The Political Science Reviewer • Volume 42, Number 1 • June 2018
© 2018 The Political Science Reviewer

Carl Schmitt's Political Theory during the Third Reich

Eduardo Schmidt Passos
Texas State University

Carl Schmitt's eagerness to enter the antechamber of power and to advise those with decision-making authority is evident from his choice to move from the University of Bonn[1] to Berlin's *Handelshochschule*[2] in 1928. The final days of the Weimar Republic provided him with the perfect occasion to put his knowledge to practical use. The deterioration of the political system, caused by the Great Depression, demanded a strong political will to reform and recover the economy. Facing severe difficulties in consolidating a parliamentary majority, Chancellor Heinrich Brüning requested in 1930 that President Paul von Hindenburg invoke Article 48[3] of the Weimar Constitution to bypass the parliament (*Reichstag*) and approve a financial reform. Article 48 would allow the government to use "emergency decrees" (*Notverordnungen*) to govern without the approval of the *Reichstag*. However, in the following years, successive invocations of Article 48 eroded the liberal and parliamentary bases of the Weimar Republic and its system of separation of powers. With the inability of moderate parties to form a stable and functional coalition, the parliamentary democracy as well as its main political parties began to lose public confidence and support. This increased the popularity of the extremist parties: NSDAP (National Socialist German Worker's Party) and KPD (Communist Party of Germany). This radicalization made the formation of a parliamentary majority more difficult and transformed the exceptional nature of emergency decrees into a regular instrument of government for the subsequent chancellors, Franz von Papen and Kurt von Schleicher.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 197 10/18/18 12:25 PM

In this chaotic context of political polarization and radicalization, Carl Schmitt's political ideas passed through several transformations to interpret the ever-changing circumstances. Nevertheless, the topic of political unity remained his main concern throughout his career. Even before the collapse of the liberal democracy, he maintained a persistent skepticism in relation to the maintenance of political unity in a context of political pluralism, and he provided the intellectual basis for an authoritarian regime with fascist inspiration. With Adolf Hitler's triumph, he saw the possibility of providing the legal foundation for the new regime: a "total state" that would be able to eliminate the internal divisions of German society. Nevertheless, his role as the "crown jurist of the Third Reich"[4] did not last long, as he was soon downgraded to a mere party propagandist who justified extra-legal murder to preserve internal peace and security. To understand the failure of the modern state in restoring original unity between spiritual and political authority, Schmitt returns to Thomas Hobbes in his last significant work during the Nazi reign in Germany. In this study, Schmitt finds in Hobbes's distinction between inner and outer confession the seeds that destroy the modern state from within. From this work, it is possible to grasp the real meaning of Schmitt's theory and the reasons behind his embrace of the Nazi regime. Based on the presupposition that the political is the total,[5] his intention is to provide a political theory capable of grounding the totality of human existence in the political realm. Consequently, his theory identifies as an enemy of the state anyone who seeks refuge in his inner spirituality or denies the absolute nature of the state.

Prelude: Schmitt and the Limits of Parliamentary Democracy

During the final hours of the Republic, Schmitt played a significant intellectual and political role in trying to move the tottering liberal democracy in the direction of an authoritarian presidentialism ruled by emergency decrees. Schmitt's concern with emergency powers dates back to World War I when he served under the military authorities in Munich, which suggests that he kept an old and persistent skepticism regarding the fate of liberal democracy.[6]

BK-UW-PSR42_1-180174-Article_9_Passos.indd 198 10/18/18 12:25 PM

In his *The Crisis of Parliamentary Democracy* (1923/1926), he argues that a democracy cannot function in an arena of parliamentary pluralism because democracy requires "first homogeneity and second—if need arises—elimination or eradication of heterogeneity."[7] For him, the modern state is no longer a neutral political arena but the self-organization of society. As a result, a parliamentary pluralistic system weakens the political will of the people and its unity. This skepticism regarding the possibility of a harmony between liberalism and democracy received its practical application in *The Guardian of the Constitution* (1931) and its polemic against Hans Kelsen's legal positivism. Schmitt argues that, in critical constitutional situations, there is a demand for a guardian of the constitutional order whose authority is not based on mere legality but rather on political legitimacy. He defends the position that the head of state, the *Reichspräsident*, should be the ultimate guardian of the constitutional order because only a political actor can have political legitimacy and responsibility over "the political." "There is an element of pure decision," Schmitt explains, "that cannot be derived from the content of the norm."[8] When the norm reaches its limits, the decisionist element comes to the foreground and a political decision becomes a necessity. In this sense, the political situation of the Weimar Republic and the survival of its constitution could no longer rely on its legality, but only on its legitimacy.[9]

In *Constitutional Theory* (1928), Schmitt argues that the Weimar Constitution is based on two pillars: the parliamentary, which represents the liberal and legalistic principle of the bourgeois *Rechtsstaat*,[10] and the presidential, which embodies the democratic, popular, and political elements of modern constitutionalism. The legislative *Rechtsstaat* can only defend and protect the rights and liberties of individuals; however, it fails to affirm the ethos of the people, who are, after all, the foundation of the society and whose support guarantees the liberal state. This incapacity of the Weimar regime to uphold the liberal values of its constitution led to the collapse of the German parliamentary *Rechtsstaat.* This collapse was analyzed by Schmitt in *Legality and Legitimacy* (1932). As he would reflect decades later in the *Afterword*, "The

BK-UW-PSR42_1-180174-Article_9_Passos.indd 199 10/18/18 12:25 PM

essay was a despairing attempt to safeguard the last hope of the Weimar Constitution, the presidential system, from a form of jurisprudence that refuses to pose the question of the friend and enemy of the constitution."[11] According to his analysis, the problem with the legislative state, which is based on the principle of legality, is that it undermines the element of legitimacy, its decisionist element. While the parliament hovers in endless discussion, it can never reach a fundamental decision about who are the real enemies of the constitutional order.

The legislative state hinges on the principle of equal chances to all political parties to win domestic power.[12] However, this principle allows anti-liberal parties to use the state power to destroy the liberal system from within. This problem is aggravated by the liberal idea of value neutrality, which prevents the bourgeois legal system to openly name Bolshevism and Nazism as the political enemies of the bourgeois order. Only the affirmation of liberalism as the fundamental value of the society and the exclusion of all opposing value systems from the political arena would protect the liberal order from its internal enemies. However, this decision would violate the liberal principle of equal chances. To solve this puzzle, Schmitt looks at the other side of the constitution: its democratic and presidential element. He wants to overcome the limitations of parliamentary legality with plebiscitary legitimacy. Through majoritarian election, the people appoint the president, thus giving him enough legitimacy to reestablish security and order.[13] Under extraordinary circumstances, only a directly elected president can have the exceptional powers to defend the substantial values of the constitution against its enemies.

Even though Schmitt argues that his model of plebiscitary presidentialism was an attempt to save the constitution, the fact is that his interpretation already points toward the "'legitimacy' of the transition to a different type of order."[14] He and the oligarchy around Hindenburg wanted to use emergency decrees to bypass the parliament and approve substantial constitutional reforms that would transform the Republic into an authoritarian regime with fascist overtones. His arguments were based on the failure of

BK-UW-PSR42_1-180174-Article_9_Passos.indd 200 10/18/18 12:25 PM

liberal pluralism and on the possibility of the realization of a "total state."[15] Thus, he was not saving the liberal Republic but helping the transition to an authoritarian state grounded on democratic support and plebiscitary legitimacy. This new regime was supposed to identify and fight the enemies of the state, which for Schmitt at that time included Bolshevism as well as Nazism. He clearly warned about the danger of a "legal revolution"[16] in which one party contrary to the liberal regime would have the power to undermine the constitutional order. However, instead of affirming the substantive liberal values of the Weimar Constitution, Schmitt had different substantive values in mind. His sincere intentions may have been the suppression of the National Socialist and the Communist parties, but he wanted to do it with an authoritarian, or even fascist, turn. Schmitt most likely did not have Hitler in mind when he proposed his policies to Papen and Schleicher, but he was definitely thinking of Benito Mussolini.

Schmitt's Turn toward the Totalitarian Regime

Evidence indicates that Schmitt almost certainly rejected the handing over of power to Hitler on January 20, 1933.[17] When Hindenburg appointed Hitler the new chancellor, he was sealing the fate of the regime by nominating to the highest executive position an open enemy of the constitution. Instead of defending the constitutional order, now the political power was in the hands of a group that endorsed without reservation a "legal revolution" and would ultimately use the power of the state to exterminate all opposition. Schmitt was initially shocked and depressed by the dire circumstances and, in his diary, expressed resentment regarding Hindenburg's decision. "The myth of Hindenburg has come to an end. Horrible situation. Schleicher steps down; Papen or Hitler will be next. The old man gone mad."[18] From this initial rejection to the acceptance and later collaboration with Hitler, it is impossible to decipher what went through Schmitt's mind in the first months of 1933. The political events and his personal positions evolved rapidly, and a year later he would provide an intellectual justification for extra-legal murder. As a jurist, whose constitutional theory was based

BK-UW-PSR42_1-180174-Article_9_Passos.indd 201 10/18/18 12:25 PM

on the friend–enemy distinction, he faced a new dilemma: now the enemies of the constituted order possess the constituent power.

Schmitt's first collaboration with the new regime began when Papen, recently appointed as Hitler's vice-chancellor, asked him to oversee the committee drafting the new Reich Governors Law.[19] On May 1, 1933, Schmitt formally joined the NSDAP. It is impossible to identify the exact reasons behind Schmitt's decision to back and join National Socialism. However, the new regime promised what the Weimar Constitution could no longer offer: order and stability. By transferring his allegiance to the new regime, Schmitt was expecting to guarantee his personal and professional security. In the past, he had publicly argued for the prohibition of the Nazi party, and until that moment he had no connections with party members or sympathy for its racial ideology. Thus, he could have become a possible target during the academic purges. Nevertheless, the position of a mere law professor under the protection of and loyal to the state was not up to par with Schmitt's personal ambitions. As an intellectual adventurer, he wanted to be center stage. Thus, he recognized in the new regime the possibility of leading his own "legal revolution." However, he knew from the beginning that at the core of national socialist ideology was the creation of an anti-Semitic state, which saw the Jews as the existential enemies of the German people. This fact did not dissuade him.

In July 1933, Hermann Göring appointed Schmitt as Prussian State Councilor, and in October Schmitt accepted the chair of public law at the University of Berlin, which he recognized as the highest honor of his career.[20] Finally, he became the head of the University Teachers' Section of the Reich Association of Jurists. This spectacular climb in the power structure of the new regime increased his prestige beyond his expectation. From his perspective, it must have appeared as a promising future with a central role in the legal affairs of Nazi Germany. Mere intellectual curiosity, however, does not explain his fascination and engagement with the underworld of Nazi politics. There was a real desire for power in his decision. By lecturing and advising the holders of power, he wanted to have his own share of power itself.[21] During this hectic

BK-UW-PSR42_1-180174-Article_9_Passos.indd 202 10/18/18 12:25 PM

year of intense collaboration, Schmitt believed he would play a central role in the reforms of the Reich, giving National Socialism its own constitutional form. What he did not foresee was that his usefulness as "crown jurist of the Third Reich" was almost exhausted by the end of 1933 and his juridical services would no longer be necessary after Hitler's consolidation of power. The Führer only relied on his old party camaraderie and refused to take advice from civil servants and the conservative politicians from the defunct Republic. After this evanescent apotheosis, Schmitt was downgraded to a mere party propagandist, and the quality of his works decreased considerably.

Schmitt's Work as a Party Propagandist

Even though the new regime was giving plenty of signals that law would not restrain it, Schmitt believed in the usefulness of his services as a jurist. At the end of 1933, he wrote a short booklet entitled *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (*State, Movement, People: the Threefold Structure of the Political Unity*), in which he attempts to outline the constitutional structure of the Third Reich. The new order should be based on a new trinity: the state, the people, and the movement. In this new mystical union, the state includes the bureaucratic organs of the government, the people encompass the democratic homogeneity and its existential racial bonds, and the movement is the political principle that should organize the political unity under the idea of leadership. In this new trinity, primacy should be given to the leader of the movement. For him, the state as a neutral institution has lost its monopoly over the political, and only a strong political will could restore this primacy. To create a new political totality, the legal structure of the Third Reich should be based on a personal union (*Personal-Unionen*) within the various sectors of the social order with the Führer.[22] Schmitt was fascinated by the political energy set in motion by the national socialist movement and wanted to have his share in this revolution.

In 1934, Schmitt published *On the Three Types of Juristic Thought*, in which he develops the concept of "concrete-order

BK-UW-PSR42_1-180174-Article_9_Passos.indd 203 10/18/18 12:25 PM

thinking" (*Konkretes Ordnungsdenken*) and reconsiders his decisionism theory. At first sight, this work is ambiguous because Schmitt's conversion from decisionism to institutionalism could be read as a conservative turn and a critique of the Nazi ideology and its refusal to create durable institutions.[23] Nevertheless, it also targets the Jews and their "normativist type of thinking" as the legal enemies of German jurisprudence. It considers that there are people, like the Jews, who, "without territory, without a state, without a church, exist only in 'law'."[24] In Schmitt's attempt to overcome the limitations of decisionism and normativism, he turns to Maurice de Hauriou's doctrine of institution, which could be read as an attempt to inhibit the totalitarian impetus of the Nazi revolution. However, even though Schmitt evokes Hauriou's institutionalism, he simply ignores its liberal and the Christian elements.[25] To avoid being identified as a conservative/Catholic reactionary,[26] Schmitt proposes a new terminology to describe the jurisprudential thinking of the new situation. Instead of "institutionalism," he coins the term "concrete-order thinking," which makes it explicit that the legal order is determined by the concrete order of the society.

This idea of "concrete order," however, remains vague and imprecise. On the one hand, it indicates that order emerges from the community of men and that this community can develop a certain idea of tradition, labor, justice, honor, and family that makes this order the concrete expression of a particular people. On the other hand, Schmitt simply dismisses the previous order of the Weimar Republic and does not make any effort to consider the bourgeois rule of law as an essential chapter in the legal development of the German people. The national socialist lawgiver, for Schmitt, should overcome private contractual notions and strike the "entire world of individualistic thinking of contractual and legal relationships."[27] Concepts such as "good faith," "common decency," "reasonable and unreasonable demands," and so on must be disconnected from the previous hermeneutics of the bourgeois society and must acquire a new meaning where they no longer serve to protect individual rights, but rather the interest of the role of society.[28] Thus, the interpretation of this work as a conservative

BK-UW-PSR42_1-180174-Article_9_Passos.indd 204 10/18/18 12:25 PM

reaction misses the radical hermeneutic revolution proposed by Schmitt, which basically subordinates all legal interpretation to the concrete political situation, i.e., the political triumph of the Third Reich. For Schmitt, a political revolution does not need to change every norm, but it can carry out its revolutionary process by simply reinterpreting the principles that guide the legal hermeneutics. Instead of the liberal interpretation that emphasizes the role of individual liberties and limits the power of the state, Schmitt advocates for a new type of juristic thinking that is able to realize the "principle of leadership."[29]

This new guiding hermeneutic principle should give new meaning and relevance to concepts like loyalty, discipline, and honor, which should reflect the concrete order of society and its institutions. "Now a concrete order and formation thinking is required that will measure up to the numerous new tasks of the governmental, *völkisch*, economic, and ideological conditions and to the new form of community."[30] In this new order, even the state loses its ideational and durable elements and becomes "only one organ of the *Führer* of the movement."[31] In fact, Schmitt's "revival" of institutional thinking surrenders all traditional institutions such as family, churches, the army, state bureaucracy, private enterprises, etc., to a capricious Führer and his movement. Schmitt's chief concern was never the preservation of traditional institutions, but rather the maintenance of political unity.

Even though Schmitt could have nourished for a while some illusions about his contribution in the creation of a stable order within the regime, there was no justification for his illusions after the Night of Long Knives. Under the pressure of the *Reichswehr* Minister, General Bloomenberg, who was menacing Hitler's regime with a military *coup*, Hitler was forced to take action against his former comrade Ernst Röhm and his SA (*Sturmabteilung*). During the night of June 30, 1934, the SA leadership was executed without judicial trial by SS (*Schutzstaffel*) troops loyal to Hitler. Additionally, the Führer seized the opportunity to persecute and eliminate the conservative establishment that had remained critical of National Socialism. The main target was the General and last

BK-UW-PSR42_1-180174-Article_9_Passos.indd 205 10/18/18 12:25 PM

Chancellor of the Weimar Republic, Kurt von Schleicher, and his wife, who were summarily executed at their home. Even though the purges directly affected a conservative with whom Schmitt had worked closely, Schmitt had mixed feelings about the SA purge.[32] On the one hand, he saw it as a necessary measure to ensure the preservation of the concrete order and the independence of the army from the left wing of the NSDAP. However, the extra-legal execution of Schleicher shocked and frightened him. His proximity with the conservative group could transform him into a target of future purges. Furthermore, as the party jurist, he was expected not only to publicly support the execution, but also to provide the legal framework for those extra-legal actions. Even though he could defend the necessity of SA purges as an emergency measure to protect the German people, the justification of the murder of Schleicher and his wife had no legal or moral basis. A few weeks later, he published the article "Der Führer schützt das Recht" (*The Führer Protects the Law*), in which he justifies the legality and necessity of Hitler's actions, without mentioning Schleicher's name. Schmitt defends Hitler's action, saying, "The true leader is always also a judge. From the leadership flows judgeship."[33] Furthermore, he claims that "today's German state has the strength and the will to distinguish between friend and foe."[34] For him, Hitler's ability to identify and destroy the enemies of the state was the highest form of justice.

After the elimination of the internal opposition in the NSDAP and the external opposition within conservative circles, Hitler continued persecuting his usual enemies, the Jews. Schmitt, who could no longer feign ignorance about the murderous nature of the new regime, also took part in this struggle against the "Jewish spirit." Germany was living in a permanent state of exception, whose main purpose was the institutionalization of anti-Semitic violence, and only a total indifference to the fate of a whole people explains Schmitt's continuous support of the regime. He praised the Nuremberg Laws (September 1935), which enacted racial purity legislation and denied citizenship to those without pure blood, as "the constitution of freedom."[35] At the beginning of 1936,

BK-UW-PSR42_1-180174-Article_9_Passos.indd 206 10/18/18 12:25 PM

he organized a conference, "Judaism in Jurisprudence," as a response to the critics within the party of his ideological purity, and presented a paper entitled "German Jurisprudence in the Struggle against the Jewish Spirit." Most of his presentation dealt with "'practical problems' of identifying Jewish authors, establishing separate Judaic sections in libraries, and assuring that scholars did not rely upon Jewish ideas."[36] As a keynote speaker, he opened with an obnoxious quotation from Hitler's *Mein Kampf*: "In that fending off the Jew, I fight for the work of the Lord."[37]

This political theological formulation symbolizes Schmitt's moral nadir. Despite all the historical circumstances, the main problem with this formulation is not its topicality, but rather the opposite. Hitler's quotation is profoundly coherent with Schmitt's political theology. His support of Hitler's policies against the Jews and his critique of the "Jewish type of juridical thinking" cannot be separated from his political theology. As Schmitt himself wrote, "Name your enemy, and I will tell you who you are."[38] His speech at the conference was an intellectual pogrom seeking to eliminate Jewish influence, mainly legal positivism, from German jurisprudence. Even though Schmitt was not directly involved in actual pogroms, he collaborated in the symbolic violence against Jews. Schmitt knew and had intellectually justified the role of the enemy in the formation of societies. It is impossible to ignore his knowledge about the existential consequences to an ethnic group once they are identified as the public enemies, particularly when this enemy is confronted with the technical-bureaucratic apparatus of a total state. However, the destiny of an alien minority was never a concern for him. Already in his *Constitutional Theory*, he argues that national homogeneity is an essential condition for a democracy and that, when a state lacks this homogeneity, there are possible solutions for this "problem," which may include quicker and more violent methods such as "the elimination of the alien component through suppression or *exile* of the heterogeneous population and other radical means."[39] For him, those are necessary measures to achieve and maintain the existential unity of the political body.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 207 10/18/18 12:25 PM

Hobbes's Failure in Creating a Total State

After his conference on "Judaism in Jurisprudence," Schmitt's opponents within the party began to plot his downfall. He was investigated and kept under surveillance by the SS, and his professional, intellectual, and personal credentials were attacked by the SS press, *Das Schwarze Korps,* because of his previous critiques of National Socialism and his former friendship with "Jewish authors." Only a direct intervention from Göring saved him from further harm. However, those attacks ultimately protected Schmitt from his own ambitions. This forced step down from the party apparatus kept him away from further engagements with war criminals like his friend and later Governor of Occupied Poland Hans Frank, who was executed during the Nuremberg Trials. Fearing the wrath of the SS and wishing to avoid further trouble, Schmitt moved away from domestic affairs and party politics. To avoid problems, most of his later works dealt with international relations.[40] However, he remained intellectually fascinated with the topic of political unity and Thomas Hobbes. From his earlier studies on political unity, he developed the concept of "total state," which is at the center of his critiques of Hobbes's *Leviathan.* This concept is contrasted with another, the "neutral state," which is able to separate state from society. However, the neutrality of the state vis-à-vis the society is no longer possible in modern democracies because these spheres interpenetrate one another to the point where this distinction is no longer effective. In this sense, all aspects of social life became politically relevant. In the final hours of the Weimar Republic, Schmitt published the article "Weiterentwicklung des totalen Staats in Deutschland" (January 1933) (*Further Development of the Total State in Germany*), in which he finds the fascist state to be a model of a total state in a qualitative sense.[41] The Italian fascist state was total because it had the instruments of power to fend off any internal enemies of the state. This total state should be a *societas perfecta* of this world and for all time.[42]

As Eric Voegelin noticed, Schmitt's concept of the "total state" is less of a scientific concept and more of a political symbol,[43] an evocation intended to unify the political body rather than to

BK-UW-PSR42_1-180174-Article_9_Passos.indd 208 10/18/18 12:25 PM

describe political reality. "Schmitt does not approach the problem of the state as an external observer but is himself active within the state as a creator of political ideas."[44] It is in the context of the mythical creation of a political symbol capable of grounding the totality of human existence in the political realm that Schmitt turns to Hobbes to assess the feasibility of the leviathan as the political myth of a "total state."

The relevance of Hobbes's theory of the state is that it overcomes the feudal anarchy and its plurality of allegiances by establishing the rational unity of modern state. However, Schmitt dismisses Hobbes's mechanist worldview because of its incapacity to produce a meaningful totality. The impossibility of finding a foundation for a "total state" in the myth of the leviathan is evident in Schmitt's unfavorable comparison between Hobbes and Hegel. "Hence the 'temporal god' of Hegel's philosophy is also a present god, *numen praesens*, and not a representation. He has no spiritual kinship with the 'mortal god' of Hobbes's philosophy of the state. On the contrary, his '*deus mortalis*' is a machine whose 'mortality' is based on the fact that one day it may be shattered by civil war and rebellion."[45] For Schmitt, Hobbes's "mortal god" is not enough to restore the original unity between spiritual and political spheres; only Hegel's state is able to fulfill this task. Surprisingly, in this comparison Schmitt uses the Roman imperial cult symbol of "*numen praesens*" (divine presence) to refer to Hegel's state as a temporal god. Interestingly, this political symbol was used for the first time by the Emperor Caracalla,[46] who was one of the most tyrannical Roman emperors known for his evil and psychopathic nature. It is not possible to know whether Schmitt was aware of this analogy or not. However, this historical analogy perfectly represents the political consequences of the divinization of the sovereign and the creation of a "total state." The divinization of the sovereign, rather than strengthening the unity of the political entity, leads ultimately to rebellion and fragmentation.

Schmitt's understanding of Hobbes's *Leviathan* as a failed political symbol becomes the topic of his most insightful monograph during Nazi Germany, *The Leviathan in the State Theory of Thomas*

BK-UW-PSR42_1-180174-Article_9_Passos.indd 209 10/18/18 12:25 PM

Hobbes: Meaning and Failure of a Political Symbol (1938). As the subtitle indicates, the work deals with two separate but related problems: the meaning and the failure of the symbol of the leviathan. First and foremost, the leviathan is a political symbol and a powerful image of the unity of the political entity. Thus, the success of the myth depends upon its triumph over the powers of division, the indirect powers, and its ability to restore the original unity between kingly and priestly powers. This intention is evident in the engraving of the *Frontispiece*, where the leviathan uses all its power to stand above secular and spiritual disputes. Schmitt then describes the different references to the leviathan in Hobbes's work to see if this mythical creation can fulfill its task. In the book, the leviathan first appears as a huge man, a huge animal, and a huge machine. Later, Hobbes adds a new characteristic to it; to speak more reverently, the creature is described as "mortal god to which we owe, under the *Immortal God*, our peace and defense."[47] Those multiple elements were supposed to create a "mythical totality composed of god, man, animal, and machine."[48] Additionally, Hobbes mentions the leviathan a third time when he refers to it, quoting the *Book of Job*, as the "king of all the children of pride."[49] However, in this last reference, Hobbes remembers "he is mortal and subject to decay, as all other earthly creatures are (…)."[50] Thus the great biblical myth, which upon Earth there is nothing like him, dwindles from its god-like character to become a mortal creature among others. Instead of being the symbol of absolute totality in which Schmitt attempted to ground his theory of state, the leviathan is only a person who rules and administers the state by distributing rewards and punishments, but he does not embody the state as a whole. Because of this lack of totality, Schmitt argues that Hobbes's theory of sovereignty paves the way for the mechanization of the state. As a result, Hobbes demystifies the state by developing the idea of commonwealth created by human reason rather than God.

This mechanization of the state creates a political community deprived of its utmost meaning. "The machine, as all of technology, is independent of every political goal and conviction and assumes a value-and-truth neutrality of a technical instrument."[51] Without a

BK-UW-PSR42_1-180174-Article_9_Passos.indd 210 10/18/18 12:25 PM

telos, the Hobbesian state is incapable of any organic totality or any affirmation of an ultimate value; this state is a mere neutral technical instrument that works independently of the people's political goals. Security and order are the goals of the new natural foundation of modern theory of state. Consequently, this neutral state transforms *potestas* into the highest *auctoritas* and removes any claim over right order or truth from the reality of the state. The state machine works to provide peace and security in exchange for unconditional obedience. However, according to Schmitt, the destiny of the mythical monster is not primordially decided by the invocation of higher right or transcendent truth. In Hobbes's discussion on miracles (chapter XXXVII), he argues that the sovereign alone can decide the miracles that the subjects of the state must believe. "A miracle is what the sovereign state authority commands its subjects to believe to be a miracle; but also—and here the irony is especially acute—the reverse: miracles cease when the state forbids them."[52] This is the moment when the mortal god shows all his power to decide over religious, as well as political, matters. As a result, the sovereign power brings back the original unity of religion and politics that was shattered by Christianity.

Nevertheless, Hobbes leaves an "individualist proviso" in his discussion about miracles when he differentiates between inner faith and outer confession. He argues that everyone can report by himself what is a true or a lie in his private reason as long as in his public reason he grants to the sovereign the power to decide in order to ensure peace and defense. "A private man has always the liberty (because thought is free) to believe or not believe, in his heart, those acts that have been given out for miracles (. . .). But when it comes to confession of faith, the private reason must submit to the public, that is to say, to God's lieutenant."[53]

This distinction between inner faith and outer confession, according to Schmitt, "contained the seed of death that destroyed the mighty leviathan from within and brought about the end of the mortal god."[54] This modern machine-like state would give rise to the liberal constitutional state a couple of centuries later. However, "[o]nly a few years after the appearance of the *Leviathan*, a liberal

BK-UW-PSR42_1-180174-Article_9_Passos.indd 211 10/18/18 12:25 PM

Jew noticed the barely visible crack in the theoretical justification of the sovereign state."[55] The "liberal Jew," who saw this "visible crack" and used it to invert Hobbes's "individualistic proviso," was Spinoza. While in the *Leviathan* the public authority makes a concession to the individual's private reason to internally believe or not in the public confession of the state, in Spinoza's *Theological-Political Treatise* the logic is inverted and the principle of freedom to philosophize[56] (*libertas philosophandi*) is transformed into a universal principle with the proviso that public peace should be respected. It is no longer the sovereign that allows individual inner faith, but the individual that respects and tolerates the sovereign's right to determine the external cult. As a result, the leviathan embodies a tremendous concentration of power only externally, but its internal justification remains weak; its only binding force is fear of violent death. Hobbes's mortal god becomes only a simulacrum of divinity that cannot prevent its members from seeking refuge in their inner castle. For Schmitt, however, the enemies of the state and of "the political" are everyone who takes the "'secret road' that leads inward."[57] His struggle is against inner spirituality that refuses to recognize the god-like nature of the state. "For the pious reader of the Bible, the leviathan remained a horror; for the Puritan, a sign of bold idolatry. For every good Christian it became a dread-provoking image to see a great animal juxtaposed to the *Corpus Mysticum* of man-god, the great Christ."[58] In this sense, Schmitt struggles not only against Jews, but also against pious Christians who fear that the total state will attempt to imitate the mystical body of Christ.

While Hobbes keeps his leviathan away from the private sphere, Schmitt wants to suppress this distinction. He wants to create a state organization, a total state, as a "uniformity of will and uniformity of spirit."[59] While Schmitt believes that the political is absolute, Hobbes is in fact showing the limits of the political. His leviathan reveals that man's fulfillment is not achieved through political means and that politics does not embody the highest good of man, but it can only prevent the highest evil, violent death. For this reason, Schmitt could identify Hobbes as a pious man. "That was the basis from which his (Hobbes) piety sprang, for I (Schmitt)

BK-UW-PSR42_1-180174-Article_9_Passos.indd 212 10/18/18 12:25 PM

believe that with Hobbes it was genuine piety."[60] Because of his piety, Hobbes is able to reestablish the eternal relationship between protection and obedience. As long as one obeys the leviathan, the modern state has the responsibility to protect its members. At this point, Schmitt's text is ambiguous, and years later he will say that it was a warning sign against the National Socialist state because it was no longer fulfilling its duty to protect Schmitt's life. This is a possible reading of Schmitt's text, but at no moment does Schmitt mention the protection of Jews; on the contrary, the text justifies the anti-Semitism of the Nazi era as well as the extermination of anyone who does not profess the Nazi civil religion both in public and in private. While Hobbes was willing to weaken the leviathan in the name of private spiritual freedom, Schmitt considered this a fatal blow in its theoretical justification because it undermined the capacity of the modern state to restore the original unity.

Conclusion

When the Russian troops occupied Berlin in April 1945, Schmitt was arrested at his home and interrogated for several hours before being released. However, when the denazification process began, Schmitt was detained again, this time in an American interrogation center, and he was later transferred to another camp, where he was imprisoned for more than a year. His interrogators wanted to know his role as a party member and especially about his position as "crown jurist of the Third Reich." Schmitt's defense was based on "eternal relation of protection and obedience." As a German citizen and a jurist, he could not be held responsible for obeying the established regime; no one should be forced to unleash his own civil war against the state or to become a martyr.[61] Even without acknowledging it, his downfall from the state hierarchy and his disengagement from party politics after 1936 saved him from further engagement with war criminals. At the end of his arrest, Schmitt was not charged with anything, although he was dismissed from his academic position. He returned to his hometown, Plettenberg, where he stayed with his family until his death in 1985 under the protection of the liberal democracy of the Federal Republic of Germany.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 213 10/18/18 12:25 PM

Schmitt's engagement with Nazism, nevertheless, went further than mere obedience. His intellectual curiosity led him to provide the juridical justification for Hitler's seizure of power and to create an intellectual façade to legitimize the anti-Semitism of the regime. Thus, to consider his personal collaboration only as one driven by professional adventure or obedience to the established regime, as he portrayed himself, is to misunderstand the intricate relationship between politics and truth. His intellectual curiosity was also driven by a *libido dominandi* (will to power). As the force that draws man into tyranny is the same one that corrupts intellectuals, both the tyrant and the corrupted intellectual want to master the whole world without being able to master their own passions. His intellectual pride sought to find unity and omnipotence in the realm of earthly things, where all things are transient like a shadow.[62] As a result, his political theory, instead of developing a realistic account of human nature and society with all their transcendent and immanent dimensions, tries to transform the modern state into an intra-mundane religious community that destroys the possibility of an authentic spiritual life.

Notes

1. At the time, the University of Bonn was one of the largest institutions of higher education in Germany. During Schmitt's tenure there (1922–1928), he had the most fruitful years of his academic life, enjoying popularity among graduate students and publishing most of his main works: *Political Theology*, *Crisis of Parliamentary Democracy*, *Concept of the Political*, and *Constitutional Theory*. However, Schmitt considered the intellectual atmosphere of Bonn too Catholic and provincial.
2. The *Handelshochschule* in Berlin was a new institution of higher education founded to support industry and commerce in Berlin, but few students went there to earn a doctoral degree. However, unlike Bonn, it was located in the political, financial, and intellectual melting pot of Berlin.
3. Article 48 of the Weimar Constitution allowed the president to take emergency measures without the approval of the parliament. To reestablish public security and order, the president, with the assistance of the army, could suspend the fundamental rights of the constitution.
4. This title was given by the Catholic intellectual Waldemar Gurian, Schmitt's former student and one of his harshest critics.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 214 10/18/18 12:25 PM

5. Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty, trans. George Schwab (Chicago: University of Chicago Press, 2005), p. 2.
6. William E. Scheuerman, "States of Emergency," in *The Oxford Handbook of Carl Schmitt*, ed. Jens Meierhenrich and Oliver Simons (New York: Oxford University Press, 2016), p. 548.
7. Carl Schmitt, *The Crisis of Parliamentary Democracy,* trans. Ellen Kennedy (Cambridge, MA: The MIT Press, 1988), p. 9.
8. Carl Schmitt, *Der Hüter der Verfassung* (Tübingen, Verlag von J. C. B. Mohr, 1931), p. 22.
9. Schmitt distinguishes two pillars of the Weimar Constitution: the first one is its parliamentary and liberal pillar, which is the source of normative legality, and the other is its presidential and democratic pillar, which is the source of popular legitimacy.
10. There is no direct English translation for *Rechtsstaat*, which broadly means a constitutional state founded on the rule of law and the idea of rights.
11. Carl Schmitt, *Legality and Legitimacy,* trans. Jeffrey Seitzer (Durham: Duke University Press, 2004), p. 95.
12. Ibid., p. 32.
13. Ibid., p. 69.
14. Reinhard Mehring, *Carl Schmitt: A Biography* (Cambridge, UK: Polity Press, 2014), p. 256.
15. Schmitt, *Legality and Legitimacy,* p. 90.
16. Ibid., p. 95.
17. Mehring, *Carl Schmitt: A Biography*, p. 271.
18. Carl Schmitt, "Personal Diary," quoted in Mehring, *Carl Schmitt: A Biography*, p. 271.
19. After the passage of the Enabling Act on March 24, 1933, the new "Reich Governors Law," or the Second Law for Synchronization of the States with the Reich (*Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*), was passed on April 7, 1933, and constituted another step in the consolidation of Hitler's dictatorship. This new legislation recreated the position of *Reichsstatthalter* (Reich Governor), which had the task of overseeing and enforcing the Reich's policies in the states. In fact, the "Reich Governors" completely suppressed the states' authority. In Prussia, Hitler gave this authority to Hermann Göring, who became Prussian prime minister without any election.
20. Mehring, *Carl Schmitt: A Biography*, p. 303.
21. Carl Schmitt, *Dialogues on Power and Space,* trans. Samuel Garrett Zeitlin (Cambridge, UK: Polity Press, 2017), p. 34.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 215 10/18/18 12:25 PM

22. Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg: Hanseatische Verlagsanstalt, 1933), p. 20.
23. For this interpretation, see Joseph W. Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton, NJ: Princeton University Press, 1983), p. 210.
24. Carl Schmitt, *On the Three Types of Juristic Thought*, trans. Joseph W. Bendersky (Westport, CT: Praeger Publishers, 2004), p. 45.
25. Eric Millard, "Hauriou et la Théorie de l'Institution," *Droit et Société*, no. 30/31 (1995), pp. 386–7.
26. Schmitt, *On the Three Types of Juristic Thought,* p. 89.
27. Ibid., p. 94.
28. Ibid., p. 91.
29. Ibid., p. 94.
30. Ibid., p. 98.
31. Ibid., p. 98.
32. Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 213.
33. "Der wahre Führer ist immer auch Richter. Aus dem Führertum fließt das Richtertum." Carl Schmitt, "Der Führer schützt das Recht (1934)," in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939* (Berlin: Duncker & Humblot, 2014), p. 228.
34. "Sie werden es unerhört finden, daß der heutige deutsche Staat die Kraft und den Willen hat, Freund und Feind zu unterscheiden." Schmitt, "Der Führer schützt das Recht (1934)," p. 231.
35. Mehring, *Carl Schmitt: A Biography,* p. 331.
36. Bendersky, *Carl Schmitt: Theorist for the Reich*, p. 235.
37. Mehring, *Carl Schmitt: A Biography*, p. 345.
38. Carl Schmitt, *Glossarium: Aufzeichnungen aus den Jahren 1947 bis 1958* (Berlin: Duncker & Humblot, 2015), p. 184.
39. Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press, 2008), p. 262.
40. During the War Period, Schmitt did not have any political or bureaucratic role in the state apparatus and only maintained his academic duties in Berlin. In this period, he propagated his concept of *Großraum* (great space) order and published his reflection on world history: *Land and Sea: A World-Historical Meditation* (1941). From 1941 to 1944, he was allowed to present conferences in neutral and occupied countries such as France, Belgium, Hungary, Romania, Portugal, and Spain. Thus, as part of the German war effort, he remained, until the end, useful to the regime on the intellectual front.
41. Carl Schmitt, "Weiterentwicklung des totalen Staats in Deutschland (Januar 1933)," in *Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles 1923–1939*, p. 212.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 216 10/18/18 12:25 PM

42. Ibid., p. 213.
43. Eric Voegelin, *The Authoritarian State: An Essay on the Problem of the Austrian State* (Columbia, MO: University of Missouri Press, 1999), p. 63.
44. Eric Voegelin, "Die Verfassungslehre von Carl Schmitt," in *Selected Book Reviews* (Columbia, MO: University of Missouri Press, 2001), p. 63.
45. Carl Schmitt, "The State as Mechanism in Hobbes and Descartes," in *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab (Chicago: The University of Chicago Press, 2008), p. 100.
46. Duncan Fishwick, *The Imperial Cult in the Latin West*: *Studies in the Ruler Cult of the Western Provinces of the Roman Empire*, vol. 3, *Provincial Cult,* part 1, *Institution and Evolution* (Leiden: Brill, 2002), p. 198.
47. Thomas Hobbes, *Leviathan*, xvii, para. 13.
48. Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, trans. George Schwab (Chicago: The University of Chicago Press, 2008), p. 19.
49. Job 41:33–34
50. Hobbes, *Leviathan*, xxviii, para. 27.
51. Schmitt, *The Leviathan in the State Theory,* p. 42.
52. Ibid., p. 55.
53. Hobbes, *Leviathan,* xxxvii, para. 13.
54. Schmitt, *The Leviathan in the State Theory,* p. 57.
55. Ibid., p. 57.
56. Benedict de Spinoza, *Theological-Political Treatise*, chapter xx.
57. Schmitt, *The Leviathan in the State Theory,* p. 61.
58. Ibid., p. 62.
59. Ibid., p. 74.
60. Ibid., p. 83.
61. Schmitt used this argument in his memorial in defense of the German industrialist Friedrich Flick. See Carl Schmitt, "The International Crime of the War of Aggression and the Principle of '*Nullum crimen, nulla poena sine lege*' (1945)," in *Writings on War,* trans. Timothy Nunan (Cambridge, UK: Polity Press, 2011), p. 194.
62. Augustine, *On the True Religion*, XLIII.84.

BK-UW-PSR42_1-180174-Article_9_Passos.indd 217 10/18/18 12:25 PM