1
Authoritarian Liberalism in Late Weimar

1. Introduction

German Social Democrat and constitutional theorist Hermann Heller coined the term 'authoritarian liberalism' in the context of a crisis of the state, and its escalation in the late stages of the Weimar Republic. He used the term to capture the shift from a parliamentary democracy to an authoritarian presidentialism, which explicitly defended the market economy and the interests of the owners of capital and big businesses.[1] This 'authoritarian liberal' state, the last throw of the dice of the ruling order, was the precursor to the fully fledged collapse of the Weimar Republic in 1933 with the Nazi seizure of power. It was, therefore, largely overshadowed by the subsequent fascist dictatorship; but it was a crucial moment in Weimar's demise.[2]

The Nazis came to power, not, as the story so often goes, on the back of an excess of democracy, but of an excess of 'liberalism', in the sense of an economic liberalism pursued by political elites ruling in emergency mode. It was a regime which insisted on maintaining the illusion of a *distance* between state and society; the political and the economic realms. This was to be achieved through a strong state, the *qualitatively* total state, strong in effecting the differentiation of realms, as opposed to the *quantitively* total state proposed by the Social Democrats and those on the political left, which, according to its opponents—notably Carl Schmitt—would be a weak state, politicizing the economy and pluralizing the state. Authoritarian liberalism, it should be noted, although defending economic liberalism, was deeply *illiberal* in the meaning of 'political liberalism': intolerant of difference, impatient of parliamentary debate, and deeply fearful of democracy in mass society.[3]

It was, thus, a privation of parliamentary democracy that preceded its outright collapse in Weimar; formally through the exercise of emergency presidential powers and the bypassing of parliament, and informally through the exercise of paramilitary violence and political intimidation of opponents. The authoritarian liberals, backed by

[1] Hermann Heller, 'Autoritärer Liberalismus', Die Neue Rundschau 44 (1933) 289 (in English translation, 'Authoritarian Liberalism?' European Law Journal 21 (2015) 295 (tr S Paulson)). This was one of Heller's final publications before the Nazis took power in January 1933, and his premature death, in exile, in Madrid in November 1933.

[2] See, eg Peter C Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism* (Duke University Press 1997)(Caldwell, 'Popular Sovereignty') 11–12. Caldwell notes that the conception of constitutional democracy associated with von Papen and Schmitt 'laid the groundwork for the Nazi takeover' and is 'obscured' by a conservative historiography that argues Weimar's republic was 'defenceless' and 'gave itself up'.

[3] Preuss describes 'mass democracy' as 'the political order of the Weimar Constitution': (Ulrich K Preuss, 'Carl Schmitt and the Weimar Constitution' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2016) 472. In this chapter it is presented rather as an *irritant* to the political order.

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capital as well as bureaucratic and military elites, were, above all, 'anti-Marxist' and 'anti-parliamentary'.[4] This is an important point to recall, and not only because it is so frequently forgotten, but because a very different, and largely misleading, story has such a powerful impact, resonating in a postwar emphasis in constitutional theory on 'over-democratisation', the misnamed 'militant democracy', 'democratic suicide', or the so-called 'tyranny of the majority'.[5]

This chapter begins by outlining the Weimar interregnum; a combination of political authoritarianism and economic liberalism, specifically the presidential cabinets ruling by diktat and decree, and the theorist that stood behind them: Carl Schmitt (section 2). This regime was supported by centrist and conservative parties and 'tolerated' by the Social Democrats. With much of the left, along with the trade unions, thereby abandoning any designs for radical democratization of society, let alone the overthrow of the capitalist system, a crisis of representation occurred (section 3). If, as many historians contend, authoritarian liberalism laid the grounds for the Nazi seizure of power, it was the suppression rather than excess of democracy that preceded Weimar's collapse. These various strategies of depoliticization are not reversed with the Nazi seizure of power; on the contrary, they are continued through the Nazi 'mass mobilization', ending the political (section 4) and replacing it with a cult of violence (section 5).

2. Authoritarian liberalism in late Weimar

The term 'authoritarian liberalism' was used by Hermann Heller specifically in reaction to the programme of centrist and conservative presidential cabinets ruling late Weimar Germany under President von Hindenburg. In this brief phase of presidential rule from 1930 to 1932, through Chancellors Brüning, von Papen, and then von Schleicher, government proceeded through emergency measures, bypassing parliamentary authority entirely. Supported by Germany's central bank, it proceeded to implement drastic cuts to state expenditure, pursue internal devaluation, and operate a deflationary policy, in part under pressure of servicing its war debts.[6]

After 1929, deeply affected by the Great Depression, as well as the liability for reparations payments, the economic situation, which had stabilized in the mid-period (1925–29), after the hyperinflations of the early 1920s, had again worsened. The German business community, increasingly frustrated with organized labour, hit by a dearth of foreign investment, and dependent on declining foreign exports, demanded 'greater expertise in the formulation and implementation of national economic policy', as well as 'authoritarian efforts to place the responsibility for economic decision

[4] Eberhard Kolb, *The Weimar Republic* (2nd edn, Routledge 2005) 116–35, at 117–18.

[5] For an analysis of the US use of, and influence on, the principle of 'militant democracy' in the context of the Cold War see Udi Greenberg, *The Weimar Century: German Emigres and the Ideological Foundations of the Cold War* (Princeton University Press 2014) ch 6.

[6] Heller, 'Autoritärer Liberalismus' (n 1) 295–301. According to Abraham, 'Brüning's strategy could be summarised as "deflation"; one he pursued in myriad ways' (David Abraham, *The Collapse of the Weimar Republic: Political Economy and Crisis* (Princeton University Press 1981) 276).

making in the hand of the Reich president'. This would enable economic policy to be implemented 'without going through parliament'.[7]

'Authoritarian liberalism' is offered pejoratively by Heller to capture the two dominant features of the regime: an avowed antipathy towards representative democracy in favour of autocracy and dictatorship, using emergency powers exercised under Article 48 of the constitution, and an ideological defence of free market liberalism and the protection of the interests of capital and major industrialists, a bloc which would soon support, with some reluctance, the transition to National Socialism.[8] In Heller's view, the presidential cabinets represented a new form of government; standing against the principles of democracy, parliamentarism, and majoritarianism, and appealing instead to a power that 'bears responsibility only before God', and to the 'miracles wrought by a dictatorship'.[9] Authoritarianism, Heller proclaims, is defined by its counterposition to *majority* rule.[10]

The concentration of state authority in an autocratic manner to deal ostensibly with emergency and exception, epitomized by the fascist dictatorship of Benito Mussolini, has a history, Heller notes, as old as the Roman Empire. But the true *experimentum crucis* of the new German version was to be found in a distinct place. It was to be found, not in the strength and extent of the political authority claimed by the state, but in the *limits* of that authority; it was to be found in its approach to the 'cardinal problem of the present', Heller declares, namely the question of the 'economic order'. Matching the sociological transformation of the bourgeoisie, as conservatism was drained of the last drop of 'social oil', and a major industrialist (Alfred Hugenberg, media magnate and former director of steel corporation Krupp) became Chairman of the former conservative party (DNVP), an authoritarianism emerged to defend *the free economy*; most appropriately this was to be addressed, Heller concluded, as 'authoritarian liberalism'.[11]

Exemplified in von Papen's ideas about the private economy, the authoritarian liberal insists, rhetorically, on the 'strict separation' of the state and the market.[12] In conceptual terms it thus represents the classical liberal belief in a society based on competition, exchange, and the price mechanism, but insists on a strong state in order to secure this market order. The authoritarian state has the positive task of maintaining the separation of politics and economics, more precisely to *depoliticize* the economy;

[7] Hans Mommsen, *The Rise and Fall of Weimar Democracy* (University of North Carolina Press 2007) 400–01.

[8] See Kolb (n 4) 116–35. According to Kolb these cabinets were supported not only by the Right but by a large part of the centre, as well as powerful economic interest groups and the army faction. Mommsen describes Hindenburg's plan as 'anti-parliamentary' and 'anti-Marxist' in terms of its basic organization (ibid 283). General von Schleicher had been pushing for such a government of the bourgeois right wing since as early as spring 1929 (ibid 282).

[9] Heller, 'Autoritärer Liberalismus' (n 1) 296.

[10] As Heller had made clear in Hermann Heller, *Sovereignty: A Contribution to the Theory of Public Law and International Law* (Belinda Cooper tr, OUP 2019) ('Sovereignty'), first published in 1927, the 'majority principle' is what links rulers and ruled.

[11] Heller, 'Autoritärer Liberalismus' (n 1) 299.

[12] Abraham (n 6) 277. As Abraham puts it, 'under Papen, the growing influence of the ministerial bureaucracy was joined to the central leadership of industrial and agrarian organizations so that the influence of the latter became wholly transparent. Wage and contract matters were to be shifted from the Labor to the Economics Ministry and *Sozialpolitik* reduced to a pure epiphenomenon of free-market considerations'.

so there is no resemblance to 'Manchester Liberalism', nor any residue of laissez-faire. On the contrary, the state must be active in pushing forward liberal modernization and loosening the bonds of solidarity, at least regarding socio-economic matters.[13] Above all, the objective of the authoritarian liberals—the 'feudalist clique that put Hitler into power'—was the elimination of socialism *and* democracy from politics by eliminating parliament, allowing the government to pursue its policies of austerity without political obstruction.[14]

The outward face of the regime—its claim to remain detached from the economy—was, in a significant part, ideological, because, in reality, Heller noted, it interfered ruthlessly in the economy in favour of certain class interests. It is therefore a formation that displayed a degree of slipperiness and hypocrisy; a difference between the rhetoric and the reality of its actions. The state that promised non-interference in the economy dismantled social policy with a 'heavy hand', feigned ideological neutrality while strongly inculcating a moral economy in the form of a duty to work necessary for the 'psychological happiness of the people', and supposedly retreated from interfering in cultural and educational policy whilst 'tripling' the costs of education.[15] The authoritarian liberal, Heller remarked contemptuously, fought against the welfare state with one hand, 'whilst subsidising large banks, large industry, and large agricultural enterprise' with the other.[16] It turned to other 'illiberal' forms of identity in order to maintain support, even acting with doses of 'authoritarian socialism' in a way that foreclosed the route of parliamentary or extra-parliamentary political contestation that might have democratically legitimated redistribution from the bottom up. What is 'decisive' for the political and social character of the authoritarian state, Heller concluded, is the '*capitalist form of the economy*'.[17]

A strong state, by then a 'thinly veiled dictatorship', asserted itself to remedy the weakness and disorder of the parliamentary system, which big business no longer trusted to deal with the economic issues of the day.[18] What was required, from the perspective of capital and heavy industry, was a government that could operate

[13] As Franz Neumann later noted, this picture of the liberal 'nightwatchman' state (a term used by socialist founder Ferdinand Lassalle to dismiss classical liberalism in the nineteenth century), was always an illusion (see Franz L Neumann, 'Economics and Politics in the Twentieth Century' in *The Democratic and the Authoritarian State* (The Free Press 1957) 258–59).

[14] Karl Polanyi, *The Great Transformation, The Political and Economic Origins of Our Time* (Beacon Press 2001) 246. The elimination of social democracy had been an aim of the German ruling class since Bismarck.

[15] Heller, 'Autoritärer Liberalismus' (n 1) 299. Adult education, in particular, was hit hard by austerity in the authoritarian liberal regime (see Mommsen (n 7)).

[16] ibid 300.

[17] ibid 298 (italics added). For the view that this policy of Brüning's was not without alternatives, see Carl-Ludwig Holtfrerich, 'Economic Policy Options and the End of the Weimar Republic' in Ian Kershaw (ed), *Weimar: Why did German Democracy Fail?* (Wiedenfeld and Nicholson 1990). Holtfrerich notes that although there were significant constraints on Brüning—including those posed internationally to Germany's foreign policy, and those placed by its domestic bank, excluded from devaluation in principle by the Young agreement of 1929/30, as well as fears of inflation from the early 1920s—, there remained political alternatives even after the summer of 1931. cf Harold James, 'Economic Reasons for the Collapse of Weimar' in Ian Kershaw (ed), *Weimar: Why did German Democracy Fail?* (Wiedenfeld and Nicholson 1990). Kolb (n 4) 122 also suggests that Brüning's chief priority was not to overcome the economic crisis but to get rid of the reparations burden.

[18] Mommsen (n 7) 292. German heavy industry, in particular, had fundamental doubts about the capacity of a parliamentary response to 'its demands that business be freed from excessive social costs and the fetters of collective bargaining' (Mommsen 267).

independently of party factions, pushing through dramatic cuts in public spending, and implementing various aspects of austerity; crucially, it reduced the system of unemployment insurance, which had been the occasion for Brüning's predecessor, the SPD chancellor Hermann Müller, to resign in March 1930.[19]

As historian Hans Mommsen puts it, 'The parliamentary constitution thus became an *empty shell* whose only function was to conceal the gradual transition to authoritarian government.'[20] Although presidential decrees had been used regularly since the early days of the Republic—first under Social Democrat president Ebert in response to violent insurrectionary uprisings—emergency politics would no longer be time-limited, nor restricted to non-budgetary matters. This manner of governing without the Reichstag, backed by coalitions of centrist, conservative, and nationalist forces, would take the violation of the principle of parliamentary democracy to the limits.[21] By 1931, state secretary Hans Schaffer would declare, 'from the budgetary point of view, we are already living in a military dictatorship'.[22]

The intellectual figure Heller had identified behind the new form of authoritarian liberalism was none other than Carl Schmitt, and in taking stock of the regime, even at this late moment, Heller was also targeting Schmitt's constitutional theory.[23] With its ability to bypass parliamentary accountability, the system of presidential cabinets was 'closer to Schmitt's heart than any other'.[24] Its techniques of government 'perfectly consummated the triumph of technocratic principles of bureaucratic-capitalist domination over political substance.'[25] In practice, its apparatus of political rule 'fell into line behind powerful economic lobbies'; the state bureaucracy, 'accountable only to the presidential cabinets and largely detached from its obligation to the parliamentary legislature', had become 'the primary location of decision-making power'.[26] Its aim of depoliticizing the economy reflected the concept of the political that Schmitt himself had theorized in his famous work of the same name, in the sense that the state had

[19] Abraham (n 6) 49–50: 'By 1930, virtually all sections of the dominant bloc agreed that post-crisis Germany must be spared the costliness and unreliability of an ineffective, democratic political structure and profit-devouring social-welfare system'.

[20] Mommsen (n 7) 317.

[21] Mommsen (n 7) 362.

[22] Mommsen (n 7) 396.

[23] 'When constitutional compromises such as those which characterized the Weimer Republic start to come apart, a conception of the state, "like Carl Schmitt's", which "declares rules and norms as insignificant and the exception as decisive" can, Heller ruefully added, achieve success' (Heller, 'Autoritärer Liberalismus' (n 1)).

[24] Chris J Thornhill, 'Carl Schmitt After the Deluge' (2000) 26 History of European Ideas 225, 237 (Thornhill, 'After the Deluge'); Chris J Thornhill, *Political Theory in Modern Germany: An Introduction* (Blackwell 2000) 88–89(Thornhill, 'Political Theory'): 'Between 1930 and 1933, Schmitt was intimately connected with the authoritarian, but non-Nazi, presidential cabinets which both temporarily checked and ultimately supported Hitler's rise to power'.

[25] Thornhill, 'After the Deluge' (n 24) 237. According to Ulrich Preuss, the regime (as late as 1932) 'was not an inescapable choice for an interim arrangement in an extraordinary time of emergency, but rather a blueprint for the kind of constitutional framework he had, right from the outset, regarded as appropriate constitutional setup to govern the political life of the German people even in ordinary times' (Preuss (n 3), 473). Schmitt was to join the NSDAP a year after this address and debate still rages as to whether Schmitt's philosophy was essentially and latently fascistic or whether his embrace of the Nazi party is better understood as merely opportunistic. For a recent evaluation, see, eg Benno Teschke, 'Decisions and Indecisions: Political and Intellectual Receptions of Carl Schmitt' (2011) 67 New Left Review 61.

[26] Thornhill 'After the Deluge' (n 24) 237.

finally grasped 'the enemy': the threat from the left to reconstitute the relation between the political and the economic realms, and erode the bourgeois *Rechsstaat*.[27]

In November 1932, Schmitt delivered an address to the German industrialists (the Langnamverein), entitled 'Strong State, Sound Economy', where he differentiated his position from the Social Democrats by explicitly distinguishing between the 'quantitatively' and 'qualitatively' total state.[28] The *quantitatively* total state, advocated by those on the left, was a weak state in Schmitt's view, interfering in the economy under the pressure of a plurality of interest groups. The *qualitatively* total state, on the other hand, drew 'a sharp line of separation vis-à-vis the economy', although, as Heller noted, ruled 'with the strongest military means and the means of mass manipulation' in culture and the media.[29] In other words, the authoritarian liberal state retreats from interfering in the sphere of distribution, and fights vehemently against the welfare state, but offers strong government to defend a militaristic and cultural conservatism.

3. Toleration by the Social Democrats: a crisis of representation

Heller, however, had made his diagnosis of authoritarian liberalism too late. With most important government business being conducted through Brüning's emergency decrees, the centrist parties in the Reichstag, including the Social Democrats (SPD), had done nothing except attempt to block 'no confidence votes' coming from the radical fringes. The SPD operated a policy of 'toleration' towards Brüning's authoritarian government; a *Tolerierungspolitik*, based, at least in part, on Heller's own prescriptions.[30] The formation of authoritarian liberalism, and the obstruction of representative democracy, in other words, were facilitated by the SPD's *own* position in the conjuncture, as well as over the long durée.[31]

Heller represented an orthodox left-Hegelian tradition in constitutional theory, placing his faith in the *soziale Rechtsstaat*, in the capacity of the Weimar state and its constitution, to deal with the social question and the issue of socio-economic

[27] Carl Schmitt, *The Concept of the Political* (George Schwab tr, expanded edn [1932], University of Chicago Press 2007). By November 1932, the KPD (Communist Party) had also made substantial inroads, increasing its vote, at the expense of the NSPAD, and obtaining 100 seats in the Reichstag.

[28] After previously rejecting the idea of the total state, Schmitt now found a way of defending it. This would be reprinted as an appendix in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (University of Wales Press 1998). Schmitt permitted the reprinting of this address twice in his lifetime, indicating it was a piece of some importance to him (see William E Scheuerman, *Carl Schmitt: The End of Law* (Rowman & Littlefield 1999) 288.

[29] Heller, 'Autoritärer Liberalismus' (n 1).

[30] Ellen Kennedy, 'The Politics of Toleration in Late Weimar: Hermann Heller's Analysis of Fascism and Political Culture' (1984) 5 History of Political Thought 109. According to Kennedy, this was justified by the SPD's parliamentary leader Breitscheid, on the basis of Heller's arguments made in *Europa und der Fascismus*, published in 1929.

[31] Although the dominant position in the SPD had become reformist, there were some, like Kirchheimer, who had maintained a more radical approach and rejected the 'toleration policy'. Thornhill describes Kirchheimer's position as a 'theoretical fusion of Marx and Schmitt' (Thornhill, Political Theory (n 24) 120).

inequality.[32] In continuing the legacy of the nineteenth-century state theory of Hegel, he followed and advanced a German idealism that presented the state as, in principle, *autonomous* from capitalist social relations, standing over and above civil society as a transcendental mediator of competing interests. Belief in the gradual reform (rather than revolution) of the state on the basis of the Weimar constitutional compromise and an 'equilibrium of class strengths' had become a dominant position in the SPD, following the founder of German socialism in the late nineteenth century, Ferdinand Lassalle, and represented by Eduard Bernstein's 'evolutionary path to socialism', as well as influenced by the work of Austro-Marxists Karl Renner and Otto Bauer.[33] It was this revisionist and reformist tradition, assuming socialism to be the 'legitimate heir' to the liberal order, that Heller represented in the German public law academy.[34]

In his book *Sovereignty*, published in 1927, Heller had been emphatic: only the self-identification of the people as sovereign could reflect a democratic relationship between rulers and ruled. Only then would the antithesis of monarchical sovereignty be achieved.[35] This could not be satisfied by the formal rule of law or a plebiscitary dictatorship. It required various devices of political representation ('such as elections, countersigning, parliamentarism, referendums, initiatives'), which should be understood as a means to guarantee juristically that 'power emanates from the people'. In practice, this must be understood on the basis of a 'majority principle', which, in order to function legitimately, requires the substantive 'homogeneity' of the people (a claim, as we will see in chapter 7, that reappeared in distorted form more than half a century later in the German Constitutional Court's Maastricht decision).[36] Heller was clear that homogeneity was, in large part, to be understood in terms of socio-economic equality, albeit buttressed and held together by a cultural community of values; a national culture.[37]

In 1927, Heller imagined the state as, potentially at least, a *neutral* state, equally open to different governmental regimes and capable of managing the problem of socio-economic inequality democratically. Even as late as 1931, during Brüning's reign as chancellor, Heller considered the authoritarian primacy of the state, and its dictatorship over society, necessary—albeit, from his perspective—to ensure the primacy of political authority *over* private economic power, and to *preserve* the institutions of the

[32] Caldwell, 'Popular Sovereignty' (n 2) 9, identifies Heller as a 'conservative social democrat'. See also Thornhill, Political Theory (n 24) 111–12 (Heller's thought 'reflects the very heart of SPD-orthodoxy in the 1920s').

[33] See, eg Otto Bauer, 'The Equilibrium of Class Strengths' in Mark E Blum and William Smaldone (eds), *Austro-Marxism: The Ideology of Unity: Austro-Marxist Theory and Strategy*, vol 1 (Brill 2015) 323–33.

[34] The SPD grew out of the Socialist Workers' Party of Germany, established when Lassalle, Bebel, Liebknecht, and others came together at Gotha in 1875, but soon banned under Bismarck's anti-socialist laws until 1890 (later splitting with the Independent Socialists in 1917). On Heller's relation with the tradition of Lassalle, see Hermann Heller, 'The Nature and Structure of the State' (1996) 18 Cardozo Law Review 1139 (tr David Dyzenhaus). On Bernstein's 'decisive' influence on the SPD, see Peter Gay, *The Dilemma of Democratic Socialism: Eduard Bernstein's Challenge to Marx* (2nd edn, Collier Books 1970) 252.

[35] Heller, 'Sovereignty' (n 10) 107

[36] ibid 108–09. In democratic states the relation between rulers and ruled, and hence the issue of representation, is a 'juristically significant factor' and, indeed, the 'crucial factor' in making sense of sovereignty.

[37] Kennedy (n 30) 125: 'Heller understood the ethical and normative task of socialism much as Fichte had understood culture—as cultivation, as the overcoming of subjectivity and isolation, as the attainment of harmony'. This was how Heller conceived integrating the working class into the unity of the national state.

Republic. He thus continued to advocate a strong state, standing above class conflict, asserting its autonomy from the capitalist economy and civil society, and using its governing institutions to maintain stability.

Heller's belief in the autonomy of the state persisted even as the material conditions became increasingly characterized by extreme inequality, and the political apparatus subject to the intense pressures of monopoly capitalism. This reflected a broader revisionist position in the SPD. Indeed, Social Democrats centred around Rudolph Hilferding, who had served as finance minister from 1928 to 1929, saw the concentration of capital and heavy industry in the late 1920s as potentially of instrumental value, more easily taken over and controlled by the 'class-neutral' state than a multitude of smaller enterprises.[38] The problem with the authoritarian liberal state, in other words, lay less in its authoritarianism than in its economic liberalism. Heller's 'faith in the state as the expression of community', as Chris Thornhill puts it, 'continued long after the German state had abandoned all interest in protecting the citizen from the economy'.[39]

To explain Heller's faith in the Weimar regime, even as its institutions were defecting from democracy, we have to consider the SPD's fear of the radical right on the horizon. The NSDAP (Nazi Party) was gaining electoral ground, and had dramatically increased its seats in the Reichstag in September 1930.[40] Rudolph Breitscheid, leader of the SPD, was, like Heller, concerned about further dividing the left; so long as there was a threat to Weimar from the NSDAP, 'nothing should be done to weaken Brüning and open the door to the fascists'.[41] On this interpretation, the SPD was 'forced to choose the lesser evil', in light of the Nazi Party's growing power.[42] Authoritarian liberalism was far from ideal, but it was better than the alternative, which, as far as the majority of Social Democrats could see, was only fascist dictatorship.

Far from protecting the Weimar Republic from the 'lesser evil', however, the government of the interregnum laid the path for the Nazi seizure of power. The toleration strategy fatally weakened the Social Democrats. It severed their link with the working class, as the harsh austerity which the governing regime pushed through, with the passive acceptance of the SPD, generated high levels of unemployment. Soaring unemployment, in turn, contributed to further weakening of the (already weakened) unions, which were further damaged by the direct undermining of the system of collective bargaining, as the authoritarian regime ordered reductions in wages and increases in working hours in the early 1930s.[43]

[38] Thornhill, 'Political Theory' (n 24) 110 ('Hilferding's brand of Marxism vacillates between an orthodox theory which asserts that modern government has been taken over by monopolies and general cartels, and a doctrine of organized capitalism, which argues that the modern state can itself resolve the contradictions between labour and capital').

[39] Thornhill, Political Theory (n 24) 112

[40] Becoming the second-largest party, with 107 seats.

[41] Kennedy (n 30) 111

[42] ibid 126–27. Kennedy notes that this was not only tactically wrong, but politically wrong, because it was not a policy *for* anything, and 'it was practised by a party that was not any longer in a position to tolerate anything. Its power, rights, and equality had already stripped away because the foundation for parliamentary democracy was gone'. The Communist Party was also increasing its parliamentary representation in the early 1930s.

[43] Ruth Dukes *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014) 40

By the end of 1932, Heller appears to have realized the mistake. The idea of the 'neutral state' is now presented as a dangerous illusion, one which he tries desperately to dispel; this is the purpose of his polemic against authoritarian liberalism. By that stage, the state appears to him not only as a liberal formation, but as a class state and a *capitalist state*: one entrenched against socialism *and* democracy. The Social Democrats, however, had contributed to this predicament by abandoning their democratic convictions.

If the SPD's policy of tolerating the authoritarian liberals added an acute crisis of representation to the economic crises that preceded Weimar's collapse, this was the final chapter of a longer story in its own deradicalization. Despite the initial promise of extending political freedom into the economic realm, 'the economic constitution' advanced by the Weimar left after the birth of the Republic in 1918 had become little more than an adjunct. What had started as a project of socialization of the economy eventually performed merely a 'service function' for the democratic capitalist state, becoming 'co-extensive with the employer's aim of maximising production and profit'.[44] The Workers' Councils were gradually hollowed out, hampered by a lack of legislative action, subsumed by the unions, lacking in support from parties on the political left (including the communist KPD), and constitutionally weakened by the Reichsgericht's interpretation of Article 165 (providing for worker co-determination) as merely programmatic and not legally binding (as opposed to Article 153, which defended the right to private property).[45]

Labour lawyer Hugo Sinzheimer, associated with drafting the substantive part of the Weimar constitution, had advocated the economic constitution as a supplement to its organizational part, to reject the 'anarchy' of economic freedom in bourgeois society and to ensure the economy was run to achieve social ends.[46] This initially meant collective self-determination by Workers' Councils, which would integrate unions, becoming public law rather than private law bodies, and concerned with more than merely industrial conflict and maximizing economic gains.[47] But, as Ruth Dukes notes, Sinzheimer soon had a change of heart, suggesting instead that the unions should bear primary responsibility for the economic constitution, which was relegated to the negotiation of terms and conditions of employment, effectively abandoning the Workers' Councils.[48] Economic democracy, in other words, meant merely enhancement of workers' interests; it had little to do with collective control over the means of production, or political freedom. The unions and the SPD, in turn, became vast bureaucracies, alienated from the political struggle for democratic socialism and

[44] ibid 21–22.

[45] ibid 20 (examining the decision of the Reichsgericht of 11 February 1926). This left the 1920 Works Council Act as the main legislative frame.

[46] ibid 18. According to Sinzheimer, 'without economic democracy as a supplement to political democracy… the vast majority of the people remained unfree, subject to the control of a minority wielding economic power.' ('Only with economic democracy—the elimination of despotism at the workplace, of the control of the markets by capital, and of the state by the propertied classes—could true democracy be achieved').

[47] ibid 17–19.

[48] ibid 20. The revolutionary Workers' Councils had been violently repressed in 1920.

gradually reduced to economism, focussing narrowly on economic interests, collective bargaining, and corporatist arrangements.[49]

In Sinzheimer's reformist vision, the separation of the state and society could thus be maintained, with the state and its governing apparatus used to impose and maintain a better balance between labour and capital. Collective bargaining would take place 'in the shadow of the law' (such as factory legislation and law guaranteeing the freedom of association) in such a way as to temper substantive inequalities, but the law would be determined elsewhere. Economic democracy thus came to mean better regulation of the economy, rather than emancipation from capitalism. It followed that workers should be regulated by public labour laws, rather than dominated by private property (capital), but would be 'regulated' nonetheless, rather than autonomous. In this account, political democracy and economic democracy remained differentiated, albeit in a more socially inclined manner than according to classical liberalism. The functioning of private law rationality would be mediated but not transformed.[50]

The social policy pursued by the reformist wing of the SPD and the major unions, including protection of workers' rights, social welfare, rights of co-determination, and a system of public assistance and social insurance, had certainly promised a great deal to the working class and achieved some concessions from capital in the early years of the Republic. But it was not a break from the logic of the capitalist state. On the contrary, social policy presented a path to accommodate diverse social forces, and maintain a 'class equilibrium'; on many accounts, it depended on the success of the capitalist system in creating growth in order to facilitate redistribution of the social product.[51]

Socialization of the means of production did not materialize, partly due to opposition from the moderate left in the SPD, and trade unions. The unions were hampered by a narrow 'pressure group' mentality, a position which led them away from seeking radical *political* change.[52] By 1930 trade union membership had plummeted, strikes had declined, and organized labour was in close collaboration with the SPD.[53] Later, Franz Neumann (who had also supported the policy of 'toleration' to authoritarian liberalism) would suggest that social democracy and the unions failed because, in the mistaken belief that economic democracy was possible without political democracy, they had restricted the working class to economism and gradualism, and failed to create a 'democratic consciousness'.[54] Instead of extending political freedom into the

[49] Charles Maier describes the new institutional arrangement in the interwar era as 'corporatism', which, in his view, meant 'the growth of private power and the twilight of sovereignty' (Charles S Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I* (Princeton University Press 2016) 9). He applies it as an ideal-type to Germany, France, and Italy.

[50] Dukes (n 43) 19 notes the likely influence of the Webbs, whose two volume *Industrial Democracy* was translated into German in 1898 .

[51] In a mirror image of Schmitt's position, Neumann had argued that the task for a socialist political theory of the state was 'to develop and concretely present the positive social content of the second part of the Weimar constitution'. Franz Neumann, 'The Social Significance of the Basic Laws in the Weimar Constitution' in K Tribe (ed), *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann* (Allen and Unwin 1987) 43.

[52] Abraham (n 6) 252–80.

[53] Franz L Neumann, *Behemoth: The Structure and Practice of National Socialism, 1933–1944* (Ivan R Dee 2009) (Neumann, 'Behemoth') 17–20.

[54] Ibid 29. Neumann's position was complex and changing. There seemed to be a break in 1933, when he considered the Weimar compromise to have been doomed from the outset, given that capital remained the 'real owner of power': (Franz L Neumann, 'The Decay of German Democracy' in William E Scheuermann

economic domain, the left surrendered the political state to the bourgeoise and sought reconciliation and compromise within the system, even after it became increasingly apparent that the capitalist state would subsume any democratic elements once these were obstructing the commercial gains of large enterprises.[55]

In other words, just when the dominant political and economic classes were *politicizing* their struggle in the early 1930s, social democrats and the unions were reduced to reformist strategies, flatly refusing political strikes and underestimating the importance of political struggle.[56] The political weakness of the left, explicitly or tacitly accepting the organized and increasingly monopolized rule of capital, enabled reactionary parties to effectively destroy the 'constitutional platform for the emancipation of labour', namely Weimar's parliamentary democracy.[57]

The rise of authoritarian liberalism in late Weimar would repress the political-democratic management of the constitutional dialectic, tilting the balance in the conflict between democracy and capitalism decisively against democracy. This is eventually acknowledged by Heller to have been a failure of his own camp, an indictment of social democracy in Germany; in particular, of its longer-term failure to succeed in uniting its values with concrete political power.[58] The Social Democrats had made the cardinal error of thinking that the dialectic of fact and norm could be severed, detaching their normative values of social equality from the actual experience of political freedom.[59] Substituting formal agency for real autonomy, they had neglected the necessity of acting *politically*.[60]

'Nothing has corrupted the working class', in Walter Benjamin's words, 'so much as the notion that it was moving with the current'.[61] Social democracy since the Gotha

(ed), *The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (University of California Press 1996) 33) (Neumann, 'Decay'). For discussion, see Claus Offe, 'The Problem of Social Power in Franz L Neumann's Thought' (2003) 10 Constellations 211. According to Thornhill, Neumann's (and Heller's) support of the 'toleration policy' towards Brüning reflected the 'state-fidelity of the Weimar SPD in general' (Thornhill, *Political Theory* (n 24) 113).

[55] Thornhill, 'Political Theory' (n 24) 119–21. Kirchheimer again appears to have been an exception, insisting that capitalism and democracy are 'formally incompatible', and arguing for a 'mass participation' in political will-formation, with the state 'genuinely superseded by a worker's democracy'.

[56] Abraham (n 6) 259–60. Neumann, 'Behemoth' (n 53) 17.

[57] Neumann, Decay (n 54) 34–37. Any 'thought of cooperation on the left', which had been divided since the First World War, evaporated after the SPD-controlled police had violently put down unarmed communist demonstrators at a May Day celebration in 1929 in Berlin and, in any case, under direction from the Party in Moscow, the KPD repudiated any united front with the 'social fascists' and insisted on immediate insurrection, a strategy that had hopelessly failed in the early 1920s (Martin Jay, 'The Weimar Left' in PE Jordan and JP McCormick (eds), *Weimar Thought: A Contested Legacy* (Princeton University Press 2013). For further discussion of the broader divergence of left-wing political strategy, including in Weimar, and its relationship to the Russian Revolution in the interwar period, see Perry Anderson, *Antinomies of Antonio Gramsci* (Verso 2017).

[58] Heller traces this fundamental error back to Kant, in a way which strikingly mirrors the reflections of Dewey: John Dewey, *German Philosophy and Politics* (rev edn, GP Putnam's Sons 1942).

[59] Otto Kahn-Freund also suggested that the distance between the fine rhetoric of social democracy in constitutional texts such as the Weimar Constitution and the reality on the ground creates a severe problem of legitimacy; see Otto Kahn-Freund, 'The Weimar Constitution' (1944) 15 The Political Quarterly 229.

[60] Heller, 'Autoritärer Liberalismus' (n 1).

[61] Walter Benjamin, 'Theses on the Philosophy of History' in Hannah Arendt (ed), *Illuminations* (The Bodley Head 2015) 250. The theses were completed in spring 1940 and first published in *Neue Rundschau* in 1950.

Programme of 1875, confusing technological advances in work with political achievement, had adopted a conformist view of historical progress. As Benjamin noted, 'This vulgar Marxist conception of the nature of labour bypasses the question of how its products might benefit the workers while still not being at their disposal. It recognizes only the progress of the mastery of nature, not the retrogression of society; it already displays the technocratic features later encountered in Fascism'.[62]

4. Fascist dictatorship: the end of the political

Authoritarian liberalism, as well as being supported by liberals, conservatives, and Catholic centrists, and tolerated by social democrats, would be actively supported by a large section of the legal academy, many law professors having become critical of the Weimar republic—even 'actively anti-constitutional', in the sense of anti-parliamentary—by the early 1930s. As Michael Stolleis explains, the legal academy envisaged an 'outwardly and inwardly strong state' that could rise above the party factions and interests in civil society and reassert the stability of constitutional liberalism: an economic liberalism protected by the legal constitution and safe from the vicissitudes of democracy.[63] This could be understood as an attempt to restore de facto the pre-revolutionary monarchical regime, albeit without formally overturning the Weimar Constitution.

The political manoeuvres of authoritarian liberals would come to a head as a constitutional matter with von Papen's forceful deposition of the SPD government in Prussia, again using Article 48 of the Constitution. Carl Schmitt, as well as closely advising the presidential cabinets, would represent the Reich government of von Papen in the Staatsgerichtshof in this so-called 'Prussian coup', with Heller representing the Prussian side.[64] The coup was launched on the pretext of restoring public security, after von Papen's government had stoked violent clashes by lifting the ban on the SA, the original paramilitary wing of the Nazi Party. The real aim of von Papen's move was 'to wrest control' of Germany's largest state (Prussia) and its apparatus of executive power from the Social Democrats, as well as attract the support of the Nazis by helping them in their street battles with the Communists.[65] The court, in an ambiguous judgment, although finding the Prussian government not to have violated its duties to the federal Reich, held the federal government's actions to be justified. Occurring only months before the Nazi seizure of power in January 1933, the Preussenschlag was a key factor in ending the Republic, giving von Papen direct control of the Prussian government and police force, as well as helping to lay the grounds for the future Nazification of

[62] ibid 251.

[63] Michael Stolleis, 'Prologue' in Christian Joerges and Navraj Singh-Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Hart Publishing 2003) 8 ('Most of them were bourgeois and conservative and willing to cooperate with the new regime').

[64] For discussion, see Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015) 1–6.

[65] ibid 1.

Germany, with Hermann Göring's later installation as Prussian Minister of the Interior enabling the Nazis to use the secret police to brutally crush potential opposition.[66]

Authoritarian liberalism ultimately proved inadequate to deal with the political and economic situation. The cabinets failed either to unite the various fractions of capital, including heavy industry and agrarian interests, or to attract a mass of popular support.[67] By the end of 1932, 'crucial decisions were being made by a handful of men in leadership circles', cliques which bypassed not only parliament and parties but even the cabinets themselves.[68] Authoritarian liberalism was a counter-revolutionary formation that lacked a coherent political strategy and a political base, without which 'it was unable to effect any lasting transformation to an authoritarian state system'.[69] But it sufficiently undermined Weimar democracy so as to ease the transition to National Socialism, with the dominant classes eventually turning, however reluctantly, to the NSDAP, in order enlist popular backing.[70]

In late 1932, the Nazi vote would actually slump in federal elections.[71] But the diminished electoral support did not prevent Hitler's assumption of power in January 1933, which unfolded along lines that had already become customary with chancellors Brüning, von Papen, and von Schleicher. Hitler was appointed chancellor by President Hindenburg on 30 January 1933, in a short-lived coalition with Hugenberg's DNVP. New elections in March 1933, in a climate of violence and intimidation created by conditions of state-supported propaganda and state-sponsored terror, operationalized by the Gestapo and the SA, again failed to produce a clear Nazi majority. This was to be the last contested election in Germany in the interwar period.

The transformation from authoritarian liberal cabinets into a 'Führer State' would happen in a relatively short space of time.[72] The Reichstag Fire Decree of February 1933, issued by von Hindenburg on the advice of chancellor Adolf Hitler under the same Article 48 of the Constitution, just before the March election, nullified key civil liberties on the pretext of defending the state against the communist opposition. In reality, it was used as a legal basis for persecuting and imprisoning assorted opponents of the regime, and consolidating a one-party state. This decree, along with the Enabling

[66] James (n 17) 51. In 1934 oversight of the secret police (Gestapo) was handed to the head of the SS, Heinrich Himmler, with the Gestapo becoming a national agency. Hitler had ordered the Rohm Purge in 1934, after which the SA was significantly scaled down.

[67] On the difficulty for competing fractions of capital to form a coherent political response to the economic situation, see Abraham (n 6), 45–52. cf Nicos Poulantzas, *Political Power and Social Classes* (Verso 2018).

[68] ibid 51.

[69] Ian Kershaw, 'The Nazi State: An Exceptional State?' (1989) New Left Review 47–67.

[70] Dick Geary, 'Employers, Workers, and the Collapse of the Weimar Republic' in Ian Kershaw (ed), *Weimar: Why Did German Democracy Fail?* (Weidenfeld and Nicholson, 1990) 92, 104–5 ('a point had been reached whereby a bourgeois bloc including the Nazis could be envisaged as the road by which the hated welfare legislation and constraining labour law could be removed. Such a coalition may not have been the first preference of most industrialists. Many believed Hitler would prove malleable, especially after the Nazis lost two million votes in the second (November) Reichstag elections of 1932 and when an internal crisis began to grip the NSDAP. Yet the important point is that by 1933 industry wanted rid of the Weimar Republic.')

[71] In the elections in November 1932, the Nazi vote fell by four per cent, and they lost thirty-four seats in the Reichstag.

[72] According to Stolleis, the transformation took 'about twenty-four months' (Michael Stolleis, *Public Law in Germany: A Historical Introduction from the 16th to the 21st Century* (OUP 2017) 101.

Act passed only weeks later, would provide the legal basis for Hitler's dictatorship, formally 'normalizing' the state of exception.[73]

To be sure, the ruling elites had completely underestimated the threat posed by Hitler. Complacency in the political class, convinced of its ability to control him, ranged from von Papen and Hugenberg to the SPD's own Rudolph Hilferding.[74] After the elections in November 1932, jubilant at the Nazis' decline, Hilferding had refused either to cooperate with von Schleicher or to join a united front with the Communist Party. The primary aim of the SPD, he had said, 'was the fight against Communism', prefiguring its Cold War position a decade later.[75]

But the reason the transition to Nazi dictatorship could occur so quickly was that the 'bourgeois elites' in the administration, the judicial system, and the military, were all willing to cooperate with the Nazi Party. They not only welcomed the end of Weimar parliamentarism, but cheered 'the end of the unions, the silencing of communists and social democrats, the expulsion of Jews, the job-creation measures and a foreign policy focused on ending the trauma of Versailles.'[76] Although there was some uneasiness in their relationship with the Nazi Party, the bourgeoisie were 'trapped' in a belief in the 'future usefulness' of the Nazis, seeing in their movement a 'department for mass mobilisation'. Mass mobilization and popular support did not mean mobilization in a political sense but, quite to the contrary, it meant mobilizing a 'culture of violence' and national redemption, and a determination to single out the 'Marxist enemy within as its prime target'.[77]

After the Nazi seizure of power in 1933, a debate had ensued among constitutional lawyers, particularly Schmitt and Nazi jurist Otto Koellreutter, over 'who could most radically purge from Nazi vocabulary the last remnants of traditional concepts of the German Constitution, now associated with liberalism'.[78] Although the rise of the Nazis was based on a 'national revolution', it was also designed, according to Koellreutter—initially in agreement with Schmitt—to *retain* the 'old German conservative heritage … in National Socialist countenance'.[79]

[73] Peter Caldwell, 'National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter and the Debate over the Nature of the Nazi State, 1933–1937' (1994) 16 Cardozo Law Review 399, 407 (Caldwell, 'National Socialism'): 'The Enabling Law transferred the authority to issue laws, ordinances, and even constitutions to the executive power, eradicating the German tradition of limiting that power by a popular assembly. In effect, the law created a government able to exercise legislative power independent of either popularly elected body Reichstag or President'.

[74] James (n 17) 51–52.

[75] Neumann, 'Behemoth' (n 53) 32.

[76] Stolleis (n 72) 101.

[77] Bernd Weisbrod, 'Violence and Sacrifice: Imagining the Nation in Weimar Germany' in Hans Mommsen (ed), *The Third Reich Between Vision and Reality: New Perspectives on German History 1918–1945* (Berg 2001) 11.

[78] Caldwell, 'National Socialism' (n 73), 399–400.

[79] ibid 407. Although Koellreutter (who had been a Nazi member for some years) and Schmitt (who joined only in 1933) would soon explode in spectacular disagreement, Caldwell notes they both 'fully accepted the two tenets of Nazi rule: the *Fuhrer* principle; and the principle of the essential unity of *Artgleichheit* (unity of species, type, or race) of the German *Volk*' (408) the 'limit' to the *Führer*'s power would be found only 'in the *Volk*'s racial identity with the *Führer*'. He notes further that 'all the major Nazi theorists tended to reject positivism, with its distinction between law as a normative category, what "ought" to be, and factual reality'.

In legal terms, Koellreutter's interpretation gave National Socialism the form of what would later be theorized by Ernst Fraenkel as the 'dual state', 'a doubled pseudo-constitutional system: on the one side, "normal" judicial activity, on the other, "special" state action at the whim of the *Führer* or his deputies'.[80] This suggested other elements of apparent continuity with the old regime, beyond the conservative heritage of imperialism. In Fraenkel's view, the transition to Nazi dictatorship would be supported by large sections of capital and business for partly rational reasons: 'capitalism played handmaiden to dictatorship', wilfully embracing a violent, inhumane ideology because the Nazis promised to maintain not only the existing conditions of technical rationality, but 'an economic order which resembled the unfettered capitalism of old'.[81]

The theory of the 'dual state', the state based partly on prerogative power and partly on the remnants of a Rechtsstaat—part lawlessness, part law—would be superseded by a very different account of the Nazi regime, one offered by Franz Neumann in his monumental *Behemoth*.[82] Neumann focused on the political economy undergirding the transition to National Socialism; the Nazi governing apparatus supported by a broad hegemonic bloc combining four distinct groups: 'big industry, the party, the bureaucracy and the armed forces.'[83] The monopolization of industry and the cartelization of politics would combine; not in a state formation, but in a totalitarian form, together pursuing capitalism in an aggressive, imperialistic, and expansionary manner.

Neumann's account suggested that National Socialism (which he characterized as 'totalitarian monopoly capitalism' rather than 'state capitalism', as theorized by fellow Frankfurt Schooler Friedrich Pollock), was in some ways continuous with the Weimar era, but was fundamentally transformative in combining monopoly capital control with a command economy.[84] As a new regime of capital accumulation, with fewer fetters on capital than in liberal democratic form, it gave rise to a 'self-reinforcing dictatorship.'[85]

In terms of its constitutional-legal form, totalitarian monopoly capitalism marked a rupture, in Neumann's presentation, in the turn to an *irrational legal system*. For Neumann, this meant that the state, as Rechtsstaat, had ceased to exist in the Nazi dictatorship. In its place, there arose 'simply a decisionistic, situation-specific, deformalized law', a 'non-state system'.[86] Neumann suggested that the Nazi order should be understood as a 'form of society in which the ruling groups control the rest of the population *directly*, without the mediation of that rational though coercive

[80] ibid 413; Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship* (Edward Shils tr, OUP 2017).

[81] Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (OUP 2018) 199–200.

[82] Neumann, Behemoth (n 53).

[83] ibid 361.

[84] See, for discussion, Meierhenrich (n 81) ch 2. According to Meierhenrich, 'remnants of the Rechtsstaat' continued to have a 'structuring effect on social outcomes in the Third Reich, especially at the level of everyday law', notably in pre-war years, but even once war had begun, thus arguing in favour of Fraenkel's 'dual-state' thesis (p 3).

[85] ibid 30. Kirchheimer too, argued that National Socialism was 'the last, logical position in the accelerated concentration of capital and cartelization which characterised the Weimar period' (Thornhill, 'Political Theory' (n 24) 124).

[86] Kelly (n 4) 296.

apparatus' that was otherwise known as the state.[87] 'If general law is the basic form of right, if law is not only *voluntas* but also *ratio*', Neumann concludes, 'we must deny the existence of law' to National Socialism.[88]

In Neumann's characterization, totalitarian monopoly capitalism hardly qualified as a state; it was a regime in which the rule of general laws had been completely destroyed through 'decisionistic' legal thinking. 'Law', Neumann claimed, 'is now a technical means for the achievement of specific political aims. It is merely the command of the sovereign. To this extent, the juristic theory of the fascist state is decisionism. Law is merely an *arcanum dominationis*, a means for the stabilization of power.'[89]

Neumann's influence on post-war constitutional legalism is indisputable.[90] The liberal Rechtsstaat would be resuscitated in the post-war era in the thought that it would present a major bulwark to the decay of democratic capitalism into a fascist dictatorship. We will consider the influence of this reading of liberal democratic decay further in Part II.

But the accuracy of Neumann's characterization of National Socialism as a lawless regime based on a fully command economy is far from undisputed.[91] Fraenkel's account, which suggests that the law continued in the private sphere of the economy, well into the Second World War, seems in many ways superior.[92]

But Neumann's reference to the 'command of the sovereign' was misleading even on his *own* interpretation, since the Nazi 'sovereign' was not a unified state or really a 'sovereign' at all, but a cartel of powerful interest groups. Neumann's account in *Behemoth* is interesting less for its theory about the end of rational law, and more for what it suggests about the end of politics. Rather than bringing forth the truly political 'total' state, National Socialism in fact undermined the real source of legal and political power, namely the principle of 'sovereignty'.[93] The principle of sovereignty 'specific to the political sphere' made little sense in terms of sheer 'command'.[94] The Nazi system triumphed over the Weimar regime, in other words, not—or at least not primarily—through the destruction of legal rationality, but through the destruction of 'the political' sphere. The moment of 'genuine politics' was completely attenuated in National Socialism 'by technical and pluralist (private-legal) modes of coercion'.[95] It is quite possible that remnants of the Rechtsstaat in fact remained in Nazi Germany—'islands of legality in a sea of lawnessness'[96] —what disappeared was the political state.

[87] Neumann, 'Behemoth' (n 53), 470 (italics added).

[88] ibid 451: 'Law, as distinct from the political command of the sovereign, is conceivable only if it is manifest in general law, but true generality is not possible in a society that cannot dispense with power'.

[89] ibid 448.

[90] Meierhenrich (n 81).

[91] See ibid. See also R Ptak, 'Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy' in Mirowski P and Plehwe D (eds), *The Road from Mont Pelerin: The Making of the Neoliberal Thought Collective* (HUP 2009), which describes it as a mixture of command economy and market capitalism.

[92] See William E Scheuerman, 'Social Democracy and the Rule of Law: The Legacy of Ernst Fraenkel' in Peter C. Caldwell and William E. Scheuerman, eds, *From Liberal Democracy to Fascism* (Humanities Press, 2000) 76–85.

[93] Kelly (n 4) 291.

[94] ibid.

[95] Thornhill, Political Theory (n 24) 127.

[96] Meierhenrich (n 81) 201.

5. A cult of violence

Although Neumann aimed his critique of decisionism partly at Carl Schmitt (of whom he was a student), Schmitt himself had quickly moved away from a decisionistic doctrine, distinguishing, in a work published in 1934, *three* types of juristic thought (based on 'norm', 'decision', and 'concrete order formation').[97] And as the Nazis consolidated their power, Schmitt would also distance himself from the concept of the state altogether.[98] Schmitt's earlier concept of the strong ('qualitatively total') state and his maintenance of a differentiation between the state and the Party, with the state retaining a hierarchy in this relation, had threatened to alienate him from the Nazi regime, which called for the rapid transcendence of the notion of the state. Even Schmitt's earlier concept of the political, based on the friend/enemy binary, was considered a bourgeois construct by the Nazis; unsuitable to a regime based on biological purity.

Schmitt soon pivoted, leaving behind his theory of the 'total state' with the publication of *State, Movement, Nation* (*Staat, Bewegung, Volk*).[99] If the 'state' remained present in Schmitt's scheme, it was now a kind of 'anachronism', narrowly defined as a bureaucratic apparatus; a static entity which carried out the political demands of the Führer, set into motion by the 'movement' of National Socialism. The movement, in turn, was the organized element of the ' "unpolitical" *Volk*'.[100]

In 1933, after Hitler's seizure of power, Schmitt proclaimed, 'On the 30 January, one can say accordingly, Hegel died'.[101] With the Nazi *movement* destroying the duality of state and society, the state would soon disappear from Nazi constitutional thought altogether, its 'liberal connotation' too embarrassing for jurists—including Schmitt—to countenance. Reinhard Hohn, a young Nazi jurist and SS member who succeeded both Schmitt and Koellreutter, then offered a 'total rethinking of legal scholarship on the basis of the *Führer* principle and racial equality', one which required that ' "science" once again become acquainted with "life." '[102] In that sense, the National Socialist regime clearly marked a departure, not only in the material economic rationality of its strategy of capital accumulation, but in its political form and ideology. An authoritarian leader would now directly represent the *Volk*, rather than any particular group, and the *Volk* would be identified on the basis of a *racial identity*. Its authority would be forged through cultivating and glorifying historical myths of violence and heroic self-sacrifice as a way to national redemption after the shame of defeat in the First World War and the punishment of Versailles.[103]

[97] Carl Schmitt, *On the Three Types of Juristic Thought*, J Bendersky, tr (Praeger 2004).

[98] The complexities of Schmitt's various moves cannot be dealt with here. For an attempt to systematize Schmitt's thought, see Martin Loughlin, 'Politonomy' in Jens Meierhenrich and Oliver Simons (eds), *The Oxford Handbook of Carl Schmitt* (OUP 2017).

[99] See Jens Meierhenrich, 'Fearing the Disorder of Things: The Development of Carl Schmitt's Institutional Theory, 1919–1942' in Meierhenrich and Simons (n 3), . Meierhenrich gives the label 'racial institutionalism' to capture Schmitt's thought from 1933 to 1938.

[100] Caldwell, 'National Socialism' (n 73) 416–17.

[101] Carl Schmitt, *Staat, Bewegung, Volk* (Hanseatischer Verlaganstalt, 1933) 32.

[102] Caldwell (n 73) 427.

[103] Weisbrod (n 77) 12–13.

If the 'decisive role' in advancing the authoritarian liberal regime had fallen to the Catholic Centre Party (Zentrum),[104] the spectre of a more radical conservative nationalist movement in the background, drawing on myths of historical loss, biological superiority, and imperial expansionist ambitions, would be essential for the turn to National Socialism to succeed. The nationalist right-wing opposition to the Republic had, in 1930, still been seriously divided, with Hugenberg's 'pan-German' bourgeoise conservatism largely ineffective, and Hitler biding his time. But a neoconservative intelligentsia that was directed not only against Marxism and socialism, but also against democracy, liberal Enlightenment, and Western civilization more generally, would come to be supported by the various political constituencies of the capitalist economy.[105] A centrist constellation hostile to the 'cultural Bolshevism', and even aesthetic modernism, associated with urban life in Weimar would attract the support of the large agrarian section of society, in addition to the middle classes.

The bourgeois bloc would soon turn to the Nazi party once it had become clear that the defection from parliamentarism by the cabinets of authoritarian liberals would not hold any answers to the economic and political crises of the day.[106] As Hermann Heller had foreseen in 1929, a non-parliamentary Rechtsstaat (Heller comparing this to the model of the USA) would not be able to 'conform to the religion of violence'. Nor could it—and this, he emphasized, was the main thing—'remove the political economic difficulties of the ruling class'.[107] In a second move, he predicted, the bourgeoisie would thus likely 'throw itself into the arms of an irrational feudalism', partly inspired by Nietzsche, based on a resentment of its own laws, and a turn to a mythology of 'genius individualism without law' which values 'adventure and danger'.[108] The supreme article of faith of the bourgeoisie, 'unable to master the sociological situation either intellectually or morally and politically' would become 'force in itself, force as an end in itself';[109] thus, the appeal of an 'aestheticizing religion of violence, which is only bearable for the strong soul of the superior man'. In Heller's view, this was represented above all by Oswald Spengler's *Decline of the West*; a declaration of belief in the nobility as the 'genuine estate'. The bourgeoisie would be willing to turn to a strongman of 'Caesaristic dimensions'. From this new conservative perspective, the masses were 'a radical nothing'.[110]

Fraenkel's account of the 'dual state' suggests that Heller was only partly right. What had eluded Heller (and Neumann) was the possible juxtaposition of a legal *and* a prerogative state; the continuation of law in the sense of a private sphere of commercial predictability with its discontinuation as a matter of public political value.[111] Heller

[104] Mommsen (n 7) 288.

[105] Stolleis (n 72) 92: 'What Kurt Sontheimer called "anti-democratic thinking" was rapidly attracting a following, especially among young intellectuals'.

[106] Mommsen (n 7) 307.

[107] Hermann Heller, 'Rechtsstaat or Dictatorship?' (Ellen Kennedy tr, 1987) 16 Economy and Society 127, 137 (first published as Rechtsstaat oder Diktatur? *in Die Neue Rundschau* (S Fischer Verlag 1929) 721–35) ('Rechtsstaat or Dictatorship?').

[108] ibid.

[109] ibid 133.

[110] ibid 137, 139. Heller also compares this new conservatism to a corporate state, where 'professional estates' rule and the masses are reduced to political apathy.

[111] In a sense, Heller had captured this point without realizing it. He saw the turn to authoritarianism and dictatorship as primarily a turn away from law as democratic legislation; this is what he meant by a

thought that the bourgeoisie would be unable 'in one breath' to cry for the 'rationalisation of the economy' *and* for an 'arbitrary dictatorship'.[112] But, in fact, the normative state provided a continuation of technical rationality in the economy, and the prerogative state provided the irrational means to pursue the rational ends of violent military expansion, restructuring Germany as a military power. This would be a boon to the armaments industry, which was able to profit from the Nazis' aggressive creation of new markets and production needs. There remained, in other words, 'a rational core in an otherwise highly "irrational shell" '.[113]

The 'people', as an idea, in the totalitarian form of National Socialism were to be 'treated as essentially *unpolitical*, and located mainly with the private sphere'. This total *de-politicization* of the people would occur in tandem with their treatment as biological racial subjects; this was the Nazis' offering to overcome the class conflicts of the Weimar era. Although appealing primarily to the Mittelstand (petit bourgeois, peasant, and 'white collar'), the Nazi movement would be able to draw support from across the various strata of society, uniting diverse elements on the basis of an authoritarian populism, and calling into doubt the very concept of class consciousness.[114]

It was not only the narrative of national redemption after a humiliating military defeat that contributed to the collapse of liberal democracy in Germany. The 'cult' of violence and violent expansion (as distinct from political power) would also play a significant role.[115] In Hannah Arendt's view, violence is an anti-political concept and closely bound together with bureaucracy: 'rule by nobody'.[116] This suggests that it was not a *political* mass mobilization that ended Weimar. On the contrary, 'The unified constituent will of the people, which stood at the root of the democratic state' would, in the formulation of Nazi ideology, be forgotten. 'The people', in the Nazi regime, 'existed simply to be ruled'.[117] It was, in other words, an anti-political mobilization that ended the Weimar Republic.

turn away from a material understanding of the Rechtsstaat. The proletarian demand for social democracy, Heller suggested, had been merely the 'extension of a material Rechtsstaat to the order of work and commodities'. But what he had missed was the need for the working class to maintain and extend political democracy.

[112] Heller, 'Rechtstaat or Dictatorship?' (n 107) 140.

[113] Meierhenrich (n 81) (adopting Fraenkel's own language). On the Nazi economy in the late thirties and into the Second World War, see Adam Tooze, *Wages of Destruction: The Making and Breaking of the Nazi Economy* (Penguin 2008) (emphasizing Hitler's turn to the threat of US imperialism and anti-Semitism); cf Dylan Riley, 'The Third Reich as Rogue Regime: Adam Tooze's *Wages of Destruction*' (2014) 22:3–4 Historical Materialism 346.

[114] On the various class make-ups of the electoral supports of the Weimar parties, see Abraham (n 6), 31 ('the key electoral contribution of the NSDAP consisted of uniting on the basis of an authoritarian populism the various Mittelstand groups').

[115] On the significance of the cult of violence, and the 'trenchocracy', a remnant of the First World War, see Weisbrod (n 77). The conceptual distinction between power and violence is discussed in Hannah Arendt, *On Violence* (Harcourt 1970).

[116] According to Arendt, 'the greater the bureaucratization of public life, the greater will be the attraction of violence. In a fully developed bureaucracy there is nobody left with whom one could argue, to whom one could present grievances, on whom the pressures of power could be exerted. Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless we have a tyranny without a tyrant' (Arendt (n 115) 81).

[117] Kelly (n 4) 293.