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Szüleimnek és Zsoltnak ajánlom

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INTRODUCTION: RIGHTS IN OLD AND NEW DEMOCRACIES

The language of rights plays a central role in contemporary constitutional and political thought and is one of the predominant modes of political argumentation in democracies around the world, both in domestic and international politics. In spite of the fact that rights are usually seen as the tokens of democratic political life, their implications have been criticized recently as promoting the cause of abstract individualism – a process that is arguably detrimental to viable democratic political communities. Searching for alternative ways of theorizing rights, however, has not always been part of such criticisms of contemporary rights talk – as we argue in Section One of the Introduction. One of the main tasks of the present work is to reconstruct the rights theories of Weimar Germany's constitutional scholarship in order to show that there is in fact a wealth of approaches to rights that go beyond the individual dimension. Critics of contemporary rights talk interested in remodelling instead of abandoning the language of rights find here a theoretical reservoir to draw on.

The contemporary focus on rights gave rise to an expanding body of literature on judicial review and the judicialization of politics both in old and new democracies. While in Weimar Germany too, the role of judges was a central element of debate in the context of constitutional scholarship on rights, and Weimar courts did claim the power to review legislation (although remained on the whole reluctant to use it), it was ultimately scholars, not judges who made rights important in Weimar. This brought with it a special interest on the part of Weimar scholars to extend their arguments on rights and courts to theorizing their own role, namely the tasks of constitutional scholarship – an element all but missing from contemporary literatures on the judicialization of politics, as Section Two of the Introcution shall demonstrate. This lack is unfortunate given that these literatures are, after all, in the quest of explaining the major shift of influence from traditional legislative and executive powers to those of the judiciary via constitutional interpretation, in which scholars surely (can) have a role.

Beside its virtues of offering alternative ways of conceptualizing rights and calling attention to the role of scholars in the life of rights, Weimar constitutional scholarship has also been credited for the debts that postwar German political and legal thought incurred. In spite of a widespread recognition of such debts (as discussed in Section Three of the Introduction), no truly comprehensive treatment of Weimar rights theories has been advanced thus far. By reconstructing all the major rights theories of Weimar scholars as well as the dynamic of

rights debates in various institutional settings, we hope to contribute a hitherto missing element to the expanding body of literature on Weimar constitutional theory.

The method followed in the design and implementation of this book has been advanced by the Cambridge school of the history of political thought. Our work however, not so much adheres to these methodological prescriptions, but rather tries to avoid the pitfalls scholars working in this tradition have repeatedly called attention to.[1] From among the Cambridge school's diverse methodological procedures, more directly observed in this work are John Pocock's ways of going about studying what he found to be the core elements in the history of political ideas: political languages.[2]

As a precondition of studying Weimar rights theories, we have to reconstruct the political language of legal positivism and its rights theory, called the theory of „subjective public rights" (in Chapter Two) which established itself in nineteenth century Germany and remained dominant until about 1900. As in Pocock's works,[3] the language of positivism will provide us the guideline to our interpretations of Weimar rights theories and debates (in Chapters Three and Four): we classify individual contributions as realizing one of the modalities of reinforcement, reform, repudiation or striking new ground vis-à-vis the language of legal positivism in general and its rights theory in particular.

It goes without saying under the methodology followed here that Weimar scholars' rights contributions have to be put into the relevant academic, institutional and political contexts. In the design of the analysis, Pocock's maxim is observed that in the study of political thought, not only the major works of the great authors, but also those otherwise left out of the limelight have to be studied.

Chapter One sets the ground for a reconstruction of Weimar rights debates by outlining the two types of contexts against the background of which we will be able to make sense of the reinforcements and transformations of the political language of positivism. First of all, the political context will be outlined in the form of a concise survey of the main political developments between 1919 and 1933 along with an analysis of the practice of judicial review and emergency legislation. Chapter Two then offers a reconstruction of the political language of positivism and its rights theory in the context of nineteenth century German legal and political thought. The constituent assembly's work in Weimar in 1919 will be analyzed in terms of its decisive turn away from the paradigm of positivism.

Chapters Three and Four are devoted to Weimar rights debates: first the individual rights theories of Heinrich Triepel, Gerhard Anschütz and Richard Thoma will be discussed,

along with an examination of the two institutional settings created for the discipline of constitutional theory: the Association of German Professors of Constitutional Law (*Vereinigung der deutschen Staatsrechtslehrer*) and the new genre of collective commentaries on the constitution (Chapter Three). The next chapter on rights theories that reach beyond the individual reconstructs the ideas of Erich Kaufmann, Rudolf Smend and Hermann Heller in the context of the debates within the Association and explores the theories of Albert Hensel, Gustav Giere, Otto Kirchheimer, Franz Neumann, Ernst Rudolf Huber, and Carl Hermann Ule. Finally, a reconstruction of Carl Schmitt's rights theory concludes Chapter Four. The Conslusions tie together the theoretical threads exposed in the narrative of the reconstruction and offer a systematic overview of Weimar rights theories, one that makes accessible to today's scholars and citizens Weimar constitutional scholarship's theoretical solutions.

The broader questions raised at the end of this work consider whether democracies, new or old, should confine themselves to speaking the language of rights in individualistic terms, and rely predominantly on judges in matters of rights. Or should they, alternatively, embrace dimensions beyond the individual when employing the language of rights, and expect scholars to play a role?

Individualism in rights talk and its alternatives

In the American context, rights talk has been made the subject of especially sharp criticism for about a decade.[4] It is, however, questionable whether the serious criticisms leveled against the American language of rights for its individualism have been able to present a real alternative and include common good or community dimensions into rights talk.

In order to mitigate the "hyperindividualism"[5] of the American language of rights, Mary Ann Glendon has suggested that a revival of rights talk was needed which would shift the rhetoric of rights away from its "legalistic character, ... exaggerated absoluteness, ... insularity, ... silence with respect to personal, civic and collective responsibilities"[6] as well as from its obsession with the self and its desires that had replaced "the older individualism of the frontier, of early capitalism and of traditional Protestantism."[7] Such revisions, on Glendon's account, would also return American political language back to its traditional themes of constitutional law such as federalism and the separation of powers[8] and turn the focus of rights decisively away from litigation, where they are a "sign of breakdown in

relationships,"[9] creating a milieu that "heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground."[10]

In a recent collection of communitarian perspectives on rights, featuring a piece by Glendon as well, the emphasis, however, was no longer on molding rights talk than on offering alternatives to it.[11] The editor, Amitai Etzioni suggested "social responsibilities" and "moral values within communities"[12] as the proper focus of political thought in contrast to the language of rights decried as "morally incomplete ... [for] ... the gap between rights and rightness."[13] The individualism fostered by American rights talk, "which can conceive of human relatedness only as a result of spontaneous feeling or calculated interest,"[14] was to be countered on Robert Bellah's account by the alternatives of "republican politics and biblical religion,"[15] pace Tocqueville. Glendon herself ended up advocating squarely against using the language of rights in the important area of welfare for she feared that "the most directly foreseeable consequence ... in the United States would be a litigation explosion of heroic proportions."[16]

But even such thoroughgoing criticisms do not really offer alternative theories of rights – they rather supplement the language of rights with other kinds of political languages, ones that engage matters of community and virtue. The associated reform of rights talk that they call for would only make it more realistic, i.e. responsive to social realities but would not remodel it to include the matters of community and virtue. Contrasting rights with virtues has a tradition which goes back well before communitarian concerns, as John Pocock showed in *Virtue, Commerce and History*[17] but as it has recently been argued, the American language of rights has not always been individualistic per se.

Like communitarian critics, Akhil Reed Amar has been dissatisfied with the "conventional wisdom that the Bill of Rights is overwhelmingly about ... individual, countermajoritarian rights"[18] as well as with legal scholarship and the law school curriculum both of which apply a "clausebound approach" and thus "miss[] the way in which structure and rights mutually reinforce" in the American language of rights. His exploration of the "original" tasks of the Bill of Rights, i.e. the first ten amendments, shows that, in contrast to today's practice, rights were meant "not to impede popular majorities but to empower them" as a "set of structural guarantees applying ... against the federal government."[19] Being essentially collective, the provisions of the original Bill of Rights protected states' rights and majority rights "alongside individual and minority rights" and extended protection over "various intermediate associations -- church, militia, and jury -- designed to create an educated and virtuous electorate." In spite of the fact that the original structural concerns of

the language of rights had been greatly transformed in the course of Reconstruction, offering now a "vision more liberal than republican, more individualist than collectivist, more private than public, more negative than positive," it still remains possible to at least tell apart "personal privileges ... of individual citizens" from "a right of states or the public at large," and draw the implications in arguments for or against their incorporation.[20]

The elaborate historical perspective offered by Amar makes it clear that the contemporary American language of rights can be reconciled with explicitly collective terms such as community or virtue only with great difficulty. The latest studies on the American "culture of rights" recent[21] and earlier[22] came to the same conclusion by highlighting the common good aspect of rights conceptions already in "revolutionary constitutional thought" in which "inalienable rights were subject to regulation for the general good of the community, so that they were qualified (rather than absolute) rights … [whereby] the framers of these [early American] constitutions reconciled natural rights with the doctrine of popular sovereignty."[23] What is more, on McAffee's account, Federalist framers and Antifederalists alike are to be understood as "referring to rights held by the people in their collective capacity," something "we have lost the ability to hear … as we have come to think of rights almost exclusively in terms of the claims of individuals against the government."[24]

The theme of natural rights has of course played a central role also in the context in which the language of human rights developed. The abstract universalistic individualism of this dialect of rights talk, restated most eloquently in a new variation on an old theme by Jack Donnelly,[25] has received an all-embracing critique by Costas Douzinas in *The End of Human Rights*. Equating the alleged triumph of human rights with the possible exhaustion of the critical potential in natural rights thought,[26] Douzinas's careful analysis of the main trends in rights criticism highlighted the legacies of Edmund Burke and Karl Marx who inspired, respectively, "the critique of [human rights'] rationalism, abstraction and absolutism"[27] as well as their "individualistic character" which deluded "emphasis on the importance of political rights and action."[28] Without offering a new synthesis itself, for "there can be no general theory of human rights," the study decries the individualistic version of human rights theory as "the atomocentric approach … [which] is cognitively limited and morally impoverished"[29] and warns against losing human rights "utopian end" entirely.[30]

There have been serious attempts made by historians of political thought to find the origins of natural rights theories and reassert into contemporary human rights talk those dimensions that its very first formulators took to be essential. Though no comprehensive

rights theories have been advanced as a result, the commitment to reopen the dimensions of justice and the common good deserve attention for our analysis.

In his definitive study of the history of the concept of natural right, Brian Tierney went so far as to use the terms natural rights and human rights interchangeably to indicate the contemporary relevance of his findings and asserted that they were at "the heart of our political tradition."[31] The central task of his work was to account for a change in the meaning of natural law: "when did the phrase ius naturale, which traditionally meant cosmic harmony or objective justice or natural moral law, begin to acquire also the sense of a subjective natural right?,"[32] where the new meaning conveyed "a faculty or ability or power of individual persons, associated with reason and moral discernment, defining and area of liberty where the individual was free to act as he pleased, leading on to specific claims and powers of humans qua humans."[33] In contrast to his colleague John Mitchell Finnis, who also conceived of human rights as "being a contemporary idiom for natural rights,"[34] Tierney tracked the roots of the theory back to times before Thomas Aquinas to a "juristic, … non-Aristotelian theory of natural rights… [which] entered the mainstream of Western political thought through other channels" than Aquinas.[35] Tierney found that "the idea of natural rights grew up among Catholic jurists and theologians," more concretely in the humanistic jurisprudence of the twelfth century, especially in the writings of medieval Decretists and canonists.[36] The further development of the doctrine in the early modern period is widely attributed to the work of Protestant political theorists, with Hugo Grotius acting as the mediator who "made it possible for the old theory to live in the modern world."[37]

Although the theory of natural rights has proved to be a versatile tool, used in various philosophies, including religious ones in the medieval ages as well as in the secularized doctrines of the Enlightenment, Tierney and Finnis agreed that in its roots, the theory of natural rights was not predominantly individualistic: "the first rights theories were not derived from contemplation of the individual isolated from his fellows ... but from reflection on the right ordering of human relationships in emerging societies."[38] Nor does its contemporary version inevitably have such implications: Finnis especially was keen on stressing the common good dimension of natural rights by pointing out that they "provide[] an instrument for expressing the demands of justice … [by] reporting and assessing a relationship of justice *from the point of view of the person(s) who benefit from* that relationship."[39] In such a way, the language of human rights can deliver "a way of sketching the outlines of the common good, the various aspects of individual well-being in a community … [and provide] a detailed

listing of the various aspects of human flourishing and fundamental components of the way of life in a community that tends to favour such flourishing in all."[40]

Jürgen Habermas too has been recently in the quest of completing the discourse of human rights.[41] His famous attempt at combining human rights and popular sovereignty[42] bears witness to the insufficiency of an explanation for human rights as institutionalized norms which emerge on the grounds of rational discussion.[43] His discourse model is predicated so much on the philosophical presumptions about rationality that it remains confined to a wholly different terrain than the solutions sought after by contemporary scholars or those offered by Weimar scholarship, with the possible exception of Hans Kelsen. As we will see at the end of Chapter Three, Kelsen remained largely an outsider in terms of rights debates exactly due to his commitment to rationality and its implications for understanding law.

The judicialization of politics in old and new democracies and the role of scholars

Constitutional meaning is a contested but central element of political discourse in constitutional democracies: just who has (final) interpretive authority is a question both debated as well as fought out in practice among various actors among whom judges and scholars usually figure predominantly. Before assessing the literatures on the judicialization of politics from the point of view of the role of legal scholarship, let us turn to the concrete historical context of Germany to see how the posture of constitutional scholarship has been shaped over the centuries, in order to be able to appreciate the intricacies of the question of interpretive authority in general.

Rudolf Smend, one of the main protagonists of Weimar rights debates, characterized "the authority of constitutional scholarship in the great questions of public legal consciousness" in the span of the eighteenth and twentieth centuries with the image of a sinking curve.[44] Since one of our tasks will be to show how important a role constitutional scholars in Weimar Germany played in the matter of rights, it is useful to recall here as a contrast, the diverse postures scholars of this discipline cultivated in the various political regimes before 1919. This offers us a good starting point to describe the significance of studying scholars' role in general, and sets the stage for the upcoming analysis of this problem in the context of Weimar Germany.

The early nineteenth century was the age of political professors in Germany:[45] the teachers of public law at the German universities were also representatives in the various parliaments and counted as public figures. This in turn meant the politicization of universities underpinned by "much confidence and political hope invested in the spoken and written word."[46] As Michael Stolleis observed,[47]

> in the second half of the eighteenth and the beginning of the nineteenth centuries the majority of political discussions that appeared in print came from academic circles… The scholarly investigation of public law in the era before 1848 was to a large extent politicized … [S]cholars of constitutional law between 1815 and 1848 were naturally engaged as popular representatives… [and] appeared as representatives in the houses… They were convinced that they could bring about change by writing and speaking, and they felt that it was their duty to use their abilities for the common good. Politics involving the constitution was suddenly a matter of general interest and had found its forum in the territorial diets.

This was the epoch that prepared the revolutions of 1848-1849 intellectually and also the period during which the political demands of the middle classes were formulated in legal terms.[48] The revolutionary Frankfurt National Assembly too included among it most active members many professors, a good number of them university teachers of public law. The influence of the legally trained was especially great since they came to occupy the leading positions of the various committees.[49]

The failure of the revolution did not lead to a wholesale retreat from politics on the part of public law scholars,[50] but it certainly led to political disappointment and a departure from the political ideals dominant before 1848 as well as from idealism as a philosophy in general.[51] The legal method that gradually developed concentrated on the positive law, without regard to historical, philosophical or political elements or the context of a general constitutional teaching. Scholars found the greatest challenge in proving the very scientific nature of the discipline:[52] this required keeping a distance from the contemporary world and mimicking the methods and patterns of civil law. One had to shake off politics and seek to ground a public law *Konstruktionsjurisprudence* which was to proceed with unpolitical presentations of positive law.[53]

Legal positivism as a scholarly method was complete by the middle decades of the nineteenth century, especially in civil law. By purifying legal thinking from nonlegal elements, a perfect conceptual pyramid could be achieved which had served as a defense against political pressures and guaranteed legal security as well as the "scholarliness" and high social status of jurisprudence. The price at which this result came was the expulsion of

natural law, metaphysical legal justifications and theory in general from the legal disciplines:[54] "textbooks according to <<political-scientific methods>> continued to be written and consumed but the scholarly ideal <<of pure construction>> from a few coherent fundamental concepts had suddenly acquired a penetrating voice and had thus won a dominant position ... [which was] indeed a <<paradigm shift.>>"[55]

It has been fully demonstrated in recent literature that the positivist paradigm was loosening up already around the turn of the century.[56] The developments in various antipositivistic directions during the Weimar Republic[57] only reinforced already existing tendencies and in turn brought about both a radicalized, offensive version of positivism in the form of Hans Kelsen's "pure theory of the law" and a defensive one epitomized by Richard Thoma's methodological treaties from late Weimar.[58]

The question of what position professors of public law vindicated for their discipline in the democratic republic of Weimar Germany is usually not at the forefront of analysis in the literature on the Weimar Republic. When students of Weimar democracy write about scholars' positions outside the academia, they tend to concentrate on the immediate or overall political positions of public law scholars, especially in relation to the famous "*Methoden- und Richtungsstreit*" (debates on methods and directions) of the 1920s, or such epochal events in the history of Weimar Germany as the *Preußenschlag* of July 1932[59] and the very final months of governmental crisis.[60] The vast literature on the debates on methods[61] is more and more predicated upon associating antipositivists with antirepublican positions as a corrective to early post-World War II charges against positivism as the dominant legal theory which had delivered the Weimar state out to the Nazis by virtue of its formalism that offered no defense against the take over of power by the enemies of Weimar.[62] So after investigations of antidemocratic thought among antipositivist constitutional scholars,[63] now democratic thought among positivists is being studied.[64] There is also no shortage of counter-efforts at depicting this or that antipostivist as the defender of the constitution.[65]

It is important, however, to emphasize the difference between our approach and the usual focus on the pro- or antirepublican stances of public law professors and their corresponding positions in the *Methodenstreit*. The focus in this work will be on their constitutional theories whose reconstruction via their various fundamental rights theories proves more viable than any conjecture on their pro- or antirepublican standing. Weimar scholars positions on and practical involvements with various institutions, especially the courts, will form part of our investigations.

This very nexus of scholars and courts, however, is a perspective that is all but missing from the literature on the judicialization of politics in old and new democracies.

There is widespread consensus about the increased role of judges in democracies, old and new.[66] In contrast to the usual manner of imagining the lines of influence between old and new democracies, Kim Lane Scheppele, in a series of studies on the judicialization of politics in new democracies, has pointed out that it was in fact judicial activism in newly democratized countries that propelled already existing similar tendencies in old democracies:[67] the "centrality of aggressive constitutional review in democratic revival"[68] functioned as a challenge to courts in established democracies and thus contributed to the judicialization of their politics. Some of the new democracies have gone so far in shifting the balance of powers for the benefit of courts that coining the new term of "courtocracy" for the novel type of democratic political regime seemed justified.[69] The literature on judicialization of politics in new democracies is, however, itself a novelty against the background of traditional transition studies that had concentrated on finding the factors of democratic stability – or collapse. The field of political science literature that emerged in the 1970s to study the conditions of democratic consolidation (or collapse) initially focused on the comprehensive institutional design questions of presidentialism versus parliamentarism, the various electoral and party systems as well as on the less institutionalized matters of elites, political culture and civil society.[70] It was only fairly recently that the pendulum swung back to the institutional problem of the role of constitutional courts.

In the course of explaining the phenomena of a progressive judicialization of politics in democracies around the world, commentators have paid more or less close attention to the problem of how judicial activism is justified.[71] It is typically in studies dealing with this problem that we find traces of an interest in the question of the role of scholars. The theoretically most elaborate treatment of this problem is Alec Stone Sweets's recent summary of his earlier work in *Governing with Judges*. Beside offering a comprehensive account of constitutional politics in Europe, the book is aimed at working out the methods for understanding the process of "constructing constitutional law" as a complex political and social process, animated by three types of actors: litigants,[72] judges and scholars. Stone Sweet described the relationship between "constitutional adjudication and doctrinal activity" as

> pervasively symbiotic. Scholars need an authoritative, <<judicial>> interpreter of the constitutional law, to structure but also to give salience and urgency, to their own activities; and constitutional courts rely heavily on legal scholars to

> disseminate and explain their decisions to politicians, judges, the interested public, and, often enough, to the constitutional judges themselves.[73]

This symbiosis also had an effect on the "social power of public law scholars" that Stone Sweet's described as being "depend[ent] … on their capacity to insulate the law from the social world, and especially from <<politics>>." In the pursuit of their "corporate interests" scholars in turn legitimize the politics of judging, on Stone Sweet's account.[74] In spite of this promising theoretical framework, no analysis of concrete examples is given.[75] The major exception that remains in the literature on the judicialization of politics that treats the role of scholars as part of its analysis of concrete constitutional democracies is the work of Bernhard Schlink,[76] whose studies on postwar German constitutionalism, beside being exemplary, have a direct bearing on our investigations as well.

Before turning to Schlink's findings, however, we have another set of comments to survey in the context of judicial activism in new democracies: there is namely an acknowledgement in the literature of a rather special point of nexus between courts and scholars in that a good part of judges on the constitutional courts of new democracies, and incidentally of old ones as well, actually come from academia.[77] Although this point is widely made, the consequences of scholars sitting on the benches of constitutional courts are rarely explored any further. One of the most fruitful attempts at demonstrating the impact of the academic background of judges, including their ties with foreign academic circles, is a study by Georg Brunner and Herbert Küpper on Hungarian constitutional courts judges.[78] As one important element of the context of German influences on Hungarian constitutional law, the authors examine not only the decisions of the court but also the judges themselves: among both sets of judges who served on the court since its establishment in 1990, the dominance of former academics with civil law background and extensive connections with German academia is revealed and held accountable for much of the legal borrowing that had taken place.[79] But scholars remaining in the academia are not discussed by these authors either[80] – evidently only he who sits on the bench matters for most commentators.

The forerunner to our own analysis of Weimar constitutional scholarship then is Bernhard Schlink[81] who found that in the postwar German setting the theme of rights continued to be the major constitutional problem along which the relationship of courts and scholars can and ought to be studied.

Schlink focused his analysis on "the relationship between constitutional legal scholarship and constitutional judicial decision making" as the main characteristic of the

"constitutional culture" of the Bonn Republic .[82] He coined the term of “constitutional court positivism”[83] to describe post-war German constitutional jurisprudence which had been "entirely under the spell of the *Bundesverfassungsgericht*" for it had "obtain[ed] its material, ideas, and confirmation from the Court's decisions, and attempt[ed] to harmonize these decisions into a coherent doctrinal corpus ... think[ing] and work[ing] *in the wake of* the *Bundesverfassungsgericht*, rather than *ahead of it*."[84] By way of contrasting German constitutional jurisprudence historically with legal theory in other fields such as civil or administrative law which have all achieved "independence ... from their branches of the judiciary," he could show that unlike other legal disciplines, constitutional scholarship could not learn to be independent for "[t]here were no [judicial] authorities to balance" and thus went from being "the singular authority"[85] on constitutional matters until the end of the Weimar Republic to being the maid of the constitutional court under the *Grundgesetz*, the Basic Law serving as the constitution of the Federal Republic of Germany since 1949. Not surprisingly then, constitutional scholars are shown in Schlink's work not to have had much to do with the great transformation of German constitutional law since the 1950s in the matter of fundamental rights: the arguments for interpreting rights as objective principles rather than as subjective rights were put forth in decisions of the Constitutional Court, which scholarship "canonize[d]"[86] and elaborated upon. Scholars sought to "participate in [the] authority ... [of] the *Bundesverfassungsgericht* ... as a sort of junior partner" rather than act as a "critical opponent"[87] and point out that the transformation made "every social and political problem into a problem of fundamental rights," ranking the "function of ensuring individual freedom ... less important."[88]

The problem of fundamental rights offered the perfect terrain for Schlink to describe the role of constitutional scholarship in the Bonn Republic. He singled out the element of the discipline's relationship to the judiciary as cardinal to the role it has played historically, adding only briefly another point of view, that of "political practice" that constitutional jurisprudence "could explain but not guide, and to which it occasionally and openly capitulated."[89] As we will show, Weimar rights theories offered ways not only for scholars but also for judges to assess “political practice” too.

Postwar German jurisprudence and Weimar rights debates

The first part of the twentieth century was wrought with great political changes in Germany: leaving the monarchy behind, the country tried democracy twice (1919, 1949 in West Germany), both times after lost wars, interspersed with experiments of the two European totalitarian ideologies, communism and national socialism (1918, 1933, 1949 in East Germany). German political and legal thought too underwent great changes: if we compare its tenets at the beginning and at the end of this period, i.e. in 1900 and 1950, we are confronted with a scene whose contrasts cannot be more pronounced. We have positivism on the one hand, natural law on the other; adventures into empire with some democratic practice replaced by a humble democracy. Both democratic momentums brought rights to the fore but without the landslide changes that took place in the language of rights in the span of the short fourteen years between 1919 and 1933, strong rights and powerful courts would not have occurred as obvious candidates for the new democratic (west) German polity and its constitution in the immediate postwar years.[90] They are a testimony to Weimar constitutional scholarship's engagement with the rights provisions of the Weimar Constitution. Since nineteenth century German legal scholarship took rights, in short, for an essentially superfluous manifestation of the principle of the legality of administration and given that positivism remained the leading, if by no means the only, school of public law in the early twentieth century as well, the fate of rights in Weimar Germany was not at all determined to be bright. It took a varied group of non-positivist scholars to make rights important in Weimar Germany (and beyond), given that the courts remained reluctant to flesh out a comprehensive doctrine of rights, even if they had laid firm claim to reviewing legislation. An important thread of continuities between the Weimar and Bonn Republics in terms of constitutional thought rests on the rights arguments to be fleshed out in this work.

Although postwar German political consciousness has for a long time adhered firmly to the tenet that "Bonn is not Weimar," the fact of the matter is that there have been numerous statements made by commentators as well as by postwar German scholars and judges themselves acknowledging the influence of the debates of Weimar on those of Bonn. Most recently, however, the problem of Weimar influences has come more openly to the fore, including discussions in the area of constitutional thought.[91]

Former acknowledgements have of course been also disputed in an earlier version of *Vergangenheitsbewältingung* (coming to terms with the past). The survey below on the

threads of influence acknowledged by commentators or by the persons affected will thus be accompanied by their rejections, where applicable.

Probably the most widely noted set of Weimar influences concerns the adjudication of the *Bundesverfassungsgericht*, the Federal Constitutional Court of the Bonn Republic. The most prominent presence from among Weimar scholar is undoubtedly attributed to Rudolf Smend, by commentators and constitutional court judges likewise.[92] The very concrete presence and influence of another Weimar scholar is also pointed out by many: Gerhard Leibholz became namely a judge on the court.[93] Others note the influence of Hermann Heller and that of Carl Schmitt as well.[94]

Weimar influences are also pointed out by commentators on a number of constitutional scholars in the Bonn Republic. Peter Häberle, Friedrich Müller, Holger Ehmke, and Robert Alexy are said to have been profoundly informed largely by the same set of Weimar scholars who exerted an influence on the court as well: Rudolf Smend, Hermann Heller, and Carl Schmitt.[95]

The wider context of Weimar influences on Bonn scholars has been a contested terrain. Nevertheless, the overall influence of Carl Schmitt on critical theory, party by the personal presence of his students Otto Kirchheimer and Franz Neumann, has been established.[96] Amidst heavy dispute, Ellen Kennedy has shown in detail Jürgen Habermas's own debts as well as those of the Frankfurt School towards Carl Schmitt.[97]

In spite of such widespread acknowledgement of Weimar influences and continuities in postwar German constitutional jurisprudence and scholarship, including the language of rights, no truly comprehensive or monographic treatment of Weimar scholars' rights theories is available as of today – a gap the present work intends to fill in.

Manfred Friedrich, in his *History of German Constitutional Scholarship* from 1997, noted that "a comprehensive recent account of the fundamental rights discussions in the Weimar Republic is missing."[98] Since then important contributions have been made, chiefly in the field of legal history, but they were all fit into much larger projects and therefore could not devote more to assessing Weimar rights debates in their complexity than a fraction of their works, typically only a few pages.

Beginning with Friedrich's own history of the discipline, we find a short discussion of rights debates offering a sketch of three of the main positions (those of Carl Schmitt, Richard Thoma and Rudolf Smend)[99] and connecting them to debates on judicial review and the powers of legislation.[100] The reason for Friedrich's excessively concise and selective

treatment of debates might have been the admitted interest in their "not wholly broken off connection with contemporary constitutional law discussions."[101]

The seminal series of the three volumes by Michael Stolleis on the *History of Public Law in Germany*[102] contain an important section on rights in volume three on *Public and Administrative Law in the Republic and Dictatorship, 1914-1945*. Written in an original style combining grandiose overview, the passing of judgement and commitment to encyclopedic bibliographical apparatus, Stolleis selected to discuss rights as one of the "main topics of constitutional interpretation."[103] Given that the nature of his project was aimed at assessing public law and its scholarship in the period 1914-1945 comprehensively, he confined discussion on rights debates to a mere three pages, with an additional few devoted to it elsewhere.[104] One of his main arguments was that rights discussions were intimately intertwined with the debate on the methods of constitutional scholarship and consequently with political developments.[105] He suggested that only after the crisis years following the end of the war in 1919 did interest in rights really first arose. As a consequence, between 1923 and 1930, rights were "invented and systematized" by scholars like Gerhard Anschütz, Richard Thoma and Carl Schmitt.[106] Also mentioned by Stolleis was the process of "rights optimization" carried out in the settings of the 1926 and 1927 meetings of the Association of German Professors of Constitutional Law and in the collective commentary on rights.[107] Rights in the last phase of the Weimar Republic from early 1930 to early 1933, „if … given any attention any more," were used against emergency decrees.[108] As we will see in Chapters Three and Four, the reconstruction of rights debates based on all rights contributions by scholars who offered a theory of rights in Weimar does outline a dynamic of rights discussion but one that is very different from that which emerges from Stolleis's three pages: both the early and the late Weimar years have namely their own rights protagonists as well as opponents and a much livelier debate than Stolleis's description would suggest. Stolleis's point that the political context played a decisive role in the "scientific boom"[109] of rights is of course well taken, but Weimar scholars rights positions have in fact shown a greater variety than the "threefold [political] meaning" Stolleis attributed to the "history of rights theory in Weimar times." The three rights approaches he distinguished among were: 1. "liberal, individualistic countermovement against overwhelming collectivist forces," 2. "conservative protection of the status quo … against egalitarian distribution imposed by mass society," and 3. "political arms [in the fight] … in the name of freedom against the <<system>> [of the Weimar Republic] as such."[110]

Similarly to Stolleis, other scholars too placed Weimar rights discussions in the context of the debate on the methods of the discipline. Knut Wolfgang Nörr argued that Weimar scholars rights theories can be understood as a function of the *Methodenstreit* in his history of Weimar private law and stressed that it was constitutional scholars, as opposed to judges, who delivered theoretical work on rights.[111] Klaus Kröger proceeded similarly in his survey, *The Development of Fundamental Rights in Germany: From the Beginnings to the Present*,[112] stressing both the point that scholars, not judges made rights important in Weimar[113] as well as the significance of various methodological directions for rights positions.[114] His short survey of about a hundred pages devoted less then twenty to Weimar debates and was thus forced to treat rights contributions highly selectively.

Taking methodological differences among scholars as his starting point of a strikingly comprehensive and profound analysis of Weimar constitutional theory,[115] Peter Caldwell took a different stance on how to present rights debates. He chose to intertwine his discussion of scholar's contributions with a hitherto unprecedented analysis in English of the jurisprudence of the high courts in Weimar.[116] He did not contest the evaluation advanced in the literatures discussed above to the effect that it was rather scholars than judges who fleshed out the problem of rights in a systematic manner in the Weimar Republic.[117] In fact, he explicitly acknowledged the influence of some scholars on the courts.[118] Trying to find the balance between talking about practice and theory, he was nevertheless able to present a series of important court decisions on two of the most hotly debated constitutional provisions, equality and property, in a manner that allowed for a thorough analysis of related scholarly contributions, at least as far as equality and property were concerned. In other parts of his study, Caldwell assessed the rudiments of the rights theories of scholars such as Rudolf Smend and Hermann Heller, but not e.g. that of Carl Schmitt whose constitutional thought he also discussed, but did so by concentrating on an agenda of his own that led to misunderstandings of Schmitt's position.[119]

In contrast to Caldwell's overarching theme of the "crisis" of the discipline, which he associated with "the failure of a particular conception of constitutional democracy to gain hegemony over political life," our analysis will take the plurality of approaches in constitutional thought and rights theories to be a virtue and concentrate on the creativity of Weimar scholarship as a collective achievement.

In a series of works in the field of legal history, Christoph Gusy has analyzed Weimar constitutional law and theory in a comprehensive manner. Most recently, he presented a systematic treatment of the Weimar constitution, a work that comes close to being a

commentary on the Weimar Constitution, offered to it posthumously in the interest of *Vergangenheitsbewältigung*.[120] Although he explicitly designated his work as a complementary volume to Stolleis's third volume dealing with constitutional scholarship proper,[121] Gusy nevertheless offered what until now remains perhaps the most comprehensive summary of issues in and contributions to Weimar rights debates. Before his "posthumous commentary," Gusy had also offered earlier thematic assessments of Weimar constitutional scholarship's achievements in areas such as political parties and judicial review.[122]

About rights, Gusy included a separate chapter in his systematic legal history of the Weimar constitution but given that he did not aspire to deliver an analysis of rights theories as well, he devoted less than five pages to advancing a threefold typology of rights conceptions among Weimar constitutional scholars. He distinguished among rights optimizing, institutional guarantee and value centered approached (personified by Richard Thoma, Martin Wolff and Rudolf Smend) and evaluated the tendencies in scholars' thinking as manifesting an "increasing significance of objective legal frameworks ... as opposed to an abating importance of individual rights theories."[123] In the "commentary" part of his work, Gusy included a detailed treatment of the major fundamental rights of the Weimar constitution (such as equality, personal freedom, rights and duties in the society, religion, education, schools, economic and social order),[124] systematically reviewed the relevant scholarly publications and connected substantial rights themes to the separation of powers problem of judicial review and the limits of legislative powers.[125]

Our reconstruction of rights debates proceeds in a similarly systematic way: the aim is to assess all rights contributions, though not by particular constitutional provisions, rather by the main protagonists of rights debates. This will allow for a presentation not only of rights positions but also of overall constitutional theories, as well as of a dynamic of debates in various institutional settings.

As we have seen so far, although widely appreciated by commentators as one of the most interesting and central topics of Weimar constitutional debates, rights discussions have not yet received the type of separate thematical treatment as did the problems of judicial review or that of political parties,[126] or the intriguing matter of the *Methodenstreit* for that matter.[127] In the course of presenting our reconstruction of Weimar rights theories in Chapters Three and Four, we will rely on the dimensions that substantially distinguished scholars' rights positions. Beyond the central theoretical divide that set scholars who theorized rights in individual terms apart from those who embraced the perspective of the political community, we will also rely on the equally crucial dimension of separation of powers positions, in

particular scholars' endorsement or rejection of judicial review by the regular courts. Finally, our investigations will be organized by an effort to circumscribe the two models of constitutional interpretation that Weimar rights debates reveal: the Association of German Professor of Constitutional Law and the collective commentaries on the Weimar Constituition both granted scholars essential, but very different roles in the life of the constitutional democratic regime of Weimar Germany.

CHAPTER ONE: A NEW DEMOCRACY IN CRISIS

The newly constituted democracy of the Weimar Republic had to live under the most severe circumstances, as this chapter aims to show. Nevertheless, one is well advised against subscribing to the kind of understanding of its history which deems its eventual collapse inevitable. While grievous and demanding, the conditions caused by military defeat, a humiliating peace, and later on hyperinflation, economic distress and a particularly bellicose political culture should all be looked upon first of all as testing the endurance of the regime. This is where a more general lesson is involved in studying Weimar Germany's lot since such conditions, or at least a combination of some of them, can be expected to beset other constitutional democracies as a normal course of affairs. (We surely cannot hold that such regimes are meant only for prosperous and wholly peaceful times.) At the same time, the series of crises that the republic went through lent the kind of intensity to politics which probed the regime's capacities and limits, including the political wit and imagination of its leaders, citizens – and constitutional scholars whose creative responses shall be discussed in chapters three and four.

Constituting a republic in the wake of military defeat and revolution: the main constitutional institutions of the new German Republic, and the practice of emergency legislation and judicial review

The collapse of the monarchy in 1918 in the aftermath of military defeat in World War I, including the pressure exerted by the victorious powers, did not simply open the path for a democratic reconstruction of Germany.[128] The former *Kaiserreich* drifted in two directions that made the eventual outcome of a unified (if federal) parliamentary republic an unlikely winner in late 1918. After Soviet pattern, a nationwide system of councils was successfully created as the result of the November revolution of soldiers and workers, and separatist tendencies came to pose real threat to the integrity of the federation forged by Bismarck in 1871. That a firm direction towards a tightly bound republic was set could largely be attributed to the decision of interim chancellor Friedrich Ebert. He enjoyed the trust both of councils as well as the military and bourgeoisie, and was thus in a position to steer the country onto a course whose concrete contours were outlined by another mediating personality in political terms: Interior Ministry State Secretary Hugo Preuss. Preuss was commissioned by Ebert to draft the constitution of the would-be republic to be discussed and ratified by a

constitutional assembly. The assembly simultaneously acted as the sovereign governing body of the country after the end of the rule of councils and before the new republican institutions started to operate.

The new republic was born into most critical times: World War I claimed 10 million dead and 20 million wounded out of which horrific numbers Germany had to reckon with 2 million dead, 4 million disabled as well as 8 million veteran soldiers who had to be returned home (3.5 million of them beyond the Rhine as the November 1918 armistice prescribed it), demobilized and returned not only to peace time economy but also to everyday life, which turned out to be as difficult as getting the economy running again. The experience of trench warfare, famine in the hinterland coupled with the continuous pressure to provide food, shelter, and coal was of greatest challenge to citizens and governments alike. It was no wonder then that in the turbulent days of early November 1918, the kings, archdukes and dukes of the German states abdicated without resistance, and well before the *Kaiser* did so. The king of Saxony told the delegation of workers' and soldiers' councils that came to ask him to step down: "Well, all right, you can take care of the mess yourselves."[129]

In the course of the seven months between February and August 1919, when council rule had already been superseded and the Constitutional Assembly was sitting in the well protected and thus peaceful city of Weimar, political murders, armed fighting and uprisings had still been the order of the day in the rest of the country, making the provision of security as urgent as any other kind of provision. The Assembly's governments and federal president Friedrich Ebert (elected by the Assembly in February 1919) all had to make extensive use of their powers to counter the vicissitude which in moral terms was greatly augmented by the terms of the peace treaty that the victors imposed on Germany. Beside assigning all guilt for the war to her, Germany under the Treaty of Versailles was also to pay heavy reparations, disarm most of her military, demilitarize the Rhineland and accept significant losses of territory.

Germany[130] remained a federation as a result of the decisions of the Weimar National Assembly which extended to minor reshuffling of territories, bringing the number of member states to twenty-six, but left intact as the largest and most populous among them: the state of Prussia. Prussia thereby lost the constitutionally dominant position[131] it had enjoyed in the *Kaiserreich* but retained its political preeminence due to its size and its location as the site of the capital, Berlin which gave home to most of the federal constitutional institutions as well.

Political powers were divided between the *Reich* (federation) and *Länder* (states), securing exclusive federal power over foreign policy, citizenship matters, defense, money

issuing, customs and the post. Powers shared by the federation and the states extended over the legal fields of civil, criminal and procedural law, social policy, the regulation of the press, expropriation, industry, mining and the railroads. The resulting dominance of the *Reich* was indicated by the hierarchy in the sources of the law: the Weimar Constitution stood above all federal statutes (*Reichsgesetze*) which in turn were placed above the decrees of the Federal President (*Reichspräsident*), the federal government (*Reichsregierung*) and its ministers. The constitutions of the member states came next in order, followed by the statutes and decrees issued by state legislations and governments.

We will concentrate almost exclusively on the federal level in terms of the *Reich's* legislative, executive and judicial powers, for this was the immediate institutional context for the fundamental rights of the federal constitution. The *Reich* legislation was composed of two chambers: the federal assembly or parliament (*Reichstag*) was elected under an electoral system of radical proportional representation which polarized the party system and required coalition governments put be together of three to four parties. After the first federal elections were held in 1920, cabinets were supposed be in office for four years but no Weimar government served a full term of office for they were all dissolved by the federal president (*Reichspräsident*), which required ultimately that a total of six federal elections had to be held until the end of 1932.[132]

The members of the federal council (*Reichsrat*) were delegated by the states and in contrast to the *Kaiserreich*, the federal government was responsible not to this body, but to the Reichstag which reinforced the dominance of the *Reich* over *Länder*.

The federal president was supposed to be elected directly by the people for seven years, the first president's, Friedrich Ebert's mandate being conferred by the National Assembly. After his death, fieldmarshal and hero of World War I, Paul von Hindenburg won the presidential elections of 1925 and 1932. In their capacity as one of the main actors in times of crisis (according to Art. 48 of the constitution), both Ebert and Hindenburg developed the presidency into a counterweight to parliament and the central power of the executive. As representative of the *Reich* in foreign relations, the president was also commander in chief of all armed forces, appointed its staff as well as the members of the *Reich* civil service. The government of the *Reich* was also appointed by the president whose main function was to find a chancellor who could build a majority government.

The federal and state civil service of the Weimar Republic made up a unified body in so far as only federal legislation and the Weimar Constitution could regulate the institution of an independent, neutral and professional public administration, as well as the status of other

federal, state and local employees.[133] University professors, for instance, were employees of the educational ministries of the various states which gave rise to the question of implications for the constitutional views they could present in their capacity as university teachers, a problem to which we turn later on in reconstructing rights debates.

The courts of Weimar Germany were concentrated in the states with two kinds of local courts and the appellate courts (*Oberlandesgerichte*) located in the various states. Weimar Germany's main federal court, the *Reichsgericht* had its seat in Leipzig and served as the supreme court of the regular court system and included, respectively housed other federal courts such as the federal financial and economic courts or the federal labor court, and a special court for constitutional matters called the *Staatsgerichtshof*.

The practice of these constitutional institutions during the short fourteen years of the republic's existence was far from firmly established or settled. Two crucial tendencies need to be reviewed at the outset for the purposes of our discussion of rights debates. Both the experience of rule with emergency or extraordinary powers (to which I will refer later on as emergency government) and the gradually changing face of the jurisprudence of the courts were of immediate significance to constitutional scholars' conceptions of rights as well as of their own roles in the Weimar Republic.

Two crisis periods build something like an arch over the more peaceful years of the mid-1920s. Emergency measures of various kinds were employed both in early Weimar (1919-23/24) as well as in late Weimar (1930-33).[134] In the aftermath of World War I, violent uprisings, masses of returning solders, a war economy, and a severe hyperinflation all had to be brought under control, the situation being worsened by a humiliating peace, reparations and by other factors such as the occupation of the Ruhr region by French and Belgian troops in 1923. On the other end of the arch framing the republic in crisis stood the 1929 collapse of New York stock exchange and the subsequent withdrawal of American capital from Germany which resulted in a collapse of public finances and almost six million unemployed, leading to disturbances and violence on extreme left and right. During these two crisis periods of Weimar Germany, substantial bodies of emergency legislation were enacted under emergency government activity that was characterized by fundamental similarities as well as major differences. The essential continuity[135] across the two crisis periods was that the presidents, Friedrich Ebert (1919-25) and Paul von Hindenburg (1925-34), both made extensive use of their "dictatorial" powers, whereas the main difference between the two crises lay in the fact that in the immediate aftermath of the war, the instrument of war time emergency legislation was retained.[136] On five occasions were enabling laws issued by parliament in early Weimar

that empowered incumbent governments to issue decrees (if necessary with the force of law[137]): in this way, governments made attempts to resolve the problems of transforming the war economy, the system of social security and public finances and made changes in the administration of justice. On one occasion in 1923, an enabling law specifically sought to empower the Stresemann government to issue decrees that could "disregard the fundamental rights of the constitution" and in contrast to all other enabling laws, did not require the consent of even a committee of parliament for its actions.[138] Albeit some of the emergency decrees issued at the end of 1923 were subsequently withdrawn by legislation, the measures implemented had been judged as successful in dealing with the challenges of post-war economic distress and hyperinflation. In contrast to the crisis of early Weimar, during the crisis period of 1930-33 in late Weimar, there were no enabling laws enacted due to the lack of legislative majority that could have decided to have recourse to this instrument again.[139] The next occasion on which an enabling law was enacted came on March 24, 1933, which many see as the real milestone in the National Socialist takeover of power, for it enabled the government to issue federal statutes, and with a content amending the constitution at that.[140]

The common feature of the two crisis periods of the Weimar Republic was thus the use of emergency powers by the presidents. Both of them had recourse to federal execution (Art. 48 (1) of the constitution): President Ebert employed it against Thüringen (twice in 1920) and Saxony (1923), whereas President Hindenburg made use of this power against Prussia in mid-1932.[141]

The presidential power to issue decrees to "restore public safety and order" (Art. 48 (2) of the constitution) came to cover economic and financial matters as well starting in 1923. President Ebert issued a total of 135 emergency decrees in fields such as finances (e.g. to stabilize the currency and simplify the procedure of levying taxes), court procedure and criminal law, and took various measures against disruptions of public order by increasing the penalties for various crimes. In this latter area, President Hindenburg too had to be active and issued decrees in the period of 1930-33 e.g. against "political terror" or the abuse of weapons and modified thereby the law of the police, criminal and procedural law.[142] Under the so called "presidential governments," complete courses of economic policy were enacted in the form of presidential emergency decrees: so e.g. in the framework of Chancellor Brüning's "policy of deflation," the first great emergency decree from July 1930 regulated various elements of the state budget such as social security (unemployment and health insurance benefits), a number of taxes such as the personal income tax, local taxes and the tobacco tax, and acted on market prices (i.e. against cartels). Among President Hindenburg's altogether

109 emergency decrees the ones on economic and financial restriction brought about intensive criticism and were opposed in parliament as well on the grounds that they went beyond tackling the immediate crisis and regulated additional questions in the form of emergency decrees beside the ones related to the crisis. President Hindenburg and the governments of the period, however, pointed to a breakdown in legislation and the unwillingness of the parties to govern, which only added to the crisis and required that Art. 48 (2) be employed as a quasi enabling law under which also the crisis of legislation could be remedied.[143]

The two periods of rule by presidential emergency decrees brought along extensive restrictions in or even the suspension of fundamental rights.[144] Seven rights could be suspended according to Art. 48 (2) and were duly included under several decrees of both crisis periods: the freedom of the person and home, secrecy of mail and post, freedom of expression, including that of the press, freedom of assembly, association, and the right to property. In concrete individual cases of regulation, further fundamental rights were also violated by way of the status of emergency decrees counting as statutes which, as we will see later on, were understood as being capable of, above all, substantiating and, thereby, possibly also restricting certain fundamental rights. Such restrictions were realized e.g. by way of instituting special courts (*Sondergerichte*) which violated the guarantee of court procedure (Art. 105), or when businesses were closed (Art. 151) or coerced to conclude forced contracts (Art. 152).[145]

We turn now to the courts of Weimar Germany whose praxis was no less contingent on the immediate political context than the above practices. The Weimar courts exercised control over legislative and executive bodies in three ways. Judicial review by the regular courts (*richterliches Prüfungsrecht*) was a highly controversial matter, in contrast to the traditional praxis of administrative courts (*Verwaltungsgerichtsbarkeit*), and the praxis of the newly established *Staatsgerichtshof* whose jurisdiction came to be referred to as constitutional adjudication (*Verfassungsgerichtsbarkeit*).[146]

The review of statutes for their constitutionality was a power that the highest regular court of Weimar Germany, the *Reichsgericht* claimed for itself quite early on: already in 1921 reference was made to the "review of formal and material legality of laws and ordinances" and to the fundamental rights of the constitution as "sacred to the German people" but no decision was based on either of these statements.[147] The next milestone in the usurpation of this jurisdiction came in the form of a communiqué issued by the Association of Judges of the Reichsgericht (*Richterverein beim Reichsgericht*) in January 1924,[148] where judges spoke out

against current plans of the government not to include mortgages in its revalorization policy which they deemed as a violation of the principles of trust and good faith beside the right to property and equality.[149] When the policy (in a somewhat modified form) was put in place in July 1924, the *Reichsgericht* seized the opportunity and delivered a definitive judgement whose reasoning claimed without any reservations a right to review the piece of legislation at hand "for the constitution itself contain[ed] no regulations that would [have] den[ied] judges the right to review ... and would [have] transfer[ed] it to any other organ."[150] The statute itself was upheld after the court completed its constitutional review but the practical significance of the case was that it had firmly established the right of courts in Weimar Germany to review statutes for their constitutionality, after other high courts such as the *Reichsfinanzhof* or the *Reichsvesorgungsgericht* had tentatively experiment with the idea.[151]

Especially significant was the practice of the *Reichsgericht* in the matter a number of fundamental rights:[152] the various rights of civil servants were protected against legislation and government[153] and the positions of the churches and schools were guarded against attempts at altering the status quo dating from the *Kaiserreich*.[154] In contrast, organizations of employers and employees were not deemed in the court's praxis as constitutionally significant,[155] whereas a comprehensively conceived version of property was rigorously protected.[156] Important as these particular fields of adjudication were, decisive for the issues we will be discussing later on was that fact *that* the *Reichsgericht* established itself as a factor in constitutional interpretation and as a counterweight to legislation.

A system of administrative courts was prescribed in Art. 107 of the Weimar Constitution "for the protection of individuals against decrees and orders of the administrative authorities." Such courts had already existed in the various states but a central high administrative court for the Reich (*Reichsverwaltungsgericht*) was never introduced in the Weimar Republic.[157] A number of special federal administrative courts of last instance and a series of highest offices in the hierarchy of the administration were designated to adjudicate cases[158] but a unifying stance and especially a strong voice in judging the praxis of federal administration was missing. The highest administrative courts in the states (especially e.g. the Prussian *Oberverwaltungsgericht*) were the most active in setting boundaries to the administrative decisions of the executives in their own states and contributed thereby to a conceptualization of the fundamental rights of the Weimar constitution as subjective public rights.[159]

The constitutional jurisdiction of the *Staatsgerichtshof*, headed by the president of the *Reichsgericht* and composed of a varied body of members according to the type of the case at

hand,[160] extended over conflicts between "constitutional factors" such as the federal and state governments and legislations as well as political parties, parliamentary factions, or individual representatives and in certain cases even religious communities or the organizations of local communities.[161] Individual constitutional complaints could not be introduced to the *Staatgerichtshof* except on the state level e.g. in Bavaria, where citizens could claim before the *Landesstaatsgerichtshof* their rights granted in the Bavarian constitution.[162] The praxis of the federal *Staatsgerichtshof* sitting in Leipzig in the building of the *Reichsgericht*, except for one single case, was not as significant as the jurisprudence of the regular and administrative courts. Unlike its praxis, the scholarly debate it gave rise to on the prospects of "constitutional courts" became very important in Weimar and beyond, a matter that belongs to our discussion in Chapter Three.[163] The one truly great case that was adjudicated by the *Staatsgerichtshof* arose as a result of the upheaval of later Weimar and was handed down in October 1932: in the process of Prussia contra *Reich*, some of the best constitutional scholars came to the fore with arguments that concerned mainly the emergency powers of the president as discussed above.[164]

Emergency government in the post-war economic and security crisis and the response of the courts

Early Weimar history is marked by the sign of crisis: the ordeals induced in the immediate aftermath of the lost war soon came to appear as readily surpassable in the light of the rapidly deteriorating condition of the currency. After almost a decade of inflation pressure on the war and post-war economy,[165] in 1923 a most devastating hyperinflation set in whose development governments for quite some time did not in earnest hurry to halt. The growing inflation wiped out not only the state's war credits, which was a vital relief after losing a war that was financed by loans, but also raised the prospect of being able to pay reparations in worthless money and thus avoid at least some of the damage caused by the retaliation of the Versailles Treaty. Such hopes were soon disappointed and the country had to reckon with the enormous social damages caused by hyperinflation: the savings of the middle classes were gradually also wiped out and the thrift of generations of small investors turned into nothing. Furthermore, as the inflation spiraled in the course of the year 1923, not only wealth but income too lost its value. So even those workers from the masses of veterans who entered the labor market in the course of demobilization after the war and were able to find jobs, now saw their very wages turn into a heap of worthless banknotes.

The hyperinflation was ultimately halted in November 1923 by a currency reform that introduced the *Rentenmark*. But the crisis of hyperinflation immediately turned into the crisis of stabilization:[166] although the stabilization policies implemented did ultimately result in a functional and rather soon in a growing economy, fiscal discipline and economic stability came at a high price. A series of deflatory measures were implemented such as massive dismissals in the civil service and among public employees, restriction on credits, and the suspension of the eight hour workday, all of which led to a sharp increase in unemployment. Other measures too caused grave discontent among citizens: after having adhered to the maxim "a mark equals a mark," and having forced creditors to accept inflated paper money in return for the good old gold Mark in which loans had been taken out, the policy to revaluate old assets and mortgages at only 15 percent of their original value (increased later to 25 percent) very much outraged pensioners and small investors. Many of them abandoned all hopes of convincing the parliamentary parties to bring about change in this decision and defected to form their own, narrowly interest based organizations, such as the Association of Mortagees and Savers and later the Revalorization and Construction Party, not to be confused with the Revalorization and Reconstruction Party.[167] The Third Emergency Tax Decree of 24 February 1924 in which the initial round of revaluation measures were enacted also postponed all public liabilities until after pending war reparations had been cleared.

Not only revaluation but also all other major policies since the end of the war had been carried out by emergency decrees enacted under the power of either enabling laws or the presidential emergency authority provided by Art. 48 (2) of the Constitution. Parliament thus had no role to play in devising these policies, and it also refrained from serious criticism whose strongest form could have been the revocation either of enabling laws or of measures taken under Art. 48 authority. Emergency government did not, however, go uncriticized in early Weimar. Various federal courts began to assert themselves as factors of constitutional interpretation and thus acted as counterweights, as we had already seen in an overview of judicial practice above.[168] The economic stabilization policies of the early 1920s precipitated a wave of activism among judges. Already on November 28, 1923, the *Reichsgericht* opposed the principle of "a mark equals a mark" that government insisted on and thereby denied any disctinction between gold mark transactions dating from before the war and those made in the inflated paper mark of 1922-1923.[169] The court found such practices to be in conflict with the civil code's principle of "trust and good faith," which in turn required measures to settle revaluation claims. The Third Emergency Tax Decree of February 24, 1924 as well as the Revaluation Law of July 16, 1925 were supposed to respond to the policy expectations of the

court, and were ultimately upheld as constitutional in a decision of the *Reichsgericht* from November 4, 1925. That the court reviewed revaluation measures under the auspices of the right to equality was the real pinnacle of judicial activism in early Weimar, partly also because the review was accompanied with constitutional arguments as to why the court could dispose over the power of reviewing in the first place: their reasoning was based on the insight that "the constitution itself contain[ed] no regulations that would [have] den[ied] judges the right to review ... and would [have] transfer[ed] it to any other organ."[170] Two incidents had already anticipated the full assertion of judicial review by the *Reichsgericht* in 1925: the Judges Association of the Reichsgericht had already warned in a letter of January 8, 1924 that the court would not only review the planned currency revaluation measures on substantial grounds such as the right to property and examine the possibility of "unconstitutional expropriation"[171] but would also strike down parts of it if the current draft would go into effect.[172] The president of the *Reichsgericht*, Walter Simons,[173] on a more general note pointed out in a letter he had sent confidentially to the Ministry of Justice on May 30, 1925 that modeling his court's powers after those of the U.S. Supreme Court would be for the benefit of Germany since a strong *Reichsgericht* could fulfill the function of a "necessary counterweight" in a democracy.[174]

Beside enduring a series of economic crises, the early Weimar Republic's public security and territorial integrity was also brought into peril. It terms of the latter, an Allied intervention was imminent since the end of the war given disagreements over the reparations provisions of the Treaty of Versailles. Still, when French and Belgian troops occupied the Ruhr area, Germany's industrial heartland, in January 1923, it came as a shock to the country and elicited a unified public and governmental response of passive resistance. Provisions for the inactive population during the eight months of passive resistance until August 1923 put extra pressure on an already overstrained economy but the trauma of foreign troops on German soil and the country's manifest vulnerability was of greater account. The reparations question came to a stillpoint in the so called Dawes Plan agreed upon in early 1924.

Peace was not secured internally either: it was stirred up by a series of violent general strikes and the threat of insurrection from left and right between 1919 and 1923. Separatist attempts were also rampant in this period, above all in the Rhineland cities of Bonn, Düsseldorf, Aachen and Koblenz. There were leftist coup attempts in Hamburg, Saxony and Thuringia and a rightist coup was attempted in Bavaria on November 9, 1923: the Beer Hall Putsch led by Adolf Hitler and General Ludendorff failed miserably just like all the other attempts did but their compound effect was to greatly aggravate a sense of unrest throughout

the country. Political assassinations too reinforced such feelings: in August 1921 Mattias Erzberger, a Catholic Centrum Party politician, was murdered by radical nationalists and in June 1922, the foreign minister Walter Rathenau was shot dead, again by right wing extremists.

These times of economic and security unrest gave rise to an early development of the doctrine of presidential powers:[175] as we had seen, President Ebert backed emergency government measures in the hyperinflation and stabilization crises under the presidential authority of Art. 48 (2). He also used his powers under Art. 48 (1) and employed federal execution against Saxony and Thuringia in 1920, and against Thuringia again in 1923. The next time this presidential power would be used came along in 1932 in the famous case of Reich vs Prussia, implemented this time by President Hindenburg, to which we come back later.

Only after the painful effects of harsh stabilization made themselves felt, did real consolidation and economic revival set in, starting in about May 1924. The influx of foreign, primarily American, capital and loans were able to fuel the economy, generating a rise in real wages and a decline in unemployment. Political unrest too had ceased and a sense of peacefulness was reconqured. A period of relative prosperity and stability commenced in the year 1924 and lasted until the Great Depression of 1929.

Consolidation at home and on the international scene: parliamentary party government during the "golden twenties"

The sense of stability and normalcy that followed the economic and security crises of the early 1920s was substantially reinforced by a foreign policy climate that appeared much more favorable compared to the harshness of the Treaty of Versailles and the trauma of Allied occupation of the Ruhr. Although the latter was terminated only as late as June 1930, a number of major foreign policy breakthroughs had been accomplished in the meantime: the Dawes Plan of September 1924 brought some certainty on the reparations question which was to be revised in August 1929 in the Young Plan that drastically reduced reparations and granted Germany full responsibility over her finances which were earlier partially under Allied control. Beyond reparations, two important stages of consolidation were also achieved: the Treaty of Locarno signed in December 1925 paved the path to Germany's acceptance into the League of Nations in September 1926. Until the stock market crash of October 24, 1929 on Wall Street which precipitated world wide economic depression that hit Germany

especially hard, the country was faring well under propitious international conditions.

Nevertheless, already by 1928, signs of destabilization were gathering with respect to the very parliamentary regime[176] that had managed to survive the economic tribulations of the postwar, hyperinflation and harsh stabilization periods and was able to control a number of situations verging on civil war. Usually recounted as a certain sign of crisis, voter dissatisfaction with and defection from the traditional conservative, liberal and socialist parties occurred promptly in the wake of the various crises of the early 1920s with which most of these parties were associated as government members. These tendencies were already palpable in the inflation elections of May 1924 that had seen the rise of splinter parties: together, they already disposed over 10% of the total vote at that time. Their strength continued to grow and the number of parties and other organizations running in the elections proliferated due to a radical version of proportional representation that granted every sixty thousand votes a seat in the Reichstag, offering thus enormous incentives for any small organization to try themselves out in the elections. Beside special interest and regional parties, highly ideological small parties, such as the NSDAP (National Socialist Workers' Party) emerged on the periphery of electoral politics with highly fluctuating constituencies. It was arguably the dreadfully successful strategy of gradually integrating votes of protest into the Nazi constituency in the 1930s that sealed the fate of the hitherto highly polarized and therefore largely dysfunctional party and parliamentary system of the 1920s.

Beside the hard facts and numbers reflected in the results of electoral politics, there was another set of features that greatly contributed to the impoverishment of Weimar parliamentarism.[177] We had already seen that parliament and therefore the political parties did not really take an active role in managing the crises of the early 1920, even if voters punished them for being merely close to where the decisions were made, namely in the various emergency governments of this period that had carried out their policies either under the authority of enabling laws or that of the president's so called dictatorial powers. This decidedly restrained posture of the parties, which came across as an unwillingness to assume responsibility, was coupled with a widespread public sentiment of aversion, distrust, and outright disdain towards party politics, fueled to a great extent by the non-party like participants of electoral politics – and in some cases, even by some of the parties themselves. The chief alternative to seeing parties standing in the focal point of politics was to employ the language of professions (*Beruf*)[178] and imagine the apparent political pluralism along some corporatist lines which transcended parties and brought the last piece of people's sense of security, namely their profession, to bear directly on politics. Together with the parties, the

party state (*Parteienstaat*) too was loathed, making it increasingly difficult for parliamentary majorities to face up to the next round of economic and security crises that commenced with the Great Depression of late 1929.

Presidential government in the economic and security crisis of 1929-1933 and the collapse of Weimar democracy

Although the two crisis periods that framed the short history of the Weimar Republic had very different backgrounds, the strain they both put on the regime was rather similar: emergency governments in both early and late Weimar had to face formidable economic challenges as well as grave threats to public security. The stringent measures invited by such conditions were implemented via emergency decrees by late Weimar's presidential emergency governments, leaving behind the means of enabling laws that had used to be a complementary source of emergency government in the early 1920s.

The collapse of the New York Stock Exchange in the fall of 1929 triggered the Great Depression which dawned on Germany already by early 1930:[179] industrial production had fallen to three quarters of its 1928 level (and continued to fall to a half by 1932), business bankruptcies increased and unemployment rose to over 30% draining the fund which had financed unemployment benefits since it had been proudly installed in 1927. An increasingly unbalanced budget and rise in government debt were the immediate consequences of the onset of depression: it seemed to be inevitable that deficit would rise sharply in the wake of a rapidly declining economy.

Nevertheless, the story of collapse, as it actually came about in 1933, was not a one-way-street process after the stock market had crashed on Wall Street. The Republic was so much not doomed to failure that in the periods of distinct improvement, not only domestic but also international expectations run high as to Germany's (or at least its economy's) ability to overcome the severe recession. It was thus not the Great Depression itself and the constraints it imposed on German politics but the opportunities it provided to political actors that brought about failure which ultimately depended on the decisions of an increasingly narrowing circle of persons, with President Hindenburg, now more than eighty five years old, being the central actor in all of this. The presidential governments of the 1930s were at times able to improve economic and security circumstances, while at other times augmented already grim conditions.

The first presidential cabinet of the early 1930s led by Heinrich Brüning was ready to

bring a declining economy under control by cutting government spending, lowering taxes, and implementing serious cuts in civil service payments. The cabinet wanted to implement these measures in an emergency decree that was backed by the president's authority provided in Art. 48 (2) of the constitution. The parties, making use of their constitutional right to veto emergency measures, were activated in outrage and rejected the decree for its detrimental effects on their constituencies, whereupon the president moved to dissolve the Reichstag, called new elections but enacted the emergency decree almost unaltered.

The elections of September 1930 featured the highest voter turn out of all Weimar elections and resulted in a massive strengthening of both extremes: there was on the one hand a significant rise in communist votes and the National Socialists on the other hand were able to sharply increase their support to six million votes, becoming thereby the second largest party in parliament a third of whose seats were thus filled by forces opposed to the Weimar "system" – as these forces scornfully referred to the republic's parliamentary democracy. In response to the election results, and the preceding campaign that centered around the right's agitation against newly settled reparations in the Young Plan, in the course of a month, huge amounts of foreign capital left the country, further impeding chances of a swift recovery.

The newly constituted Brüning government, which now professed itself to be above parties, continued to pursue its austerity policy with greater resolve than ever: a rise in workers' contribution to the unemployment fund was implemented, special taxes (like on mineral water) were levied, and cuts in government spending and civil service pay were introduced. No parliamentary revocation followed this time, largely because the Social Democrats restrained themselves -- which in turn secured their position in the Prussian government. The situation in early 1931 was decidedly optimistic: international support for Brüning grew, and confidence seemed to have been regained, which all showed in the statistics as well: withdrawal of foreign capital was halted, industrial production rose slightly and unemployment ceased to increase. According to "authoritative banking opinion … the Reich [was expected] to be able to borrow sufficient funds to meet her domestic and international obligations."[180]

The government's announcement of another wave of austerity measures under such favorable circumstances was, however, supposed to indicate to the outside world as well that Germany in reality was not able to fulfill its reparations obligations as agreed to in the Young Plan. Domestic political forces of the right continued to put pressure on the government to move on the reparations issue and once rumors about a moratorium were already out, Brüning moved to denounce reparations and assert that Germany had paid all that she could afford. In

a communiqué that accompanied the emergency decree of June 5, 1931, he pointed out that "relieving Germany of the unbearable reparations payments [was] an imperative necessity."[181]

The slowly regained confidence evaporated by the second and investors began to turn their marks into gold which in turn started to undermined the stability of the currency, raising the specter of yet another round of devastating inflation. The Reichsbank's efforts to defend the mark foreclosed its capacity to intervene and save domestic banks that were running into severe liquidity problems: "the Reichsbank could no longer act as a central bank to its domestic constituents."[182] Thus the banking crisis of June and July 1931, as it manifested itself most spectacularly in the collapse of several big banks like Danatbank and Dresdner, was a consequence of a currency crisis that was "made in Germany," and by politics at that. Raising the possibility of a "moratorium or repudiation of Germany's foreign currency debts and ... default or postponement of payments even on domestic debt"[183] was something the Brüning government was not forced but still decided to undertake. Once the currency and banking crises were under way, the government swiftly stepped in, declared banking holidays for July 14 and 15, 1931 and granted itself wide control powers over the system of monetary transactions in the Emergency Decree for the Protection of Credit. Although such measures in themselves were successful, the economic crisis had taken on such vast social dimensions that a radicalization of politics and the dismay of parliamentarism seemed immanent. In the spring of 1931 there were already almost 5 million unemployed, their numbers still on the rise (reaching 5.6 million in 1932, plus 1.5 million "invisibly" unemployed), bringing the pauperization of large sectors of society to completion.

When the Brüning government fell in June 1932, Franz von Papen continued the course of emergency government by aiming first at dismantling the remnants of the welfare state in spite of the already dire conditions under which the beneficiaries had to survive. The reductions in unemployment and health benefits were followed later on by positive measures deigned to stimulate an already slowly recovering economy: the policy to create new jobs and provide credit for businesses was, however, complemented with further cuts in social benefits.

If surmounting economic difficulties was at least partially successful in late Weimar, albeit the associated the social costs were probably higher than those of the early 1920s, efforts at the maintenance of public security were clearly less effective. To be sure, conditions were much worse in comparison with the situation in early Weimar: paramilitary groups had thrived in the meantime, their total membership greatly outnumbering the combined strength of police and military forces. The *Stalhelm* was founded at the end of 1918 to unite returning "undefeated veterans," and now had about one million members. The Nazi combat units (SA,

founded in 1921), had about 420 thousand members and the defense units (SS, founded in 1925) numbered 52 thousand. The *Reichsbanner* of the Social Democrats was founded in 1924 in response to the failed Beer Hall Putsch attempt of 1923, and had one million members in late Weimar. The communists controlled 130 thousand Red Front Soldiers.

In the course of the years 1931-1932, clashes among these groups on the streets were frequent: Red Front Soliders would come into confrontation with SA members or both would fight the *Reichsbanner*, making political violence so commonplace that some cities were on the brink of civil war. Aggression was especially great during the election campaign of June-July, 1932: there were 300 dead and more than a thousand wounded after the fights. Uniforms and military rituals were supposed to bring order into the disorder of civil war in later Weimar.[184]

The vicissitudes of late Weimar were handled increasingly via emergency government as opposed to a parliamentary path of legislation: the five emergency decrees of 1930 were passed in a year when the Reichstag had a total of 94 sessions. There were forty emergency decrees the following year with the Reichstag being convened 57 times. In 1932, practically all measures were implemented via emergency decrees, legislation being all but excluded and the Reichstag sitting only thirteen times. The governments of this period went from being allegedly "above parties" but supported on the whole by legislation (Brüning), through being detached from parliament (von Papen), to being outright hostile to parties under General Schleicher who was in office from December 1932 until January, 1933 when Hitler took over the position of chancellor. Also, no enabling laws were enacted in the early 1930s, making the legitimacy of emergency government rest solely on presidential authority as opposed to the partially legislative authority of emergency government in the early 1920s. A comprehensive enabling law, and for a period of four years at that, would be demanded later on by Hitler as incoming chancellor[185] but Nazi power would ultimately be anchored by the Emegency Decree for the Protection of the People and State of February 28, 1933 (enacted in the wake of the *Reichstag* fire of the day before) in which the president let the Nazi government grant itself excessive powers that were used to turn the Weimar Republic into the Third Reich.[186]

Reinforcing the primacy of presidential powers in this period, the most famous constitutional conflict of the Weimar Republic came along in July 1932 when the presidential power of federal execution (Art. 48 (1) of the constitution) was applied against Prussia, the largest state of the federation. The case came before the *Staatsgerichtshof*, the special state court of the *Reichsgericht* which upheld the president's course of action except for those measures that violated federalist principles and reinstated Prussia's representation in the upper

house of federal legislation, the *Reichsrat*.[187]

There is a deeply sad irony in the fact that president Hindenburg saw the appointment of Hitler as chancellor in January 1933 as the only constitutionally mandated way of relinquishing presidential government, practiced way too long. He saw this move as a return to political leadership backed by parliamentary support. But the *Reichstag* of 1933 was an emblem of crisis: after the economy and security had been more or less rescued, now parliamentary democracy was finally in a crisis and there was no emergency government to save it.

CHAPTER TWO: RIGHTS IN GERMANY UNTIL 1919

Fundamental rights in German constitutional thought until 1919

In order to be able to assess the significance of the presence of a broad catalogue of rights in the Weimar Constitution and the scholarly debates it gave rise to during the short fourteen years of the Weimar Republic, we have to first briefly survey the history of German political and legal thought to indicate venues of continuity and rupture across monarchy and republic in the ways in which rights were thought about.

Grounded in the natural law tradition and the political thought of the Enlightenment, the language of rights was to gain political and legal significance in late eighteenth century Europe and America. The problem of rights continued to form one of the central tenets of nineteenth century Western political and legal thought, paving the way for a few rights to appear in some of the German constitutions of the so called "early constitutional" area of the early nineteenth century.[188] These constitutions turned the German monarchies in question into constitutional monarchies but the rights they contained were essentially concession granted by the monarchs with the legal import of setting general aims or programs for the administration thereby legally constraining its operation.[189] Arguments cast in the language of rights served also as the backbone of political demands of pre-1848 Europe in general and Germany in particular, holding sway on discussions extending into the debates of the revolutionary Frankfurt National Assembly of 1848-49.[190]

The revolutionary triumph of classical individual rights, demanded by the middle classes with the intent of renouncing the estate system, was complete in the Frankfurt debates, even if it took quite some time to formulate ideas into concrete legal provisions.[191] In the course of debates, it became clear that by this time natural law arguments played less of role and were replaced by the historical school's understanding of rights as emanating from the historical and national, i.e. German spirit.[192]

The *Paulskirche* charter of rights from late 1848 and the federal constitution from 1849,[193] however, never had a chance to engender further discussions on the fundamental rights they had proclaimed. The disappointment over the failure of the revolution, which meant the defeat of both rights demands and national unity related claims, led scholars and citizens alike to abandon former hopes and endure a narrow program of the rule of law, meaning essentially the protection of citizens' freedoms as prescribed by the laws set by the

parliaments and monarchs of the various German states.[194] Accordingly, legal scholars turned away from comprehensive legal and political questions and devoted themselves to interpreting the positively given laws. When the political program of national unity was finally realized at the hands of Bismarck, respect for his deed and joy over the long awaited common state of the *Kaiserreich* was so great that people abode the absence of rights from the federal constitutional text of 1871.[195] Coming short of constitutional status on the federal level, many rights were granted in the federal statutes of the *Kaiserreich*[196] -- and were grossly disregarded first in the *Kulturkampf's* anti-Catholic legislation, and then in the anti-Socialist laws as well as in the policies of Germanization in the Polish territories.[197]

The constitutions of some member states had, however, declared fundamental rights for their citizens already before unity was achieved. Most importantly, the Prussian constitution of 1850[198] included, by contemporary standards, an extensive rights catalogue, with some of its fundamental rights granted not only for individual Prussian citizens but also for collectives, such as the churches and the schools. Constitutional scholarship, still immersed primarily in the positively given law, naturally considered it as its task to make sense of the rights provisions in state constitutions and in federal statutes.

The relevant legal doctrine of the *Kaiserreich's* positivist public law scholarship[199] was the theory of "subjective public rights:" although precise definitions varied, these rights were understood as being different from the legal claims that arose among private persons and were also to be distinguished from the effects of legal regulations whose workings benefited the citizen without him having a claim to such benefits. The theory then dealt with *subjective*, because claimable and *public* rights, the latter attribute indicating legal grounds regulated by public law. There was a clear split in the *Kaiserreich* between two schools of public law[200] on the question of whether the fundamental rights included in the constitutions of the members states and the rights granted in federal statutes constituted "subjective public rights": the scholars who took the affirmative side maintained that citizens could claim their fundamental rights at the appropriate courts against any act of the administration that transgressed legal boundaries. The influential proponents of this view, Georg Jellinek, Otto von Gierke and Georg Meyer, also asserted a protected sphere of freedom for the individual that stood out of reach for legal regulation even if, positively formulated, this famously meant "simply freedom from illegal constraint."[201] Any rights or freedoms, nevertheless, had to be recognized by the state and thus in their very existence depended on the positive, or in the terms of the theory, objective legal order. On an abstract level then, this school doubted the significance and theoretical coherence of defining either positively or theoretically a *particular* set of rights

and supported rather the idea of a *general* right to claim freedom.[202] In practice, however, particular rights proved to mean very real limits to the state during the *Kaiserreich*: administrative courts subscribed to the fundamental rights theory of "subjective public rights" and actively protected the freedom of citizens against administration.[203]

Other scholars, who refused to acknowledge fundamental rights as "subjective public rights," like Carl Friedrich von Gerber, C. Bornhak, Max von Seydel, Friedrich Giese, set out from the duality of subjects and an all-powerful state and maintained that "the (subjective) rights of individuals against the state ... are conceptually unthinkable ... [because] mutual rights are only possible when both sides are subjected to the existing legal system. .. The state as the source of law, is above the law. .. The subject cannot, therefore, make any successful claim to a right against ... [the state's] will."[204] Paul Laband, the most important representative of this school, declared accordingly that "fundamental rights [are] norms for the state which it gives to itself," and thus evaluated the position of the citizen in the polity in a way that markedly differed from the position taken in the other school where, as we recall, individuals had rights they could personally claim: "[fundamental rights] are not rights since they do not have an object."[205]

When in 1914 Ottmar Bühler "drew up the balance of a hundred years of debate,"[206] he reported that rights had been dissolved into the principle of the legality of administration which, by turn, had achieved common acknowledgement, making "fundamental rights devoid of any further meaning."[207] The area designated for discussions on rights, "the positivistic orphans of political fundamental rights,"[208] was thus to be found in the rapidly expanding field of administrative law that increasingly separated itself from the concerns of constitutional law.[209]

By way of a short summary, we can say that the language of rights played an important but not a central role in German political and legal thought in the nineteenth and early twentieth century. Taking a look ahead into the latter part of the past century, we find rights at the forefront of postwar German political and legal discourse in the *Bundesrepublik*. We turn now to the intervening period to assess the processes of drafting and theorizing rights in Weimar Germany.

Fundamental rights in the Weimar Constitution

Deliberations on a new republican constitution took place between February and July 1919 in the city of Weimar, a safe haven amidst chaotic postwar conditions and a symbol of German culture. From the point of view of our investigations, the drafting of rights provisions and the role of scholars in that process are the central matters to be addressed below in the reconstruction of the constituent assembly's work.[210] The point of these investigations will be to show the decisive turn away from the rights conception of nineteenth century positivism, a shift that was further radicalized by some and in contrast, nearly overlooked by other rights theorists of the newly constituted republic.

Beside the elected members of the National Assembly, a number of legal scholars were also instrumental in shaping the institutions of the new republic, though this time the constituent assembly was far from being a „parliament of professors" as in 1848.[211]

Most famous is the role Hugo Preuss,[212] professor of public law at a Berlin university, played in the initial phase of drafting the new constitution. His appointment to the federal interior ministry as state secretary in November 1918 meant that he was responsible for putting together a draft that could serve as the basis of discussions at the National Assembly for which elections were held in January 1919 and which then started to meet in Weimar in February 1919. Preuss was commissioned most likely because earlier he had already published drafts of amendments to the federal as well as the Prussian constitutions. Beside convening a group of high officials from the federal bureaucracy to meet in the building of the interior ministry in Berlin between December 9 and 12, 1918, Preuss also called on a few scholars who themselves had actively published on constitutional matters and asked them to assist the preparatory committee in putting together a government draft. Gerhard Anschütz,[213] one of the most influential public law scholars at the time, ended up not attending the meeting but had sent in his proposals which were also published later.[214] Another scholar of great stature, renowned for his political commentary in the *Frankfurter Zeitung* and other dailies, was also invited: Max Weber[215] actually sat in on the secret preparatory meetings, exerting a major influence on a few crucial points of the constitution, most notably on the nature of the office of the federal president and in the matter of the balance of federalist and unitary elements in the relations between federal institutions and the governments of member states.[216] Beside these well-known academic figures from among the drafters of the Weimar Constitution, a focus on the rights provisions reveals that an additional three legal scholars,

namely Konrad Beyerle,[217] Heinrich Triepel[218] and J.V. Bredt[219] have also exerted a major influence, as will be shown below, and should therefore be thought as founding fathers of the Weimar Constitution.

Preuss' initial draft contained hardly any rights provisions at all: only three fundamental rights -- equality before the law, freedom of conscience and the protection of national minorities -- were included in his text out of fear for committing a grave and familiar mistake.[220] Preuss namely explicitly referred to the failure of the *Paulskirche* Constitution of 1848, which in historical memory was (and still continues to be) commonly attributed to the length of discussions on the matter of rights, resulting ultimately in forfeiting a great historical chance to fashion a democratic political system. Along with Preuss, the two other scholars on the preparatory committee too placed the emphasis of their proposals on areas more traditionally conceived of as constitutional, namely on organizational questions.[221] They all presumed that what Germany urgently needed was a draft text and then a final decision by the National Assembly on how the political institutions of the *Reich* should be constituted. For them, the most serious questions of the day ranged from federalism vs. unitary state (with the problem of the status of Prussia at the forefront), to parliamentarism vs. presidential regime and extended over such fields as the organization of the military and that of the administration of justice. Although only after heavy debates and difficult compromises, the official draft's proposals on the organization of *Reich* and *Länder* were passed in the National Assembly without fundamental modifications. As regards rights, however, the debates among the representatives focused mainly on how to extend and modify the provisions put forth by Preuss in the official draft constitution, which in its final version actually ended up including more than just the mere initial three rights. A number of other rights such as freedom of scholarship and teaching, freedom of opinion and the press, right of gathering and association, right to petition, freedom of person, protection of home and property, secrecy of the post were also taken up into the text submitted to deliberation by the National Assembly.

Irrespective of whether they sat on government or on opposition benches, the first reactions of representatives in the opening plenary session of the National Assembly were overwhelmingly critical of the way in which the problem of rights was laid out in the government draft:[222] e.g. the Majority Socialist speaker attacked the property clause which his party saw as hindering chances of socialization,[223] whereas the Catholic Centrum Party claimed that the rights in the government draft were practically "fundamental rights against religion" and proposed the introduction of clauses which explicitly protected religious communities (as opposed to merely declaring the freedom of consciousness), securing for

example, among other guarantees, their right to collect taxes from their members.[224] The conservative opposition too wished to warrant the status of the churches, especially by recognizing their prevailing positions in education.[225] Other government coalition representatives missed the counterpart of rights in the draft and thus called for enumerating a corresponding set of duties in the constitution. They also advocated the broadening of rights clauses to include "economic and social freedoms ... without which <<the whole democratization of political life>> would be ineffective."[226]

After the initial plenary debates, the government draft continued to be disputed in the constitutional committee of the National Assembly, a body which was composed of 28 representatives and was in session during the months of May and June 1919. It became clear already in the plenary session that representatives wanted more rights and that differences were significant with regard to substance.[227] To work around this problem and not let the whole of the constitutional committee be bogged down with rights, an even smaller group, a subcommittee for rights was established with only 14 representatives from the National Assembly. With not more than ten members present at the meetings, they worked throughout the month of May 1919.[228] The proceedings of the subcommittee on rights were based on a draft rights catalogue put together by the legal historian Konrad Beyerle.[229] This draft turned out to be the single most influential text produced in the course of rights discussions in the National Assembly for "its construct, structure and system as well as the fundamental content of its particular provisions were not changed significantly" by the various forums that discussed it, such as the subcommittee for rights, the constitutional committee and finally the concluding plenary sessions of the National Assembly.[230]

Beyerle's draft rights catalogue was, however, not a creation of his own. He relied on various sources in putting it together, among which the initial government proposal played only a minor role. His was to be a new proposal on rights, conceived according to new ideas. The novel approaches to rights that Beyerle's draft embraced came primarily from two of the so called „private" draft constitutions.[231]

Beyerle wrote the draft rights catalogue with the assistance of another member of the committee, Adalbert Düringer,[232] former justice minister of Baden, representative of the opposition party DNVP and president of an association called Law and Economy.[233] This association had earlier published the work[234] complied by its members between December 1918 and January 1919 in an association committee, which they had created in order to assist the job of the National Assembly by "taking stock of and evaluating former German and foreign experiences [in constitutional matters] ... and scientifically going through the major

legal questions."[235] Their comprehensive draft constitution contained a rights catalogue of 40 articles and was taken as one of the basis of the draft Beyerle and Düringer, the president of the association, were putting together on fundamental rights. A number of public law scholars took part in formulating the association's draft constitution,[236] and it is not easy to discern who was responsible for which sections. It can nevertheless be inferred from other contemporary publications[237] that the author of the proposed provisions on fundamental rights was Heinrich Triepel.[238]

Triepel is definitely to be credited with wording the introduction to the rights catalogue of the association draft which was taken over word by word into the draft of the subcommittee and later that of the constitutional committee:[239] „to the German people and its citizens the following rights are guaranteed. They are to guide and bind the constitution, legislation and administration in the Reich and in the member states."[240] In all the other provisions of Beyerle's draft alternative formulations were also included which relied on three further sources. The other "private" draft consulted by Beyerle was written by Bredt and the final draft also relied on the 1919 constitutions of Baden and Wüttenberg.[241] Bredt's draft constitution was consulted mainly for its parts that contained "for the first time … a number of economic, labor and social rights … [which] from a rather conservative jurist constituted … a clear turn away from the dominant views on rights in the *Kaiserreich*."[242]

The impact of the Law and Economy Association's draft, however, extended much further than just the introductory provision. Triepel's advocacy of rights for a republican constitution rested on the idea that in a democracy "the freedom of the individual against the state" needed to be secured in the form of rights, contrary to "the dangerous misconception that in a democratic state the freedom of citizens would be furnished by itself."[243] In the new German democracy, Triepel contended, such freedoms would run the risk of remaining unprotected unless new means were found to replace the ones that used to be in place. In the constitutional monarchies of the *Kaiserreich*, i.e. in the member states and in the federal *Reich* government, Triepel pointed out, "there was a healthy mixture of monarchical and democratic elements, as well as a separation of powers, including a constitutional balance between legislation and executive ... [which] could offer the kind of protection for freedom that a pure democracy can never provide." In the new constitution, therefore, it was of paramount importance "to exactly and comprehensively declare the freedoms of citizens and thereby establish their protection not only against the executive but above all against the legislation."[244] Two articles of the association draft were designed specifically to convey these ideas. Art. 51 at the head of the rights catalogue was to be reinforced by a complementary

provision placed outside the section on rights, formulated again most probably by Triepel. In order to provide constitutional protection for rights Art. 147 of the draft called for all courts to review legislation in their practice and reject to apply them in case they found them unconstitutional, e.g. when they violated any of the constitutional rights that were proposed to be included into the new constitution. Triepel portrayed the protection provided by judicial review as "the palladium of the freedoms of citizens in the United States [of America] ... which German citizens were well advised to request for themselves."[245] Another association member, Erich Kaufmann, Triepel's colleague at Berlin university's law faculty and contributor to the association draft constitution, too relied in his defense of the idea of judicial review on the example of the US and the potentials of regular review practice by courts manifested by the American case: "the [US] constitution became a permanent subject of consideration and scrutiny not only for the courts but also for the justice-seeking public and their legal advocates, and turned thereby into a significant component of public legal consciousness."[246]

Beyerle's presentation of the draft to the constitutional committee at the end of May 1919 very much relied on the ideas put forth by Triepel and Kaufmann as well as on the provisions of the Association's draft. He pointed out the "change … in the meaning of rights … [moving it] away from the times of pure … legal positivism during the last decades of the *Kaiserreich*. In the meantime, one realized the value of rights in their significance as guarantees, recognized in the constitution."[247] He summarized the main venues along which the government's original draft was expanded by pointing out first of all that along with rights, duties were also taken up in his text. The sheer number of provisions increased substantially too, placing "the rights and duties of the [individual] person in the front line and [at the same time] connecting them to the fundamental structures of social life." Finally, he called attention to the great "values of rights [in that] they provide a purely legally graspable sanction."[248]

The draft Beyerle presented was voted on approvingly in the constitutional committee, only to be called wholly into question soon when it came before the plenary session of the National Assembly. A "rights crisis"[249] ensued which was precipitated by the introductory provision on the binding nature of rights and the associated idea of judicial review but soon widened into a wholesale criticism of rights in general by a number of representatives who began to contemplate "whether taking up rights [in the constitution] was even desirable."[250] The eventual solution to the crisis was to remove the disputed introductory provision which in turn made the acceptance of the rest of the draft on rights possible.

The Weimar Constitution thus came to embody an extensive rights catalogue[251] which went beyond individual rights and included rights of collectives such as religious communities, civil servants, local communities as well as clauses on education and scholarship, and various spheres of economic life. These rights altogether, just as the major institutional solutions of the constitution, carried the mark of what was memorably referred to as "compromise." Although the association draft taken up by Beyerle served as the basis of deliberations in the subcommittee on fundamental rights, representatives soon realized the significance of the possibility to anchor certain claims in the form of constitutional rights and had a great number of them written into the text. For most of these, there would not have been enough support if they were voted on one by one, thus various pacts in the form of overall "compromises" were struck, ensuring guarantees for major institutionally entrenched legacies such as religious schools and the public financing of churches.[252] Beyond compromises, however, all understood the text as having opened a new field by moving away from earlier rights conceptions. A number of scholars stood ready at the starting-line to make sense of the rights provisions of the constitution which in their final format were ideally construed for both debate and theorizing.

CHAPTER THREE: INDIVIDUAL RIGHTS THEORIES IN WEIMAR GERMANY

The opening phase of Weimar rights discussions resuscitated the idea, already present in the deliberations of the National Assembly, that rights really posed a separation of powers problem, bringing the powers of courts and legislation into the limelight. That rights discussions among constitutional scholars developed and preserved this nexus throughout the Weimar years was largely due to the activities of Heinrich Triepel[253] who not only brought this theme over from constitution making[254] into constitutional interpretation but also managed to set it at the heart of rights discussions. His main opponents in the ensuing battle on rights and courts were the positivists with whom Triepel shared an otherwise fundamentally similar view on the nature of rights which they all theorized in individualistic terms. It was the rights of individuals that both Triepel and the positivists wanted to see secured in the new democracy, albeit in fundamentally different ways: Triepel suggested regular courts to fulfil this task, whereas the positivists wanted to rely on the administrative courts exclusively. The fight was thus centered on separation of powers matters but also extended to include the question of the proper battleground as well: Triepel and the two doyens of Weimar positivism, Gerhard Anschütz and Richard Thoma, had very different ideas about how to forge an authoritative voice for the discipline of constitutional law and its scholarship. The Association of German Professors or Constitutional Law, founded by Triepel, and the *Handbook of German Constitutional Law*, edited by Anschütz and Thoma, were both meant as institutional solutions designed to establish constitutional scholarship as an important factor of Weimar constitutional life. These two terrains became the most influential institutions of the discipline, their relationship to each other turning, arguably, into a rivalry. The constitutional question upon which the conflict turned was the meaning of rights. The annual meetings of the Association were, namely, home to the emergence of rights theories that grasped the concept of rights in decisively non-individualistic terms and placed them, as Triepel did, at the heart of constitutional interpretation. In contrast, the *Handbook* treated rights as peripheral to the sphere of the „constitutional" which the positivists reserved for organizational and institutional matters only.

This chapter reconstructs the two versions of Weimar individual rights theories (Triepel's and the positivists'), locating them in the context of separation of powers matters. At the same time, the chapter also offers an assessment of the two institutional attempts at forging an authoritative status for the discipline: the annual meetings of the Association between 1922 and 1931, and the preparation and publication of the *Handbook* between 1926

and 1932 will be set, respectively, in the context of the founder's (Triepel's) and the editors' (Anschütz's and Thoma's) ideas about the discipline's role. Rights theories mobilizing dimensions beyond the individual advanced within and outside the Association will be the subject of the next chapter.

The fundamental rights of the Weimar constitution did not at first generate a discipline-wide interest either in the academic discussions among constitutional scholars or in the curriculum of law schools.[255] Rather, constitutional scholars were initially eager to discuss matters such as the international legal implications of a lost war as manifest in the Treaty of Versailles, the exclusion from the League of Nations, the curbing of German sovereignty in the Rhineland and the form and amount of reparations.[256] As to domestic constitutional and political matters, scholars were primarily interested in questions of federalism, the constitutional status of the federal president, as well as the tension between representative and direct democracy, including the problem of political parties. Integrating most of these central themes, the issue of constitutional reforms and amendments also played an important role in early Weimar constitutional scholarship.[257] Scholars' attention to rights grew only gradually to be one of the top concerns of the discipline but in the end, contributions on this theme ended up comprising a most extensive body of literature and occupying central stage in the constitutional debates of the Weimar Republic.

Regular courts as the bulwarks of individual rights: Heinrich Triepel, founder of the Association of German Professors of Constitutional Law

In the first years of the newly founded republic, Heinrich Triepel, as a scholar who had a major influence on the text of the constitution as well, came to dominate not only the initial rounds of rights discussions but practically also the discipline of constitutional law as a whole. He not only organized, single-handedly[258] and with an effect lasting to this day, the Association of German Professors of Constitutional Law in 1922 and successfully promoted the cause of public law among lawyers in general, he was also able to take advantage of his academic and social position and set the agenda of debates on public law matters, especially as regards the topic of fundamental rights.[259] A good indication of his overall influence in these first years is his series of efforts not to let the debate on judicial review die down in the wake of an inconclusive decision of the National Assembly. We recall how closely intertwined this issue was with the problem of fundamental rights already in his draft

constitution written for the Law and Economy Association. In the early 1920s, Triepel practically staged a massive campaign for the recognition of judicial review among jurists in general and among constitutional scholars in particular. He regarded judicial review as a core institution of democracies (like the United States or Switzerland):[260] it was to function as the „palladium of freedom"[261] which „in democratic parliamentary states was probably more endangered than in any other [regime]."[262] By briefly reviewing Triepel's activities in this field,[263] we will be in a better position to evaluate his role in shaping the status of the discipline as a whole.

In 1921 Triepel managed to push through a vote on a resolution that committed the German Jurists' Assembly to acknowledging the highly controversial practice of judicial review by regular courts[264] -- and refer to it at the next meeting in 1924 as res judicata.[265] This was all the more spectacular since these two meetings of the German legal profession were the first ones ever to discuss a constitutional matter in the history of the Assembly.[266] Triepel was elected to the presidency in 1921 and could thus secure, with the support of the president, that constitutional topics would be discussed at Assembly meeting[267] but it took immense rhetorical power for his arguments to be also unanimously accepted by representatives of various legal professions.[268]

A year later, in 1922 Triepel proposed the subject to be the topic of the opening speech at the founding meeting of the Association of German Professors of Constitutional Law where he was also elected president of the Association and remained in this position until 1926.[269] Richard Thoma, one of the most prestigious positivist public law scholars was asked to deliver the main speech and it was through him that Triepel could secure that a definitive rejection of judicial review would be excluded from the discussion. Thoma argued namely, that in the face of "a difference of opinions among authorities [fellow scholars of public law] .. either the arguments for or against judicial review could be grounded logically." Such a "real problem" could thus only be solved by means that fell outside the terrain of "logical-legal argumentation" and mobilized subjective will and evaluations, especially as regards one's "trust in the loyalty of the newly organized state." Thoma's evaluation of the danger that unconstitutional legislation could be passed put such fears aside as belonging "into the sphere of ghosts" and concentrated on a number of momentums when the self-defense of the constitution could be assumed: the president's prerogative before proclaiming statutes, ministerial responsibility and the possibilities of legislative minorities (representatives, press, interest organizations) guaranteed by the system of proportional representation were all there to prevent a legislative majority from passing unconstitutional legislation. He could therefore

only hope and propose that judges and scholars "hold on to the German, and also European, tradition ... [and agree] that what was once proclaimed in the Gazette as statute, has to be obeyed by judges and citizens alike."[270] Triepel made sure in his report on the founding meeting to praise the quality and „exemplary objectivity" of Thoma's presentation but left no doubt that "there [was] still a strong disagreement in opinions," ensuring thereby the continuation of debates on the question.[271]

Judicial review, accordingly, became a topic very soon again, already at the third meeting of the Association in early 1925, this time with an advocate of judicial review in the role of the main speaker on the topic of "the protection of public law." Walter Jellinek seized the opportunity to promote constitutional review by the ordinary courts as a solution allowed for, even if not demanded by the Weimar Constitution. To have a systematic argument for judicial review was crucial at this stage since the default position, dominant in the *Kaiserreich* and received approvingly by positivist, wanted to delegate most matters of public law, including fundamental rights, to the specialized system of administrative courts.

When, however, the subject of judicial review came up again a year later, at the 1926 meeting of the Association, Triepel, still president of the Association, practically attempted to silent discussion on the subject by referring to the fact that the year before, in November 1925, the highest court of Germany in public law matters, the *Staatsgerichtshof*, had claimed for itself the right of judicial review: "[the matter] is thereby decided," Triepel proclaimed.[272] Although courts remained hesitant in exercising judicial review in the Weimar Republic and public law scholars continued to be divided on the matter, Heinrich Triepel exerted a decisive influence in imposing an agenda on the discipline and widening the circle of supporters for judicial review.

Triepel's campaign for judicial review was not confined, however, to the ranks of the discipline but included those of the high courts as well. Again, meetings of the Association provided the opportunity, this time serving as pillars of the bridge connecting scholars to chief justices. Already on the occasion of the second meeting of the Association in 1924 in Jena, as president of the Association, Triepel invited members of the state's highest courts and greeted them in his opening speech as colleagues with whom constitutional scholars constituted "a kind of personal union" on account of the "substantial and personal connections" binding especially those judges to scholars who themselves came from academia.[273] The next year the meeting was convened in the city of Leipzig, the seat of the *Reichsgericht* whose members showed up in great numbers at the occasion. In his opening speech, Triepel went as far as to speak about "an undissolvable marriage binding the praxis and theory of the law in Germany"

and assured the judges of the highest court that "each new volume of [their] decisions is taken in the hands [of constitutional scholars] with great expectations."[274] His high appreciation of the *Reichsgericht's* constitutional role was made clear already the year before when Triepel, writing about the highest court's competence to adjudicate legal disputes between the federation and the members states, concluded that the court was „the guardian of freedom against the absolutism of parliament."[275]

In his reply to Triepel's greeting, the president of the *Reichsgericht*, Walter Simons recalled as a contrast to current times his studies at Leipzig University from forty years ago when "a connection between constitutional scholarship and the *Reichsgericht* could not really be discerned."[276] He used the occasion to pled against plans to establish a separate highest court of administration (*Reichsverwaltungsgericht*, called for in the constitution itself), so that his court could "greet the members of the Association [...] also in the future as colleagues in the same effort."[277] He portrayed as unfortunate the idea of breaking the unity of adjudication that had been the main virtue of Anglo-Saxon legal development as well. Especially problematic he found the prospect of a loss of unity "of German legal life" in the face of the growing importance of public law that had taken over many of the matters regulated by private law beforehand. The result of these developments, he warned, would be that "the Reichsgericht would lose its influence which in turn would benefit only the new [administrative] courts."[278] That arguments against the expansion of administrative courts were advanced by the president of the *Reichsgericht* at an Association meeting under Triepel's presidency is a most telling expression the of basic conflict between Triepel and the positivist who advocated administrative courts and at the same time strongly opposed that wide powers be given to the hands of regular court judges.

While Triepel was very successful in the early 1920s in promoting the cause of judicial review, his real dominance over the discipline of constitutional law in this period was rooted in his effort to inspire and thematize constitutional debate by providing a terrain for the most important discussions. By initiating the foundation of the Association of German Professors of Constitutional Law in 1922, Triepel wanted to provide a framework for constitutional scholarship to discuss the "significant cases and questions of public life," as the Association by-laws had it.[279] Accordingly, most of the central constitutional problems of Weimar Germany were debated by scholars in the course of a mere eight Association meetings,[280] starting with judicial review, federalism and the powers of the president already at the first occasions. Triepel explicitly positioned the Association on the borderline of academia and

politics by saying in his report on the first, founding meeting that although the new Association had an "academic-scientific character,"[281] this did not mean that "politics could be wholly separated from constitutional scholarship."[282] In spite of the apparent „conflicts … in political views"[283] among scholars and the politically sensitive topics discussed, the Association, ultimately, was able to prevent the discipline from falling apart into separate political camps. Contemporary and later commentators agree that such a political fragmentation would have depleted the prestige of the discipline.[284]

It was thus understandably important for Triepel to emphasize from the very beginning that in case the Association was to take a position on a "burning question of public life," it would do so by excluding "all party political perspectives."[285] This distinction among the various meanings of the political, however, allowed Triepel to raise his warning voice on a number of highly political matters already at the second meeting in 1924: he protested against the "occupation of German territory by France and Belgium ... violating all written and unwritten regulations of international law," as well as against the prohibition of *Anschluß* between Germany and Austria[286] and cautioned against similar violations of the law at home. In characterizing the home front, he compared the process in which the law became a wilderness (*Rechtsverwilderung*) to "a bolting horse in the pottery market"[287] and protested against the practice that "legislative and decree issuing powers" disconsider the "guiding star ... of justice."[288] In Triepel's view, cautioning against the violation of the principle that "justitia est fundamentum non solum regnorum, sed etiam rerum publicarum" was the "sacred responsibility of German constitutional scholarship."[289]

The next and last occasion when a word of caution was explicitly voiced, this time by the Association as a whole, came along in 1931, at what turned out to be the final meeting of constitutional scholars in the Weimar Republic. On this occasion, the Association voted on a press communiqué which was reproduced on the first page of the proceedings of that year's meeting. It is noteworthy that the substance of the warning is similar to that of Triepel's from the year 1924:

> It should be the duty of the governments of the federation and the states to watch out more carefully than before that the instrument of emergency decree shall not be misused by the inclusion of regulations which do not have even an indirect connection either to the protection of public security or to control over an immediate exigency.[290]

But Triepel strove after not only to establish in the Association the posture of the discipline to

the outside -- equally critical for him was to ensure institutionalized debate among his colleagues on central constitutional questions. He did not seem to have had illusions as to the differences that would surface in the presentations and discussions at the meetings of the Association, so we have to assume that the point for him was not so much that *his* positions would be given support by some of his colleagues but that he would be instrumental in providing the framework for colleagues to advance their positions.[291] Accordingly, he was always one of the most active discussants at the meetings and seems to have taken advantage of his long presidency (1922-26) in setting the agenda of the meetings as well.

His real success, however, was exactly what is being remembered as the crisis or even the failure of the discipline, namely that the Association was home to the so called *Methodenstreit*, in the course of which methodological differences among scholars became all too clear. Triepel stressed all the way along that he did not consider the emergence of divergences as harmful but rather as one of the main points of the meetings. So already in 1922 in his report on the founding meeting, he pointed out that there were "conflicts in scientific methods and political views" and did not circumvent the fact that the views on the main topic of that meeting, i.e. on judicial review, "clashed still very hard."[292] When the "fight over the methods" broke out in earnest at the 1926 meeting with Kaufmann's remark that "positivism is ... superseded" and his reliance on natural law in interpreting equality, Triepel was quick to state that he would not want to "make a confession in the fight between natural and positive law"[293] as all others in the debate did. He restrained himself so as to be able to stay away from having to fully reject others' positions. The most radical statement of complete rejection was delivered at the 1927 meeting by Richard Thoma, who contested Kaufmann's above mentioned remarks: "I could not comprehend much of what he had said ... It is for me, so to speak, in Chinese ... I simply do not understand it and am not the only one in this hall who does not understand it ... A gulf of not-understanding of the problematique and terminology separates one group from the other."[294] Triepel replied by saying that he was surprised that Kaufmann's words "could be found as incomprehensible" and added that "even if the terminology of the new direction is sometimes more difficult to understand than it would be preferable, [he] would say with Dostoyevski: the new is good only then, when one cannot grasp it immediately."[295]

As a counterpart to his encouragement of profound debates among scholars within the Association, Triepel praised the collegial atmosphere of meetings and friendly relations among scholars:[296] his commitment in this regard was epitomized by his many remarks to this effect in the discussions at the Association as well as on the occasion when he invited for tea

to his house all participants of the founding meeting.[297]

The Association, in sum, was clearly meant to be a challenge to colleagues to think together, as if in a forum, about particular constitutional problems and thereby to ensure regular and intensive debates as well as scholarly creativity. Triepel seems to have been convinced that the authoritative status of constitutional scholars[298] would be reinforced by the Association and its debates, and the lack of one single expert voice was not to their detriment.

Triepel's theory of individual rights

Triepel engaged the topic of fundamental rights as a central constitutional issue into his very first analyses of the new constitution. He did so by consistently linking the problem of fundamental rights to the questions of judicial review and the limitations on legislative powers, giving thus a separation of powers context to his own rights discourse, as well as to discussions in the discipline.[299] Triepel acknowledged that the second part of the Weimar constitution included many provisions that did not lay down real fundamental rights and argued that it was because of this that the constitutional Assembly refrained from recognizing fundamental rights in general as constituting limits for legislation. For real fundamental rights, however, "judicial review was, if not the only, certainly the most important protection of citizens' freedom against a power-thirsty parliament."[300] Since the „balance of powers," the „best guarantee of freedom" according to Triepel, was compromised in parliamentary regimes by a „complete dependence of the executive on the representative body (*Volksvertretung*)," there remained only judicial review as „freedom's protective wall," especially as far as rights were concerned.[301]

Beside being protected by the courts, fundamental rights also had to be binding on legislation in Triepel's theory. Following up on what had already been there in the Law and Economy Association draft, Triepel insisted on the limits that fundamental rights posed to legislation in order to prevent that these rights perish into "meaninglessness"[302] which could only be avoided by taking the constitution seriously and acknowledging its primacy[303] over all other forms of law. This most important tenet of his constitutional thought contended that any state power existed only under the constitution and was therefore regulated by it. Triepel had only one important ally among scholars in the first years of the 1920s beside his university colleague Erich Kaufmann (who was his collaborator in writing and publicly defending the draft constitution of the Law and Economy Association) in making the case that rights confined legislation: another colleague at the Berlin faculty of law, Martin Wolff also advanced this idea in an article written in 1923 where he argued that constitutional property

rights created bounds for legislation that it was not allowed to transgress.[304] Another point of consonance with Triepel's agenda was that Wolff too had relied on the Swiss example:[305] Swiss rights jurisprudence had already become the standard reference for Triepel,[306] equaling in importance to references to the practice of the US Supreme Court and the US political system in general.[307]

Triepel of course also wrote about the content and functions of particular rights beside linking the question of rights to judicial review and a constitutionally bounded legislation. When tackling concrete problems in connection with fundamental rights, he emphasized the immediate applicability of particular constitutional rights provisions. Thus in a legal brief written in 1924 he argued for the recognition of the equality clause as valid legal norm, recourse to which created grounds for establishing the unconstitutionality of complicated emergency regulations on shares which discriminated against those who owned preference shares since they were to lose more than holders of regular shares as a result of revaluation policies.[308] Triepel argued furthermore that the right to property and the rules on takings were also violated by these regulations. He did not need to go to great lengths to establish that the property clause was valid legal norm, or that it bounded legislation: he could rely on a *Reichsgericht* decision in the first and on Wolff in the second respect.[309] The emphasis on equality and property in these years was, however, not a matter of choice for scholarly interest : these writings and court decisions were part of an effort to „counter the inflation (emergency) legislation of the year 1923."[310]

The full implications of Triepel's approach to the equality clause were soon spelled out by his student, Gerhard Leibholz who was later to become himself a professor and an influential judge on the Federal Constitutional Court in the early *Bundesrepublik*.[311] He wrote his dissertation, *The Equality before the Law*,[312] in 1925 in which he recaptured many of his professors' rallying points like the separation-of-powers based arguments about judicial review and the limitations on legislation,[313] but also the practice of resorting to the exemplary cases of Swiss and US high court jurisprudence.[314] Equality was defined also in his treaties as an individual right, one existing before any political recognition of it.[315] Leibholz's writing on the equality clause, however, reached further and grasped it as a principle that prohibited the arbitrary handling of individuals throughout the legal system.[316] That was a move Triepel did not really make his own: he never advanced a theory of rights that would have transformed the rights of individuals into principles,[317] or put them in any other non-individual dimension. Other colleagues were about to start to do just that in the upcoming years when challenged by invitations to speak about rights at Association meetings.[318] As we will see in the next

chapter, Triepel did not at all criticize such theoretical explorations but rather praised them for their creativity.

Genuine fundamental rights in Triepel's thought were then confined to the rights individuals possessed against the state.[319] So the language of his fundamental rights discourse was crowded with expressions like "the freedom of citizens" and "civil liberties"[320] to designate the kind of rights that embodied "civil freedom in a democratic parliamentary state [a freedom which was] perhaps more endangered than in any other [regime]."[321] He stayed true to his early conceptualization and continued to argue for the recognition of individual rights in the second part of the constitutional text. In this regard, especially significant was an early suggestion of his to the effect that fundamental rights, even in doubt,[322] were supposed to be interpreted in such a way as to recognize their legal validity and content. The so called maxim of „fundamental right optimization" (*Grundrechtsoptimierung*) is thus to be accorded to no other Weimar scholar than Triepel.[323]

As discussions went on, Triepel added new shades to his picture of fundamental rights as the rights of individuals. When other exponents of constitutional rights entered the scene and began to circulate such concepts as values and institutions to describe fundamental rights (scholars like Erich Kaufmann, Rudolf Smend or Carl Schmitt, whose ideas we will assess in the next chapter), Triepel greeted and encouraged them,[324] endorsed their ideas as "the new theory" (juxtaposed to the "dominant theory" of positivism to which we come next), but his support for such novel ways of theorizing fundamental rights never meant that he would have fully subscribed to any of them. He surely never advanced a theory of his own that would have incorporated a collective dimension to complete, let alone to supplant the individual dimension of rights. On a concrete occasion he defended, against Carl Schmitt, the raison d'être of the individual version of a right constitutionally guaranteed for civil servants but at the same time accepted its collective interpretation as well.[325] In his article from 1921 on the rights of civil servants, Triepel first and foremost of all contended that their constitutionally granted so called acquired rights became valid legal norms as soon as the constitution came into effect.[326] If the provision in question might have gone "too far" in privileging this group, this condition was "only to be helped via constitutional amendment."[327] As he argued a few years later, such an amendment would have had to take an explicit form, that is, it would have actually had to alter the relevant constitutional text. Tacit amendments would not do, he claimed, even if put through by qualified majorities of legislation. Whoever wanted to fight the acquired rights of civil servants, needed to say so openly, by truncating the text and eradicating the provision.[328] Before that happened, he contended in 1931, individual civil

servants should be able to lay „claims to provisions that are essential components of being a civil servant" such as a life-long tenure.[329] Such individual claims, on Triepel's account by no means run counter to institutional guarantees for the civil service as whole, as suggested by Carl Schmitt.[330]

In general, however, Triepel never opposed that Kaufmann, Smend or Schmitt would theorize rights in explicitly non-individual terms either when such ideas were voiced in public at the meetings of the Association or when he tackled them in his writings.[331] This later position of Triepel's could certainly not have been a consistent one given the many contradictions among the theories that he simultaneously endorsed. His enthusiasm for an increasingly powerful scholarly support for rights was rather rooted in his search for munitions against „democratic absolutism."[332]

What he meant by democratic absolutism was made all too clear in the late 1920s, when Triepel was keen on accentuating his unconcealed aversion to parliament and the political parties.[333] Refusing to leave the sphere of politics to the parties, he opted for considering constitutional scholarship, as well as any constitutional interpretation, as a political matter so as to be able to define a comprehensive sense of the political, as that which had a bearing on the setting of goals, either according to values or in terms of interests .[334] As to scholarship's position then, he denied, against the tenets of formalistic positivism[335] that „[it would be possible] to interpret the law without regard to the political."[336] But legislation in turn was also supposed to be bound in terms of the goals it could set: "one [has to] follow the guiding star ... of the idea of law [and that of] eternal justice."[337] There was, however, ground to doubt that those guiding stars would actually be followed: the antagonism of "the law formed after [the] liberal principles" of parliamentarism and the "reality of mass democracy" seemed to suggest that "old parliamentarism was taken over by the rule of the party-state (*Parteienstaat*)." This was a process that Triepel described in the language of pathology and evaluated as the "degeneration of the state's body,"[338] for there was reasons to fear the „disintegration … of state and society"[339] caused by the intrustion of parties into the state. While political parties were mentioned only negatively in the Weimar Constitution in Art. 130 (1),[340] they had gradually built themselves deeper and deeper into political processes like elections,[341] legislation, the formation of government, and bureaucratic administration, which gave rise to the question whether their existence would therefore fall under a quasi constitutional recognition.[342] Triepel answered this with a resounding no, stating that parties were „extraconstitutional phenomena."[343] Nevertheless, mass democracy was gaining an upper hand over parliamentarism,[344] Triepel anxiously concluded, leaving hardly any

counterweights as bulwarks of freedom when coupled with another core problem of the party-state: „statute absolutism." This concept accorded the status of „an act of sovereignty to the statute" and did not recognize that „in a democratic republic … the constitution had primacy over simple legislation."[345] Triepel's Weimar scholarship, in the end, can be understood as a search for guarantees and guarantors not only of the freedom of individuals but also of all other constitutionally recognized entities.[346] For democracy, on Triepel's account, would not secure freedom by itself, as he warned already in 1919.[347] Triepel's rights theory was construed then to provide an effectice means of protecting private individuals from the concrete threats posed by democratic absolutism. The new democratic regime of the Weimar Republic was understood as potentially hostile to individual liberties because democratic majorities, in the form of parliamentary parties, were commonly accepted as disposing over sovereign powers with no constitutional institution to counter them. An integral part of Triepel's rights theory then was to respond to this particular situation of the Weimar Republic and promote the power of courts as bulwarks of individual freedom against legislative supremacy. The calling of constitutional scholarship in this most important political matter of protecting individual freedom was to debate the possible meanings of individual liberties and thereby to assist with well-examined arguments those in a position to actually protect these rights, namely the courts. The sense of collegiality between scholars and judges implied in Triepel's rights theory found its expression in a number of instances in his own practical endeavors as well as in the institutional embodiment of this model of scholarly constitutional interpretation, the Association of German Professors of Constitutional Law.

Administrative courts as the bulwarks of individual rights: Gerhard Anschütz and Richard Thoma, editors of the Handbook of German Constitutional Law

Anschütz's individual rights theory in his commentaries

Gerhard Anschütz's[348] positivist constitutional scholarship in the Weimar Republic was referred to from all sides as the "dominant theory" whose authority anchored in his co-editorship of the single most important constitutional law textbook of the Kaiserreich[349] and his commentary on the Prussian constitution.[350] This force illuminated and in turn was reinforced by the trajectory of Anschütz's work in Weimar Germany, most importantly by the fourteen editions of his commentary on the Weimar Constitution[351] and his co-editing, with the other doyen of Weimar positivism and long time Heidelberg colleague Richard Thoma,[352] of the seminal collective commentary on the Weimar constitution, called the *Handbook of*

German Constitutional Law which came out in two volumes in 1930 and 1932.[353] This chapter will reconstruct the individual rights theories of Anschütz and Thoma, contrasting them with that of Triepel, and assess the new genre of the collective commentary in the context of their ideas about the role of the discipline, comparing the status of the Association with that of the *Handbook*.

In the first and the first revised editions of his commentary on the Weimar constitution, which appeared in 1921 and 1926,[354] Anschütz covered developments in the field of rights discussions until the mid-1920s. That rights were "typical"[355] to many constitutions, including some earlier German ones, led Anschütz to argue that particular provisions were also meant to be understood "as they had been so far ... [i.e.] according to their traditional interpretation in Germany."[356] This general rule was based on the idea of a common constitutional custom which had been shared by many German constitutions before the National Assembly worded one in 1919 in Weimar. The gap between monarchical and republican Germany was thus bridged via constitutionalism in Anschütz's approach. The fundamental continuity of German constitutional thought was supposed to hold also for the question of who was bound by rights: legislation traditionally was not, therefore it was not supposed to be in Weimar Germany either.

With respect to one of the most debated rights at the time, the equality clause, Anschütz maintained that, like before, it was no norm for legislation under the Weimar constitution, explicitly rejecting all arguments to the contrary.[357] In the case of property, in contrast, he modified his stance and in the first revised edition of his commentary he partially adopted the position advocated by many in the early 1920s that rights bounded legislation.[358] He acknowledged that property, as one of the "foundation stones of our bourgeois legal, social and economic order along with marriage, parents' rights, freedom of contract and inheritance rights"[359] was protected constitutionally in such a way that it constituted "a meaningful limit to legislation."[360] Just as in other parts and editions of his commentaries, Anschütz meticulously listed all relevant major works that had contributed to the discussion of the property clause and explicitly endorsed the arguments of Triepel and Wolff not only with regard to the clause's (on his reading at least limited) binding force for legislation[361] but also as far as the designation of property as a legal institution was concerned,[362] including the new interpretation of limits to expropriation implied in the formula of "the good of the public."[363]

Under the heading of another type of argumentation, one that he deemed a matter of legal policy and thus called "rechtspolitisch,"[364] he claimed that property (and other rights of

the individual) needed more protection in the post-war situation because of the great changes that had taken place in the wake of war and during the period that he termed "war socialism,"[365] which incidentally, as he pointed out, was still in operation. Such a "wholly transformed relationship between the state and individual rights" demanded that individual rights be "interpreted not restrictively but broadly, and not with a collective but an individual meaning."[366] This was also the core meaning Anschütz attributed to fundamental rights already in his memorandum submitted to Hugo Preuss's committee that worked on a draft constitution:[367] in early 1919 Anschütz claimed that individualism was to be protected by rights provisions against the "ruling forces of socialism and collectivism" and that it all depended on rights "whether we would live ... in a democracy ... or in a dictatorship of the proletariat, i.e. under class rule."[368] The final edition of his commentary continued to hold on to this conception and declared that „rights … are to be understood individualistically … [and] pertain not to the relationship of state and its citizens but to [that] between state and the individual."[369]

Contrary to his reception of novel theories in the case of property, Anschütz defended the traditional interpretation of the equality clause and rejected the arguments that have called for its understanding as a prohibition of arbitrary legislation, advanced by Triepel and Leibholz.[370] Anschütz specifically took issue with the practice of these scholars who relied in their constitutional arguments on the ideas put forth in the jurisprudence of Swiss and American high courts and reinforced his own interpretative principle of assigning priority to interpretations that had been traditional to Germany.[371] He also rebuked the "political value judgment" he suspected to be at the root of the new theory and protested against any doubts that called into question "the capability of ruling parliamentary majorities to be objective, i.e. to treat similar cases equally," and wondered why mistrust was shown only against parliament but not against the judiciary.[372] His interpretation, which he himself termed "restricted," denied then that the equality clause would have prohibited "unjust, unequal or otherwise arbitrary exercise of the legislative power." In his view, „[Art. 109 was] not at all a norm for legislation."[373]

In the case of equality, Anschütz was not inspired to implement a revision similar to that which he had advanced for property even though he considered both of them to be "old liberal common goods"[374] and in 1921 found their traditional interpretations adequate for making sense of their appearance in the Weimar constitution. He defended the traditional interpretation of equality even in the very last edition of the commentary in 1933, against some of the same scholars whose property interpretations he had signed on to in the first

revised edition of 1926.[375] In the overwhelming majority of cases, Anschütz's strategy was to take rights for a quite normal constitutional problem and further domesticate them via the interpretative doctrine of earlier German legal dogma to be found either in theory or in praxis, that is either in constitutional scholarship or in the jurisprudence of the courts. How could then he side in some cases with novel interpretations? Such a seemingly inconsistent posture in the face of vast differences in the scholarly evaluation of certain rights could only be maintained against the background of the most comprehensive and typical of positivist interpretative principles.

The trademark positivist interpretative doctrine, which organized the rights interpretations of other positivist commentators such as Friedrich Giese[376] or Fritz Stier-Somlo,[377] held that rights had to be expounded "case by case,"[378] each taken separately in order to ascertain their legal meaning and establish what kind of rights they were. This credo then allowed an authoritative commentator like Anschütz to change his mind[379] regarding the nature and meaning of particular rights. Seen from this perspective, Anschütz did not do more than shift property from one category to the other, thereby reinforcing an interpretative direction in place not only among scholars but also in the language of the judiciary,[380] and at the same time further fortified his own power over categorization. The constitutional meaning of rights for Anschütz rested on a nonessentialist conception, where meaning was contingent upon the interpretative traditions and communities of scholars and judges. Within these bounds, which were to function more as a framework rather than provide a definitive set of meanings, the rendering of interpretative possibilities was ultimately reserved to commentating authorities like Anschütz.

The principle of treating rights one by one and simultaneously classifying and systematizing them buttressed positivist theories of rights and prompted Anschütz to insist on his dual classificatory system in all editions of his commentary:[381] the first of the two categories designated rights in the strict sense which enjoyed immediate and actual legal effectivity. The second category of rights encompassed mere guidelines which were not immediately applicable and required legislative acts to be actualized. Only very few rights were designated to fall under the first category,[382] whereby by definition the second category encompassed most of the rights provisions of the Weimar constitution according to Anschütz's classification. The dichotomy of rights as legal norms versus guidelines and the corresponding prerogative of grouping each rights clause either under the one or to the other category formed the backbone of Anschütz's positivist fundamental right interpretation. The commentary's last edition of 1933 continued to hold on to that principle,[383] but more

importantly closed on a note signaling potential further reshufflings of rights from second to first class and their likely subjects:

> along with Thoma … one will have to acknowledge that in case of doubt, rights are to be presumed actual [i.e. immediately applicable] and not the other way around. The political, ethical meaning of rights, including their history of ideas (geistesgeschichtlische) … should in no way be decried [in the work of Smend, Schmitt or Kaufmann] … but will be readily approved.[384]

Subsequent to the commentary's 1933 edition, the political context changed so much that Anschütz had no opportunity to realize the interpretive moves implied by such an integrative program and could not offer further modifications in his theory of individual rights. A very similar pattern emerges from his colleague's and collaborator's changing stance on methods and individual rights: as we will see, Richard Thoma too was eager to tame the tide of non-positivist methods but refused to translate its consequences into his theory of rights.

Thoma's theory of individual rights in the collective commentaries

Richard Thoma took the opportunity of a *Festschrift* article written in 1925 for the fiftieth anniversary of the Prussian administrative court to lay out his initial position on fundamental rights, addressing developments in the debates on the interpretation of the equality clause. He subscribed to the view of Anschütz, Giese and Stier-Somlo, claiming that the equality clause was "so unclear .. that for interpretative reasons and on grounds of the history of legal dogma ... all independent meaning was to be denied to [it]."[385] Thoma specifically objected to Heinrich Triepel's advocacy of constitutional protection for the equality principle but all of Triepel's other rights related arguments received criticism from Thoma. In this vein he called into question the adequacy of relying on the example of the United States and Switzerland in the matter of an extensive judicial review[386] and held up, in contrast, the achievements of home-grown jurisprudence (especially that of the Prussian administrative court in whose honor his article was written...) which never needed to "do tricks with provisions"[387] to deliver a powerful practice of rights protection. His opposition to judicial review by the regular courts was of course not newly induced but had been stated clearly already in his opening lecture at the founding meeting of the Association of German Professors of Constitutional Law in 1922. The idea that rights clauses would be binding on legislation did, however, urge him to protest and reformulate his conviction that legislative majorities as opposed to courts of any kind were to be trusted to "be judges" on whether a particular regulation discriminated in a "just

and reasonable" manner.[388] Such separation-of-powers-based arguments remained constant themes in his writings on rights as did his protest against any limits on legislation which he at one point credited with "plentitudo potestatis..., the sovereign in law creation."[389]

Throughout the Weimar years, Thoma referred to his piece from 1925 as his definitive treaties on how rights had to be systematized and placed on a scale indicating the level of their legal protection.[390] He ranked rights according to their legal force into four categories: rights on the highest level[391] could only be changed by constitutional amendment and could not be suspended by the president in case of emergency as the rights on the second level were allowed to be.[392] Rights in the third category[393] were regulated on the level of federal legislation and confined the powers of member states. The fourth category of fundamental rights[394] was famously said to be "running empty" due to the positivist doctrine that held sway from before the times of the Weimar Republic. In Prussian constitutional "theory and practice" the principle of the "legality of administration" already guaranteed the very idea that Thoma found to be at the core of this fourth group of fundamental rights, namely that they could only "exist in the framework of a statute or be restricted by one" -- which was coterminous with the principle of the legality of administration.[395] To honor the Prussian administrative court's practice of 1875-1925 was the perfect symbolic opportunity for Thoma to demonstrate his strong ties to the mainstream positivism of the Kaiserreich and illustrate the ways in which continuity with its fundamental rights conceptions could be realized in Weimar Germany. Although Thoma was to revisit some of his views on rights in a few years, his later writings too paid homage to late nineteenth century figures of positivist rights theory and reinforced continuity with them in many ways.

The collective nature of the two late Weimar commentaries notwithstanding, Thoma made sure to reserve for himself the strategically central pieces on rights both in the *Handbook of German Constitutional Law* that Anschütz and he edited,[396] as well as in the *Commentary on the Second Part of the Federal Constitution* edited by Hans Carl Nipperdey.[397] Before discussing the status of these complementary collective commentaries within the discipline, let us complete the picture of how Thoma's rights theory developed on their pages.

By 1929, Thoma's rights theory underwent a major change: he arrived at a revision of his overall evaluation of rights in his contribution to the collective commentary on the second part of the constitution edited by Nipperdey.[398] He famously declared "once and for all" that he "became considerably more convinced of the normative force ... of fundamental rights" and did so as a result of "continual thinking on the basis of the theoretical inquiries which

appeared since [his first publication in this field in 1925]."[399] For certain cases of rights he now supported the application of an interpretation "that assign[ed] them legal effectivity in the strongest possible manner"[400] and suggested thus that "as a rule and in doubt fundamental rights [were] binding [legal norms]"[401] -- a proposition to which Anschütz referred approvingly a few years later in the final edition of his commentary. What later came to be celebrated as Thoma's postulate of "fundamental right optimization"[402] did not, however, constitute a general interpretative rule but was actually juxtaposed to the idea, notably voiced in the very introductory sentences to the piece in which he was supposed to assess the "Legal meaning of the fundamental rights of the Weimar Constitution *in general*,"[403] that every single provision had to be interpreted *separately*.[404] We have already seen in Thoma's and Anschütz's early writings that *this* was the comprehensive positivist interpretative principle vis-à-vis rights. Thoma further elaborated it here into a method to solidify its status: the positivist interpretation of rights had to start out with an evaluation of the literal meaning of a particular provision, continue with a recourse to the history of the idea and dogma of the legal institution in question, consider the history of its origin (that is, the original intent of those who worded it) and finally examine a right's relation to other provisions of the constitutional text.[405]

In acknowledging the immediate legal effectivity of some rights, Thoma did not refer to the authors whose work most pointedly and consistently argued for recognizing rights as legal norms, like e.g. Triepel, Wolff or Kaufmann but relied instead on the "revision" allegedly put through by authors like Anschütz and the jurisprudence of high courts.[406] He simply ironized about the non-positivist scholars who energetically engaged themselves in rights interpretations and suggested that "German legal scholarship treat[ed] the Weimar Constitution as a mountain in whose depths the magic wand of the interpreter can always point to new and hitherto hidden streams of valid legal norms."[407]

Even more decisive for rights than the positivist positions on individual questions regarding separation of powers (like the legislative or judicial competencies just mentioned) was Thoma's increasing willingness to cast his rights discourse in a language which then molded his political thought as a whole. After several years of fighting over rights as a matter central to how political powers were to be separated in Weimar Germany, we find Richard Thoma reformulating and more clearly stating the core of a Weimar brand of positivist fundamental rights theory. His ambivalence towards new rights approaches was rooted in an aspiration to turn to the old, instead of the new in rights questions: by way of fully restoring the framework of a "system of subjective public rights,"[408] he resuscitated a late nineteenth

century figure of argumentation in public law which not only assigned rights a strictly circumscribed sphere of influence but also had wide-ranging implications for the constitutional thought of positivists in Weimar Germany. Advanced since 1925 but expounded in more detail in both of his pieces in the collective commentaries (symbolically reducing his discussion to this very theme in his last and most authoritative *Handbook* piece), Thoma revisited a central doctrine of the *Kaiserreich's* positivist public law scholarship.[409] In his hands, the theory of "subjective public rights" was to guarantee that individuals could personally claim some rights against administrative authorities and did not have to contend with "the reflex benefits of objective legal expressions" which was all those *Kaiserreich* theorists who denied the status of "subjective public right" to fundamental rights allowed citizens to enjoy vis-à-vis "the" State. In Thoma's formulation, the theory postulated a primeval fundamental right (not explicated in the text of the constitution), namely a "general personality right of freedom from illegal restrictions" which was to serve as a model to any other enacted, positivized right (either in the constitution or in statutes) which had to be interpreted as analogous to the primeval "subjective public right."

The significance of such a comprehensive rights theory turned not only on the question of which rights were then to be viewed as "subjective public rights" but also on the issue of how individuals could actually claim them. Although we have seen that Thoma's appreciation of the "legal force residing in fundamental rights" had grown significantly, "subjective public rights" still made up only a fairly exclusive club among the many rights provisions of the Weimar constitution. Thoma's catalogue of rights (in the narrow sense of "subjective public rights") listed rights in three categories:[410] beside the category of freedoms,[411] Thoma made use of two others developed by Georg Jellinek, namely those of status activus,[412] and status positivus.[413]

More decisively, however, the comprehensive theory also rigorously restricted the range of institutions where individuals could claim the rights that the theory concluded were real ones. Thoma relied here on the doctrine as it was expounded in the Kaiserreich and agreed that essentially only administrative courts were to play the role of protector in this system, with regular courts if not completely banned then still not preferred in carrying out the task of protecting fundamental rights. Such protection was naturally to be provided only against the various institutions of the administration. That Thoma implemented no changes in this respect to the earlier version of the theory, gave rise to a most peculiar situation which was to characterize the whole lifetime of the Weimar Republic: since all attempts at introducing a federal administrative court (*Reichsverwaltungsgericht*) had failed, and a

unified federal system of administrative judiciary never materialized,[414] fundamental rights, according to Thoma's theory, were left without a crucial protector, at least as far as the federal level was concerned. Administrative courts on the member state level continued to adjudicate cases as they did in the *Kaiserreich* but in contrast to those times when the federal constitution of 1871 had no rights provisions at all and the active administrative judiciaries of the *Länder* protected rights granted in the constitutions the *Länder* (and also greatly contributed to the development of the very doctrine of "subjective public rights"), the Weimar Constitution included a whole catalogue of fundamental rights which not only needed to be sorted out and categorized according to the positivist rights theory but would also have required the existence of a federal administrative judiciary to protect them. Thoma never fully rejected review by the regular courts exactly because they "provided important protection for the freedoms of citizens,"[415] but he was also not ready to grant a significant role to the regular judiciary either in this matter or generally regarding judicial review.[416] The positivist effort to keep ordinary courts away from fundamental rights and advocate administrative courts, the institutions seen adequate for their protection, formed part of a larger battle in disciplinary politics aimed at securing the professional authority necessary for drawing the boundary between the fields of public and administrative law, the two disciplines which had separated from one another during the nineteenth century which served as ground zero for Weimar positivists.[417]

The overarching theory of "subjective public rights" illuminated a number of crucial stances in Thoma's rights discourse: he wrote his very first explicit rights treaties for an administrative court anniversary, fought against judicial review and the limitations on legislative powers throughout the Weimar years,[418] and then at the height of his professional influence felt the need to address rights again and radicalized his position by retreating into a comprehensive theory from the more volatile ground of interpreting rights one by one and having to take ongoing interpretive developments into account.

The role of legislation under this theory was to creatively dominate the field of rights, setting not only their boundaries but their very substance as well. Federal statutes could create "subjective public rights" or modify those in the constitution either by changing the text with a qualified majority of two thirds of the votes in legislation or by way of expounding right provisions whose substances the constitution regulated only abstractly. The freedom of citizens that administrative courts were supposed to protect was circumscribed by such legislative acts: in fact, the more there was of it, the better, since without right-instituting statutes, there would not have been much to claim before the courts. This was a concept of

„statutory freedom" which Thoma energetically defended and in the service of which he thought to have acted consistently when moving with ease across regime boundaries.[419]

Reinforcing the context of the separation of powers arguments which had framed rights discussions all the way through since Triepel's early contribution, Thoma felt challenged to explicitly state his conception of legislative supremacy in his two commentary articles on rights. In relation to rights, such a stance implied that "the collective majesty of the power of the people formed into a state exclud[ed] any absoluteness of freedoms or rights of the subjects of the state."[420] The statutory positivist political theory did not allow "legislation to carry only a mere competency but [it had to] exercise the *plenitudo potestatis* from which all other competencies were to be regulated"[421] and emphasized that the ideal of *Rechtsstaat* should not be understood as the binding of legislation, but much more as the binding of the judiciary and administration: only the latter two "should be under the law."[422] Whereas positivists ultimately could not recognize rights against the state "as norm-giving instance" (*normierender Staat*), the separation of powers resulted in many institutions, i.e. the state "formed by norms" (*normierter Staat*), against which their theory already allowed citizens to posses rights.[423]

In spite of the fact that their positivist theory of rights was individualistic, the political theory of Anschütz and Thoma in Weimar rested not on the individual but on a conception of the people. Both of them stressed the democratic principle of the Weimar constitution and advanced a theory of popular sovereignty that provided a subtle background to their arguments about courts and legislation discussed above. They held, namely, that the German people's sovereignty was always present in the electorate's votes in plebiscites, in parliamentary and presidential elections, outlining the contours of a parliament in which vast legislative and executive powers were to combine and which only a few „checks and balances" were to counter.[424] Any political power had to be connected in some way to the people, so elections, not legal procedures before the courts or in the bureaucracies formed the backbone of Weimar democracy, even if the latter were important as well. No matter how central the legislative state for positivists was, Thoma laid stress on pointing out its difference from the "legality of the life of the state:"[425] as a prime means of securing the latter, Weimar positivists advocated the expansion of administrative courts to check the praxis of administration, which they saw, under the influence of Max Weber's political sociology, as a defining momentum of modern politics.[426] Regular courts on the other hand were not accorded any serious constitutional significance, as we recall from Thoma's presentation at the founding meeting of the Association of German Professors of Constitutional Law. In fact,

granting any review powers to the courts would have meant that "judges would [have been] placed above legislation"[427] which "would [have] meant standing [constitutional] relations on their head."[428]

Beyond legislative supremacy, Anschütz and Thoma also subscribed to the theory of unbounded parliamentary competency to amend the constitution. Such an extension of legislative powers led to a lack of substantial limits to the politics of the people and an extreme voluntarism implied in the notion of the „elasticity" of the constitution.[429] While Anschütz imagined the presence of the people in these processes by identifying the state with the people and finding „the common will of the entire people" in the state's operations,[430] Thoma conceived of the people's presence as manifesting itself in a plurality of groups that form alternating majorities in the party-state.[431] They both explicitly endorsed the political parties which Thoma specifically tied to the liberal principle of the Weimar constitution ensuring an elitist democracy as opposed to radical egalitarianism.[432] Somewhat in contrast to this, Anschütz took democracy to demand „an entire people that thinks and feels politically [which was a] condition no constitution [could] create [but one that was] a prerequisite … of a democratic state."[433] In spite of differences in their concepts of democracy, they both took pride in being democrats „loyal to the constitution."[434]

At the root of critical stances against one or the other element of their views of Weimar democracy, both Anschütz and Thoma suspected class anxieties beside theoretical misgivings on the part of colleagues. Critics embodied the „Patrician [who feared being] overrun by the Plebeian" on Thoma's reading while Anschütz stated that „the class to which we academics belong, the educated bourgeoisie … [is] not always free of … resentments [and] feels pushed back by other classes."

In light of the political theory Weimar positivists endorsed, it comes as no surprise that in the polemics Thoma allowed himself in the commentaries, he accused of being antidemocratic all those who advocated the idea that rights bound legislation, argued for limits to constitutional amendment or wanted the courts to practice the constitutional review of legislation.[435] He did not name the "enemies of democracy" but we know that the thematic coupling of rights with the causes he took to be undemocratic was primarily suggested both by Heinrich Triepel, as well as by Carl Schmitt whose ideas we come to discuss in the next chapter. To the latter, Thoma had already casually addressed such an accusation[436] but in the rights commentary he went much further. By declaring "the elasticity of the constitution a politically ... superb thing"[437] and in contrast attributing to Schmitt a "dual spiritual attitude towards the phenomenon … of Rechtsstaat," Thoma suspected that "deep down ...

[Schmitt's] constitutional theory was aimed not at sanctifying but rather at depreciating the written constitution, ...[which he] endowed with the kind of stiffness, which was to cause its collapse."[438] Thoma's accusations against Schmitt were all the more interesting because three short years after they were made on the pages of the Nipperdey commentary on rights, we encounter the two of them as fellow contributors on rights for the *Handbook*...[439]

On the whole, the positivist duo's theory of popular sovereignty seems to have allowed only for majoritarian rights securing the power of the people and not for anything that transcended them. Still, they both endorsed an individual understanding of rights, advanced as a matter of continuity with the imperial constitutional tradition. We recall, that this was such a strong argument on their part, that Thoma would have had the matter of judicial review ultimately be decided by the facts of tradition at the expense of theory. Such an approach, however, secured not the people's but scholars' power. And that power was meant to be made effective in the form of commentaries.

Rights in the collective commentaries

The two collective commentaries for which Thoma delivered definitive pieces on rights were written and published parallel during the second half of the 1920s. *Fundamental Rights and Fundamental Duties of the Federal Constitution: A Commentary on the Second Part of the Federal Constitution* was edited by Hans Carl Nipperdey and was published in three volumes in 1929 and 1930. The two volumes of *Handbook of German Constitutional Law* edited by Anschütz and Thoma were published in 1930 and 1932.

It was the "immediate practical significance" of rights that attracted Hans Carl Nipperdey -- a young professor at the University of Cologne and a specialist in new legal discipline of labor law[440] -- to take up editorship of the three-volume commentary.[441] Although we do not know much about the circumstances of the inception of the idea to put out this commentary either as far as the publishing house Weimar Hobbing in Berlin is concerned or in terms of why Nipperdey would have been commissioned to be the editor,[442] it is nevertheless clear from the list of forty-nine contributors[443] that the undertaking was supposed to mobilize not constitutional scholars primarily but men of the "theory and praxis" of various legal fields. The twelve commentators who came from high ranks of the governments of *Reich* and *Länder* interpreted such fundamental rights for the Nipperdey collective commentary as the right to vote, the right to education or the property clause, whereas the seven judges of the various high courts covered such rights as the freedom of expression and assembly, and the rights of civil servants. Two lawyers wrote the articles on

intellectual property and on "socialization." None of the law professors who wrote the remaining entries -- excluding those who wrote on the administration of justice, which put the total number of entries on fundamental rights written by academics to a mere 26 -- had extensively published earlier on rights. Thus all contributors counted as outsiders to rights discussions among constitutional scholars, in contrast to which Richard Thoma wrote the general introduction, while Anschütz explained the system and significance of administrative courts for fundamental rights.[444] Their influence is clearly discernible on the individual entries that generally bore the tone of compliance with the line dictated by positivists.[445] Their names and views also marked the Nipperdey commentary as a complementary undertaking to the other grandiose collective project that Anschütz and Thoma were orchestrating at the time.

In their introduction to the first volume of the *Handbook of German Constitutional Law*, the editors referred explicitly to the complementary nature of the two collective commentaries by stressing the impracticability of including entries on all rights provisions in their collective commentary given the "completeness of .. presentation" in the three volumes edited by Nipperdey. They added, most importantly, that fundamental rights in "any case ... belong[ed] materially .. to the working field of administrative law"[446] as opposed to constituting a problem for constitutional law proper. Nipperdey, for his part, formulated this idea and the complementary character of the three volumes he edited by referring those interested in this academic question to Thoma's summary piece "The legal meaning of fundamental rights provisions in the German Constitution in general" which "said the necessary ... about the content and method of [these volumes]."[447] As to the relationship of rights and constitutional law, Nipperdey stressed that "their meaning extended beyond the confines of constitutional and administrative law .. [and] involved such fields as civil, commercial, business and labor law ... the law of the churches, penal law and international law, etc."[448]

In contrast to an overall compliance with the positivist position on rights, Nipperdey in his preface alluded nevertheless to "having tried to place fundamental rights [in the course of the analysis] into the storm of events in state, society, culture and economy," a program which bore witness to aspirations that clearly aimed beyond a narrowly confined positivism.[449] But as an outsider to constitutional law, Nipperdey must have figured for the positivist duo as an uncontroversial character in the debates on rights. His later role was to disappoint these expectations: Nipperdey followed up on his institutional involvement in the rights discussions of late Weimar by continuing to take an active part in producing commentaries on rights, this time on those of the new 1949 constitution. He co-edited the definitive *Handbook of the*

Threory and Practice of Fundamental Rights in the early Bundesrepublik and adjudicated cases as chief justice of the Federal Labor Court.[450]

More important for the course of Weimar rights discussions than the obvious and explicit parallel and complementary relationship of the Nipperdey commentary to the *Handbook*, was the rivalry implied in the relationship between the collective commentary on public law edited by Anschütz and Thoma (a project started in 1926 and completed in 1932) and the Association of German Professors of Public Law, founded by Triepel in 1922 and presided over by him until 1926. Both enterprises were explicitly conceived in terms that pertained to the whole of the discipline and clashed most palpably on the question of rights.

Whereas rights formed one of the central problems in the discussions of the Association, the *Handbook* to the contrary was designed to treat rights on the periphery of constitutional law: the editors recognized the presence of rights clauses in the second part of the constitution as a general feature of modern constitutions, embodying the "idea of freedom" but not as occupying the same plane as the organizational part of constitutions which they accounted for as constitutional law proper. They thus conceived of rights provisions in general as embodying an aspect of a wider constitutional custom existing well beyond the text but on the other hand as comprising textual sites in the constitution which they sharply distinguished from what traditionally passed for constitutional law.[451] Accordingly, the editors decided to devote separate entries only on "the most significant fundamental rights of German democracy from the perspective of constitutional policy (*verfassungspolitisch*),"[452] beside a summary survey on rights as whole. Such a positioning of rights was planned for a work that aspired to continue the tradition of the great constitutional textbook of the *Kaiserreich* (written by Georg Meyer, its last edition form 1914-1919 with Anschütz's co-operation) and that of "the standard work ...[of] the big 4-volume Laband."[453]

The genre of a collective commentary was particularly apt for a larger disciplinary project in which the doyens of Weimar positivism turned away from a defensive posture and adopted the pose of integration. Just a few years after the divisions in the discipline became open in the so called debate on methods,[454] Anschütz and Thoma wished to reintegrate colleagues by mobilizing them around a discipline-defining collective project whose "Subject [and] Methods..."[455] Thoma formulated so masterfully that the new positivist credo had all chances to consolidate most antipositivist objections and accommodate new directions voiced in the *Methodenstreit*. He decried the ways in which the old public law positivism "went astray" by practicing a "one-sided logicism" and wanted to preserve the discipline's scientificality by isolating itself from all values, questions of politics and conditions of

society.[456] Relying explicitly on some of his most important opponents in the debate on methods like Triepel and Smend, Thoma proposed to complete the "shift that had taken place since the turn of the century" and defined the task of constitutional scholarship not only in providing a "dogmatic of the positive law" but also in accounting for its "historical contextualization, sociological explanation, political critique and (legal) philosophical evaluation."[457] Such a discipline would be a "source of the political education and the living force of the realization of the political existence .. of the nation."[458] But even this "*neue Sachlichkeit*" (new Objectivity) [459]of the revised positivist line could not attract a particular set of colleagues. A great number of key "antipositivist" scholars ended up staying away from the collective commentary such as Triepel, Smend, Kaufmann, Holstein or Heller.[460] In spite of the fact that only a rather limited "plurality" of constitutional theories came to be represented on the pages of the Handbook, its two volumes were still considered to deliver the definitive stance on the central constitutional problems of Weimar Germany.[461] Thus when we take stock of the positions on fundamental rights in the second volume of the *Handbook* of 1932, we find a unified, and by virtue of their location, institutionally dominant set of views marking the era of late Weimar. The rights entries of the Handbook owed this status partly to the fact that fundamental rights formed the topic of one single Association meeting after the founding and *Methodenstreit* epochs (1922-1927),[462] whereby the Association of German Professors of Constitutional Law can be said to have lost its former institutional grip on rights discussions in late Weimar.

In the sections of the *Handbook* which were supposed to discuss the "the most significant fundamental rights of German democracy," five authors covered some altogether 20 different rights provisions under the headings of the right to equality, the freedom of association and assembly, the freedom of speech, the freedom of religion and the constitutional foundations of educational institutions. All contributors, including Anschütz who wrote the entry on religion, relied either on the classifications developed by Thoma in his piece for the Nipperdey commentary or on his theory of subjective public rights advanced in the *Handbook* itself. Accordingly, the binding nature of rights on legislation was acknowledged for provisions on the freedom of speech, religion and education. An associated judicial review was rejected according to the pattern that was by now familiar from earlier debates -- a clear novelty was present, however, in the straightforwardness with which Häntzschel presented the concrete contemporary possibilities of legal protection for fundamental rights in general and the freedom of expression in particular:[463]

> there is no legal protection for expression, or for any other rights for that matter, on the constitutional level ... [W]hen the administration or the courts of the member state act in conflict with Art. 118 ... the federal government can execute certain matters directly or request a decision from the Staatsgericht but the individual citizen himself still does not have a (federally regulated) legal way to enforce his right ... [T]his deficiency is rooted in the fact that a federal administrative court as foreseen in Art. 107 is still not established ... so a unifying voice on fundamental rights is missing for the legislative and administrative powers of member states ... [O]n the member state level, individuals can turn to administrative courts only in the states that allow access to these courts, like Prussia, whereas in states like Bavaria, individuals can turn only to the immediate superior administrative level in case they want to claim that their fundamental right to freely express their opinion was violated.

Rendered from an institutionally dominant position, these contributions on fundamental rights in the collective commentaries comprehensively reviewed and rendered judgement on the debates on particular rights provisions but could hardly claim the kind of authority that Thoma's summary commentary writings exerted on the terrain of rights discussions. Both the *Handbook* and the Nipperdey commentary on rights were dominated by a positivist individual rights theory, traced back by Thoma to its pre-Weimar roots of a theory of subjective public rights. No matter how integrative Thoma's new methodology was, the rights theory endorsed by the collective commentaries remained positivist.

Kelsen's position on rights

There is a nice counterpoint to the nexus of Weimar positivists' theory of rights and positivist methods in the views of Hans Kelsen.[464] He radicalized the positivist method into a „pure theory of law" with which in turn he could hardly make any sense of rights as a legal matter. Kelsen therefore advanced no theory of rights, which along with his methods, put him in a position that had probably more to do with Kaiserreich constitutional scholarship than with the scene of Weimar constitutional debates. Nevertheless, Kelsen was an active participant of the most important scholarly discussions of Weimar Germany (given that he himself provoked some of those debates), which made him an honorary Weimar constitutional scholar.[465]

In contrast to the increasingly integrative character of Weimar positivists' methods, Kelsen's positivism went the opposite way and wanted to purify legal science from all considerations that looked beyond the positive law, applied any other tool than logic and construed the law in any other way than into a system of concepts.[466] This radical separation of his scholarship from other disciplines and almost all versions of constitutional

jurisprudence practiced contemporarily also urged him to confront his colleagues and in the form of criticism make clear the distinctions which set his approach apart. On neo-Kantian basis he was not willing to accept any value judgements or politically relevant findings in the course of legal analysis.[467] This intellectual posture built itself so much into his scholarship that on an abstract level it can be brought into connection with his commitment to democracy.[468] The thrust of democracy Kelsen defined on the one hand as relativism: „a *Weltanschauung* of criticism and positivism, defined as a philosophical and scientific school of thought based in the positive – that is, the given, the perceivable, a changeable and constantly changing experience … corresponds … with a democratic attitude … reject[ing] the assumption of an absolute transcending … experience."[469] On the other hand, Kelsen's theory of democracy, very much in agreement with Weimar positivists, put the concept of the people on center stage, advancing thereby a theory of popular sovereignty. Popular sovereignty for Kelsen meant above all that the freedom of the people, formed into a state, had primacy over all else, including the individual and his freedom.[470]

As to the consequences of this theory of popular sovereignty for rights, the two positivist schools went wide apart: since Kelsen equated the state with the legal system, he could acknowledge no legal rights that would predate the state.[471] The idea of such rights was decried by Kelsen as being rooted in natural law, which he did not accept either in terms of his legal method or in terms of his theory of democracy. Rights catalogues thus presented for him a paradox in that they took the form of law to secure freedom from the positive law.[472] The one area where rights were attributed a meaning consistent with Kelsen's legal and democratic theory was the rights of minorities:[473]

> "[The] *protection of minorities* is the essential function of the so-called *basic rights* and *rights of freedom*, or *human and civil rights*… Originally, they offered individuals protection against executive authority, which, under the principle of absolute monarchy, was authorized to carry out in the "public interest" any restriction of the individual sphere not expressly prohibited by law. But as soon as administration and jurisdiction become possible only on the basis of specific legal authorization …as in constitutional monarchy and the democratic republic, the establishment of basic rights makes sense only if it unfolds in a specific *constitutional form*… [T]he catalogue of basic rights and rights of freedom turns *from protection of the individual from the state to protection of a minority*, a *qualified* minority, from the *absolute* majority. It means that measures encroaching upon certain national, religious, economic, or spiritual and intellectual spheres of interest are possible … only when the majority and the minority *agree*.

In spite of this principled position on rights, which, we recall, he did not considered as a scientific view, Kelsen wrote about rights in the positive law in a way that had more in common with his Weimar positivist colleagues. He was commissioned to contribute a piece to the Handbook to explain the main constitutional features of Austria,[474] and as a member of the Association's presidency elected in 1928,[475] he gave an address on constitutional adjudication in Vienna[476] -- these two pieces give the best account of his take on positively given rights.

Kelsen acknowledged in his commentary piece that fundamental rights were not simply guidelines for legislation but also prohibited the statutory violation of individual freedom that rights as subjective public rights circumscribed. They also required that legislation built in a certain positive content to its acts in which it realized constitutional rights.[477] The new judicial organ that Kelsen theoretically construed and presided over since 1921, the Austrian constitutional court, also adjudicated cases that belonged ultimately in the competency of administrative courts, as Kelsen pointed out. Most importantly, the constitutional court "accepted complaints ... against administrative organs, in case the petitioner claimed that one of his constitutionally guaranteed rights was violated in the [administrative] decision."[478] We cannot and do not have to go into the question of the practice of the Austrian constitutional court to indicate the limits of such a judicial activity on the rights front: for "the application of any norms beyond the legal and positive ones has to be out of question,"[479] Kelsen made sure to declare. Constitutional adjudication, a most important professional activity for Kelsen between 1921 and 1929, would enter a "highly dangerous" territory when it relied on "any kind of natural legal rules ... or justice ... -- postulates that [were] in fact expressions of mere group interests," whereby the constitutional court would "usurp an entirety of power that it would have to find unbearable."[480] At an earlier Association meeting, Kelsen had already protested vehemently against a broad understanding of rights and the associated idea of judicial review by regular courts.[481] He decried such attempts as dangerous and ultimately capricious metaphysics and stood up for legislators as opposed to a regular courts in the separation of powers context of that debate. Kelsen granted wholesale powers to legislation to realize the dominance of majorities and only much later, namely in 1955 did he "substantiate his concept of democracy" by taking a "normative turn" and acknowledging limits to legislation -- in the form of liberties at that.[482]

In the Austrian context then, only the constitutional court had a standing in the protection of rights, both in terms of concrete cases of individual complaints and as far as limits to legislation were concerned. Rights in the "pure theory of law" pertained thus above all to legislation. Positive legislation substantiated rights in statutes whereas negative

legislation (as constitutional adjudication was understood and termed by Kelsen) guaranteed the logical consistency of the legal system by making void pieces of positive legislation that logically did not fit the constitution. The methodological background to these ideas rested, again, on the sharpest possible separation of the legal-logical perspective from all other considerations, such as the ones Richard Thoma proposed to include in the framework of a revised positivist constitutional scholarship, not to mention the methodological novelties proposed by "antipositivists." Sociological, political or historical considerations fully excluded, Kelsen allowed even philosophy to inform his legal theory only in the form of a specific version of neo-Kantianism. Only under the perspective that this rationalism covered did the legal system, including rights, came into the view of the "pure theory of the law." In sharp contrast to this, rights discussions in Weimar Germany started out and continued to be held under presumptions that designated the problem of rights outside of formal rationalism, setting Kelsen's positivism so much apart that the cleavage between his and Weimar scholars' constitutional discourse came to open only in the polemics about methods but not in the matter of rights.

In conclusion to this chapter, let us recall that in contrast to Heinrich Triepel's individual rights theory, the positivist theory of rights was designed to protect the private sphere of the individual not from the legislative encroachment enacted by democratic majorities but from the executive branch of government: administration writ large. The positivists relied on administrative courts to deliver the protection of individuals against illegal practices by various administrative institutions. At the heart of positivist rights theory lay the contention to secure the legality of administration – as opposed to Triepel's rights theory whose main aspiration was to guarantee the constitutionality of legislation. Beyond their very different evaluations of what kinds of threats were posed to individual freedom by the concrete ways in which political powers were devided and separated in Weimar Germany, Triepel's and the positivists' rights theories also implied contradictory positions on the role of scholarship in constitutional interpretation. As opposed to Triepel's model of constitutional debate, realized in the framework of the Association, the positivists opted to deliver authoritative judgments themselves in collective commentaries where they sought to fix, instead of debating constitutional meaning for "theory and practice."

CHAPTER FOUR: WEIMAR RIGHTS THEORIES REACHING BEYOND THE PRIVATE INDIVIDUAL

The political community dimension of rights in the debates of the Association of German Professors of Constitutional Law: Erich Kaufmann, Rudolf Smend and Hermann Heller

At the beginning, we find only sporadic and largely negative references to rights in the reports on Association meetings since 1922[483] but Heinrich Triepel's energetic initiative to thematize and appraise fundamental rights was soon to find its impact on the Association's agenda too. That rights would be chosen to be discussion topics quite early on is to be attributed to Triepel's dominating influence as founder and first president of the Association. Equality was discussed already at the fourth meeting in 1926 when Triepel was still in the first, grounding presidency of the Association whereas the year after that the freedom of opinion was debated at the Association's meeting in 1927.

Erich Kaufmann, Rudolf Smend and Hermann Heller presented their rights theories in the context of Association debates at the 1926 and 1927 meetings which offer us the possibility to discuss the political community dimension of rights implied in their theories by juxtaposing them to the individual rights theories analized in the previous chapter.

Rights as principles of natural law in Erich Kaufmann's constitutional theory

Erich Kaufmann[484] delivered the main address on the equality clause of the Weimar Constitution at the 1926 meeting of the Association. He deliberately took a radical stance, one that he was sure to shock many of his colleagues. He declared the equality clause to realize an element of natural law and thereby proclaim a legal principle in the constitution that was not the invention or the creation of the National Assembly. The equality clause provided thus an example of how the whole legal system stood under the reign of a "higher order [one that was] eternal, inescapable" and whose legal principles had to be heeded for any "statutes [Gesetz] to be real law [Recht]."[485] Relying on natural law in the interpretation of positive constitutional law basically meant tipping over almost a hundred years of positivism and reconnecting to a disciplinary tradition whose overthrowing was a constitutive element of positivism.[486] That some colleagues were indeed dismayed by Kaufmann's starting point and commented on his speech accordingly is surprising to the extent that his 1921 treatise on the "Critique of Neo-Kantian Philosophy of Law"[487] had already made clear enough his stance against all versions of formalistic neo-Kantianism standing in the background of legal positivism. He objected to considering "the law without any relation to sociological or

psychological forces" and accused positivist interpreters of Kant of having thrown German scholarship into an intellectual isolation. Especially unfortunate on Kaufmann's reading was the sharp distinction wedged between the ethical and the legal, against "the real Kant," as well as the resulting wholesale separation of values from the law. He concluded the essay with a call to the "emerging generation" to "throw rationalism out of itself" and alluded to the necessity of "continuing natural law thinking" at various points of his work.[488]

Succinctly formulated, Kaufmann declared positivism to be "impoverished"[489] in his main speech at the 1926 Association meeting – these were fighting words which inflamed the famous battle on the methods of constitutional law. As opposed to an ailing positivism, he praised the natural law tradition as the viable alternative. In his speech, Kaufmann subscribed to a version of the natural law tradition that recognized a series of so called "objective institutions of the moral universe," contesting thereby the rival theory of natural law based on individualistic and rationalistic notions.[490] He rejected the abstract and general notion of equality, in currency since the seventeenth century, and opted in contrast for an „institutional understanding" based on Aristotelian and Christian notions of natural law.[491] Essential to his argument was the explanation of how natural law could be made to matter in the world. „Each generation … [has] an active and constructive role [to play]", Kaufmann suggested:

> we have to fill the institutions with our spirit … not only to realize these institutions in the first place but also to fill them with [our] own conceptions of legitimacy (*Legitimitätsvorstellungen*), to pour [our] own spirit into eternal forms, to give them, in fact, real life.[492]

In this vein, Kaufmann interpreted the equality clause as embodying a very concrete principle of legitimacy, namely "the prohibition, across the legal system, of discrimination according to estates, classes, confessions, national or racial origin."[493] He designated three corresponding tasks to be carried out in the form of human endeavor under the auspices of natural law: the "choice of principles of justice," first of all, was a decision of the highest significance with which legislative bodies were entrusted who also had the task of writing up "technical legal formulas and norms," which still counted as realizations of natural law, albeit on the lowest level. The level in between these highest and lowest of tasks was, however, no longer the sole competence of legislation: they were to share with judges the duty to "develop norms out of the telos of objective institutions" and to "formulate a community's principles of legitimacy."[494] He showed what he meant by these various levels and the division of tasks between courts and parliaments on the example of recent legislation and jurisprudence on the

burning revaluation question. As to the first and highest task, Kaufmann pointed out that legislation clearly violated the requirements that would have followed from the principle of "*justicia commutativa*" or "justice of exchange." But since legislation decided to choose a different principle, that of "*justicia distributiva* ... and thereby took into consideration the comprehensive historical, political, economic, financial and social situation of the German people," the legislation's further decisions were to be judged under the auspices of distributive justice. Courts were bound by these decisions and were forbidden to adjudicate cases in the spirit of "*justicia commutativa*." Their "specific judicial task" was to watch for the violation of the "outer borders" that gave themselves from the principle of justice to which legislation committed a particular legal area. Courts were not supposed to "trespass [the territory of] legislative consideration and decision by way of a know-it-all-better behavior."[495] A pattern was reproduced in Kaufmann's address that, as we have seen, was molded early on by Heinrich Triepel and Kaufmann himself going back as far as their co-authored draft constitution of 1919: to talk about rights meant already there to talk about the role of courts and legislation. "Taking rights seriously" was coterminous for both of them with a bounded legislation and empowered courts whose task it was to police the boundaries of the constitution and not let legislation transgress them.

Although Kaufmann never developed his views into a fully fledged theory of rights, it is clear that his reliance on natural law did not involve a turn to the concept of natural rights. As his Association speech indicated, he saw eternal principles acknowledged in constitutional rights provisions which embodied „society's … objectively differentiated … institutions whose goals or teleology reflected natural law."[496] Along this central dialectical path of his Weimar thought he was able to offer the rudiments of a constitutional theory of popular sovereignty which, on the one hand, avoided relativism by way of situating the plurality of voluntaristic elements of his theory within the ultimate framework of natural law.[497] On the other hand, he was also able to forestall a totalizing conception of the people as an undifferentiated unity whose „spirit" or „will" in turn would be made identical with the state.[498] He defined as „the necessary point of departure for all constitutional theory… an insight into what the people's spirit and the people's will actually are."[499] Such a „genuine constitutional theory"[500] involved an understanding of the „fundamental categories of constitutional life [:] action; consent and denial of consent; deliberation with regard to action; deliberation with regard to consent or denial of consent."[501] An analysis of these aspects made it possible for Kaufmann to grasp „the individuality of a constitution [which] rest[ed] on how individual peoples have in their individual spirit succeeded in giving these categories ethical

and spiritual content in particular historical contexts."[502] Thereby transcendently rooted ideas became immanent to a particular polity. Yet, he rejected „every hyperspiritualization of constitutional law," by calling attention to the fact that „[a] constitution can do nothing more than create and establish frames in which the people's actual ethical and charismatic powers can find expression in a legal order."[503] Consequently Kaufmann found an increasing need „to give the political conflict organizational, legal, and ethical form by means of parliament"[504] as well as in „associational pluralism [as] the organs of people's will."[505] Similarly, he had earlier called for „research on truly dominant sociological forces … i.e. especially the praxis of parliament and the parties as the actual creators of and modifiers of the *living constitutional law*."[506] The pluralism implied in this theory led to a conception of representation[507] which, taken together with the tasks Kaufmann assigned to legislation in realizing natural law in the world, made his evaluation of political parties and parliament far less critical than his colleague's Heinrich Triepel's was. Yet, their overall separation of powers position, formulated by both of them mainly in connection with rights contributions, was very similar: the two of them count as the leading advocates of judicial review in Weimar Germany.[508] In contrast, the natural law background to Kaufmann's position remained a unique stance in the Weimar Republic – only to be suddenly reinforced by post-war committments in the Bonn Republic.

The second speech at the 1926 meeting by Hans Nawiasky[509] and the discussion that followed after the speeches fully reproduced the separation of powers pattern of rights discourse. Nawiasky set the stage by declaring himself an opponent of Kaufmann on all grounds:

> Kaufmann is an idealist, i.e. natural law thinker, I am a skeptical, i.e. positivist, perhaps not an altogether outdated one. For Kaufmann law and ethics are one in a sense, for me they are two different things. For him law (Recht) has a primacy on which statutes make … small modifications. For me the statute has primacy as that from which law is interpreted.[510]

He then gave three possible meanings to the equality clause, two of which he found to be in agreement with his "systematic" interpretation of the constitution.[511] Equality in the course of the application of laws was uncontroversial on his reading, unlike equality in a "personal sense" which he still upheld as inherent to the constitution and saw it as prohibiting legislation that would discriminate along social groups. This was a suggestion that diverged from the interpretation of other positivists like Anschütz, who declared also at this occasion that

"equality was a norm not for he who gives the law, but for he who applies it."[512] It was only the third meaning of equality that Nawiasky vehemently rejected as incompatible with the constitution: material equality would have required that "the same circumstances ought to be handled in the same way," a principle he took Triepel and Leibholz to promote.[513] It was in connection with this third meaning, that Nawiasky formulated a strong argument against judicial review. He pointed to the consequences of such a judicial practice which he foresaw as realizing a "centralism and ... the kingdom of the judiciary": the question for him was whether the meaning of laws would be defined "in a compromise of interests achieved by the majorities of the factions or parties ... or in the course of an evaluation of interests which arises in the circles from which our judges come."[514]

In terms of the latter issue, Triepel felt content when he observed in the discussion time that the "the vast majority of scholars tends to accept the new interpretation ... as does the Reichsgericht," in harmony with the two speakers of the meeting both of whom "took as their starting point [the position] that Art. 109 is a norm for legislation as well," leaving aside the fact that Nawiasky did so only with respect to two layers of meanings attributed to equality.[515]

Anschütz, Thoma and Kelsen all took the opportunity offered by Nawiasky's conclusions on judicial review and contributed arguments against it that went beyond separation of powers problems.[516] Anschütz did not confine himself to remarking that in exercising judicial review the judge would rise above the legislator which would lead to his politicization and thus to the "degeneration" of his jurisprudence.[517] He also gave voice to his general dismay at Kaufmann's natural law references:[518]

> I was surprised to see with what intensity and commitment an idea burst out … one which until a short time ago I understood to have been outdated: the idea of natural law. It must have an indestructible vitality. All of a sudden, I have to appear as very old fashioned, although earlier I thought I was representing progress. The world changes. Natural law is again fashionable. … With a natural law validity [accorded to] the equality clause, we are putting handcuffs on ourselves. … [T]hat leads to a natural law legitimacy [which is] so revolutionary that I would need to be convinced [of its validity]… Until then I remain committed to the position advanced in my commentary.

Thoma too connected the question of judicial review to much broader themes. He called into question the presumption that a homogeneous legal thinking would arise in the context of the social milieu of the legally educated, which he took to be the grounds for some of his colleagues' advocacy of "a power of autonomous ... subjective decision" for judges. He

dismissed this assumption as anarchistic and registered in an almost anguished tone that "there [was] no legal community, ... only group subjectivities that oppose each other like fire and water"; "if our culture is to be preserved, ... there has to be order ... and someone has to have the last decision." Thoma named parliament as the body entrusted with that grave task as opposed to the courts.[519]

Hans Kelsen also entered the debate and defended the position he called positivist and presented it as shared wholly with Anschütz: "I feel hit [by Kaufmann's remark that positivism is impoverished] just like Herr Anschütz … for I am a positivist, still and in spite of all."[520] He took it upon himself to put the question of limits to legislation into a larger framework in the course of rebutting Kaufmann's natural law based arguments. He dismissed natural law as metaphysics which only led to a most radical subjectivism and served the political purposes of obliterating the authority of the positive legislator. He who asked the questions natural law was after, contended Kelsen, was interested in the "eternal question of what [was] behind the positive law." Kelsen warned that instead of finding the absolute truth of a metaphysic or the absolute justice of a natural law, one had to "look the Gorgon head of power in the face ... if one did not close his eyes after lifting the veil."[521]

In the context of the heated debates mobilizing separation of powers arguments, the question of the content of the equality clause was somewhat neglected. Nawiasky's final comments, however, summarized the result of discussions thus far -- both at the Association meeting and in the previously published literature. Out of the five different conceptions that Nawiasky found to have been formulated in the discipline, Anschütz's narrow interpretation, "[as advanced] until the second edition of his commentary," that equality meant only equality in the course of applying the laws, i.e. in the context of administration, was represented by hardly anyone any more. The second understanding of equality as "legal equality in personal sense" which functioned as a program for legislation was Anschütz's position of the day. As a third position came then Nawiasky's own which we have detailed above. Kaufmann's conception of equality as binding on legislation and inducing a limited version of judicial review was portrayed as the fourth understanding, different from Triepel's, whose position of "equality in the material sense" we have also discussed above.[522]

In contrast to the order of presentations at the 1926 meeting of German Professors of Public Law, the first speaker at the 1927 meeting to talk about the topic of yet another fundamental right, came from the ranks of positivist scholars: Karl Rothenbücher[523] of the University of München was an unorthodox scholar of public law in many respects. A colleague and friend

of Max Weber, his interests ranged from the sociology of law to studying forms of historical thought and as far as documented evidence is available, he might well have been the first professor to offer a course, already in the spring semester of 1921, on fundamental rights as part of the legal curriculum.[524] His presentation at the Association meeting on the freedom of expression (Art. 118) and academic teaching (Art. 142) betrayed an encyclopedic knowledge about the history of the idea of rights and revealed his long time engagement with the problem of their workings.

Rothenbücher interpreted both freedoms as individual rights that protected the expression of an "opinion, i.e. the taking of fundamental stand [on an issue]" which in the case of academics in civil service positions (which almost all university teachers occupied) meant the freedom to express "scientific opinions." By focusing on individuals and their opinions, Rothenbücher could also propose that under his interpretation, Art. 118 was binding for legislation in the sense that it prohibited any legislative act that would have oppressed an opinion or its spreading. His related suggestion that such a prohibition pertained not only to legislation but also to "economically strong private" actors, especially business associations who themselves had power "even if they [did] not have an imperium to rule over," bore witness to his sociological sensitivity. Art. 142 on the other hand, did not constitute a limit to legislation but guaranteed that no disciplinary, i.e. administrative measures could be taken against university teachers for the "scientific opinions" they express.[525] Similarly to his positivist colleague's nuanced interpretation at the previous meeting, Rothenbücher too advanced a balanced reading of concrete fundamental rights, some of which after close scrutiny were found to bind legislation. That both positivist speakers extended their interpretations to separation of powers related matters signals how firmly established an element this problem had become in rights discussions.

Rights as values integrating society in Rudolf Smend's rights theory

The second address on the freedom of expression at the 1927 Association meeting was delivered by Rudolf Smend[526] who came out with a presentation primarily of his comprehensive constitutional theory that he was working on at the time, the theory of integration. Smend eventually published the long awaited book, *Constitution and Constitutional Law*,[527] in just a year's time in 1928, in which he wanted to break decisively with "juristic positivism" and considered the state as a piece of "intellectual (*geistige*) reality" which was to be primarily grasped not by legal methods but by the means of the sciences of the humanities (*Geisteswissenschaften*).[528] Constitutions, in Smend's understanding, were

supposed to enable the reproduction of the "totality of life" in a state and prescribe the channels for such a process in three forms of integration: personal, functional and substantial integration. The various organs of the state were brought together into an intertwined process of personal and functional integration,[529] whereas substantial integration was realized primarily by fundamental rights beside such symbolic elements as the territory of the state or the colors of the flag.[530] Personal integration was implicated in „the establishment … and constitutional operation of [state] organs" such as the activities of the head of state, parliamentary majorities and cabinets, or the bureaucracy of administration and courts, whereas the process of functional integration manifested itself in procedures such as elections, parliamentary negotiations, cabinet formation, plebiscites.[531]

According to Smend's theory of integration, the double meaning of a catalogue of fundamental rights captured both a legitimating function on the basis of a value system as well as a „substantial" integrative function. The value system of rights under whose aegis the positive legal order became legitimated served simultaneously as the momentum of integration of the German people that made them substantially a people in the first place, differentiating them from other peoples via the particular set of values positivized in the constitution.[532] The interpretation of any single fundamental right had to mobilize the context of "contemporary circumstances of life ... and the constitutional constellation of values," i.e. the whole of the constitution, as well as the concrete social and political conditions under which rights were realized.[533] Smend's rights interpretation rested then on two levels immanent to the polity: the community's particular value system and the concrete circumstances of their realization, Smend's version of the „living constitution."

Smend interpreted the freedom of expression and of academic teaching in this vein at the 1927 Association meeting: under the Weimar Constitution which did not prescribe a stable set of relations or contents but "regulate[d] its own substance, ... the flowing, itself always renewing life," fundamental rights in general acquired an intensified meaning in the course of the transition from monarchy to republic and came to enable the state instead of imposing limits to it. The freedom of expression (Art. 118) embodied what Smend called a "social, group building function" since its main aim was to guarantee the development of "the will of the group and its life" in activities such as "advertising, agitation [or] demonstration." This provision was thus misleadingly listed under the "rights of the individual person" in the constitution, Smend contended. The freedom of academic teaching (Art. 142) similarly referred not to the possibilities of individual scholars but encapsulated "German idealism and its institutional product, the German university of the nineteenth century ... with the historical

starting points of interpretation being Fichte and Jena." The Weimar Constitution recognized this "great public institution" in the sense which Fichte gave to the new type of the university in his *Rektoratsrede*, and made it the "fundamental right of the German university."[534]

As to the separation-of-powers-related effects of fundamental rights, Smend's arguments reversed Rothenbücher's conclusions to this effect. The freedom of academic teaching was to bind legislation on Smend's account too – so much so that he declared Art. 20 of Bavaria's Constitution therefore invalid for its conflict with the federal constitution's provision on the freedom of teaching. On the other hand, he claimed that "general statutes" of the federal legislation could limit the freedom of expression, since it all depended on the meaning one gave to the notion of "generality." Smend's solution was to put this question as well in a comprehensive context and define the notion in question as "the material generality of the Enlightenment..., i.e. the values of society, public order and security, [and] the competing rights of others." So the constitution, on Smend's reading, put the values inherent to the idea of "general statutes" above the collectively exercised freedom of expression.[535]

Fundamental rights served then in Smend's theory of integration both as the reflection of a value system as well as a means of the German people's constant re-creation of itself in its totality. Similarly to Kaufmann's approach, Smend too opted rather for studying the "living constitution" of the Weimar Republic as opposed to interpreting the dead-letter constitutional text of the *Reich* Constitution. For Smend, however, immanent values and processes stood in the focus of constitutional analysis in contrast to Kaufmann's transcendental origins.

In a logical extension of his rights theory, Smend later on interpreted the liberal individualized rights of the Bourgeois in a way that fed into the activities of the *Bürger*, the active citizen of antiquity, enabling him to carry out his "personal political right of vocation" as a German citizen.[536] Such a conception of citizenship reflected well Smend's understanding of rights as having more of an enabling instead of a restricting quality.[537] By including the hitherto missing problem of citizenship into his theory, Smend reinforced the edifice of a comprehensive constitutional theory of rights that not only served as the guiding principle of his own constitutional interpretation but also enjoyed a lively reception among his colleagues in the Bonn Republic, comparable to the influence it exerted on Weimar constitutional debates.[538] This was partly due to the fact that the type of interpretive tasks implied by his theory of citizenship designated a prime role for scholars in the „every day plebiscite" of the nation.[539]

Anschütz, Thoma and Giese were quick to defend their positions on fundamental

rights even under the pejorative title of "the ruling theory" and sided with Rothenbücher in the discussion time. Anschütz objected in general to "an overestimation of fundamental rights" and Thoma disparaged Smend's "Sunday's reverie" for not solving the actual juristic "working day" task of "examining each and every sentence for its legal content."[540]

Triepel, Kaufmann and Otto Koellreutter on the other hand, seized the opportunity offered by Smend's speech and rendered fundamental rights as "legalized values" or, in Kaufmann's case, as "institutions" whose "ethical content .. and objective ethos" were to be "interpreted only with the help of the sciences of the humanities (*geisteswissenschaftlich*)." They all emphasized that the provisions in question were genuine legal norms suggesting that the two separation of powers related consequences applied here as well: binding of legislation and enforcement by judiciary in the course of constitutional review.[541]

Especially noteworthy was Triepel's strategy at this Association meeting: taking up Anschütz's comment on the overestimation of rights, he attempted to create the sense of a joint venture in which scholars of public law lived and worked together through a process whose result was just the opposite of what Anschütz had raised. These sentences from Triepel are so fascinating in their design that it seems appropriate to recount them at some length:[542]

> Anschütz spoke about the overestimation of fundamental rights in our times. ... [O]ne could also say that fundamental right were underestimated previously. It is, indeed, strange how intensively rights are considered today in contrast to previous times. What are the grounds for that? First of all, there are external grounds. The Weimar Constitution committed almost half of its provisions to fundamental rights. The internal ground is the reconstruction of the state and that citizens in a democratic republic have reasons to lay stress on their <<freedoms.>> But what are the reasons that we scholars more and more immerse ourselves in this material? I do not know if it had happened to you in the same way as it did to me: previously, I did not study fundamental rights more than it was common to do so, and had also looked upon the fundamental rights of the Weimar Constitution with a certain disdain. For they seemed to me too unclear, contradictory in their wording, too much a result of compromises ... an <<interfactional party program.>> I find more and more now, that fundamental rights make up almost the most important part of the whole constitution. But above all, in the methodological approach that we more and more lean towards in public law, fundamental rights have become an immediate necessity but at least a very important bulwark for us.

We can conclude from our analysis thus far that Triepel in these remarks compromised some of the facts of his own scholarship in the Weimar area in order to be able to put the rhetorically strongest case: overlooking his own consistent advocacy of rights, he wished to create the illusion that he too went together with other colleagues along the path that was soon

to be called the "actualization" of fundamental rights. We have seen that, as a matter of fact, scholars of public law of all convictions did progressively attribute some legal significance to rights which to contemporaries must have seemed as an ongoing process with a set direction to it. Even if some wished to halt it, they recognized its presence -- as did for example Anschütz in his above mentioned comment on the "overestimation" of rights. Relying on this commonly held perception, Triepel employed a figure of speech ("more and more") to reinforce the power of this process and tried to induce his colleagues not only to continue to go along this path but also to consider rights as a problem central to the discipline of public law as well.

In just three years time, it was exactly this latter recognition that was ultimately denied by the editors of the *Handbook of German Constitutional Law*. Gerhar d Anschütz and Richard Thoma came to possess an institutional dominance over the discipline by virtue of the prestige associated with their role in putting out this collective commentary which was deemed by all as the definitive statement on Weimar constitutional law. Although rights would be discussed on the pages on the *Handbook*, and not in a wholly dismissive manner, readers interested in the details of rights problems would be referred to another commentary.[543] No wonder then that Triepel declined to contribute to the *Handbook* in spite of its initiator's, Anschütz's persistent attempts at winning him over to the collective commentary for which organization began already at the end of 1926.[544] Triepel's rejection and strategy raises the question whether Triepel's above analyzed rhetorical move was more than just a figure of speech employed in order to create the impression of a common collegial commitment to fundamental rights. Triepel's statement in March 1927 might well have been a quite direct rebuttal of Anschütz's designs to place rights on the outskirts of constitutional law in the framework of an authoritative collective commentary, made most probably very clear in the first memoranda on the project that Anschütz began to circulate by December 1926.[545] The prospect of such an "underestimation" of rights urged Triepel to make use of the last opportunity as president of the Association and by the power of words and images sought to secure a fundamental position for rights under the Weimar Constitution.

Rights connecting social pluralism and unity in Hermann Heller's constitutional theory

The 1927 meeting was continued very much in the spirit of fight over the methods of constitutional scholarship. Hermann Heller[546] spoke about the "notion of the statute in the Constitution"[547] and used this opportunity to restate some of his earlier criticisms of the "ruling theory"[548] of positivism and in turn to ally himself with Smend as his fellow

antipositivist presenter. Heller described the state of the discipline of constitutional law as „having gone astray for two generations by virtue of … believing to have to avoid all sociological and ethical problems."[549] It was Hans Kelsen's „pure theory of the law …, the late born heir of logical legal positivism"[550] that symbolized the contemporary crisis of the discipline for Heller whose grudges against Kelsen were hallmarks of his polemics throughout the Weimar years.[551] Positive law was not supposed to be detached from the ethical sphere, Heller argued against Kelsen's demand of purity, nor should it be equated with it. By distinguishing the fundamental principles of law (*Rechtsgrundsätze*) from positive law,[552] Heller sought to strike ground for ethical and political principles that informed the positive law. The transcendental trajectories of such principles were to be rounded off by the social, political and economic realities of a concrete polity. Finding an immanent ethical basis for the positive law rooted in social practices was the main objective of his program of grounding a theory of substantial *Rechtsstaat*, given that „the legality of the state based on the rule of law [was] not in a position to replace legitimacy," Heller maintained.[553]

The basic tenets of Heller's constitutional theory were echoed in his understanding of fundamental rights, a theme he evoked in his Association speech. He rested his analysis of rights on an article he had written in 1924 on "Fundamental rights and fundamental duties,"[554] stressing only one methodological point in his Association address. He supported, namely, a procedure favored by his great adversaries, the positivists that each and every right provision had to be examined separately in order to be able ascertain their legal meaning as well as the associated meaning of "statute" in the text of these provisions.[555] Heller's theory of rights differed, however, greatly from the positivist stance. He saw in the second part of the constitution a reflection of four ideas that arose out of "the historical fight among ideals and interests."[556] The presence of liberal, democratic, national and social ideas in the constitution were, however, not to be understood as imprints of ideological programs but as indications of "forms of social life ... that exist ... in the intellectual, political and economic reality."[557] Although Heller put much emphasis on the point that rights were no longer to be understood in individualistic terms, he still maintained that only those fundamental rights were "genuine" which would be claimed by individuals in a legal process.[558] The other three categories of rights from the point of view of their "legal meaning" covered on the one hand moral principles which "refer[ed] to the fundamental institutions of German legal life and [were] thus of immediate practical significance for constitutional interpretation."[559] On the other hand, Heller identified legislative programs, as well as regulations that were binding for legislation such that they could be violated only via constitutional amendment.[560]

Heller's conclusion that the four different ideas he identified to be present in the Weimar Constitution had to be "reconciled" in the political process connected his rights theory to the thrust of his theory of popular sovereignty. Heller imagined, namely, the fundamental contradictions, tensions and conflicts of interest observable in society ("the people as a plurality") to be transformable via a "political agreement" into a "unity of decision"[561] ("people as a unity").[562] For such a transformation to be viable, a minimum of "social homogeneity" was called for in Heller's understanding – a "cultural" condition[563] his analysis proved to be severely deficient:

> The democratic formation of unity ceases to exist when all politically relevant sections of the people no longer recognize themselves in any way in the political unity, when they are not able to identify themselves in any way with the symbols and representatives of the state. In that moment the unity is cleaved, and civil war, dictatorship, and alien domination are in the cards. The difficult birth of the Continental coalition governments, their short duration, as well as their lack of any far-reaching operative effect, are the most obvious symptoms of an insufficient social homogeneity and, therefore, most dangerous signs of the crisis of our democracies … Despite the momentary tranquillity (more accurately, fatigue), the state of social homogeneity, which is the presupposition of political democracy, is lacking to an extent unmatched in previous eras.[564]

In spite of the severeness of the diagnosis, Heller still held out the hope of the functionalibity of the Weimar Constitution. In a speech given at the 1930 "Constitution Day,"[565] he stressed the dynamic quality of the constitution as the "living expression of the actual social power relations," i.e. as the "freedom of plurality" in tension with the "form of unity."[566] Heller offered here a reading of the Constitution's contradictions, especially those among the rights provisions, as being rooted in the Weimar polity's "intellectual and social situation" and praised the Constitution for "having left legal ventilators free for all lively social powers and thereby allowing for a non-violent smoothing out of social contradictions."[567] In a concluding historical tour of the horizon, he celebrated the Constitution's "open political form" as its "best feature:"[568]

> We are in fact living in a time, in which old political form ideals no longer and new ones not yet have validity. The monarchy became … a subject matter of movies, the liberal *Rechtsstaat* is no longer up to the challenges of the day, and the political forms of a social *Rechtsstaat* is just in the making. In this historical situation, the open political form of the Weimar Constitution is the only one appropriate for us. We celebrate the Weimar Constitution not because it would mean an immediate fulfillment for us, but because it makes our task possible.[569]

As evidenced by basic tenets of his rights theory, Heller advanced the ideal of a "reality science" (*Wirklichkeitswissenschaft*) for comprehensive constitutional studies which did bring him in close connection to scholars such as Kaufmann or Smend, as well as to a conception of the „living constitution" predicated upon polity immanent perspectives tied to an understanding of rights. Heller's vision was, however, less captured by the image of an integrated society – he rather saw an ongoing fight, one that was conducted in the terms of constitutional rights, electoral campaigns, coalitions governments, and possibly by other means as well: "we will protect the Weimar Constitution, if need be with arms in the hand!" he declared in the final words of his speech in 1930.[570]

Rights as a function of contingencies in interpretive practices: Albert Hensel, Gustav Giere, Otto Kirchheimer, Franz Neumann, Ernst Rudolf Huber, Carl Hermann Ule

Heller's diagnosis from 1924 on the presence of conflicting political ideas both in the constitutional text as well as in the social reality of Weimar Germany, found widespread reinforcement in the rights contributions of Weimar scholars from varied backgrounds.

Albert Hensel and Gustav Giere

Albert Hensel[571] and his student Gustav Giere,[572] focused on political *Weltanschauungen* or ideologies in rendering the second part of the Weimar Constitution and the related interpretative practices of colleagues and judges.[573] While Hensel employed a theoretically less elaborate framework for studying what he took to be the central constitutional question, namely whether constitutional rights made up a system of values, his student, Giere put his analysis in the context of philosophical debates on values and the methodological developments in the matter of constructing (ideal) types and typologies in various fields of the humanities and social sciences.

Hensel pointed out in an analysis of the rights adjudication of the *Reichsgericht* in 1929 that while the tendency present both in the practice of the court and in constitutional scholarship to grant increasing attention and significance to rights remained a "parallel phenomena ... without mutual enrichment," the highest court, similarly to certains scholars' position, did itself proclaim that "fundamental rights [provisions] as a unity, betray a system of norms."[574] In sharp contrast to the approach of taking rights separately, as suggested and practiced in the institutionally dominant interpretation of rights in late Weimar's *Handbook*, Hensel advocated that interpretation started out from the "system of fundamental rights" and

conveyed the meaning of particular rights provisions from the perspective of this complex -- an approach for which he argued to have found support in the practice of the high courts as well.[575]

Taking the postulate of unity as their core problem, Hensel and Giere came to the same disquieting conclusion in their analysis of the second part of the Weimar Constitution. Hensel's article from 1931 "Fundamental rights and political ideology" and Giere's treatise from 1932 "The problem of the value system of Weimar fundamental rights" both argued that four main political ideologies, the democratic, the religious or Catholic, the Socialist and the liberal animated the rights provisions of the constitution, with the liberal element exercising the dominant influence.[576] No unity could thus be disclosed in the analysis, much rather an ongoing battle fought over the values of these ideologies.[577] All stakes were put then on constitutional interpretation in Hensel's and Giere's judgement: "a specific political ideology has to unite without contradictions the fundamental decisions into a system of rights...," suggested Hensel and added that "this unity of values has to be manifested in the whole legal system that rests on the system of fundamental rights."[578] Giere's tone was outright alarmed in stating that "we must achieve a synthesis, for otherwise the validity of fundamental rights as a whole would stay on sand."[579] He closed his comprehensive investigations with a call: "we have to search for a new unity for our people, one that is substantially grounded ... and which can replace the emergency building of Weimar and put in the place of its relativism constructively new, generally acknowledged absolute values."[580] While such a call departed from the practice of constitutional interpretation and pointed outside the confines of the constitution, the rights position implied in it retained the perspective of immanence but at the same time betrayed a definitive move to embrace a homogenious conception of community, leaving plurality behind.

Otto Kirchheimer and Franz Neumann

The tension between a postulated unity of fundamental rights and the impact of conflicting political ideologies gave the framework for Otto Kirchheimer's[581] thinking about the Weimar Constitution as well. In his short book, "Weimar -- and then what?,"[582] written for the Young Socialist Book Series in 1930, Kirchheimer identified the failure of the Weimar Constitution in that "it has not itself decided anything" for its fundamental rights did not provide a "binding social and cultural program" that could have "unite[d] the people as a whole."[583] On the contrary, Weimar fundamental rights "in principle left space for a new social order .. in fact [they] made free way for all conceivable objectives."[584] The rights provisions of the Weimar

Constitution made up a "series of anchors" in which "the most divergent value systems were placed side by side ... without a compromise, i.e. a solution being achieved [among them]."[585] Kirchheimer found the impact of socialism, liberal-capitalism and political Catholicism present in the rights provisions of the Weimar Constitution whose enforcement depended then on the "force each interest group could mount in realizing the program points in their respective fundamental rights."[586] Kirchheimer could point in this vein to the success of bourgeois interests in the interpretation of the equality clause which "serve[d] really only as the guarantee of the existing capitalist interest groups ... and [thereby that of] the greatest inequalities of all, the existing distribution of property."[587] Kirchheimer came to the same conclusion with regard to the problem of property in another piece from 1930, "The limits of expropriation: a contribution to the study of the origins of the expropriation institution and the interpretation of Art. 153 of the Weimar Constitution."[588] The property clause marked simultaneously a break with the "categories of a bourgeois constitutional scheme" and signalled the lack of a "positive commitment to another economic order."[589] Exploiting the indecision of the constitution also in this field, the tendencies in the interpretative practices, including those of the *Reichsgericht's* in the preceding ten years created, on Kirchheimer's account, "a bulwark of the old bourgeois *Rechtsstaat*," disregarding the "changes in the meaning" (*Bedeutungswandel*) of property that could only be grasped when the function of property was considered in the "concrete social and political context."[590] For "socialist constitutional interpretation," Kirchheimer set the task of assessing the institutions of the constitution always in the concrete situation with regard to the question "how [they] change[d] the position of the working classes."[591] A unifying perspective such as this one was supposed to remedy the indecision of the constitution itself. Yet, Kirchheimer was far from ruling out during the Weimar years the possibility or the desirability, for that matter, of a „new decision" that would bring a revolutionary end to the original decision underlining the Weimar Constitution. However, when the prospect of collapse was drawing nearer, Kirchheimer „abandoned his principled objections to parliamentary democracy [and] acknowledged that …<<modern democracy … was after all, the sole form of government which constitutionally makes possible the cooperation or the alteration of different groups at a time of increasing social or national heterogeneity >>."[592]

Along similar political lines, a Socialist colleague of the radical Kirchheimer, Franz Neumann[593] too was captivated by interpretive developments in the field of rights. In contrast to Kirchheimer, Neumann was a representative of the reformist wing of the Social Democratic Party, a stance he symbolically gave voice to in a reference to Kirchheimer's question posed

in the title of his article „Weimar – and then what?," „which [came] very close to communist conceptions" on Neumann's reading: „the answer can only be `First Weimar´!"[594] This affirmative stance was manifest in his analysis of fundamental rights as well. He sought not to overcome but to reconfigure conditions regulated by the laws and the constitution. His program was rooted in a theory of constitutional interpretation that sought to „create a system out of apparently mutually contradictory legal norms and demonstrate which are the underlying tenets of such basic [rights]."[595] Constitutional interpretation for Neumann was predicated upon the understanding that „the content of every legal decree is capable of functional alteration … [i.e.] the content and social meaning of a legal institution can experience decisive transformation."[596] His own mission was therefore clear: he was to set his own „doctrine of the social *Rechtsstaat*" against trends in „state theory and legal practice" that worked towards a „renaissance of the bourgeois doctrine of the *Rechtsstaat*."[597] The weight of the „decision by interpretation" implied in the conflict between the two doctrines was made tangible on the examples of equality and property:

> What … is the principle of equality embodied in Article 109? … [T]he liberal conception of equality cannot possibly be established in the Constitution. This is because, in its most significant parts, the Constitution is the creation of the working class. … [T]he object of the basic [rights] will not be the securing of private property, but rather, of the laboring person, the securing of his advancement. … Today, German legal science … adhere[s] to the fiction that economy is ruled by natural laws and not by those of jurisprudence …, it ignores the second major section of the Constitution which contains the foundation for intervention on the part of society and the state in the allegedly natural course of the economy. It proceeds from the knowledge that the concept of property in bourgeois law is central and indivisible … [and] overlook[s] the fact that the concept of property presents a bundle of functions.[598]

Neumann's own interpretive contribution was supposed to feed into a stream of political constitutional interpretations by Socialists carried out on various levels: for „socialist state theory" Kirchheimer assigned the duty to „develop and concretely present the positive social content of the second part of the Weimar Constitution." This was an area where he could refer only to the contributions of Hermann Heller and register that much, if not all the work was still to be done. On the next level, „the principal task of socialist jurisprudence" was to advance a „socialist interpretation of the basic [rights]," setting it against bourgeois interpretations. In this connection, Kirchheimer's contributions were mentioned as having accomplished something towards socialist jurisprudence. Finally, it was „the task of socialist politics" to realize the „principles" uncovered by socialist state theory and jurisprudence.[599]

Stepping decisively outside the traditional „academic" role, both Kirchheimer and Neumann advanced an openly political conception of constitutional interpretation, one that gave grounds for their critical evaluations of interpretive practices writ large. They ultimately conceived of rights as a terrain of a battle fought with words, where unifying justifications clashed and the stronger prevailed. They both seemed to have been incapable of admitting for contradictions or compromises – a witness to their fundamentally skeptical attitude towards Weimar democracy as well as a watershed separating them from their Socialist colleague, Hermann Heller.

Ernst Rudolf Huber and Carl Hermann Ule

Like in the case of socialist scholars, it was again Weimar interpretative practices that served as the starting point for rights analysis among young scholars coming from a very different background, but not separate worlds. For Ernst Rudolf Huber,[600] a young advocate of the "*ideengeschichtlich*" (history of ideas) method in constitutional theory, the crucial problem in the history of the idea of rights was "how the liberties of North American and French kinds came to replace old-English people's freedoms."[601] While the latter had always entailed "constructive principles ... [and were] aimed at building things up ... [like] the rights and privileges of estates," liberties, on the contrary, "set out from the <<equality>> of people and thereby denied all complex orders," "aiming at protection from ... an absolutist state [the existence of which] they had presupposed."[602] That very basic change in the meaning of rights came to have a significance for Weimar Germany as well. Huber proposed to always take the "contemporary intellectual context" or the "reality of ideas" as determining for the meanings rights could enjoy and examine the constitution always with regard to the "actual senses" current ideas give to expressions.[603] The thrust of Huber's argument was summarized in the title of his hundred-page article: a "Change in the meaning of fundamental rights" had occurred in the course of public discussions and rights debates in Weimar Germany, such that "it was not any longer the unlimited, liberal freedom of the individual but a regulated, controlled freedom" that fundamental rights came to substantiate.[604] With a move that paralleled Carl Schmitt's, Huber identified the position of rights as being a juncture at which the principles of democracy and liberalism clashed: the contradiction arose from the fact that the person on whom the state was to rest according to the democratic, that is positive and constructive sense of rights, at the same time wanted freedom from the state, according to the liberal, that is negative and defensive sense of rights.[605]

This change of meaning affected both liberties and the four other categories of rights

Huber identified in the Weimar Constitution.[606] Individual liberties such as the freedom of the person, expression, assembly and association "had been subjected to political necessities in the course of constitutional development and had been thereby brought into a connection with the general order of the state."[607] The same fate met "the general legal principles" of the constitution such as equality which were "no longer thought about in exclusively individualistic terms ... but above all from the point of view of the state."[608] Huber, like many others, subscribed to the distinction of institutional guarantees and legal institutions, to be discussed in detail in the next section on Carl Schmitt. Huber's version entailed the difference that he divided the former into two further categories: the various forms of state organizations such as the professional civil service, judges or the schools had to be distinguished, on Huber's account, from "protected corporations" such as religious communities, local communities, universities and the associated freedom of teaching, the middle classes and national minorities. Also belonging to the latter category were the various schemes of social security, which "once realized ... evoked the second function of a programmatic statement; ... they became namely guaranteed."[609]

As complex as his own categorization of rights was, Ernst Rudolf Huber's theory of rights as a compact entity of the Weimar Constitution lay at the heart of his conception of what these rights accomplished in the Weimar polity: they were to be understood as the foundation stones of political unity because they integrated the three autonomous spheres of religion, culture and economy into a people's state (*Volksstaat*).[610] This crucial function of rights was to counter the tendencies to a "total state," i.e. the attempts at dissolving the liberal opposition of state and society striven after both by Marxist-Socialists and thinkers of the nation state. Fundamental rights, in Huber's interpretation, "made the diversity of social forms and institutions the basis of the political system" of Weimar Germany.[611]

His conclusions on the possibilities for protecting rights was a truly unique position among Weimar scholars: he argued that in a liberal state only state institutions could be parties to a constitutional conflict, whereas in a people's state like Weimar Germany, all other political or public groups could, in principle, be parties to constitutional cases. Since, however, Art. 19 of the Weimar Constitution restricted standing to entities in one of the member states, and since only protected corporations could claim constitutionally granted guarantees, Huber found that only religious communities, local communities and universities could really be parties to constitutional cases. Only these protected corporations of the particular member states could file a constitutional complaint against the member state in which they were registered.[612]

In Huber's theory, fundamental rights, because not bound so much by legal technicality, were also thought to be more prone to change than the organizational clauses of the constitution. The task of interpretation for Huber was then focused on the changes in meaning, and on identifying and describing the various epochs in the history of the idea of rights.[613]

Another attempt at mobilizing the methods and insights of various disciplines of the humanities was advanced by Carl Hermann Ule[614] whose theory of interpretation proved to be one of the most elaborate of all Weimar positions on constitutional meaning. A very young scholar in late Weimar and compiler of a comprehensive index to the *Handbook*,[615] Ule published an article "On the interpretation of fundamental rights" in 1932.[616] In formulating a comprehensive theory of interpretation of his own, Ule, just like his fellow young scholars, relied on the interpretative practices of his contemporaries and construed his own position in the context of rights discussions of the 1920s and early 1930s.

Ule recognized the political nature of fundamental rights and that their interpretation, by implication, was a political endeavor itself.[617] His theory of constitutional interpretation was thus part of a larger project in which he theorized politics in conjunction with the constitution without, however, giving a comprehensive account of his political theory at this point. It was nevertheless clear that great theoretical energies were put into developing a method for constitutional interpretation whose results "alone could claim to be binding"[618] and thus serve both as a guideline as well as an instrument of political critique.

Ule proposed what he called a historical-teleological method of interpretation, with five possible levels of interpretative investigations which were based on the interpretative practices and theories advanced in Weimar rights discussions and were considered here as "important building blocks" for his own comprehensive method.[619] First of all he understood fundamental rights, in a phenomenological tradition, to be "essentially occasional formulations," that is texts whose meaning was to be understood both in relation to the person "uttering" them and in terms of the situation in which, we would today say, the speech act, was accomplished. Still on the level of investigating "mere literal meaning," the provision's meaning in terms of contemporary conventional language had to be determined to see whether several meanings could be found. If that was the case, one had to see if it was possible to determine a single meaning that was systematically most coherent with the other provisions of the second part and the whole of the constitutional text. The third and fourth levels of investigation were supposed to deliver objective and subjective meanings, respectively: on the

one hand, one had to evaluate whether the legal historical development supported one or the other meanings uncovered thus far, whereas "original intent" was to be accounted for as a merely subjective element, to be compared with the objective sense emerging from the history of intellectual development. The fifth and last step was to be employed only in case no unanimous meaning could be found in previous steps. The historical-teleological method required then that one had to choose as the binding interpretation that which was "most conducive to the historical trajectory."[620]

The critical line of Ule's undertakings was not to be missed: he decried as an illusion and a typical child of positivism the belief that it was possible to propose binding interpretations in general, as in the par excellence positivist practice of alleging to provide a definitive and all-purposive commentary on the law, without any consideration for the various interpretative problems Ule raised and proposed to solve in his theory. Constitutional meaning could never be fixed "in general,"[621] Ule concluded, and suggested simultaneously that instead of constitutional scholars as authors of commentaries, rather judges, civil servants and scholars who voiced their interpretations in concrete cases were to animate and dominate rights.[622] It is truly paradoxical then that extending into the very year that he published his article on constitutional interpretation, Ule would act as compiler of a register for the paragon of commentaries, the Handbook of German Public Law...

In sum, the contingencies of constitutional interpretive practices left scholars, typically younger ones, anxious about a lack of unity and the intensity of conflict they all found in their respective analysis to be present in Weimar constitutional interpretation. This uneasiness about competing interpretations will bring us back in the Conclusions to Heinrich Triepel's project and the ethos of the Association of German Professors of Constitutional Law, as well as to the ethos of the collective commentary guided by Gerhard Anschütz and Richard Thoma. Our question will not so much be whether the lack of a common voice among scholars impeded or enhanced the authority of the discipline in the long run – that problem points outside the confines of the present work. The more modest question to be dealt with is rather what the very existence of institutional settings for the discipline implied for the practice of constitutional interpretation.

Legal and political rights in the constitutional theory of Carl Schmitt

There are two distinctive fields to be distinguished in Carl Schmitt's[623] rights discourse in Weimar: beside advancing one of the most comprehensive rights theories of Weimar Germany, Schmitt's rights contributions also covered a vast area of polemics. Having reconstructed the main rights theories of Schmitt's Weimar colleagues, we are now in a position to assess his rhetoric too beyond the novelties of his rights theory. The fundamental shifts that occurred both in his polemics (1928 - mid-1932) as well as in his own rights position accomplished in *Legality and Legitimacy*[624] (mid-1932) will be discussed after his rights theory is reconstructed on the basis of Schmitt's core Weimar book, the *Constitutional Theory* of 1928.[625]

Similarly to his colleagues Smend or Heller who searched for new ways of rendering constitutional problems, Carl Schmitt too advanced a wholly novel framework for understanding rights.[626] He in fact proposed that a new subject, constitutional theory, as in the title of his book *Verfassungslehre*, would be the proper site for discussing the kinds of problems raised by the rights provisions of the Weimar Constitution. Schmitt saw the task of constitutional theory in systematically assessing the fundamental problems of constitutional regimes, ancient or modern, not shying away from "philosophical, historical or sociological"[627] questions as did the constitutional scholarship of the *Kaiserreich*.[628] He proposed the kind of theoretical rendering of constitutional problems that started out from a systematic categorization of the historical forms of constitutional regimes. The contours of the various types of constitutional regimes were established by reconstructing the aspirations of political groups and actors whose concrete political struggles as well as the outcomes were taken to shape the principles of the regimes which developed as a result.[629] At the nexus of an analysis of concrete political contexts and the postulate of a theoretical and systematic constitutional scholarship,[630] Schmitt identified a particular concept of constitution as dominant since the eighteenth century, one which had served the principle of "*bürgerliche Freiheit* (bourgeois freedom)"[631] and had taken the form of "*bürgerlicher Rechtsstaat* (bourgeois rule of law)."[632] He analyzed then the Weimar Constitution as an example of this type,[633] and presented it as his central case in demonstrating the workings of a constitutional theory. In the course of doing so he also discussed what he called the „political" dimension, for only by such an extension did his analysis come to fulfil the program of constitutional

theory: Weimar, as an example of modern constitutions, was thus understood to be both a democracy and a *Rechtsstaat*, giving it a fundamentally dual character.[634]

It was at the nexus of these two dimensions that the chief elements and organizing principles of his rights theory were set out in *Constitutional Theory*. Later on, further distinctions were proposed[635] and incorporated into his rights piece written for the *Handbook* published in 1932.[636] These extensions were all coherent with the rudiments of the rights theory in *Constitutional Theory* – unlike the revisions he proposed in *Legality and Legitimacy*. It is therefore fitting to discuss first Schmitt's rights theory separately from his polemic and then turn to the reversal in his position in the middle of 1932.

Schmitt's theory of the legal rights of individuals

Rights found their place on both sides of the constitutional schism that Schmitt postulated to have split the kind of constitutions that had become the ideals since the eighteenth century and of which the Weimar Constitution was an example. Real fundamental rights that he called liberties (*Freiheitsrechte*) belonged to the so called *rechtsstaatlich* field of such modern constitutions. (Because of the notorious difficulty of translating the derivatives of *Rechtsstaat*, as well as the core expression, I will call this the legal field.) The legal field of constitutions was juxtaposed to the political field, animated either by the democratic principle, as in the case of Weimar, or the monarchical principle, with the traditionally accepted third, the aristocratic also enlisted as a principle providing polities with a political form.[637] Although Schmitt located his most detailed discussion of rights in the sections devoted to an analysis of the legal field, it is nevertheless clear that all rights other than liberties (*Freiheitsrechte*) were to be thought of as political in an important sense.[638] Only liberties existed before and above the state, claimed Schmitt, all other kinds of rights presupposed the existence of a polity and thrived within it. This fundamental distinction was built then into the definition of liberties, the genuine fundamental rights of a constitutional democracy whose legal field was predicated upon "bourgeois individualism:" liberties occupied an apolitical sphere where "the freedom of the individual [was] in principle unrestricted whereas the state's capacity to intervene [was] in principle restricted."[639] Liberties, together with the principle of the separation of powers, a "system of competencies with marked boundaries," made up the thrust of the legal field of constitutions like that which had been written in Weimar.[640] Although most prominently discussed and received by colleagues in Weimar and beyond were Schmitt's many distinctions and innovative conceptualizations developed for understanding rights in the „political" dimension of constitutions, it was nevertheless the core concept of liberties, that of

true fundamental rights, which really stood at the center of his rights theory as formulated first in *Constitutional Theory*. The classical rights of the freedom of person, privacy of home, secrecy of post, freedom of opinion, assembly, association and religion, and the freedom of contract were all attached to the individual and were to be conceived, on Schmitt's account, as unpolitical in the sense that they had been recognized but not given by the state whose interference with this sphere of individual freedom was "on principle restricted." Restriction of the individual's freedom could only occur as an exception and even then it had to happen "in a calculable way, on grounds and with a content that was reviewable," i.e. by general statutes.[641]

The likewise "*rechtsstaatlich*" concept of the statute was thus put in the service of guaranteeing the apolitical sphere of individual freedom which in many respects *was*, nevertheless, regulated by the state. So much so that Schmitt in fact, time and again, pointed out the fact that liberties were recognized in constitutions in such a way that a "typical measure of intervention"[642] was understood to go with them. The statute, however, remained the defining element in the life of liberties and could function as such due to the particular qualities it needed to possess to be true to the *rechtsstaatlich* tradition. It is incidentally not misleading here to render the "*rechtsstaatlich*" idea with the otherwise inappropriate English expression of the rule of law. As a guiding point of his polemic against many participants of rights debates (to which we come next), Schmitt insisted on the importance of „legislation enacting statues" which to many contemporaries seemed as a tautology. What else would legislation enact, if not statutes? A more literal translation of Schmitt's claim in the German original would have its English equivalent in the demand that "the lawgiver has to give laws." The polemical edge of this fundamental requirement was directed against concrete contemporary practices and their theoretical justifications, where in the form of a statute, legislation enacted individual measures or other kinds of orders which did not live up to the quality statues had to possess, namely to be general norms.[643] When legislation did not enact general norms in the form of statute, Schmitt maintained, it bode farewell to the rule of law and substituted in its place the rule of legislation, essentially a form of absolutism which had characterized the practice and theory of *Kaiserreich* constitutionalism as well. Only as a general norm could the statute be true to justice and reasonableness, claimed Schmitt, and also serve the organizational criteria of setting the administration of the law clearly apart from legislation and distinguishing between the two branches of justice and of the executive. Standing "in the clearest contradiction to Hobbes's [dictum] <<*autoritas, non veritas facit legem*>>,"[644] the rechtsstaatlich statute deserved then to be put at the absolute center of the

kind of polity in which it was used – Schmitt accordingly designated the type to which the Weimar polity belonged with the phrase *Gesetzgebungsstaat* (legislative state).

If the life of liberties was bound up with statutes in Schmitt's rights theory, their existence was tied to the act of constitution giving.[645] The fact that liberties were included into a constitutional text brought with it all the requirements reviewed above because it was a mark of the recognition of the principle of individual freedom which in turn required *rechtsstaatlich* statutes and the division of powers into three branches. In another string of widely discussed arguments, Schmitt claimed that this act of recognition took the form of a collective political decision of the German people in which it gave itself a constitution. Therefore liberties, as well as other kinds of rights, were bound up in their existence with that basic decision whose imprint in the constitutional text was not to be revised in any other way but by a comparable decision of the German people, that is by another act of constitution making. On such grounds, Schmitt argued for substantial limits to constitutional amendment and advanced a distinction between constitution and constitutional laws, the latter being subject to change unlike the core institutions or any of the rights listed in the constitution (at least not in their entirety). Schmitt very strongly criticized those whose positions on rights offered ways of their complete removal from the constitutional text and maintained that not only liberties but also all other kinds of rights had to be maintained on the level of the text of the constitution and could only be removed if the constitution as a whole was replaced by another one. The same applied to a number of other constitutional principles that the German people "on the power of consciousness of its political existence as a people" decided upon: democracy, republican form of government, federal state, parliamentarism, and the *bürgerlicher Rechtsstaat* (bourgeois rule of law).[646]

In the matter of classifying Weimar Germany as a constitutional democracy, Schmitt accorded to liberties the defining role in determining which ideal type Weimar belonged to: as opposed to his position in mid-1932, when he sought to render the constitution in a different way and employ the various rights of the „political part" of the constitution as the defining moment to show what kind of state such rights implied, in *Constitutional Theory* and in all of his other writings until *Legality and Legitimacy*, liberties were said to have a "constituting function for the type and structure of the whole community."[647] The basic question of what kind of polity a constitution actually formed turned then on *which* set of rights were to be regarded as the real fundamental rights of that constitution.[648] Up until his very last Weimar writing on rights, Schmitt's firm position was that for the Weimar Constitution, liberties were the real fundamental rights and developed his interpretation of the constitution according to

this formative basic stance.

At the same time, however, liberties, even if they counted as "the" fundamental rights of Weimar Germany, were not the only kinds of rights in the constitution. The arguments Schmitt advanced on constitution making and the substantial limits to constitutional amendment had to have an implication for the meaning and constitutional status of rights other than liberties. The whole of the text was to be reckoned in the fundamental decision of the German people. Though deeming liberties as definitive for Weimar, Schmitt did not circumvent the issue of confusion arising from the basic political decision: he asserted that it left the constitutional outcome impure in that it mixed the principle of individual freedom with many other kinds of claims, indeed with conflicting principles, giving it a "mixed character" in short.

Unpolitical liberties were contrasted then with two categories of individual political rights,[649] both of which assumed the existence of a polity -- and a well functioning one at that, we should add. In depicting the category of the rights of citizens (*Staatsbürgerrechte*), Schmitt relied on the distinction between bourgeois and citoyen,[650] assigning the former to the unpolitical sphere of liberties, while imputing a political character to the latter:[651] it was within the state that citizens exercised their right to vote, participated in referenda, petitioned the government or took up public office on equal terms. They engaged in the political life of a democracy in their capacity as democratic citizens. Schmitt also enlisted equality before the law in this category of rights which set him apart from most Weimar scholars. The meaning of the provision of equality before the law was also immanent, on Schmitt's reading, to the definition of the statute, prohibiting exceptions and discrimination as well as any legislative targeting of concrete persons or groups. Essentially subsumed under the problematic of *rechtsstaatlich* statute, equality before the law did not as a consequence emerge as part of the sphere of individual freedom and was not classified as a liberty. Significantly, it received detailed discussion in the sections of *Constitutional Theory* where the so called political field of constitutions, that is the democratic field in the case of Weimar, was expounded. Here, it was elevated to the status of a principle and contrasted with that of freedom -- of the two, "only equality [was] democratic,"[652] proposed Schmitt and substantiated it with a discussion of the notion of the people. In contrast to the idea of universal human equality, which Schmitt related to individualism and designated as serving liberties, the democratic principle of equality implied resemblances of values or substance,[653] and grounded belonging to a specific people. It did feed then on the recognition of differences but its direction, Schmitt insisted, was not to the outside[654] but to the inside: it was realized in various concrete equalities, like

equality before the law, equal access to public offices and equal voting rights.[655] The latter was a matter far from obvious at the time: the Prussian three-class voting system had just been abolished with the regime change and women for the first time in the history of any German state could vote in the Weimar Republic. As to other "extensions" of voting rights, Schmitt specifically denied the democratic quality of such practices as the various forms of direct democracy, proportional representation or the secrecy of the vote and considered them rather to rest on individualistic, i.e. undemocratic ideas.[656]

The principle of equality served then as a crucial backbone to Schmitt's theory of democracy as advanced in *Constitutional Theory*.[657] Implied was a substantial equality or homogeneity which in itself was supposed to prevent a qualitative distinction from arising between governors and governed, rulers and the ruled: the identity of the two groups had to secure to domestic politics a fundamental immanence, preserving the substantial resemblances on which it rested.[658] Schmitt's democratic substantiation of equality produced a truly unique rendering of Art. 109, which bore no positive connection to contemporaneous interpretative developments, either at the Association or in the writings of his colleagues – their interpretations of equality received attention in Schmitt's polemic only.

In another category of individual political rights Schmitt proposed to conceptualize the problem of state provisions via the notion of social rights (*sozialistische* or *soziale Rechte*): the right to work, care, schooling and education belonged here, all of them true novelties of the Weimar Constitution.[659] Schmitt argued that they not only came short of grounding any individual claim for a particular form of provision, they were also effective merely to the extent that they comprised guidelines for legislation, administration and the courts. In his Handbook contribution, Schmitt went so far as to suggest that particular social provisions were not even based on these constitutional articles but on the statutes that spelled them out in detail such as the Unemployment Act of July 16, 1927.

As opposed to liberties and other rights of the individual, Schmitt construed a pair of categories for the "rights" of institutions and groups that have since been in use in German legal scholarship and jursiprudence in the field of basic rights. Institutional guarantees (*institutionelle Garantien*)[660] and legal institutions (*Institutsgarantien*)[661] covered those articles of the second part of the Weimar Constitution which recognized certain "typical, traditionally existing ... legal relations" with the force and full implications of such a recognition forming part of the constitution giving act itself. They too enjoyed a textual permanence that was to protect them from legislative "destruction." Institutional guarantees pertained to institutions of the public law like the churches, the right of communities

(*Gemeinde*) to self-administration, the various rights of civil servants, the freedom of the arts and sciences or the right to leisure. In contrast, the category of legal institutions encompassed various private law institutions such as property, inheritance or marriage. In addition, status quo guarantees were also listed in Schmitt's piece for the *Handbook*, which pertained mainly to the churches and to issues such as for instance the retaining of theological faculties of the universities guaranteed in Art. 149 (3).

All rights provisions in the second part of the Weimar Constitution which Schmitt did not classify as liberties counted, by virtue of the definition given for liberties and the systematic bond as well as fissure comprising the province of rights, as principally restricted rights since they depended on an existing state and as such were also subject to statutory interference which did not have to meet the requirements posed in the case of liberties, only that of generality. They were, however, together with liberties, part of the constitution in the existential sense of being part of the decision of the German people in which it gave itself the Weimar Constitution and thus, insisted Schmitt, were to be protected against constitutional amendment aimed at their destruction. His judgement on priority was, nevertheless, unwavering -- until the summer of 1932 that is: the signature rights of the Weimar Republic were its individual liberties.

Among the novelties included in the distinctions proposed by Schmitt for grasping rights, the categories that went beyond the individual's private sphere to theorize rights in institutional terms as well as in the political dimension were witness to a theoretical interest that likewise motivated scholars such as Kaufmann, Smend or Heller. The dimension of community was grasped in Schmitt's case with the very concrete elements of institutional guarantees and legal institutions which were able to secure an almost trivial sense of immanence in the exercise of fixing constitutional meaning in the field of rights. This was a solution that was much less complicated than Kaufmann's or Heller's attempt to connect polity transcendent and immanent perspectives, and in contrast to Smend's theory of integration, the community dimension was not the momentum that would have defined Schmitt's rights theory as a whole – at least not his pre-1932 rights theory. Nor did the political dimension of citizens' practices stand in the focus. What is more, Schmitt's constitutional theory approved the diversity in the institutions of society and citizens' political practices only to the extent they were anchored in the Constitution. His theory therefore did not approve of social pluralism in all its forms.[662] In fact, he ended up essentially rejecting it for the political significance it was able to take on and challenge the unity that needed to underlie politics in Schmitt's view.[663]

We turn now to Schmitt's polemic in rights debates which served as the background to the turnabout in his rights theory in late Weimar. Studying his polemics also puts us in a better position to evaluate the fact that Schmitt was commissioned to write the leading rights piece for the *Handbook*.

Schmitt's rights polemic

Carl Schmitt's entry into rights discussions with a legal brief from 1926[664] registered a story of seeming conformity with the prevalent tendencies of the early 1920s when many rights were "activated" (*Aktualisierung* was how many referred to the phenomenon) against the background of positivist scruples. The title of the brief itself was suggestive: "Judicial Independence, Equality before the Law and the Protection of Private Property according to the Weimar Constitution," emphasizing some of the major themes of rights advocates on the occasion of the publication of "Draft Laws on Property Disputes with the Previously Reigning Princely Houses," as the subtitle had it. Of interest here are not so much the particular conclusions Schmitt came to with respect to the draft laws submitted by the Communists and the German Democratic Party – he found both of them unconstitutional on several grounds.[665] More important were his positions on the three issues raised in the title and his criticism or support granted to the main figures of the ongoing rights discussions. Schmitt grouped the positions he reviewed according to whether they had played a role in turning away from the "trite simplicity"[666] of prewar positivist scholarship and allied himself with new approaches. There is not a single critical remark in this legal brief regarding either the novel advocacy of judicial review or the new interpretation of the two rights provisions most critical to the early phase, property and equality. He cited thus not only his colleagues Triepel, Wolff, and Leibholz approvingly, but also the *Reichtsgericht* decision of November 4, 1925 asserting the right of judicial review.[667] What is more, Schmitt explicitly defended courts against legislation, which was extraordinary from the perspective of his arguments during the late 1920s and early 1930s which concluded systematically in a critique of the "judicial state" (*Justizstaat*) and in the affirmation of a legislative state (*Gesetzgebungsstaat*) as the form prescribed by the Constitution.[668]

Without advancing in the 1926 legal brief a fully-fledged theory of what rights were, Schmitt made clear that he regarded equality and property as binding on legislation only to the extent of what could be demanded of acts of legislation: a set of requirements that he later developed in *Constitutional Theory*. We encounter already here his characteristic move of tying the meaning of equality fully to the problem of the generality of the statute which did

not allow for exceptions, individual measures or transgressions, moves that both draft laws proposed to do.[669] In a similar vein, property's meaning was turned into the requirement that taking happened as prescribed in a general statute.[670]

Although later on Schmitt became the most outspoken critic of tendencies in rights discourse both in the positivist and in the antipositivist camps and his rights contributions would be filled with polemical statements, in 1926 he was critical almost solely of Gerhard Anschütz, and even with him only when he thought Anschütz stuck to the "old teaching," as he did, we recall, particularly in the matter of equality and continued to claim in the revised editions of his commentary that equality pertained only to the application of the law, but in no way to legislation.[671] Schmitt thus condemned Anschütz, and thereby pre-war constitutional scholarship for not realizing that "the judge was submitted to the law and not to legislation" and thus for promoting a "rule of legislation" instead of the "rule of law."[672] In a review of Anschütz's 1926 revised *Commentary*,[673] Schmitt radicalized the antipositivist position and called for scholars to group themselves either for or against Anschütz's way of going about interpreting the constitution:[674] unsystematically, as if one dealt with the civil code, handing hard cases over to legislation and thus not fulfilling the "awful but at the same time honoring task" of the new constitutional scholarship.[675] Here and later elsewhere Anschütz was made out to be a fossil of pre-war scholarship who moved around half blindly because his spectacles allowed him to see only certain things but not some of the crucial realities of the new regime.[676] It is helpful to emphasize here the sense of complete alienation Schmitt gave voice to in his comments on Anschütz, and his apparent resolve to avoid anything like this regarding Richard Thoma.

This is an important momentum for evaluating Schmitt's contribution on the topic of rights written for volume two of the *Handbook*. Research on the *Handbook* has shown[677] that Thoma planned to write the summary survey on fundamental rights for the Handbook but since he had just contributed such a piece to the Nipperdey commentary on rights, published in its first volume in 1929, the idea came up that, contrary to original plans, he would yield to someone else writing a comparable summary entry for the *Handbook*. Thoma himself proposed Hans Gerber but Anschütz did not see him being "up to the task" and suggested Carl Schmitt instead.[678] Thoma might not have supported this idea too much given that he had earlier called Schmitt a closet authoritarian, and not much before Schmitt was asked to write the piece for the *Handbook*, also an antidemocrat who entertained a "spiritual opposition to the whole phenomenon of *Rechtsstaat*." How could then the three of them agree on Schmitt publishing an important piece on rights in the *Handbook*?

I think the answer lies partly in Schmitt's theory of rights before 1932 as well as in a complex set of arguments which he continued to elaborate as part of his constitutional theory until the very *Handbook* piece in question. Schmitt's position was emphasizing the *Rechtsstaat* quality of Weimar, a central tenet of positivist constitutional theory as well, implying an essentially individualistic rights theory along with a primacy of the „legislative state" as well as an opposition to judicial review.[679] Important shifts in Schmitt's polemic (to which we come next) might have also been partly responsible for making co-operation among the three possible, although the writings of the two positivist authorities do not betray a recognition of Schmitt's moves. Rather, it looks as if Thoma never really had taken note of them -- and Anschütz seemed never to have cared much about them.

That Carl Schmitt would be asked to contribute the leading piece on rights in the *Handbook* and that he would agree to do so is a most telling witness to both his essentially *rechtsstaatlich* rights conception at the time, and the editors' efforts to win over representatives of the "new theories." Schmitt would come into view in this latter regard as a theorist who offered ways of conceptualizing rights other than those of the individual but was able to combine „new ways" with the old theory. Still, it comes as no surprise that the story of Carl Schmitt's co-operation with the editors of the *Handbook* ended on an ambivalent note: Thoma decided to reserve his editorial rights and nevertheless delivered a definitive statement on fundamental rights of his own. He included his contribution right after Schmitt's text as if to reinforce the positivist program to consider constitutional rights merely as „The system of subjective public rights and duties,"[680] and to counter any other alternative tendencies present in Schmitt's rights theory.

Written between the time of presenting a systematic theory of rights (1928) and completing a decisive turnaround in evaluating the fundamental rights of the Weimar Constitution (mid-1932), through a number of smaller articles Carl Schmitt became an outspoken critic of the general tendency among scholars and judges to make more and more rights positive and active (*Positivierung*, *Aktualisierung*). So whereas in 1926 the main target of his critical remarks was „trite positivism," he now suddenly turned against the very rights advocates who had opposed positivists themselves. This reversal in his evaluation of interpretive developments in rights discussions did not, however, mean a turnabout in his position, only one in his polemic. The change in his position was to come only in 1932.

Since the onset of economic crisis of the late 1920s, Schmitt had began to find especially problematic the interpretive developments regarding private property which came to be understood so extensively that, on Schmitt's account, it could no longer be protected as

a legal institution (which was how he categorized property, we recall, not as a liberty). Not only material property (*Sacheigentum*) but also all pecuniary claims were now to be covered under private property bringing along the "breaking up" of the corresponding notion of expropriation.[681] Another case of an overly positivized set of rights was an example of an institutional guarantee, the rights of civil service. Here Schmitt saw as fundamentally flawed that any cuts in payments would be seen as violating the "acquired rights" of civil servants[682] and that when done, it would be required that a qualified majority of two thirds instead of a simple majority enacts such measures.[683] Not the institution of civil service in a concrete form, but the conditions of its existence and operation were protected in the constitution, he argued. In the concrete case, Schmitt maintained that a six percent cut was not unconstitutional because civil servants did not have a personal claim to a particular numerical sum as payment and such a cut was also not undermining their traditional way of life and prestige -- unlike their wish to "maintain payments achieved in times of prosperity ... without regard to the changed circumstances of state, people, economy and finances."[684]

On a more general note, Schmitt gave an overview of developments in rights discourse on the occasion of the tenth anniversary of the writing of the Weimar Constitution.[685] He asserted that the most important tendency in the ten years of the constitution's life was that the rights of its second part came to the foreground. He charged his colleagues and the courts with falsely activating rights, overstraining them all at once after "generations of jurisprudence and practice have played them down."[686] In a review of the first volume of the Nipperdey commentary on basic rights,[687] Richard Thoma was particularly criticized for lending an authoritative voice to such trendy practices,[688] as advanced by practically all the rights advocates we encountered in the course of our discussion so far. A special place among them was accorded to Heinrich Triepel[689] who Schmitt found not only guilty of greatly enhancing this dangerous constitutional tendency but also responsible for encouraging the single most important outcome of these developments: the increased political power of the judiciary.

In taking stock of the situation ten years after the foundation of the republican regime, Schmitt deemed courts to have brought the second part of the constitution to the forefront, and along with jurisprudence to "have [taken] the fate of the second part of the constitution in their hands."[690] Schmitt feared that calls for establishing a constitutional court or an administrative central court would only lead to an "awful monster of universal-central-control-instance" whose "review powers over legislation, executive and the administration of justice"[691] one would "mistakenly celebrate as the triumph of the Rechtsstaat."[692] Such a "dangerous presence" would in fact obliterate the independence of the judge by "relieving him

from boundness to statutes and granting him another kind of <<independence>> which is really political irresponsibility."[693] His pithy conclusion and warning was that "in the conflict of politics and judiciary, politics ha[d] nothing to win, while the judiciary [had] all to lose."[694]

Schmitt's polemic was directed at what he saw as a hasty appraisal of rights that was spreading among scholars and judges alike and at the newly gained power of the judiciary in deciding significant matters against the will of legislative majorities. He took both trends to be in principled conflict with a classical *Rechtsstaat* whose legal form was supposed to frame Weimar democracy.

Schmitt's theory of the political rights of individuals and institutional rights

In the tense year of 1932, Schmitt employed the tone of drama when in *Legality and Legitimacy*[695] he revisited his views on Weimar constitutionalism. Whereas earlier Schmitt located the fundamental tension of the Weimar constitution in that the decision of the German people meant a commitment both to the principles of *Rechtsstaat* and to the democratic political form, now he saw a more intensive contradiction between the principles of a legislative state (*Gesetzgebungsstaat*) prescribed by the first part of the constitution, and the "substantial order" recognized in the second part of the text on constitutional rights.[696] This contradiction actually split the Weimar constitution into two coherent constitutions,[697] requiring, in effect, a new decision of sorts: the choice between the two constitutions was predicated upon how one evaluated the nature of constitutional rights.[698] Liberties, as Schmitt had always argued, belonged essentially to the ideal of the *Rechtsstaat*, realizing an individualistic social world[699] and as such differed fundamentally from all other kinds of rights. Against the "value neutrality" of liberties, Schmitt now advocated a decision for the "richness of values" in the "material legal anchors" of those provisions of the second part of the constitution which he had earlier identified as political rights and the guarantees of institutions or of the status quo.[700]

Schmitt's suggestion was that a new situation had presented itself which called for a similar interpretive decision as the one accomplished in *Constitutional Theory*. The basis of his assessment was the interpretative practices in the field of rights -- an evaluation whose merits had been the same for a long time, only Schmitt's stance on them had been revised to its opposite. The "overestimation" of rights among constitutional scholars and judges had urged Schmitt since the late 1920s to protest and point out how this tendency undermined the *Rechtsstaat*. Now that he was willing to let the *Rechtsstaat* principle go, he could join the forces of rights advocates and provide the rudiments of a theory to frame and reinforce these

divergent trends. Schmitt pointed out the consequences of such a basic shift: rights such as those of religious communities or of civil servants ("and in case of successful activation those of unions as well") would come to enjoy a higher legality than liberties since the former stood under a protection of constitutional amendment strength, whereas the latter required only an "inferior" legality of a simple majority.[701]

Especially striking was the change in Schmitt's evaluation of judges: just a little more than a year before, he still made them a central point of his criticism exactly for their practice on the rights front and decried them as wholly incapable of acting in the role of a "guardian of the constitution."[702] Only those who could act in a truly "neutral" manner could fulfil that function, Schmitt argued in early 1931, and referred above all to the president and the highest ranks of the professional civil service in their capacity as expert architects of national policy, especially in the field of public finances. The president and the administration remained in the most esteemed positions in Schmitt's evaluation of 1932, with the courts newly ranked among them. The courts, along with administration writ large, came to be seen as the bulwarks in the implementation and protection of rights. Obviously downgraded by Schmitt in the course of revisiting his former views was legislation. His misgivings about parliament and political parties were unmistakably present in a series of his Weimar writings, most prominently in *Crisis of Parliamentary Democracy* from 1923,[703] with his criticism of party pluralism greatly intensified in *The Guardian of the Constitution* from 1931. By mid-1932, however, transforming his tone of criticism into repudiation, Schmitt came to advocate the replacement of legality in which he formerly saw the basis of legitimacy for the legislative state (*Gesetzgebungsstaat*), with the democratic-plebiscitiary legitimacy of the rule of the president, the administration and the courts.[704] Schmitt identified two further terrains on which "parliamentary legislation" suffered a setback in the face of "extraordinary legislation:" in the practice of plebiscites and in the course of leveling statutes and decrees enacted by the president under Art. 48 of the Constitution.[705]

The fate of the Weimar constitution was then primarily entrusted to interpretative practices related to fundamental rights. So beside claiming a reinforced role for the president in „guarding" the constitution, Schmitt called on judges, scholars, ministers and other government members as well as civil servants to "save the idea of a German constitution" by "developing the inner consistency ... of the core of [its] second part ... and relieving it from contradictions and compromises."[706] Such interpretative practices were to counter the attempts that, as he had pointed out already the year before in his "Protector of the constitution" (1931), abused the neutrality and equal chances ideals of the Weimar

constitution and sought to "introduce a new constitution in its stead."[707] "In [the latter] case, the fiction of a majority-functionalism neutral to values would soon draw to its end. Then truth takes its revenge."[708]

The thrust of Schmitt's 1932 reversal of his rights theory entailed not only the fall of individual liberties and the corresponding victory of rights beyond the private individual but also an intense accentuation of the role of scholarship.[709] In assuming the task of rendering the meaning of constitution-engendering decisions by the German people, Schmitt now came close to claiming powers as an interpreter that were arguably most intimately connected to the original decisions. Contemplating and practicing such „decisions" by interpretation was, however, not a unique or heroic proposition. As we have seen, Schmitt's students, quite unaffectedly, threw themselves vehemently into such endeavors, as did many a young scholar in late Weimar. But the true heirs to Schmitt's late Weimar rights theory were to harness its benefits in another constitutional democracy.

CONCLUSIONS

There are a number of conclusions to be drawn from our reconstruction of Weimar rights debates, in particular from those theories that pushed the horizon of rights talk beyond the private individual. Let us first recall their position in the context of Weimar Germany's intellectual and political landscape.

Weimar rights theories that went beyond the private individual and grasped the whole or the parts of the political community as beneficiaries of rights were advanced in the immediate intellectual context of a rich and creative set of rights debates. Rights debates among Weimar constitutional scholars constituted a continuous fight over the terms of the language of rights covering the whole lifetime of the regime from constitutional drafting to constitutional collapse. The problem of rights has to be therefore recognized as one of the central themes of constitutional scholarship in Weimar Germany. There were two institutional settings that provided the terrain for scholarly constitutional discussions in general and rights debates in particular: the Association of German Professors of Constitutional Law, and the collective commentaries on the Weimar Constitution. The political context – the invocation of emergency powers to combat economic and security crises or the growing electoral success of parties ready to destroy the republic – had less of a direct impact on rights discussion than these two institutional elements of the intellectual context. Although the gradual exhaustion of legislative powers from the initial to the final phases of the regime's crisis did frame one of the hallmark problems of rights debates – the proper extent of legislative and judicial powers – the dynamic of the debates was shaped primarily by factors internal to the professional discourse.

The theoretical possibilities opened up by Weimar scholars in their rights debates can be grouped, in conclusion, along four dimensions.

First of all, the reconstruction of Weimar rights debates reveals a fundamental theoretical divide between two main schools of thought: some scholars propose the inclusion, while others insist on the total exclusion of dimensions that go beyond the private individual. At stake here is the most crucial theoretical question of this work, namely what kind of solutions there are for not confining the language of rights to protecting the private sphere of individual persons but to use the political and social dimension of values, ideals, institutions and other forms of social life that are not reducible to the individual.

Beside this most fundamental distinction on the question of who is benefited by rights, further ones emerge that set theorists apart and create various typologies of rights theories. The three charts below indicate that there are altogether thirteen different categories of Weimar rights theories, arrayed along three further dimensions, all of which can be combined with the fundamental dimension on the beneficiaries of rights.

TABLE 1

Weimar rights theories according to the beneficiary and origin of rights

			origin of rights	
			polity immanent	**polity transcendent**
beneficiary of rights	**private individual**		Anschütz, Thoma Triepel*	Schmitt (pre-1932)
	political community	**homogeneous**	Schmitt (mid-1932)*	Kaufmann*
		plural	Hensel*, Giere*, Kirchheimer*, Neumann* Smend, Huber, Ule Heller*	

* The placing of scholars close to the axis of polity immanent/transcendent perspectives indicates their commitment to combine them – with the emphasis remaining ultimately on the side where their names appear. Likewise, the placing of scholars close to the axis of homogeneous/plural perspectives indicates their commitment to embrace both conceptions of the political community, adhering ultimately to the one where their names appear.

TABLE 2

Weimar rights theories according to the beneficiary of rights and models of interpretation endorsed

		interpretive model	
		interpretive debate	**interpretive decision**
beneficiary of rights	**private individual**	Triepel	Anschütz, Thoma Schmitt (pre-1932)
	political community	Kaufmann, Smend Heller, Huber, Ule, Schmitt (mid-1932)	Hensel, Giere, Kirchheimer, Neumann

TABLE 3

Weimar rights theories according to the beneficiary of rights and positions on judicial review by regular courts

		judicial review	
		pro-court	**anti-court**
Beneficiary of rights	**private individual**	Triepel	Anschütz. Thoma Schmitt (pre-1932)
	political community	Kaufmann Schmitt (mid-1932)	Smend

Table 1 captures differences among scholars on the question from where they suggest rights originate: the distinction between polity immanent and polity transcendent sources of rights describes the difference between those who believed that rights only existed within a particular political community (polity immanent) and those who believed that rights existed apart from any particular political community (polity transcendent).

The chart also includes a further refinement of the basic category of the political community as the beneficiary of rights: some scholars imagined the community as an essentially diverse and plural entity, whereas others focused rather on shared traits and conceived of the polity as essentially homogeneous.

In Table 2, positions are differentiated according to the models of interpretation that scholars endorsed. Whether they welcomed conflicting interpretations or tried to impose one authoritative reading, informed even substantial elements of scholars' rights theories, beside determining their strategies in the rhetoric of rights debates. This dimension recalls the two institutional settings of the intellectual context and designates the Association of German Professors of Public Law as the model of interpretive debate in contrast to the collective commentaries that embody interpretive judgment.

Table 3 ties together two main threads that substantially organized rights debates in Weimar Germany: the theme of the separation of powers appears here in the dimension that sets those scholars apart who believed that rights presented tasks for the regular courts to fulfill, from those who rejected this idea and assigned essentially all power over rights to the legislator.

Among the protagonists most interesting for our conclusions, that is among those who theorized rights in terms of the political community, there are major differences along all four dimensions. First of all, the distinction between polity immanent and polity transcendent

origins of rights in Table 1 sets apart Erich Kaufmann's approach to rights as principles of natural law. Kaufmann proposed that there were objective institutions of the moral universe that provided natural law with its primary forms. These obviously did not originate from the concrete circumstances of life in a particular polity but were rooted in the transcendental dimension. Nevertheless, the main project of Kaufmann's rights theory was to describe how particular peoples in particular historical contexts gave concrete ethical and spiritual content to the categories of natural law. His maxim of "pouring our own spirit into eternal forms" betrayed his commitment to combine the two perspectives as a central element of his rights theory. A similar commitment characterizes the rights theory of Hermann Heller who, in contrast to Kaufmann, started out from an explicitly polity-immanent perspective by understanding rights as expressions of forms of social life embedded in intellectual, political and economic reality. He nevertheless maintained that the positive law was not to be detached from the ethical sphere and that the two were in fact combined in what he called the "fundamental principles of law." So starting out from fundamentally different positions on the origins of rights, Kaufmann and Heller ended up offering rather similar solutions for translating eternal principles into concrete, legally formulated units: rights.

Heller's interest in social pluralism extended to an understanding of the dynamic quality of the constitution as the living expression of the actual power relations of society and concluded in his quest to channel plurality into unity by seeking to find ways to reconcile conflicting ideas in the democratic political process. His contention that the people as a plurality was transformable via political agreement into a people as a unity was shared by other Weimar rights theorists, too.

The most prominent representative of this position was undoubtedly Rudolf Smend, whose understanding of rights as the embodiment of a particular set of values that contribute to the integration of society has found resonance with German scholars to this day. The element of change is imputed to the processes of integration by Smend's postulate of the constant reproduction of life within the framework of the constitution, whereby the German people, in their various capacities, actively re-create themselves, taking part in a kind of everyday plebiscite. This self-reflexivity combined with potential transformations was at the heart of the rights theories of two young Weimar scholars as well: Ernst Rudolf Huber and Carl Hermann Ule, however, also possessed a shared acute interest in the matters of constitutional interpretation, on which they both delivered elaborate theoretical positions in late Weimar. Their treaties in effect summarized what all scholars whose positions have been discussed in this section so far accepted, namely that interpretive debate, instead of some final

arbiter, would define what elements of social pluralism become integrated into the language of rights (Table 2). So no matter how different Kaufmann's, Heller's or Smend's rights theory was, once one got beyond their shared commitment to go outside the private sphere when theorizing rights, they all subscribed to the model of interpretation institutionalized in the Association of German Professors of Constitutional Law, established by Heinrich Triepel. The Association was an institutionalized public forum of debate that sought to secure scholars' authority in constitutional questions exactly by virtue of allowing – and in fact provoking – different constitutional interpretations to compete with each other and letting outsiders have an access to already formed positions that had been tried out in debate. In this model, interpretive debate was designed to foster authority.

In sharp contrast to the interpretation position of their fellow scholars, several political community rights theorists were willing to do away with interpretive debate in the interest of an ideologically coherent rights theory (Table 2). The position of scholars such as Albert Hensel, Gustav Giere, Otto Kirchheimer and Franz Neumann therefore had more in common with the positivist commentators than with scholars of an essentially similar theoretical stance on rights: instead of interpretive debate, they all called for the fixing of constitutional meaning and thereby for a unity that implied the victory of the strongest social power and its interpretive practice. Since they considered the presence of conflicting political ideologies in the various rights articles to be untenable and sought to find ways of overcoming the indecision of the constitution by creating a system out of apparently contradictory legal norms to find their underlying tenets, these scholars were in fact committed to embracing a homogeneous vision of the political community. That was a move that set these scholars apart from their colleagues Heller, Smend, Huber and Ule, in spite of the fact that they all predicated their rights theories upon essentially the same conception of the political community: they all managed to grasp social differences in a particular society to theorize rights as community sustaining ideas that are ultimately supposed to integrate or unite the polity – exactly by virtue of taking note of its pluralism in the language of rights. Hensel, Giere, Kirchheimer and Neumann on the other hand were in a sense intimidated both by interpretive plurality as well as ultimately by social plurality, and let themselves be attracted to the development of more homogeneous circumstances.

The attractiveness of homogeneity was a position shared by the last of our political community rights theorists, Carl Schmitt (Table 1). Abandoning his former insistence on the rights of the private individual as the hallmark of the Weimar Constitution, Schmitt by the middle of 1932 became an advocate of rights as the expression of social institutions and of

citizens' political lives. While his institutional understanding would easily join him with the approaches of Heller, Smend or Huber, his concept of equality as one of the basic principles of democratic citizenship sets him apart and positions him as a theorist of the homogeneity of the political community. Equality defines for Schmitt the concept of the people in terms of resemblances of values and substances that are realized in concrete equalities such as equal access to public offices or equal voting rights. Equality conceived so broadly guarantees that no qualitative distinctions arise between governors and governed. His simultaneous recognition of a vast and institutionally diverse sphere of social life marks his eventual commitment to combine the perspectives of homogeneity and plurality. Schmitt's endorsement of interpretive debate (Table 2), however, distinguishes him from colleagues who sought to emphasize homogeneity. Though he started from an explicitly pluralistic analysis of rights, as did his students Kirchheimer and Neumann, his mid-1932 rights theory is predicated upon the recognition that while conflicting interpretive practices determine the fate of a constitution, they do so ambiguously, without final interpretive decisions setting one direction or laying down one path for the polity to follow.

To complete our analysis of the positions circumscribed by the typologies above, let us finally turn to those categories of rights theories where the individual and his private sphere appear as the central focus of rights talk – as in contemporary mainstream rights discourse.

Although Heinrich Triepel, Gerhard Anschütz and Richard Thoma shared a theoretical starting point in the recognition that individual rights emanated from the polity's concrete circumstances (Table 1), Triepel agreed with his colleagues Anschütz and Thoma on hardly anything else. While Triepel wanted to secure the authority of scholars in constitutional interpretation by an institutional forum of interpretive debate, his positivist colleagues Anschütz and Thoma opted for a single interpretive judgment to be handed down in collective commentaries (Table 2). The three of them dominated the two central institutional settings in which rights positions were advanced during the Weimar Republic: the Association of German Professors of Constitutional Law and the collective commentaries. These two institutional settings, however, sharply differed as to which positions they gave voice to. The Association meetings were home to all kinds of positions, whereas the positivist theory of individual rights dominated both collective commentaries.

To recall, upon the initiative of Heinrich Triepel, the Association of German Professors of Constitutional Law was founded in 1922. The notion of constitutional scholarship was tied to the holding a position of (full) professor at a university – and the

Association in turn included almost all constitutional scholars teaching at German speaking universities. Growing in this sense out of the academia, the Association provided a forum for discussion among professors whose academic debates in other settings (such as journals, *Antritts*- or *Rektoratsrede*) were essentially continued at the meetings of the Association. Was the Association purely an extension of academia? As we have seen, scholars attributed to their addresses and discussion contributions much weight so they arguably conceived of their own Association activity as being public, not merely academic(al), i.e. serving exclusively the purposes of instruction or communication within the discipline. What public role did the Association then claim?

The Association was an institutionalized public forum of debate that sought to secure scholars authority in constitutional questions exactly by virtue of allowing, in fact provoking different constitutional interpretations to compete with each other and requiring thereby a sustained attention to its activity. In this model, interpretive debate was designed to foster authority.

In contrast, a rival interpretive authority emerged upon the initiative of Gerhard Anschütz and Richard Thoma. A new genre of constitutional scholarship, a collective commentary on the constitution was put together between 1926 and 1932, written by a significantly fewer number of scholars than the membership of the Association, making the profile of contributors much less diverse than that of the Association. Nevertheless, the same question arises as above. Was the Handbook an extension of academia? Again, on the basis of scholars attitudes, we gather that their contributions were meant to be public, not only academic(al). So what public role did the Handbook then claim?

The Handbook was an institutionalized venue of fixing constitutional meaning „for theory and practice" that sought to secure scholars authority in constitutional questions by relying essentially on the authority of earlier variations of the genre of commentary written by individual scholars of high stature. (Collective authorship was thus not a remedy for an ailing respect for scholars such as Anschütz but essentially its reinforcement.) In this model, interpretive judgment produced by or under the editorship of already prestigious scholars was designed to foster authority.

Both the Association and the collective commentary became standard institutional settings for constitutional scholarship in the Weimar Republic and beyond and serve as the hallmarks of two models of constitutional interpretation by scholars.

Beyond the individual/political community divide that most decisively separated scholars in the rights debates of Weimar Germany, the equally prevalent difference in scholars' positions on judicial review by the regular courts presents us with a typology that ties together these two main threads that had organized much of our reconstruction of rights debates (Table 3). Both among individual rights theorists, as well as among political community rights theorists the differences that emerge on separation of powers questions form an integral part of scholars' rights conceptions. Scholars interested in protecting individual freedom and the private sphere differ greatly as to which branch of government they want to protect individuals from – and which courts they see fit to the task of protection. While the positivists, Anschütz and Thoma, understood rights as keeping the executive out of the private sphere and relied on administrative courts to both police the boundaries of legality and not let administration transgress what rights protected, Triepel wanted to protect the individual from a potentially absolutist legislature and relied on judicial review by the regular courts to police the boundaries of constitutionality and not let legislation transgress what rights protected. Similarly, the political-community-focused school of rights theorists was divided on the question of judicial review: Kaufmann was an ally of Triepel in arguing for judicial review, whereas Schmitt's mid-1932 change of heart entailed a sharp turnabout in his evaluation of the role of courts. His former misgivings put aside, Schmitt became a supporter of judicial review. This was a position that Smend did not make his own: although he never explicitly rejected judicial review, he also never endorsed the idea in Weimar Germany.

The question, finally to be raised in connection with the larger perspective on democracies new and old is how scholarship can place itself in the context of a more and more judicialized politics. In spite of the fact that one of the central points of Weimar rights debates, the issue of judicial review, counts today as a matter decided by the facts on the ground, there still is a real question as to whether constitutional scholarship should seek to establish institutionalized forums for its own discussions in light of the dominance of judicial review in matters of constitutional meaning. In democracies with powerful courts and a strong rights doctrine, institutional settings for the discipline of constitutional law might well contribute to arousing and sustaining creativity among constitutional scholars. Scholars in democracies with powerful courts and a strong individual rights doctrine have all the more reason to look outside the immediate legal framework of constitutionalism and judge for themselves whether the conditions of and processes in their political community call for the recognition of dimensions of social or political life that were hitherto excluded by the individual focus of the

language of rights. Weimar rights theories can assist both of these endeavors by offering models of constitutional interpretation and a number of approaches to rights that engage the perspective of political communities.

APPENDIX 1

Overview of the eight meetings of the Association of German Professors of Constitutional Law in the Weimar Republic*

	Date and venue	Presidency	Topic 1	Presenters	Topic 2	Presenters
1.	1922, Berlin	Triepel, Anschütz, Stier-Somlo	Constitutional law in legal education	Fleischmann Sartorius	Judicial review	Thoma
2.	1924, Jena		German federalism	Anschütz Bilfinger	Presidential dictatorship	Schmitt Jacobi
3.	1925, Leipzig		Protection of public law	Jellinek Lassar	Constitutional law of communities	Stier-Somlo Köhler Helfritz
4.	1926, Münster		Equality in Art. 109 of the Weimar Constitution	Kaufmann Nawiasky	Impact of tax law on public law concepts	Hensel Bühler
5.	1927, München	Thoma, Smend, Nawiasky	Freedom of expression	Rothenbücher Smend	Concept of statute in the Weimar Constitution	Heller Wenzel
6.	1928, Wien		Constitutional adjudication	Triepel Kelsen	Review of administrative acts by regular courts	Layer Hippel
7.	1929, Frankfurt	Sartorius, Kelsen, Koellreutter	Federal and state legal order	Fleiner Lukas	Administrative law of public institutions	Richter Köttgen
8.	1931, Halle		The law of the civil service	Gerber Merkl	Electoral law	Pohl Leibholz

* Information is based on the published proceedings of the meetings. The bibliographical references to the proceedings are as follows:

1. *Archiv des öffentlichen Rechts* 43 (1922): 267-286.
2. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 1., 1924.
3. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 2., 1925.
4. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 3., 1927.
5. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 4., 1928.
6. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 5., 1929.
7. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 6., 1929.
8. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vol. 7., 1932.

ENDNOTES

[1] Most comprehensively summarised by Quentin Skinner in "Meaning and Understanding in the History of Political Ideas," in ed. James Tully, *Meaning and Context: Quentin Skinner and His Critics* (Cambridge: Polity Press, 1988), 29-67. In this piece Skinner dismisses two sets of approaches as misleading for a study of political ideas and outlines his own in a programmatic manner. Instead of the "text only" and the "context only" approaches, he calls attention to the necessity of studing the intent of the author (in the complex sense, to be examined from all three aspects of a speech act: locution, illocution, perlocution) and understand it in the given context taken as an ultimate linguistic framework of the possible meanings which in the given setting could possibly be attributed to the contribution in question.

[2] Pocock's explicitly methodological writings can be found in *Politics, Language and Time: Essays on Political Thought and History* (1971) (Chicago: University of Chicago Press, 1989). Cf. especially his "Languages and their implications: the transformation of the study of political thought," (3-41); "Time, institutions and action: an essay on traditions and their understanding," (233-272); "On the non-revoltionary character of paradigms: a self-criticism and afterpiece," (273-291).

[3] Probably most famous is one of Pocock's first studies*, The Ancient Constitution and the Feudal Law: a Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957) the findings of which are essentially summarised in "Burke and the anctient constitution – a problem in the history of ideas," in *Politics, Language and Time*, 202-232. His other studies of the early modern period are also exemplary for the approach of political languages: *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975); *Virtue, Commerce, and History : Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985); and most recently the seminal three-volume study on Gibbon (in preparation for which he is said to have read Gibbon's library *in toto*, cf. Ferenc Horkay-Hörcher, „Afterword" in *A koramodern politikai eszmetörténet cambridge-i látképe*, ed. Ferenc Horkay-Hörcher (Pécs: Tanulmány Kiadó, 1997), 302): *Barbarism and Religion I: The Enlightments of Edward Gibbon; II: Narratives of Civil Government; III: The First Decline and Fall* (Cambridge: Cambridge University Press, 1999).

[4] Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1993).

[5] Ibid., 75, 178.

[6] Ibid., x.

[7] Ibid., 173, with reference to Robert Bellah's *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California, 1985).

[8] Ibid., 4, 5, 162, 168.

[9] Ibid., 175, 45.

[10] Ibid., 14.

[11] *Rights and the Common Good: The Communitarian Perspective*, ed. Amitai Etzioni (New York: St. Martin's Press, 1995).

[12] Ibid., iii.

[13] Ibid., 19.

[14] Ibid., 54.

[15] Ibid., 56.

[16] Ibid., 32.

[17] John Greville Agard Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), 45ff.

[18] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstuction* (New Haven: Yale University Press, 1998), xiii.

[19] Ibid., xii.

[20] Ibid., 221. His solution is refined incorporation.

[21] *Two Cultures of Rights: The Quest for Inclusion and Participation in Modern America and Germany*, eds. Manfred Berg, Martin Geyer (Cambridge: Cambridge University Press, 2002). The essays on the whole grant the point about individualism but are intent on tackling "the question of how

the liberal concept of citizenship can be reconciled with the dynamics of multicultural societies" and in turn contemplate "whether the American concept of multiculturalism is a viable model for Germany to emulate" (2-3, 16 in Manfred Berg, Martin Geyer, "Introduction").

[22] Thomas McAffee, *Inherent Right, the Written Constitution, and Popular Sovereignty* (Westport: Greenwood, 2000).

[23] Ibid., 23.

[24] Ibid., 83. On Antifederalists: they "were a long ways from arguing for a strong presumption in favor of individual limitations [on government] … [rather] these thinkers agreed that it was essential that the people reserve their fundamental rights as specific limitations on governmental powers"(129).

[25] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 2003), a rewritten version of the 1989 book by the same title, defines human rights as "an attractive moral vision of human beings as equal and autonomous agents living in states that treat each citizen with equal concern and respect" (38). He nevertheless takes a defensive posture at various points, e.g. "human rights … are not held by atomistic individuals, nor are they necessarily corrosive to community" (25), or "neither liberal theory nor Western liberal practice is characterized by extreme or corrosive individualism" (204). Most significantly, however, he proposes that even "people's rights and the right to self-determination … are best seen rights of individuals acting as members of social groups" (222).

[26] Costas Douzinas, *The End of Human Rights* (Oxford: Hart, 2000), 380.

[27] Ibid., 157.

[28] Ibid., 169.

[29] Ibid., 4.

[30] Iibid., 380.

[31] Brian Tierney, *The Idea of Natural Rights* (Grand Rapids: Eerdemans, 2001), 2, 346.

[32] Ibid., 46.

[33] Ibid., 54.

[34] John Mitchell Finnis, *Natural Law and Natural Rights* (Oxford: Oxford Univesity Press, 1980), 198.

[35] Tierney, *The Idea of Natural Rights*, 45. Finnis's fallacy being the assumption to that "since there is no doctrine of subjective rights in Aquinas and there is such a doctrine in Suarez, a <<watershed>> must be situated between the thirteenth and the seventeenth century," based on the misconception that "if an idea is not to be found in Aquinas it is not really a medieval idea at all," ibid.

[36] Ibid., 316, 43. Decretists were commentators on the *Decretum* of Gratian, a compilation of church law put together around 1140 inspired by the revival of legal studies that occurred upon the recovery of the whole corpus of Roman Law around 1100, ibid., 56.

With this position he also contested the views of scholars such as Michel Villey or Quentin Skinner to the effect that thinkers active at the turn of the fourteenth and fifteenth centuries would have been the "pioneer[s] in the creation of an individualist theory of natural rights," ibid., 210. However, the real target of refutation was the most outspoken exponent of this view, Richard Tuck, who claimed that "the transition was made to a fully fledged natural rights theory … [in] the work of … Jean Gerson [in his works published in 1381 and 1402]," in *Natural Rights Theories: Their Origins and Development* (Cambridge: Cambridge University Press, 1979), 25.

It goes without saying that Tierney's position makes untenable the criticisms of contemporary rights theory contributions form scholars such as "Alisdair McIntyre … Leo Strauss … B.C. MacPherson .. Ian Shapiro" who base their arguments on a "supposed seventeenth-century origin of [natural rights] theories," ibid., 43-44.

[37] Ibid., 316, 342. Grotius's role is evaluated as central also by Tuck: Grotius presented the "first reconstruction of an actual legal system in terms of rights rather than laws" and "stressed individuality in the area of rights but communality in the area of obligation," Tuck, *Natural Rights Theories*, 60, 82.

[38] Ibid., 70.

[39] Finnis, *Natural Law and Natural Rights*, 210, 205.

[40] Ibid., 214, 221.

[41] Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Frankfurt am Main: Suhrkamp, 1992).

[42] On a different level: the concepts of the individual and the people, ibid., 133.

[43] Ibid., 135-136, 138.
[44] Rudolf Smend, "Der Einfluß der deutschen Staats- und Verwaltungsrechtslehre des 19. Jahrhunderts auf das Leben in Verfassung und Verwaltung," (1939) in *Staatsrechtliche Abhandlugen*, 2nd enlarged edition (Berlin: Duncker & Humblot, 1968), 326-345; 338.
[45] Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn, 2001), 248 ff.
[46] Ibid., 249.
[47] Ibid., 9, 73-74.
[48] Ibid., 251.
[49] Ibid., 253.
[50] Ibid., 249.
[51] Ibid., 249, 254.
[52] Ibid., 256.
[53] Ibid., 258.
[54] Ibid., 315.
[55] Ibid., 320.
[56] Walter Pauly, *Methodenwandel im deutschen Spätkonstitutionalismus. Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom Öffentlichen Rechts im 19. Jahrhundert* (Tübingen: Mohr, 1993).
[57] Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik. Untersuchungen zu Erich Kaufmann, Günther Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987).
[58] Richard Thoma, "Gegenstand-Methode-Literatur," in eds. Gerhard Anschütz, Richard Thoma, *Handbuch des Deutschen Staatsrechts*, vol. 1 (Tübingen: Mohr, 1930), 1-13.
[59] David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon, 1997).
[60] Cf. most recently Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004).
[61] Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechslehre -- ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Stuttgart: Steiner, 2001). Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (München: Beck, 1999), esp. 153-202. Christoph Gusy, *Die Weimarer Reichsverfassung* (Tübingen: Mohr, 1997), 420-63. Manfred Friedrich, *Geschichte des deutschen Staatsrechtswissenschaft* (Berlin: Duncker & Humblot, 1997), 320-36. Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklung in der Weimarer Republik und ihr Verhältnis zur Ideolisierung der Rechtswissenschaft unter dem Nationalsozialismus* (München: Beck, 1994). Further references are included in all of these works. In English, two books give an overview of this problem: Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law. The Theory and Practice of Weimar Constitutionalism* (North Carolina: Duke University Press, 1997). *Weimar: A Jurisprudence of Crisis*, eds. Arthur Jacobson, Bernhard Schlink, translated by Belinda Cooper et al. (Berkeley: University of California Press, 2000).
[62] Cf. the famous Radbuch thesis or e.g. Dieter Grimm, „Verfassungserfüllung-Verfassungsbewahrung-Verfassungsauflösung. Positionen der Staatsrechtslehre in der Krise der Weimarer Republik," in ed. Heinrich A. Winkler, *Die deutsche Staatskrise, 1930-1933* (München: Oldenburg, 1993), 183-199.
[63] Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik* (München: Nymphenburger, 1962). In the chapter on constitutional scholars Sontheimer discusses in some detail the ideas of Erich Kaufmann, Heinrich Triepel, Gerhard Leibholz, Carl Schmitt, Rudolf Smend, Otto Koellreutter and suggests that the intensity of debate on methods could have been a function of the lack of an established political science whose tasks antipositivists scholars wished to realize within their own discipline, an aspiration shared by yet another scholar, Hermann Heller, cf. ibid., 89-90.
[64] *Demokratisches Denken in der Weimarer Republik*, ed. Christoph Gusy, (Baden-Baden: Nomos, 2000). From among constitutional scholars, especially the ideas of Hugo Preuß, Richard Thoma, Hans Kelsen, Hermann Heller are discussed.
[65] One obvious example from the recent Carl Schmitt literature is Lutz Berthold, *Carl Schmitt und der Staatsnotstandsplan am Ende der Weimarer Republik* (Berlin: Duncker & Humblot, 1999). From

among the biographies, Ulrich Gassner's study on Triepel is exemplary in this regard: *Heinrich Triepel. Leben und Werk* (Berlin: Duncker & Humblot, 1999).

[66] For most recent comprehensive accounts of those processes see Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000. Hermann Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press, 2000).

[67] "Democracy by Judiciary" in ed. Wojciech Sadurski**,** *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International, 2003). "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe," msc. "Declarations of Independence: Judicial Reaction to Political Pressure," in eds. Steven Burbank, Barry Friedman, *Judicial Independence at the Crossroads* (London: Sage, 2002). "Constitutional Interpretation after Regimes of Horror," University of Pennsylvania Law School, Public Law Working Paper No. 5 (May 2000).

[68] Ibid., 11-12.

[69] Ibid., 3, N6. Her main example for the "rise of judicial democracy" (ibid.) is Hungary, where "the Hungarian Constitutional Court, through the 1990s, practically ran [the country]" ("Constitutional Negotiations"). László Sólyom, the first president of the Court (1990-1998), confirms this evaluation in general when he recalls a saying he jokingly reiterated at the astonishment of participants at various conferences: "we the court … [instead of] we the people" ("The Role of Constitutional Courts in the Transition to Democracy, with Special Reference to Hungary," *International Sociology* 18 (2003): 133-161), but he also calls attention to the fact that "each year [brought] six to ten decisions that [were] decisive for constitutional development in Hungary" and that the court had to "maintain a balance between activism and self-restraint" ("Introduction to the Decisions of the Constitutional Court of the Republic of Hungary" in *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press, 2000, 1-63; 2-3). On the court's strategic moves also cf. Katalin Füzér, "The Invisible Constitution: the Construction of Constitutional Reality in Hungary" *International Journal of Sociology* 26 (1996): 48-65; "Wirtschaftlicher Notstand: Konstitutionalismus und ökonomischer Diskurs im postkommunistischen Ungarn" in ed. Christian Boulanger, translated by Jasna Miletic, *Recht in der Transformation: Rechts- und Verfassungswandel in Mittel- und Osteuropa* (Berlin: Berliner Debatte, 2002), 171-192.

[70] Weimar Germany usually figures in this literature as „the" example of misconceived or improvised (Eschenburg) democracy in vague allusions to its case as a major instance of a collapsed democracy where most, if not all, factors of democratic stability have been unfavorably construed or practiced.

The vagueness of attention to Weimar Germany can be attributed to a number of circumstances: first, it had collapsed before scholarly interest had arisen in the factors of democratic stability and instability, and second the success of the West German democratic experience obscured the vista of democratic breakdown in Weimar. Also, the public's gaze, including largely that of the academia, has been fixed on the totalitarian experience of National Socialist Germany as the central momentum of early twentieth century German political history, degrading Weimar Germany to the status of an entrance hall to the edifice of Nazi Germany.

Given the interests of literatures on transition to and consolidation of democracy, Weimar Germany would deserve to be made a prime case of analysis for all separation of powers related questions like presidents, parliaments, parties and the courts. Beside these matters, however, the Weimar Republic also offers evidence that broadening the scope of studies to include the political languages of democratic transition and consolidation is well-advised. Cf. Thomas Childers's studies on the persistence of the language of *Stand* in German political discourse, "The social language of politics in Germany: the sociology of political discourse in the Weimar Republic" in *American Historical Review* 95 (1990): 331-358; "Languages of liberalism: liberal political discourse in the Weimar Republic," in eds. Konrad Jarausch, Larry E. Jones, *In Search of Liberal Germany: Festschrift for Theodore Hamerow* (New York: Berg, 1990).

The use of the language of rights, in particular, had been given new impetus by the democratic transitions of the years 1919 and 1989 and our task in this work will be to show how in Weimar Germany, this language had been shaped primarily by scholars -- instead of courts, as in the case of many 1989 transitions, especially so in Hungary.

In this connection, yet another trait of our own investigations has to be mentioned: we will not circumvent the issue of crisis and collapse in the Weimar Republic against the background of which scholars pursued the theme of rights. Chapter 1 will provide the necessary in this regard in the form of a concise survey of the sequence of crises analyzed along the lines of separation of powers implications that had a bearing on rights debates as well. On the whole, however, even the two series of severe crises did not inevitably cause the regime's collapse. These events are rather to be understood as testing the viability of Weimar as a constitutional democracy which (unless one holds that such regimes are only for times of peace and prosperity) should be able to withstand serious difficulties. Weimar Germany was able to do so for the most part – many other factors beyond economic distress led to its eventual failure.

[71] This problem stands of course at the heart of much of American discussion about constitutional interpretation under the heading of countermajoritarian difficulty. Cf. Barry Friedman's series for further references, "The history of the countermajoritarian difficulty" in 73 *New York University Law Review* 333 (1998), and in 148 *University of Pennsylvania Law Review* 971 (2000). Outside the US, however, Wojciech Sadurksi finds in general little reflection on this issue: "the unproblematic character of the constitutional review of laws as exercised by constitutional courts has been, more or less, taken for granted" (*Postcommunist Constitutional Courts in Search of Political Legitimacy* (Badia Fiesolana: European University Institute, 2001), 9).

Close attention is given to this problem by Scheppele, "Constitutional Negotiations" and "Declarations of Independence." Also cf. Stone Sweet, *Governing with Judges*; Lee Epstien, Jack Knight, Olga Shvestova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government" in *Law and Society Review* 35 (2001): 117-163. Also cf. the literature on judicial independence, a problem brought to the fore by the very phenomena of the judicialization of politics, as the editor, Peter Russel, notes in the "Conclusion" *to Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville: University Press of Virginia, 2001), 301-302.

[72] Their role is emphasized, primarily in the American context, by Charles Epp in *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998)

[73] Stone Sweet, *Governing with Judges*, 148.

[74] Ibid., 147.

[75] The same is true of other commentators who have noted the importance of the nexus of courts and scholars. Cf. Wojciech Sadurski, *Postcommunist Constitutional Courts*, 10. Martin Shapiro, "The Success of Judicial Review," in eds. Sally Kenney et al., *Constitutional Dialogues in Comparative Perspective* (London: Macmillian, 1999), 193-219; 214.

[76] Cf. Stone Sweet, ibid. 147: " Schlink is one of a very small number of constitutionalists who have written reflectively on their discipline."

[77] To start with the genre of self-reflection: Sólyom, "The Role of Constitutional Courts." "Introduction to the Decisions of the Hungarian Constitutional Court," 4. Also cf. his "Die Rolle der Verfassungsgerichtsbarkeit in politischen Transformationsprozessen – der Fall Ungarns" in *Die Rolle der Verfassungsgerichtsbarkeit in politischen Transformationsprozessen* (Heidelberg: Müller, 2002), 17-40; 23-27. The point is made in relation to both new and old democracies by Sadurski, *Postcommunist Constitutional Courts*, 10. In the European context cf. Stone Sweet, *Governing with Judges*, 148.

[78] Georg Brunner, Herbert Küpper, "Der Einfluß des deutschen Rechts auf die Transformation des ungarischen Rechts nach der Wende durch Humboldt-Stipendiaten: Das Beispiel Verfassungsgericht." msc., 2001.

For the decisions of the court see *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, and Georg Brunner, László Sólyom, *Verfassungsgerichtsbarkeit in Ungarn: Analysen und Entscheidungssammlung 1990-1993* (Baden-Baden: Nomos, 1995).

[79] Brunner, Küpper, "Der Einnfluß," 8-17.

[80] Brunner, even in 2000, gives as reason for this the lack of scholars who could be of influence: "the body of constitutional law in general and a doctrine of fundamental rights in particular deserving this name simply did not exist before 1990/1991 … furthermore the reservoir of scholarly personnel is

rather limited," in "The constitutions of Central and Eastern European countries and the duty to protect and ensure human rights" in ed. Eckart Klein, *The Duty to Protect and Ensure Human Rights* (Berlin: Berlin Verlag, 2000), 73-92; 74.

[81] Schlink himself has a double identity: not only is he a scholar (teaching public law and legal philosophy at the Humboldt University in Berlin), he is also a justice of the Constitutional Court of the State of Nordrhein-Westfalen. Cf. the credits given in his chapter "The Dynamics of Constitutional Adjudication" in eds. Michel Rosenfeld, Andrew Arato, *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press, 1998), 371-378; 371.

[82] Bernhard Schlink, "German Constitutional Culture in Transition," in ed. Michel Rosenfeld, *Constitutionalism, Identity, Difference, and Legitimacy*, (Durham: Duke University Press, 1994), 197-222; 197.

[83] Ibid., 217. Also cf. his famous article „Die Entthronung der Staatsrechtswissenschaft durch die Verfassungsgerichtsbarkeit" in *Der Staat* 28 (1989): 161-172. For the uses of the phrase „Bundesverfassungsgerichtspositivismus," cf. 164, 169, 170 which he contrasts with an alternative model, exemplified by „American constitutional scholarship," ibid.

[84] Schlink, "German Constitutional Culture in Transition," 216, emphasis mine.

[85] Ibid., 219. Also cf. "dominant position it once held ... during the Weimar Republic," ibid., 199.; "the position of [constitutional] scholarship as the final court of appeal in all questions of law of state remained unquestioned," ibid., 218.

[86] Ibid., 221.

[87] Ibid., 220. This critical point is also made in Schlink, "The Dynamic of Constitutional Adjudication," 376: „constitutional legal scholarship could and should more often take on a critical and even a leading role."

[88] Ibid., 215.

[89] Ibid., 219-20. The example Schlink gives is "Georg Meyer & Gerhard Anschütz, *Lehrbuch des Deutschen Staatsrechts* 906 (7th ed. 1919), [where] law of the state simply ceased with the Prussian military and constitutional conflict, the greatest conflict of the nineteenth century between the monarch and parliament," ibid., n42.

[90] With regard to introducing constitutional review cf. Donald. P. Kommers in his standard work, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edition (Durham: Duke University Press, 1997), where he argues that primarily indigenous German traditions of judicial review provided the basis for the Federal Constitutional Court's establishment in 1951. One gets, however, a slightly different impression by looking at the documents exchanged between the emerging German authorities and the Allied occupying powers, in particular the two documents of the all-powerful three Military Governors written in response to (West) German steps to prepare a "Basic Law." The Allied Memorandum of March 2, 1949 reiterated some of the "principles set forth" in the Aide Memoire of November 22, 1948 which specifically required the constituent assembly (called the Parliamentary Council) to observe, among other tenets, "an independent judiciary to review federal legislation, to review the exercise of federal executive power, and to adjudicate conflicts between the federal and land authorities as well as between land authorities, and to protect the civil rights and freedom of the individual." Both documents are published in *Documents on the Creation of the German Federal Constitution* (Civil Administration Division, Office of Military Government for Germany (US), September 1, 1949).

Beyond these "Allied interventions," as the Germans understood them, relating to the fulfillment of the principles of the London Agreement of the spring of 1948 (concluded among the Allied powers) was the scheme of a political model which would have retained vast Allied "control powers" in the hands of the Allied Control Commission in the framework of an Occupation Statute existing parallel to a German constitution that was arguably seen at the time by all sides as the basis of long-time arrangements for German political life. It was only due to the new terms of the cold war that Germany's political life took a course very different from the one foreseen at the end of 1949 -- by becoming a strategic ally to its occupiers both in the West and in the East, Germany changed from foe to friend of the former Allies on both sides of the newly drawn Iron Curtain. For a more detailed argument cf. Katalin Füzér, "German Constitutionalism in the Context of Postwar European Security: Foe, Friend, or Ally of the West?," ms., 1999.

Ultimately, the differences were fundamental between the inception of the Weimar and the Bonn Republics in the decisive momentums of constitution writing. Although situated similarly after lost wars and thus forced to comply with the pressures of victors, the constitutional assemblies in Weimar and Bonn acted under antipodal circumstances: freely in the case of Weimar (once the main Anglo-Saxon demand to dispense with the monarchy had been earlier fulfilled), and under supervision and in acquiesce in Allied guidelines both in the preparatory phases in the castle of Herrenchiemsee (August 10-25, 1948) and in Bonn (September 1, 1948 - May 23, 1949). Still, without an initial German commitment to strong rights and powerful courts, it is unlikely that the solutions, which continue to serve as the foundations of German constitutionalism, would have been worked out in the same manner.

[91] *Weimars lange Schatten: "Weimar" als Argument nach 1945*, ed. Christoph Gusy (Baden-Baden: Nomos, 2004), especially Oliver Lepsius, "Die Wiederentdeckung Weimars durch die bundesdeutsche Staatsrechtslehre," 354-394. Also by Gusy "Vergangenheitsrechtsprechung: Die Weimarer Reichsverfassung in der Rechtssprechung des Bundesverfassungsgerichts," *Zeitschrift für neuere Rechtsgeschichte* 26 (2004): 62-83. Also cf. *Weimar und die deutsche Verfassung: Zur Geschichte und Aktualität von 1919*, ed. Andreas Rödder (Stuttgart: Klett-Cotta, 1999*). 80 Jahre Weimarer Reichsverfassung – was ist Geblieben?*, ed. Eberhard Eichenhofer (Tübingen: Mohr, 1999).

[92] To start with judges, and a recent statement from their ranks: Jutta Limbach understands her service on the court as a way of contributing to the integrative functioning of constitutional adjudication, conceived entirely in the framework of Smend's theory of integration that she quotes excessively in "Die Intergrationskraft des Bundesverfassungsgerichts" in ed. Hans Vorländer, *Integration durch Verfassung* (Baden-Baden: Westdeutscher Verlag, 2002), 315-328; especially 3-4.

Ernst-Wolfgang Böckenförde's starting point is an insight gained in conversation with various Weimar rights theories: namely that one cannot approach rights interpretation before making clear what kind of rights theory one supports. Theory is first, interpretation comes second, concludes Böckenförde in "Grundrechtstheorie und Grundrechtsinterpretation" in *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp, 1991), 115-145; 118. Out of the five types of rights theories he identifies, two are found to be based on Smend's rights theory: the "value theory of rights" (129-133) and the "democratic-functional rights theory" (133-136).

Commentators have also noted Smend's influence:

Hans Vorländer, "Integration durch Verfassung? Die symbolische Bedeutung der Verfassung im politischen Integrationsprocess" in *Integration durch Verfassung*, 9-40; 14, esp. N28: talks about a "Smend school" and mentions the names of scholars such as Holger Ehmke, Martin Kriele, Friedrich Müller, Konrad Hesse and Peter Häberle.

Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd revised edition (Durham: Duke University Press, 1997), 45, 49.

Caldwell, *Popular Sovereignty*, 144: notes that Häberle and Ehmke were participants of Smend's "seminar on constitutional law in 1945."

Thomas Henne, "Von 0 auf Lüth in 6 ½ Jahren," (Antrittsvorlesung, University of Frankfurt, June 2002), msc., 31: identifies Smend's theory of integration as one of the main factors inspiring for the early court to launch an extensive reading of rights in the 1950s.

Schlink, „The dynamic of constitutional adjudication," 374: „between the 1950s and the 1970s the Bundesverfassungsgericht discussed fundamental rights as being values and as forming a value system."

Ingeborg Maus, „Hermann Heller und die Staatslehre der Bundesrepublik," 211 N88: notes Smend's influence on the court.

Christoph Gusy, "Vergangenheitsrechtsprechung: Die Weimarer Reichsverfassung in der Rechtssprechung des Bundesverfassungsgerichts" in *Zeitschrift für neuere Rechtsgeschichte* (2004), 73-75: "in several areas Weimar scholars' ideas endorsed or positively referenced, especially until 1970 … [such as] the value centered method advanced by Smend."

Bonn scholars have acknowledged their debts to Smend, e.g.:

Häberle, *Verfassung als öffentlicher Prozess: Materialen zu einer Verfassungstheorie der offenen Gesellschaft*, 3rd edition (Berlin: Duncker & Humblot, 1998), 320.

Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002), 206-207.

[93] Caldwell, *Popular Sovereignty*, 155: Leibholz's „approach to the equality clause was appropriated … almost word for word by the Federal Constitutional Court … on which [he] himself served as one of the first judges."

Christoph Gusy, "Vergangenheitsrechtsprechung," 76-77: Leibholz's influence with regard to the „so called party state" (Parteienstaat).

Also cf. Henne, "Von 0 auf 6 ½", 24.

Manfred Wiegandt, "Antiliberal foundations, democratic convictions: the methodological and political position of Gerhard Leibholz in the Weimar Republic," in *From Liberal Democracy to Fascism* (Boston: Humantities, 2000), 106-135; 135.

[94] Maus, "Hermann Heller," 214, 215: notes Heller's influence on the court via constitutional interpretation methods; also via the concept of social rule of law.

Böckenförde, "Grundrechtstheorie und Grundrechtsinterpretation," 119-129: two of the rights theories identified in the article are attributed to Schmitt: that of "liberal (bourgeois-rule of law) rights theory" and "institutional rights theory."

[95] Maus, "Hermann Heller," 216; 212-213 argues that Heller's constitutional interpretation methods influenced Häberle and Friedrich Müller. Caldwell makes the latter point, adding Smend to the list, *Popular Sovereignty*, 142. Also cf. Caldwell, ibid., 144, who recalled Smend's seminar in 1945 that Häberle and Ehmke attended.

Caldwell, ibid., 142, argues that Heller and Smend framed postwar constitutional interpretation theories by Kriele, Müller and Alexy.

Vorländer, "Integration durch Verfassung?" 14, esp. N28: "Smend school:" Holger Ehmke, Martin Kriele, Friedrich Müller, Konrad Hesse and Peter Häberle.

Ellen Kennedy, "Carl Schmitt in West German perspective" in *West European Politics* 7 (1984): 120-127, 126 N19: notes Schmitt's academic influence on Böckenförde, as well as on Hermann Lübbe, Joseph Kaiser and Reinhart Koselleck.

[96] So when Dyzenhaus finds (*Legality and Legitimacy*, 246, FN103) that Habermas's position in Faktizität und Geltung "maps neatly … Heller's," however, Habermas makes no reference to Heller, nor does he refer to Franz Neumann or Otto Kirchheimer, he attributes these obvious gaps to the influence Schmitt had on their work in Weimar. On the background to that cf. below.

[97] Ellen Kennedy, "Carl Schmitt and the Frankfurt School" in *Telos* 71 (Spring 1987): 37-66, 38; "Carl Schmitt and the Frankfurt School: A rejoinder" in *Telos* 73 (Fall 1987): 101-116 with further references that make the same case.

For the contrary opinion cf. Martin Jay, "Reconciling the Irreconcilable? Rejoinder to Kennedy" in *Telos* 71 (1987): 67-80; Alfons Söllner, "Beyond Carl Schmitt: Political Theory in the Frankfurt School" ibid. 81-96; Ulrich Preuss, "The Critique of German Liberalism: Reply to Kennedy, ibid. 97-109.

Kennedy also calls attention to the similarities in Habermas's approach to those of Heller in "The politics of toleration in late Weimar: Hermann Heller's analysis of Fascism and political culture" in *History of Political Thought* 5 (1984): 109-127, 126 N45.

[98] Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (Berlin: Duncker & Humblot, 1997), 377 N2.

[99] Each in about half a page, ibid., 378-380.

[100] Discussing the positions of Anschütz, Triepel, Kaufmann, Leibholz, Nawiasky, Thoma and Kelsen, in two and a half pages altogether, ibid., 380-383.

[101] Ibid., 377.

[102] The first volume by Michael Stolleis is *Geschichte des öffentlichen Rechts Deutschlands: Reichspublizistik und Policeywissenschaft 1600 – 1800* (München: Beck, 1988). Second volume: *Geschichte des öffentlichen Rechts Deutschlands: Staatsrechtslehre und Verwaltungswissenschaft 1800 - 1914* (München: Beck, 1992). In English*: Public Law in Germany, 1800-1914*. Translated by Pamela Biel (New York: Berghahn, 2001), hereinafter quoted as *History of Public Law*. Third volume*: Geschichte des öffentlichen Rechts Deutschlands: Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914 - 1945* (München: Beck, 1999), hereinafter quoted as *Geschichte des*

öffentlichen Rechts. In English*: A History of Public Law in Germany, 1914-1945*. Translated by Thomas Dunlap (Oxford: Oxford University Press, 2004).
[103] Stolleis, *Geschichte des öffentlichen Rechts*, 100-124 discusses main topics of interpretation.
[104] Ibid., 109-113. Also cf. 189-192.
[105] Chapter on "Methodenstreit und Staatskrise,"ibid., 153-202, esp. 185, 188-190, 192. Also cf. Michael Stolleis, *Der Methodenstreit der Weimarer Staatsrechtslehre: Ein abgeschlossenes Kapitel der Wissenschaftsgeschichte?* (Stuttgart: Steiner, 2001), text of a talk given on February 5, 2000. The debate on methods is a subject examined in great detail in the secondary literature. Beyond the three main heterogeneous schools, Vienna positivism, Weimar positivism and antipositivists, scholars also distinguish among several groups within each.
[106] Stolleis, *Geschichte des öffentlichen Rechts*, 110.
[107] Ibid., 110, 189-190.
[108] Ibid., 110.
[109] Ibid., 111.
[110] All quotes from ibid., 111.
[111] Knut Wolfgang Nörr, *Zwischen den Mühlsteinen: Eine Privatrechtsgeschichte der Weimarer Reichsverfassung* (Tübingen: Mohr, 1988), 7-11.
[112] Klaus Kröger, *Grundrechtsentwicklung in Deutschland: von ihren Anfängen bis zur Gegenwart* (Tübingen: Mohr, 1998).
[113] Ibid., 83.
[114] Also cf. by Kröger, „Der Wandel des Grundrechtsverständnisses in der Weimarer Republik," in *Geschichtliche Rechtswissenschaft. Festgabe für Alfred Söllner zum 60. Geburtstag* (Gießen: Brühlscher, 1990), 299-312.
[115] Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997).
[116] Ibid., 145-148, 153-170.
[117] Ibid., 145.
[118] Ibid., 156.
[119] Cf. the inaccurate statement to the effect that "social rights, such as the right to work, had no real place in Schmitt's Theory of a Constitution," ibid., 103. As we will see, the right to work was understood by Schmitt as an example of the category of "political rights" developed as the result of one of the most important theoretical distinctions proposed in the book in question, and elevated later on to the top of the hierarchy of rights. Cf. Chapter Four below.
[120] Christoph Gusy, *Die Weimarer Reichsverfassung* (Tübingen: Mohr, 1997). He situated his own interest in Weimar by distinguishing himself from two misconceptions: the one sees Weimar as „a final step to the Third Reich," while the other maintains that „Bonn is nicht Weimar" and tries to counter the idea of there being any relevance of Weimar for the postwar Bonn Republic and more recently for the reunited Federal Germany. As opposed to both of these approaches he maintained in the introduction that „to reflect on the Weimar Constitution inevitably means to reflect on Basic Law as well," (ibid. V.) but concluded in the epilogue that „writing about the Weimar Republic is not writing about the Federal Republic," (ibid., 466). His emphasis in terms of an overall approach to the violability of constitutions remained on „constitutional preconditions" (Verfassungsvoraussetzungen) that „a constitution, based on freedom and democracy … cannot guarantee itself," (ibid., 467).
[121] Ibid., VI.
[122] Christoph Gusy, *Die Lehre vom Parteienstaat in der Weimarer Republik* (Banden-Baden: Nomos, 1993). *Richterliches Prüfungsrecht: Eine verfassungsgeschichtliche Untersuchung* (Berlin: Duncker & Humblot, 1985), 74-119 on Weimar.
[123] Gusy, *Die Weimarer Reichsverfassung*, 279
[124] Ibid., 287-337.
[125] Ibid., 280-286.
[126] Gusy, *Richterliches Prüfungsrecht.* Helge Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit der Staatsrechtslehre in der Weimarer Republik* (Göttingen: Schwartz, 1984). Seog-Yun Song, *Politische Parteien und Verbände in der Verfassungsrechtslehre der Weimarer Republik* (Berlin: Duncker & Humblot, 1996).

[127] Most recently see Stolleis's evaluation of the debate as "a closed chapter of the history of science," *Der Methodenstreit der Weimarer Staatsrechtslehre*, 21. Also by him *Geschichte des öffentlichen Rechts*, chapter on "Methodenstreit und Staatskrise," 153-202. Gusy, *Die Weimarer Reichsverfassung,* 427-447. Cf. in English Caldwell, *Popular Sovereignty*; and the collection of essays and translations in *Weimar: A Jurisprudence of Crisis*, ed. Arthur J. Jacobson, Berhard Schlink (Berkeley: University of California Press, 2000), especially Arthur Jacobson, Bernhard Schlink, "Constitutional Crisis: The German and the American Experience," ibid., 1-39. On the turn of the century root of the debate cf. Stefan Korioth, "The Shattering of Methods in Late Wilhelmine Germany," ibid., 41-63; and Walter Pauly, *Der Methodenwandel im deutschen Spätkonstitutionalismus: Ein Beitrag zu Entwicklung und Gestalt der Wissenschaft vom öffentlichen Recht im 19. Jahrhundert* (Tübingen: Mohr, 1993). Also cf. Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft*, 322-333. Klaus Rennert, *Die <<geisteswissenschaftliche Richtung>> in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günter Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987). Renate Graner, *Die Staatsrechtslehre in der politischen Auseinandersetzung in der Weimarer Republik* (Frieburg: Hochschulverlag, 1980). Rudolf Smend, "Die Vereiningung der Deutschen Staatsrechtslehrer und der Richtungsstreit" *in Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Berlin: Duncker & Humblot, 1974), 575-589.

[128] The reconstruction of the historical context is based on the following literature (all other literature is cited directly). In English: Hans Mommsen, *The Rise and Fall of Weimar Democracy*, translated by Elborg Forster and Larry Eugene Jones (Chapel Hill: University of North Carolina Press, 1989). Sebastian Haffner, *The Ailing Empire: Germany from Bismarck to Hitler*, translated by Jean Steinberg (New York: Fromm, 1989). *The Weimar Republic Sourcebook*, eds. Anton Kaes, Martin Jay, Edward Dimenberg (Berkeley: University of California Press, 1993). Eberhard Kolb*, The Weimar Republic*, translated by P. S. Falla (London: Unwin Hyman, 1988) Cf. in German Kolb's updated work, *Die Weimarer Republik*, 6th updated and enlarged edition (München: Oldenburg, 2002). Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik*, 2nd updated and enlarged edition (Stuttgart: Ring, 1957). Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, vols. 5-7 (Stuttgart: W. Kohlhammer, 1978-1984).

[129] Haffner, *The Ailing Empire*, 127.

[130] We draw mainly on Huber, *Deutsche Verfassungsgeschichte*, vol. 6; and Christoph Gusy, *Die Weimarer Reichsverfassung*. Tübingen: Mohr, 1997.

[131] Prussia's constitutional dominance in the 1871 Empire (decried by critics as the big-Prussian solution for German unification – as opposed to the small-German solution customarily used for the regime) rested on a number of constitutional arrangements. Two of the most important were: 1. the Hohenzollern ruling family in Prussia had a claim to the imperial throne as well, making the King of Prussia serving as Kaiser for the Empire; 2. the office of imperial chancellor (fulfiled upon appointment by the Kaiser) coincided with that of the prime ministership of Prussia – occupied by Bismarck until 1890.

[132] On German electoral politics in the *Kaiserreich* and the Weimar Republic see Thomas Childers*, The Nazi Voter. The Social Foundations of Fascism in Germany, 1919-1933* (Chapel Hill: University of North Carolina Press, 1983).

[133] On the civil service in the general see Jane Caplan, *Government without Administration. State and Civil Service in Weimar and Nazi Germany* (Oxford: Clarendon, 1988).

[134] Cf. Hans Mommsen, *The Rise and Fall of Weimar Democracy*, translated by Elborg Forster and Larry Eugene Jones (Chapel Hill: University of Califonia Press, 1996), especially 129-171; 172-216; 357-437. Karl Dietrich Bracher, *Die Auflösung der Weimarer Republik*. 2nd edition (Stuttgart: Ring, 1957), especially 47-63; 287-685. Eberhard Kolb, *Die Weimarer Republik* (München: Oldenburg, 1993), especially 35-54; 107-146.

[135] For a similar evaluation cf. Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004), 258-259, 262.

[136] Michael Frese, *Ermächtigungsgesetzgebung im Deutschen Reich, 1914-1933* (Pfaffenweiler: Centarus, 1985). Huber, *Deutsche Verfassungsgeschichte (*Stuttgart: Kohlhammer, 1981), vol. 6, 437-43.

[137] Ont the basis of the enabling laws, altogether 420 decrees with the force of law were issued

between 1919 and 1925, of which the "reform" decrees with long-lasting effect regulated such matters as the establishment of the German Pension Bank, measures against cartells, several cases of levying of taxes, and various changes in the law of civil and criminal procedure, ibid. 443.

[138] Erstes Reichs-Ermächtigungsgesetz vom 13. Oktober, 1923 in Huber, *Dokumente zur deutschen Verfassungsgeschichte*, vol. 4, nr. 185, 216.

[139] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 446.

[140] Ibid., 441, n33., Ernst Rudolf Huber*, Dokumente zur deutschen Verfassungsgeschichte*, vol. 4, 665-6.

[141] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 731-744. On the details of the famous case of Prussia contra Reich from 1932 see David Dyzenhaus, *Legality and Legitimacy. Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar (*Oxford: Clarendon, 1997).

[142] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 446-7.

[143] Huber, *Deutsche Verfassungsgeschichte*, vol. 7, 805-6.

[144] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 715-9.

[145] Ibid., 717.

[146] Micheal Stolleis, "Judicial review, administrative and constitutional jurisdiction in the Weimar Republic," msc. Huber, *Deutsche Verfassungsgeschichte*, vol. 6.

[147] Ibid., 8.

[148] *Juristische Wochenschrif*, 53 (1924) 2: 90.

[149] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 565. Stolleis, "Judicial review, administrative and constitutional jurisdiction in the Weimar Republic" in *Ratio Juris* 16 2 (2003): 266-280, 8. Childers, *Nazi Voter*, 81.

[150] Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 565.

[151] Ibid., 566.

[152] Cf. Albert Hensel, "Grundrechte und Rechtssprechung," in ed. Otto Schreiber, *Die Reichsgerichtspraxis im deutschen Rechtsleben. Festgabe der juristischen Fakutäten zum 50jähigen Bestehen des Reichsgerichts*, vol. 1 (Berlin/Leipzig: Walter de Gruyter, 1929), 1-32. Albert Buschke*, Die Grundrechte der Weimarer Verfassung in der Rechtssprechung des Reichsgerichts* (Berlin: Stilke, 1930).

[153] Buschke, ibid., 63-96.

[154] Ibid., 96-104; 104-110.

[155] Ibid., 126-130.

[156] Ibid., 105-126.

[157] Huber, *Deutsche Verfassungsgeschichte*, 568-9. Stolleis, „Judicial Review," 9-10. Stolleis, *Geschichte des öffentlichen Rechts,* vol. 3, 364.

[158] For example the Reich Financial High Court (*Reichsfinanzhof*) or the Reich Welfare High Court (*Reichsversorgungsgericht*) operated as administrative courts in the fields of public finances and social welfare, whereas the Reich Office of Patents (*Reichspatentamt*) or the Reich Office of Social Security (*Reichsversicherungsamt*) functioned as last appeal within the system of administration. As opposed to any of the regular courts, both kinds of administrative jurisdiction was characterised by a lack of judicial independence and the guarantees of court proceedure. Ibid., 568-71.

[159] Richard Thoma, "Grundrechte und Polizeigewalt," in ed. Heinrich Triepel, *Verwaltungsrechtliche Abhandlungen. Festgabe zur Feier des fünfzigjahrigen Bestehens des Presußischen Oberverwaltungsgericht, 1875-1925* (Berlin: Henmanns, 1925), 183-223.

[160] The main difference in the court's composition related to the question whether federal organs were involved in the conflict in which case only judges served on the court, coming from the *Reichsgericht* and the state administrative courts, whereas the conflicts involving only state organs were adjudicated by judges and politicians alike who were elected by the two houses of the federal legislature. Huber, *Deutsche Verfassungsgeschichte*, vol. 6, 546-7.

[161] Ibid., 545.

[162] Ibid., 559-600.

[163] Stolleis, ibid., 10-11. Cf. especially the 1928 meeting of the Association of German Professors of Constitutional Law.

[164] Dyzenhaus, *Legality and Legitimacy*.

[165] The financing of the war was also based on the inflation generating practice of money printing after the currency had been practically lifted off the gold base by the enabling act of August 4, 1914, a piece of legislation to which we return soon. The amount of money, for instance, was five times more at the end of the war compared to what it had been at the beginning of it. The fundamental continuity of economic policy across war and early Weimar, including the efforts at cartelization, has been argued by Gerald. D. Feldman, *The Great Disorder: Politics, Economics and Society in the German Inflation, 1914-24* (Oxford: Oxford University Press, 1993).
[166] Cf. Thomas Childers, *The Nazi Voter*, 50-118, especially 53, 81-87.
[167] Ibid., 81-82.
[168] Beside the literature cited there, we rely on the following in reconstructing the judicial practice of this period: Helge Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit*, 51-58. Christoph Gusy, *Richterliches Prüfungsrecht*, 80-89. Peter Caldwell, *Popular Sovereignty*, 145-160. John Philip Dawson, *Oracles of the Law,* (Ann Arbor: University of Michigan Press, 1968), 468-479.
[169] Childers, *The Nazi Voter*, p. 81; Hort Gründer, *Walter Simons*, 230-231.
[170] Huber, *Deutsche Verfassungsgeschichte,* vol. 6, 565.
[171] Richterverein beim Reichsgericht, *Juristische Wochenschrift* 33 (1924): 90.
[172] Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit,* 53-54; Gusy, *Richterliches Prüfungsrecht,* 83; Caldwell, *Popular Sovereignty*, 148.
[173] On the president of the Reichsgericht between 1922-1929 cf. Horst Gründer, *Walter Simons als Staatsmann, Jurist und Kirchenpolitiker* (Neustadt: Ph. C. W. Schmidt, 1975), esp. 221-258.
[174] Caldwell, *Popular Sovereignty*, 146.
[175] Cf. Ellen Kennedy, *Constitutional Failure*, 258, 262.
[176] The reconstruction of electoral dynamic in the 1920s is based on Thomas Childers' *The Nazi Voter* and "Interest and Ideology: Anti-System Politics in the Era of Stabilization, 1924-1928" in ed. Gerald D. Feldman*, Die Nachwirkungen der Inflation auf die deutsche Geschichte, 1924-1933* (München: Oldenbourg, 1985), 1-20.
[177] The reconstruction of an anti-party mentality is based on Thomas Childers' The Nazi Voter.
[178] The reconstruction of the language of professions is based on Thomas Childers, "The Social Language of Poltics in Germany: The Sociology of Political Discourse in the Weimar Republic" in *The American Historical Review*, 95 2 (1990): 331-358; and "Languages of Liberalism: Liberal Political Discourse in the Weimar Republic."
[179] The reconstruction of the economic crisis of the 1930s is based on Thomas Ferguson and Peter Temin, "Made in Germany: The German Currency Crisis of July, 1931" in *MIT Deptartment of Economics Working Paper No. 01-07*, 2001.
[180] Ibid., 13, quotes *New York Times*, Feb 8, 1931, 8.
[181] Mommsen, *The Rise and Fall of Weimar*, 387.
[182] Ferguson and Temin, "Made in Germany," 38.
[183] Ibid., 25.
[184] Cf. Mommsen, *The Rise and Fall of Weimar*, 439ff.
[185] Ibid., 531.
[186] Ibid., 542-543.
[187] On the case and the constitutional controversy it gave rise to cf. Dyzenhaus, *Legality and Legitimacy* and Caldwell, *Popular Sovereignty*, 160-170.
[188] The constitutions of Bavaria and Baden from 1818, that of Württemberg from 1819, Hessen-Darmstadt from 1820, Kurhessen and Sachsen from 1831 all contained a number of single rights, but no rights catalogues. Cf. Michael Stolleis, *Public Law in Germany, 1800-1914*, translated by Palema Biel (New York: Berghahn, 2001), 70-1, 165-185. Klaus Kröger, *Grundrechtsentwicklung in Deutschland -- von ihren Anfängen bis zur Gegenwart* (Tübingen: Mohr Siebeck, 1998), 13-17. Ernst-Wolfgang Böckenförde, „Wie werden in Deutschland die Grundrechte im Verfassungsrecht interpretiert?" msc., 1-2. Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte: Reform und Restauration 1789 bis 1830*, (1960), vol. 1 (reprint Stuttgart: Kohlhammer, 1990), 350. *Deutsche Verfassungsgeschichte: Der Kampf um Einheit und Freiheit, 1830 bis 1850*, (1960), vol. 2, ibid., 1988: 774.
[189] Kröger, *Grundrechtsentwicklung*, 12-8.

[190] Stolleis, *Public Law in Germany*, 250-4; Ernst Rudolf Huber*, Deutsche Verfassungsgeschichte*, vol. 2.
[191] Contrary to the suggestion of the draft constitution introduced to the constitutional committee of the Frankfurt National Assembly, representatives began with discussions on fundamental rights instead of deciding on the pressing institutional questions of a new federation. The draft rights catalogue prepared by a special subcommittee was then debated in the plenary session of the National Assembly for more than half a year. The end result, "The Fundamental Rights of the German People" was promulgated in December 1848 as an independent federal statute while representatives turned to discussing organizational questions. Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte*, vol. 2: 774-6. The federal statute on fundamental rights was in force *de iure* until 1851 when it was withdrawn in the course of reactionary federal legislation, ibid. 783., vol. 3: 136-78.
[192] Kröger, *Grundrechtsentwicklung*, 26. Stolleis, *Public Law in Germany*, 252-3.
[193] Ernst Rudolf Huber, *Dokumente zur deutschen Verfassungsgeschichte, 1803-1850*, vol. 1 (Stuttgart: Kohlhammer, 1978), 389.
[194] Stolleis, *Public Law in Germany*, 257.
[195] Ibid., 347. There were a number of initiatives at the first meeting of the newly elected federal legislative body, the *Reichstag*, to include rights in the federal constitution. Bismarck firmly rejected such attempts for he had to make sure that federal rights would not evoke too much federal power -- which the member states of the new federation that he was about to forge would surely not have liked. Huber, *Deutsche Verfassungsgeschichte*, vol. 3: 665-6.
[196] Ernst Rudolf Huber argues that the rights guaranteed in various federal statutes under the 1871 constitution made up a substantial body of "material constitutional law," in "Grundrechte im Bismarckschen Reichssystem," in eds. Horst Ehmke et al., *Festschrift für Ulrich Scheuner zum 70. Geburtstag* (Berlin: Duncker & Humblot, 1973), 132-151.
[197] Stolleis, *Public Law in Germany*, 347. Huber emphasizes the rights protecting attitude of federal government and legislation alike and points out instances of rights violations by state legislations, "Grundrechte im Bismarckschen," 175-8.
[198] Huber, *Dokumente*, vol. 3: 54-128, on fundamental rights, 101-128.
[199] The canon ranges from such milestones as Gerber's *1852 Über öffentlichen Rechte*, through Laband's *Das Staatsrecht des Deutschen Reichs* from 1876, and Georg Jellinek's *System der subjektiven öffentlichen Rechte* from 1892 to Bühler's *Die subjektive öffentliche Rechte* from 1914. Cf. primarily Hartmut Bauer, *Geschichtliche Grundlage der Lehre vom subjektiven öffentlichen Recht* (Berlin: Duncker & Humblot, 1986). Also see Bühler himself, "Zur Theorie des subjektiven öffentlichen Rechts" from 1927.
[200] Kröger, *Wandel*, 300-1. Bauer, *Geschichtliche Grundlage,* 66-8. Stolleis, *Public Law in Germany*, 347-51.
[201] Bauer, *Geschichtliche Grundlage,* 68, N111, quoting Meyer, *Lehrbuch des deutschen Staatsrechts*, 687, in the 4th edition from 1895.
[202] Kröger, *Wandel*, 301. Bauer, *Geschichtliche Grundlage,* 68.
[203] Bühler, "Zur Theorie des subjektiven öffentlichen Rechts," 33. Administrative court practice in Württemberg 319-368, and Saxony 414-460.
[204] Bauer, *Geschichtliche Grundlage,* 66-7, quotes Bornhak, *Preußisches Staatsrecht*, vol. 1, 268 from 1888.
[205] Bauer, *Geschichtliche Grundlage,* 67, quotes Laband, *Staatsrecht*, vol. 1, 151, from 1911.
[206] Dieter Grimm, "Die Entwicklung der Grundrechtstheorie in der deutschen Staatsrechtlehre des 19. Jahrhunderts," in *Recht und Staat der bürgerlicher Gesellschaft* (Frankfurt am Main: Suhrkamp, 1987), 308-346; 264.
[207] Ottomar Bühler, "Die subjektive öffentliche Rechte und ihr Schutz in der deutschen Verwaltungsrechtssprechung," 61 quoted in Kröger, *Wandel*, 44. Cf. also Stolleis, *Public Law in Germany*, 350-1.
[208] Ibid., 349.
[209] Ibid., 373-402.
[210] We rely primarily on Friedhelm Köster, *Entstehungsgeschichte der Grundrechtsbestimmungen des zweiten Hauptteils der Weimarer Reichsverfassung in den Vorarbeiten der Reichsregierung und den*

Beratungen der Nationalversammlung (Göttingen: Cuvilleir, 2003). Also cf. most recently Walter Pauly, *Grundrechtslaboratorium Weimar: zur Entstehung des zweiten Hauptteils der Reichsverfassung vom 14. August 1919*, with the cooperation of Olaf Hünemörder. (Tübingen: Mohr Siebeck, 2004). For questions related to the work of the National Assembly in general, Ernst Rudolf Huber's definitive *Deutsche Verfassungsgeschichte seit 1789: Weltkrieg, Revolution und Reichserneuerung 1914-1919*, vol. 5 (1978) (Stuttgart: Kohlhammer, 1992) will be used, if otherwise not indicated.

[211] Micheal Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (München: Beck, 1999), 81.

[212] On Preuss (1860-1925) cf. Walter Jellinek, „Entstehung und Aufbau der Weimarer Reichsverfassung," in *Handbuch des deutschen Staatsrechts*, eds. Gerhard Anschütz, Richard Thoma, vol. 1 (Tübingen: Mohr, 1930), 127-8. Jellinek emphasized Preuss's standing to the left (even if not as far on the left as to be a social democrat) who could nevertheless provided "a bridge to the bourgeoisie" and therefore guarantee that compromises would be forged, ibid. As to his constitutional views which reflected his teachers, Otto Gierke's organistic political theory cf. Carl Schmitt, *Hugo Preuss: Sein Staatsbegriff und seine Stellung in der deutschen Staatsrechtslehre* (Tübingen: Mohr, 1930).

[213] For biographical on information on Anschütz cf. Chapter Three.

[214] In the immediate aftermath of military defeat, travel by train was made slow and difficult due to masses of returning solders. Anschütz took of from his home and university city Heidelberg in the south of Germany and got as far as Halle, his hometown, about a third of way still to go, where both his physical and psychological energies as well as time had run out: it was the day the meeting had started. Since his proposals were in any case in Preuss' possession ("Die kommende Reichsverfassung" in *Deutsche Juristenzeitung*, 24 (1919): 113-123), he decided to return to Heidelberg. (Anschütz, *Aus meinem Leben*, ed. Walter Pauly (Frankfurt am Main: Kostermann, 1993), 239-40.)

[215] Max Weber (1864-1920). Professor of political economy and sociology at the universities of Freiburg (1894), Heidelberg (1897), Vienna (1918). Influential scholarship in sociology and other social sciences. Active political journalism throughout his lifetime. For Weber and for the details of his participation in the preparatory meeting see Marianne Weber, *Max Weber: Ein Lebensbild* (München: Piper, 1989), 649-52; and Wolfgang Mommsen, *Max Weber and German Politics 1890-1920*, translated by Michael Steinberg (Chicago: University of Chicago Press, 1984), 355-71.

[216] In an article written for the *Frankfurter Zeitung* in November 1918, Max Weber, in harmony with his earlier campaign for the full scale parliamentarization of the *Kaiserreich*, proposed constitutional monarchy as the "technically most adaptable and therefore strongest state form." His position on the president, expressed in detail when the fall of the monarchy was inevitable, was fully coherent with his earlier constitutional views and only on a superficial reading can appear to constitute a breach of his commitments and thus an unprincipled withdrawal of support from parliament and transfer of political weight to the president. (As suggested by Wolfgang Mommsen ibid. and David Beetham*, Max Weber and the Theory of Modern Politics* (Cambridge: Polity Press, 1985.) Weber's theory of democracy rested partly on a conception of a democratic political leader whom he sought to see emerge first in parliament and then in the person of the directly elected president. The reason for the shift of location where the leader was supposed to arise can be summarized in a sentence, taken from one of Weber's writings in support of a strong presidential office: "the whole edifice of the Reich will be in danger of collapsing whenever there is a crisis in parliament, something which will not be unusual when there are at least four to five parties" in "The President of the Reich" in ed. Peter Lassman, Ronald Speirs, *Political Writings* (Cambridge: Cambridge University Press, 1994), 307. He thus still wanted a strong parliament but not one which was to rule alone – a condition which was given during the *Kaiserreich* since the emperor (practically: his chancellor) acted as the head of the executive and thus as a counterbalance to parliament.

[217] Konrad Beyerle (1872-1933). Professor of legal history at the universities of Breslau (1903), Göttingen (1906), Bonn (1917), München (1918). Member of the National Assembly of 1919 as a representative of the Catholic Centrum Party (*Zentrum*), and member of parliament 1920-1924.

[218] For biographical information on Triepel see Chapter Three.

[219] J.V. Bredt (1879-1940). After being a judge, Bredt became an academic as professor of public and administrative law. He was a "free conservative" member of Prussian house of delegates between 1911-1918. Founding member of DNVP in 1918, then of another smaller conservative party in 1920. He was a member of the Prussian state parliament (1921-1924) and of the *Reichstag* (1924-1933). In 1930-1931 he was minister of justice in the Brüning cabinet.
[220] Cf. Jellinek, "Entstehung und Aufbau der Weimarer Reichsverfassung," 129. Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte*, vol. 5, 1179-80.
[221] Cf. Anschütz, "Die kommende Reichsverfassung;" *Aus meinem Leben*. Max Weber, "Deutschlands künftige Staatsform," and "Der Reichspräsident" *in Poltitische Schriften*, 436-71; 498-517.
[222] The survey of events and positions is based on Huber*, Deutsche Verfassungsgeschichte*, vol. 5, 1184-90.
[223] Representative Richard Fischer, SPD, ibid., 1186.
[224] Representative Peter Spahn, Zentrum, idid., 1186.
[225] Representative Clemens von Delbrück, DNVP, ibid., 1188.
[226] Representatives Erich Koch and Walter Schücking, DDP, ibid., 1187, 1189.
[227] A peculiar momentum of critique on the government proposal carried over from the plenary session to the constitutional committee was the submission of a counter proposal by Friedrich Naumann ("Versuch volksverständlicher Grundrechte" in Huber, *Dokumente*, vol. 4, Nr.89.). His infamous rights catalogue was supposed to be "commonly understandable" by virtue of encapsulating the fundamental values of contemporary political thinking which Naumann saw as emanating from the conception of a "social people's state" (Huber, *Deutsche Verfassungsgeschichte*, vol. 5, 1199; Huber "Friedrich Naumanns Weimarer Grundrechtsetwurf," in ed. Okko Behrends, *Festschrift für Franz Wieacker* (Göttingen: Vandenhoeck, 1978), 384ff.). His rights catalogue decidedly did not want to revitalize the classical 1848er canon of rights but sought a wholly novel way of broadening the scope of rights from the protection of the individual to a territory where rights provisions took note of the social, cultural and economic realities of the day (Huber, *Deutsche Verfassungsgeschichte,* vol. 5, 1199). Since his formulations seemed way too awkward, even ridiculous to the members of the constitutional committee, they rejected his catalogue as a whole (cf. Walter Jellinek, „Entstehung und Ausbau der Weimarer Reichsverfassung," 134. Ulrich Gassner, *Heinrich Triepel: Leben und Werk* (Berlin: Duncker & Humblot, 1995), 117, also 113-114). In spite of its rejection, Naumann's draft very well captured the spirit of looking for new ways of conceptualizing rights which, as we will see, resonated rather well with many of his fellow representatives' intentions.
[228] Köster, *Entstehungsgeschichte*, 173.
[229] Ibid., 178.
[230] Ibid., 197.
[231] There were altogether eleven drafts published between December 1918 and February 1919 that came from "unofficial" sources, typically by scholars or politicians, ibid., 69.
[232] Ibid., 175-176, 196
[233] The Verein "Recht und Wirtschaft," founded in 1911, wanted to provide a bridge between the field of legal theory and practice, and the terrain of economic life by way of bringing the social and economic realities closer to jurists and judges and thus enabling them to adjudicate and develop the law in a more informed manner. The association soon grew to include several thousand jurists, judges and leading figures of business who were active in discussing major legal policy matters as a league of experts. Members belonged to various political parties and the association was keen on not to be associated with any party, but strove to be "above them". Cf. Gassner, *Heinrich Triepel*, 104-6.
[*234*] *Entwurf einer Verfassung des Deutschen Reichs*. (Berlin: Verfassungsausschuß des Vereins Recht und Wirtschaft, 1919).
[235] Erich Kaufmann, "Der Verfassungsetwurf des Vereins <<Recht und Wirtschaft>>," in *Recht und Wirtschaft*, 8 (1919): 46-51, 46.
[236] Among them Heinrich Triepel, Erich Kaufmann, Theodor Kipp, Fritz Rathenau, etc. (Gassner, *Heinrich Triepel*, 106).
[237] Heinrich Triepel, "Die Entwürfe zur neuen Reichsverfassung," in *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft* (Berlin: Duncker & Humblot) 43 (1919): 55-106.

Erich Kaufmann, "Der Verfassungsetwurf des Vereins <<Recht und Wirtschaft>>," in Recht und Wirtschaft, 8 (1919): 46-51.
[238] Triepel's biographer, Gassner draws this conclusion as well, *Heinrich Triepel*, 107.
[239] Triepel recalled these very words many times later on – if not coined by him, insisting on them as quasi his own words would have made him a dishonest man, which he clearly was not.
[240] Köster, *Entstehungsgeschichte*, 178.
[241] Ibid.
[242] Ibid., 73.
[243] Heinrich Triepel, "Die Entwürfe zur neuen Reichsverfassung," 64.
[244] Ibid., 64, 65-6.
[245] Triepel, „Die Entwürfe," 70.
[246] Erich Kaufmann, "Der Verfassungsetwurf des Vereins <<Recht und Wirtschaft>>," 50.
[247] Köster, *Entstehungsgeschichte*, 225.
[248] Ibid., 226-227.
[249] Ibid., 263.
[250] Ibid. Most critical was the position of Preuss and the representatives Heinze (DVP) and Koch (DDP), against whom Beyerle (Zentrum), Cohn (USDP) and Düringer (DVNP) defended the draft. Köster, *Entstehungsgeschichte*, 264
[251] A recent authoritative English translation of the Weimar Constitution (whose second part lists fundamental rights) can be found in Carl Schmitt, *Constitutional Theory*, translated and edited by Jeffrey Seitzer (Durham: Duke University Press, 2008): 409-440.
[252] Huber, *Deutsche Verfassungsgeschichte*, vol. 5, 1201.
[253] Heinrich Triepel (1868–1946). Professor of international and constitutional law at the universities of Tübingen (1990), Kiel (1908) and Berlin (1913). Influential scholarship first in international law (dualistic theory) using positivist methods, then in public law (federalism, courts, rights) using methods that involved especially the political aspects of constitutional problems. More on Triepel's role below in this chapter; also cf. in English Ralf Poscher, "Heinrich Triepel," in *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 171-174; and the definitive biography by Ulrich Gassner, *Heinrich Triepel: Leben und Werk* (Berlin: Duncker & Humblot, 1999).
[254] Cf. above Triepel's role as one of the fathers of the Weimar Constitution in his capacity as the author of the draft constitution of the Law and Economy Association, Chapter Two.
[255] One notable documented counterexample regarding the latter is Karl Rothenbücher's seminar on fundamental rights which he offered at München in 1921 and to which we will come back when discussing his positivist contribution in Chapter Four. In general cf. Michael Stolleis*, Geschichte des öffentlichen Rechts in Deutschland: Staats- und Vewaltungsrechtswissenschaft in Republik und Diktatur, 1914-1945*, vol. 3. (München: Beck, 1999), 109-114.
[256] On the central themes of constitutional scholarship cf. Stolleis, *Geschichte des öffentlichen Rechts*, 100-124.
[257] Christoph Gusy, *Weimarer Reichsverfassung* (Tübingen: Mohr, 1997), 447-458.
[258] Demonstrated by Gassner, *Heinrich Triepel*, 133-139. Cf. also Stolleis, *Geschichte des öffentlichen Rechts,* 186-187. Poscher's remark, the only available evaluation of Triepel's role in the English literature, is thus somewhat misleading: "Triepel was responding to the wishes of other colleagues as well," ("Heinrich Triepel," 171).
[259] Cf. Gassner, *Heinrich Triepel,* 127-145; 355-388.
[260] Heinrich Triepel, *Golbilanzen-Verordnung und Vorzugsaktien: Zur Frage der Rechtsgültikgeit der über sogenannte schuldverschreibungsänliche Aktien in den Durchführungsbestimmungen zur Goldbilanzen-Verordung erhaltenen Vorschriften. Ein Rechtsgutachten* (Berlin: Walter de Gruyter, 1924), 26-32; *Verhandlungen des 33. Deutschen Juristentages*, 1924 (Berlin: Walter de Gruyter, 1925): 56; "Die Entwürfe zur neuen Reichsverfassung,"in *Schmollers Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft* (Berlin: Duncker & Humblot) 43 (1919): 55-106; 70.
[261] Heinrich Triepel, "Die Entwürfe zur neuen Reichsverfassung," 70.
[262] Triepel, *Verhandlungen des 33. Deutschen Juristentages*, 1924: 56.
[263] Triepel's position on courts was personally motivated by an early momentum in his life when he had to decide between a career in the academia as opposed to being a professional judge. In the 1890's

he pursued both, writing his tenure book (*Habilitation*) simultaneously to preparing for the exams required for continuing to serve as a judge at the Leipzig *Landesgericht* (state appellate court) (Gassner, 45-48). Albeit the calling of scholarship was clearly his choice at the time, he never distanced himself from the would-be profession of his youth: judgeship remained an experience to which he came back to time after time in his scholarship (Gassner, 48) and had the course of events in the Weimar Republic run differently, in praxis as well. Triepel was namely elected in 1921 to serve on the *Staatsgerichtshof* in its composition as the court of impeachment for the federal president, federal chancellor and the defense minister (Gassner, 168-9). That the occupants of these offices were never charged with violating the constitution, and Triepel consequently did not actually serve on the court, does not alter the significance of the fact that he had been a member of the *Staatsgericht* during the Weimar Republic and consequently had looked upon judges as his colleagues.

[264] Triepel, *Verhandlungen des 32. Deutschen Juristentages*, 1921: 54. Also see his comments on his efforts at the next assembly in *Verhandlungen des 33. Deutschen Juristentages*, 1924: 59.

[265] Ibid. He could not get a reaffirmation at this meeting because Gerhard Anschütz intervened and protested against taking a vote (again) on the question of judicial review. Ibid., 66.

[266] *Der Deutsche Juristentag 1860-1994*, eds. H. Conrand, G. Dilcher, H-J. Kurland (München: Beck Verlag, 1997).

[267] At the 1921 and 1924 meetings the topics were, respectively: "Is it advised to include in the Constitution new regulations on the distinction between statute and decree?;" and "Validity and form of constitutional amendments that do not alter the constitutional text," Gassner, *Heinrich Triepel*, 127-8.

[268] Ibid., 129.

[269] Throughout the dissertation, we rely on inferences and secondary sources in matters related to the operation of the Association in Weimar where no definitive information is to be gathered from the published proceedings of the meetings (*Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer*, vols. 1-7 (Berlin: Walter de Gruyter, 1924-1932), hereinafter: *VVDStRL*.) (On the discussion topics, presenters as well as on the composition of the presidencies cf. Appendix 1.) The documents of the Association from the years 1922-1932 and with a few exceptions most of the papers generated between 1933-1949 „have supposedly been lost" (Stolleis*, Geschichte des öffentlichen Rechts in Deutschland*, 314) making the history of the Association in this period „an almost white surface in terms of documents" (Michael Stolleis, "Die Vereinigung der Deutschen Staatsrechtslehrer. Bemerkungen zu ihrer Geschichte" in *Kritische Vierteljahrschrift für Gesetzgebung und Rechtswissenschaft*, 80 (1997): 345.)

As to what had happened to the documents we have some personally related information from a student of Otto Koellreutter (Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 314, N423, and "Die Vereinigung," 345, N21, and personal communication with professor Stolleis). Koellreutter was in the last presidency of the Association during the National Socialist take over of power and was documentedly in possession of the Assocation papers in the year 1938 (cf. Otto Sartorius's letter dissolving the Assocation reprinted in *AöR* 99 (1974): 312). On the basis of information provided by Koellreuter's student Carl Hermann Ule, Stolleis relates the story of the documents as follows: „[Koellreutter] had evidently pondered and grumbled about [the documents] for a long time … which had made his housekeeper so angry that she is supposed had thrown everything into the fire one day when the Professor was out of the house" ("Die Vereinigung," 345, N21 also cf. *Geschichte des öffentlichen Rechts in Deutschland*, 314, N423) . On Koellreutter cf. Jörg Schmidt, *Otto Koellreutter, 1883-1972: Sen Leben, sein Werk, seine Zeit* (Frankfurt am Main: Lang, 1995)

[270] Richard Thoma, "Das richterliche Prüfungsrecht," *AöR*, 43 (1922): 267-286.

[271] Heinrich Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer," *AöR*, 43 (1922): 349-353; 351.

[272] Triepel, *VVDStRL*, vol.3: 44: "Die Frage ... ist ja entschieden."

[273] Triepel, "Eröffnungsansprache," *VVDStRL*, vol. 1: 5-10; 7.

[274] Triepel, "Eröffnungsansprache," *VVDStRL*, vol. 2: 1-4; 3.

[275] Heinrich Triepel, "Streitigkeiten zwischen Reich und Ländern: Beiträge zur Auslegung des Artikels 19 der Weimarer Reichsverfassung" in *Festgabe der Berliner juristischen Fakultät für Wilhelm Kahl zum Doktorjubiläum am 19. April 1923,* (1923) (reprint Aalen: Scientia Verlag, 1984).

[276] Ibid., 6.
[277] Ibid., 7.
[278] Ibid., 6-7.
[279] Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer," *AöR* 43 (1922): 349-353; 352. Reprinted also at the end of each volume in which the proceedings were published.
[280] Cf. Appendix 1.
[281] Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer," *AöR* 43 (1922): 349-353; 350.
[282] Ibid. Cf. also the translated excerpts from his 1926 address as rector of Berlin University, "Law of the State and Politics," in *Weimar: A Jurisprudence of Crisis*, 176-188: "we … declare ourselves unable to interpret the law without considering the political," 187.
[283] Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer," *AöR* 43 (1922): 349-353*;* 349.
[284] Rudolf Smend, "Zur Geschichte der Berliner Juristenfakultät im 20. Jahrhundert," in *Studium Berolinense*, (Berlin, 1960), 109-128; 123. Condording Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 186; Gassner, *Heinrich Triepel*, 139.
[285] Ibid.
[286] Triepel, *VVDStRL* vol. 1: 9, 5-6.
[287] Ibid., 9-10.
[288] Ibid., 10.
[289] Ibid.
[290] Triepel, *VVDStRL*, vol. 7: 1.
[291] Triepel was keen on policing the boundaries of the discipline and controlling the terrain of important debates, a commitment manifest in his editorship of the *Archiv des öffentlichen Rechts* as well. The journal was a central medium of the discipline before the war and as such gave forum to the paradigmatic formalistic positivism of the Kaisserreich as well as to its loosening up around the turn of the century. On the history of the journal see Carsten Doerfert, *Das Archiv des öffentlichen Rechts, 1885-1918* (Berlin: Duncker & Humblot, 1993), on positivism and its loosening up cf. esp., 99-111.
Triepel took over editorship in 1919 and remained a dominant figure of the journal until he withdrew at the turn of the years 1933-34. (Gassner, *Heinrich Triepel*, 163-67.) The *Archiv* was home to a number of pathbreaking writings on fundamental rights especially in late Weimar and the Association meetings received detailed reviews on its pages:
Heinrich Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer" in *AöR*, 43 (1922): 349-351; Fritz Stier-Somlo, "Die zweite Tagung der Vereinigung der deutschen Staatsrechtslehrer" and "Die dritte Tagung der Vereinigung der deutschen Staatsrechtslehrer" both in *AöR* 46 (1924): 88-105 and 48 (1925): 98-109; Günter Holstein, "Von Aufgaben und Zielen heutiger Staatswissenschaft. Zur Tagung der Vereinigung deutscher Staatsrechtslehrer" in *AöR* 50 (1926): 1-40; Lutz Richter, "Die sechste Tagung der Vereinigung der deutschen Staatsrechtslehrer" in *AöR*, 53 (1928): 441-459; Hans Gerber, "Die Siebente Tagung der Vereinigung der deutschen Staatsrechtslehrer" in *AöR* 56 (1929): 253-286; Arnold Köttgen, "Die achte Tagung der Vereinigung der deutschen Staatsrechtslehrer" in *AöR* 60 (1932): 404-431.
[292] Triepel, "Die Vereinigung der deutschen Staatsrechtslehrer" in *AöR*, 43 (1922): 349-351; 349, 351.
[293] Triepel, *VVDStRL*, vol. 3: 50.
[294] Richard Thoma, *VVDStRL*, vol. 4: 86.
[295] Ibid., 90. Not all kinds of conflicts did, however, count as welcome in Triepel's reading: in a 1930 review of Hans Kelsen's book, *The State as Integration,* written in rebuttal of Rudolf Smend's constitutional theory, Triepel found as "inexcusable" that Kelsen would "insinuate Smend's work as an instrument of fight against democracy and the Weimar Constitution." Also unacceptable was Kelsen's characterization of "younger colleagues who stand on the opposite side .. as <<career-conscious authors.>>" Triepel concluded his review with a warning on the state of the discipline: "if such things were to become style in our circles, unprejudiced scientific discussion would be impossible in the future" (Triepel's review, "Eine Rüge" is reprinted in Peter Häberle*, Rezensierte Verfassungsrechtswissenschaft* (Berlin: Duncker & Humblot, 1982), 122.)
[296] Gassner, *Heinrich Triepel*, 138-139.
[297] Ibid., 138, N489.
[298] Triepel as an academic of high scholarly stature was commissioned to serve on the Constitutional

Committee of the States' Conference (Verfassungsausschuß der Länderkonferez) in 1928 to discuss the possibilities of reforming the relations between the federation and the states in various versions of a comprehensive "Reichsreform." Beside Triepel, only Gerhard Anschütz was asked to attend the meetings "as an independent expert." (Gassner, *Heinrich Triepel*, 151-152). Being summoned as an expert was, however, not the role in which he liked to see himself most. At the last meeting of the Association in 1931, he explained on the example of parliamentary committees, the difficulties he saw involved in the relations of scholars and the parties inviting them: independence was usually compromised and scholars ended up being frustrated since they could contribute to the problem on its merits, but could not take part in the decision itself. Triepel thus preferred to be listened to not as an expert in parliament but as a "personality ... respected in ... a scientific field," *VVDStRL*, vol. 7: 194-5.

[299] Triepel, "Entwürfe," (1919); „Der Weg der Gesetzgebung nach der neuen Reichsverfassung" *AöR* 139 (1920): 456-546; discussions contributions in *Verhandlungen des 32. Deutschen Juristentages*, 1921, *Verhandlungen des 33. Deutschen Juristentages*, 1924, *VVDStRL* vol. 3, *VVDStRL*, vol 4., and *Golbilanzen-Verordnung.*

[300] Triepel, "Der Weg der Gesetzgebung," 537.

[301] Ibid.

[302] Triepel, *Golbilanzen-Verordnung*, 27-28.

[303] Triepel, *Verhandlungen des 33. Deutschen Juristentages*, 1924, 20.

[304] Martin Wolff, "Reichsverfassung und Eigentum" in *Festgabe der Berliner juristischen Fakultät für Wilhelm Kahl zum Doktorjubiläum am 19. April 1923,* (1923) (reprint Aalen: Scientia Verlag, 1984), 3-30.

[305] Ibid., 6.

[306] E.g. Triepel, *Verhandlungen des 33. Deutschen Juristentages*, 1924: 56 or *Golbilanzen-Verordnung*, 24.

[307] Triepel, "Entwürfe," 70; *Verhandlungen des 33. Deutschen Juristentages*, 1924: 56; *Golbilanzen-Verordnung,* 26.; *VVDStRL* vol. 6: 12, 26.

[308] Triepel, *Golbilanzen-Verordnung*, 35.

[309] Ibid., 15.

[310] Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 189. As to the inflation also cf. Chapter One, *A democracy in crisis: emergency government in the postwar economic and security crisis and the response of the courts*.

[311] For Leibholz see Manfred H.Wiegandt, *Norm und Wirklichkeit. Gerhard Leibholz (1901-1982). Leben, Werk und Richteramt* (Baden-Baden: Nomos, 1995). Also cf. in English by the same author „Antiliberal foundations, democratic convictions: the methodological and political position of Gerhard Leibholz in the Weimar Republic" in eds. Peter Caldwell, William Scheuerman*, From Liberal Democracy to Fascism* (Boston: Humanities, 2000), 106-135.

[312] Gerhard Leibholz, *Die Gleichheit vor dem Gesetz: Eine Studie auf rechtsvergleichender und rechtsphilosophischer Grundlage* (Berlin: Otto Liebmann, 1925).

[313] Ibid., 123ff.

[314] Ibid., 36, 46, 47, 79.

[315] Ibid., 115.

[316] Ibid., 72, 87, 118. The German terminus technicus is *Willkürsverbot*.

[317] He would occasionally speak about "the principle of equality … placed under the protection of the Constitution" (*Golbilanzen-Verordnung*, 26) but a comprehensive theory of rights as principles was never put forth by Triepel. Cf. Gassner (*Heinrich Triepel*, 359), who is of the same opinion. For a contrary view see Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997), 149.

[318] Equality was also the topic of the 1926 meeting of the Association of German Professors of Constitutional Law, the last year of Triepel's presidency, which again testified to his continuing efforts to keep rights on the agenda of scholarly discussions. Cf. Erich Kaufmann's remark at the beginning of his lecture on equality: "We have our board to thank for initiating my lecture today which is a great honor for me." *VVDStRL*, vol. 3: 2. The rights theory advanced by Kaufmann at this meeting belongs to the next chapter.

[319] Emphasized by Gassner, *Heinrich Triepel*, 358 but not put into the context of debates on rights. As

to the unfoundedness of his suggestion that we should understand Triepel's position simply as being in opposition to the ideas of the representatives of the *geisteswissenschaftliche Richtung*, cf. the below.

[320] So Triepel talks about "the freedom of the individual against the state" and "the freedom of citizens from the state" in „Die Entwürfe." 64; "civil freedom against a powerthirsty parliament" in "Der Weg der Gesetzgebung," 537; "guarantees of the freedom of citizens," in *Verhandlungen des 33. Deutschen Juristentages*, 1924: 56; "the subjective rights of individuals," in „Ein Eingriff in wholerworbene Beamtenrechte" in *Deutschen Juristen Zeitung* 36 (1931): 1537-1542; 1539.

[321] Triepel, *Verhandlungen des 33. Deutschen Juristentages*, 1924: 56.

[322] Triepel, *Golbilanzen-Verordnung*, 28.

[323] Contrary to statements such as Gusy's (*Die Weimarer Reichsverfassung*, 277) which attributes this idea to Richard Thoma. Cf. also Stolleis*, Geschichte des öffentlichen Rechts*, 110.

[324] With respect to Smend and Kaufmann and their propositions at the Association meetings cf. Triepel, *VVDStRL*, vol. 4: 90, with respect to his simultaneous acceptance of Carl Schmitt's conception of institutional guarantees and his distancing from it cf. Triepel, "Ein Eingriff in wholerworbene Beamtenrechte," 1538-1539.

[325] Triepel objected to Schmitt's interpretation („Wolherworbene Beamtenrechte und Gehaltskürzungen" in *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954: Materialen zu einer Verfassungslehre* (Berlin: Duncker & Humblot, 1958), 174-180, to be discussed in detail in the next chapter) of the acquired rights of civil servants (Art.129 of the Weimar Constitution) as constituting "only a so called institutional guarantee" („Ein Eingriff in wholerworbene Beamtenrechte," 1538) but went ahead to show that if one accepted Schmitt's interpretation of the article as an institutional guarantee, the debated reductions in professors' incomes that university administration in Hamburg enacted still violated the constitutional provision in question.

[326] Triepel, "Beamten" in AöR 40 (1921): 349-377, 357.

[327] Ibid.

[328] Triepel, *Verhandlungen des 33. Deutschen Juristentages*, 1924: 53-55.

[329] Triepel, "Ein Eingriff in wholerworbene Beamtenrechte," 1540.

[330] Schmitt reduced the argument about individual vs institutional conceptualization of the right in question to the point that "the amount of income is not inviolable" ("Wolherworbene Beamtenrechte," 176).

[331] Cf. Gassner, *Heinrich Triepel*, 359.

[332] "Der Weg der Gesetzgebung," 537.

[333] Heinrich Triepel, *Die Staatsverfassung und die politischen Parteien* (Berlin: Otto Liebmann, 1928). Cf. also the translated excerpts "Law of the State and Politics" *in Weimar: A Jurisprudence of Crisis*, 176-188.

[334] Heinrich Triepel, *Staatsrecht und Politik. Rede beim Antritte des Rektorats der Friedrich Wilhelms-Universität zu Berlin* (Berlin: Walter de Gruyter, 1927), 37. "Wesen und Entwicklung der Staatsgerichtsbarkeit" in *VVDStRL*, vol. 5: 4, 5, 7.

[335] Triepel, *Staatsrecht und Politik*, 8.

[336] Ibid., 37.

[337] Ibid., 39-40.

[338] Triepel, *Die Staatsverfassung*, 34.

[339] Gassner, *Heinrich Triepel*, 414.

[340] "Public officials are servants of the whole community, not of a party."

[341] Especially via proportional representation where voters choose party lists instead of electing individual candidates making therefore the whole process not viable without parties. Cf. Chapter One.

[342] Triepel, *Die Staatsverfassung*, 12, 31.

[343] Triepel, *Die Staatsverfassung*, 29. In the face of Triepel's critical assessment of political parties, it might come as a surprise that he had actually belonged to one of the Weimar oppositional parties. He joined the conservative DNVP (German National People's Party) at the time of its foundation in 1919 and quit in late 1929 when a change in the leadership made it no longer bearable for him to stay affiliated (Gassner, *Heinrich Triepel*, 181-2). (On the party cf. Friedrich Frhr. Hiller von Gaertingen, "Die Deutschnationale Volkspartei," in eds. Erich Mattias, Rudolf Morsey, *Das Ende der Parteien 1933: Darstellungen und Dokumente* (Düsseldorf: Droste, 1984), 541-652.)

[344] Triepel, *Deutsche Allemeine Zeitung*, April 22, 1923: 1.
[345] Triepel, *Golbilanzen-Verordnung*, 28.
[346] "A parliametary democracy will always be a born enemy of self-administration" Triepel emphasized in 1923 in *Streitigkeiten zwischen Reich und Länder*, 118.
[347] Triepel, "Der Weg der Gesetzgebung," 64.
[348] Gerhard Anschütz (1867-1948). Professor of public law at the universities of Tübingen (1899), Heidelberg (1900), Berlin (1908), Heidelberg (1916). Influential scholarship and editorial work in the genre of textbooks and commentaries already in the *Kaiserreich*, continued in the Weimar Republic. His methods changed from conceptual or constructivist positivism to statutory positivism by the turn of the century. More on Anschütz's involvements below, also cf. in English, Walter Pauly, "Gerhard Anschütz" *in Weimar: A Jurisprudence of Crisis*, 128-130; see furthermore Pauly, "Zum Leben und Werk von Gerhard Anschütz" in *Aus meinem Leben* (Frankfurt am Main: Klostermann, 1993), XI-XLIV); also by him, "Gerhard Anschütz" in *Juristen: Ein Biographisches Lexikon. Von der Antike bis zum 20. Jahrhundert* (München: Beck, 1995), 36-37. His memoires have been recently edited by Walter Pauly and published as Gerhard Anschütz, *Aus meinem Leben*.
[349] Meyer-Anschütz, *Lehrbuch des deutschen Staatsrechts*, 7th edition (München-Leipzig: Duncker & Humblot, 1914-1919).
[350] Gerhard Anschütz, *Die Verfassungs-Urkunde für den Preussischen Staat vom 31. Januar 1850. Ein Kommentar für Wissenschaft und Praxis* (Berlin, 1921). Cf. Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn, 2001), 282.
[351] Gerhard Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis* (Berlin: Stilke). First edition 1921; first revised edition (appeared as joint 3rd and 4th editions) 1926; the third revised edition appeared in 1929 (as 10th edition) and the final revised edition appeared in 1933 as 14th edition and is most commonly cited (and exclusively reprinted, Bad Homburg: Gehlen, 1968) in spite of the fact that the commentary had undergone a sequence of major rewritings by the time it reached this final format in the 14th edition. I use the 1st (1921), the first revised, i.e. joint 3rd and 4th (1926) and the final 14th (1933) editions in this work, to be cited hereinafter as *Kommentar* 1921, *Kommentar* 1926 and *Kommentar* 1933, respectively.
[352] Richard Thoma (1874-1957). Professor of public law at the universities of Hamburg (1908), Tübingen (1909), Heidelberg (1911), Bonn (1928). Influential scholarship in constitutional and administrative law. His methods changed in the Weimar Republic to include non-positivist elements but on the whole remained a statutory positivist. More on Thoma's role below, also cf. in English Peter Caldwell, "Richard Thoma," in *Weimar: A Jurisprudence of Crisis*, 151-155; and his biography by Hans-Dieter Rath, *Positivismus und Demokratie. Richard Thoma 1874-1957* (Berlin: Duncker & Humblot, 1981).
[353] *Handbuch des Deutschen Staatsrechts*, vols. 1-2, eds. Gerhard Anschütz and Richard Thoma (Tübingen: Mohr, 1930, 1932). Hereinafter *Handbuch*.
[354] Anschütz, *Kommentar* 1921, *Kommentar* 1926.
[355] Anschütz, *Kommentar* 1921, 181.
[356] Anschütz, *Kommentar* 1926, 307.
[357] Anschütz, *Kommentar* 1921, 189; *Kommentar* 1926, 306, 309.
[358] Anschütz, *Kommentar* 1926, 398.
[359] Ibid., 397-8.
[360] Ibid., 398.
[361] Ibid., 389.
[362] Ibid., 397.
[363] Ibid., 398.
[364] Ibid., 400.
[365] Ibid., 400.
[366] Ibid., 401.
[367] On Anschütz's role cf. Chapter Two.
[368] Gerhard Anschütz, "Die kommende Reichsverfassung," *Deutsche Juristenzeitung*, 24 (1919): 114-123; 115.
[369] Anschütz, *Kommentar* 1933, 513.

[370] Anschütz, *Kommentar* 1921, 189; *Kommentar* 1926, 305-6.
[371] Anschütz, *Kommentar* 1926, 307.
[372] Anschütz, *Kommentar* 1926, 308-9.
[373] Ibid.
[374] Such "old-liberal common goods" as equality were also the arts. 114-118, 123, 124, 135, 136, i.e. the freedoms of the person, residence, mail, opinion, assembly, association and religion in *Kommentar* 1926, 307. For property cf. Anschütz, *Kommentar* 1921, 246; *Kommentar* 1926, 396.
[375] This was the case especially in relation to Triepel. "In spite of the polemic, the here represented position is to be maintained," Anschütz, *Kommentar* 1926, 306. "[W]ith Wolff and Triepel we can say that .... legislation is also bound," Anschütz, *Kommentar* 1926, 397.
[376] Friedrich Giese, *Grundriss des Reichsstaatsrechts* (Bonn: Röhrscheid, 1926), 198.
[377] Fritz Stier-Somlo, *Die Verfassung des Deutschen Reiches* (Berlin: Henmanns, 1931), 242-244.
[378] Anschütz, *Kommentar* 1921, 186; *Kommentar* 1926, 302.
[379] As opposed to Giese's insistence on the traditional interpretation, *Grundriss*, 164, 200.
[380] Anschütz, *Kommentar* 1926, 401-2.
[381] Anschütz, *Kommentar* 1921, 186; *Kommentar* 1926, 302; *Kommentar* 1933, 514-520.
[382] In the last edition Anschütz lists Art. 109 (3) 2, (4), (5); Art. 139; Art. 145 (514); Art. 110 (2); Art. 118 (2); Art. 131 (515); Art. 112 (2), (3); Art. 116; Art. 135; Art. 136 (518); Art. 111; Art. 117; Art. 123; Art. 124 (519).
[383] Even in the very last sentence of the chapter analysing the rights catalogue of the Weimar Constitution.
[384] Anschütz, *Kommentar* 1933, 516.
[385] Richard Thoma, ”Grundrechte und Polizeigewalt,” in ed. Heinrich Triepel*, Festgabe zur Feier des fünfzigjährigen Bestehens des Preßischen Oberverwaltungsgerichts 1875-1925* (Berlin: Heymann, 1925), 217, FN31.
[386] Thoma, ”Grundrechte und Polizeigewalt,” 220.
[387] Ibid.
[388] Ibid., 223.
[389] Richard Thoma, “Die juristische Bedeutung der grundrechtlichen Sätze der deutschen Reichsverfassung im allgemeinen,” in ed. Hans Carl Nipperdey, 3 vols, *Die Grundrechte und Grundpflichten der Reichsverfassung. Kommentar zum zweiten Teil der Reichsverfassung* (Berlin: Hobbing, 1929-30), 1-53; 49. (Hereinafter *Nipperdey Kommentar*.)
[390] Thoma, *Nipperdey Kommentar*, vol.1, 3. We review his rights classifications in their eventual completeness already here even though his writings for the two collective commentaries in later Weimar did supplement with a few details his scheme of 1925 beside revisiting the issue of the normative force of rights. More important for us now than the changes implemented in the meantime is the early fulfilment of the positivist imperative to categorize rights – beside holding firm to the other methodological doctrine of separately interpreting each and every right to determine their "legal content" as we had seen Anschütz do this in his commentaries.
[391] Rights on the highest level were Arts. 17 (1) 2, (2), 22, 30, 41 (1), 73 (2) (3), 99 (1), 105 1, 2, 109, 110 (2), 112 (3), 113, 116, 118 (2), 126, 128 (2), 129 (1) 3, 4, 130 (2), 131, 135, 137, 138 (2), „Grundrechte und Polizeigewalt,” 191-2.
[392] Rights on the second level were Arts. 114, 117, 118, 123, 124, 153, ibid., 192-3.
[393] Rights of the third category were Arts. 111, 112 (1), 117, 123 (2), 124 (2) 1, 151 (3), 153 (2) 2, 3, ibid., 193-4.
[394] Rights in this fourth category were Arts. 114 (1), 115, 122 (2), 153 (1), 154. "They do not say anything that would not hold anyway," ibid., 196.
[395] Ibid., 194-6.
[396] *Handbuch des deutschen Staatsrechts*, eds. Richard Thoma, Gerhard Anschütz, 2 vols (Tübingen: Mohr, 1930, 1932). Hereinafter *Handbuch*.
[397] *Nipperdey Kommentar*.
[398] Thoma, "Die juristische Bedeutung der grundrechtlichen Sätze,” *Nipperdey Kommentar*, vol. 1, 1-53.
[399] Ibid., 3.

[400] Ibid., 9
[401] Ibid., 12.
[402] Cf. Christoph Gusy, *Weimarer Reichsverfassung*, 277.
[403] Title of *Nipperdey Kommentar*, emphasis mine.
[404] Ibid., 2, 11, 13.
[405] Ibid., 13-14.
[406] Ibid., 4
[407] Ibid.
[408] In a rudimentary form already in his 1925 piece, then elaborated in *Nipperdey Kommentar* and presented as his contribution per se in the chapter on rights in the Handbook.
[409] Cf. Chapter Two.
[410] Thoma, *Nipperdey Kommentar*, 20.
[411] Ibid., 21-6. Arts. 111, 112, 113, 114, 115, 116, 117, 118, 123, 124, 126, 127, 130 (2), 135, 136, 137, 140, 141, 142, 149 (2), 151, 152 (1), 153 (1), 159, 160.
[412] Ibid., 26-7. Arts. 125, 110, 128 (1), 159, 160, 165.
[413] Ibid., 27-8. Arts. 109 (2), 110 (2), 112 (2), 114 (2), 124 (2), 126, 129, 128 (2), 131, 136 (2), 137 (5) (7), 140, 143 (3), 146 (2), 147, 153 (2), 156 (3).
[414] Anschütz, "Verwaltungsgerichte," in *Nipperdey Kommentar*, 129-152.
[415] Thoma, "Die juristische Bedeutung der grundrechtlichen Sätze," 41.
[416] Although he could concieve even of constitutional review "under certain circmustances," Thoma "Die juristische Bedeutung der grundrechtlichen Sätze," 14.
[417] Cf. Stolleis, *Public Law in Germany*, 373-375
[418] His statements to this effect at Association debates will be discussed in the next chapter.
[419] His biographer, Rath, talks about *Systemkonformität* in this respect, *Positivismus und Demokratie*.
[420] Thoma, "Das System der subjektiven öffentlichen Rechte und Pflichten," in *Handbuch*, 606-623; 608.
[421] Ibid.
[422] Thoma, *Nipperdey Kommentar*, 45.
[423] Thoma, "Das System der subjektiven öffentlichen Rechte und Pflichten,", 609.
[424] Simple majorities of the legislative were balanced by various factors, such as popular initiatives and referenda, the powers of the president, the federal structure, fundamental rights, protections for minorities (via proportional representation, a qualified majority for constitutional amendment and committees of investigation in parliament), as well as by the practice of the courts and the administration, "The Reich as a Democracy" (translation of another piece of his from *Handbuch*, 186-200, published in *Weimar: A Jurisprudence of Crisis*, 166-169).
[425] Richard Thoma, "Der Begriff der modernen Demokratie in seinem Verhältnis zum Staatsbegriff," in ed. Melchior Palyi, *Hauptprobleme der Soziologie. Erinnerungsgabe für Max Weber*, Vol. 2 (München/Leipzig: Duncker & Humblot, 1923), 56.
[426] Both Thoma and Anschütz taught at the University of Heidelberg for most of the Weimar years: Anschütz was on the faculty there from 1916 until his retirement in 1933 and Thoma until 1928 when he went to the University of Bonn. They were both shaped by the academic milieu of Heidelberg and were at the same time hallmarks of it. While they both referred to Max Weber as a central figure of their immediate academic contexts, in Thoma's case this connection was more than just a matter of acquaintance. (Rath's biography is predicated on this allegedly fundamental connection. As to Anschütz cf. *Aus meinem Leben*, 79, 211).

Thoma is said to have been influenced by Weber's theory of science and his methodology (Rath, *Positivismus und Demokratie*, 57-71) although it is not clear how the central Weberian methodological instrument of the ideal type or his theory of action found its way into law at all, or into Thoma's constitutional scholarship specifically. Beside the significance of bureaucracy, the only obvious weberian teaching adopted by Thoma in the analysis of modern democracy is the duality of its legitimacy: democratic and legal.

More profound and apparent were the connections between the two on the front of politics. But in no way should a strong connection be necessarily understood to mean agreement between the two on some of the most basic matters. Thoma's very unweberian posture as a scholar is the central

evidence for that. For unlike Max Weber who tossed himself about between the callings of a politician and a scholar (cf. Marianne Weber, *Max Weber: Ein Lebensbild* (München: Piper, 1989); Wolfgang Mommsen, *Max Weber and German Politics, 1890-1920*, translated by Michael Steinberg (Chicago: University of Chicago Press, 1984), Thoma was ready to be active politically *as* a scholar, something Weber had mostly cautioned against. (Cf. his methodological studies on objectivity, and value neutrality ("Die <<Objektivität>> sozialwissenschaftlicher und sozialpolitischer Erkentniss" (1914) in *Gesammelte Aufsätze zur Wissenschaftslehre*, 3rd edition (Tübingen: Mohr, 1968), 146-214;
"Der Sinn der <<Wertfreiheit>> der soziologischen und ökonomischen Wissenschaften. (1917) in ibid., 489-540; and of course his speech, "Science as a Vocation" ("Wissenschaft als Beruf," held as a speech in 1917, and published in 1919 (Stuttgart: Reclam, 1995). For an earlier take on these issues cf. also his Rektoratsrede from 1905, "The Nation State and Economic Policy" in which he claimed that " the science of political economy was a POLITICAL science… a servant of politics… [i.e.] of the enduring power-political interest of the nation," in ed. Peter Lassman, Ronald Speirs, *Political Writings* (Cambridge: Cambridge University Press, 1994), 1-28; 16.)

Thoma was engaged outside the academia in many ways but always rid on his reputation as a scholar and never entered politics as a politician. In 1926 he characterized his commitments in this regard in the following way: "exactly as a scholar ... do I feel obliged to tackle contemporary political and social challenges in practice ... [in compliance with] the maxim of the scholar's duty to take part in active life" (Rath*, Positivismus und Demokratie*, 45-46).

[427] Anschütz's remark at the 1926 Association meeting, *VVDStRL*, vol. 3: 49.

[428] Thoma's remark, ibid., 58.

[429] This positivist position invited later commentators' accusations that positivism paved the path of National Socialist take over of power for it could not offer anything that would have guarded the Weimar Constitution. Cf. the famous Radbuch thesis or Dieter Grimm, „Verfassungserfüllung-Verfassungsbewahrung-Verfassungsauflösung. Positionen der Staatsrechtslehre in der Krise der Weimarer Republik," in ed. Heinrich A. Winkler, *Die deutsche Staatskrise, 1930-1933* (München: Oldenburg, 1993), 183-199.

[430] Anschütz, "Three guiding principles of the Weimar Constitution," *in Weimar: A Jurisprudence of Crisis*, 132-150. For the unitary conception of federalism implied in such a model of popular sovereignty cf. Anschütz's speech at the 1924 meeting the Association of German Professors of Constitutional Law in *VVDStRL*, vol. 1: 11-34.

[431] Thoma, "The Reich as democracy," 157-161.

[432] Ibid., 161.

[433] Anschütz, "Three guiding principles," 149.

[434] The political involvements of the two positivists are in line with the consequences of their political theories, implying a citizenry active in the political parties as well. Thoma was a founding member of the German Democratic Party (DDP), to which Anschütz also belonged, but beside signing a campaign letter, his activity was concentrated on appearing to speak at party meetings and writing newspaper articles on a few topics of local and regional interest such as the planned sewer on the Neckar river running through Heidelberg. On a national level, he engaged himself with the draft legislation to reform the schools of Weimar Germany and the plans to newly divide the territory of the Reich among the member states, in both cases voicing his views as a scholar for his party (Rath, *Positivismus und Demokratie*, 42).

Of the many politically active civil organizations he came to belong to or even co-founded, the first one in the Weimar Republic was the Association for the Politics of the Law, later simply called the Heidelberg Association, founded in February 1919 in Max Weber's house with the aim of protesting at home and abroad against the peace treaty, especially as regards its reference to the "German responsibility for the war" (ibid, 46, 47). Next in line was the Association of University Teachers Loyal to the Constitution, founded in 1926 in the city of Weimar and renamed as Weimar Club in 1931 so as not to create the impression that those who did not belong to it were the opponents of the constitution. (Cf. Herbert Döring, *Der Weimarer Kreis. Studien zum politischen Bewußtsein verfassungstreuer Hochschullehrer in der Weimarer Republik* (Meisenheim, 1975.) He was one of the leaders here as well and was active in organizing the four public meetings of the Association (1926, 1927, 1931, 1932) where the emphasis was put on "driving politics out of the universities," while at

the same time the main goal was to "win the German universities and other schools of higher learning over to the new state." The attitude of "politics-free national harmony" was detectable in this Association's activities which to a great extent evoked the ethos of pre-war German professors' staying above party politics. (Rath, *Positivismus und Demokratie*, 48-49).

Very much along these lines did Thoma co-found in 1928, soon after he had moved to Bonn, the so called Academic-Political Association which was aimed at the students of the university whose "patriotic duty [it was to acquire] the political interest and deep political knowledge ... indispensable in the democratic republic." Although directed at schooling the opinions of students, the "discussion evenings ... [with] presentations and debates" were supposed to be formed into a "discussion-association above parties." That the initiative did not receive too much response from the students, was of great concern for Thoma (ibid., 51).

In contrast to Thoma's active practical engagement as a constitutional scholar, Gerhard Anschütz stayed more within the confines of the academia, indicated well by his wholly passive membership of the DDP (Aus meinem Leben, 180) which, however, did not constitute his only political connection. He was founder in 1916 and active member until 1933 of an informal Political Club in Heidelberg, where mainly university professors of various disciplines met in private once a month and discussed political matters among themselves on the basis of presentations by the members or invited speakers. Meant exclusively to serve their own instruction, the discussions of the thirty-some professors were never brought to the public even if some, like Anschütz, published revised versions of the presentations they had delivered in the Club (ibid., 207).

[435] "Die juristische Bedeutung," 12.

[436] He did so when reviewing Schmitt's book from 1926*, Die geistesgeschichtliche Lage des heutingen Parlamentarismus*, in Triepel, "On the ideology of parliamentarism," published in the English translation of *Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (Cambridge, Massachusett: MIT Press), 77-83. "[B]ehind these ultimately rather sinister observations [on the collapse of parliamentarism] there stands the unexpressed personal conviction of the author that an alliance between a nationalistic dictator and the Catholic Church could be the real solution and achieve a definitive restoration of order, discipline and hierarchy," 82.

[437] Thoma, "Die juristische Bedeutung," 42.

[438] Ibid., 44-5.

[439] Schmitt's rights piece in the Handbook and the circumstances of his inclusion into the group of contributors will be discussed in Chapter Four.

[440] Hans Carl Nipperdey (1895-1968). Professor of civil and labor law at the university of Cologne (1925). Influential scholarship in the fields of civil, labor and economic law. Served on the Labor Court of the Bonn Republic as its first president (1954-1963). On Nipperdey see Joachim Rückert's entry in *Neue Deutsche Biographie*, vol. 19: 280-281. Also cf. Thorsten Hollstein, „Um der Freiheit willen – die Konzeption der Grundrechte bei Hans Carl Nipperdey" in eds. Thomas Henne, Arne Riedlinger, *Das Lüth-Urteil in (rechts-) historischer Sicht. Die Konflikte um Veit Harlan und die Grundrechtsjudikatur des Bundesverfassungsgerichts* (Berlin: 2004), 242ff.

[441] Nipperdey, *Nipperdey Kommentar*, V.

[442] According to Professor Rückert's personal communication, there are no documents in the archives of the publishing house that would clarify these issues.

[443] Along with names, the professions and current positions of contributors are also listed in the tables of contents of the three volumes.

[444] Richard Thoma, "Die juristische Bedeutung." Gerhard Anschütz, "Verwaltungsgerichte."

[445] An overview of entries suffices here since these contributions emerged outside the confines of constitutional scholarship, which stands in the focus of our investigations in this work. E.g. the editor's, Hans Carl Nipperdey's own entry on Art. 159, the right of combination or union relied primarily on Anschütz's commentary (*Nipperdey Kommentar*, vol. 2: 385-434; 385-386), while many other pieces explicitly drew on the comprehensive positivist method to interpret each and every right separately such as Walter Landé's entry on education and the schools (ibid., vol. 3: 1-98; 19) or Kitzinger's entry on the freedom of scholarship and the arts (Art. 142) which classified and interpreted this fundamental right primarily in terms of Thoma's scheme (ibid., vol. 2: 450-510; esp. 465ff).

All the more striking were the exceptions, such as Fritz Stier-Somlo's meticulous presentation

of scholarly debates on the equality clause ("Artikel 109. Die Gleihheit vor dem Gesetz" ibid., vol. 1: 158-218) and his siding with the "new theory:" he subscribed in his contribution on Art. 109 not only to the view that the equality clause was to cover "equal material conditions," but also acknowledged it as immediately applicable law and as such reviewable by the courts and binding on legislation (197, 200-1).

Another example, that of property, cut interestingly the other way and proved to be an exception not only to positivist interpretations but also to the "new theory" of the right to property: we recall that it had been a controversial topic in the early 1920s but a nearly complete consensus was soon achieved around the extended interpretation of property. The author of the entry on Art. 153 in the Nipperdey commentary, Dr. Walter Schelcher, a main advisor to the federal government ("Wirklicher Geheimer Rat"), agreed, however, with the view that property meant "only private property and was to be understood exclusively in terms of its meaning in the civil code" and explicitly distanced himself from all who attributed a more extensive meaning to the property clause (ibid., vol. 1: 196- 249; especially 204, also cf. 203ff.)

[446] Gerhard Anschütz, Richard Thoma, Vorwort, in *Handbuch*, VI.

[447] Nipperdey, Vorwort, in *Nipperdey Kommentar*, V.

[448] Ibid.

[449] Ibid.

[450] *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*, vols. 1-4., eds. Hans Carl Nipperdey, Karl August Bettermann, Ulrich Scheuner Berlin: Duncker & Humblot, 1954-1972.

[451] Nipperdey, Vorwort, in *Handbuch*, VI.

[452] Ibid., VI-VII.

[453] Walter Pauly, "Einführung. Die neue Sachlichkeit der Staatsrechtslehre in der Demokratie," in eds. Gerhard Anschütz und Richard Thoma, *Handbuch des deutschen Staatsrechts*, reprint (Tübingen: Mohr. 1998), 3-17; 7 where he quotes a letter written by Anschütz in eary December 1926 to the publisher Oskar Siebeck.

[454] Cf. especially the meetings of 1926 and 1927 to be discussed in the next chapter.

[455] Thoma, "Einleitung: Gegenstand. Methode. Literature," 1-13 in *Handbuch*, vol. 1.

[456] Ibid., 4-5;

[457] Ibid., 5-6; 4.

[458] Ibid., 6.

[459] The phrase refers to the artistic movement of the 1920s and 1930s, characterized by a commitment to conveying "reality" to the fullest possible extent. The Handbook was associated with neue Sachlichkeit already in a contemporary review and the connection continued to be pointed out in later studies on Weimar constitutional theory (Pauly, "Einführung," 4, N8).

[460] Pauly goes to great lengths to demonstrate that this was *not* the result of exclusionist strategies on the part of the editors. The editors followed an explicitly integrationist approach on our reading as well – whose chief result was Carl Schmitt's contribution on rights which will be discussed in the next chapter.

When, however, we put the Handbook in the context of one of the defining set of constitutional debates of Weimar Germany, that of rights discussions, we can also point out some of the reasons why a particular set of scholars was decisively not willing to be integrated into such a new positivist project. This will be one of the tasks of our discussion of Association meetings in the next chapter. Pauly, for his part, had to confine himself to regretting the gaps in the archival documentation of the Handbook and could „only speculate as to the reasons ... why these people stayed away" (ibid., 8).

[461] It would exceed the possibilities of this work to account for the nevertheless existing "dissents" present in the Handbook, as pointed out by Walter Pauly in his introduction.

[462] Cf. Appendix 1. The last meeting in 1931 concentrated on the possibilities of reform mainly, and the discussion on the rights of civil servants revealed no novel rights theories.

[463] Kurt Häntzschel, "Das Recht der freien Meinungsäußerung," in *Handbuch*, vol. 2: 651-675; 672-3.

[464] Hans Kelsen (1881-1973). Professor of constitutional, administrative and international law at the universities of Vienna (1919), Cologne (1929), Geneva (1933), Prague (1936), after emigration to the US first Harvard, and finally Berkeley (1945). Influential scholarship in legal philosophy,

constitutional and international law. Judge on the Austrian Constitutional Court 1921-1930. Cf. in English Clemens Jabloner, "Hans Kelsen" in *Weimar: A Jurisprudence of Crisis*, 67-76; R. Thienel's entry in *Juristen*, 344-346; his biography by Rudolf Métall, *Hans Kelsen: Leben und Werk* (Wien: Deuticke, 1969). Also cf. Horst Dreier, "Hans Kelsen (1881-1973): Jurist der Jahrhunderts?" in eds. Helmut Heinrichs et al., *Deutsche Juristen jüdischer Herkunft* (München: Beck, 1993), 705-732, as well as his *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (Baden-Baden: Nomos, 1986).

[465] Cf. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 166, 169-170.

[466] Cf. Hans Kelsen, *Allgemeine Staatslehre* (1925) (reprint Bad Homburg: Gehlen, 1966). *Reine Rechtslehre. Einleitung in die Rechtswissenschaftliche Problematik* (1934) (reprint Aalen: Scientia, 1994). In English*: Introduction to the Problems of Legal Theory* (Oxford: Clarendon, 1992*). Der soziologische und juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses vom Staat und Recht* (1922) (reprint Aalen: Scientia, 1981).

[467] "If [scholarship] arrogates to itself … a creative and normative influence on the object given to its cognition, then what is merely an expression of a subjective interest presents itself as cloaked in the authority of scholarship, that is, equipped with the value of objective knowledge," in Kelsen, "Legal Formalism and the Pure Theory of the Law" in *Weimar: A Jurisprudence of Crisis*, 76-83; 78.

[468] Kelsen of course denied that his legal methodology would imply any commitment politically or otherwise: "when I advocated democracy or pacifism, I never passed this judgement off as the result of objective scholarly knowledge, but declared it openly and honestly to be the consequence of a fundamental subjective value judgement far beyond any scholarly pretension. Doing scholarship does not force us to abandon all political judgement; it merely obligates us to separate one from the other, cognition from volition," ibid., 80. (It should be noted here that even the choice of words, let alone the position resembles so much Max Weber's programmatic separation of science and value judgements or politics, that one wonders as to Kelsen's debts to him. Cf. Weber's methodological writings mentioned above and his speech Science as a Vocation, esp. 35-44 on the rejection of professorial prophecy.)

[469] Kelsen, "The Essence and Value of Democracy," in *Weimar: A Jurisprudence of Crisis*, 84-109; 107.

[470] Ibid., 88-89. Also in accordance with Thoma's analysis, Kelsen presented as a fundamental process of democratic politics that the people split first into a passive and active camp, forming within the latter competing groups: the political parties. Ibid., 91-92. In spite his positive evaluation of the parties, he never belonged to one (Métall, *Hans Kelsen*, 112). His role as a constitutional court judge, however, did count on his own reading as a position of "norm giving," certainly outside science and thus „political" in a broad sense (cf. "Legal formalism," 82-83) as did his prior activities as "father of the Austrian constitution" of 1920 (Métall, *Hans Kelsen*, 34-36).

[471] Kelsen, *Allgemeine Staatslehre*, 154.

[472] Ibid., 155.

[473] Kelsen, "On the essence and value of democracy" 100-101.

[474] Kelsen, "Die Entwicklung des Staatsrechts im Oesterreich seit dem Jahre 1918" in *Handbuch*, vol. 1: 147-165.

[475] Both of these invitations were advanced in the spirit of "Pan-Germanism" that dominated the membership rules of the Association as well.

[476] Kelsen gave the second address after Heinrich Triepel -- in spite of the fundamental differences in their approaches, both scholars defined Staatsgerichtsbarkeit, or the practice of the state court, as constitutional adjudication. Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit," *VVDStRL*, vol. 5: 30-88.

[477] Kelsen, *Handbuch*, vol. 1: 154-5; *VVDStRL*, vol. 5: 37.

[478] Kelsen, *Handbuch*, vol. 1: 162.

[479] Kelsen, *VVDStRL*, vol. 5: 68.

[480] Ibid., 69-70.

[481] Kelsen, *VVDStRL*, vol. 3: 53-55. His polemic will be discussed in the next chapter.

[482] In Kelsen, "Foundations of Democracy" quoted by Horst Dreier*, Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen*, 263-265.

[483] Such as Richard Thoma's remark at the very fist meeting in 1922 when he referred to fundamental rights as the result of compromises and took the opportunity to indicate his fundamental position on individual rights as well: "a constitutional conflict … between the state and an individual ... is inconceivable... Not every conflict caused by disagreement on the meaning of a constitutional provision is a constitutional conflict." ("Das richterliche Prüfungsrecht," *AöR*, 1922: 274.)

At the second meeting in 1924, fundamental rights were brought up in the discussion after the speeches on federalism and were portrayed as one of the central elements of a unitary federal constitutional structure, as opposed to its particularistic, i.e. member states reinforcing elements. One gathers from Triepel's overall purposes at the time that he himself might have called attention to this unitary attribute of rights, seeking to attract Anschütz's sympathies to them who had declared himself in his main speech on federalism an ardent advocate of a unitary state. ("Der deutsche Föderalismus in Vergangenheit, Gegenwart und Zukunft," in *Veröffentlichungen der Vereinugung der Deutschen Staatsrechtslehrer* (*VVDStRL*) 1: 11-34.) The ensuing discussion was reported only in a short summary form ("Verhandlungsbericht zum Thema <<Föderalismus>>," ibid.: 60-62) in this first piece of a series of seven booklets that published the Association's proceedings.

The other discussion topic at the 1924 meeting concerned the emergency powers of the president whose competency to suspend some fundamental rights created the first occasion for the Association to talk about rights, even if under a confined perspective. The discussion summary, however, did not register comments either on the main speaker's, Carl Schmitt's interpretation of fundamental rights in this context or on his observation that "it was, politically speaking, a dangerous act of abuse, to write into the constitution all possible heart affairs such as fundamental rights or quasi fundamental rights ... for organization is the central momentum of all constitutions." ("Die Diktatur des Reichspräsidenten nach Art. 48 der Reichsverfassung," in *VVDStRL* 1: 63-104, 91.) As to the president's power to suspend some rights, Schmitt noted that thereby "legal bounds ... were lifted which ... expanded ... the administration's field of activity." (Ibid., 76.) In the same vein, fundamental rights were brought into connection with the field of administration and administrative courts at the next meeting in 1925 by Gerhard Lassar as well. ("Der Schutz des öffentlichen Rechts durch ordentliche und durch Verwaltungsgerichte: Fortschritte, Rückschritte und Entwicklungstendenzen seit der Revolution," in *VVDStRL* 2: 81-105.) We recall that the positions of considering rights as not constitutional law proper and granting them the status of limits to administrative actions at the most were to become trademark positivist interpretative moves which were not countered forcefully by colleagues at these first three Association meetings. The meeting in 1926, however, was to bring the initial threads of debate on fundamental rights conducted in journals and books thus far into the open and establish the topic of rights as a central element of constitutional debate via the Association by extending it to hitherto unexplored dimensions.

[484] Erich Kaufmann (1880-1972). Professor of public law at the universities Kiel (1912), Königsberg (1913), Berlin (1917-1920, 1927-1934), Bonn (1920-1927, 1950-1958), and München (1946-1950). Published in the fields of legal philosophy, public and international law. From Neokantian beginnings, Kaufmann developed into a critic of formalistic positivism. Beside being a scholar, he was also actively involved as government advisor and legal representative in the Weimar Republic as well as in the Federal Republic of Germany. He emigrated to the Netherlands in 1939 and returned to Germany in 1946. Cf. in English Stephen Cloyd, "Erich Kaufmann" in *Weimar: A Jurisprudence of Crisis*, eds. A. J. Jacobson, Bernhard Schlink (Berkeley: University of California Press, 2000), 189-196. Also cf. Manfred Friedrich, "Jurist in der Zeit jenseits der Zeiten," in *Deutsche Juristen jüdischer Herkunft,* eds. Helmut Heinrichs et al., (München: Beck, 1993), 693-704. Peter Lerche, "Erich Kaufmann – Gelehrter und Patriot," in *Große jüdische Gelehrte an der Münchener Juristischen Fakultät,* eds. Peter Landau, Hermann Nehlsen, (Ebelsbach: Aktiv, 2001), 20-31. Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günter Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987), 99-122, 160-197, 261-286. Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklung in der Weimarer Republik und ihr Verhältniss zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus* (München: Beck, 1994), 344-354.

[485] Kaufmann, *VVDStRL* 3: 3, 6.

[486] Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Beghahn Books), 8-9, 316.
[487] Erich Kaufmann, *Kritik der Neukantischen Rechtsphilosophie: Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft* (Tübingen: Mohr, 1921, reprint Aalen: Scientia, 1964).
[488] Kaufmann, *Kritik der Neukantischen Rechtsphilosophie*, 92, 93, 101, 93.
[489]Kaufmann, *VVDStRL* 3: 3.
[490] Ibid., 15.
[491] Ibid., 4, 13-16. Also cf. Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklung in der Weimarer Republik und ihr Verhältniss zur Ideologisierung der Rechtswissenschaft unter dem Nationalsozialismus* (München: Beck, 1994), 349-350.
[492] Kaufmann, *VVDStRL* 3: 16.
[493] Ibid., 17.
[494] Ibid., 19-21.
[495] Ibid., 19-22.
[496] Stephen Cloyd, "Erich Kaufmann," 193.
[497] Ibid., 194.
[498] In contrast cf. Anschütz's position discussed above.
[499] Erich Kaufmann, "On the Problem of the People's Will," in *Weimar: A Jurisprudence of Crisis*, eds. A. J. Jacobson, Bernhard Schlink (Berkeley: University of California Press, 2000), 196-206; 206.
[500] Ibid., 205.
[501] Ibid.
[502] Ibid., 206.
[503] Ibid., 199.
[504] Ibid., 202-203.
[505] Ibid., 200.
[506] Quoted by Rudolf Smend, "Verfassung und Verfassungsrecht," (1928) in *Staatsrechtliche Abhandlungen*, 2nd enlarged edition (Berlin: Duncker & Humblot, 1968), 187 from Kaufmann, "Die Rerierungsbildung in Preußen und im Reiche," *Die Westmark*, 1 (1921): 207. Emphasis mine.
[507] Even if with critical overtones, confirmed by Oliver Lepsius, "Staatstheorie und Demokratiebegriff in der Weimarer Republik," in *Demokratisches Denken in der Weimarer Republik*, ed. Christoph Gusy (Baden-Baden: Nomos, 2000), 382-386.
[508] Cf. for a similar evaluation Helge Wendenburg, *Die Debatte um die Verfassungsgerichtsbarkeit und der Methodenstreit der Staatsrechtslehre in der Weimarer Republik* (Göttingen: Schwartz, 1984), 62-68, 68-72, 75-83, 139-151.
[509] Hans Nawiasky (1880-1961). Professor of public, administrative and labor law at the universities of Vienna (1914), München (1919, 1949), an in the emigration in Switzerland at St. Gallen (1933). On Nawiasky cf. the entry by H.F. Zacher, *Neue Deutsche Biographie*; also by him "Hans Nawiasky," in ed. Helmut Heinrichs et al., *Deutsche Juristen jüdischer Herkunft* (München: Beck, 1993), 677ff.
[510] Nawiasky, *VVDStRL* 3: 25.
[511] Ibid., 26, 35-6.
[512] Ibid., 48.
[513] Ibid., 40-41.
[514] Ibid., 40-2. To prove the class based empirical validity of such an objection was the aim of the authors in the journal "Die Justiz" whose activity is documented and analysed in Theo Rasehorn, *Justizkritik in der Weimarer Republik: Das Beispiel der Zeitschrift „Die Justiz"* (Franfurt am Main: Campus, 1985), 157-169, 171-221.
[515] Nawiasky, *VVDStRL* 3: 50.
[516] Ibid., 47-50, 58.
[517] Ibid., 49.
[518] Ibid., 47.
[519] Ibid., 58.
[520] Ibid., 53.
[521] Ibid., 54-5.
[522] Ibid., 62.

[523] Karl Rothenbücher (1880-1932). Professor of public law at the University of München (1910). Used positivist methods, and was active in the DDP (German Democratic Party) which he left in 1930 in protest against "abusive application of Art. 48." His resignation letter of July 21, 1930 is in his files, cf. below. On Rothenbücher cf. Stolleis's footnote on him, *Geschichte des öffentlichen Rechts*, 288, N270.

[524] The Rothenbücher Nachlaß has recently been acquired by the Max Planck Institute of European Legal History, Frankfurt am Main, Germany (cf. http://www.mpier.uni-frankfurt.de/Bibliothek/profil.htm, "Juristenbibliotheke und Nachlässe"), where some ten boxes of (unsorted) documents offer a wealth of information on this intriguing figure. The syllabus for the course, offered "privatissime und gratis" and taken by 19 students (Rothenbücher NL 1:50) and what I believe to be lecture notes (Rothenbücher NL 1:205), among other materials, raise most of the issues that he included into his comprehensive Association address in 1927.

[525] Rothenbücher, *VVDStRL* 4: 18, 28, 26, 37-42.

[526] Rudolf Smend (1882-1975). Professor of public law at the universities of Greifswald (1909), Tübingen (1911), Bonn (1915), Berlin (1922) and (forced to change to) Göttingen (1935). Influential scholarship in constitutional history, public law, the law of church and state, and Protestant church law. His methods always involved historical, sociological and normative elements. Throughout his life, Smend was an active lay leader of the Protestant Church of Germany. On Smend cf. in English Stefan Koiroth, "Rudolf Smend," *Weimar: A Jurisprudenc of Crisis*, 207-213; and Peter Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law*, (Durham: Duke University Press, 1997), 120-126, 133-136. Michael Stolleis's entry "Rudolf Smend," in *Juristen: Ein biograpphisches Lexikon* (München: Beck, 1995), 569-571. Also cf. Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günter Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987), 141-157, 214-259, 299-318.

[527] Rudolf Smend, "Verfassung und Verfassungsrecht," 119-276.

[528] Ibid., 119, 126-127; 136. The idealism implied both in his method and in his philosophy was rooted in the phenomenological tradition but in effect marked a whole new school of legal thought whose various representatives came to be seen as united in the striving to put law in the larger context of intellectual history and at the same in relation to the concrete political and social situation and values of German society. Along with Smend and Kaufmann as central figures, Hermann Heller, Günther Holstein, Albert Hensel and Gustav Giere have been ranked among the followers of this "idealistic school" (geisteswissenschaftliche Richtung). Cf. Klaus Rennert, *Die "geisteswissenschaftliche Richtung" in der Staatsrechtslehre der Weimarer Republik: Untersuchungen zu Erich Kaufmann, Günter Holstein und Rudolf Smend* (Berlin: Duncker & Humblot, 1987), esp. 316-8.

[529] Smend, "Verfassung und Verfassungsrecht," 142-148; 148-160; 198-205, 205-215, 242-252, 253-269.

[530] Ibid., 160-170, 215-218, 260-268.

[531] Ibid.

[532] Ibid., 264-266.

[533] Ibid., 233- 242, 265-266.

[534] Smend, *VVDStRL* 4, 46-7, 50, 62, 59, 64, 73.

[535] Ibid., 73-53.

[536] Smend, "Bürger und Bourgeois im deutschen Staatsrecht," (1933) in *Staatsrechtliche Abhandlungen*, 309-325, esp. 318-9 where Smend states: „the starting point … of the meaning of fundamental rights in the Reich constitution is that they equip various groups [workers, propetied class, civil servants] of society with freedoms and guarantees which are prerequisites of real, not only formal citizen freedom for these groups."

[537] In contemporary constitutional theory, we have seen similar attempts by Stephen Holmes, *Passions and Constraint: on the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995).

[538] Cf. Introduction, and Korioth, "Rudolf Smend," in *Weimar*, 212.

[539] Smend, "Verfassung und Verfassungsrecht," 136. The National Socialist regime could make no use of Smend's theory of intergation largely due to the fact that he did not utilize the concept of duty, present in the constitutional text and exploited by the Nazis to a great extent. Cf. Michael Stolleis, *Geschichte des öffentlichen Rechts Deutschland*, vol. 3. (München: Beck, 1999), 360-364.

[540] *VVDStRL* 4, 75, 86.
[541] Ibid., 4, 77-8, 81-2.
[542] Ibid., 89.
[543] Gerhard Anschütz, Richard Thoma, "Vorwort," in *Handbuch des deutschen Staatsrechts*, vol. 1. (1930), eds. Gerhard Anschütz, Richard Thoma, reprint (Tübingen: Mohr, 1998), VI-VIII.
[544] Walter Pauly, „Einführung: Die neue Sachlichkeit der Staatsrechtsleher in der Demokratie," in *Handbuch des deutschen Staatsrechts*, 7-8.
[545] Ibid., 7 and N30.
[546] Hermann Heller. (1891-1933). Taught public law at the universities of Leipzig (1921), Berlin (1928), was professor in Frankfurt am Main (1932), after emigration accepted a chair in Madrid (1933) and was supposed to go to the University of Chicago at the time of his death. Published widely, partly posthumously, in the fields of political and legal philosophy, political science, constitutional and international law. His methods were "reality" centered, with sociological, political and cultural perspectives included into his legal analysis. Heller was active in the Social Democratic party working at youth centers and vocational schools throughout the Weimar years and acting as legal representative for the party. On Heller cf. in English David Dyzenhaus, "Hermann Heller," in *Weimar*, 249-265. Also by him, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Clarendon Press, 1997), 161-217. N. Urban, "Hermann Heller," in *Juristen*, 281-282. Wolfgang Schluchter, "Hermann Heller: Ein wissenschaftliches und politisches Portrait," in *Staatslehre in der Weimarer Republik: Hermann Heller zu ehren*, eds. Christoph Müller, Ilse Staff (Frankfurt am Main: Suhrkamp), 24-42.
[547] Heller, "Der Begriff des Gesetzes in der Reichsverfassung," in *VVDStRL* 4: 98-135.
[548] Heller, "Die Krisis der Staatslehre," (1926) in *Gesammelte Schriften*. 2nd edition, ed. Christoph Müller (Tübingen: Mohr, 1992), 3-30. Especially targeted, as always by Heller, was Hans Kelsen and his pure theory of the law.
[549] Heller, "Die Krisis der Staatsrechtslehre," 15.
[550] Ibid.
[551] Cf. David Dyzenhaus, "The Gorgon Head of Power: Heller and Kelsen on the Rule of Law" in *From Liberal Democracy to Fascism,* eds. Peter Caldwell, William Scheuerman (Boston: Humanities, 2000), 20-46.
[552] Heller, *VVDStRL* 4: 120, 118-123.
[553] Heller, "The Essence and Structure of the State," *Weimar*, 266.
[554] Heller, "Grundrechte und Grundpflichten" (1924) in *Gesammelte Schriften*, 281-317.
[555] Heller, *VVDStRL* 4: 131-3.
[556] Heller, "Grundrechte," 287.
[557] Ibid., p. 291.
[558] Ibid., p. 286-7.
[559] Heller listed arts. 119, 120, 122, 132-34, 151-55, 157, 158, 162-64 as moral principles at *VVDStRL* 4: 120.
[560] Heller, "Grundrechte," 186-7.
[561] For the unity of deision cf. also Heller, "Die Souveränität," (1927) in *Gesammelte Schriften*, 31-202; 104, 125-126
[562] Heller, "Political Democracy and Social Homogeniety," *Weimar*, 256- 265; 260, 257.
[563] Phrase borrowed from Ellen Kennedy, "The Politics of Toleration in Late Weimar: Hermann Heller's analysis of Fascism and Political Culture" in *History of Political Thought* 5 1 (1984): 109-127, 126.
[564] Ibid., 260, 262.
[565] On the celebrations of the Weimar Constitution's birthday see *Der Verfassungstag*, ed. Ralf Poscher (Baden-Baden: Nomos, 1999). Beside providing a history of the national holiday, Poscher also publishes in full several of the speeches held at celebrations in the years 1923, 1926, 1928, 1929, 1930, 1931, and 1932, along with biographies of the speakers and a short description of the respective year's major political events.

[566] Heller, “Freiheit und Form in der Reichsverfassung,” in Verfassungstag, 173-176; 173, 174. The speech was held on July 14, 1930 at the celebration of the German Student Association in Berlin (ibid., 173).
[567] Ibid., 175.
[568] Ibid.
[569] Ibid., 176.
[570] Ibid.
[571] Albert Hensel (1895-1933). Hensel was a professor or law at the universities of Bonn and Königsberg. On Hensel cf. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 222.
[572] Gustav Giere was a student of Hensel at Königsberg University in late Weimar.
[573] Albert Hensel, "Grundrechte und Rechtsprechung," in *Die Reichsgerichtspraxis im deutschen Rechtsleben. Festgabe der juristischen Fakutäten zum 50jährigen Bestehen des Reichsgerichts*, Vol. 1., ed. Otto Schreiber (Berlin: Walter de Gruyter, 1929), 1-32. Albert Hensel, *Grundrechte und politische Weltanschauung* (Tübingen: Mohr, 1931). Gustav Giere, *Das Problem des Wertsystems der Weimarer Grundrechte* (Breslau-Neukirch: Alfred Kutze, 1932).
[574] Hensel, "Grundrechte und Rechtsprechung," 3, 8.
[575] Ibid., 15-6.
[576] Hensel, *Grundrechte und politische Weltanschauung*, 17, 21, 23-4, 26, 28, 33; Giere, *Das Problem des Wertsystems der Weimarer Grundrechte*, 37, 38-81; 81-86 where Giere includes as a separate category "specific German" rights provisions such as the constitutional regulations of the civil service, or those on the protection of national memorials (*Denkmalschutz*, Art. 150), or the rights of the middle classes (Art. 164); 96, 98.
[577] Hensel, *Grundrechte und politische Weltanschauung*, 34; Giere, *Das Problem des Wertsystems der Weimarer Grundrechte*, 89, 95-7.
[578] Hensel, *Grundrechte und politische Weltanschauung*, 8, 9.
[579] Giere, *Das Problem des Wertsystems der Weimarer Grundrechte,* 92.
[580] Ibid., 98.
[581] Otto Kirchheimer (1905-1965). Student of Carl Schmitt (Ph.D. in Bonn, further studies in Berlin). Active member of the Social Democratic Party. Member of the Frankfurt School, working at the Institute for Social Research in Paris and New York, 1934-1942. Professor at Columbia University. On Kirchheimer cf. Keith Tribe, „Franz Neumann in der Emigration: 1933-1942” in *Die Frankfurter Schule und die Folgen*, eds. Axel Honneth, Albrecht Wellmer (Berlin: Walter de Gruyter, 1986), 259-284. William Scheuermann, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: Cambridge University Press, 1994).

On his relationship with Carl Schmitt see Ellen Kennedy, “Carl Schmitt and the Frankfurt School” in *Telos* 71 (Spring 1987): 37-66, 38; “Carl Schmitt and the Frankfurt School: A rejoinder” in *Telos* 73 (Fall 1987): 101-116.
[582] Kirchheimer, "Weimar -- und dann was?," (1930) in *Politik und Verfassung* (Frankfurt am Main: Suhrkamp, 1964), 9-56.
[583] Ibid., 33, 39.
[584] Ibid., 54.
[585] Ibid., 32.
[586] Ibid., 33.
[587] Ibid., 35.
[588] Kirchheimer, "Die Grenzen der Enteignung. Ein Beitrag zur Entwicklungsgeschichte des Enteignungsinstituts und zur Auslegung des Art. 153 der Weimarer Verfassung," (1930) in *Funktionen des Staats und der Verfassung. 10 Analysen* (Frankfurt am Main: Suhrkamp, 1972), 223-295.
[589] Ibid., 265.
[590] Ibid., 256, 225.
[591] Kirchheimer, "Weimar," 20-21.
[592] Ellen Kennedy, “Carl Schmitt and the Frankfurt School” in *Telos* (Spring 1987) 71: 37-66; 53 quoting Kirchheimer, “Constitutional reaction, 1932,” in Otto Kirchheimer, *Politics, Law and Social Change: Selected Essays of Otto Kirchheimer* (New York: Columbia University Press, 1969), 75-87; 80. Also cf. Kirchheimer’s “Remarks on Carl Schmitt’s Legalität und Legitimität,” co-authored by

Nathan Leites in *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann*, ed. Keith Tribe (London: Allen, 1987), 149-178, 171 where he makes a similar statement: "[democracy] constitutes the only political system which embodies an institutional guarantee of a change of power, no matter how drastic, with an entire continuity of the legal order."

[593] Franz L. Neumann (1900-1954). Worked in the legal field both in the academia (universities of Frankfurt am Main, Berlin) and in the practice as a member of Social Democratic Party. After emigration in 1933, turned to academia (London School of Economics and Politics, Institute of Social Research in New York), and held a position at Columbia University (1946). Member of the Frankfurt School (1936-1942). On Neumann cf. Alfons Söllner, „Franz Neumann: Skizzen zu einer intellektuellen und politischen Biographie" in Franz Neumann, *Wirtschaft, Staat und Demokratie: Aufsätze 1930-1954*, ed. Alfons Söllner (Frankfurt am Main: Suhrkamp, 1978). Martin Jay, „Foreword: Neumann and the Frankfurt School," in Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Democracy* (Leamington Spa: Berg, 1986), ix-xiv. William Scheuermann, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: Cambridge University Press, 1994).

On his relationship with Carl Schmitt see Ellen Kennedy, "Carl Schmitt and the Frankfurt School" in Telos (Spring 1987) 71: 37-66, 38, ; "Carl Schmitt and the Frankfurt School: A rejoinder" in *Telos* 73 (Fall 1987): 101-116.

[594] Franz Neumann, "The Social Significance of the Basic Laws [sic!] in the Weimar Constitution," in *Social Democracy and the Rule of Law: Otto Kirchheimer and Franz Neumann*, ed. Keith Tribe (London: Allen, 1987), 27-43; 43. (The translation of the title is odd: it makes "Rechte" into "laws" instead of "rights." Cf. the German original reprinted in „Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung," in Franz Neumann, *Wirtschaft, Staat und Demokratie* (Frankfurt am Main: Suhrkamp, 1978), 57-75.)

[595] Ibid., 28.

[596] Ibid., 33. In this connection he specifically rejected what he took to be Carl Schmitt's stance on constitutional interpretation: "the extraordinarily stimulating theory of Carl Schmitt is in error when he claims that the specific resolutions that the German people have embodied in their constitution (and, in particular, the political resolutions anchored in the basic [rights]) cannot be altered, since this would result in the constitution abolishing itself. … The theories of Carl Schmitt compel revolution if a development of the Constitution is desired," ibid., 30.

[597] Ibid., 42-43. Also cf. Neumann, "On the preconditions and legal concept of an economic constitution," in ibid., 44-65; 57 and Neumann, "The Rule of Law under the Weimar Constitution," in *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986), 266-285, where Neumann retrospectively states that "the fundamental rights of the Weimar Constitution and … judicial review became … the means of maintaining the existing state of political, cultural and economic life," ibid. 276-277.

[598] Neumann, "The Social Significance," 37, 40.

[599] Ibid., 42-43.

[600] Ernst Rudolf Huber (1903-1990). Like Kirchheimer and Neumann, he was a student of Carl Schmitt. As a young scholar in late Weimar, Huber was *Privatdozent* (approximately: lecturer) at Bonn University. Later professor of public law at the universities of Kiel (1933), Leipzig (1937), Straßburg (1941-1944), Göttingen (1962). Published in the field of constitutional law during the National Socialist regime, adapting to Nazi ideology. Huber is most well-known for his postwar monumental German constitutional history of whose altogether 8 volumes we had already cited a few. Cf. esp. Chapters One and Two above. On Huber see Ralf Walkenhaus, *Konservatives Staatsdenken: eine wissenssoziologische Studie zu Ernst Rudolf Huber* (Berlin: Akademie, 1997), and "Ernst Rudolf Huber," entry in Gerhard Köbler, *Lexikon der europäischen Rechtsgeschichte* (München: Beck, 1997), 241-242.

[601] Ernst Rudolf Huber, "Bedeutungswandel der Grundrechte," in *AöR* N.F. 23 (1933): 1-99, 3.

[602] Ibid., 3, 4, 6.

[603] Ibid., 2.

[604] Ibid, 81.

[605] Ibid., 7, 9.

[606] Ibid., 15-79.
[607] Ibid., 80; 17-8.
[608] Ibid., 33.
[609] Ibid., 72; 53-79.
[610] Ibid., 90, 93.
[611] Ibid., 86-7; 89.
[612] Ibid., 94-5.
[613] In this vein, Huber offered a theory of duties to replace rights altogether in his *Verfassungsrecht des Großdeutschen Reiches*, 2nd enlarged edition (Hamburg: Hanseatische Verlagsanst, 1939). Also cf. in English a short excerpt from the first edition of this work from 1937, "Constitution" in *Weimar*, 328-330; 329-330: "rights of freedom, guarantees of [civil law] institutions … and of [public law] institutions … disappear from the people's constitution. The deeper reason for this is that in a people's constitution the principle of "guarantees" had been overcome in general. The essence of the liberal constitution was found in <<guarantees>>: it was a system of securities and guarantees against the power of the state. The people's constitution does not have this guaranteeing function; on the contrary, it aims to increase the effectiveness and striking power of political authority. It does not protect individuals and groups against the whole, but serves the unity and wholeness of the people against individuals and group subversions."
[614] Carl Hermann Ule. As a young scholar in late Weimar, Ule was faculty assistant at Greifswald University.
[615] Ule, "Sachregister," in *Handbuch des Deutschen Staatsrechts*, vol 2., 743-790.
[616] Ule, "Über die Auslegung der Grundrechte," in *AöR* N.F. 21 (1932): 37-123.
[617] Ibid., 120.
[618] Ibid., 72, 93, 123.
[619] Ibid., 118; grouped in six schools and analyzed at 93-117.
[620] Ibid. 120-1.
[621] Ibid., 120.
[622] Ibid., 73.
[623] Carl Schmitt (1888-1985). Professor of public law at the universities of Greifswald (1921), Bonn (1922), Berlin (1928, 1933), Cologne (1933). Influential scholarship in political and legal theory, constitutional and international law. Member of the National Socialist Party (1933) and collaborator in the Nazi regime (1933-1936). Schmitt spent the postwar years withdrawn into privacy in his hometown Plettenberg. From the vast literature on Schmitt cf. the biographies by Joseph Bendersky, *Carl Schmitt: Theorist for the Reich* (Princeton: Princeton University Press, 1983). Paul Noak, *Carl Schmitt: Eine Biographie* (Frankfurt am Main: Propyläen, 1993). Volker Neumann, "Carl Schmitt" in *Weimar: A Jurisprudence of Crisis* (Berkeley: University of California Press, 2000), 280-290. Michael Stolleis, "Carl Schmitt," in *Juristen*, 547-548.

On Schmitt's scholarship cf. most recently Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Durham: Duke University Press, 2004). Also cf. *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998). Hasso Hofmann, *Legitimität gegen Legalität: Der Weg den politischen Philosophie Carl Schmitts* (Berlin: Duncker & Humblot, 1992). Helmult Quartisch, *Positionen und Begriffe Carl Schmitts* (Berlin: Duncker & Humblot, 1989). George Schwab, *The Challenge of the Exception: An Introcution to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker & Humblot, 1970).
[624] Carl Schmitt, "Legalität und Legitimität," (1932) in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 261-350. In English: *Legality and Legitimacy*. Translated and edited by Jeffrey Seitzer (Durham: Duke University Press, 2004).
[625] Carl Schmitt, *Verfassungslehre*, (1928), 7th edition, (Berlin: Duncker & Humblot, 1989). Also cf. the ong awaited English translation: *Constitutional Theory*, translated and edited by Jeffrey Seitzer, foreword by Ellen Kennedy (Durham: Duke University Press, 2008).
[626] Beyond a common search for novel frameworks were, of course, fundamental differences in approaches, some of which Schmitt was sure to point out in the introduction where he explicitely distanced himself from Smend's theory of integration (ibid., XI-XII).
[627] Schmitt, *Verfassungslehre*, IX.

[628] In the introduction to *Verfassungslehre*, Schmitt referred to the work of the Association of German Professors of Constitutional Law as occupying the same terrain of constitutional theorizing that he sought to carve out in his 1928 treaties. Also mentioned by Schmitt as contemporary partners in the practice of constitutional theory were the courts of Weimar Germany whose activity, in spite of his principled misgivings against judicial activism which we discuss below along with his polemics, he evaluated in the following way: "if the practice of constitutional review of statutes further develop[ed] ... [they would] be active in considering the constitutional theoretical aspect of all legal questions." Ibid., X.
[629] Ibid., 44-60.
[630] Schmitt specifically contrasted his approach to the genre of commentaries and monographies which he understood to focus on particular constitutional provisions only and not offering thus a "system"of constitutional thought.
[631] Ibid., 38.
[632] Ibid., XI. and 125-220.
[633] Other prominent examples being the various French constitutions but not the early American ones, ibid., XI.
[634] Ibid., 41, 125, 163.
[635] Notably in his article from 1931: Schmitt, "Freiheitsrechte und institutionelle Garantien" in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 140-173 in which he developed the distinction between institutional guarantees and legal institutions.
[636] Schmitt, "Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung," (1932) in *Handbuch des Deutschen Staatsrechts*, vol. 2, 572-606, reprinted in *Verfassungsrechtliche Aufsätze* as „Grundrechte und Grundpflichten," 181-231. (References below are to the latter.)
[637] Cf. Schmitt, *Verfassungslehre*, 221-359. Two other versions of the present juxtapostion have to be mentioned here: one of them prefigured, the other ran parallel to the opposition of legal and political fields that organized Constitutional Theory. In *The Crisis of Parliamentary Democracy* (1923), translated by Ellen Kennedy (Cambridge: MIT, 1985), Schmitt argued that liberalism and democracy contradicted each other and that the practice of parliamentarism (a prime factor of liberal politics) stood in conflict with its own principles. In *The Concept of the Political* (1932), translated by George Schwab (Chicago: University of Chicago Press, 1996) the first version of which he wrote parallel to Constitutional Theory in 1928, Schmitt reiterated that liberalism systematically denied the political (cf. especially Section 8), causing its politics to be exhausted in a polemic critique of policies but not allowing it to "produce[] on its own a positive theory of state, government, and politics," ibid., 70.
[638] Schmitt, *Verfassungslehre*, 170.
[639] Ibid., 126.
[640] Ibid., 164, 127.
[641] On general statutes see Schmitt, "Der rechtsstaatliche Gesetzesbegriff," ibid., 138-157.
[642] Ibid., 176; Schmitt, "Grundrechte und Grundpflichten," (1932) in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 181-231; 209. That such restrictions are "typical" seems plausible enough but is never resolved with the postulate of "exceptionality" that is also listed as a defining element in statutory restrictions applicable to liberties. Restrictions are either really exceptional, or on the contrary are regular, that is to say "typical" in which case the reasons for such a "traditional" measure of limitation on various liberties would need to be explored.
[643] Schmitt, *Verfassungslehre*, ibid., 175-177.
[644] Ibid., 140.
[645] The following discussion is based on ibid., 161-163.
[646] Ibid., 23-24.
[647] Schmitt, "Grundrechte," 226.
[648] Schmitt, *Verfassungslehre*, 163; "Grundrechte," 206, 226.
[649] Cf. Schmitt's scheme, ibid., 170, summarizing all four kinds of individual rights: beside the two unpolitical liberties that can be exercised either alone (e.g.freedom of consciousness, personal freedom, inviolablity of the home and secrecy of the post), or "togehter with other individuals" (e.g. freedom of speech and press, freedom of assembly and association), Schmitt depicts the political rights of the individual that are understood to be either her democratic citizens' rights (e.g. right to petition,

equal voting rights and equal access to public office), or her claims for social provisions (e.g. right to work, right to education).
[650] A distinction which, as we have seen above, was utilized also by Rudolf Smend in characterizing the idea of rights in the various constitutions.
[651] Schmitt, *Verfassungslehre*, 168, see also 253.
[652] Ibid., 224.
[653] Ibid., 226, 234. As examples of the "moments" through which democratic equality had historically came about, Schmitt lists, “conceptions of common racial origin, religion, common fate and tradition,” ibid. 226.
[654] The perspective of the outside received attention in *The Concept of the Political* (CP) written parallel to *Constitutional Theory* (CT). Schmitt's defintion of the political in these two works covers then a polity's inside and outside (or its disintergration, as the case may be) in an essentially complementary manner, without the one or the other providing the key to understanding both of them. Cf. Böckenförde's suggestion that CP would be the key to CT advanced in „The Concept of the Political: A Key to Understanding Carl Schmitt’s Constitutional Theory,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus (Durham: Duke University Press, 1998), 37-55. I see Böckenförde's piece as *highlighting* some of the political dimension(s) of CT, rather than explaining it from the prespective of CP. The meaning of the "political" in CP does not contradict that which is used in CT, and provided Schmitt sufficient ground to make a systematic argument in constitutional theory (fully acknowledged by Böckenförde) -- the parallelism of the democratic thematic does not mean that one is a foundation to the other: one might as well say that it is precisely the conceptualization of the political in CT which provides a key to understanding CP. If forced to choose, I would rather side with the latter proposition.
[655] Schmitt, *Verfassungslehre*, 253.
[656] Ibid., 226.
[657] Ibid., 221-282.
[658] Ibid., 227-235.
[659] Ibid., 169-170.
[660] Developed already in Schmitt, *Verfassungslehre*, 170-174.
[661] Developed in Schmitt, “Freiheitsrechte und institutionelle Garantien” (1931) and reinforced in Schmitt, “Grundrechte und Grundpflichten” (1932).
[662] He specifically objected to theories of pluralism for “challeng[ing] the primacy of the state as well as the law, subordinating both to <<society>>” and for presenting the state as a “social group or association existing at best side-by-side with, but on no account above, the other associations.” In Schmitt, “State ethics and the pluralist state,” *Weimar*, 300-312; 301. Also cf. Schmitt, *The Concept of the Political*, 40-42.
[663] Cf. ibid., 22, 25, 62: via Hegel: “The often quoted sentence of quantity transforming into quality has a thoroughly political meaning. It is an expression of the recognition that from every domain the point of the political is reached and with it a qualitatively new intensity of human groupings.”
[664] Carl Schmitt, *Unabhängigkeit der Richter, Gleichheit vor dem Gesetz und Gewährleistung des Privateigentums nach der Weimarer Verfassung. Ein Rechtsgutachten zu den Gesetzentwürfen über die Vermögensauseinandersetzung mit den früher regierenden Fürstenhäusern* (Berlin: Walter de Gruyter, 1926).
[665] He found the former to violate arts. 102, 105 and 109, the latter arts.102, 105, 109 and 153 of the Constitution, *Unabhängigkeit*, 24. He went as far as to suggest that the draft of the communists showed that "for them a distinction between an unconstitutional and a constitutional state of affairs is not more than a bourgeois prejudice," ibid., 14.
[666] Ibid., 21, also cf. 12.
[667] Ibid., 17, 20, 13.
[668] Cf. Carl Schmitt, “Das Reichsgericht als Hüter der Verfassung” (1929) in *Verfassungsrechtliche Aufsätze*, 63-109, and Schmitt, *Der Hüter der Verfassung* (Tübingen: Mohr, 1931).
[669] Ibid., 11, 20-23.
[670] Ibid., 17-18.
[671] Ibid., 21.

[672] Ibid., 11, 12.
[673] Carl Schmitt, "Review of Gerhard Anschütz, Die Verfassung des Deutschen Reiches vom 11. August 1919," in *Juristische Wochenschrift*, 55 (1926): 2270-2272.
[674] Ibid., 2272.
[675] Ibid., 2272, 2270, 2272.
[676] In the review, Schmitt claims that Anschütz can ignore the requirement in art 153 (2) that takings happen only according to law, only because "he cannot at all understand such a criteria on the basis of his formalistic concept of statute," ibid., 2271.
[677] I rely on Walter Pauly's introduction to the reprint edition of the *Handbook*. His extensive archival research provides the background to this question. Pauly, "Einführung. Die neue Sachlichkeit der Staatsrechtslehre in der Demokratie," in *Handbuch des deutschen Staatsrechts* (1930-1932), eds. Gerhard Anschütz, Richard Thoma, 2 vols., reprint edition (Tübingen: Mohr, 1998), 3-17.
[678] Pauly, "Einführung," p.8.
[679] Not to be forgotten here is, of course, Schmitt's criticism both of the actual practice of the *Rechtsstaat* (e.g. the misuse of statutes) and his evaluation of the contradictions of democracy and *Rechtsstaat*. As for the latter cf. Schmitt, *The Crisis of Parliamentary Democracy* (1923) or Schmitt, "The liberal rule of law" in *Weimar*, 294-300 which he concludes with noting "the inadequacy of the methods of the state based on the liberal rule of law [Rechsstaat]," ibid., 300.
[680] Richard Thoma, "Das System der subjektiven öffentlichen Rechte und Pflichten," in *Handbuch des Deutschen Staatsrechts*, vol. 2., 606-623. Tübingen: Mohr, 1932.
[681] Carl Schmitt, "Die Auflösug des Enteignungsbegriff," *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 110-123.
[682] Carl Schmitt, "Wohlerworbene Beamtenrechte und Gehaltskürzungen," in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 174-180; 174; Carl Schmitt, "Die staatsrechtliche Bedeutung der Notverordnung, insbesondere ihre Rechtsgültigkeit" (1931) in ibid., 235-262; 257.
[683] Schmitt, "Wolherworbene," 174.
[684] Schmitt, "Wohlerworbene," 176, 178; Schmitt, "Die staatsrechtliche Bedeutung," 257.
[685] Schmitt, "Zehn Jahre Reichsverfassung," (1929) in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 34-40.
[686] Ibid., 34, 36-7, 39.
[687] Schmitt, "Weimars „Heiligtümer" im Spiegel der Staatsrechtswissenschaft" (a review of Hans Carl Nipperdey, Grundrechte und Grundpflichten) originally in Juristische Wochenschrift 1931: 1675ff., reprinted in *Rezensierte Verfassungsrechtswissenschaft*, ed. Peter Häberle (Berlin: Duncker & Humblot, 1982), 103-109.
[688] Ibid., 105-6.
[689] Schmitt, "Die Auflösung des Enteignungsbegriffs," (1929) in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 110-123; 117. Schmitt, "Wohlerworbene", 174, „Freiheitsrechte," 165.
[690] Schmitt, "Zehn Jahre Reichsverfassung," 39.
[691] Ibid., 38
[692] Schmitt, "Die Auflösung," 117.
[693] Ibid.
[694] Ibid., 118
[695] Schmitt, "Legalität und Legitimität," (1932) in *Verfassungsrechtliche Aufsätze aus dem Jahren 1924-1954* (Berlin: Duncker & Humblot, 1958), 261-350.
[696] Ibid., 274-83, esp. 282 for the legislaive state; 344 for substantial order; and for the contradiction of the two: 294, 299.
[697] Ibid., 344.
[698] Ibid., 310.
[699] Ibid., 311.
[700] Ibid., 303.
[701] Ibid., 312.
[702] Carl Schmitt, *Der Hüter der Verfassung*. Tübingen: Mohr.1931.

[703] Carl Schmitt, *The Crisis of Parliamentary Democracy*, translated by Ellen Kennedy (Cambridge: MIT, 1985).
[704] The legislative state would "turn inevitably into a governmental, administrative and judicial state" and "the power of organs that apply the law, i.e. that of the executive and the judiciary [would] grow beyond that of simple legislation," Schmitt, *Legalität*, 308-309.
[705] Ibid., 312-319; 319-335.
[706] Ibid., 344-345.
[707] Ibid., 344, 302.
[708] Ibid., 345: this is the very last sentences of the original text. Further notes were added to it for the collection from which we quote.
[709] Of relevance here are Schmitt's corresponding practical involvements beyond academia and as an academic. While Schmitt kept no great distance from politics already during his Bonn years (1922-1928) in so far as he counted as a public supporter of the Catholic *Zentrum* on account of his publications in Catholic journals and his speeches at *Zentrum* party meetings, the reason for his decision to take up a position at the Berlin *Handelshochschule* (1928-32) is said to have been his wish to "be at the center of politics" (Noack, *Carl Schmitt*, 91-96, 100, 103). Bonn and Berlin were truly not on a comparable level in terms of the intensity of politics one could experience in them during the 1920s and 1930s and Schmitt clearly opted for intimacy with the latter. He soon came to have close contacts with high federal government officials, either in the form of friendship as in the case of Johannes Popitz (1929-1945, state secretary at the ministry of finances), or as their advisor on various constitutional matters. Of these, his role as representative of the federal government in the case of "Prussia contra Reich" in October 1932 is undoubtedly the most famous (ibid., 138-139, also cf. David Dyzenhaus, *Legality and Legitimacy*, 38-101). Beside this public function under the government of Papen, Schmitt served as an advisor for General Schleicher's politics through his confidential colleagues Eugen Ott and Erich Marcks during Schleicher's capacity as federal defense minister as well as in the course of his chancellorship between December 1932 - January 1933 (Noack, 147-148). Most importantly, in the fall of 1932 Schmitt took part in the preparation of an emergency plan (*Staatsnotstandsplan*) put together in the ministry of defense by Schleicher's colleagues in which the postponement of new elections after the dissolution of parliament, and the banning of radical parties were proposed as the two pillars on which a solution to the crisis was to be based in the face of imminent take over of power by radical parties. New research indicates that Schmitt pursued the matter further an put forth an alternative plan which would not have required the president to (look as if he) violate(d) a constitutional provision (even though Schmitt himself delivered constitutional arguments earlier that would have justified such a move on the part of the president who, for his part, was too keen on proceeding fully "constitutionally" – thereby there was reason to expect that he might have not agreed to the original version of the Schleicher plan): instead of postponing elections Schmitt suggested that the validity of so called "negative vote of no confidence" would be rejected with the argument that the *Reichstag* had obstructed governments in implementing policies since 1930 while at the same time it failed to fulfil its role of legislation. His alternative plan seems not to have made it in time to be considered for its merits (Lutz Berthold, *Carl Schmitt und der Staatsnotsstandplan am Ende der Weimarer Republik* (Berlin: Duncker & Humblot, 1999), 36-8).
Schmitt was nevertheless considered as the main advisor for and supporter of the original plan in an incident that also pointed to his complete alienation from *Zentrum* circles in the 1930s, evidenced also by the fact that he stopped publishing in Catholic journals, turning instead to the publications of the "conservative revolution." The case that most clearly indicated Schmitt's distance from political Catholicism in these years deserves detailed attention also for its concluding stages. It started on January 29, 1933 when the president of the *Zentrum*, the priest Kaas published an open letter to the chancellor and warned him of implementing the emergency plan which he saw as unconstitutional and as a result of "a tendency of relativising constitutional law practiced by Carl Schmitt and his followers"(Noack, 160-166, quote 162). Schmitt was furious at the charge and sent a reply to Kaas, copies of which he had sent to "the presidencies of the Association of German Professors of Constitutional Law and [that of] the *Staatsgerichtshof*, [as well as to] Papen, Schleicher and Hindenburg" (ibid., 163). Schmitt protested against the accusation that the plan would have proposed illegal moves, a conclusion which Kaas drew on the basis of "differences in the approach to and

position on a scientific [question]." His main objection, however, was that the "reputation of a German legal scholar ... was publicly damaged" (ibid.). He was to give voice to this latter concern soon again, reinforcing the conception of a constitutional scholar whose scholarly work, on the one hand, by its nature lent itself to immediate application, whether he offered it in the form of advice or published it as a scholarly position, but on the other hand remained on the scholarly side of the watershed beyond which politics was located. The defining momentum separating the two coasts was decision – something scholars (of Schmitt's kind) did not engage in, even in cases when they proposed a major shift in the interpretation of the most basic decisions of a people in giving itself a constitution, as Schmitt did in his *Legality and Legitimacy*. We recall that in this piece Schmitt urged *his readers to make a decision* in favor of the counter constitution contained in the second part of the Weimar Constitution.

Also to be noted in conclusion is the marked difference between Schmitt's attitude towards the discipline of constitutional law as a whole and the ways of conceptualizing constitutional scholarship in the case of scholars like Triepel or the Weimar positivists, Anschütz and Thoma. Their conceptions were predicated upon a particular vision of the discipline as a whole which also implied an active involvement on their part in shaping the discipline itself. In contrast to this, Schmitt's practical involvement pertained not so much to the discipline but more directly to politics. An indication of his lack of interest in engaging himself in the matters of the discipline was his reserved posture in relation to the Association of German Professors of Constitutional Law: beside delivering a speech on the dictatorial powers of the president in 1924, he never took part in the discussion and did not always go to the meetings either. He seems to have presumed as unproblematic the prestige and authority of constitutional scholarship and drew on it as a matter of course in his own practical endeavors without worrying about maintaining or casting the discipline by virtue of his praxis. This conception was succinctly formulated in a radio talk with Schmitt that was produced before the National Socialist take over of power but was aired on February 1, 1933. In his very last statement from Weimar Germany, Schmitt referred to himself as:

> "theoretician ... pure scientist and nothing but scholar ... [who as such] observe[d] the concrete, living law of the people [he] belonged to. The kind of law and statute that [he] deal[t] with [was] in the highest spiritual sense always present and thus belong[ed] immediately to the life of the people, like its language, its faith [and] its concrete political fate" (ibid., 166).

In contrast, in about a year's time, Schmitt already possessed a vision for the mission of the legal discipline whose contours we better recall in his own words. (The text is based on two lectures given at the beginning of 1934, *Über die drei Arten des rechtswissenschaftlichen Denkens* (1933) (reprint Berlin: Duncker & Humblot, 1993, 5.):

> a *new concept of jurist* was introduced … [by] the National Socialist movement in Germany. The estate like uniting of German jurists in the *Deutschen Rechtsfront* (German Law Front) rests on a conception of the jurist which abolishes and overcomes the prior positivistic tearing apart of law and economy, law and society, law and politics. … The leader of the *Deutsche Rechtsfront* and the founder and president of the *Akademie für Deutsches Recht* (Academy of German Law), Reich justice commissar dr. Hans Frank defined the task of German jurists to be in <<shaping matters>> in the German spirit. This term, conveyed by him, expresses the fundamental trait of the new [type of] thinking in terms of orders and structures (*Ordungs- und Gestaltungsdenken*) (ibid., 54).

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