

## POLITICAL THEOLOGY AND THE NAZI STATE: CARL SCHMITT'S CONCEPT OF THE INSTITUTION<sup>\*</sup>

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*The fundamental importance of theology in the work of Carl Schmitt has been the subject of much recent literature on this controversial figure. However, there has been little consensus on the precise nature of Schmitt's own political theology—that is, on what links there are between his religious or metaphysical concepts and his ideas concerning the nature of political organization and action. This is especially the case with his works of the Nazi era, which are now being studied with the same kind of critical attention given to his more influential Weimar works. In this essay I focus on the important turn Schmitt made in the early years of the Third Reich, from “decisionism” to what he called “institutional thinking,” in order to reveal the theological basis for his understanding of the new regime. I will then argue that Schmitt's institutional approach had in fact always been central to his earlier, better-known writings on law and the state. Schmitt's concept of the institution, which had roots in French legal theory, grounded a political theology that was in the end less a metaphysical approach to the state than one that drew on the concrete example of the legal institutional order of the Catholic Church.*

Owing to its formal superiority, jurisprudence can easily assume a posture similar to Catholicism with respect to alternating political forms in that it can positively align itself with various and sundry power complexes, provided only there is a sufficient minimum of form “to establish order.” Once the new situation permits recognition of an authority, it provides the groundwork for a jurisprudence—the concrete foundation for a substantive form.

Carl Schmitt, *Roman Catholicism and Political Form*, tr. G. L. Ulmen  
(Westport, CT, 1996; first published 1923), 29

Carl Schmitt's sympathy for National Socialism, although it came as a shock to many of his contemporaries, nonetheless strikes some as a natural extension of his earlier thinking about the state. Schmitt's decisionist theory of a sovereign

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power beyond the law, and his emphasis on the importance of the friend/enemy distinction in politics, seems all too congruent with his theoretical justifications of the *Führerstaat* in the early years of the Nazi regime. And yet Schmitt himself, after the war, always maintained that his ideas concerning the state were rather distinct from the theories and practices of a Third Reich centered on the personal leadership of Hitler. As Schmitt infamously claimed, he had never been infected by the Nazi “bacillus.”

While many would see this as merely a self-serving attempt to minimize his involvement with the Nazis, it would be a mistake to draw a straight line between Schmitt’s “decisionism” and the German state organized around the decisive power of the Führer. For in 1933 and 1934 Schmitt was in fact highlighting the inadequacies of the decisionist model, arguing explicitly for a new approach that emphasized an “institutional” conception of the state. Schmitt’s specific appropriation of what was a largely French legal discourse on institutionalism reveals much about how he understood the challenges and opportunities of this historical moment. Pursuing this connection also reveals an important institutional dimension to Schmitt’s Weimar-era writings on the state. Schmitt’s institutional theorization in 1933 and 1934 was not therefore merely opportunistic, nor was it intrinsically fascist.

The institutional character of Schmitt’s thinking can hardly be understood without tracing its links to political theology. As Schmitt once claimed, “all significant concepts of the modern theory of the state are secularized theological concepts.”<sup>1</sup> Yet Schmitt’s own political theology has never been clearly articulated. Many scholars have pointed to Schmitt’s involvement with Catholic political circles, but these accounts have never yielded a convincing account of what he actually wrote about the state during the Weimar, let alone the Nazi, period.<sup>2</sup> Alternatively, Heinrich Meier has read Schmitt’s entire career in light of some rather extreme postwar reflections on metaphysics and theology, arguing that Schmitt’s political theory was from the start a veiled theology.<sup>3</sup> Yet an analysis of Schmitt’s institutional thought in the Weimar period and the early years of the Nazi regime demonstrate that political theology did not at all mean the transfer

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1 Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*, 2nd edn (Munich, 1934), 49; *idem*, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA, 1985), 36; my emphasis. Note that throughout the essay I have sometimes modified the published translations of Schmitt’s texts.

2 Manfred Dahlheimer, *Carl Schmitt und der deutsches Katholizismus 1888–1936* (Paderborn, 1998); Andreas Koenen, *Der Fall Carl Schmitt: Sein Aufstieg zum “Kronjuristen des Dritten Reiches”* (Darmstadt, 1995); Bernd Ruthers, *Carl Schmitt im Dritten Reich: Wissenschaft als Zeitgeist-Verstärkung?* (Munich, 1990).

3 Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, trans. Marcus Brainard (Chicago, 1998).

of metaphysical theological principles into the political sphere. This twentieth-century political theology was a distinctly practical reflection on how the political and legal order of the Catholic Church—the most striking historical example of institutional stability—might provide a model structure for the secular state form.

If we want to understand fully Schmitt's political theology, we need to set aside the search for theological messages (overt or hidden) in Schmitt's work. This is not at all to deny their existence or their importance. However, it is critically important that we focus on how Schmitt actually understood the political form of the state—and especially the National Socialist regime, this “new state for the twentieth century,” as he often called it—before beginning to trace the theological analogues that inform his work in this period. For Schmitt always kept separate, at least conceptually, the theological and political spheres. Schmitt had a deep commitment to a particular idea (and ideal) of law in the Nazi period, one that he had maintained for some time before 1933, and which guided his initial interpretation of the Third Reich in 1933 and 1934. Putting the concept of the institution at the center of Schmitt's thinking reveals the outlines of this juridical idea, and its connection with a political theology that was essentially *catholic* (of the “whole”)—and in many ways *Catholic* in inspiration.

## NATIONAL SOCIALISM AS POLITICAL RELIGION

The National Socialists' relationship with religion was very complicated and not even very coherent, as party ideologues drew on Christian tropes and ideas and celebrated pagan doctrines and mythologies, while simultaneously trying to destroy and neutralize, but also coopt, organized religion in Germany.<sup>4</sup> But many critics, especially émigrés on the left, were interested less in the ideological *content* of Nazi propaganda than the theological *structure* of the regime's mode of governance. The exiled Munich lawyer and professor Karl Loewenstein, in an echo of Schmitt, once stated, “Government institutions and their dogmatization can be assessed correctly only in terms of a political theology.”<sup>5</sup> For Loewenstein, writing in 1940 as a professor of political science in the United States, it was painfully clear that the new state signaled a reversion to an earlier, more primitive metaphysical understanding of the world. Only the Führer could “incarnate” the German *Volk*, which was “something permanent, supernatural, a mystical entity; real, beyond the existing totality of all inhabitants” (60). Hitler's “superhuman,” mystically

4 The best account is Richard Steigmann-Gall, *The Holy Reich: Nazi Conceptions of Christianity 1919–1945* (New York, 2003).

5 Karl Loewenstein, *Hitler's Germany: The Nazi Background to War*, 2nd edn (New York, 1940), 218. Further page references are in the text.

charged powers were “incapable of being integrated by definable institutions or legislative arrangements” (49). The regime relied on the “fanatical devotion” to the person of Hitler, precisely because there was no other legitimate source of authority. Hitler’s infallibility—which Loewenstein explicitly compares to the Pope’s—was founded on a religious conception of authority that was very difficult for non-believers to comprehend (212, 134).

Loewenstein’s account of the “secularized theology” of the Nazi state was hardly unique, as many writers drew attention to a peculiarly religious form of legitimacy underwriting the *Führerstaat*, what Franz Neumann described as “the sophistry of this new theory of transubstantiation implied by the identification of the Leader and the people.”<sup>6</sup> Still, as many observers of the Third Reich realized, the example of Germany was a serious warning sign for all of those states that had become increasingly reliant on executive authority and supraconstitutional measures.<sup>7</sup> Inevitably, in a serious crisis, a “personal” leader would provide much-needed direction and energy. However, in periods of normality, only an institutionalized authority could ever provide the stability necessary for any durable political order. The rational, institutionalized state could collapse entirely when (as in Germany) the perhaps necessary dictatorial emergency power permanently established its authority by drawing on a questionable metaphysical principle of identification.<sup>8</sup>

Interestingly enough, Schmitt himself agreed with these émigré critics, identifying, albeit after the war, the pathology of the National Socialist state as the absence of any genuine institutional stability. In a written submission to Robert Kempner, who interrogated Schmitt as a possible war criminal in the spring of 1947,<sup>9</sup> Schmitt offered this observation: “it should be noted that Hitler had only the deepest hatred for any stipulations through forms or even institutions [*Einrichtungen*] and that a ruffling of his brow would have been enough to begin

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6 Franz Neumann, *Behemoth: The Structure and Practice of National Socialism 1933–1944* (1942; rev. 1944) (New York, 1966), 469.

7 For example, Loewenstein, *Hitler’s Germany*, vii, and Ernest S. Griffith, introduction to Fritz Ermarth, *The New Germany: National Socialist Government in Theory and Practice* (Washington, DC, 1936), ix.

8 Sigmund Neumann, “Leadership: Institutional and Personal,” *Journal of Politics* 3 (1941), 136–7. Cf. *idem*, *Permanent Revolution: The Total State in a World at War* (New York, 1942), 5 and Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E. A. Shils, with Edith Loewenstein and Klaus Koor (New York, 1941), 68–9.

9 Incidentally, it was Karl Loewenstein, as part of the American legal team, who requested that Schmitt be rearrested. Loewenstein’s report on Schmitt is preserved at the Amherst College Archives. See Ernst Stiefel and Frank Mecklenburg, *Deutsche Juristen im amerikanischen Exil, 1933–1950* (Tübingen, 1991), 198–9.

all over again.” The “fundamental abnormality” of the regime, Schmitt explained, stemmed from Hitler’s deliberate and unprecedented “subjectiveness.”<sup>10</sup>

Schmitt went on to compare Hitler’s position to the Pope’s—but, unlike Loewenstein, he would remark on the key differences between these two supposedly “infallible” leaders, noting the importance of institutional controls:

The head of the Roman Catholic Church, the Pope, is infallible according to the dogma of this Church, but his infallibility is nevertheless clearly limited to general determinations and its exercise is bound to the most distinct and transparent forms (*ex cathedra*). By comparison, Hitler decreed general and individual orders of all kinds.

And he did this, Schmitt says, “openly or secretly, verbally or in writing, with reason or as a passing fancy, so that fundamentally no one could control a ‘Führer decree.’”<sup>11</sup> Schmitt offered other examples, including the “constitutionally absurd situation” of Hitler personally extending the Enabling Act, which had given at least some minimal form of foundational legal justification for his authority, and the Führer’s decision of 1 September 1939 to appoint his own successor, something even the infallible head of the Roman Catholic Church would never attempt. Overall the regime was, according to Schmitt, “a system that knew no binding forms [*bindende Formen*] and institutions [*Einrichtungen*], in which everything it did or announced was always ‘subject to change.’” Schmitt concluded by highlighting “the fundamental irreconcilability of the omnipotence of the Führer [*Führer-Allmacht*] and the legalizing order of the state.”<sup>12</sup>

While Schmitt at this moment fails to mention any of his own numerous contributions to the dismantling of the “legalizing order of the state”<sup>13</sup> (telling Kempner that he was responsible only for writing “scholarly treatises”<sup>14</sup>), this particular critique of the Third Reich was not, in fact, entirely retrospective or merely self-serving. For as early as 1934, in *Über die drei Arten des rechtswissenschaftlichen Denkens* (*On the Three Types of Juristic Thought*), Schmitt had already offered the papal institution as a potential analogue of a new political order in Germany, noting that “the infallible decision of the Pope does not establish the order and institution [*Institution*] of the church but presupposes them: the Pope is, as head of the church, only infallible by virtue of his office [*kraft*

10 Carl Schmitt, *Antworten in Nürnberg*, ed. Helmut Quaritsch (Berlin, 2000), 98–9; trans. Joseph Bendersky in “Interrogation of Carl Schmitt by Robert Kempner, I,” *Telos* 72 (1987), 122.

11 Ibid.

12 Ibid.

13 For details on Schmitt’s activities in this regard see William Scheuerman, “After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order, 1933–1936,” *Cardozo Law Review* 19 (1997–8), 1743–69.

14 Schmitt, *Antworten*, 90; Bendersky, “Interrogation of Carl Schmitt,” 129.

*seines Amtes*], not the other way around, [i.e.] the infallible one is the Pope.”<sup>15</sup> Belying his reputation as a “decisionist,” Schmitt observed that those who tried to trace “order” to the act of decision usually assumed the existence of at least some institutional form. For example, both the monarchy and the estates were taken for granted in Jean Bodin’s influential theory of sovereign decision (27/61). Schmitt also argued here that a normative belief in the “rule of law” likewise assumes the existence of a concrete legal community with regulative practices that can realize these norms. As Schmitt said, “concepts like king, master, overseer, or governor, as well as judge and court, shift us immediately into concrete institutional orders [*konkrete institutionelle Ordnungen*] that are no longer merely rules” (15/50). But what exactly were “institutions” and why was he so concerned with them at just this historical moment?

### SCHMITT AND THE QUESTION OF INSTITUTIONS, CA. 1934

Schmitt developed his concept of the institution just as the National Socialists were consolidating and developing their power after the revolution of 1933. Although we tend to think of the Third Reich as a centralized, totalitarian police state which dominated and controlled all aspects of German society, the situation, especially in the earliest years of the regime, was considerably more complicated, and much more anarchic than often assumed. Hitler’s assumption of power in a (relatively) bloodless revolution was surprising to many Germans—even the National Socialists themselves—and in fact the Party leadership was not fully prepared, practically speaking, for the dramatic social and political transformations that had been promised in its own relentless propaganda campaigns. While the state and its bureaucracy were, of course, quickly Nazified, the government from the start was plagued by the lack of any clear vision for the new state and an absence of any real institutional organization within the party itself.<sup>16</sup> As Martin Broszat has explained, the situation was confused because “sometimes overlapping but seldom coordinated and frequently opposing processes” were set in motion from very different sources: by the Party revolution “from below,” by a centralizing state dictatorship “from above,” and by the simultaneous, improvisational adjustments made in the realm of civil society at large.<sup>17</sup>

15 Carl Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens* (Hamburg, 1934), 26; *idem*, *On the Three Types of Juristic Thought*, trans. Joseph W. Bendersky (Westport, CT, 2004), 60. Further references (German/English) are in the text.

16 Hans Mommsen, *From Weimar to Auschwitz*, trans. Philip O’Connor (Princeton, 1991), 143–4, 170.

17 Martin Broszat, *The Hitler State: The Foundation and Development of the Internal Structure of the Third Reich*, trans. John W. Holden (London, 1981), 347.

Within the regime, the boundaries between “state” and “party” were never entirely clear. Therefore the precise nature and extent of Hitler’s power was ill-defined, especially before he took over the office of the presidency.<sup>18</sup> Furthermore, there was a real reluctance on the part of the leadership to formalize and stabilize these relations. As Ian Kershaw has observed, Hitler was “distrustful of all forms of institutional loyalty and authority,” and indeed “hypersensitive toward any attempt to impose the slightest institutional or legal restriction upon his authority,”<sup>19</sup> and this ethos permeated an entire governmental structure organized more by personal connections than by well-defined organizational ones. Adding to the confusion was the fact that this “omnipotent” and “infallible” leader was notoriously reluctant to make key policy decisions, particularly on domestic questions.<sup>20</sup> Hitler refrained from participating in the numerous political conflicts that were generated by this regime that from the start encouraged “initiative” and autonomy on the part of state (and quasi-state) entities of all kinds, so that jurisdictional boundaries and hierarchies were fluid. Above the fray, Hitler preferred to remain unsullied by the practical demands (and responsibilities) of actual governance, especially in the early phase of leadership.<sup>21</sup>

The result was a kind of “semi-institutionalized conflict” in which the drive for power and domination in all sectors of German society was never really offset by what Jane Caplan has called the “ballast of administration,” because, in Broszat’s words, the “institutional, corporate unity and coherence of the government” had collapsed.<sup>22</sup> As Franz Neumann explained many years ago, the bureaucracy, the army, industry, and the party had all carved out their own zones of domination in the Third Reich. “Each group is sovereign and authoritarian; each is equipped with legislative, administrative, and judicial power of its own; each is thus capable of carrying out swiftly and ruthlessly the necessary compromises among the four.”<sup>23</sup> The result was that Germans were subjected to a plethora of institutions (state and non-state alike) which had each in these new conditions “gained the ability to produce and to enforce control

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18 Ibid., 194.

19 Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation*, 4th edn (London, 2000), 82–3.

20 Mommsen, *From Weimar to Auschwitz*, 157.

21 Michael Geyer, “The State in National-Socialist Germany,” in Charles Bright and Susan Harding, eds., *Statemaking and Social Movements: Essays in History and Theory* (Ann Arbor, MI, 1984), 193–232, 210; Mommsen, *From Weimar to Auschwitz*, 160; Kershaw, *The Nazi Dictatorship*, 87.

22 Jane Caplan, *Government without Administration: State and Civil Service in Weimar and Nazi Germany* (Oxford, 1988), vii, x; cf. Broszat, *The Hitler State*, 194.

23 F. Neumann, *Behemoth*, 398.

over its own domain autonomously.”<sup>24</sup> The real political struggles were between these spheres of control—that is, conflicts over the boundaries of authority and competition for resources dominated public life in the regime.<sup>25</sup> According to Neumann, the classic form of the state had disappeared in Germany, and with it any potential space of integration. “It is thus impossible to detect in the framework of the National Socialist political system any one organ which monopolizes political power.” There was, in effect, no real political unity.<sup>26</sup> The unity provided by the Führer was at best a kind of mythology, one propagated with relentless determination (but with mixed success) by the National Socialists.

Given the circumstances, it is not so surprising that Schmitt would in 1934 use the preface to the second edition of *Political Theology* (his supposed decisionist manifesto) to announce his new “institutional” approach to political and legal orders. There he argued that “the decisionist, focusing on the moment, always runs the risk of missing the stable content inherent in every great political movement.” In contrast, “institutional [*institutionelle*] legal thinking unfolds in institutions [*Einrichtungen*] and organizations [*Gestaltungen*] that transcend the personal sphere.” At the same time he warned that the stability of institutions could be undermined if there was no comprehensive order to organize them in relation to each other: “an isolated institutional thinking leads to the pluralism characteristic of a feudal-corporate growth that is devoid of sovereignty.”<sup>27</sup> In the new political landscape Schmitt identified the challenge of integrating the increasingly autonomous zones of power in a pluralistic administrative regime. In order to avoid a perilous descent into that modern variant of feudalism Schmitt would call “polycracy,” a stable political unity had to be rediscovered, and that required a political formation more organized than a purely decisionist dictatorship. Schmitt’s thinking about institutions was his way of conceptualizing a stable governmental system that would nonetheless preserve a space for decisive interventions to protect this prevailing order in exceptional circumstances.

So Schmitt rejected, in *On the Three Types of Juristic Thought*, the radical decisionism of someone like Hobbes, who believed that only a decision could ever establish political and legal order, because this would mean that a “sovereign decision springs from normative nothingness and a concrete *disorder* [*Unordnung*]” (28/62). The sovereign decision is constrained, then, by a legal order that precedes it. However, this order is not defined by mere norms,

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24 Geyer, “The state,” 205; cf. an essay by one of Schmitt’s former students: Otto Kirchheimer, “The Legal Order of National Socialism,” *Studies in Philosophy and Social Science* 9 (1941), 456–75, esp. 469–70.

25 Geyer, “The state,” 199, 205–7.

26 F. Neumann, *Behemoth*, 469

27 Schmitt, preface to *Political Theology*, 3; the German preface is unpaginated.



something Schmitt had repeatedly argued in the Weimar period. “Every order, including the ‘legal order,’ is bound to concrete concepts of what is normal, which are not derived from general norms, but rather such norms are generated by their specific order and for their specific order” (22–3/56). So countering the two extremes of normativism and decisionism, Schmitt suggested that an “institution” marks the legal form of a “concrete order” that defines both the limit of sovereign decision and the essential foundation of any normative constraint.

Yet Schmitt is rather allusive as he develops this idea. Early in the book, for example, he refers to Pindar’s work *Nomos basileus* (Nomos is King), noting that “*Nomos* . . . must have in itself certain of the highest, unalterable [*unabänderliche*], but also concrete qualities of an order” (16/50). With Pindar, Schmitt suggests that we think of law as *Recht* in the broadest sense, as the combination of decisionist, normative, and, above all, institutional ideas, a matrix Schmitt calls a “concrete order.” In a suggestive passage, Schmitt goes on to hint at the underlying political theology of this conception, quoting Hölderlin’s commentary on Pindar:

Nomos, the law, is here discipline [*Zucht*], in so far as it is the form [*Gestalt*] within which man encounters himself and God. It is the church and the law of the land and inherited rules that, more firmly than art, embody the living relations within which a people encounters itself and others in time. (17/51)

Modern jurisprudence, Schmitt explains, has become so preoccupied with the relationship between norms and decisions (between “authority” and “power,” we might say) that it has forgotten the true origin of all law—the concrete orders of human social life itself.

Although Schmitt makes the rather dubious claim here that a legal tradition of “concrete-order and communitarian thinking has never ceased in Germany,” despite the threats posed by Roman law in the Renaissance and contractual theory in the Enlightenment, and by Kantian idealism, French constitutionalism, and scientific positivism in the nineteenth century, Schmitt’s narrative of continuity is nonetheless instructive, as he says that “the institutional [*institutionelle*] certainty of the Catholic Church” in Catholic countries, and the “Lutheran sense of the ‘natural orders of creation’” in Protestant Germany, “always determined the reality of legal life in a much stronger way than did the dominating rational-law legal and political theory of the philosophers” (42/75).

Schmitt argues in effect that all “concrete orders” within communities—key social and political institutions—must be understood as foundational, requiring no further legitimation. Schmitt presents Luther in this context as someone who knew to defend the “natural internal orders of marriage, family, *Stand*, person, and office” against all the normativizations heralded by the abstract philosophers of modernity. Schmitt does not, however, suggest that theology provides another form of legitimation for these institutions. Instead, he pointedly cites Luther’s

own confirmation of these “eternal laws,” those “which Christ did not take away but rather confirmed,” thereby emphasizing the foundational nature of these concrete human orders even in the very presence of divinity. Schmitt’s institutional theory draws on this singular depiction of Christ as he who affirms and protects a human order, instead of reconstructing it according to some transcendent ideal (42–3/75–6).

For Schmitt, the state, a special form of institution, takes on this role of “protection” in the secular realm. Discussing Hegel’s “resurrection” of concrete-orders thinking, Schmitt praises him for affirming that institutions in a particular national community are the social forms that allow a civil society to be integrated into a “greater total order” (46/78). But, Schmitt explains, for Hegel only the state is capable of effecting this integration. Without any real “content” of its own, the state harmonizes the plural institutions of a historically determined community. As Schmitt puts it, in Hegel’s philosophy the state is “neither mere sovereign decision nor a ‘norm of norms,’ nor a changing combination of both notions of the state, alternating between the state-of-exception [*Ausnahmezustand*] and legality. It is the concrete order of orders, the institution of institutions [*Institution der Institutionen*]” (47/78–9).

Though Hegelian thinking fell victim to the scientific spirit of positivism in the nineteenth century, Schmitt informs us that it is a French jurist, the great public-law professor Maurice Hauriou (1856–1929), who rediscovers this supposedly “German” form of legal thinking for the twentieth century.<sup>28</sup> Hauriou’s work on institutions was, Schmitt claims, the “first systematic attempt of a restoration of concrete-order thinking since the dominance of juristic positivism.” Hauriou is described here as untainted by arbitrary theoretical frameworks or predetermined methodologies. Schmitt reminds us that Hauriou’s forty-year-long study of the French administrative regime was the product of daily direct contact with the actual objects of his analysis—the decisions, ideals, and practices of the institution itself, which he came to regard “as a unit living according to its own laws and inner discipline.” In the complex twentieth-century political environment, Hauriou showed how institutions—even government institutions—have to be understood as independent forms in their own right, with their own legal structures and their own systems of authority. In this context Hauriou was moved to redefine the institution of the state as that entity capable of preserving and ordering the many different established institutions within any given society. As

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28 On Hauriou’s influence in Germany before and after 1933 see Roman Schnur, “L’Influence du doyen Maurice Hauriou dans les pays germaniques,” trans. M. Broy, in *La Pensée du doyen Maurice Hauriou et son influence* (Paris, 1969), 257–70. On Schmitt’s use of Hauriou in *On the Three Types of Juristic Thought* see Dahlheimer, *Carl Schmitt und der deutsches Katholizismus*, 399, 407–10.

Schmitt put it, echoing his summary of the Hegelian state, “For the institutional mode of thinking, the state itself is no longer a norm or a system of norms, nor a pure sovereign decision, but the institution of institutions [*Institution der Institutionen*], in whose order numerous other, in themselves autonomous, institutions find their protection [*Schutz*] and their order.” The state’s function is here reduced to preserving a “political unity” pushed to its limit, defined now as simply the secure coexistence of pre-existing organizations and orders within the borders of historically conditioned governmental regimes (54–7/86–88).

Clearly, the key term in this whole analysis is “institution,” a problematic term in German, given that three separate words might be used (*Einrichtung*, *Institution*, *Anstalt*), none of which fully captures Schmitt’s sense of “concrete order,” itself a somewhat paradoxical formulation (57/89). Worse, Schmitt’s own elaboration of the concept of the institution and its relation to “concrete order” is rather hazy at this, the crucial, juncture of the argument. He tries to distance Hauriou’s theory from “typical Roman Catholic” conservative ideas, arguing that Hauriou is not committed to “a mere restitution of bygone things or a conservation of superannuated establishments [*Einrichtungen*]” (58/90). But while suggesting that concrete orders can be newly “formed,” as in the new Germany, Schmitt does pointedly remark that the key elements of a “concept of the institution” would have to include “jurisdictional authority, hierarchy of offices, inner autonomy, internal counterbalancing of opposing forces and tendencies, inner discipline, honor, and official secrets, and with these the all-important foundational presupposition, namely a normal stabilized situation, a *situation établie*” (56/88). Yet Schmitt fails to follow up on any of these points. His minimal examples of new “institutional thinking” in the regime are hardly inspiring, limited as they are to some sinister, but still more-or-less technical, developments in Nazi jurisprudence in the areas of tax law, labor relations, and criminal justice (part II, chapter 3).

Given the dramatic institutional reformation of Germany, Schmitt’s lack of any systematic theorization here is quite striking. It seems to me that Schmitt’s confession that he had to “resist giving a detailed lecture” on Hauriou’s influential theory is rather significant (56/88). In a footnote Schmitt refers the reader to the three key texts where Hauriou developed his general theory.<sup>29</sup> Reading Hauriou in light of Schmitt’s concerns here, it becomes evident both why the ideas of this important and influential French Catholic jurist—whom Schmitt would later call his “elder brother,” and the “the master of our discipline”<sup>30</sup>—play such a key role

29 Schmitt lists the following works: *La Science sociale traditionnelle* (1896), *Principes du droit public* (1910), and the essay “La Théorie de l’institution et de la fondation” (1925).

30 Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Frieherr von Medem (Berlin, 1991), 13; *idem*, *The “Nomos” of the Earth in the International Law of the*

in Schmitt's book on institutional theory, and why Schmitt evaded any detailed exposition of them. For Hauriou's theory of the institution cannot help but illuminate the Catholic political theology grounding Schmitt's conceptualization of the National Socialist regime in 1934.

## HAURIOU AND THE IDEA OF THE INSTITUTION

Although in *On the Three Types of Juristic Thought* Schmitt tried to detach Hauriou from any explicitly Catholic political position, in fact Hauriou's Catholicism was an important dimension of his legal thinking. Hauriou once admitted that the theory of the institution, the greatest concern of his life, was intimately bound up with the idea of God.<sup>31</sup> So if Schmitt was right to emphasize Hauriou's long and deep engagement with the concrete legal institutions of the French administrative state, it was rather disingenuous to suggest that Hauriou was a kind of anti-ideological empiricist. From the start his thinking was inflected by philosophical and theological concerns. A genuinely human civilization was, Hauriou believed, marked by a sense of order and organization that could only be explained in terms of the life of the spirit. Society is a "life in common," having a "mysterious quality" which Hauriou ascribes to a group having the "same manner of action, the same manner of thinking, the same turn of spirit."<sup>32</sup>

Institutions are liminal entities, forms of order with a concrete presence in the world of materiality, but incarnating an organizational structure that is spiritual and therefore immaterial. The stable order of human communities is inevitably threatened by internal conflicts generated by the division of labor in complex material economies, Hauriou believed, and yet a spiritual sense of belonging brings about a reaction of solidarity against this division. The state is that institutional "organ" created to act in the name of this spiritual unity against the threats of disorder. The state is justified in terms less of its specific activity than of its very existence as the instrument of social unity: "incarnating the political unity of the group, every government, however imperfect it may be, has one right, namely, to endure. It is necessary that it endure so that the political unity of the group continues to exist."<sup>33</sup> We might say that political authority

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"*Jus Publicum Europaeum*", trans. G. L. Ulmen (New York, 2003), 210. Cf. *idem*, "Die Legale Weltrevolution," *Der Staat* 3 (1978), 321–39.

31 From a letter of 14 June 1923, quoted by André Hauriou, "Maurice Hauriou—A Memoir," in Albert Broderick, ed., *The French Institutionalists: Maurice Hauriou, Georges Renard, Joseph T. Delos*, trans. Mary Welling (Cambridge, MA, 1970), 25–9, 26.

32 Hauriou, *La Science sociale traditionnelle* (Paris, 1898), 5, 363.

33 *Ibid.*, 367.

flows from this existential quality of the state, however the community itself is defined.<sup>34</sup>

What distinguished a true institution from an artificial unity imposed merely through force was the juridical character of authority, something Hauriou addressed in several of his influential law textbooks. Whatever its historical origin, a system of authority can become an “institution subsisting by itself and not by force” only when it is transformed into an embodiment of social unity. This transformation was the task of jurisprudence, which “does not create social institutions that are exclusively its own, but simply tends to *regularize and improve*, if possible, the existing brute organizations.”<sup>35</sup> Law is the sign of a more radical juridical organization that is itself the articulation of a “unity” that is only immanent in specific historically determined social groups.<sup>36</sup> Obedience to institutional authority, for Hauriou, becomes then the very mark of participation for communities that have no other visible form of being. “Established social order is what separates us from catastrophe,” he once wrote, adding that “we prefer a certain dose of injustice rather than risk catastrophe.”<sup>37</sup>

In his important 1925 essay on the nature of institutions, Hauriou developed this structure further. He argued that the core aim of an institution was “an idea of a work or enterprise to be realized.” Since a shared idea cannot actually realize itself without some kind of concrete instrument of action, Hauriou tells us that some “power” must be organized that can equip this idea with “organs.” Institutional order, “directed by the organs of the power and regulated by procedures,” provided an opportunity for visible “manifestations of communion,” a space for the instantiation of a community.<sup>38</sup> The institutional perspective led Hauriou to a novel understanding of legitimacy. If authority is necessary to establish and maintain the formal order of community life, that authority is itself bound to the “directing idea” that gives life to this community. As Hauriou admits, the directing idea has no predetermined forms of expression—only in the moment can it be realized for a specific purpose. While this might seem to open up a realm of arbitrary power, in fact what Hauriou shows here is that no one authority figure can ever claim some privileged relationship with the idea or the “people,” since

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34 As is clearly explicated in Maurice Hauriou, “Le Régime d’état,” *Revue socialiste* 39 (1904), 564–581.

35 Maurice Hauriou, *Principes de droit public*, 2nd edn (Paris, 1916), 9; translated in Broderick, *The French Institutionalists*, 54; my emphasis.

36 *Ibid.*, 8/53.

37 Maurice Hauriou, “L’Ordre social,” in *idem*, *Aux Sources du droit: Le Pouvoir, l’ordre, et la liberté* (Paris, 1933), 43–71, 49.

38 Maurice Hauriou, “La Théorie de l’institution et de la fondation (essai de vitalisme social),” in *idem*, *Aux sources*, 96–8; trans. in *French Institutionalists*, 99–100. Further references (French/English) are in the text.

neither really exists (concretely) without this comprehensive institutional matrix of power. In other words, the true source of legitimacy within an institution is its enduring character as a unity, and this is assured both by the actions of the authority to establish and protect the internal order of the group, and also significantly by the juridical culture of the institution: “an idea of a work or enterprise cannot be socially realized unless juridical situations are created and maintained in and around it.” At the same time Hauriou tells us that “only an organized power can *create* juridical situations and maintain them” (114/112; my emphasis).

### CHURCH, STATE, LAW: A CATHOLIC POLITICAL THEOLOGY

Hauriou does not offer many specific examples in this essay, but one of the most significant is the institutional order of the Roman Catholic Church. The Church as institution forms around the original community linked by that undetermined idea of Christianity, and thereby provides the concrete means for continuing to “determine” this idea within varying historical circumstances. According to Hauriou, the great strength of the Church has been its ability to provide a common subjective interpretation of the faith, preventing the division of the community into multiple sects. This official interpretation in no way exhausts the essential mystery of the idea of Christ, but the doctrine—protected by the Church’s power structure and legal system—guarantees a continuity that binds past, present, and future members of this community. The Church is not a privileged voice of objective truth, but rather provides a necessary simulacrum of that objective truth. The institution establishes and preserves an admittedly subjective formulation that nonetheless by virtue of being shared and enforced as common takes on the attributes of objectivity, while always leaving open the possibility of real transformation (118/115).

Hauriou constructs an analogy between Church and state based on this institutional form of representation. Political institutions are the concrete mechanisms that translate the community’s “idea” into practice. Yet the idea cannot regulate its own expression:

A body is nothing without its organs, and it wills only through them, but these organs must will for it and not for themselves. This difficult problem is solved by the representative principle, which rests entirely upon the idea of the work to be realized. This directing idea is supposed to be common to the organs of government and to the members of the group. The whole technique of representative organization consists in assuring in practice the reality of this common vision, continuously if possible, periodically at the very least. (103/105)

Political organs were variant expressions of a common political unity, appropriate to tasks and problems of different kinds. He once described the structure of the modern state as a kind of “trinity” of functions: the executive “stands for the very being of the state,” the legislative power expresses “thought” through law,

and the judicial institutions harmonize “the law in all its applications with the constitution of the state.”<sup>39</sup>

Hauriou offered another version of this political trinity in his 1925 essay on the institution, where he said that executive authority is the sphere for the “intuitive” power of decision, deliberative bodies provide the space for reflection, while the people through their suffrage have the “competency of assent” (103/105). Clearly, Hauriou used the analogue of the Trinity not to suggest that the political organs are vehicles of some mystical divine power, but rather to highlight the crucial structural parallel—that something fundamentally unitary can be expressed in different forms without compromising that unity. So the Church, like the state, like any institutional order, is the historical vehicle for the unity of a specific human community, yet that unity is itself “expressed” within the plural functional spaces that define the actual life of the institution.

In *Roman Catholicism and Political Form*, which first appeared in 1923, Schmitt echoed Hauriou’s “institutional” (as opposed to metaphysical) approach to both Church and state. For Schmitt, the Church’s own particular form of rationalism was one that “resides in institutions [*Institutionen*] and is essentially juridical; its greatest achievement is having made the priesthood into an office [*Amte*]—a very distinctive type of office.”<sup>40</sup> Within the Church, holders of power orient themselves by the spirit of the community as a whole, embodying and realizing its central ideas. The “office” is what endows a particular human being with authority. The Pope is the infallible leader of the Church as a whole, but absolutely not, Schmitt says, because he wields some metaphysical power that flows from a privileged relationship with the divine. As Schmitt emphatically states, the Pope is not at all a genuine “prophet,” but instead the “Vicar” (*Stellvertreter*) of Christ, literally a human substitute for the absent founder of the Christian community. This “ceremonial function precludes all the fanatical excesses of an unbridled prophetism,” Schmitt notes—in contrast to modern technical politicians who will sacrifice anything to achieve their particular goals (20/14). And as Schmitt will suggest, the Pope is a substitute for Christ, but not, we might say, the only substitute. This is why Schmitt calls the Church a *complexio oppositorum*, a “complex of opposites,” where no one norm or rule or individual can really encompass all the activities of the community (10/8).<sup>41</sup>

39 Quoted in A. Hauriou, “Memoir,” in Broderick, *The French Institutionalists*, 26.

40 Carl Schmitt, *Römischer Katholizismus und politische Form* (Munich, 1925), 19–20; *idem*, *Roman Catholicism and Political Form*, trans. G. L. Ulmen (Westport, CT, 1996), 14. Note that the German text reads “Institutionellen,” which must be an error. Further references (German/English) are in the text.

41 Samuel Weber notes that this term is not in fact a doctrinal one, and Schmitt uses it to emphasize the “this-worldly” nature of the Church and the absence of transcendental

Like Hauriou, Schmitt suggests that what binds a group together is a shared spiritual reality. Ultimately, any political and legal system is grounded in what Schmitt calls the “idea.” One obeys the authority of an institution like the Church or the state not out of sheer coercion, and not because one believes that the authority is a transcendent power, which would amount to the same thing. “No political system can survive even a generation with only naked techniques of holding power. To the political belongs the idea [*Idee*] because there is no politics without authority and no authority without an ethos of belief [*Überzeugung*]” (23/17). Schmitt implies that human beings have power over others because their authority does come from somewhere utterly transcendent, but from that transcendent sphere that all of us inhabit—the realm of ideas. “So long as even a ghost of an idea [*Idee*] exists, so also does the notion that something preceded the given reality of material things—that there is something transcendent—and this always means an authority from above” (37/27).

So authority flows from the idea that animates a human community, and the concrete authority figure is understood not as the privileged embodiment or incarnation of that idea, but rather as its *representative*. The representative makes visible and concrete something that is by its very nature immaterial, ephemeral, and undetermined. The Church, for Schmitt, is the paradigmatic institutional order because it has developed this idea of representation most fully over its long history.<sup>42</sup> While other institutions are certainly capable of producing representative figures (Schmitt perhaps surprisingly cites the Enlightenment notion of the “legislator” as one example; 26–7/19), the modern state has, he thinks, become increasingly “rational” in the technical and instrumental sense of the word, thus diminishing the power of representation. Throughout his Weimar work, Schmitt would insist that the modern state be reimagined as a representative entity which would be capable of expressing the foundational political unity binding national groups together. As Schmitt and other conservative thinkers repeatedly warned, we risk losing the essence of political unity as the intensifying conflicts of modern social existence entered the state via party politics and the expansion of administrative welfare institutions.<sup>43</sup>

Schmitt seemed to suggest that the Church constituted a model of collaboration that the state might adapt in its own struggles with the contradictory

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syntheses. Samuel Weber, *Targets of Opportunity: On the Militarization of Thinking* (New York, 2005), 27.

42 On the idea of representation see Weber, *Targets of Opportunity*, 30–41, and Duncan Kelly, “Carl Schmitt’s Political Theory of Representation,” *Journal of the History of Ideas* 65 (2004), 113–34.

43 See Michael Geyer, “The State,” 195, on the problem of the state–society border for Weimar conservatives in general.



currents of twentieth-century history. Schmitt claimed that “from the standpoint of a world-view, all political forms [*Formen*] and possibilities become nothing more than tools for the realization of an idea [*Idee*]” (5), and this explains both the Church’s willingness to embrace alliances with the most varied political regimes and the capacity of the state to recognize its opponents as equals. The Church was a “complex of opposites” capable of allying itself with monarchies, democracies, and dictatorships. What guided the Church in negotiating these plural forms of association was not only its “directing idea” (to use Hauriou’s term) but also the existential idea present in any institutional order—the idea, that is, of its own survival amidst competing and ever-changing political forces. In his later work, Schmitt would ultimately argue that the concept of the political appropriate to modern conditions was “catholic” in this sense: preserving the unity of community within historically changing circumstances so as to make possible the development of its core principles and aspirations.

During the Weimar period Schmitt reconceptualized the state as an institutional unity without a specific content, one that therefore did not recapitulate the diversity inherent in any national community but instead strove to preserve “order” by representing the existential ideal of unity in its purest form. In this way the state can be understood as secular theology—as an analogue not of a reigning divinity, but instead of an institution that, like the Church, aimed to preserve community through internal legal regulation and pragmatic collaboration with existing forms of order.<sup>44</sup>

Early on, in texts like *Roman Catholicism and Political Form*, Schmitt was trying to make the point that contemporary states were failing in their effort to maintain this ideal of order. He urgently warned that the state must rediscover representative figures capable of acting in the name of unity if it was to preserve itself against invading social and economic forces. He also argued that the stability and security of individual states (and, by extension, of Europe or the globe as a whole) would be assured only if they were juridically organized. Though it was an admittedly imperfect alternative to Catholicism, jurisprudence was the one secular practice that could unite and stabilize the most varied, even opposed, political regimes in the modern era (40/29). Even if “jurisprudence is only a mediator of established law” (41/30), as Schmitt would claim here, still it gives law its enduring character and therefore provides the critical foundation for any institution’s stability. Whatever the contingent origin of new political regimes,

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44 On canon law in relation to community formation in the Church see Eugenio Corecco, *The Theology of Canon Law: A Methodological Question*, trans. Francesco Turvasi (Pittsburgh, 1992). For an argument linking the systematization of canon law with the origins of modern secular legal culture in the West see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard, 1983).

the jurist has the task of articulating and preserving order. The state, meanwhile, has the role of defending that ideal of order against internal and external threats.

Written at exactly the same time as *Roman Catholicism and Political Form*, Schmitt's better-known book *Political Theology* can be read as a determined effort to locate these "catholic" sources of order (that is, both an institutional hierarchy of decision and a legal ethos) in their modern political forms. The sovereign, for Schmitt, is not at all the revolutionary "sovereign dictator" described in his 1921 book *Die Diktatur*, the one who creates a new order in the name of the people.<sup>45</sup> For Schmitt the sovereign is the one who decides on the emergency "exception" (*Ausnahmezustand*).<sup>46</sup> Using this terminology of "exception" allows Schmitt to link sovereignty to an existing order. However, the sovereign is not a classic "commissarial dictator," bound to preserve the existing legal system in its literal specificity.<sup>47</sup> The sovereign is a "liminal figure," Schmitt explains, both inside and outside the law at the same time. What resolves this seeming paradox is Schmitt's conception of foundational order. When the normative, prescriptive set of legal rules fails, the community bound by this law is in "extreme peril" (*äußerster Not*) because the state, the organ of unity, is itself in question.<sup>48</sup> The sovereign must decide what to do in order to restore the normality the community enjoyed prior to the crisis. The sovereign is the figure who represents the unity of that body, who can intervene to re-establish unity when the normal legal mechanisms (including the provisions of "emergency law," we should note<sup>49</sup>) are inadequate. The sovereign is not "beyond the law," therefore, because the defense of the very existence of the political community is a defense of the fundamental substantial order at the origin of all legality.

Schmitt spends considerable effort in this text criticizing metaphysical interpretations of sovereignty; such a legitimization would, he feared, lead to a power unfettered by any limitation, conceptual or practical.<sup>50</sup> By linking the sovereign to the legal order—the sovereign, we need to emphasize, decides only on exceptions to an already existing order—Schmitt outlines a kind of "office" that is defined not by the actual content of the "directing idea" of the political community but instead by the existential logic intrinsic to any political community, however defined. This same basic structure, in which the boundary between the political and the legal begins to blur, was evident in

45 Carl Schmitt, *Die Diktatur: von den Anfängen des modernen Souveränitätsgedanken bis zum proletarischen Klassenkampf*, 3rd edn (Berlin, 1964; first published 1921), chap. 4.

46 Schmitt, *Political Theology*, 11/5.

47 Schmitt, *Die Diktatur*, chap. 1.

48 Schmitt, *Political Theology*, 12/6.

49 Ibid., 11/5.

50 Ibid., chap. 3. Cf. *idem*, *Verfassungslehre*, 3rd edn (Berlin, 1957; first published 1928), 237–8.

Schmitt's *Verfassungslehre* ("constitutional theory") of 1928, where he argued that what we usually take to be a "constitution" (whether a document or unwritten tradition) was only one particular manifestation—and not the only possible manifestation—of a more basic political order. The mere existence of political institutions signaled a consciousness of political unity, and this was what Schmitt looked to as the true foundation of authority in the state.<sup>51</sup> "All existing political unity finds its value and its 'right to existence' not in normative justice or the utility of its content, but in its existence" (22).

This "conscious will to exist politically" was the will of a community to distinguish itself from others (79). A community's specific identity, Schmitt claimed, came from shared spiritual "ideas" (*Vorstellungen*)—for example, the idea of race (to point to the most volatile term) or perhaps the ideas of a common faith, common destiny, or common traditions (227). The institutions were "constituted" in order to give form to shared ideas, but also to protect and give voice to this abstract foundational desire for unity (209). As he explained in a long footnote on the distinction between mere "power" (*Macht*) and legitimate "authority" (*Autorität*), institutions only acquire legitimacy once they are established as an accepted "tradition" within a community, proving their success and durability (chapter 8, note 1)

As Schmitt began at this time to elaborate his famous "concept of the political" in the late 1920s, he would state more clearly that the essence of political action was the representation of this abstracted structure of unity, the formal existence of the community and not its contingent content, so to speak. A political institution is, in fact, like no other institution, for it is the final human grouping for these individuals, the last source of unity and order and therefore the last chance for stability and something worth killing (and dying) for.<sup>52</sup> Depending on the historical circumstances, different forms of community can attain political status.<sup>53</sup> As he wrote in an essay from 1930, "the political has no specific substance." Political unity "lives off the various domains of human life and thought and gains

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51 Schmitt, *Verfassungslehre*, 20, 22–3. Further references in the text. On the "politicality" of Schmitt's constitutional theory see Ernst-Wolfgang Böckenforde, "The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory," in David Dyzenhaus, ed., *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC, 1998), 37–55, and Olivier Beaud, "Carl Schmitt, ou le juriste engagé," introduction to Carl Schmitt, *La Théorie de la constitution*, trans. Lilyane Deroche (Paris, 1989).

52 Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago, 1996), 26, 38, 48.

53 See Carl Schmitt, "The Age of Neutralizations and Depoliticizations (1929)," trans. John P. McCormick and Mathias Konzett, *Telos* 96 (1993), 130–42.

its energy from science, culture, religion, law, and language.”<sup>54</sup> The state defined the borders of enmity and friendship, yet it was not at its origin dependent on any particular ethos of community. The friend/enemy distinction was purely political, and not the occasion for asserting religious or other values.

Schmitt's defense of sovereignty was not, then, the sign of some simplistic desire for authoritarian rule. It was his attempt to locate figures who might represent (in his Catholic sense of the term) the foundational unity of the modern state, an effort to maintain whatever order these states had achieved—within their respective borders and in the larger spaces of Europe and the globe. This was the inspiration for what Schmitt called “the duty for a state.”<sup>55</sup>

### THE REVOLUTION OF 1933 AND THE INSTITUTIONS OF THE NEW GERMANY

As a “theologian of the existing order” Schmitt the jurist worked to preserve, for his own existential reasons, a democratic constitutional structure—though without any commitment to its foundational ideas.<sup>56</sup> Schmitt's decision to acknowledge the “new order” of the National Socialist regime early in 1933 is more surprising given his qualms about the new leadership and the instability of the political situation. However, the new government was, at least in theory, a legal one, and more important for someone who valued the state as a source of security, there was no obvious alternative to turn to at this point. The Third Reich was ultimately recognized internationally as the legitimate government of Germany and of course had considerable popular support.

Early on, in the spring of 1933, Schmitt recognized that the Enabling Act was no typical emergency measure but the foundation of a radically new form of government.<sup>57</sup> In keeping with German legal tradition,<sup>58</sup> Schmitt and other jurists attempted to define the new constitutional order, this time in the absence of any founding document. Schmitt's first major theoretical text in this period, *Staat, Bewegung, Volk* (“state, movement, people”), was just one of many contemporary

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54 Carl Schmitt, “State Ethics and the Pluralist State,” in Arthur J. Jacobson and Bernhard Schlink, eds., *Weimar: A Jurisprudence of Crisis*, (Berkeley, 2000), 308.

55 *Ibid.*, 312.

56 See Schmitt's *Verfassungslehre*, as well as his *Die Hüter der Verfassung* (Tübingen, 1931) and *Legalität und Legitimität* (Berlin, 1932), in English as *Legality and Legitimacy*, trans. Jeffrey Seitzer (Durham, NC, 2004).

57 Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (London, 2000), 177–8.

58 With no institutions of constitutional review in Germany, jurists had taken on the task of shaping constitutional interpretation. See Michael Stolleis, *A History of Public Law in Germany, 1914–1945*, trans. Thomas Dunlop (Oxford, 2004).

attempts to give some structure to the emergent National Socialist state.<sup>59</sup> In this fluid period of transition, Schmitt was not limited to parroting official Nazi ideology and often veered substantially from this doctrine. The subtitle of Schmitt's book—"the triadic organization of the political unity"—hinted at his original slant. Schmitt engages and deploys many National Socialist ideas in this text, including racist ones, yet at the same time urges the foundation of an institutional order. Dismissing all liberal notions of limit, Schmitt nonetheless was exploring how new institutional structures of authority might be established within the state.

Schmitt's goal was to formalize the relationship between the traditional state structure and the new party "movement" that had gone beyond traditional interest politics by embracing elements of both the left and the right in a comprehensive nationalistic agenda. It was an open question at this point whether the party would, as in other European dictatorships of the interwar period, be reduced to the role of "state party," or instead be in a clear position of power over the government, as in the Soviet Union. This question remained completely unresolved in the Third Reich, due largely to the fact that the power of both the state and the party was only ever a devolved power, flowing from the charismatic leader. However, we must remember that in the earliest phases of the regime, when power was being consolidated and authority over certain sectors of German society (such as the army) was minimal or nonexistent, many expected that a new institutional order might well emerge.<sup>60</sup>

As Schmitt declared at the start of *Staat, Bewegung, Volk*, the Weimar Republic was now officially dead, and a whole new set of concepts was needed.<sup>61</sup> Yet Schmitt immediately moved to place the new regime in historical context. He argued that the "triple unity" of the Third Reich marks an evolution from the old "state-society" binary that conditioned classical political forms. We know that Schmitt was always alert to what he saw as the great danger of the modern era—the blurring, that is, of the boundary between state and society. Here Schmitt saw that the problem could be overcome with a complete reorganization of governmental functions in the new state structure.

Schmitt's aim here was to extricate the purely political state from the administrative sphere, the space where state and society interpenetrate one another most intimately (16). The task of this streamlined state was to constitute and protect the political unity of the nation. It is the space of "decision." This state was protected from "social" conflict because it was (of course) not at all a

59 Caplan, *Government without Administration*, 335, and Caldwell, "National socialism," 399.

60 Broszat, *The Hitler State*, 194; Mommsen, *From Weimar to Auschwitz*, 145.

61 Carl Schmitt, *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg, 1935), 6–9. Further references in the text.

representative structure, in the liberal parliamentary sense. Meanwhile, Schmitt suggested, the party would take on the role of “guiding” civil society; it would, in other words, have the responsibility of supervising the administrative institutions of a modern state regime (11–13). This dynamic “movement,” Schmitt argued, is representative in its own way, in that the members of the party are an elite drawn from all sectors of society (12). Schmitt, in keeping with his earlier work, relegated the *Volk* to a purely passive political role, capable only of expressing simple affirmations or rejections.

It is tempting to see Schmitt’s triadic unity as somehow Trinitarian. Schmitt demarcated what Hauriou would call separate “competencies.” Yet Schmitt nowhere suggested any metaphysical analogues that would imply that each political aspect was in fact incarnating a genuine transcendent unity. In fact Schmitt emphasized from the start the historical fact that the German people is defined by its division—into confessions, races, classes, interest groups, and so on.<sup>62</sup> Unity, he suggests, is an achievement of political integration in the state, the result of the “internal and coherent logic of [the state’s] institutions and normativizations [*Normierung*]” (33).

So Schmitt identifies the key concept (*Kernbegriff*) of the new regime as the principle of “guidance” (*Führung*). For this active force is necessary to produce and reproduce integration. The movement, Schmitt says, ought to “guide” the activities of civil society, while penetrating the state itself, providing an indirect but powerful influence on this body as well. The Führer, then, is only one expression of the fundamental principle of leadership.<sup>63</sup> So while he is careful to say that the Führer always retains the final responsibility of decision, Schmitt also calls for the creation of a *Führerrat* (“leader’s advisory council”), an “institution” (*Einrichtung*) that is a source of expert advice and guidance.<sup>64</sup> Though this body would be unelected, Schmitt says its members should be chosen by the Führer “according to determined principles” (35). As an example of such an institution, he mentions the Prussian State Council, to which Schmitt himself was appointed by Goering in 1933.<sup>65</sup>

62 On the diversity and heterogeneity of the German people see Carl Schmitt, “The Liberal Rule of Law,” in Jacobson and Schlink, *Weimar*, 297, 299.

63 Note that Schmitt rarely refers to Hitler personally in this text, only to what we might call the “office” of “Führer.”

64 Various advisory bodies along this line were suggested but none were ever established in the regime. See Mommsen, *From Weimar to Auschwitz*, 144, 155.

65 On the context of Schmitt’s appointment see Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham, NC, 2004), 15, and Dirk Blasius, *Carl Schmitt: Preußischer Staatsrat in Hitlers Reich*, pt III, chap. 3, “Die Einrichtung des Preußischen Staatsrat.”

Still, Schmitt could hardly deny the preeminent position of the Leader in this new structure of power. There was, theoretically speaking, no real institutional limit to his power. Or rather, as Schmitt bluntly stated, “only racial identity [*Artgleichheit*] can prevent the Führer’s power from becoming tyrannical or arbitrary.” This “real presence” is no allegory, Schmitt wrote, but is the foundation of an “infallible” contact between the Führer and his partisans (42). However, since it is extremely unlikely that Schmitt was suddenly converted to a racist understanding of sovereignty in 1933, we must ask what he might have meant by these statements. His language provides a possible answer, for he goes on to say at this point that “without the *principle* [*Grundsatz*] of racial identity, the national-socialist state could not exist” (42; my emphasis). Schmitt’s concluding sentence is, however, rather ambivalent—he declares that “without this racial identity the total state of the Führer would not last one day” (46). It is hard not to read this as a warning about the inherent instability of the new regime’s concept of power.<sup>66</sup> Yet at the same time Schmitt’s call for the institutionalization and hence “regularization” of this new racial conception is his only concrete response to the problem of political stability—jurists, he warned, must think “systematically” about these “concepts” (*Begriffes*) of racial identity, for they permeate the organization of the regime (43).<sup>67</sup>

Yet the question of race is not prominent in “The Führer protects the law,” perhaps Schmitt’s most notorious piece of writing. Justifying, juridically, the Röhm purge, Hitler’s deadly operation against the SA leadership and numerous political opponents, Schmitt returned to his own radical existential concept of sovereignty. While many critics have rightly condemned this essay and its “absurdly horrifying title,”<sup>68</sup> the subtitle—“Concerning Hitler’s discourse to the Reichstag on 13 July 1934”—is less often cited but quite revealing. For what Schmitt offers here is an analysis not so much of the purge itself (the details of the “conspiracy” are not discussed) but of Hitler’s own justifications, offered almost two weeks after the event. While much of Hitler’s discourse was taken up with the fantastic narrative of the supposed conspiracy of Röhm and others to wrest control of the government, Hitler also mentions the retrospective legalization of the murderous purge by the Reichstag. While this account reads as a kind of caricature of interwar emergency

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66 As Loewenstein later noted, in 1940, “Deification of the leader . . . is certainly as much a postulate as a practical necessity upon which the regime stands or falls.” (Loewenstein, *Hitler’s Germany*, 60)

67 Schmitt’s embrace of anti-Semitic ideas and practices in the National Socialist regime can be explained only in part by the kind of elusive anti-Semitism that Raphael Gross has traced in Schmitt’s pre-Nazi career, in *Carl Schmitt und die Juden: eine deutsche Rechtslehre* (Frankfurt am Main, 2000).

68 McCormick, “Political Theology,” 840.

law doctrine, much of what Hitler wrote was, at least in theory, consistent with a European “jurisprudence of crisis” typical of the era.

For his essay, Schmitt’s method was to highlight selectively those portions of Hitler’s speech which resonated with his own views on political unity and the role of the state.<sup>69</sup> Schmitt figures Hitler as a representative of Germany’s eternal desire for a secure and unitary state. Hitler, Schmitt explained, had heeded the “warning and admonition” of German history—the fact that in moments of crisis the German state had collapsed and opened up the chasm of lawlessness, civil war, and revolution. Hitler had what Schmitt called the “justice” to “institute a new state and a new order” because as the new leader of the German people he produced political order in a time of danger. By continuing to identify and destroy enemies of the state, Hitler “protects the law from its worst abuse,” the destruction of the concrete political unity that guarantees order in the first place.<sup>70</sup> While Schmitt infamously wrote that Hitler was, as Führer, the “supreme judicial authority,” capable of deciding in an emergency without recourse to any judicial body, it was in fact Hitler who first made the claim.<sup>71</sup>

Schmitt takes this as an opportunity to revisit his own concept of the political. “All law finds its origin in the *right of a people to live*.”<sup>72</sup> Bizarrely invoking a late nineteenth-century French text in administrative law, Schmitt says that society must be defended through *actes du gouvernement*.<sup>73</sup> The purge was an example of such a sovereign decision against the internal enemy.<sup>74</sup> Schmitt also draws attention to another important aspect of Hitler’s speech, the Führer’s admission that certain “special actions” during the purge (for example, the murder of General Schleicher and his wife, Schmitt’s friends) were in fact “illegal” and outside of the scope of the genuine emergency. Here Schmitt emphasizes two

69 Schmitt marked passages from Hitler’s speech and Goering’s Reichstag discourse when preparing his own essay. See Joseph Bendersky, *Carl Schmitt, Theorist of the Reich* (Princeton, 1993), 215.

70 Carl Schmitt, “Der Führer schützt das Recht: zur Reichstagsrede Adolf Hitlers vom 13. Juli 1934,” in *idem, Positionen und Begriffe im Kampf mit Weimar—Genf—Versailles 1923–1939* (Hamburg, 1940), 199–203, 197, 200.

71 Hitler’s speech of 13 July 1934, trans. in Max Domarus, *Hitler: Speeches and Proclamations, 1932–1945. The Chronicle of a Dictatorship. Vol. 1: The years 1932–1934* (London, 1990), 498.

72 Schmitt, “Der Führer,” 200; my emphasis.

73 The reference is to Gabriel Dufour, *Traité général de droit administratif appliqué*. Schmitt also cites this text in *Concept of the Political*, 21, n. 3. But we should note that for Dufour, the only brake of government is “responsibility” and the only protection for individuals are the “constitutional guarantees.” See Dufour, *Traité*, 3rd edn, 5 vols. (Paris, 1868), 5: 126–7.

74 Hitler’s language was more explicit: “I gave the order to shoot those parties responsible for this treason, and I also gave the order to burn out the tumors of our domestic poisoning and of the poisoning of foreign countries down to the raw flesh.” Domarus, *Hitler: Speeches and Proclamations*, 498.



things: first, the specificity of this particular “act of government” and the need to return to normality once “order” was reestablished and, second, the principle that decisions are regulated by the nature of the emergency. As Hitler himself said, Germany’s most “valuable possession” was “inner order and peace both within and without!”<sup>75</sup> And in fact many Germans, especially in the middle classes, believed (wrongly, of course) that the repression of the violent brownshirts was a move in the direction of political normality and stability. Hitler’s brutal action had in fact come only after intense pressure, both from within the Party and from the independent army leadership, to control the SA, which had hoped to be integrated into the regular Reichswehr.<sup>76</sup>

In the end we can see that Schmitt’s turn to an institutional concept of the state in 1934 was not at all incompatible with this selective defense of Hitler’s deadly action in the Röhm purge. Clearly Schmitt was willing to defend the idea of a sovereign political entity capable of intervening to protect the political unity of a nation threatened by longstanding historical divisions. However, genuine enduring stability would emerge only from a proper institutionalization of political order in a triadic unity that would mirror the complex institutional unities exemplified by bodies such as the Catholic Church. This is all to suggest that Schmitt’s effort to theorize the Nazi state in 1933 and 1934 was connected to his sense that the duty of the jurist was to regularize and thereby make durable the existing social and political order. Schmitt’s sympathy for a strong decisive state related to that state’s ability to protect genuine institutional orders. Whatever the consequences, he was more than willing to take on the challenge of conceptualizing the new Germany of the National Socialists. His dramatic fall in 1936 and subsequent retreat from these debates was hardly a sign of Schmitt’s lack of commitment, as apologists still maintain, but in fact was the result of internal factional strife, so prevalent in the regime.<sup>77</sup>

## THE REDISCOVERY OF LAW

In 1942, in the midst of war, Schmitt spoke on the role legal figures played in the “formation of the French spirit” at the newly formed Deutsche Institut in occupied Paris.<sup>78</sup> Rather provocatively, Schmitt claimed that in France, unlike

75 Ibid., 501.

76 See Mommsen, *From Weimar to Auschwitz*, 154, 171; and Richard Bessel, “Political Violence and the Nazi Seizure of Power,” in *idem*, ed., *Life in the Third Reich* (Oxford, 1987), 1–15, 11–12, 15.

77 On this point see Caldwell, “National Socialism.”

78 Eckard Michels, *Das Deutsche Institut in Paris 1940–1944: ein Beitrag zu den deutsch-französischen Kulturbeziehungen und zur auswärtigen Kulturpolitik des Dritten Reiches* (Stuttgart, 1993).

any other nation, it was the “*Legist*” who “was the trailblazer of national unity, its spokesman in times of great historical conflicts and in desperate civil wars.” The French spirit is essentially juridical, Schmitt said, because its identity is bound up with the legal forms that founded a secure social and political order. The modern French state, legitimated juridically with new concepts of sovereignty forged by jurists such as Jean Bodin, was a purely legal entity. Able to neutralize brutal civil and religious conflicts, the French state thus created a “fragment of order.”<sup>79</sup> But, as Schmitt explained, this spirit was not confined to France alone. For once the classic model of the French *Gesetzesstaat* was adopted by other European nations that were seeking an escape from their own civil and religious violence, public law everywhere was transformed into “constitutional” law. But even more important for Schmitt, just as a neutral legality secured order *within* the individual European states, a new international law stripped of moral and religious legitimation made possible a stable, peaceful order *between* these states.<sup>80</sup>

However, Schmitt had to admit that the juridical spirit born and developed in France had clearly lost its historical potency. The classic *état de droit*, along with the international law bound up with it, was now obsolete. The new European space would, Schmitt rather abruptly said at the end of the essay, be mastered by a German legal spirit, one rooted in the historical concreteness of peoples and territories. However, his unattributed concluding quotation from Hölderlin’s poem “Der Wanderer” (“the wanderer”), which alludes to a certain nostalgia for the Rhenish homeland in an era of colonial expansion, forces us to question this celebratory conclusion.<sup>81</sup> Indeed, throughout this essay Schmitt clearly identifies himself with figures such as Bodin, who in defense of the integrity of the secular state had to make difficult decisions in moments of extreme danger.<sup>82</sup>

As the war neared its end, Schmitt would explicitly ally himself with the juridical spirit of the French, arguing now, in a lecture that he delivered across fascist and occupied Europe, that it was in fact a European phenomenon and one that still had some vitality. Looking ahead to the coming postwar world, Schmitt said that in a world of contingent “politics” and “motorized” legislation only the jurist can bring genuine “unity” to law, providing it with some stability. “Jurisprudence is itself the true source of law.” While jurists “cannot choose the changing rulers and regimes” they can, “in the changing situations,” Schmitt

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79 Carl Schmitt, “Die Formung des französischen Geistes durch den Legisten,” *Deutschland-Frankreich* 1 (1942), 1–30, 5–6, 10, 17.

80 Ibid., 13–17.

81 Ibid., 29. See as well Carl Schmitt, *Die Wendung zum diskriminierenden Kriegsbegriff* (Berlin, 1938) and his later *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Köln, 1950).

82 Schmitt, “Die Formung,” 19–21.

said, “preserve the basis of a rational human existence that cannot do without legal principles,” including “a sense for the logic and consistency of concepts and institutions [*Institutionen*]; a sense for reciprocity and the minimum of an orderly procedure, due process, without which there can be no law.”<sup>83</sup> In this apologetic essay, Schmitt revealed in a new light the importance of the concept of the institution in his thinking, as he looked for new sources of order near the end of the Third Reich. Tellingly, Schmitt returns here again to Hauriou, noting that in the middle of World War I this “French jurist of European reputation” condemned the Revolution of 1789 for its “systematic destruction of customary institutions,” which led to “permanent revolution” because the “transience [*mobilité*] of the written law” never provided the stability of genuine institutions. As Schmitt pointedly comments, if the “great jurist” Hauriou believed in 1916 that some redress could be found in the distinction between routine legislation and constitutional law, “European constitutional experiences since 1919 have certainly dashed this hope.”<sup>84</sup>

Although here, at the end of the war, Schmitt was clearly trying to mask his deep engagement with the National Socialist program, and especially its racial agenda, his effort to rediscover the task of the jurist was not completely self-serving. His ideas on the institutional nature of legal and political order mark a line of continuity between his Weimar-era work and his theoretical writings in the early years of the Nazi regime. Schmitt’s willingness to adopt racist language, and to countenance the most ruthless racial policies through 1936, was not just a product of latent anti-Semitism, nor was it merely opportunistic. Rather, Schmitt seemed to see in these racial ideas the potential source of a new institutional identity and a new legal order for a German state that had been fractured by historical forces and the misapplication of abstract liberal constitutionalism.<sup>85</sup> Similarly, the Führer was not, according to Schmitt, the incarnation of a German *Volk*, but rather the delimited institutional organ of political unity, an organ that could protect the plurality of institutional orders in Germany.

That the Nazi *Führerstaat* never lived up to his expectations does not mean that Schmitt was never really a Nazi. However, Schmitt’s longstanding institutional

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83 Carl Schmitt, “Die Lage der europäischen Rechtswissenschaft (1943/44),” in *idem, Verfassungsrechtliche Aufsätze aus den Jahren 1924–1954: Materialien zu einer Verfassungslehre*, 3rd edn (Berlin, 1985), 386–426, 398, 403–4, 412, 422–3; *idem*, “The plight of European jurisprudence,” trans. G. L. Ulmen, *Telos* 83 (1980), 35–70, 44, 49–50, 57, 66–7.

84 *Ibid.*, 424, n. 44/68, n. 74.

85 Schmitt emphasized the importance of forming a new judicial spirit and identity via an anti-Semitic legal culture. See especially his “Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist,” *Deutsche Juristen-Zeitung* 41 (1936) 80, 1193–9, 1196, and his commentary on the Nuremberg laws as well, in Schmitt, “Die Verfassung der Freiheit,” *ibid.*, 40 (1935), 1133–5, 1135.

approach to the state, derived from a political theology inspired by the model of the Church, does affirm a consistent critical distance from the Third Reich. As Karl Loewenstein remarked, in the 1945 report on Schmitt he prepared as part of the American legal team in Germany to prosecute war criminals, Schmitt would just as easily defend democracy as he did totalitarianism if he was permitted to teach again.<sup>86</sup> According to Loewenstein, this was because Schmitt was merely looking out for his own interests. It is more likely, though, that Schmitt the jurist was trying, as Hauriou put it, “to regularize and improve” the existing conditions before and after 1933. But Schmitt’s conceptualization of the Third Reich was an attempt to institutionalize a regime bent more on violence, war, and destruction than any genuine ideal of stability. As the legal system was systematically destroyed in Nazi Germany, Schmitt began to look to the large spaces of international law to find new sources of order. Yet he never seemed to acknowledge the possibility that in these violent, exceptional times, resistance to the Nazi state may well have been the best route to security—as many conservatives (including his friend Johannes Popitz, part of the 1944 plot to assassinate Hitler) belatedly realized.<sup>87</sup>

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86 Karl Loewenstein, “Observations on Personality and Work of Professor Carl Schmitt,” final leaf, in Karl Loewenstein Papers, Amherst College Archives, Box 28, folder 1. On Loewenstein in Germany see Stiefl and Mecklenburg, 197–201.

87 See Kennedy, *Constitutional Failure*, 14.