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# Mobilizing the Western tradition for present politics: Carl Schmitt's polemical uses of Roman law, 1923–1945

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## ABSTRACT

This article offers a new reading of Carl Schmitt and his Nazi engagement by chronologically examining the changing uses of Roman law in his Weimar and Nazi thought. I argue that Schmitt's different ways of narrating the modern reception of Roman law disclose, first, the Nazification of his thought in the spring of 1933, and second, the partial and apologetic de-Nazification of his thinking in the 1940s. While Schmitt's Weimar-era works are defined by a positive use of Roman imagery, ranging from Schmitt's support to the Catholic Church to his endorsement of Benito Mussolini's 'total state' in Italy, Schmitt's Nazi writings from 1933 to 1936 describe the reception of Roman law as an anti-German virus that must be overcome by the Nazi movement. This shift mirrors Schmitt's transformation from an authoritarian thinker sympathetic to Italian Fascism into a devoted Nazi. However, once Schmitt begins to see that Germany will lose World War II, he recalibrates his position. While Schmitt's earlier Nazi writings offered a negative estimation of the historical school of Friedrich Carl von Savigny, in his 1943/44 book on European legal science, Schmitt portrays Savigny as the paradigmatic European, whose work opens the path for a renewed legal science.

## KEYWORDS

Carl Schmitt; Roman law; legal history; Nazism; antisemitism; Friedrich Carl von Savigny

## 1. Introduction: Carl Schmitt, 'the Roman'?

The use of classical sources, both Roman and Greek, runs through the writings of Carl Schmitt like a red thread.<sup>1</sup> Drawing a direct relation between the classical past of the West and himself, Schmitt would often refer to himself as a 'Roman'<sup>2</sup> and emphasize his 'arcane love' for the Latin language.<sup>3</sup> As two of Schmitt's close friends, Gerd Giesler and Ernst Hüsmert, recount: 'When Schmitt often referred to himself as a 'Roman,' he highlighted his affinity to the Latin-influenced cultural sphere.' Schmitt's self-proclaimed 'Latinity' had its roots in his catholic faith and upbringing, especially from the side of his mother.<sup>4</sup> As Giesler and Hüsmert also emphasize, to describe himself, Schmitt would cite the Roman poet Ausonius, a fellow *Moselaner*: 'My essence is slow, noiseless and yielding, like that of a calm river, like the Mosel, *tacito rumore Mosellae*.<sup>5</sup> Although Schmitt, by his own

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<sup>1</sup>For a very useful (but incomplete) table of Schmitt's references to classics, see Rink, *Myrtenzweige*, 183–6.

<sup>2</sup>Eg., Schmitt, *Tagebücher 1925 bis 1929, 444*. All translations in this essay are mine.

<sup>3</sup>Schmitt, *Tagebücher 1925 bis 1929*, 438.

<sup>4</sup>Giesler and Hüsmert, *Carl Schmitt und Plettenberg*, 2. For Schmitt's own comments on his faith and its relativization through a broad 'humanistic upbringing,' see Schmitt, *Glossarium*, 370.

<sup>5</sup>Schmitt, *Ex Captivitate Salus*, 10. On Schmitt's self-description as a 'Moselaner,' see Mehring, *Aufstieg und Fall*, 18–20. On Schmitt and Plettenberg, see Villinger, *Verortung des Politischen*.

testimony, knew both Latin and Greek well,<sup>6</sup> Schmitt had a particular affinity with Latin, occasionally conversing in the language all the way until his late years.<sup>7</sup>

Schmitt's affinity to the Latin language and cultural sphere was also reflected in the reception of his works, which in its early stages found much resonance in Italy and Spain<sup>8</sup> – the two states, which under Mussolini, and, later, under Franco most closely modelled the kind of 'qualitatively strong total state' that Schmitt would theorize and admire during the late Weimar years before joining the Nazis. Schmitt also knew modern romance languages very well and spoke fluent French, Spanish and Italian,<sup>9</sup> of which the first he knew on the level of a native speaker.<sup>10</sup>

For a lawyer, the affinity to 'Latinity' and to Roman antiquity was of course a natural inclination, given the tremendous influence that the reception of Roman law has had to some of the modern legal systems of Western Europe.<sup>11</sup> When Schmitt was asked in a 1971 interview about his university studies, he emphasized this historical aspect, noting that even though he had initially wanted to study philology, on the advice of his uncle he nevertheless ended up to the faculty of law:

I stayed there, found it wonderful, because it started immediately in the first semester with Roman law. Now, that was for me a pleasure, Latin, and so on, that was a tremendous joy, *Corpus Iuris* – I found it incredibly interesting.<sup>12</sup>

When Schmitt would often describe 'the juridical way of thinking and speaking that has become ingrained into my flesh and blood,'<sup>13</sup> he was also referring to a certain history that his juridical way of thinking necessarily carried with it. Schmitt's famous statement from *Political Theology*, that 'all significant concepts of the modern theory of the state are secularized theological concepts,'<sup>14</sup> also discloses this fact. As Schmitt explains later in his *Political Theology II*, theology and jurisprudence 'operated structurally compatible concepts' and thus demonstrated a 'systematic structural-kinship.'<sup>15</sup> It was this structure itself that formed a historical continuum reaching from the classical past of Greece and Rome to Christian theology, and finally, to modern legal science. Schmitt's life-long interest in classical history was also an essential part in his friendships with such renowned romanists and ancient historians as Álvaro d'Ors,<sup>16</sup> Franz Wieacker,<sup>17</sup> and Christian Meier,<sup>18</sup> who all also greatly respected the quality of Schmitt's works.

This article offers a systematic examination of the way Schmitt understands the meaning of Roman law and narrates the story of its reception in his Weimar- and Nazi-era writings from 1923 to 1945. I argue that Schmitt's constantly changing and ideological use of the history of Roman law – its images, stories and symbols – opens a new way of understanding the development of Schmitt's thought from the 1920s to the end of World War II.<sup>19</sup>

I begin examining Schmitt's changing use of Roman law and historical imagery in his Weimar-era works by offering a close reading of Schmitt's 1923 book *Römischer Katholizismus und politische*

<sup>6</sup>Schmitt, *Glossarium* 341.

<sup>7</sup>Mehring, *Aufstieg und Fall*, 566. On Schmitt's preference for Latin cf., Schmitt, *Der Schatten Gottes*, 475; Schmitt, *Tagebücher 1925 bis 1929*, 437–8.

<sup>8</sup>On Schmitt's reception, see Müller, *A Dangerous Mind*; Maschke, *Der Tod des Carl Schmitt*, 13–107. On Schmitt and Italy, see Schieder, 'Carl Schmitt und Italien'. On Schmitt and Spain, see Saralegui, *Pensador español*.

<sup>9</sup>Schmitt, *Glossarium*, 341.

<sup>10</sup>Mehring, *Aufstieg und Fall*, 144.

<sup>11</sup>See Wieacker, *Privatrechtsgeschichte*; Van Caenegem, *European Law in the Past and the Future*; Stein, *Roman Law in European History*.

<sup>12</sup>Hertweck and Kisoudis, *Gespräch*, 55.

<sup>13</sup>Schmitt, 'Welt grossartigster Spannung', 513. Schmitt always emphasized that he was primarily a lawyer. See Schmitt, *Glossarium*, 13–4; Schmitt, *Ex Captivitate Salus*, 55. On Schmitt as a lawyer, see Neumann, *Carl Schmitt als Jurist*.

<sup>14</sup>Schmitt, *Politische Theologie*, 49.

<sup>15</sup>Schmitt, *Politische Theologie II*, 77, 79n1.

<sup>16</sup>Schmitt and d'Ors, *Briefwechsel*.

<sup>17</sup>Erkkilä, *The Conceptual Change of Conscience*.

<sup>18</sup>Christian Meier im Gespräch mit Gerd Giesler.

<sup>19</sup>However, my intention is not to argue that Schmitt's thought would be nostalgic as Rudolf Smend does by referring to Schmitt's 'ancient conception of the state and antique-like point of view' (Smend, *Verfassung und Verfassungsrecht*, 213).

*Form.* While Schmitt initially deploys the vocabulary of traditions and the images of Rome in this work in order to defend the European civilization against nihilistic Russian communism, after distancing himself from the Church in the mid-1920s, Schmitt begins to use this very same vocabulary and imagery in a different manner. After becoming alienated from the Catholic church, Schmitt begins to utilize these very same classical images in order to defend the tradition of the European continental state, represented most intensively by Mussolini's *Stato totalitario*.

Second, I explore how Schmitt's Nazi writings from 1933 onward suddenly begin to utilize the history of Roman law in an entirely new fashion. This essential transformation illustrates how and why Schmitt abandons his Weimar-era 'decisionism' in favour of what he begins to call 'concrete order thought' after he joins the Nazi party on the 27th of April, officially becoming a member on May 1st 1933.<sup>20</sup> I maintain that in distinction to the singularly positive uses of Roman law, history and images in his Weimar-era works, Schmitt's Nazi writings from 1933 to 1936 begin to portray the German reception of Roman law as a deadly virus that is completely foreign to the German spirit. By defending a true German way of thinking against the 'foreign invasions' of Roman law and Western liberalism, Schmitt affirms the points 19 and 24 of the NSDAP party programme, which demanded the replacement of Roman law with a 'common German law' and proclaimed a struggle against the 'Jewish-materialistic spirit.'<sup>21</sup> Offering a new perspective to Schmitt's Nazi engagement from 1933 to 1936, I show that while Schmitt's Weimar-era works were animated by an admiration of Italian fascism and correspondingly by an overwhelmingly positive use of Roman imaginary, the historical-political imagery that Schmitt uses to legitimate Nazi Germany becomes decisively anti-Roman.<sup>22</sup>

Finally, third, I demonstrate how Schmitt's use of Roman law once again changes during World War II. Unlike Schmitt himself retrospectively claimed, he does not distance himself from Nazism decisively and fully in 1936,<sup>23</sup> but only during 1942/1943 after the war on the Eastern front has inevitably turned into a loss for the invading German armies.<sup>24</sup> This is most clearly apparent in Schmitt's book, *The State of European Legal Science* (1943/1944), in which Schmitt begins to describe the reception of Roman law in an entirely new fashion. Abandoning his description of the reception of Roman law as an anti-German infiltration, Schmitt now portrays the European-wide reception of Roman law as the only possible basis for a common European legal science. While Schmitt's earlier Nazi-era writings had criticized Friedrich Carl von Savigny and his historical school, in 1943/44 Schmitt begins to describe Savigny as *the* paradigmatic European thinker. In this way, Roman history and symbolics now gain new political and personal functions in Schmitt's thought. On the one hand, this history is mobilized to describe the potentials of a shared European legal science at a moment when the Nazi invasion to the East is doomed to failure. On the other hand, this shared European history is conjured up as an apologetic *deus ex machina* through which Schmitt breaks away, although only indirectly and half-heartedly, from his earlier espousals of Nazi-ideology.

This study takes its bearings from the notion that a selective use of historical images, symbols and narratives can serve as an illuminating beacon through which it is possible to disclose and highlight the fundamental changes in the more fundamental presuppositions and axioms at the heart of

<sup>20</sup>Cf., Schmitt, *Tagebücher 1930–1934*, 287; Hertweck and Kisoudis, *Gespräch*, 101; Schmitt, *Antworten in Nürnberg*, 84–5.

<sup>21</sup>While the article 19 of the NSDAP party programme states that '*Wir fordern Ersatz für das der materialistischen Weltordnung dienende römische Recht durch ein deutsches Gemein-Recht*,' article 24 emphasizes that Nazi-ideology '*bekämpft den jüdisch-materialistischen Geist in und außer uns*' in order to realize the fundamental principle of '*Gemeinnutz vor Eigennutz*.'

<sup>22</sup>While Schmitt's Nazi-engagement is analyzed by a great plethora of studies, none of them focuses on Schmitt's changing uses of Roman law and classical history. See, Bendersky, *Theorist for the Reich*; Rüthers, *Carl Schmitt im dritten Reich*; Koenen, *Der Fall Carl Schmitt*; Gross, *Carl Schmitt und die Juden*; Blasius, *Preussischer Staatsrat*; Kennedy, *Constitutional Failure*, 11–37; Mehring, *Aufstieg und Fall*, 304–436; Neumann, *Carl Schmitt als Jurist*. Although this question receives some attention in the broader histories of Nazi law, also these studies do not offer a sustained analysis of Schmitt's uses of Roman law. See especially, Rüthers, *Entartetes Recht*; Stolleis, *Recht im Unrecht*; Stolleis, *Geschichte des öffentlichen Rechts*.

<sup>23</sup>Schmitt, *Antworten in Nürnberg*, 54; Mehring, *Aufstieg und Fall*, 548; cf., 436.

<sup>24</sup>This has been broadly recognized; Meier, *Die Lehre Carl Schmitts*, 255; Gross, *Carl Schmitt und die Juden*, 296; Mehring, *Aufstieg und Fall*, 436; Kervégan, *Que faire de Carl Schmitt?* 11, 43, 231; Hell, *The Conquest of Ruins*, 420, 429; Suuronen, 'Nazi Revolution'.

Schmitt's thinking.<sup>25</sup> As the often neglected but crucially important opening sentences of the second chapter of *Political Theology* elucidate, Schmitt always knew that theories and concepts must change with major political events:

When constitutional theories and concepts are reconfigured under the impact of political events and changes, so the discussion initially becomes influenced by the practical perspectives of the day and modifies the traditional notions (*überlieferten Vorstellungen*) according to some immediate purpose.<sup>26</sup>

Schmitt's changing mobilizations of the history of Roman law for different political purposes in different historical contexts exemplifies what this sentence means.

A number of previous studies have offered different perspectives on Schmitt's relationship to Roman law and antiquity. For instance, Kaius Tuori investigates Schmitt's use of Roman symbolics in the context of his early theory of dictatorship<sup>27</sup> and Luigi Garofalo and Reinhard Mehring examine Schmitt's 1943/44 text on European legal science.<sup>28</sup> However, neither Tuori, Garofalo nor Mehring discusses the profound changes in Schmitt's understanding of Roman law. Aiming for a more comprehensive portrayal of Schmitt's uses of classical antiquity, Annette Rink's, *Das Schwert Im Myrtenzweige. Antikenrezeption bei Carl Schmitt* (2000) studies Schmitt's uses of Roman and Greek sources in a work that operates at the borders of academic text and fiction. While offering interesting insights, Rink leaves Schmitt's most central legal historical writings from the Nazi-era unanalyzed and thus offers a deficient picture of his most racist writings.<sup>29</sup>

Schmitt's use of Roman imagery is also discussed in Andreas Koenen's well-known intellectual biography, *Der Fall Carl Schmitt. Sein Aufstieg zum 'Kronjuristen des Dritten Reiches'* (1995) and in Richard Faber's collection of essays. Both portray Schmitt as a systematically Catholic thinker from diametrically opposed perspectives. While Koenen establishes a dubious division between conservative revolutionaries like Schmitt, on the one hand, and real Nazis, on the other,<sup>30</sup> Richard Faber collapses all of Schmitt's thinking into an unchanging mixture of Latinity, Catholicism and fascism.<sup>31</sup> Neither Koenen nor Faber recognizes the crucial changes that take place in Schmitt's political positions, which is directly reflected in his changing uses of Roman law in the 1930s and 1940s.

Most recently, Julia Hell's work *The Conquest of Ruins: The Third Reich and the Fall of Rome* (2019) vividly discusses Schmitt as a theorist of Roman imperial mimesis in the context of his international thought, focusing primarily on Schmitt's *Grossraum*-theory and the concept of the *Katechon*.<sup>32</sup> Also Hell emphasizes Schmitt's consistent 'theological commitments' and the continuity of his decisionism. However, in distinction to previous studies, Hell emphasizes the antisemitic

<sup>25</sup>For examples of this kind of an approach, see how the changes in the use of such a seemingly meaningless word as '*Geist*' actually discloses Martin Heidegger's path to Nazification and his later denazification (see Derrida, *Of Spirit*), or how the sudden appropriation of the discourse of human rights in the late thinking of Michel Foucault reflects the development of his later 'ethical' thinking (Goulder, *Foucault and the Politics of Rights*). In the case of Schmitt himself, see how his changing use of the metaphor of the '*Zwischenzustand*' illuminates the broader lines of development of his thought; Pankakoski, 'Intermediate State.'

<sup>26</sup>Schmitt, *Politische Theologie*, 25.

<sup>27</sup>Tuori, 'Schmitt and the Sovereignty of Roman Dictators.' Although, as Tuori clearly shows, Schmitt's 1919 book on dictatorship is very central to Schmitt's understanding of the meaning of Rome, I will not analyze this work in detail in this essay. In distinction to the narrower gaze of the legal historian that Schmitt applies in *Die Diktatur* (1921) Schmitt's 1923 book on Roman Catholicism not only repeats the central historical arguments present in Schmitt's theory of the dictatorship, but also expands them into a more general cultural-historical narrative. This reflects my broader methodological focus: Instead of analyzing the development of Schmitt's singular concepts that have their roots in Roman law, I will focus primarily on analyzing Schmitt's broader historical narratives concerning the meaning and the reception of Roman law and how these narratives change in the different periods of his career.

<sup>28</sup>Garofalo, 'Carl Schmitt e la "Wissenschaft des römischen Rechts"'; Mehring, 'Carl Schmitts Schrift "Die Lage der europäischen Rechtswissenschaft".'

<sup>29</sup>Rink, *Myrtenzweige*, 18–20.

<sup>30</sup>Koenen, *Der Fall*, 728. Koenen grounds this problematic argument on Armin Mohler's *Die Konservative Revolution in Deutschland 1918–1932* (1949) (see, Koenen, *Der Fall Carl Schmitt*, 6). The recent publication of Schmitt's diaries from the 1920s and 1930s has clearly demonstrated that Koenen's (and Mohler's) description of Schmitt as a part of this supposed broader conservative school of thought has no grounding in either Schmitt's biography or his publications.

<sup>31</sup>Faber, *Lateinischer Faschismus*.

<sup>32</sup>Hell, *The Conquest of Ruins*, 401–30.

nature of Schmitt's thinking.<sup>33</sup> Although Hell's analysis of the Roman symbolics at the heart of Schmitt's *Grossraum*-thinking and theory of the *Katechon* is often convincing, also Hell describes Schmitt as a systematically Catholic thinker and does not analyze the way Schmitt's uses of Roman law evolve.<sup>34</sup>

In a critical discussion with these studies, this article examines in detail how Schmitt's use of Roman law and classical imagery develops from 1923 to 1945; first, from the publication of Schmitt's *Römischer Katholizismus* to his theory of the total state, and second, from Schmitt's analyses of the 1933 Nazi Revolution to his 1943/1944 book *The State of European Legal Science*. In distinction to the previous studies, I argue that Schmitt cannot be portrayed as a systematically Catholic thinker.<sup>35</sup> Most importantly, the year 1933 represents a genuine cesura in Schmitt's thinking. For Schmitt, the Nazi seizure of power is a *true revolution* that forces and allows him to confront 'the difficult task of rethinking and recultivating traditional concepts,' as Schmitt constantly repeats with a revolutionary ethos in numerous writings published after the *Machtergreifung*.<sup>36</sup>

In analyzing Schmitt's changing uses of classical images, narratives and symbols, it is crucial to remember that Schmitt operated polemically within broader academic discussions.<sup>37</sup> Just as the philosopher Martin Heidegger and the political theorist Hannah Arendt would perform different returns to and retrievals from the Greco-Roman antiquity,<sup>38</sup> a great plurality of German legal theorists and historians were engaged in rethinking the Western heritage from the perspective of legal history and theory. Among them were thinkers sidelined by the Nazis like Paul Koschaker and those who made careers within the party, like Franz Wieacker.<sup>39</sup> It is obvious that when Schmitt is discussing ancient sources in his writings, he is also, often implicitly, participating to these wider discussions concerning the faith of Europe and its shared history and traditions. I will examine this broader historical context of Schmitt's arguments to the extent that it is essential for understanding his arguments. In the following section, I will begin analyzing Schmitt's uses of the classical past by investigating his Weimar-era writings.

## 2. Schmitt's deployment of Roman imagery in the Weimar-era: from the Church to the total state

Schmitt's 1923 book *Römischer Katholizismus und politische Form* offers a detailed narrative of the Catholic Church as the contemporary bearer of European traditions and Roman universalism. Schmitt begins his book with a striking sentence: 'There is an anti-Roman affect.'<sup>40</sup> As he explains, Rome is nothing less than an 'image' (*Bild*) with a 'mythical power.' The image of Rome has 'nourished' various political battles by providing them with a 'mythical arsenal.' Whole generations of pious protestants and orthodox Christians have seen in the image of Rome the incarnation of the anti-Christ or the embodiment of the whore of Babylon; both themselves mythical images of disorder, chaos and imperial evil. Modern politicians from Gladstone,

<sup>33</sup>Ibid., 410, 426–7. Hell relies broadly on Gross, *Carl Schmitt und die Juden*. As we will see, Gross's thesis of Schmitt's unchanging antisemitism is also too straightforward.

<sup>34</sup>Ibid., 404–7.

<sup>35</sup>Beyond the works mentioned above, the description of Schmitt as a Catholic has been defended notably by Meier, *Die Lehre Carl Schmitts*. On the clear discontinuities of Schmitt's Catholicism, cf., Mehring, 'Catholic Layman'; Suuronen, 'Carl Schmitt's Critique of Biotechnology and Utopias.'

<sup>36</sup>Schmitt, 'Über die neuen Aufgaben der Verfassungsgeschichte', 264. On Schmitt's revolutionary ethos, see Suuronen, 'Nazi Revolution'; Blasius, *Preussischer Staatsrat*, 12, 111; Mehring, *Aufstieg und Fall*, 309–10, 340–7, 380; Quaritsch, *Positionen und Begriffe Carl Schmitts*, 79.

<sup>37</sup>Eg., Hewitson and D'Auria, *Europe in Crisis*; Tuori and Björklund, *Roman Law and the Idea of Europe*.

<sup>38</sup>For a general depiction of such attempts in the twentieth century see Strong, *Politics without Vision*. For a detailed elaboration of Heidegger's reading of the tradition that, in distinction to Schmitt's legal historical narratives focused on Rome, takes its bearings from Greek philosophy, see Backman, *Complicated Presence*.

<sup>39</sup>Cf., Beggio, *Paul Koschaker*; Tuori, *Empire of Law*.

<sup>40</sup>Schmitt, *Römischer Katholizismus und Politische Form*, 5.



Bismarck and Cromwell to writers like Dostoyevsky were united, although to different degrees, in their anti-Roman horror.<sup>41</sup>

With equal ferocity and mythical strength, the political image of Rome has also ‘nourished’ positive political energies and identities. According to Schmitt, the best proof for the ‘continuity of the catholic Church and Roman Empire’ is that Catholicism has animated equally the historical and philosophical constructions of both the opponents and supporters of the Church; that of the philosopher of *Action Française*, Charles Maurras, the race theorist Houston Stewart Chamberlain as well as the thinking of Max Weber and Dostoyevsky.<sup>42</sup> Schmitt describes the catholic Church as a *complexio oppositorum*; a unique institution of ‘astounding elasticity’ that is able to both animate political battles on all sides and to incorporate within its ideological corpus the most different doctrines, peoples and ideas.<sup>43</sup> Although Schmitt has not yet explicitly formulated his thesis of the political, it is obvious to any perceptive reader that already his 1923 book presents the image of Rome as nothing less than a mythical mirror that both nourishes and discloses various friend/enemy-distinctions.<sup>44</sup>

Schmitt also appreciates the Church for its ability to realize the political idea of *representation*. That the Church has been able to function as a point of self-identification to a plurality of political movements is inextricably related to its historical position and role as a ‘historical complex and administrative apparatus’ that carries forward the ‘universalism of the Roman Empire.’<sup>45</sup> As Schmitt puts it, the Catholic Church is the ‘bearer of the juridical spirit and the true heir of the Roman law’<sup>46</sup> and the institution in which ‘the Roman rationalism continues to survive (*weiterlebt*)’<sup>47</sup> This rationalism ‘lies in the institutional [form] and is essentially juridical (*juristisch*)’; it is defined by the ‘capacity to juridical form.’<sup>48</sup> The organization of the Church is ‘eminently political’ because its conception of life is based on *more* than mere economic calculations; on the realization of its own metaphysically grounded worldview.<sup>49</sup> As an institution, the Church exemplifies the fact that ‘the idea belongs to the political, because there is no politics without authority and no authority without the ethos of conviction.’<sup>50</sup> As the leader of the Church and all of Christendom, the pope is the ‘vicar of Christ’ (*Stellvertreter Christi*) and the lineage of his office can be traced back all the way to Christ himself.<sup>51</sup>

Schmitt’s veneration of Catholicism and his description of the Church as the bearer of European ‘*civitas humana*,’<sup>52</sup> has a directly political purpose. Schmitt locates the enemies of the Church to *liberalism* and *communism*. Mobilizing the vocabulary of ‘traditions’ and the imagery connected to Rome to the level of contemporary political battles, Schmitt argues that both liberalism and communism equally threaten the Church as the bearer of European traditions: “The big industrialist has no other ideal than Lenin has, namely an “electrified earth.” Both ultimately argue only about the right method concerning the electrification.”<sup>53</sup> Liberalism and communism are *metaphysically similar* because both actively deny the idea that politics must always be grounded on transcendental values. Unlike liberalism and communism that merely give ‘recipes for the manipulation of matter,’ through its defense of the Christian worldview, the ‘particular rationality’ of the Church ‘gives a

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<sup>41</sup>Ibid.

<sup>42</sup>Ibid., 9.

<sup>43</sup>Ibid., 6, 11–12.

<sup>44</sup>Ibid., 27, 29.

<sup>45</sup>Ibid., 9.

<sup>46</sup>Ibid., 31.

<sup>47</sup>Ibid., 23.

<sup>48</sup>Ibid., 23, 31.

<sup>49</sup>Ibid., 27–29.

<sup>50</sup>Ibid., 28.

<sup>51</sup>Ibid., 23–4

<sup>52</sup>Ibid., 32.

<sup>53</sup>Ibid., 22, cf., 29.

direction' to the 'irrational darkness of the human soul.'<sup>54</sup> It is from this 'pretension' to be more than mere mechanics, consumption and materiality that the Church derives its specific demand for 'validity and authority.'<sup>55</sup>

Schmitt then concludes his work by drawing the lines between the European civilization and the new kind of active nihilism that defines communism. Referring to Giuseppe Mazzini, Schmitt hopes to unify Europeans through a common enemy; the actively nihilistic Russia.<sup>56</sup> What both Christians and liberals must realize, Schmitt implies, is that the rising proletariat in Europe and the 'Russentum that is turning itself away from Europe,' are, also in their own self-understanding, anti-traditional 'Barbarians,' who threaten to eradicate European traditions and culture.<sup>57</sup> In this great political battle the Church must choose its side just as it had chosen to support the anti-Enlightenment tendencies in the previous century. In the twentieth century, the Church and its 'concept of humanity' must defend its own specific political 'idea' and 'West-European civilization' against the anarchistic Russians.<sup>58</sup> In this rather ingenious fashion, Schmitt manages to both criticize liberalism radically and yet also envision a potential way of overcoming its deeply anti-political nature through the image of a common enemy.<sup>59</sup>

However, as we know today, Schmitt's celebration of Catholicism in the realm of the political did not last very long. By the mid-1920s, Schmitt becomes alienated from Catholicism both personally and politically.<sup>60</sup> In distinction to his 1923 pamphlet, by early 1925 Schmitt already refers to himself as a 'catholic layman' (*katholischer Laie*) in his notebooks and declares that even though he is 'a son of the Roman-Catholic Church,' he is nevertheless 'not obliged to remain a child my whole life ... I grow and become an adult ... *sors de l'enfance*.'<sup>61</sup> As Schmitt distances himself from the Catholic Church, he also begins to distance himself from the historical interpretation that was inextricably attached to his interpretation of the political relevance of the Church. Schmitt's alienation from the Church is reflected in the mirror of Roman imagery. While Schmitt still emphasizes the connection between Catholicism and Rome in a 1924 letter to his fellow constitutional lawyer Rudolf Smend,<sup>62</sup> only a few years later Schmitt has already grown much more ambivalent in his judgment, writing in his notebooks that 'the last and best formulation for the power of the Roman Church remains the sentence of Hobbes: the pope is the specter that haunts (*umgeht*) the grave of *Imperium Romanum*.'<sup>63</sup> Although the change is small, it is still noticeable: The Church is no longer the *self-evident* bearer of the Western tradition, but merely circulates around the tombstone of Rome, around its mythical imagery.

Descriptively, as Schmitt's self-distancing from the Church develops further, Schmitt asks in another notebook entry from 1926 'Is the era of Rome at its end?' without providing a direct answer.<sup>64</sup> However, still during the same year, Schmitt indeed provides an answer to his own question, when he writes to his friend, the author and literary critic Franz Blei that 'the era of Rome has come to an end.'<sup>65</sup> As Schmitt now also laments in his diaries, the idea of a unified Christian Europe

<sup>54</sup>Ibid., 23–4.

<sup>55</sup>Ibid., 28–9.

<sup>56</sup>Ibid., 65.

<sup>57</sup>Ibid., 63–4.

<sup>58</sup>Ibid., 65.

<sup>59</sup>It is thus too hasty to collapse Schmitt's arguments to a variant of the German *Zivilisationskritik* as is sometime done; Richard Wolin, 'The Conservative Revolutionary Habitus'; Hell, *The Conquest of Ruins*, 406. As Schmitt's student Armin Mohler rightly emphasizes, what distinguished Schmitt from the average 'conservative revolutionary' of the Weimar-era, is precisely the fact that Schmitt virtually *never* positively cites Friedrich Nietzsche, who laid the foundations for the German civilizational discourse; Mohler, 'Carl Schmitt und die 'Konservative Revolution''. On Schmitt's radical opposition to Thomas Mann, one of the central representatives of Weimar-era civilizational discourse, see Mehring, 'Der 'Gross-Verwerter''.

<sup>60</sup>Mehring, *Aufstieg und Fall*, 184–5; Mehring, 'Catholic Layman'.

<sup>61</sup>Schmitt, *Tagebücher 1925 bis 1929*, 342.

<sup>62</sup>Schmitt and Smend, *Briefwechsel 1921–1961*, 27.

<sup>63</sup>Schmitt, *Tagebücher 1925 bis 1929*, 414.

<sup>64</sup>Ibid., 350.

<sup>65</sup>Schmitt's words are recounted by Blei, *Briefe an Carl Schmitt*, 68.



that he had hoped for and envisioned in 1923 discloses itself as a mere momentary delusion, since even ‘the preliminaries’ of a Christian culture are ‘missing’ from contemporary Europe.<sup>66</sup>

Although Schmitt gradually distances himself from the Church, it is important to emphasize that this certainly does not amount to a wholesale abandonment of the whole discourse concerning Western traditions and the classical past. Rather, the vocabulary of traditions is transposed to another arena: The arena of the continental European *state*. This is reflected especially clearly in Schmitt’s growing respect for Italian fascism and its ‘qualitatively strong total state,’ which in the late 1920s and early 1930s, as Mehring notes, becomes Schmitt’s ‘model for the restoration of statehood.’<sup>67</sup> In an especially interesting entry to one of his notebooks, Schmitt describes this change in terms of the ‘anti-Roman affect’ that now gains an entirely new interpretation:

The anti-Roman affect is today no longer at all directed so strongly against the Church (it would be a delusion, if she [the Church] believed that it was, and a fraudulent overestimation, since she [the Church] is bureaucratized), but against fascism, dictatorship, Caesarism, that is, against every true state. Rome = state. Pacifism = Neutralism.<sup>68</sup>

Schmitt clarifies the meaning of this new anti-Roman affect in his 1929 review essay of Erwin Beck-erath’s book *Wesen und Werden des faschistischen Staates* (1927). In this text, Schmitt now joins in the large number of ideologists who utilized the fascist discourse of *Romanità* and aimed to portray fascist Italy as the contemporary inheritor of ancient Rome.<sup>69</sup> Just as Mussolini himself would declare that ‘the Roman tradition’ was nothing less than ‘an ideal of force in action,’<sup>70</sup> against the weak Republic of Weimar, Schmitt now celebrates the fact that ‘the fascist state, with an ancient honesty (*antiker Ehrlichkeit*), will once again be a state.’ Schmitt emphasizes that this ‘strong feeling of a connection with antiquity is not only decoration’ but must rather be understood as a concrete defense of the European tradition of statehood, which is itself a ‘classical image.’<sup>71</sup> While in 1923 Schmitt drew a distinction between a common European civilization and Russia, he now transforms this distinction into one between Italian fascism that recognizes with an ‘ancient simplicity (*mit antiker Simplizität*)’ the ‘concrete plurality of peoples and nations’ and between the ‘ideological-abstract-ghostlike monism’ that is at heart of the violently globalist worldview of communism.<sup>72</sup> The image of the shared Christian Europe is abandoned in favour of a defense of a plurality of national traditions, the latter being exemplified by Italy and her mythical espousal of the Roman heritage. It is in this sense that the ‘anti-Roman affect’ is now mobilized ‘against fascism, dictatorship, Caesarism’ by Italy’s enemies.<sup>73</sup> If in 1923 the anti-Roman affect meant, politically speaking, to position oneself against Catholicism, in 1929, to be against Rome means to be against fascist Italy, the most exemplary realization of a strong state in Europe. If in 1923 one resisted the *Church* by resisting Rome, in 1929 one resists the *state* by resisting Rome.

As Cosimo Cascione notes, despite of exceptions like the historian Ettore Pais and the romanist Pietro de Francisci, most of the authors who theorized Italy’s classical Roman heritage never attempted at providing any kind of a ‘serious confrontation with classical culture and its tradition’ but were rather content in dealing with this matter based on ‘intuition’ and by creating ‘a superficial and a ritual connection of past grandeur and (alleged) present glories.’<sup>74</sup> As Wolfgang Schieder emphasizes, also Schmitt’s understanding of the political realities of fascist Italy were largely based on such assumptions.<sup>75</sup> This is also reflected by the fact that Schmitt’s use of classical history

<sup>66</sup>Schmitt, *Tagebücher 1925 bis 1929*, 491.

<sup>67</sup>Mehring, *Aufstieg und Fall*, 242.

<sup>68</sup>Schmitt, *Tagebücher 1925 bis 1929*, 487.

<sup>69</sup>See for instance Cascione, ‘The idea of Rome’.

<sup>70</sup>Mussolini, *The Political and Social Doctrine of Fascism*, 25.

<sup>71</sup>Schmitt, ‘Wesen und Werden’, 130. However, it is important to note that according to Schmitt, the state was a ‘concrete concept bound to a historical epoch’ – the epoch of modernity (Schmitt, ‘Staat als ein konkreter’). Schmitt explicitly criticizes the romanist d’Ors for an anachronistic use of the concept of ‘state’ in his historical studies (Schmitt and d’Ors, *Briefwechsel*, 89).

<sup>72</sup>Schmitt, ‘Wesen und Werden’, 130.

<sup>73</sup>Schmitt, *Tagebücher 1925 bis 1929*, 487.

<sup>74</sup>Cascione, ‘The Idea of Rome’, 133–4.

<sup>75</sup>Schieder, ‘Carl Schmitt und Italien’, 14–21.

changes crucially when he aligns himself with the Nazi party and its revolutionary forces in the Spring of 1933.

### 3. The Nazi Revolution in legal science: Schmitt's battle against Roman law and liberalism from 1933 to 1936

Schmitt's friend Franz Blei found it hard to believe that such a well-read man like Schmitt could join the Nazi party. Drawing an interesting contrast between Carl Schmitt the 'Roman' and the well-read 'humanist' whom Blei had known in the early 1920s, on the one hand, and the later Carl Schmitt, who joined the Nazis, on the other, Blei wonders in an essay published in 1940:

How could this Roman, Rhenish, fully unromantic Catholic, who wrote the classical work 'Roman Catholicism and political form,' succumb to the Leviathan of the state? ... How could this contemplative, calm, *weinfrohe* man, who saw in his Rhenish homeland and its Romanity and Christianity the fulfillment of humanism, succumb to such a noisy berserker-Germanness?<sup>76</sup>

While one could simply argue that Blei had failed to understand the way Schmitt had distanced himself from the Church and therewith from the traditions it represented, there is a deeper point to Blei's contrast between Schmitt's early 'Latinity' and his later Nazism. As Hans Frank, the leading Nazi Lawyer on whom Schmitt's career in the party depended,<sup>77</sup> announced in an article from April 1933, published in *Völkischer Beobachter*, one of the central aspects of future Nazi law was to be a decisive turn from Roman Law to a 'German Law' that would be accompanied by the creation of a new faculty for racial science.<sup>78</sup> In this negative sense, it was not only the French Revolution that was performed 'in Roman costume and with Roman phrases,' as Karl Marx had famously observed decades earlier.<sup>79</sup> This turn against the reception of Roman law that had been announced already in the article 19 of the Nazi party programme from 1920 constituted one part in the comprehensive retelling of world history that the Nazi movement was now pushing through in all spheres of life.<sup>80</sup>

While there are some studies that analyze Schmitt's retelling of *modern* German history in his early Nazi-era writings<sup>81</sup> and others that engage Schmitt's fierce battle against the liberal concept of the *Rechtsstaat*,<sup>82</sup> Schmitt's attack against the reception of Roman law between 1933 and 1936 remains a topic that has not been analyzed in detail.<sup>83</sup> In fact, virtually all studies on Schmitt and Nazism presuppose that the Nazi 'deconstruction of the state horrified Carl Schmitt, who with his firm grounding in Roman law, Catholicism and pontifical *summa potestas*, remained very Latin in this regard.<sup>84</sup> However, this interpretation is not supported by Schmitt's Nazi-era writings. Tackling this subject in detail, I will argue in this section that Schmitt develops a detailed historical narrative about the 'spiritual subjugation' of Germany,<sup>85</sup> which not only aims to retell the modern history of Germany but also the way Roman law was uncritically received by German lawyers and liberals. I demonstrate how Schmitt's narrative concerning the reception of Roman law forms an essential part of his self-proclaimed 'struggle of concepts (*Kampf der Begriffe*)' that aims to purify

<sup>76</sup>Blei, *Zeitgenössische Bildnisse*, 21; cited in Mehring, *Aufstieg und Fall*, 315.

<sup>77</sup>Blasius, *Preussischer Staatsrat*, 170–80; Mehring, *Aufstieg und Fall*, 373.

<sup>78</sup>Gräfin von Lösch, *Der nackte Geist*, 188.

<sup>79</sup>Marx, *Der Achtzehnte Brumaire*, 2.

<sup>80</sup>On the revolutionary historical imaginary of the Nazis, see especially Dennis, *Inhumanities*; Chapoutot, *Le nazisme et l'antiquité*; Martin, *The Nazi-Fascist New Order*; Chapoutot, *La révolution culturelle nazie*; Chapoutot, *The Law of Blood*; Hell, *The Conquest of Ruins*.

<sup>81</sup>Eg., Blasius, *Preussischer Staatsrat*, 128–51; Smeltzer, "Germany's Salvation".

<sup>82</sup>Eg., Stolleis, *Geschichte des öffentlichen Rechts*, 330–8; Meierhenrich, *The Remnants of the Rechtsstaat*, 95–158.

<sup>83</sup>For general treatments of legal history and Roman law under Nazi rule (in which Schmitt is mentioned in passing), see Stolleis, *Recht im Unrecht*, 57–93; Stolleis, 'Römisches Recht und Rassengesetze'.

<sup>84</sup>Chapoutot, *The Law of Blood*, 115.

<sup>85</sup>Schmitt, 'Die Logik der geistigen Unterwerfung',.

Nazi legal science from foreign concepts.<sup>86</sup> As Schmitt puts it, it was of crucial importance that the process of ‘co-ordination’ (*Gleichschaltung*) would also reach historical depths and reform the words of legal language itself.<sup>87</sup>

In 1933 Schmitt instantly realized that the Nazi Revolution constituted a revolutionary moment that would necessitate a profound historical revisionism. In *Staat, Bewegung, Volk* (1933), Schmitt declares that ‘the past obtains its light from the present and all perceiving spirit is present spirit.’<sup>88</sup> In a particularly symbolical move, Schmitt now emphasizes that Nazism must be understood as a *break* from the Christian-Roman traditions represented by the Church. Nazi-ideology fiercely rejects and negates the Christian idea of *representation* and its image of the political relation as a relation constituted by the shepherd and his flock. The *Führer* does not represent anything; he incarnates, without any artificial separation and distance required by representation, the immediate will of the German people as a racial community.<sup>89</sup> That nothing could be more wrong than to describe the racist Nazi ideology as the bearer of Roman-Christian universalism was clear to Schmitt already long before he joined the Nazi party in 1933. Schmitt’s notebooks from the 1920s record his readings of Arthur de Gobineau’s *Essai sur l’inégalité des races humaines* (1853–1855), which, as Schmitt notes, already attacked the universalistic heritage of Rome and the traditions of the Enlightenment.<sup>90</sup> As Schmitt highlights in his 1935 essay on ‘Legal science in the Führer-state,’ the Nazi revolution must retell legal and world history from its own perspective:

The upheaval, in which we are standing, is enormous and not a matter of days or years ... when we are preparing a new ground (*Boden*) for hundreds and thousands of years, it is scientifically necessary and self-evident, that we also go back into the past with hundreds and thousands of years, not out of antiquarian and archeological interests, not out of a false historical neutrality and objectivity, but on the contrary, because every past (*jede Vergangenheit*) obtains its light from the present.<sup>91</sup>

It is in this sense that Schmitt’s Nazi-era works after 1933 aim to tease out a novel genealogy of true German concrete orders.<sup>92</sup> This search for a new Nazi history is, at the same time, an attempt to purify Germany from the ‘spiritual subjugation’ caused by the reception of Roman law and liberal thinking. In an article published in 1934, which carries the descriptive name, ‘*Unsere geistige Gesamtlage und unsere juristische Aufgabe*’ (‘Our comprehensive spiritual situation and our juridical task’), Schmitt writes:

Two great invasions of foreign law (*fremden Rechts*) have infiltrated (*ingedrungen*) the German people and its legal life (*Rechtsleben*): The reception of Roman law in the late Middle Ages and the reception of liberal constitutionalism in the nineteenth century.<sup>93</sup>

According to Schmitt the influence of Roman law and liberal constitutionalism cannot be explained as a natural exchange of ideas between neighbouring nations and peoples; in reality, they represent nothing less than completely foreign ‘invasions’ (*Einbrüche*) and as such form a part of the

<sup>86</sup>Schmitt, ‘Nationalsozialismus und Rechtsstaat’, 713–4.

<sup>87</sup>Schmitt, ‘Der Weg des deutschen Juristen’, 692.

<sup>88</sup>Schmitt, *Staat, Bewegung, Volk*, 28.

<sup>89</sup>*Ibid.*, 41–2. The radicality of Schmitt’s statements in his Nazi works is often not taken at face value. For instance, in her otherwise erudite work on Schmitt’s Weimar-era thought, Ellen Kennedy argues that Schmitt’s decision to join the Nazis could be described as a shift from initially supporting a commissarial dictatorship during the tumultuous year of 1932 toward supporting a sovereign dictatorship under Hitler during 1933 (Kennedy, *Constitutional Failure*, 154–183, 223n12). Kennedy interprets Schmitt’s shift to Nazism too directly from the perspective of his Weimar-era thought. Schmitt’s Nazi-writings explicitly emphasize that the new concept of ‘leadershipness’ (*Führertum*) that defines the novel power-structure of the Nazi movement is *not a form of dictatorship of any kind*, but rather an entirely new kind of constitutional concept based on the shared racial homogeneity of the *Führer* and his ‘followership’ (*Gefolgschaft*) (Schmitt, ‘Der Neubau’, 250; Schmitt, *Staat, Bewegung, Volk*, 42; this important semantic change is also not recognized by Mehring, ‘Carl Schmitts Schrift “Die Lage der europäischen Rechtswissenschaft”’, 866). On Schmitt’s analysis of the Nazi-movement as a radically revolutionary power formation based on the concepts of *Führertum* and *Artgleichheit*, see Suuronen, ‘Nazi Revolution.’

<sup>90</sup>Schmitt, *Tagebücher 1925 bis 1929*, 361–2; cf., 346; Schmitt, *Der Schatten Gottes*, 154–5, 168.

<sup>91</sup>Schmitt, ‘Die Rechtswissenschaft im Führerstaat’, 439.

<sup>92</sup>This is most fully performed in Schmitt, *Über die drei Arten*, 34ff.

<sup>93</sup>Schmitt, ‘Unsere geistige Gesamtlage und unsere juristische Aufgabe’, 11.

comprehensive ‘spiritual subjugation’ (*geistige Unterwerfung*) of Germany. These foreign invasions lead to the development of ‘foreign ... conceptual-systems and thought-systems’ on German soil, ultimately establishing the domination of ‘*volksfremde Rechtssätze*,’ legal propositions foreign to the German people. Schmitt emphasizes that these non-German infiltrations had such a radical effect on the development of German law that even the paradigmatic ‘type’ of a German jurist was soon defined by these foreign traditions. The practical result was that the truly German concrete order based on a ‘living and actual reality’ was replaced by an ‘abstract normativism’ that set the measure for a supposedly scientific and ‘purely juristic’ way of thinking.<sup>94</sup>

As one specifically important example, Schmitt mentions the distinction of private and public law that was bequeathed to modern continental legal systems through the reception of Roman law.<sup>95</sup> However, as Schmitt emphasizes in his 1934 essay ‘National Socialist Legal Thinking,’ ultimately, the task of Nazi lawyers is not to trace the singular non-German influences, but rather to prepare the overcoming of a whole system of normativistic and anti-German deceptions. It is in this sense that

The battle against the Roman law has a deeper meaning. It should not make us mere historians of law or bring forth evidence that every single sentence of the *Sachsenspiegel* would be more correct than every single sentence of the *Corpus iuris*. It is a battle against the after-effects and consequences of a process, which in its immense scope is unparalleled, [and which] has changed the *thought type of the Jurist (Denktypus des Juristen)*.<sup>96</sup>

Everything comes down to tracking and overcoming a specific ‘spiritual habitus’ and ‘a specific juridical way of thinking’ that broke through in Germany through the influence of Roman law: ‘This is what we mean, when we say, that we are engaged in a battle against the Roman law.’<sup>97</sup> It is crucial to become conscious of the ‘loanwords and loan-thoughts’ that have separated the German lawyer from the concrete German order and way of thinking ever since the 15th century. This development saw its apex in the nineteenth century through the ‘influx of the Jewish guest-people (*jüdischen Gastvolkes*)’ – a people that for thousands of years only lived ‘in law (*Gesetz*) and in norm’ without a state of its own.<sup>98</sup> By rethinking the fundamental legal concepts and thus freeing herself from a foreign way of thinking, Germany and its new lawyers were now spearheading an epochal revolution through which the German people and her allies would return ‘to their own soil (*Boden*), to their own blood (*Blut*) and to the natural orders, that arise out of blood and soil (*Blut und Boden*).’<sup>99</sup>

Schmitt specifies all of these arguments further in an essay entitled ‘The task and necessity of a German estate of lawyers,’ published in 1936. In this text Schmitt pronounces that ‘the program of the NSDAP is a true, and namely our most important source of law’; its substance has, by 1936, turned into ‘valid law’ and it defines the work of everyone, who is in any way connected to questions related to law: the judge, the legislator, the legal scholar and the lawyer, who are now all described as ‘German protectors of law (*Rechtswahrer*)’<sup>100</sup> – a specifically Nazi term that was generally preferred over the ‘degenerated’ Latin-rooted ‘jurist.’<sup>101</sup> Schmitt refers especially to the point 19 of the party programme and celebrates the fact that the received Roman law that had merely served the interests of a ‘material world-order’ was now being overcome with a ‘German common law’ (*deutsches Gemeinrecht*).<sup>102</sup>

<sup>94</sup>Ibid; cf. Carl Schmitt, ‘Aufgabe und Notwendigkeit’, 181. On the ‘ideal-type’ of the Roman jurists as ‘interchangeable people’ (*fungibele personen*), which Schmitt attacks here, see Giltaij, ‘Autonomy and Authority’.

<sup>95</sup>Schmitt, ‘Die Rechtswissenschaft im Führerstaat’, 435.

<sup>96</sup>Schmitt, ‘Nationalsozialistisches Rechtsdenken’, 226.

<sup>97</sup>Ibid.

<sup>98</sup>Ibid.

<sup>99</sup>Ibid., 229.

<sup>100</sup>Schmitt, ‘Aufgabe und Notwendigkeit’, 181.

<sup>101</sup>Chapoutot, *The Law of Blood*, 94ff.

<sup>102</sup>Schmitt, ‘Aufgabe und Notwendigkeit’, 181.

Schmitt then moves on to describe German legal history as a battle between true Germanic law and foreign Roman law, portraying all attempts at resisting the influence of the latter as heroic resistance.<sup>103</sup> The most important attempt at resisting Roman law had been undertaken by the *germanistische Rechtsschule* during the nineteenth century. As especially important works from this tradition, Schmitt names Georg Beseler's *Volksrecht und Juristenrecht* (1843) that was written as a critique of Friedrich Carl von Savigny's and Georg Friedrich Puchta's 'reanimation of *Romanistik*' and the first volume of Otto von Gierke's *Genossenschaftsrecht* (1868).<sup>104</sup> Bringing his historical portrayal of this Germanic tradition to the twentieth century, Schmitt also emphasizes the importance of Heinrich Brunner and Karl von Amira as trailblazers of a specifically Germanic law. However, since the efforts of all these jurists were unfortunately not supported by a strong political movement, they remained powerless in the shadow of the 'several-hundred-year-long domination of Roman reception-law (*Rezeptionsrechts*).' Finally, the lost battle culminated to the publication of the 1896 *Bürgerliches Gesetzbuch* (BGB), coming into force in 1900, which despite of appearances continued to be defined by the ideas of legal positivism and abstract normativism. Such lawyers as Erich Jung, Philipp Heck and Ernst Stampe, who tried to resist this codification, still remained helpless and without influence.<sup>105</sup>

Only the triumph of National Socialism in 1933 finally liberates Germany from this foreign sickness. Drawing on this historical background, Schmitt formulates the revolutionary and purificatory task of the coming Nazi legal science as follows: 'The battle against Roman *Rezeptionsrecht* is a battle against an estate of lawyers (*Juristenstand*) formed through a foreign law and [a battle] for a German estate of lawyers (*Juristenstand*).'<sup>106</sup> Schmitt also emphasizes that in order to fully grasp the nature of this historical battle, one must consider the specific infiltration of 'Jewish scholars' to Germany's legal life. To this extent, he announces in a footnote his intention of doing so in an upcoming conference on 'Jewishness in legal science,' which Schmitt will organize later in 1936.<sup>107</sup>

Schmitt specifies his argument by stating that his battle against Rome is *a battle against a specific reception of Roman law, and not against Roman law in its entirety*. Unlike the received version of Roman law in Germany, Schmitt proclaims that a true *Volksrecht* was clearly present in the thought of 'the greatest jurists of classical Roman law.'<sup>108</sup> With the NSDAP party programme as valid law and with Hitler as the 'highest judge of the nation,' the deadly influence of the received and essentially Jewish Roman law can now finally be overcome. It can now be perceived that the received *Corpus iuris* was, in fact, nothing more than a feeble 'Ersatz of a political unity' that had replaced the real political unity of Germany with an abstract and powerless unity of codified norms. This, again, was conserved by the *corpus iurisconsultorum* at the German faculties of law.<sup>109</sup>

These same themes are analyzed in greater detail in Schmitt's most comprehensive legal historical essay from the early Nazi-era, 'The historical situation of German legal science,' published in 1936 in the *Deutsche Juristen-Zeitung*, edited by Schmitt himself since May 1934. This essay explains in much greater detail how 'the German people has found its *völkische Lebensordnung* through the Führer of the national socialist movement' and elaborates what this means for the 'German renewal of law (*deutschen Rechsterneuerung*).'<sup>110</sup> First, specifying his distinction between the deadly

<sup>103</sup>On Germanic and Roman law in the nineteenth century, see Whitman, *The Legacy of Roman Law*, 205–9; On similar narratives among Nazi thinkers, see Stolleis, *Recht im Unrecht*, 64–5.

<sup>104</sup>These praising remarks are contradictory to Schmitt's 1930 essay on Hugo Preuss, in which Schmitt criticizes Gierke. See Schmitt, 'Hugo Preuss', 169–76. There is no doubt that this change is connected to what Michael Stolleis calls a 'Gierke-Renaissance in National Socialism'; Stolleis, *Recht im Unrecht*, 64 n28. However, see also Schmitt's antisemitic remarks in relation to Gierke's marriage and children, in Schmitt and Huber, *Briefwechsel*, 189.

<sup>105</sup>Schmitt, 'Aufgabe und Notwendigkeit', 181.

<sup>106</sup>*Ibid.*, 182.

<sup>107</sup>*Ibid.*, 181, fn1. For the deeply antisemitic conference proceedings, see *Das Judentum in der Rechtswissenschaft*. For background, see Mehring, *Aufstieg und Fall*, 372–8; Rütters, *Entartetes Recht*, 125–42.

<sup>108</sup>Schmitt, 'Aufgabe und Notwendigkeit', 182. This was a wide-spread narrative among Nazi lawyers and also propagated by Schmitt's patron Hans Frank. See, Chapoutot, *The Law of Blood*, 53, 92–9; Chapoutot, 'The Denaturalization of Nordic Law'.

<sup>109</sup>Schmitt, 'Aufgabe und Notwendigkeit', 182.

<sup>110</sup>Schmitt, 'Die geschichtliche Lage', 15–6.



reception of a liberal and inherently ‘Jewish’ *science of Roman law* and between *true Roman law*, whose real substance had been lost for millennia before being recovered by the National Socialists, Schmitt now declares:

The great times of legal science are by no means democratic ones nor times defined by the rule of law (*rechtsstaatliche*) in the sense of the liberal concept of democracy or rule of law (*Rechtsstaat*). To the authority of the famous Roman *Jurisconsultus* equipped with the *jus respondendi* belongs the authority of the Roman Caesar Augustus, the *auctoritas Divi Augusti* (Dig. 2, 49) [*sic*].<sup>111</sup>

Although Schmitt is not drawing a direct parallel between Hitler and the Roman emperor, because Schmitt emphasizes that the specifically Nazi notion of ‘leadershipness’ (*Führertum*) grounded on racial homogeneity (*Artgleichheit*) has absolutely no historical precedents at all,<sup>112</sup> Schmitt is nevertheless alluding that Nazi Germany has restored the glory of the true *Volksrecht* that had once been realized in Rome. Drawing on a long tradition of narratives, Schmitt implies that both in the golden era of early Roman empire and in Nazi Germany the legal system is guaranteed by a strong ruler.<sup>113</sup> Schmitt now portrays the Nazi lawyer as a *Rechtswahrer*, a protector of law, who forms an essential part in the defense of ‘*völkisch* orders’ threatened by ‘racially hostile powers (*artfeindlichen Mächten*).’ It is in this sense that the new German protector of law is a ‘vivid part of the concrete order and of the status, whose law it must guard’; the German protector of law is the ‘true ratio status’ and a ‘*vigens disciplina*.’<sup>114</sup>

Schmitt also specifies his distinction between the feeble ersatz unity created by the reception of Roman law and the strong racial unity of the German people realized by the Nazi movement. Schmitt maintains that German legal history is defined by the attempt to replace the latter with a mere abstract *Rechtsgemeinschaft*, a fictive community of law that arose as temporary solution in a ‘political vacuum’ devoid of true political unity. In order to illustrate this historical reality, Schmitt refers to Rudolf Sohm’s 1874 article, ‘*Deutsche Rechtsentwicklung und Kodifikation*’ in which Sohm argues that the reception of Roman law was not the reception of a *Recht* but the reception of *Rechtswissenschaft*; or as Schmitt would have it, not a reception of a law in the sense of customs, habits, concrete ways of life, but rather the reception of a lifeless, coded language that no longer reflected the reality of former Roman glory:

In the centuries-long agony of the Holy Roman Empire the legal science in Germany helped to fill out a political vacuum; it created a ‘common German law’ that in the lack of a political unity of Germany at least meant a type of ‘legal community.’<sup>115</sup>

The lack of political unity found a feeble replacement in the abstract unity of a common legal science represented by the *Reichskammergericht*. This court became the symbolical unifier of a weak *Reich* that had been split into a heterogeneous mix of protestants and Catholics during the sixteenth century. Forming an interesting contrast to Hannah Arendt’s later way of using the metaphor of ‘dark times’,<sup>116</sup> Schmitt refers to this era as a ‘murky time’ (*trüben Zeit*) and portrays this court as the ‘hotbed of a political sickness’ and as the very symbol of a non-unified Germany.<sup>117</sup>

It is at this point that ‘the great success of the historical school of Savigny seemed to be the sole, complete triumph of the science of jurisprudence.’ The influence of the historical school relied on the political vacuum that existed in Germany. The received Roman law was nothing but an empty surrogate, a helpless and life-less doctrine that came to define a politically despaired Germany. The historical school of Savigny, ultimately, was destroyed by its infinite ‘self-contradictions.’ Historically,

<sup>111</sup>Ibid., 16. Schmitt (mis)cites this same passage from the Digest also in Schmitt, ‘Die Rechtswissenschaft im Führerstaat’, 436.

<sup>112</sup>Cf., Schmitt, *Staat, Bewegung, Volk*, 41–2; Schmitt, ‘Kodifikation oder Novelle?’ 924.

<sup>113</sup>On the Roman emperor as the highest judge, which Schmitt mentions in this context, See, Tuori, *The Emperor of Law*. On positive reappropriations of Roman imagery by the Nazis, cf., Chapoutot, *Le nazisme et l’antiquité*; Hell, *The Conquest of Ruins*, 307–400.

<sup>114</sup>Schmitt, ‘Die geschichtliche Lage’, 16.

<sup>115</sup>Ibid., 17.

<sup>116</sup>See Arendt, ‘Gedanken zu Lessing’.

<sup>117</sup>Schmitt, ‘Die geschichtliche Lage’, 17–8.



Savigny's science of jurisprudence 'stands between the end of absolute Monarchy and the victory of the national-liberal movement' and its temporary achievement was the impressive creation of a fictionally united Germany in this interim period. However, as Schmitt notes, Savigny's historical school did not find the way toward the German people and its 'blood and soil' (*Blut und Boden*), but rather lead to the development of an abstract history of law that remained a matter of an educated bourgeoisie. For these reasons, the triumph of the historical school could not be anything but a *Scheinsieg*.<sup>118</sup>

In the lack of a true political unity, Germany had been left to the hands of a '*jüdisch-freimaurerisch geführten Liberalismus*,' a liberalism dominated by Jewish and freemasonic elements that came to fully occupy the concept of science. By validating their political goals as supposedly objective 'science,' Jewish-freemasonic liberalism set out to 'corrode the Prussian soldier state and bureaucratic state from within (*von innen heraus zu zersetzen*).'<sup>119</sup> All of this could only be overcome when Nazism would transform the abstract unity of Germany into a true racial unity. As Schmitt now notes with a certain bitterness, the 'last victory' of this now outdated mode of thinking was to be found in the *Preussenschlag*-trial in which Schmitt himself had defended the state and its right of intervention. Schmitt then concludes by referring to Reinhard Höhn's study 'Rechtsgemeinschaft und Volksgemeinschaft' from 1935 as the seminal study that has demonstrated how the problems of constitutional liberalism and its foreign traditions can be overcome.<sup>120</sup>

As Johann Chapoutot notes, in the texts of Nazi authors Roman Law is often 'nothing but a straw man set up for purposes of political condemnation.'<sup>121</sup> While this certainly applies to Schmitt's historical revisionism as well, Schmitt's anti-Roman discourse also served more specific polemical and rhetorical purposes. First, Schmitt's radical self-distancing from the historical imagery related to Rome is also a self-distancing from Italian fascism that he still admired in his late Weimar-era writings. Fascism and its strong 'total state' is now gradually replaced with the much more extreme ethos of the Nazi Revolution and its racist imagery of *Blut und Boden*. It is surprisingly rarely understood that Schmitt's move from decisionism to concrete order thought also mirrors the shift of his own political position from that of an authoritarian thinker who idealized Italian fascism toward becoming a racist Nazi.<sup>122</sup>

Second, through his interpretation of Roman law from the Nazi perspective, Schmitt was also engaged in a polemical debate with the romanists of his era. As Kaius Tuori shows in his recent work, for romanists critical of the Nazi regime, the history of Roman law had started to function as a kind of a 'surrogate arena' for political debates in which they could express political opinions indirectly.<sup>123</sup> Schmitt's analysis of Roman law stands in an especially polemical relationship to the works of the romanist Fritz Schulz. Schmitt was actively engaged in the ousting of both Schulz and the Jewish legal scholar Erich Kaufmann from the university of Berlin, where Schmitt became an Ordinarius on the first of October 1933.<sup>124</sup> Not surprisingly, Schmitt also had an extremely negative conception of Schulz's 1934 book *Prinzipien des Römischen Rechts* that sought to mobilize Roman law as an antidote to the Nazi legal science.<sup>125</sup> Referring to Schulz in particular and to Jewish-liberal authors in general, Schmitt lamented the 'individualistic and internationalist undermining' of Germany

<sup>118</sup>Ibid., 18–9.

<sup>119</sup>Ibid., 16. Schmitt made similar arguments in his diaries as early as 1932, see Schmitt, *Tagebücher 1930–1934*, 415–6.

<sup>120</sup>Schmitt, 'Die geschichtliche Lage', 18. Although the SS member Höhn was influenced by Schmitt still at this point, he would soon be instrumental in Schmitt's ousting from party offices. See Koenen, *Der Fall Carl Schmitt*, 661ff.

<sup>121</sup>Chapoutot, 'The Denaturalization of Nordic Law', 123.

<sup>122</sup>In fact, Schmitt carefully distinguishes the non-racist political system of fascist Italy from the axiomatically racist system of Nazi Germany. See especially Schmitt, 'Faschistische und nationalsozialistische Rechtswissenschaft'; Schmitt, 'I caratteri essenziali dello Stato nazional-socialista'; Schmitt, 'Die nationalsozialistische Gesetzgebung'.

<sup>123</sup>See Tuori, *Empire of Law*, 21, 76, 149, 170, 228.

<sup>124</sup>Gräfin von Lösch, *Der nackte Geist*, 183–90, 197, 201–7.

<sup>125</sup>Schmitt and Huber, *Briefwechsel*, 205–8. See also the extremely negative review of Schulz's book in *Deutsche Juristen-Zeitung*, edited by Schmitt and mentioned by him positively in the aforementioned letters to Huber; Lange, 'Deutsche Romanistik?' On Schmitt and Schulz more generally, see Tuori, *Empire of Law*.

undertaken by ‘racially foreign authors,’ who had been allowed to portray their opinions as ‘unbiased science.’<sup>126</sup>

Schmitt also debated the matter with the Romanist Fritz Pringsheim, who in an open letter asked Schmitt about his one-sided and fully negative estimation of received Roman law. Schmitt, in response, simply referred to his ‘scientific publications’ and noted that he would not be ‘interrogated’ on the matter by the likes of Pringsheim.<sup>127</sup> All of this was of course in perfect harmony with Schmitt’s celebration of the expulsion of Jewish scholars from Germany<sup>128</sup> and with his fierce support for the aryization of Germany’s public life through the process of *Gleichschaltung*.<sup>129</sup>

#### 4. Finding another Rome during World War II: Roman law as the basis for a European legal science

The hostile rhetoric against the reception of Roman law that dominates Schmitt’s Nazi writings from 1933 to 1936 progressively evolves toward more historically oriented analysis after Schmitt’s downfall in the ranks of the Nazi party in late 1936.<sup>130</sup> Especially important in this sense are three of Schmitt’s legal historical works from the early 1940s, ‘Das ‘Allgemeine Deutsche Staatsrecht’ (1940) and ‘Die Formung des französischen Geistes durch den Legisten’ (1942), and finally his short book *Die Lage der europäischen Rechtswissenschaft* (1943/44).<sup>131</sup> All of these examine in detail the historical development of Western liberalism in Germany and Europe, focusing especially on the reception of Roman law. In this section, I will analyze the most important of these three studies in detail – Schmitt’s 1943/44 book on European legal science – and augment its historical insights by drawing from the two other essays when necessary.

The historical context that animates all of these writings is of course World War II. This context is especially relevant to Schmitt’s 1943/44 book, because it is during 1942 and 1943 that Schmitt begins to see that Germany will lose the war. The European ‘large space’ (*Grossraum*) dominated by the hegemonic empire (*Reich*) of Nazi Germany that Schmitt had envisioned in his 1939/1941 book on the *Völkerrechtliche Grossraumordnung* now begins to wither away as the tide of the war turns against the invading German armies in the East.<sup>132</sup> Already in the 1920s, Schmitt had seen that after World War I we had entered an epoch that was an ‘intermediary state’ in which the old concepts bound to the concept of the *state* were retained although they no longer reflected the actual political reality.<sup>133</sup> The world divided into several large spaces had been Schmitt’s answer to the decay of the Westphalian balance of powers that had established the concept of the state as the self-evident ‘image of order that dominates everything.’<sup>134</sup>

In a highly symbolical move, Schmitt’s writings on the *Grossraum* had cited Vergil’s famous words from one of his *Eclogues* to describe the dawn of a new world order that would be realized by the Nazi *Reich*: *Ab integro nascitur ordo*.<sup>135</sup> This is Schmitt’s own abbreviation from Vergil’s

<sup>126</sup>Schmitt, ‘Die geschichtliche Lage’, 16–7. Here Schmitt draws his arguments from Lange’s hostile review of Schulz’s book and from another essay in which the Jewish appropriation of science is described in detail; Lange, ‘Der Verfall des Persönlichkeitsgedankens’.

<sup>127</sup>Pringsheim, ‘Die Haltung der Freiburger Studenten’. Schmitt notes the reception of this letter: ‘Angst vor den Juden (Brief Pringsheim)’ (Schmitt, *Tagebücher 1930–1934*, 312).

<sup>128</sup>Schmitt, ‘Die deutschen Intellektuellen’.

<sup>129</sup>Schmitt, ‘Das gute Recht der deutschen Revolution’.

<sup>130</sup>On Schmitt’s downfall, compare Koenen, *Der Fall Carl Schmitt*, 651–764; Blasius, *Preussischer Staatsrat*, 153–80; Mehring, *Aufstieg und Fall*, 378–80. On the closely connected accelerating meaninglessness of legal science in general, especially after 1938, see Stolleis, *Geschichte des öffentlichen Rechts*, 317–50.

<sup>131</sup>On the various versions of this work see Mehring, ‘Carl Schmitts Schrift “Die Lage der europäischen Rechtswissenschaft”’, 855–9. On the differences between the 1943/44 version and the published version from 1950, which I use here, see Schmitt and Smend, *Briefwechsel 1921–1961*, 113–5, fn387.

<sup>132</sup>On Schmitt’s international thought, see Odysseos and Petito, *Carl Schmitt*; Hooker, *Carl Schmitt’s international thought*; Minca and Rowan, *On Schmitt and Space*.

<sup>133</sup>Pankakoski, ‘Intermediate State’.

<sup>134</sup>Schmitt, ‘Staat als ein konkreter’, 376.

<sup>135</sup>Schmitt, *Völkerrechtliche Grossraumordnung*, 306.

lines, *magnus ab integro saeculorum nascitur ordo*, ‘the great order of the ages is born anew.’<sup>136</sup> However, with the Nazi defeat on the Eastern front, Schmitt begins to see that the Nazi expansion would not lead to a world divided into different Monroe-doctrines and large spaces. The era of European hegemony was now inevitably coming to its end.

This crucial turning point in the global political situation leads Schmitt to perform another interesting *volte-face* in his use of classical imagery and history. Schmitt not only abandons his highly political use of Vergil’s lines, which according to Reinhard Mehring were nothing less than Schmitt’s ‘motto’ in the 1930s and 1940s,<sup>137</sup> but also develops an entirely new reading of the history of Roman law. Whereas Schmitt’s Nazi-era writings from the 1930s paint the reception of Roman law as a weed that needed to be rooted out in the name of the Nazi-revolution, in the early 1940s, by contrast, Schmitt begins to develop a theory of a shared European legal past, which is nourished by a highly positive image of the reception of Roman law. This turn is performed in Schmitt’s pamphlet *The State of European Legal Science* (which already in its title emphasizes Europe and thus appears in an interesting contradiction to Schmitt’s 1936 essay ‘The historical situation of German legal science’) and partially anticipated in the two other essays mentioned above.

Schmitt opens his book on European legal science by emphasizing two factors that seem to make the very idea of a common European legal science impossible. First, the ‘political disunity (*Zerrissenheit*) of Europe’ caused by the two great world wars, and second, the dominance of legal positivism that is grounded on the pluralistic particularity of different national legal systems.<sup>138</sup> However, Schmitt argues that there is more to European legal history than the restricted historical gaze of legal positivism allows one to see. Abandoning his former description of the reception of Roman law as an unnatural ‘invasion,’ Schmitt now begins to argue that ‘the whole history of law and the development of law of the European peoples is for a thousand years a history of reciprocal receptions.’ If this history is understood in the right way, Schmitt argues, one can discover ‘a true European community, whose shared law (*gemeinsames Recht*) bears the features of a true *common law*.’<sup>139</sup>

In a glaring contradiction to his earlier arguments on the subject, Schmitt now maintains that the heart of this historical development is formed by ‘the great, centuries long event of confrontation of legal history, the ‘reception of Roman Law.’ The ‘rebirth of Roman Law in the Middle-Ages’ and the reception of the *Corpus Juris Justiniani* is a revolutionary event of ‘European-wide meaning.’<sup>140</sup> This reception forms the shared European ‘cultural structure’ constituted by a specific ‘European spirit.’ Through the reception of Roman law, this cultural edifice laid the basis for ‘a model of juridical thinking (*Gedankenarbeit*),’ a ‘shared vocabulary’ based on the Latin language, and thus, ultimately a kind of a ‘spiritual and conceptual (*gedanklich*) *Common Law* of Europe.’<sup>141</sup>

It is important to emphasize that Schmitt’s essay obviously does not advocate the resurrection of Roman law as a received system of norms. Schmitt emphasizes that all ‘reactionary turnarounds’ and attempts at deriving legitimate codifications from received law in the style of the *Pandektenwissenschaft* have lost their validity for good.<sup>142</sup> ‘We know that there is no restoration of bygone historical situations. A historical truth is only true *once*.’<sup>143</sup> Unlike Paul Koschaker, who argued in his *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (1938) that the crisis of modern legal science must be located precisely to the fact that the received *ius commune* had lost its validity with the introduction of the new *Bürgerliches Gesetzbuch* in 1900, Schmitt fully abandons the notion that received law could provide any direct solutions. Unlike Koschaker, Schmitt argues that the fact that Roman law no longer has direct validity on the twentieth century legal systems

<sup>136</sup>This forms an interesting contrast with the opposite way Hannah Arendt would use Vergil’s same words in her description of the American constitutional model. See Arendt, *On Revolution*, 171, 202–4.

<sup>137</sup>On Schmitt’s uses of Vergil, see Mehring, *Aufstieg und Fall*, 247, 274, 396–7.

<sup>138</sup>Schmitt, *Die Lage*, 386.

<sup>139</sup>*Ibid.*, 390–91.

<sup>140</sup>*Ibid.*, 391.

<sup>141</sup>*Ibid.*, 396.

<sup>142</sup>*Ibid.*, 392, 394, 416.

<sup>143</sup>*Ibid.*, 415.

of Europe is but a small portion of the true crisis of legal science that goes beyond the narrow limits of particular legal codifications.<sup>144</sup>

What the history of Roman law and its reception provides, Schmitt maintains, is a ‘tremendous wealth of new insights’ that one can and must ‘take over creatively (*gestaltend bemächtigen*).’<sup>145</sup> To explain the relevance of this shared legal past for contemporary politics, Schmitt renarrates modern European legal history and presents an original interpretation of the roots of the contemporary legal and political crisis.

Schmitt begins by portraying the birth of European legal science through the reception of Roman law as the very first step in the development of what he calls ‘occidental rationalism.’ The first ‘trail-blazers’ and ‘great revolutionaries’ of this rationalism were the early legists, the experts of Roman law in the early middle-ages, who helped to animate a broader rebirth of Roman law in the twelfth, thirteenth and fourteenth centuries through their commentaries.<sup>146</sup> In a fierce battle with the Church and its canonical law, these thinkers managed to assert the position of legal science as a separate faculty. Through their efforts, Roman law gradually came to influence and define the juridical language of all European nations.<sup>147</sup> With the Renaissance, European legal science then witnessed a golden age that was, simultaneously, also an era of bloody confessional civil wars. It was in this era that Europe witnessed the birth of modern constitutional law (*Staatsrecht*) and its most central concept, sovereignty. This development is signalled above all by French thinkers, in particular by Jean Bodin and his famous *Les Six Livres de la République* (1576).<sup>148</sup>

Schmitt argues that the crisis of occidental rationalism centered around the notions of the state and sovereignty begins with the development of legal positivism during the Enlightenment period. The crucial historical ‘turning point’ is marked by the Spring of Nations in 1848 after which liberalism and legal positivism gradually take hold in all European countries. Gradually, the *ius naturale* of preceding generations is replaced by the positivistic idea of ‘progress’ and law is reduced to a mere ‘majority decision’ and to an ‘unclear compromise of heterogeneous party coalitions.’<sup>149</sup> In this way, legitimate sovereignty becomes undermined and obscured. In the twentieth century, this crisis accelerates in an unforeseen way, especially after World War I, as the ‘practice of law-making becomes ever more simplified and ever more accelerated.’<sup>150</sup> In Weimar Germany, this is evident in the misuse of the article 48 as a law making practice for purposes not justified by the Weimar constitution, such as pushing through major financial and economic decisions.<sup>151</sup> Finally, we arrive at a moment when law is now nothing more than a ‘motorized’ vehicle of ‘planning’ and bureaucratic misuse that no longer requires no sovereign legitimacy at all to be used for any imaginable purpose.<sup>152</sup> Through this legal historical narrative, Schmitt not only criticizes modern legal positivism, but also National Socialism that is now implicitly portrayed as the ultimate and most extreme *consequence* of the former. Similarly, already in 1942 Schmitt had blamed the United States for the outbreak of World War II, describing it as an ‘accelerator against its own will’ – a description derived from the supposed betrayal to the more original doctrine of isolation and limited empire; the Monroe Doctrine.<sup>153</sup>

Although Schmitt now repeats the central historical arguments at the heart of his former Nazi era works on legal history, Schmitt now recalibrates his analysis of modern legal positivism and its relationship to Roman law in an interesting way. Instead of simply pointing to the modern reception of Roman law as a virus that is inextricably bound with the development of modern ‘Jewish’

<sup>144</sup>Ibid., 394. Schmitt nevertheless calls Koschaker the ‘master’ (Ibid) and the ‘definitive authority’ on the subject; see Schmitt, ‘Das Allgemeine Deutsche Staatsrecht’, 167. On Koschaker and Roman law, see Beggio, *Paul Koschaker*.

<sup>145</sup>Schmitt, *Die Lage*, 416.

<sup>146</sup>Ibid., 421.

<sup>147</sup>Ibid., 421–2, 392; cf., Schmitt, ‘Legisten’, 187–8, 193–4.

<sup>148</sup>Schmitt, *Die Lage*, 422.

<sup>149</sup>Ibid., 397–8, 402. On the crucial importance of 1848 for Schmitt, see Carl Schmitt, ‘Lorenz von Stein’.

<sup>150</sup>Schmitt, *Die Lage*, 404.

<sup>151</sup>Ibid., 405.

<sup>152</sup>Ibid., 407.

<sup>153</sup>Carl Schmitt, ‘Beschleuniger wider Willen’.

liberalism as such, Schmitt now offers a more nuanced treatment by distinguishing between the different legal receptions of England, France and Germany. While the legal praxis of England had gradually developed into case law defined by legal precedents, France provides the historical example for the continental state that in distinction to England and its localization of law to a separate legal profession and court system, monopolized law-making power to its own hands, becoming the typical example of what Schmitt calls a *Der zentralisierte Gesetzesstaat*.<sup>154</sup> Turning not only against these two models but also against the ‘motorized’ and permanent state of exception in Hitler’s Germany, Schmitt argues that German legal history provides another path for conceptualizing a pan-European political entity. Performing an astonishing turn around, Schmitt now portrays Savigny and his historical school as *the* pioneers of the European *Grossraum*.

Although Savigny’s attempts had failed in the nineteenth century because of the prevailing liberal constitutionalism, this does not affect the ‘actuality’ and the ‘European meaningfulness’ of his unique approach.<sup>155</sup> Savigny’s ideas are ‘more actual today than during the time of their emergence.’<sup>156</sup> Schmitt’s rediscovery of Savigny is his answer to the problem that he formulated in his other legal historical works from the early 1940s, especially to the fact that ‘the German legal science, ever since Bodin, no longer knew the *Reich*, only the state.’<sup>157</sup> It is in this sense that Schmitt prophesized the ‘restoration’ of the concept of the *Reich* over the state already in his 1940 essay on the history of German legal thought.<sup>158</sup> Similarly, Schmitt’s 1942 essay on the French legists had sought to demonstrate how the concepts of the state and sovereignty were a specifically French creation, ‘the classical political achievement of the French spirit.’<sup>159</sup> Creating a historical foil for his own theory the *Grossraum*, Schmitt argued that the French nation and its ideal model of the sovereign state had failed precisely at the moment when it was confronted ‘with the task of a European *Grossraum-order*.’<sup>160</sup> Although the French spirit had created the central concepts of modern constitutional theory that eventually took hold in all of Europe, this state-bound way of thinking had ‘not discovered the way to the European *Grossraum*.’ It is in this sense that Schmitt ended his 1942 essay on the French legists with the prophetic proclamation: ‘This time around the order will be won through Germany and the *Reich*’; ‘what comes, is our new *Reich*.’<sup>161</sup>

These prophetic declarations acquire a deeper historical foundation in Schmitt’s book on European legal science from 1943/44. While the French had theorized the state, it was the German tradition spearheaded by Savigny that would open up the way for conceptualizing the German *Reich* and its hegemonic European *Grossraum* by discovering a shared and organic pan-European legal history. In distinction to the case law system in England and to the state-bound model of France, Schmitt argues that the historical school of Savigny opens up a European *Sonderweg* of legal thought and allows one to image legal science itself as the true ‘protector of law (*Rechtswahlerin*).’<sup>162</sup> For this way of thinking, the ultimate source of law is found in *the organic historical development of law itself*: For Savigny and his historical school ‘the science of law is namely itself the true source of law.’<sup>163</sup> What Savigny’s thinking realizes is the fact that ‘the law (*Recht*) as a concrete order cannot be separated from its history. True law (*Recht*) is not posited, but rather develops in an unintentional development.’<sup>164</sup> When Schmitt argues in this way that the true ‘origin’ (*Ursprung*) of law is to be found in its own history and tradition – from something pre-given

<sup>154</sup>Schmitt, *Die Lage*, 414.

<sup>155</sup>*Ibid.*, 415.

<sup>156</sup>*Ibid.*, 408.

<sup>157</sup>Carl Schmitt, ‘Das ‘Allgemeine deutsche Staatsrecht’’, 169.

<sup>158</sup>*Ibid.*, 180.

<sup>159</sup>Schmitt, ‘Legisten’, 198.

<sup>160</sup>*Ibid.*, 207–8.

<sup>161</sup>*Ibid.*, 208, 210; cf., 194.

<sup>162</sup>Schmitt, *Die Lage*, 414.

<sup>163</sup>*Ibid.*, 412.

<sup>164</sup>*Ibid.*, 411.



and not intentionally posited – he implicitly criticizes both legal positivism and Nazism of which neither recognizes such an origin.<sup>165</sup>

While Schmitt's earlier Nazi-era writings had said nothing positive about Savigny, when the Nazi empire begins to crumble down after the failure of Operation Barbarossa, Schmitt now apologetically mobilizes Savigny's thought in order to salvage what is still left of his own vision of a European *Grossraum*. Whereas Schmitt's earlier Nazi-era texts described Savigny's historical school skeptically as a failed 'reanimation of *Romanistik*' and criticized the Herderian theory of the *Volksgeist* that animates and underlies Savigny's ideas,<sup>166</sup> in 1943/44 Savigny is portrayed as nothing less than the 'paradigm'<sup>167</sup> and as a European '*katechon*,'<sup>168</sup> whose thought allows Schmitt to outline the basis for a new European legal science. If one would make a list of great Europeans, Schmitt proclaims, there would be 'very few names' that would deserve inclusion like 'the name Friedrich Carl von Savigny,' who is now celebrated as 'the renewer of the science of Roman law,' as the 'leader ... of a historical school' and as the 'founder of modern private international law.'<sup>169</sup> It is Savigny, who now allows us to see how European legal science itself has turned into the 'last asylum of law (*Rechts*).'<sup>170</sup>

If in 1936 Schmitt still lamented that it was precisely Roman law that had reduced the European community to a unity of substantiveless norms and thus created a weak 'ersatz' community<sup>171</sup>, by 1943/44 Schmitt came to think that even such an 'abstract' unity is better than no unity at all. Thus, falling back on the idea of a shared European legal past, Schmitt falls back on an idea that he himself had formerly denounced. Most astonishingly, Schmitt even implicitly acknowledges this in his book by referring to the fact that 'the quarrel for and against the science [of Roman law] ... was disputed with the greatest intensity precisely in Germany in the years after 1933 from all possible perspectives.'<sup>172</sup> What Schmitt leaves unmentioned, however, is that not only had he himself participated actively in these debates after 1933, but that his own interpretation and understanding of Roman law had, by 1943, changed completely.<sup>173</sup> From being a foreign virus within Germany, it had now transformed to the shared history of the 'concrete order' of Europe and formed nothing less than the very *historical core* of what Schmitt called Europe's concrete 'localization' and 'ordering' in his *Grossraum* theory.<sup>174</sup> Abandoning his Nazi distinction between the golden era of Roman law that was lost with the 'Jewish' reception of the science of Roman law, Schmitt now recalibrates his attack toward a *particular interpretation of Roman Law* – the positivist-liberal one – that has been harmful and which has prohibited the Europeans and Germans from seeing the actual and fundamental importance of true Roman law. In this way, Roman law now transforms into nothing less than the shared historical basis on the which European unity can still be imagined after the failure of the Nazi invasion to the East.<sup>175</sup>

<sup>165</sup>Ibid.

<sup>166</sup>Schmitt, 'Aufgabe und Notwendigkeit,' 181–2.

<sup>167</sup>Schmitt, *Die Lage*, 408.

<sup>168</sup>This remark is from the new endnotes Schmitt added in 1958. Schmitt, *Die Lage*, 427–9; cf., Schmitt, 'Kodifikation', 920. Although this is beyond the reach of this study, it is important to note that the concept of the *katechon* emerges to Schmitt's thinking roughly during the same period (in 1942) when Schmitt is engaged in the process of revising his understanding concerning the history of Roman law and its reception. On Schmitt's theory of the *katechon*, cf., Hell, *The Conquest of Ruins*, 401–30; Suuronen 'Carl Schmitt's Critique of Biotechnology and Utopias'.

<sup>169</sup>Schmitt, *Die Lage*, 409.

<sup>170</sup>Ibid., 408.

<sup>171</sup>Schmitt 'Aufgabe und Notwendigkeit', 182; Schmitt, 'Die Geschichtliche Lage', 18.

<sup>172</sup>Schmitt, *Die Lage*, 392–3.

<sup>173</sup>Schmitt was of course not alone in performing such a turnaround in the early 1940s. For instance, Stolleis mentions Georg Dahm and Franz Wieacker as major examples. See, Stolleis, *Recht im Unrecht*, 87–9.

<sup>174</sup>Schmitt, *Völkerrechtliche Grossraumordnung*, 319; cf., Schmitt, *Der Nomos der Erde*, 13–20.

<sup>175</sup>All this shows how misleading it is to argue that Schmitt's apologetic 1943/44 book would demonstrate that he *never* truly embraced Nazism, as has been argued among others by Christian Tilitzki, who uses Schmitt's 1943/44 book to draw an absolute contrast between Schmitt and the biologically racist viewpoint of SS-men like Reinhard Höhn (Tilitzki, 'Carl Schmitt', 65–7). Tilitzki ignores the changes in Schmitt's positions, does not mention the fact that Schmitt cited Höhn's works positively in his Nazi writings, nor does he acknowledge the fact that before the SS publicly attacked Schmitt in the articles published in *Das schwarze Korps*, Schmitt had been Höhn's academic supporter (see Koenen, *Der Fall Carl Schmitt*, 661–71; cf., Stolleis, *Geschichte des*



## 5. In conclusion: classical images for present politics

Schmitt was aware that he used Roman imagery and history as a situational-polemical instrument that gained new interpretations in new political contexts. As Schmitt notes in his 1943/44 book: 'Every new spiritual current of the European spirit has led to new, unexpected facets of perception of Roman law.'<sup>176</sup> Acceptingly citing the famous words of Johann Wolfgang von Goethe to his personal secretary Johann Peter Eckermann, also Schmitt likened Roman law to 'a duck that dives under water and may every now and again hide away, but never fully disappears and always on some occasion resurfaces vividly.'<sup>177</sup>

In this essay I have examined how Schmitt's usage of Roman law surfaces and resurfaces, transforms and develops from his early book on Roman Catholicism to his treatment of this topic in his 1943/44 book on European legal science. As we have seen, Schmitt first mobilized the vocabulary of traditions and the image of Roman universalism to defend the Catholic Church against Russian nihilism, before gradually transposing and remobilizing these same historical vocabularies in a romantic defense of the total state of Mussolini. It is already at this point that Schmitt himself acknowledges the chameleon-like nature of his own uses of Roman history, when he acceptingly cites words of the French playwright Pierre Corneille: '*Rome n'est plus dans Rome, elle est toute ou je suis,*' Rome is no longer in Rome, she is here where I am.<sup>178</sup> As Schmitt's political position undergoes a shift, the imagery of Rome changes as well. True Rome is wherever Carl Schmitt is.

By the Spring of 1933, the time was again ripe for another transformation. As we have seen, when Schmitt joined the Nazis, he also distanced himself from his former positive espousal of Roman imagery and symbolics. As if retrospectively acknowledging this himself, Schmitt would later describe his own abandonment of the constitutional framework of Weimar's *Rechtsstaat* in 1932/1933 as his own 'crossing of the *Rubicon*,' thus making an implicit allusion to Lucan's *Pharsalia* and Caesar's famous defiance of the Republican constitution.<sup>179</sup> When Schmitt abandoned the Weimar Republic in favour of the new Nazi Empire during 1933, he also distanced himself from the republican history that the legal practice and constitution of Weimar still implicitly carried with it. In the name of the 'German Revolution,' Schmitt's historical imagery turned against the 'Jewish' reception of Roman law that was contrasted with the untainted golden age of true Roman '*Volksrecht*.' All of this shows how deeply problematic it is to argue that Schmitt would have *never* embraced the more racist tendencies of Nazism<sup>180</sup> or that Schmitt *always* remained an essentially Catholic thinker.<sup>181</sup>

Finally, engaging in a half-hearted and a deeply apologetic denazification of his own thinking, Schmitt once again began to recalibrate his use of classical imagery as it became clear that Germany would lose World War II. Analyzing Schmitt's 1943/44 book, I showed how Schmitt mobilized the history of Roman law and Savigny's historical school as vehicles for rethinking the European community – an endeavour in which thinkers like Koschaker and Wieacker were also engaged in

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*öffentlichen Rechts*, 327–9). However, this also does not mean that there would be no difference between Schmitt and the younger generation of SS-intellectuals, whose overtly revolutionary tendencies Schmitt criticized by 1936 (see Schmitt, 'I caratteri essenziali dello Stato nazionalsocialista', 18; cf., Koenen, *Der Fall Carl Schmitt*, 667). On the worldview of the younger SS-intellectuals, which diverged from Schmitt's, see Christian Ingrao, *Believe and Destroy*.

<sup>176</sup>Schmitt, *Die Lage*, 393.

<sup>177</sup>Eckermann, *Gespräche mit Goethe*, 74–5; Schmitt, *Die Lage*, 394.

<sup>178</sup>Schmitt and Smend, *Briefwechsel 1921–1961*, 28.

<sup>179</sup>This is shown by Blasius, *Preussischer Staatsrat*, 69–70. This seems to be corroborated by the fact that Schmitt explicitly notes in his diaries during early December 1932 that he no longer sees the *Reichstag* as the representative of the people in the sense of the Weimar constitution. See, Schmitt, *Tagebücher 1930–1934*, 242, 244fn1273. In fact, Schmitt also uses the metaphor of the *Rubicon* in 1935 to describe the radical novelty of the Nazi *movement* in distinction to the less radical fascist *state* in Italy; Schmitt, 'Die Rechtswissenschaft im Führerstaat', 439. The same metaphor is also used by Schmitt's commentators in a descriptive sense. See Koenen, *Der Fall Carl Schmitt*, 85–172; Balakrishnan, *The Enemy*, 138, 164; Mehring, *Aufstieg und Fall*, 313.

<sup>180</sup>Most comprehensive arguments of this kind: Bendersky, *Theorist for the Reich*, 208; Koenen, *Der Fall*, 728.

<sup>181</sup>Eg, Koenen, *Der Fall*; Hell, *The Conquest of Ruins*; Meier, *Die Lehre Carl Schmitts*; Faber, *Lateinischer Faschismus*.

different ways. Schmitt's vision of a shared European legal history was a vision *through which* Schmitt was now explicitly obscuring and perhaps even implicitly denouncing his own earlier espousals of Nazi-ideology.<sup>182</sup> It is in this complex process that one also discovers the often neglected roots to Schmitt's turn toward a historical philosophy of *nomos*, in which the discourse of traditions and concrete orders is fused with a historical 'battle over Rome'<sup>183</sup> and to Schmitt's later dubious claims according to which *Rom* and *Raum* are – in their original historical-etymological fusing of 'localization' and 'ordering' – the very same word.<sup>184</sup>

In his postwar writings and notebooks, Schmitt would go on to imply that it was not only him, who was in 'exile' in Plettenberg, but rather the whole of European legal science: '1. The Europ[ean]. Science of law is the last refuge (*Asyl*) of law. 2. The Europ[ean]. Science of law is currently in exile. 3. We belong to the exile government.'<sup>185</sup> Emphasizing himself as an outsider, Schmitt would once again cite Corneille: 'My legal science is in exile ... *Rome n'est plus dans Rome, elle est toute ou je suis*.'<sup>186</sup> It was not merely the old Nazi Carl Schmitt, who had been forced to take refuge in 'San Casciano – Plettenberg,' but Rome itself. Calling his hometown of Plettenberg 'San Casciano' was a conscious analogy, first, to the forced exile of Niccolò Machiavelli, who had also been turned down by the rulers he had striven to legitimate,<sup>187</sup> and second, to Saint Cassian of Imola, who had been betrayed by his own students and condemned to death.<sup>188</sup>

These kind of self-mythologizations obviously served an apologetic purpose. As Schmitt acknowledges in his *Glossarium*, creating nicknames for himself was his own way of answering to his so-called 'persecutors' in the postwar context: 'Because I define so well, I must also at one point compile a collection of self-definitions and set them against the countless foreign definitions.'<sup>189</sup> Referring to himself as a 'Roman' was Schmitt's ingenious rhetorical strategy that allowed him to weave in a non-existing continuity into his own works. By retrospectively portraying himself as an essentially Christian political theologian, whose political positions had supposedly remained constant ever since his early book on Catholicism from 1923, Schmitt could imply that he was never a racist Nazi.<sup>190</sup>

However, as we have seen, in actual reality, Schmitt was a fiercely devoted Nazi at least from 1933 to 1936 and even beyond. For him, Roman imagery and history were not the unchanging tradition that animated his supposedly continuous Christian political theology, but rather simply a Benjaminian treasure trove of citations devoid of fixed meaning. From the 1920s to the 1940s, Schmitt deployed this reserve of narratives and images for a broad array of contradictory purposes: For the defense of a Christian Europe and the total state; then, by using Roman law as a negative foil for the legitimization of Nazi rule in Germany, and finally, as the justificatory historical background for a shared European legal science. In all these instances, Rome was wherever Carl Schmitt was.

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<sup>182</sup>It is noteworthy that in distinction to the 1950 version of *The State of European Legal Science*, the earlier versions from 1943/44 still referred to the idea of race and even to the ideas of the racist publicist Johann von Leers (Schmitt and Smend, *Briefwechsel*, 114 fn387).

<sup>183</sup>Schmitt, *Der Nomos*, 29. Although in his *Der Nomos der Erde* (1950) Schmitt explicitly denies a biological interpretation of the concept of *nomos* (Schmitt, *Der Nomos*, 39), when reading this work it is crucial to remember that in 1933 Schmitt had argued that Adolf Hitler's will was 'the *nomos* of the German people' (Schmitt, 'Der Neubau', 252).

<sup>184</sup>Schmitt, 'Raum und Rom'.

<sup>185</sup>Schmitt, *Glossarium*, 156.

<sup>186</sup>*Ibid.*, 237.

<sup>187</sup>Schmitt and Jünger, *Briefe 1930–1983*, 306, 402.

<sup>188</sup>*Ibid.*, 402–3; Schmitt and Koselleck, *Der Briefwechsel*, 262–3.

<sup>189</sup>Schmitt, *Glossarium*, 259.

<sup>190</sup>See Schmitt, *Ex Captivitate Salus*, 69; Schmitt, *Glossarium*, 99, 215; cf., footnote 35.

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