terminology used In his Weimar texts, in which he split legitimacy into dynastic and democratic forms, the latter according to which the people themselves decide the basis of their constitution or the 'type and form of their political existence.'[33] In 1932, Schmitt maintained that same distinction, arguing that the Reichswehr and the Reichsbeamtentum replaced dynastic legitimacy with the 'plebiscitary legitimacy of the Reichspräsident elected by the German people.'[34] However, Lenin's theory problematizes this dichotomy, as it operates according to a different principle than dynastic or democratic/plebiscitary legitimacy: the basis for Soviet legitimacy cannot be ascribed to either a monarch or popular, democratic consent. This interpretation is hinted at in *Verfassungslehre*, when Schmitt claims that "'Soviets" in Russia' are an example of a 'minority' as the subject of constituent power: while claiming to act in the interests of the

29 In Robert Tucker, *The Marx-Engels Reader* (New York: Norton, 1978).
30 Vladimir Lenin, *State and Revolution* (New York: International Publishers, 1943), p. 9.
31 Lenin, *State and Revolution*, p. 96. Although Schmitt does not cite this text specifically, the archives show that he owned a copy of a 1919 edition with handwritten annotations, indicating that Schmitt would have been familiar with Lenin's arguments. See NRW 265-25952.
32 Kelly, 'Carl Schmitt's Political Theory of Representation,' p. 122; Martin Loughlin, 'On Constituent Power,' in eds. Michael Dowdle and Michael Wilkinson, *Constitutionalism beyond Liberalism* (Cambridge: Cambridge University Press, 2017), 151-175, p. 162. For an analysis of the different subjects of constituent power, see Schmitt, *Verfassungslehre*, pp. 77-82, 90-91.
33 Schmitt, *Verfassungslehre*, p. 78. 'Art und Form seiner politischen Existenz.'
34 Schmitt, Legalität und Legitimität, p. 273. 'in der plebiszitären Legitimität des vom deutschen Volk gewählten Reichspräsident.'

people, the people have no vote over constitutional arrangements.[35]

In the postwar period, however, what was first classified as a form of *minority* constituent power is now taken as representative of a *revolutionary* form of legitimacy. At first glance, this may appear as a simple semantic shift: the Russian Revolution was led by a party vanguard, a small minority of the population, thus combining both descriptions. However, the terminological shift indicates a move away from an Aristotelian regime analysis – focusing on the number of actors – to an analysis of the basis of its legitimacy. As Schmitt explains,

> 'The great manifesto of this victory is Lenin's text on legality and illegality as mere methods . . . the authentic legal philosophy. Now there is only one revolutionary legitimacy. This may justify every cruelty, and may bestow upon every inhumanity the character of a measure in the service of a higher humanity, and guarantee the absolution of the world spirit for everything, for wars and civil wars, for liquidation of entire classes and peoples.'[36]

Thus, for Schmitt, the revolutionary form of legitimacy had proven itself 'victorious' over dynastic or even democratic forms: This victory of revolutionary legitimacy was made possible by Marxism's appeal to a better future, whereas dynastic legitimacy was based on the past in the form of a hereditary succession, and democratic legitimacy based on a majority vote in the present. Neither of these alternative forms of legitimacy based on past and present, monarchy and democracy, however, could stop the Marxist assertion of a utopian future. Thus, Schmitt ominously concludes that 'this legitimacy is today monopolized in the East; The West has yet to notice the splitting of legality and legitimacy.'[37]

For Schmitt, Lenin's mobilization of legality as a mere tool of the revolution followed from the original division between legality and legitimacy in the wake of Napoleon's abdication in 1815. After his abdication, restoration of the monarchy was coded as the restoration of a form of historical dynastic legitimacy, whereas the continuation of the Napoleonic code a form of legality. The debate that followed showed two competing views of the monarchy: 'The liberals wanted constitutional monarchy as a legal form of rule, the royalists wanted it as a legitimate form.' Indeed, in Schmitt's characterization, the liberals wanted to subject

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[35] Schmitt, *Verfassungslehre*, p. 82. In this text, Schmitt does not consider a type of revolutionary legitimacy, but rather only contrasts dynastic and democratic forms. See Schmitt, *Verfassungslehre*, p. 90.

[36] Schmitt, *Glossarium*, p. 139. 'Das große Manifest dieses Sieges ist Lenins Schrift über Legalität und Illegalität als bloße Methoden (Der Radikalismus, die Kinderkrankheit der Revolution), die authentische Rechtsphilosophie . . . Jetzt gibt es nur noch eine revolutionäre Legitimität. Diese vermag jede Grausamkeit zu rechtfertigen, jedem Imperialismus den Charakter einer Befreiungsaktion, jeder Unmenschlichkeit den Charakter einer Maßnahme im Dienste einer höheren Menschlichkeit zu verleihen und für alles, für Kriege und Bürgerkriege, Liquidierung ganzer Schichten und Völker die Absolution des Weltgeistes zu garantieren.'

[37] Schmitt, *Glossarium*, p. 139. 'Diese Legitimität ist heute im Osten monopolisiert; der Westen hat noch nicht einmal die Aufspaltung von Legalität und Legitimität bemerkt.'

the monarchy to the law, elevating the status of legality and denying any form of dynastic legitimacy that existed outside of or above the law. Schmitt saw in the French historian Jules Michelet evidence of 'celebrating the law … as an expression of civilization in comparison with (Russian) barbarism,' in so far as rule by law ended the 'age of rule by paternity [*Vaterherrschaft*].'[38] In contrast, the law was an expression of 'the government of man by himself.'[39] In Schmitt's commentary on Michelet in *Glossarium*, he exploits the etymology of *Vaterherrschaft* – in French, paternité – to argue that Michelet demonstrated that 'Humanity no longer has a father as the source of authority; in his place is the law. Therefore, the crisis of legality is more than an arbitrary difficulty.'[40] In Michelet's narrative, the end of rule by paternity was meant to apply only up until the Vistula river, the nineteenth century dividing line between the Russian Empire and the Habsburg East Galicia. Later, quoting the legal historian Henry Maine, he writes in English, 'The philosophers of France, in their eagerness to escape from what they deemed a superstition of the priests, flung themselves headlong into a superstition of the lawyers.'[41]

Nearly ten years later, Schmitt returns to Michelet's argument in *Glossarium* to connect his commentary on the replacement of the father with law to socialism: 'Socialism is the opposite to paternalism,' or put more bluntly, 'socialism thus = negation of the law of inheritance/succession; property without inheritance law; I merely inherit my own body.'[42] Although the next section of this chapter deals with the division of private property under Schmitt's conception of socialism, it suffices here to note that, once again, Schmitt's rhetorical strategy is to link liberalism with socialism, and to show that they both operate on shared propositions – in this case, that both oppose a form of rule by (the) father.

In addition to showing the conceptual linkages between liberalism and socialism, Schmitt's argument asserts a historical continuity as well. He argues that socialist theory in the Revolution of 1848 appropriated this fracturing of legality and legitimacy, first established after Napoleon's abdication, with 'full momentum and full consciousness informed by the philosophy of history.'[43] As a result, 'according to the Communist Manifesto, the law of

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[38] Schmitt, 'Das Problem der Legalität,' p. 449. 'Die Liberalen wollen die konstitutionelle Monarchie als eine legale, die Royalisten wollen sie als eine legitime Herrschaftsform … Michelet feiert das Gesetz … als den Ausdruck der Zivilisation gegenüber der (russischen) Barbarei.'

[39] Schmitt, 'Das Problem der Legalität,' p. 449 'Die Regierung des Menschen durch sich selbst.'

[40] Schmitt, *Glossarium*, p. 20. 'Die Menschheit hat keinen Vater mehr als Quelle der Autorität; an seine Stelle (patriarchalisch) ist das Gesetz getreten. Daher ist die Krise der Legalität mehr als eine beliebige Schwierigkeit.'

[41] Schmitt, *Glossarium*, p. 151. From Henry Maine, *Ancient Law* (London: Dent, 1917).

[42] Schmitt, Glossarium, p. 345. 'Sozialismus ist der Gegensatz zu Paternalismus … Sozialismus also = Verneinung des Erbrechts; Eigentum ohne Erbrecht, Einzig erbt [sic] ich den eigenen Leib.'

[43] Schmitt, 'Das Problem der Legalität,' p. 450. On this point, see Jeffrey Seitzer, 'Schmitt's Critique of Liberal Constitutionalism,' p. 285. 'mit voller Wucht und vollem geschichtsphilosophischem Bewußtsein hinein.'

the bourgeois class-state is the enemy of the proletariat,' and could be done away with by appeal to a higher source of legitimacy. For Schmitt, this represented an intensification of an economic grouping – the class – into one that was political: class conflict.[44] That Marxism presented an intellectual continuity with liberalism was no historical accident: Marxists 'followed their liberal-bourgeois opponents into the sphere of the economic, and caught him here in his own land with his own weapons.'[45] At the same time, however, Lenin intensified this relationship by 'transforming legality into a poisoned weapon, with which one stabs the political opponent in the back.'[46] Instead, Schmitt lamented the appropriation of Hegel in the East, where his work had become a 'monopoly weapon of Moscow Marxism.'[47] As Schmitt claims 'the two socialist sacraments! Hegel: The State is the present God. Marx: The state must be butchered for the banquet of the Leviathan. That is the great sacrament of Marxist Socialism; is it already long since been realized, over there in Russia.'[48]

For Schmitt, the Marxist appropriation of the concept of dictatorship in the dictatorship of the proletariat reflected an injection of historicity into the term. Thus, he argues that, in the original, pre-Bolshevik Marxist conception,

> The development towards the communist end-state must proceed according to the Marxist "organic" (in the Hegelian sense) economic conception of history, economic relations must be ripe for their transformation, the development is (also in the Hegelian sense) "immanent," the conditions cannot be "made" ripe through force, an artificial, mechanistic intervention in this organic development would be for every Marxist meaningless.[49]

However, this conception underwent a mutation in Bolshevism, according to which the counter-revolutionary bourgeoisie acts as a 'mechanical obstacle, through which the path to organic development becomes blocked and must be cleared with equally mechanical and

[44] See Schmitt, *Der Begriff des Politischen. Synoptische Darstellung*, p. 116.

[45] Schmitt, *Der Begriff des Politischen. Synoptische Darstellung*, p. 224. 'Daß sie ihrem liberal-bürgerlichen Gegner auf das Gebiet des Ökonomischen gefolgt war und ihn hier sozusagen in seinem eigenen Land mit seinen eigenen Waffen stellte.'

[46] Schmitt, 'Das Problem der Legalität,' p. 450 'Nach dem Kommunistischen Manifest ist das Gesetz des bürgerlichen Klassenstaates der Feind des Proletariats'; 'Die Legalität wird zur vergifteten Waffe, die man dem politischen Gegner in den Rücken stößt.'

[47] Schmitt, *Glossarium*, p. 63. 'Eine Monopolwaffe des Moskauer Marxismus.'

[48] Schmitt, Glossarium, p. 305. 'Die zwei sozialistischen Sakramente! Hegel: Der Staat ist der präsente Gott; Marx: Der Staat muß geschlachtet werden, zum Gastmahl des Leviathan. Das ist das große Sakrament des marxistischen Sozialismus; es ist schon längst vollgezogen, drüben in Russland.'

[49] Schmitt *Die Diktatur*, pp. xv-xvi. 'Die Entwicklung zum kommunistischen Endzustand muß nach der ökonomischen Geschichtsauffassung des Marxismus "organisch" (im Hegelschen Sinne) vor sich gehen, die wirtschaftlichen Verhältnisse müssen reif sein für die Umwälzung, die Entwicklung ist (ebenfalls im Hegelschen Sinne) "immanent", die Zustände können nicht gewaltsam reif "gemacht" werden, ein künstliches, mechanisches Eingreifen in diese organische Entwicklung wäre für jeden Marxisten sinnlos.'

extreme methods.'[50] Although the association of Marxism and mechanical rationality is the subject of the following chapter, it suffices here to note that this is an application of the future-oriented revolution legitimacy of the proletariat: in locating itself as the teleological end-point of the organic unfolding of history, revolutionary action is legitimated as a means of clearing any inorganic obstacles. For Schmitt, revolutionary intervention is equally inorganic as he does not share a Marxist conception of history; rather, his argument is that Bolsheviks see revolutionary violence as justified as a means of accelerating 'historical development' towards a utopian future, and against whatever illegitimate barriers stand against the direction of history. As he puts it, 'He who stands on the side of coming things is allowed to topple that which is already falling.'[51] In *Der Begriff des Politischen*, Schmitt noted that 'the antithesis of proletariat and bourgeoisie, formulated by Marx, which south to concentrate all conflicts of world history into a single, last conflict against *the last enemy of humanity*.'[52] Against this last enemy of humanity, all types of violence become justified.

For Schmitt, a central aspect of Marxist ideology was its mobilization and weaponization of historical narratives to depict its success as inevitable, guaranteed by the laws of history. As he argued, 'Marxism – and with it, the entire official credo of Communism – is a philosophy of history at the highest level; to such an extent that every opponent sees himself compelled to reflect on his own historical situation and his own concept of history.'[53] Particularly in relation to the Revolutions of 1848, Schmitt saw that 'in the consciousness of continuity there is a significant superiority and even a monopoly of communist authors above other historians, who fail to find their way with the events of 1848 and through this incompetency lose their right to create a picture of the contemporary moment.'[54] A monopoly on historical interpretation bestowed upon Marxism a type of secularized, 'historical legitimacy' and a 'right to violence' for the furthering of their own cause.[55] Indeed, for Schmitt, 'all communist

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[50] Schmitt *Die Diktatur*, p. xvi. See Volker Neumann, *Carl Schmitt als Jurist*, p. 37. 'Ein mechanisches Hindernis, durch das der organischen Entwicklung der Weg verbaut wird und mit ebenso mechanischen und äußerlichen Mitteln beseitigt werden muss.'

[51] Schmitt *Die Diktatur*, p. xvi. 'Wer auf der Seite der kommenden Dinge steht, darf das, was fällt, auch noch stoßen.'

[52] Schmitt, *Der Begriff des Politischen: Synoptische Darstellung*, p. 224. 'Die durch Karl Marx formulierte Antithese von Bourgeois und Proletarier, die alle Kämpfe der Weltgeschichte in einem einzigen, letzten Kampf gegen den letzten Feind der Menschheit zu konzentrieren sucht.' Emphasis added.

[53] Carl Schmitt 'Die Einheit der Welt,' in Schmitt, *Frieden oder Pazifismus*, 841-871, p. 846. 'Der Marxismus – und mit ihm das ganze offizielle Credo des Kommunismus – ist Geschichtsphilosophie im höchsten Grade; zu einem solchen Grade, daß jeder Gegner sich gezwungen sieht, sich auf seine eigene geschichtliche Situation und sein eigenes Geschichtsbild zu besinnen.'

[54] Carl Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation*, p. 86. 'In dem Bewußtsein der Kontinuität steckt eine bedeutende Überlegenheit und sogar ein Monopol der kommunistischen Autoren über die andern Geschichtsschreiber, die sich mit den Ereignissen von 1848 nicht zurechtfinden und durch diese Unfähigkeit das Recht verliergen, ein Bild der Gegenwart zu geben.' Repeated on p. 108.

[55] Schmitt, *Donoso Cortés*, p. 112. 'die geschichtliche Legitimität'; 'das Recht zur Gewalt.'

plans, beginning with the five year plan' presented a vision of a better future and pointed toward a 'dialectical path of history' that would 'lead to the unity of the world.'[56] Although it had its roots in 1848, this process was intensified during the Revolution of 1917: 'Since the Russian Revolution of 1917, Soviet state power has stood in the service of a universal convergence of the political unity of the world and of human kind.'[57] As such, Marxism in its various ideological articulations pointed to a different form of world de-politicization than their Western counterparts, but nevertheless a type of de-politicization. This construction of a historical narrative was, in a parallel to Schmitt's commentary on Vitoria, a type of 'over-painting [*Übermalungen*]' which 'must be cleared away.'[58] Instead, Schmitt sought a 'true' diagnosis of the events of 1848 and their meaning for the contemporary moment, an interpretation he found in Donoso Cortés:

> Against the reigning optimism, [Cortés] saw that train lines and the telegraph entail a centralizing and leveling dictatorship . . . The optimistic illusion consists in the connection between the progress of technology and the progress of freedom and the moral perfection of mankind, which are connected into a unified concept of progress.[59]

The optimistic illusions – and delusions – of socialism and liberalism saw a future state complete with the perfection of man, if only every last barrier to progress could be removed; for Schmitt, this faith in progress, *Fortschrittsglaube*, was nothing other than a justification for violence and a confused description of technology as an emancipatory force.

Writing in a retrospective 1978 publication 'The Legal World Revolution,' Schmitt noted, following the Spanish communist partisan and later party leader, Santiago Carrillo, that 'Lenin and Trotsky's more violent methods of illegal revolution of October 1917 are today out-dated.'[60] Instead, one should practice a form of legal revolution, working through the mechanisms of the state to achieve the same purposes.[61] Indeed, this was the point, Schmitt claimed, of the underworld criminal Mackie Messer in Bertolt Brecht's *Die Dreigroschenro-*

56 Schmitt 'Die Einheit der Welt,' p. 848.

57 Carl Schmitt, 'Die legale Weltrevolution,' p. 925. 'Seit der russischen Revolution vom Oktober 1917 steht die sowjetstaatliche Macht im Dienst einer universalen Annäherung an die politische Einheit der Wekt und des Menschengeschlechts.'

58 Schmitt, *Donoso Cortés*, p. 102. '

59 Schmitt, *Donoso Cortés*, p. 104. 'Daß Eisenbahn und Telegraph eine zentralisierende, alles applanierende Diktatur mit sich bringen, hat er im Gegensatz zu dem herrschenden Optimismus mit aller Klarheit sofort gesehen . . . Die optimistische Illusion beruhte darauf, daß sie den Fortschritt der Technik mit dem Fortschritt der Freiheit und der moralischen Vervollkommnung der Menschheit du einem einheitlichen Fortschrittsbegriff verband.' Schmitt repeats verbatim sections of this argument in 'Die Einheit der Welt,' p. 847.

60 On Santiago Carrillo, see Paul Preston, *The Last Stalinist: The Life of Santiago Carrillo* (London: William Collins, 2014). Schmitt owned a copy of Carrillo's 1977 monograph, *'Eurocomunismo' y estado*. See NRW 265-28801 with marginalia.

61 Schmitt, *Frieden oder Pazifismus*, p. 920. 'Daß die gewaltsameren Methoden der illegalen Revolution Lenins und Trotzkis vom Oktober 1917 heute veraltet sind.'

man: ‘Work must be legal. Here ends legality as a gangster parole.’[62] The life of a gangster: this was the ultimate conclusion of Lenin’s two-fold revolutionary strategy.

5.2 Socialism as a ‘*Nomos*’?

Schmitt’s *Der Nomos der Erde* (1950), concerned primarily with the historical development of the law of nations, concludes with a section provocatively titled ‘The Question of a New Nomos of the Earth.’ The question remains effectively unanswered: although Schmitt is clear that the League of Nations failed to establish a new nomos, his historical narrative effectively ends – with some minor exceptions – before the outbreak of World War II. However, writing in *Glossarium* on August 20, 1948, Schmitt negated the question, explaining that ‘Berlin lies, as the bird flies, between New York and Moscow. On this path, West meets East at that point. But these paths do not result in localization and order, and *to demonstrate this is precisely the meaning of my Nomos of the Earth*.’ [63] In denying the existence of a new ‘localization and order,’ Schmitt was denying the existence of a new nomos. As he explained, ‘this word [nomos] . . . is most suitable to raise the fundamental process of unifying order and localization to consciousness.’[64] This journal entry is significant for four reasons: first, while the published text of *Der Nomos der Erde* focuses on the interwar period, it shows that the object of his analysis extended into the postwar period; second, this entry effectively denies that the postwar period had established a new nomos of the earth, but was rather a continuation of ‘nihilism’ in international law following the dissolution of the jus publicum europaeum; third, in so far as Schmitt directly and explicitly stated the meaning of his own text, this claim ought to be taken seriously as an interpretive framework; and fourth, it places Eastern Marxism on par with Western Liberalism, embodied in Moscow and New York respectively, as a potential contender of the new Nomos of the Earth, challenging the almost exclusive focus on Schmitt’s commentary on the Western hemisphere in secondary literature.[65] This in turn raises a series of further questions: first, to what extent does Marxism

[62] Schmitt, ‘Das Problem der Legalität,’ p. 450. Compare his use of the text in chapter 3 on natural law. ‘Die Arbeit muß legal sein. Hier endet die Legalität als Gangsterparole.’ This is a slight misquotation: Brecht’s original text was ‘Man muss legal arbeiten.’

[63] Schmitt, *Glossarium*, p. 145. Emphasis added. ‘Also Berlin liegt in der Luftlinie zwischen New York und Moskau; auf dieser Luftlinie treffen sich dort der Westen und der Osten. Aber diese Linien ergeben keine Ortung und keine Ordnung, und das zu zeigen ist ja gerade der Sinn meines Nomos der Erde.’

[64] Schmitt, *Nomos der Erde*, pp. 13, 36. Cf. Hooker, *Carl Schmitt’s International Thought*, p. 22. ‘Dieses Wort . . . ist am besten geeignet, den grundlegenden, Ortung und Ordnung in sich vereinigenden Vorgang zum Bewußtsein zu bringen.’

[65] See Louiza Odysseos and Fabio Petito, ‘Introducing the International Theory of Carl Schmitt: International Law, International Relations, and the Present Global Predicament(s),’ *Leiden Journal of International Law*

qualify as a unique 'nomos' according to Schmitt's use of the concept? Second, why would neither East nor West form a 'localization and order,' and what significance would this carry with it within Schmitt's broader conceptual framework?

Schmitt's consideration of Marxism as a nomos begins not at the international level but rather at the domestic. In secondary literature, Schmitt's concept of 'nomos' has almost exclusively been treated as relating to international law and politics. For example, Gary Ulmen has argued that nomos 'was grounded in European public law, as distinguished from domestic or constitutional law,'[66] and William Hooker characterized 'nomos [as describing] the fundamental territorial ordering of the world.'[67] Likewise, Oliver Simons read nomos as providing 'an apt tool for comprehending the changing international system.'[68] Such interpretations run contrary to Schmitt's own stated understand, however, as he himself makes clear that there is a 'constitutional-theoretical side of the Nomos-Problem' which is revealed when 'the most important function of the state consists in the distribution or the redistribution of the social product [*Sozialprodukt*].'[69] Already in *Nomos der Erde*, Schmitt had hinted at the domestic side of the equation, noting that 'land appropriation is for us towards the exterior (in relation to other peoples) and the interior (for the land and property order within a state) the original type [*Ur-Typus*] of a constitutive legal process.'[70] Thus, not only is there a second component to the concept of nomos which has been frequently overlooked in scholarly literature, but it is this very component which would be central for Schmitt's interpretation of socialism. Moreover, the domestic constitutional side of the nomos question could be articulated in relation to the social state. 'Before the social product can be divided, it [the state] must "*take*,"' and it is in precisely the relation between taking and dividing that Schmitt sees the Marxist concept of the state. As he explains, 'the state as the great distributor is simultaneously the great taker. It takes that which is to be distributed, in part through taxation and revenue collection, part through confiscation through the disenfranchisement of certain inhabitants of his territory, or certain men, whom he declares outside of the law or is

19 (2006), 1-7, p. 2.; Thalin Zarmanian, 'Carl Schmitt and the Problem of Legal Order: From Domestic to International,' *Leiden Journal of International Law* 19 (2006), 41-67.

[66] Gary Ulmen, 'Translator's Introduction,' in Carl Schmitt, *The Nomos of the Earth*, p. 10.

[67] *Hooker, Carl Schmitt's International Thought*, p. 22.

[68] Oliver Simons, 'Carl Schmitt's Spatial Rhetoric,' in *The Oxford Handbook of Carl Schmtt*, p. 777.

[69] Carl Schmitt, 'Nehmen, Teilen, Weiden,' in *Verfassungsrechtliche Aufsätze* (Berlin: Duncker & Humblot, 2003 [1958]), p. 503. 'Sozialprodukt' is generally translated as the 'national product,' but I have chosen the more literal translation, as this maintains the wordplay in Schmitt's analysis. 'Eine verfassungstheoretische Seite des Nomos-Problems . . . die wichtigste Funktion des Staates in der Verteilung oder Umverteilung des Sozialprodukts besteht.'

[70] Schmitt, *Der Nomos der Erde*, pp. 17-18. 'So ist die Landnahme für uns nach Außen (gegenüber anderen Völkern) und nach Innen (für die Boden- und Eigentumsordnung innerhalb eines landes) der Ur-Typus eines konstituierenden Rechtsvorganges.'

secretly treated as such.'[71]

The state as a 'taker' and a 'distributor' fits within Schmitt's tripartite definition of his concept of nomos as taking, dividing, and using [*Nutzen*], three categories which Schmitt asserts are present in 'all stadiums of human co-existence,' and form, in some combination, the core of all political ideologies.[72] The form of taking [*Nehmen*] is typically an act of land-appropriation such as the discovery of America as a 'constitutive process in the law of nations' lasting from 1492 to 1890.[73] For Schmitt, this act of original appropriation is always a concrete, historical instance and not a hypothetical or thought construct, thereby asserting the fundamentally political origins of the legal order.[74] On the basis of this first appropriation, 'the continuity of a constitution is recognizable as long as recourse to this first appropriation is apparent and recognized.'[75] This discussion of land appropriation most closely mirrors the discussion of nomos presented in *Der Nomos der Erde*, though as shown above, taxation and expropriation are equally forms of 'taking.' In its second definition, nomos means the process of 'dividing and distributing [*Teilen und Verteilen*].'[76] Schmitt is here referring to the distribution of private property, whether that is physical land or commodities, like 'the car, that a worker in the United States of America has standing outside his door.'[77] The third meaning, *Weiden*, or producing, is a form of 'productive labor' both in an agricultural sense of pasturing land, as well as an industrial, capitalist sense. Taken together, Schmitt's introduction of these three elements shifts the focus of his concept of nomos from the bracketing of war and the historical development of the law of nations to domestic, social, and economic questions. Furthermore, it is precisely the combination of these three definitions that Schmitt uses to characterize both liberalism and Marxism.

In addition to the conceptual division of nomos, Schmitt constructs a historical narrative

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[71] Schmitt, *Glossarium*, p. 313. 'Der Staat als der große Verteiler ist zugleich der große Nehmer. Er nimmt das zu Verteilende teils im Wege der Besteuerung und Abgabenerhebung, teils durch Konfiskationen im Wege der Entrechtung bestimmter Einwohner seines Gebietes oder bestimmter Menschen, die er für hors la loi erklärt oder unter den Händen einfach so behandelt.'

[72] Schmitt, 'Nehmen, Teilen, Weiden,' p. 492. 'In jedem Stadium menschlichen Zusammenlebens.' On this text, see Minca and Rowan, *On Schmitt and Space*, pp. 218-221; and Reinhard Mehring, 'Macht im Recht: Carl Schmitts Rechtsbegriff in seiner Entwicklung,' *Der Staat* 43(1) (2004), 1-22, p. 18.

[73] See Schmitt, *Nomos der Erde*, pp. 48-52, 120. On the narrative of dissolution following the Berlin Conference of 1885, see pp. 200-212.

[74] Schmitt, *Nomos der Erde*, p. 17.

[75] Schmitt, 'Nehmen, Teilen, Weiden,' p. 502. 'Die Kontinuität einer Verfassung ist so lange erkennbar, wie der Regreß auf diese erste Nahme erkennbar und anerkannt ist.'

[76] Schmitt, 'Nehmen, Teilen, Weiden,' p. 491. Schmitt uses 'Distribution' as his own translation for *Verteilung*. In German these two terms – dividing and distributing – are etymologically linked with the same root, which unfortunately cannot be precisely mirrored in English.

[77] Schmitt, 'Nehmen, Teilen, Weiden,' p. 491. 'Das Auto, das ein Arbeiter in den Vereinigten Staaten von Amerika vor seiner Tür stehen hat.'

of the shifting relation between these three elements. 'Up until the Industrial Revolution of the 18th century in Europe,' he claims, 'the order and sequence was clearly based on some appropriation as an obvious precondition and basis for further dividing and producing.'[78] Thus, land appropriation provided the 'radical title,' both establishing an 'inside' and 'outside' to the political unit, as well as establishing private property – a right to 'mine and thine.'[79] Thus, for Schmitt, from the biblical narrative of the conquest and annexation of Canaan, through to Hobbes, Locke and Kant, the sequence had always remained the same, even if the original act of 'appropriation' was at times forgotten in popular memory: first take, then divide, and then produce.

The historical sequence of *Nehmen*, *Teilen* and *Weiden* changed with the rise of liberalism, occurring concurrently with the Industrial Revolution: distribution [*Teilen*] was only considered after production [*Weiden*]. Echoing his invocation of Donoso Cortés discussed in the previous section, Schmitt notes that for liberalism, 'progress and economic freedom consist in the forces of production becoming free and thereby ushering in such an increase in production and mass of consumption goods that appropriation ceases and even division no longer forms a problem.'[80] Further appropriation would seem 'in a economic sense irrational,' as the high level of production and economic activity would raise the standard of living 'by itself,' obviating the need to consider questions of just distribution of property. In turn, technological advancement would act as an accelerant, leading to 'immeasurable increases in production.'[81] Thus, liberalism represented an inversion of the typical sequence of nomos as *nehmen*, *teilen*, *weiden* as it is fundamentally a question of '*weiden*,' of production, and subordinates both appropriation and division.

Socialism is thus the reaction to liberalism's attempt to pursue a higher standard of living through production while simultaneously ignoring questions of distribution: socialism 'is at its core a question of the correct division and distribution, and socialism is therefore above all a doctrine of *re-distribution* [*Neu-Verteilen*].'[82] The emphasis on re-distribution can take

[78] Schmitt, 'Nehmen, Teilen, Weiden,' pp. 492-3. 'Bis zur industriellen Revolution des europäischen 18. Jahrhunderts beruhte die Ordnung und Reihenfolge eindeutig darauf, daß irgendein Nehmen als selbtverständliche Voraussetzung und Grundlage für das weitere Teilen und Produzieren anerkannt war.'

[79] Schmitt, *Nomos der Erde*, p. 17; Schmitt, 'Nehmen, Teilen, Weiden,' p. 493.

[80] Schmitt, 'Nehmen, Teilen, Weiden,' pp. 495-496. 'Fortschritt und wirtschaftliche Freiheit bestehen darin, daß die Produktionskräfte frei werden und daß dadurch von selbst eine solche Steigerung der Produktion und der Masse der Konsumgüter eintritt, daß das Nehmen aufhört und sogar das Teilen kein selbstständiges Problem mehr bedeutet.'

[81] Schmitt, 'Nehmen, Teilen, Weiden,' p. 496. See as well section two, 'Technology, Utopia and Annihilation' of the following chapter. 'Zu einer unabsehbaren Steigerung der Produktion.'

[82] Schmitt, 'Nehmen, Teilen, Weiden,' p. 496. The exception to this the utopian socialist Chales Fourier, who still believes in the liberating potential of technology, as discussed in the following chapter. 'Sie ist in ihrem Kern eine Frage der richtigen Teilung und Verteilung, und der Sozialismus ist dementsprechend vor allem

on two separate forms, with the 'moralists' such as Proudhon on the one hand, and the dialectical materialists on the other. For Proudhon, the 'elevation of the producer over the consumer' justifies the act of appropriation of the 'mere consumer.' Thus, 'appropriation is a consequence and corollary of just division and distribution.'[83] In contrast, Marx's dialectical materialism mobilizes a historical argument that the 'bourgeois social order [is] a situationally repugnant distribution ... which *in the end* sublates and destroys itself.' [84] For Schmitt, however, appropriation still takes on a central role within Marxist theory in the concept of the 'expropriation of the expropriator.'[85] Despite any protestations to the contrary, 'appropriation as the precondition for a new division does not cease. If the essence consists in the precedence of taking before dividing and producing, then such a doctrine of expropriating of the expropriator is a manifestly strongest imperialism, because it is the most modern.'[86] If liberalism could be characterized as the fantasy of ever greater production solving issues of distribution and the necessity of further appropriation, then Marxism equally presented the fantasy of redistribution rendering appropriation obsolete. For Schmitt, both ideologies had failed to acknowledge the fundamental role of appropriation as an originary act: whether land appropriation or the 'expropriation of the expropriators,' neither ideology could escape the primacy of appropriation. Indeed, appropriation was a historical and constitutive act that grounded the subsequent legal order – both liberalism and socialism, in denying the fact of appropriation, attempted to cut off or eliminate these very historical roots.

In the postwar years, Schmitt became increasingly fixated on a conception of the state, according to which 'the most important function of the state consists in the distribution and redistribution of the social product [*Sozialprodukt*].'[87] Indeed, for Schmitt, he who distributes and redistributes occupies a position of 'genuine political power.'[88] As he would rephrase the problematic in *Glossarium*, 'the basic evil according to Marx, the cause of all 'self-alienation,' is the division of labor. Socialism does not sublate this; it only organizes the divided [*die Geteilten*] into a social unity of distribution [*Verteilung*]. That is much more horrific. Who

eine Lehre vom Neu-Verteilen.'

[83] Schmitt, 'Nehmen, Teilen, Weiden,' p. 498.

[84] Schmitt, 'Nehmen, Teilen, Weiden,' p. 498. '[die] bürgerliche[] Gesllschaftsordnung als eine ... Situationswidrigkeit der Verteilung ... die sich schließlich selber aufhebt und zerstört.' Emphasis added.

[85] Schmitt, 'Nehmen, Teilen, Weiden,' p. 499.

[86] Schmitt, 'Nehmen, Teilen, Weiden,' p. 500. 'Das Nehmen als Voraussetzung des neuen Teilens hört eben doch nicht auf. Wenn das Wesen des Imperialismus im Vorrang des Nehmens vor dem Teilen und dem Produzieren liegt, dann ist eine solche Doktrin der Expropriation der Expropriateure offenbar stärkster, weil modernster Imperialismus.

[87] Schmitt, 'Nehmen, Teilen, Weiden,' p. 503. 'sobald die wichtigste Funktion des Staates in der Verteilung oder Umverteilung des Sozialprodukts besteht.'

[88] Schmitt, 'Nehmen, Teilen, Weiden,' p. 503.

protects us from the distributors [*Verteilern*]?'[89] For Schmitt, although this problem was perhaps most clearly articulated in Marxist theory of expropriation, it was common to all political parties that appeal to the 'concept of the social.'[90] Further, 'Lenin and his Russian comrades were already great valorizers, and with valorization begins the surplus value, and with the surplus value [begins] high politics and everything else is only a result of time.'[91]

Describing Marxism as a 'manifestly strongest imperialism' and 'its most modern form' represents a reformulation of the critique of capitalism as the highest form of imperialism, as articulated by Lenin and his contemporaries.[92] Indeed, if Lenin had posited monopoly capitalism as the highest form of imperialism, Schmitt argued that socialism was its strongest. Thus, he points to Marx's citation of Goethe's *Lehrgespräch* in *Das Kapital* on 'the so-called primitive accumulation':

> Teacher: Remember, o Child, where these gifts are from. They cannot be from you alone.
> Child: Oy, I have everything from Papa!
> Teacher: And where does he have it from?
> Child: From Grandpa.
> Teacher: No, come on! Where did your grandpa get it from?
> Child: He *took* it.[93]

This anecdote takes on a double function in Schmitt's narrative. In Marx's theory, it characterizes the act of primitive accumulation [*ursprüngliche Akkumulation*], an original act of appropriating public property to account for the origins of capitalism. This is, in Marx's characterization, a violent affair: 'and the history of this, their expropriation, is written in the annals of mankind in letters of blood and fire.'[94] This originary act of appropriation is what would have allowed for the accumulation of capital and and increased levels of production, thereby insisting that *nehmen* was 'the point of departure the capitalist mode of production'[95]

[89] Schmitt, *Glossarium*, p. 48. 'Das Grundübel nach Marx, Ursache aller 'Selbstentfremdung,' ist die Arbeitsteliung. Der Sozialismus hebt sie nicht auf; er organisiert nur die Geteilten zu einer sozialen Einheit der Verteilung. Das ist noch viel schauerlicher. Wer schützt uns dann vor den Verteilern?'

[90] Schmitt, 'Nehmen, Teilen, Weiden,' p. 496.

[91] Schmitt, *Glossarium*, p. 350. 'Lenin und seine russische Genossen waren schon Verwerter und mit der Verwertung beginnt der Mehrwert, und mit dem Mehrwert die hohe Politik und alles Weitere ist nur noch Folge der Zeit.'

[92] Vladimir Lenin, *Imperialism: The Highest Stage of Capitalism (London: Penguin, 2010.*

[93] Quoted in Schmitt, 'Nehmen, Teilen, Weiden,' p. 503. Original in J. W. von Goethe, *Gedichte Bd. II*, ed. Curt Nuch; in Friedrich Engels, 'Deutscher Sozialismus in Versen und Prosa,' in Karl Marx and Friedrich Engels, *Werke Bd. IV* (Berlin: Dietz Verlag, 1990), pp. 233-234. 'Lehrer: Bedenk, o Kind, woher sind diese Gaben? Kind: Ei, alles hab' ich vom Papa. L: Und der, woher hat's der? K: Vom Großpapa. L: Nicht doch! Woher hat's denn der Großpapa bekommen? K: Der hat's genommen.'

[94] Karl Marx, *Das Kapital Bd. I*, pp. 743, 770. 'Und die Geschichte dieser ihrer Expropriation ist in die Annalen der Menschheit eingeschrieben mit Zügen von Blut und Feuer.'

[95] Karl Marx, *Das Kapital Bd. I*, p. 741.

On this point, Schmitt's characterization of the liberal nomos agrees with agrees with Marx's characterization of capitalism. However, Schmitt simultaneously holds that the exact same argument can be made in regards to the preliminary stage of socialization, the 'expropriation of the expropriators' – this expropriation would likewise be a type of taking that would allow for re-distribution of property. In both cases, an originary act of appropriation was unavoidable, and yet both sought to diminish its significance or conceal it entirely.

By obscuring the foundational act of appropriation, Schmitt argues that both liberalism and Marxism represent forms of political utopianism. As he explains it, 'the utopian society – that of the liberal free market, as well as of the Marxist future state,' yet another linkage of the two ideologies, in both forms the utopian society 'allegedly no longer takes, but rather only produces, and this in infinite quantities, such that dividing and distributing are no longer a problem. There ceases therefore not only appropriating [*Nehmen*], but also dividing and distributing [*Teilen und Verteilen*], and there will only be production [*produziert*], only creation.' Such faith in production as a means of overcoming any necessity of redistribution, and of creating without an originary act of appropriation represents the equivalent to divine creation: 'the great God-appropriation is then complete. Human society is thus God, who only gives and does not need to take, because he can create everything from nothing.'[96] In this sense, Schmitt returns once again to Jules Michelet and *Vaterherrschaft*, arguing that liberalism and marxism had displaced God as father, instead imbuing humans with the act of creation – and to an infinite degree.

Schmitt's attack against Marxism in the postwar period therefore forms a parallel to the rhetorical strategy he adopted against liberalism in *The Concept of the Political*: liberalism, through its 'neutralizations and its depoliticizations,' attempted to negate the friend/enemy distinction and replace it with economic competition.[97] However, in claiming to transcend the political, Schmitt argued that economic competition can become intensified to the point that it triggers political conflict, thus leading back to a friend/enemy distinction. Furthermore, neutralizations were themselves political and in fact escalated the intensity of conflict because the enemy was now considered a 'disturber of the peace *hors-la-loi*,' and as such, deserved

[96] Schmitt, *Glossarium* p. 313, additional commentary p. 366. See the exchange between Schmitt and Kojève in *Schmittiana VI*, pp. 100-101. In the afterword to '*Nehmen, Teilen, Weiden*,' Schmitt repeats this argument as a response to Alexandre Kojève: 'No man can give without having taken. Only a God, who created the world out of nothing, can give without taking, and even he in the frame of the world he created out of nothing.' In *Glossarium*, Schmitt claims that only a Jewish author can recognize this, citing both Kojève and Taubes. 'Dann ist der große Gott-Nahme vollendet. Dann ist nämlich die menschliche Gesellschaft der Gott, der nur gibt und nichts zu nehmen braucht, weil er alles aus dem Nichts erschafft.'

[97] Schmitt, *Der Begriff des Politischen, Synoptische Ausgabe*, pp. 82, 188. See Heiner Bielefeldt, 'Carl Schmitt's Critique of Liberalism: Systematic Reconstruction and Counter-Criticism,' in *Carl Schmitt's Critique of Liberalism*, 23-26, p. 25.

the fate of a crusade against him.[98] Thus, in the last analysis, 'this supposedly non-political and apparently anti-political system serves either the existing friend/enemy distinction, or it leads to a new one, and thus it does not escape the consequence of the political.'[99] In the same way, Marxism attempted to circumvent the original aspect of appropriation through a just division of goods. However, Schmitt's argument remained that in so doing, Marxism merely denied that the expropriation had occurred; it was equally trapped into the sequential order of taking, dividing, and producing. As a result, Marxism could not offer a *new* nomos of the earth.

5.3 Electrifying the Earth

In one of the many diary entries defending his decision to refuse de-Nazification, dated 1. October, 1949, Schmitt closed the entry with a sudden turn to Lenin, writing that

> Lenin's ideal was the electrified earth. Our superiority to Lenin and Leninism consists in:
>
> 1. We really do not have any ideals (he believed that he had none and that was his superiority).
> 2. If we had ideals, our ideal would rather be a de-electrified earth rather than an electrified one. Because we love our earth.[100]

Schmitt does not define this 'we' in the same passage; however, over the course of the previous week, Schmitt identifies and discusses in the first person plural as 'we poor jurists' [*wir armen Juristen*], noting that 'it is now on us to ensure that jurisprudence does not die a common death with the myth of the legislator.'[101] Schmitt's identification as a jurist trying to prevent the death of jurisprudence corresponds to the opening warning in *Der Nomos der Erde* of an existential question facing the discipline of law, the discipline to which he dedicates his

[98] Schmitt, *Der Begriff des Politischen, Synoptische Ausgabe*, p. 240. Cf. Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff.*

[99] Schmitt, *Der Begriff des Politischen, Synoptische Ausgabe*, pp. 240-242. See Ellen Kennedy, 'Hostis not Inimicus,' in *Carl Schmitt's Critique of Liberalism*, 92-108, p. 95. 'Dieses angeblich unpolitische und scheinbar sogar antipolitische System dient entweder bestehenden oder führt zu neuen Freund- und Feindgruppierungen und vermag der Konsequenz des Politischen nicht zu entrinnen'

[100] Schmitt, *Glossarium*, p. 207. The same identification is in Schmitt 'Nehmen, Teilen, Weiden,' p. 495. Underline in the original. 'Lenins Ideal war die elektrifizierte Erde. Unsere Überlegenheit über Lenin und den Leninismus beruht darauf, daß 1. wir wirklich keine Ideale haben (er behaupte nämlich, er selber hätte keine und das sei seine Überlegenheit.) 2. Wenn wir Ideale hätten, unser Ideal eher eine entelektrifizierte Erde wäre als eine elektrifizierte. Denn wir lieben unsere Erde.'

[101] Schmitt, *Glossarium*, pp. 205-6. 'An uns ist es jetzt, dafür zu sorgen, daß die Rechtswissenschaft nicht mit dem Mythos vom Legislateur zusammen eines gemeinsamen Todes stirbt.'

text.[102] It would seem, then, that the future of jurisprudence depended upon a rejection of the electrified earth, a reference to the incursion of the corrupting influence of technology, machines, and industrialization. The phrase ‘electrified earth’ has telling roots in Schmitt’s earlier work. The first time that Schmitt used the phrase ‘electrified earth’ to describe Lenin’s thought came 26 years earlier in his *Römischer Katholizismus und politische Form* (1923), in which he argues that ‘the world view of the modern industrialist resembles that of the industrial proletariat like one twin resembles the other.’ The argument is simply that both liberalism and socialism ascribe to the same ideal of a mechanical, technological progress. For Schmitt, the two ideologies ‘fight merely over the correct method of electrification. The American financier and the Russian Bolshevist find themselves together in the fight for economic thought, that is, in the fight against politicians and jurists.’[103] As such, Schmitt had already characterized Bolshevism as a challenge to jurists and jurisprudence more broadly using the metaphor of electrification to represent technical rationality.

As Günter Maschke, Schmitt’s editor, has shown, Schmitt’s attribution to Lenin of the phrase ‘electrified earth’ is a paraphrase of the latter’s speech before the 8th Soviet Congress, 22-29. December, 1920: ‘Communism – that is Soviet power plus electrification for the whole country!’ For Maschke, Schmitt’s mis-quotation was in fact intentional, as it reflected Lenin’s true aim of, in Maschke’s words, ‘a de-politicized, peaceful world unity’ beyond the current territorial borders of the Soviet Union.[104] The accuracy of the quotation, however, is less significant than the point Schmitt intended for it to reveal: that despite all of the ideological differences between Marxism and Western liberalism,

> ‘Eastern and Western faith meet on this point [of electrification]. That’s not remarkable as they both arise from the same source, the philosophy of history of the 18th and 19th centuries. East and West are today separated through an iron curtain, but the waves and corpuscles of a common philosophy of history penetrate the curtain and establish a form of invisible, and exceedingly dangerous communication.’[105]

Indeed, that there was a unified position between liberalism and socialism had been Schmitt’s position since the proclamation of the Weimar Republic and Hugo Preuß’ explanation that Germany was faced with a choice between ‘either Wilson or Lenin, either the democracy that developed out of the French and American revolutions or the brutal form of Russian

[102] Schmitt, *der Nomos der Erde*, pp. 5-6.

[103] Carl Schmitt, *Römischer Katholizismus und politische Form* (Stuttgart: Klett-Cotta, 2016 [1923]), p. 22.

[104] Günter Maschke, ‘Notize zu “Die Einheit der Welt,”’ in Schmitt, *Frieden oder Pazifismus*, p. 861.

[105] Carl Schmitt, ‘Die Einheit der Welt,’ in Schmitt, *Frieden oder Pazifismus*, p. 847. ‘Ostlicher und westlicher Glaube treffen sich in diesem Punkt. Das ist nicht erstaunlich, entstammen sie doch beide der gleichen Quelle, der Geschichtsphilosophie des 18. und 19. Jahrhunderts. Ost und West sind heute getrennt durch einen Eisernen Vorhang, aber die Wellen und Korpuskeln einer gemeinsamen Geschichtsphilosophie durchdringen den Vorhang und begründen eine Art unsichtbare, äußerst gefährliche Kommunikation.’

fanaticism. One must choose.'[106] While Preuß had opted for Western liberalism, for Schmitt, the decision was itself a false one: Wilson and Lenin presented two sides of the same coin, with more in common than what separated them.[107] Nearly thirty years later and Schmitt held the same view – the binary choice between the two powers of the Cold War was equally false.

This chapter has contributed a new perspective on Schmitt's mobilization of Lenin's political thought as evidence of broad shifts in political and legal concepts, particularly within the categories of legality and legitimacy. As such, it sought to move beyond the content offered in *Der Begriff des Politischen* and *Theorie des Partisanen*,[108] as well as in a possible overlap with Bolshevism in a 'theory of acts of sovereignty,' an overlap that allowed for Schmitt's thought to be labeled by one scholar as 'a right-wing Leninism.'[109] Furthermore, this chapter has also pointed to another direction of Schmitt's radical critique of technology as expounded by John McCormick's *Carl Schmitt's Critique of Liberalism*. For McCormick, 'Socialism, domestically manifested in revolutionary and reformist parties and externally manifested in the Soviet Union, is the political ideology that clearly most rouses Schmitt's ire.' And yet, he justifies his book's focus on liberalism by arguing that 'the fact that to Schmitt's mind liberalism as a hegemonic political theory . . . weakened Germany's position vis-à-vis socialism internally and internationally indeed made liberalism an unavoidable object of his critical attention.' Indeed, for McCormick, 'Schmitt explicitly equates liberalism . . . with this neutralizing technological force.'[110] While Schmitt does view liberalism as a form of technology, the preceding sections of this chapter have shown that Schmitt applies the same critique to Marxist theory, what he describes as a 'religion of technical progress.'[111] Indeed, the electrification of Marxism extends further in Schmitt's analysis: it was Karl Marx

[106]Quoted in Kennedy, *Constitutional Failure*, p. 111. See also Martin Loughlin, 'Editorial Introduction to Carl Schmitt, "Hugo Preuss": His Concept of the State and His Position in German State Theory,"' *History of Political Thought* 38(3) (2017), 345-370; Peter Stirk, 'Hugo Preuss, German Political Thought and the Weimar Constitution,' *History of Political Thought* 13(3) (2002), 497-516.

[107]See Heinrich Meier, *Die Lehre Carl Schmitts*, p. 226. On this point, Schmitt was joined by many members of the 'conservative revolution.' See Joshua Smeltzer, "'Germany's Salvation": Carl Schmitt's Teleological History of the Second Reich,' *History of European Ideas* (2018), 1-16. See as well Carl Schmitt, 'Der bürgerliche Rechtsstaat,' in *Staat, Großraum, Nomos*, 44-54, p. 44.

[108]Gabriella Slomp, 'The Theory of the Partisan: Carl Schmitt's Neglected Legacy,' *History of Political Thought* 26(3) (2005), 502-519; Peter Uwe Hohendahl, *Perilous Futures* (Ithaca: Cornell University Press, 2018), 117-142.

[109]See Tracy Strong, *Politics without Vision* (Chicago: University of Chicago, 2012), pp. 218, 242. Strong emphasizes Lenin's theory of the party at the expense of what Schmitt himself actually picked up on: the weaponization of legality.

[110]McCormick, *Carl Schmitt's Critique of Liberalism*, pp. 5-6.

[111]Schmitt, *Der Begriff des Politischen: Synoptische Darstellung*, p. 249. See Neumann, *Carl Schmitt als Jurist*, pp. 93-94. 'Religion des technischen Fortschritts.'

'who realized, that technology was the true revolutionary principle.'[112] As a result, Schmitt's critique of technological rationality was not a means to the end of attacking liberalism, but rather itself a principle focus of his critique – liberalism, to use a clinical metaphor, is a symptom, not the disease itself. In the following chapter, I will solidify this interpretation by turning to another angle of Schmitt's critique of technology and its manifestation in both liberalism and Marxism – his critique of utopia and utopianism as a form of annihilation.

[112]Schmitt, *Römischer Katholizismus und politische Form*, p. 57.

Chapter 6

Technology, Law, and Annihilation: Carl Schmitt's Critique of Utopianism

In the foreword to his postwar history of the law of nations, *The Nomos of the Earth*, Carl Schmitt warned of an 'existential question confronting jurisprudence itself, which today is being crushed between theology and technology, if it does not assert the ground of its own existence in a correctly recognized and fruitful historicity.'[1] On the one hand, the resurgence of just war theories from the Spanish Scholastics through contemporaries such as James Brown Scott threatened to breach the cordon sanitaire established by Alberico Gentili's famous dictum, '*Silete, theologi, in munere alieno!*'[2] On the other, in his *Ex Captivitate Salus*, Schmitt's reflections from captivity in the period of 1945-47 and published concurrently with *The Nomos of the Earth*, Schmitt lamented the emergence of yet another command to silence, that of a 'completely profane technicity' aimed at jurists themselves: '*Silete jurisconsulti!*'[3] While the period of the *jus publicum Europaeum* had begun by creating a space for the law of nations without recourse to theology as its basis, technicity now threatened to erode its defining principles. Indeed, as Schmitt insisted, 'I am the last, deliberate representative of the *jus publicum Europaeum* . . . and I experience its end like Benito Cereno experienced the

[1] Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 2011 [1950]), p. 6: 'Es betrifft die Existenzfrage der Rechtswissenschaft selbst, die heute zwischen Theologie und Technik zerrieben wird, wenn sie nicht in einer richtig erkannten und fruchtbar gewordenen Geschichtlichkeit den Boden ihres eigenen Daseins behauptet.'

[2] Schmitt, *Der Nomos der Erde*, repeated on pp. 92, 96, 212; repeated in Carl Schmitt, *Ex Captivitate Salus* (Berlin: Duncker & Humblot, 2002 [1950]), pp. 70, 75.

[3] Schmitt, *Ex Captivitate Salus*, p. 75. Schmitt makes a permutation of the same claim in *Der Nomos der Erde*, writing in regards to jurists at the end of the 19th century, 'sileamus in munere alieno,' p. 212. Use of the first person plural would suggest that Schmitt feels that, in addition to the jurists at the end of the 19th century, he himself has received a command to silence.'restlos profanen Technizität.'

journey of the pirate ship.'[4]

This chapter focuses on the existential threat posed by technicity for jurisprudence according to Schmitt by reconstructing his esoteric warning in light of his notebook entries from the period in *Glossarium*. Going further than *The Nomos of the Earth*, *Glossarium* establishes utopianism as deeply imbricated in his broader critique of technicity. Indeed, over the course of three years, Schmitt would return time and time again to the writings of Thomas More, Aldous Huxley, Samuel Butler, and even Thomas Hobbes to elucidate his unique concept of utopia. The first section of this paper excavates Schmit's theory of the origins and conceptual history of utopia within the context of two 'de-localizations [*Ent-Ortungen*]'[5] in space and human nature; the paper then moves to establish the neglected links in Schmitt's work between history, technology, and utopia to reveal Schmitt's understanding of utopia as the annihilation and the negation of law. In so doing, this chapter reconstructs a conservative critique of utopian thought independent of liberal critics,[6] and provides a new prism through which to view Schmitt's postwar writings on the law of nations and international politics.

6.1 Two Phases of De-Localization

First published posthumously in 1991, Schmitt's *Glossarium* contains unmediated and often unrevised insight into his postwar thought in the form of notebook entries.[7] These entries are composed as fragments, brief reflections on topics ranging from his criticism of denazification to the law of armed occupation following World War II. Controversial in its publication for exposing Schmitt's unmitigated anti-Semitism even after the collapse of the 'Third Reich,'[8] it

[4] Schmitt, *Ex Captivitate Salus*, p. 75. For Schmitt's identification with Melville's Benito Cereno, see Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall* (Munich: C.H. Beck, 2009), pp. 408-410; William Scheuermann, *Carl Schmitt: The End of Law* (Oxford: Rowman, 1999), pp. 177-178; Thomas Beebee, 'Carl Schmitt's Myth of Benito Cereno,' *Seminar: A Journal of Germanic Studies* 42(2) (2006), 114-134; Nicolaus Sombart, *Jugend in Berlin* (Frankfurt: Fischer, 1994), pp. 268-270. 'Ich bin der letzte, bewusste Vertreter des jus publicum Europaeum . . . und erfahre sein Ende so, wie Benito Cereno die Fahrt des Piratenschiffs erfuhr.'

[5] This chapter retains Schmitt's idiosyncratic orthography of 'Ent-Ortung' in 'de-localization' to mimic his emphasis on the negation of localization, the significance of which is central to the following section.

[6] For example, Karl Popper, *The Open Society and Its Enemies* (London: Routledge, 2011).

[7] This dissertation uses the 2015 expanded, corrected, and commentated edition produced under the editorship of Gerd Giesler and Martin Tilke. The 1991 edition under Eberhard von Medem only published the first three books of *Glossarium*, stopping in 1951, and a list of discrepancies and errors compiled by Piet Tommissen ran twenty pages. See Gerd Giesler and Martin Tilke, 'Einleitung' in *Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958* (Berlin: Duncker & Humblot, 2015), p. vii.

[8] Raphael Gross, 'The "True Enemy": Antisemitism in Carl Schmitt's Life and Work,' in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2016), p. 106; Richard Faber, 'Es Gibt einen antijüdischen Affekt! Über Carl Schmitts "Glossarium,"' *Zeitschrift für Religions- und Geistesgeschichte* 46(1) (1994), 70-73.

is within *Glossarium* that Schmitt develops his understanding of utopia, a concept important enough for him to include in the index he kept of his own notebooks.[9]

In Schmitt's first entry discussing utopia, dated November 11, 1947, he asks 'What is specific about utopia (in comparison to all possible types of ideal constructions, pipe dreams, and fanciful programs)?' The answer he provides is simply that 'Thomas More, who invented the word, stood in the great spatial revolution of his age and from there found the leap into the non-space, the u-topos, of which a Greek of antiquity would not at all have been capable.'[10] Thus, for Schmitt, the first step to understanding utopian thought is to historicize its conceptual origins and place it within the context of a 'great spatial revolution' taking place in England at the time of More's writing.

Schmitt had already posited the existence of a world-historical spatial revolution in *Land and Sea*, posing the question, 'A spatial revolution – what is this?' before answering that it occurs whenever 'the structure of the concept of space itself is altered.'[11] A result of this revolution is that it affects 'a change in the concepts of space encompassing all the levels and domains of human existence.'[12] The central historical process playing out during More's lifetime was, according to Schmitt, the discovery of the Americas.[13] It was only as a result of this discovery that the ability to conceive of nothing or nothingness became possible. Here, Schmitt takes the publication of More's *Utopia* as reflecting this historical development, in the very fact that both 'a fantastically new and negative spatial conception and a word like "utopia" were possible,' thereby '[announcing] already the abysmal spatial revolution.'[14]

In Schmitt's world history, it was the British who first made the transition to a maritime existence: 'Only in first becoming an island in a new, heretofore unknown sense did England

[9] Carl Schmitt, *Glossarium. Aufzeichnungen aus den Jahren 1947 bis 1958* (Berlin: Duncker & Humblot, 2015), p. 398.

[10] Schmitt, *Glossarium*, p. 35: 'Was ist das Spezifische der Utopie (gegenüber allen möglichen Arten von Idealkonstruktionen, Wunschträumen und phantastischen Programmen? Es liegt daran, daß Thomas Morus, der das Wort Utopia erfunden hat, in der großen Raumrevolution seines Zeitalters stand und von dort den Absprung in den Nicht-Raum, den U-topos fand, dessen ein Grieche der Antike gar nicht fähig gewesen wäre.'

[11] Carl Schmitt, *Land und Meer: Eine weltgeschichtliche Betrachtung* (Stuttgart: Klett-Cotta, 2018 [1942]), pp. 55, 57. 'Was ist das, eine Raumrevolution? . . . Die Struktur des Raumbegriffes selber ändert.' Carl Schmitt, *Land and Sea*, trans. Samuel Garrett Zeitlin (Candor: Telos Press, 2015), pp. 47, 49; see also Claudio Minca and Rory Rowan, *On Schmitt and Space* (London: Routledge, 2016), pp. 189-192.

[12] Schmitt, *Land und Meer*, p. 68. 'Eine alle Stufen und Gebiete menschlichen Daseins erfassende Veränderung der Raumbegriffe.'

[13] Carl Schmitt, 'Die Raumrevolution. Durch den totalen Krieg zu einem totalen Frieden (1940),' in *Staat, Großraum, Nomos*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 388-391, p. 388.

[14] Carl Schmitt, 'Staatliche Souveränität und freies Meer (1941),' in *Staat, Großraum, Nomos*, 401-429, p. 410: 'eine phantastisch neue, negative Raumvorstellung und ein Wort wie 'Utopie' möglich war, kündete sich schon die abgründige Raumrevolution an.'

complete the British maritime appropriation of the world oceans and complete the first phase of the planetary spatial revolution.'[15] The British transition into a maritime existence was, 'at its core, something special and singular,' and the 'process cannot be compared with any previous event in world history.'[16] This unique spatial revolution was epitomized by the later Prime Minister Benjamin Disraeli's suggestion in *Tancred: Or, the New Crusade* (1847) to move the Queen and her court from London to Delhi, a proposal that Schmitt claims could only be taken seriously by a fully 'uprooted and de-territorialized' people.[17] Through this vision of a de-territorialized state, 'the great fish, the Leviathan, could set itself in motion and seek out other oceans.'[18]

This narrative locates the concept of utopia as emerging in England at the same moment that England itself transitions into the maritime existence of 'an island,' unbound to any concrete location. The emergence of utopia as a concept is inseparable from this spatial revolution, and it is no coincidence that an Englishman, Thomas More, coined the concept, just as it is no coincidence that the Leviathan – the 'great whale' – emerges in the same period.[19] Thus, an initial way to frame the conceptual origins utopian thought would be as the epiphenomenal representation of spatial changes occurring in England – More's turning away from the topos to a u-topos is representative of a broader world-historical spatial revolution which allowed for 'humans ... [to] conceive of an empty space.'[20]

However, Schmitt immediately cautions against a straightforward reading of More's

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[15] Schmitt, *Land und Meer*, p. 90. 'Erst indem es in einem neuen, bisher unbekannten Sinne zur Insel wurde, hat es die britische Seenahme der Weltozeane vollendet und den damaligen ersten Abschnitt der planetarischen Raumrevolution gewonnen.' See also Oliver Simons, 'Carl Schmitt's Spatial Rhetoric,' in *The Oxford Handbook of Carl Schmitt*, p. 780. Schmitt uses Britain and England interchangeably in his text.

[16] Carl Schmitt, 'Das Meer gegen das Land (1941),' in *Staat, Großraum, Nomos*, 395-400, pp. 395-396. Schmitt's insistence on the singularity and uniqueness of this development directly contradicts William Hooker's repeated assertion of a spatial revolution occurring in both England and the Netherlands concurrently. This position is further rebuked in Schmitt's claim that 'Not France and not Holland ... achieved the great and planetary decision for the world ocean, but rather England.' See Carl Schmitt, 'Staatliche Souveränität und freies Meer,' in *Staat, Großraum, Nomos*, ed. Günter Maschke (Berlin: Duncker & Humblot, 1995), 401-422, p. 409; Carl Schmitt, *Dialogues on Space and Power*, trans. Samuel Garrett Zeitlin (Cambridge: Polity), p. 71; William Hooker, *Carl Schmitt's International Thought* (Cambridge: Cambridge University Press, 2010), pp. 70, 89, 90.

[17] On Schmitt and Disraeli, particularly as an anti-Semitic trope, see Samuel Garrett Zeitlin, 'Propaganda and Critique: An Introduction to Land and Sea,' in Schmitt, *Land and Sea*, pp. xliv, xlviii; Schmitt, *Land and Sea*, p. 82n129. See also Schmitt, 'Das Meer gegen das Land,' p. 397; Reinhard Mehring, *Carl Schmitt: Aufstieg und Fall* (Munich: C.H. Beck, 2009), p. 427.

[18] Schmitt, *Land und Meer*, 95. 'Der große Fisch, der Leviathan, konnte sich in Bewegung setzen und andere Ozeane aufsuchen.' Of course, over forty years before *Tancred*'s publication, the Portuguese court had moved to Brazil; however, Schmitt glosses over this challenge to his narrative.

[19] Carl Schmitt, *Leviathan in der Staatslehre des Thomas Hobbes* (Cologne: Hohenheim Verlag, 1982 [1938]), p. 34.

[20] Schmitt, *Land und Meer*, p. 66. 'Die Menschen können sich ... einen leeren Raum vorstellen.'

'abstention from topos' as 'only the first, superficial negative aspect of the matter.'[21] Instead, the concept of utopia transcends its historical origins and negates the core of Schmitt's understanding of law and its relationship to space: 'this abstention from space and place, this de-localization, is an abstraction from the relationship – eternal for a man of antiquity – of localization and order.' As Schmitt summarizes his position, 'every order is a concretely localized law. Law is law only at the right location, on this side of the "line"!'[22] Utopian 'de-localization' thereby functions as the negation of law by denying law's connection to the earth – to follow Schmitt's logic, there can be no concrete law without a corresponding localization,[23] and because utopianism de-localizes, it is therefore not possible for there to be law in a utopia.[24]

From this interpretation of utopia as the negation of law, Schmitt proceeds to reject depictions of 'utopia as any desired fantasy or ideal construction,' as the term was used by contemporaries such as Ernst Bloch.[25] Instead, utopia is a 'system of thought based on the premise of sublating space and of delocalization, on the no-longer-spatially-boundedness of human coexistence.'[26] In attempting to sublate spatial distinctions, utopianism 'makes man master over nature' and is characterized by 'the "receding of natural barriers."'[27] This last line is a direct reference to the work of Georg Lukács and his reading of capitalism in *History and Class Consciousness*, cited in *Glossarium* just three days later.[28] As Lukács notes, 'the uniqueness of capitalism is that it sublates all "natural barriers" and transforms the

[21] Schmitt, *Glossarium*, p. 35; cf. Schmitt, 'Staatliche Souveränität und freies Meer,' p. 410. 'das Absehen von topos ... das ist nur das erste, oberflächliche Negative der Sache.'

[22] Schmitt, *Glossarium*, p. 35. The last sentence is a play on the word 'Recht' as both law and right. For the significance of 'the line' in Schmitt's history of the law of nations, see Schmitt, *Der Nomos der Erde*, pp. 54-69; and Carl Schmitt, 'Die letzte globale Linie (1943),' in *Staat, Großraum, Nomos*, pp. 440-448. 'Dieses Absehen von Raum und Ort, diese Ent-Ortung, ist ein Abstrahieren von dem (für einen antiken Menschen ewigen) Zusammenhang von Ortung und Ordnung. Jede Ordnung ist konkret geortetes Recht. Recht ist Recht nur am rechten Ort, diesseits der "Linie"!'

[23] Carl Schmitt, *Über die drei Arten rechtswissenschaftlichen Denkens* (Berlin: Duncker & Humblot, 2006 [1934]), pp. 13n3, 19-20.

[24] Cf. Lyman Tower Sargent, 'Authority & Utopia: Utopianism in Political Thought,' *Polity* 14 (1982), 565-84, p. 582; Lyman Tower Sargent, "A Note on the Other Side of Human Nature," *Political Theory* 3 (1975), 88-97, pp. 91-92. For Schmitt, the mere presence of judges and a legal code does not constitute law as a concrete order.

[25] For a highly influential contemporary use of utopianism as 'social dreaming' and 'fantasy,' see Ernst Bloch, *Das Prinzip Hoffnung* (Berlin: Aufbau-Verlag, 1955), pp. 13-27.

[26] Schmitt, *Glossarium*, p. 35: 'Ich sehe also in der Utopie nicht eine beliebige Phantastik oder Idealkonstruktion, sondern ein auf der Voraussetzung der Raumaufhebung und Entortung, auf der Nicht-mehr-Raumgebundenheit menschlichen Zusammenlebens errichtetes Gedankensystem.'

[27] Schmitt, *Glossarium*, p. 35: 'das "Zurückweichen der Naturschranke"'; 'den Menschen zum Herrn der Natur macht.'

[28] Schmitt, *Glossarium*, p. 37. Schmitt had previously used this quotation from Lukács in Schmitt, 'Das Zeitalter der Neutralisierungen und Entpolitisierungen,' in *Der Begriff des Politischen. Synoptische Ausgabe*, p. 257.

totality of human relations to one another into purely social ones.'[29] For Schmitt, however, it is not capitalism as such that operates as the motor of this recession, but rather the process – initiated in England and reflected in More's *Utopia* – of rationalization and technicity that he asserts would still exist under socialism.[30] As Schmitt writes immediately after quoting Lukács, 'Man creates for itself its own world according to rational considerations. With increasing technology, utopia escalates in this sense to ever increasingly audacious dimensions.'[31] Indeed, at the margins of his notebook, Schmitt wrote 'There is only utopian socialism (everything else is National-Socialism); *the scientificity of Socialism is precisely that which is utopian*.'[32] Utopian thought in this first sense is the human attempt to displace natural barriers and transform itself through de-territorialization into an abstract humanity encompassing the entire world, a process which Schmitt had already vehemently rejected as a form of deception.[33]

However, the impulse to overcome natural barriers in a spatial sense represents only the first phase of utopian thought in Schmitt's history. The second phase, in contrast, is characterized by the attempt to overcome the final natural barrier: utopian displacement turns its gaze inwards to human nature.[34] This second phase is the construction of 'a community made out of systematically standardized humans.'[35] While the first phase was captured in More's *Utopia*, the second phase was encapsulated in Aldous Huxley's *Brave New World*, 'the great significance of which is based on the systematically altered nature of man by man.'[36] In Schmitt's characterization, *Brave New World* represents the 'total planning, which also brings in the natural characteristics of human *Physis* and *Psyche* into its de-localization.'[37] Indeed, Huxley and More are the representatives of two distinct phases

[29] Georg Lukács, *Geschichte und Klassenbewusstsein* (Neuwied: Hermann Luchterhand Verlag, 1968), p. 166. The exact phrase is repeated twice at pp. 409, 413: 'Die Einzigartigkeit des Kapitalismus besteht gerade darin, daß er alle "Naturschranken" aufhebt und die Gesamtheit der Beziehungen der Menschen zueinander in rein gesellschaftliche verwandelt.'

[30] Cf. John McCormick, 'Transcending Weber's Categories of Modernity? The Early Lukács and Schmitt on the Rationalization Thesis,' *New German Critique* 75 (1998), 133-77, pp. 139, 151.

[31] Schmitt, *Glossarium*, p. 35: 'Der Mensch schafft sich nach rationale Gesichtspunkten seine eigene Welt. Mit steigender Technik steigt daher die Utopie in diesem Sinne in immer kühnere Dimensionen.'

[32] Schmitt, *Glossarium*, p. 35: 'Es gibt nur utopischen Sozialismus (jeder andere ist National-Sozialismus); die Wissenschaftlichkeit des Sozialismus ist gerade das Utopische).' Emphasis added.

[33] Carl Schmitt, *Der Begriff des Politischen* (Berlin: Duncker & Humblot, 1963 [1932]), pp. 36-37, 55.

[34] In contrast, see Sargent's reading of More that 'More argued that a much better life could be developed without changing the basic nature of the people' in Lyman Tower Sargent, 'A Note on the Other Side of Human Nature in the Utopian Novel,' *Political Theory* 3:1 (1975), 88-97, p. 91.

[35] Schmitt, *Glossarium*, p. 35: 'ein aus dem planmäßig genormten Menschen zusammengesetztes Gemeinwesen.' A variation of the same claim is made on page 89.

[36] Schmitt, *Glossarium*, p. 35: 'dessen große Bedeutung auf dieser von Menschen planmäßig veränderten Natur des Menschen beruht.'

[37] Schmitt, *Glossarium*, p. 36: 'die totale Planung, die auch die natürlichen Gegebenheiten der menschlichen

in the development of utopian thought: 'It is the monstrous, oppressive, practically and theoretically overwhelmingly logical New World of Aldous Huxley, which today defines the concept of utopia and, at the same time, that of the New World.' Thus, Huxley can be seen as the culmination of the process unleashed by More: 'Thomas More brings the de-localization, at the start of the geographical spatial revolution; Huxley the de-humanization, at the start of the technical spatial revolution.'[38] As Schmitt would rephrase it less than a month later, 'An end to utopia! Aldous Huxley closes the epoch of utopia, Thomas More opened it. He can now be canonized, while Huxley *(a nation) can only be condemned out of her own mouth*.' [39]

Schmitt's characterization of *Brave New World* as the culmination of utopian thought is crucial in three ways. First, it collapses the supposed distinction between utopian and dystopian texts by placing Huxley's novel within the same historical process as More's *Utopia* – de-localization turned from the external world to 'the last natural barrier, human nature itself.'[40] Schmitt's point in doing so is that, far from producing ideal states, all utopias are in fact horrifying.[41] It is not that utopian projects devolved and became dystopian, but rather that all utopias – in so far as they contain the essential element of de-localization – are representative of that 'bad place.' Nor is it, following Lyman Sargent's recent scholarship, 'this desire to bring reality into accord with unrealistic goals that gives utopians a bad name,' but rather the act of displacement inherent in utopia itself.[42] Second, by identifying this second phase with Huxley, and including '(a nation)' beside his name, Schmitt reinforces his association of the decisive moments in the history of utopian thought with the English, a supposedly de-territorialized people. In Schmitt's world historical narrative, these two phases are in fact connected, as 'the industrial revolution transformed the children of the sea born from the element of the sea into machine builders and machine operators.'[43] Third, and most

Physis und Psyche in ihre Ent-Ortung einbezieht.' The same description is in Schmitt, *Ex Captivitate Salus*, p. 86.

[38] Schmitt, *Glossarium*, p. 36: '[es ist] die ungeheuerliche, erdrückende, praktisch und theoretisch überwältigend folgerichtige Neue Welt von Aldous Huxley, die heute den Begriff der Utopie und zugleich den der Neuen Welt bestimmt. Thomas Morus bringt die Ent-Ortung, bei Beginn der geographischen Raumrevolution; Huxley die Ent-Menschung, bei Beginn der technischen Raumrevolution.'

[39] Schmitt, *Glossarium*, p. 45. The italicized portions are written in English in Schmitt's text. In addition, over the word 'nation' he has written 'people' and over 'her' he has written 'its': 'Schluß mit der Utopie! Aldous Huxley schließt die Epoche der Utopie ab, Thomas Morus hat sie eröffnet. Er kann jetzt heilig gesprochen werden, während Huxley (A nation), can only be condemned out of her own mouth.'

[40] Schmitt, *Glossarium*, p. 35: 'Die letzte Naturschranke, die Natur des Menschen selbst.'

[41] While Schmitt appears in Gregory Claeys' recent work on the concept of dystopia, he is not considered as having commented at any length on the concept. Gregory Claeys, *Dystopia: A Natural History* (Oxford: Oxford University Press, 2016), pp. 18, 29, 121, 261, 497-498; for the definition of dystopia as 'bad place,' see Sargent, 'The Three Faces of Utopianism Revisited,' p. 5; Sargent, 'Authority and Utopia,' p. 565.

[42] Sargent, 'Authority and Utopia,' p. 583.

[43] Schmitt, *Land und Meer*, p. 99; Carl Schmitt, *Dialogues on Power and Space*, trans. Samuel Garrett Zeitlin (Cambridge: Polity, 2015), pp. 67-68, 72. 'Die industrielle Revolution verwandelte die aus dem Element des

significantly, utopian thought in this second phase is linked to technology as its means of realization. Technology is what allows man to change his own nature and plan a world made out of 'systematically standardized humans.' Indeed, Huxley's *Brave New World* represents the moment in which 'the factory' – the embodiment of rationality and technicity – can be re-imagined as producing not just commodities but humans themselves as a standardized commodity.[44] Utopian thought therefore reaches is culmination in the exact moment that humans are stripped of their humanity.

6.2 Technology, Utopia, and Annihilation

Beyond presenting a conceptual history of utopia in the form of the dual de-localization of space and human nature, *Glossarium* contains a vehement rejection of utopian thought in all of its contemporary iterations. This rejection is based on Schmitt's broader understanding of utopia as synonymous with annihilation [*Vernichtung*] literally read as the act of transforming something into nothing. Using the work of both Karl Marx and Samuel Butler, Schmitt grounds his polemic against utopian thought in a broader criticism of technology and rationalization prevalent in German conservatism since the Weimar Republic.[45] Technology, utopia and annihilation thus form the key conceptual framework for Schmitt's criticism.

The relationship between technology, utopia, and annihilation is best articulated in Schmitt's understanding of Marxism and its conception of history. It is perhaps surprising, however, that Schmitt turned to the German-Jewish literary modernist, Alfred Döblin, for his understanding of the relationship between history and utopia before turning to their role in Marxism. Schmitt quotes Döblin's text of 1948, titled 'The German Utopia of 1933 and Literature,' in which he characterizes utopia as 'a human plan to suspend history, in order to jump out of history and to achieve a stable perfection.'[46] Of course, in referencing

Meeres geborenen Kinder der See in Maschinenbauer und Maschinenbediener.'

[44] Carl Schmitt, *Theodor Däublers 'Nordlicht'* (Berlin: Duncker & Humblot, 1991 [1916]), pp. 59, 66; on technology in Schmitt's earlier works, see Duncan Kelly, *The State of the Political: Conceptions of Politics and the State in the Thought of Max Weber, Carl Schmitt, and Franz Neumann* (Oxford: Oxford University Press, 2003), pp. 212-215; McCormick, 'Transcending Weber's Categories of Modernity?', p. 142.

[45] Peter Fritzsche, 'Nazi Modernism,' *Modernism/Modernity* 3(1) (1996), 1-22, pp. 13-4. Herf dates technological pessimism to the period following the defeat of National Socialism, but this largely ignores Schmitt's texts prior to 1933, cited above. See Jeffrey Herf, 'Belated Pessimism: Technology and Twentieth-Century German Conservative Intellectuals,' in *Technology, Pessimism, and Postmodernism*, eds. Yaron Ezrahi et al. (Dordrecht: Kluwer Academic Publishers, 1993).

[46] Quoted in Schmitt, *Glossarium*, p. 63. Original text in Alfred Döblin, 'Die deutsche Utopie von 1933 und die deutsche Literatur,' in *Schriften zu Ästhetik, Poetik und Literatur* (Olten: Walter-Verlag, 1989), 367-403, p. 368: 'Es ist ein menschlicher Plan, die Geschichte zu unterbrechen, um aus der Geschichte herauszuspringen und zu einer stabilen Vollkommenheit zu gelangen.'

'The German Utopia of 1933,' Döblin was not writing about Marxism but rather National Socialism. For Döblin, National Socialism constituted a utopian ideology and maintained a 'utopian core' in so far as 'a fantasy is conjured up, which ought to triumph over this confused, historical reality. One constructs a condition that should build the culmination, the height, the conclusion of this historical process.'[47] After 1933, this fantasy took the form of a biological utopia – the 'Third Reich' – as the supposedly stable, teleological endpoint to German history.[48] But in so doing, National Socialist ideology was in fact trying to escape – or 'jump out of,' as Döblin phrases it – 'historical reality' through the assertion of a völkisch 'fantasy.'

Schmitt takes Döblin's interpretation of National Socialism as attempting to jump out of history and turns it on its head as it applies to Marxism. Echoing Marx's famous eleventh thesis on Feuerbach – 'The philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it'[49] – Schmitt claims that Marx's 'scientific nature signifies the pretense of *changing the world without leaping out of history*.'[50] Instead, Marx's vision relies on machines for its enactment within the confines of a materialist conception of history: 'the machine is the tool dedicated to utopia, the weapon of plan fulfillment.'[51] Thus, in contrast to Döblin's interpretation of National Socialism, it was not necessary to suspend history to bring about a utopia in Marx's understanding, since machines themselves posed the promise of overcoming mankind: 'the machine differentiates itself from the tool in the sense that it in itself transcends the human who holds a tool, the manual laborer. Therein, in this transcendence, lies already utopia.'[52]

Furthermore, Schmitt's characterization of Marx as a utopian theorist mobilizes Marx's own objections to utopian socialism in order to convict him of being a utopian theorist himself. In the *Communist Manifesto*, Marx and Engels label Henri de Saint-Simon, Charles

[47] Döblin, 'Die deutsche Utopie von 1933,' p. 368: 'Und da wird ... ein Traumbild hineingezaubert, das über diese konfuse, geschichtliche Realität triumphieren soll. Man konstruiert einen Zustand, der die Kulmination, die Blüte, den Abschluß des historischen Prozesses bilden soll.'

[48] Frank-Lothar Kroll, *Utopie als Ideologie. Geschichtsdenken und politisches Handeln im Dritten Reich* (Paderborn: Ferdinand Schöningh, 1998); Joshua Smeltzer, "'Germany's Salvation": Carl Schmitt's Teleological History of the Second Reich,' *History of European Ideas* 44, no. 5 (2018): 590-604.

[49] Karl Marx, 'Theses on Feuerbach,' *The Marx-Engels Reader*, ed. Robert Tucker (New York: W.W. Norton, 1978), p. 145. Emphasis in original.

[50] Schmitt, *Glossarium*, p. 63: "'Wissenschaftlichkeit" [bedeutet] den Anspruch, die Welt zu verändern, ohne aus der Geschichte herauszuspringen.' Emphasis added.

[51] Schmitt, *Glossarium*, p. 63: 'Die Maschine ist das der Utopie zugeordnete Werkzeug, die Waffe der Planverwirklichung.' For Schmitt's previous equation of technology as 'always only an instrument and a weapon,' see Schmitt, 'Das Zeitalter der Neutralisierungen,' p. 254.

[52] Schmitt, *Glossarium*, p. 63: 'Die Maschine unterscheidet sich vom Werkzeug dadurch, daß sie in sich selbst den das Werkzeug handhabenden Menschen, den Handwerker, transzendiert. Darin, in dieser Transzendenz, liegt schon die Utopie.'

Fourier, and Robert Owen as utopian socialists and castigate them for attempting to 'deaden the class struggle and to reconcile the class antagonisms.'[53] As Engels developed the line of attack in *Socialism: Utopian and Scientific*, utopian socialists attempted to solve social problems by recourse to reason – for them, 'socialism is the expression of the absolute truth, reason and justice, and has only to be discovered to conquer all the world by virtue of its own power.'[54] In Engels' eyes, however, this was nothing more than 'pure fantasy.'[55] In contrast to the naiveté of their utopian predecessors, Marx is hailed as being the first to deliver a 'scientific' socialism through 'two great discoveries': the theory of surplus value and the materialist conception of history.[56] Indeed, utopian socialist planning is rendered useless once one accepts a scientific view of history.[57] However, Schmitt weaponizes and deploys the claim to work within a materialist telos of history – articulated as a form of scientific socialism – against Marx as evidence of his own utopianism. As Schmitt would rephrase his critique in *The Tyranny of Values* (1960) – with a direct citation of Engels' text – 'today, science and utopia have long been reciprocally coordinated [*gleichgeschaltet*].'[58] The two concepts are in fact interlocked in Schmitt's critique of utopianism.

Schmitt extends his critique by arguing that annihilation functions as the hidden conceptual mechanism underlying utopian thought. While Marx hoped to change the world and usher in a utopian age through machines, Schmitt counters that machines can only change the world by first destroying it. This destruction takes the form of spatial de-localization, of removing spatial specificity and replacing it with abstract nothingness – annihilation. In the sentence immediately following his criticism of Marx, Schmitt pivots to the book of Revelations, asking 'what does Rev 21:1 mean: new earth; without sea? A utopia?'[59] Revelations 21:1 presents a description of the transformation of the world at the end of times: 'And I saw a new heaven and a new earth: for the first heaven and the first earth were passed away; and there was no more sea.' Only then is the Holy City, new Jerusalem, said to descend from heaven.

The annihilation intrinsic to utopian thought plays a pivotal role in Revelations as the

[53] Karl Marx and Friedrich Engels, 'The Manifest of the Communist Party,' in *The Marx-Engels Reader*, p. 499.

[54] Friedrich Engels, 'Socialism: Utopian and Scientific,' in *The Marx-Engels Reader*, p. 693.

[55] Engels, 'Socialism: Utopian and Scientific,' p. 687.

[56] Engels, 'Socialism: Utopian and Scientific,' p. 700.

[57] David Leopold, 'Socialism and (the Rejection of) Utopia,' *Journal of Political Ideologies* 12 (2007), 219-237, p. 233.

[58] Carl Schmitt, *Die Tyrannei der Werte* (Berlin: Duncker & Humblot, 2011 [1960/1967]), p. 20: 'Heute haben Wissenschaft und Utopie sich längst gegenseitig gleichgeschaltet.'

[59] Schmitt, *Glossarium*, p. 64. Schmitt uses the abbreviation for 'Apocalypse' instead of 'Revelations' in his text, following *die Theologische Realenzyklopädie*, Giesler and Tielke, 'Einleitung,' p. ix. The same verse is cited in Schmitt, *Dialogues*, p. 56: 'Was bedeutet Apk 21,1: neue Erde; ohne Meer? Eine Utopie?'

establishment of the Holy City only occurs after judgment, when disbelievers are said to be cast into lakes of fire. That pools of fire precede the Holy City is essential in Schmitt's reading, as fire is the element related to 'explosions' and 'the modern means of annihilation' in his theory of the four basic elements.[60] Indeed, Schmitt turns to a secularized version of Revelations 21:1 in his description of the detonation of explosives on Helgoland after World War II: 'What does the destruction of the island of Helgoland in 1947/48 signify? A piece of land was leveled to the sea, sunk into the sea . . . The first time in history. U-topia; transformation of a very strong localization into nothing. Annihilation.'[61] For Schmitt, the bombing of Helgoland demonstrated an interplay between annihilation as the end of history and technology as its means of fulfillment: technology was employed to bring about the end of history for the island. Furthermore, it was the British – the nation linked to both phases of de-localization in utopian thought in Schmitt's conceptual history – who engineered one of the largest non-nuclear explosions in history. Thus, Schmitt's reference to the bombing of Helgoland as creating a 'U-topia' establishes utopia and annihilation as two sides of the same coin: the bombing transformed Helgoland into a utopia, a no-place.

6.3 Enmity and Utopia

When Schmitt returns to the concept of utopia less than a month later, he begins once again with the interplay of utopia and the fantasy of stability found in Alfred Döblin's work: 'What is a utopia? The sublation of the infinite possibilities of mankind in a final realization; at first only thought, then realized. Because every thought of man is fulfilled.'[62] This time, however, Schmitt emphasizes a temporal aspect of utopia, claiming that utopianism closes off the potential for future change. This closing off is articulated in the opposition between the finite and the infinite in the temporal horizon of the future: 'The sin of utopia lies in the fact that the realization in the finite should sublate angst, which lies in the possibility of the infinite.'[63] Here, Schmitt turns to a central theme in the conceptual history of utopia, one that Reinhart Koselleck would echo in his analysis of Mercier and the 'temporalization of utopia' decades

[60] Carl Schmitt, 'Maritime Weltpolitik,' in *Staat, Großraum, Nomos*, 478-480, p. 479; Schmitt, *Land and Sea*, p. 91; Zeitlin, 'Propaganda and Critique,' p. lxviii.

[61] Schmitt, *Glossarium*, p. 64: 'Was bedeutet die Vernichtung der Insel Helgoland 1947/48? Ein Stück Land wird dem Meer gleich gemacht, ins Meer versenkt . . . Erstmalig in der Geschichte. U-topie; Verwandlung einer sehr starken Ortung ins Nichts. Vernichtung.'

[62] Schmitt, *Glossarium*, p. 71: 'Was ist eine Utopie? Die Aufhebung der unendlichen Möglichkeiten des Menschen in einer endlichen Realisierung; Erst nur gedacht, dann verwirklicht. Denn jeder Gedanke des Menschen geht in Erfüllung.'

[63] Schmitt, *Glossarium*, p. 71: 'Die Sünde der Utopie liegt darin, daß die Realisierung im Endlichen die Angst aufheben soll, die in der Möglichkeit des Unendlichen liegt.'

later,[64] writing 'utopia is the paradise that lies in the distant but still attainable future.'[65] However, unlike Koselleck's work, Schmitt's interpretation emphasizes the negating and destructive capacity of utopian thought. He writes,

> The capability to think of what is distant is becoming ever more slight. Therefore, the utopian of the nineteenth century must transition into positive scientificity and assert that paradise can already dawn tomorrow if we only quickly and radically eliminate and annihilate, completely eradicate the last barrier: capitalists, Jews, Jesuits or Hitler. Unfortunately, some always remain leftover.[66]

Schmitt statement is remarkable for two reasons. First, it insists on the negative element of utopian thought, on annihilation as its means of fulfillment. Schmitt's argument is that the promise of a utopian future can be used to justify the annihilation of any barrier preventing its fulfillment, including the annihilation of human life. Second, in placing both Jews and Hitler within the same list, Schmitt asserts an equivalence between the Holocaust and Stauffenberg's assassination attempt on Hitler, both of which Schmitt interprets as acts aimed at the realization of utopias.[67]

Crucially, Schmitt's interpretation of the utopian drive to annihilation extends beyond the annihilation of space, elucidated in his example of the bombing of Helgoland, to the annihilation of humans as the final barrier to utopian realization. As such, his theory of utopian annihilation corresponds to the two phases of de-localization given in his conceptual history. Indeed, it is only in the second phase that the increasing power of science, technology, and machines could be utilized in the present for the establishment of an imminent utopia through the elimination of enmity. But as Schmitt himself noted, the utopian impulse towards the complete annihilation of the enemy is impossible to fulfill, as new enemies and new wars will inevitably emerge. Quoting from Virgil, Schmitt notes '*erunt etiam altera bella*' – there will be other wars. As early as *The Concept of the Political*, Schmitt held that the complete neutralization of enmity was in fact a liberal deception; instead, there will always

[64] Reinhart Koselleck, 'Die Verzeitlichung der Utopie,' in *Zeitschichten* (Frankfurt: Suhrkamp, 2000), 131-149. That there would be similarities is not surprising. See Niklas Olsen, *History in the Plural* (New York: Berghahn, 2014).

[65] Schmitt, *Glossarium*, p. 71: 'Die Utopie ist das in der fernen, aber doch erreichbaren Zukunft liegende Paradies.'

[66] Schmitt, *Glossarium*, p. 71. That Schmitt wished to eliminate the influence of Jewish thought in jurisprudence and held a conference on 'Das Judentum in der Rechtswissenschaft' on October 3 & 4, 1936 remains unsaid. See Mehring, *Aufstieg und Fall*, pp. 372-378. 'Die Fähigkeit, in die Ferne zu denken, wird immer geringer. Deshalb muß der Utopist des 19. Jahrhunderts von der Utopie zur positive Wissenschaftlichkeit übergehen und behaupten, daß das Paradies morgen schon anbrechen kann, wenn wir nur schnell und radikal das letzte Hindernis – die Kapitalisten, die Juden, die Jesuiten oder Hitler – beseitigen und vernichten, restlos ausrotten. Leider bleiben immer einige Reste.'

[67] For Schmitt's criticism of Stauffenberg, see Schmitt, *Glossarium*, p. 178: 'So bleibt nur der a deo excitatus. Das war Stauffenberg nicht.'

be a new enemy once the previous enemy has been eradicated.[68] Complete security could only come after the elimination of enmity, but this is a conceptual impossibility in Schmitt's understanding, as it would mean a neutralization of the concept of the political.[69] Here, he asks 'what does Hobbes want: public tranquility and stability. However, he still knows: *complete security is not to be expected in this life*; therefore, we will try what is possible; these are the modest, not yet intoxicated utopians.'[70] Hobbes knows that complete security is impossible while nevertheless still desiring it.[71] Likewise, Thomas More is also revealed as a 'modest utopian,' in so far as he and Hobbes 'do *not yet* believe in global world peace.'[72]

Indeed, Schmitt claims that Thomas More's *Utopia* is in fact not utopian despite lending its name to the concept; instead, the text presents a eutopia, a claim Schmitt repeats in two consecutive entries. The conceptual distinction between *eu*topia and *u*topia turns on the role of machines in the construction of utopias: 'The machine is not a means of happiness, but rather of utopia. But with More, there appear no machines.'[73] Indeed, he continues by noting 'The Utopia of Thomas More is not yet a scientific Utopia; it is rather a Eutopia: "*More's Gay Genius*" was not capable of a Machine-Utopia.'[74] Without the presence of machines, More's text presents a eutopia; machines, in their destructive capacity, are thus the necessary means for the annihilation of space and enmity inherent in a *u*-topia.

Due to the destructive capacity of machines, Schmitt posits a fundamental tension between

[68] In his highly influential translation of *The Concept of the Political*, George Schwab has inserted the word 'utopian,' although Schmitt himself did not use the term. See Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996), p. 55.

[69] See Stephen Legg, 'Interwar Spatial Chaos: Imperialism, Internationalism and the League of Nations,' in *Spatiality, Sovereignty and Carl Schmitt: Geographies of the Nomos*, ed. Stephen Legg (London: Rutledge, 2011), 114.

[70] Schmitt, *Glossarium*, p. 71. The italicized text is in Latin in the original and 'plena' is underlined. Here, Schmitt is quoting from Augustine; he has previously used this line in the third edition of the Concept of the Political after Leo Strauss' criticism, indicating that he accepted Strauss' position. See Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* (Chicago: Chicago University Press, 1995), pp. 44-46. Also quoted in Heinrich Meier, *The Lesson of Carl Schmitt* (Chicago: Chicago University Press, 1998), p. 165. Additionally, while Jens Meierhenrich discusses this quote, he fails to locate it within Schmitt's criticism of utopianism. See Jens Meierhenrich, 'Fearing the Disorder of Things: The Development of Carl Schmitt's Institutional Theory, 1919-1942,' in *The Oxford Handbook of Carl Schmitt*, eds. Jens Meierhenrich and Oliver Simons (Oxford: Oxford University Press, 2016), p. 197. 'Was will Hobbes: Öffentliche Ruhe und Sicherheit; doch er weiß noch: plena securitas in hac vita non expectanda; versuchen wir also das Mögliche; das sind die bescheidenen, noch nicht berauschten Utopisten.'

[71] See Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue* (Chicago: Chicago University Press, 1995), pp. 44-46.

[72] Schmitt, *Glossarium*, p. 71: 'Sie glauben noch nicht an den globalen Weltfrieden.' Emphasis added.

[73] Schmitt, *Glossarium*, p. 71: 'Die Maschine ist nicht das Mittel des Glücks, sondern der Utopie. Aber bei Morus kommen doch noch keine Maschinen vor.'

[74] Schmitt, *Glossarium*, p. 72: 'Die Utopie des Thomas Morus ist noch keine wissenschaftliche Utopia; sie ist eher eine Eutopie: "More's gay genius" war keiner Maschinen-Utopie fähig.'

freedom and technology: 'The escape from freedom is *in concreto* nothing other than the escape into technology ... The way towards this freedom would be therefore the way out of technology.'[75] Schmitt identifies the path into this freedom as none other than Samuel Butler's *Erewhon*, a utopian novel set in a land where all machines invented in the previous 271 years were destroyed. Schmitt himself is struck by the significance of Butler's analysis, writing 'time and again the paramount position of Samuel Butler; how should one write the intellectual history of the 19th century without knowing him?' Indeed, Schmitt wonders, 'How could Ernst Jünger write *Der Arbeiter* without knowing him? The most superior treatment of the topic: technology and technocracy.'[76] The significance of Butler's critique for Schmitt's understanding is in questioning the relationship between man and machine: '*The servant glides by imperceptible approaches into the master. Is not machinery linked with animal life in an infinite variety of ways?* Belongs to the Lev.[iathan] as great machine.'[77]

Butler earns such high praise from Schmitt specifically for chapters 23-25 on 'The Book of the Machines,' originally published in three parts as 'Darwin among the Machines,' 'The Mechanical Creation,' and 'Lucubratio Ebria.' As Schmitt wrote to Ernst Jünger on May 5, 1948, 'Butler's letter of 1863 on "Darwin among the Machines" ... contains the essential concept.'[78] In these chapters, the narrator of *Erewhon* finally learns the reasoning behind the destruction of all machines in the land, namely that 'there is no security ... against the ultimate development of mechanical consciousness, in the fact of machines possessing little consciousness now.'[79] Indeed, central to the argument presented is that machines and humanity have become so intertwined that it is impossible to conceive of one without the other. As Butler writes in 'The Book of Machines':

> If all machines were to be annihilated at one moment ... and if all knowledge of mechanical laws were taken from him so that he could make no more machines ... we should become extinct in six weeks ... Man's very soul is due to the machines; it is a machine-made thing: he thinks as he thinks, and feels as he feels, through the work that machines have wrought upon him, and their existence is quite as much as sine qua non

[75] Schmitt, *Glossarium*, p. 101. On this theme in Schmitt's earlier thought, see John McCormick, 'Fear, Technology, and the State: Carl Schmitt, Leo Strauss, and the Revival of Hobbes in Weimar and National Socialist Germany,' *Political Theory* 22, no. 4 (1994), 619-652; John McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge University Press, 1997): 'Die Flucht vor der Freiheit ist in concreto nichts anderes als die Flucht in die Technik ... Der Weg in diese Freiheit wäre demnach der Weg aus der Technik.'

[76] Schmitt, *Glossarium*, p. 62. 'Wie konnte Ernst Jünger den "Arbeiter" schreiben ohne ihn zu kennen? Die überlegenste Behandlung des Themas: Technik und Technokratie.'

[77] Schmitt, *Glossarium*, p. 62. The italicized text is in English in the original. Cf. Schmitt, *Der Leviathan in der Staatslehre des Thomas Hobbes*; McCormick, 'Fear, Technology, and the State,' pp. 637, 639. 'Gehört zum Lev.[iathan] als große Maschine.'

[78] Ernst Jünger and Carl Schmitt, *Briefe 1930-1983*, ed. Helmuth Kiesel (Stuttgart: Klett-Cotta, 1999), p. 227.

[79] Samuel Butler, *Erewhon* (London: Penguin Books, 1970), p. 199.

for his, as his for theirs.[80]

In other words, the typical relationship between man and machine has been reversed – instead of machines being dependent on man, it is now man who is dependent on machines for his reproduction and sustenance. Indeed, the omnipresence of machines has annihilated human nature, transforming it into a 'machine-made thing' in the promise of establishing a scientific utopia. This was the utopian promise of technicity: the annihilation of human nature.

Moreover, Schmitt sees in the nineteenth century author an early prognosis of 'new criminalizations (elimination of enmity through the elimination of the distinction between enemy and criminal).' He writes, 'Samuel Butler Erewhon (1872, Ch XI on Some Erewhonian Trials): Misfortune is considered more or less criminal . . . The judge says then: it is not my business to justify the law. To be born to sick parents is an exceedingly peculiar crime for the Erewhonians.'[81] In this passage, Schmitt references the words of a system of justice that explicitly bases itself on an understanding of natural law. The same judge declares during sentencing, 'nature attaches a severe penalty to such offences, and human law must emphasize the decrees of nature' – thus being sick must be considered a crime.[82] As I have argued in the previous chapters, Schmitt would have been sympathetic to the critique of natural law; however, he is using the utopian text as a satire of a wider process of criminalization extending into the biological, 'about which we seldomly still dare to laugh after our experiences.'[83] Butler's depiction of the criminalization of sickness is merely the absurd endpoint to an impulse towards criminalization as another means of 'the elimination of enmity.'

In a letter to Wilhelm Grewe, the German international lawyer and diplomat, dated April 3, 1948, Schmitt explicitly links Butler's criminalization of illness to the criminalization of wars of aggression.[84] Schmitt's letter is framed as a commentary on Grewe's *Nuremberg as a Legal Question* (1947), which Schmitt lauded for performing a 'great, decisive methodological service' in maintaining a distinction between the criminalization of wars of aggression and other 'crimes of war' and 'crimes against humanity.'[85] For Schmitt, 'the problem of new

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[80] Butler, *Erewhon*, p. 207.

[81] Schmitt, *Glossarium*, pp. 57-58: 'Neue Kriminalisierungen (Abschaffung der Feindschaft durch Abschaffung der Unterscheidung von Feind und Verbrecher ... Von kranken Eltern geboren zu werden, ist ein ganz besonderes Verbrechen bei den Erewhonianern.'

[82] Butler, *Erewhon*, p. 113.

[83] Schmitt, *Glossarium*, p. 90: 'über die wir nach unseren Erfahrungen kaum noch zu lachen wagen.'

[84] Copied into Schmitt, *Glossarium*, pp. 89-91. On Grewe, see Bardo Fassbender, 'Stories of War and Peace: On Writing the History of International Law in the "Third Reich" and After,"' *European Journal of International Law* 13 (2002), 479-512; Jochen Frowein, 'Wilhelm G. Grewe' in *Staatsrechtlehrer des 20. Jahrhunderts* eds. Peter Häberle, Michael Kilian, & Heinrich Wolff (Berlin: De Gruyter, 2014), 790-797; Stephen Neff, 'Wilhelm Grewe. *The Epochs of International Law,*' *Journal of the History of International Law* 3(2) (2001), 252-254.

[85] Schmitt, *Glossarium*, p. 90. 'ein großes, entscheidendes methodologisches Verdienst.'

criminalizations and penalizations' had extended from 'the modern dissolution of criminal law into the annihilation of pests and those who disturb the peace, all the way to the biological criminalization of sickness in Samuel Butler's *Erewhon*.'[86] This letter to Grewe establishes Butler's *Erewhon* as both representing the endpoint of a process of criminalization as well as confirming Schmitt's claim that criminalization justifies the annihilation of those who break the law; in the law of nations, this meant that war was no longer fought between two enemies on the same level, but rather a discriminating war fought against an international criminal.[87]

6.4 Utopia, Nihilism, and the New Nomos of the Earth

The previous sections of this chapter have dealt with Schmitt as a private intellectual, writing within the confines of his 'asylum' in Plettenberg after his release from Nuremberg.[88] At the same time as he recorded his private reflections in *Glossarium*, Schmitt was also revising and expanding what would become his post-war magnum opus, *The Nomos of the Earth*, a project which he had started during the last years of the war.[89] While much of Schmitt's analysis of utopia and utopianism fell away in this public manuscript, traces of his characterization of utopia and its relation to technology and annihilation remained. However, in this text, Schmitt's commentary would turn on the relationship between utopia, nihilism, and the new nomos of the earth.

The work begins with five introductory corollaries, the third of which, titled 'Notes on the Law of Nations of the Christian Middle Ages,' discusses the concrete order of the *Respublica Christiana* with its basic dualism of Imperium and Sacerdotium, emperor and Pope.[90] This epoch was defined by a basic distinction between Christian and non-Christian states for the differentiation of types of war, meaning that just war theory was circumscribed by a historical and spatial division of peoples.[91] However, this period gave way to 'an entirely different spatial order,' the birth of the modern *jus publicum Europaeum* characterized by the legal titles of occupation and discovery. This new epoch saw the rise of 'the centralized, spatially

[86] Schmitt, *Glossarium*, p. 90. 'Schädlinge' is a play on words as both pests, ie. as carriers of disease, as well as someone who damages, derived from the verb 'schaden.' Schmitt would have been well aware of the use of the term 'Volksschädling' as a National Socialist legal concept. 'Das Problem der Neu-Kriminalisierungen und Poenalisierungen ... den modernen Auflösungen des Strafrechts in Vernichtung der Schädlinge und Störenfriede, bis zu den biologistischen Kriminalisierungen der Krankheit in Samuel Butlers Erewhon.'

[87] Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin: Duncker & Humblot, 2007 [1938]), p. 8.

[88] Mehring, *Aufstieg und Fall*, p. 452; Schmitt, *Ex Captivitate Salus*, pp. 96-99.

[89] Mehring, *Aufstieg und Fall*, pp. 430-431.

[90] Schmitt, *Der Nomos der Erde*, p. 28.

[91] Schmitt, *Der Nomos der Erde*, p. 35.

self-contained, European territorial state, sovereign with respect to the emperor and pope, but also with respect to each of its neighbors.'[92]

For Schmitt, the historical transformation of the *Respublica Christiana* into the *jus publicum Europaeum* brought with it 'tumultuous situations of the worst kind,' namely the introduction of anarchy into the international system, the result of the formation of competing sovereign states. Central to Schmitt's history of the European law of nations is that anarchy does not imply absolute lawlessness; rather, echoing Schmitt's letter to Grewe on new criminalizations in Butler's Erewhon, it allowed for 'the opponent to be recognized as an enemy on the same level, as *justus hostis*.'[93] In other words, in the *jus publicum Europaeum* enmity was not criminalized but was still a legal institution. Schmitt emphasizes this point once more: 'Anarchy and law need not exclude one another.'[94]

Schmitt draws on the concept of utopia to drive a wedge between anarchy and nihilism on the possibility of the continued presence of law. In the case of nihilism, 'the specific negativity must be made conscious, through which nihilism receives its historical place, its topos . . . It becomes apparent namely in the connection between utopia and nihilism, that only a final and categorical separation of order and localization in an historically specific sense can be named nihilism.'[95] Schmitt's statement here can only be read in light of his definition of utopia as a form of de-localization through annihilation. Nihilism and utopia are therefore conceptually linked: both concepts posit a break with space and instead replace it with an abstract nothingness.[96] This abstract nothingness is the 'specific negativity' of nihilism as a historical movement, the very same abstract nothingness found in the *u*-topos.

Schmitt draws on this distinction once again to attack a variation of pacifism associated with his repeated target of polemics, the international lawyer and editor of *Friedens-Warte* Hans Wehberg: 'the great problems of the law of nations are not as easy as that League of Nations pacifism characterizes it with its catchword of anarchy.'[97] Instead, he insists that

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[92] Schmitt, *Der Nomos der Erde*, p. 36: 'Sie entsteht mit dem zentralisierten, gegenüber Kaiser und Papst, aber auch gegenüber jedem Nachbarn souveränen, räumlich in sich geschlossenen, europäischen Flächenstaat.'

[93] Schmitt, *Der Nomos der Erde*, p. 159. 'Daß der Gegner als Feind auf gleicher Ebene, als justis hostis anerkannt wird.'

[94] Schmitt, *Der Nomos der Erde*, p. 159. 'Anarchie und Recht brauchen sich nicht auszuschließen.'

[95] Schmitt, *Der Nomos der Erde*, p. 36. 'Die spezifische Negativität [muß] bewußt werden, durch die der Nihilismus seinen geschichtlichen Platz, seinen Topos erhält . . . In dem Zusammenhang von Utopie und Nihilismus wird nämlich sichtbar, daß erst eine endgültige und grundsätzliche Trennung von Ordnung und Ortung in einem geschichtlich-spezifischen Sinne Nihilismus genannt werden kann.'

[96] See Minca and Rowan, *On Schmitt and Space*, pp. 193-194.

[97] Schmitt, *Der Nomos der Erde*, p. 159. Schmitt uses the present tense indicating that this particular brand of pacifism lived on after the dissolution of the League of Nations itself in 1946, The particular target Schmitt's polemic would have been Hans Wehberg, cited on the previous page, and one of Schmitt's recurring targets. On 'League of Nations Pacifism,' see Monica Garcia-Salmones, 'Walther Schücking

the 'anarchical methods' of the Middle Ages were not a form of nihilism, as 'they knew and defended ... true law, which consists in secure localizations and orders.'[98] For Schmitt, 'this alone is decisive, because there is the possibility of differentiating sensible wars from wars of annihilation and, in contrast with the *tabula rasa* of nihilist legalizations, to save the possibilities of concrete orders.'[99] The connection between nihilism and tabula rasa is significant, as it implies that nihilism wants to cut off history, to cut off the very foundation for Schmitt's attempted rescue of jurisprudence in historicity.

For Schmitt, the radical negativity of nihilism is derived from its origins in utopian thought. Schmitt once again contextualizes the emergence of utopian thought within England's world-historical shift to a 'maritime existence.'[100] Using almost identical language to that in his first entry on utopia in *Glossarium*, he maintains that 'the island became the bearer of the spatial transformation to a new nomos of the earth, potentially even already the jumping-off point for the later leap into the complete delocalization of modern technology.'[101] All of this is represented in the word utopia, which Schmitt claims 'could only emerge in that period and on the English island in order ... to become the signature of an entire era.'[102] This forms a central moment in Schmitt's history, as it posits the rise of utopianism with an epochal shift in the law of nations. Indeed, Schmitt writes 'I therefore did not want to leave unmentioned such a significant work and word as this *Utopia* by Thomas More before I began with the controversies in the law of nations on the freedom of the seas.'[103]

Schmitt then imports his argument from *Glossarium* that the word utopia contains within it a radically negative element, pointing to the content of the work and the very title itself as

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and the Pacifist Traditions of International Law,' *The European Journal of International Law* 22(3) 2011, 755-782; Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2001), pp. 213-222; Joshua Smeltzer, 'Hans Wehberg and the *jus belli ac pacis* in Interwar International Law,' *Global Intellectual History* (Online First). 'So einfach, wie es jener Völkerbunds-Pazifismus mit seinem Schlagwort Anarchie hinstellt, sind die großen Probleme des Völkerrechts nicht.'

[98] Schmitt, *Der Nomos der Erde*, p. 159: 'Sie kannten und wahrten ... echtes Recht, das in sicheren Ortungen und Ordnungen bestand.'

[99] Schmitt, *Der Nomos der Erde*, p. 159: 'Das allein ist entscheidend, weil es die Möglichkeit gibt, sinnvolle Kriege von Vernichtungskriegen zu unterscheiden und gegenüber der *tabula rasa* nihilistischer Vergesetzlichungen die Möglichkeiten konkreter Ordnungen zu retten.'

[100] Schmitt, *Der Nomos der Erde*, p. 149.

[101] Schmitt, *Der Nomos der Erde*, p. 149. 'Die Insel wurde der Träger des Raumwandels zu einem neuen Nomos der Erde, potenziell sogar schon zum Absprungfeld für den späteren Sprung in die totale Entortung der modernen Technik.'

[102] Schmitt, *Der Nomos der Erde*, p. 149. 'Daß sie nur damals und nur auf der englischen Insel entstehen konnte, um ... zur Signatur eines ganzen Zeitalters zu werden.'

[103] Schmitt, *Der Nomos der Erde*, p. 150. This sentence is entirely omitted in the English edition. See Carl Schmitt, *The Nomos of the Earth*, p. 178. 'Ich wollte deshalb, bevor ich mit der völkerrechtlichen Kontroverse über die Freiheit der Meere beginne, ein so bedeutungsvolles Werk und Wort wie diese *Utopie* des Thomas Mores nicht unerwähnt lassen.'

'manifesting a monstrous sublation of all localizations, on which the old Nomos of the Earth was based.'[104] While Schmitt maintains that 'all law is law only at the correct location,'[105] utopianism negated the localization that Schmitt held essential for the validity of law. The etymology of utopia itself to shows that it 'means not simply a Nowhere generally (or a *Erewhon*), but rather the U-Topos, in contrast to the negation of which even the A-Topos has still a stronger, negative connection to the topos.'[106] This negation of space explains yet another reason why, for Schmitt, Hobbes' state of nature could not be considered a utopia: 'Hobbes' state of nature is a *no man's land*, therefore *not* at all a *nowhere*.'[107] Instead, the Hobbesian state of nature was to be found in America, a consequence of the 'land appropriation of the new world.'[108] Furthermore, Schmitt's reference to Butler's *Erewhon* underscores the significance of the work for his understanding of utopia, even though Schmitt provides no citation and excludes Butler from the index of the book – it is only by reference to Schmitt's notebook entries that the centrality of the work in explicating the relationship between criminalization of war and utopianism becomes clear.

In *The Nomos of the Earth*, the concept of utopia contains within it both the initial spatial revolution that culminated in the English transition into a maritime existence, as well as the logic of its further development into an 'industrial-technical existence.'[109] This narrative follows Schmitt's theory of the two stages of de-localization in utopian thought, though he omits referencing Huxley entirely. While Schmitt claims that Thomas More could be considered as having written more of an *Eutopia* than an *Utopia*, 'the fatal shadow had fallen, and behind the new worldview of a world ordered from the sea, there dawned the further future of the industrial age, which emerged from the island in the 18th century.'[110] Thus, utopia – both the word and the content of More's novel – is not only a concept that could have only emerged in England, but it also tracks England's transformation from a maritime existence into an industrial-technical existence. It is this industrial-technical existence that is at the core of the de-localization of human nature found in *Brave New World*. Here,

[104] Schmitt, *Der Nomos der Erde*, p. 149. 'Utopia bekundet sich die Möglichkeit einer ungeheuerlichen Aufhebung aller Ortungen, auf denen der alte Nomos der Erde beruhte.'

[105] Schmitt, *Der Nomos der Erde*, p. 67. Repeated in Schmitt, *Glossarium*, p. 35.

[106] Schmitt, *Der Nomos der Erde*, p. 149. 'Utopia bedeutet ja nicht einfach allgemein ein Nirgendwo, ein Nowhere (oder Erewhon), sondern den U-Topos, im Vergleich zu dessen Negation sogar der A-Topos noch eine stärkere, negative Beziehung zum Topos hat.'

[107] Schmitt, *Der Nomos der Erde*, p. 64. 'Der Naturzustand von Hobbes ist ein *Niemandsland*, aber deshalb bei weitem noch *kein Nirgendwo*.' Emphasis in original.

[108] Schmitt, *Der Nomos der Erde*, p. 53. 'Landnahme einer neuen Welt.'

[109] Schmitt, *Der Nomos der Erde*, p. 150. 'die industriell-technische Existenz.' See also Minca and Rowan, *On Schmitt and Space*, pp. 189-191.

[110] Schmitt, *Der Nomos der Erde*, p. 150: 'Aber der verhängnisvolle Schatten war gefallen, und hinter dem neuen Weltbild einer vom Meere aus geordneten Welt dämmerte bereits die weitere Zukunft des industriellen Zeitalters, das im 18. Jahrhundert von der Insel seinen Ausgang nahm.'

Schmitt's etymological analysis turns simply on his understanding of topos: to be without a topos means being 'without localization [*Ortung*] and therefore not a concrete order.'[111] Thus, a utopia is by definition the negation of a concrete order, the negation of a topos, its annihilation. For that reason, it violates Schmitt's very definition of law provided in this work as the 'unity of order and localization.'[112]

6.5 The New Crusaders

Writing in the immediate aftermath of the Second World War, Schmitt, like many German intellectuals,[113] was deeply unsettled by the advent of the atomic bomb, as the utopian promises of 'contemporary natural science' had finally culminated in a new, 'modern means of annihilation' with planetary consequences.[114] Coupled with the criminalization of war and the rise of a 'completely profane technicity' replacing the *jus publicum Europaeum*, Schmitt warned of righteous wars of annihilation approaching in the horizon: 'the bomber or the strafer pilot uses his weapon against the population of an inimical country vertically, like St. George used his lance against the dragon.'[115] Schmitt's reference to St. George, the patron saint of England, was no accident – from its origins in the 'British maritime appropriation of the world oceans,' to the bombing of Helgoland and technological advances in aerial warfare, the concept of utopia and its drive to annihilation was thoroughly British.[116] Far from ushering in a golden age of peace and stability, utopianism had delivered the means making the earth 'entirely empty, into a tabula rasa.'[117]

This chapter establishes utopia as a central concept to Schmitt's immediate postwar legal thought, part of the dual forces threatening the very existence of jurisprudence. Over the course of three years, Schmitt returned time and time again to the concept in his private journal entries, connecting his critique of utopianism to a broader critique of technicity.

[111]Schmitt, *Der Nomos der Erde*, p. 20: 'Ohne Ortung und deshalb keine konkrete Ordnung.'
[112]Schmitt, *Der Nomos der Erde*, p. 13: 'Das Recht als Einheit von Ordnung und Ortung.'
[113]See Cara O'Connor, 'Arendt, Jaspers, and the Politicized Physicists,' *Constellations* 20(1) (2013), 102-120; Theodor Adorno, *Negative Dialektik* (Frankfurt: Surhkamp, 1966).
[114]Schmitt, *Der Nomos der Erde*, p. 285. On Schmitt's later writings and the atomic bomb, see Gabriella Slomp, 'The Theory of the Partisan: Carl Schmitt's Neglected Legacy,' *History of Political Thought* 26 (2005), 502-519, 516; Gabriella Slomp, 'Carl Schmitt's Five Arguments against the Idea of Just War,' *Cambridge Review of International Affairs* 19 (2006), 435-447, p. 443: 'Die heutige Naturwissenschaft'; 'der modernen Vernichtungsmittel.'
[115]Schmitt, *Der Nomos der Erde*, pp. 92, 299: 'Der Bomben- oder Tiefflieger gebraucht seine Waffe gegen die Bevölkerung des feindlichen Landes vertikal wie der heilige Georg seine Lanze gegen Drachen gebrauchte.'
[116]Schmitt, *Land und Meer*, p. 90. 'die britische Seenahme der Weltozeane.'
[117]Schmitt, *Glossarium*, p. 136. 'völlig leer, zur tabula rasa gemacht.'

In the first instance, Schmitt constructed a conceptual history focused on two utopian de-localizations: the de-localization of space in Thomas More and the de-localization of human nature in Aldous Huxley. However, these entries have a broader significance in revealing utopianism as synonymous with modern means of annihilation. Rather than presenting a brilliant future to be realized, utopia represented the negation of law and the 'abstention from topos.' In the years after Germany had faced complete destruction – and indeed territorial dismemberment by the occupying forces – utopianism would not point to the way forward; instead, Schmitt insisted that its various manifestations in Marxism and pacifism could only deepen the crisis. By reconstructing Schmitt's criticism of utopianism in the fragments of *Glossarium*, this chapter gives a new prism for interpreting the aim of Schmitt's post-war writings: to demonstrate a form of historicity that could challenge the threat of utopianism and technology for jurisprudence. Indeed, for Schmitt, nothing less than total annihilation was at stake.

Conclusion: The State of Historicity

There is a well established approach to the history of political thought which holds that historical texts – for example, Thomas Hobbes' *Leviathan* or John Locke's *Two Treatises of Government* – ought to be read as '[expressing] the Question-Answer structure of all historical situations and events. Every historical human action and deed is the answer to a question, which itself is raised out of history.' These questions are in turn posed by individual authors writing within a specific historical context: 'a historical situation is unintelligible, so long as it is not understood as a call by humans and at the same time as the human answer to this call. Every human word is an answer.' According to this approach, it is the task of the historian to first situate texts within their historical contexts, discursive paradigms, or linguistic fields in order to identify their function as a specific, historical answer to a unique, historical question. Indeed, such an approach holds that 'every answer receives its meaning through the question, which it answers, and remains meaningless for those who do not know the question.'

This approach to the history of political thought, the tracing of a 'Question-Answer logic,' has its origins in the work of the British historian and philosopher R.G. Collingwood. In his *An Autobiography* (1939), Collingwood asserted that intellectual historians must 'reconstruct the problem; or, never think you understand any statement made by a philosopher until you have decided, with the utmost possible accuracy, what the question is to which he means it for an answer.'[1] Collingwood's Question-Answer logic in history profoundly influenced the first generation of contextualists and the so-called 'Cambridge School of the History of Political Thought' in the work of Quentin Skinner and J. G. A. Pocock.[2] Skinner, for his part,

[1] R.G. Collingwood, *An Autobiography* (Oxford: Oxford University Press, 1939), p. 74. On Collingwood's philosophy of history, see Markku Hyrkkänen, 'All History is, More or Less, Intellectual History: R.G. Collingwood's Contribution to the Theory and Methodology of Intellectual History,' *Intellectual History Review* 19(2) (2009), 251-263, pp. 253-255; James Somerville, 'Collingwood's Logic of Question and Answer,' *The Monist* 72(4) (1989), 526-541.

[2] On Collingwood's influence on the Cambridge School, see Kenneth McIntyre, 'Historicity as Methodology or Hermeneutics: Collingwood's Influence on Skinner and Gadamer,' *Journal of the History of Philosophy* 2(2) (2008), 138-166; Richard Bourke, 'The Cambridge School,' unpublished manuscript, pp. 2, 4; Holly

still recalls being 'fascinated' by Collingwood's *The Idea of History* (1946) and notes that Collingwood's work had 'the most immediate and powerful influence on the direction' of his own scholarly project.[3] Such is the foundational significance ascribed to Collingwood's work, and the Question-Answer logic in particular, for laying the groundwork of one of the dominant approaches to the contemporary study of the history of political thought.

However, the quotations with which this conclusion began were first published in 1955, not in 1939; they were composed in German, not in English; and they were written by a jurist, not a historian. The author of the above quotations was none other than Carl Schmitt, and the occasion for his writing was the *Festschrift* published to celebrate Ernst Jünger's sixtieth birthday.[4] As the title of his essay – 'The Historical Structure of the Contemporary World-Opposition between East and West' – already indicates, the larger question posed by Schmitt's text is how to understand the Cold War and the formation of a supposed 'world opposition' between East and West. It is precisely within this context that Schmitt deals with the methods of two English historians – R.G. Collingwood and Arnold Toynbee – in formulating his own vision for the study and purpose of the history of political and legal thought. To be clear, it is not the case that the above quotations were Schmitt paraphrasing Collingwood's method; rather, they were Schmitt describing his own method, which he acknowledges 'has much to do' with Collingwood's own Question-Answer logic. Indeed, if the reception of Collingwood was an essential moment in the foundations of the so-called 'Cambridge School,' that School has an unacknowledged sibling in the jurist from Plettenberg.

Schmitt's reflection on Collingwood, Toynbee, and the philosophy of history came as a response to, and criticism of, Ernst Jünger's 1953 publication, *Der Gordische Knoten* ['The Gordian Knot'].[5] In this text, Jünger posits that the opposition between'East and West' is

Hamilton-Bleakley, 'Linguistic Philosophy and *The Foundations*,' in eds. Annabel Brett and James Tully, *Rethinking the Foundations of Modern Political Thought* (Cambridge: Cambridge University Press, 2010), 20-34, pp. 20, 22-23; Quentin Skinner, 'Surveying the Foundations: A Retrospect and a Reassessment,' in *Rethinking the Foundations of Modern Political Thought*, 236-261, p. 241; David Boucher, 'Language, Politics and Paradigms: Pocock and the Study of Political Thought,' *Polity* 17(4) (1985), 761-776; Richard Whatmore, 'Intellectual History and the History of Political Thought,' in eds. Richard Whatmore and Brian Young, *Advances in Intellectual History* (London: Palgrave, 2006), 109-129.

[3] Petri Koikkalainen and Sami Syrjänmäki, 'On Encountering the Past - Interview with Quentin Skinner.'

[4] Carl Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes von Ost und West,' in *Freundschaftliche Begegnungen*, ed. Armin Mohler (Frankfurt: Vittorio Klostermann, 1955), p. 151. 'Die Frage-Antwort-Struktur aller geschichtlichen Situationen und Ereignisse zum Ausdruck bringen. Jede geschichtliche Handlung und Tat eines Menschen ist die Antwort auf eine Frage, die von der Geschichte erhoben wird. Eine geschichtliche Situation ist unverständlich, solange sie nicht als ein von Menschen vernommener Anruf und zugleich als Antwort der Menschen auf diesen Ruf verstanden wird. Jedes menschliche Wort ist eine Antwort. Jede Antwort erhält ihren Sinn durch die Frage, auf die sie antwortet und bleibt sinnlos für jeden, der die Frage nicht kennt. Der Sinn der Frage wiederum liegt in der konkreten Situation, in der sie sich erhebt.'

[5] While Schmitt's reflections appear in published form for the first time in 1955, newspaper reports of a series

an opposition 'of the highest degree,' one which, like the rotation of the earth, constantly repeats itself throughout history.[6] This confrontation is, as Jünger describes it, 'eternally contemporary' in new formations, and the East-West structure of the Cold War is merely the contemporary iteration of the same conflict described Herodotus' characterization of the Second Persian Invasion of Greece: a conflict between Western freedom and Eastern despotism.[7] For Jünger, this conflict between two polar forces, representing two competing ideologies, is encapsulated in the mythic symbol of the Gordian Knot: 'The Gordian Knot is to be conceived of as a question of destiny; it always tightens itself anew, just as the question always poses itself anew. There appears a new light in the sword of Alexander, Enlightenment in a higher, sunny sense.'[8]

For Schmitt, however, Jünger's analysis missed the mark for two reasons. First, Schmitt believed that 'the truth of polar oppositions is eternally true, eternally in the sense of an eternal return. Historical truth, by contrast, is only true once.' Furthermore, following Heraclitus, Schmitt held that it was 'not possible to step into the same river twice.'[9] Historical events were singular occurrences; at best, they form parallels which can 'serve for the understanding of this uniqueness,' but they never form simple repetitions or eternal reoccurrences.[10] The Cold War may express itself in the shorthand of East versus West, but it takes place in a fundamentally different circumstance than the wars of antiquity. To hold the East-West division as an eternal characteristic of international politics was to cement the historically contingent, removing it of its historicity. As Schmitt argues, 'historical thinking is thinking about unique situations and, therewith, about unique truths.'[11] In addition to critiquing Jünger's 'polarity thinking' for its insufficient historicity, Schmitt argues that Jünger accepted 'East' and 'West' as themselves pre-given concepts when, unlike the opposition between North and South, they lack a polar referent: 'In relation to Europe, America is to the West; in relation to America, China and Russia are the West; and in relation to China and Russia,

of Schmitt's public lectures in 1953 confirm that he was already speaking about Collingwood, Toynbee, and the philosophy of history in connection with his critique of technology. See NRW 0265-19047: 'Neue Deutung moderner Technik,' *Iserlohn Zeitung*, 17. October, 1953. See also the reference to Collingwood in the bottom left hand corner of Schmitt's handwritten lecture notes for the event, in NRW 0265-18962, p. 4.

[6] Ernst Jünger, *Der Gordische Knoten* (Frankfurt am Main: Vittorio Klostermann, 1953), p. 5.

[7] Jünger, *Der Gordische Knoten*, pp. 13, 17. For Jünger, the opposition East-West is as eternal as 'Man and Woman' and 'You and I.' See Jünger, *Der Gordische Knoten*, p. 150.

[8] Jünger, *Der Gordische Knoten*, p. 147. Quoted in Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes.'

[9] Schmitt, 'The Historical Structure of the Contemporary World-Opposition,' p. 115. Schmitt, 'Die Lage der europäischen Rechtswissenschaft,' p. 415. Emphasis in the original. Schmitt repeats this formulation in Schmitt, *Dialogues*, p. 72. Schmitt, *Positionen und Begriffe* (Berlin: Duncker & Humblot, 2014 [1939]).

[10] Schmitt, 'The Historical Structure,' p. 114. On the occurrence of historical parallels, see Schmitt, *Donoso Cortés in gesamteuropäischer Interpretation*, pp. 87-88. 92-96.

[11] Schmitt, 'The Historical Structure,' p. 114.

Europe is to the West.'[12] More than making a superficial geographical observation, Schmitt was instead asserting that the geographic distinction of East and West cannot possibly be the cause of enmity and conflict.

How then to conceive of the 'Gordian Knot' in international politics if not characterized by the opposition between East and West? As I have argued in chapters five and six of this dissertation, Schmitt held that Western liberalism and Eastern socialism were closer than either party of the Cold War cared to admit: both sides were joined in a common philosophy of history, a grounding in technological rationality, and faith in human progress. If there were a contemporary sword of Alexander capable of slicing through the Gordian Knot and rendering the supposed distinction between East and West obsolete, it would thus be the philosophy of history: as Schmitt recorded in *Glossarium*, 'Ernst Jünger thinks . . . that the philosophers of history are today more important than atomic physicists. I, the diagnostician of the discriminating concept of war and the transformation of state war into civil war, am not surprised.'[13] For Schmitt, a return to concrete, historical thinking of the type he had outlined in *Die Lage der europäischen Rechtswissenschaft* would expose the true nature of the contemporary world opposition: 'not a polar, but rather a historical-dialectical opposition between land and sea.'[14]

And so Schmitt turned to R.G. Collingwood to sharpen his sword and slice through the Gordian Knot. This meant adopting the language of a Question-Answer logic in history, and locating the historical situation that gave rise to the particular question: 'every answer receives its meaning through the question, which it answers, and remains meaningless for those who do not know the question.' However, Schmitt also went beyond Collingwood. Schmitt says, for example, that it is to Collingwood's credit that he attempted to 'overcome his own heritage in the non-historical positivism of the natural sciences,' and yet, 'the English philosopher himself remained stuck in the conception of science of 19th century England.'[15] In other words, while Collingwood had attempted to introduce a concept of historicity via the Question-Answer logic, he ultimately failed to do so, as Collingwood's own thought was shaped by a different set of questions arising from positivism. Specifically, Schmitt believes that Collingwood focuses too much on the individual and his or her individual psychology

[12] Schmitt, 'The Historical Structure,' p. 104.

[13] Schmitt, *Glossarium*, p. 95. 'Ernst Jünger meint . . . daß die Geschichtsphilosophen heute wichtiger sind als die Atom-Physiker. Natürlich. Ich, der Diagnostiker des diskriminierenden Kriegsbegriffs und der Verwandlung des Staatenkrieges in den Bürgerkrieg, bin davon nicht überrascht.'

[14] Schmitt, 'The Historical Structure,' p. 133. This is a reference to the opposition first posited in Schmitt, *Land und Meer*.

[15] Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes,' p. 151. 'um seine eigene Herkunft aus der Ungeschichtlichkeit des naturwissenschaftlichen Positivismus zu überwinden'; 'doch blieb der englische Philosoph selbst viel zu tief in dem Wissenschaftsbegriff des englischen 19. Jahrhunderts stecken.'

as opposed to the influence of culture and society in shaping questions they seek to answer. Thus, for Schmitt, 'it is not a single human or a sum of individual humans who pose some question and it is even less the case that some historian ex post confronts the past with some questions' that he or she formulates from the vantage point of the present.[16] Rather, in his corrective to Collingwood, he argues that 'history itself consists of concrete questions and answers,' meaning that even questions are historical in their origins. As Schmitt states his interpretation in a more poetic moment, 'by hearing the question and call of history and attempting to answer through their behavior and deeds, humans venture into the great test of historical power and are shaped by a court [of history]. In short: *they cross over from the state of nature into the state of historicity* [*in den Stand der Geschichtlichkeit*].'[17]

In emphasizing the significance of culture and society for the formation of questions in history, Schmitt proposes improving the limitations of Collingwood's method by turning to the English historian, Arnold Toynbee.[18] For Schmitt, Toynbee's Challenge-Response structure represents a 'significant improvement' over Collingwood's method: instead of focusing on the individual and their psychology, Toynbee examines 'high civilizations,' 'with which the concrete historical challenge, the call to history, and the just-as-concrete historical answer or response of humans must be asked.'[19] Toynbee's method thus represents an increase in 'knowledge production,' which Schmitt credits for understanding 'the dialectical structure of every historical situation.'

However, Schmitt still distinguishes his method from the approach taken by Toynbee. Toynbee may have refined Collingwood's approach, but the historical method had not yet reached its apotheosis, as even Toynbee made a fatal mistake: 'By allowing for his more than twenty cultures or high civilizations to be paraded out one after the other, he obscures the substantive singularity of everything historical and thereby even the structure of the historical [*des Geschichtlichen*] itself.'[20] There are no eternally true historical laws, just as there is no inevitable march of progress towards a predetermined endpoint.[21] Each moment, culture,

[16] Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes,' pp. 151-152. 'Dass nicht ein einzelner Mensch oder eine Summe von einzelnen Menschen irgendeine Frage stellt und dass noch viel weniger irgendwelche Geschichtsschreiber ex post mit irgendwelchen Fragen an die Vergangenheit herantreten, sondern dass die Geschichte selbst in konkreten Fragen und Antworten besteht.'

[17] Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes,' p. 153. 'Indem die Menschen die Frage und den Ruf der Geschichte vernehmen und durch ihr Verhalten und ihre Taten zu beantworten suchen, wagen sie sich in die große Probe der Geschichtsmächtigkeit hinein und werden sie geprägt durch ein Gericht. Mit einem Wort: sie treten aus dem Naturzustand in den Stand der Geschichtlichkeit ein.' Emphasis added.

[18] Schmitt heard Toynbee speak at an event at the *Akademie des deutschen Rechts* in 1939. See Mehring, *Carl Schmitt*, p. 369.

[19] Schmitt, 'The Historical Structure,' p. 120.

[20] Schmitt, 'Die geschichtliche Struktur des heutigen Welt-Gegensatzes,' p. 154.

[21] On this point, Schmitt diverges from his earliest writings under National Socialism, where German history

and civilization would need to be considered individually, in light of its concrete singularity.

Schmitt thus presents his own approach as standing in the same intellectual tradition as Collingwood and Toynbee, while at the same time overcoming their methodological deficiencies. Borrowing from both of these authors, Schmitt articulates a form of dialectics: 'When we here ask about a dialectical tension, we are not looking for a general law or a statistical probability, no more than we are looking for a general logic of a conceptual dialectic in a systematic sense.' This idea, he is quick to point out, is not Hegelian, though one is tempted to immediately associate the dialectical method with Hegel. However, here as well, Schmitt guards himself against too quick of an association. He claims that the 'singularity can be easily lost within [Hegel's] great systematic and thus the historical event is transformed into a mere thought process.'

For scholars such as Reinhard Mehring, Schmitt located and developed his 'dialectic of history' in the work of Hegel, advancing a series of dialectic oppositions such as land and sea, East and West, state and revolution, and Leviathan and Behemoth. Mehring's interpretation follows from Schmitt's invocation of Hegel's *Rechtsphilosophie*, paragraph 247, which Mehring interprets as 'authorizing the dialectic of land and sea in Hegel.'[22] To this point, I agree with Mehring that this specific historical dialectic is advanced in Schmitt's work as a counter to Jünger's East-West polarity; however, Mehring goes much further, arguing that 'Schmitt enthrones himself as the decisive exegete of Hegel of the twentieth century, and takes the place occupied by Marx.'[23] This is the central claim of Mehring's monograph: that Hegel is the primary intellectual figure animating Schmitt's theory of history and law. However, as quoted above, Schmitt himself says that while he employs the term 'dialectic,' that he does not use the term in a Hegelian sense; he even complains that using the term 'dialectic' sets one up to be seen as a Hegelian: 'the dialectical tension . . . ought to lead us neither into Hegelian nor into natural scientific nor even into normativistic generalities.'[24] Of course, Schmitt thinks with and mobilizes Hegel, for example during his discussion of natural law (see chapter 3). But to read Hegel as determinate is to overlook Schmitt's own rather explicit formulations of his intellectual influences, namely the influence of the historical school of law, and of Savigny in particular, as well as philosophers of history such as Collingwood and Toynbee.

Instead, Schmitt's method is meant to guard against both a Hegelian 'misunderstanding of a conceptual generalization' as well as the transformation of a single historical event

was retroactively rewritten to lead to the formation of the Third Reich. See Smeltzer, 'Germany's Salvation.'

[22] Mehring, *Pathetisches Denken*, p. 220.

[23] Mehring, *Pathetisches Denken*, p. 220.

[24] Schmitt, 'The Historical Structure,' p. 122.

into something approaching a general law.[25] In Jünger's case, the East-West division was reminiscent of the liberal belief in human progress and the centrality of class conflict under Marxist conceptions of history. In each of these cases, a specific historical moment fell victim to an errant 'law ordaining madness [*Vergesetzlichungs-Wahn*]'.[26] Instead, for Schmitt, all historical events must be captured in their concrete singularity; there may be parallels, but never the return of the same. In short, for Schmitt, 'a historical truth can only be true once.'

* * *

At the first symposium dedicated to Carl Schmitt's work organized after his death, Helmut Quaritsch proposed a new research direction, according to which Schmitt would be treated like Jean Bodin or any of the great authors in the history of political thought.[27] For Quaritsch, it was time to break with previous scholarship, with its focus, on the one hand, on Schmitt's role as a 'historical actor' under National Socialism, and on the other, the 'selective' appropriation of his theories for contemporary use. Following Quaritsch, this dissertation has rejected using Schmitt's theories to understand contemporary politics or develop a normative 'Schmittian' political theory. Both of these approaches, I have argued, lack a sufficient recognition of the historicity of Schmitt's thought, its shifts over time, and its multiple historical contexts. At the same time, however, this dissertation has insisted on the impossibility of separating Schmitt the 'historical actor' from Schmitt, the newest thinker in the modern canon of the history of political and legal thought. To do so would violate Schmitt's own methodological approach to the study of any 'great thinker' from Francisco de Vitoria to Thomas More and Donoso Cortés, or even Jean Bodin himself.[28]

In 2017, Reinhard Mehring wrote that 'Schmitt's labyrinthine Nachlaß is not inexhaustible,' and that the 'historicization of his work' is already advanced.[29] Mehring is, in once sense, quite right: although it contains over ten thousand cataloged items, the Schmitt Nachlaß is finite. However, the process of historicization is only at its beginning phase: archival documents have primarily been used in countering the dominant 'vulgar Schmittianism' that has accompanied his international reception, a seemingly perpetual task given

[25] Schmitt, 'The Historical Structure,' p. 121.

[26] Schmitt, 'The Historical Structure,' p. 121.

[27] Reinhard Mehring, *Carl Schmitt: Denker im Widerstreit* (München: Verlag Karl Alber, 2017), pp. 353-354.

[28] See Carl Schmitt, 'Die Formung des französischen Geistes durch den Legisten'; and Samuel Garrett Zeitlin, 'Politics and the History of Political Thought: Carl Schmitt's Bodin in Nazi-Occupied Paris,' conference paper presented at the University of Cambridge on 12. November, 2019. On the historicity of Cortés, see Schmitt, *Donoso Cortes in gesamteuropäischer Interpretation*, p. 101.

[29] Quoted in Sebastian Huhnholz, 'Hochzeit mit Machiavelli,' *Süddeutsche Zeitung*, 22.7.2017. Mehring, *Denker im Widerstreit*, p. 11.

Schmitt's increasing popularity and the flood of secondary literature. However, to accept Schmitt's historicity on his *own* terms, and arising out of his *own* writings, opens the possibility of internally reconstructing and reinterpreting Schmitt's broader body of work according to the standards he himself set out. This is the way forward.

First and foremost, this dissertation is about Carl Schmitt's relationship to history: both his historical and discursive context in the intellectual history of twentieth century Germany, as well as his formulation and mobilization of historical narratives for political purposes. This project began with Schmitt's invocation of an 'existential question' facing contemporary jurisprudence, a discipline he felt was being 'crushed between theology and technology.' The answer, Schmitt posited, was to be found in the 'historicity' of law – a concept that remains largely ignored in Schmitt scholarship despite the central role Schmitt himself ascribed to it. The wager of this dissertation was that this concern of an existential question facing jurisprudence, one that Schmitt repeated in multiple publications, was of fundamental importance to Schmitt in this period: such a warning does not come lightly, and as a result, should occupy a key position in interpreting the aims and intentions of a lifelong jurist. In so doing, this dissertation has shown how Schmitt used historicity to combat the incursion of theology in the form of natural law doctrines as a type of eternally true law, one that threatened in its contemporary manifestations to unleash 'world civil war.' In the following chapter, I then showed that Schmitt's Vitoria interpretation was directly aimed at the American Lawyer James Brown Scott and the resurgence of liberal international theory that asserted its intellectual heritage in Scholastic ideals. The assertion of a set of eternally valid legal principles stood in direct contrast to Schmitt's own assertion of the historical and cultural contingency of law. The following two chapters of this dissertation switched to the other side of the conceptual triangle, the relationship between technology and historicity. Chapter five focused on Schmitt's conception of socialism as the historical continuation of liberalism through a common faith in human progress and the radical potential of technology to overcome the necessity of appropriation. In the following chapter, I examined Schmitt's critique of political utopianism – primarily contained in his notebook entries with traces in his *Der Nomos der Erde* – as an ideology that seeks to cut off the historical roots of law while reshaping mankind according to a rational plan. Utopianism, therefore, forms the polar opposite to natural law doctrines in Schmitt's conceptual framework: while natural law sought to locate timeless principles through the excavation of past authors, utopianism asserted its validity in its claim to lie in a future perfect state. For Schmitt, once the utopian can claim to stand on 'the side of coming things,' then even the annihilation of space and human nature becomes justified. Indeed, for Schmitt, following in his interpretation of Savigny, history did not unfold according to rational principles or casual laws reminiscent

of the natural sciences; instead, history and law were organic in their development and elucidation over time and thus could not be predetermined by human reason.

One important implication of this shift in interpreting Schmitt's work and the emphasis on historicity is that it problematizes the assumption of a consistent 'Schmittian' theory across his oeuvre. Instead, each work must first be approached within its historical context; only then can continuities and divergences be established. As a result, this dissertation has focused on the period between 1943 and 1956, beginning with a draft manuscript of *Die Lage der europäischen Rechtswissenschaft* and drawing a set of continuities and threads linking an otherwise disparate collection of postwar texts. This shows the extent to which 1945 was not a complete caesura in Schmitt's thought; rather, the beginnings of Schmitt's post-war work was conceived of prior to the end of the war. These texts would undergo significant revisions before publication, but their origins – and the historical questions they sought to answer – were indeed older. At the same time, this dissertation has focused on what would normally be considered 'minor texts' within Schmitt's oeuvre. In other words, while the reception in the Anglosphere has focused on a series of his Weimar writings – above all, *The Concept of the Political*, *Political Theology*, and *The Crisis of Parliamentary Democracy* – this focus has obscured other texts, and has predetermined the reception of Schmitt's later writings. Thus, the texts that have traditionally been considered 'major' have occupied a secondary position throughout the dissertation, primarily used to show continuities and divergences over time rather than the core of an ahistorical 'Schmittian' political theory. This shift in focus has allowed for an emphasis on a specific problem that emerges later in Schmitt's work. Indeed, Schmitt's own writings were the response to specific questions, processes, and arguments that arose out of concrete moments in history. In focusing on lesser known texts – letters, diary entries, unpublished manuscripts, and shorter essays – I have sought to highlight the revisions which Schmitt undertook as a result of changing historical circumstances, his repeated insistence that his essays be treated as historical documents rather than statements on the eternal nature of politics and law, and the extent to which even larger manuscripts were conceived of as responses to contemporary historical problems even if the polemical target was not explicitly identified in the text itself. At the same time, however, I have shown that Schmitt was not merely delivering a diagnosis, recording the changing political and legal structures around him as a passive observer; rather, he conceived of the philosophy of history itself as a battleground for political contestation, one in which Schmitt actively participated.

'A la historia apelo.'[30]

[30] Schmitt, *Donoso Cortes in gesamteuropäischer Interpretation*, p. 13.

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