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Historical-sociology vs. ontology: The role of economy in Otto Kirchheimer and Carl Schmitt's essays 'Legality and Legitimacy'

Karsten Olson
University of Minnesota, USA

Abstract
The pre-1932 writings of Otto Kirchheimer are often described by researchers as the work of a young 'left-Schmittian', a radical Marxist who gave the anti-liberal critique and theoretical apparatus of his *Doktorvater* Carl Schmitt a new purpose for different 'political ends'. The danger of this approach is that fundamental divisions between the societal conceptualizations of both theoreticians are ignored in lieu of apparent terminological similarity. Through the lens of economy, it is therefore the intent of this article to continue in the tradition of Alfons Söllner and Frank Schale, pushing against this assumed affinity and highlighting Otto Kirchheimer's unique defense of liberal democracy.

Keywords
economy, Otto Kirchheimer, legality, legitimacy, Carl Schmitt

Much of the research on the relationship[1] between Otto Kirchheimer and his *Doktorvater* Carl Schmitt poses two related questions. To what extent was young Kirchheimer a left-Schmittian? And when did the break occur, that is, when did Kirchheimer free himself of Schmitt's spell and emerge as a fully independent theorist? One source of these

Corresponding author:
Karsten Olson, Department of German, Scandinavian and Dutch, University of Minnesota, 9 Pleasant Street SE, Minneapolis, MN 55414, USA.
Email: olso6313@umn.edu

formulations is Ellen Kennedy's well-known essay 'Carl Schmitt and the Frankfurt School', in which Kennedy asserts that Kirchheimer was the 'legitimate heir and the transmitter of [Schmitt's] ideas within Critical theory' (Kennedy, 1987: 47), creating the now familiar formulation of Schmitt and Kirchheimer sharing the same theoretical apparatus to achieve different political goals. Kennedy's essay has a distinctly polemical quality, strongly asserting Carl Schmitt's largely secret sway over 'the Frankfurt School', as well as his total methodological indoctrination of Kirchheimer prior to 1932.[2] 'Carl Schmitt and the Frankfurt School' drew an equally polemic response from Alfons Söllner[3] in 'Jenseits von Carl Schmitt', a self-proclaimed 'Anti-Kritik' of Kennedy's article (Söllner, 1986: 504). However, despite its polemical character, 'Jenseits von Carl Schmitt' remains one of the most fruitful examinations of early Kirchheimer for two reasons. First, it avoids the problematic formulation of the left's oft-cited 'fascination'[4] with Schmitt, which at times seems to portray Schmitt as a theoretical siren, dashing the stout ships of Marxists on the rocks of accidental fascism. Second, by arguing *against* an inherent similarity, Söllner is forced to give a detailed account of what concepts are used by Kirchheimer, as well as *how* and in what context. The question of shared methodology and moments of 'convergence' (Kennedy, 1987: 37) between the right and the left is certainly not without interest; however, such an approach runs the risk of masking difference behind the veil of apparent similarity; both Schmitt and Kirchheimer rely, to varying degrees, on concepts of decision, homogeneity, sovereignty and exception within their constitutional theory, but not only do they produce, by all accounts, markedly different 'political results',[5] the foundational understandings of society upon which they are based also stand in direct opposition to one another.

Söllner's analysis leads to a subtle but significant shift; Kirchheimer is no longer a left-Schmittian[6] implementing anti-liberal critique in the service of a Marxist agenda, but rather his argumentation is 'historical-sociological' in direct contrast to Schmitt's 'ontological' democratic critique (Söllner, 1986: 511). Frank Schale argues in a similar vein in 'Parlamentarismus und Demokratie' [Parliamentarianism and Democracy], stating that Kirchheimer operated from a 'sociological-scientific' perspective, one intrinsically material in orientation, which afforded a knowledge of Weimar 'from the inside' (Schale, 2011: 141, 143). In other words, Kirchheimer was from the very beginning not merely adopting but rather critically engaging with Schmitt's terminology.[7] It is my hope to continue Söllner's project of conceptual differentiation by examining Schmitt's and Kirchheimer's final exchange on the topic of legality and legitimacy within liberal democracy; in 1932 Kirchheimer wrote 'Legality and Legitimacy', which was followed later that year by Schmitt's essay of the same title, which was in turn answered directly by Kirchheimer's[8] 'Remarks on Carl Schmitt's *Legality and Legitimacy*'. The fundamental nature of the questions posed by both theorists reflects the political instability of the time and also serves to demonstrate the gulf that had always existed between the two, even while they were seemingly operating within the same framework. Central to this division is the role of the economy, and it is subsequently through the lens of the economy that I hope to highlight critical differences between Schmitt and Kirchheimer, and also to sketch a shift within Kirchheimer's own thought, one which cast a new, hopeful light on the potential of liberal democracy.

I Carl Schmitt's *Legality and Legitimacy* and the impossibility of democracy

In *Legality and Legitimacy*, Schmitt defines the legislative state as 'a particular type of political system that is distinctive in that norms intended to be just are the highest and decisive expression of the community will ... and all other public functions, affairs and substantive areas must be subordinated to them' (Schmitt, 2004: 3). The legislative state is synonymous with the rule of law;[9] however, Schmitt holds the phrase 'the rule of law' to be misleading, as

> ... laws do not rule; they exist only as norms. There is no ruling and mere power at all anymore. Whoever exercises power and government acts 'on the basis of law' or 'in the name of the law'. He does nothing other than what a valid norm permits jurisdictionally. (Schmitt, 2004: 4)

What this expresses is the difference between the decrees of a monarch and legislative law as norm; in the person of a monarch, ruling and law are joined, and decrees made by the ruler are immediately legitimate, not needing to follow previous precedent. In other words, the ruler is the sovereign force whose legitimacy is external to the decrees he or she creates, which are merely an expression of this sovereignty. In contrast, for norms to govern, a division between the executive and legislative branches is necessary; one portion of government, the legislature, creates laws which are designed to serve as general guiding parameters. The executive or administrative branch then acts, but only in accordance with the provided norms. According to Schmitt, this division provides one of two primary sources of legitimacy within a legislative state: because the law is placed above all individuals within the state, and no person or group of persons is capable of both creating and interpreting the law, all citizens are equal before the law.

As a result, the legitimacy of the rule of law is fundamentally different from that of a monarch: the legitimacy of a monarch is *substantive*, that is, he or she is the ruler because of power granted from God or some other eternal source of justice external to the system of law. In contrast, the legitimacy of the legislative state is strictly *formal*, that is, according to Schmitt, it makes no claim to eternal justice but rather its legitimacy is entirely the result of the equitable nature of its administration and process of law creation. The second source of legitimacy within a legislative state is therefore the equal chance of all citizens to form the law, by means of the representative democratic process. Unlike the dualistic structure of state vs. society which existed under constitutional monarchy, in a democratic state 'the state's will and the people's will [become] identical' (Schmitt, 2004: 24) or in other words there exists complete 'identity of the rulers and the ruled' (Kennedy, 1987: 42). What Schmitt seeks to underline is that the old tension between the rights of the individual and the authority of the state has theoretically been resolved; the citizens of a democracy are beholden only to the law which they themselves helped shape. In practice this means that the 'law is the momentary will of the people present at the time' (Schmitt, 2004: 24). As a result, the division between which laws are *legal* and which are *legitimate* disappears; it is no longer necessary for a law to make claim to an external source of justice, as its majority sanction is justification

enough. Any law passed legally by the representative body is by definition legitimate, *regardless of content*. This is again presented in contrast to the sovereign, whose decrees were by definition legal (as they were not bound to precedent) but not necessarily legitimate, since they had to operate demonstrably in accordance with higher truth from which he or she derived power.

To reiterate: the legitimacy of the rule of law (and hence legislative government) depends on both equality before the law and the equal ability of all citizens to form the law. It is the second criterion which Schmitt believes liberal democracy fails to achieve; in order to form the law, there must exist the possibility of every citizen belonging to the majority party. The problem is a basic lack of homogeneity within the voting population, homogeneity which Schmitt argues is necessarily contained in the idea of 'equal chance':

> The method of will formation through simple majority vote is sensible and acceptable when an essential similarity among the entire people can be assumed. For in this case, there is no voting down of the minority. Rather, the vote should only permit a latent and presupposed agreement and consensus to become evident. (Schmitt, 2004: 27)

In such a democracy, lines of division over specific laws would be a matter of temporary misunderstanding, not fundamental disagreement, and the process of legislation would be one of uncovering of an already existent universally held conviction. Party lines would not be fixed; indeed there would be no set party structure, as there would also be no absolute divisions within the population, and no specific interests to represent.

If, however, a population is *not* homogeneous, if it *does* contain 'permanent minorities' (Schmitt, 2004: 28) which have no hope of belonging to the majority party and subsequently no possibility of forming laws, then Schmitt argues that democracy is not the enlightened and egalitarian government it pretends to be, but rather a functionalist nightmare rooted strictly in statistics; 'Fifty-one percent produces the majority in parliament; 51% of the votes in parliament produces law and legality; 51% also demonstrates the confidence of parliament and produces the parliamentary government' (ibid.: 27). It is the formalistic nature of law under democracy which makes the ability of every citizen to form the law so vital; *anything* passed by the legislative body *is law* without requiring a substantive truth claim, law which then governs the behavior of all citizens; 'without this principle, majority calculus would be a grotesque game, not merely because of its indifference toward every substantive result. The concept of legality derived from this principle would also be a shameless mockery of all justice' (ibid.: 28). Schmitt assumes that if the population is not homogeneous then the majority, once established, will seek to consolidate its power and thereby permanently bar access to the minority.

Schmitt argues that because the Weimar Republic *is* heterogeneous and *does* contain permanent minority groups, there is an immediate need to protect these minorities from persecution by the majority. This protection is achieved by creating a division both within the constitution, in the form of laws protecting certain individual rights, and also necessarily within the law itself, between low and high law – that is, laws which require a simple majority vote, and those rights protected from 'the transient will of the majority' through the requirement of a two-thirds majority. Unfortunately, Schmitt views this

protection as both inadequate (how is persecution of 33% of the population more just than that of 49%?) and furthermore dangerous: just as rule of law necessitates the division of executive from legislative, division within the law further necessitates the formation of judicial and administrative bodies to protect the laws from the lawmakers. There is 'no hierarchy of norms, but rather only a hierarchy of concrete persons and organs' (Schmitt, 2004: 54). The establishment of so many different administrative bodies within the legislative state inevitably results in a 'race' for power; for while it is possible for the various factions to exist parallel to one another during times of relative stability, in the moment of crisis sovereignty is bitterly contested. This race occurs not only between the branches of government, but also within the legislative body itself, where it takes the ultimate form of minority suppression; minority parties are declared illegal and illegitimate, and are thereby permanently barred from the democratic process. In this moment the majority party becomes the state, and even the semblance of 'equal chance' has disappeared. The minority party in turn declares the majority to be in violation of the constitution and therefore illegal and illegitimate: 'so at the critical juncture, each denounces the other, with both playing the guardian of legality and the guardian of the constitution. The result is a condition without legality or a constitution' (ibid.: 34).

The collapse of the democratic process within the legislature is of little lasting consequence, however; in the race between governmental branches, the executive branch will invariably win, for while the legislative branch is responsible for generating the universal norms that dictate legality, the executive translates the universal and non-particular norm into concrete action. This means that no matter what checks have been placed against the executive branch, its actions can only ever *retroactively* be deemed in violation of the law, and any corrective measure necessarily lags behind the new realities created by the concrete actions of the executive and administrative state organs. This problem is exacerbated by the existence of state of emergency clauses which are 'undetermined and evaluative concepts, such as ''public security and order'', ''danger'', ''emergency'', ''necessary measures'', ''hostility to the state and constitution'', ''peaceful disposition'', ''life and death issues'', etc.' (Schmitt, 2004: 32). The executive branch both determines what constitutes a state of emergency and in that self-defined moment assumes the mantle of legality. It is such moments of crisis that allow a president or chancellor to disband congress altogether, or, in more contemporary cases, to declare wars and suspend individual rights without the technically necessary approval of the legislating body.

Schmitt, however, does not bemoan the disintegration of the representative democracy under the weight of its own contradictions – since he always held the promise of equal chance to be impossible, the democratic process is determined to be fundamentally illegitimate and can be nothing but 'a rather complicated form of absolutism' (Schmitt, 2004: 20). Further, Schmitt hoped that this collapse could lead to a more just form of government, one in which the will of the people finds direct expression through a plebiscitary president ruling in accordance with his or her own conscience, whose legitimacy is the source of legality and not vice versa. Schmitt held that such a government would reunite law with its ethical base, a government with 'the substantive characteristics and capacities of the German people' (ibid.: 93). In a similar gesture, Schmitt

argues that the bureaucracy is much more than the mere 'tool' its etymology reflects, and that its position in society could grow further, providing 'a genuine elite ... capable of producing authority and legitimacy ... Such an elite would have qualities like incorruptibility, separation from the world of striving for money and profit, education, sense of duty and loyalty, plus certain obviously diminishing tendencies toward cooptation' (ibid.: 13).

It is impossible to read Schmitt's vision of a strong executive ruling in the spirit of the German people, backed by an elite bureaucracy, without discomfort, and it is hardly surprising that many have accused Schmitt of intentionally undermining the Weimar Republic. In her more recent book *Constitutional Failure*, Kennedy presents a convincing case that Schmitt was deeply dismayed by the Nazi seizure of power in 1933, and further contends that Schmitt joined the Nationalsozialistische Deutsche Arbeiterpartei [the National Socialist Workers' Party or the Nazi Party] (the NSDAP) out of a sense of responsibility to the German people, since he saw himself as a modern Machiavelli, duty-bound to guide the state to the best of his abilities, regardless of the ruling party (Kennedy, 2004: 18). Prior to the *Machtergreifung*, Schmitt's policy recommendations to the Hindenburg administration specifically targeted parties such as the NSDAP and the Kommunistische Partei Deutschlands [the Communist Party of Germany] (the KDP), that is, parties whose 'revolutionary intent' made them enemies of the state in Schmitt's friend/foe political constellation. Kennedy is therefore justified in questioning those critics who accuse Schmitt of intentionally sabotaging the Weimar Republic,[10] reminding them instead of the gulf between 'political critique and consequences'. Without attempting to assign guilt, the following question remains: is Schmitt's proposed transformation of a parliamentary democracy into an authoritarian state governed by a plebiscitary president and bureaucratic elite – a 'preservation'?[11] Kennedy, too, notes the disturbing parallels between Schmitt's utopian vision and the NS reality which was to follow:

> Most of the changes that Schmitt ... favored were realized – but with substantively different meaning: there was a state of emergency, the Länder were 'coordinated' with the Reich ... the parties were abolished, and the NSDAP was the only legal organization. (Kennedy, 2004: 169)

In other words, the primary difference between Schmitt's hopes and political reality after 1933 was the specific party in control, not the basic functioning of that government. It is, then, the tragic irony of Schmitt's political maneuverings before 1933 that those very tactics designed to prevent parties such as the NSDAP from achieving power made them almost impossible to dislodge once they had attained it – parliament had been successfully de-fanged in favor of a strong executive branch, and the power of states such as Prussia to resist had been shattered, all with Schmitt's direct support.

II Schmitt on economy

The almost total absence of economic considerations from Schmitt's arguments, excluding the minor, negative reference to the 'incorruptible' bureaucratic elite, is no oversight.

Instead, Schmitt proudly proclaims in the second sentence of *Legality and Legitimacy*: 'optimistic or pessimistic suppositions and prognoses are not of interest here; various crises – whether of the biological, medical, or economic variety, postwar crises, crises of confidence, those involving health, puberty, weight loss or what have you, will also not be considered' (Schmitt, 2004: 5). Though the preceding sentence claims this essay as a work of 'scholarly shorthand' concerning legal development, the proximity of 'economic' crises to those of 'puberty' and 'weight loss' achieves the intended trivializing effect, reducing the economic dimension to incidental fluff.

In order the better to explain this disinterest-bordering-on-disdain, it is necessary to look to Schmitt's works which deal with the economic directly, an excellent example of which is provided by the essay 'Das Zeitalter der Neutralisierungen und Entpolitisierungen' [The Age of Neutralizations and Depoliticizations], which, despite its short length, presents its readers with a schematic intellectual history spanning half a millennium. 'Zeitalter' begins with the axiomatic assertion that every era contains a central organizing principle; beginning in the 16th century and moving chronologically forward in neat 100-year intervals, the 'centers' are as follows: theology, metaphysics, humanistic/morality and economics (later he names the 20th century as the era of technology and religiosity). These centers serve two primary functions: first, they provide the touchstone in relation to which all further terms are defined; and second, they establish the battleground upon which all political contests are fought (Schmitt, 1991b: 80). For an example of the touchstone property, when the concept of 'progress' was introduced in the 18th century, it was understood in the sense of humanity's inevitable climb towards moral perfection, while in the 19th century this had transformed into progress towards the economic well-being of all of 'mankind' and the disappearance of want and deprivation, and finally in the 20th century pure technological perfection was understood (ibid.: 85). The center-as-battleground functions similarly; in the 16th century it was unthinkable for two warring religious factions to belong to the same state, while in the 19th century it was equally unimaginable for two rival economic systems to exist and operate within the same nation.

What is apparent from this cursory description is that the economic is decentered in two ways; first, while the economic *was* the central ideology of western thought in the 19th century, in the 20th century it is no longer. This allows Schmitt to concede that Marx was a visionary of his time, while still arguing that the continued obsession with the economy is antiquated and distorts the view of power relations as they *really* stand in the 20th century (Schmitt, 1991b: 83). Second, and more importantly, the economy has been grouped with other second-tier categories, ideological centers which go in and out of fashion without affecting the core of human civilization, namely the political. The overarching thesis of 'Zeitalter der Neutralisierungen und Entpolitisierungen' is, as the title suggests, that the shifting ideological cores represent a progression towards perceived neutrality and the unpolitical, motivated by a desire to escape the war and bloodshed associated with political division (ibid.: 88). Unfortunately, humankind has discovered the opposite to be true, and every attempt at increased neutrality has been accompanied by escalating violence and brutality; as Schmitt famously concludes, the 'most horrible war is waged only in the name of peace, the most terrible oppression

occurs only in the name of freedom, and the most ghastly barbarity in the name of humanity' (ibid.: 94).

A similar conclusion can be found in *Der Begriff des Politischen* [The Concept of the Political]; here Schmitt lists the various substitutions which liberalism has made in an attempt to neutralize the political: struggle is replaced with competition or discussion, the political state with society both in the sense of a moral humanity and as a system of production, the *Volk* with the public and consumers (Schmitt, 1991a: 71). This transformation is achieved through the totalizing influence of liberal democracy, which, through the aforementioned identity of ruling and ruled, blurs the lines between state and society (ibid.: 24). Once again, this does not produce the intended effect of neutralizing and depoliticizing the world; with the clear definition of the state destroyed (the same state which had served as a framework for friend/foe distinctions and therefore the political), *everything* has the potential to become political (ibid.). The political itself has no content and is only a relationship of a certain intensity; any conflict which has the potential to reach a point of existential crisis, a friend/foe division which can be resolved only with the physical annihilation of the other, can become political (ibid.: 27). In part, it has no content because it is always 'concrete' and 'historical' (ibid.: 9), and, as 'Zeitalter' demonstrates, the content of this dispute can vary greatly. Nevertheless, the political is *always* present, and any hope of pedagogically or economically weaning humanity from its inherent drive to create friend/foe distinctions is at best naïve, and at worst responsible for unspeakable atrocities.

The final point to be made concerning economy is this: economy is secondary to the political, not only in the sense that it is less essential, but also sequentially; in order for any of the secondary systems (religion, law, economy, morality, aesthetics) to function, the state and the political must precede it. Within Schmitt's system, it is the exception, the moment of decision, the sovereign which *creates* the normalized space in which society can first function (Schmitt, 1991a: 46). According to Schmitt's admittedly pessimistic (or, in his estimation, 'realistic') view of humanity, without the political, without friend/foe distinctions, protection and obedience, there could be only chaos and violence, and no law, economy or any other social construct would have any meaning.

Understood in this manner, the absence of economy from Schmitt's discussion of legality and legitimacy is hardly surprising; the economy was no longer the conceptual framework in the 20th century, and, more importantly, its secondary position (comparable with that of law itself) makes any attempt to derive legal precedent from the economy misguided. Of course, this also raises many important questions which go unanswered in these texts. Where do the centers come from? How are they changed? Are they at all affected by the external world? Schmitt's theory may well be 'historical' and 'concrete', but it is far from material; ideologies seem to shift exclusively under the force of will, be it individual, collective, or sovereign. It is also important to note that in Schmitt's analysis, democracy fails because of logical inconsistencies within the *idea* of the institution, and not because of any external influences (including the much-derided 'crises'). Schmitt's idealism has particular significance when applied to the concept of homogeneity. What exactly *is* the 'German spirit'? Where do homogeneities come from? These questions feature prominently both in Kirchheimer's own theory and in his

critique of Schmitt, where the economy, and with it the 'historical sociological' referred to by Söllner, takes center stage.

III Kirchheimer: A material response

In contrast to Schmitt, it is difficult to find a central term in Kirchheimer which is *not* to be understood in relationship to the economy; formal law, mechanical majorities, homogeneity and the theoretical division between social and political democracy are all defined by their economic underpinnings. The problem of 'formal law', for example, already features prominently in Kirchheimer's 1930 essay 'Weimar und was dann?' [Weimar and What Then?], albeit in an entirely different form than both he and Schmitt would later use. Kirchheimer is indeed critical of the 'formal' nature of parliamentary law, though not 'formal' understood as the opposite of substantive, but rather 'formal' in the sense that they are laws *in name only*, i.e. laws without the force of law (Kirchheimer, 1964: 56). In order the better to understand 'formal' in this sense, it is necessary to review the historical origins of democracy, which Kirchheimer characterizes broadly as the successful rise to power of the bourgeoisie, with the aid of the proletariat, against constitutional monarchy, all of which was achieved under the banner of human rights, equality and democracy. Kirchheimer readily concedes this as an emancipatory moment, but is quick to note that, contrary to the expectations of later constitutional framers, the emancipatory element of democracy disappeared as soon as the bourgeoisie assumed power (ibid.: 53) – in fact, those same rights which had been championed so loudly became a real danger to the stability of bourgeois rule (ibid.: 16). The universal suffrage necessary to rally the proletariat against the monarchy carried the unfortunate side-effect of actually granting them political power, thereby making the possibility of radical wealth-redistribution a real threat. In order to stave off this eventuality, the bourgeoisie limited democracy to *political* democracy – that is, citizens were granted the right to vote in addition to equality before the law, but *not* 'social' or substantive equality; the existing economic structures are preserved through property laws and bills of rights, establishing a bourgeois dictatorship in the place of a social democracy, a social democracy that would have actually represented the logical completion of the democratic ideals of liberty and equality (ibid.: 17, 18).

Kirchheimer critiques the substantive laws of the Weimar Republic particularly sharply; in a moment of true Schmittian argumentation, he describes the mixed substantive legislation as a delay of decision masquerading as compromise (Kirchheimer, 1964: 154). Unlike a true compromise, in which both parties agree to concessions, Kirchheimer contends that the substantive rights provided by the Weimar Constitution are a set of conflicting laws in which everyone is given exactly what she or he wants (ibid.: 32). This leads to one of the most powerful forms of oppression available to the bourgeois dictatorship, namely *selective* law enforcement: since the judiciary and the administrative arms of the government are controlled by the economic elite, only those laws that are advantageous to the bourgeoisie are practised. The most famous examples of this selective enforcement were the wildly varying responses of the federal government to uprisings in the German states; communist uprisings were dealt with severely, parties were disbanded and jail sentences doled out, while fascist usurpations of political

power, which posed no threat to the established economic norms, were left largely unpunished. The most extreme tool against socialist reform in the bourgeois arsenal also originates among the 'substantive' laws, namely the ability of the president to suspend parliament via article 48. It is in this moment that the dictatorship of the bourgeoisie, always present, is laid bare, as it uses extra-legal means to achieve through force what it could not enact through democratic legislation. It is in *this* sense that Kirchheimer refers to parliamentary law as 'formal law', or 'game rules', that is, meaningless edicts unable to truly challenge the status quo, a status quo determined by economic forces beyond the reach of the legal system (ibid.: 56). Kirchheimer, too, is concerned with the 51% – namely that even if sufficient votes are cast in parliament to affect change, they will be rendered impotent by a system designed to maintain the current economic hierarchy.

However, as skeptical as Kirchheimer was of the likelihood of success within the democratic system of the Weimar Republic, he was even *less* optimistic about the chances through extra-legal channels; 'Weimar und was dann?' is littered with indications that Kirchheimer was already opposed to revolutionary action, if for no other reason than he thought it was impractical. For example, Kirchheimer notes perceptively that not only did the military once have close ties to the monarchy, and was in general a conservative force likely to oppose revolutionary forces, within Weimar, it had also been incorporated into the bureaucracy and therefore robbed of any independence, instead clearly standing in the service of 'bourgeois order' (Kirchheimer, 1964: 42). More significantly still, Kirchheimer states that all attempts thus far to dismantle parliament on the grounds that it was a calcified, dysfunctional body, had been the actions of right-wing presidents against the more leftist parliament, in part as a means of hiding the uncomfortable truth of economic stratification which the party system represented (ibid.: 28). Attempts nevertheless to characterize Kirchheimer as an anti-democratic radical seem primarily based on the title of the essay and are in no way substantiated by the text itself. The anti-revolutionary nature of 'Weimar und was dann?' is captured very effectively in Schale's positioning of Kirchheimer as a 'left-socialist', in opposition to both liberal-socialism *and* revolutionary communism/Leninism (Schale, 2011: 156). Kirchheimer remained a staunch, if critically reflective, member of the Sozialdemokratische Partei Deutschlands [the Social Democratic Party of Germany] (the SPD) until the very end of the republic, and at every turn rejected Leninist, potentially 'left-Schmittian', justifications of 'temporary' dictatorship in the name of democracy; Kirchheimer recognized that the fundamental principles of democracy are necessarily both equality *and* freedom/self-determination. To destroy individual freedom in the name of equality would be to destroy democracy itself (ibid.: 156, 158, 161). Kirchheimer's task in 'Weimar und was dann?' was therefore not to undermine the legitimacy of parliament as part of a revolutionary agenda, but rather *to highlight those forces* (primarily economic) *which were already at work against it*. The bourgeois dictatorship had existed in a 'provisional' form since the inception of the Weimar Republic: the danger was that if the economic order was further challenged by parliament the bourgeois dictatorship could become a legal, 'sovereign' reality (ibid.: 157).

Two years later, Kirchheimer would revisit the topic of compromise in 'Legality and Legitimacy': 'although its opponents prefer to overlook this, this liberalism [of the Weimar Republic] has less to do with a fundamental commitment to liberal ideals than

to the fact that it proved to be a practical organizational principle for a class-divided country' (Kirchheimer, 1996a: 54). Kirchheimer's own definition of formal law had changed in the interval, from formal in the sense of ineffective, to instead describing the formulaic method of law creation: 'the legislative state, parliamentary democracy, knows no form of legitimacy beyond that of its origins. Since any legislative resolution of a majority of the people constitutes a law, the legitimacy of this form of government consists simply in its legality' (ibid.: 49). This is the meaning Schmitt would borrow for his own essay, though even in this instance of using loosely similar definitions, the positioning of the terms varied greatly:

> The prospects of every system of legality-based political rule depend on the possibility of incorporating the dialectic of historical change more smoothly than a system of rule based on an appeal to legitimacy can accomplish. The latter is only capable of surviving to the extent that it succeeds in attributing the appearance of eternal validity to the political and social conditions of a particular moment. (Kirchheimer, 1996a: 58)

The very property for which Schmitt extols substantive laws, that they refer to concrete moral values external to the legal system itself, Kirchheimer cites as their primary weakness; by *not* abstracting from the practical moment in order to create universal norms, the administration is continually forced to connect concrete, contingent decisions to some semblance of permanence and justice. By contrast, democratic laws need not rule in the particular moment, and instead only set general parameters for legal action. Because the legitimacy of an individual formal law is not the result of its direct connection to an eternal truth, but rather is derived from the egalitarian process through which it was created, democratic law proves to be much more flexible and better able to adjust to the 'dialectic of historical change', change that unquestionably encompasses the economic crises Schmitt chose to ignore. Similarly, Kirchheimer argues that France was able to avoid many of the difficulties facing Weimar precisely because the French Constitution was *entirely* formal, containing only the operational guidelines and no material law. In so doing, it negated the ability of the court to test the constitutionality of laws passed by the legislative body; any law passed by parliament was by definition *legal and legitimate*. Far from being a source of instability and weakness, the purely formal nature of the French Constitution protected the laws of France from judiciary incursions, thereby preventing the formation of the 'empire' of bureaucracies which was challenging the legitimacy of the Weimar Republic.

Instead of blaming the empty formality of the legislative state for permitting majority domination of minority groups, Kirchheimer notes that the minority oppression which *was* occurring in Weimar was instead the direct result of expanding substantive legislation: the German courts had begun instituting a 'supra-legal constitutionality' through determining the potential revolutionary intent of political parties and labor unions (Kirchheimer, 1996a: 53). This represented a clear perversion of legislative law; instead of determining guilt or innocence on the basis of actions, judges now ruled over the 'revolutionary' potential, determining legitimacy and not legality:

> In the face of the court's presumption of illegality, even its own well-considered acknowledgment of evidence suggesting the legality of the actions of the KPO [Kommunistische Partei Deutschlands Opposition (the Communist Party of Germany Opposition)] at the present time is rendered inconsequential; the only thing that really counts is the KPO's illegitimate goal, its 'revolutionary objectives'. (Kirchheimer, 1996a: 56)

This is Schmitt's friend/foe distinction hard at work; those parties, the core ideology of which is deemed dangerous to the *existence* of the state, are illegal, regardless of actual behavior. This is an assertion of the priority of the political within Weimar, and a clear usurpation of the rule of law. The direct result of implementing a *legitimate* form of law based on 'a specific set of cultural values' was the suppression of minority voices (Kirchheimer, 1996a: 53). As Kirchheimer notes, it is entirely possible for 'revolutionary' parties to be completely legal, productive members of the republic, while it is equally possible for 'good' parties to engage in illegal and undemocratic behavior, and attempting to prevent future illegality through minority suppression is simply too risky to justify, 'we dare not be so presumptuous as to claim the ability to anticipate what only the historian is entitled to: the highly relative distinction between revolutionary and "good" parties' (ibid.: 54). It is worth once again noting that the persecuted party in this instance is the far-left KPO, a clear enemy of bourgeois hegemony, while extreme right-wing groups with revolutionary political intent but allied with existing economic powers went unmolested. This both further demonstrates the inequitable functioning of legitimate law, and also strongly indicates that Schmitt greatly misjudged the continued influence of economics upon the 'political'.

In 'Remarks to Carl Schmitt's *Legality and Legitimacy*', Kirchheimer maintains his primary defense of formal law as the most practical and stable form of governance, but also expands his argument to address some of the specific issues raised by Schmitt. Returning to the constitutional division between formal and substantive law, Kirchheimer challenges Schmitt's characterization of this divide as constituting an absolute contradiction, something Kirchheimer achieves both by demonstrating that the division itself is not as clear as Schmitt maintains and, additionally, by stressing the thoroughly ambiguous nature of the effects produced by substantive law. To muddy the division between formal and substantive law, Kirchheimer further divides substantive law into three categories: programmatic norms, which provide 'moral pressure' to legislators but which have no actual legal repercussions; authorization norms, norms that seek to make explicit certain abilities of the legislature which would otherwise be unclear; and finally the fixative norms, norms that have corresponding formal laws which restrict legislating ability and require a two-thirds vote to overturn them (Kirchheimer, 1996b: 71). Of these, only the fixative norms are truly substantive in Schmitt's sense; laws which seek to offer concrete protections or rights against the will of the simple majority. However, Kirchheimer stresses that real functioning of even this category is other than Schmitt imagines; far from being a constant threat to the legitimacy of formal law, or offering a fundamentally different form of legitimacy, these protections are instead largely designed to *improve* the functioning of formal legislation during periods of relative political stability, 'by removing certain objects from the immediate access of simple majorities they make it more difficult for those objects to become the target of everyday

political struggles. They reduce tensions and hence tend to improve the functioning of democracy' (ibid.). If these fixative norms are chosen correctly, they both anticipate legislation which would have eventually resulted from potentially long political struggles, and further allow for a degree of planning within the democratic state.

Problems arise only with fixative norms and, therefore, substantive law as a whole, in periods experiencing '*variation in social power relations*' (Kirchheimer, 1996b: 71). This seems in line with Schmitt's assertion that in the moment of crisis, substantive law offers warring parties leverage with which to deny the constitutionality of their enemies and hence decry them as illegitimate and illegal. Yet Kirchheimer offers another interpretation of this tension by suggesting that though it is imaginable that a majority party, frustrated in its attempts to achieve political goals by fixative norms, may seek extralegal means of achieving its ends, even in this worst case scenario, the effects of fixative norms are not necessarily *only* disintegrative; for while these norms may foster resentment within the restricted majority, they simultaneously can engender loyalty to the state in those protected. As an example, he cites the provisions in place protecting civil servants from the volatility of shifting majorities, which both increase the commitment of the civil servants to the government they serve and further increase stability by reducing the 'scope of political spoils' in the form of appointments (ibid.: 72). Again, the constitution of the Weimar Republic is understood, not as the ultimate fruition of liberal ideology, but rather as a pragmatic attempt to overcome real, economic tensions within the German populace.

Of course, it is impossible to critique Schmitt's *Legality and Legitimacy* without addressing the concept of homogeneity. As mentioned previously, Kirchheimer had already stated that the economically heterogeneous population of Weimar was one of the factors which led to the pragmatic selection of a liberal democracy. However, the centrality of homogeneity within Schmitt's argumentation forced him to give a more detailed account. Kirchheimer still viewed *economic* heterogeneity as a central hurdle to the stability of Weimar and of democracy as a whole:

> By means of the results of its effects on the economic structure, the right to property, as well as that to personal liberty, brings about an inequality of political chances among social groups. If the democratic socialist position – that its economic structure could bring about 'equality of opportunity' while preserving the rights of citizenship – were justified ... this would indicate that a type of democracy with a specifiable normative content exists, in which a maximal approximation of the ideal of 'equal chance' in *every* sense of the term has been achieved. (Kirchheimer, 1996b: 80)

The ambivalent nature of substantive laws is once more apparent. On the one hand, the right to private property represents the backbone of liberal values and provides protection of individual freedoms against the state. On the other hand, discrepancies in personal wealth lead to huge distortions in the democratic process and a fundamental inequality – which, again, is not the result of the formal system of laws but rather the substantive laws of the constitution. But more strikingly, this passage hints at the transformative potential of representative democracy: 'at any given point in time, a democratic system may not directly realize a given set of values. Nonetheless, it may be believed that at some point

in the future democracy will affect the realization of those values' (Kirchheimer, 1996b: 68). Kirchheimer here is outlining the potential *instrumental* value of democracy; the very 'empty formalism' which Schmitt criticized is lent a new utopian valence: 'democracy is the only political system that provides an institutional guarantee that even the most decisive transitions of power need not threaten the continuity of the legal order' (ibid.: 82). Kirchheimer is careful to distinguish this as an *indirect* instrumental use of democracy, instrumental only in the sense it is using political democracy to fully realize the ideals of social democracy by creating substantive, economic equality in tandem with personal freedom. This stands in stark contrast not only to the direct instrumentalization carried out by National Socialism, but also to the aforementioned policies recommended by Schmitt to the Hindenburg administration, initiatives that relied on their own legitimacy over legality. In this sense Kirchheimer is indeed an advocate of revolution, but it is a *legal* revolution, one in which the liberties and rights of the individual are preserved (i.e. there can be no justification for dictatorship, temporary or otherwise) while the democratic ideal of *equality* is realized both at the political and the social, economic level.

Schmitt's insistence that the state be capable of discerning friend from foe, coupled with the prerequisite of homogeneity for the equitable functioning of democracy, leads Kirchheimer to conclude that in Schmitt's theory, 'homogeneity refers to an empirical condition' and not to a sociological formation; that is, homogeneities exist in nature, and it is the task of the state to discover them and then, through a model of exclusion, to delineate a homogeneous political body (Kirchheimer, 1996b: 64).[12] In light of the events of the Second World War, this is obviously a troubling formulation, one which evokes *Blut und Boden* and the mystical racism of the Nazis. Kirchheimer, in contrast, notes that all existing democracies by necessity accommodate heterogeneous populations and that, indeed, *all populations are by necessity heterogeneous*; furthermore, he notes that there appears to be a global trend towards increased heterogeneity (ibid.: 68–9). Not only is such ideological heterogeneity inevitable, pure homogeneity would represent the total destruction of the individual; citizens of Schmitt's plebiscitary presidency may have the right to vote and equality before the law, but such a government cannot be considered *democratic* as it destroys the freedom to think and act differently which representative democracy affords (ibid.: 66). This is not to say that greater social cohesion and homogeneity are impossible, and Kirchheimer describes the integrative potential of ideology coupled with economic reality:

> Until recently, a virtually unlimited faith in the virtues of a form of egotistical calculation, namely interest-based solidarity, functioned as a powerful integrative instrument in the United States. Its efficacy can be demonstrated simply by comparing the manner in which nationally heterogeneous groups have been assimilated in America to similar attempts at assimilation in Europe. (Kirchheimer, 1996b: 69)

The reason this ideology had provided such a successful integrative tool within the United States is that it corresponded with an economic reality for a large portion of the population; with the onset of the Great Depression, Kirchheimer noted that it was quickly becoming a 'false consciousness', and that the cohesion of the United States was

suffering as a result (Kirchheimer, 1996b: 69). This is a clear example of what Schale referred to as the 'profanation' of Schmitt's concept of '*Volk*' through a 'sociological and constitutionally-realistic' analysis: the homogeneity which Schmitt set as both a prerequisite for democracy and simultaneously determined to be impossible for that democracy to achieve is instead replaced with a societal process (Schale, 2011: 146, 158). As such, models of economic integration regain their viability, and at least the *possibility* of the transformation from a political to a social democracy is restored.

Conclusion

This has been an attempt to return to an old debate concerning the nature of the relationship between Otto Kirchheimer and Carl Schmitt, and within this context, to extend, through the lens of the economy, Alfons Söllner's characterization of this relationship as one of conflict between historical-sociology and ontology; it is through economy that the distinctions between the two theorists are at their most apparent, making nearly all analogies untenable and revealing false friends in their shared terminology, while simultaneously avoiding less productive tangents, such as those that focus on the left's 'fascination' with Schmitt or attempt retroactively to assign blame for the collapse of the republic. Schmitt's critique of democracy rests on a logical imperfection, an equation which refuses to balance due to the lack of uniformity of its components. The political creates space for societal normalcy, organized over and against other units of state. The central organizing principle itself is irrelevant, all that matters is the existential contest of wills, in which 'spirit fights against spirit, life against life', and any attempt to mask or avoid this primordial struggle ends in atrocity (Schmitt, 1991b: 95). Kirchheimer, by contrast, suggests a world shaped by historical development and economic forces, homogeneities not as ideological battle lines to be drawn, but egalitarian communities to be shaped and fostered, a hope for a democratic future that lives up to its own ideals. Kirchheimer saw with great clarity the inequities within the Weimar Republic and also ominous shortfalls of its constitution, but time and again insisted on its transformative potential. While it would be easy to dismiss his theoretical optimism as blind hope against looming cataclysm, his lifelong dedication to the study of constitutional law suggests otherwise.

Notes

1. As Frank Schale notes in 'Parlamentarismus und Demokratie', this interest has little to do with the personal relationship between the two men, and instead focuses on a perceived 'spiritual proximity' (Schale, 2011: 141). For one of the few exceptions, see Reinhard Mehring's '"Ein typischer Fall jugendlicher Produktivität". Otto Kirchheimers Bonner Promotionsakte' (2011).
2. In reference to Schmitt's and Kirchheimer's clear divergence in response to the Preußenschlag.
3. A previous work, 'Left Students of the Conservative Revolution', in which Söllner had differentiated Schmitt and Kirchheimer, had been referred to somewhat provocatively by Kennedy as 'confused' (Kennedy, 1987: 52).

4. For an examination of this fascination, see Volker Neumann's short retrospective 'Carl Schmitt und die Linke' (1983), written for Carl Schmitt's 95th birthday.
5. One man would go on to be an active member in the exiled Frankfurt School, the other the 'crown-jurist' of the Nazi Party.
6. Thereby also marking a change from Söllner's own earlier essay; see 'Linke Schüler der konservativen Revolution' (1983: 222).
7. As Riccardo Bavaj notes in 'Otto Kirchheimers Parlamentarismuskritik in der Weimarer Republik', Schmitt had in turn borrowed much of his terminology from Marx and Lenin, making Kirchheimer's repurposing less surprising (Bavaj, 2007: 33).
8. Written in tandem with Nathan Leites.
9. It is this reduction which will logically permit Schmitt to extend any critique of the rule of law to legislative states as a whole.
10. For an example of this, see John McCormick's (2004) introduction to Schmitt's *Legality and Legitimacy*, 'Identifying or Exploiting the Paradoxes of Constitutional Democracy?', in particular the section titled 'The Conservative Stab in the Back? Schmitt and the Sabotage of the Republic'. As is clear from the title, the intent is to determine Schmitt's relative guilt or innocence of the 'crime' of the fall of the Weimar Republic, hinging on the fundamental question: 'Was [Schmitt] trying to destroy the republic, or was he trying to save it?' with McCormick eventually ruling in favor of guilt, or at least Schmitt's being 'passively complicit' (McCormick, 2004: xix, xxiii).
11. On the topic of preservation, William Scheuerman's introduction to *The Rule of Law Under Siege* provides an unequivocal response: 'The real aim of Schmitt's *Legality and Legitimacy* is not to "save" the Weimar Republic, but to rob Weimar of its most elementary democratic elements by relying on a limited portion of the Weimar Constitution' (Scheuerman, 1996: 10).
12. Bavaj similarly notes the exclusionary/inclusionary division between Kirchheimer and Schmitt, further suggesting that for Kirchheimer this represented a move towards Franz Neumann and Hans Kelsen (Bavaj, 2007: 50). It bears mentioning that the exchange described within the current essay between Kirchheimer and Schmitt is only a small part of a legal debate which had been raging within Germany since before the drafting of the Weimar Constitution, including but not limited to legal theorists such as Franz Neumann, Hans Kelsen, Herman Heller, Gerhard Anschütz and Ernst Fraenkel – however, due to space constraints, it is necessary at present to maintain a rather myopic focus.

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Author biography

Karsten Olson is a doctoral student at the University of Minnesota currently working as an instructor in the Kulturwissenschaft Department at the University of Viadrina and as a research assistant at the Zentrum für Literatur- und Kulturforschung in Berlin.